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Public Law and Policy Research Unit

**Submission to the Legal and Constitutional Affairs Legislation Committee
Migration Amendment (Strengthening the Character Test) Bill 2019**

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1. The Nature of Designated Offences

The Bill introduces a new category of offence, designated offences, to the character test.

Designated offences are offences that involve violence, non-consensual conduct of a sexual nature, breaching court orders for personal protection; or using a weapon. They include both very serious offences such as murder, and also a wide range of minor offences such as stalking, or causing harm, or throwing an object at a train, where the maximum penalty can be as low as 2 years.

Conviction of a designated offence in itself is sufficient to make a person liable to cancellation of their permanent resident visa at the discretion of the Minister, regardless of the sentence imposed for the offence. This means visa cancellation can occur without consideration of the seriousness of the actual conduct of the person who has committed the offence. This is a fundamental shift from the rationale behind the current character test, which focuses on a person's actual behaviour, reflected in the length of the sentence imposed for the commission of a criminal offence.

The Minister maintains the discretion not to cancel a person's visa for commission of a designated offence but, in exercising his or her discretion, the Minister does not have to take into account the seriousness of the conduct triggering the discretion.

A permanent resident may fail the character test for the commission of very minor offences, including:

- pushing another person over in the course of a scuffle, but causing them no injury (an offence of violence), or even 'aiding, abetting, counselling, or inducing' another person to push someone over;
- threatening to hit someone with a book, a stick or a wooden ruler which can all be defined as weapons (under s 4(b) a weapon includes: 'a thing where the person who has the thing intends or threatens to use the thing, or intends the thing be used, to inflict bodily harm).

According to the Law Institute of Victoria, designated offences might also include 'shoplifting', 'a teen sharing intimate images with a girlfriend or boyfriend', damaging property, verbal threats or dangerous driving'.¹

In a submission to the JCSM inquiry into 'Migrant Settlement Outcomes 2017',² the Law Council of Australia noted that in relation to the current character test, the threshold is already too broad and the safeguards insufficient to prevent visas being cancelled on individuals that may not actually present any risk to the community.³ This concern is magnified in relation to Designated Offences.

It is important to note that sentences for an offence are *maximum* sentences. They indicate that the worst offending of this type might lead to imposition of such a sentence. But a person may be convicted of an offence and have no sentence of imprisonment imposed at all due to the minor nature of the offending.

2. The character test is already very broad, and does not need to be broadened further.

¹ Refugee Council of Australia, Submission 10, to the Senate and Constitutional Affairs Committee inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018.

² Joint Standing Committee on Migration, 'No one teaches you to become an Australia: Report of the inquiry into migrant settlement outcomes', December 2017, https://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Migration/settlementoutcomes/Report

³ Law Council of Australia, *Submission 82*, pg. 5, 25.

Since 2007, changes to citizenship and migration law have reflected a changing perception of the place of permanent residents in the community. Changes in the law have altered both the security of residence of permanent residents, and has created new barriers to their transition to citizenship.⁴

Most relevantly to this inquiry, in 2014, the law was amended to alter the character test and significantly widen the grounds for cancellation of permanent resident visas.⁵ As a result of these amendments, there has been a dramatic increase in visa cancellations. Annual visa cancellations from 2015 to the present are over 10 times higher than annual cancellations in the previous five years.

Table 1**

| Year | Number of visa cancellations |
|---------|---|
| 2010/11 | 70 |
| 2011/12 | 102 |
| 2012/13 | 78 |
| 2013/14 | 158 |
| | Passing of the Australian Citizenship and Other Legislation Amendment Act (2014) |
| 2015 | 900 |
| 2016 | 1051 |
| 2017 | 822 |

** Information collated from Table 7.4 of the Joint Standing Committee on Migration, 'No one teaches you to become an Australia: Report of the inquiry into migrant settlement outcomes, December 2017

3. The breadth of Ministerial Discretion to cancel a visa as a result of conviction of a designated offence

Commission of designated offence does not lead to mandatory cancellation of a visa, but triggers the minister's discretion. In the second reading speech introducing the Bill, the Minister for Immigration, David Coleman stated that 'the department will need to take into account a wide range of factors contained within a binding ministerial direction. Those factors include:

- the protection of the Australian community from criminal or other serious conduct;
- the best interests of minors in Australia;
- expectations of the Australian community;
- Australia's international obligations;
- the impact on victims; and
- the nature and extent of the person's ties to Australia.'

⁴ See, eg, Australian Citizenship Amendment (Citizenship Testing) Act 2007, <https://www.legislation.gov.au/Details/C2007A00142>; Australian Citizenship and Other Legislation Amendment Bill 2014, https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=r5181; Australian Citizenship Legislation Amendment (Strengthening the Requirement for Australian Citizenship and Other Measures) Bill 2017, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5914; Australian Citizenship Amendment (Allegiance to Australia) Act 2015, <https://www.legislation.gov.au/Details/C2015A00166>
⁵ Migration Amendment (Character and General Visa Cancellation) Act 2014, <https://www.legislation.gov.au/Details/C2014A00129>.

This list of factors have no internal consistency. It is not clear which is more important, and there are no criteria for deciding between them. 'Expectations of the Australian community' is inherently vague and can be interpreted however the Minister sees fit. Although natural justice applies to the Minister's decision, as long as the Minister merely mentions that he or she has considered this list of factors, it is difficult to see how a decision of the Minister could ever be successfully challenged despite its manifest unreasonableness.

4. Visa cancellation has grave consequences for permanent residents and their families.

Many of those who have had their visas cancelled spend long periods in immigration detention if they are not able to be deported to another country. This is particularly a problem for permanent residents with a refugee background. It is particularly anomalous for a person to spend extended periods in immigration detention from the commission of a crime that a court determined did not warrant a sentence of imprisonment, as is possible for designated offences.

Many of those who have their visas cancelled find themselves separated from children for whom they have substantial caring obligations, and with no prospect of visiting their family due to their ineligibility to enter Australia.

Many of those who have their visas cancelled find themselves cast into a foreign country in which they have no understanding of the culture, no family or friends, and don't speak the language. In these circumstances, they face a serious risk of mental deterioration and destitution.

Permanent residents who find themselves in this position are likely to be struggling in their lives, and inherently vulnerable, as is evidenced by the fact that they have committed offences against the Australian law in the first place.

It is unconscionable that very minor offending that comes within the category of designated offences could lead to any or all of these consequences.

5. Visa cancellations affect Australia's relations with other countries.

The dramatic increase in the deportation of Australian permanent residents to New Zealand since 2014 has been criticised by successive New Zealand Prime Ministers, John Key and Jacinda Ardern and has caused tension between the two countries.⁶

The deportation of long terms residents to countries where they have no substantive connection, no family and don't speak the language has not been welcomed by the receiving countries. See, for example, the deportation of Stefan Nystrom to Sweden in 2006.⁷

The extension of deportations to permanent residents who have failed the character test despite not committing a crime worthy of imprisonment will only add to these tensions.

⁶ See eg, 'Jacinda Ardern tells Scott Morrison Australias deportation policy 'corrosive'', *The Guardian*, 22 February 2019, <https://www.theguardian.com/australia-news/2019/feb/22/jacinda-ardern-tells-scott-morrison-australias-deportation-policy-corrosive>; 'John Key to question Malcolm Turnbull over departing New Zealanders', *The Guardian*, 16 October 2015, <https://www.theguardian.com/australia-news/2015/oct/16/john-key-to-question-malcolm-turnbull-over-deporting-new-zealanders>

⁷ See, eg, <https://www.hrlc.org.au/human-rights-case-summaries/theres-no-place-like-home-the-case-of-mr-nystrom>

6. Adding Designated offences to the character test will not improve safety in the community

In his second reading speech introducing the Bill, the Minister made express reference to a recommendation of the Joint Standing Committee on Migration report, 'No one teaches you to become an Australian: Report of the inquiry into migrant settlement outcomes' as the impetus for introducing designated offences to the character test.⁸

It is important to analyse the basis for this recommendation as it appears in the Report.

First, the recommendation in the report is not supported by any reasons for its introduction other than a general assertion that it will improve safety in the community.

The recommendation appears in a section of the Report that focuses on terrorism and extremism, and counter extremism policy. However, designated offences are not related to terrorist activity. They involve low-level domestic crime.

Any person who is suspected of engaging in terrorist activity already fails the character test on a number of grounds. See, for example, ss 501(6)(d) and 501(6)(g).

Second, the Report provides no evidence of how the addition of designated offences will make the community safer. This is merely asserted.

Before changing the character test to include designated offences, it is important to ask whether, and how, including designated offences will increase the safety of the community at large.

All the offences identified as Designated Offences are already considered in the character test when a person has been convicted of any of those offences and been sentenced to a term of imprisonment for at least one year.

The sentence imposed on a person for the commission of an offence is a more reliable indicator for the danger the person presents to the Australian community than the mere commission of an offence.

It is incumbent on the government to provide evidence for why the current character test is insufficient to protect the Australian community, particularly given the severe adverse consequences for permanent residents who have their visas cancelled discussed above.

7. The introduction of Designated Offences to the character test may *decrease* the safety of the Australian community, and particularly permanent residents in the community

In most respects, permanent residents have the same social, economic and political rights as citizens. The equality of citizens and permanent residents is important for social cohesion. It also reflects the understanding that there is very little difference between citizens and permanent residents. Both have fully committed to a life in Australia.

Security of residence is of vital importance for permanent residents to develop a sense of belonging in the community, and to fully commit to Australia. It contributes to social cohesion.

If a permanent resident can be removed from Australia for minor infractions, they and their families may feel less secure, less welcome, and less committed to contributing to the Australian community.

⁸ David Coleman, Migration Amendment (Strengthening the Character Test) bill 2019 – Second Reading, 4 July 2019, Transcript ID chamber/hansardr/ce759aa1-47bf-467d-a58b-3bf640990032/toc.

With the threat of visa cancellation and deportation hanging over them for very minor offences, permanent residents who are innocent victims of violence may be reluctant to approach the police for fear that they will be accused of initiating the confrontation. They may also be reluctant to help others who are the victims of violence for fear they will be dragged into a confrontation. With the stakes so high, permanent residents may second-guess their natural community-minded instincts.

The JSCM report quotes Harris Wake Pty Ltd, which suggests cancelling a migrant's visa could lead to other consequences, including:

- Increasing alienation in the broader migrant community;
- Reinforcing societal divisions;
- Migrants may perceive that they cannot overcome racial or religious stigma, and be turned away from contributing to Australian society; and
- Dramatic risk of increased extremism ('us and them') which is the exact opposite of what we should be trying to do in these sensitive and vulnerable communities.⁹

8. Pressure on the administration of justice

Designated offences create two distinct problems for the administration of justice.

First, the potential dire consequences of a conviction for a designated offence mean that defendants will be less likely to enter a guilty plea. Therefore, for designated offences, the usual incentive for entering a guilty plea of receiving a lesser sentence is completely negated. As a result there are likely to be an increased number of trials for minor offences.

Second, the JSCM report discussed a concern from the Police Federation of Australia and others that the Courts were lowering sentences for offences below the one year threshold that triggered mandatory visa cancellation.¹⁰ Although there is no evidence that courts take the migration consequences for offenders into account in sentencing, it needs to be acknowledged that the severe consequences for offenders of visa cancellation and deportation does constitute a significant extra punishment for offending. The National Judicial College of Australia has identified the tension that the severe consequences of a sentence may have on offenders. The College's guide to courts on sentencing provisions states that 'there is conflicting authority as to whether an offender's liability to be deported is a relevant factor in sentencing federal offenders'.¹¹

In relation to designated offences, judges will face a new dilemma: if the migration consequence for conviction of a designated offence is disproportionate to the level of offending, should judges refrain from finding an alleged offender guilty of the commission of a minor offence to avoid this consequence?

The very prospect of judges responding to this dilemma by avoiding a determination of guilt for a designated offence risks undermining confidence in the judiciary and the judicial system.

The dilemma illustrates the fundamental problem of attaching severe migration consequences to minor offending.

⁹ Joint Standing Committee on Migration, 'No one teaches you to become an Australia: Report of the inquiry into migrant settlement outcomes, December 2017, [7.154].

¹⁰ Joint Standing Committee on Migration, 'No one teaches you to become an Australia: Report of the inquiry into migrant settlement outcomes, December 2017, [7.172]

¹¹ National Judicial College of Australia, 'Deportation', viewed on 13 November 2017, <<https://njca.com.au>>

9. More productive ways to keep Australia Safe

The vast majority of the JSCM Report into Migrant Settlement Outcomes, 'No one teaches you to become an Australian' is focused on ways to assist permanent residents to integrate into the Australian community, recognising that the transition to life in the new society can be particularly difficult for some.

The report looks at the current provision of settlement services and how they can be improved. It focuses on the importance of education and employment to assist new migrants with integration. It acknowledges that new, and particularly young, permanent residents may get into trouble, and need help to get back on a path to social well-being, and to contribute to the Australian community.

These parts of the report understand that permanent residents are a vital part of the Australian community, that having accepted people into the community, we have a responsibility to assist them to integrate successfully. It also recognises that permanent residents need to feel secure in Australia to integrate effectively, and not to fear deportation if they are guilty of a minor offence that a Court has determined does not warrant a sentence of imprisonment.

The primary values of safety, cohesion and tolerance in the Australian community will be much better served through supporting permanent residents who commit offences at the low end of seriousness rather than on finding new ways to exclude them from the community.