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Australian Senate Legal and Constitutional Affairs Legislation Committee
Inquiry into the Migration Amendment (Strengthening the Character Test) Bill

Submission by the Government of New Zealand

1. New Zealand's concerns about Australia's existing visa cancellation and deportations regime have been widely canvassed, including through regular bilateral officials-level discussions and a 12 September 2018 New Zealand Government submission to the Joint Standing Committee on Migration. The key elements of those concerns, and how they would be exacerbated by this Migration Amendment Bill, are outlined in this submission.
2. New Zealanders **contribute greatly** to Australia's economy and society:
 - Australia is home to New Zealand's largest diaspora community – about 650,000 people (or about 13% of our resident population).
 - Successive governments on both sides of the Tasman have recognised the benefits of the trans-Tasman movement of labour, skills, and ideas. Australians and New Zealanders are able to live and work freely on both sides of the Tasman, although the treatment that the two groups receive now differs as a consequence of Australian policy changes.
 - New Zealanders in Australia on average earn more than Australian-born people and are also more likely to be in work than Australians. That means they pay more tax than the average Australian.
 - The fundamentals of the trans-Tasman people relationship are strong. In every year since its annual "feelings thermometer" survey was first conducted in 2005, the Lowy Institute has found that New Zealand is the country towards which Australians hold the warmest feelings. The 2018 rating (86/100) is the highest ever recorded.
3. New Zealanders have the **lowest dual citizenship rates** of any nationality living in Australia (other than countries that forbid dual citizenship, e.g. Japan). This is partly an unintended consequence of the visa treatment that Australia affords them:
 - The average New Zealander in Australia has lived in Australia for over 15 years. Many have only ever known Australia as home, and consider

themselves Australian. Despite these dual identities, over 70% of New Zealanders in Australia have only one (New Zealand) passport.

- Before 2001, New Zealanders had little incentive to attain Australian citizenship as they were accorded all the rights and privileges of a permanent resident and until 2014 they were protected from deportation after 10 years of residence.
 - Although the incentives to gain citizenship are greater for New Zealanders arriving since 2001, awareness of the potential advantages in changing their status is low and many New Zealanders have limited ability to meet the criteria and cost of seeking permanent residence, which is a prerequisite for citizenship. Fewer than 10% of the New Zealanders who have been living in Australia for 10 years are Australian citizens, cf. 70% for third country immigrants (who cannot live indefinitely on temporary visas) after 10 years in Australia.
4. New Zealanders have been **disproportionately affected by Australia's deportation policies** since 2014:
- More than half of Australia's visa cancellations in 2017 were New Zealanders, despite New Zealanders making up less than 10% of the foreign-born population.
 - This is a result of two elements to the 2014 changes:
 - The lowering of the criminal record threshold inevitably led to greater numbers of non-citizens liable for mandatory visa cancellation. This affected New Zealanders more than other nationalities due to their lower dual citizenship rates.
 - The removal of protection from deportation for long-term residents (of 10 years or longer) had a particularly disproportionate effect on New Zealanders, because New Zealanders are the only nationality with the ability to reside for longer than 10 years in Australia without permanent residency or citizenship.
5. The 2014 changes have been **corrosive to the New Zealand – Australia relationship** due to the disproportionate effect of Australia's policy on New Zealand and the lack of reciprocity of treatment:
- Only 1% of total deportations from New Zealand are to Australia; more than 50% of total deportations from Australia are to New Zealand.
 - New Zealand's deportation law implicitly accounts for non-citizens' connections to New Zealand when determining liability for deportation. Those who have legally resided in New Zealand for over 10 years cannot be deported.
 - The underlying principle of New Zealand's deportation policy is that New Zealand accepts some responsibility for the behaviour of people who have lived in New Zealand on residence class visas for long periods of time – they've made New Zealand their home and New Zealand has benefited from their contribution.
6. **Australia has responsibilities for those people who are products of Australia:**
- A large group of New Zealanders have lived in Australia for many years, on the understanding that their visa was effectively indefinite. Many came here as very young children, were educated here, and are Australian in almost every way except for a final citizenship paper.

- Just as a small cohort in every society turns to criminality, so do a small cohort of the New Zealanders living in Australia. Perhaps for some that is partly a result of their inability to fully participate in Australian society, or to access social safety nets when their lives don't go entirely according to plan.
 - They are a tiny proportion of the New Zealanders living here. Just like many other New Zealanders here, their families, their jobs, and their lives are in Australia. But the provisions of the Migration Act mean that their visas are cancelled and many are deported.
 - New Zealand acknowledges Australia's sovereign right to take actions to protect the community and to manage its borders. New Zealand's principal concern relates to visa cancellation of New Zealanders who arrived in Australia as children. By cancelling their visas, Australia is not taking responsibility for these people's failure to succeed in Australian society, despite them, in many cases, being a product of Australian society.
7. New Zealand is concerned about the deportation of **offenders who do not have a cumulative criminal record of 12 months** in sentences:
- New Zealand respects the right of the Australian Government to determine the level of criminality by non-citizens that will make them liable for deportation through the section 501 criminal record threshold. New Zealand takes a similar approach, albeit with protection for long-term residents of New Zealand.
 - A criminal record threshold enjoys community support because the community rightly expects that judges will make a fair decision about the seriousness of a person's offending based on the facts presented in Court. Information collected by Police or Immigration officials that is not presented in Court does not enjoy the same level of community confidence.
 - The Bill's powers to deport people based on the classification of the crimes they commit (being punishable by a two-year sentence) rather than the actual sentence imposed would be contrary to the Australian and New Zealand communities' expectations for an independent judicial system. Public perceptions of fairness rely on an independent judge's impartial assessment of the seriousness of the individuals' offending, and therefore the consequences that are warranted.
8. New Zealand is also concerned that the visa cancellation provisions of the Migration Act are **being applied to minors**:
- While neither the Migration Act nor this Amendment Bill explicitly refer to minors, a New Zealand minor's Australian visa has been cancelled this year under the Act.
 - This resulted in a child being held in adult immigration detention, which appears to be contrary to their right to be segregated from adult detainees.
 - It is noteworthy that the Administrative Appeals Tribunal overturned the cancellation on the basis that due consideration had not been given to their best interests as a child.
9. There has been a **400% rise in the cancellation of New Zealanders' visas under section 116** of the Migration Act in the last two years, for offences that don't meet the section 501 threshold:
- The Migration Act gives decision-makers, including Ministers, extraordinarily broad powers under section 116 to cancel "temporary" visas. No Ministerial Directive requires consideration of a person's connections to Australia in

applying section 116 cancellations, as Ministerial Directive 65 applies only to section 501 cancellations.

- Section 116 cancellations uniquely affect New Zealand long-term residents of Australia, as it can only be applied to temporary visa holders, and New Zealanders are the only nationality that can reside indefinitely in Australia on “temporary” visas.
- Section 116 cancellations appear to be made without reference to the factors outlined in Ministerial Directive 65, such as an individual’s connections with Australia and the impact that deportation may have on children. It is unclear why the Australian Government instituted a detailed Ministerial Directive to govern revocation requests for serious criminals cancelled under section 501, but does not offer the same formal process to lesser offenders cancelled under section 116.
- Section 116 has been applied to New Zealanders for breach of restraining orders, or one-off assault charges. The effect of the visa cancellation in these cases is often a life-long separation from family. It also has an effect on the New Zealand community, which is being required to shoulder the burden of rehabilitation for someone who may identify as Australian, and who has lost their family and community support networks.

10. The proposed Migration Act Amendment Bill to “strengthen the character test” **raises many of the same concerns as section 116 cancellations:**

- It would de-link deportation decisions from the independent assessment by judges of the seriousness of an individual’s offending and the appropriate consequences that should be imposed. It would instead place these powers in the hands of Immigration officials using information that may not have been ruled admissible in a Court of law, and which the individual has not been able to address in Court. This raises serious natural justice concerns.
- It is unclear how the appeal process would work for these new, discretionary, section 501 visa cancellations. Would individuals be able to seek revocation of visa cancellations through the Department of Home Affairs like the more serious offenders whose visas are cancelled under the mandatory provisions of section 501? Or would appeal to the Administrative Appeals Tribunal be their only option for review of the merits of the decision? If the latter, it will be hard to explain why lower-level offenders have fewer appeal avenues available to them than those with longer criminal records.
- It appears to have a particular focus on the cancellation of minors’ visas, so it may result in an increase in the number of New Zealand minors having their Australian visas cancelled. Minors who have grown up in Australia are particularly vulnerable if deported, as they often have almost no connections or support networks in New Zealand. The Bill could also result in more New Zealand minors being held in adult immigration detention facilities in Australia while they await appeal decisions.

Conclusion

11. The proposed Migration Act Amendment Bill to “strengthen the character test” **would make a bad situation worse for New Zealanders and therefore for New Zealand:**

- Despite Australia benefiting from a New Zealand cohort living in Australia that is highly employed and well paid, overall New Zealanders would be disproportionately affected by and vulnerable to Australia’s deportation policies due to their much lower dual citizenship rates.

- It would result in people receiving the ultimate sanction of life-long separation from family for first offences and lower-level offending. In the absence of protection for long-term residents, there would be more people deported to a country that they left as an infant and may have never visited since.
- Its apparent increased focus on cancelling minor's visas would raise particular concerns about treatment of vulnerable young people.
- It would place an increased burden on the New Zealand Government and individual New Zealand communities to rehabilitate Australian-raised offenders in a community where they have no ties.
- More decisions would be made on the basis of information collected by Australian Immigration officials that could be ruled inadmissible in a Court of law. This is contrary to community expectations in New Zealand and Australia of how justice should work.
- The further imbalance in treatment of New Zealanders compared to their Australian counterparts in New Zealand would exacerbate the already corrosive impact of the 2014 changes to the Migration Act on the New Zealand – Australia relationship.