

Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018

Legal Aid NSW submission to the Legal
and Constitutional Affairs Legislation
Committee

November 2018

323 CASTLEREAGH ST
HAYMARKET NSW 2000 / DX 5 SYDNEY

Legal Aid 
NEW SOUTH WALES

Table of Contents

About Legal Aid NSW	2
Introduction	3
The legislative regime for visa refusals and cancellations	4
Legal Aid NSW concerns with the proposed scheme	4
The Bill is unnecessary	4
The proposed amendments are too broad	5
Lack of clarity as to intended operation of the provisions	6
Impact on already vulnerable individuals.....	8
Practical implications.....	11
The amendments should operate prospectively	13
Annexure 1: NSW Criminal Court Statistics July 2015 to June 2018	14

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW's Government law team has immigration lawyers who provide legal advice, assistance and representation about family, refugee and humanitarian visas and Australian citizenship. This includes advice on detention, removal, cancellation procedures and exclusion periods.

Our Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of

Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and the Drug Court.

The Children's Legal Service of Legal Aid NSW advises and represents children and young people under 18 involved in criminal cases and Apprehended Violence Order applications in the Children's Courts.

Legal Aid NSW welcomes the opportunity to provide a submission to the Legal and Constitutional Affairs Legislation Committee's Inquiry into the *Migration Amendment (Strengthening the Character Test) Bill 2018*.

Should you require any further information, please contact:

Bill Gerogiannis

Senior Solicitor

Government Law Specialists

Civil Law Division

or

Julia Brown

Senior Law Reform Solicitor

Strategic Law Reform Unit

Policy, Planning and Programs Division

Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the Legal and Constitutional Affairs Legislation Committee's Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018 (the Bill).

Legal Aid NSW does not support the Bill. Visa cancellation or refusals on criminal grounds have life altering and permanent consequences for affected people and their families. The Bill proposes significant amendments to the existing visa cancellation and refusal regime in section 501 of the *Migration Act 1958* (Cth) (the Act) by expanding grounds for visa cancellation or refusal where a non-citizen has been convicted of certain *designated offences*.

In these circumstances, it is imperative for grounds for visa cancellation to reflect a necessary and proportionate response to the identified objective of the Bill. This would ensure that non-citizens who have been convicted of serious offences and who pose a risk to the safety of the Australian community are appropriately considered for visa refusal or cancellation.¹ Expanding grounds to cancel or refuse a visa based not on an individual sentence, but on the maximum penalty for the offence at large, regardless of the particular degree and seriousness of offending conduct, is neither a necessary or proportionate response to the identified policy objective. We consider that this will produce arbitrary and harsh outcomes, including for already vulnerable people.

The proposed amendments also magnify Legal Aid NSW's concerns about the effective double punishment inherent in the mandatory visa cancellation regime introduced in 2014. While visa cancellation is a statutory power that is executive in nature, the consequence of permanent removal from Australia is likely to have far more significant and life-long impacts than any court sentence.

In May 2018, Legal Aid NSW provided a submission to the Joint Committee on Migration's Inquiry into the review processes associated with visa cancellation made on criminal grounds.² We highlighted a number of concerns as to the practical challenges faced by an affected person to argue for the revocation of visa cancellation, and the harsh consequences for highly vulnerable people who have little or no access to free legal assistance. These concerns are amplified in the context of the present Bill. If enacted, we consider the provisions will lead to a very significant increase in demand for advice and assistance from legal aid agencies in relation to visa cancellations.

We also draw the Committee's attention to the potential practical impacts of the Bill on the effective and efficient operation of the criminal justice system in NSW. The amendments

¹ The Hon David Coleman, Minister for Immigration, Citizenship and Multicultural Affairs, Second Reading Speech on introduction of the Migration Amendment (Strengthening the Character Test Bill) 2018 (Hansard, 25 October 2018)

² https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0009/28818/Legal-Aid-NSW-submission-to-inquiry-into-visa-cancellation-on-criminal-grounds.pdf

may act as a disincentive for accused persons appearing before New South Wales criminal courts to plead guilty, leading to more defended hearings.

Appropriate guilty pleas in criminal matters is a desired outcome for all participants in criminal proceedings. Legal Aid NSW suggests that the Committee consider the potential impact of the Bill on the rates of guilty pleas to designated offences, and the associated impacts on delays and costs to state justice agencies.

Our detailed submissions on these issues follow.

The legislative regime for visa refusals and cancellations

The character test is defined at section 501(6) of the Act and comprises several limbs.³ If a person does not pass the character test, section 501 provides: (1) a discretionary power to refuse a visa⁴; (2) a discretionary power to cancel a visa⁵; and (3) a mandatory cancellation provision.⁶ The Department of Home Affairs (the Department) procedures for administering these provisions are detailed in Standard Operating Procedures.⁷

The current character test is triggered by a criminal conviction in respect of which a sentencing court, having considered the *particular circumstances of the case before it* and the *subjective features* of the convicted person, determines that a term of imprisonment of at least 12 months is warranted. The Bill expands this test to apply the character test to any listed offence which is *punishable* by a term of imprisonment of 2 years or more (under the new concept of a *designated offence* in proposed section 501(7AA)). *Designated offences* include, but are not limited to, offences involving violence, non-consensual conduct of a sexual nature, use or possession of a weapon and breaches of court or tribunal orders made for personal protection of another person.⁸

Legal Aid NSW concerns with the proposed scheme

The Bill is unnecessary

The Department and the Minister for Immigration already have wide powers to cancel or refuse a visa under section 501 of the Migration Act where there are character concerns. There appears to be nothing in the current legislative scheme that would prevent the Minister or their delegate from issuing a notice of intention to consider cancellation

³ Department of Immigration and Border Protection, Operation of the *Migration Act 1958*; Standard Operating Procedures.

⁴ Section 501(1) (with notice) or section 501(3) (without notice) – Minister only power.

⁵ Section 501(2) (with notice) or section 501(3) (without notice) – Minister only power.

⁶ Section 501(3A) (without notice).

⁷ Available to subscribers to Legend, the Department's electronic database of migration and citizenship legislation and policy documents.

⁸ As explained in the Explanatory Memorandum, the intention is to provide examples of the types of offences which are caught by the term *designated offence*. Other offences which are not listed or an offence similar to those listed but identified differently in the jurisdiction it was committed in, are intended to be captured by the term *designated offence*: Explanatory Memorandum, page 5.

(NOICC) or a notice of intention to consider refusal of a visa (NOICR) for any of the offences which are described as *designated offences* in the Bill.

Legal Aid NSW therefore considers that the Bill is unnecessary.

The proposed amendments are too broad

An arbitrary approach to those offences that trigger the character test

Triggering the character test without regard to the degree and seriousness of the particular relevant offending is not justified. As noted above, there does not appear to be any legislative guidance as to whether offending of relatively minor objective seriousness would trigger a cancellation. The designated offence categories typically cover a broad range of conduct and moral culpability. However, the provisions do not differentiate, for instance, between offending conduct that a court has found warrants a penalty of five years full time imprisonment and conduct where a conviction with no other penalty has been recorded or where dealt with by a minor fine.

In the last financial year 114,000 offenders were dealt with in NSW by way of a non-custodial penalty in respect of offences that would typically be classified as designated offences.⁹ Further detail is provided in Annexure 1. It is not apparent how all convictions that are dealt with by way of a non-custodial order would justify application of the character test.

The sentencing exercise

We do not agree with the assertion in the Explanatory Memorandum to the Bill that decisions to cancel or refuse a visa on the basis of a non-citizen having committed a *designated offence* will reflect objective standards, and are in line with the Australian community's understanding of a serious offence.¹⁰ This is because the sentencing exercise is not confined to consideration of the objective seriousness of an offence. Rather, sentencing is a complex process which balances competing interests. It requires a discretionary decision in the light of the circumstances of the individual case, and the purposes to be served by the sentencing exercise.¹¹ A key purpose of criminal punishment is the protection of society.¹² This is codified in New South Wales in section 3A(c) of the *Crimes (Sentencing Procedure Act) 1999* (NSW): a sentencing court is required to turn its mind to community safety.

The maximum penalty is a yardstick for courts when sentencing but is reserved for the worst, most serious examples of an offence.¹³ Using a maximum penalty as a trigger for visa cancellation or refusal is therefore a potentially inaccurate, unfair and arbitrary

⁹ Statistics as to what proportion of these offenders were non-citizens are not available.

¹⁰ Explanatory Memorandum, [39]

¹¹ *R v Engert* (1995) 84 A Crim R 67

¹² *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476

¹³ *Markarian v The Queen* (2005) 228 CLR 357

indicator of the degree of risk to the safety of the Australia community posed by a non-citizen.

The actual penalty imposed in a particular matter is a more reliable indication of the objective criminality, than the maximum penalty. Weighing the objective seriousness of an offence with the subjective features of the offender is the very purpose of the sentencing exercise. In that context, Legal Aid NSW considers that that purpose, and the role of a sentencing court, is undermined by the Bill.

Concerns as to inclusion of particular offences

Offences that carry 2 year jail terms (proposed section 5C(3)(b)(iii))

The above concerns are underlined by the Bill's inclusion of offences which carry a term of imprisonment of not less than 2 years. This penalty threshold would capture a significant number of criminal offences in NSW. With some exceptions, NSW summary offences carry a maximum penalty of 2 years imprisonment and would therefore be captured by the Bill.

Breach of personal protection orders (proposed section 5C(3)(a)(iii))

An example of the potentially arbitrary nature of the amendments relates to breaches of court or tribunal personal protection orders. This category does not differentiate between an Apprehended Personal Violence Order (APVO) and an Apprehended Domestic Violence Order (ADVO).

Under the *Crimes (Personal and Domestic Violence) Act 2007* (NSW) an APVO relates to parties who are not in a domestic relationship, for example neighbours or work colleagues. Different considerations apply to the sentencing of breaches of ADVO orders given the policy objective of reducing the unacceptably high rates of domestic and family violence in NSW: breaches of ADVOS with violence attract a gaol penalty.¹⁴ More broadly, any offence committed in the context of a domestic relationship carries a presumption of full time gaol or a supervised order.¹⁵ This important distinction is not reflected in the Bill.

Accessory liability offences (proposed sections 5C(3)(a)(iv – viii))

Legal Aid NSW has particular concerns about the inclusion of accessory offences as designated offences in the Bill. Such offences, particularly when combined with the broad range of offences identified above, generally involve a much lesser degree of criminality than the principle offence.

Lack of clarity as to intended operation of the provisions

It is unclear how the proposed changes will be administered in practice. The only guidance is the processes used under the current legislative scheme, which are set out in the Standard Operating Procedures. If those procedures are adopted for the proposed changes, it appears that:

¹⁴ Section 14(4) of the CDPVA

¹⁵ Section 4B, *Crimes Sentencing Procedure Act 1997* (NSW)

-
- If a person is convicted of a “*designated offence*”, they may be served with a NOICC or an NOICR¹⁶
 - The new provisions will be enlivened, irrespective of what penalty the court imposes, whether it be a supervised order, a fine or a term of imprisonment.

It is also unclear whether, as a matter of course, a NOICC or NOICR will be issued to a person who is convicted or pleads guilty to a *designated offence*, or whether the Department will be selective.

The blanket issuing of a NOICC or NOICR where a non-citizen is convicted in respect of any designated offence would be an exceptionally resource-intensive process and lead to a significant increase in the numbers of notices issued. However, should the laws be applied in a targeted manner this would also be highly undesirable and arbitrary. It would be difficult for a respondent to a notice to focus their response without an understanding of the considerations taken into account by the decision-maker.

Under the current regime, a person who receives a NOICC or NOICR has 28 days to respond with reasons why their visa should not be cancelled or refused. The decision-maker then exercises his or her discretion as to whether to cancel or refuse by weighing up various factors in Ministerial Direction 65.¹⁷ We refer you to our May 2018 submission which outlines why many people are unable to respond adequately in the short response time.¹⁸

Further information in relation to this issue would assist stakeholders to further consider the potential operational impact of the Bill, including:

- How will the Department identify those it intends to serve with a NOICC or NOICR?
- How long after the conviction would a person receive such notice?
- How will those people be located so that service of the NOICC or NOICR is effected?
- What time limit will be given to visa holders to respond to the notice, and will this time limit take into account the known individual circumstances of the visa holder. For example, will an individual from a non-English speaking background or who is in a mental health facility be provided with additional time or resources to respond?
- Given the life altering effect of a decision, what steps will the Department take to make decisions within a reasonable time?
- What triage system is proposed? Will some decisions be made by the Minister personally? If so, for what type of offences or offenders?

¹⁶ Sections 501(2) and 501(1) of the Act.

¹⁷ Direction no. 65 - *Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*.

¹⁸ Footnote 2 above.

Impact on already vulnerable individuals

Legal Aid NSW considers that the Bill will impact harshly on already vulnerable and disadvantaged individuals and their families.

Refugees

Visa cancellation and refusal of visa applications on character grounds have especially serious consequences for people to whom Australia has protection obligations under the UN Refugee Convention. Visa cancellation or refusal based on character grounds can result in the indefinite detention of the person, due to Australia being unable to return a person to their home country if they would face persecution or significant harm. In 2013, the Australian Human Rights Commission (AHRC) identified a number of significant concerns about the human rights issues raised by visa refusal or cancellations under section 501 of the Migration Act. One risk included that such persons may be subjected to arbitrary detention (including prolonged or indefinite detention), contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).¹⁹

Long-term permanent residents

Visa cancellations for long-term permanent residents can be particularly harsh on both the affected individual and their family. This includes removal from Australia and being sent to a country where they have spent little time, do not speak the language and where they have few or no social or family connections.²⁰

The AHRC has expressed particular concern about the visa cancellation of long-term permanent residents and the risk of separation from children and other family members due to a person's detention and/or removal from Australia.²¹ It cited the Commonwealth Ombudsman is concerned that the use of section 501 to cancel the visas of long-term permanent residents goes beyond the original intention of the provision.²²

Children and young people

Legal Aid NSW opposes the inclusion of offences committed by juveniles in the proposed expanded character test.

The law acknowledges that children and young people should have specific protections due their vulnerability,²³ particularly those involved in the criminal justice system. The United Nations *Convention on the Rights of the Child* (CROC) requires that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child

¹⁹ Australian Human Rights Commissions. Background paper: *Human rights issues raised by visa refusal or cancellation under section 501 of the Migration Act* (June 2013) page 10.

²⁰ Ibid, page 11.

²¹ Footnote 22, page 11.

²² Ibid.

²³ See, for example the *Young Offenders Act 1997* (NSW), which provides a legislative framework for the diversion of young offenders in NSW.

shall be a primary consideration.²⁴ CROC also requires the state to enact laws that take into account "the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."²⁵

There are complex issues present in juvenile offending. It is widely accepted that crime is committed disproportionately by young people. People aged 15 to 19 are more likely to be processed by police for the commission of a crime than are members of any other population group".²⁶ Research on brain development suggests that the disproportionate involvement of young people in crime occurs because the adolescent brain is still developing until the early 20s. Adolescents are more likely to take risks and to act impulsively and without fully understanding or analysing the consequences of their actions. They are also more vulnerable to peer pressure and prone to overestimate short-term payoffs.²⁷ However, most young people grow out of offending—rates of offending peak at age 18 to 19 and drop away after that.²⁸ The scientific understanding of brain development is reflected in sentencing principles for young offenders.²⁹ Accordingly, when sentencing a young person, NSW courts are required to place greater emphasis on rehabilitation, and give less weight to general deterrence and retribution.

Young people who perpetrate violence can also be victims of violence. Legal Aid NSW's experience working with young people in Out of Home Care (OoHC) is that behavioural issues normally dealt with as a disciplinary matter in the home can lead to ADVOs being taken out against the young person. In our experience, young people may also often lack a full understanding of ADVOs and conditions and this can result in inadvertent breaches of orders. This can leave Unaccompanied Minors (children and young people who have travelled to Australia without parents or family support) in OoHC particularly vulnerable to the proposed scheme.

In Legal Aid NSW's experience, young people arriving under Australia's refugee program have extra challenges. They may have fled war, persecution or oppression. They may have missed years of school or been born in refugee camps. Past trauma and

²⁴ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC); Article 3.

²⁵ CROC article 40. Australia ratified CROC in 1990.

²⁶ Kelly Richards, "What makes juvenile offenders different from adult offenders?" *Trends & Issues in Crime and Criminal Justice* No. 409 February 2011, 1.

²⁷ Malcolm Ritter, *Experts link teen brains' immaturity, juvenile crime*
<http://abcnews.go.com/Technology/story?id=3943187&page=1>

²⁸ Richards, above n 29, 2. See also Abigail Fagan and John Western, 'Escalation and deceleration of offending behaviours from adolescence to early adulthood (2005) 38(1) Australian and New Zealand Journal of Criminology 59.

²⁹ The NSW Judicial Commission's Sentencing Benchbook stats that *The law recognises the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law. Accordingly, allowance will be made for an offender's youth and not just their biological age ... The weight to be given to the fact of the offender's youth does not vary depending upon the seriousness of the offence. Where the immaturity of the offender is a significant factor in the commission of the offence, the criminality involved will be less than if the same offence was committed by an adult* : Judicial Commission *Sentencing Benchbook* [15-015]

intergenerational trauma can lead to young migrants coming into contact with the criminal justice system.

The potentially unfair impact of the Bill on a young person is demonstrated by the following case study, drawn from Legal Aid NSW's practice experience with working with young clients.

Case Study – Abbas

Abbas is 18 years old. He came to Australia from Iran seeking asylum with his mother and sister. Abbas and his family have applied for a protection visa. Abbas has been diagnosed with Post-Traumatic Stress Disorder as a result of witnessing the murder of his father in Iran and an incident he witnessed on the boat travelling to Australia. Abbas' mother has also been diagnosed with PTSD and depression.

Recently, Abbas has lost interest in school and friends and has been feeling hopeless about life in general. Abbas is learning to negotiate his change in cultural context, language, and social expectations, at the same time as he is adjusting to changes within himself as an adolescent.

Before he turned 18, Abbas got into an argument with his sister about what they were watching on TV. The incident escalated and resulted in Abbas shouting and pushing his sister. Abbas' mother called the police, who charged Abbas with assault and took out a provisional ADVO. Ultimately, Abbas received a bond in the Children's Court and was made the subject of a final ADVO for a period of 12 months.

Several months later, and after Abbas turned 18, he again has an argument with his sister and swore at her. His mother called the police, who charged Abbas with breaching the ADVO.

He was ultimately dealt with in the Local Court by way of a section 10A conviction with no further penalty.

In the above scenario, the character test would be triggered both when Abbas is a juvenile and an adult. Legal Aid NSW's Children's Legal Service regularly appears in matters which reflect Abbas' case.

We consider that the acknowledgment in the Explanatory Memorandum that "the best interests of the child will be taken into account in the decision to refuse/cancel a child's visa" is inadequate in light of these significant concerns.³⁰ Should the Bill progress, we recommend that:

- children be excluded from the proposed provisions or, in the alternative, that the Bill be amended to include statutory recognition of the best interests of a child, and

³⁰ Like other section 501 provisions within the *Migration Act 1958*, the specific grounds introduced by this Bill does not differentiate between adults and persons under the age of 18. However, the best interests of the child are, and will remain to be, a primary consideration in any decision whether to refuse or cancel a child's visa on character grounds. As such, the refusal or cancellation of a child's visa on these grounds would only occur in exceptional circumstances: Page 13, Attachment A, *Statement of Compatibility with Human Rights*

-
- offences committed as a juvenile be excluded.

Practical implications

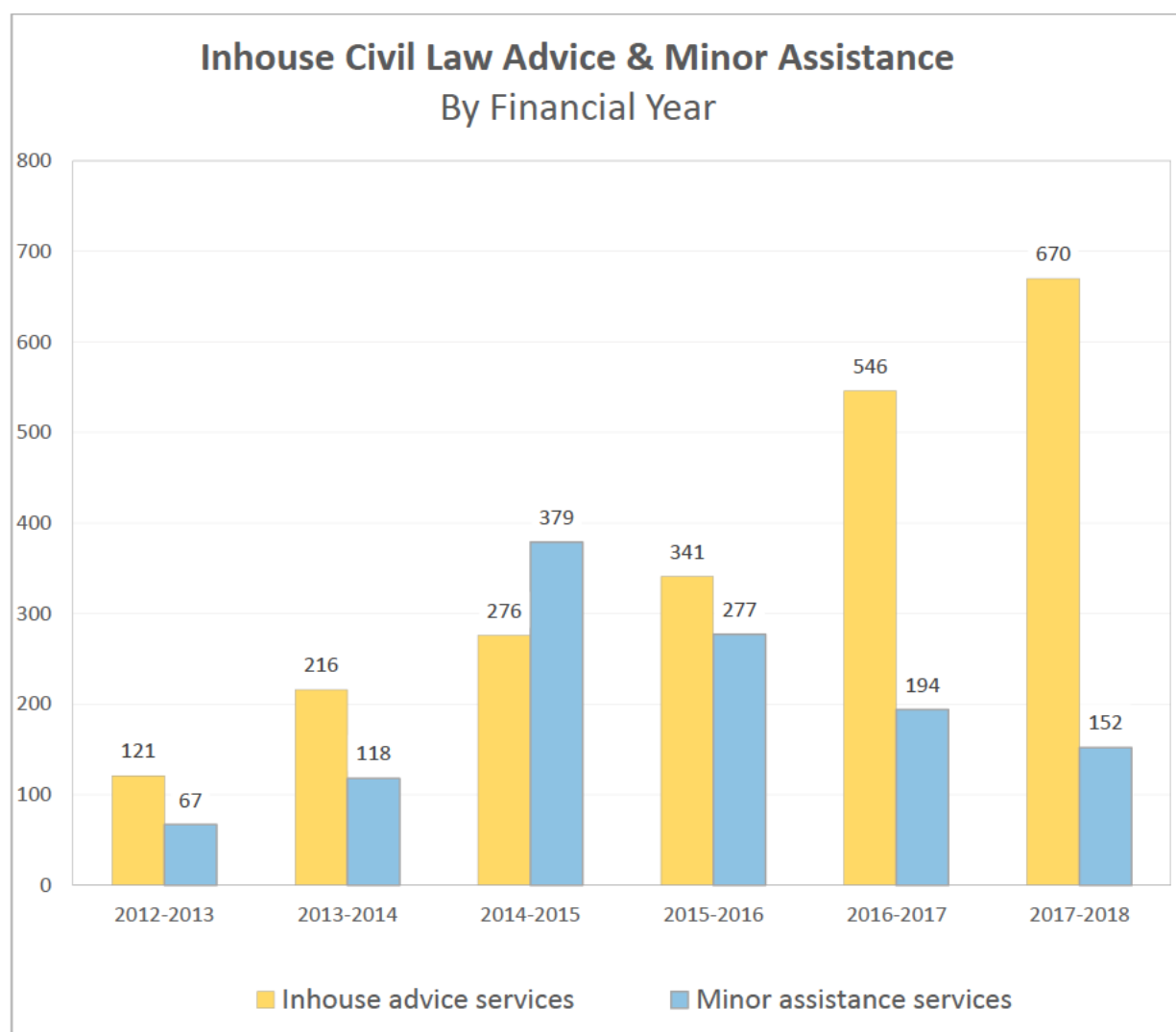
Increase in demand for legal advice

The number of people seeking assistance from Legal Aid NSW regarding visa cancellation has increased sharply since mandatory visa cancellation provisions were introduced into the *Migration Act* in December 2014. This significant increase reflects figures published by the Department of Home Affairs indicating that visa cancellations under section 501 have increased from 84 in 2013–14 to 1,284 in 2016–17.³¹ Figure 1 below demonstrates the increased demand for in-house advice and minor assistance given by Legal Aid NSW on visa cancellations over this period. These figures demonstrate that while demand for advice continues to grow, Legal Aid NSW has been unable to meet that demand beyond the provision of initial advice.³²

³¹ See: <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>

³² Grants of legal aid are available for judicial or merits review of visa cancellation decisions in limited circumstances. In addition to meeting Legal Aid NSW's means test, merit test and unpaid contribution test, a matter must also raise a significant human rights issue because the applicant would be at risk of persecution or death if returned to their country of origin; or it is in the best interests of the child or children because it is clearly the child or children who will suffer if the applicant is deported; or the applicant is a person who has either substantial mental health problems or significant cognitive difficulties or a significant physical difficulty, and if deported back to their country of origin he or she would be denied significant family support: Legal Aid NSW Policy Online, Guideline 3.4.

Figure 1



It is likely that the Bill would significantly further increase the demands for legal advice and assistance. If every non-citizen convicted of a *designated offence* receives a notice of intention to cancel or refuse their visa, the numbers of people seeking advice would likely increase dramatically. Such an increase could not be accommodated without significant funding increases for legal aid services to provide such advice and assistance.

Increased incentive to defend charges

Based on its extensive experience in representing criminal defendants, Legal Aid NSW considers that the proposed amendments will undermine the motivation for a person who is not an Australian citizen to plead guilty to a designated offence, where a plea of guilty to an offence in NSW is otherwise a mitigating factor on sentence (section 22, CSPA). Where the person becomes aware that they may face visa cancellation or refusal even where the likely sentence is a non-custodial one, there may be little to lose in seeking to defend the charge(s). This would lead to more defended hearings in the Local Court and trials in the District Court.

Appropriate guilty pleas in criminal matters are desirable and necessary for the effective and efficient operation of the criminal justice system. Recently commenced reforms in NSW aim to increase the number of early guilty pleas so as to reduce the inconvenience, expense and potential re-traumatisation of victims and witnesses caused by prolonged criminal proceedings.³³ Legal Aid NSW considers that those objectives are undermined by this Bill. This would have an adverse impact on resources across the justice system, including those of the police, prosecution and defence.

In particular, the amendments risk an increased number of defended hearings in relation to offences for breach of ADVOs. A significant proportion of criminal offences in the NSW court system relate to breaches of ADVOs.³⁴ If a conviction for breach of an ADVO risks visa cancellation, there is less incentive for a non-citizen to plead guilty to such offences. The NSW Sentencing Council's 2016 *Report on Sentencing for domestic violence offences* observed that in 2014, a guilty plea was the most common charge outcome for DV offences.³⁵ Defended hearings can be traumatic and can prolong court proceedings for people in need of protection. The benefits of a guilty plea in matters which involve domestic and family violence have wider impacts than on individuals directly involved in the criminal justice process, including impacts on children.

Legal Aid NSW is not in a position to estimate the projected impacts of the Bill on the number of guilty pleas and defended hearings in respect of designated offences, including domestic violence offences. However, we expect that the impact would be significant, due to the wide range of criminal behaviour caught by the definition of *designated offence* and the large number of offences that would attract consideration of the character test. We suggest that such issues should be properly assessed should the Bill be progressed.

The amendments should operate prospectively

For the following reasons, Legal Aid NSW opposes the retrospective operation of the Bill.

Firstly, the Bill impacts significantly and in a punitive fashion on the rights of affected people. Secondly, the necessity for retrospectivity is not justified, given that the Department and the Minister already have broad powers to issue NOICCs under sections 501(1) and (2) of the Act for any offences that are defined as *designated offences*. Finally, Legal Aid NSW is concerned that retrospective consideration of the expanded test - in circumstances where no previous action has been taken to refuse or cancel a visa following an earlier conviction - cannot be undertaken fairly and transparently.

³³ <https://www.justice.nsw.gov.au/Documents/Reforms/early-guilty-pleas-factsheet.pdf>

³⁴ Between July 2013 and June 2014 23,240 provisional ADVOs, 18,045 interim ADVOs and 24,458 final ADVOs were issued in NSW. Police recorded 12,072 ADVO breaches up until end of 30 June 2015 which could be linked to these orders: See

Poynton, S., Stavrou, E., Marott, N. and Fitzgerald, J. (2016). Breach rate of Apprehended Domestic Violence Orders in NSW (Bureau Brief No. 119). Sydney: NSW Bureau of Crime Statistics and Research, page 5

³⁵ Except for reckless grievous bodily harm that was DV-related: see page 37 and Figure 3.4.

Annexure 1: NSW Criminal Court Statistics July 2015 to June 2018

Number of persons sentenced to non-custodial penalties^ for their principal offence*

Offence type	Jul 2015 - Jun 2016			Jul 2016 - Jun 2017			Jul 2017 - Jun 2018		
	non custodial penalties	% non custodial penalties	Total persons found guilty	non custodial penalties	% non custodial penalties	Total persons found guilty	non custodial penalties	% non custodial penalties	Total persons found guilty
Violent offence against a person^^	18954	83.03%	22828	19644	82.69%	23756	19858	83.07%	23905
Sexual assault and related offences	486	48.84%	995	581	48.34%	1202	653	53.18%	1228
Breach of violence order	3377	84.28%	4007	3527	85.01%	4149	3469	83.69%	4145
Prohibited and regulated weapons and explosives offences	2081	88.14%	2361	2157	87.75%	2458	2167	87.03%	2490
Total	110563	89.56%	123455	112126	89.11%	125823	114000	89.44%	127453

*Where a person has been found guilty of more than one offence, the offence which received the most serious penalty is the principal offence.

^That is, all penalties except for imprisonment and juvenile control orders

^^ includes: Homicide and related offences + Acts intended to cause injury + Dangerous or negligent acts endangering persons + Abduction, harassment and other offences against the person + Robbery, extortion and related offences

Source: NSW Bureau of Crime Statistics and Research