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New Zealand High Commission presentation
Joint Standing Committee on Migration inquiry into review processes
associated with visa cancellations made on criminal grounds

1. New Zealanders contribute greatly to Australia's economy and society, but are disproportionately affected by Australia's deportation policies, partly as an unintended consequence of the visa treatment that Australia affords them:
 - 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 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.
 - New Zealanders who arrive in Australia today have limited ability and incentives to seek permanent residence, which is a prerequisite for gaining Australian 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 after 10 years in Australia.
 - 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 the one (New Zealand) passport.
 - New Zealanders in Australia on non-protected special category visas have very limited access to social welfare payments, including only very limited access to the unemployment benefit, and even then only after 10 years of continuous residence.
 - Because of their unique immigration status, and resulting low level of Australian citizenship, New Zealanders are more vulnerable than Australian citizens and other long-term immigrants, and more likely to be subject to Australia's visa cancellation and deportation regime. This is despite their often extensive familial and economic roots here.

- This shows through in the deportation statistics – more than half of Australia’s visa cancellations in 2017 were New Zealanders, despite New Zealanders making up under 10% of the foreign-born population. It’s clear that New Zealanders’ visa status in Australia is a contributor to their over-representation in deportation statistics.
 - There are a range of other unintended consequences of this visa treatment. For example, New Zealanders on non-protected special category visas don’t qualify for the National Disability Insurance Scheme, despite paying the relevant levies. They don’t qualify for early withdrawal of their Australian superannuation on hardship grounds as they are ineligible for Centrelink payments. And they don’t qualify for the National Redress Scheme for Institutional Child Sexual Abuse. These are all issues that we are working on with the relevant parts of the Australian government.
 - But deportations is the issue that we’re most focused on, in part because it is threatening to undermine the generally very positive trans-Tasman relationship.
2. Some New Zealanders are not being given access to what New Zealand considers to be appropriate due process before being deported from Australia:
- A decision to cancel somebody’s visa is a very significant one. This is especially so when that person has lived in the country for a long period of time – even the vast majority of their life – when they’ve worked there, paid their taxes, and established a family in that country.
 - New Zealand has raised a number of concerns about Australia’s visa cancellation and deportation policies, especially in relation to the 2014 changes to the Migration Act. The very significant action of cancelling somebody’s visa, when they have lived here legally for many years, should at the very least be the result of a full and robust legal process.
 - In particular, we are aware of a growing number of New Zealanders who are long-term residents of Australia and have been deported under Section 116 of the Migration Act without facing trial for the alleged crimes that triggered their visa cancellation, and who do not have a criminal record of 12 months or longer.
 - This raises a number of concerns for us, in terms of habeas corpus, in terms of ensuring that Australian victims receive the justice they are entitled to, and in terms of protection of the New Zealand community if these people are being deported to NZ without any meaningful connection to their country of citizenship.
 - But our concerns are even broader than that. The Migration Act gives decision-makers, including Ministers, extraordinarily broad powers under Section 116 to cancel visas. No Ministerial Directive that considers an individual’s connections to Australia applies to the exercise of these powers (as Ministerial Directive 65 applies only to Section 501 cancellations).
 - This can give the impression that some Section 116 cancellations are being made arbitrarily and without reference to the factors outlined in Ministerial Directive 65, such as an individuals’ connections with Australia. It is unclear to us why the Australian Government does not offer a formal process to those whose visas are cancelled under section 116 equivalent to

the process offered to the potentially more serious offenders whose visas are cancelled under section 501.

3. Australia's treatment of New Zealand minors has been particularly concerning:
 - We are especially concerned that Section 116 has been applied to at least one New Zealand minor in the last year.
 - In that case, a 16 year old New Zealand citizen was detained for many months in an adult immigration detention centre hundreds of kilometres from his family and support networks.
 - New Zealand raised serious concerns about whether this treatment of a minor conformed with Australia's obligations under the UN Convention on the Rights of the Child, including (Art 37) the right for a minor to be held separately from adults.
 - It is noteworthy that the AAT overturned the decision to cancel this New Zealand minor's visa, on the basis that due consideration had not been given to their best interests. While the relevant visa was reinstated, we cannot know the personal impact that holding a minor in adult detention has had.

4. The AAT process is an important one, and should be retained and improved on
 - As we outlined in our written submission to the statutory review of the AAT, the Tribunal plays a valuable role in reviewing the merits of visa cancellation decisions in Australia, including by taking into account the unique complexities involved in the cancellation of New Zealanders' visas.
 - In our view, the Tribunal has been meeting its objective to promote public trust and confidence in its decision-making. Its deliberations help to ensure that visa cancellation decisions reflect the expectations of the Australian community.
 - New Zealand would like to see the Tribunal process continue and be improved on, including in terms of reducing the relevant processing times. It can take many months for a case to be heard and decided on by the AAT.

5. New Zealand accepts that all countries have a sovereign right to determine their own immigration policies, in accordance with international law. We think it may be useful to outline the approach that New Zealand takes to deportations, to provide some context for our concerns about Australia's policies:
 - New Zealand's deportation law applying to non-citizen residents convicted of offenses implicitly accounts for their connections to New Zealand when determining liability for deportation.
 - If a residence class visa holder (which Australians are granted on arrival, as long as they meet character requirements) has held that visa for:
 - Up to two years, a conviction for a crime that has a prison sentence of at least 3 months means they are liable for deportation;
 - Up to five years, a conviction for a crime that has a prison sentence of more than 2 years means they are liable for deportation;

- Up to 10 years, a prison sentence of more than 5 years means they are liable for deportation;
 - more than 10 years, they will effectively not be deported regardless of their criminality.
- All individuals who are subject to deportation from New Zealand must be interviewed before they leave to ensure there are no grounds or exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from NZ.
 - Australians' New Zealand visas cannot be cancelled by ministerial discretion in the absence of a criminal conviction as Australians are not classified as temporary migrants, and therefore the New Zealand equivalent of section 116 of the Migration Act does not apply to Australians.
 - Around 1000 people have been deported from New Zealand since July 2014 (about when the Australian Act was amended). Eleven of those 1000, or about 1% were Australian; they were deported for a range of serious criminal offenses including attempted murder, sex offenses and drug offenses. That compares to nearly 1400 New Zealanders being deported from Australia in a similar timeframe (including 260 in 2015, 395 in 2016, and 464 in 2017) – that's the majority of Australia's total deportations caseload.
 - The underlying principle of these deportation provisions 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.
 - This recognises that the New Zealand community as a whole has an interest in ensuring that migrants succeed after they arrive in our country and, where they do not succeed and become criminals, that we have an interest in rehabilitating them.
 - People who have held residence class visas for over a decade are considered to be New Zealand's responsibility, not the responsibility of the country they came from so many years before. This recognises that the environment people live in, especially for long periods of time, contributes to their behaviour.
6. Australia has responsibilities, especially for those people who have been long resident in 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.
 - Those who came here since 2001 have had very limited ability and incentives to secure formal permanent residence or citizenship in Australia, due in part to the changes made to the application of the relevant special category visa in 2001.
 - 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, but 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.

Conclusion

7. In applying a nationality-blind deportation policy Australia has uniquely affected New Zealanders, who now comprise more than half of Australia's visa cancellations despite making up less than 10% of the foreign-born population.
8. This disproportionate impact on New Zealand is a result of Australia's deportation policy failing to allow for the special immigration status of New Zealanders living long-term in Australia, and the corresponding low rates of Australian citizenship amongst that cohort.
9. There is a public policy case for "connections to Australia" being given more weight in the visa cancellation appeal process, particularly where people have resided in Australia for a long period of time.
10. The existence of an independent merits review process like the AAT helps to ensure that most New Zealanders whose visas have been cancelled have access to an appropriate level of due process at that stage.
11. There are also grounds for concern that some of the legal processes involved in the visa cancellation and deportation of New Zealanders appear to be less than robust. The application and implementation of section 116 of the Migration Act to New Zealanders who have long been resident in Australia, and have not been convicted of the alleged crime that triggered their visa cancellation, is of particular concern to New Zealand.