Chapter 2

The key issues

2.1 This chapter considers the need for the Migration Amendment (Strengthening the Character Test) Bill 2018 (the bill), and discusses a number of issues raised with the committee by submitters in respect to the proposed changes to the *Migration Act 1958* (the Act).

2.2 The chapter concludes with the committee view and the committee's recommendation with respect to the bill.

The need for the bill

2.3 As set out in the Minister's second reading speech, the amendments to the existing character test at section 501 of the Act that would be made by the bill would strengthen 'the current legislative framework in relation to visa refusals and cancellations on character grounds'.[1]

2.4 In referring to the stated purpose of the bill, some submitters suggested that the Minister already has expansive powers to refuse or cancel a visa on character grounds, and questioned whether the bill is justified or necessary.[2] For example, the Law Council of Australia (Law Council) stated that while it 'recognises that it is both necessary and appropriate to regulate people seeking to enter and remain in Australia by reference to questions of character', the need to expand the existing visa cancellation provisions 'has not been made sufficiently clear'.[3]

2.5 Similarly, the Asylum Seeker Resource Centre (ASRC) questioned the need for the bill, which it argued 'will offer no greater protection or safety to the Australian community beyond what is already provided for in existing law'.[4]

2.6 The New South Wales Council for Civil Liberties (NSWCCL) highlighted the existing powers of the Minister to refuse and cancel visas:

> …under the existing act, persons can already be deemed to have failed the character test if they pose any risk to the community, on the basis of their criminal of general conduct, or due to an association they have.[5]

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1 The Hon. Mr David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *Parliamentary Debates*, 25 October 2018, p. 1.

2 See, for example, Australian Human Rights Commission, *Submission 3*, p. 15; Australian Lawyers for Human Rights (ALHR), *Submission 7*, p. 2; Australian Federation of Islamic Councils, *Submission 11*, p. 1; Legal Aid New South Wales (Legal Aid), *Submission 14*, pp. 4–5; Refugee Legal, *Submission 16*, pp. 4–5.

3 Law Council of Australia (Law Council), *Submission 9*, p. 9.

4 Asylum Seeker Resource Centre (ASRC), *Submission 8*, p. 1.

5 New South Wales Council for Civil Liberties (NSWCCL), *Submission 2*, p. 4.

2.7 The Visa Cancellations Working Group (Working Group) also submitted that adequate powers to cancel a visa already exist:

> The Bill categorically does not enable the cancellation of the visas of any person for whom cancellation is not already available. It merely removes a decision maker's power to assess whether or not certain individuals meet or fail the character test, making failure mandatory in prescribed circumstances. This will make disproportionate and ill-informed decision-making that is out of step with community standards immensely more likely.[6]

2.8 However, the Department of Home Affairs (the Department) explained that the proposed amendments made by the bill:

> …will ensure non-citizens who are convicted of certain serious offences—and pose an ongoing risk to the Australian community while in Australia or will pose a threat if they are allowed to enter Australia—do not pass the character test and are appropriately considered for visa refusal or cancellation.[7]

2.9 The bill would achieve this end by amending the character test at section 501 of the Act, providing delegates 'with a clear, objective ground with which to consider refusing or cancelling a non-citizen's [sic] visa' due to a conviction for one or more offences, such as:

- violence against a person;
- non-consensual conduct of a sexual nature;
- breaching an order made by a court or tribunal for the person[al] protection of another person — such as an apprehended violence order;
- using or possessing a weapon; or
- involvement in any of the above.[8]

2.10 The Department explained that, in determining whether to refuse or cancel a visa on character grounds, a delegate 'must consider a wide range of factors contained within binding Ministerial Direction 65', which includes:

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

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6 Visa Cancellations Working Group (Working Group), *Submission 13*, p. 5.

7 Department of Home Affairs, *Submission 15*, p. 3.

8 Department of Home Affairs, *Submission 15*, p. 3.

- the nature and extent of a person's ties to Australia.[9]

2.11 The Department provided three case studies which illustrate why these changes are necessary to protect the Australian community, including the following:

> **Mr C** is an adult permanent visa holder in Australia who has links to youth gangs. Mr C was found guilty without conviction for theft related offences, for which he received a youth supervision order. He subsequently was also convicted of a violent offence and sentenced to a period of four months imprisonment. Mr C has not been sentenced to a term of imprisonment of 12 months or more and, under the current character provisions, does not objectively fail the character test on the basis of his criminal history.
>
> Mr C's visa cannot be considered for cancellation under section 116(1)(e) of the Act on the basis that he may present a risk to the community, as this power does not apply to permanent visa holders who are in Australia.
>
> Mr C will remain in Australia as the holder of a permanent visa, unless sufficient adverse information becomes available to find that Mr C does not pass the character test under subjective grounds.
>
> However, under the proposed designated offences ground in the Migration Amendment (Strengthening the Character Test) Bill 2018, Mr C would objectively fail the character test as he has been convicted of a violent offence, which is punishable by imprisonment for a maximum term of five years.[10]

Groups affected by visa cancellations

2.12 The majority of submitters to the committee discussed the proposed changes in the bill with reference to the 2014 amendments to section 501 of the Act—discussed in chapter 1—and the effect of these amendments, and the anticipated effect of the proposed amendments, on particular groups. Some submitters also suggested that, contrary to the government's stated position,[11] the bill does not accord with community expectations.[12]

2.13 This section discusses the evidence received in respect of those groups most frequently identified by submitters as being potentially affected by the proposed amendments in the bill.

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9 Department of Home Affairs, *Submission 15*, p. 8.

10 Department of Home Affairs, *Submission 15*, p. 13.

11 Migration Amendment (Strengthening the Character Test) Bill 2018 explanatory memorandum (Explanatory Memorandum), p. 11.

12 See, for example, Federation of Ethnic Communities' Councils of Australia (FECCA), *Submission 1*, p. 2; ALHR, *Submission 7*, p. 2; Refugee Council of Australia (Refugee Council), *Submission 10*, p. 1.

Children

2.14 A number of submitters expressed concern that the current visa cancellation provisions apply,[13] and that the proposed amendments will also apply,[14] to minors.

2.15 For example, the Refugee Council of Australia (Refugee Council) stated that the bill:

> ...lowers the bar for visa cancellations to such an extent that a child could be subject to indefinite detention or deportation for sharing an intimate image of their girlfriend or boyfriend, or for shoplifting.[15]

2.16 Legal Aid New South Wales (Legal Aid) offered a case study that, it suggested, demonstrated how the proposed changes would trigger the character test for a person both as a juvenile and as an adult:

> 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.[16]

2.17 In its submission, the Law Council expressed concern about 'the impact of the proposed measures on children', noting that while the explanatory memorandum to the bill provides that the provisions would apply to children 'only in exceptional circumstances…it does not prescribe what these exceptional circumstances will be'.[17]

2.18 As such, the Law Council considered that 'there is a high possibility that this will negatively impact families and young people' and submitted the bill should be amended to capture the intention set out in the explanatory memorandum—that a child's visa will only be cancelled in exceptional circumstances.[18]

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13 New Zealand Government, *Submission 4*, p. 3. The New Zealand Government noted in its submission that 'a New Zealand minor's Australian visa has been cancelled this year under the Act', but that the decision was overturned by the Administrative Appeals Tribunal 'on the basis that due consideration had not been given to their best interests as a child'—see p. 3.

14 See, for example, Refugee Council, *Submission 10*, p. 3; Working Group, *Submission 13*, p. 13.

15 Refugee Council, *Submission 10*, p. 1.

16 Legal Aid, *Submission 14*, p. 10.

17 Law Council, *Submission 9*, p. 12.

18 Law Council, *Submission 9*, p. 12.

2.19 Another way in which submitters suggested the proposed changes may adversely affect children is through a child's relationship with a primary visa applicant.

2.20 For example, the Australian Catholic Migrant and Refugee Office (ACMRO) of the Australian Catholic Bishops Conference expressed concern about the effect of a primary applicant's visa being cancelled on character grounds on spouses and children. The ACMRO submitted that spouses and children 'are not the ones who have committed the crime, but consequential victims of the action of the primary applicant's criminal behaviour'.[19] The ACMRO suggested that the proposed changes to the Act could serve to uproot and disorient children's lives 'because of actions taken which were not in their control'.[20]

2.21 It was on that basis that the ACMRO urged:

> …that due consideration is given to families, spouses and children, caught up in these situations beyond their control when drafting and proposing the necessary Legislative Instruments that will guide the decision making processes.[21]

2.22 Similarly, the ASRC outlined how a relationship with a primary visa applicant could adversely affect women and children who are victims of family violence:

> The physical elements of a 'designated offence' in the Bill include breach of 'an order made by a court or tribunal for the personal protection of another person'. This provision will most commonly, and is intended to, apply to intervention orders relating to family violence. This provision highlights our existing concern regarding the cancellation of visas of family violence offenders, in circumstances where the affected family member is dependent on that same visa.
>
> Most often, the victim of family violence is the wife and/or child of the perpetrator. When families are present in Australia as visa holders, there is generally one primary visa holder (often the husband) and one or more 'dependent' visa holders (often a spouse and/or child). When a husband's visa is cancelled on account of family violence offences, any 'dependents' will also have their visas cancelled. This means that a wife and child who have suffered family violence will have their visas cancelled and they will be removed from Australia together with the perpetrator.[22]

2.23 The statement of compatibility with human rights with respect to the bill addressed the issue of the rights of minors, and noted that the best interests of the child will be taken into account regarding a decision to refuse or cancel a visa in accordance with Australia's international law obligations:

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19 Australian Catholic Migrant and Refugee Office (ACMRO), *Submission 5*, p. 2.

20 ACMRO, *Submission 5*, p. 2.

21 ACMRO, *Submission 5*, p. 2.

22 ASRC, *Submission 8*, pp. 5–6.

> While rights relating to family and children generally weigh heavy against cancellation or refusal, there will be circumstances where they may be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record or past behaviour or associations.[23]

2.24 Indeed, as noted above, delegates who are considering whether to refuse or cancel a visa on character grounds are required to consider the best interests of minors in Australia.

New Zealand residents

2.25 A number of submitters discussed the anticipated effect of the proposed changes to the character test on New Zealanders with reference to the effect of the 2014 changes on this group of visa holders.

2.26 New Zealanders living in Australia have a unique visa status and, owing to their broad set of rights provided by this status, 'have had a far lower citizenship take-up rate compared to other migrant groups'.[24] As a result, New Zealanders tend to be more liable to deportation than visa holders of other nationalities.

2.27 Oz Kiwi, the peak body for the issues affecting the rights of New Zealanders residing in Australia, provided an overview of the current visa arrangements for New Zealanders:

> New Zealanders arriving in Australia have been granted a Special Category Visa (SCV) since the introduction of the universal visa system in 1994. The SCV is a nationality-specific visa that allows New Zealand citizens to reside indefinitely in Australia. It has been included in both the repealed *Australian Citizenship Act 1948* and the *Citizenship Act 2007* (Cth) as a visa that can fulfil permanent residence requirements, subject to ministerial declaration. However, since 2001 ministerial declarations have only extended 'permanent resident' status under citizenship law to certain SCV holders who were living in Australia by 26 February 2001.[25]

2.28 Oz Kiwi discussed what it considered to be the disproportionate effect that the visa cancellation provisions introduced in 2014 have had on New Zealanders:

> Since s501 was amended in December 2014 1,200 New Zealanders have been deported. Visa cancellations have increased tenfold under the revised s501. Of the 2,850 people deported between July 2014 and June 2017, 51 per cent were New Zealanders.[26]

2.29 Statistics produced by the Commonwealth Ombudsman for its 2016 investigation report into section 501 of the Act, illustrate the high rate of visa cancellation for New Zealanders, set out at Figure 2.1.

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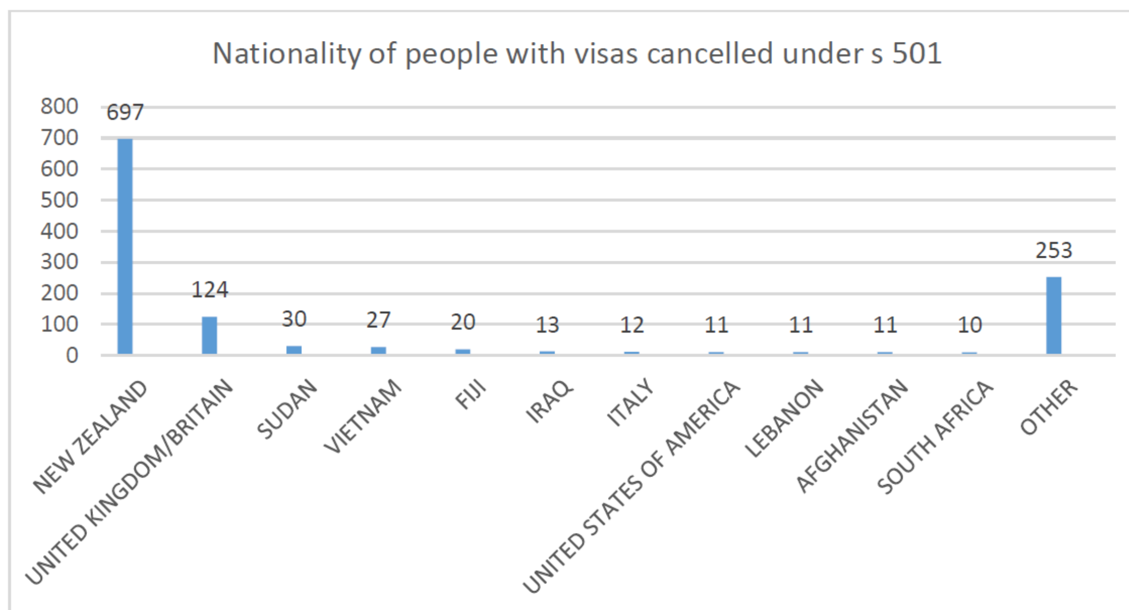
23 Explanatory Memorandum, pp. 12–13, citing the *Convention on the Rights of the Child* and the *International Covenant on Civil and Political Rights.*

24 Oz Kiwi, *Submission 6*, p. 2.

25 Oz Kiwi, *Submission 6*, p. 1.

26 Oz Kiwi, *Submission 6*, p. 3 (citations omitted).

Figure 2.1: Nationality of people with visas cancelled under s 501, 1 January 2014–19 February 2016



Source: Commonwealth Ombudsman, *The Department of Immigration and Border Protection: The administration of section 501 of the Migration Act 1958*, December 2016, p. 7.

2.30 The Border Crossing Observatory observed that, since the changes to the character test introduced in 2014, New Zealanders have also 'become the largest nationality group for visa cancellations and deportations under s501 which has included a number of long term residents'.[27]

2.31 Oz Kiwi attributed this overrepresentation to several factors, including that 'any individual who has resided [in Australia] for a decade is no longer protected' from visa cancellation and subsequent detention.[28]

2.32 Figure 2.2 illustrates the rise of New Zealanders in immigration detention.

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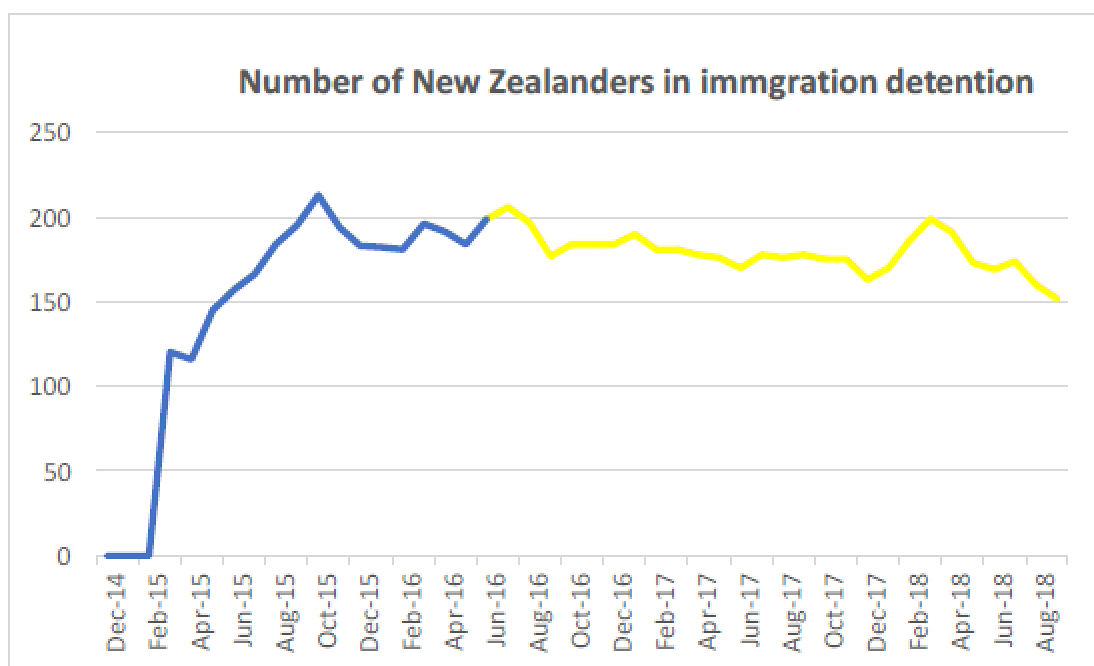
27 Border Crossing Observatory, Monash University, *Submission 12*, p. 6.

28 Oz Kiwi, *Submission 6*, p. 2.

Figure 2.2: Number of New Zealanders in immigration detention



Source: Border Crossing Observatory, Monash University, *Submission 12*, p. 7 citing Department of Home Affairs, *Immigration Detention Statistics* https://www.homeaffairs.gov.au/research-and-statistics/statistics/visastatistics/live/immigration-detention.

2.33 In its submission, the New Zealand Government set out the reasons New Zealanders 'have been disproportionately affected by Australia's deportation policies since 2014':

- 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.[29]

2.34 The New Zealand Government suggested that the visa cancellation provisions introduced in 2014 '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'. It noted, for example, that:

> 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 –

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29 New Zealand Government, *Submission 4*, p. 2.

> they've made New Zealand their home and New Zealand has benefited from their contribution.[30]

2.35 The New Zealand Government submitted that, just as New Zealand has some responsibility for long-term residents of New Zealand, 'Australia has responsibilities for those people who are products of Australia'.[31] The New Zealand Government concluded that the proposed changes 'would make a bad situation worse for New Zealanders and therefore for New Zealand'.[32]

2.36 The responsibility of the Australian government for New Zealanders who have long resided in Australia was also discussed by Oz Kiwi, which expressed concern about the expected effect of the proposed changes on long-term residents:

> Oz Kiwi has long been concerned about the impact that visa cancellation may have on a person who has been residing in Australia for a long period of time. The proposed Migration Amendment Bill will cast the net wider. Prior to 1998, the deportation of non-citizens who had committed criminal offences was covered by sections 200 and 201 of the *Migration Act 1958* (Cth). Under these sections, the Minister could only deport a non-citizen who had been convicted of a crime (punishable by imprisonment for two years or more) if the non-citizen had been resident in Australia for less than ten years. Subsequent amendments to the Act in relation to section 501, have been used to cancel the visas of permanent residents who have lived in Australia for more than ten years.[33]

Humanitarian visa holders

2.37 A number of submitters raised concerns that the bill is inconsistent with Australia's non-refoulement obligations under international law that prohibit Australia from returning someone to a country where they will face persecution or serious human rights violations.[34]

2.38 In its submission, the ASRC set out the effect of the visa cancellation provisions on refugees and asylum seekers with reference to non-refoulement. The ASRC suggested that requirements in departmental guidelines to consider such international obligations are insufficient, and that:

> The state of domestic law is that, if a person's visa is refused or cancelled, they may be returned to their country of origin even if they face persecution or other serious harm.[35]

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30 New Zealand Government, *Submission 4*, p. 2.

31 New Zealand Government, *Submission 4*, p. 2.

32 New Zealand Government, *Submission 4*, p. 4.

33 Oz Kiwi, *Submission 6*, p. 2.

34 See, for example, ALHR, *Submission 7*, pp. 4–5; Border Crossing Observatory, Monash University, *Submission 12*, p. 4.

35 ASRC, *Submission 8*, p. 2.

2.39 The Refugee Council informed the committee that the consequence of a visa cancellation for refugees 'is indefinite detention, as they cannot be returned to their country of origin without breaching our *non-refoulement* obligations'.[36] The Refugee Council informed the committee that, more recently, it has heard that:

> …visas are being cancelled without people being detained. Instead, these people are left without a valid visa in the community, without the right to work and without other means to support themselves. Such enforced destitution is also a breach of our international obligations.[37]

2.40 In its submission, Refugee Legal provided a case study example of a Rohingya[38] refugee to illustrate its submission that the bill would 'have a significant adverse impact on the lives of vulnerable people, including children, refugees, people seeking asylum and victims of domestic violence'.[39] In the example of the Rohingya refugee, it stated the adverse impact could be indefinite detention of a stateless person.

2.41 In respect of the time spent in detention as a result of visa cancellations, the Commonwealth Ombudsman reported in 2016 that:

> The average length of time in detention for those who requested revocation was 150 days in the period 1 January 2014 to 31 December 2015. On 29 February 2016, the average time to process a s 501(3A) revocation request had increased to 153 days. We note at the close of business on 1 March 2015 there were, however, 158 cases where persons have spent six months or more awaiting an outcome and 21 cases where persons have spent 12 months or more awaiting an outcome.[40]

2.42 Although these concerns have been raised with the committee by submitters, the statement of compatibility with human rights in the explanatory memorandum to the bill emphasises Australia's commitment to its non-refoulement obligations.[41] These obligations 'are considered as part of the decision whether to refuse or cancel a visa on character grounds', such that:

> Anyone who is found to engage Australia's non-refoulement obligations during the refusal or cancellation decision or in subsequent visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations.[42]

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36 Refugee Council, *Submission 10*, p. 2.

37 Refugee Council, *Submission 10*, p. 3.

38 The Rohingya are a Muslim ethnic group who are not recognised as citizens in Myanmar, despite living there for generations. They are considered by the Burmese government to be illegal immigrants from Bangladesh.

39 Refugee Legal, *Submission 16*, p. 8.

40 Commonwealth Ombudsman, *The Department of Immigration and Border Protection: The administration of section 501 of the Migration Act 1958*, December 2016, p. 6.

41 Explanatory Memorandum, p. 12.

42 Explanatory Memorandum, p. 12.

Other issues

2.43 Submitters to the inquiry also raised broader issues of concern regarding the proposed amendments to the existing character test in the Act.

2.44 Other issues that were raised but are not examined in this section included the use of the phrase 'knowingly concerned' in respect of criminal conduct;[43] the constitutionality of the provisions;[44] foreign convictions;[45] and the issue of rehabilitation of prisoners.[46]

Aiding and abetting a designated offence

2.45 One of the designated offences that will be introduced if the bill is passed is the offence of 'aiding, abetting, counselling or procuring' the commission of one or more of the offences set out at subparagraphs 501(7AA)(a)(i)–(iv).[47]

2.46 The Federation of Ethnic Communities' Councils of Australia (FECCA) expressed its concern with this provision—proposed subparagraph 501(7AA)(a)(v)—which it suggested 'will disproportionally affect women, involved in a relationship with an offender, who are often victims of intimate partner and domestic violence'.[48]

2.47 The Law Council also expressed concern with the inclusion of 'aiding' or 'abetting' in the definition of a designated offence, stating that the provision 'could have a considerable impact on vulnerable individuals and in particular women involved in a relationship with the offender' and could, in turn, 'serve to de-incentivise individuals from cooperating with authorities'.[49]

2.48 The NSWCCL considered that this provision would 'strongly discourage people from letting the police know of offences in which they or those they care about have played a small part'.[50]

2.49 However, as the explanatory memorandum states, the physical elements of the designated offence set out at proposed subparagraphs 501(7AA)(a)(v)–(viii) are intended to:

> …capture those non-citizens with links to those activities that pose a risk to the Australian community, such as (but not limited to) organised crime, outlaw motor cycle gangs or those who, without committing the physical elements as set out in subparagraphs 501(7AA)(a)(i)-(iv), have a level of

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43 Law Council, *Submission 9*, p. 12.

44 Law Council, *Submission 9*, p. 13; Working Group, *Submission 13*, p. 14.

45 ASRC, *Submission 8*, p. 7.

46 NSWCCL, *Submission 2*, p. 7.

47 Strengthening the Character Test Bill, Schedule 1, Item 4, proposed subparagraph 501(7AA)(a)(v).

48 FECCA, *Submission 1*, p. 2.

49 Law Council, *Submission 9*, p. 11.

50 NSWCCL, *Submission 2*, p. 6.

> involvement in the commission of a designated offence that gives rise to an offence in and of itself. This makes it clear that the intention is that non-citizens who are criminals or who are associated with criminal activity should not remain in, or be allowed to enter, Australia.[51]

Maximum sentencing penalties

2.50 Proposed paragraph 501(7AA)(b) of the bill introduces the elements of a designated offence with respect to offences punishable by imprisonment for a maximum term of not less than two years.

2.51 The Law Council expressed its concern with this provision—it considered the maximum sentencing penalty provision has 'the potential to undermine the sentencing function of the judicial system and the discretion it possesses with regards to sentencing offenders'.[52] The Law Council also stated:

> 30. Proposed paragraph 501(7AA)(b)… seeks to shift the threshold for visa cancellation or refusal away from an individual's imposed sentence (which reflects the seriousness of the actual conduct) to the offence itself and its maximum possible penalty, regardless of the actual sentence handed down to the individual.
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> 31. It is noted that maximum penalties are reserved for the worst, most serious examples of an offence. The Law Council is concerned that this shift fails to appreciate the role of criminal sentencing and the careful consideration that is given by the courts to a range of social factors when an individual is convicted of an offence, including mitigating circumstances such as age, health, disability, moral culpability, or the objective seriousness of the relevant offence.
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> 32. The Law Council submits that having a cancellation provision based on the maximum possible sentence rather than the actual sentenced imposed fails to consider both the legislative structure of the criminal law legislation or the circumstances of the offence and individual concerned, and does not adequately reflect the seriousness of the individual's conduct or risk. The law has long recognised that different circumstances give rise to different standards of culpability. As such, possible maximum sentences are not a proper basis for determining seriousness.[53]

2.52 Legal Aid made similar observations in its submission, and suggested that the role of the sentencing court is undermined by the bill, explaining:

> 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.[54]

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51 Explanatory Memorandum, p. 6.

52 Law Council, *Submission 9*, p. 10.

53 Law Council, *Submission 9*, p. 10.

54 Legal Aid, *Submission 14*, p. 6.

2.53 The Australian Lawyers for Human Rights (ALHR) provided examples of those offences which may be punishable by a term of imprisonment of two years or more, but for which it may not be appropriate to impose the two year sentence of imprisonment 'and which the Australian community would consider to be a minor or trifling offence':

> For example, in Western Australia the summary penalty for damaging property by graffiti ranges from a community based order to a two year term of imprisonment The criminal law system appropriately already has the power to consider the risk a person who damages property by graffiti may pose the community and determine that it does not warrant a two year term of imprisonment. Further, it is implausible that the Australian community would consider that the offence of graffiti is serious enough to warrant the refusal or cancellation of a visa, even though it can potentially attract a two year term of imprisonment. However, this is the type of offence the Bill captures through its expansion of powers without any proper consideration of the actual sentence imposed by the criminal law system.[55]

2.54 In regard to the proposed introduction of the two-year maximum penalties, the Working Group noted that maximum sentences provide 'for aggravating circumstances in the course of offending, where harsher punishment is warranted':

> In the vast majority of cases limited or no such circumstance exists. Courts, accordingly, rarely impose the maximum penalty. An actual judicial sentence is a more appropriate indication of the seriousness of offending.[56]

2.55 The Working Group submitted that 'the Bill will capture a significant number of individuals whose conduct may not fall under the commonly accepted definition of a serious offence'.[57]

2.56 The Working Group also expressed concern with the low criminal threshold in the bill, stating that the bill:

> …will capture a significant number of individuals whose offences could not fall under the commonly accepted definition of 'serious offences'. This is primarily due to the inclusion of certain offences with a potential sentence of not less than two years, regardless of the judicial sentence given. For example, some offences which would fall under this category include:
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> - verbal threats,
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> …
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> - Any attempted offence of the nature stipulated, being an offence not carried out.[58]

55 ALHR, *Submission 7*, p. 3.

56 Working Group, *Submission 13*, p. 9 (citations omitted).

57 Working Group, *Submission 13*, p. 11.

58 Working Group, *Submission 13*, p. 8 (citations omitted).

2.57 However, the explanatory memorandum to the bill provides that the intention of this proposed amendment 'is to make it clear that a designated offence must be a serious offence, and not merely a minor or trifling offence'.[59] Further, the proposed amendment:

> …also sets an objective standard for the determination of what constitutes a designated offence, which relies upon established existing criminal law and law enforcement processes in states and territories to determine the seriousness of a given offence.
>
> This will ensure that discretionary visa cancellation and refusal decisions are based on objective standards of criminality and seriousness.[60]

Access to justice

2.58 A number of submitters suggested that the proposed amendments to section 501 of the Act would provide limited access to merits review.

2.59 For example, FECCA outlined how, in its view, the proposed changes 'may lead to grave injustice and the eroding of individual human rights and freedoms' in the context of merits review of a decision to refuse or cancel a visa on character grounds.[61] FECCA explained that:

> The current review process for refusals and cancellations is characterised by great expense to the individual, no access to legal representation and a strict timeframe for review which relies on the subject of the order understanding the complexities of the AAT. The removal of an individual from Australia—including some who have spent their whole lives in this country—can have a devastating impact on the individual, their family and community.[62]

2.60 The Law Council expressed similar concerns, and informed the committee that it had found that there had been a 'significant increase in demand for legal assistance following the expansion of visa cancellation powers'.[63]

2.61 In its submission, the ALHR spoke to equality before the courts and tribunals:

> …the practical impact of the Bill undermines this right because it undermines judicial direction and the determinations the criminal law system makes during sentencing as to whether a person poses a risk to the community and therefore whether the Court should impose a sentence of imprisonment or not. The Bill not only reinforces a discriminatory regime where two people who have committed the same crime are treated very differently depending on whether they are a citizen or not, but also introduces a regime where a non-citizen may commit the same offence, but

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59 Explanatory Memorandum, p. 7.

60 Explanatory Memorandum, p. 7.

61 FECCA, *Submission 1*, p. 2.

62 FECCA, *Submission 1*, p. 2.

63 Law Council, *Submission 9*, p. 9.

> in a less serious context and receive a less serious sentence, yet still be subject to a more serious outcome, including arbitrary detention and removal from Australia.[64]

2.62 The Refugee Council stated that:

> …non-citizens could be held in indefinite detention or deported without any form of substantive independent review, as there is no right to review by the Administrative Appeals Tribunal if the decision is made personally by a Minister. Even if the Tribunal can review the decision, this can be overturned by the Minister.[65]

2.63 However, the statement of compatibility with human rights provides that the bill does not amend 'the relevant procedures and review mechanisms available', and that the bill accords with Australia's international obligations:

> To the extent that a larger number of people may have their visa cancelled as a result of this amendment, possibly leading to their expulsion, the processes are in accordance with the procedural requirements of Article 13 [of the *International Covenant on Civil and Political Rights*] and review of the decisions is available – merits review by the Administrative Appeals Tribunal and/or judicial review for decisions made by a delegate, and judicial review of decisions made by the Minister personally.[66]

Retrospectivity

2.64 A number of submitters expressed concern that the proposed measures of the bill may be retrospective in nature. For example, the Law Council considered that, as a result of the proposed amendments, a non-citizen could be removed 'for their historic involvement in a designated offence, which in the absence of the proposed amendments may not have amounted to a failure to pass the character test'.[67] The Law Council submitted that:

> …there has been insufficient justification for the possible retrospective nature of the proposed measures, particularly when consideration is given to the considerable impact on the lives of those that may be affected by the reforms.[68]

2.65 The ASRC also discussed this issue, stating that item 7 of the bill 'undermines the rule of law and creates legal uncertainty for legal applicants', and also that it is:

> …unjust to apply the new character requirements to offences committed prior to the commencement of the concept of a 'designated offence.' This would result in visa holders who may have lived in Australia for decades

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64 ALHR, *Submission 7*, p. 4.

65 Refugee Council, *Submission 10*, p. 1.

66 Explanatory Memorandum, p. 12. Article 13 of the *International Covenant on Civil and Political Rights* concerns the expulsion of aliens.

67 Law Council, *Submission 9*, p. 13.

68 Law Council, *Submission 9*, p. 13.

> and received a fine or minimal sentence for a 'designated offence' many years ago, become suddenly liable to visa cancellation, regardless of the fact that they could not have predicted their actions may result in visa cancellation at the time. We submit that this is an unacceptable outcome.[69]

2.66 Legal Aid also expressed concern with the retrospective nature of the bill, a measure which it opposed on the following grounds:

> 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.[70]

2.67 The Department did identify in its submission that the new designated offence ground proposed by the bill 'will apply retroactively—meaning the decision-maker can consider convictions for a designated offence which occurred before, on, or after the commencement of this Bill'.[71] However, the Department also stated that this is consistent with previous amendments to the character test, such as:

- 1998 amendments to sections 501(6)(a)—relating to a person [who] has a substantial criminal record, 501(6)(c)—relating to past and present criminal or general conduct and 501(6)(d)—relating to a person’s conduct if they were to enter or remain in Australia.
- 2011 amendments to sections 501(6)(aa)—relating to convictions while in, or escaped from immigration detention, and 501(6)(ab)—relating to convictions for escaping immigration detention.
- 2014 amendments to section 501(3A)—the introduction of the mandatory cancellation framework.[72]

Committee view

2.68 The committee acknowledges the concerns raised by some submitters with respect to the proposed amendments to the Act by the bill. However, the committee considers that the amendments are necessary to strengthen the current visa refusal and cancellation provisions at section 501 of the Act.

2.69 The committee acknowledges and agrees with the view put by the Minister in his second reading speech—that is, that the bill:

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69 ASRC, *Submission 8*, p. 9.

70 Legal Aid, *Submission 14*, p. 13.

71 Department of Home Affairs, *Submission 15*, p. 6.

72 Department of Home Affairs, *Submission 15*, p. 6.

> …ensures that noncitizens 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.[73]

2.70 The committee also agrees with the Minister that the bill sends a message that the Australian community will not tolerate non-citizens who have been convicted of serious offences.[74]

2.71 The committee further considers that there is need to strengthen current provisions to protect Australians against harm from non-citizens. The committee considers that the Australian government must therefore legislate to ensure that the Australian community is safe and secure—the community expects the government to do so.

2.72 The committee is satisfied that the bill strikes the appropriate balance between the protection of the Australian community and the rights of non-citizens who have committed criminal acts, and therefore recommends the passage of the bill.

Recommendation 1

2.73 The committee recommends that the bill be passed.

Senator the Hon Ian Macdonald

Chair

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73 The Hon. Mr David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *Parliamentary Debates*, 25 October 2018, p. 1.

74 The Hon. Mr David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *Parliamentary Debates*, 25 October 2018, p. 1.