

Australian Greens dissenting report

1.1 The Australian Greens acknowledge the extensive work of the Committee in this inquiry, and thank everyone who made a public submission, or gave evidence at a public hearing.

1.2 The Australian Greens hold many significant and substantive concerns with the bill before this inquiry, the *Migration Amendment (Strengthening the Character Test) Bill 2018*.

Public policy should be based on evidence

1.3 Firstly, the Australian Greens question the need for this legislation.

1.4 In its report on the bill, the Joint Standing Committee on Migration (JCSM), as cited earlier in this report, noted:

... there exist 'community concerns about the escalation of violent crimes such as homicide, serious assault, rape, indecent assault, aggravated burglary, motor vehicle theft and rioting; particularly in Victoria', and expressed the view that 'such serious criminal offences committed by visa holders must have appropriate consequences'.

1.5 There are already appropriate consequences for criminal offences committed by visa holders, as there are for all residents of and visitors to Australia. But this bill, as have previous amendments to the *Migration Act 1958*, creates additional and disproportionate consequences for migrant visa holders.

1.6 Also of concern is that such overreaching legislation would be drafted to address perceived concerns, and not evidenced problems – particularly when these concerns are often inflamed by those who would use them for legislative and political agendas. Despite community concerns, homicide and related offences are on the decrease, as is unlawful entry with intent and armed robbery, and the number of offenders including youth offenders – engaging in criminal activity.¹

1.7 In Victoria, which the JCSM gave special mention, and despite all the conservative rhetoric of youth gangs, there has been a significant decrease in youth offences, with Victoria having the second lowest youth offender rate (behind only the Australian Capital Territory).²

Arbitrary and non-reviewable decisions

1.8 The Australian Greens are also concerned about this bill's move away from an individual sentence-based model, to an arbitrary potential penalty model. When

1 Australian Bureau of Statistics 2018, 4510.0 - Recorded Crime - Victims, Australia, 2017, Australian Bureau of Statistics, Canberra, viewed 14 December 2018, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2017~Main%20Features~Victims%20of%20Crime,%20Australia~3>

2 Australian Bureau of Statistics 2018, 4519.0 - Recorded Crime - Offenders, 2016-17, Australian Bureau of Statistics, Canberra, viewed 14 December 2018, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2016-17~Main%20Features~Victoria~9>

considering this aspect of the bill, the Parliamentary Joint Committee on Human Rights (PJCHR) noted:

... the existing framework generally focuses on a sentence-based approach whereby, for example, the determination of whether a person has a 'substantial criminal record' is by reference to a person's sentence of imprisonment. The proposed amendments provide additional bases upon which the minister may cancel or refuse a visa by reference to the length of time for which the 'designated offence' may be punishable, rather than the length of time for which the person is sentenced.

1.9 As is the case with mandatory sentencing, which is also widely condemned by the legal and academic professions, this arbitrary model is blunt and unjust. As argued by Australian Lawyers for Human Rights:

[This] Bill fails to take into account the role of the criminal law system and judicial discretion in Australia in considering the material facts of an offence and imposing a sentence, including a sentence of imprisonment, which is appropriate in all the circumstances of the case and which therefore reflects the seriousness of the crime and the risk the person poses to the Australian community.

1.10 The Human Rights Commission further argued:

Given the potential impact on individual rights, any decision to refuse or cancel a visa should be made properly and take into account all of the relevant circumstances ... In extreme cases, this can amount to arbitrary decision making under international human rights law.

1.11 Also troubling is that this bill targets a cohort that already has limited access to justice. As the Federation of Ethnic Communities' Councils of Australia (FECCA) noted:

Currently the Migration Act adversely impact on highly vulnerable sections of Australia's community who have no access to free legal assistance with the proposed amendments will only further restrict their access to justice.

Effects on individuals, families, and communities

1.12 FECCA, along with the Human Rights Commission, also raised concerns regarding the bill's ability to deport long-term residents of Australia, and to separate families, noting:

... an individual may be removed to a country the language of which they do not speak; where they have spent little time (or never lived); and where they have no familial, social or economic connections.

1.13 Regarding families, FECCA argued the bill presents a real risk of facilitating:

... separation of mothers and fathers from children, including dependent children, and other family members. [Furthermore,] the proposed inclusion of 'aiding and abetting' will disproportionately affect women, involved in a relationship with an offender, who are often victims of intimate partner and domestic violence.

1.14 This bill, particularly when cancelling the visa of a father, will therefore potentially create a twofold blow for dependents, particularly, but not limited to, when there cancellation was on the basis of family violence. As the Asylum Seeker Resource Centre (ASRC) submitted:

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.

1.15 Such a situation, the ASRC further argues will lead to:

... an impossible conflict of interest, as the prospect of losing their visa and that of their children may deter victims of family violence from seeking the essential protection from violence that they need.

Rights and welfare of children

1.16 The Australian Greens are also very concerned about how this bill will impact on the rights and welfare of children. The Refugee Council of Australia, in arguing this bill would breach our commitment to international obligations to the protection of children, such as the Convention on the Rights of the Child, noted:

There is nothing in this Bill that prescribes any differential treatment for children. While the Explanatory Memorandum suggests that their visas will be cancelled only in 'exceptional circumstances', the Bill does not spell out what they are or any legislative process to ensure that consideration. Indeed, it is clear from the Explanatory Memorandum that the Bill contemplates that some children will be subject to indefinite detention or removal because of this Bill. This is consistent with political commentary which suggests the Bill is intended to be used in relation to children.

1.17 The ASRC also notes that the arbitrary concept of 'designated offences' will disproportionately impact children and young people, as:

Children are more likely to receive lower sentences for criminal convictions and will generally only receive custodial sentences as a last resort. However, under the Bill, such sentencing considerations will not be taken into account and children will be exposed to visa refusal or cancellation and potentially unaccompanied deportation.

Recognition of time and ties to Australia

1.18 Oz Kiwi, in its submission, noted:

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.

1.19 The Australian Greens believe Oz Kiwi's recommendation that any non-citizen who has either lived in Australia for more than ten (10) years, or who arrived in Australia before the age of ten (10), should not be able to have their visa cancelled, warrants further consideration by the Parliament.

1.20 Such an amendment would also bring Australia into line with its Trans-Tasman Travel Arrangement partner, New Zealand, which has a tiered deportation system that takes into account how long a person has lived there, and the seriousness of their crimes. In New Zealand, a non-citizen cannot be deported after 10 years of living in the country.

Retrospectivity, and the rule of law

1.21 The Australian Greens have long argued that retrospective laws are inconsistent with the rule of law – particularly when applied to punitive legislation. The amendments in this bill will apply to anyone who holds a visa and committed or was convicted of a designated offence at any time. The Law Council of Australia submitted its concerns that the bill:

... could be used to remove a non-citizen 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 [and] 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.

Conclusion

1.22 In summary, this bill – which targets migrants and bypasses judicial process – will lower an already low bar for refusing or cancelling the visas of non-citizens, for reasons, as identified in the explanatory memorandum, such as sharing intimate images, verbally threatening someone, associating with members of a gang, or holding a rock in a threatening way.

1.23 With the Government, joint-committees of this Parliament, and witnesses for this inquiry all failing to present a case for why these additional powers and legislation are necessary, and given the Minister already has legislated powers to cancel the visas of serious offenders under the *Migration Act 1958*, the Australian Greens will recommend this bill not be passed by the Senate.

Recommendation 1

1.24 The Australian Greens recommend that the Senate does not pass this bill.

Senator Nick McKim
Senator for Tasmania