

Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

7th August 2019

Dear Committee,

Re: *Migration Amendment (Strengthening the Character Test) Bill 2019*

We are pleased to make this submission to the Inquiry by the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) into the Migration (Strengthening the Character Test) Bill 2019 (the Bill). We acknowledge the 2018 Committee inquiry report and write to underscore and expound on points made in previous submissions, with a particular focus on the deportation implications of the Bill and Australia's international human rights obligations.

Under the current Act, a visa may be refused or cancelled where a person has failed the character test because they have been sentenced to a total term of 12 months or more. The Bill extends the character test to apply to offences which are punishable by a term of imprisonment of 2 years or more (listed under a designated offence in proposed section 501(7AA)), regardless of the sentence actually imposed.

In effectively expanding the grounds for visa cancellation and in turn, removal or detention, the Bill represents an escalation of the convergence of immigration and criminal law—what professor Julia Stumpf refers to as the 'cimmigration crisis'.¹ The growing intersection between the two legal regimes has serious human rights and civil liberty implications.

We have serious concerns that the proposed amendments enhance the 'double punishment' ramifications of the mandatory visa cancellation and removal regime introduced in 2014.

The immigration and deportation consequences following criminal activity are increasingly considered a form of punishment by immigration scholars. As early as 1893, the US Supreme Court stated that

it needs no citation of authorities to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.²

¹ Julia Stumpf, 'The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56(2) *American University Law Review* 367.

² *Fong Yue Ting v United States*, 149 US 698, 740 (Brewer J, dissenting) (1893).

The Supreme Court reiterated this position in the recent seminal decision of *Padilla v Kentucky*, stating that ‘deportation is a particularly severe penalty’³ and not merely a collateral consequence of a criminal conviction.

For many non-citizens the impact of deportation is often far harsher than the original sentence, and vastly disproportionate to the original offence. This is especially problematic when we consider that under the proposed amendments the Minister is empowered to cancel or refuse a visa on the basis of the maximum term attached to a conviction, regardless of the sentence actually imposed. This means that a person convicted of a relatively minor offence is rendered deportable and vulnerable to the Minister’s broad discretion.

Furthermore, as outlined by the Standing Committee for the Scrutiny of Bills under the proposed amendments the Minister is not required to take into consideration a noncitizen’s individual circumstances, including his or her family or community ties with Australia.⁴

Right to Return and Long-term Permanent Residents

The impact of removal is especially severe for long-term permanent residents, who will have built strong familial, cultural and other bonds in Australia. As the Standing Committee for the Scrutiny of Bills noted, the legislation applies to (and makes no provision for) permanent residents who have been present in Australia for a long period of time,⁵ including people who arrived in Australia as children, and who may have little connection to their country of origin.

This disregard for the longevity of connection to Australia is rearticulated in the recent report of the Joint Standing Committee on Migration *The Report of the Inquiry into Review Processes Associated with Visa Cancellations made on Criminal Grounds*. This report has been directly relied upon for the support of the Bill in the Minister’s second reading speech. The report states that:

Long-term permanent residents of Australia from all countries must understand that they are not protected from possible deportation for criminal activity, regardless of the length of time they have lived in Australia.⁶

This view is in stark contrast to those articulated by the then Minister of Immigration in 1983 in introducing into [s 12](#) of the *Migration Act* a 10-year limit after which all lawful permanent residents could no longer be deported.⁷ In his second reading speech introducing these

³ *Padilla v Kentucky*, 130 US 1486 (2010).

⁴ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 13, 14 November 2018) 10.

⁵ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 13, 14 November 2018) 10.

⁶ Joint Standing Committee on Migration, Parliament of Australia, *Inquiry into Review Processes Associated with Visa Cancellations made on Criminal Grounds* (Final Report, February 2019) ix.

⁷ *Migration Amendment Act 1983* (Cth) [s 10](#), substituting a new *Migration Act 1958–89* (Cth) [s 12](#), which was directed to ‘[d]eportation of non-citizens present in Australia for less than 10 years who are convicted of crimes’.

amendments, the then Minister for Immigration and Ethnic Affairs, Mr Stewart West, remarked that:

In administering a large-scale immigration program the Government and the community must be prepared to accept some 'bad with the good'. The overwhelming majority of non-citizens who settle in this country are law-abiding members of the community and have a right to expect, after 10 years of lawful residence, that they will not be expelled.⁸

In committee debates concerning the proposed amendments, the Minister elaborated on the reasoning of the government in introducing the 10-year limit on liability for deportation as follows:

Let us say that a 12-year-old Greek or Italian comes here and stays for 15 or 20 years. We will have moulded him. He will have been here for most of his life and will have been through our schools and universities and have lived under our social system. If at the end of that time he does something such as grow marihuana, do we then say: 'We do not want you. We will send you back from whence you came and that country or government can be responsible for you after we have been responsible for creating the type of citizen you are now?' That is not acceptable to us ... [W]e have responsibility for these people after 10 years, whether we like it or not.⁹

The case of Stefan Nystrom is an illustrative example of the harsh impact of deportation on long term permanent residents. The Federal Court noted in *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121:

It is one thing to say that the responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies with the discretion of the responsible minister. That has little to do with the permanent banishment of an absorbed member of the Australian community with no relevant ties elsewhere. The appellant has indeed behaved badly, but no worse than many of his age who have also lived as members of the Australian community all their lives but who happen to be citizens. The difference is the barest of technicalities. It is the chance result of an accident of birth, the inaction of the appellant's parents and some contestable High Court decisions. Apart from the dire punishment of the individual involved, it presumes that Australia can export its problems elsewhere.

⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1983, 1086. For similar statements in the Senate, see also Commonwealth, *Parliamentary Debates*, Senate, 7 September 1983, 373–4 (John Button, Minister for Industry and Commerce), quoted by Heydon and Crennan JJ in *Nystrom* [2006] HCA 50; (2006) 228 CLR 566, 609–10. In general, see Michelle Foster, 'An Alien by the Barest of Threads: The Legality of the Deportation of Long-Term Residents from Australia' (2009) 33 (2) *Melbourne University Law Review* 483.

⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 August 1983, 236, cited in Michelle Foster, 'An Alien by the Barest of Threads: The Legality of the Deportation of Long-Term Residents from Australia' (2009) 33 (2) *Melbourne University Law Review* 483.

It is important to recall that while a long term permanent resident is not a citizen of Australia, Australia may still be considered his or her ‘own country’ for the purposes of Article 12(4) ICCPR. The phrase ‘his own country’ has been interpreted broadly by the UN Human Rights Committee and the drafting history of the provisions supports the interpretation that ‘own country’ goes beyond mere nationality.

The UN Human Rights Committee has unequivocally stated:

‘The scope of ‘his own country’ is broader than the concept of ‘country of his nationality’. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.¹⁰

It is also important to recall that Article 12(4) is not subject to any limitation, even on national interest or security grounds¹¹ and that the right to enter one’s own country applies regardless of whether a person has another nationality.¹²

We reiterate the concern expressed by the Parliamentary Joint Committee on Human Rights that the lack of responsibility on the Minister to take into account the right to return and remain in one’s own country risks breaching such obligations.¹³ Specifically that while ministerial directions dictate that a non-citizen’s ties to Australia must be taken into account by a delegate, these directions are not binding on the Minister when making such determinations in his or her personal capacity.¹⁴

Beyond the right to return to one’s own country, we have concerns that the proposed amendments are incompatible with Australia’s international human rights obligations in other key ways.

Family separation and Rights of the child

The devastating impact on children of deportation-related forced separation of families cannot be overstated. The expansion of visa cancellation powers introduced by the proposed Bill risks increasing incidents of deportation of long-term permanent residents, thus placing Australia in breach of its obligations under several human rights instruments.

¹⁰ Human Rights Committee, *General Comment No 27; Article 12 (Freedom of Movement)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Ass.9 (2 November 1999) paras 20–21; See also Human Rights Committee, *Views: Communication No 1557/2007*, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (1 September 2011) (*Nystrom v Australia*).

¹¹ Michelle Foster, Jane McAdam and Davina Wadley ‘Part Two: Prevention and Reduction of Statelessness in Australia – An Ongoing Challenge’ (2016) 40 *Melbourne University Law Review* 497.

¹² See, eg, *Nystrom v Australia*, UN Doc CCPR/C/102/D/1557/2007, 18 [7.4].

¹³ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 1,12 February 2019) 95.

¹⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 1,12 February 2019) 95.

The Universal Declaration of Human Rights (UDHR) provides that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.

In addition, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) likewise protects against 'arbitrary or unlawful interference with ...privacy, family, home or correspondence'.

Several treaty provisions under the Convention on the Rights of the Child (CRC) protect the rights of children to remain with their families. The preamble to CRC characterizes the family as the 'natural environment for the growth and well-being of all its members and particularly children'. Article 3 provides that 'in all activities concerning children ...the best interests of the child shall be a primary consideration', and Article 9(1) requires states to ensure that a child

shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

We are concerned that the expanded visa cancellation powers introduced by the Bill will increase incidents of forced separation of families. While the statement of compatibility notes that 'the decision to refuse or cancel will appropriately weigh the impact of separation from family and the best interest of any children against the non-citizen's risk to the community', the Joint Committee on Human Rights has rightly questioned the act of placing other interests, such as 'the risk to the community' as equivalent to the rights of the child.¹⁵ The Joint Committee further contends that:

there are questions as to whether the measures in the bill pursue a legitimate objective, are rationally connected to that objective and are proportionate. The potential separation of family members, including of parents from their children, where those persons may have resided in Australia for a very long time, indicates that the impact of these measures may be significant.¹⁶

The vast body of scholarship documenting the devastating impact of forced family separation of children in the US underscores the disproportionate impact of these measures.¹⁷

¹⁵ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 1, 12 February 2019) 93.

¹⁶ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 12, 27 November 2018) 17.

¹⁷ See, eg, Bryan Lonagan, 'American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of their Families' (2007) 32(1) *New York University Review of Law and Social Change* 255; Daniel Kanstroom, *Aftermath: Deportation law and the new American Diaspora* (Oxford University Press, 2012); Deborah A. Boehm, 'Separated Families: Barriers to Family Reunification after Deportation' (2017) 5(2) *Journal on Migration and Human Security* 401. See also Khanh Hoang and Sudrishti Reich, 'Managing crime through migration law in Australia and the United States: a comparative analysis' (2017) *Comparative migration studies* vol. 5,1 (2017) 12.

Arbitrary Detention

The Joint Committee on Human Rights has discussed at length the implication that this Bill may have on the right to liberty, with reference to arbitrary detention. Noting that it is most likely to apply in cases:

where the person may be subject to indefinite or prolonged detention as the person cannot be returned to their home country because they may be subject to persecution there.¹⁸

We reiterate this point and further note the enhanced risk of indefinite detention for stateless individuals with no recognised country to which they may be returned. Department of Home Affairs statistics show that as of June 2019, 56 stateless individuals were held in Immigration Detention.¹⁹ This is an increase in the number of individuals identified as stateless held in Immigration Detention since November 2018 when 44 stateless persons were identified.²⁰ This should further be viewed in the context of a steep increase over the past five years in the average period of time individuals have been held in Immigration Detention, together with the fact that over 20% of individuals are held in Immigration Detention for longer than two years.²¹

Conclusion

For the reasons set out in this submission, we respectfully request the Committee to recommend that the Bill not pass in its current form.

Please do not hesitate to be in touch should you have any questions about this submission.

~~Kind regards,~~

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¹⁸ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 12, 27 November 2018) 8.

¹⁹ Department of Home Affairs, Immigration Detention and Community Statistics Summary (Report, 30 June 2019) 8. A further 88 individuals in the community under Residence Determination amounting to 144 stateless individuals in total.

²⁰ Department of Home Affairs, Immigration Detention and Community Statistics Summary (Report, 30 November 2018) 8.

²¹ Department of Home Affairs, Immigration Detention and Community Statistics Summary (Report, 30 June 2019) 11.