

28 November 2018

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Dear Committee Secretary

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

1. We welcome the opportunity to contribute to the Committee's inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018 (**the Bill**).
2. The Asylum Seeker Resource Centre (**ASRC**) is an independent, not for profit organisation working to support and empower people seeking asylum in Australia. The Human Rights Law Program is an accredited community legal centre working within the ASRC to provide holistic legal support to clients at all stages of the refugee determination process, including character refusal and cancellation processes.
3. We are deeply concerned by the proposed amendments to the already extensive and broad-reaching visa refusal and cancellation powers. Specifically, we are concerned that:
  - a. The Bill increases the risk that people who are owed refugee or complementary protection obligations by Australia may be returned to their country of origin in breach of international law;
  - b. The Bill does not achieve its stated purpose of providing greater protection to the Australian community and adds nothing to the existing legislative regime;
  - c. The Bill is poorly drafted and creates confusion;
  - d. Defining a 'designated offence' by reference to maximum penalty rather than actual sentence imposed is arbitrary and disproportionate;
  - e. The proposed amendments will unduly impact children and other vulnerable people, including victims of domestic violence who are dependent visa holders;
  - f. Convictions in a foreign country are often an unreliable and unjust basis for assessing character, particularly for those fleeing political persecution;
  - g. The retrospective application of the Bill to offences committed and visa applications submitted prior to commencement undermines the rule of law; and
  - h. Australia's migration system should not be used as a method of doubly punishing those who have already been punished by the criminal justice system.
4. Overall, we believe there is no justification for the amendments proposed in the Bill, which seek only to serve a political agenda and will offer no greater protection or safety to the Australian community beyond what is already provided for in existing law. In light of the adverse implications for refugees, children and vulnerable persons which are explored in this submission, we urge the Committee to recommend that the Bill not be passed.

## A Implications for refugees and people seeking asylum

5. As our work at the ASRC focuses on refugees and people seeking asylum, our primary concerns arising from the Bill relate to the impact of expanded cancellation and refusal powers on persons to whom Australia owes protection obligations. Such obligations may arise under the Convention relating to the Status of Refugees, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. These treaties create *non-refoulement* obligations for signatories, a principle also embedded in customary international law, which prohibits States from expelling people to places where they may face persecution or serious harm.
6. The consequences of a decision to cancel or refuse a protection visa on character grounds are profoundly serious. The *Migration Act 1958* (Cth) (**the Act**) expressly purports to override international law by stipulating that *non-refoulement* obligations are irrelevant to the duty contained in s 198 of the Act to remove an unlawful non-citizen from Australia as soon as reasonably practicable after a visa application is refused or cancelled.<sup>1</sup> This means that, even if a person is found to be a refugee or otherwise owed protection obligations, officers of the Department of Home Affairs are **required** to remove the person from Australia if their visa is cancelled or refused on character grounds.
7. The guidelines issued to decision makers<sup>2</sup> direct that international *non-refoulement* obligations be taken into account in applying s 501 of the Act, but expressly provide that *non-refoulement* obligations do not preclude cancellation or refusal of a visa. Although Australia has ratified the treaties listed above and the Minister states that no one found to be owed protection will be removed in breach of *non-refoulement* obligations,<sup>3</sup> this is contradictory to the position in law. Statements of intention made by the Minister in policy documents or explanatory memoranda are not easily enforceable. 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.
8. This is already an issue of great concern under current law. The proposed Bill seeks to expand powers to cancel and refuse visas, including protection visas. The Explanatory Memorandum specifically contemplates that the practical impact of the Bill will be "greater numbers of people being liable for consideration of refusal or cancellation of a visa".<sup>4</sup> If this is so, the effect of the Bill will also be greater numbers of people facing indefinite detention, or at risk of being returned to persecution or other serious harm in breach of international legal obligations. The processes referred to in the Explanatory Memorandum to 'mitigate' this risk<sup>5</sup> are entirely inadequate, as they are non-binding, non-compellable processes which offer no enforceable protection for a person facing *refoulement*. In our submission, this is an unacceptable result. If visa cancellations are to be further extended, greater protections must be built into the Act for those who are owed *non-refoulement* obligations.

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<sup>1</sup> *Migration Act 1958* (Cth), s 197C.

<sup>2</sup> Direction no. 65 under s 499 of the Act: Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s 501CA, 22 December 2014.

<sup>3</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018, 12.

<sup>4</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018, 10.

<sup>5</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018, 11.

**B No utility**

9. There is no utility in passing the Bill as it does not empower decision makers to do anything they cannot already do. The character test as currently framed in s 501 of the Act provides an extremely broad discretion for decision makers to consider a person for visa cancellation or refusal. For example, a person will already fail the character test if:
- a. The Minister reasonably suspects that the person is a member of or associated with a group, organisation or person who has been involved in criminal conduct (regardless of whether or not the person has engaged in criminal conduct themselves);<sup>6</sup>
  - b. Having regard to either the person's past and present criminal conduct, or the person's past and present **general** conduct, the person is not of 'good character'; or
  - c. There is a risk that the person will engage in criminal conduct in Australia, or represent a danger to the Australian community, whether by being liable to become involved in activities that are disruptive to the community, or in any other way.
10. Under these provisions, a person can be considered for visa refusal or cancellation because a decision maker thinks there is a chance they might become disruptive to the community in the future. Under these provisions, a person who is a refugee may be exposed to the risk of *refoulement* simply because the decision maker thinks they are a bad person.
11. These vague and general provisions are in addition to the specific provisions of the character test relating to substantial criminal records, people smuggling offences, child sex offences, harassment, stalking and vilification, offences of 'serious international concern' including genocide and war crimes, ASIO security risk assessments, and Interpol notices.
12. The concept of 'designated offences' as proposed by the Bill does not bring any criminal conduct within the scope of the character test which is not already covered. Decision makers are already empowered to consider cancellation or refusal in relation to any offence that would fall within the definition of 'designated offence.' For example:
- a. Designated offences involving violence against a person could be covered by s 501(6)(a), (ba), (c), or (d);
  - b. Designated offences involving non-consensual conduct of a sexual nature could be covered by s 501(6)(a), (ba), (c), (d), or (e);
  - c. Designated offences involving the breach of an order made by a court or tribunal for the personal protection of another person could be covered by s 501(6)(a), (c), or (d);
  - d. Designated offences involving the use or possession of a weapon could be covered by s 501(6)(a), (c), or (d);
  - e. Offences of aiding, abetting, inducing, or being knowingly concerned in the commission of a designated offence could be covered by s 501(6)(a), (b), (c), or (d).
13. The stated aim of the Bill is to provide grounds for non-citizens who commit serious offences to be considered for visa refusal or cancellation.<sup>7</sup> Such grounds clearly already exist.
14. If the Bill also aims to provide a "clearer and more objective basis"<sup>8</sup> for refusing or cancelling the visa of persons who do not meet the substantial criminal record test, then the Bill must

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<sup>6</sup> This provision was introduced specifically to target members of motorcycle and criminal gangs.

<sup>7</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018, 2.

repeal the vague and subjective elements of the character test discussed above. It does not seek to do so.

15. There is no indication in the Explanatory Memorandum or elsewhere that existing cancellation and refusal powers are insufficient, or are in any way hindering the Government's ability to protect the Australian community. In fact, the rate of character cancellations and refusals has drastically increased in recent years. In the financial year 2013/14, the Department cancelled 584 visas under s 501. In 2017/18, the figure was 1,212.<sup>9</sup> Visas were cancelled for crimes including assault, drug offences, sexual offences, domestic violence and driving offences.
16. In the absence of any identified need for expanded cancellation and refusal powers, and considering the Bill's inability to achieve its stated aims, we strongly echo the observation of the Scrutiny of Bills Committee that:

*...in light of the already extremely broad discretionary powers available for the minister to refuse to issue or cancel the visa of a non-citizen, the explanatory materials have given limited justification for the expansion of these powers by this bill.<sup>10</sup>*

17. Given the Bill has no apparent utility, it can only be assumed that it has been tabled for political purposes, as a Federal election draws nearer and the Government campaigns on a 'tough on crime' platform at the expense of migrant communities. This is not a proper basis for the passage of law.

### **C An arbitrary threshold**

18. The Explanatory Memorandum states that the Bill will ensure that discretionary visa cancellation and refusals are based on objective standards of criminality and seriousness. Instead, the Bill in fact erodes objective standards and seeks to introduce arbitrary and unreasonably low thresholds for failing the character test.
19. The offences with which the Bill is concerned are offences involving violence, non-consensual sexual conduct, breaches of protective court orders or use of weapon, which carry a maximum term of imprisonment of at least two years. However, the definition of 'designated offence' does not accord with the definition of 'serious offence' which already exists elsewhere in the Act.
20. As defined in s 5, a 'serious Australian offence' is an offence that involves violence, is a serious drug offence, involves serious damage to property, or relates to immigration detention, **and** is punishable by imprisonment for a maximum term of at least three years. The definition of 'designated offence' in the Bill sets a significantly lower threshold of what classifies as a serious offence and creates confusion within the existing legislation.
21. It is not necessary that the *minimum* sentence for a designated offence involve any term of imprisonment at all. A designated offence may be something which is usually only punishable

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<sup>8</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018, 10.

<sup>9</sup> This does not include refusals under s 501. Source: Department of Home Affairs, *Key visa cancellation statistics*, <https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>.

<sup>10</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2018*, 14 November 2018.

by way of fine. Visa cancellation is a grossly disproportionate consequence of incurring a fine.<sup>11</sup>

22. Most significantly, a designated offence is not determined by any reference to the actual sentence imposed by a court. The Bills allows no room for consideration of any mitigating factors that have been carefully weighed by criminal courts in imposing a particular sentence.
23. The concept of judicial discretion in sentencing is essential to the fair administration of justice. There are countless reasons that a person may be convicted of a crime with a maximum penalty of more than two years imprisonment, but receive no custodial sentence at all. A court may take into account that the person is a first time offender, entered an early guilty plea, has good prospects of rehabilitation, acted under duress, caused minimal harm, was suffering from mental or physical illness, has demonstrated remorse, or assisted police with enquiries. Maximum penalties are designed to be taken into account as a sentencing factor, but are not designed as an objective and uniform assessment of the seriousness of any particular offence committed.
24. It is an entirely illogical prospect that a court could consider it appropriate to wholly suspend a custodial sentence, only for the person to be taken into indefinite immigration detention as a result of visa cancellation by the Minister. It is notable that, in sentencing, criminal courts do *not* take into account the potential impact on a person's visa or migration status.
25. The Minister proposes that other factors and circumstances of the offending will be taken into account as part of the discretionary cancellation or refusal process. It is concerning that the offence-based approach proposed in the Bill includes no legislative requirement for sentencing considerations or other mitigating factors to be taken into account and leaves this entirely dependent on decision maker discretion. We note that many people who are subject to visa refusals or cancellations do not have access to merits review processes.
26. Under the existing Act, a decision maker can refuse or cancel a visa if a person has been sentenced, cumulatively, to a term of imprisonment of 12 months or more. We submit that this existing standard, while also unfair, is a comparatively 'objective' standard of criminality and seriousness, and the arbitrary thresholds proposed in the Bill should be rejected.

#### **D Impact on children, victims of domestic violence and other vulnerable people**

27. 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.
28. 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

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<sup>11</sup> We refer to the example provided by the Scrutiny of Bills Committee (*ibid*), in that *a person carrying pepper spray may be convicted of possession of a weapon, and although the person may only be given a minor fine, this conviction would empower the minister to cancel their visa, leading to their detention and removal from Australia.*

family violence will have their visas cancelled and they will be removed from Australia together with the perpetrator.

29. In our experience, this creates a perverse situation where victims of family violence are in fact punished for the violence committed against them. It also creates 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.
30. This situation is completely out of step with other national initiatives to encourage reporting and use of available legal mechanisms to provide victims of family violence with effective protection. As advisors, we find ourselves unable to reassure victims of family violence that their migration status will not be disadvantaged because they have sought help and protection from family violence.
31. Specific provisions exist in the Act to protect affected family members who hold Partner category visas from losing their visa should their relationship break down due to family violence.<sup>12</sup> No such provisions exist for other categories of visas, including protection visas.
32. If the Minister plans to target more perpetrators of family violence for visa cancellation, he must provide protection for dependent visa holders. Should the Committee support this Bill, we ask the Committee to recommend that a separate provision be included to afford legal protection from visa cancellation to victims of family violence who are dependent on the visa of a person whose visa has been cancelled on that basis.
33. We are further concerned about the impact of the Bill on children and young people, both in terms of separation of the family unit and cancellation of children's visas.
34. If rates of visa refusal and cancellations increase as a result of the Bill, it is inevitable that more families will be separated and more children will lose a parent. The Explanatory Memorandum states that the best interests of children and impact of separation from family members will be taken into account as part of the consideration process,<sup>13</sup> however we again note that this consideration is not protected in legislation and is left to the discretion of decision makers. The Explanatory Memorandum in fact suggests that should the Bill be passed, decision makers could give less weight to the rights of the child, and more weight to "community expectations and threats posed by individuals".<sup>14</sup>
35. As stated in the Explanatory Memorandum, the grounds introduced by the Bill do not differentiate between adults and children. While this is already the case for the existing character test, the arbitrary concept of 'designated offences' as proposed by the Bill will disproportionately impact children and young people. 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.

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<sup>12</sup> Provided the person can present sufficient evidence that family violence took place, and that the relationship has ended.

<sup>13</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018, 13.

<sup>14</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018, 13.

36. This applies equally to other vulnerable people who may be experiencing homelessness, poor mental health or substance addiction, who receive lower sentences on account of their special circumstances but will be nonetheless exposed to visa refusal or cancellation.
37. The Minister claims that refusal or cancellation of a child's visa on the grounds of committing a 'designated offence' would only occur in exceptional circumstances.<sup>15</sup> This statement has no basis in law or evidence. There is no requirement in the Bill, the existing Act, or decision-making guidelines for any 'exceptional circumstances' test to be satisfied before a child's visa can be cancelled. They are subject to the same decision making process as adults.
38. In fact, it appears that the Bill has been motivated in part by a desire to cancel more children's visas. Jason Wood, chairman of the Joint Standing Committee on Migration and contributor to the Bill, was recently reported as saying that "the no age restriction clause was necessary because a lot of Sudanese and other gang-related violence was being committed by youths aged under 18, particularly in Victoria."<sup>16</sup> The same article refers to an incident of a 'home invasion' alleged to have been committed by persons of African appearance in their mid to late teens, about whom Mr Wood stated "these are precisely the sort of violent thugs I want deported."
39. We refer again to our concerns regarding the political motivations behind this Bill and denounce the Government's reprehensible vilification of African communities and youth. Our Government should be devoting resources to rehabilitation, education and support for all young offenders, particularly where they have been exposed to violence and trauma as children. We urge the Committee not to expose children, victims of domestic violence and other vulnerable people to these proposed amendments which will disproportionately impact their fundamental rights.

## **E Foreign convictions**

40. The definition in the Bill of a designated offence includes offences against a law in force in a foreign country (Foreign Convictions). The inclusion of Foreign Convictions as a ground to refuse or cancel a visa raises serious concerns. Criminal justice systems in foreign countries, including the investigation and prosecution of offences, are often not of an equivalent standard to the Australian criminal justice system. These differences are due to a range of factors including limited resources available to governments, lack of access to legal representation, and fewer checks and balances within government institutions which can enable greater corruption in a country's police force and judiciary. Whilst some of these factors also affect the Australian criminal justice system, these issues often have a greater impact in developing nations, including countries from which people seek asylum. As such, a Foreign Conviction should not automatically impugn a person's character and be considered with the same weight as a conviction under the Australian criminal system.
41. Further, many persons who seek asylum in Australia are fleeing political persecution in their countries of origin, where they have been framed or targeted and wrongly convicted of criminal offences. Such people would be unduly punished if the basis of their protection claim could be relied on by the Australian government to refuse or cancel their protection visa. This would result in an extremely unfair outcome, and would discourage people seeking asylum from disclosing the full extent of their protection claims on account of the risk of visa refusal. People seeking asylum already face many barriers to fully expressing their protection claims,

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<sup>15</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018, 13.

<sup>16</sup> Keith Moore, "Immigration Department will deport more sex offenders and violent thugs under new visa law", *Herald Sun*, 22 October 2018.

including mental health issues and fear of authorities, and this amendment would add yet another barrier.

42. We note that the existing character test in s 501 of the Act already captures convictions in a foreign country for child sex offences, genocide, war crimes, crimes against humanity, torture, slavery or other crimes of 'serious international concern'. It also captures those who are the subject of an Interpol notice.
43. The Bill further provides that the law in the Australian Capital Territory (ACT) should determine whether a Foreign Conviction warrants the refusal or cancellation of a visa. This involves assessing whether the offence resulting in the Foreign Conviction would be an offence in the ACT and if the penalty in the ACT attracts a maximum penalty of at least two years imprisonment.
44. It is arbitrary for criminal legislation in the ACT to be the benchmark to determine whether a Foreign Conviction justifies the refusal or cancellation of a visa. As each State and Territory in Australia has its own criminal legislation, it is possible that a Foreign Conviction may be an offence in the ACT whilst not being an offence and/or having a different penalty in other Australian States and Territories. The Explanatory Memorandum for the Bill states that this provision was included to ensure that "an offence that is considered a designated offence is an offence that is equal to an offence that would be considered a serious crime in Australia". However, for the reasons outlined above, the inclusion of this provision will not ensure the envisaged outcome and will result in unfair and inconsistent consequences.

#### **F Poor drafting**

45. We are concerned that the current drafting of the Bill and the definitions of 'designated offence' contained in clauses 4 and 6 of the schedule of amendments are unclear and may create confusion.
46. It appears from paragraph 20 of the Explanatory Memorandum that a 'designated offence' is intended to be one which satisfies both the conditions set out in (a), being the physical elements of the offence, and either one of the conditions in (b) or (c), being the maximum sentence elements. As currently drafted, the Bill is easily interpreted as creating a 'designated offence' for any offence which satisfies either (a), (b) or (c) alone. This would clearly capture a vast array of minor and non-violent offences which have a maximum sentence of two years imprisonment or more but do not include the specified physical elements.
47. To avoid confusion the Bill ought to state that *a designated offence is an offence against a law in force in Australia, or a foreign country, in relation to which both of the following conditions are satisfied*. The maximum sentence elements in subsections (b) and (c) ought to be subsumed as alternate limbs of one condition (b). Thus, a designated offence should be required to satisfy both condition (a) and (b)(i) or (b)(ii).
48. We submit that the lack of clarity in the current drafting is further reason that the Committee should recommend the Bill not be passed.

#### **G Retrospective application**

49. We draw the Committee's attention to clause 7 of the schedule of amendments in the Bill, which provides that the new requirements of the character test are intended to apply to visa



applications submitted prior to the commencement of the Bill, and to offences committed before that date.

50. We submit that this retrospective application undermines the rule of law and creates legal uncertainty for visa applicants, who should be able to trust that their applications will be assessed in accordance with the law as it stands at the time of their application.
51. It is also 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 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.

## **H Double punishment**

52. As stated above, character cancellation and refusals have increased drastically recent years. The ASRC rejects the notion that the visa cancellation and refusal regime should be used as a secondary method for punishing those who have already been punished by the criminal justice system.
53. People subject to visa cancellations have often been living in Australia for many years. They often have children, families and other strong community ties in Australia. For many, Australia is all they have ever known, and they may have no living relatives in their countries of birth.
54. It is also frequently the case that criminal offending is driven by circumstances which arose in Australia, such as homelessness, substance addiction, or poor mental health. Australia cannot ethically wash its hands of those who are Australian in all but formal status, and have been affected by circumstances arising in our society.
55. People convicted of crimes serve their sentence in the form of fines, imprisonment or other court order. Visa cancellation or refusal should not be used as a secondary punishment, particularly in the case of refugees and people seeking asylum, where that second punishment may amount to life imprisonment in the form of indefinite detention, or *refoulement* to face death or serious harm.

## **I Recommendations**

56. We submit that the Committee should recommend that the Bill not be passed in its entirety. The impact on refugees, women, children and other vulnerable persons cannot be justified in circumstances where the proposed amendments add nothing to the existing legislative regime. The Government should not be permitted to use the visa refusal and cancellation regime as a political tool to promote a 'tough on crime' agenda.
57. We would be pleased to provide further information on any part of this submission should it assist the Committee.

Yours faithfully

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