

**SUPPLEMENTARY SUBMISSION:
MIGRATION AND CITIZENSHIP LEGISLATION AMENDMENT (STRENGTHENING
INFORMATION PROVISIONS) BILL 2020**

1. The Visa Cancellations Working Group (**the Working Group**) is grateful for the opportunity to provide a supplementary submission to the Parliamentary Joint Committee on Intelligence and Security in response to the *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (the Bill)*.
2. In initial submissions, the Working Group raised a concern that the proposed Bill lacks clarity, impinges without appropriate justification on the rule of law, increases opacity and vests undue discretion to the executive, and will lead to damaging and unjust outcomes.
3. At [70] – [80] of those submissions, we commented on the possibility of the Bill causing harm to **survivors of family violence**.
4. We now supplement those comments, offering a lens by which the Bill's potential to cause harm on account of the deficiencies can be clearly seen. We note, however, the prospect for other, unforeseen harms as other laws are made that suffer similar interaction.
5. Visa cancellation and refusal can lead to long-term (and indefinite) detention, permanent separation of families, harm to children, and forcible and permanent removal from Australia (including in breach of Australia's non-refoulement obligations).
6. The Committee is aware of the extraordinary breadth of visa cancellation and refusal powers vested in the Department of Home Affairs. A person can fail the character test on suspicion of association grounds only, or indeed on the basis of an assessment of their general conduct.¹ There is no minimum standard of conduct.
7. Relevantly, the proposed Bill, applied in the context of Australia's cancellation and refusal regime, **places survivors of family violence at risk of visa cancellation or refusal and other harms**.
8. The Bill, through this lens, jeopardises the recommendations of the National Plan to Reduce Violence Against Women and Their Children. The National Plan recognises the vulnerability of migrant women and children to family violence linked to their precarious visa status and recommends 'community-led and tailored initiatives to address the unique experiences and needs of communities affected by multiple forms of discrimination or inequality.'²

¹ s 501(6) of the Act.

² Action 10, Fourth Action Plan, NAP -

https://www.dss.gov.au/sites/default/files/documents/08_2019/fourth_action-plan.pdf.

Interaction of the proposed Bill and visa cancellation or refusal

9. Direction no. 90, made under s 499 of the *Migration Act 1958* (Cth) and which came into effect on 15 April 2021,³ crystallises the considerable danger that inheres in the proposed Bill. The Direction governs how all decision-makers must approach visa refusal and cancellation under s 501 of the *Migration Act 1958* (Cth). It makes clear that all persons who are believed to have engaged in broadly-defined family violence should be refused visas or have their visas cancelled, even where there are ‘strong countervailing circumstances’.⁴
10. Most concerning, there is no minimum standard of evidence for what constitutes family violence in the Direction. Wherever “there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence”, that family violence becomes a primary consideration in the cancellation or refusal of a person’s visa.⁵ No further substance is given to what constitutes ‘information or evidence from independent and authoritative sources’, meaning it could include anything from a medical record, to a call made to an early intervention service, or a third-party report to an early intervention service or to the police.
11. If the Bill is passed, and that ‘information or evidence’ is passed to the Department from a ‘gazetted agency’, it may become ‘Protected Information’, meaning that it cannot be disclosed to the survivor.
12. The Working Group consulted widely with specialist organisations dealing with family violence regarding the Direction. The misidentification of perpetrators was one of the key concerns raised by those experts about the Direction: that is, that often it is the *survivor* who is considered the perpetrator of the violence. Indeed:

*Almost half the women murdered by an intimate partner in Queensland had previously been labelled by police as the perpetrator of domestic violence...*⁶
13. As we noted in our initial submissions, if a survivor is misidentified as a perpetrator, even if just by a police preliminary report or by a call to an agency by the perpetrator, the low evidentiary standards of the Direction mean that survivor can be exposed to visa cancellation or refusal. The Bill means that the survivor may also have that information, or parts thereof, withheld from them, meaning they will not be able to respond to those allegations.
14. That increased vulnerability may lead to further weaponization of the visa cancellation and refusal regime against survivors by perpetrators. The Working Group is aware of

³ We have elsewhere raised our concern about the Direction unintentionally undermining the critical work of eradicating family violence. The focus for these submissions, however, is how the proposed Bill interacts with the Direction.

⁴ Direction no 90 at [5.2(5)].

⁵ Direction no. 90 at [8.2(2)].

⁶ Smeed, B., ‘Queensland police misidentified women murdered by husbands as perpetrators of domestic violence’, the Guardian, 3 May 2021, available at <https://www.theguardian.com/australia-news/2021/may/03/women-murdered-by-husbands-labelled-perpetrators-of-domestic-violence-by-queensland-police>.

numerous instances where a perpetrator has threatened a survivor with cancellation of their visa; similarly, we are aware of reports by expert bodies that acts including false reporting are used as a tool of family violence against survivors by perpetrators.

15. Members of the Working Group have considerable experience advising women and children fleeing family violence. Those women and children are typically very distressed, fearful and without resources or information. Often, they are in insecure accommodation and unable to afford legal advice. They are very unlikely to have the ability or resources to challenge a decision by the Minister or her delegates in court, particularly on a point of law such as raised by the Bill.
16. While the Direction stipulates that a person regarding whom there is information about family violence should be afforded undefined 'procedural fairness', no content is given to that requirement, and the removal of oversight makes it close to impossible to know if or how it is being effected.⁷
17. Further, the Protected Information could nonetheless be considered elsewhere as part of the cancellation or refusal process, including as the ground for cancellation or refusal itself, or as general evidence of character, and the survivor may never know it existed.
18. It is true that generally, visa cancellation and refusal involve discretion by a decision-maker. This offers scant protection to survivors. If a survivor of family violence receives a visa cancellation notice due to misidentification and does not or cannot respond (including because of the withholding of information), or cannot respond sufficiently, then a delegate of the Minister will have no basis on which to exercise that discretion favourably. Similarly, there is no guarantee that a decision-maker will exercise their discretion fairly or properly, particularly if they are permitted to use Protected Information against a person.
19. To illustrate, between 2013 and 2020, roughly 65% of people subject to a negative s 501 decision do not exercise their right to appeal the decision in the Administrative Appeals Tribunal.⁸ Although analogous figures are not available, it can be extrapolated that a large number of people who receive s 501 notices are not able to engage at the primary stage either.
20. Similarly, the fact that of 870 s 501 cases decided by the Tribunal between 2013 and 2020, roughly 25% resulted in an applicant win, indicates that primary decision makers regularly make the wrong decision.⁹ Statistics also show that 29% of AAT decisions appealed to court were affected by jurisdictional error.¹⁰ In short, decision-makers are markedly fallible, people are often unable to access review or make their case, and opacity is likely to lead to a loss of integrity in outcome.

⁷ We also note with concern that this undefined clause places survivors of family violence in danger of retribution, although not directly relevant to the proposed Bill.

⁸ FA 19/12/00125.

⁹ FA 19/12/00125.

¹⁰ FA 19/12/00125.

Other matters

21. The Bill is also apt to harm survivors of family violence in that some non-citizen women and children are dependent on their partners for their status in Australia. If their partner's visa is cancelled or refused (including on the basis of Protected Information), they may no longer be permitted to remain in Australia: there is very little security or assistance available for non-citizen survivors of family violence, further contributing to their precarious status.
22. Given the potential effects set out above, the Bill may have the unintended effect of deterring survivors from seeking the assistance of police or other support services, given the seriousness of the consequences for perpetrators and for themselves.
23. Policies including early intervention may be undermined, as may recourse to support, such as counselling and family violence support services, given that information may be, against a survivor's wishes, used adversely against a partner or may be used to jeopardise their status in Australia.

CONCLUSION

24. This example of potential harm to survivors of family violence vividly exposes the dangers that inhere where the rule of law is eroded and where oversight is reduced, particularly where there is no clear justification for the proposed measures.
25. Again, the Working Group **strongly recommends** that the proposed Bill **be rejected**.
26. The Working Group welcomes the opportunity to consult further on a confidential basis. If you would like to discuss any of these matters further, please contact Hannah Dickinson and Sanmati Verma, the Chair and Deputy Chair of the Working Group, by email at workinggroup@visacancellations.org.