



## **Assessing seriousness of offending in character cancellation: avoiding unnecessary and costly changes**

**Submission to the Legal and Constitutional Affairs Legislation  
Committee's Inquiry regarding the Migration Amendment (Strengthening  
the Character Test) Bill 2019**

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## Contents

<b>Executive Summary</b> .....	<b>2</b>
<b>Victoria Legal Aid, visa cancellation and our clients</b> .....	<b>4</b>
<b>How the proposed changes would operate in practice</b> .....	<b>6</b>
<b>The current law and its operation</b> .....	<b>7</b>
<b>1. Australia’s criminal courts: The most appropriate forum for determining the seriousness of offending, risk and penalties</b> .....	<b>9</b>
<b>2. Increased uncertainty and injustice</b> .....	<b>10</b>
<b>3. Significant, costly and systemic unintended consequences</b> .....	<b>11</b>
3.1 Impact on the criminal justice system .....	11
3.2 Impact on the administrative law system.....	12
3.3 Impact on the family violence system .....	12
3.4 Impacts on young people.....	13

## Executive Summary

Victoria Legal Aid (VLA) welcomes the opportunity to contribute to the Legal and Constitutional Affairs Legislation Committee's Inquiry regarding the Migration Amendment (Strengthening the Character Test) Bill 2019 (**the Bill**).

VLA recognises that it is both necessary and appropriate to regulate people seeking to enter and remain in Australia by reference to questions of character and risk. Section 501 of the *Migration Act 1958*, (**Migration Act**) is the cornerstone of the 'character regime', which allows the refusal or cancellation of non-citizens' visas on the basis of their conduct or risk of harm to the community. The Bill intends to introduce additional circumstances where a person would necessarily fail the character test, potentially resulting in visa refusal or cancellation.

The character regime applies to any person who is not a citizen of Australia (**non-citizens**), and is unaffected by their connection to this country, the duration of their lives here, their status as refugees, or the nature of their visa (be it permanent or temporary).

Last year, VLA's Migration Program provided almost 2000 legal services to people with migration issues and more than 250 of these related to visa cancellations. Our Criminal Law Program is the largest criminal law practice in Victoria. In the 2017/2018 financial year, approximately 52,000 unique clients received a summary crime service, which amounts to approximately 50% of all VLA clients.

Through this work we see the lives and circumstances of people affected by Australia's visa cancellation regime. Most often we are working with people who have held refugee or humanitarian visas granted offshore, who have been in Australia for a long time and who have family and community here.

A high proportion of the clients we assist have themselves been victims of violence or abuse. These experiences and the trauma that follows sometimes lead to substance use and mental health issues, which contribute to their offending.

Informed by this work, we make three key points regarding the Bill:

- 1. Australia's criminal courts are the most appropriate forum for determining the seriousness of offending, risk and penalties.** By linking refusals and cancellation of visas to the maximum sentence available, rather than to the sentence the person actually received, the Bill would be a significant movement away from the role of sentencing courts, traditionally regarded as the bodies best placed to make decisions about punishment, risk and community safety. It would mean a person who is given a fine or community order based on the offence and their circumstances, faces the same visa consequences as someone who receives a full two-year prison sentence for more serious offending or more limited mitigating factors.
- 2. The Bill would create uncertainty and injustice.** The new category of 'designated offences' is broad and poorly defined. It would be difficult to implement in practice and would have different implications for people in different States and Territories. Its interpretation carries a real risk of error, potentially resulting in unjust outcomes and an increase in litigation in the Federal Courts, with accompanying delays, costs and legal uncertainty.
- 3. There would be significant unintended consequences, carrying heavy costs for the immigration detention, criminal justice, family violence and administrative law systems.** The broadening of the character provisions under the new Bill would have flow on impacts for the advice people require in relation to family violence and summary crime, and may affect people's decisions in terms of pleading guilty or contesting orders or charges, thereby prolonging their legal matters. There would also be a significant burden on immigration decision-makers. The increase in non-citizens who would necessarily fail the

character test would likely result in an increase in visa cancellations, resulting in an increase of people held in immigration detention for prolonged periods. These changes would drain public resources, undermine the integrity of administrative processes, and impose significant pressure on courts, tribunals, and the legal assistance sector.

It is our strong recommendation that the Committee reports on the significant risks associated with the Bill and recommends that the Bill not proceed.

## Victoria Legal Aid, visa cancellation and our clients

VLA is an independent statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. Working alongside our partners in the private profession and community legal centres, we help people with legal problems such as criminal matters, family separation, child protection, family violence, fines, social security, mental health, immigration, discrimination, guardianship and administration, tenancy and debt.

Our Legal Help telephone line is a resource for all Victorians to seek information, advice and assistance with legal problems. We also deliver specialist non-legal services, including our Family Dispute Resolution Service, Independent Mental Health Advocacy and Independent Family Advocacy and Support, as well as providing community legal education, and contributing to policy and law reform.

Our contribution is informed by our work with clients and consumers experiencing crime and immigration issues:

- **Large client base.** During 2017–18, VLA helped 94,485 unique clients: 11% were in custody, detention or psychiatric care; and 22% were from culturally and linguistically diverse backgrounds.<sup>1</sup> Other characteristics of VLA’s clients that may be of interest to the Committee are set out in the infographic below.
- **Specialist work in the migration system.** Our Migration Program provides specialist support for non-citizens, particularly asylum seekers, refugees, victims of family violence, and people facing visa cancellation. We conduct judicial review in the Federal Courts and provide services through telephone advice, minor work files, and court and Tribunal duties. Three of our lawyers have been accredited by the Law Institute of Victoria as specialists in immigration law. In 2018–19, we provided almost 2000 specialist migration legal services. More information about this work is set out below.
- **Specialist work in the criminal justice system.** Our Criminal Law program is the largest criminal law practice in Victoria, providing services and information to people charged with criminal offences across Victoria. VLA also funds legal advice and representation for people charged with criminal offences provided by private practitioners under a grant of legal assistance. We provide specialist services to children and young people in the Children’s Court of Victoria, provide duty lawyer services, advice and representation to people charged with criminal offences in the Magistrates’ Court of Victoria and legal advice and representation for people charged with serious criminal offences that are heard in the County and Supreme Courts.

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<sup>1</sup> See Victoria Legal Aid, *Annual Report 2017–18* (Report, 19 December 2018) <<https://www.legalaid.vic.gov.au/about-us/our-organisation/annual-report-2017-18>> (*VLA Annual Report*). Unique clients are individual clients who accessed one or more of Victoria Legal Aid’s legal services. This does not include people for whom a client-lawyer relationship was not formed, who received telephone, website or in-person information at court or at public counters or participated in community legal education—we do not create an individual client record for these people.

Image: VLA's clients in 2017–18.<sup>2</sup>



These figures do not include clients seen by a private practitioner duty lawyer.

\* Examples include children and young people, people experiencing homelessness, people in custody and immigration detention, and psychiatric patients.

\*\* This is based on the Australian Bureau of Statistics definition of people from culturally and linguistically diverse backgrounds. It includes people who speak a language other than English at home and people who were born in a non-English speaking country.

### A snapshot of VLA's visa cancellation work

The largest part of our migration work is our judicial review practice, which includes assisting clients seeking judicial review of visa cancellation decisions made under s 501 of the Migration Act. These proceedings very often relate to a cancellation decision of the Minister because these decisions are not amenable to review in the Administrative Appeals Tribunal (AAT).

- In 2017–18, VLA's migration team provided legal advice on character cancellation matters to 258 people and legal information on character cancellation matters to 165 people.

<sup>2</sup> VLA Annual Report (n 1) 15.

- Issues around visa cancellation or refusal on character grounds make up around 35% of all ‘one off’ advice services provided by the Migration Program. This demand has been fairly consistent since the introduction of s 501(3A) of the Migration Act in December 2014. By contrast, in the 2014 financial year, the team recorded less than 10 visa cancellation advice sessions.
- In 2017–18, character cancellation of visas was the second most common civil law issue raised by prisoners calling our Prisoner Legal Help service, after complaints about the prison itself. The Prisoner Legal Help line received 105 calls regarding visa cancellation (by comparison, 107 calls were complaints about the prison, 54 calls related to fines and 20 to professional negligence).
- In 2017–18, our general Legal Help telephone service took 218 calls in relation to visa cancellation.

Most often we are working with people who have held refugee or humanitarian visas granted offshore, who have been in Australia for a long time and who have family and community here.

Those seeking advice are primarily detained in either the state prison system or the immigration detention system. Our clients often have low levels of literacy, poor English language skills, and limited ability to obtain and send information regarding their visa cancellation or refusal. In addition, a high proportion of the clients we assist have themselves been victims of violence or abuse, including in Australia.

This work has informed our contributions to the current Inquiry.

## How the proposed changes would operate in practice

The Bill proposes to amend s 501 of the Migration Act, which governs the circumstances in which a visa can be refused or cancelled on character grounds.

The stated purpose of the Bill is to ‘strengthen the current legislative framework in relation to visa refusals and cancellations on character grounds ... [and ensure] 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’.<sup>3</sup>

Section 501(6) of the Migration Act currently sets out 11 circumstances where a person will not pass the character test. The Bill proposes adding a twelfth instance: where the person has been “**convicted of a designated offence**”.

Proposed new subsection (7AA) defines ‘designated offence’. In summary, an offence would be a designated offence if **both** the following criteria are met:

- ‘**[O]ne or more of the physical elements of the offence**’ involves:
  - violence against a person, including (without limitation) murder, manslaughter, kidnapping, assault, aggravated burglary and the threat of violence;
  - non-consensual conduct of a sexual nature, including (without limitation) sexual assault and the non consensual commission of an act of indecency or sharing of an intimate image;
  - breaching an order made by a court or tribunal for the personal protection of another person;
  - using or possessing a weapon (defined in new s 7AB to include a thing intended or threatened to be used to inflict bodily injury);

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<sup>3</sup> Migration Amendment (Strengthening the Character Test) Bill 2019 (Cth), Second Reading, Minister David Coleman (4 July 2019) 314.



- aiding, abetting, counselling, procuring, inducing, being knowingly involved in (directly or indirectly), or conspiring with others to commit any of the above offences;

**and**

- For an offence against a law in force in Australia, the offence is punishable by imprisonment of **a maximum term of not less than 2 years**; or
- For an offence against a law in another country, if it were assumed that it had taken place in the ACT, the offence is punishable by imprisonment of a maximum term of not less than 2 years.<sup>4</sup>

The Explanatory Memorandum notes that the offences listed are intended as ‘examples only’. The use of ‘one or more of the physical elements of the offence’ in the definition of ‘designated offence’ and what this would mean in practice is discussed below in part 2.

The Bill would mean that a person would not pass the character test if the person has been convicted of a ‘designated offence’ **which carries an available sentence of two years or more**. Crucially, this is not the same as the sentence actually imposed. The court may have released the person on a Community Corrections Order, sentenced them to one month in prison or given them a fine. The sentencing court applies well-established sentencing principles, which include the consideration of all mitigating and aggravating factors, such as the seriousness of the offending; prior offences; a history of trauma; and supporting reports from mental health or drug and alcohol specialists. The Bill does not allow these factors to be considered in an assessment of character.

Once it has been determined that a non-citizen has committed a designated offence which carries an available sentence of not less than two years, they would fail the character test, and receive a Notice of Intention to Consider Cancellation (or refusal) of Visa (**NOICC**). The non-citizen would then have an opportunity to provide representations to the Minister (or his delegate) as to why they do not fail the character test, and/or why the Minister should exercise his discretion not to cancel or refuse their visa. Written reasons must be provided for the decision, which may be appealed to the AAT (if the delegate made the decision) or directly to the Federal Court (if the Minister made a personal decision).

## The current law and its operation

Under the Migration Act, there are extensive existing provisions empowering the Minister or his delegate to cancel or refuse the visa of a non-citizen who has committed serious offences or poses a risk to the Australian community.

Section 501(6) of the Migration Act sets out a clear legislative intention to distinguish between particularly serious conduct that attracts *necessary* failure of the character test, and conduct that cannot be identified solely by reference to the type of offence, and requires a process of deliberation to determine whether that conduct justifies a failure of the character test.

These categories are set out below.

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<sup>4</sup> The Bill also proposes to amend s 5C of the *Migration Act*, which currently sets out circumstances where a person will be of character concern, analogous to the 11 circumstances where a person will fail the character test under s 501. This section is relevant to the permitted disclosure to, and collection by, the Department of identifying information under ss 257A and 336E of the *Migration Act*. Proposed new subsection 5C(1)(a) purports to add a twelfth instance where a person will be of character concern: where they have committed a ‘designated offence’, as defined above.

## Objective, necessary character test failures

Non-citizens who have:

- a substantial criminal record, having been:
  - sentenced, over any period of time, to terms of imprisonment exceeding 12 months in total; or
  - acquitted of an offence on the grounds of insanity or unsoundness of mind, and as a result detained in a facility;
  - found to be unfit to enter a plea, but to have committed the offence and as a result been detained in a facility;
- committed an offence relating to immigration detention;
- been involved in crimes of international concern including people smuggling;
- had a charge proved, been found guilty of, or been convicted of a sexually based offence involving a child;
- been assessed by ASIO as being directly or indirectly a risk of security.

## Potential character test failures requiring discretionary assessment

Non-citizens who:

- the Minister reasonably suspects are or have been a member of a group, or associated with a group or person, where the Minister reasonably suspects that group has been or is involved with criminal conduct;
- are not of good character, considering their past or present criminal and/or general conduct;
- present any kind of risk to a person or the community in Australia, including by inciting discord or engaging in disruptive activities;
- have an Interpol notice issued about them, leading to a reasonable inference they present a risk to the community.

The second category allows decision-makers to consider a range of factors, including the nature of the offending, the sentence imposed, any remarks by the courts or authorities, the criminal history of the person, and the general conduct of the non-citizen.

Where a person fails the character test, the following options are available to the Department:

- **Discretionary refusal or cancellation:** The Minister (or his delegate) may exercise his discretion to refuse or cancel a visa. The Minister may in some circumstances refuse or cancel a visa, without natural justice, when he considers it is in the national interest to do so;
- **Mandatory cancellation:** The visa will be cancelled if the person is serving a sentence of imprisonment and they do not satisfy the character test because they have been:
  - sentenced, over any period of time, to terms of imprisonment exceeding 12 months in total; or
  - been convicted of a sexually based offence involving a child.

Through this regime, the current law already provides grounds for non-citizens who commit serious offences or present safety risks to be considered for refusal or cancellation.

Statistics published by the Department of Home Affairs show that there has been a 1400% increase in s 501 visa cancellations since the introduction of new laws in 2014: from 84 to 1,284. There has been a 770% increase in s 501 visa refusals over the same period.<sup>5</sup>

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<sup>5</sup> Department of Home Affairs, 'Visa Statistics', *Key Visa Cancellation Statistics* (Webpage, 15 March 2019) <<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>>.

## 1. Australia's criminal courts: The most appropriate forum for determining the seriousness of offending, risk and penalties

In our view, Australia's criminal courts are the most appropriate forum for determining the seriousness of offending, risk and penalties. The Explanatory Memorandum acknowledges that 'the visa cancellation or refusal of a non-citizen due to having committed a designated offence for the purposes of the character test does have lasting consequences for non-citizens, including permanent exclusion from Australia in some cases'.<sup>6</sup> It discusses the aim of ensuring 'that discretionary visa cancellation and refusal decisions are based on objective standards of criminality and seriousness'.<sup>7</sup>

The Statement of Compatibility also refers to expanding the framework '*beyond a primarily sentence-based approach*'.<sup>8</sup>

Under the current regime, it is not the case that only people with sentences of 12 months or more are liable for cancellation. As discussed above, individuals are already considered for refusal or cancellation after failing the character test under ss 501(6)(aa) – (e). Currently, the Minister or his delegate looks to the sentence and remarks on sentence as key indicators of seriousness of offending and risk.

The Bill would make the sentencing court and its findings irrelevant, as it is not the sentence that can lead to failure of the character test, but the maximum available sentence for that type of offence. For example, a person who has breached a family violence intervention order would automatically fail the character test by reason of this Bill, regardless of the sentence given for this breach. A young person who has sent a text in breach of an intervention order and is sentenced to a fine and participation in a men's behaviour change program would face the same consequences for their visa as someone who has repeatedly assaulted their partner or children and received a prison sentence.<sup>9</sup>

The legislature provides for a maximum sentence for offences to give the sentencing court a broad discretion to determine the appropriate sentence based on multiple factors. In setting maximum sentences, the legislature has not turned its mind to implications for visa status. Setting the benchmark at the maximum available penalty, rather than the particular outcome for the particular conduct and offender, deprives decision-makers of the assistance of sentencing remarks in determining what activities may give rise to character concerns.

A sentence imposed by a court is the more appropriate measure of the seriousness of a particular conduct of a non-citizen. The courts have expertise in assessing the culpability of an offender and are a valuable reference point for Departmental decision-making.

The provisions introduced by the Bill shift the consideration of seriousness of an offence from the sentencing Court to the Department – from the judiciary to an arm of executive government. This is a significant movement away from the role of sentencing courts, traditionally regarded as the bodies best placed to make decisions about punishment, risk and community safety.

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<sup>6</sup> Parliament of Australia, 'Explanatory Memorandum', *Migration Amendment (Strengthening the Character Test) Bill 2019 Explanatory Memorandum* (August 2019) 37  
<[https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6349\\_ems\\_6380119e-0502-4146-9ce4-029421d5ac61%22](https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6349_ems_6380119e-0502-4146-9ce4-029421d5ac61%22)> ('Explanatory Memorandum').

<sup>7</sup> Ibid 38.

<sup>8</sup> Ibid.

<sup>9</sup> See Explanatory Memorandum (n 6) 27. 'The nature of the breach is not intended to be material in determining whether the physical element has been satisfied, the breach of the order in and of itself should be considered as satisfying the physical element required for a designated offence to have occurred'.

The Bill would subject a category of people who, under the criminal justice system may have demonstrated strong mitigating circumstances around their offending and good prospects of rehabilitation, to the prospect of having their visa cancelled or refused and facing lengthy detention, removal to an unfamiliar country and disconnection from family.

Furthermore, without denying the seriousness of each 'designated offence', the Bill proposes to enforce the same visa consequences for offending of vastly different degrees of seriousness. In short, the Bill is setting up a framework which goes far beyond what the criminal justice system deems necessary to manage risk and protect community safety.

It would have significant impacts on individuals and families, as well as the substantial systemic impacts discussed below.

## 2. Increased uncertainty and injustice

In seeking to have broad application, the Bill provides that the definition of 'designated offence' may be met where '**one or more of the physical elements involves**' violence against a person, non-consensual conduct of a sexual nature, breaching a court or tribunal order for the protection of a person, using or possessing a weapon or aiding, abetting, counselling, procuring, inducing, being knowingly involved in (directly or indirectly), or conspiring with others to commit any of these offences.

The Explanatory Memorandum notes that the intention of this section is to 'provide examples' of offences that might be included, 'but is not intended to limit the offences' to those listed.

This is an unclear definition, which would prove challenging to implement in practice.

It is not possible to exhaustively list the offences the Bill seeks to capture. Decision-makers would first need to consider whether the offence falls within the definition of a 'designated offence', which would require them to consider whether one or more of the physical elements of the offence involves an element identified in the proposed ss 7AA. This is not a straightforward exercise.

By way of example, an analysis of the *Summary Offences Act 1966* (Vic), the *Family Violence Protection Act 2008* (Vic) and the *Crimes Act 1958* (Vic) identified 59 offences which would or may be captured under this definition.

The Bill therefore does not provide the clarity that it seeks to.<sup>10</sup> An error in identifying a designated offence is likely to amount to jurisdictional error. Given the significant potential for such error to occur, this has the capacity to increase both (a) unjust outcomes; and (b) litigation in the Federal Courts, leading to further delays, increased costs and legal uncertainty (with the prospect of decisions being set aside).

We also note that under the Bill, the same conduct may result in different character test outcomes in different states, regardless of the actual sentences imposed or other features of the conduct. This is because:

1. **Different states have different maximum penalties for offences.** Conduct that would result in automatic failure of the character test in one state might not in another.
2. **There are offences that exist in one state but not in another.** For example, in Victoria, common assault can be prosecuted in the summary jurisdiction, which would not bring it within

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<sup>10</sup> See Explanatory Memorandum (n 6), Statement of Compatibility with Human Rights (Annexure A) 10: 'While there is also a provision that allows consideration of refusal or cancellation of a visa based on a person's past and present criminal or general conduct, the amendments in this Bill provide a clearer and more objective basis for refusing or cancelling the visa of a non-citizen whose offending has not attracted a sentence of 12 months or more, but who nonetheless poses an unacceptable risk to the safety of law-abiding citizens and non-citizens'.

the scope of the Bill.<sup>11</sup> However, prosecution of common assault in New South Wales is *only* by way of indictment and a penalty of two years' imprisonment is available,<sup>12</sup> and therefore would result in necessary failure of the character test under the Bill.

Despite the Bill's stated intention of providing "*further clarity by objectively setting out offences that adversely impact upon the inalienable right of law-abiding citizens and non-citizens to be protected*", the current drafting in fact creates uncertainty and risks being unworkable in practice.

### 3. Significant, costly and systemic unintended consequences

The Bill would have many unintended consequences, including increases in: costs to the community; burdens on administrative decision-makers of the Department of Home Affairs; merits review; pressures on immigration detention, the Magistrates' Court and criminal justice system; and prison numbers.

#### 3.1 Impact on the criminal justice system

We are concerned about potential implications of the Bill on the summary and indictable crime jurisdiction, including the state courts, private practitioners, community lawyers, Victoria Legal Aid, and remand populations. We have noted the possible impacts in Victoria but note that other jurisdictions are likely to experience equivalent impact on criminal justice processes.

The system is already under significant pressure.<sup>13</sup> According to the most recent Magistrates' Court of Victoria Annual Report, the increasing workload in the criminal jurisdiction of the Magistrates' Court 'continues to present one of the biggest challenges for the MCV.'<sup>14</sup>

Currently, the high volume of matters dealt with in the Magistrates' Court means that matters must be heard and determined in a short period of time. Matters are often resolved on the first mention date by way of a plea of guilty, assisted by VLA duty lawyers. Many of the most common offences heard and determined by the Magistrates' Court would be affected by the proposed changes.<sup>15</sup>

The possibility of visa cancellation would mean that the resolution of a person's criminal charges would become more complex and require additional time. We anticipate the following factors would have a direct impact on the summary jurisdiction and the resolution of a person's charges:

- people would require more time with a duty lawyer to discuss the consequences of the alleged criminal offending on their migration status;
- duty lawyers would spend more time negotiating with prosecution on how to proceed with charges;
- matters are less likely to resolve with a plea of guilty,<sup>16</sup> which would lead to more contested hearings which are more time and resource intensive;<sup>17</sup>
- consideration of the migration impacts would make the sentencing exercise more complex;

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<sup>11</sup> *Summary Offences Act 1966* (Vic) s 23.

<sup>12</sup> *Crimes Act 1900* (NSW) s 61.

<sup>13</sup> Law and Justice Foundation of New South Wales, *In Summary: Evaluation of the Appropriateness and Sustainability of Victoria Legal Aid's Summary Crime Program* (Final Report, June 2017) <<http://www.legalaid.vic.gov.au/about-us/research-and-analysis/summary-crime-evaluation-report>> ('*Law and Justice Foundation Report*').

<sup>14</sup> Magistrates' Court of Victoria, *Annual Report 2016-2017* (Report, September 2017) <[https://www.mcv.vic.gov.au/sites/default/files/2019-05/Annual\\_Report\\_16-17.pdf](https://www.mcv.vic.gov.au/sites/default/files/2019-05/Annual_Report_16-17.pdf)> ('*Magistrates' Court of Victoria Annual Report*').

<sup>15</sup> Of the criminal offences most commonly brought before the Magistrates' Court, many will be affected by the Bill, including charges of unlawful assault (the sixth most common charge) and intentionally/recklessly cause injury (the fifteenth most common charge).

<sup>16</sup> This may be because a person is concerned about the direct consequences for their migration status or because they no longer have an incentive to plead guilty to avoid spending time on remand, as the alternative will be to enter immigration detention if their visa is cancelled.

<sup>17</sup> In the Magistrates' Court of Victoria in the 2016/2017 financial year, **74,132** matters were listed for plea of guilty hearings, compared with **8,678** contested hearings. In our experience, where a Magistrate might otherwise hear as many as 40 pleas in any one day, for a contested hearing a whole day must be set aside. In New South Wales, over the 2014-2015 period, 88.8% of criminal matters were finalised by guilty plea.

- matters are less likely to resolve on the day of listing and may be adjourned to enable additional preparation or negotiation of the charges; and
- people are more likely to spend time on remand while waiting for their matter to resolve, with the growing remand population already resulting in significant financial cost to the community.

There are a range of direct and indirect operational costs associated with these impacts. The Magistrates' Court of Victoria, and services such as Victoria Legal Aid that work within the summary jurisdiction, do not have the capacity to absorb this additional demand.

### 3.2 Impact on the administrative law system

The Bill would undoubtedly cause serious strain on the administrative law system.

An increase in visa cancellations is highly likely to occur as a result of the Bill. This means that strain on the primary decision-making stage, merits review at the Administrative Appeals Tribunal (**AAT**) and the Federal Courts would increase.

The AAT is already under significant pressure because of increased demand. Applications to the AAT for review of decisions concerning cancellation of visas made on character-related grounds increased from 183 in 2016–17 to 235 in 2017–18.<sup>18</sup> In the 2013/2014 period prior to the introduction of the mandatory visa cancellation regime, the number of applications to the AAT was 33.<sup>19</sup>

These matters are complex and there are limited numbers of members who have been identified by the AAT as having the requisite skills to hear them. Moreover, applications relating to decisions under ss 501 and 501CA of the Migration Act are required to be dealt with on an expedited basis and finalised within 12 weeks after the applicant was notified of the decision.<sup>20</sup> If these matters are not resolved within 12 weeks, there is a deemed affirmation of the decision under review. We are concerned that an increase in the number of character related matters would have an impact on the quality and integrity of the decision-making process and potentially an increase in deemed affirmed rates.

In our experience, most affected non-citizens seek judicial review of decisions affirming a cancellation decision, given the grave impact such a decision has on their lives. Our Migration Program saw a significant increase in demand for advice and assistance about visa cancellation following the 2014 amendments.<sup>21</sup> We are concerned about the increased burden and cost on the Federal Court system and service providers. We also note that people are detained in immigration detention facilities during these decision-making, review and appeal processes, at significant personal cost to their wellbeing and significant financial cost to the Federal Government.<sup>22</sup>

### 3.3 Impact on the family violence system

Under the Bill, designated offences would include any breach of a family violence order, whether interim or final. Although the offence of contravention of a family violence order carries a maximum term of imprisonment of two years,<sup>23</sup> statistics for the period 1 July 2013 – 30 June 2016 show that imprisonment was imposed as sentence in only 19.6% of cases. Where a term of imprisonment was imposed, only in 2.1% of cases was the term imposed for a period of two years. Matters were

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<sup>18</sup> Administrative Appeals Tribunal, *Administrative Appeals Tribunal Annual Report 2017-2018* (Annual Report, 2 October 2018) 29 <<https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201718/AAT-Annual-Report-2017-18.pdf>>.

<sup>19</sup> *Ibid* 174.

<sup>20</sup> *Migration Act 1958* (Cth) s 500(6L)(c).

<sup>21</sup> See also, The Justice Project, *Final Report – Part 1: Recent Arrivals to Australia* (Final Report, August 2018) 30.

<sup>22</sup> National Commission of Audit, Government of Australia (Report, Appendix Volume 2, 2014) 10.14 Illegal Maritime Arrival Costs <<https://www.ncoa.gov.au/report/appendix-volume-2/10-14-illegal-maritime-arrival-costs>>. In 2014, the National Commission of Audit estimated the annual cost of holding a person in onshore detention at AUD239,000.

<sup>23</sup> *Family Violence Protection Act 2008* (Vic) s 123(2).

otherwise dealt with of by way of a Community Corrections Order (23.5%); a fine (27.6 %) or an adjourned undertaking, discharge or dismissal (22.4%). Where a term of imprisonment was imposed, 40.9% were for a period of less than three months; 28.5% between three and six months and 16.3% for periods between six and 12 months.<sup>24</sup>

There is a risk that victims of family violence, or people protected by an order that has been breached, whose partners or family members are non-citizens, may be less likely to report if their partner or family member would be at greater risk of visa refusal or cancellation as a result.

Affected non-citizens may also be more likely contest the making of orders because of the potential implication for their visa status. This would place an increased burden on the court and on victims who would need to go through a contested hearing to obtain a final order. The legal assistance sector's capacity to assist in these situations, would also be affected by the Bill, due to the need to give more complex advice through duty lawyer services and through increased grants of legal assistance.<sup>25</sup> Affected non-citizens contesting FVIOs due to concerns about the impact on their visa will add to court room delays and increased listings in family violence courts.

The Bill would also have an impact on victims of family violence who have been incorrectly identified as the primary aggressor. In Victoria, research and data analysis from Women's Legal Service Victoria reveal that the problem is serious and pervasive.<sup>26</sup> Refugee women have been identified by Women's Legal Service Victoria as a group who may face discrimination when dealing with Police, which may lead to them being misidentified as perpetrators of family violence. Women who have been misidentified in this way will be at risk of visa refusal or cancellation if an order is made against them which is subsequently breached as indicated by the example in part 1 above.

The Bill's attempts to capture numerous forms of 'relational' offending, including accessory offending, aiding or abetting, or other degrees of connection with an offence, potentially puts victims in violent relationships at risk of falling within a designated offence where their violent partner is committing the offences. Including these types of offences risks unintentionally capturing victims of violence in the harsher provisions.<sup>27</sup>

### 3.4 Impacts on young people

In VLA's view, protections for young people should exist in any visa cancellation regime.

We are concerned that there is no explicit protection for children's visa status in the Bill.

In this regard, we strongly endorse and repeat the submissions made by the Law Council of Australia at [87]–[92].

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<sup>24</sup> Sentencing Advisory Council, 'Contravene Family Violence Intervention Order', *SACStat Magistrates Court* (Webpage, 10 May 2019) <[https://www.sentencingcouncil.vic.gov.au/sacstat/magistrates\\_court/08\\_52\\_123\\_2.html](https://www.sentencingcouncil.vic.gov.au/sacstat/magistrates_court/08_52_123_2.html)>.

<sup>25</sup> *Family Violence Protection Act 2008* (Vic) ss 71 and 72. These sections provides that Victoria Legal Aid must offer a grant of assistance to self-represented litigants for representation at contested hearings.

<sup>26</sup> Women's Legal Service Victoria and Monash University, *Policy Paper 1: Police misidentification of the 'primary aggressor' in family violence incidents in Victoria* (July 2018) <<https://www.womenslegal.org.au/files/file/WLSV%20Policy%20Brief%201%20MisID%20July%202018.pdf>>.

<sup>27</sup> See *Migration Act 1958* (Cth) s 501(6)(b). There is already a specific cancellation provision where the Minister reasonably suspects: a person is or has been a member of a group or organisation; or is or has been associated with a group, organisation or person, and the Minister reasonably suspects that group, organisation of person has been or is involved in criminal conduct.