

21 December 2021

Senator the Hon Sarah Henderson
Chair
Senate Legal and Constitutional Affairs Legislation Committee

By email: legcon.sen@aph.gov.au

Dear Chair

Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2021 (Cth)

Legal Aid NSW welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2021 (Cth) (**Bill**).

[About Legal Aid NSW](#)

The Legal Aid Commission of NSW is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients. We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

Legal Aid NSW provides free specialist advice and minor assistance to prisoners and members of the community on visa cancellation issues, principally through its Government Law team. Advice and minor assistance are not subject to a means test.

Lawyers in our Government Law team conduct litigation in the Administrative Appeals Tribunal (**AAT**) and Federal Court pursuant to a grant of legal aid. The matters for which we can grant legal aid are set out in our policies and are subject to a merit and means test. Our lawyers also advise and represent many women on temporary visas who are experiencing family violence.

Legal Aid NSW opposes the Bill

The current Bill is substantially the same as its previous incarnations. It seeks to introduce significant amendments to the existing visa cancellation and refusal regime in section 501 *Migration Act 1958* (Cth) (**Act**) by providing grounds to consider visa cancellation or refusal where a non-citizen has been convicted of offences described in the Bill as *designated offences*.

Those previous Bills have not been passed by the Parliament. Most recently, in October 2021, the Senate voted not to pass the Migration Amendment (Strengthening the Character Test) Bill 2019 (Cth).

Legal Aid NSW continues to oppose passage of the current Bill on substantially the same grounds as it has opposed the previous Bills. For details about the bases upon which we opposed the 2018 Bill, we refer the Committee to our 2018 submission to the Legal and Constitutional Affairs Legislation Committee.¹

Rather than repeating the substance of our objections to the proposed legislative changes here, we refer the Committee to our earlier submission but add some further comments arising from our particular expertise.

The proposed changes to the current regime are unnecessary and disproportionate

The Minister already has wide legislative powers to cancel or refuse visas on character grounds. These are supported by a detailed Ministerial Direction which guides decision makers in factors to be considered and the weight to be given to those factors when deciding whether to refuse or cancel a visa.² We submit that these powers are more than adequate to deal with individual cases of serious offending and to weigh up the risk to, and protection of, the community. In our view, no cogent reasons have been put to justify the changes.

¹ Legal Aid NSW, *Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018: Submission to the Legal and Constitutional Affairs Legislation Committee* (November 2018). Available at: https://www.legalaid.nsw.gov.au/data/assets/pdf_file/0009/30105/LAN-submission-to-migration-bill.pdf.

² Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Ministerial Direction No. 90: Visa Refusal and Cancellation Under Section 501 and Revocation of a Mandatory Cancellation of a Visa Under Section 501CA* (8 March 2021).

Legal Aid NSW agrees with and supports the findings of the recent report of the Parliamentary Joint Committee on Human Rights regarding this Bill.³ In its summary the Committee states:

.... the committee considers it has not been established that the measure is necessary and addresses a pressing and substantial concern for the purposes of international human rights law. The committee considers it has also not been established that the measure would, in all instances, be proportionate to the objectives sought to be achieved.⁴

Disproportionate impact on already vulnerable and disadvantaged people

Legal Aid NSW considers that the Bill will have a disproportionately harsh impact on already vulnerable and disadvantaged individuals and their families, including refugees, long-term permanent residents and children and young people.⁵

In addition to those groups, Legal Aid NSW submits that the proposed changes will have a disproportionate impact on women experiencing family violence.

The Bill proposes that while a conviction for common assault or equivalent will not constitute a “designated offence” if it does not cause bodily harm or harm to a person’s mental health, an offence involving family violence will be a “designated offence”, irrespective of whether the assault causes bodily harm or harm to a person’s mental health.⁶

Legal Aid NSW strongly supports measures to address family violence, but the Minister’s existing powers adequately address this serious issue. It should be noted in particular that the existing ground on which a person may fail the character test, enlivening the Minister’s discretionary power to cancel a visa, include where “there is a risk that the person may engage in criminal conduct” or may “harass, molest, intimidate or stalk another person”.⁷ Family violence offending is also adequately captured on the basis of a person having a “substantial criminal record”.⁸

³ Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 15 of 2021* (8 December 2021) 17.

⁴ *Ibid* 33 [1.87].

⁵ See Legal Aid NSW, *Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018: Submission to the Legal and Constitutional Affairs Legislation Committee* (November 2018) 8-11. Available at: https://www.legalaid.nsw.gov.au/data/assets/pdf_file/0009/30105/LAN-submission-to-migration-bill.pdf.

⁶ Proposed section 501(7AC)(b). See further discussion of proposed section 501(7AC) in the section below on ‘Triggering the character test without regard to the degree and seriousness of the particular relevant offending is not justified’.

⁷ *Migration Act 1958* (Cth) s 501(6)(d).

⁸ *Ibid* s 501(6)(a), (7).

In addition, Ministerial Direction 90, which governs relevant visa decisions made on or after 15 April 2021, requires that acts of family violence are to be considered as very serious, regardless of the sentence imposed.⁹

The current regime therefore provides a rigorous framework which treats family violence seriously in the exercise of the discretion regarding the refusal or cancellation of a visa.

The problem facing many women whose partners are not Australian citizens is that while they may no longer wish to stay in a relationship characterised by violence and intimidation, that does not generally equate to a desire to have their former partner potentially removed from Australia permanently. Such action can have significant negative consequence for survivors of family violence.

Removal from Australia with no prospect of return means that the partner may be permanently separated from their children. Some women may feel judgement or rejection from their community, where she is seen as being the cause of her former husband's removal from Australia. The mother also loses any hope of receiving financial or practical assistance with parenting or child support. Women on temporary visas who were dependant on their partner's visa application as secondary applicants may also face adverse consequences for their own visa status and ability to stay in Australia.

Our lawyers have spoken to many female clients who are scared or reluctant to report family violence that they have experienced because of fear that it will have consequences for their partner's visa or their pathway to permanent residence.

Our lawyers have spoken to many clients who want reassurance that if they take steps towards protecting themselves (like reporting to police), there will not be any unwanted immigration-related consequences for their former or current partners. Such reassurance cannot be provided even under the current legislative regime.

Our concern is that by designating family violence offences as a ground for cancellation, regardless of seriousness or sentence imposed, and so increasing the risk of cancellation, the Bill only deepens the difficulties faced by women in seeking safety. The foreseeable consequence is that women will be less likely to report family violence than is the case now.

Care must also be taken not to adversely affect women who are seeking to escape a violent relationship who themselves may be charged with assault. This can sometimes

⁹ See Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Ministerial Direction No. 90: Visa Refusal and Cancellation Under Section 501 and Revocation of a Mandatory Cancellation of a Visa Under Section 501CA* (8 March 2021) paras 8(2), 8.1.1(a), 8.2.

be a result of communication difficulties with the police responding to incidents when interpreters are difficult to come by, and sometimes have convictions entered in absentia after not attending court due their fear of their ex-partner.

Our lawyers have also advised women whose abusive Australian citizen partner has made false statements to the police, leading to charges for criminal offences.

For these reasons, Legal Aid NSW submits that the existing regime adequately deals with this important and sensitive issue and the proposed amendments should not be introduced into the legislation.

Financial Impact

According to the Explanatory Memorandum for the Bill, these amendments will have a low financial impact.¹⁰

It is not clear on what basis this statement has been made or what factors have been considered in making that assessment. For example, it is unclear whether the impact on the wider justice system has been considered, taking into account the issues raised in our 2018 submission.¹¹ Legal Aid NSW considers that the proposed amendments would undermine the motivation for a person who is not an Australian citizen to plead guilty to a designated offence.

Where the person becomes aware that they may face visa cancellation or refusal even where the likely sentence is a non-custodial one, there may be little to lose in seeking to defend the charge(s). This would lead to more defended hearings in the Local Court and trials in the District Court. Appropriate guilty pleas in criminal matters are desirable and necessary for the effective and efficient operation of the criminal justice system.

Reforms in NSW aim to increase the number of early appropriate guilty pleas so as to reduce the inconvenience, expense and potential re-traumatisation of victims and witnesses caused by prolonged criminal proceedings. Legal Aid NSW considers that those objectives are undermined by this Bill. This would have an adverse impact on resources across the justice system, including those of the police, prosecution and defence, as well as legal aid resourcing.

¹⁰ Parliament of the Commonwealth of Australia, House of Representatives, *Migration Amendment (Strengthening the Character Test) Bill 2021: Explanatory Memorandum* (2021) 2.

¹¹ See Legal Aid NSW, *Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018: Submission to the Legal and Constitutional Affairs Legislation Committee* (November 2018) 11-13. Available at: https://www.legalaid.nsw.gov.au/data/assets/pdf_file/0009/30105/LAN-submission-to-migration-bill.pdf.

There is no indication that any legal aid impact has been considered. The experience of Legal Aid NSW is that the demand for advice on visa cancellations is high,¹² having increased significantly since the introduction of the mandatory visa cancellation regime in 2014. Currently requests for advice on visa cancellation make up about 20% of all civil law advice to prisoners in Legal Aid NSW.

The changes proposed by this Bill will, in our view, lead to the issuing of a greater number of notices of intention to cancel or refuse visas. The net widening purpose behind this Bill will result in many of these notices being issued to younger offenders. As was made clear in our 2018 submission, a large proportion of this cohort ‘grow out’ of their offending before reaching the current threshold of serious offending under the mandatory cancellation scheme. The targeting of young offenders will place undue pressure and stress on vulnerable individuals and their families. It will also greatly add to the demand for advice services which would be an unfunded cost of the proposed changes.

Triggering the character test without regard to the degree and seriousness of the particular relevant offending is not justified¹³

The Bill proposes a new provision which was not included in previous Bills, being subsection 501(7AC). In general, that provision states that a conviction for an offence of common assault, or equivalent, is taken not to be a conviction for a “designated offence” unless the act constituting the offence causes, or substantially contributes to, either temporary or permanent bodily harm or harm to another person’s mental health. As noted above, this does not apply if the offence is related to family violence.

On the basis of Legal Aid NSW’s criminal law experience, we consider the exception as drafted is confusing and unclear. It does not address the concerns previously raised about the proposed amendments capturing low-level conduct for which visa cancellation is a disproportionate response.

In our view the provision will lead to great uncertainty and inconsistent application as to what constitutes a ‘designated offence’. It will add unnecessary evidentiary complexity to a process that is already difficult to navigate for people who are caught by the visa cancellation and refusal regime.

On its face, the provision requires a decision maker to undertake a separate exercise into whether the offence causes, or substantially contributes to, either temporary or

¹² Legal Aid NSW advice services for visa cancellation matter type - 2020/2021: 506 advice services. 1 July 2021 – 7 December 2021: 222 advice services.

¹³ See Legal Aid NSW, *Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018: Submission to the Legal and Constitutional Affairs Legislation Committee* (November 2018) 5. Available at: https://www.legalaid.nsw.gov.au/data/assets/pdf_file/0009/30105/LAN-submission-to-migration-bill.pdf.

permanent bodily harm or harm to another person's mental health. This may not always be evident on the facts, and it is unclear what would constitute acceptable evidence to enable a delegate or a tribunal to determine the extent of the physical or mental harm to the person, or indeed what constitutes "mental harm". There is no indication about who bears the onus of proving that the assault (or equivalent) is excluded because it did not cause the above-mentioned harm. Potentially, an inquiry regarding these matters could also retraumatise the victim and their family if it involves them having to give evidence about harm for the purposes of the immigration inquiry.

The current regime already considers the seriousness of offending, most notably by reference to the sentence imposed, and considers the impact on victims.¹⁴ Assessment of these matters should be left to the sentencing court. To the extent it is also considered in subsequent administrative proceedings, it is most appropriately evaluated in the weighing of the competing factors in the exercise of the discretion. We consider that the proposed amendments would make the visa cancellation and refusal regime unnecessarily more complicated and difficult to administer both at the primary stage and at the merits review stage before the AAT.

Thank you for the opportunity to make a submission to this inquiry. If you have any questions or would like to discuss this submission further, please contact

Yours sincerely

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¹⁴ Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Ministerial Direction No. 90: Visa Refusal and Cancellation Under Section 501 and Revocation of a Mandatory Cancellation of a Visa Under Section 501CA* (8 March 2021) para 9(1)(c), 9.3.