17 DECEMBER 2021

MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2021

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

VISA
CANCELLATIONS
WORKING GROUP

ABOUT THE VISA CANCELLATIONS WORKING GROUP

The Visa Cancellations Working Group is a national group with significant expertise in the area of visa cancellations and migration more generally.

Its membership includes multiple LIV Accredited Specialists in Immigration Law, and is comprised of individuals from private law firms, not-for-profit organisations, community legal centres, and tertiary institutions, including :

- Abode Migration;
- Amnesty International Australia;
- Assent Migration;
- Asylum Seeker Resource Centre;
- AUM Lawyers;
- Carina Ford Immigration Lawyers;
- Central Australian Women's Legal Service;
- Circle Green Community Legal;
- Clothier Anderson Immigration Lawyers;
- Darebin Community Legal Centre;
- Erskine Rodan & Associates;
- Estrin Saul Lawyers and Migration Specialists;
- FCG Legal;
- Fitzroy Legal Service;
- Federation of Ethnic Communities Councils of Australia Inc;
- Flemington Kensington Community Legal Centre;
- Foundation House;
- Immigration Advice and Rights Centre;
- Jesuit Refugee Service (JRS) Australia;
- Kah Lawyers;
- Law Access;
- Legal Aid New South Wales;
- Monash University;
- MYAN Australia;
- Northern CLC;
- Peter McMullin Centre on Statelessness;
- Refugee Legal;
- Refugee Advice & Casework Service;
- Russell Kennedy;
- SCALES Community Legal;
- The Kaldor Centre;
- The Refugee Council of Australia;
- The University of Melbourne;
- Varess;
- Victoria Legal Aid;
- Welcome Legal;
- WLW Migration Lawyers, and
- Women's Legal Service NSW.

The views in these submissions do not purport to be endorsed by all members.

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ENDORSING PERSONS AND ORGANISATIONS

These submissions are endorsed as follows.

ORGANISATIONS

Abode Migration
Amnesty International Australia
ANZ Society of Criminology Thematic Group on Crimmigration and Border Control
Asylum Seeker Resource Centre
Australian Lawyers for Human Rights
Buttar, Caldwell & Co. Solicitors
Canberra Law School
Carina Ford Immigration Lawyers
Clothier Anderson Immigration Lawyers
Liberty Victoria
Refugee Advice & Casework Service
Russell Kennedy
Safe and Equal
Southern Communities Advocacy Legal and Education Service
Women's Legal Service Victoria

EXECUTIVE SUMMARY

The Working Group recommends the Bill be rejected in its entirety for reasons including the following:

- The Bill **does not introduce new powers to cancel a person's visa**, as it was intended to do.
- The Bill sets **an arbitrary and inappropriate low bar for failure of the character test**, leading to diminished integrity of outcomes and to serious harm for individuals, families, and communities. It does not align with Australian community standards.
- The Bill does not **appropriately utilise and respect the expertise of Australian courts** and the sentencing function exercised by those courts.
- The Bill is likely to **seriously impact the criminal justice space in terms of resourcing and outcomes**, including the State and Territory courts, legal services providers, and custody and immigration detention facilities.
- The Bill is likely to **seriously impact administrative law process** by increasing load on primary, merits and judicial review bodies.
- The Bill has unintended consequences in that it **fails to protect vulnerable individuals**, including victim-survivors of family violence, children, Aboriginal and Torres Strait Islanders, those with mental health issues, and those from refugee or asylum seeker backgrounds. It is likely to be incompatible with Australia's international obligations.

INTRODUCTION

1. The Visa Cancellations Working Group (**the Working Group**) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the recently tabled Migration Amendment (Strengthening the Character Test) Bill 2021 (**the Bill**).

2. The Working Group recognises that it is appropriate to regulate people seeking to enter and remain in Australia by reference to questions of character and risk.

3. Equally, it must be acknowledged that visa cancellation or refusal is not a trivial matter for the individuals, families, and communities affected: it can result in detention (including indefinite detention), permanent family separation, forcible removal from Australia, loss of refugee protection, potential refoulement to situations of persecution and serious

harm, and serious psychological consequences.[1] As was observed by Chief Justice Allsop, in some circumstances, cancellation is "*potentially life-destroying*".[2]

4. It is also complex. There are numerous opportunities during a refusal or cancellation process for an individual to lose access to their rights, for example by failing to take action within immovable timeframes, including due to lack of access to legal assistance. This can occur due to a change of address, an inability to comprehend what can be obscure wording,[3] or a lack of access to legal or other assistance. Individuals may also struggle to respond in ways that properly make their cases, owing to numerous factors including linguistic barriers and entrenched disadvantage.

5. Australia's legislative framework for regulation of visa cancellation and refusal is contained in the *Migration Act 1958* (Cth) (**the Act**) and the *Migration Regulations 1994* (Cth) (**the Regulations**). There are numerous and broadly permissive grounds on which a visa can be cancelled or refused, including under ss.116, 109, and 501.

6. The Bill subject to the present Inquiry proposes amendments to s 501, introducing additional circumstances in which a person will mandatorily fail the character test.

7. The Working Group has made submissions regarding the regime in the past.[4] In particular, the Working Group has expressed concern about unwarranted outcomes, unintended consequences, unnecessary waste of resources, opacity, and divisive rhetoric, and it urges the Committee to increase protections for the rule of law in the character framework. The Working Group considers that lawful, consistent, informed, apolitical, and proportionate decision-making is critical in this area.

8. For the reasons set out herein, the Working Group **recommends that the Bill be rejected**. This Bill, in its current form, will damage the integrity of outcomes in this most serious of areas. The Bill replaces what is already a powerful and permissive tool, albeit an imperfect one, with an inferior and blunt tool.

9. The Working Group considers **that the Bill does not and cannot achieve its intended purpose**. Broad powers to cancel a person's visa, including in circumstances considered by this Bill, are already available under the existing framework. The justifications contained in the Explanatory Memorandum are not borne out in the legislation as drafted, and do not sufficiently make the case for the legislation. Given the severity of the consequences of visa cancellation or refusal, any amendments to the regime must be carefully justified, and approached with caution.

[1] A leading recent review of studies regarding immigration detention and health, for example, found that there "*is a significant relationship between detention duration and mental health deterioration*" and that "*detention should be viewed as a traumatic experience in and of itself*": see M von Wethem et al, 'The impact of immigration detention on mental health: a systematic review", BMC Psychiatry (2018) 18:382.
[2] *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [45].
[3] In *DFQ17 v Minister for Immigration and Border Protection* [2019] FCAFC 64 (18 April 2019), per Perram J at [62], the Full Court of the Federal Court described the description of timeframes for merits review in a Protection (subclass 866) visa refusal as "*piecemeal, entirely obscure and essentially incomprehensible*". Cancellation or refusal notifications are not unlike these refusals.
[4] Visa Cancellations Working Group, Submission No. 33 to the Joint Standing Committee on Migration, *Inquiry into Review Processes Associated with Visa Cancellations made on criminal grounds*, 15 May 2018.

10. Rather than supporting the protection of the Australian community, the **Bill will cause many thousands more individuals to *automatically* fail the character test**. The current law already provides for a subjective assessment of a person's character, including with reference to past and present criminal and *general* conduct, to determine such individuals fail the character test. Failure of the character test in the circumstances proposed by this Bill will often be plainly disproportionate, and at times absurd.

11. The Bill will also have the **unintended consequences** set out in these submissions. These include harm to victim-survivors of family violence, increased costs to the community, increased burden on administrative decision-makers of the Department of Home Affairs, increased instances of merits review, pressures on the capacity and operation of the onshore detention regime, and increased pressure on the courts. Moreover, by removing one step of assessment, and by articulating an excessively low and inconsistent baseline for what is considered 'serious', this Bill will reduce the threshold for automatic visa cancellation or refusal and make it more likely that delegates will make disproportionate decisions.

THE HISTORY OF THE BILL

12. The Working Group notes with considerable concern the history of this Bill, in particular given the serious issues raised repeatedly by Senate and Parliamentary Committees, by senators and Members of Parliament, and by numerous experts in the migration and refugee field.

13. Substantially similar Bills have been advanced unsuccessfully in recent years:

    a. The Migration Amendment (Strengthening the Character Test) Bill 2018, which was considered by the Senate Standing Committee for the Scrutiny of Bills, and by the Parliamentary Joint Committee on Human Rights, and the subject of an Inquiry by the Senate Legal and Constitutional Affairs Legislation Committee, receiving 17 submissions, before lapsing at dissolution on 11 April 2019;
    b. The Migration Amendment (Strengthening the Character Test) Bill 2019, which was considered by the Senate Standing Committee for the Scrutiny of Bills, and by the Parliamentary Joint Committee on Human Rights, and the subject of an Inquiry by the Senate Legal and Constitutional Affairs Legislation Committee, receiving 32 submissions and conducting a public hearing, and subject to multiple proposed amendments, before being negatived at second reading on 20 October 2021.

14. The Working Group considers it extraordinary that, despite the serious and legitimate concerns raised about previous iterations of the Bill from all quarters during the course of scrutiny of the Bill, and despite the failure of this legislation on two occasions, including just weeks ago, the Bill has been advanced in its current form.

15. The *only change* in this iteration of the Bill is that an assault or equivalent conviction (and related indirect offending) is a designated offence only if it substantially contributed to bodily harm or harm to another person's mental health, or if it involves family violence.

16. Of the 49 submissions received by the previous Inquiries, only 4 were supportive of the proposed changes: submissions by the Department of Home Affairs, the Police Federation of Australia, and an individual. Serious concerns were raised in the 45 other submissions from highly respected organisations and individuals. Those concerns included the extremely harmful unintended consequences of the proposed legislation for groups including victim-survivors of family violence.

17. Plainly, an extraordinary amount of public and private resources have been put toward scrutinising this proposed legislation, and there has been a clear case made out that this Bill is damaging and unnecessary. Neither the Bill nor the Explanatory Memorandum engages with these concerns.

18. This third iteration of the Bill has *again* been referred to the Senate Standing Committee for the Scrutiny of Bills, the Parliamentary Joint Committee on Human Rights, and is the subject of the present Inquiry by the Senate Legal and Constitutional Affairs Legislation Committee.

19. The Parliamentary Joint Committee on Human Rights has said, noting its concerns are "consistent with its previous findings in relation to substantially similar measures":[5]
    a. "[I]n circumstances where the minister may already cancel or refuse a person's visa where a person has committed an offence that would fall within the definition of 'designated offence', it is not clear that the measures are necessary…"[6]
    b. "[T]he mandatory nature of detention of persons who have had their visa cancelled, in the absence of any opportunity to challenge detention in substantive terms, means that expanding the bases on which visas may be cancelled increases the risk of a person being arbitrarily deprived of liberty. If this were to apply to children, this would also risk being incompatible with the rights of the child."[7]
    c. There is a risk the measure will be incompatible with a number of human rights, including the rights to liberty, to return to one's own country, to the protection of family; the rights of the child, and the prohibitions on the expulsion of aliens without due process and on non-refoulement.
    d. It is not sufficient for measures to be "desirable or convenient": the objective must be pressing and substantial, something which the Committee considers has not been established.[8]

20. The Senate Standing Committee for the Scrutiny of Bills has said, noting is reiterating its previous scrutiny concerns:[9]
    a. "The committee notes that in light of the already broad discretionary powers available for the minister to refuse to issue or cancel the visa of a non-citizen,

[5] Parliamentary Joint Committee on Human Rights, Report 15 of 2021, [1.89].
[6] PJCHR, Report 15 of 2021, [1.60]; see also [1.88].
[7] PJCHR, Report 15 of 2021, [1.63].
[8] PJCHR, Report 15 of 2021, [1.88].
[9] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 18 of 2021, [1.78].

the explanatory materials have given limited justification for the expansion of these powers by this bill…"[10]

b. The Bill "raises scrutiny concerns as to whether the measure unduly trespasses on rights and liberties."[11]

21. In these circumstances, it is difficult to comprehend why, then, the Bill has been advanced in its current form. It risks the waste of public resources and the misdirection of community and legal resources in an environment of considerable scarcity.

22. Further, the Working Group is concerned that the presentation of the Bill to Parliament for a third time, with minimal revisions, suggests a concerning disregard by the government for parliamentary processes. It is precisely the role of Parliamentary committees to collect expert evidence and community views regarding the impact of intended legislation; views expressed to and by those committees should be treated with deference by the drafters of legislation. The manner in which this Bill has thrice been presented to Parliament, in almost identical form, is both an impost upon parliamentary and public resources and an indication that the government is unconcerned with the impact of the legislation. Quite apart from the practical matters that are canvassed below, this in itself should be cause for comment by the Committee.

23. The Working Group has called, in the past, for an inquiry into the character framework to address concerns with its function and effect, and repeats that call. Such an inquiry would be an opportunity for useful development of the framework and its operation, and would allow organisations such as those dealing with family violence to contribute their considerable expertise. No such inquiry has taken place. The Working Group considers this an important first step in identifying areas requiring improvement and appropriate and considered solutions.

24. The Working Group has repeatedly expressed the view that the character regime, as it currently operates, is unwieldy and overbroad, generates unjust outcomes with insufficient attention paid to the visa holder's circumstances and routinely places Australia in breach of its international obligations. The operation of the regime has created serious and persisting diplomatic tensions with New Zealand. And over the past six years in particular, the administration of the regime has involved extraordinary taxpayer cost.

25. Before any expansions are proposed, the character regime must be comprehensively reviewed, to ensure that it is serving the purposes of community cohesion and safety for which it was originally introduced.

26. At **Annexure C** is the Working Group's current Position Paper. If such protections were implemented, a Bill such as the present would be considerably less dangerous and apt for misapplication.

[10] SSCSB, Scrutiny Digest 18 of 2021, [1.86].
[11] SSCSB, Scrutiny Digest 18 of 2021, [1.87].

MISCONCEPTIONS REGARDING VISA CANCELLATION AND REFUSAL

27. The character framework is complex, and misunderstanding and misreporting is commonplace. Consideration of the Bill requires a firm grasp on the law governing visa cancellations and refusals. These submissions will set out the current and proposed law, but as a foundation, we address the following misconceptions at the outset to avoid confusion.

Misconception	Fact
The Department can only cancel people's visas if they are sentenced to imprisonment for 12 months or more.	There is **no minimum standard of criminal conduct** for visa cancellation or refusal. A Minister, or his or her delegates, can cancel a visa on the basis of any criminal or general conduct, [12] including on the basis of charges alone, and including where there have been no charges at all. [13] If a person is sentenced to imprisonment for 12 months or more, their visa **must** be cancelled. [14]
Only the Minister personally can cancel visas.	A Minister or his or her delegates can cancel visas. If a Minister makes a personal decision, the person affected will not be able to seek merits review of that decision. References in the legislation to "the Minister" encompass his or her delegates, unless otherwise specified, for example in s. 501(4).
Only temporary visas can be cancelled.	Any person who holds a visa, permanent or temporary, refugee or family, can have that visa cancelled. There are no protections for non-citizens regardless of how long they may have lived in Australia, or on any other basis.

RECOMMENDATIONS

1. The Working Group recommends the Bill be rejected.
2. The Working Group calls for an Inquiry into the character cancellation regime to increase transparency and integrity around decision-making in this space.

[12] See, for example, ss 501(1) or (2) in concert with (6)(b), (ab), (c), or (d).
[13] See, for example, ss 501(1) or (2) in concert with ss 501(6)(b),(ba), (c) or (d).
[14] ss 501(3A) and 501(6)(a)-(c) and (e).

CONTEXT

28. Any consideration of the character regime must have regard to the context in which these decisions occur.

29. Any visa holder, regardless of whether the visa is temporary or permanent, regardless of how long they have lived in Australia, and regardless of age, refugee background, or mental impairment, can be subject to cancellation. Any visa applicant can be subject to visa refusal. Moreover, the character framework is legally complex and can be overwhelming and hard to navigate.

Effect on individuals, families and communities

30. Generally, people who have their visa cancelled or refused (if onshore) will be subject to immigration detention and possible forcible removal. Their detention may continue for many years, even indefinitely, in poor conditions. If Australia owes *non-refoulement* obligations in respect of the person (e.g. because they are refugees, they cannot be removed, and so they must remain in detention.[15] Often, people subject to cancellation or refusal (say, of a Resident Return (subclass 155) visa) have lived in Australia for most of their lives and have extensive family ties here and no significant ties anywhere else. Often, they are vulnerable due to age, health, or lack of education. Often, there is an enormous impact on their families and communities, including descent into poverty and children or people with health issues being left without carers. The person will also generally be prohibited from applying for a further visa, with the exception, in certain circumstances, of a protection visa, which may also later be refused on character grounds.

31. The Working Group has seen numerous examples of people of pension age who have lived in Australia since before they were five, and who have children and grandchildren in this country, but who are subject to visa cancellation. Refugees undergo visa cancellation or refusal. Children, who have never been tried as adults, undergo visa cancellation or refusal. It is an issue which often affects the most vulnerable people in our community.

32. It also deeply affects Australian families of those who are subject to visa cancellation or visa refusal. A person can be left without a parent, child or partner, which may mean a loss of financial and other support.

Complexity

33. The character framework is extremely complex and may subject the individual to strict deadlines which can be difficult to determine or adhere to for a range of reasons.

34. A determination that a person fails the character test means either that their visa must or may be cancelled or refused. In some cases, that person has the right to merits review within a strict timeframe, after which time they completely lose their right to merits review.

[15] s 197C of the Act.

In other cases, they have no such right, and must consider costly, lengthy and uncertain appeals to the federal courts, again, often without access to legal assistance.

35. Understanding and exercising existing rights can be extremely hard, particularly for vulnerable persons, such as children, those with mental health or other capacity issues, and those with limited English skills (including refugees).

36. At **Annexure A**, we include a flowchart that demonstrates the complexity of just one of the provisions, s.501(2), which governs situations where a person is first considered to fail the character test, and then the discretion to cancel is enlivened. A Notice of Intention to Consider Cancellation (**NOICC**) is then sent to the person, inviting them to comment and providing Direction no 90 for their reference, at 23 pages without the other annexures. Timeframes for response vary significantly depending on the stage of the matter.

37. Of those who manage to respond to a cancellation, Notice of Intention to Consider Refusal (**NOICR**) or NOICC, roughly 65% of people entitled to seek review of a s 501 decision in the Administrative Appeals Tribunal do not do so. This equates to many hundreds of people who have had their right to remain in Australia removed without so much as an interview.[16] Similarly, 33% of people entitled to seek court review of a s 501 decision do not do so, despite the fact that the court finds errors in the s 5t01 decision in nearly 1 in 5 court challenges.[17]

38. In the Working Group's experience, there are numerous reasons why a person may not take action, including:
    - because they moved addresses (as permanent residents can do without notifying the Department);
    - because of their limited English skills, their age, or their mental health/capacity;
    - because of their location (such as within the limitations of criminal custody);
    - because of fear arising from the prospect of cancellation, and a belief that they have no chance;
    - because of their lack of resources, including access to legal assistance, or
    - because they become overwhelmed, or did not understand the unforgiving nature of the timeframes, processes or law.

39. Unlike in criminal proceedings, even when a person is *able* to seek review despite numerous barriers, they are unable to secure representation: there has been enormous increase in demand for assistance following the expansion of visa cancellation powers in 2014. At the court and tribunal, between 60 and 67% of people are unrepresented. The sector is completely overwhelmed and unable to deal with the volume of cases.[18]

40. Generally, the more vulnerable the person, the more likely they are to lose a right due to failure to respond, and the more likely they will be unable to obtain legal assistance with the process. Their quality of response will also, generally, be lower.

[16] FA 19/12/00125.
[17] FA 19/12/00125.
[18] FA 19/12/00125.

41. If a person fails to respond to a NOICC or Notice of Intention to Consider Refusal (**NOICR**), then the Department will make its decision based solely on the information before it: that a person has failed the character test. They may then take into account the severity of the offending, but it is unclear what information would be before a decision-maker. This may vary, and is likely to produce unfair and disproportionate results.

42. It follows that, despite the fact that a residual discretion remains, numerous people will be adversely and disproportionately affected by the changes, because they will automatically fail the character test for minor offending.

SUMMARY OF THE LAW

43. It is crucial to understand the distinction between a person *necessarily* failing the character test and *being assessed as* failing the character test. This is at the heart of the proposed legislation.

44. The Bill does not propose any process improvement. Under both the current and proposed law, the process is as follows:

    a. A person is identified as being of character concern due to their own disclosure, or through notification from state, territory, Federal or international authorities.
    b. The Department assesses whether that person fails the character test by reference to s.501(6) of the Act.
    c. If the person fails the character test, depending on the circumstances:
        i. Their visa is mandatorily cancelled, if they have a significant criminal history,
        ii. A delegate considers whether to exercise the discretion not to cancel or refuse their visa, or
        iii. The Minister cancels or refuses their visa in the national interest.

    The Bill categorically does not enable the cancellation or refusal of the visas of any person for whom cancellation or refusal is not already available. It merely removes a decision-maker's power to assess whether or not certain individuals meet or fail the character test, making failure mandatory in prescribed circumstances.

45. It is not only the explicit impacts of a change of legislation that must be considered. The removal of a step of assessment is likely to significantly impact a decision-maker's consideration of whether or not the discretion to not cancel weighs in the favour of a visa holder or applicant. If, for that decision-maker, the person *necessarily* fails the character test, a decision to cancel is significantly more likely to follow than it is if they need to use discretion. A determination which is permitted, or 'endorsed', even where that permission is not directive, has a psychological and practical effect on those who are responsible for application of the law: being squarely told, in effect, that particular offending is 'serious' no matter the context will make decision-makers significantly more likely to exercise the discretion to cancel or refuse a visa.

The current law

46. Under the current law, a person's visa *will* be mandatorily cancelled if they have a significant criminal record, and it *may* be cancelled on the basis of *any other conduct*.

47. At present, a person will *objectively* fail the character test if:

- They have, over any interval of time, been sentenced to a *total* of twelve months' imprisonment or more, regardless of whether they have spent any time in prison;[19]
- Where they have been acquitted of an offence on the grounds of unsoundness of mind, or a court considered them not fit to plead, and, as a result, they have been detained in a facility or institution;
- They committed an offence relating to immigration detention, including escape from immigration detention;
- A court, Australian or foreign, has convicted or found them guilty of one or more sexually based offences involving a child;
- They have been charged with or indicted for crimes of serious international concern;
- ASIO have assessed them as, directly or indirectly, a risk to security;
- There is an Interpol notice relating to the person, from which it is reasonable to infer the person would be a risk to the community.

48. At present, a person *will also* fail the character test if a decision-maker assesses any of the following:

- Having regard to *any* past and present criminal or general conduct, they are not of good character.
- There is a risk that, in Australia, they would:
    - Engage in criminal conduct
    - Harass, molest, intimidate or stalk another person
    - Vilify a segment of the community
    - Incite discord
    - Represent a danger to the community or a segment of the community in any way
- There is a reasonable suspicion that:
    - they are or have been associated with a group, organisation or person who the Minister reasonably suspects has been or is involved in criminal conduct, or
    - they have been or are involved in serious international offending, regardless of whether there has been a conviction, including people smuggling.

49. The powers are clearly broad and permissive. They can be exercised by a delegate of the Minister, or by a Minister personally.

[19] This includes situations where, for example, a person may have received four three-month sentences of imprisonment over a period of 30 years.

50. For completeness, it is important to note that s.116 of the Act also provides for the cancellation of temporary visas on the basis of conduct.

The proposed law

51. The Bill proposes that a person should fail the character test *necessarily* if:

- They have been convicted of any offence involving:
  - Violence, including threat, robbery, and low-level assaults (providing that assault caused either physical or mental harm);
  - Non-consensual conduct of a sexual nature, including the sharing of an intimate image;
  - Breach of a court or tribunal order made to protect a person, including inadvertent breaches, regardless of the nature of the breach;
  - Use or possession of a weapon (any thing where a person intends or threatens to use that thing to inflict bodily injury).
- They have been convicted of having aided, abetted, counselled, procured, conspired to commit or induced any of the above offending.
- Either of the following qualifications is met:
  d. If the offence is against an Australian law, a *possible* sentence of not less than two years was available to the court, and
  e. If the offence was against a foreign law, had the act constituting the offence been in Australia, a sentence of two or more years would have been available to the court.

52. Plainly, the Bill does not widen the scope for cancellations or refusals whatsoever. It merely, and without justification, removes scope for assessment of whether a person fails the character test.

JUSTIFICATION FOR THE BILL

53. The Explanatory Memorandum states that the Bill is a response to recommendations by the 2017 Joint Standing Committee on Migration report on migrant settlement outcomes entitled "No one teaches you to become an Australian" that those convicted of a serious offence should have their visas cancelled under character provisions.[20] As set out herein, they already can.

54. The Explanatory Memorandum states the Bill ensures "the character test aligns directly with community expectations that non-citizens who are convicted of offences such as murder, sexual assault or aggravated burglary will not be permitted to enter or remain in the Australian community. It is misleading to suggest that such individuals do not already fall within the character framework. As set out herein, they do.

55. It is concerning that the government continues to press the same misleading justification for the Bill as it did in 2018 and 2019. As with its previous iterations, it remains the case that *all* forms of offending which the Explanatory Memorandum purports to target are capable of being dealt with under existing powers. Far from capturing 'serious' offending such as murder, sexual assault and aggravated burglary, the provisions of the Bill are sufficiently nebulous to capture some of the lowest, most petty and common forms of offending. We return to discuss some of the more alarming potential applications of the Bill in the sections below.

56. The Department provided submissions to the Inquiry regarding the Bill in 2018. Attached at **Annexure B** is our response, demonstrating that each case study advanced by the Department would already be caught under current law.

57. It is *not* the case that only individuals sentenced to twelve months' or more imprisonment fail the character test at present. The proposed Bill seems to proceed on that wrong and regularly refuted assumption.

58. Insofar as the Bill purports to introduce another 'objective' basis for failure of the character test, in addition to the 'substantial criminal record' limb, it is inapt for this purpose. In circumstances where a visa holder has been sentenced to a term (or terms) of imprisonment in excess of 12 months, and so has a substantial criminal record, they must fail the character test – there is limited or no space for interpretation by an officer of the Department. But the definition of a 'designated offence' simply does not operate in such a black-and-white fashion. The definition must be carefully applied to a visa-holder's circumstances to divine whether they are caught by it – first an officer must detect a conviction; then determine whether the 'physical elements of the offence' involved violence, non-consensual sexual acts, use of a weapon or breach of an order; then determine the maximum sentence available for that offence. The confusion is compounded when it is recalled that the definition encompasses *overseas* convictions, and manifold forms of conduct 'aiding,' 'abetting,' 'counselling,' 'procuring,' 'inducing,' 'being in any way directly or indirectly concerned' or 'conspiring' in relation to an offence. When the Committee considers the complexity of its operation, it will become clear that its application in individual cases will involve significant bureaucratic resources and expense. Given that it is tied rigidly to certain convoluted definitions of particular forms of offences, it is clear that the proposed new head of the 'character test' is substantially more unwieldy, inflexible and difficult to apply in practice than the existing heads. Why should it be necessary for the Parliament to interpose an entire, complex framework allowing for failure of the 'character test' in relation to a 'designated offence,' when precisely the same offences might fall under the aspect of the character test relating to 'past or present general or criminal conduct'?

59. Statistics published by the Department of Home Affairs show that there has been as much as a 1500% increase in annual s 501 visa cancellations since the introduction of new laws in 2014: from 76 to 1,278 in 2016/2017 and 1018 in 2019/2020. There has

been a 845% increase in s.501 visa refusals, from 83 in 2013/2014 to 785 in 2020/2021 despite border issues.[21]

60. The same statistics show that the offences for which visas were cancelled in the 2020/2021 year include assault, murder, sexual offences, domestic violence and burglary and robbery offences, each in high numbers.

61. It is incorrect and frankly misleading to suggest that such cancellations are not occurring, or are not empowered.

62. It has not been established that there are any cases in which the Department is not currently empowered to refuse or cancel a person's visa. Rather, it has been established that the Department can and does cancel visas in record numbers in the situations it claims it cannot.

CONCERNS REGARDING THE BILL

AN INAPPROPRIATELY LOW THRESHOLD

63. The proposed legislation is, simply put, too broad, and with too low a threshold.

64. 'Character' is not defined in the Act, and consideration of a person's 'enduring moral qualities'[22] is far from simple. 'Character' itself is difficult to define, encompassing notions of constitution, disposition, calibre, temperament and standing all at once. The choice by the legislature of the word indicates its intention: it did not choose 'conduct' or 'criminal history', but 'character'.

65. Given the nature and effect of the character framework, it can also be assumed its purpose is the protection of the Australian community.

66. By way of comparison (and noting the requirement in the citizenship regime is broader than for cancellation or refusal), Departmental policy regarding the 'good character' requirement for citizenship set out at s.24(6) of the *Australian Citizenship Act 2007* (Cth) states:

> *It is not departmental policy for decision makers to be bound by a check-list. Decision makers need to look at the merits of each case and to turn their minds to the issues of character until they are 'satisfied', on a reasoned basis that an applicant is, or is not, of good character…*
>
> *… the Federal Court and the AAT have used the ordinary meaning of the words, and made reference to dictionary definitions. Most cases have adopted the following definition from the Full FC judgment in Irving v Minister for Immigration, Local Government and Ethnic Affairs ((1996) 68 FCR 422; at 431-432):*

[21] See <www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>.
[22] *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411, per Lee J at [34].

> *Unless the terms of the Act and regulations require some other meaning be applied, the words 'good character' should be taken to be used in their ordinary sense, namely, a reference to the enduring moral qualities of a person, and not the good standing, fame or repute of that person in the community. The former is an objective assessment apt to be proved as a fact while the latter is a review of subjective public opinion… A person who has been convicted of a serious crime and thereafter held in contempt in the community, nonetheless may show that he or she has reformed and is of good character… Conversely, a person of good repute may be shown by objective assessment to be a person of bad character.*
>
> *In this context, 'moral' does not have any religious connotations. The phrase 'enduring moral qualities' encompasses the following concepts:*
>
> - *characteristics which have been demonstrated over a very long period of time*
> - *distinguishing right from wrong*
> - *behaving in an ethical manner, conforming to the rules and values of Australian society.*[23]
>
> *The good character requirement looks at the essence of the applicant. Their behaviour is a manifestation of their essential characteristics.*

67. Decision-makers assessing character for citizenship look at numerous factors including the timeframe of the conduct and the surrounding circumstances.

68. The Bill would create inconsistency in the way 'character' is understood and applied across visa and citizenship regimes.

69. Any attempt to create a one-size-fits-all approach to a character test is likely to fall dangerously short of its objectives.

70. Given the seriousness of the assessment, a legislative objective character test should align with community standards and be appropriately measured. A person should not fail such a test if their conduct would not, in the eyes of the public or according to common sense, warrant such severe condemnation.

71. In the context where a person's general conduct alone, or their past association with another person who may have had a past involvement in crime, can already lead to a visa cancellation or refusal, the Bill introduces an unacceptable and arbitrary standard of criminality that takes no account of context, and goes so far to disavow any relevance of context. It imposes a rigid set of circumstances where a person must fail the character test.

72. It will capture a significant number of individuals whose offences could not fall under the commonly accepted definition of 'serious offences'. This is primarily due to the inclusion of certain offences with a potential sentence of not less than two years, regardless of the judicial sentence given. [24] For example, some offences which would fall under this category include:

[23] Chapter 11, Australian Citizenship Policy.
[24] *Migration Act 1958* (Cth), s.501(7AA)(b)(ii), (iii).

- verbal threats,[25] such as telling a person you want to slap them, or sending a text that you will punch the person's new partner, if that conduct causes harm to a person's mental health;
- assault, such as grasping a person by the sleeve if that conduct causes harm to a person's mental health;;
- any form of contravention of an intervention order,[26] including where the offender was approached by the protected person, or responded to a text from that person;
- a minor sharing an intimate image of their girlfriend or boyfriend,[27]
- Any *attempted* offence of the nature stipulated, being an offence not carried out.

73. There is also an oddity of standard introduced. For example, a person trafficking commercial quantities of drugs may not automatically fail the character test, but a child who got into a classroom fight would; a person committing repeated million-dollar fraud may not, but a former partner who texted their partner 'Merry Christmas' would; a person committing sabotage against the government may not, but a person who shouted in the office after being made redundant might.

74. When the character test provisions are set too low this leads to unnecessary detention, at significant risk and cost to the individual concerned but also at significant and unnecessary cost to the State. The tribunal and courts are likely to overturn over-zealous cancellations by departmental decision makers. This leads to unnecessary and often prolonged incarceration and creates un-necessary risk for individuals and fiscal costs for the state that are not justified or proportionate to the risk involved.

75. The introduction of s 501(3A) mandatory cancellation led to an explosion in immigration detention numbers, sometimes even for minor non-violent offending such as fraud, where revocation decisions occurred but only after long periods of detention due to administrative delay and limited processing resources. It would be folly to repeat this mistake and introduce a blanket provision that would sweep up relatively minor offending into the character cancellation and associated detention and review system without appropriate protections.

76. The Working Group submits these are not standards and inconsistencies acceptable to the Australian community, nor do they reflect a common-sense appreciation of the notion of character.

Available sentence as a parameter

77. The mere availability of a particular sentence does not and cannot solve the question of the seriousness of an offence.

[25] *Crimes Act 1986* (Vic), s 21.
[26] *Crimes (Family Violence) Act 1987*, s.22(1).
[27] *Summary Offences Act 1966*, s.41DA.

78. Primarily, this is because different circumstances give rise to different standards of moral culpability. The man who possesses cannabis to provide pain relief to his terminally ill wife is less morally culpable than the man who procures the substance to sell to children. Similarly, a young person who steals chewing gum from a shop is in a different category to the person who steals high-value goods as part of a history of offending. A homeless person with limited cognitive function or mental faculty stealing from a shop is less morally culpable than a person with robust mental health and secure housing situation. A woman who assaults her husband after years of family violence is less culpable than a person who assaults a stranger on the street. A person who breaches an order because they send a text hoping to arrange to send Christmas presents to their children is less morally culpable than a person who stalks and intimidates their former partner despite an order.

79. A maximum sentence provides for aggravating circumstances in the course of offending, where harsher punishment is warranted. In the vast majority of cases, limited or no such circumstance exists. Courts, accordingly, rarely impose the maximum penalty.[28] An actual judicial sentence is a more appropriate indication of the seriousness of offending than the charge itself.

80. By way of example, sentencing statistics for the following offences which would result in mandatory failure of the test are as follows:

    a. For the offence of breach of an intervention order, the Magistrates' Court of Victoria imposed a sentence of imprisonment in 7.7% of cases, with no person sentenced to more than 18 months' imprisonment.[29]
    b. For the offence of threatening to cause serious injury, the Magistrates' Court of Victoria imposed a sentence of imprisonment in 30% of cases, with the majority of those sentenced receiving a term of less than 6 months.[30]
    c. For the offence of assault, the Magistrates' Court of Victoria imposed a sentence of imprisonment in 36.2% of cases, with just 5% of those sentenced receiving a term in excess of two years.[31]
    d. For the offence of robbery, the Victorian higher courts imposed a sentence of imprisonment in approximately 50% of cases between 2010 and 2015, and the terms of imprisonment ranged from 2 months to 5 years.[32]
    e. For the offence of causing injury recklessly (where injury includes any pain), the Victorian higher courts imposed sentences of imprisonment in just 14% of cases, and fewer than 25% of those who were imprisoned received a sentence of over two years.[33]
    f. For the offence of affray (any unlawful fighting or a display of force that might frighten a person if they were present, regardless of whether anyone was

[28] Sentencing Advisory Council, 'How Courts Sentence Adult Offenders, 1 June 2018.
[29] SACStat Magistrates' Court, 'Breach intervention order', 1 August 2017.
[30] SACStat Magistrates' Court, 'Make threat to inflict serious injury', 1 August 2017.
[31] SACStat Magistrates' Court, 'Assault', 1 August 2017.
[32] Sentencing Advisory Council, 'Sentencing Trends for Robbery in the Higher Courts of Victoria 2010-2011 to 2014-2015 – Sentencing Snapshot 185, 28 June 2016.
[33] Sentencing Advisory Council, 'Sentencing Trends for Causing Injury Recklessly in the Higher Courts of Victoria 2010-11 to 2014-2015 – Sentencing Snapshot 191, 28 June 2016.

present), the Victorian higher courts imposed sentences of imprisonment in just 11% of cases. *No one* received a sentence in excess of two years.[34]

81. The Working Group also notes the following examples, which, while they would not cause mandatory failure of the character test under the proposed law, underscore that sentences available to a court are not a proper basis for determining seriousness of offending, and the concept of moral culpability:

    a. A person who has an article of disguise in their custody or possession may be subject to two years' imprisonment.[35]
    b. Any theft, no matter the circumstances, and including minor shop theft, has an available penalty in excess of two years.
    c. A person who begs may be subject to 12 months' imprisonment.
    d. A person who leaves a fire in the open air that they are in charge of, without leaving another person in charge (as distinct from arson), may be subject to 12 months' imprisonment.

82. It is our submission that Australia's criminal courts are appropriately placed to determine the seriousness of offending. This is their area of expertise and their express function. The discretion vested in them is so vested in express recognition of the fact that there are different standards of culpability, and different levels of seriousness within any set of offending.[36] To fail to recognise this wastes and denigrates a valuable resource and affects the quality of the administrative decision-making. It also fails to uphold a separation of powers by critiquing judges in the manner in which they consider sentencing.

83. We refer to a fact sheet on mandatory sentencing prepared by the Law Council of Australia, which provides examples of inappropriate mandatory sentencing outcomes to underscore the importance of discretion, and notes "*it is the courts, rather than the Parliament, that deal with the reality rather than the idea of crime*".[37]

84. Indeed, the nexus between cancellation or refusal and serious crime has historically been achieved by reference to sentencing by the Court, acknowledging that sentences of imprisonment represent the most serious criminal penalty available and are imposed after the consideration of all other options by a sentencing judge, importantly having heard all matters in mitigation.

85. There is no suggestion in the Bill that a decision-maker is in a better position to make such decisions that a Court. They do not have the same level and quality of information a sentencing judge has before them. All of the assessment undertaken by the courts would be wasted, and an inaccurate and incomplete picture would be before the administrative decision-maker.

[34] Sentencing Advisory Council, 'Sentencing Trends for Affray in the Higher Courts of Victoria 2010-2011 to 2014-2015 – Sentencing Snapshot 185, 28 June 2016.
[35] S.49C, Summary Offences Act 1966.
[36] See, for example, *R v Silva [2015] NSWSC 148*, where the defendant received a two-year sentence for manslaughter in circumstances where she had been subjected to ongoing family violence.
[37] Law Council of Australia, 'Mandatory Sentencing Factsheet', available at file:///C:/Users/hd9532/Downloads/1405-Factsheet-Mandatory-Sentencing-Factsheet.pdf.

86. The provisions introduced by the Bill shifts the consideration of seriousness of an offence from the sentencing Court to the Department and executive. This is an unnecessary and unwarranted subversion of the function performed by sentencing courts, and a waste of a key expert resource.

Conviction as a parameter

87. A conviction in itself is not a satisfactory basis for a conclusion about character.

88. Firstly, it is apparent that defendants plead guilty to offences for many reasons, including due to a lack of advice or for expediency. The lack of funding for migration advice means many people are not aware of the migration implications of charges.

89. A conviction can be recorded for an offence where the matter is otherwise discharged (per s 7(1)(h), *Sentencing Act 1991*. In some instances, for example, a conviction must be recorded before another non-restrictive sentence is imposed – for instance, a conviction must be recorded before an offender receives a suspended sentence (per s 7(c), Sentencing Act 1991). The court would take these steps in circumstances where it was of the view that the offending was not among the most serious. The Department would, however, automatically take a view to the contrary, without regard to the material before the sentencing judge.

90. Given that the character test has never previously been framed by reference to conviction (rather than sentence), other than in the case of sexually based offending against a minor, this means that sentencing courts in Australia have constructively miscarried in considering sentencing options for those who will now be subject to these provisions – by failing to consider the migration consequences of the sentence in mitigation, in the same manner as imprisonment length is duly considered.

91. As explored above, the Bill will capture a significant number of individuals whose conduct may not fall under the commonly accepted definition of a serious offence.

92. Again, we reiterate the context in which this consideration occurs. The consequence is likely to remove a person from home and family, often permanently. It is in addition to the punishments imposed by the criminal system. The threshold is unjustifiably low, and without basis.

Accessory offences

93. The extension of the character test to include convictions for accessory offences to a raft of undefined offences by way of 501(7AA)(v)-(vii)) is deeply concerning.

94. As the Department of Justice of the State Government of Victoria has observed:

> *The authorities do not state a consistent fault principle for accessories. Sometimes they require a purpose, to bring about a crime; sometimes knowledge; sometimes an intention in a wide sense; sometimes they are satisfied with an intention to play some part in bringing it about; sometimes they use a formula that embraces recklessness. As so often happens, the courts are*

chiefly concerned to achieve a result that seems right in the particular case, leaving commentators to make what they can of what comes out.[38]

95. Proposed subparagraph 501(7AA)(a)(vii), if enacted, would apply to non-citizens who are in any way, directly or indirectly, knowingly concerned in or otherwise a party to the commission of a designated offence. In our submission, this creates a lack of clarity and certainty and ought to be condemned.

96. The Working Group considers that accessory offences should not lead to necessary failure of the character test.

97. Further, the inclusion of 'Aiding, abetting'…the commission of such a designated offence (501(7AA)(a)(v))' could have a considerable impact on vulnerable individuals, in particular women involved in a relationship with the offender. This could serve to de-incentivise individuals from cooperating with authorities. Vulnerable individuals already concerned to assist authorities over the repercussions from the offender could risk cancellation or refusal of their visa if found guilty of aiding and abetting.

EFFECT ON CRIMINAL LAW SYSTEM

98. The Bill is likely to have unintended consequences for the criminal law system, particularly in its summary jurisdiction.

99. The Magistrates' Court of Victoria (**MCV**) has 120 magistrates, 28 reserve magistrates, 17 judicial registrars and 935 staff working across 51 locations, covering both criminal and civil jurisdictions.[39]

100. The COVID-19 pandemic has skewed court statistics somewhat, meaning it could not hear cases as it otherwise would have. We therefore refer to earlier data. The MCV held 726,000 hearings in the criminal jurisdiction in the 2016-2017 financial year. Contested hearings accounted for 8,678 of hearings in the MCV, and contest mentions 18,673.[40]

101. In the same financial year, the MCV finalised 81.3% of cases within six months, with 4,918 cases having been pending for more than 12 months.[41]

102. It is recognised that a person pleading guilty assists the justice system. It means a contest hearing is not necessary, and facilitates expedient resolution of matters. The Working Group understands that the vast majority of criminal cases currently resolve by way of plea of guilty.

103. The effect of the proposed legislation will be that accused non-citizens do not plead guilty to offences, knowing that *any conviction*, regardless of sentence, will lead to them failing the character test automatically.

[38] 'Complicity Reforms', Criminal Law Review, Department of Justice, October 2014 (available at https://assets.justice.vic.gov.au/justice/resources/1157ae80-b668-4b01-92cc-4428973bea62/complicity-reforms.pdf).
[39] Magistrates' Court of Victoria, Annual Report 2016-2018, p7.
[40] Magistrates' Court of Victoria, Annual Report 2016-2018, p.33.
[41] Magistrates' Court of Victoria, Annual Report 2016-2018, p33.

104. This will place an inordinate strain on the criminal jurisdiction, who will be forced to resolve matters other than by pleas, including at contest hearings, contest mentions, and on appeals. Numerous adjournments, where a person might otherwise have sought to enter a plea on the day, will likely be necessary. In turn, this will impact the number of people held on remand.

105. This will also impact practitioners, who will need to spend more time providing advice and negotiating regarding how to proceed with charges.

106. Moreover, sentencing judges may be required to have regard, in mitigation, to the fact that a conviction will lead to the automatic failure of the character test of the defendant, making the sentencing exercise more complex.

107. The Working Group also considers that the question of bail and remand will become more complex. Already, non-citizen prisoners do not generally have access to bail and to rehabilitative re-entry programs, and are held at higher-security facilities. Many non-citizens are afraid of having their visas cancelled and being taken into immigration detention while awaiting trial, knowing that it is difficult to access lawyers and prepare a case while in immigration detention and that it is not counted as time served, should a custodial sentence be received.

108. Increased demand in the MCV placed pressure on remand, with one in three prisoners in custody awaiting sentencing as at 30 June 2016.[42]

109. Under the Bill, people may be more reluctant to apply for bail for a number of reasons, including because of the effect of sentence calculation and because of a fear of immigration detention. They may therefore be unable to demonstrate their rehabilitation in the community, leading to a greater likelihood of an adverse outcome.

110. Already, non-citizen cancellees in criminal custody are treated significantly differently than their citizen counterparts. They have access to fewer rehabilitation processes, and if their cancellation or refusal is not finalised, they are generally not granted parole due to changes in a number of State and Territory Parole Guidelines. The changes would further entrench that difference by increasing the number of people subject to refusal or cancellation in criminal custody, reducing their access to services and their ability to demonstrate reform while on bail (if bail applications are reduced).

111. The substantial increased burden on the criminal jurisdiction is not warranted and would be damaging to the integrity and purposes of the system. We are concerned that the affected bodies and providers will not have the capacity to deal with the change in demand.

[42] Magistrates' Court of Victoria, Annual Report 2016-2018, p8.

EFFECT ON THE ADMINISTRATIVE SYSTEM

112. An unavoidable flow-on effect of the Bill will be to increase the burden at primary stage, at merits review, and at judicial review, placing immense burden on already overburdened bodies, as well as on the legal assistance sector.

113. It is difficult to quantify the increase in numbers of cancellations that the Bill is likely to cause. To calculate the likely increase, a list of offences would need to be furnished. That list would be extensive: a preliminary assessment by the Working Group indicates at least 40 Victorian offences would be caught, outside of other State and Territory offences. This is to say nothing of the overseas offences possibly caught. We again note our concerns about offences which might fall under the term, depending on their circumstances. These could not be quantified and must remain uncertain.

114. Figures regarding non-citizens committing those offences would then be needed, or, at the very least, a figure for how many of those offences are committed Australia-wide, and the proportion of non-citizens committing offences in Australia as against the citizen population.

115. It is very likely that undertaking the above analysis would indicate an immense increase in people expected to necessarily fail the character test under the Bill. It is the Working Group's position that the systems dealing with visa cancellations are already close to crisis point. Any increase will be unmanageable.

116. Plainly, and as we stated in our initial submissions, a decision-maker will need to consider the case (as they would now, when the case is referred to the Department or otherwise comes to its attention), match it up against the relevant law in the relevant jurisdiction as it stands at the time, and decide whether to exercise the discretion to institute a cancellation process. At the point of cancellation, they will again need to assess against the relevant law in case of a change. Again, this undermines the claim that certainty and objectively will be attained by the Bill.

117. **Burden on Departmental decision-makers will increase** because many more people will necessarily fail the character test. The automatic failure of the character test will mean that delegates must move to make a detailed assessment of the person's circumstances in circumstances where the person is plainly not of 'bad' character. For example, instead of sending a NOICC or NOICR, having that person return voluminous submissions, and having to consider the person against Direction 90, and having to make a jurisdictionally sound decision, that person would never needed to have been considered for cancellation or refusal at all on a common-sense approach.

118. This is especially so given the concerns about uncertainty raised above.

119. Similarly, many offences too numerous to list will still need to be considered against the discretionary character test failure powers. For example, those convicted of the following offences may still need assessment against the character test:

a. Trafficking in a drug of dependence to a child, s.71AB, *Drugs, Poisons and Controlled Substances Act 1981* (Vic);
b. Robbery and theft, ss 74 and 75, *Crimes Act 1958* (Vic);
c. Blackmail, s.87, *Crimes Act 1958* (Vic), and
d. Obtaining property by deception, s.81, *Crimes Act 1958* (Vic).

120. Given the enormous breadth of offences *not* covered, and given the uncertainty raised, there will be little reduced burden on decision-makers in discretionary assessments of character.

121. As a result of the above, **increased delays** will occur. Already, there are substantial waiting periods for resolution of cancellation and refusal matters, which weigh heavily on those affected and increase the number of persons in immigration or criminal custody.

122. **Burden on the Administrative Appeals Tribunal (AAT) will increase** as a flow-on effect. cases concerning visa refusal or cancellation under s.501 are accorded special priority by the Tribunal, given that in most cases they must by law be determined within 84 days or will be deemed to be affirmed.[43] Reviews in 'character' cases are usually conducted by senior members, and are resource-intensive. Following the amalgamation of the Tribunal in 2015, members now sit across divisions, such that increased traffic in one division has an impact in all others. Specifically, an increase in lodgements in the General Division, relating to character, would likely draw resources away from the Migration and Refugee Division, where the backlog of cases is already years long.[44]

123. **Burden on Australia's federal courts will increase** as a flow-on effect.

124. **Burden on the legal assistance sector will increase**. The Law Council has highlighted the large increase in demand for assistance following the expansion of character powers in 2014.[45]

125. **Burden on the detention system will increase**. The average yearly cost of holding one person in onshore detention is $361,835.[46] The effect of a cancellation or refusal under s.501 is detention until any review process is complete. The period of time between when a person provides their response to a NOICC/NOICR and when the decision is taken to cancel a visa is frequently very lengthy, months or even years. Given the likely increase in primary cancellations and refusals, the existing burden on the AAT, and the years-long delay in the courts, the cost of detention to the community can be expected to be extraordinary.

[43] s 500(6L)(c).
[44] We draw the Committee's attention to the recent report on the Administrative Appeal Tribunal's processed conducted by former Justice Ian Callinan, available at https://www.ag.gov.au/Consultations/Documents/statutory-review-tribunals-act-2015/report-statutory-review-aat.pdf. The report notes an *'intimidating'* backlog in migration and refugee decisions – nearing 55,000. Currently, the relevant divisions of the Tribunal are able to finalise only around 17,000 decisions per year. This means the existing backlog is likely to take years to clear.
[45] The Justice Project, *Final Report – Part 1: Recent Arrivals to Australia* (August 2018), 30.
[46] Refugee Council of Australia, 'Statistics on people in detention in Australia', November 2021.

126. This does not include the cost due to operational reasons of moving persons around in the detention centre across the country that is currently occurring due to capacity issues within the detention centre system.

127. It is also likely that the increased burdens outlined above will have flow-on consequences for backlogs in other areas of the visa and citizenship processing.

128. Preserving a requirement to make an assessment for the character test is a protection against the prolonged or indefinite detention of people in inappropriate circumstances. People should not be detained in disproportionate circumstances.

129. There is a lack of justification present in the Bill or the Explanatory Memorandum for setting in train such serious consequences, not only for applicants and their family members, but for the resources of the Australian community.

130. Contrary to the claim in the Explanatory Memorandum, then, it is not the case that the amendments will have a low financial impact.

UNCERTAINTY

131. The Working Group notes a lack of clarity regarding offences that may be caught, and expresses significant concern for the lack of certainty and proportion, particularly cross-jurisdictionally. There is not a uniform approach across jurisdictions within Australia, both in terms of sentences available and in terms of application: this will result in different outcomes for the same conduct in different states of Australia. This is plainly undesirable.

132. The sole substantive change to this iteration of the Bill considerably increases that uncertainty. It mandates that a conviction for common assault, to meet the definition of 'designated offence', must cause or substantially contribute to temporary or permanent bodily harm or harm to another person's mental health, or it must involve family violence.

133. Firstly, again, the application will be different in different state jurisdictions because of the varying offences and definitions each state uses. As one example, the Bill does not define bodily harm.

134. Secondly, for a delegate to determine whether a common assault caused injury (bodily or mental) they would need to review the evidence in the case. A common assault does not necessarily involve harm. Getting that evidence, and properly construing it, is time-consuming, difficult, and contains the risk of serious error. In jurisdictions like the Magistrates' Court of Victoria, ascertaining whether harm was caused might require listening to an audio recording of the sentencing. Not only is there remarkable uncertainty, there is also severe administrative burden and cost involved.

135. This is all the more so when it comes to ascertaining whether mental harm was caused or substantially caused by the offending. There is uncertainty about whether that mental harm must be caused to the victim, or whether it extends to others (such as relatives).

136. A delegate would again need to review the evidence or obtain and read or listen to sentencing remarks. In some jurisdictions such as New South Wales,[47] there will categorically never be a victim impact statement regarding common assault, and whether comment in sentencing is made regarding mental harm will be inconsistent.

137. The Criminal Code definition referred to in the Bill is as follows, at s 4: "harm to a person's mental health includes significant psychological harm to the person, but does not include a reference to ordinary emotional reactions (for example, distress, grief, fear or anger)."

138. For a delegate to determine whether there was evidence of mental harm, whether it was an ordinary human reaction, and the cause of that harm, creates unacceptable uncertainty. Far from creating increased uniformity, it fosters subjective and disparate conclusions from delegate to delegate, from jurisdiction to jurisdiction, and based on evidence that will vary wildly.

139. The Working Group considers an unacceptable level of uncertainty inheres in the Bill more generally. At the hearing for the previous iteration of the Bill, representatives of the Department were unable to provide any of the following:
    a. A list of which offences in which jurisdictions would fall under the category 'designated offence'. Indeed, the Department was unsure that such a list could even be compiled. They could not advance a rough number of offences that would be caught.
    b. An estimate, even roughly, of how many people would be affected. Indeed, they noted that they "haven't been able to" model such figures, indicating that they have attempted to do so.
    c. A figure for how many non-citizens have been convicted of an offence.
    d. Any support for a proposition that existing laws have increased community safety, and that the Bill will increase community safety.
    e. Any figures for how many people affected by s.501 sought review.

140. The Department stated that any list of designated offences would change rapidly, even in the space of two weeks. This is of great concern and undermines the claim that certainty and objectively will be attained by the Bill.

141. It is the Working Group's view that the uncertainty caused by the Bill makes it unworkable and dangerous.

IMPACT ON VICTIM-SURVIVORS OF FAMILY VIOLENCE

142. The Working Group has raised concerns that the existing character framework places victim-survivors of family violence, particularly women and children, at considerable risk. Those risks arise from the prevalent misidentification of victims as offenders, the consequential cancellation of visas held by victims who are dependent upon the visa of their spouse and the lack of direct consideration given to victims' interests in *Ministerial Direction 90.* The Bill increases those risks, and jeopardises the recommendations of the Fourth National Action Plan to Reduce Violence Against Women and Their Children.

[47] S 27 Crimes (Sentencing Procedure) Act 1999.

143. The National Action 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.'[48]

144. We note with concern that the National Action Plan has been employed to justify amendments to the visa cancellation regime in recent times, even though there is *no mention* in the document of visa cancellation as an appropriate method for dealing with family violence. It is now firmly established in the family violence sector that policy initiatives which impact or purport to protect the interests of victim-survivors must be carefully guided by experts in the field and the input of those affected. As was the case with the introduction of *Direction 90,* there is no indication that the government has sought to gauge the views of family violence experts on the possible implications of the Bill.

Misidentification of victims as perpetrators of family violence

145. If passed into law, the provisions of the Bill will increase the risk that that victim-survivors of family violence, particularly women and children, will themselves face visa cancellation or refusal.

146. Misidentification of victims as perpetrators is a critical issue in dealing with family violence: that is, that often it is the *survivor* who is considered the perpetrator of the violence. Specialist family violence practitioners estimate 30-50% of women listed as respondents that they see have been misidentified. Aboriginal women, migrant and refugee women, women with disabilities, criminalised women and LGBTIQ+ people are at greater risk of being misidentified as a perpetrator.[49] Indeed, almost half the women murdered by an intimate partner in Queensland had previously been labelled by police as the perpetrator of domestic violence.[50]

147. Weaponization by perpetrators of accusations of family violence against victim-survivors are also critically relevant. Under the Bill, if a victim-survivor is misidentified as a perpetrator and convicted of a family violence offence including a breach, she will automatically fail the character test and be exposed to cancellation or refusal.

148. As we have set out above, a victim-survivor of family violence who through her circumstances is coerced into permitting her partner to have contact with her and their child, in breach of an intervention order, will automatically fail the character test. Under the overbroad terms set by the Bill, she will be taken to have 'aided' and facilitated the breach of orders by the perpetrator.

149. Perpetrators may use this law to further harm victim-survivors of family violence, particularly women and children.

[48] Action 10, Fourth Action Plan, NAP - https://www.dss.gov.au/sites/default/files/documents/08_2019/fourth_action-plan.pdf.
[49] Family Violence Reform Implementation Monitor, 'Monitoring Victoria's family violence reforms', December 2021.
[50] Smee, B., 'Queensland police misidentified women murdered by husbands as perpetrators of domestic violence', the Guardian, 3 May 2021.

Increased risks to women and children experiencing family violence

150. 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.

151. 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.

Particular risk to temporary visa holders

152. It is noteworthy that the Fourth National Action Plan refers to migrant women on temporary visas as a cohort particularly at risk of family violence, due to their insecure visa status and therefore their dependence upon their spouse. Despite purporting to protect the interests of victim-survivors, the Bill singularly compounds the vulnerability of women and children on temporary visas. On this basis alone it should be rejected.

153. The Bill increases the grounds on which perpetrators of family violence might have their visas cancelled. As well as crimes of violence or sexual coercion, the definition of a 'designated offence' specifically captures breach of Court orders, of course including protective and intervention orders. However in expanding the bases on which the perpetrators of family violence may have their visas cancelled, the Bill simultaneously exposes their partners and children to visa cancellation.

154. Women and children who hold temporary visas are in a particularly vulnerable position. Often, their visas will be dependent upon the visas held by a male head of the family, who was the 'primary applicant' for the temporary visa. Temporary visas do not contain domestic violence provisions, which would allow holders to transition from one visa to another if they demonstrate family violence. Rather, if the visa held by the 'primary' visa-holder is cancelled on character grounds, as he has committed family violence against his partner or children, the perverse result is that his partner or children who are dependent upon his visa must also have *their* visas cancelled.

155. In the absence of alternative visa pathways for many women and children who have experienced family violence, perpetrated by the primary visa holder, there is very little security or assistance available for non-citizen survivors of family violence, further contributing to their precarious status.

156. It also significantly increases the possibility of the permanent separation of families against the will of those families, including leaving women and children without viable

visa options in Australia, no material, parenting or other support. Survivors' voices may be sidelined. Women and children may be subjected to paternalistic, disempowering and dangerous intervention in their lives and against their wishes. They may have little control over the outcomes and processes.

157. Given the potential effects set out above, the Bill is likely to have the unintended effect of deterring survivors of family violence from seeking the assistance of police or other support services, given the seriousness of the consequences for perpetrators and for themselves.

158. 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.

COMPATIBILITY WITH AUSTRALIA'S INTERNATIONAL OBLIGATIONS

159. The Explanatory Memorandum asserts that the Bill is compatible with Australia's human rights obligations. As set out above, the Committee has raised concerns about whether this is the case. The Working Group shares those concerns.

160. The Working Group is particularly concerned about the impact of the proposed amendments on the prohibition on refoulement and expulsion of aliens, and the rights relating to family and children.

Non-refoulement obligations

161. In operation, the provisions contained in the Bill are likely to further undermine Australia's compliance with its *non-refoulement* obligations at international law.

162. The Explanatory Memorandum states:

> *Australia remains committed to its international obligations concerning non-refoulement. These obligations are considered as part of the decision whether to refuse or cancel a visa on character grounds. Anyone who is found to engage Australia's non-refoulement obligations during the refusal or cancellation decision or in subsequent visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations… A person with a protection finding cannot be removed to the relevant country unless they request this in writing, or where the Minister makes a decision under section 197D that, for example due to improving country conditions, a protection finding would no longer be made in the person's case…*
>
> *As such, this amendment does not affect Australia's commitment to complying with its non-refoulement obligations.*[51]

163. This is incorrect, including because:

[51] EM 12.

a. In the Working Group's experience, people with protection findings who are in immigration detention are requesting removal because of the extreme distress caused to them by protracted or indefinite detention. Although the Department has found them to be refugees, they can be removed where they make a request to be removed. The Working Group notes its serious concerns regarding whether any such requests can be described as voluntary.
b. A person must apply for a Protection visa and obtain a protection finding before they are protected by the current legislation. The Department may be aware that they have refugee claims, including because of their profile or because they arrived on a humanitarian visa, but they can still *refoule* them unless a Protection visa application is made. Many people cannot or do not make protection visa applications because of exhaustion, lack of resources, or lack of capacity, including people with severe mental illness.

164. Numerous cases show that a person's status as a refugee is far from determinative in a character process. Many people who are refugees, including those with serious mental illness, receive negative decisions, condemning them either to indefinite detention in Australia's notorious detention centres, or to refoulement to the worst forms of harm.

165. Australia's accession to relevant international treaties conferring *non-refoulement* obligations requires it to treat those obligations as paramount as part of a decision under the character framework. *Non-refoulement* obligations are non-derogable at international law, meaning they cannot be selectively withdrawn from.

166. Further, inbuilt in the *non-refoulement* assessment is consideration of the risk posed by the applicant to the community of the receiving country. This assessment is contained at Articles 1F and 33(2) of the *Convention on the Status of Refugees.* In turn, exclusions based on criminal or other prohibited conduced are enshrined at sections 5H(2), 36(1C) and 36(2C) of the Act. In recognition of the seriousness of exclusion from refugee or protected person status on the basis of an offence, the regime established by the Act permits a right of review to the AAT in its general decision in respect of all such decisions. In countless cases, Courts have emphasised the need for 'meticulous investigation and solid grounds' before an exclusion decision is made.[52] In the Working Group's view, this necessarily reflects both the grave consequences that flow from excluding an otherwise fearful person from protected status, as well as the paramount status of *non-refoulement* at international law.

167. The approach taken under the current character regime to questions of *non-refoulement* is inconsistent with the approach mandated under international treaties. *Non-refoulement* is either elided or treated as one consideration amongst many to be 'balanced' in arriving at a character decision. The dangers associated with the present approach will be redoubled as the ambit of the character power expands. Under the powers proposed by the Bill, a Protection visa holder may face an increased chance of cancellation leading to *refoulement* or indefinite detention following minor offending such as a verbal threat.

[52] *WAKN v MIMIA* (2004) 138 FCR 579 at [52].

168. If enacted, the Bill creates the significant and expanded possibility for Australia's *non-refoulement* obligations to be undermined.

Rights relating to families and children

169. The Explanatory Memorandum notes Article 3(1) of the Convention on the Rights of the Child, and Articles 17(1) and 23(1) of the ICCPR, as relevant.

170. As points of principle, the Working Group considers that children should not be subject to visa cancellation, and that family unity should be a primary consideration in the character framework. The character test should exclude offences occurring before a person turns 18 years old.

171. In the Working Group's significant experience, contrary to what is stated in the Explanatory Memorandum, it is **not** only exceptional circumstances in which children face visa cancellation or refusal. The Working Group has seen numerous cases of serious concern in which children have faced cancellation or refusal.

172. The expansion of automatic failure of the character test will affect children particularly severely. Children convicted of relatively minor offences will now automatically fail the character test. The Working Group considers that is likely to be disastrous for many Australian families, and plainly contrary to the best interests of the child.

173. People under 18 are not tried as adults: the laws of Australia affirm the common-sense proposition that children are unlike adults in the degree to which they are morally responsible for their actions.

174. Minors who offend often come from unstable backgrounds with low literacy and childhood trauma. They are often able to rehabilitate and become functional members of society.[53]

175. To subject a child to visa cancellation is to subject them to immigration detention. The Australian Human Rights Commission's National Inquiry into Children in Detention made a number of findings and recommendations which we submit are highly relevant to consider. The AHRC found that the mandatory and prolonged immigration detention of children is in clear violation of the Convention on the Rights of the Child:

> *Detention puts teenagers at high risk of mental illness, emotional distress and self-harming behaviour.*
>
> *Detention impedes the social and emotional maturation of teenagers. [...]*
>
> *The detention environment is not a safe and supportive environment for teenagers... Teenagers in detention are exposed to risk as they are kept in confined areas with other teenagers and adults who are mentally unwell and*

[53] McGregor, Joel, 'Young crime is often a phase, and locking kids up is counterproductive', the Conversation, 29 July 2019, available at http://theconversation.com/young-crime-is-often-a-phase-and-locking-kids-up-is-counterproductive-120968.

> *who engage in self-harming behaviour... Teenagers in detention are subject to policies and procedures which encroach upon their dignity.*
> *...*
> *Unaccompanied children require higher levels of emotional and social support because they do not have a parent in the detention environment. Detention is not a place where these children can develop the resiliencies that they will need for adult life.*
>
> *There are causal links between detention, mental health deterioration and self-harm in unaccompanied children*.[54]

176. Whilst the best interests of the child are presently a primary consideration in Direction no. 90, they are rarely determinative. It is our experience that the assessment of this is generally inadequate, often due to an unavailability of information and an inability to obtain information. Given that a negative decision will likely permanently separate families, improved protection is manifestly warranted. The Department is likely to be able to provide statistics regarding how many visa cancellees had affected children in Australia, and the proportion of cases where a favourable outcome was reached.

177. The Bill increases significantly the risk of harm to children (either by the cancellation of their visas, or as the result of separation from a parent) and the risk of family separation. An increase in visa cancellations such as that expected as a result of this amendment will necessarily involve many hundreds more effected children and families, and particularly in circumstances of considerably reduced seriousness of offending.

178. This is an unacceptable consequence of the Bill.

EFFECT ON AUSTRALIA'S INTERNATIONAL STANDING

179. In our submission, the Bill has the potential to adversely affect Australia's relationships within the international community.

180. By far the majority of those affected by visa cancellation are citizens of New Zealand. The government of New Zealand has repeatedly expressed concern about these cancellations to the Australian government, saying they are having a "*corrosive effect*" on Australia's relationship with New Zealand.[55]

181. It is to be expected that other countries would share this perspective. Where there is little nexus between a person and their 'home country' – in particular, where they have been raised in Australia since childhood – it is difficult to see an appropriate rationale for their forcible removal from Australia. The Bill would increase the numbers of refusals and cancellations, and therefore the strain on our international relations (in particular, with New Zealand).

[54] Australian Human Rights Commission, The Forgotten Children: National Inquiry into Children in Immigration Detention
(2014).
[55] Martin, S., 'Visa character test change 'could mean fivefold rise in deportations', the Guardian, 6 August 2019, available at https://www.theguardian.com/australia-news/2019/aug/06/visa-character-test-change-could-mean-fivefold-rise-in-deportations.

182. As the Full Court of the Federal Court of Australia has observed:

> *[T]he consequence of non-compliance with Australia's treaty obligations does not only impact on the person who might be returned to their home country. It impacts upon Australia's reputation and standing in the global community*.[56]

183. The Full Court has also said that the violation of international law is intrinsically and inherently a matter of national interest:

> *Article 26 of the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), and the principle of pacta sunt servanda, impose upon the Australian Government an obligation to observe and perform, in good faith, those treaties to which it is a party. Failure to do so exposes the nation to responsibility for internationally wrongful acts under the Draft Articles on Responsibility of States for Internationally Wrongful Acts, commended by the General Assembly on 28 January 2002, A/RES/56/83 and on 8 January 2008, A/RES/62/61, in which case Australia may face legal consequences (Art 28), including, but not limited to: cessation and non-repetition (Art 30), reparation (Art 31) in the form of restitution (Art 35), compensation (Art 36) and satisfaction (Art 37), in addition to countermeasures (Art 49). Whether or not these legal consequences in fact arise, a breach of a treaty is a breach of international law, which is a breach of law nonetheless.*[57]

184. This Bill is apt to seriously affect Australia's international standing.

185. The Working Group considers that an appropriate protection against such harm could be effected by excluding from visa cancellation people who have lived in Australia for ten or more years, and by ensuring Australia is compliant with its international obligations.

SERIOUS IMPACTS ON SECTIONS OF THE AUSTRALIAN COMMUNITY

Aboriginal and Torres Strait Islander people

186. Visa cancellation and refusal also affects Indigenous Australians, being Aboriginal and Torres Strait Islander persons. Such persons may be non-citizens because they were born in other countries, despite having Indigenous heritage. The Working Group is aware of multiple of visa cancellation of Indigenous non-citizens, which has created the fundamentally anomalous situation that Indigenous Australians may be subject to forcible removal from Australia to other countries.

187. The *Racial Discrimination Act 1975* (Cth) at s.3 defines 'Aboriginal' as a person who is a descendant of an indigenous inhabitant of Australia and 'Torres Strait Islander' as a person who is a descendent of an indigenous inhabitant of the Torres Strait Islands.

[56] *Ali v Minister for Home Affairs* [2020] FCAFC 109 at [90]; see also *Hernandez v Minister for Home Affairs* [2020] FCA 415 at [63].
[57] *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195 at [13]-[15].

188. Aboriginal and Torres Strait Islander cultures have existed in Australia continuously for some 65,000 years and are the oldest living cultures in the world.

189. The relationship of Aboriginal Torres Strait Islander persons to Australia is unique:

> *Aboriginal and Torres Strait Islander peoples also hold distinct rights through their unique relationship to the land and waters and their status as the first peoples of Australia. Their experience of colonisation distinguishes them from all others within our multicultural nation.*[58]

190. As the Council for Aboriginal Reconciliation have noted, it is an unavoidable reality of Australia's past that Aboriginal and Torres Strait Islander peoples have not had the opportunity to fully enjoy their human rights in this country:

> *This is because of the process of colonisation, the dispersal, removal and dispossession of many Aboriginal and Torres Strait Islander peoples, and a history of discrimination.*[59]

191. Australia is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples (**the Declaration**), which recognises "*historic injustices*" and "*the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies*". Setting out the "*minimum standards for survival, dignity and well-being*", the Declaration repeatedly underscores the right of Indigenous Peoples to their land and to self-determination.

192. In a 2017 report by the Australian Law Reform Commission, the disproportionate incarceration of Aboriginal and Torres Strait Islander persons was noted:

> *In 2016, Aboriginal and Torres Strait Islander people were seven times more likely than non-Indigenous people to be charged with a criminal offence and appear before the courts; 11 times more likely to be held in prison on remand awaiting trial or sentence, and 12.5 times more likely to receive a sentence of imprisonment.*[60]

193. In considering the issue, the Report took into account:

> *… the relationships between Aboriginal and Torres Strait Islander offending and incarceration and inter-generational trauma, loss of culture, poverty, discrimination, alcohol and drug use, experience of violence, including family violence, child abuse and neglect, contact with child protection and welfare*

[58] Council for Aboriginal Reconciliation, *Roadmap to Reconciliation* (2000), at http://www.austlii.edu.au/au/orgs/car/recognising_rights/pg3.htm.
[59] Ibid.

[60] Australian Law Reform Commission, Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report No 133 (2017)..

systems, educational access and performance, cognitive and psychological factors, housing circumstances and employment. [61]

194. Indigenous persons are likely to be disproportionately affected by the Bill.

195. The Working Group recommends that existing legislation ought to be amended to exclude Indigenous Australians from the possibility of visa cancellation or refusal.

People with serious health issues

196. People with mental health issues, disability, acquired brain injuries, and other capacity limitations including trauma backgrounds are likely to be disproportionately affected by this legislation.

197. People with these vulnerabilities should have increased protections in existing legislation so that the full range of circumstances relating to their diminished responsibility or relevant mitigating factors, can be taken into account to prevent serious injustice.

CONDITIONS IN DETENTION

198. Given the likely increase in people in immigration detention, and given after a decision is made to cancel or refuse on character grounds they must remain in immigration detention, the Working Group notes with concern the conditions in Australia's immigration detention facilities.

199. By way of example, at Victoria's Melbourne Immigration Transit Accommodation, where conditions are better than at most facililities the following non-exhaustive events have occurred:
    a. A hunger strike stopped after detained refugees became dangerously ill and were admitted to hospital, with concerns raised about medical treatment. [62]
    b. A 46-year-old New Zealand man died. [63]
    c. In 2019, a 23-year-old Afghan man **died** at MITA, after his medication was allegedly ceased. [64] Another detainee, seeing paramedics treating the man, collapsed, and was hospitalised two days later. [65]
    d. Days later, an Afghan asylum seeker was taken to hospital after trying to set himself on fire. [66]

[61] Ibid.

[62] Vasefi, S., 'Refugee hunger strike at Melbourne detention centre ends after 17 days with detainees in hospital', the Guardian, 7 July 2021.
[63] McGowan, M., 'New Zealand man dies while detained in Melbourne immigration detention centre', the Guardian, 10 August 2020.
[64] Davidson, H., 'Afghan man dies at Melbourne immigration detention centre', Guardian Australia, 13 July 2019, available at https://www.theguardian.com/australia-news/2019/jul/13/afghan-man-dies-at-melbourne-immigration-detention-centre.
[65] Hall, B., 'Iraqi asylum seeker sews his lips together amid mounting despair at MITA, lawyer says', Sydney Morning Herald, 23 July 2019, available at https://www.smh.com.au/national/iraqi-asylum-seeker-sews-his-lips-together-amid-mounting-despair-at-mita-lawyer-says-20190723-p529sr.html.
[66] Baker, N., 'Asylum seeker tries to set himself on fire at Melbourne detention facility', SBS News, 16 July 2019, available at https://www.sbs.com.au/news/asylum-seeker-tries-to-set-himself-on-fire-at-melbourne-detention-facility.

e. On 22 July 2019, an Iraqi asylum seeker was hospitalised after sewing his lips together.[67]
f. In January 2019, hundreds of detainees went on a hunger strike in protest against their living conditions.[68]
g. A two-year-old girl had four teeth surgically removed and another four treated on Thursday after they began to rot during her time in detention. She may not grow front teeth until the age of 7.[69]
h. Another two-year-old girl was forced to wait over seven hours to be taken to hospital after receiving a head injury.[70]
i. Also this month, a lawyer for a family of detainees was forced to call an ambulance for a 15-month-old girl suffering influenza, after complaints were ignored by staff;[71]
j. In 2019, the Australian Human Rights Commission - a government body - reported concerns that the use of restraints may not be necessary, reasonable and proportionate in all circumstances and limited space and privacy at the centre.[72]
k. Reports of increasing violence by guards are not uncommon.[73]

200. The Australian Human Rights Commission (**the AHRC**) has published a report on risk assessment practices in onshore detention facilities[74]. The AHRC considers that the methods being currently used to manage risks in detention 'can limit the enjoyment of human rights, in a manner that is not necessary, reasonable and proportionate'. In particular, the ACHR expresses concern in relation to the following issues:

- *Inaccurate risk assessments may result in people in detention being subject to restrictions that are not warranted in their individual circumstances.*

- *The use of restraints during escort outside detention facilities has become routine, and may in some cases be disproportionate to the risk of absconding.*

[67] Hall, B., 'Iraqi asylum seeker sews his lips together amid mounting despair at MITA, lawyer says', Sydney Morning Herald, 23 July 2019, available at https://www.smh.com.au/national/iraqi-asylum-seeker-sews-his-lips-together-amid-mounting-despair-at-mita-lawyer-says-20190723-p529sr.html.
[68] 'Hundreds go on hunger strike at Melbourne detention centre', SBS News, 9 January 2019, available at https://www.sbs.com.au/news/hundreds-go-on-hunger-strike-at-melbourne-detention-centre.
[69] Truu, M., 'Two-year-old in immigration detention forced to have rotting teeth surgically removed', SBS News, 26 July 2019, available at https://www.sbs.com.au/news/two-year-old-in-immigration-detention-forced-to-have-rotting-teeth-surgically-removed.
[70] Hall, B., 'Iraqi asylum seeker sews his lips together amid mounting despair at MITA, lawyer says', Sydney Morning Herald, 23 July 2019, available at https://www.smh.com.au/national/iraqi-asylum-seeker-sews-his-lips-together-amid-mounting-despair-at-mita-lawyer-says-20190723-p529sr.html.
[71] Razak, Iskhandar, 'Asylum seeker's baby rushed from Melbourne immigration detention centre to hospital with flu', ABC News, 17 July 2019, available at https://www.abc.net.au/news/2019-07-16/melbourne-immigration-detention-baby-rushed-to-hospital-with-flu/11314074.
[72] 'Risk management in immigration detention', Australian Human Rights Commission, 2019, available at https://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_risk_management_immigration_detention_2019.pdf.
[73] See, for example, https://www.news.com.au/video/id-5348771529001-6032415068001/detainee-accuses-broadmeadows-detention-centre-guards-of-violence.
[74] Australian Human Rights Commission, *Risk management in immigration detention (2019)*, 18 June 2019, available at: https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019 (AHRC Report 2019)

- *Conditions in high-security accommodation compounds and single separation units are typically harsh, restrictive and prison-like.*

- *Restrictions relating to excursions, personal items and external visits are applied on a blanket basis, regardless of whether they are necessary in a person's individual circumstances.*

- *Australia's system of mandatory immigration detention—combined with Ministerial guidelines that preclude the consideration of community alternatives to detention for certain groups—continues to result in people being detained when there is no valid justification for their ongoing detention under international law.*[75]

201. In the same report, the AHRC noted that the average length of detention of people has increased and 'has stood at over 400 days since mid-2015'.[76] The proposed changes would lead to a significant increase of length of time spent in detention, particularly as decision-makers take longer to finalise matters as work volume will increase dramatically. As a result, the mental and physical health of people held in immigration detention will deteriorate further as they are held for longer periods for conduct that ordinary Australians would not consider warrants the deprivation of a person's liberty, and their access to family and home.

202. Any provisions resulting in greater numbers of persons in immigration detention should be avoided.

203. In addition, the provisions of current law which trigger mandatory failure of the character test where a person commits any offence relating to immigration detention would benefit from review. In our submission, the well-documented scope and scale of rights violations against those held in immigration detention centres warrants a case-by-case examination of any decision to refuse or cancel a visa because of a detention-related offence. It is vital that there be the opportunity for assessment of the degree of culpability for detention-related offences against the specific context and relevant mitigating circumstances relating to that offence to ensure that visa cancellation or refusal process cannot be used as an additional tool of punishment against those held in immigration detention who raise complaints about their treatment in detention.

RETROSPECTIVITY

204. The Working Group expresses concern about the retrospectivity of the proposed Bill. It means that people who have committed historical offences will fail the character test, where that non-citizen was previously not considered to fail the character test.

205. Given the impact on individuals, families, and communities, if the Bill were to be passed, the Working Group considers the proposed law must not be retrospective.

[75] AHRC Report 2019, *Commissioners Foreword,* available at: https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019
[76] AHRC Report 2019, p. 68

CONCLUSION

206. The Bill proposes to replace a powerful and flexible tool with a blunt and unsubtle tool that will increase poor and disproportionate decision-making, burdens on review bodies and the detention system, and community apprehension. Importantly, it will, without justification, wrest from those with expertise – the judiciary – assessment of what is considered 'serious', and replace it with a turgid and inflexible definition, the application of which will in many cases be completely inappropriate.

207. The Australian community will not support an opaque, unfair system, and, as more and more people are affected by visa cancellations and refusals, and the public becomes aware of the realities of many cancellations and refusals, concern relating to this framework is likely to increase. If outcomes out of line with community standards proceed, the Australian community may lose faith in the administrative system and its objects.

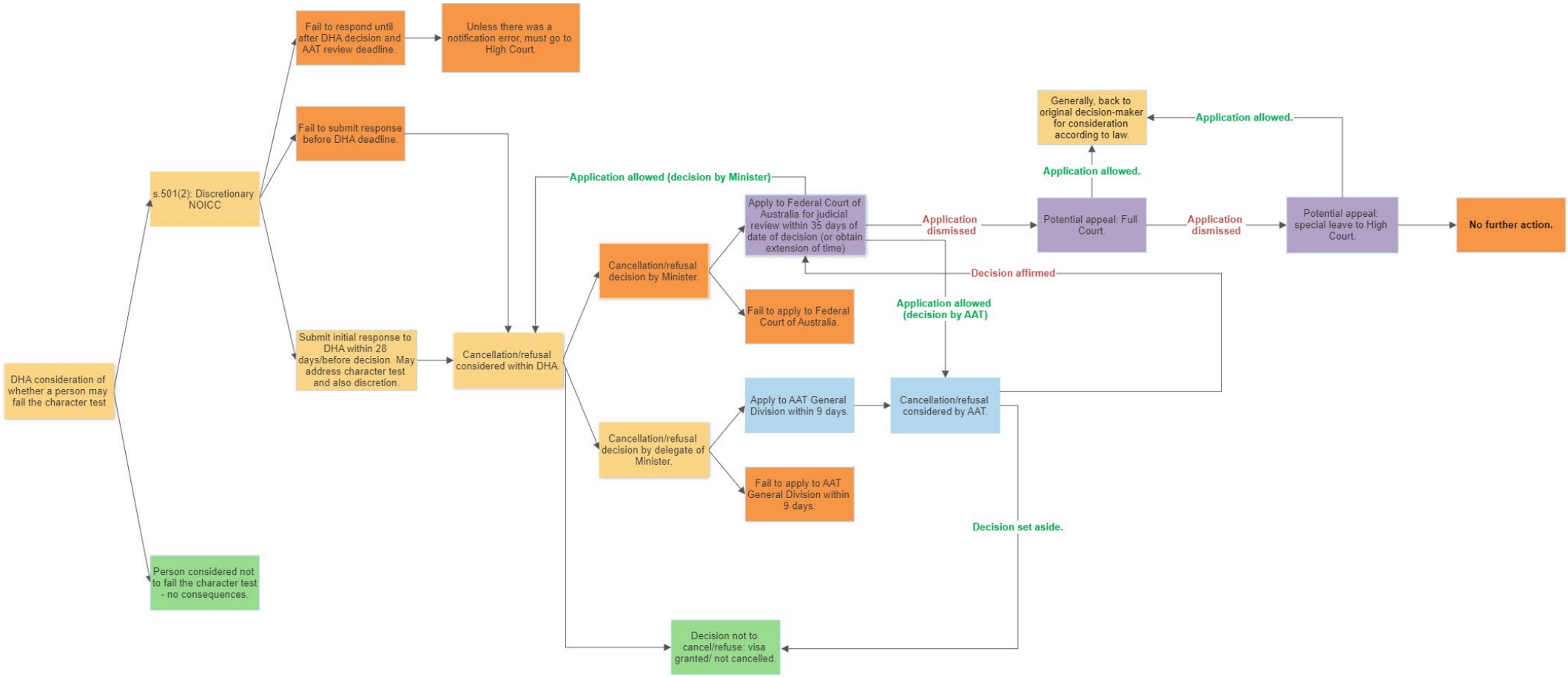
208. The Working Group urges the Committee to reject this unjustified and dangerous Bill.

209. 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, Chair and Deputy Chair of the Working Group, by email at workinggroup@visacancellations.org.

ANNEXURE A

Section 501(2)

Discretionary cancellation by delegate or Minister with natural justice



ANNEXURE B

2 SEPTEMBER 2019

MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2019

Supplementary submission to the Inquiry

VISA
CANCELLATIONS
WORKING GROUP

SUPPLEMENTARY SUBMISSION

1. The Visa Cancellations Working Group (**the Working Group**) refers to its previous submissions regarding the Inquiry into the recently tabled Migration Amendment (Strengthening the Character Test) Bill 2019 (**the Bill**), made both in writing and by way of oral evidence at the Senate Committee hearing. The Working Group is grateful to the Committee for the opportunity to contribute to the Inquiry.

2. Following the Senate Committee hearing on 19 August 2019, it is apparent that there remain issues to address. The Working Group makes the following submissions.

UNCERTAINTY

3. The Working Group remains very concerned about the uncertainty inherent in the Bill. Evidence given at the hearing did nothing to alleviate those concerns, and indeed exacerbated them.

4. At the hearing, representatives of the Department of Home Affairs (**the Department**) were unable to provide any of the following:

    a. A list of which offences in which jurisdictions would fall under the category 'designated offence'. Indeed, the Department was unsure that such a list could even be compiled. They could not advance a rough number of offences that would be caught.

    b. An estimate, even roughly, of how many people would be affected. Indeed, they noted that they "haven't been able to" model such figures, indicating that they have attempted to do so.

    c. A figure for how many non-citizens have been convicted of an offence.

    d. Any support for a proposition that existing laws have increased community safety, and that the Bill will increase community safety.

    e. Any figures for how many people affected by s.501 sought review.

5. The Department stated that any list of designated offences would change rapidly, even in the space of two weeks. This is of great concern and undermines the claim that certainty and objectively will be attained by the Bill.

Calculating a figure for increase

6. To calculate the likely increase, a list of offences would need to be furnished. That list would be extensive: a preliminary assessment by the Working Group indicates at least 40 Victorian offences would be caught, outside of other State and Territory offences. This is to say nothing of the overseas offences possibly caught.

7. Figures regarding non-citizens committing those offences would then be needed, or, at the very least, a figure for how many of those offences are committed Australia-wide, and the proportion of non-citizens committing offences in Australia as against the citizen population.

8. We again note our concerns about offences which *might* fall under the term, depending on their circumstances. These could not be quantified and must remain uncertain.

9. It is very likely that undertaking the above analysis would indicate an immense increase in people expected to necessarily fail the character test under the Bill. It is the Working Group's position

that the systems dealing with visa cancellations are already close to crisis point. *Any* increase will be challenging and may lead to systemic crisis.

10. Plainly, and as we stated in our initial submissions, a decision-maker will need to consider the case (as they would now, when the case is referred to the Department or otherwise comes to its attention), match it up against the relevant law in the relevant jurisdiction as it stands at the time, and decide whether to exercise the discretion to institute a cancellation process. At the point of cancellation, they will again need to assess against the relevant law in case of a change. Again, this undermines the claim that certainty and objectively will be attained by the Bill.

ADMINISTRATIVE BURDEN

11. As pointed out in our testimony before the Committee, there already exists a critical amount of decision-making pressure on the Department, the Administrative Appeals Tribunal, and the Federal Courts. All bodies are under considerable strain and are struggling to deal with existing caseloads, manifesting in delays.

12. A drastic expansion in character refusal and cancellation powers will add to the burden, both on the Department, and on the already beleaguered General Division of the Tribunal. As noted in evidence before the Committee, cases concerning visa refusal or cancellation under s.501 are accorded special priority by the Tribunal, given that in most cases they must by law be determined within 84 days or will be deemed to be affirmed.[1] Reviews in 'character' cases are usually conducted by senior members, and are resource-intensive. Following the amalgamation of the Tribunal in 2015, members now sit across divisions, such that increased traffic in one division has an impact in all others. Specifically, an increase in lodgements in the General Division, relating to character, would likely draw resources away from the Migration and Refugee Division, where the backlog of cases is already years long.[2]

13. Under the Act, a person whose visa is refused or cancelled on character grounds is taken to have had all other visas refused or cancelled on the same grounds, and is thus liable for detention. The expense of increased community compliance activities and detention cannot be underestimated.

14. We also reiterate that if the Tribunal is unable to comply with its s.500(6L) 84-day time limit for decision-making, the cancellation or refusal decision is taken to be affirmed. This is hugely problematic for the integrity of decision-making and reputationally.

15. The Department's costing figure for the changes is zero, but they agree there will be an increase in referrals and workload. They indicate the Department will 'absorb' the cost. This is an entirely unsatisfactory answer and should concern the Committee.

EFFICIENCY OF THE CURRENT SYSTEM

16. The Committee should have regard to evidence given by the Department regarding referrals. Cases are referred to them by various agencies. There can be no question that the Department are presently unaware of cases of concern. There can be no question that the Department currently have, and use, the power to refuse or cancel visas in cases of concern.

[1] *Migration Act 1958 (Cth)*, s 500(6L)(c).
[2] We draw the Committee's attention to the recent report on the Administrative Appeal Tribunal's processed conducted by former Justice Ian Callinan, available at https://www.ag.gov.au/Consultations/Documents/statutory-review-tribunals-act-2015/report-statutory-review-aat.pdf. The report notes an *'intimidating'* backlog in migration and refugee decisions – nearing 55,000. Currently, the relevant divisions of the Tribunal are able to finalise only around 17,000 decisions per year. This means the existing backlog is likely to take years to clear.

INCREASED RISK OF *REFOULEMENT*

17. We reiterate our concerns regarding the impact of the Bill in terms of our international obligations, particularly in light of the evidence given to the Inquiry by the Department.

18. We note the evidence of the Department to the Committee on the topic of *non-refoulement*. A representative of the Department indicated that *non-refoulement*, under the Direction, is one of the factors that "*must*" be taken into account. She indicates that decision-makers, as a matter of course, do take *non-refoulement* into account. She also states that Australia 'simply' does not breach its *non-refoulement* obligations. Unfortunately, these statements do not reflect the legal position.

19. In our view, *non-refoulement* is unsatisfactorily dealt with under the current character regime, and will continue to be so under the Bill. Successive decisions, subject to recent court authority, display the Minister's willingness to defer consideration of protection obligations to a later point in the visa holder's immigration processes. Even in circumstances where it is a protection visa being considered for refusal or cancellation, the current Ministerial direction makes it clear that the existence of *non-refoulement* obligations will <u>not</u> be treated as a primary consideration. In many cancellation cases, it is not considered *at all* despite being raised squarely by the relevant person. Rather, the Minister states that the obligations will be considered at some point in the future, or, in cases where protection visas are being considered for refusal or cancellation, decisions the Working Group have seen acknowledge that it is possible that a person's non-refoulement claims may *never* be considered prior to removal.

20. It may assist the Committee to request information regarding the number of delegate, Ministerial, and Tribunal decisions that defer *non-refoulement* considerations to a future date, or acknowledge that such considerations may never be ventilated.

21. As noted above, persons whose visas are cancelled or refused under s.501 are liable for immigration detention. Once detained, such persons are liable for removal from Australia under s.198 of the *Act.* Since 2014, s.197C has expressly required the removal of persons from detention, *whether or not non-refoulement obligations were assessed or found to be owed to the person.*

22. The Department's evidence is an insufficient, and indeed incorrect, response to the matters we have raised above. An expansion of the character powers leads to an increase in number of the persons liable for detention. In turn, once in detention, such persons become automatically liable for removal, whether or not protection obligations are owed. Consideration of Australia's *non-refoulement* obligations is routinely deferred by decision-makers, even where they acknowledge the obligations may never be considered.

23. Thus, expanding the scope of the existing character powers necessarily expands the scope for Australia's breach of its *non-refoulement* obligations.

RESPONSE TO EXAMPLES PROVIDED BY THE DEPARTMENT

24. Firstly, an important caveat: nothing is known about the nature or detail of the offences advanced in the Department's hypotheticals, or about the persons' circumstances, including even what visa they hold (be it family, skilled, protection or otherwise).

25. We refer to and repeat our detailed submissions on these points.

26. Significant caution must therefore be exercised in assessing these hypotheticals and they are of limited use to the Committee for these reasons and those advanced below.

'A temporary visa holder' (TVH)

27. TVH has been convicted of violent assault-related offences, but has not yet been subject to a term or terms of imprisonment of 12 months or more. He does not objectively fail the character test.

28. Factually, TVH's conduct has not been considered by the courts to warrant imprisonment at all.

29. It was misleading and wrong for the Department to claim, as they explicitly did at the hearing, that TVH would not be captured by the current regime.

30. Under the current law, TVH would almost certainly be referred to the Department by law enforcement agencies. Whether he failed the character test would then be considered. If it was considered that he did, because of s.501(6)(c) or (d) of the Act (which, in our experience, is very likely), TVH's visa could be cancelled under:

    a. Section 116(1)(e) of the Act;
    b. Section 501(2) of the Act, or
    c. Section 501(3) of the Act.

31. TVH would be invited to provide submissions as to why the visa should not be cancelled. The decision-maker would have discretion as to whether or not to cancel.

32. The Committee might benefit from information from the Department about how many non-citizens convicted of numerous counts of 'assault-related offences' have not faced cancellation or refusal processes.

33. Nothing would change under the present law, as enunciated by the Department at the hearing and in submissions. The differences are in the likely outcome, the lack of regard to circumstances, and the opportunities for the loss of review rights:

    a. TVH would automatically, without any regard to his circumstances, fail the character test;
    b. Failure of a character test is a powerful directive and can certainly be expected to affect ultimate outcomes;
    c. Accordingly, the cancellation process is more likely to proceed, without regard to comments from sentencing judges or mitigating material. The burden on the Department to assess these materials *prior* to commencing cancellation proceedings would cause enormous cost and delay. The Committee may be assisted by information from the Department about what they will consider, and what information they will seek, before instituting proceedings.
    d. TVH may, for various reasons set out in our submissions, either fail to respond at all to a Notice of Intention to Consider Cancellation, or fail to provide appropriate material.

34. If TVH is an applicant for a permanent visa, it could be refused under s.501(1) or (3). He would be required to declare his history, and provide a police clearance, as part of the application process. His history would certainly come to the Department's attention.

Mr N

35. The example of Mr N, provided by the Department, is also misleading. It is entirely unclear why this example was provided.

36. Mr N holds a bridging visa in association with an ongoing permanent visa application. He was convicted of stalking another person and of threatening to inflict serious injury and received a six-month term of imprisonment. His application was refused under s.501(1), and his bridging visa cancelled by operation of law. The Administrative Appeals Tribunal, after hearing his review application, determined to exercise its discretion in Mr N's favour. We must assume the Tribunal set aside the decision to refuse under s.501(1), and so his permanent visa was effectively returned to the Department for final processing. No information is given about the outcome.

37. Factually, the Department was permitted to cancel Mr N's bridging visa at various stages under:

    a. Section 116(1)(e);
    b. Section 116(1)(g), because of:
        i. Reg 2.43(oa) (if he held a bridging visa A, B, C, or D), because he was convicted of an offence);
        ii. Reg 2.43(p) (if he held a bridging visa E), because he was convicted or charged of an offence;
        iii. Reg 2.43(q) (if he held a bridging visa E), because he was under investigation by a law enforcement agency);
    c. Because of a failure of the character test under s.501(6)(c) or (d) of the Act, under:
        i. S.501(2), or
        ii. S.501(3).

38. It appears the Department did not consider these avenues appropriate. They were aware of his offending and had these options available. This is indicative they did not consider these avenues appropriate. It can be inferred that they would not consider pursuit of cancellation appropriate under the proposed terms of the Bill.

39. Additionally, were Mr N's permanent visa granted, the Minister could still use his numerous existing powers to cancel that visa. The proposed Bill does not effect any change there.

40. Again, it was suggested by a member of the Committee that that case would not have been captured by the current regime. It plainly was, and it went through the available review processes. That would not change under the proposed regime **at all**. No bearing on the outcome in that case would be achieved by the Bill.

Mr D

41. Mr D holds a permanent visa and was convicted of a number of crimes including sexual assault and common assault and was sentenced to a two-year good behaviour order. The absence of a custodial sentence for these offences indicates significant mitigating factors or minimal seriousness on the scale.

42. In this example, the Department explicitly, and somewhat bizarrely, states that despite this history and the Department being aware of it, there is not "*sufficient adverse information*" to find Mr D does not fail the character test because of his "past and present criminal conduct" or his "past and present general conduct" (s.501(6)(c)) or because there is a risk that he would engage in criminal conduct, harass, molest, intimidate or talk another person, vilify the community, incite discord, or represent any kind of danger to a person or the broader community (s.501(6)(d)).

43. If the Department does not consider Mr D to be caught by any of the above, it is highly questionable whether he should face a cancellation process, which the Department considers he would under the new Bill.

44. In the Working Group's experience, Mr D would almost certainly face cancellation processes under s.501(2) or (3) of the current Act. The Committee might benefit from information from the

Department about how many non-citizens convicted of sexual assault and common assault have not faced cancellation or refusal processes.

45. The same concerns as apply to TVH in respect of outcome and opportunity for loss apply here.

FURTHER INFORMATION REQUIRED

The Working Group suggests that there is a serious lack of information about the effect of the law available, and proposes the following information needs to be obtained:

- Details regarding the modelled financial and practical impact on the Administrative Appeals Tribunal, on immigration detention, on primary decision-making, and on the relevant courts
- Statistics on the numbers of murders, assaults, sexual assaults, and aggravated burglaries committed by non-citizens that did not result in a cancellation or refusal process under the current laws.
- Information regarding the number of delegate, Ministerial, and Tribunal decisions that defer *non-refoulement* considerations to a future date, or acknowledge that such considerations may never be ventilated.
- Clarity regarding when non-refoulement will be considered, by whom, and at what stage.
- Information regarding how many people affected by s.501 either do not respond or do not seek review.

ANNEXURE C

POSITION PAPER

Visa cancellations and refusals affect thousands of people who call Australia home, and their families and communities.

The Working Group considers the current regime cumbersome, opaque, disproportionate, and harmful to the Australian community.

Australia's current visa cancellations scheme is inconsistent, unclear, and damaging to individuals, families and communities.

The rule of law is fundamental to the Australian community and is assumed by our Constitution. The Australian community is best served by administrative decisions that are lawful, transparent, consistent, rational, and fair.

The Working Group calls for the following urgent action to bring the regime in line with community expectations and ensure access to justice for those affected.

Changes to the Legislation

General

- Legislative timeframes be instituted for decision-making.
- All information the Minister wishes to provide to an affected person for comment must be provided within 28 days of the initial notice.
- All people facing visa cancellation or refusal must have the decision, its consequences, and their options thoroughly explained to them in a format that they can understand.
- Protections against cancellation be inserted for long-term residents of Australia.

Departmental and Ministerial powers

- The Act should be amended to exclude from s 501 visa cancellation children and people who entered Australia as refugees.
- Mandatory cancellation under s 501(3A) ought to be abolished. Cancellation of visas that would have been mandatory can proceed under other limbs of s 501.
    - If s 501(3A) is not abolished, there must be explicit protection for people whose sentences are reduced on appeal.
    - If s 501(3A) is not abolished, there must be no time limit on request for revocation.
- S 501(3) cancellations ought to be revocable by the Minister for other reasons, in addition to proving satisfaction of the character test.
- Ministerial personal powers ought to be reserved for the most serious cases, given that affected people will not have access to any merits review.

- The Minister should not have power to set aside a positive AAT decision, other than for reasons of national security.
- The character test be amended as follows:
    - Subsection (6)(b) ought to make clear that association alone is insufficient, and there must be attendant risk;
    - Subsection (7A) ought be abolished so that concurrent sentences are counted in the way they are imposed by the court.

Reviews – merits and judicial

- Appointments to the AAT ought to be non-political, transparent and made by an independent body.
- Section 500(6L), the provision meaning the AAT will be taken to have affirmed a cancellation decision if no decision has been made within 84 days, ought to be reversed, so that the decision is taken to be set aside.
- Timeframes for response across the cancellation regime ought to be harmonised: in all cases, people affected should have 35 days from the date of the decision notification to respond or to seek review.
- S 500(6H) be abolished. If it is not abolished, it should be applied to all documents given to the Tribunal, including by the Minister.

Detention

- An effective and regular detention review mechanism ought to be legislated, entitling a person to appear before an independent body regarding the appropriateness of their ongoing detention.
- Individual risk assessments considering alternative management options (including less restrictive detention, or risk management in the community) be mandatory on an ongoing basis in tandem with assessment regarding whether there is a need for release.
- The use of full-body restraints in transfers cease.
- Restraints be used only where necessary.

Changes to Direction No. 90

- The Direction be amended to enshrine:
    - The principle that the following people ought not have their visas cancelled in any but the most serious circumstances, for example national security:
        - people who have lived in Australia for over 10 years;
        - people who arrived in Australia as children;
        - people with serious disability, impairment or health issues, and
        - people who will face serious harm if they were removed from Australia.
    - The principle that a person's visa should not be cancelled if they have no criminal record and are awaiting hearing of charges in any but the most serious circumstances.
    - That the primacy of freedom of speech in respect of s 501(6)(d) ought be given significant weight, and balanced against potential harm to the community.
    - The principle that a person found by a sentencing judge or Tribunal not to be a danger to the community ought not have their visa cancelled or refused.
    - The principle that Aboriginal and Torres Strait Islander people should not have their visas cancelled.
    - The principle that close family or care connections in Australia should be a primary consideration.

- The Direction be amended, following consultation, to ensure it does not place victim-survivors of family violence, particularly women and children, at risk.
- Law and policy regarding s 500A be updated to reflect the foregoing.
- Law and policy regarding s 116 be updated to reflect the foregoing.

Funding

- Legal representation be assured for **all** people for cancellation cases being heard at the General or Migration and Refugee Divisions of the Administrative Appeals Tribunal.
- Funding be available for legal representation for people facing cancellation at the primary stages.
- Increased funding for the federal courts of Australia to ensure timely processing of cases.