



Multicultural Youth Advocacy Network (MYAN Australia)

Submission to the Joint Standing
Committee on Migration for Inquiry on
Review processes associated with visa
cancellations made on criminal
grounds

Additional Information

August 2018

MYAN Australia - Inquiry on Review processes associated with visa cancellations made on criminal grounds

About MYAN

Multicultural Youth Advocacy Network (MYAN) is the national peak body representing the rights and interests of young people from refugee and migrant backgrounds and those who work with them.

MYAN works in partnership with young people, government and non-government agencies at the state and territory and national levels to ensure that the particular needs of young people from refugee and migrant backgrounds are recognised, and to support a coherent and consistent approach to addressing these in policy and service delivery. MYAN undertakes a range of policy and sector development activities, and supports young people to develop leadership skills and networks.

Young people from refugee and migrant backgrounds demonstrate high levels of resilience and resourcefulness and have the potential to be active participants in and contributors to Australian society. However, they can face particular barriers to accessing services and opportunities, including language, culture, limited social capital and unfamiliarity with Australian systems and processes (including the service system), racism and discrimination. These factors can place them at a social and economic disadvantage within Australian society, which can mean they are at higher risk of social and economic isolation. MYAN believes that a targeted approach to policy and service delivery is essential to addressing these barriers.

MYAN has developed the *National Youth Settlement Framework* to support a targeted and consistent approach to addressing the needs of newly arrived young people settling in Australia.

About this submission

MYAN welcomes the opportunity to provide additional information to the Joint Standing Committee on Migration's Inquiry into the review processes associated with visa cancellations made on criminal grounds. This submission is a supplement to MYAN's original submission to the Committee, and our contributions at a public hearing in Melbourne in July 2018, focusing on:

- A. The significant impact of the current visa cancellations regime on children and young people.
- B. The 'double penalisation' of young people under the current visa cancellations regime, and its undermining of efforts in the youth justice system.
- C. That the youth justice system is functioning well and providing robust responses to youth crime.
- D. The need for an expanded inquiry into visa cancellations regime, including with a focus on the specific impact and circumstances of young people from refugee and migrant backgrounds, their families and communities.

Recommendations:

In addition to the MYAN's recommendations in our initial submission to the Committee, MYAN makes the following recommendations;

1. Ensure legislation regarding visa cancellations explicitly excludes children/young people under the age of 18.
2. Consider the *best interest of the child* and *non-refoulement* principles as primary considerations in any visa cancellation process, ensuring that government personnel engaged to make determinations in relation to visa cancellations have relevant and adequate training on and understanding of the meaning and interpretation of these concepts consistent with international human rights law, specifically the Convention on the Rights of Child.
3. Adopt a youth justice approach to respond to anti-social and criminal behaviour amongst a small number of young people from migrant and refugee backgrounds engaged in criminal behaviour, and avoid using the visa cancellations regime to respond to youth offending.
4. Avoid a 'double penalisation' of young people who have already served their sentence within the criminal justice system, and strengthen rather than undermine efforts of the youth justice system, which aims to divert and rehabilitate young people engaged in offending behaviour.
5. Initiate an expanded inquiry into visa cancellations (covering visa cancellations under both s116 and s501 of the Migration Act 1958) that considers;
 - a. The impact of visa cancellations on young people, including but not limited to the perspectives of young people;
 - b. The interaction of the visa cancellations regime with the youth justice system;
 - c. Perspectives of youth justice experts researching on youth offending as well as positive outcomes following successful rehabilitation/diversion initiatives;
 - d. Perspective/views of the families/communities of young people whose visas are cancelled and what this process means for them;
 - e. The type of supports young people and their families are able to access (including legal advice, social/youth worker support, etc.) to challenge a visa cancellation decision and possible improvements to supports accessed;
 - f. The level of training of staff preparing/taking visa cancellation decisions in the Department of Home Affairs and recommendations for standards of training;
 - g. A possible overhaul of the visa cancellations system which can be re-designed to ensure that young people do not experience automatic and mandatory visa cancellation, and are given an opportunity to first respond to the initial consideration of visa cancellation before any decision is reached on their visa status - with a view to the future impact of such decisions on young people's lives, and that of their families and communities.
 - h. Ways to increase disaggregated visa cancellations data by age (specifically reporting on young people aged 15 to 18 and 18 to 24), visa subclass, or time spent in detention.

A. The significant impact of the current visa cancellations regime on children and young people:

In recent years, the criminal activity of a small number of young people, including some from refugee and migrant backgrounds, has attracted a great deal of media attention¹ and community concern in Australia. In particular, concerns for community safety in Victoria have risen amid an increase in the violent nature and frequency of certain offences among a small group of young repeat offenders.²

MYAN recognises the need to address community safety concerns with appropriate, targeted responses and welcomes public consultations as part of the process for determining both the problem and the solutions required. MYAN does not support the use of the character test leading to visa cancellation as a tool for addressing issues arising from refugee and migrant young people's engagement in criminal offending. **MYAN is concerned that there is little space in the existing legislation and guidance that calls on the Minister to consider the circumstances of an individual young person.**³

While there is no reference to age limits in the Migration Act 1958 on the applicability of mandatory visa cancellations, the Explanatory Memorandum of the 2016 Bill (which introduced wider powers to the Minister for visa cancellations) openly states that (with reference to the best interests of the child and Article 3(1) of the Convention on the Rights of the Child);

*"... the best interests of any child or children affected by the decision is a primary consideration, which is weighed against factors such as the risk the person presents to the Australian community. ... while section 501 of the Migration Act is applicable to minors, it is generally not used to cancel the visas of minors who have a criminal record, nor does it allow the cancellation of the visas of dependant family members."*⁴

MYAN cannot confirm whether the term 'the best interest of the child' is being used purposefully or is mentioned loosely to justify proposed changes in legislation without carrying its true meaning and purpose – that is to give voice to children and young people. MYAN believes such use of the term risks undermining the very concept of the best interest of the child which has been defined and established under the Convention on the Rights of the Child, of which Australia is a signatory, as well as various general comments of the United Nations Committee on the Rights of the Child, and has been reinforced under various international human rights instruments.

¹ For a recent example on this see, Henriques-Gomes, L (2018) *Channel Seven accused of fear-mongering over 'African gangs' story*, *The Guardian*. Available at: <https://www.theguardian.com/media/2018/jul/09/channel-sevens-african-gangs-beat-up-prompts-fear-among-african-australians>.

² MYAN Australia (2017) *MYAN Submission to the Joint Standing Committee on Migration: Inquiry into Settlement Outcomes*. Melbourne: MYAN. p. 42.

³ MYAN Australia (2017) *MYAN Submission to the Joint Standing Committee on Migration: Inquiry into Settlement Outcomes*. Melbourne: MYAN. p. 42.

⁴ Parliament of Australia (2016) *Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016 Explanatory Memorandum*. Available at: http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5691_ems_0c935c8f-adb2-4e37-ac8a-843fc66f3854/upload_pdf/489818.pdf;fileType=application%2Fpdf, p.20.

MYAN is particularly concerned about the language used in Explanatory Memorandum of the 2016 Bill (above) in relation to applicability to minors under Section 501 of the Migration Act. This poses dramatic risks for children and young people from refugee backgrounds, as stated above, as: (i) their removal following visa cancellation may constitute refoulement (a contravention of Australia's obligations under the 1951 Refugee Convention as well as other international obligations under International Covenant on Civil and Political Rights and Convention against Torture) or (ii) if they are not removed, they may face indefinite detention in an (adult) immigration detention facility.

MYAN strongly believes that at a minimum any reference to visa cancellations in legislation should explicitly exclude children/young people under the age of 18 from such processes. MYAN is concerned that international human rights instruments, specifically the Convention on the Rights of Child, are being used as a reference point in these processes to legitimise legislation change and that this may be a misinterpretation of human rights instruments.

These concerns are supported by recent news reports on young people under the age of 18 who were in immigration detention due to visa cancellation.⁵ MYAN is concerned about the increase in visa cancellations and lack of publicly available national data concerning the age breakdown and visa status of people who are facing this process and whether/or to what extent young people under the age of 18 are facing such consequences. While the Department of Home Affairs releases data on cancellation statistics⁶, such data is not disaggregated by age (specifically 16 to 25 year olds), visa status or time spent in immigration detention.

- **Research on transitory nature of youth offending**

Propositions regarding visa cancellations for young people under 18 are further concerning given the evidence on the transitory nature of youth offending. The broad literature on youth offending recognises that factors deriving from socio-economic disadvantage and exclusion may leave youth at increased risk of offending behaviour.⁷ It is well documented that adolescents are more susceptible to peer influence and risk-taking behaviour than are adults, as a result of their stage of biological, mental and emotional development.⁸ For most young people, offending is episodic, transitory and unlikely to continue into adulthood⁹ as they would 'grow out' of offending and have 'law-abiding lifestyles as young adults'.¹⁰ As a

⁵ O'Regan, S (2018) *Why New Zealand Is Furious About Australia's Deportation Policy*, *The New York Times*. Available at: <https://www.nytimes.com/2018/07/03/world/asia/new-zealand-australia-deportations.html>.

⁶ Department of Home Affairs (2018) *Key visa cancellation statistics*. Available at: <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>.

⁷ MYAN (2017), *Submission to the Joint Standing Committee on Migration: Inquiry into Settlement Outcomes*. Melbourne: Multicultural Youth Advocacy Network (MYAN), p. 44-45.

⁸ Hemphill, S. A. & Smith, R. (2010). *Preventing youth violence: What does and doesn't work and why? An overview of the evidence on approaches and programs*. Report prepared for the Australian Research Alliance for Children and Youth, Canberra.

⁹ JSS (2015). *An escalating problem: Responding to the increased remand of children in Victoria*. Melbourne: JSS.

¹⁰ Richards, K (2011) *What makes juvenile offenders different from adult offenders? Trends & issues in crime and criminal justice series, no. 409*. Australian Institute of Criminology. According to Richards, "Research on adolescent brain development demonstrates that the second decade of life is a period of rapid change, particularly in the areas of the brain associated with response inhibition, the calibration of risks and rewards and the regulation of emotions ... It appears that adolescents not only consider risks cognitively (by weighing up the potential risks and rewards of a particular act), but socially and/or emotionally ... It has been recognised that young people are more at risk of a range of problems conducive to offending—including mental health

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result, approaches to addressing offending among young people focus on diversion and rehabilitation – recognising that young people are likely, with appropriate intervention, to be successfully diverted from this behaviour, especially if underlying factors placing them at risk are addressed.

- **Limited supports available to young people going through visa cancellations**

As discussed in the public hearing in Melbourne in July 2018 held by the Committee, legal aid for people from refugee backgrounds is very limited, and almost non-existent for people from migrant backgrounds. Visa cancellations regime is therefore disproportionately impacting migrant young people who have much limited opportunity to access legal aid. Department of Home Affairs commented in its public hearing appearance on how they gather information for revocation decisions as follows;

“Sometimes representatives will put forward other specialist-type people, like medical specialists, particularly where there are issues with people perhaps having mental illness and issues like that. So all of those things are taken into consideration. A lot of it is based on what we receive from the representatives, but we will also seek information at times as well, if we believe that we may be able to get more information available to us to enable a well-balanced and reasonable consideration of all the facts.”¹¹

This explanation clearly demonstrates that unless young people concerned has access to legal representation, they have very little chance to provide information and evidence which may support their case and demonstrate their individual situation for revocation of a visa cancellation decision.

Under the current visa cancellation system, young people who engage in offending behaviour are not provided with a notice related to the mandatory cancellation provisions of the Migration Act 1958. MYAN believes, building on the recommendation of the Committee on its Inquiry into Migrant Settlement Outcomes, there should be a notice provided to the young people to inform them that their visa may be cancelled and such criminal record may impact their eligibility to acquire Australian citizenship.¹² Such a notice needs to be served to young people when they first engage criminal justice system informing them about these possible future outcomes. Young people also separately needs to be notified when there is a process initiated by the Department of Home Affairs which could lead to their visa cancellation, providing them with enough time to gather the support they need to challenge such a consideration on visa cancellation before a final decision is taken.

problems, alcohol and other drug use and peer pressure—than adults, due to their immaturity and heavy reliance on peer networks ... Progression through puberty has been shown to be associated with statistically significant changes in behaviour in both males and females and may be linked to an increase in aggression and delinquency.”

¹¹ Proof Committee Hansard (2018) *Joint Standing Committee On Migration: Review processes associated with visa cancellations made on criminal grounds. Public Hearing, 27.6.2018.* p. 5.

¹² Joint Standing Committee on Migration (2017), *No one teaches you to become an Australian: Report of the inquiry into migrant settlement outcomes.* Canberra: Commonwealth of Australia, p. 145.

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The above explanation provided to the Committee by the Department of Home Affairs also demonstrates that if young people had been notified before reaching a decision and had the opportunity to challenge any consideration leading to visa cancellation with access to supports to present their case, they might have never had their visa cancelled and spent time in immigration detention. Avoiding any such outcome from the beginning is specifically important for young people due to future implications of having such a record. Even if their visa cancellation decision is revoked later on, having been through such a process may significantly affect young people's ability to become Australian citizens in the future, despite having grown out of this transitional period of offending.

- **Giving voice to children and young people**

Young people need opportunities to have their voices heard by decision-makers in their communities, as well as at the state and national levels. An over-reliance on stereotypes and misinformation, and negative media reports¹³, has added considerably to the perception that young people from refugee and migrant backgrounds are a 'problem'.¹⁴ Opportunities need to be created purposefully to include and to hear from young people, recognising that the voices of young people generally, and minority youth particularly, are rarely heard in public debate.

B. The 'double penalisation' of young people under the current visa cancellations regime, and its undermining of efforts in the youth justice system:

Young people who demonstrate anti-social behaviour and engage in criminal conduct are sentenced in line with the response of the criminal justice system and serve their sentence. Young people who have already served their sentence, including through the youth justice system, face double penalisation through the visa cancellation regime, despite thorough processes of youth justice systems. This undermines the efforts of the youth justice system, which is focused on rehabilitation and diversion, with an aim to ensure these young people re-engage with social life and become active and contributing members of the society. As an example of how the youth justice system operates, the youth parole board in Victoria implements thorough scrutiny before determining the release of these young people on parole. Parole board has '*interests of/risk to the community*' among its primary considerations before reaching a decision and requires a detailed parole plan which must be prepared by a parole officer providing comprehensive information about the young person's current status and plans for living in the community on parole, including managing the risk of re-offending, accommodation, education/employment, professional support (counselling), supervision and compliance with special conditions. Young people on parole must also abide by youth parole orders which have core terms and conditions that are prescribed in the Victorian Children, Youth and Families Regulations 2007.¹⁵

¹³ Chingaipe (2016) *Race, stereotyping and Melbourne's Apex gang*. *The Saturday Paper*. (25 February 2016)

¹⁴ MYAN Australia (2017) *MYAN Submission to the Joint Standing Committee on Migration: Inquiry into Settlement Outcomes*. Melbourne: MYAN. p. 47.

¹⁵ State of Victoria, Department of Health and Human Services (2016) *Youth Parole Board Annual Report 2015–16*. Available at: https://www.parliament.vic.gov.au/file_uploads/Youth_Parole_Board_Annual_Report_2015-16_L2jN9RxM.pdf, pp. 4 and 9.

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MYAN believes the current efforts of the youth justice system should be supported and further developed to respond to the needs of a small group of young people from refugee and migrant backgrounds - to reintegrate them into society and pursue their aspirations and fulfil their potential as active members of and positive contributors to Australian society.

C. The youth justice system is functioning well and providing robust responses to youth crime:

Youth justice issues require a youth justice response. The broad youth justice literature has driven the development of a very specific and targeted approach to responding to youth offending in Australia that focuses on early intervention, diversion, rehabilitation and age-appropriateness. These approaches are built on evidence that shows punitive measures are likely to worsen the likelihood of reoffending among young people by further isolating them from the community, rather than addressing the underlying factors impacting offending behaviour.¹⁶ Similar to approaches undertaken in Australia, initiatives to respond to the needs of young people in criminal justice systems have also been initiated in other countries.

Such approaches undertaken in Australia in the youth justice area are also consistent with the principles of the Convention on the Rights of the Child and other associated human rights covenants to which Australia is a party, and thus apply equally to young people from refugee and migrant backgrounds. Consistent with the Convention on the Rights of the Child, all young people should be treated as young people first under the law, which in Australia includes consideration of diversion and rehabilitation options. **A young person's visa or residency status should not negate or minimise consideration of these options first.**¹⁷

Shifts in youth offending over time, including downward trends in overall youth crime across Australia, demonstrate that while youth justice systems may experience challenges¹⁸ and crises, these are not new and in the main current approaches have demonstrated that they are flexible and capable of responding.¹⁹

MYAN, in its engagement with the Australian Government, has echoed the Australian Human Rights Commission's recommendation that Section 501 should "not be used as a means to address 'anti-social behaviour' amongst young people from migrant and refugee backgrounds"²⁰ as cancelling visas under s501 is not a valid criminal justice response. Increasing the focus on such punitive policies and legislation changes, as a means

¹⁶ Sentencing Council of Victoria (2016); Williams et al. (2009).

¹⁷ Additionally, the *Racial Discrimination Act 1975 (Cth.)* Part II, Section 5, adds to the broad prohibition of racial discrimination the term 'immigrant status'. This provision makes it possible for persons who experience unfair treatment due to their immigrant status, a relatives or an associates, to obtain protections under the Act.

¹⁸ See Victorian Auditor-General's Report for a recent review of Victorian youth justice system. Victorian Auditor-General's Report (2018) *Managing Rehabilitation Services in Youth Detention*. Independent assurance report to Parliament 2018–19: 4. Available at: <https://www.audit.vic.gov.au/sites/default/files/2018-08/20180808-Youth-Detention.pdf>.

¹⁹ Victorian youth offending rates have fallen significantly among some groups previously singled out as 'problematic', such as those born in Somalia. See MYAN (2017) *Submission to the Joint Standing Committee on Migration: Inquiry into Settlement Outcomes*. Melbourne: Multicultural Youth Advocacy Network (MYAN), p. 69-70. For overview, see Sutherland & Millstead (2016).

²⁰ Australian Human Rights Commission (2017) *Inquiry into Migrant Settlement Outcomes, Australian Human Rights Commission Submission to the Joint Standing Committee on Migration*. Available at https://www.humanrights.gov.au/sites/default/files/AHRC%2020170131%20Final_AHRC%20Submission_Migrant%20Settlement%20Outcomes.pdf, p. 5.

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to punish the small minority break the law, has the potential to negatively impact settlement for many children and young people, their families and communities. A lack of security about the future and sense of belonging are key factors contributing to social isolation and disengagement.

- **Early intervention and prevention**

Early intervention and prevention strategies should work to provide stronger and earlier access to youth programs that address the causes of disadvantage. To address the underlying challenges and vulnerabilities placing some refugee and migrant young people at greater risk will require targeted responses, in including programs and initiatives that keep young people in school; support successful education to work transitions; that strengthen community cohesion and mend relationships between young people and their communities; support engagement in sport and recreation and; more broadly, investment in youth-centred and family-aware approaches in policy and service delivery.

- D. The need for an expanded inquiry into visa cancellations regime, including with a focus on the specific impact and circumstances of young people from refugee and migrant backgrounds, their families and communities:**

MYAN believes there is a need for the Committee to undertake a broader and further inquiry looking into the visa cancellations regime (including visa cancellations based on s116 and s501 of the Migration Act 1958). MYAN believes such an inquiry should expand to cover cancellations under s116 as well, as young people on temporary visas, especially Pasifika young people from New Zealand, are impacted drastically by visa cancellations under the provisions of s116.

A broader inquiry should consider:

- a. The impact of visa cancellations on young people, including but not limited to the perspectives of young people;
- b. The interaction of the visa cancellations regime with the youth justice system;
- c. Perspectives of youth justice experts researching on youth offending as well as positive outcomes following successful rehabilitation/diversion initiatives;
- d. Perspective/views of the families/communities of young people whose visas are cancelled and what this process means for them;
- e. The type of supports young people and their families are able to access (including legal advice, social/youth worker support, etc.) to challenge a visa cancellation decision and possible improvements to supports accessed;
- f. The level of training of staff preparing/taking visa cancellation decisions in the Department of Home Affairs and recommendations for standards of training;
- g. A possible overhaul of the visa cancellations system which can be re-designed to ensure that young people do not experience automatic and mandatory visa cancellation, and are given an opportunity to first respond to the initial consideration of visa cancellation before any decision is reached on their visa status - with a view to

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the future impact of such decisions on young people's lives, and that of their families and communities.

- h. Ways to increase disaggregated visa cancellations data by age (specifically reporting on young people aged 15 to 18 and 18 to 24), visa subclass, or time spent in detention.

While young people who are impacted by visa cancellations may not have lived in Australia for decades, MYAN understands the majority of young people who have been impacted by this regime have spent their formative years in Australia - raised in Australia as part of our community and society.

While MYAN does not call for abolishing of the visa cancellations system completely, we believe that in such a procedure, there should be consideration for individual circumstances of young people before reaching a decision. This requires a thorough process which should be undertaken by specifically trained personnel/experts that have an understanding of the impact of settlement on young people as well as an understanding of adolescence as an important transitional period in a person's lifespan.²¹ Therefore we believe such an inquiry should look into the level of training of personnel who are taking such decisions in detail and should make recommendations for standards of training.

MYAN suggests that a broader inquiry also looks into the interaction of the visa cancellations regime with the youth justice system, aiming to prevent situations where youth justice system would be undermined.

MYAN suggests such an inquiry also look into the types of supports available to young people from refugee and migrant backgrounds who undergo visa cancellations procedures. As mentioned above, young people from refugee and migrant backgrounds have limited access to legal aid, and without legal representation, they have limited opportunity to access supports and provide supporting material to make their case against the visa cancellation decision taken by the Department of Home Affairs.

MYAN further suggests that a broader inquiry investigates a possible overhaul of the visa cancellations system which can be re-designed to ensure that young people do not experience automatic and mandatory visa cancellation, and are given an opportunity to first respond to the initial consideration of visa cancellation before any decision is reached on their visa status.

²¹ An important example to how such an understanding could be incorporated is the different approaches taken in youth justice in Australia with an understanding of the transitional nature of juvenile and youth crime. According to Australian Institute of Criminology, "in some instances, juveniles' convictions may not be recorded. This strategy aims to avoid stigmatising juveniles and assist juveniles to 'grow out' of crime rather than become entrenched in the criminal justice system. In most jurisdictions, for example, juveniles who participate in a restorative justice conference and complete the requisite actions resulting from the conference (such as apologising to the victim and/or paying restitution), do not have a conviction recorded, even though they have admitted guilt. Similarly, in some jurisdictions, a juvenile can be found guilty of an offence without being convicted. ... It is important to consider in this context the extent to which juveniles' psychosocial immaturity affects their pleading decisions in court." For more see, Richards, K (2011) *What makes juvenile offenders different from adult offenders? Trends & issues in crime and criminal justice series, no. 409*. Australian Institute of Criminology.

Recommendations:

1. Ensure legislation regarding visa cancellations explicitly excludes children/young people under the age of 18.
2. Consider the *best interest of the child* and *non-refoulement* principles as primary considerations in any visa cancellation process, ensuring that government personnel engaged to make determinations in relation to visa cancellations have relevant and adequate training on and understanding of the meaning and interpretation of these concepts consistent with international human rights law, specifically the Convention on the Rights of Child.
3. Adopt a youth justice approach to respond to anti-social and criminal behaviour amongst a small number of young people from migrant and refugee backgrounds engaged in criminal behaviour, and avoid using the visa cancellations regime to respond to youth offending.
4. Avoid a 'double penalisation' of young people who have already served their sentence within the criminal justice system, and strengthen rather than undermine efforts of the youth justice system, which aims to divert and rehabilitate young people engaged in offending behaviour.
5. Initiate an expanded inquiry into visa cancellations (covering visa cancellations under both s116 and s501 of the Migration Act 1958) that considers;
 - a. The impact of visa cancellations on young people, including but not limited to the perspectives of young people;
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 - g. A possible overhaul of the visa cancellations system which can be re-designed to ensure that young people do not experience automatic and mandatory visa cancellation, and are given an opportunity to first respond to the initial consideration of visa cancellation before any decision is reached on their visa status - with a view to the future impact of such decisions on young people's lives, and that of their families and communities;
 - h. Ways to increase disaggregated visa cancellations data by age (specifically reporting on young people aged 15 to 18 and 18 to 24), visa subclass, or time spent in detention.