



SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2019

The Refugee Council of Australia (RCOA) is the national peak body for refugees, people seeking asylum, and the organisations and individuals who work with them, representing over 190 organisations. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

We welcome the opportunity to restate our significant concerns about this Bill. We have consistently expressed our profound concerns about the continuing expansion of executive powers under the visa cancellations framework, and the undermining of safeguards and independent scrutiny.

We have raised in previous submissions to this Committee, and to the Joint Standing Committee on Migration, our strong concerns that the exponential increase in visa cancellations has resulted in refugees languishing in indefinite detention. We have also consistently stated our concern that such legislation undermines the rule of law and the principle of equality of the law.

This Bill continues these lamentable trends. While it adds nothing to the existing sweeping powers of the Government to protect the safety of Australian citizens, it lowers the bar for visa cancellations to such an extent that a child could be subject to indefinite detention or deportation for sharing an intimate image of their girlfriend or boyfriend, or for shoplifting. Even worse, non-citizens could be held in indefinite detention or deported without any form of substantive independent review, as there is no right to review by the Administrative Appeals Tribunal if the decision is made personally by a Minister. Even if the Tribunal can review the decision, this can be overturned by the Minister.

It is the role of Parliament to preserve the constitutional principles of the rule of law, equality of law, and separation of powers. It is also its role to defend the norms that have made our Australian society one of the most successful multicultural societies in the world, including the norms of non-discrimination, respect for others, and fairness in its treatment of non-citizens. This Bill undermines these vital principles.

1 Adding to a draconian framework

1.1 We have previously expressed profound concerns about the scope of the current visa cancellations framework in several inquiries, most recently in our detailed submission to the Joint

Standing Committee on Migration's inquiry into the review process for visa cancellations.¹ Those concerns include:

- For refugees, the risk (and reality) of indefinite detention, as although their visas have been cancelled, they cannot be forced to return to another country without Australia being in breach of its international legal obligations of *non-refoulement*. However, indefinite detention itself in this context also breaches Australia's international legal obligations.
- The mandatory nature of cancellations, meaning that people are detained without consideration of context, and are forced to wait on a review of the cancellation decision only once they are detained, and often after months or years in detention
- The lack of adequate safeguards in the process, including the lack of independent legal advice, very strict and tight timelines for appeal, and inadequate communication of the effect of visa cancellations (especially for people for whom English is not their first language)
- The delays encountered in the review process, and the inadequate policies to ensure people's detention is reviewed adequately
- The extraordinary level of Ministerial discretion and intervention, with the Minister being able to overturn the decisions of an independent tribunal or to avoid the Tribunal's review by personally making decisions, and to also make ministerial guidelines.

1.2 In this context, the claim that this Bill would serve to protect the national interest is nonsense. The Government already has extraordinary powers to cancel or refuse visas based on character. The Explanatory Memorandum to this Bill suggests that it is intended to capture individuals with links to organised crimes, outlaw motorcycle gangs, and those who murder, assault, sexually assault or burglarise. However, all these offences are already captured in the existing framework. Section 501 of the *Migration Act* already gives the Minister and his delegate broad powers to cancel a person's visa, including if a decision maker, having regard to any past and present criminal or general conduct, decides that a person is not of good character.²

1.3 For refugees, the consequence of a visa cancellation is indefinite detention, as they cannot be returned to their country of origin without breaching our *non-refoulement* obligations. There are already many refugees subject to such indefinite detention, which is itself a breach of our international legal obligations, including the protection of the right of liberty under Article 9 of the International Covenant on Civil and Political Rights. As we have previously submitted to the Joint Standing Committee on Migration, cancelling such visas does not serve any legitimate purpose, as such people cannot be removed.

1.4 In more recent months, we have heard that visas are being cancelled without people being detained. Instead, these people are left without a valid visa in the community, without the right to work and without other means to support themselves. Such enforced destitution is also a breach of our international obligations.

1.5 Further, the existing framework undermines the constitutional principles of the rule of law and separation of powers. It empowers a single person — the Minister for Immigration — with the right to detain a person indefinitely without the right to a fair process under our criminal system. Under

¹ Refugee Council of Australia, *Inquiry into the Review Processes Associated with Visa Cancellations Made on Criminal Grounds* (Submission, Joint Standing Committee on Migration, 27 April 2018)

<<https://www.refugeecouncil.org.au/publications/submissions/visa-cancellations-reviews/>>. See also Refugee Council of Australia, *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (Submission, 4 March 2016)

<<https://www.refugeecouncil.org.au/r/sub/1410-Character.pdf>>; Refugee Council of Australia, *Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016* (Submission, 4 March 2016)

<<http://www.refugeecouncil.org.au/publications/submissions/character-cancellation-consequential-provisions/>>.

² For a detailed explanation of the existing visa cancellation powers under section 501 see the Visa Cancellation Working Group's submission to this inquiry, which RCOA endorses.

this Bill, that person could be detained even if they have not been ordered to serve a sentence by a judge. This is exactly the kind of tyranny that the rule of law was evolved to defend against.

2 'Potential' sentences, not actual sentences

2.1 This Bill increases the circumstances under which a person can have their visa cancelled or refused under the character test of section 501 of the Migration Act 1958. The Bill proposes that a person will fail the character test if they have been convicted of any offence involving:

- Violence, including threat, robbery, and low-level assaults;
- 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 (anything where a person intends or threatens to use that thing to inflict bodily injury).

In addition, the offence must have a *possible* sentence of two years or more, even if the person received a lesser sentence (or no sentence at all). This significantly increases the risk that refugees and vulnerable people will be detained or deported, including for minor offences.

2.2 A key change made by this Bill is that people will automatically fail the character test based on *possible* court sentences, rather than the sentence that they receive. A court, of course, can hear and receive evidence and consider the overall context of the offence and the offender. By converting the threshold from an actual to a potential sentence, the Bill removes all these considerations from the 'character' test.

2.3 In contrast, the new test would essentially remove all consideration of what happened in a court, and rather refer only to what a State legislature in Australia had decided to enact at one point in time. As noted by the Law Institute of Victoria, there is no necessary correspondence between the potential length of a sentence and the seriousness of a crime.

2.4 Many offences that carry potential sentences of two years or more are far from the kind of 'serious' offence indicated by the Explanatory Memorandum. According to the Law Institute of Victoria, shoplifting, a teen sharing intimate images with a girlfriend or boyfriend, damaging property, verbal threats, or dangerous driving would all satisfy this test, even if a judge decided not to give them a prison sentence at all. The effect of this is would be to lower the level of offending that would trigger an automatic cancellation to an absurd level, which would surely defeat rather than protect community expectations.

3 Children and other vulnerable members

3.1 There is nothing in this Bill that prescribes any differential treatment for children. While the Explanatory Memorandum suggests that their visas will be cancelled only in 'exceptional circumstances', the Bill does not spell out what they are or any legislative process to ensure that consideration. Indeed, it is clear from the Explanatory Memorandum that the Bill contemplates that some children will be subject to indefinite detention or removal because of this Bill. This is consistent with political commentary which suggests the Bill is intended to be used in relation to children.

3.2 The Explanatory Memorandum suggests that it is consistent with our international legal obligations to children. However, the immigration detention of children is never permitted under international law,³ so this Bill would clearly be in breach of our obligations to children.

3.3 The Bill would also affect other vulnerable members, including the spouses of refugees, because it would also make anyone who 'aids and abets', induces or is 'in any way (directly or indirectly) knowingly concerned in, or a party to' any of the offences subject to visa cancellation.⁴ The breadth of this is extraordinary, and the fear that this provision would cause, even if it is not enforced, would put already vulnerable members of our community under enormous stress.

Recommendation 1

RCOA recommends that this Bill should not be passed.

³ Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on Deprivation of Liberty of Migrants* (No Advanced edited version, 7 February 2018)

<https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf>, [40].

⁴ See proposed sections 5C(3)(v)-(viii), s 7AA(a)(v)-(viii).