NSWCCL SUBMISSION

THE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

INQUIRY INTO THE MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2021

17 December 2021

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Submission of the New South Wales Council for Civil Liberties (CCL) to the inquiry by the Legal and Constitutional Affairs Committee (the Committee) into the Migration Amendment (Strengthening the Character Test) Bill 2021 [Provisions] (the Bill).

CCL thanks the Committee for the opportunity to make this submission. This is the third time that such a bill has been presented to Parliament. We made an extensive submission to the 2019 version of this bill, and those criticisms stand. We append that submission to this one. Criticisms made by the Australian Human Rights Commission, the Australian Law Council, The Federation of Ethnic Communities Councils of Australia, the Parliamentary Joint Committee on Human Rights, the Scrutiny of Bills Committee and the Visa Cancellations Working Group also still apply. We are disappointed that the Bill has been reintroduced without those criticisms being answered.

In the earlier submission we argued

i. This bill is not about protecting the Australian people from serious dangers. It is a disproportionate response to visa holders who have committed minor crimes.
ii. This bill will subject people who are of no danger to society to the rigours of indefinite detention, or to being deported. There will be serious consequences for their families. There is no evidence that "the community" would want such outcomes.
iii. The bill would allow the Minister the discretion to cancel or refuse to issue a visa to a person who has been convicted of a designated offence but who may have received a very short sentence, or no sentence at all.[1]
iv. The bill presupposes that careful decisions of the courts, made after proper process, input by experts and the experienced judgement of judges, are inferior to decisions made by the Minister with the aid of his Department. Sentences, after all, take account both of the seriousness of the crime and of the desirability of deterrence—both of the individual and of others. That is, they take into account the dangers to the community.
v. The bill contains no exceptions for children.
vi. The bill ignores the processes of rehabilitation.
viii. A determination that a person fails the character test, depending on how it is made, means either that their visa must be, or may be, cancelled or refused. There is a right to
merits review is available only in some cases. (The courts can only deal with errors of law.) The extraordinary, unjust, power already given to the Minister and his delegates needs no extension—rather, it should be cut back.
ix. Some examples of how the powers are used raise serious concerns about the existing law, and the procedures that are applied. We have moved from deporting people who clearly are a danger and high risk, such as unrehabilitated murderers, to deporting people because a minister cannot be sure that they are not a danger to the community. This change in the risk assessment is unreasonable, and ignores the ability of people to rehabilitate and the ability of the community to accept manageable risk.

[1] Senate Standing Committee for the Scrutiny of Bills Scrutiny Digest 134 of 2018, [1.26]. The Scrutiny Committee also noted that 'in the light of the extremely broad discretionary powers available for the minister to refuse or cancel the visa of a non-citizen, the explanatory materials have given limited justification for the expansion of these powers by this bill'. This is an understatement.

Worse, we are prepared to send a person off to his likely execution, whose two crimes concerned drug dealing. It would be extraordinary if the Australian people accepted such actions, if they knew about them.

These criticisms stand. Here are some additional arguments.

The Joint Committee on Human Rights (the Rights Committee) has again raised problems with this version of the Bill[2]. We consider some of those below.

What the Bill does.

At present under section 501 of the Migration Act 1958, a person *automatically* fails the character test if they have been convicted and sentenced to death, life imprisonment, or a total of twelve months of more of imprisonment. If they do so fail, the Minister must cancel the person's visa, if they have one, or refuse to grant them one if their existing visa is due to expire or they don't have one.

There are many other ways that a person may fail that test. Some are automatic; others involve the judgement of the Minister.[3] Crucially, a person fails the test if, having regard to their past or present criminal conduct or their past or present general conduct, the person is not of good character. In these cases, the Minister may, but is not obliged to, cancel or refuse a visa.

The bill proposes to extend the grounds on which a person *automatically* fails the test.

If a person is convicted of certain crimes whose maximum possible sentence is two years' imprisonment or more, the person will fail the test, irrespective of the actual sentence passed.

That is to say, a person may be convicted without any sentence at all, or no custodial one, but will still have failed the character test, without the Minister having considered that case.

The specified crimes are:
Violence against a person, including murder, manslaughter, kidnapping, assault, aggravated burglary and the threat of violence, non-consensual conduct of a sexual nature including sexual assault, non-consensual commission of an act of indecency or sharing of an intimate image, breaching an order made by a court or tribunal for the personal protection of a person, using or possessing a weapon, and various ancillary crimes, of procuring or assisting with those offences.

[2] Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2021, *Report 15 of 2021*; [2021] AUPJCHR 150.

[3] A person convicted of any offence at all while in immigration detention or during an escape from such detention fails the test. If the Minister reasonably suspects that a person is a member of or is associated with an organisation that in involved in criminal conduct, or is associated with a person that is involved in criminal conduct, the person fails the test. If the Minister reasonably suspects a person has been involved in people smuggling, trafficking in persons, genocide, a crime against humanity, a war crime, torture, or any other crime of serious international concern, the person fails the test—even if they have never been convicted. There are numerous other grounds.

The purpose of the Bill.

It is unclear what purpose the proposed changes serve. The Explanatory Memorandum (EM) tells us only that passage of the Bill will 'ensure that non-citizens who are convicted of certain serious offences and pose a risk to the safety of the Australian community do not pass the character test and may be appropriately considered for visa refusal and cancellation,'[4] and that 'the amendments in the Bill will ensure that the character test aligns directly [sic] 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.' [5]

Both of these claims are mistaken. *The Bill has nothing to do with serious offences.* It has to do with cases where the courts have determined that offences are minor, and have accordingly given minor penalties. Where there are serious breaches of the law, courts sentence the offenders to lengthy prison sentences—as we and others have noted before.

There is no public evidence that there is a general expectation in the Australian community that people who have committed minor, understandable or morally acceptable breaches of serious criminal laws should have their visas cancelled and be sent to their countries of citizenship, especially when, from long presence in Australia, that has become their country. At any rate, we know of no evidence for such a claim; and though we have challenged it before, no evidence is presented in the EM. Nor is it presented when the same claim is made in the Statement of Compatibility with Human Rights.

The intended application of the Bill.

The EM tells us that 'generally, the discretion to cancel or refuse to grant a visa will not be exercised for low level, petty or historical offending.'[6] It may be a fault of expression, but it would seem to imply that it is expected that sometimes it will be. The Bill certainly leaves this possibility open. We doubt whether "the Australian community" would support this. The Committee should reject it explicitly.[7]

Further we are told (correctly) that 'failure to pass the character test does not necessarily mean the non-citizen's visa will be cancelled or refused….a delegate of the Minister must have regard to the factors prescribed in the relevant Ministerial Direction made under section 499 of the Migration Act'. The Rights Committee has examined the current Direction at length, and we agree with the problems it sees.

As we argued in 2019, it is a function of the courts to carefully consider the details of a case, the background of offenders, their prospects of rehabilitation, and whether they are a danger to society. They have access to expert knowledge of such things, have experienced judges, and make their decisions accordingly.

This bill would ignore all that, and automatically—and arrogantly—override the courts' decisions.

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[4]Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2021).
[5] Ibid.
[6] Item 5, paragraph 22.
[7] The Committee should never see its role, or the role of its government members, as uncritically supporting the passage of Government bills, or uncritically accepting assurances from a government department that new powers will only be used in certain ways. Its prestige, and the reputations of its members, depend on its willingness to be critical.

By application of the principle that de minibus non curat lex, trivial infringements of criminal laws do not result in convictions. However, it is not hard to imagine circumstances where an infringement of the laws covered by this bill are *not* trivial, but are justifiable or excusable—or even commendable. Indeed, it is just such cases where the penalties that are given are less than 12 months in prison, or no penalty at all.

This is true of violence, breaching a court order for the personal protections of another person, using or possessing a weapon, or the auxiliary offences. It may even be true of murder.

It is true that the Bill is different from the earlier versions presented in 2018 and 2019 by the addition of sections that recognise these things in relation to common assault, excluding cases that do not cause bodily harm, harm to a person's mental health or involve family violence. However, there has been no such modification for any of the other criteria. And this modification is inadequate, as the following cases show.

1. A very recent case is that of Glenn Stratton, accused of murder, but later pleading guilty to aiding and abetting his father's suicide.[8] Mr. Stratton shot his father dead. The older man had been undergoing chemotherapy, radiotherapy and immunotherapy for bowel cancer, having survived surgery, but still had the cancer. He had added a page to his advanced care direction a week earlier, begged his son to shoot him, and threatened to do it himself, which would have been messy and painful, in that he could not easily hold the rifle appropriately. It is perhaps relevant (as Hollingworth J remarked) that he had been a passionate supporter of euthanasia law reform. The son was convicted, and released on an adjourned undertaking of two years.

Glenn Stratton therefore used a weapon, caused bodily harm, assaulted his father, might have been convicted of murder or manslaughter. He was, so far as we know, an Australian citizen. But had he not been, had he been on a visa, he would have automatically failed the character test on several counts if this bill were law. That would have been an unjust outcome.

2. There are other cases where killing is criminal, but understandable, and the penalties are therefore light—notably battered wife syndrome cases.

3. As the Scrutiny Committee notes, a person may be convicted of carrying a weapon for possessing a pepper spray.

4. Contraventions of intervention orders may more readily be seen to be minor. A person might contact an estranged partner by email about the suitability of Christmas presents for their children.

5. A person may respond to an email, politely, or make a phone call at the request of the victim.

6. Children or young teenagers could automatically fail the test through sharing of an inappropriate image.

[8] DPP v Stratton [2021] VSC 810 (9 December 2021).

7. A person may innocently carry a slingshot or a paint shell gun across the border into New South Wales, where possession is not restricted in the home state, but is forbidden under the *Weapons Prohibition Ac*t 1998 (NSW).

But as the EM notes, 'The nature of the breech is not intended to be material in determining whether the physical element has been satisfied. The breech of the order in and of itself should be considered as satisfying the physical element required for a designated offence to have occurred.'[9] True, a court might decline to convict on the de minibus principle. If one did convict (after all, image sharing is not trivial), the delegate of a Minister or the Minister him or herself might not cancel the visa—it would depend on the current Direction. And as the Rights Committee has pointed out, the current Direction is at odds with the human rights of children, by subordinating concern for them to other considerations.

In summary, and as we said in our earlier submission, because the bill permits visa cancellation on the basis of merely *possible* maximum sentences, it will legitimate harsh penalties on people whose crimes are minor. Under section 503 of the Act, a person who fails the character test is not entitled to remain here. The person is detained and then deported; or if that is not possible (where a person is at risk of death if sent to the country of his or her citizenship, or where the person is stateless), may be kept in detention for long periods, or even for life. The Bill is proposing that serious harm be done to minor offenders.

The consequences of visa cancellation.

Under section 189 of the Act, a person whose visa is cancelled or refused must be taken into detention. This is a very serious matter, and almost certainly, in the case of someone whose visa would be cancelled under this Bill, would be contrary to their human rights—whether these are understood as moral considerations or under international law.

The psychological consequences of prolonged detention are well known. There has been a new meta-analysis of research on the prevalence of psychiatric disorders among *refugees* in immigration detention, published online by the British Journal of Psychiatry (so peer reviewed). Examining nine studies which between them covered 630 refugees and migrants, 522 in detention, it found 'a huge burden of mental health problems in detained refugees and migrants of all ages…relative to non-detained samples'.[10] It is unlikely that the effects are less for people detained as a result of their failing the character test, or would be detained as a consequence of the passage of this Bill.

As we also noted before, harm is done to families, by the separation of a parent for long periods, sometimes permanently.

One significant difference this time is that the detention of a person can expose them to the risk of catching COVID-19, as can be seen from the outbreak in the Park Hotel Alternative Place of Detention in Melbourne and the number of guards in detention centres who have tested positive to the virus. To the already serious consequences of cancellation of a person's visa, noted in our previous submission, must be added the risk of a torturous death.

[9] Item 6, paragraph 31.
[10] https://www.cambridge.org/core/journals/bjpsych-open/article/prevalence-of-psychiatric-disorders-among-refugees-and-migrants-in-immigration-detention-systematic-review-with-metaanalysis/20729EFFC3668FDF669E9939B96D3C2C

Courts are already taking this into account when determining sentences, particularly in the context of frequent lockdowns, the inability to have family visits and the inability to isolate.

The Bill proposes that people whose crime was committed before its commencement will be subject to its sections.[11] Such retrospectivity is unacceptable for any purpose, and especially not for the purposes of sending yet more people out of Australia, especially when they have lived here long enough to call Australia 'home'. It is no comfort to find the EM declaring that 'generally, the discretion to cancel or refuse a visa will not be exercised for low-level, petty or historical offending. If this is the case, why is subitem 7(3) included? Indeed, why is the Bill put forward at all?

Conflicts with human rights

The Rights Committee has raised a number of incompatibilities with international human rights treaties to which Australia is a party.

We agree with that Committee's concerns. CCL will not traverse the entire work of that committee, but refers the Committee to it. We note however the following:

1. The Bill is incompatible with Article 9 of the International Covenant on Human Rights. This is a prohibition on arbitrary detention.

It is not enough that detention is permitted or required under a law; to avoid being arbitrary, the law must be reasonable, necessary and proportionate, and the ground of its necessity must be pressing and substantial—it is not the case that just any outcome that is seen as desirable will do.[12]

According to the Statement, the proposals in the Bill seek to 'achieve the safety of the Australian Community and the integrity of the migration program.'[13] It is not at all clear that offenders caught by the new provisions are a danger to the Australian Community. Ex hypothesi, their offending is minor, or they would have received greater sentences. Further, nearly half of offenders do not offend again on their release; and the proportion is improved if they are given assistance by organisations such as the Community Restorative Centre.

But even if some are, there is no basis for holding that there is pressing and substantial need for the measures of this bill. After all, in the few cases where the courts may be held to have got things wrong, the Minister has open to him or her the power under paragraph 501(6)c of the Act to cancel or refuse a visa having regard to a person's past and present criminal conduct or past and present general conduct.

2. If a person's visa is cancelled, detention is then mandatory. If that leads to protracted detention, that detention will become arbitrary under international law, because individual circumstances are not taken into account under such mandatory detention, and there is no right to review on the merits by courts.

[11] Item 7(3).
[12] Successive Explanatory Memoranda have failed to recognise this.
[13] Statement of compatibility, p. 18.

3. We note the Rights Committee's comments about what constitutes a person's own country.[14] 'The reference to a person's 'own country' is not restricted to countries with which the person has the formal status of citizenship. It includes a country to which a person has very strong ties, such as a country in which they have resided for a substantial period of time and established their home.'[15]

In our view, someone who has lived in Australia for ten years has made Australia their country, whatever their formal citizenship status. Such people have a right to participate in decisions that affect them[16], and therefore a right to become Australian citizens. Minor or justifiable infringement of criminal laws should not be used as an excuse to prevent them from taking out citizenship. Nor should they be an excuse to deport them.

The requirement of balance.

In addition to the requirements of international law, there are also standard moral obligations if inalienable human rights are transgressed. The benefits of doing so must be balanced against the transgression of rights, together with any harm that will eventuate. One of the requirements of balance is that the transgression is the one that, of the various possibilities, that least infringes the rights. We, the Scrutiny Committee, the Rights Committee and others have made it plain that this bill does not meet this requirement.

Recommendation 1: the bill should be rejected.

Recommendation 2: If the bill is to progress, a section should be inserted preventing the cancellation of the visas of minors on character grounds.

Recommendation 3: There should be an independent review, preferably by the Australian Law Reform Commission, of the 17 sections of the Migration Act that constitute the character test and its consequences, and of the application of that legislation in practice. Such a review should also examine the merits of the New Zealand approach, which limits visa cancellation to people who have lived in that country for less than 10 years.

[14] Rights Report at 1.66.
[15] They quote Nystrom v Australia, UN Human Rights Committee Communication 1557/2007 (1 September 2011).
[16] This a one of the foundational principles of democracy.

This submission was prepared by Dr Martin Bibby on behalf of the New South Wales Council for Civil Liberties.

Yours sincerely,

Michelle Falstein
Secretary
NSW Council for Civil Liberties

Appendix. Our submission to the inquiry into the 2019 bill.

The Council for Civil Liberties (NSWCCL) thanks the Legal and Constitutional Committee for the opportunity to make a submission to its inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019.

In view of the severe consequences that can follow visa cancellation, NSWCCL seeks the opportunity to present material to the Legal and Constitutional Committee directly.

This bill is identical to the Strengthening the Character Test Bill 2018, a deeply flawed and unjust proposal, which was subject to substantial criticism from some of Australia's most august bodies, including the Australian Human Rights Commission, the Australian Law Council, The Federation of Ethnic Communities Councils of Australia, the Parliamentary Joint Committee on Human Rights,[17] the Scrutiny of Bills Committee, as well as the Government of New Zealand and the NSW Council for Civil Liberties. The only change has been a grammatical correction in the Explanatory Memorandum.

Summary

i. This bill is not about protecting the Australian people from serious dangers. It is a disproportionate response to visa holders who have committed minor crimes.

ii. This bill will subject people who are of no danger to society to the rigours of indefinite detention, or to being deported. There will be serious consequences for their families. There is no evidence that "the community" would want such outcomes.

iii. The bill would allow the Minister the discretion to cancel or refuse to issue a visa to a person who has been convicted of a designated offence but who may have received a very short sentence, or no sentence at all.[18]

iv. The bill presupposes that careful decisions of the courts, made after proper process, input by experts and the experienced judgement of judges, are inferior to decisions made by the Minister with the aid of his Department. Sentences, after all, take account both of the seriousness of the crime and of the desirability of deterrence—both of the individual and of others. That is, they take into account the dangers to the community.

v. The bill contains no exceptions for children.

vi. The bill ignores the processes of rehabilitation.

viii. A determination that a person fails the character test, depending on how it is made, means either that their visa must be, or may be, cancelled or refused. There is a right to
merits review is available only in some cases. (The courts can only deal with errors of law.) The extraordinary, unjust, power already given to the Minister and his delegates needs no extension—rather, it should be cut back.

ix. Some examples of how the powers are used raise serious concerns about the existing law, and the procedures that are applied. We have moved from deporting people who clearly are a danger and high risk, such as unrehabilitated murderers, to deporting people because a minister cannot be sure that

[17] Report 12 of 2018, November 27 pp. 2-22, Report 1 of 2019, July 30, pp.69-97.

[18] Senate Standing Committee for the Scrutiny of Bills Scrutiny Digest 134 of 2018, [1.26]. The Scrutiny Committee also noted that 'in the light of the extremely broad discretionary powers available for the minister to refuse or cancel the visa of a non-citizen, the explanatory materials have given limited justification for the expansion of these powers by this bill'. This is an understatement.

they are not a danger to the community. This change in the risk assessment is unreasonable, and ignores the ability of people to rehabilitate and the ability of the community to accept manageable risk.

Worse, we are prepared to send a person off to his likely execution, whose two crimes concerned drug dealing. It would be extraordinary if the Australian people accepted such actions, if they knew about them.

Recommendation 1: the bill should be rejected.
Recommendation 2: If the bill is to progress, a section should be inserted preventing the cancellation of the visas of minors on character grounds.
Recommendation 3: There should be an independent review, preferably by the Australian Law Reform Commission, of the 17 sections of the Migration Act that constitute the character test and its consequences, and of the application of that legislation in practice. Such a review should also examine the merits of the New Zealand approach, which limits visa cancellation to people who have lived in that country for less than 10 years.

1. What this bill is about.

Despite what has been said in the Explanatory Memorandum,[19] this bill is not about outlaw motorcycle gangs, murderers, people who commit serious assaults, sexual assault of aggravated burglary. People who are convicted of such crimes do not receive sentences of less than a year, unless their actual offences are minor—and if so, they are known *not* to be a danger to the community.

Harming such people by putting them in indefinite detention, or separating them from their families by sending them away, is arbitrary and disproportionate. It can have dramatic and awful consequences for their families. It is contrary to Australia's obligations under the International Covenant on Civil and Political Rights.

Contrary to a misconception being put about, judges and magistrates do not lighten sentences in order to ensure that convicted persons are not subjected to the cancellation of their visas and thrust into detention or sent overseas. For judicial officers are prevented from doing this by the laws of several states and also by a determination of the High Court.

It is clear that generally a judge is not entitled to deliberately fashion a sentence to avoid statutory consequences.

The NSW Court of Criminal Appeals has made it plain that the prospect of deportation is an irrelevant consideration which is not to be taken into account. Cases include Pham 2005 NSWCCA 94 at 13, AC 2016 NSWCCA 107 at 70, Arrowsmith 2018 SASCFC 47 at 37 and Kristensen 2018 NSWCCA 1

In any case, under the existing act, persons can already be deemed to have failed the character test if they pose any risk to the community, on the basis of their past or present criminal or general conduct, or due to an association they have. This is already too wide a categorisation for people to fail the character test.

[19] E.g., on page 7.

2. The motivation for the bill.
If the concern behind the bill were about protecting people, the proposers would be embarrassed about releasing dangerous criminals into other societies—especially when there are few nations in a better position than Australia to effect the reform of
miscreants, or to control them if reform fails. They would be embarrassed about the cancellation of visas of refugees who, in detention, take out their frustration and despair by physical resistance to their sometimes cruel guards. They would be embarrassed about sending people who have been in Australia since childhood to countries they have no connection with, countries which cannot be seen as having any responsibility for those persons' actions.

The boasts of the Minister for Home Affairs, that more visas were cancelled in twelve months than were cancelled in six years under the recent Labor Governments[20] are relevant here. If, as the Minister averred, 'visa cancellation numbers [were] at about 3,400, the highest number in this federation'[21], there is reason to be concerned about the motivation for this bill. That is, it is hard not to believe that there are motivations other than a desire to keep Australia safe, such as a desire, contrary to the constitution, to punish people who have already been punished, or pure vindictiveness.

3. Harsh penalties for minor offences.
Because the bill permits visa cancellation on the basis of possible maximum sentences, it will legitimate harsh penalties on people whose crimes are minor. Under section 503 of the Act, a person who fails the character test is not entitled to remain here. The person is detained and then deported; or if that is not possible (where a person is at risk of death if sent to the country of his or her citizenship, or where the person is stateless[22]), may be kept in detention for long periods, or even for life.[23] The Department, or its leaders, are proposing to do serious harm to minor offenders.

Given the treatment that has been perpetrated against asylum seekers who have committed the most minor of crimes in detention, this is not fanciful.

The bill will create more suffering, and because of overcrowding, worse conditions in detention centres.

It is not hard to think of minor offences, even for the four categories included in proposed paragraph 501(7AA)(a) of the bill, that will lay a person open to visa cancellation.[24]

It is not only the persons who have committed minor crimes who will suffer as a result of the application of this legislation. The bill will bring about separation of parents from their children, and spouses from each other. The spouses and their children will thus also be victims. Where the primary visa holder is the offender, secondary visa holders—his/her spouse and children—will lose their visas also. Or where the offender is the only or principal money earner, they will lose their means of support.

[20] Interview with Ray Hadley, http:minister:homeaffairs.gov.au/peterdutton/Pages/Had-Inf.aspx
[21] https://startsat60.com/news/crime/david-degning-grandpa-dpeorted-back-to-britain
[22] See, however, the Choe case outlined below.
[23] It should not be forgotten that indefinite detention leads to mental illness and suicide attempts.
[24] See section 4 below.

Moreover, in the past and recently, individuals have been removed to countries where they cannot speak the language, where they have spent little time and only as infants, or have never lived, and where they have no means of support, no family or other connections.

4. Offences under the four categories—proposed paragraph 501(7AA)(a).

Under this bill, a person would fail the character test for offences that are in fact quite trivia, and do not in fact mean that the person is, in any natural sense of the words, a threat to society. A person subject to a court order, for instance, might contact an ex-partner, in contravention of an order made for the personal protection of that partner, for the most urgent of reasons, or forgetfully, especially when there has been no actual violence in the past. (Such cases are regrettably not unusual.) As the Law Institute of Victoria has pointed out, a child who shares an intimate picture with a boyfriend or a girlfriend would automatically fail the character test. A pair of punches to the body, occurring for the first and only time in an individual's life, regrettable though they are, do not imply that the offender is a threat to society. Yet the assailant would fail the test.

Thus proposed paragraph 501(7AA)(a) is woefully inadequate in its attempted restriction of the offences covered to serious crimes. There is a failure of imagination by those who have put it forward.

5. Aiding or abetting the commission of offences under the four categories.
This group of "designated offences" is most likely to involve the family members of an offender. Where the offences are already minor—and in the cases the bill is intended to catch, all the offences are minor[25]—the involvement of partners or children will be trivial.
This section will also strongly discourage people from letting the police know of offences in which they or those they care about have played a small part.

6. Catching out children.
There are no exceptions made for children under these amendments—or in section 501 as it is. The Explanatory Memorandum does state that only in exceptional circumstances would a child's visa be cancelled—but that is a mere promise. There is no account even there, and certainly not in the bill, of what those circumstances might be. It is true that Ministerial Direction 79 lists the best interests of minor children in Australia as one of three primary considerations to be taken into account in determining whether a visa should be cancelled. The examples of David Degning and Jagdeep Singh below do not give confidence in the way this requirement is implemented.

Children of course should not (abusive parenting aside) be separated from their parents. Nor should parents lose their visas because of the actions of their children.
If the bill is to progress, CCL recommends that a section be included preventing the cancellation of the visas of children on character grounds.

7. Gainsaying the courts.
The shift from actual sentences to the maximum available sentences fails to appreciate the role of maximum sentences. They are for the worst cases of an offence. The actual sentences given take account of the material facts of the offences, mitigating and other circumstances such as disability and especially moral culpability, and also the likely threat to society. (Parole decisions also take account of

[25] They have, after all, been given minimal senences.s

those threats.) And, of course, they also take into account the actual gravity of the actions committed. Basing visa cancellation on maximum sentences ignores those factors. As such, possible maximum sentences are not an appropriate basis for determining seriousness, nor for judging the likely threat to society posed by a defendant.

8. Ignoring rehabilitation.
Whether or not a convicted person who has served their sentence is a continuing threat to the community is a matter to be judged after society's attempts at rehabilitation have been completed. These attempts go on after the prisoner has been released, and are often successful.[26] The judgement of the Minister should not be made on the basis of the crimes committed alone, but on a careful assessment of the individual.

The bill is unnecessary, it is unjust, and it is unwise. It should be rejected.

9. The need for a comprehensive review of the existing legislation and its implementation.

Some examples:

The 'Choe' case.

The Guardian reported[27] that the Department of Immigration was about to deport a North Korean born refugee, despite recognising that he would probably be executed or sent to a forced labour camp[28] on arrival at his birth country. He had two convictions for supplying a drug, but the New South Wales District Court had found that he had good prospects for rehabilitation. The Department is reported as having determined that execution was not an insurmountable hardship sufficient to stop his deportation. Shockingly, the Administrative Appeal Tribunal upheld the decision, holding that 'protection of the Australian community and community expectations outweigh other considerations.' It seems a human life is not worth much in modern Australia.

David Degning.
Mr. Degning arrived in Australia at the age of 6. In 2009, he committed the serious offence of having intercourse with a person with a cognitive impairment. He pleaded guilty in 2013 and was given a suspended 17 month sentence. (The court, in effect, did not judge that he was a danger to others.) He had a further conviction for drunk driving, and failed to declare his convictions on two passenger arrival cards some years before his visa was cancelled. It is hard to see how this failure shows that he is a danger to Australia.[29]

The first he knew that his visa had been cancelled was when his home was invaded by 16 Border Force officers at 5.00 a.m., and he was taken off to detention. He was to be deported to the United Kingdom,

[26] The recidivism rate for all crimes is about 42%. How many of those whose visas have been cancelled would never have offended again?
[27] The Guardian, December 28, 2018, Australian edition. See also The Sydney Morning Herald of the same date.
[28] Many prisoners do not survive the torture, other mistreatment and bad conditions in these camps.
[29] The Minister is reported to have averred that Mr. Degning's failure to declare his convictions showed that he did not respect the law—and so that he might harm the community. This is a truly remarkable non sequitur. Why did no one in the Department pick him up on this?

where had no connections. The Minister's extraordinary decision was overturned by the Federal Court—eighteen months later.

Jagdeep Singh
Mr. Singh was a taxi driver, who was convicted of indecent assault of an adult woman. He was not given a sentence of imprisonment, but an eighteen months corrections order, indicating that the magistrate did not consider him a danger to the community, and that the offence, though serious, did not warrant a jail sentence. Nevertheless, his visa was cancelled by a delegate of the Minister. Justice Logan of the Administrative Appeals Tribunal overruled that decision, on the grounds that Mr. Singh needed only six weeks to get his affairs in order—arrangements for his children, to sell his unit, collect papers from a university and so on—matters his wife could not attend to owing to her working full-time.

The affair was subject to adverse comment in certain sections of the media. Then the Minister got involved, and overrode the decision of the AAT.

It is hard to fathom what motivated him in any way that would do him credit. There was no benefit to Australian society. No breach of Australia's borders was involved. And there is absolutely no connection between the Minister's decision and discouraging people from getting on boats and drowning.

At best this was a mindless, fundamentalist, adherence to an unjustifiable policy—beyond its intended bounds. At worst, it was motivated by a desire to "get back"—vindictive vengeance.

Jacob Symonds lived in Australia since he was one, but was deported to New Zealand. Notoriously, Alex Viane, who never set foot in New Zealand, was deported there. It was plainly Australia's responsibility to deal with those men.

There have been older, extraordinary cases.

Robert Jovicic.
Mr. Jovicic lived in Australia since he was two years old. After living here for 36 years, and in the latter part of that being repeatedly convicted of crimes related to his heroin addiction, he was deported to Serbia, even though he could not speak Serbo-Croat, and had no means of support there. He became destitute.[30]

Stefan Nystrom
Mr. Nystrom lived in Australia since he was 27 days old, and was deported to Sweden after committing serious offences, many of them as a minor. He could not speak a word of Swedish. Sending such people out of the country is absurd. And wrong.

The temptation of a Minister or his or her advisors to use the character test for purposes other than keeping notorious criminals out of Australia in the first place was made plain by the Haneef case. Dr Mohamed Haneef, an Indian national, was arrested at Brisbane airport on 2 July 2007 in connection with a failed London bomb plot. He was held for twelve days before being charged with providing

[30] How does making a man destitute and at risk of dying compare with his crimes? Which is graver?

support to a terrorist organisation. He had in fact given a sim card with some unused data available to his cousin, who had subsequently used it in a failed terrorist attack. He was held for twelve days on this charge, before it sank in that sim cards are purchasable for a small price at supermarkets. Dr Haneef was given bail, but the then Minister for Immigration, being convinced Dr. Haneef was involved in the terrorist plot, cancelled his visa. Dr. Haneef was deported, and his expertise lost to Australia. The then Minister for Immigration was wrong. Those officers of the Australian Federal Police who advised him were wrong. The members of the then Department of Immigration who advised him were either wrong, or acceded to his demands without managing to show him he was wrong. None of them knew what every regular shopper in a supermarket knew, that SIM cards were widely and cheaply available. And when these things were pointed out to the Minister and a court granted Dr. Haneef bail, the Minister used the character test in s. 501 to wreck his reputation and have him deported. That is, the minister refused to admit, or could not be persuaded, that he was wrong. It took a court case to overturn his decision.

Since then, an obdurate minister has been given the power to overturn decisions of the Administrative Appeals Tribunal. Such decisions undermine the independence and respect of the merits review system, and are contrary to the rule of law.

It is clear that the law as it stands allows too much unfettered power to the Minister.

It is also unjust to expect another country to deal with a person who becomes a criminal in Australia, especially one who has lived here for a long time or from infancy before offending.

NSWCCL calls for an independent review, preferably by the Australian Law Reform Commission, of the 17 sections of the Migration Act that constitute the character test and its consequences, and of the application of that legislation in practice. Such a review should also examine the merits of the New Zealand approach, which has a tiered deportation system, and which limits visa cancellation to people who have lived in that country for less than 10 years.

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