UNIVERSITY OF CANBERRA

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Sophie Dunstone

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Committee Members,

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

We write this submission in our capacity as Professors in Law and Criminology at the Canberra Law School, University of Canberra. Our research over many decades has provided us with significant expertise in the area of youth justice, deportation, policing, border control and the differential effects of law and justice policy on vulnerable populations.

Professor Leanne Weber's research examines policing and border control using criminological and human rights frameworks. Leanne holds an MA in the theory and practice of human rights from the University of Essex, and an MPhil and PhD in criminology from the University of Cambridge. She has produced, or co-produced, ten academic books, and has authored more than 50 journal articles and book chapters on policing, deportation and border control.

Professor Alison Gerard is the Head of the Canberra Law School. Alison has an LLB (Hons) from the University of Technology, Sydney, and a BA (Hons) and PhD from Monash University. Alison's research focuses on justice issues and has been published in leading international and Australian journals. Her sixth book, which focuses on the criminalisation of young people in out-of-home care, will be published by Routledge in 2022. Alison is on the Executive of the Australasian Law Academics Association (ALAA).

Both Professors Weber and Gerard are currently Chief Investigators on an Australian Research Council Discovery Project examining 'criminal deportation' in Australia.

We wish to note that we endorse the submission made separately to this Inquiry by the Visa Cancellations Working Group.

Our submission is informed by our research experience and focuses on three elements. The first two are relevant to the context of this Bill, namely:

1. The flawed conclusions and recommendations of the majority report of the Joint Standing Committee on Migration that led to this Bill; and
2. Why a trauma-informed approach to adult and youth justice is what makes communities safer.

Our final point pertains specifically to the proposed introduction of 'designated offences' and examines:

3. The dangers of increasing reliance on risk assessments made by law enforcement officers and/or delegates of the Minister.

Flawed recommendations seeking enactment in the current Bill

We note that this Bill aims to enact two recommendations of the Joint Standing Committee on Migration, from their Report entitled *No one teaches you to become an Australian - Report of the inquiry into migrant settlement outcomes* (2017). These recommendations, 15 and 16, were not agreed to by either the Labor or Greens members of the Committee, and both produced Dissenting Reports. The Government's response to the Report at the time merely 'noted' these specific recommendations and explained that the provisions were already in place in the existing framework.

The forward to the Report contains the following statement (Joint Standing Committee on Migration, 2017: ix):

> Not all arrivals will flourish in their new environment. Some will struggle and some will become a threat to the safety of their new community. I have seen this in my own electorate with the rise of the Apex Gang, a group of young people with a Sudanese background terrorising suburban Melbourne with riots, thefts, car jackings and violent home invasions.

As others have argued extensively, there is no evidence to support this claim. In a detailed analysis, Weber et al (2021) have demonstrated how inflammatory media reporting and targeted policing prior to the last Victorian election promoted an inflated perception of dangerousness concerning African youths, with very serious ramifications for African Australian communities. In other research, Pasifika community leaders also challenged widespread assumptions about gang membership that young people confronted every day at school and in interactions with police (Weber 2018, 2020). These negative stereotypes associated with criminality and gang membership produce harms for non-citizens or Australian citizens from these communities. Whilst the Forward laments the 'lack of mechanisms' to deal with gang issues in Victoria, the evidence of Victoria police is that the Apex gang is a 'non-entity' (Joint Standing Committee on Migration, 2017: 130). The Committee Report contains contradictory assertions, flawed conclusions and recommendations that are harmful to the Australian community.

Trauma-informed approaches rather than deportation for children and adults

The Bill under review will result in the targeting of an increased number of children and adults for deportation.

Deportation under s501 of the *Migration Act 1958* (Cth) is a continuation of punitive approaches to young people who come into conflict with the criminal law. Punishment does little to advance community safety particularly in relation to young people. As Carrington and Pereira (2009: 29) write:

> Contemporary criminological research indicates that the best way to prevent juvenile reoffending is to keep young people out of custody and away from institutions which foster recidivism and secondary deviation (See for example Chen et al 2005; Lynch, Buckman and Renske, 2003).

Recent inquiries on youth justice in Australia have produced common themes relevant to this legislation (Clancey, Wang & Lin, 2020: 5). These are broadly summarised as:

1. Children and young people who come into contact with the criminal justice system are vulnerable and have complex needs;
2. These needs are likely to be exacerbated by incarceration;
3. Ways to avoid incarceration include:
    a. Raising the minimum age of criminal responsibility;
    b. Expanding diversion; and
    c. Expanding alternatives to detention.

Expanding the use of deportation to address falling youth crime is not a strategy backed by evidence. Rather, what the Bill seeks to promote is a way of further targeting non-citizens for punishment to foster a narrative that non-citizens pose a threat to our community that can only be addressed through exclusion.

Addressing the underlying reasons behind why people commit crime, is key to community safety. Whilst the majority of children with histories of trauma do not come into contact with the criminal justice system, young people with histories of trauma and adverse childhood experiences are over-represented in the criminal justice system (Malvaso et al., 2021). Studies have found that vulnerability and adversity are more likely to contribute to violent offending by girls, more than boys (McAra & McVie 2010). Insights on young offenders show a correlation between offending and mental health concerns, particularly for girls. Women generally are sentenced to longer periods for transgressions as it is seen as acting out of their gender norms (Fitzpatrick et al 2019: 28).

Children who grow up in challenging environments deserve understanding and support, not deportation. State and territory governments administer child protection systems for children identified as vulnerable and at risk. For those moved into out-of-home care (OOHC), stable placements are important for reducing the risk of involvement with the criminal justice system (Ryan & Testa, 2005). In Australia, studies have found that placement in OOHC is associated with increased involvement with the criminal justice system (Gerard, McGrath, Colvin, & McFarlane, 2019; Malvaso & Delfabbro, 2015; McFarlane, 2010, 2017; Ringland, Weatherburn, & Poynton, 2015). Just over 30% of all children in detention in Australia between 2014 and 2015 had also been in the child protection system in the same year (Australian Institute of Health and Welfare, 2017). In our previous work, we argued the criminalisation of children in residential care was a result a range of factors that included a care environment where minor disciplinary infractions were dealt with by police, with undertrained

and underqualified staff unable to manage these problems in-house (Gerard et al., 2019). The over-representation of Aboriginal and Torres Strait Islander children in care means that Indigenous children are likely to be particularly affected by the criminalisation of children and adults with care experience. We already know of cases of young people with a history of offending linked to their experience of out-of-home care, being deported.

There are aspects of being in out-of-home care that make children more vulnerable to harsher penalties. When children in care are charged with offending and arrive at court, a lack of a support network can result in making a term of incarceration more likely (Fitzpatrick et al 2019: 29). Additionally, having an adult support worker attend court and assist with the court process is not guaranteed and is also not a common occurrence, against the wishes of young people (McDowell, 2020). Research has suggested that girls more than boys are affected by harsher penalties due to care status bias (Conger and Ross, 2001 in Fitzpatrick et al 2019: 29).

Rather than punishment, the 'best interests of the child' require recognising histories of trauma and reducing re-traumatisation, otherwise known as trauma-informed care (Harris & Fallot, 2001). In broad terms, our criminal justice system places great emphasis on children and adults taking responsibility for behaviours without acknowledging histories of trauma and understanding their impact. The pursuit of children and adults for deportation, some of whom have been propelled into the criminal justice system as a result of inadequate access to, or experience of, government service provision, is manifestly unfair and unjust.

The dangers of increasing reliance on risk assessments made by law enforcement officers and/or delegates of the Minister

The proposed legislation introduces 'designated offences' for which convictions will render non-citizens to be of 'character concern' and liable for visa cancellation, regardless of sentences actually imposed by Courts. The Explanatory Memorandum at Clause 39 asserts that 'this will ensure that discretionary visa cancellation and refusal decisions are based on *objective* standards of criminality and seriousness' (italics added).

Sentencing is a highly specialized task requiring the careful exercise of discretion. It is an established tenet of criminal justice that a *subjective* element is required in order to ensure justice in individual cases (Krasnostein & Freiberg, 2013). Magistrates and Judges have considerable expertise in weighing up a range of factors including the seriousness of the offending, ongoing risks to the community and potential for rehabilitation in deciding between alternative sanctions, taking into account detailed information about offenders that is presented and tested in court. Disregarding the sentence imposed by the Court in relation to *liability for* visa cancellation would shift the focus exclusively to assumptions about future risk of offending made entirely on the basis of the legal offence category, not the individual offender.

The proposed change seems to be motivated by a desire to increase the pool of convicted non-citizens brought into the purview of the visa cancellation machinery, rather than to improve the assessment and management of risks to the community. The thinking behind these proposed changes builds on existing trends in law enforcement in which undue emphasis is placed on demonstrably imprecise estimates of individual and collective risk (Weber 2021). Conviction for a

'designated offence' in a circumstance that does not meet the existing criteria for 'serious offending' which would trigger *automatic* visa cancellation under s501(3A), would render a non-citizen liable to *discretionary* visa cancellation, under s501(3) of the *Migration Act 1958 (Cth).* The proposed legislative change therefore does not reduce overall discretion within the system as implied by the claim of objectivity, but merely shifts it away from Courts and towards the Minister who exercises these discretionary powers, and ultimately to those who advise them.

We have very solid grounds to be concerned about further expanding reliance on assessments by departmental officers about safety risks to the community. We do not know precisely how departmental officers make their risk assessments, other than by reference to a crude 'risk matrix'. We do know that departmental instructions that apply to both first instance decisions and appeals to the Administrative Appeals Tribunal privilege perceived risks over other potentially mitigating considerations, and that reference is often made, without evidence, to presumed 'community expectations' (Billings and Huang 2019, Bostock 2011).

We also have cause for concern where assertions about risks to the community may be relayed to immigration authorities by police. Empirical research has established that NSW Police are keen to use immigration law to 'get rid' of offending non-citizens when convenient, including for minor offences (Weber 2014). Clearly police cannot be considered objective arbiters of risk where they have a vested interest in achieving this result. A review of one risk-based system used by NSW Police found that it targeted children as young as ten and argued that the attribution of risk classifications to children and young people was unjustified (Sentas and Pandolfini 2017). There is also mounting evidence from that study and from around the world that the use of risk-based systems by police amplifies pre-existing racial bias (Williams and Kind 2019). The unreliability of risk assessments by police was highlighted by the Victorian Ombudsman, who claimed that intensive policing of the public housing tower blocks in Melbourne during a Covid lockdown was informed by 'incorrect and potentially stereotypical assumptions' about the security risks posed by the residents, who were largely from migrant backgrounds (Victorian Ombudsman 2020).

Conclusion

The proposed legislative changes will neither increase the fairness or objectivity of the visa cancellation process, nor provide appreciable benefits to community safety for reasons that we have outlined above. It will likely have a disproportionate impact on those impacted by institutional harms, such as those with experience of certain types of out-of-home care. For these reasons, the Bill should be abandoned.

Professor Alison Gerard and Professor Leanne Weber
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