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# WESTERN SYDNEY UNIVERSITY



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## INTRODUCTION

1. On 4 July 2019, the Senate referred the provisions of the Migration Amendment (Strengthening the Character Test) Bill 2019 to the Legal and Constitutional Affairs Legislation Committee (LCAL Committee) for inquiry and report by 13 September 2019. Stakeholders may lodge a submission to the inquiry by 7 August 2019.
2. The submitters of this submission hold academic positions at Western Sydney University (WSU). Professor Anna Cody is the Dean of the School of Law with a distinguished background in human rights law and legal education.<sup>1</sup> Dr Jason Donnelly is a Senior Lecturer and Course Convenor of the Graduate Diploma in Australian Migration Law (GDAML) in the School of Law and a Barrister of the Supreme Court of New South Wales and High Court of Australia with specialised expertise in Australian migration law.<sup>2</sup>
3. Critically, the opinions reflected in these submissions are those of the submitters and do not necessarily reflect the perspective of WSU. The views advanced in this document should not be taken to reflect the views of WSU.
4. In preparing the submissions, the submitters have had close regard to the following documents:
  - Claire Petrie, Bills Digest No. 12, 2019–20, Migration Amendment (Strengthening the Character Test) Bill 2019, Parliament of Australia, Department of Parliamentary Services
  - The Honourable David Coleman, Member for Banks and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, Migration Amendment (Strengthening the Character Test) Bill 2019, Second Reading Speech, Commonwealth of Australia, Thursday, 4 July 2019
  - Explanatory Memorandum, The Parliament of the Commonwealth of Australia, House of Representatives, Migration Amendment

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[https://www.westernsydney.edu.au/newscentre/news\\_centre/more\\_news\\_stories/university\\_welcomes\\_new\\_dean\\_to\\_the\\_school\\_of\\_law](https://www.westernsydney.edu.au/newscentre/news_centre/more_news_stories/university_welcomes_new_dean_to_the_school_of_law)

<sup>2</sup> Doctor Jason Donnelly [https://www.westernsydney.edu.au/staff\\_profiles/WSU/doctor\\_jason\\_donnelly](https://www.westernsydney.edu.au/staff_profiles/WSU/doctor_jason_donnelly)

(Strengthening the Character Test) Bill 2019

- Statement of Compatibility with Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2019
- Migration Amendment (Strengthening the Character Test) Bill 2019
- Ministerial Direction No. 79: New Guidelines for the Character Requirement
- Applicable Australian case law.

5. In summary, the submitters contend that the proposed enactment of the Migration Amendment (Strengthening the Character Test) Bill 2019 (character Bill) is unnecessary, has the potential to breach fundamental human rights related to non-citizens residing in Australia, is a troubling expansion of executive power, and is unjustified.

## **UNRAVELLING THE SECOND READING SPEECH**

6. On 4 July 2019, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ('the Minister') moved that the character Bill be read a second time. In accordance with this normal parliamentary procedure, the Minister advanced a number of reasons to justify the enactment of the character Bill.
7. For the submitters, various reasons advanced by the Minister to justify the enactment of the character Bill are either misplaced or otherwise plainly wrong as a matter of law.
8. First, the Minister outlined that:

The purpose of the Migration Amendment (Strengthening the Character Test) Bill 2019 is to strengthen the current legislative framework in relation to visa refusals and cancellations on character grounds. This Bill ensures that noncitizens who have been convicted of serious offences, and who pose a risk to the safety of the Australian community, are appropriately considered for visa

refusal or cancellation.<sup>3</sup>

9. Accordingly, for the Minister, the character Bill purportedly ensures that non-citizens who have been convicted of serious offences and pose a risk of harm to members of the Australian community are considered for either visa cancellation or visa refusal on character grounds.
10. The preceding assertion advanced by the Minister is not entirely correct. Although the character Bill demonstrates that non-citizens convicted of serious offences (e.g. 'designated offences') may be considered for either visa cancellation or visa refusal,<sup>4</sup> none of the express provisions say anything about posing a risk of harm to the community.
11. The statutory effect of the character Bill is that non-citizens are taken to fail the character test by reason of committing a 'designated offence' as proposed by s 501(7AA) of the character Bill. Critically, a major focus of the 'designated offence' definition is the commission of particular kinds of offences which are punishable by imprisonment for life or imprisonment for a maximum term of not less than two years.<sup>5</sup>
12. A substantial focus of the new character provisions is on examining the maximum penalty for relevant offences (which, at a broader level of abstraction, demonstrates the potential seriousness of the criminality in question). Beyond that, however, the mere commission of a 'designated offence' does not necessarily demonstrate that the non-citizen poses a risk of harm to members of the Australian community. That latter issue requires closer regard to the subjective considerations relevant to the offence and the non-citizen (which are irrelevant to the 'designated offence' regime mandated by the character Bill).
13. The upshot of the preceding analysis is that it is correct to say that the character Bill ensures that non-citizens who have potentially been convicted of serious

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<sup>3</sup> The Hon David Coleman, Member for Banks and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, Migration Amendment (Strengthening the Character Test) Bill 2019, Second Reading Speech, Commonwealth of Australia, Thursday, 4 July 2019, 49.

<sup>4</sup> Migration Amendment (Strengthening the Character Test) Bill 2019, Schedule 1 – Amendments, Item 4.

<sup>5</sup> Ibid, Item 6.

offences may be considered for visa refusal or cancellation. However, it is not necessarily the case that a non-citizen who is taken to fail the character test (by reason of committing a designated offence) poses an ongoing risk to the safety of the Australian community that justifies invoking consideration of either visa refusal or cancellation.

14. Secondly, the Minister contended that: '[t]he Bill presents a very clear message to all noncitizens that the Australian community has no tolerance for foreign nationals who have been convicted of such crimes'.<sup>6</sup> Contrary to this misplaced assertion, the Australian community does have a level of tolerance for non-citizens who engage in the commission of serious offences in Australia in particular circumstances.

15. For example, in Direction No. 79, the Minister has outlined a number of principles that speak in terms of tolerance for criminality committed by non-citizens:

#### 6.1 Objectives

...

(2) ... Where the discretion to refuse to grant or to cancel a visa is enlivened, the decision-maker must consider whether to exercise the discretion to refuse or cancel the visa given the specific circumstances of the case.

#### 6.3 Principles

...

(5) Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.

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<sup>6</sup>The Hon David Coleman, Member for Banks and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, Migration Amendment (Strengthening the Character Test) Bill 2019, Second Reading Speech, Commonwealth of Australia, Thursday, 4 July 2019, 49.

(7) The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused.

16. Thus, Direction No. 79 itself demonstrates that the Australian community may exercise a level of tolerance with respect to a non-citizen who engages in criminality in circumstances where that person has lived in Australia for a substantial length of time, made a positive contribution to the Australian community, and has close ties in Australia.

17. Use of language such as the Australian community having 'no tolerance' for non-citizens who engage in the commission of serious offences in Australia has the potential (by implication) to indicate that non-citizens who engage in criminality in Australia will be deported (as if it is a foregone conclusion). However, such a policy principle (as advanced by the Minister) would be *ultra vires* the character provisions in s 501 of the *Migration Act 1958* (Cth) ('the Act'). In other words, use of the word 'may' in ss 501(1)–(2) of the Act demonstrates that discretionary decisions must be made having regard to the individual circumstances of each case. Thus, favourable character decisions made under s 501 of the Act demonstrate a level of tolerance by decision-makers (having regard to the expectations of the Australian community).

18. Thirdly, the Minister further contended that:

Consistent with community views and expectations, the Australian government has a very low tolerance for criminal behaviour. Entry and stay in Australia by non-citizens is a privilege, not a right, and the Australian community expects that the Australian government can and should refuse entry to non-citizens, or cancel their visas, if they do not abide by the rule of law. Those who choose to break the law and fail to uphold the standards of behaviour expected by the Australian community should expect to lose that privilege.<sup>7</sup>

19. There are two critical problems with the preceding contention.

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<sup>7</sup> Ibid.

20. The Minister contended that the Australian government has a very low tolerance for criminal behaviour. However, as outlined above, Direction No. 79 itself recognises that a higher level of tolerance may be shown to a non-citizen in light of the particular circumstances related to that person.
21. Further, as Griffiths J made plain in *DKXY v Minister for Home Affairs* [2019] FCA 495 [31], the primary consideration in Direction No. 79 — namely, the expectations of the Australian community — is ‘to be assessed in the light of all the relevant circumstances which appertain to it’. Thus, having regard to all relevant circumstances, despite committing a serious offence, the expectations of the Australian community may weigh in favour of a non-citizen (which demonstrates, potentially, a high level of tolerance granted to that person).
22. The Minister speaks of both the entry and stay of non-citizens in Australia as ‘a privilege’.<sup>8</sup> The Minister contends that those who commit criminal offences and fail to uphold the standards of behaviour expected by the Australian community should expect to lose ‘the privilege’ of remaining in Australia.
23. Unsurprisingly, the Minister’s use of the word ‘privilege’ is repeated in Direction No. 79 in clauses 6.3(1), 6.3(3), 7(1)(a), 9.1(1) and 13.1(1). Critically, the Minister’s use of the word ‘privilege’ in the Second Reading Speech for the character Bill and Direction No. 79 is legally incorrect. For example, in *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 [70], Griffiths J held:

In particular, without doubting the relevance to the exercise of that power of protecting the Australian community, it is important that the value of the statement of reasons is not diminished by resort to superficial aphorisms or empty rhetoric, which is illustrated by phrases such as ‘expectations of the Australian community’ and the ‘privilege’ of being a visa-holder. The former concept has the potential to mask a subjective value judgment and to distort the objectivity of the decision-making process. The latter expression is simply misleading as a legal concept. Under Australian law, having the status of a visa-holder is not a privilege. Visa-holders hold statutory and non-statutory

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<sup>8</sup> Ibid.

rights which are inconsistent with the notion of their status being described simply as a 'privilege'. For example, many visa-holders have statutory rights of review and all visa-holders have rights relating to judicial review of adverse migration decisions. The statutory rights of a visa-holder are, of course, subject to the lawful exercise of executive powers such as those under s 501. But that fact does not justify the position of a visa-holder under Australian law being described as merely one of 'privilege' in a legal sense.

24. Fourthly, an apparent reason for introducing the character Bill was expressed by the Minister in the following terms:

By strengthening the character test in this way, the minister and their delegates will have a clear and objective ground with which to consider cancelling the visa of, or refusing the grant of a visa to, a non-citizen who has been convicted of offences ...<sup>9</sup>

25. Thus, for the Minister, the proposed Bill will strengthen the character test provisions in s 501 of the Act and provide clear and objective grounds for considering either cancellation or refusal of a non-citizen's visa. At a broader level of generality, it appears that the Minister has indicated that a proposed expansion to the character test provisions in s 501 of the Act is required.

26. Although the provisions reflected in the character Bill will indeed provide objective grounds to demonstrate whether a non-citizen fails the character test, the character Bill does not strengthen the character test in s 501. As outlined earlier in these submissions, the mere commission of a criminal offence in the past does not necessarily indicate that the non-citizen poses a risk of committing future offences in Australia.<sup>10</sup>

27. The current statutory regime already sufficiently regulates character issues related to non-citizens under s 501 of the Act. For example, in accordance with s 501(6)(d)(i), a person does not pass the character test if there is a risk that the person would engage in criminal conduct in Australia in the event that the person were allowed to enter or to remain in Australia. The grounds are

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<sup>9</sup> Ibid.

<sup>10</sup> Cf, *Cotterill v Minister for Immigration and Border Protection* [2015] FCA 802 [15] (Pagone J).

enlivened if there is evidence suggesting that there is more than a minimal or remote chance that the person would engage in criminal conduct.<sup>11</sup> The reference to criminal conduct must be read as requiring that there is a risk of the person engaging in conduct for which a criminal conviction could be recorded.<sup>12</sup>

28. Thus, the character test reflected in s 501(6)(d)(i) of the Act provides a fairly clear basis for demonstrating that a non-citizen fails the character test. If there is more than a minimal or remote chance of the non-citizen engaging in future criminality in Australia, the person is taken to fail the character test (which would then enliven the discretion of the Minister to consider either cancelling or refusing a visa to the relevant non-citizen).

29. The benefit of the statutory regime mandated by s 501(6)(d)(i) of the Act is that for the purposes of determining whether a non-citizen passes the character test, regard is had to the individual circumstances of the offence and the offender. Conversely, the 'designated offence' regime mandated by the character Bill ignores the subjective considerations at the stage of determining whether a non-citizen passes the character test. Thus, the proposed 'designated offence' has the real potential for either the Minister or his delegate to consider either cancellation or refusal of the visa to a non-citizen in circumstances where the non-citizen does not pose a risk of harm to the Australian community.

30. For the submitters, before the statutory discretion mandated by the character test in s 501 of the Act is invoked (e.g. limb 2 – balancing relevant primary and other considerations), the non-citizen should be taken to fail the character test under limb 1 on the basis of some rational foundation (e.g. evidence that the person poses an unacceptable risk of harm to the Australian community).

31. Naturally, if a non-citizen is convicted of a criminal offence for which no period of imprisonment is imposed by a sentencing court, several significant inferences are potentially open:

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<sup>11</sup> Direction No. 79, Section 2 – Application of the character test, cl 6(2).

<sup>12</sup> *Ibid*, cl 6.1(2).

- (a) The offence is not inherently serious.
- (b) Although the offence is inherently serious, there are substantial mitigating factors (such as excellent prospects of rehabilitation) that indicate the offender does not pose a real risk of reoffending.
- (c) The individualised circumstances of the offending dictate that only a minimal penalty should be imposed upon the offender (e.g. the offence was not intended, but the non-citizen is caught by strict liability provisions or is the subject of a reckless indifference finding). Further, there may be other more appropriate sentences such as a community service order or fine.

32. In the three examples postulated above, for the submitters, there is no real justification in finding a non-citizen fails the character test (such that the non-citizen should be the subject of the burdensome, complex and challenging process of responding to a notice of intention to consider either cancellation or refusal of the relevant visa). If the 'designated offence' regime is introduced, a non-citizen may very well be taken to fail the character test under s 501(7AA) of the Act in the three examples given. Expressed in this way, the potentiality of such scenarios coming to fruition is entirely unacceptable and inconsistent with community values and standards in Australia. This would result in unfair and overly harsh outcomes.

## **CRITICAL POINTS FROM THE BILLS DIGEST**

33. Bills Digest No. 12 (2019–20) provides a useful summary of the key issues related to the character Bill. The submitters have considered the contents of this document closely. Generally, the submitters are in overall agreement with the reasons summarised in Bills Digest No. 12 as to why the proposed provisions reflected in the character Bill should be rejected.<sup>13</sup> The following points are particularly worthy of close consideration by the LCAL Committee.

34. First, statistics released by the Department of Home Affairs show that visa

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<sup>13</sup> Cf, Claire Petrie, Bills Digest No. 12, 2019–20, Migration Amendment (Strengthening the Character Test) Bill 2019, Parliament of Australia, Department of Parliamentary Services, 10.

cancellations on character grounds increased by over 1400 per cent between 2013–14 and 2016–17 financial years, as a result of the introduction of mandatory cancellations in 2014.<sup>14</sup>

35. Despite the extraordinary increase in visa cancellations of non-citizens from 2013 onwards, the federal government has failed to provide substantial evidence that the previous changes made in 2014 to the character test process in s 501 of the Act have made the Australian community a safer place.

36. The submitters are not persuaded that cogent and reliable evidence has been advanced by the federal government that demonstrates the mandatory cancellation provisions introduced in 2014 were either warranted or justified. Despite the astonishing increase in visa cancellations between 2013–14 and 2016–17 financial years, the government has provided little evidence that criminality of non-citizens in Australia was an extraordinary problem that required urgent attention.

37. For the submitters, both the mandatory cancellation provisions introduced in 2014 by the *Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth)*<sup>15</sup> and the current bill are not a proportionate and necessary response to criminality in Australia. Much of the proposed justification for the sweeping changes to the character test in s 501 of the Act over the last several years is based on government rhetoric, without independent evidence from relevant stakeholders and experts.

38. Secondly, in the Joint Standing Committee on Migration report on migrant settlement outcomes in 2017 (*No One Teaches You To Become an Australian*), it was noted that the majority of submitters in that inquiry largely held the view that the current character and cancellation provisions in the Act were an adequate way of addressing non-citizens who had been involved in criminal activities.<sup>16</sup>

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<sup>14</sup> Ibid, 5.

<sup>15</sup> Ibid, 4.

<sup>16</sup> Joint Standing Committee on Migration, *No One Teaches You To Become an Australian: Report of the Inquiry into Migrant Settlement Outcomes*, The Committee, Canberra, December 2017, 154.

39. As recently as February 2019, the Joint Standing Committee on Migration published a separate report in relation to the character provisions in s 501 of the Act (*The Report of the Inquiry into Review Processes Associated with Visa Cancellations Made on Criminal Grounds*).<sup>17</sup> Critically, the report found that, overall, the existing character provisions in the Act ‘operate well and are achieving the aim of protecting the Australian community’.<sup>18</sup>
40. Thus, there is clear evidence from relevant stakeholders that no applicable changes to the character test provisions in s 501 of the Act are required. Regrettably, for the submitters, the federal government has continued down a path of substantial expansion of executive power in an unjustified and unnecessary manner.
41. In the 2017 report, the Committee also cited ‘community concerns about the escalation of violent crimes’, stating ‘such serious criminal offences committed by visa holders must have appropriate consequences’.<sup>19</sup> Evidently, non-citizens who engage in criminal conduct are the subject of appropriate consequences — namely, the imposition of criminal penalties. Thus, non-citizens who engage in criminality in Australia are already punished for their offending.
42. In the February 2019 report, the committee stated that ‘the AAT [Administrative Appeals Tribunal] has made some decisions that do not align with the community’s expectations that serious violent criminals will be deported from Australia’.<sup>20</sup> For the submitters, there are three fundamental difficulties with this finding by the Committee:
- (a) The Committee has provided little objective evidence to demonstrate that character deportation decisions made by the AAT do not accord with community expectations in Australia.

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<sup>17</sup> Joint Standing Committee on Migration, *The Report of the Inquiry into Review Processes Associated with Visa Cancellations Made on Criminal Grounds*, Canberra, February 2019.

<sup>18</sup> *Ibid*, 40.

<sup>19</sup> Joint Standing Committee on Migration, *No One Teaches You To Become an Australian: Report of the Inquiry into Migrant Settlement Outcomes*, The Committee, Canberra, December 2017, 174.

<sup>20</sup> Joint Standing Committee on Migration, *The Report of the Inquiry into Review Processes Associated with Visa Cancellations Made on Criminal Grounds*, Canberra, February 2019, 89.

(b) If character deportation decisions made by the AAT were a significant problem, one would expect to see various decisions made before the statutory tribunal quashed in judicial review proceedings. To the contrary, by way of example, in the 2016–17 reporting period, only 3% of appeals from AAT were allowed.<sup>21</sup> The substantially low success rates on appeal demonstrate that a vast majority of AAT decisions are made according to law.

(c) In the February 2019 report, reference was made to ‘some decisions’ of the AAT not aligning with community expectations. Even if this were true (which is not conceded), for the submitters, a substantial number of questionable decisions of the AAT would need to be made before one should consider law reform. In any event, for the submitters, Direction No. 79 and previous ministerial directions of the government plainly demonstrate that the commission of serious criminal offences by non-citizens does not necessarily reflect a community expectation that the non-citizens should be deported from Australia. The ultimate exercise of discretion to deport a non-citizen from Australia is a complex and intricate balancing process that considers both the reasons for and against deportation.<sup>22</sup>

43. Thirdly, in relation to the character Bill, the Scrutiny Appeals Committee has previously stated, *inter alia*, that the proposed law further expands an already broad discretion of the Minister’s to refuse or cancel a visa that will likely result in ‘more people being held in immigration detention, removed from Australia and potentially separated from their family’.<sup>23</sup>

44. For the submitters, with respect, there is much merit in the relevant contentions advanced by the Scrutiny Appeals Committee outlined above. Decision-makers already have a substantially broad discretionary power to either cancel or refuse a visa on criminal grounds under s 501 of the Act. The submitters are

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<sup>21</sup> The Hon IDF Callinan AC, Parliament of the Commonwealth of Australia, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 19 December 2018 (tabled before Parliament of the Commonwealth of Australia on 23 July 2019), 115.

<sup>22</sup> Cf, *Gasper v Minister for Immigration and Border Protection* (2016) 153 ALD 337, 345 (North ACJ).

<sup>23</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny digest*, 13, 2018, The Senate, 14 November 2018, 8–12.

not persuaded that either the Minister or his delegate should enjoy a further expansion of wide-ranging executive powers at the potential expense of individual rights related to non-citizens and their ties in Australia (many of whom are Australian citizens, permanent residents or otherwise have an indefinite right to remain in Australia).

45. Although judicial review offers a 'small beacon of hope' for non-citizens who are the subject of adverse character decisions, the broad nature of power vested in the executive with respect to decisions made under s 501 of the Act makes judicial review a weak accountability mechanism for non-citizens. Given the extraordinarily broad powers enjoyed by the executive in the area of deportation, demonstrating jurisdictional error in judicial review proceedings is extremely difficult. Thus, the separation of powers doctrine does not necessarily provide relevant checks and balances with respect to executive decisions made regarding deportation from Australia.

46. Fourthly, the Explanatory Memorandum states that the character Bill will have no financial impact.<sup>24</sup> The submitters respectfully question whether this conclusion is factually correct. On the assumption that the character Bill becomes law in Australia, it is likely to result in an increased number of notices of intention to consider cancellation or refusal of the relevant visa being issued to non-citizens.

47. The legal processes associated with these notices being issued by the Department of Home Affairs is likely to take up departmental resourcing and lead to further appeals before both the AAT and Australian courts (particularly the Federal Court of Australia and the High Court of Australia). Understood in this way, it is difficult to accept that the imposition of the character Bill will have no financial impact. Indeed, in the Statement of Compatibility with Human Rights associated with the character Bill, the government appears to have conceded that the practical effect of these amendments will be greater numbers of people being liable for consideration of refusal or cancellation of a visa as they would not, or no longer, meet the character requirements reflected in s 501

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<sup>24</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2019, 2.

of the Act.<sup>25</sup> Thus, there will be financial consequences.

48. Fifthly, s 501(7AA)(b) of the character Bill outlines that to meet the definition of 'designated offence', an offence against Australian law must be punishable by imprisonment for life or for a fixed or maximum term of two years or more. The nature of the proposed threshold has been the subject of previous substantial criticism from relevant stakeholders, on the basis that the proposed new law looks to the maximum available penalty attached to the offence rather than the actual sentence imposed on a person.<sup>26</sup> The submitters respectfully endorse this substantial contention as a reason against enactment of the character Bill in Australia.

49. The Explanatory Memorandum does not provide a clear explanation for the shift away from a sentenced-based approach.<sup>27</sup> As the Law Council of Australia forcefully argued, the focus on maximum sentences fails to appreciate the role of criminal sentencing, which recognises that different circumstances give rise to different degrees of culpability.<sup>28</sup>

50. As the High Court of Australia made plain in *Elias v The Queen* (2013) 248 CLR 483, 184–5, the administration of the criminal law involves individualised justice, the attainment of which is acknowledged to involve the exercise of a wide sentencing discretion. It is plain that the designated offence regime mandated by the character Bill fails to provide individualised justice by determining whether a person fails the character test (as an objective standard is set without reference to subjective considerations relevant to the offence or the offender).

51. Sixthly, the Explanatory Memorandum to the character Bill states that the refusal or cancellation of a child's visa on character grounds 'would only occur in exceptional circumstances'.<sup>29</sup> With respect, this assertion is plainly incorrect

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<sup>25</sup> Ibid, 10.

<sup>26</sup> Claire Petrie, Bills Digest No. 12, 2019–20, Migration Amendment (Strengthening the Character Test) Bill 2019, Parliament of Australia, Department of Parliamentary Services, 12.

<sup>27</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2019, 10.

<sup>28</sup> Law Council of Australia, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018* [Submission no. 9], 30 November 2018, 10.

<sup>29</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2019, 13.

and should be rejected. Neither the statutory scheme reflected in s 501 of the Act nor Direction No. 79 makes this assertion. Further, there is nothing in the proposed character Bill that mandates an 'exceptional circumstances' test for children.

52. Accordingly, where a child may be the subject of visa refusal or cancellation on character grounds in s 501 of the Act, the applicable primary and other considerations reflected in Direction No. 79 will apply (as has application to all non-citizens who engage the character provisions in s 501 of the Act). Nothing said in the Explanatory Memorandum, as extrinsic material, can be taken to override the clear language reflected in s 501 of the Act and Direction No. 79, which does not mandate deportation of children on character grounds in 'exceptional circumstances' or otherwise. Any assertion to the contrary should be rejected.

53. Finally, in the 'Concluding comments' section of the Bills Digest, the following is said:

Rather than expanding the types of conduct captured by the character provisions of the Migration Act, the Bill changes the way that certain conduct is treated by decision-makers. Under the Bill's proposed measures, a person convicted of a 'designated offence' will automatically fail the character test, and may have their visa cancelled or visa application refused. This is a departure from the existing scheme, in which the decision-maker must consider the circumstances connected with the person's offending to assess whether they fail the character test.<sup>30</sup>

54. For the submitters, the critical flaw in the character Bill is the shift away from consideration of a non-citizen's individual circumstances in assessing whether they fail the character test towards an automatic failure based on prescribed offences. Logically, having regard to an individual's circumstances (as a matter of individualised justice) provides the most reliable and fair model of determining whether a person fails the character test and potentially poses an

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<sup>30</sup> Claire Petrie, Bills Digest No. 12, 2019–20, Migration Amendment (Strengthening the Character Test) Bill 2019, Parliament of Australia, Department of Parliamentary Services, 18.

unacceptable risk of harm to members of the Australian community.

55. Prescribing that a person fails the character test and may pose an unacceptable risk of harm to the Australian community without regard to subjective considerations (which is exactly what the character Bill does)<sup>31</sup> defies logic and is an affront to the fundamental rights of non-citizens and those either directly or indirectly affected by the significant character deportation decisions made by the executive in Australia.

56. The Explanatory Memorandum speaks of setting an objective standard for the determination of what constitutes a designated offence, which relies upon established criminal law and law enforcement processes in states and territories to determine the seriousness of a given offence.<sup>32</sup> However, the reality is that existing criminal law principles and law enforcement processes are entirely sidelined in determining whether a non-citizen fails the character test by reference to the 'designated offence' regime — because, as outlined earlier by the submitters, the remarks on sentence and the circumstances of the offence are not taken into account by the Minister or his delegates in determining whether a non-citizen fails the character test.

57. Merely because Parliament has prescribed a maximum penalty for an offence in excess of two years does not demonstrate that a non-citizen who commits such an offence will have committed a serious offence. That question can only be answered by having close regard to the circumstances of the offence and the offender.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

58. Attachment A to the Explanatory Memorandum for the character Bill outlines that the proposed law is compatible with human rights and freedoms recognised or declared in international instruments listed in s 3 of the *Human Rights*

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<sup>31</sup> Cf, Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2019, Outline.

<sup>32</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2019, 7.

*(Parliamentary Scrutiny) Act 2011 (Cth).*<sup>33</sup>

59. A number of important points are made in Attachment A to the Explanatory Memorandum ('Statement of Compatibility with Human Rights') concerning the character Bill. The submitters would like to respond to those points that are either factually or legally incorrect.

60. First, it is stated:

The amendments will ensure the character test aligns directly with community expectations, that non-citizens who commit offences such as murder, assault, sexual assault or aggravated burglary will not be permitted to remain in the Australian community.<sup>34</sup>

61. The submitters are not persuaded that community expectations in Australia are to the effect that a non-citizen's visa should be either cancelled or refused on the grounds prescribed by a 'designated offence'. Certainly, no clear evidence has been adduced that demonstrates community expectations favour finding a non-citizen fails the character test without having regard to the individual circumstances of the offending and subjective considerations of the offender.

62. It is not correct to say that non-citizens who commit murder, assault, sexual assault or aggravated burglary will not be permitted to remain in the Australian community. Assuming that a non-citizen who has committed such an offence does not receive a period of imprisonment of at least 12 months, there is no automatic expectation that the non-citizen will have his or her visa cancelled or refused on character grounds. Contrary to the assertion expressed above, the non-citizen may indeed be entitled to remain in the Australian community even if he or she is taken to fail the character test as prescribed by the character Bill (as the decision-maker may exercise his or her discretion favourably toward the non-citizen, applying relevant primary and other considerations in Direction No. 79).

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<sup>33</sup> Ibid, 9.

<sup>34</sup> Ibid.

63. Secondly, it is contended that:

The amendments expand the framework beyond a primarily sentence-based approach and instead allow the Minister or delegate to look at the individual circumstances of the offending and the severity of the conduct.<sup>35</sup>

64. The preceding assertion appears to indicate decision-makers will consider the individual circumstances of the offending and severity of the conduct under the proposed 'designated offence' regime. However, for reasons already given, the proposed new law allows a decision-maker to find that the non-citizen fails the character test without considering the individual circumstances of the offence and the objective seriousness of the non-citizen's offending (which are explored in the remarks on sentence above).

65. Plainly, the real intention of the proposed 'designated offence' regime is to expand executive power to capture a range of offending that may not be necessarily serious (e.g. because the offender has not been sentenced to a term of imprisonment). The government speaks in terms of the character Bill being required to capture non-citizens who may have escaped a term of imprisonment of less than 12 months but otherwise potentially pose a risk of harm to the Australian community (and thus require consideration by the cancellation or refusal of a visa).<sup>36</sup> However, whether a non-citizen poses an ongoing risk of harm to the Australian community by reference to past criminality requires close consideration of the offending that actually occurred. Regrettably, the 'designated offence' regime seeks to bypass the critical element in the risk assessment process.

66. Thirdly, the government says that the decision to consider either refusal or cancellation of a visa by reference to the 'designated offence' regime 'will be discretionary'.<sup>37</sup> However, the character Bill provides no prescriptive rules in defining the particular circumstances in which the Minister (or delegate) will consider invoking his discretion concerning a non-citizen who falls within the

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

'designated offence' regime. Thus, the absence of prescriptive rules may create a situation where non-citizens who fail the character test on the basis of the 'designated offence' regime are treated differently. For example, the Minister may decide to issue a notice of intention to consider cancelling the visa of a non-citizen who fails the character test by reference to a commission of a 'designated offence'. However, for reasons not entirely clear, the Minister (or his delegate) may decide not to issue a notice of intention to consider cancellation of the visa to another non-citizen who otherwise also fails the character test under the proposed laws. Such a state of affairs could create inconsistency in treatment of non-citizens and is a matter of concern for the submitters.

67. Fourthly, it has been contended that:

Decision-makers exercising the discretion to refuse or cancel a person's visa are guided by comprehensive policy guidelines and Ministerial Directions, and take into account the individual's circumstances and relevant international obligations. This means the visa decision, and any consequent detention or refusal, is a proportionate response to the individual circumstances of each case.<sup>38</sup>

68. Contrary to the above assertion, where a decision-maker is considering whether to cancel, refuse or revoke a mandatory cancellation decision, any relevant international non-refoulement claims advanced by a non-citizen is not necessarily considered by the decision-maker. Should there be any doubt about that, the submitters draw the LCAL Committee's attention to clauses 10.1(4), 12.1(4) and 14.1(4) of Direction No. 79.

69. For example, cl 10.1(4) of Direction No. 79 mandates that:

Where a non-citizen makes claims which may give rise to international non-refoulement obligations and that non-citizen is able to make a valid application for another visa, it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of determining whether their visa should be cancelled.

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<sup>38</sup> Ibid, 11.

70. Thus, any consequential detention of a non-citizen on character grounds may not necessarily be 'a proportionate response' (particularly in circumstances where the decision-maker has failed to take into account any non-refoulement claims advanced by the non-citizen).

71. Fifthly, it has been contended that:

... the Government has processes in place to mitigate any risk of a person's detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman Own Motion enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.<sup>39</sup>

72. In response to the preceding contentions advanced, the submitters note:

- (a) Many of the accountability mechanisms outlined above provide fairly weak protections for non-citizens who are the subject of indefinite or arbitrary detention.
- (b) The measures also assume ready access to legal advice and representation for non-citizens, which is often not available or is very expensive and therefore not accessible.
- (c) The Minister's own policy expressly mandates that he will not generally consider the detention intervention power (e.g. s 195A of the Act) concerning non-citizens whose visas have been refused or cancelled under s 501 of the Act.<sup>40</sup>
- (d) The submitters are not persuaded that the Minister and/or the Department of Home Affairs will adopt a substantial number of recommendations made by both the Commonwealth Ombudsman and the Australian Human Rights Commission. Certainly, the federal government has failed to accept

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<sup>39</sup> Ibid.

<sup>40</sup> PAM3: Act – Compliance and Case Resolution – Case resolution – Minister's powers – Minister's detention intervention power.

previous recommendations made by these statutory bodies.<sup>41</sup>

73. Sixthly, it has been contended that:

[a]nyone who is found to engage Australia's non-refoulement obligations during the refusal or cancellation decision or in subsequent visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations.<sup>42</sup>

74. This statement is legally wrong. Section 197C of the Act mandates:

- (1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.
- (2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.

75. If the Minister does not exercise one of his discretionary powers to grant the non-citizen a visa, the effect of section 198, when read with section 197C of the Act, appears to be that the non-citizen would be required to be removed from Australia regardless of Australia's international non-refoulement obligations.<sup>43</sup>

76. In *PRHR and Minister for Immigration and Border Protection (Migration)* [2017] AATA 2782 [142], Deputy President Forgie concluded that:

Since the enactment of s 197C, it is clear that the whole of the final sentences in each of paragraphs 12(2) and (6) are an incorrect statement of the law. To say, as paragraph 12.1(2) currently does, that Australia 'will not remove a non-citizen, as a consequence of the refusal of their visa application, to the country in respect of which the non-refoulement obligation exists', is not a correct statement of the law. If the circumstances set out in s 198 apply, s 197C imposes an obligation upon an officer to remove a non-citizen regardless of

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<sup>41</sup> Cf, Australian Human Rights Commission, Risk management in immigration detention, 2019: <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>

<sup>42</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2019, 12.

<sup>43</sup> *DMH16 v Minister for Immigration and Border Protection* [2017] FCA 448 (North ACJ).

whether Australia has non-refoulement obligations in respect of him or her.

77. Thus, a non-citizen who fails the character test and otherwise has had the statutory discretion in s 501 of the Act exercised unfavourably on him or her must be removed from Australia (regardless of whether a decision-maker has found that non-refoulement obligations are owed to the person).<sup>44</sup>

## CONCLUSION

78. For the reasons advanced, the submitters submit that the character Bill is not necessary. Further, the submitters are not persuaded that the character Bill is compatible with human rights. As demonstrated throughout the submissions, a troubling number of contentions advanced by the government are wrong as a matter of law. Accordingly, serious questions remain as to the legitimacy of the conclusions said to support the need for the enactment of the 'designated offence' regime.

79. The latest round of law reform to the character test provisions in s 501 of the Act will result in:

- (a) the government seeking to impede further upon the fundamental rights of non-citizens and members of the Australian community;
- (b) the continued expansion of executive power at the expense of fundamental rights;
- (c) a reduction in individualised justice at the stage of determining whether a person passes the character test (as subjective considerations concerning the individual are entirely ignored); and
- (d) the rejection of compelling submissions advanced by stakeholders who have specialised expertise and knowledge in the area of deportation and s 501 of the Act.

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<sup>44</sup> Assuming the non-citizen has exhausted all of his or her appeal rights.

80. The proposed enactment of the character Bill should be rejected. Should it be necessary, the submitters welcome the opportunity to provide evidence to the LCAL Committee orally.

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