

The Senate

Legal and Constitutional Affairs
Legislation Committee

Migration Amendment (Strengthening the
Character Test) Bill 2019 [Provisions]

September 2019

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Recommendation

Recommendation 1

2.91 The committee recommends that the Senate pass the bill.

Chapter 1

Introduction

- 1.1 On 4 July 2019 the Senate referred, contingent upon introduction in the House of Representatives, the provisions of the Migration Amendment (Strengthening the Character Test) Bill 2019 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 13 September 2019.¹
- 1.2 The Senate referred the bill to the committee following a recommendation of the Selection of Bills Committee.² The report of the Selection of Bills Committee presented multiple reasons for referral, including to allow stakeholders an opportunity to inform the committee of detailed concerns.³

Previous bill and committee inquiry

- 1.3 The bill is identical to another bill of a similar name: the Migration Amendment (Strengthening the Character Test) Bill 2018 (the 2018 bill).⁴
- 1.4 The 2018 bill was introduced into the House of Representatives on 25 October 2018 by the Minister for Immigration, Citizenship and Multicultural Affairs, the Hon David Coleman MP.⁵ It lapsed at prorogation of the 45th Parliament on 11 April 2019.
- 1.5 On 15 November 2018 the Senate referred the provisions of the 2018 bill to the committee for inquiry and report by 18 January 2019.⁶ The committee received 17 submissions and did not conduct any public hearings. The committee presented its report on 17 December 2018 with one recommendation: that the bill be passed.⁷ Labor senators presented a dissenting report with four recommendations, including that the bill not be passed in its current form. The Australian Greens presented a dissenting report recommending that the Senate not pass the bill.

¹ *Journals of the Senate*, No. 3, 4 July 2019, pp. 78–81.

² Selection of Bills Committee, *Report No. 2 of 2019*, 4 July 2019, [p. 4].

³ Selection of Bills Committee, *Report No. 2 of 2019*, 4 July 2019, Appendix 10.

⁴ There are some superficial differences between the bills such as the name of the relevant portfolio.

⁵ *House of Representatives Votes and Proceedings*, No. 148, 25 October 2018, p. 1933.

⁶ *Journals of the Senate*, No. 129, 15 November 2018, p. 4149.

⁷ Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Strengthening the Character Test) Bill 2018 [Provisions]*, December 2018.

Conduct of this inquiry

- 1.6 Details of the inquiry were advertised on the committee's webpage. The committee called for submissions to be received by 7 August 2019 and also wrote to a range of organisations inviting them to submit. The committee received 32 submissions, which are listed at Appendix 1.
- 1.7 The committee held one public hearing on 19 August 2019 in Canberra. The witnesses who appeared at that hearing are listed at Appendix 2.
- 1.8 In conducting this inquiry, the committee was also able to consider public submissions to its earlier inquiry into the 2018 bill. Where appropriate, the submitters to the earlier inquiry were advised that there was no need to re-submit to this inquiry unless the submitter had updated or amended information to provide to the committee.

Acknowledgements

- 1.9 The committee thanks all submitters and witnesses for the evidence they provided to this inquiry.

Structure of this report

- 1.10 This report consists of two chapters:
- This chapter outlines the key provisions of the bill and provides administrative details relating to the inquiry.
 - Chapter 2 examines the key issues raised in evidence and provides the committee's view.

Purpose of the bill

- 1.11 The bill was introduced into the House of Representatives on 4 July 2019 by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, the Hon David Coleman MP.⁸ The minister said that the purpose of the bill 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. The 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.⁹

⁸ *House of Representatives Votes and Proceedings*, No. 3, 4 July 2019, p. 65.

⁹ The Hon David Coleman MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *House of Representatives Hansard*, 4 July 2019, p. 314.

Background

- 1.12 Section 501 of the *Migration Act 1958* (the Act), which relates to the refusal or cancellation of visas on character grounds, has undergone significant change since 2014.¹⁰
- 1.13 A key development was the passage of the Migration Amendment (Character and General Visa Cancellation) Bill 2014. Data from the Department of Home Affairs shows that visa cancellations on character grounds increased by over 1,400 per cent between the 2013-14 and 2016-17 financial years.¹¹
- 1.14 In December 2017 the Joint Standing Committee on Migration (the migration committee) published a report titled *No one teaches you to become an Australian*. The explanatory memorandum to the bill states that the bill is in response to the migration committee's recommendations,¹² and highlighted two recommendations in particular:

Recommendation 15

The Committee recommends that the Australian Government amend the *Migration Act 1958* requiring the mandatory cancellation of visas for offenders aged between 16 and 18 years who have been convicted of a serious violent offence, such as car jacking's or serious assaults. If legislation is amended, this should be accompanied by a caveat that no retrospective liability is thereby created.

Recommendation 16

The Committee is also recommending that anyone over 18 years of age who has been convicted of a serious violent offence which is prescribed, such as serious assaults, aggravated burglary, sexual offences and possession of child pornography, have their visa cancelled under section 501 of the *Migration Act 1958*.¹³

- 1.15 The migration committee also published a report in February 2019 regarding review processes associated with visa cancellations made on criminal grounds. In that report the migration committee reflected positively on the 2018 bill:

This important legislation will ensure violent offenders can be removed from Australia at the earliest possible opportunity.

The Committee believes this legislation would address a number of community concerns around non-citizens who commit acts of violence in

¹⁰ Further background is in Chapter 1 of Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Strengthening the Character Test) Bill 2018 [Provisions]*, December 2018.

¹¹ Claire Petrie, Australian Parliamentary Library, *Bills Digest No. 12, 2019-20, Migration Amendment (Strengthening the Character Test) Bill 2019*, 24 July 2019, p. 5.

¹² Explanatory memorandum to the Migration Amendment (Strengthening the Character Test) Bill 2019 (explanatory memorandum), p. 9.

¹³ Joint Standing Committee on Migration, *No one teaches you to become an Australian*, December 2017, p. 175.

Australia. As such, the Committee urges the Australian government to pass and enact this legislation without delay.¹⁴

Existing character provisions

What is the character test?

1.16 Currently, a person does not pass the character test if any one or more of the criteria set out at subsection 501(6) of the Act is satisfied.¹⁵ Without exhaustively outlining all these criteria, they include the following:

- The person has a 'substantial criminal record', which is defined to include a person who has been sentenced to a term or terms of imprisonment totalling 12 months or more.¹⁶
- The person has been convicted of an offence that was committed while they were in immigration detention or during an escape from immigration detention.¹⁷
- The person has been convicted of an offence against section 197A of the Act, which provides that detainees must not escape from immigration detention.¹⁸
- The minister reasonably suspects that the person has had or has an association with a group, organisation or person that has been or is involved in criminal conduct.¹⁹
- The minister reasonably suspects that the person is or has been involved in conduct constituting certain listed offences including people smuggling, trafficking in persons, and genocide, whether or not the person has been convicted of the offence.²⁰
- Having regard to the person's past and present criminal conduct or their past and present general conduct, the person is not of good character.²¹
- In the event that the person were allowed to remain in Australia, there is a risk that the person would:
 - engage in criminal conduct in Australia;
 - harass, molest, intimidate or stalk another person in Australia;

¹⁴ Joint Standing Committee on Migration, *The report of the inquiry into review processes associated with visa cancellations made on criminal grounds*, February 2019, p. 92.

¹⁵ A summary of these criteria is available at Annex A, Department of Home Affairs, *Submission 15*, pp. 12–13.

¹⁶ Paragraph 501(6)(a) and subsection 501(7) of the *Migration Act 1958* (the Act).

¹⁷ Paragraph 501(6)(aa) of the Act.

¹⁸ Section 197A and paragraph 501(6)(ab) of the Act.

¹⁹ Paragraph 501(6)(b) of the Act.

²⁰ Paragraph 501(6)(ba) of the Act.

²¹ Paragraph 501(6)(c) of the Act.

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- vilify a segment of the Australian community;
 - incite discord in the Australian community or a segment of that community; or
 - represent a danger to the Australian community or to a segment of that community.²²
- A court in Australia or a foreign country has found the person guilty of one or more sexually based offence involving a child.²³
 - The person has, in Australia or a foreign country, been charged with or indicted for one or more listed crimes, including the crime of genocide, a crime against humanity, and a war crime.²⁴
 - The person has been assessed by the Australian Intelligence Security Organisation (ASIO) to be directly or indirectly a risk to security.²⁵
 - An Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.²⁶
- 1.17 If none of the relevant criteria are satisfied then the person passes the character test.²⁷

What happens if a person fails the character test?

- 1.18 The minister or a delegate *may* refuse to grant a visa to a person if the person does not satisfy the minister or delegate that the person passes the character test.²⁸
- 1.19 The minister or delegate *may* cancel a visa that has been granted to a person if:
- the minister reasonably suspects that the person does not pass the character test; and
 - the person does not satisfy the minister that the person passes the character test.²⁹
- 1.20 There are also some circumstances in which failing the character test means that a person's visa *must* be cancelled.³⁰

²² Paragraph 501(6)(d) of the Act.

²³ Paragraph 501(6)(e) of the Act.

²⁴ Paragraph 501(6)(f) of the Act.

²⁵ Paragraph 501(6)(g) of the Act.

²⁶ Paragraph 501(6)(h) of the Act.

²⁷ Subsection 501(6) of the Act.

²⁸ Subsection 501(1) of the Act.

²⁹ Subsection 501(2) of the Act.

³⁰ Subsection 501(3A) of the Act.

- 1.21 When a delegate considers refusing or cancelling a visa on character grounds, they should have regard to the guidance set out in *Direction No. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* (Direction No. 79). This direction was signed by the Minister for Immigration, Citizenship and Multicultural Affairs and commenced on 28 February 2019, replacing previous Direction No. 65.
- 1.22 If a person's visa is refused or cancelled by a delegate on character grounds using discretionary powers, the person may be able to seek merits review through the Administrative Appeals Tribunal (AAT). However, if the decision was made by the minister personally then merits review is not available.³¹ Nonetheless, all decisions made under section 501 of the Act, including those made by the minister, may be reviewed by the Federal Court or High Court.³²

Key provisions of the bill

- 1.23 The bill would amend only the Act. It would insert a new ground on which a person may fail the character test. It would also amend the current definition of 'character concern' to reflect the new ground of the character test.

The new 'designated offence' ground

- 1.24 The bill would provide that a person does not pass the character test if the person has been convicted of a 'designated offence'.³³
- 1.25 The full meaning of 'designated offence' is set out at proposed subsections 501(7AA) and 501(7AB) of the bill.³⁴ In general terms, an offence is a designated offence if:
- the offence is punishable by imprisonment for a maximum term of not less than two years;³⁵ and
 - one or more of the physical elements of the offence satisfies one or more of the criteria set out at proposed paragraph 501(7AA)(a), which include (but are not limited to):
 - violence against a person;
 - non-consensual conduct of a sexual nature;
 - breaching an order made by a court or tribunal for the personal protection of another person; and

³¹ Subsections 501(3), 501(4) and 501(5) of the Act.

³² Department of Home Affairs, *Submission 15*, p. 10,

³³ See item 5 of schedule 1 of the bill.

³⁴ See item 6 of schedule 1 of the bill.

³⁵ The bill is drafted to also cover offences punishable by imprisonment for life or for a fixed term of not less than two years. See proposed subparagraphs 501(7AA)(b)(i) and 501(7AA)(b)(ii) at item 6 of schedule 1 of the bill.

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- using or possessing a weapon (defined to include a thing made or adapted for use for inflicting bodily injury).³⁶
- 1.26 The meaning of 'designated offence' incorporates offences against a law of a foreign country, provided that (in addition to satisfying one of the physical elements):
- if it were assumed the act or omission constituting the offence had taken place in the Australian Capital Territory (ACT):
 - the act or omission would have constituted an offence against a law in force in the ACT; and
 - the ACT offence would have been punishable by imprisonment for a maximum term of not less than two years.³⁷
- 1.27 In simplified terms, the effect of the new ground would be that a person would fail the character test if:
- the person has been convicted of an offence; and
 - the offence is punishable by imprisonment for a maximum term of not less than two years; and
 - the offence involves one or more of the physical elements set out in the bill.
- 1.28 A person who has failed the character test in this way will not automatically have their visa cancelled or refused. Rather, failing the character test means that there is a discretion for the minister or delegate to cancel or refuse the person's visa.³⁸

Amended definition of 'character concern'

- 1.29 Existing section 5C of the Act contains a definition of 'character concern' that mirrors the existing character test at section 501. The Department of Home Affairs has stated that the definition of 'character concern' is relevant in determining:
- the circumstances in which the department can disclose personal information for the purposes of data matching; or
 - the reasons for which biometrics captured by the department can be used.³⁹
- 1.30 The bill would amend the definition of 'character concern' so that, in effect, a non-citizen convicted of a designated offence is of character concern.⁴⁰ This

³⁶ See proposed paragraph 501(7AA)(a) at item 6 of schedule 1 of the bill. The full meaning of 'weapon' is provided at proposed subsection 501(7AB).

³⁷ The bill is drafted to also cover offences punishable by imprisonment for life or for a fixed term of not less than two years. See proposed subparagraph 501(7AA)(c)(ii) at item 6 of schedule 1 of the bill.

³⁸ Department of Home Affairs, *Submission 14*, p. 9.

³⁹ Department of Home Affairs, *Submission 15*, p. 8.

would mean that the definition of 'character concern' would continue to mirror the character test requirements in section 501 of the Act.

Application of the amendments

- 1.31 The provisions of the bill would commence the day after receiving Royal Assent.⁴¹
- 1.32 The provisions of the bill would apply whether the person committed or was convicted of a designated offence before, on, or after commencement of the provisions.⁴²

Consideration by other parliamentary committees

Senate Scrutiny of Bills Committee

- 1.33 The Scrutiny of Bills Committee (the scrutiny committee) raised concerns about whether the 'broad discretionary powers' in the 2018 bill would unduly trespass on rights and liberties.⁴³ It reiterated those concerns in relation to the bill currently before the committee.⁴⁴
- 1.34 The points made by the scrutiny committee include the following:
- The scrutiny committee has previously raised concerns about the existing character framework, which noted that:

...the broadly framed powers under section 501 are not, as a practical matter, constrained by law 'due to the breadth of discretion, the absence of procedural fairness obligations, the fact that merits review is unavailable, or a combination of these factors'.⁴⁵
 - The bill would allow the minister 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:

For example, a person carrying pepper spray may be convicted of possession of a weapon, and although the person may only be given a minor fine, this conviction would empower the minister to cancel their visa, leading to their detention and removal from Australia. As the power to cancel would be based simply on the fact of conviction, there is nothing in the legislation that would require the minister to consider the person's overall good character, their family or other connections to Australia or the

⁴⁰ See items 1 to 4 of schedule 1 of the bill.

⁴¹ Clause 2 of the bill.

⁴² Subitem 7(3) of schedule 1 of the bill.

⁴³ Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee), *Scrutiny Digest 13 of 2018*, 14 November 2018, pp. 8–12.

⁴⁴ Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2019*, 24 July 2019, p. 27.

⁴⁵ Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2018*, 14 November 2018, p. 11.

length of their stay in Australia (noting that this could apply to permanent residents who have lived in Australia for many years).⁴⁶

- In light of the 'already extremely broad discretionary powers' available for the minister, the explanatory materials 'have given limited justification for the expansion of these powers by this bill'.⁴⁷

1.35 The scrutiny committee concluded as follows:

The committee notes that section 501 of the *Migration Act 1958* already gives the minister a broad discretionary power to refuse or cancel a visa in the absence of procedural fairness obligations and where merits review is largely unavailable. The committee considers, in these circumstances, expanding powers to empower the minister to cancel a visa (which could lead to the detention and removal of a non-citizen), raises scrutiny concerns as to whether the measure unduly trespasses on rights and liberties.

The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of amending the character test set out under the section 501 of the *Migration Act 1958*.⁴⁸

Parliamentary Joint Committee on Human Rights

1.36 The Parliamentary Joint Committee on Human Rights (the human rights committee) raised a number of concerns regarding the 2018 bill.⁴⁹ It later provided further views about that bill after receiving a response from the minister.⁵⁰ In relation to the current bill, the human rights committee reiterated its views on the 2018 bill.⁵¹

1.37 After considering a response from the minister, the human rights committee raised concerns including the following:

- The committee considered that the proposed expansion of the minister's power to cancel or refuse a visa is likely to be incompatible with Australia's non-refoulement obligations and the right to an effective remedy.⁵²
- The committee considered that the expanded bases on which a person's visa may be cancelled, the consequence of which would be that the person is

⁴⁶ Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2018*, 14 November 2018, p. 10.

⁴⁷ Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2018*, 14 November 2018, p. 11.

⁴⁸ Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2018*, 14 November 2018, pp. 11–12.

⁴⁹ Parliamentary Joint Committee on Human Rights (Human Rights Committee), *Report 12 of 2018*, 27 November 2018, pp. 2–22.

⁵⁰ Human Rights Committee, *Report 1 of 2019*, 12 February 2019, pp. 69–97.

⁵¹ Human Rights Committee, *Report 3 of 2019*, 30 July 2019, pp. 78–79.

⁵² Human Rights Committee, *Report 1 of 2019*, 12 February 2019, pp. 78–79.

subject to immigration detention, is likely to be incompatible with the right to liberty.⁵³

- The committee considered that for persons who would have their visa cancelled without natural justice under section 501(3) of the Migration Act for having committed a 'designated offence', there is a risk that the measures may be incompatible with the prohibition on expulsion without due process.⁵⁴
- The committee considered that the measures are likely to be incompatible with the right to protection of the family and the obligation to consider the best interests of the child as a primary consideration, particularly in relation to cancellation of a child's visa.⁵⁵
- The committee considered that there is a risk that the measures may be incompatible with the right to freedom of movement in circumstances where the minister is not required to take into account the right to enter and remain in one's 'own country' when exercising his personal power to refuse or cancel a visa.⁵⁶
- The committee was unable to conclude that expanding the definition of 'character concern' to include persons who have committed a 'designated offence' is compatible with the right to privacy.⁵⁷

Note on references

1.38 In this report, references to *Committee Hansard* are to proof transcripts. Page numbers may vary between proof and official transcripts.

1.39 This report cites submissions received during the committee's inquiry into the 2018 bill, as well as submissions received during this inquiry. Unless otherwise stated, references to submissions are to submissions to this inquiry.

⁵³ Human Rights Committee, *Report 1 of 2019*, 12 February 2019, p. 84.

⁵⁴ Human Rights Committee, *Report 1 of 2019*, 12 February 2019, p. 90.

⁵⁵ Human Rights Committee, *Report 1 of 2019*, 12 February 2019, p. 93.

⁵⁶ Human Rights Committee, *Report 1 of 2019*, 12 February 2019, p. 95.

⁵⁷ Human Rights Committee, *Report 1 of 2019*, 12 February 2019, p. 97.

Chapter 2

Key issues

- 2.1 This chapter outlines the key issues raised in evidence to the committee:
- Whether there is a need for the bill.
 - The proposed definition of 'designated offence'.
 - The appropriateness of failing the character test due to a conviction for a designated offence (without consideration of any sentence imposed).
 - The application of discretion to potential visa refusals and cancellations.
 - The effect of visa refusals and cancellations on non-citizens, including human rights implications.
 - Other issues, including Australia's relationship with foreign countries; potential administrative costs; the inclusion of 'aiding and abetting' a designated offence; and retrospectivity.
- 2.2 The chapter concludes by providing the committee's view.

The need for the bill

- 2.3 Many submitters and witnesses recognised that it is appropriate for the government to be able to regulate whether a non-citizen may enter or stay in Australia with regard to community safety or the non-citizen's character.¹ However, a number of inquiry participants did not support the bill as they considered existing character test provisions to be adequate, or more than adequate, for this purpose.²
- 2.4 For example, Ms Carina Ford of the Law Council of Australia (the Law Council) said that the *Migration Act 1958* (the Act) 'already provides overly broad powers to cancel and refuse visas on character grounds', and that these powers are 'more than sufficient to respond appropriately to individuals who commit serious offences and provide a clear risk to the community'.³

¹ See, for example, Ms Carina Ford, Member, Migration Law Committee, Law Council of Australia (Law Council), *Committee Hansard*, 19 August 2019, p. 1; Dr Sangeetha Pillai, Senior Research Associate, Kaldor Centre for International Refugee Law (Kaldor Centre), *Committee Hansard*, 19 August 2019, p. 2.; Victoria Legal Aid, *Submission 10*, p. 2; Visa Cancellations Working Group, *Submission 14*, p. 6; Ethnic Communities Council of Western Australia, *Submission 22*, p. 1.

² See, for example, Asylum Seeker Resource Centre, *Submission 3*, p. 3; Refugee Council of Australia, *Submission 13*, pp. 1–2; Australian Lawyers for Human Rights, *Submission 25*, p. 4; Dr Pillai, Kaldor Centre, *Committee Hansard*, 19 August 2019, pp. 2–3; Mr Mohammad Al-Khafaji, Chief Executive Officer, Federation of Ethnic Communities' Councils of Australia (FECCA), *Committee Hansard*, 19 August 2019, p. 29; Dr Carolyn Graydon, Principal Solicitor and Manager Human Rights Law Program, Asylum Seeker Resource Centre, *Committee Hansard*, 19 August 2019, pp. 41–42;

³ Ms Ford, Member, Law Council, *Committee Hansard*, 19 August 2019, p. 1.

- 2.5 The Human Rights Commissioner, Mr Edward Santow, suggested that the bill:
- ...should be considered in the context of the existing character provisions in the Migration Act, which the joint standing committee [on migration] described earlier this year as operating well and protecting the Australian community. It's difficult to identify a situation where a noncitizen who poses a significant risk to the community would not already fall foul of one of the character provisions in section 501(6).⁴
- 2.6 A submission from Mr Henry Sherrell, Peter Mares, Abul Rizvi, Dr Shanthi Robertson, Dr Laurie Berg and Kevin Bain said the government has not provided examples of character concern that cannot be addressed by existing provisions.⁵ Also, Professor Anna Cody and Dr Jason Donnelly said that despite the 'extraordinary increase' in visa cancellations from 2013 onwards, the government has 'failed to provide substantial evidence that the previous changes made in 2014 to the character test...have made the Australian community a safer place'.⁶
- 2.7 The Visa Cancellations Working Group (the Working Group) emphasised that the bill 'does not enable the cancellation or refusal of the visas of any person for whom cancellation or refusal is not already available'. Rather, the bill 'merely removes a decision-maker's power to assess whether or not certain individuals meet or fail the character test, making failure mandatory in prescribed circumstances'.⁷
- 2.8 The Working Group disputed three de-identified case studies presented by the Department of Home Affairs (the department) as justification for the bill.⁸ For each case, the department had stated that the person would be eligible or able to stay in Australia 'unless sufficient adverse information becomes available to find that [the person] does not pass the character test under subjective grounds'.⁹ The Working Group submitted that each person 'would already be caught under current law'.¹⁰

⁴ Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Committee Hansard*, 19 August 2019, p. 36. Also see Australian Human Rights Commission, *Submission 4*, pp. 8–10.

⁵ Mr Henry Sherrell, Peter Mares, Abul Rizvi, Dr Shanthi Robertson, Dr Laurie Berg and Kevin Bain, *Submission 2*, [p. 3].

⁶ Professor Anna Cody and Dr Jason Donnelly, *Submission 21*, p. 11.

⁷ Visa Cancellations Working Group, *Submission 14*, p. 11

⁸ The Visa Cancellations Working Group also disputed additional case studies described by the department at the committee's public hearing on 19 August 2019; see Visa Cancellations Working Group, *Submission 14.1*, [pp. 4–7].

⁹ Department of Home Affairs, *Submission 15*, p. 14.

¹⁰ Visa Cancellations Working Group, *Submission 14*, p. 13. Also see Law Council, *Submission 29*, p. 21.

- 2.9 Professor Cody and Dr Donnelly also advanced that the minister was 'legally incorrect' to say that the entry and stay of non-citizens in Australia is 'a privilege'.¹¹ They quoted Griffiths J in *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 [70], who said that visa holders 'hold statutory and non-statutory rights which are inconsistent with the notion of their status being described simply as a "privilege"'.¹²
- 2.10 Other submitters took a contrary view about the need for the bill. For example, Mr Scott Weber of the Police Federation of Australia told the committee:
- We're talking about protecting the victims and society—that is, Australia—and also the people who abide by the law. We're talking about people who commit offences when they are here as guests in Australia, when they should be abiding by the law. When they actually commit those heinous offences, when they commit such violent or sexual offences, all police officers across the country think it should be automatic and instantaneous that their right to stay in Australia be reviewed.¹³
- 2.11 Mr Weber also told the committee that the Police Federation hears from police officers and the general public that if a non-citizen commits a violent offence or an offence of a sexual nature then their visa should be reviewed or revoked.¹⁴
- 2.12 Ms Maria Aylward submitted that if the proposed provisions had been in place in 2010 then the murder of her sister and sister's partner by a non-citizen would have been prevented.¹⁵ She noted that prior to the murder, the perpetrator had been convicted of an offence carrying a maximum penalty exceeding two years' imprisonment.¹⁶
- 2.13 Ms Aylward further suggested the objective test proposed by the bill would help bring cases to the authorities' attention, stating that crimes committed by non-citizens 'may only come to the attention of Immigration when the person applies for citizenship or permanent residence'. She submitted:

Although there is a provision in s.501(6) of the *Migration Act 1958* to cancel a visa based on the person's "past and present criminal conduct", the main way non-citizen criminals are identified is if they are sentenced to a term of imprisonment of at least 12 months. ...

¹¹ The Hon David Coleman MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, quoted in Professor Cody and Dr Donnelly, *Submission 21*, p. 7.

¹² Professor Cody and Dr Donnelly, *Submission 21*, pp. 7–8. Also see Law Council, responses to questions on notice, 19 August 2019 (received 23 August 2019), pp. 3–4.

¹³ Mr Scott Weber, Police Federation of Australia (Police Federation), *Committee Hansard*, 19 August 2019, p. 51.

¹⁴ Mr Weber, Police Federation, *Committee Hansard*, 19 August 2019, p. 52.

¹⁵ Ms Maria Aylward, *Submission 32*, p. 13.

¹⁶ Ms Aylward, *Submission 32*, p. 1.

This means non-citizens can be committing numerous criminal offences against victims over many years or decades before being identified and subject to removal proceedings.¹⁷

2.14 The department submitted that the bill would provide:

...a clear standard, in terms of convictions for designated offences, that is clear for both visa holders and the public as to what type of criminal conduct will involve meeting or not meeting the character test.¹⁸

2.15 The department provided de-identified examples, including one of a person who was convicted of violent assault related offences but did not objectively fail the character test under existing arrangements.¹⁹ The department acknowledged submissions that the bill is not necessary because there are existing subjective grounds regarding past and present conduct, but noted that this subjective ground 'isn't used widely'.²⁰ The department also stated:

It's that subjective nature that is very hard for one decision-maker and another decision-maker to apply in a way that's consistent, objective and transparent. I think at least one, if not more, of the examples that [departmental officer] Mr Willard highlighted shows that a decision-maker has taken the view that subjectively we think they fail the character test under this existing regime, but upon merits review it's found to be a different answer.²¹

2.16 Regarding the effect of the bill on community safety, the department stated that 'once a person has been removed from the Australian community, it's very difficult to indicate what they may or may not have done' had they stayed. However, the department also suggested:

Having people no longer in the Australian community who have, quite objectively, clearly committed criminal offences that are obviously of a serious and violent nature is, in and of itself, an end to be attained.²²

The definition of 'designated offence'

The clarity of the definition

2.17 Victoria Legal Aid submitted that the definition is 'unclear', 'would prove challenging to implement in practice', and 'does not provide the clarity that it

¹⁷ Ms Aylward, *Submission 32*, p. 2.

¹⁸ Mr Michael Willard, Acting First Assistant Secretary, Immigration and Community Protection Policy Division, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 57.

¹⁹ Mr Willard, Department of Home Affairs, *Committee Hansard*, 19 August 2019, pp. 64–66. Note: the Visa Cancellations Working Group also responded to these cases at *Submission 14.1*, [pp. 4–7].

²⁰ Ms Pip De Veau, General Counsel and First Assistant Secretary, Legal Division, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 62.

²¹ Ms De Veau, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 66.

²² Ms De Veau, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 61.

seeks to'. It explained that decision-makers would first need to consider whether an offence involves one of the physical elements of a designated offence, which is 'not a straightforward exercise'.²³

- 2.18 Victoria Legal Aid further suggested there is 'significant potential' for errors to occur in identifying designated offences, which would increase 'unjust outcomes'.²⁴ It also expressed concern that 'the same conduct may result in different character test outcomes in different states', either because maximum penalties vary or because there are offences that exist in one state but not in another.²⁵
- 2.19 The Law Council raised concern that 'there may be years of litigation ahead in order for the Federal Courts to establish the outside parameters of these provisions'.²⁶ The Law Council recommended that the committee seek from the department a detailed list of the existing offences likely to be 'designated offences',²⁷ and stated that if the department 'is unable to do so, this would raise concerning questions about the uncertain scope of the legislation'.²⁸
- 2.20 The department explained that the bill does not list specific offences 'as offences vary in name and characterisation across each State and Territory, and may change at any time'.²⁹ Prescribing the offences in legislation 'would require continual amendment as and when criminal law changed'. A departmental representative further stated that the objectivity of the proposed provisions 'comes in relation to both the nature of the violent descriptor and the objective two-year penalty'.³⁰ The department further submitted:

The definition of a 'designated offence' as set out in the Bill provides an objective, readily discernible ground for failing the character test which will remain up-to-date and applicable, irrespective of changes to State and Territory criminal law.³¹

²³ Victoria Legal Aid, *Submission 10*, p. 10. Also see Visa Cancellations Working Group, *Submission 14.1*, [pp. 2–3].

²⁴ Victoria Legal Aid, *Submission 10*, p. 10. Also see Ms Sarah Fisher, Manager, Migration Sub-Program, Victoria Legal Aid, *Committee Hansard*, 19 August 2019, p. 44.

²⁵ Victoria Legal Aid, *Submission 10*, pp. 10–11. Also see Visa Cancellations Working Group, *Submission 14*, p. 13; Law Council, *Submission 29*, pp. 23–24.

²⁶ Law Council, responses to questions on notice, 19 August 2019 (received 23 August 2019), p. 1.

²⁷ Law Council, *Submission 29*, p. 25.

²⁸ Law Council, responses to questions on notice, 19 August 2019 (received 23 August 2019), p. 3. Also see Visa Cancellations Working Group, *Submission 14.1*, [p. 2].

²⁹ Department of Home Affairs, responses to questions on notice, 19 August 2019 (received 4 September 2019), p. 1. Also see Department of Home Affairs, *Submission 14*, p. 6.

³⁰ Ms De Veau, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 58.

³¹ Department of Home Affairs, responses to questions on notice, 19 August 2019 (received 4 September 2019), p. 2.

The offences classified as 'designated offences'

2.21 Liberty Victoria expressed concern about the offences included and excluded from the meaning of designated offence:

[I]t appears arbitrary that numerous offences, such as the trafficking of commercial quantities of drugs and all so-called 'white-collar' crime, will not be caught by the proposed Bill, whereas many relatively minor offences will be. The sense of arbitrariness is of concern.³²

2.22 Ms Gabrielle Bashir SC of the Law Council submitted that the proposed designated offence ground 'sets a very, very low bar' that would include the threat of violence where no actual violence occurred, and the use of a hammer, rock, or stick within the proposed meaning of 'weapon'.³³

2.23 The Working Group provided a number of examples to illustrate its concern that the bill would introduce 'an oddity of standard':

For example, a person trafficking commercial quantities of drugs may not automatically fail the character test, but a child who got into a classroom fight would; a person committing repeated million-dollar fraud may not, but a former partner who texted their partner 'Merry Christmas' would; a person committing sabotage against the government may not, but a person who yelled at their boss after being made redundant might.³⁴

2.24 Mr Sherrell et al submitted that the new 'designated offence' ground would 'immediately expand the number of people failing the character test':

While it is not possible to confidently state exactly how many people will be affected, there is evidence to suggest it could be by a factor of five, including people who are unlikely to be an ongoing threat to the Australian community.³⁵

2.25 Mr Sherrell estimated that 'tens of thousands' of people would be affected. Some of these people would have been in Australia for a year, but 'you're going to get people who entered the country in the fifties, in the sixties and in the seventies who are still living on a permanent visa'.³⁶ As Mr Sherrell clarified, the consequences for these people 'won't be mandatory deportation';

³² Liberty Victoria, *Submission 24*, p. 4. Also see Kaldor Centre, *Submission 27*, [pp. 2–3].

³³ Ms Gabrielle Bashir SC, Co-Chair, National Criminal Law Committee, Law Council, *Committee Hansard*, 19 August 2019, pp. 4–5.

³⁴ Visa Cancellations Working Group, *Submission 14*, pp. 15–16. Also see New South Wales Council for Civil Liberties, *Submission 5*, pp. 7–8.

³⁵ Mr Sherrell et al, *Submission 2*, [p. 1].

³⁶ Mr Sherrell, private capacity, *Committee Hansard*, 19 August 2019, p. 16. Also see Ms Hannah Dickinson, Chair, Visa Cancellations Working Group, *Committee Hansard*, 19 August 2019, p. 46; Ms Fisher, Victoria Legal Aid, *Committee Hansard*, 19 August 2019, p. 46.

it will be 'mandatory failure of the character test and it will then be discretionary' as to whether a visa is cancelled.³⁷

- 2.26 The department expects the bill 'will increase the number of non-citizens who objectively fail the character test and then are referred for discretionary consideration of visa refusal or cancellation'.³⁸ However, it also noted various circumstances that would not meet the definition of a designated offence, including where a person is accused of an offence but the police choose not to pursue the matter; where a person is convicted of an offence carrying a maximum sentence below two years' imprisonment; or where a person is convicted of an offence that does not involve one of the required physical elements.³⁹
- 2.27 The department posited that the bill 'recognises that certain serious offences (a designated offence) have a significant impact on victims and their communities'.⁴⁰ On this point, Ms Aylward put to the committee that there is:

...no credible evidence the proposed laws will be used to remove people with minor convictions or strong reasons to be allowed to stay, although I cannot see how being found guilty of a serious offence can be considered to be a "minor" offence.⁴¹

Failing the character test due to conviction for a designated offence

- 2.28 The bill would cause a person to fail the character test if they are convicted of a designated offence, regardless of any sentence imposed by the court.
- 2.29 The Law Council advanced that maximum penalties are 'reserved for the worst, most serious examples of an offence', and they 'cannot and do not take into account the actual conduct of the offender or other case-specific facts'.⁴² Ms Ford of the Law Council said that:

...the determination of the seriousness of the offence committed depends not only on the offence category but also on the gravity of the offence in the particular circumstance of the case, which is often reflected in the punishment or sentence that the court imposes.

...

Further, if a criminal court has determined that a convicted person does not present a risk to the community and imposes a fine or a suspended

³⁷ Mr Sherrell, private capacity, *Committee Hansard*, 19 August 2019, p. 16.

³⁸ Mr Willard, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 58.

³⁹ Department of Home Affairs, *Submission 14*, p. 7.

⁴⁰ Department of Home Affairs, *Submission 14*, p. 5.

⁴¹ Ms Aylward, *Submission 32*, p. 12.

⁴² Law Council, *Submission 29*, p. 22. Also see Asylum Seeker Resource Centre, *Submission 3*, p. 5; Dr Pillai, Kaldor Centre, *Committee Hansard*, 19 August 2019, p. 5.

sentence, it is questionable whether automatically failing to meet the character test is needed to protect the community.⁴³

- 2.30 Victoria Legal Aid suggested that in setting maximum sentences, the legislature 'has not turned its mind to implications for visa status'.⁴⁴ It expressed concern that the bill would:

...subject a category of people who, under the criminal justice system may have demonstrated strong mitigating circumstances around their offending and good prospects of rehabilitation, to the prospect of having their visa cancelled or refused and facing lengthy detention, removal to an unfamiliar country and disconnection from family.⁴⁵

- 2.31 Several inquiry participants advanced that the seriousness of an offence is better reflected by the sentence rather than the conviction. Liberty Victoria posited that the 'expertise of Australian courts is and should remain a valuable resource for administrative decision-makers'.⁴⁶ The Law Council suggested that the bill has 'the potential to undermine the sentencing function of the judicial system and the discretion it possesses regarding sentencing offenders'.⁴⁷ The Working Group submitted that Australia's criminal courts:

...are appropriately placed to determine the seriousness of offending. This is their area of expertise and their express function. The discretion vested in them is so vested in express recognition of the fact that there are different standards of culpability, and different levels of seriousness within any set of offending. To fail to recognise this wastes and denigrates a valuable resource and affects the quality of the administrative decision-making. It also fails to uphold a separation of powers by critiquing judges in the manner in which they consider sentencing.⁴⁸

- 2.32 The Working Group also provided data indicating that many convictions of designated offences result in a term of imprisonment below two years or no imprisonment at all.⁴⁹

- 2.33 The New South Wales Council for Civil Liberties advised that '[c]ontrary to a misconception being put about', the laws of several states and a determination

⁴³ Ms Ford, Law Council, *Committee Hansard*, 19 August 2019, p. 2. Also see Dr Donnelly, private capacity, *Committee Hansard*, 19 August 2019, p. 13 and pp. 18–19; Mr Santow, Australian Human Rights Commission, *Committee Hansard*, 19 August 2019, p. 36; Ms Dickinson, Visa Cancellations Working Group, *Committee Hansard*, 19 August 2019, p. 42; Ms Fisher, Victoria Legal Aid, *Committee Hansard*, 19 August 2019, p. 44.

⁴⁴ Victoria Legal Aid, *Submission 10*, p. 9. Also see FECCA, *Submission 8*, p. 3.

⁴⁵ Victoria Legal Aid, *Submission 10*, p. 10.

⁴⁶ Liberty Victoria, *Submission 24*, p. 4.

⁴⁷ Law Council, *Submission 29*, p. 22.

⁴⁸ Visa Cancellations Working Group, *Submission 14*, p. 17.

⁴⁹ Visa Cancellations Working Group, *Submission 14*, pp. 16–17. Also see, Mr Al-Khafaji, FECCA, *Committee Hansard*, 19 August 2019, p. 29.

of the High Court prevent judicial officers from lightening sentences in order to ensure convicted non-citizens are not subject to visa cancellation.⁵⁰

- 2.34 However, Ms Aylward submitted that there is 'some evidence the magistrates and judges are aware of the current 12-month rule and imposing sentences that are under that, so as to "assist" criminals'.⁵¹ In addition, the Police Federation expressed concerns that the intent of the character provisions 'could be averted by the judiciary, simply by imposing sentences of less than 12 months'.⁵² The Police Federation argued that:

...anyone convicted of a crime of violence, regardless of their length of sentence and who is a non-citizen of Australia, should have their status to remain here immediately reviewed.⁵³

- 2.35 The department highlighted there are already grounds of the character test that turn on a conviction rather than a sentence.⁵⁴ Moreover, a departmental representative emphasised that consideration of a matter by a delegate is not intended to be 'the same consideration or a better consideration' than that of a sentencing court; rather, it is 'a different consideration'. She explained:

[T]he courts, in relation to the character cancellation space, confirmed that the ability of the executive government to make a decision in relation to a person's visa is not the same as the punitive nature the Chapter III court takes into account in relation to sentencing a person before the courts for criminal conduct.⁵⁵

- 2.36 The departmental official drew the following analogy:

It's no different, really, to a doctor who might sexually abuse a patient and is charged with a criminal offence and is sentenced by a court. There is still room, in relation to the administration of the medical profession, for a regulator to say, 'In addition to being sentenced from a civil and administrative point of view, we're going to take a decision in relation to whether that person practices.'⁵⁶

- 2.37 Finally, the departmental representative explained that the proposed arrangements retain subjective considerations, even though criminal sentences are not considered. This is because the seriousness of a non-citizen's offending behaviour, which would have been considered by a court in sentencing, is:

⁵⁰ NSW Council for Civil Liberties, *Submission 5*, p. 5. Also see Public Law and Policy Research Unit, *Submission 19*, p. 6.

⁵¹ Ms Aylward, *Submission 32*, p. 1.

⁵² Police Federation, *Submission 12*, [p. 2].

⁵³ Police Federation, *Submission 12*, [pp. 1–2].

⁵⁴ Department of Home Affairs, *Submission 14*, p. 8.

⁵⁵ Ms De Veau, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 62. Also see Mr Weber, Police Federation, *Committee Hansard*, 19 August 2019, p. 56.

⁵⁶ Ms De Veau, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 62.

...equally relevant under [Direction No. 79] for whether or not [your visa] will in fact be cancelled and, once again, on review, relevant to merits review and relevant to the reasonableness of it in judicial review.⁵⁷

Discretion in decisions to refuse or cancel a visa

2.38 The Immigration Advice and Rights Centre (IARC) acknowledged that even after a person fails the character test due to a conviction, there remains discretion regarding whether their visa is refused or cancelled. However, it suggested that:

...it is inevitable that the proposed amendments will result in more people having their visas cancelled/refused and, in turn, being deported from Australia. This is so, not only due to the discretion arising, but also because Direction 79, which decision makers must adhere to, makes that outcome more likely. For example, under the heading 'Principles', paragraph 6.3(3) of Direction 79 states that:

*"The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere."*⁵⁸

2.39 IARC further stated that two of the three 'primary considerations' in Direction 79 'will almost always be adverse to a non-citizen'. Additional considerations, such as the non-citizen's ties to the Australian community, are classified as 'other considerations' and 'will generally be given less weight in the exercise of discretion'.⁵⁹

2.40 The Working Group similarly advanced that the bill is likely to effect a decision-maker's consideration:

If, for that decision-maker, the person necessarily fails the character test, a decision to cancel is significantly more likely to follow. A determination which is permitted, or 'endorsed', even where that permission is not directive, has a psychological and practical effect on those who are responsible for application of the law: being squarely told, in effect, that particular offending is 'serious' no matter the context will make decision-makers significantly more likely to exercise the discretion to cancel or refuse a visa.⁶⁰

2.41 The Working Group also submitted that if a non-citizen fails to respond to a Notice to Consider Cancellation from the department (which may occur for various reasons, including that the non-citizen has changed address), then:

⁵⁷ Ms De Veau, Department of Home Affairs, *Committee Hansard*, 19 August 2019, pp. 66–67. Also see Mr Weber, Police Federation, *Committee Hansard*, 19 August 2019, p. 53.

⁵⁸ Immigration Advice and Rights Centre, *Submission 18*, p. 3.

⁵⁹ Immigration Advice and Rights Centre, *Submission 18*, p. 3.

⁶⁰ Visa Cancellations Working Group, *Submission 14*, p. 11. Also see, for example, Mr Al-Khafaji, FECCA, *Committee Hansard*, 19 August 2019, p. 30; Dr Graydon, Asylum Seeker Resource Centre, *Committee Hansard*, 19 August 2019, p. 48.

...the Department will make its decision based solely on the information before it: that a person has failed the character test. They may then take into account the severity of the offending, but it is unclear what information would be before a decision-maker. This may vary, and is likely to produce unfair and disproportionate results.⁶¹

2.42 Mr Santow of the Australian Human Rights Commission stated that the breadth of discretion available to the minister and delegates:

...can mean that you will have inconsistent decision-making depending on who is the actual delegate with responsibility. That can limit rights associated with equality before the law.⁶²

2.43 Some concerns were also raised about whether vulnerable people will have access to legal representation during the visa cancellation process.⁶³ Ms Ford of the Law Council stated that 'limited safeguards are available', highlighting that the rules of natural justice may not apply and, if the decision is made by the minister, then there is no right to merits review.⁶⁴ Mr Prince of the Law Council said that it should 'be of very limited comfort to this committee to conclude that the discretion is still there...It is a very significant thing to be held to fail the character test'.⁶⁵

2.44 Further, the Settlement Council of Australia expressed concern that, once the legislation is in place, the department and minister would be able to change the policy framework for discretionary decisions, potentially without parliamentary oversight.⁶⁶

2.45 The department has previously noted that the bill 'does not lower the bar for cancelling or refusing a visa under section 501' of the Act (which contains the character test).⁶⁷ It submitted that if the minister or delegate is considering visa refusal or cancellation on character grounds, 'the affected person is given the opportunity to provide relevant information or comments to the decision-maker'.⁶⁸ In addition, a departmental representative explained that

⁶¹ Visa Cancellations Working Group, *Submission 14*, p. 10. Also see Ms Dickinson, Visa Cancellations Working Group, *Committee Hansard*, 19 August 2019, p. 43.

⁶² Mr Santow, Human Rights Commission, *Committee Hansard*, 19 August 2019, p. 37. Also see Professor Cody and Dr Donnelly, *Submission 21*, p. 20.

⁶³ See, for example, Refugee Legal, *Submission 17*, pp. 3–4; Dr Donnelly, *Committee Hansard*, 19 August 2019, p. 17;

⁶⁴ Ms Ford, Law Council, *Committee Hansard*, 19 August 2019, p. 2.

⁶⁵ Mr David Prince, Member, Migration Law Committee, Law Council, *Committee Hansard*, 19 August 2019, p. 7.

⁶⁶ Settlement Council of Australia, *Submission 23*, p. 2.

⁶⁷ Department of Home Affairs, *Submission 15* to inquiry into 2018 bill, p. 7.

⁶⁸ Department of Home Affairs, *Submission 14*, p. 9.

once it is clear that a person has failed the character test, the additional factors considered are 'broad and wideranging'. The decision-maker can:

...take into account the particular nature of the offending conduct, the seriousness of the offence, the ties to the community, the length of time the person has been in Australia and the interests of the family and of minors. Indeed, some of the suggestions about the minor nature of offending would clearly be able to be taken into account in that other discretion.⁶⁹

Human rights implications and the effect of visa cancellations

2.46 The Public Law and Policy Research Unit stated that the bill may decrease community safety. Mr Reilly, Director of the Unit, submitted that when granting a permanent resident visa, Australia makes a commitment to the person which is 'crucial to them being able to be effective members of our community and participate fully in a number of ways'.⁷⁰ The Unit further explained:

If a permanent resident can be removed from Australia for minor infractions, they and their families may feel less secure, less welcome, and less committed to contributing to the Australian community.

With the threat of visa cancellation and deportation hanging over them for very minor offences, permanent residents who are innocent victims of violence may be reluctant to approach the police for fear that they will be accused of initiating the confrontation. They may also be reluctant to help others who are the victims of violence for fear they will be dragged into a confrontation. With the stakes so high, permanent residents may second-guess their natural community-minded instincts.⁷¹

2.47 Mr Sherrell et al similarly submitted that the bill 'will further exacerbate the divide between Australian citizens and non-citizens'.⁷² They stated:

It is possible for visa holders to have failed the character test and for this to have no effect on their visa status, nor on any future visa applications. However in this scenario, many additional people will be aware they have failed the character test and this may manifest itself in general unease and tension about long-term certainty of Australian residency.⁷³

⁶⁹ Ms De Veau, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 62.

⁷⁰ Mr Alex Reilly, Director, Public Law and Policy Research Unit, University of Adelaide, *Committee Hansard*, 19 August 2019, pp. 12–13.

⁷¹ Public Law and Policy Research Unit, *Submission 19*, pp. 5–6. Also see Settlement Council of Australia, *Submission 23*, p. 2.

⁷² Mr Sherrell et al, *Submission 2*, [p. 4]. Also see Mr Al-Khafaji, FECCA, *Committee Hansard*, 19 August 2019, p. 33.

⁷³ Mr Sherrell et al, *Submission 2*, [pp. 3–4].

2.48 The Asylum Seeker Resource Centre emphasised that sometimes 'the consequences for the human beings involved will be far worse than almost any jail sentence'.⁷⁴ The Law Council also submitted that if the bill became law:

...it may result in the detention of individuals for far longer periods than their sentences of imprisonment. In some cases, this would include people who were never sentenced to any imprisonment at all.⁷⁵

2.49 Moreover, the Kaldor Centre submitted that the proposed amendments 'would be inconsistent with a number of Australia's international human rights obligations'. The obligations include Australia's non-refoulement obligations, the right to liberty, and the obligation to consider the best interests of the child as a primary consideration.⁷⁶

2.50 The United Nations High Commissioner for Refugees (UNHCR) highlighted the risk of prolonged or indefinite detention after a person's visa is cancelled.⁷⁷ It also expressed concern about the existing character test, including that non-refoulement obligations are not required to be considered as a primary or paramount consideration.⁷⁸ The UNHCR advanced that by expanding the grounds for visa refusal or cancellation on character grounds, the bill further increases the risk of refugees and stateless persons being detained in circumstances that are inconsistent with international standards.⁷⁹

2.51 The Asylum Seeker Resource Centre noted the minister 'states that no one found to be owed protection will be removed in breach of *non refoulement* obligations', but submitted that this is 'contradictory to the position in law'.⁸⁰

2.52 The Working Group highlighted subsection 197C(2) of the Act, which states that an officer's duty to remove an unlawful non-citizen from Australia arises

⁷⁴ Dr Graydon, Asylum Seeker Resource Centre, *Committee Hansard*, 19 August 2019, p. 41. Also see, for example, Visa Cancellations Working Group, *Submission 14*, p. 9; Immigration Advice and Rights Centre, *Submission 18*, pp. 3–4; Public Law and Policy Research Unit, *Submission 19*, p. 4; Queensland Council for Civil Liberties, *Submission 26*, [p. 2]; Mr Al-Khafaji, FECCA, *Committee Hansard*, 19 August 2019, pp. 29–30.

⁷⁵ Law Council, *Submission 29*, p. 28.

⁷⁶ Kaldor Centre, *Submission 27*, [pp. 4–5]. Also see, for example, Peter McMullin Centre on Statelessness, *Submission 7*, [pp. 2–6]; Liberty Victoria, *Submission 24*, pp. 4–6; Australian Lawyers for Human Rights, *Submission 25*, pp. 5–7; Dr Donnelly, *Committee Hansard*, 19 August 2019, pp. 13–14.

⁷⁷ United Nations High Commissioner for Refugees, *Submission 28*, p. 3. Also see, for example, Law Council of Australia, *Submission 29*, pp. 12–13.

⁷⁸ UNHCR, *Submission 28*, pp. 4–5.

⁷⁹ UNHCR, *Submission 28*, p. 7.

⁸⁰ Asylum Seeker Resource Centre, *Submission 3*, p. 2. Also see Visa Cancellations Working Group, *Submission 14*, pp. 21–24; Immigration Advice and Rights Centre, *Submission 18*, pp. 4–5; Professor Cody and Dr Donnelly, *Submission 21*, pp. 20–22.

irrespective of Australia's non-refoulement obligations.⁸¹ It stated that as a consequence of the bill, it is 'likely that a greater number of people owed non-refoulement obligations will face cancellation or refusal and will be indefinitely detained', and that the bill would create 'the significant and expanded possibility for Australia's non-refoulement obligations to be undermined'.⁸²

2.53 Some inquiry participants discussed the effect of the bill on children. The Peter McMullin Centre on Statelessness expressed concern that the bill would 'increase incidents of forced separation of families'.⁸³ Refugee Legal advanced:

The focus of the youth justice system Australia wide is on rehabilitation, with dedicated sentencing principles applying to young offenders. Visa cancellation, prolonged immigration detention, and removal from Australia, particularly where there is no effective family support in the other country, runs counter to these principles and to our international obligations under the Convention on the Rights of the Child ('CROC').⁸⁴

2.54 Further, the Law Council of Australia noted that 'the explanatory memorandum states that only in exceptional circumstances would a child's visa be cancelled', but expressed concern that:

...neither it nor the bill prescribes what those exceptional circumstances will be. Nor does the bill limit the power to cancel a visa held by a minor to cases where exceptional circumstances exist.⁸⁵

2.55 Notwithstanding the above concerns, the explanatory memorandum states that the bill is compatible with human rights.⁸⁶ The department submitted that the government 'remains committed to Australia's international obligations':

The individual circumstances of a non-citizen who does not pass the character test on this ground can be taken into account in both considering visa refusal and cancellation, and throughout the removals process.⁸⁷

2.56 Regarding non-refoulement obligations, the statement of compatibility says:

⁸¹ Also see Dr Donnelly, *Committee Hansard*, 19 August 2019, p. 13–14; Dr Graydon, Asylum Seeker Resource Centre, *Committee Hansard*, 19 August 2019, p. 42.

⁸² Visa Cancellations Working Group, *Submission 14*, p. 24; also see Visa Cancellations Working Group, *Submission 14.1*, [p. 4].

⁸³ Peter McMullin Centre on Statelessness, *Submission 7*, [p. 5].

⁸⁴ Refugee Legal, *Submission 17*, p. 2. Also see Multicultural Youth Advocacy Network, *Submission 20*, [p. 2]; Liberty Victoria, *Submission 24*, p. 5.

⁸⁵ Ms Ford, Law Council, *Committee Hansard*, 19 August 2019, p. 2. Also see Asylum Seeker Resource Centre, *Submission 3*, p. 7; Refugee Council of Australia, *Submission 13*, pp. 3–4; Visa Cancellations Working Group, *Submission 14*, p. 25; Professor Cody and Dr Donnelly, *Submission 21*, pp. 15–16.

⁸⁶ Explanatory memorandum, p. 14.

⁸⁷ Department of Home Affairs, *Submission 14*, p. 10.

Anyone 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.⁸⁸

2.57 Further, a departmental representative said that non-refoulement is not 'directly contingent' on whether or not a person's visa is cancelled:

If there are considerations around non-refoulement, they can be raised at the time of the cancellation of a visa. You will see from the directions that it's one of the factors that must be taken into account. So, in exercising that discretion, you as a decision-maker, or the AAT in the merits review, are turning your mind to the international obligations. Then, if a visa is cancelled and a person is going to be returned, there's an opportunity to apply for protection. So there's a second opportunity at that point in time to consider whether returning a person would breach our international obligations. Then, before a person is removed, there's consideration at that point in time as to whether the removal will breach international obligations.⁸⁹

2.58 Regarding the protection of children, the department submitted that it approaches the possible refusal or cancellation of minors' visas:

...with a high degree of caution and consultation. A visa refusal or cancellation under section 501 of the *Migration Act 1958* is made after full consideration of the person's individual circumstances, the best interests of the child, and Australia's international obligations—including those under the Convention on the Rights of the Child.⁹⁰

Other issues

2.59 Inquiry participants raised a series of broader issues regarding the bill. Issues that were raised in evidence but are not examined in this report include the use of the phrase 'knowingly concerned' in the meaning of 'designated offence';⁹¹ constitutional considerations;⁹² foreign offences;⁹³ implications for Indigenous Australians;⁹⁴ the drafting of the bill;⁹⁵ and rehabilitation of prisoners.⁹⁶

⁸⁸ Explanatory memorandum, p. 12.

⁸⁹ Ms De Veau, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 67.

⁹⁰ Department of Home Affairs, *Submission 14*, p. 10.

⁹¹ Mr Kostya Kuzmin, *Submission 11*, pp. 4–5; Law Council, *Submission 29*, pp. 26–27.

⁹² Law Council, *Submission 29*, p. 34; Visa Cancellations Working Group, *Submission 13* to inquiry into 2018 bill, p. 14.

⁹³ Asylum Seeker Resource Centre, *Submission 3*, pp. 8–9; Ethnic Communities Council of Western Australia, *Submission 22*, p. 3; Kaldor Centre, *Submission 27*, [p. 5]; Law Council, *Submission 29*, p. 35; Ms Marianne Dickie and Mr Sergio Zanotti Stagliorio, *Submission 31*, pp. 4–6

⁹⁴ Visa Cancellations Working Group, *Submission 14*, pp. 27–28.

⁹⁵ Asylum Seeker Resource Centre, *Submission 3*, p. 9.

Australia's relationship with foreign countries

2.60 Some evidence to the inquiry expressed concern about how deportations on character grounds affect Australia's relationship with foreign countries, particularly New Zealand.⁹⁷

2.61 The New Zealand High Commissioner to Australia, Her Excellency Dame Annette King, told the committee:

It's been pointed out on a number of occasions, most recently by our Prime Minister Ardern, that the 2014 changes [to the character test] have been corrosive to our New Zealand-Australia relationship. It boils down to the disproportionate effect on New Zealand and the lack of reciprocity of treatment. For example, only one per cent of total deportations from New Zealand are to Australia, while more than 50 per cent of total deportations from Australia are to New Zealand.⁹⁸

2.62 High Commissioner King acknowledged that about 44 per cent of non-citizens deported to New Zealand have reoffended in New Zealand, but stated:

Many of these people have lived in Australia for 20, 30 or 40 years and they have come back to New Zealand with very few connections. As any of us knows, family connections, community connections and society connections are the glue that hold societies together. People who have had little to do with New Zealand and been deported back into communities don't have friends and don't have jobs. Even though our agencies reach out to them the vital element is often missing for those people because it is back here in Australia: it is their loved ones. And you can't replace the loved ones in New Zealand for those that are here.⁹⁹

2.63 The New Zealand Government submitted that the bill would 'make a bad situation worse for New Zealanders and therefore for New Zealand'.¹⁰⁰ High Commissioner King said that 'we would ideally like to return to some reciprocity' and to the pre-2014 arrangements. If that is not possible, then 'we would like special consideration for New Zealanders living in Australia'.¹⁰¹

2.64 High Commissioner King submitted that 'Australia has responsibility for those people who are the product of Australia':

⁹⁶ NSW Council for Civil Liberties, *Submission 5*, p. 9; Multicultural Youth Advocacy Network, *Submission 20*, p. 1; Kaldor Centre, *Submission 27*, [p. 4].

⁹⁷ See, for example, Visa Cancellations Working Group, *Submission 14*, p. 24; Oz Kiwi, *Submission 16*, p. 2; Kaldor Centre, *Submission 27*, [p. 4].

⁹⁸ Her Excellency Dame Annette King, High Commissioner, New Zealand High Commission, *Committee Hansard*, 19 August 2019, p. 22.

⁹⁹ High Commissioner King, *Committee Hansard*, 19 August 2019, p. 24.

¹⁰⁰ Government of New Zealand, *Submission 4* to inquiry into 2018 bill, [p. 4].

¹⁰¹ High Commissioner King, *Committee Hansard*, 19 August 2019, p. 26.

Many New Zealanders come here as young children. They are educated here. They are Australians in every way, except they don't have that final citizenship paper.¹⁰²

2.65 The Law Council made a similar point, suggesting that:

...where residents of Australia – particularly long-term residents – have, over the course of their lives, become entangled in criminal activity, it should be Australia's responsibility to manage the consequences. The criminal justice system offers a fair and just means of doing so, having regard to the individual, their level of culpability, the mitigating circumstances and the risk posed to the community. The problems created should not, generally, be exported elsewhere.¹⁰³

2.66 The Public Law and Policy Research Unit submitted that the deportation of long term residents to countries where the deportee has 'no substantive connection' or does not speak the language 'has not been welcomed by the receiving countries'. It said:

The extension of deportations to permanent residents who have failed the character test despite not committing a crime worthy of imprisonment will only add to these tensions.¹⁰⁴

Possible administrative and financial costs of implementation

2.67 The Law Council submitted that the proposed expansion of the character test powers 'may incur the Australian community significant costs'. It noted that:

...any unnecessary expansion of existing powers will increase the number of visa cancellations and refusals and place an increasing demand on the already limited resources of the AAT, the courts, and the legal assistance sector.¹⁰⁵

2.68 Ms Dickinson of the Working Group told the committee that there are already 'enormous delays' at the primary stage where delegates consider cancellations or refusals.¹⁰⁶ The Working Group submitted that:

...the systems dealing with visa cancellations are already close to crisis point. *Any* increase will be challenging and may lead to systemic crisis.¹⁰⁷

¹⁰² High Commissioner King, *Committee Hansard*, 19 August 2019, p. 22.

¹⁰³ Law Council of Australia, *Submission 28*, p. 8.

¹⁰⁴ Public Law and Policy Research Unit, *Submission 19*, p. 4.

¹⁰⁵ Law Council of Australia, *Submission 28*, pp. 31–32. Also see, for example, Victoria Legal Aid, *Submission 10*, pp. 11–12; Visa Cancellations Working Group, *Submission 14*, p. 21; Professor Cody and Dr Donnelly, *Submission 21*, p. 14; Liberty Victoria, *Submission 24*, pp. 6–7; Mr Prince, Law Council, *Committee Hansard*, 19 August 2019, pp. 6–7; Dr Donnelly, *Committee Hansard*, 19 August 2019, p. 15; Ms Sanmati Verma, Senior Lawyer, Accredited Specialist in Immigration Law, Visa Cancellations Working Group, *Committee Hansard*, 19 August 2019, pp. 43–44; Dr Graydon, Asylum Seeker Resource Centre, *Committee Hansard*, 19 August 2019, p. 45.

¹⁰⁶ Ms Dickinson, Visa Cancellations Working Group, *Committee Hansard*, 19 August 2019, p. 45.

¹⁰⁷ Visa Cancellations Working Group, *Submission 14.1*, [pp. 2–3].

2.69 A number of submitters also expressed concern that the bill may discourage non-citizens from pleading guilty.¹⁰⁸ As the Law Council stated:

The criminal justice system operates at its heart assuming or based upon plea deals, about arrangements—pleas are given. The criminal justice system simply cannot operate without that system. Anyone with a visa who is charged with these offences would really have no choice but to fight, and they would not, could not, in all sanity, enter a plea of guilty.¹⁰⁹

2.70 Mr Weber of the Police Federation took a contrary view. He suggested:

At the first instance, most offenders will plead not guilty and continue to plead not guilty until they see the entire brief and have more assistance from their legal advisers and solicitors and barristers...We have mandatory sentences in numerous states. Higher penalties have been arranged for numerous offences. The guilty to not-guilty ratio virtually stays the same across most of the country.¹¹⁰

2.71 Regarding the administrative costs, the explanatory memorandum states that the proposed amendments will have no financial impact.¹¹¹ Departmental representatives stated that the department will absorb the extra costs, and the department would continue to prioritise cases 'around the severity of cases and the community protection concern'.¹¹²

2.72 A representative stated that submissions suggesting that workload for the AAT and others will increase assume that 'there has been a positive referral, the referral has been considered, the visa has been cancelled and the person has then taken up their review rights'.¹¹³ She further noted that there 'will be a degree of overlap' between non-citizens who fail the existing character test and non-citizens who would fail it under the proposed amendments.¹¹⁴

Aiding and abetting a designated offence

2.73 Under the bill, one of the physical elements of a designated offence is aiding or abetting the commission of an offence.¹¹⁵

¹⁰⁸ See, for example, Public Law and Policy Research Unit, *Submission 19*, p. 6; Dr Pillai, Kaldor Centre, *Committee Hansard*, 19 August 2019, p. 3; Mr Santow, Australian Human Rights Commission, *Committee Hansard*, 19 August 2019, p. 38.

¹⁰⁹ Mr Prince, Law Council, *Committee Hansard*, 19 August 2019, p. 9.

¹¹⁰ Mr Weber, Police Federation, *Committee Hansard*, 19 August 2019, p. 55.

¹¹¹ Explanatory memorandum, p. 2.

¹¹² Mr Willard, Department of Home Affairs, and Ms Sachi Wimmer, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 61.

¹¹³ Ms De Veau, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 60.

¹¹⁴ Ms De Veau, Department of Home Affairs, *Committee Hansard*, 19 August 2019, pp. 60–61.

¹¹⁵ See proposed subparagraph 501(7AA)(a)(v) at item 6 of schedule 1 of the bill.

2.74 The Asylum Seeker Resource Centre submitted that among visa-holding families in Australia, 'there is generally one primary visa holder (often the husband) and one or more "dependent" visa holders (often a spouse and/or child)'. It said:

This means that a wife and child who have suffered family violence will have their visas cancelled and they will be removed from Australia together with the perpetrator.

In our experience, this creates a perverse situation where victims of family violence are in fact punished for the violence committed against them.¹¹⁶

2.75 In addition, Victoria Legal Aid advised that:

...there is a real risk that victims of family violence are going to be less likely to report on family violence if their partner or the family member, the perpetrator, is a noncitizen as this will have a direct impact on their visa status and their children's right to remain in Australia.¹¹⁷

2.76 Mr Bashir of the Law Council said that 'aiding' and 'abetting' could pick up:

...if a woman and her partner had an AVO in place, she needed his help to get the kids to school and she rang him and asked him come and help to do that.¹¹⁸

2.77 FECCA advanced that women would be disproportionately affected because:

...often those who are involved in a relationship with an offender may somehow become involved in a crime that they have committed. This can be in a situation of intimate partner and domestic violence, and often these women are sentenced accordingly by the courts, and this entire circumstance is taken into consideration in their sentencing but isn't taken into consideration in this bill.¹¹⁹

2.78 FECCA also acknowledged that including contraventions of an apprehended violence order in the bill 'does seek to protect women in these situations'. However, FECCA suggested that:

...without considering the entire circumstance, it's quite easy to prove somebody has breached an AVO and it's a much lower proof than to find someone guilty of a crime. Including that in this bill, we think, creates risk in situations that people should not have their visas cancelled for.¹²⁰

2.79 Mr Weber of the Police Federation stated that the inclusion of breaching an order for the personal protection of another person would protect women

¹¹⁶ Asylum Seeker Resource Centre, *Submission 3*, p. 6. Also see, for example, NSW Council for Civil Liberties, *Submission 5*, pp. 7–8; Refugee Council of Australia, *Submission 13*, p. 4; Liberty Victoria, *Submission 24*, p. 4; Settlement Services International, *Submission 30*, p. 4.

¹¹⁷ Ms Fisher, Victoria Legal Aid, *Committee Hansard*, 19 August 2019, p. 46.

¹¹⁸ Ms Bashir, Law Council, *Committee Hansard*, 19 August 2019, p. 5.

¹¹⁹ Ms Lauren Stark, Policy and Project Officer, FECCA, *Committee Hansard*, 19 August 2019, p. 30.

¹²⁰ Ms Stark, FECCA, *Committee Hansard*, 19 August 2019, p. 30.

experiencing family and domestic violence. When asked whether he has observed, as a police officer, that women are disproportionately aiders and abettors of criminal offences, Mr Weber replied:

No, not really. Most offenders are male, in most of the crime categories. It's a very broad generalisation of the statistics, but they might be there and help cover up the offence or feel pressured to cover up the offence. But that would be taken on its own merit, and it would be to a lesser degree that that charge would be used. And if it were, the judiciary but also the police and the DPP would take those circumstances into account. It would be very rare that that would occur.¹²¹

- 2.80 In addition, the department stated that it has not seen any evidence that the inclusion of aiding and abetting would disproportionately harm women.¹²² It also noted that an ancillary offence is 'not considered a secondary offence in terms of penalty'; rather, ancillary offences 'are treated objectively in all the criminal codes as if the person has committed the offence itself'. The department further explained various events that would need to occur before a person, such as someone who had aided the breach of an order, had their visa cancelled:

[T]here is the discretion of the police as to whether they prosecute. There's the discretion of the DPP as to whether it meets the prosecutorial guidelines and charges are laid. Then, of course, there's the ability of a court to give non-conviction orders. It's only...when you've got a conviction that you're going to trigger the new objective test. Then, of course, the subjective features of the seriousness of the offence can all be considered as to whether—once having triggered the test that you've failed the character test—you are, in fact, having your visa cancelled.¹²³

- 2.81 The department also clarified that there are no provisions in the Act that 'result in the consequential cancellation of family members who hold a visa associated with a non-citizen who has had their visa cancelled under section 501'. With respect to family violence, the department submitted that:

...a victim's visa will not be consequentially cancelled under section 501, if the primary visa holder (and perpetrator) is cancelled due to character concerns. Victims of domestic and family violence associated with a non-citizen whose visa was cancelled due to character concerns are assessed on a case-by-case basis.¹²⁴

¹²¹ Mr Weber, Police Federation, *Committee Hansard*, 19 August 2019, p. 55. Also see Ms De Veau, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 65.

¹²² Mr Willard, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 65.

¹²³ Ms De Veau, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 65.

¹²⁴ Department of Home Affairs, *Submission 14*, pp. 9–10.

Retrospectivity

2.82 As outlined in chapter 1, a non-citizen would fail the character test if they have been convicted of a designated offence at any time.

2.83 The Asylum Seeker Resource Centre submitted that this retrospectivity 'undermines the rule of law and creates legal uncertainty for visa applicants'. It is also 'unjust to apply the new character requirements to offences committed prior to the commencement of the concept of a "designated offence"'.¹²⁵

2.84 The Law Council acknowledged the department's justification that previous amendments to the character test have applied retrospectively, but considered that is:

...an insufficient justification for the measures' retrospective nature, particularly when consideration is given to the considerable and punitive impact on the lives of those affected, and their extended reach well into a person's past.¹²⁶

2.85 The department noted that the application of the bill to past offences is consistent with other amendments made to the character test, including:

- 1998 amendments to sections 501(6)(a)—relating to a person having a substantial criminal record, 501(6)(c)—relating to past and present criminal or general conduct and 501(6)(d)—relating to a risk that the person would engage in certain undesirable conduct if they were to enter or remain in Australia.
- 2011 amendments to sections 501(6)(aa)—relating to convictions while in, or escaped from immigration detention, and 501(6)(ab)—relating to convictions for escaping immigration detention.
- 2014 amendments to section 501(3A)—the introduction of the mandatory cancellation framework.¹²⁷

Committee view

2.86 Community safety is a critical objective for government. The committee considers it entirely appropriate for the government to have the power to refuse or cancel the visas of non-citizens who pose a threat to the safety of others. The committee further considers that the proposed amendments would appropriately strengthen the existing character test framework.

¹²⁵ Asylum Seeker Resource Centre, *Submission 3*, pp. 9–10. Also see, for example, Mr Sherrell et al, *Submission 2*, [p. 3]; Liberty Victoria, *Submission 24*, pp. 7–8; Australian Lawyers for Human Rights, *Submission 25*, p. 7; Kaldor Centre, *Submission 27*, [p. 3]; Settlement Services International, *Submission 30*, p. 4

¹²⁶ Law Council, *Submission 29*, p. 34.

¹²⁷ Department of Home Affairs, *Submission 14*, p. 8.

- 2.87 The committee acknowledges concerns expressed by some inquiry participants that it would cause undue harm for a person to fail the character test due to a conviction for a 'designated offence'.
- 2.88 However, the committee considers a conviction for a designated offence to be a serious matter. Moreover, the bill would not cause the automatic refusal or cancellation of visas. Rather, the bill would ensure that the visa status of a non-citizen who is convicted of a designated offence is appropriately *reviewed*. This process maintains discretion for decision-makers to consider the particular risk posed by each non-citizen. The committee agrees with the department that decisions about the refusal or cancellation of a visa are distinct from, and for a different purpose to, the criminal justice process applied by the courts.
- 2.89 The committee acknowledges that other concerns were raised during the inquiry, including that deporting non-citizens on character grounds may diminish Australia's relationship with foreign countries, particularly New Zealand. However, the committee is of the view that the bill strikes an appropriate balance between the protection of the Australian community and the rights of non-citizens who have committed designated offences. The committee is also reassured by departmental advice that the bill is compatible with human rights.
- 2.90 While appreciating the gravity of visa refusals and cancellations for affected non-citizens and those around them, the committee is also mindful of the suffering experienced by victims of designated offences. The bill provides a clear and objective basis for failure of the character test that also allows for decision-makers to appropriately consider a range of matters for each non-citizen's case.

Recommendation 1

- 2.91 The committee recommends that the Senate pass the bill.**

Senator Amanda Stoker
Chair

Labor Senators' dissenting report

- 1.1 Labor is committed to keeping the Australian community safe. We accept that the Commonwealth must be able to refuse or cancel the visas of non-citizens who pose a risk to the good order and safety of the community.
- 1.2 The Minister for Home Affairs already has extremely broad powers to act in this way. Section 501 of the Migration Act allows, and in some cases requires, the minister to cancel or refuse a visa if a person is deemed to have failed the character test.
- 1.3 Labor supported the strengthening of the character cancellation provisions in the Migration Act in 2014. This included introducing mandatory visa cancellation where a non-citizen is serving a full time custodial sentence, and has either been sentenced to a term of imprisonment of 12 months or more, or has been found guilty of a sexually based crime involving a child.¹

Expansion of Ministerial powers is not justified

- 1.4 The proposed expansion of the character test in this bill, however, is not justified. The government has failed to provide sufficient evidence to demonstrate that the changes are needed, or to alleviate the concerns of almost all inquiry participants that the bill will cause undue harm to non-citizens, those close to them, and the community more broadly.
- 1.5 The Department of Home Affairs argued that the bill was introduced in response to recommendations of the Joint Standing Committee on Migration in its report titled *No one teaches you to become an Australian*.

Recommendation 15

The Committee recommends that the Australian Government amend the *Migration Act 1958* requiring the mandatory cancellation of visas for offenders aged between 16 and 18 years who have been convicted of a serious violent offence, such as car jacking's or serious assaults. If legislation is amended, this should be accompanied by a caveat that no retrospective liability is thereby created.

Recommendation 16

The Committee is also recommending that anyone over 18 years of age who has been convicted of a serious violent offence which is prescribed, such as serious assaults, aggravated burglary, sexual offences and possession of child pornography, have their visa cancelled under section 501 of the *Migration Act 1958*.²

¹ See section 501(3A) of the *Migration Act 1958*.

² Department of Home Affairs, *Submission 15*, p. 4; Joint Standing Committee on Migration, *No One Teaches You to Become an Australian: Report of the inquiry into migrant settlement outcomes*, December 2017, p. 175

- 1.6 However, that report failed to take into account that the majority of submitters to the inquiry:

...held the view that the current character and cancellation provisions in the Act were an adequate way of addressing non-citizens who have been involved in criminal activities.³

- 1.7 Further, only government members of the committee supported the relevant recommendations.⁴ Labor members dissented, stating:

On recommendations 15-18 where Labor dissents, this report does not objectively reflect the evidence presented during the course of the inquiry. It ignores crucial contextual details and places an undue emphasis on others. There is minimal or no evidence to justify some recommendations made by the Committee.⁵

- 1.8 The vast majority of evidence to the committee opposed this bill. This included submissions from the Law Council of Australia, the Australian Human Rights Commission, the United Nations High Commissioner for Refugees, Victoria Legal Aid, the Visa Cancellations Working Group, Liberty Victoria, Australian Lawyers for Human Rights, the Asylum Seeker Resource Centre, the Federation of Ethnic Communities' Councils of Australia, and the Multicultural Youth Advocacy Network.

- 1.9 Labor senators are concerned that the committee majority's recommendation has not sufficiently taken into account the issues with the bill raised by these reputable groups.

- 1.10 We also note that the committee majority's recommendation to support the bill has given insufficient weight to serious objections raised by the Parliamentary Joint Committee on Human Rights and the Senate's Scrutiny of Bills Committee in their review of the 2018 version of this bill, which is identical to the present bill. The Joint Committee was especially concerned that:

...the proposed expansion of the minister's power to cancel or refuse a visa is likely to be incompatible with Australia's non-refoulement obligations and the right to an effective remedy.⁶

- 1.11 The Scrutiny of Bills Committee commented that in the light of the 'already extremely broad discretionary powers available to the minister', the

³ Joint Standing Committee on Migration, *No One Teaches You to Become an Australian: Report of the inquiry into migrant settlement outcomes*, December 2017, p. 154

⁴ See dissenting reports of Labor Members, pp. 245–256, and the Australian Greens, pp. 237–243, in Joint Standing Committee on Migration, *No One Teaches You to Become an Australian*, December 2017.

⁵ Labor Members dissenting report, Joint Standing Committee on Migration, *No One Teaches You to Become and Australian*, p. 246.

⁶ Parliamentary Joint Committee on Human Rights, *Report 1 of 2019*, 12 February 2019, pp. 78–79.

explanatory materials for the bill had 'given limited justification for the expansion of these powers'.⁷

Is the bill necessary?

1.12 An initial question is whether the bill is necessary. Labor senators consider that the minister already has extremely broad discretionary powers to refuse to issue or cancel a visa on character grounds. There has been insufficient justification as to why this proposed expansion is necessary or proportionate.

1.13 A large number of inquiry participants submitted that the existing powers in the Act are sufficient for the protection of the Australian community. As the Law Council of Australia stated:

The Law Council is concerned that the bill is neither necessary nor proportionate and that the Migration Act already provides overly broad powers to cancel and refuse visas on character grounds. These are more than sufficient to respond appropriately to individuals who commit serious offences and provide a clear risk to the community.⁸

1.14 Moreover, as emphasised by the Visa Cancellations Working Group, the bill:

...categorically does not enable the cancellation or refusal of the visas of any person for whom cancellation or refusal is not already available. It merely removes a decision maker's power to assess whether or not certain individuals meet or fail the character test, making failure mandatory in prescribed circumstances.⁹

No evidence that the bill will protect the community

1.15 The minister is already able to refuse a visa on a wide range of character grounds.¹⁰

1.16 Under section 501(6) of the Act, a person is deemed to have failed the character test if:

- the person has a substantial criminal record;
- the minister reasonably suspects that the person is or has been a member or associate of a group involved in criminal conduct;
- the person is not of good character, having regard to that person's past or present criminal conduct, or past or present general conduct;
- there is a risk that if the person entered or remained in Australia, the person would:
 - engage in criminal conduct;

⁷ Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2018*, 14 November 2018, p. 11.

⁸ Ms Carina Ford, Member, Migration Law Committee, Law Council of Australia (Law Council), *Committee Hansard*, 19 August 2019, p. 1.

⁹ Visa Cancellations Working Group, *Submission 14*, p. 11.

¹⁰ See paragraph 501(6)(c) of the *Migration Act 1958*.

- harass, molest, intimidate or stalk another person;
 - vilify a segment of the community, or incite discord in the community; or
 - represent a danger to the community or a segment of the community; or
- a court in Australia or abroad has convicted the person of one or more sexual offences involving a child; or found the person guilty of such an offence, or found a charge against the person proven for such an offence, even if that person was discharged without conviction.
- 1.17 As many participants in the inquiry noted, it is extremely difficult to conceive of any kind of criminal conduct, or danger to the community, that is not already captured by these provisions.
- 1.18 The government, however, has unpersuasively continued to insist that the proposed strengthening of character cancellation provisions is necessary to ensure community safety.
- 1.19 When asked to identify the problem that the bill sought to address, the department stated:

The bill introduces an objective element to the character test and it applies in addition to existing subjective and objective elements in the character test. It provides a clear standard, in terms of convictions for designated offences, that is clear for both visa holders and the public as to what type of criminal conduct will involve meeting or not meeting the character test.¹¹

Bill could undermine the functioning of the legal system

- 1.20 Despite claiming that the bill would provide a clear and objective standard, the department failed to produce a list of offences that would constitute a 'designated offence' under the bill. It advanced:

To provide a comprehensive list of all offences in Australia which would fall within the definition of a 'designated offence' would be an onerous task, taking considerable time to compile and verify. Even were such a list compiled, it would be out-of-date when relevant criminal legislation in the States and Territories changed. This can happen quickly and at any time.¹²

- 1.21 Given the breadth of the 'physical elements' listed as part of the meaning of 'designated offence', this response is inadequate. It is important that legislation of this kind be clear to all citizens, particularly where it may lead to severe consequences for certain Australian residents, and especially where clarity is part of the stated purpose of the legislation. Labor senators highlight concerns from the Law Council:

¹¹ Mr Michael Willard, Acting First Assistant Secretary, Immigration and Community Protection Policy Division, Department of Home Affairs, *Committee Hansard*, 19 August 2019, p. 57.

¹² Department of Home Affairs, responses to questions on notice, 19 August 2019, (received 4 September 2019), [p. 3].

[A] core difficulty with the Bill is that due to the non-exhaustive, open-ended nature of the definition of 'designated offence' it is not clear which offences will be captured. The Law Council is concerned that there may be years of litigation ahead in order for the Federal Courts to establish the outside parameters of these provisions.¹³

1.22 Labor senators also note a comment by the Asylum Seeker Resource Centre:

If the Bill also aims to provide a 'clearer and more objective basis' for refusing or cancelling the visa of persons who do not meet the substantial criminal record test, then the Bill must repeal the vague and subjective elements of the character test... It does not seek to do so.¹⁴

1.23 The main change introduced by this bill is the notion of a designated offence: a person would be deemed to have failed the character test if that person is convicted of a designated offence carrying a maximum penalty of more than two years, regardless of the actual sentence given.

1.24 As the Law Council has argued, this change 'has the potential to undermine the sentencing function of the judicial system and the discretion exercised by judicial officers'. As the Law Council's submission stated:

The thresholds proposed by the Bill are likely to capture a range of individuals who ordinarily would not be considered to have committed a 'serious offence', having regard to existing definitions in criminal law.¹⁵

1.25 The Law Council has also warned that a likely consequence of these changes is that fewer migrants will seek the protection of the law due to fears of visa cancellation, including in situations of dire need, such as family violence.

1.26 It is also likely that fewer accused persons will enter guilty pleas, thereby creating a greater strain on the criminal justice system because of more contested and protracted court proceedings.

1.27 The changes are therefore also likely to increase the cost to Australian taxpayers of conducting investigations, the cost of operating courts and tribunals, and the cost of operating the immigration detention system.

1.28 The report of the majority of the committee, and the department's submission, emphasised that the bill retains discretion for decision-makers because a person convicted of a designated offence would not automatically have their visa cancelled; rather, they would automatically fail the character test and their visa status may then be reviewed.

1.29 Even if discretion is maintained, however, it is not appropriate to determine that a person failed the character test for what the Law Council has described

¹³ Law Council, responses to questions on notice, 19 August 2019 (received 23 August 2019), p. 1.

¹⁴ Asylum Seeker Resource Centre, *Submission 3*, pp. 3–4.

¹⁵ Law Council, *Submission 29*, p. 6.

as low-level offending. As the Law Council stated, the bill sets a 'very, very low bar'.¹⁶ In addition:

It should be of very limited comfort to this committee to conclude that the discretion is still there. That should not make you comfortable. It is a very significant thing to be held to fail the character test.¹⁷

1.30 Moreover, submitters raised concerns about how decision-makers would apply their discretion, particularly given that the person would have been held to clearly fail the character test. There were also concerns about access to legal representation and whether non-citizens would be able (in practice) to put their case to the decision maker.

1.31 When introducing the bill, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, the Hon David Coleman MP, suggested that entry and stay in Australia by non-citizens 'is a privilege, not a right'.¹⁸ While Labor senators agree that there are circumstances in which it is appropriate to refuse or cancel a visa on character grounds, it is worth noting the case of *Minister for Immigration and Border Protection v Stretton* where 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 rights which are inconsistent with the notion of their status being described simply as a 'privilege'.**¹⁹

Bill will damage relations with New Zealand

1.32 The consequences of further strengthening the character test for Australia's relationship with New Zealand are of profound concern.

¹⁶ Ms Gabrielle Bashir SC, Co-Chair, National Criminal Law Committee, Law Council, *Committee Hansard*, 19 August 2019, p. 4.

¹⁷ Mr David Prince, Member, Migration Law Committee, Law Council, *Committee Hansard*, 19 August 2019, p. 7.

¹⁸ The Hon David Coleman MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *House of Representatives Hansard*, 4 July 2019, p. 314.

¹⁹ Griffiths J quoted in Law Council of Australia, responses to questions on notice, 19 August 2019 (received 23 August 2019), pp. 3–4.

- 1.33 Historically, Australia and New Zealand have a long and uniquely close relationship, which it can reasonably be assumed both countries wish to preserve.
- 1.34 However, New Zealand's Prime Minister, Jacinda Ardern, has stated that even the existing character test provisions are having a 'corrosive effect' on the relationship between the two countries. This comment was repeated by the New Zealand High Commissioner, Dame Annette King, in evidence to the committee.²⁰ In its submission to the committee's previous inquiry, the New Zealand Government stated that the bill 'would make a bad situation worse for New Zealanders and therefore for New Zealand'.²¹
- 1.35 The reason for the New Zealand Government's concern is that New Zealand citizens are disproportionately affected by the character test expulsions. More than 50 per cent of deportations from Australia are to New Zealand, whereas only one per cent of deportations from New Zealand are to Australia.
- 1.36 In many cases, the New Zealand citizens deported on character grounds are people who arrived in this country as young children, have spent all their lives here, and identify as Australian.
- 1.37 As High Commissioner King suggested, that is almost certainly part of the explanation for the fact that 44 per cent of New Zealanders deported on character grounds re-offend in New Zealand. They have been sent to a country where they may no longer have close family and have no social support.
- 1.38 New Zealand also cancels the visas of non-citizens who commit offences or are judged to be a risk to the community. However, in New Zealand these exclusions are applied on a 'sliding scale': persons who have lived in the community for 10 years or more cannot be deported.
- 1.39 Labor believes a similar sliding scale is worth considering for Australia. It would remove the problem created by deporting New Zealand citizens who have lived here either all their lives or for very long periods and who identify as Australians.

Conclusion

- 1.40 For the reasons we have set out, Labor senators believe this Bill is unnecessary and has the potential to infringe the rights of visa holders without increasing protection for the wider community. Therefore:

²⁰ Her Excellency Dame Annette King, High Commissioner, New Zealand High Commission, *Committee Hansard*, 19 August 2019, pp. 22–28.

²¹ Government of New Zealand, *Submission 4* to the committee's inquiry into the 2018 bill, [p. 4].

Recommendation 1

1.41 Labor Senators recommend that the bill not be passed.

Recommendation 2

1.42 Labor party Senators are particularly concerned about the impact this legislation could have on our critical relationship with New Zealand and recommend further consultation and communication with the New Zealand government.

**Senator the Hon Kim Carr
Deputy Chair**

**Senator Anthony Chisholm
Labor Senator for Queensland**

Australian Greens dissenting report

- 1.1 The Australian Greens thank everyone who made a public submission and/or public representation to this inquiry.
- 1.2 As stated in the Chair's report, this bill is identical to one tabled in the previous parliament: the Migration Amendment (Strengthening the Character Test) Bill 2018 (the 2018 bill).
- 1.3 As with our dissenting report for the Legal and Constitutional Affairs Legislation Committee inquiry into the 2018 bill, this chapter will again raise many significant and substantive concerns with the Migration Amendment (Strengthening the Character Test) Bill 2019 (the 2019 bill).

Public policy should be based on evidence

- 1.4 The Australian Greens question the need for this legislation.
- 1.5 There are already appropriate consequences for criminal offences committed by visa holders, as there are for all residents of, and visitors to, Australia. This bill, as have previous amendments to the *Migration Act 1958*, seeks to create additional and disproportionate consequences for non-citizens.
- 1.6 Crime rates in Australia are in fact decreasing.
- 1.7 According to the Australian Bureau of Statistics, between 2016–17 and 2017–18 the youth offender rate decreased for all jurisdictions except Western Australia, which only increased by 4 offenders per 100,000 persons. During the same period, the number of all offenders proceeded against by police decreased in all states and territories except for the Northern Territory.
- 1.8 Given the evidence, it is clear this bill is more about stigmatising and persecuting particular cohorts of people than it is about public safety.

Who will be affected by the bill

- 1.9 This bill will, according to a legislative brief on the 2019 bill by the Andrew & Renata Kaldor Centre for International Refugee Law (the Kaldor Centre), introduce:

...a category of 'designated offences,' characterised by particular types of conduct and a maximum sentencing term of at least two years imprisonment. Under the proposed changes, any non-citizen who convicted of a 'designated offence,' in Australia or abroad will be deemed to fail the character test, irrespective of the actual sentence imposed. This will not lead to automatic visa cancellation, but will enliven the Minister's discretionary cancellation powers in ss 501(2) and 501(3).

- 1.10 Sherrell, Mares, Rizvi, Robertson, Berg & Bain, in their submission to the 2019 bill, have warned the introduction of the 'designated offence' and subsequent mandatory failure of the character test upon conviction of a

designated offence (regardless of any sentences imposed by the courts for those offences) by this bill will possibly increase the number of people captured by section 501 of the *Migration Act 1958* by a factor of five, including, most concerning, people who are not likely to be an ongoing threat to the Australian community.

1.11 Sherrell et al submitted:

Given the existing suite of powers under the character test, combined with mandatory cancellation for visa holders sentenced to at least 12 months jail, this Bill will primarily affect people who are sentenced to a range of non-jail sentences, reflecting the fact that many will not be an ongoing risk to the Australian community. It has the potential to inflict a double punishment, with the second punishment of removal and permanent exclusion from Australia being disproportionate to the nature of the original offence.

1.12 According to the Kaldor Centre's legislative brief, anyone without citizenship living in Australia, no matter for how long, will fail the character test if they have been convicted of a 'designated offence' at any point in the past.

1.13 Perversely, as identified by the Kaldor Centre, Liberty Victoria, and the Visa Cancellations Working Group, this could also include people of Aboriginal origin who were born overseas. This has already occurred under existing section 501 powers, with notable cases including "WSML", whose visa cancellation was overturned by the Administrative Appeals Tribunal, and Daniel Love and Brendan Thoms, both of whom have cases before the High Court. All three of these men have an aboriginal parent, but were non-citizens because they were born overseas.

Retrospectivity and the rule of law

1.14 The Australian Greens have long argued that retrospective laws are inconsistent with the rule of law. The amendments in this bill will apply to any non-citizen who was convicted of a designated offence at any time. The Law Council of Australia submitted its concerns that the 2019 bill:

...could be used to remove a non-citizen for their historic involvement in a designated offence, which in the absence of the proposed amendments may not have amounted to a failure to pass the character test [and that there is] insufficient justification for the measures' retrospective nature, particularly when consideration is given to the considerable and punitive impact on the lives of those affected, and their extended reach well into a person's past.

1.15 According to the Kaldor Centre in their legislative brief, this will include people who 'have lived in Australia for many decades, with no recent criminal history'.

Recognition of time and ties to Australia

1.16 Oz Kiwi, in its submission to the 2019 bill, noted:

Prior to 1998, the deportation of non-citizens who had committed criminal offences was covered by Sections 200 and 201 of the Migration Act 1958 (Cth). Under these sections, the Minister could only deport a non-citizen who had been convicted of a crime (punishable by imprisonment for two years or more) if the non-citizen had been resident in Australia for less than ten years. Subsequent amendments to the Act in relation to Section 501, have been used to cancel the visas of permanent residents who have lived in Australia for more than ten years.

1.17 The Australian Greens support Oz Kiwi's recommendation that any non-citizen who has either lived in Australia for more than ten (10) years, or who arrived in Australia before the age of ten (10), should not be able to have their visa cancelled.

1.18 This would bring Australia into line with its Trans-Tasman Travel Arrangement partner, New Zealand, which has a tiered deportation system that takes into account how long a person has lived there, and the seriousness of their crimes. In New Zealand, a non-citizen cannot be deported after 10 years of living in the country.

1.19 In its submission to the 2018 bill, the Government of New Zealand, before noting a 400 per cent rise in cancellations of New Zealanders' visas under current s 501 powers, raised a principle concern relating to:

...visa cancellation of New Zealanders who arrived in Australia as children. By cancelling their visas, Australia is not taking responsibility for these people's failure to succeed in Australian society, despite them, in many cases, being a product of Australian society.

Recommendation 1

1.20 That the *Migration Act 1958* be amended to prevent any non-citizen who has either lived in Australia for more than 10 years, or who arrived in Australia before the age of 10, from having their visa cancelled.

Arbitrary and non-reviewable decisions

1.21 The Australian Greens are also concerned about this bill's move away from an individual sentence-based model, to an arbitrary penalty model. When considering this aspect of the 2018 bill, the Parliamentary Joint Committee on Human Rights (PJCHR) noted:

...the existing framework generally focuses on a sentence-based approach whereby, for example, the determination of whether a person has a 'substantial criminal record' is by reference to a person's sentence of imprisonment. The proposed amendments provide additional bases upon which the minister may cancel or refuse a visa by reference to the length of time for which the 'designated offence' may be punishable, rather than the length of time for which the person is sentenced.

- 1.22 This arbitrary penalty model is as blunt and unjust a model as mandatory sentencing, which is widely condemned by the legal and academic professions. As argued by Australian Lawyers for Human Rights in their submission to this latest inquiry:

[This] Bill fails to take into account the role of the criminal law system and judicial discretion in Australia in considering the material facts of an offence and imposing a sentence, including a sentence of imprisonment, which is appropriate in all the circumstances of the case and which therefore reflects the seriousness of the crime and the risk the person poses to the Australian community.

- 1.23 In their submission to the 2019 bill, the Human Rights Commission further argued:

Given the potential impact on individual rights, any decision to refuse or cancel a visa should be made properly and take into account all of the relevant circumstances ... In extreme cases, this can amount to arbitrary decision making under international human rights law.

- 1.24 Also troubling is that this 2019 bill targets a cohort that largely already has problems accessing justice. As the Federation of Ethnic Communities' Councils of Australia (FECCA) noted:

Currently the Migration Act adversely impacts on highly vulnerable sections of Australia's community who have no access to free legal assistance and the proposed amendments will only further restrict their access to justice.

Effects on individuals, families, and communities

- 1.25 FECCA, along with the Human Rights Commission, also raised concerns regarding the bill's capacity to deport long-term residents of Australia, and to separate families. FECCA submitted that:

An individual may be removed to a country where they do not speak the language; where they have spent little time (or never lived); and where they have no familial, social or economic connections.

- 1.26 Regarding families, FECCA argued the bill presents a real risk of facilitating:

...separation of mothers and fathers from children, including dependent children, and other family members. [Furthermore,] the proposed inclusion of 'aiding and abetting' will disproportionately affect women, involved in a relationship with an offender, who are often victims of intimate partner and domestic violence and sentenced accordingly by the courts.

- 1.27 This bill, particularly when cancelling the visa of a father, will therefore potentially create a twofold blow for dependents, particularly when the cancellation was on the basis of family violence. As the Asylum Seeker Resource Centre (ASRC) most recently submitted:

Most often, the victim of family violence is the wife and/or child of the perpetrator. When families are present in Australia as visa holders, there is

generally one primary visa holder (often the husband) and one or more 'dependent' visa holders (often a spouse and/or child). When a husband's visa is cancelled on account of family violence offences, any 'dependents' will also have their visas cancelled. This means that a wife and child who have suffered family violence will have their visas cancelled and they will be removed from Australia together with the perpetrator.

1.28 Such a situation, the ASRC further argued will lead to:

...an impossible conflict of interest, as the prospect of losing their visa and that of their children may deter victims of family violence from seeking the essential protection from violence that they need.

Rights and welfare of children

1.29 The Australian Greens are also concerned about how this bill will impact on the rights and welfare of children. The Refugee Council of Australia argued the 2019 bill would breach our commitment to international obligations to the protection of children, such as the Convention on the Rights of the Child, and noted:

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

1.30 The ASRC also notes that the arbitrary concept of 'designated offences' will disproportionately impact children and young people, as:

[c]hildren are more likely to receive lower sentences for criminal convictions and will generally only receive custodial sentences as a last resort. However, under the Bill, such sentencing considerations will not be taken into account and children will be exposed to visa refusal or cancellation and potentially unaccompanied deportation.

Conclusion

1.31 This bill—which targets migrants and bypasses judicial process—will lower an already low bar for refusing or cancelling the visas of non-citizens, for reasons, as identified in the explanatory memorandum, such as sharing intimate images, verbally threatening someone, associating with members of a gang, or holding a rock in a threatening way.

1.32 The Government has failed to present a case for these additional powers.

Recommendation 2

1.33 The Australian Greens recommend that the Senate does not pass this bill.

**Senator Nick McKim
Greens Senator for Tasmania**

Appendix 1

Submissions and answers to questions on notice

Submissions

- 1 Legal Services Commission of South Australia
- 2 Mr Henry Sherrell, Peter Mares, Abul Rizvi, Dr. Shanthi Robertson,
Dr. Laurie Berg and Kevin Bain
- 3 Asylum Seeker Resource Centre
- 4 Australian Human Rights Commission
- 5 NSW Council for Civil Liberties
- 6 Australian Council of TESOL Associations
- 7 Peter McMullin Centre on Statelessness
- 8 Federation of Ethnic Communities' Councils of Australia (FECCA)
- 9 Ms Heather Marr
- 10 Victoria Legal Aid
- 11 Mr Kostya Kuzmin
- 12 Police Federation of Australia
- 13 Refugee Council of Australia
- 14 Visa Cancellations Working Group
 - 14.1 Supplementary to submission 14
- 15 Department of Home Affairs
- 16 Oz Kiwi
- 17 Refugee Legal
- 18 Immigration Advice and Rights Centre (IARC)
- 19 Public Law and Policy Research Unit, University of Adelaide
- 20 Multicultural Youth Advocacy Network (MYAN)
- 21 Professor Anna Cody and Dr Jason Donnelly
- 22 Ethnic Communities Council of WA
- 23 Settlement Council of Australia
- 24 Liberty Victoria
- 25 Australian Lawyers for Human Rights
- 26 Queensland Council for Civil Liberties
- 27 Kaldor Centre for International Refugee Law
- 28 United Nations High Commissioner for Refugees
- 29 Law Council of Australia
- 30 Settlement Services International
- 31 Ms Marianne Dickie and Mr Sergio Zanotti Staglitorio
- 32 Ms Maria Aylward

Answers to Questions on Notice

- 1 Law Council of Australia, responses to questions on notice, 19 August 2019 (received 23 August 2019)
- 2 Department of Home Affairs, responses to questions on notice, 19 August 2019 (received 4 September 2019)

Appendix 2

Hearing

Monday, 19 August 2019
Committee Room 2S1
Parliament House
Canberra

Law Council of Australia

- Ms Gabrielle Bashir SC, Co-Chair, National Criminal Law Committee
- Ms Leonie Campbell, Deputy Director, Policy
- Ms Carina Ford, Member, Migration Law Committee
- Mr David Prince, Member, Migration Law Committee

Kaldor Centre for International Refugee Law

- Dr Sangeetha Pillai, Senior Research Associate

Public Law and Policy Research Unit, University of Adelaide

- Mr Alex Reilly, Professor

Dr Jason Donnelly, Private capacity

Mr Henry Sherrell, Private capacity

New Zealand High Commission

- Dame Annette King, High Commissioner
- Mr Andrew White, First Secretary

Federation of Ethnic Communities' Councils of Australia (FECCA)

- Mr Mohammad Al-Khafaji, Chief Executive Officer
- Ms Lauren Stark, Policy and Project Officer

Australian Human Rights Commission

- Mr Edward Santow, Human Rights Commissioner
- Ms Lara Renton, Senior Lawyer

Asylum Seeker Resource Centre

- Dr Carolyn Graydon, Principal Solicitor and Manager Human Rights Law Program

Victoria Legal Aid

- Ms Sarah Fisher, Manager, Migration sub-program

Visa Cancellations Working Group

- Ms Hannah Dickinson, Chair
- Ms Sanmati Verma, Member

Police Federation of Australia

- Mr Scott Weber, Chief Executive Officer

Department of Home Affairs

- Mr Michael Willard, Acting First Assistant Secretary, Immigration and Community Protection Policy
- Mr Malcolm McAllister, Assistant Secretary, Compliance and Community Protection Policy
- Ms Pip De Veau, First Assistant Secretary, Legal Division
- Ms Sachi Wimmer, First Assistant Secretary, Immigration Integrity and Community Protection Policy