7 AUGUST 2019

MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2019

Submission to the Inquiry by the Joint Standing Committee

VISA
CANCELLATIONS
WORKING GROUP

ABOUT THE VISA CANCELLATIONS WORKING GROUP

The Visa Cancellations Working Group (the Working Group) is a national group with significant expertise in the area of visa cancellations and migration more generally.

Its membership is comprised of individuals from private law firms, not-for-profit organisations, community legal centres, and tertiary institutions, including:

- Victoria Legal Aid;
- The Refugee Council of Australia;
- The Law Institute of Victoria;
- AUM Lawyers;
- Clothier Anderson Immigration Lawyers;
- Erskine Rodan & Associates;
- NSW Council for Civil Liberties;
- Amnesty International;
- Refugee Advice & Casework Service;
- Justice Connect;
- Salvos Legal;
- Kah Lawyers;
- Monash University;
- MYAN Australia;
- Asylum Seeker Resource Centre;
- Russell Kennedy;
- Foundation House;
- Flemington Kensington Community Legal Centre;
- Jesuit Refugee Service (JRS) Australia;
- The Australian Human Rights Commission;
- Brigidine Asylum Seekers Project;
- The Settlement Council of Australia;
- Multicultural Development Australia;
- Carina Ford Immigration Lawyers;
- Welcome Lawyers;
- Abode Migration;
- Darebin Community Legal Centre;
- Slater & Gordon, and
- The Kaldor Centre.

The views in this submission do not purport to be endorsed in their entirety by all members of the Working Group.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Working Group recommends the Bill be rejected in its entirety for reasons including the following:

- The Bill **does not provide for more or improved powers to cancel a person's visa**, as it was intended to do.

- The Bill sets **an arbitrary and inappropriate low bar for failure of the character test**, leading to diminished integrity of outcomes and to serious harm for individuals. It does not align with Australian community standards.

- The Bill does not **appropriately utilise and respect the expertise of Australian courts** and the sentencing function exercised by those courts.

- The Bill is likely to **seriously impact the criminal justice space in terms of resourcing and outcomes**, including the State and Territory courts, legal services providers, and custody and immigration detention facilities.

- The Bill is likely to **seriously impact administrative law process** by increasing load on primary, merits and judicial review bodies.

- The Bill has unintended consequences in that it **fails to protect vulnerable individuals**, including minors, Aboriginal and Torres Strait Islanders, those with mental illness, and those from refugee or asylum seeker backgrounds. It is likely to be incompatible with Australia's international obligations. It will have an unnecessarily harsh effect on those caught.

ENDORSING BODIES

These submissions are endorsed by the following bodies:

- Abode Migration
- Albany Migration Services
- Amnesty International
- Asylum Seeker Resource Centre
- AUM Lawyers
- Border Crossing Observatory at Monash University
- Buttar, Caldwell & Co. Solicitors
- Carina Ford Immigration Lawyers
- Clothier Anderson Immigration Lawyers
- Flemington Kensington Community Legal Centre
- Immigration Advice & Rights Centre
- Jesuit Refugee Service (JRS) Australia
- Justice Connect
- Kaldor Centre for International Refugee Law
- Multicultural Youth Advocacy Network Australia (MYAN)
- Refugee Advice and Casework Service
- Refugee Council of Australia
- Russell Kennedy Lawyers
- Springvale Monash Legal Service
- Tasmanian Refugee Legal Service

INTRODUCTION

1. The Visa Cancellations Working Group (**the Working Group**) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the recently tabled Migration Amendment (Strengthening the Character Test) Bill 2019 (**the Bill**).

2. The Working Group recognises that it is appropriate to regulate people seeking to enter and remain in Australia by reference to questions of character and risk. There are undoubtedly cases where a person should forfeit their right to enter, or remain in, Australia, having regard to the entirety of the circumstances.

3. Equally, it must be acknowledged that visa cancellation or refusal is not a trivial matter for individuals affected: it can result in detention (including indefinite detention), family separation (sometimes permanent), forcible removal from a country, loss of refugee protection, potential refoulement to situations of persecution and serious harm, and serious psychological consequences.[1] As was observed by Chief Justice Allsop, in some circumstances, cancellation is "*potentially life-destroying*".[2]

4. It is also complex. There are numerous opportunities during a refusal or cancellation process for an individual to lose access to their rights, for example by failing to respond to a letter within tight timeframes, or by failing to lodge an application for merits review within the strict timeframes of the legislation, including due to lack of access to legal assistance.[3] This can occur due to a change of address, an inability to comprehend what can be obscure wording, or a lack of access to legal or other assistance. Individuals may also struggle to respond in ways that properly make their cases, owing to numerous factors including linguistic barriers and entrenched disadvantage.

5. Australia's legislative framework for regulation of visa cancellation and refusal is contained in the *Migration Act 1958* (Cth) (**the Act**) and the *Migration Regulations 1994* (Cth) (**the Regulations**). There are numerous grounds on which a visa can be cancelled or refused, including under ss.116, 109, and 501. Amendments to s.501 are the subject of the present Inquiry (**the character framework**).

6. The Bill purports to introduce additional circumstances in which a person will mandatorily fail the character test. Both the present law and the law as proposed will be summarised in these submissions.

[1] A leading recent review of studies regarding immigration detention and health, for example, found that there "*is a significant relationship between detention duration and mental health deterioration*" and that "*detention should be viewed as a traumatic experience in and of itself*": see M von Wethem et al, 'The impact of immigration detention on mental health: a systematic review", BMC Psychiatry (2018) 18:382.
[2] *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [45].
[3] In *DFQ17 v Minister for Immigration and Border Protection* [2019] FCAFC 64 (18 April 2019), per Perram J at [62], the Full Court of the Federal Court described the description of timeframes for merits review in a Protection (subclass 866) visa refusal as "*piecemeal, entirely obscure and essentially incomprehensible*". Cancellation or refusal notifications are not unlike these refusals.

7. The Working Group has made submissions regarding the regime in the past, and it refers to and repeats those submissions.[4] In particular, it repeats its observations about unwarranted outcomes, unnecessary waste of resources, opacity, and divisive rhetoric, and it urges the Committee to increase protections for the rule of law in the character framework. The Working Group considers that lawful, consistent, informed, apolitical, and proportionate decision-making is critical in this area.

8. For the reasons set out herein, the Working Group **recommends that the Bill be rejected**. This Bill, in its current form, will damage the integrity of outcomes in this most serious of areas. The Bill replaces what is already a powerful and permissive tool, albeit an imperfect one, with an inferior and blunt tool that lacks appropriate discretion.

9. The Working Group considers **that the Bill does not and cannot achieve its intended purpose**. Broad powers to cancel a person's visa, including in circumstances considered by this Bill, are already available under the existing framework. The justifications contained in the Explanatory Memorandum are not borne out in the legislation as drafted, and do not sufficiently make the case for the legislation. Given the severity of the consequences of visa cancellation or refusal, any amendments to the regime must be manifestly justified, and approached with caution.

10. Rather than supporting the protection of the Australian community, the **Bill will cause many thousands more individuals to *automatically* fail the character test**. The current law already provides for a subjective assessment of a person's character, including with reference to past and present criminal and *general* conduct, to determine such individuals fail the character test. Failure of the character test in the circumstances proposed by this Bill will often be plainly disproportionate, at times absurd.

11. The Bill will also have the **unintended consequences** set out in these submissions. These include increased costs to the community, increased burden on administrative decision-makers of the Department of Home Affairs, increased instances of merits review, pressures on the capacity and operation of the onshore detention regime, and increased pressure on the courts. Moreover, by removing one step of assessment, and by articulating an excessively low and inconsistent baseline for what is considered 'serious', this Bill will reduce the threshold for automatic visa cancellation or refusal and make it more likely that delegates will make disproportionate decisions.

12. Any future modifications to the present regime, it is submitted, must:

    - Protect proportionate, reasonable, and informed decision-making;
    - Increase the clarity of the law and processes for affected individuals;
    - Protect public resources;
    - Ensure that any expansion of the existing cancellation or refusal powers are accompanied by additional resourcing for downstream services that will likely be impacted, in particular the legal assistance sector, courts, and tribunals;
    - Provide for consideration of the judicial sentence as opposed to the potential sentence;
    - Remove accessory offences as triggers for mandatory failure of the character test;

[4] Visa Cancellations Working Group, Submission No. 33 to the Joint Standing Committee on Migration, *Inquiry into Review Processes Associated with Visa Cancellations made on criminal grounds*, 15 May 2018.

- Recognise as primary considerations:
    i. Australia's international obligations, particularly *non-refoulement* and the prohibition on arbitrary and indefinite detention, and
    ii. The tenure of a person's life in Australia.
- Introduce clear protections for children and other vulnerable persons affected directly and indirectly by visa cancellation and refusal decisions;
- Introduce provision for funded independent legal assistance for impecunious persons subject to the character framework.

RECOMMENDATIONS

1. The Working Group recommends the Bill be rejected.

2. The Working Group calls for an Inquiry into the character cancellation regime to increase transparency and integrity around decision-making in this space.

CONTEXT

13. Any consideration of the character regime must have regard to the context in which these decisions occur.

14. Any visa holder, regardless of whether the visa is temporary or permanent, regardless of how long they have lived in Australia, and regardless of age, refugee background, or mental impairment, can be subject to cancellation. Any visa applicant can be subject to visa refusal. Moreover, the character framework is legally complex and can be overwhelming and hard to navigate.

EFFECT ON INDIVIDUALS, FAMILIES AND COMMUNITIES

15. Generally, people who have their visa cancelled or refused (if onshore) will be subject to immigration detention and possible forcible removal. Their detention may continue for many years, even indefinitely, in poor conditions. If Australia owes *non-refoulement* obligations in respect of the person (e.g. because they are owed protection obligations, they cannot be removed, and so they must remain in detention. Often, people subject to cancellation or refusal (say, of a Resident Return (subclass 155) visa) have lived in Australia for most of their lives and have extensive family ties here and no significant ties anywhere else. Often, they are vulnerable due to age, health, or lack of education. Often, there is an enormous impact on their families and communities, including descent into poverty and children or people with health issues being left without carers. The person will also generally be prohibited from applying for a further visa, with the exception, in certain circumstances, of a protection visa, which may also later be refused on character grounds.

16. In the Working Group's experience, people of pension age who have lived in Australia since before they were five, and who have children and grandchildren in this country, are subject to visa cancellation. Even people who have been found to be refugees undergo visa cancellation or refusal. Children, who have never been tried as adults, undergo visa cancellation or refusal. It is an issue which often affects the most vulnerable people in our community.

17. It also deeply affects Australian families of those who are subject to visa cancellation or visa refusal as a child can be without a parent, child or partner.

COMPLEXITY

18. The character framework is extremely complex and may subject the individual to strict deadlines which can be difficult to determine or adhere to for a range of reasons.

19. A determination that a person fails the character test means either that their visa must or may be cancelled or refused. In some cases, that person has the right to merits review within a strict timeframe, after which time they completely lose their right to merits review. In other cases, they have no such right, and must consider costly, lengthy and uncertain appeals to the federal courts, again, often without access to legal assistance.

20. Understanding and exercising existing rights can be extremely hard, particularly for vulnerable persons, such as children, those with mental health or other capacity issues, and those with limited English skills (including refugees).

21. At **Annexure A**, we include a flowchart that demonstrates the complexity of just one of the provisions, s.501(2), which governs situations where a person is first considered to fail the character test, and then the discretion to cancel is enlivened. A Notice of Intention to Consider Cancellation (**NOICC**) is then sent to the person, inviting them to comment and providing Direction 79 for their reference, at 33 pages without the other annexures. Timeframes for response vary significantly depending on the stage of the matter.

22. In the Working Group's experience, there are numerous reasons why a person may fail to respond, including:

- because they moved addresses (as permanent residents can do without notifying the Department)
- because of their limited English skills, their age, or their mental health/capacity
- because of their location (such as within the limitations of criminal custody)
- because of their lack of resources, including access to legal assistance
- because they become overwhelmed, or did not understand the unforgiving nature of the timeframes, processes or law.

23. Generally, the more vulnerable the person, the more likely they are to lose a right due to failure to respond, and the more likely they will be unable to obtain legal assistance with the process. Their quality of response will also, generally, be lower.

24. If a person fails to respond to a NOICC or Notice of Intention to Consider Refusal (**NOICR**), then 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.

25. It follows that, despite the fact that a residual discretion remains, numerous people will be adversely and disproportionately affected by the changes, because they will automatically fail the character test for minor offending.

THE EFFECT OF THE BILL

26. It is crucial to understand the distinction between a person *necessarily* failing the character test and *being assessed as* failing the character test. This is at the heart of the proposed legislation.

27. The Bill does not propose any streamlining of process. Under both the current and proposed law, the process is as follows:

a. A person is identified as being of character concern due to their own disclosure, or through notification from state, territory, Federal or international authorities.
b. The Department assesses whether that person fails the character test by reference to s.501(6) of the Act.
c. If the person fails the character test, depending on the circumstances:
    i. Their visa is mandatorily cancelled,

ii. A delegate considers whether to exercise the discretion not to cancel or refuse their visa, or
iii. The Minister cancels or refuses their visa in the national interest.

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.

28. It is not only the explicit impacts of a change of legislation that must be considered. The removal of a step of assessment is likely to impact a decision-maker's consideration significantly of whether or not the discretion to not cancel weighs in the favour of a visa holder or applicant. 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.

THE CURRENT LAW

29. The current law envisages numerous circumstances where a person will fail the character test. If a person does not *necessarily* fail the character test by virtue of their criminal or other past conduct, an assessment by a delegate or the Minister of their conduct or associations can lead to a determination that they do not pass the character test.

30. At present, a person will *objectively* fail the character test if:

- They have, over any interval of time, been sentenced to a *total* of twelve months' imprisonment or more, regardless of whether they have spent any time in prison;[5]
- Where they have been acquitted of an offence on the grounds of unsoundness of mind, or a court considered them not fit to plead, and, as a result, they have been detained in a facility or institution;
- They committed an offence relating to immigration detention, including escape from immigration detention;
- A court, Australian or foreign, has convicted or found them guilty of one or more sexually based offences involving a child;
- They have been charged with or indicted for crimes of serious international concern;
- ASIO have assessed them as, directly or indirectly, a risk to security;
- There is an Interpol notice relating to the person, from which it is reasonable to infer the person would be a risk to the community.

[5] This includes situations where, for example, a person may have received four three-month sentences of imprisonment over a period of 30 years.

31. At present, a person *will also* fail the character test if a decision-maker assesses any of the following:

- Having regard to *any* past and present criminal or general conduct, they are not of good character.
- There is a risk that, in Australia, they would:
  - Engage in criminal conduct
  - Harass, molest, intimidate or stalk another person
  - Vilify a segment of the community
  - Incite discord
  - Represent a danger to the community or a segment of the community in any way
- There is a reasonable suspicion that:
  - they are or have been associated with a group, organisation or person who the Minister reasonably suspects has been or is involved in criminal conduct, or
  - they have been or are involved in serious international offending, regardless of whether there has been a conviction, including people smuggling.

32. The powers are clearly broad and permissive.

33. For completeness, it is important to note that s.116 of the Act also provides for the cancellation of temporary visas on the basis of offending, and on the basis of charges alone.

THE PROPOSED LAW

34. The Bill proposes that a person should fail the character test *necessarily* if:

- They have been convicted of any offence involving:
  - Violence, including threat, robbery, and low-level assaults;
  - Non-consensual conduct of a sexual nature, including the sharing of an intimate image;
  - Breach of a court or tribunal order made to protect a person, including inadvertent breaches, regardless of the nature of the breach;
  - Use or possession of a weapon (any thing where a person intends or threatens to use that thing to inflict bodily injury).
- They have been convicted of having aided, abetted, counselled, procured, conspired to commit or induced any of the above offending.
- Either of the following qualifications is met:
  - If the offence is against an Australian law, a *possible* sentence of not less than two years was available to the court, and
  - If the offence was against a foreign law, had the act constituting the offence been in Australia, a sentence of two or more years would have been available to the court.

35. Plainly, the Bill does not widen the scope for cancellations or refusals whatsoever. It merely, and without justification, removes scope for assessment of whether a person fails the character test.

36. The Working Group notes a lack of clarity regarding offences that may be caught, and shares that body's concern for the lack of certainty and proportion, particularly cross-jurisdictionally. There is not a uniform approach across jurisdictions within Australia, both in terms of sentences available and in terms of application: this will result in different outcomes for the same conduct in different states of Australia. This is plainly undesirable.

THE PURPOSE OF THE BILL

37. The Explanatory Memorandum states that the insertion of new subparagraphs 501(7AA)(a)(v)(viii):

> *intends to capture those non-citizens with links to those activities that pose a risk to the Australian community, such as (but not limited to) organised crime, outlaw motor cycle gangs or those who, without committing the physical offence… have a level of involvement in the commission of a designated offence that gives rise to an offence in and of itself*.

38. It further states that the amendments:

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

39. It is misleading to suggest that such individuals do not already fall within the character framework. As set out herein, they do.

40. The Department provided submissions to the Inquiry regarding the Bill in 2018. Attached at **Annexure B** is the content of our response, demonstrating that each case study advanced by the Department would already be caught under current law.

41. It is *not* the case that only individuals sentenced to twelve months or more imprisonment fail the character test at present. The proposed Bill seems to proceed on that assumption.

42. Statistics published by the Department of Home Affairs show that there has been a 1400% increase in s.501 visa cancellations since the introduction of new laws in 2014: from 84 to 1,284. There has been a 770% increase in s.501 visa refusals over the same period.[6]

43. The same statistics show that the offences for which visas were cancelled in the 2016/2017 year include assault, murder, sexual offences, and burglary and robbery offences, each in high numbers. It is incorrect and misleading to suggest that such cancellations are not occurring, or are not empowered.

44. The Working Group is concerned by the mismatch between the stated intention of the proposed legislation and its potential to achieve that intention.

[6] See <www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>.

AN INAPPROPRIATELY LOW THRESHOLD

45. The proposed legislation is, simply put, too broad, and with too low a threshold.

46. 'Character' is not defined in the Act, and consideration of a person's 'enduring moral qualities'[7] is far from simple. 'Character' itself is difficult to define, encompassing notions of constitution, disposition, calibre, temperament and standing all at once. The choice by the legislature of the word indicates its intention: it did not choose 'conduct' or 'criminal history', but 'character'.

47. Given the nature and effect of the character framework, it can also be assumed its purpose is the protection of the Australian community.

48. By way of comparison (and noting the requirement in the citizenship regime is broader than for cancellation or refusal), Departmental policy regarding the 'good character' requirement for citizenship set out at s.24(6) of the *Australian Citizenship Act 2007* (Cth) states:

> *It is not departmental policy for decision makers to be bound by a check-list. Decision makers need to look at the merits of each case and to turn their minds to the issues of character until they are 'satisfied', on a reasoned basis that an applicant is, or is not, of good character…*
>
> *… the Federal Court and the AAT have used the ordinary meaning of the words, and made reference to dictionary definitions. Most cases have adopted the following definition from the Full FC judgment in Irving v Minister for Immigration, Local Government and Ethnic Affairs ((1996) 68 FCR 422; at 431-432):*
>
> > *Unless the terms of the Act and regulations require some other meaning be applied, the words 'good character' should be taken to be used in their ordinary sense, namely, a reference to the enduring moral qualities of a person, and not the good standing, fame or repute of that person in the community. The former is an objective assessment apt to be proved as a fact while the latter is a review of subjective public opinion… A person who has been convicted of a serious crime and thereafter held in contempt in the community, nonetheless may show that he or she has reformed and is of good character… Conversely, a person of good repute may be shown by objective assessment to be a person of bad character.*
>
> *In this context, 'moral' does not have any religious connotations. The phrase 'enduring moral qualities' encompasses the following concepts:*
>
> - *characteristics which have been demonstrated over a very long period of time*
> - *distinguishing right from wrong*

[7] *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411, per Lee J at [34].

- *behaving in an ethical manner, conforming to the rules and values of Australian society.*[8]

The good character requirement looks at the essence of the applicant. Their behaviour is a manifestation of their essential characteristics.

49. Decision-makers assessing character for citizenship look at numerous factors including the timeframe of the conduct and the surrounding circumstances.

50. The Bill would therefore create inconsistency in the way 'character' is understood and applied across visa and citizenship regimes.

51. Any attempt to create a one-size-fits-all approach to a character test without discretion built in, is likely to fall dangerously short.

52. Given the seriousness of the assessment, a legislative objective character test should align with community standards and be appropriately measured. A person should not fail such a test if their conduct would not, in the eyes of the public or according to common sense, warrant such severe condemnation.

53. In the context where a person's general conduct alone, or their past association with another person who may have had a past involvement in crime, can already lead to a visa cancellation or refusal, the Bill introduces an unacceptable and arbitrary standard of criminality that takes no account of context, and goes so far to disavow any relevance of context. It imposes a rigid set of circumstances where a person must fail the character test.

54. It will capture a significant number of individuals whose offences could not fall under the commonly accepted definition of 'serious offences'. This is primarily due to the inclusion of certain offences with a potential sentence of not less than two years, regardless of the judicial sentence given. [9] For example, some offences which would fall under this category include:

    a. verbal threats,[10] such as telling a person you want to slap them, or sending a text that you will punch the person's new partner;
    b. assault, such as grasping a person by the sleeve;
    c. any form of contravention of an intervention order,[11] including where the offender was approached by the protected person, or even merely responded to a text from that person;
    d. a minor sharing an intimate image of their girlfriend or boyfriend,[12]
    e. Any *attempted* offence of the nature stipulated, being an offence not carried out.

55. There is also an oddity of standard introduced. 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

[8] Chapter 11, Australian Citizenship Policy.
[9] *Migration Act 1958* (Cth), s.501(7AA)(b)(ii), (iii).
[10] *Crimes Act 1986* (Vic), s 21.
[11] *Crimes (Family Violence) Act 1987*, s.22(1).
[12] *Summary Offences Act 1966*, s.41DA.

committing sabotage against the government may not, but a person who yelled at their boss after being made redundant might.

56. The Working Group submits these are not standards and inconsistencies acceptable to the Australian community, nor do they reflect a common-sense appreciation of the notion of character.

AVAILABLE SENTENCE AS A PARAMETER

57. The mere availability of a particular sentence does not and cannot solve the question of the seriousness of an offence.

58. Primarily, this is because different circumstances give rise to different standards of moral culpability. The man who possesses cannabis to provide pain relief to his terminally ill wife is less morally culpable than the man who procures the substance to sell to children. Similarly, a young person who steals chewing gum from a shop is in a different category to the person who steals high-value goods as part of a history of offending. A homeless person with limited cognitive function or mental faculty stealing from a shop is less morally culpable than a person with robust mental health and secure housing situation. A woman who assaults her husband after years of family violence is less culpable than a person who assaults a stranger on the street. A person who breaches an order because they send a text hoping to arrange to send Christmas presents to their children is less morally culpable than a person who stalks and intimidates their former partner despite an order.

59. A maximum sentence provides for aggravating circumstances in the course of offending, where harsher punishment is warranted. In the vast majority of cases, limited or no such circumstance exists. Courts, accordingly, rarely impose the maximum penalty.[13] An actual judicial sentence is a more appropriate indication of the seriousness of offending than the charge itself.

60. By way of example, sentencing statistics for the following offences which would result in mandatory failure of the test are as follows:

    a. For the offence of breach of an intervention order, the Magistrates' Court of Victoria imposed a sentence of imprisonment in 7.7% of cases, with no person sentenced to more than 18 months' imprisonment.[14]
    b. For the offence of threatening to cause serious injury, the Magistrates' Court of Victoria imposed a sentence of imprisonment in 30% of cases, with the majority of those sentenced receiving a term of less than 6 months.[15]
    c. For the offence of assault, the Magistrates' Court of Victoria imposed a sentence of imprisonment in 36.2% of cases, with just 5% of those sentenced receiving a term in excess of two years.[16]
    d. For the offence of robbery, the Victorian higher courts imposed a sentence of imprisonment in approximately 50% of cases between 2010 and 2015, and the terms of imprisonment ranged from 2 months to 5 years.[17]

[13] Sentencing Advisory Council, 'How Courts Sentence Adult Offenders, 1 June 2018.
[14] SACStat Magistrates' Court, 'Breach intervention order', 1 August 2017.
[15] SACStat Magistrates' Court, 'Make threat to inflict serious injury', 1 August 2017.
[16] SACStat Magistrates' Court, 'Assault', 1 August 2017.
[17] Sentencing Advisory Council, 'Sentencing Trends for Robbery in the Higher Courts of Victoria 2010-2011 to 2014-2015 – Sentencing Snapshot 185, 28 June 2016.

e. For the offence of causing injury recklessly (where injury includes any pain), the Victorian higher courts imposed sentences of imprisonment in just 14% of cases, and fewer than 25% of those who were imprisoned received a sentence of over two years.[18]
f. For the offence of affray (any unlawful fighting or a display of force that might frighten a person if they were present, regardless of whether anyone was present), the Victorian higher courts imposed sentences of imprisonment in just 11% of cases. *No one* received a sentence in excess of two years.[19]

61. The Working Group also notes the following examples, which, while they would not cause mandatory failure of the character test under the proposed law, underscore that sentences available to a court are not a proper basis for determining seriousness of offending, and the concept of moral culpability:

a. A person who has an article of disguise in their custody or possession may be subject to two years' imprisonment.[20]
b. Any theft, no matter the circumstances, and including minor shop theft, has an available penalty in excess of two years.
c. A person who begs may be subject to 12 months' imprisonment.
d. A person who leaves a fire in the open air that they are in charge of, without leaving another person in charge (as distinct from arson), may be subject to 12 months' imprisonment.

62. It is our submission 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.[21] 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.

63. We refer to a fact sheet on mandatory sentencing prepared by the Law Council of Australia, which provides examples of inappropriate mandatory sentencing outcomes to underscore the importance of discretion, and notes "*it is the courts, rather than the Parliament, that deal with the reality rather than the idea of crime*".[22]

64. Indeed, the nexus between cancellation or refusal and serious crime has historically been achieved by reference to sentencing by the Court, acknowledging that sentences of imprisonment represent the most serious criminal penalty available and are imposed after the consideration of all other options by a sentencing judge, importantly having heard all matters in mitigation.

---

[18] Sentencing Advisory Council, 'Sentencing Trends for Causing Injury Recklessly in the Higher Courts of Victoria 2010-11 to 2014-2015 – Sentencing Snapshot 191, 28 June 2016.
[19] Sentencing Advisory Council, 'Sentencing Trends for Affray in the Higher Courts of Victoria 2010-2011 to 2014-2015 – Sentencing Snapshot 185, 28 June 2016.
[20] S.49C, Summary Offences Act 1966.
[21] See, for example, *R v Silva [2015] NSWSC 148*, where the defendant received a two-year sentence for manslaughter in circumstances where she had been subjected to ongoing family violence.
[22] Law Council of Australia, 'Mandatory Sentencing Factsheet', available at file:///C:/Users/hd9532/Downloads/1405-Factsheet-Mandatory-Sentencing-Factsheet.pdf.

65. There is no suggestion in the Bill that a decision-maker is in a better position to make such decisions that a Court. They do not have the same level and quality of information a sentencing judge has before them. All of the assessment undertaken by the courts would be wasted, and an inaccurate and incomplete picture would be before the administrative decision-maker.

66. The provisions introduced by the Bill shifts the consideration of seriousness of an offence from the sentencing Court to the Department and executive. This is an unnecessary and unwarranted subversion of the function performed by sentencing courts, and a waste of a key expert resource.

CONVICTION AS A PARAMETER

67. A conviction in itself is not a satisfactory basis for a conclusion about character.

68. Firstly, it is apparent that defendants plead guilty to offences for many reasons, including due to a lack of comprehension or advice.

69. A conviction can be recorded for an offence where the matter is otherwise discharged (per s 7(1)(h), *Sentencing Act 1991*. In some instances, for example, a conviction must be recorded before another non-restrictive sentence is imposed – for instance, a conviction must be recorded before an offender receives a suspended sentence (per s 7(c), Sentencing Act 1991). The court would take these steps in circumstances where it was of the view that the offending was not among the most serious. The Department would, however, automatically take a view to the contrary, without regard to the material before the sentencing judge.

70. Given that the character test has never previously been framed by reference to conviction (rather than sentence), other than in the case of sexually based offending against a minor, this means that sentencing courts in Australia have constrictively miscarried in considering sentencing options for those who will now be subject to these provisions – by failing to consider the migration consequences of the sentence in mitigation, in the same manner as imprisonment length is duly considered.

71. Plainly, the Bill will capture a significant number of individuals whose conduct may not fall under the commonly accepted definition of a serious offence.

72. Again, we reiterate the context in which this consideration occurs. The consequence is likely to remove a person from home and family, often permanently. It is in addition to the punishments imposed by the criminal system. The threshold is unjustifiably low, and without basis.

THE EFFECT ON THE CRIMINAL PROCESS

73. The Bill is likely to have unintended consequences for the criminal law system, particularly in its summary jurisdiction.

74. For example, the Magistrates' Court of Victoria (**MCV**) has 124 magistrates and 718 staff working across 51 locations, covering both criminal and civil jurisdictions.[23] Increasing

[23] Magistrates' Court of Victoria, Annual Report 2016-2018, p4.

workload (including complex cases) is one of the biggest challenges, with growth anticipated to continue at up to 10 percent annually.[24]

75. The MCV held 726,000 hearings in the criminal jurisdiction in the 2016-2017 financial year. Contested hearings accounted for 8,678 of hearings in the MCV, and contest mentions 18,673.[25] Together, they accounted for under 4% of hearings in the MCV.

76. In the same financial year, the MCV finalised 81.3% of cases within six months, with 4,918 cases having been pending for more than 12 months.[26]

77. It is recognised that a person pleading guilty assists the justice system. It means a contest hearing is not necessary, and facilitates expedient resolution of matters. The Working Group understands that the vast majority of criminal cases currently resolve by way of plea of guilty.

78. The effect of the proposed legislation will be that accused non-citizens do not plead guilty to offences, knowing that *any conviction*, regardless of sentence, will lead to them failing the character test automatically.

79. This will place an inordinate strain on the criminal jurisdiction, who will be forced to resolve matters other than by pleas, including at contest hearings, contest mentions, and on appeals. Numerous adjournments, where a person might otherwise have sought to enter a plea on the day, will likely be necessary. In turn, this will impact the number of people held on remand.

80. This will also impact practitioners, who will need to spend more time providing advice and negotiating regarding how to proceed with charges.

81. Moreover, sentencing judges may be required to have regard, in mitigation, to the fact that a conviction will lead to the automatic failure of the character test of the defendant, making the sentencing exercise more complex.

82. The Working Group also considers that the question of bail and remand will become more complex. Already, non-citizen prisoners do not generally have access to bail and to rehabilitative re-entry programs, and are held at higher-security facilities. Many non-citizens are afraid of having their visas cancelled and being taken into immigration detention while awaiting trial, knowing that it is difficult to access lawyers and prepare a case while in immigration detention and that it is not counted as time served, should a custodial sentence be received.

83. Increased demand in the MCV placed pressure on remand, with one in three prisoners in custody awaiting sentencing as at 30 June 2016.[27]

84. Under the Bill, people may be more reluctant to apply for bail for a number of reasons. They may therefore be unable to demonstrate their rehabilitation in the community.

[24] Magistrates' Court of Victoria, Annual Report 2016-2018, p16.
[25] Magistrates' Court of Victoria, Annual Report 2016-2018, p.33.
[26] Magistrates' Court of Victoria, Annual Report 2016-2018, p33.
[27] Magistrates' Court of Victoria, Annual Report 2016-2018, p8.

85. Already, non-citizen cancellees in criminal custody are treated significantly differently than their citizen counterparts. They have access to fewer rehabilitation processes, and if their cancellation or refusal is not finalised, they are generally not granted parole due to changes in a number of State and Territory Parole Guidelines. The changes would further entrench that difference by increasing the number of people subject to refusal or cancellation in criminal custody, reducing their access to services and their ability to demonstrate reform while on bail (if bail applications are reduced).

86. The substantial increased burden on the criminal jurisdiction is not warranted and would be damaging to the integrity and purposes of the system. We are concerned that the affected bodies and providers will not have the capacity to deal with the change in demand.

THE EFFECT ON THE ADMINISTRATIVE PROCESS

87. An unavoidable flow-on effect of the Bill will be to increase the burden at primary stage, at merits review, and at judicial review, placing immense burden on already overburdened bodies, as well as on the legal assistance sector.

88. **Burden on Departmental decision-makers will increase** because many more people will necessarily fail the character test. The automatic failure of the character test will mean that delegates must move to make a detailed assessment of the person's circumstances in circumstances where the person is plainly not of 'bad' character. For example, instead of sending a NOICC or NOICR, having that person return voluminous submissions, and having to consider the person against Direction 79, and having to make a jurisdictionally sound decision, that person would never needed to have been considered for cancellation or refusal at all on a common-sense approach.

89. Similarly, many offences too numerous to list will still need to be considered against the discretionary character test failure powers. For example, those convicted of the following offences may still need assessment against the character test:

    a. Trafficking in a drug of dependence to a child, s.71AB, *Drugs, Poisons and Controlled Substances Act 1981* (Vic);
    b. Selling a cannabis water pipe, s. 80V, *Drugs, Poisons and Controlled Substances Act 1981* (Vic);
    c. Robbery and theft, ss 74 and 75, *Crimes Act 1958* (Vic);
    d. Blackmail, s.87, *Crimes Act 1958* (Vic), and
    e. Obtaining property by deception, s.81, *Crimes Act 1958* (Vic).

90. Given the enormous breadth of offences *not* covered, and given the uncertainty raised, there will be little reduced burden on decision-makers in discretionary assessments of character.

91. As a result of the above, **increased delays** will occur. Already, there are substantial waiting periods for resolution of cancellation and refusal matters, which weigh heavily on those affected and increase the number of persons in immigration or criminal custody.

92. **Burden on the Administrative Appeals Tribunal (AAT) will increase** as a flow-on effect.

93. **Burden on Australia's federal courts will increase** as a flow-on effect.

94. **Burden on the legal assistance sector will increase**. The Law Council has highlighted the large increase in demand for assistance following the expansion of character powers in 2014.[28]

95. **Burden on the detention system will increase**. The average yearly cost of holding one person in onshore detention is $346,178.[29] The effect of a cancellation or refusal under s.501 is detention until any review process is complete. The period of time between when a person provides their response to a NOICC/NOICR and when the decision is taken to cancel a visa is frequently very lengthy, months or even years. Given the likely increase in primary cancellations and refusals, the existing burden on the AAT, and the years-long delay in the courts, the cost of detention to the community can be expected to be significant.

96. This does not include the cost due to operational reasons of moving persons around in the detention centre across the country that is currently occurring due to capacity issues within the detention centre system.

97. It is also likely that the increased burdens outlined above will have flow-on consequences for backlogs in other areas of the visa and citizenship processing, including in primary onshore protection applications, 'Legacy Caseload' applications, and at the Immigration Assessment Authority (IAA), noting the finite resources available to the Department of Home Affairs (DHA) and the AAT.

98. Preserving a requirement to make an assessment for the character test is a protection against the prolonged detention of people in appropriate circumstances. People should not be detained in disproportionate circumstances.

99. There is a lack of justification present in the Bill or the Explanatory Memorandum for setting in train such serious consequences, not only for applicants and their family members, but for the resources of the Australian community.

AUSTRALIA'S NON-REFOULEMENT OBLIGATIONS

100. In operation, the provisions contained in the Bill are likely to further and seriously undermine Australia's compliance with its *non-refoulement* obligations at international law. The Working Group notes that the Explanatory Memorandum purports that the Bill complies with Australian's international undertakings, stating as follows:

> *Australia remains committed to its international obligations concerning non-refoulement. These obligations are considered as part of the decision whether to refuse or cancel a visa on character grounds. Anyone who is found to engage Australia's non-refoulement obligations during the refusal or cancellation*

[28] The Justice Project, *Final Report – Part 1: Recent Arrivals to Australia* (August 2018), 30.
[29] Karp, P., 'Australia's 'border protection' policies cost taxpayers $4bn last year', the Guardian, 5 January 2018.

> *decision or in subsequent visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations*.[30]

101. There is, however, significant confusion regarding the treatment of *non-refoulement* obligations in the character consideration process, which will only be exacerbated by the Bill.

102. A number of recent cases demonstrate both the Minister and his Department's unwillingness to assess *non-refoulement* in the course of character decisions. *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96 involved a challenge to the personal decision of the Minister not to revoke the mandatory cancellation of a visa held by a Lebanese national. In the course of his revocation submissions, the visa holder had raised a number of claims suggesting he faced harm on return to Tripoli. In deciding not to revoke the mandatory cancellation, the Minister found that it was not necessary to give consideration to *non-refoulement* obligations, as the visa holder could later apply for a Protection visa, at which stage such obligations would be considered and assessed. The Full Court held the Minister's approach to be in error, given there could be no guarantee of the order of assessment of a future Protection visa application, or whether *non-refoulement* or other criteria (such as character) would be considered first.

103. The Minister responded by promulgating *Direction No. 75* which directed that:

> *… decision-makers who are considering an application for a protection visa must first assess whether the refugee and complementary protection criteria are met before considering ineligibility criteria, or referral of the application for consideration under s 501*.

104. Subsequent decisions by the Minister, which deferred consideration of *non-refoulement* on the basis that the issues would be canvassed in a future Protection visa application, were upheld by the Federal Court.[31] The Minister is therefore alleviated, in many circumstances,[32] from considering *non-refoulement* obligations in character decisions which do not relate to a Protection visa. Further Full Court authority on this point is expected to clarify the law.

105. However, even where the decision is made in the context of a Protection visa, *non-refoulement* obligations are not treated as definitive, or even paramount. *Non-refoulement* is listed amongst 'other considerations,' rather than being a primary consideration. In effect, this means that the Minister, his delegates at the Department, and the AAT on review, are at liberty to disregard the existence of protection obligations when deciding whether a visa should be cancelled or refused on character grounds.

106. The Working Group notes the recent findings of the Joint Standing Committee on Migration in its inquiry into review of cancellation decisions, to the effect that:

---

[30] EM 12.
[31] See *Ali v Minister for Immigration and Border Protection* [2018] FCA 650; *Greene v Assistant Minister for Home Affairs* [2018] FCA 919 I and, in *Turay v Assistant Minister for Home Affairs* [2018] FCA 1487; *DOB18 v Minister for Home Affairs* [2019] FCAFC 63
[32] See *Omar v Minister for Home Affairs* [2018] FCA 279.

> *The Committee does not support the suggestion that non-refoulement should be a primary consideration. The right to safety of one individual does not outweigh the right of the Australian community to be protected from individuals who pose an ongoing risk*.

107. The Working Group respectfully disagrees with the Standing Committee's conclusion.

108. Australia's accession to relevant international treaties conferring *non-refoulement* obligations requires is to treat those obligations as paramount. *Non-refoulement* obligations are non-derogable at international law, meaning they cannot be selectively withdrawn from.

109. Further, inbuilt in the *non-refoulement* assessment is consideration of the risk posed by the applicant to the community of the receiving country. This assessment is contained at Articles 1F and 33(2) of the *Convention on the Status of Refugees.* In turn, exclusions based on criminal or other prohibited conduced are enshrined at sections 5H(2), 36(1C) and 36(2C) of the Act. In recognition of the seriousness of exclusion from refugee or protected person status on the basis of an offence, the regime established by the Act permits a right of review to the AAT in its general decision in respect of all such decisions. In countless cases, Courts have emphasised the need for 'meticulous investigation and solid grounds' before an exclusion decision is made.[33] In the Working Group's view, this necessarily reflects both the grave consequences that flow from excluding an otherwise fearful person from protected status, as well as the paramount status of *non-refoulement* at international law.

110. The approach taken under the current character regime to questions of *non-refoulement* is inconsistent with the approach mandated under international treaties. *Non-refoulement* is either elided or treated as one consideration amongst many to be 'balanced' in arriving at a character decision. The dangers associated with the present approach will be redoubled as the ambit of the character power expands. It is foreseeable, under the powers proposed by the Bill, that a Protection visa holder may face *refoulement* following minor conviction for an assault, even where it is later overturned.

111. The Minister's insistence on Australia's compliance with *non-refoulement* obligations rests on the assurance that Australia will not remove people from Australia in breach of international law. However, this position does not reflect the current state of the law. Section 197C(2) of the *Migration Act* provides, in bald terms:

> *An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.*

[33] *WAKN v MIMIA* (2004) 138 FCR 579 at [52].

112. In *DMH16 v Minister for Immigration and Border Protection* [2017] FCA 448, North ACJ held that s 197C, properly understood in that case, permitted the removal of a Protection visa holder to Syria following a refusal decision made in reliance on s 501(1).

113. As a consequence of the Bill, it is also likely that a greater number of people owed non-refoulement obligations will face cancellation or refusal and will be indefinitely detained.

114. If enacted, the Bill creates the significant and expanded possibility for Australia's *non-refoulement* obligations to be undermined.

INTERNATIONAL RELATIONS

115. In our submission, the Bill has the potential to adversely affect Australia's relationships within the international community.

116. By far the majority of those affected by visa cancellation are citizens of New Zealand. The government of New Zealand has repeatedly expressed concern about these cancellations to the Australian government, saying they are having a "*corrosive effect*" on Australia's relationship with New Zealand.[34]

117. It is to be expected that other countries would share this perspective. Where there is little nexus between a person and their 'home country' – in particular, where they have been raised in Australia since before they were ten years old – it is difficult to see an appropriate rationale for their forcible removal from Australia. The Bill would increase the numbers of refusals and cancellations, and therefore the strain on our international relations (in particular, with New Zealand).

ACCESSORY OFFENCES

118. The extension of the character test to include convictions for accessory offences to a raft of undefined offences by way of 501(7AA)(v)-(vii)) is deeply concerning.

119. As the Department of Justice of the State Government of Victoria has observed:

> *The authorities do not state a consistent fault principle for accessories. Sometimes they require a purpose, to bring about a crime; sometimes knowledge; sometimes an intention in a wide sense; sometimes they are satisfied with an intention to play some part in bringing it about; sometimes they use a formula that embraces recklessness. As so often happens, the courts are*

[34] Martin, S., 'Visa character test change 'could mean fivefold rise in deportations', the Guardian, 6 August 2019, available at https://www.theguardian.com/australia-news/2019/aug/06/visa-character-test-change-could-mean-fivefold-rise-in-deportations.

chiefly concerned to achieve a result that seems right in the particular case, leaving commentators to make what they can of what comes out.[35]

120. Proposed subparagraph 501(7AA)(a)(vii), if enacted, would apply to non-citizens who are in any way, directly or indirectly, knowingly concerned in or otherwise a party to the commission of a designated offence. In our submission, this creates a lack of clarity and certainty and ought to be condemned.

121. The Working Group considers that accessory offences should not lead to necessary failure of the character test.

RELATIONAL OFFENDING AND VULNERABILITY

122. The inclusion of 'Aiding, abetting'…the commission of such a designated offence (501(7AA)(a)(v))' could have a considerable impact on vulnerable individuals, in particular women involved in a relationship with the offender. This could serve to de-incentivise individuals from cooperating with authorities. Vulnerable individuals already concerned to assist authorities over the repercussions from the offender could risk cancellation or refusal of their visa if found guilty of aiding and abetting.

PROTECTIONS FOR CHILDREN/VULNERABLE PERSONS

123. At present, children's visas can already be cancelled under s.501. In the Working Group's significant experience, contrary to what is stated in the Explanatory Memorandum, it is **not** only exceptional circumstances in which children face visa cancellation or refusal. The Working Group has seen numerous cases of serious concern in which children have faced cancellation or refusal.

124. The expansion of automatic failure of the character test will affect children particularly severely. Children convicted of relatively minor offences will now automatically fail the character test. The Working Group considers that is likely to be disastrous for many Australian families, and plainly contrary to the best interests of the child.

125. Although Direction 79 mandates consideration of the best interests of children in Australia as a primary consideration, it is our experience that the assessment of this is generally inadequate, often due to an unavailability of information and an inability to obtain information. Given that a negative decision will likely permanently separate families, improved protection is manifestly warranted.

126. People under 18 are not tried as adults: the laws of Australia affirm the common-sense proposition that children are unlike adults in the degree to which they are morally responsible for their actions.

127. Minors who offend often come from unstable backgrounds with low literacy and childhood trauma. They are often able to rehabilitate and become functional members of society.[36]

---

[35] 'Complicity Reforms', Criminal Law Review, Department of Justice, October 2014 (available at https://assets.justice.vic.gov.au/justice/resources/1157ae80-b668-4b01-92cc-4428973bea62/complicity-reforms.pdf).

[36] McGregor, Joel, 'Young crime is often a phase, and locking kids up is counterproductive', the Conversation, 29 July 2019, available at http://theconversation.com/young-crime-is-often-a-phase-and-locking-kids-up-is-counterproductive-120968.

128. To subject a child to visa cancellation is to subject them to immigration detention. The Australian Human Rights Commission's National Inquiry into Children in Detention made a number of findings and recommendations which we submit are highly relevant to consider. The AHRC found that the mandatory and prolonged immigration detention of children is in clear violation of the Convention on the Rights of the Child:

> *Detention puts teenagers at high risk of mental illness, emotional distress and self-harming behaviour.*
>
> *Detention impedes the social and emotional maturation of teenagers. […]*
>
> *The detention environment is not a safe and supportive environment for teenagers… Teenagers in detention are exposed to risk as they are kept in confined areas with other teenagers and adults who are mentally unwell and who engage in self-harming behaviour… Teenagers in detention are subject to policies and procedures which encroach upon their dignity.*
> *…*
> *Unaccompanied children require higher levels of emotional and social support because they do not have a parent in the detention environment. Detention is not a place where these children can develop the resiliencies that they will need for adult life.*
>
> *There are causal links between detention, mental health deterioration and self-harm in unaccompanied children*.[37]

129. We recommend that a provision be included in the existing legislation protecting minors from visa cancellation or refusal by, for example, limiting the application of the character test to offences that occurred after a person turned 18 years old.

130. If minors are not to be protected from visa cancellation or refusal under s.501, those minors issued with NOICCs or NOICRS ought to be provided with funding for legal assistance.

131. Similarly, those with mental illness, acquired brain injuries, other capacity limitations including trauma backgrounds, should have increased protections in the legislation from necessary failure of the character test so that the full range of circumstances relating to their diminished responsibility or relevant mitigating factors, can be taken into account to prevent serious injustice.

132. We also note that people with vulnerabilities are most in need of *pro bono* legal assistance. Increased demand may mean people are unable to access assistance, and given the complexity of the regime, the consequences for them will be serious.

[37] Australian Human Rights Commission, The Forgotten Children: National Inquiry into Children in Immigration Detention
(2014).

PROTECTIONS FOR INDIGENOUS AUSTRALIANS

133. Visa cancellation and refusal also affects Indigenous Australians, being Aboriginal and Torres Strait Islander persons. Such persons may be non-citizens because they were born in other countries, despite having Indigenous heritage. The Working Group is aware of at least three cases of visa cancellation of Indigenous non-citizens, which has created the fundamentally anomalous situation that Indigenous Australians have been subject to removal from Australia to other countries.

134. The *Racial Discrimination Act 1975* (Cth) at s.3 defines 'Aboriginal' as a person who is a descendant of an indigenous inhabitant of Australia and 'Torres Strait Islander' as a person who is a descendent of an indigenous inhabitant of the Torres Strait Islands.

135. Aboriginal and Torres Strait Islander cultures have existed in Australia continuously for some 65,000 years and are the oldest living cultures in the world.

136. The relationship of Aboriginal Torres Strait Islander persons to Australia is unique:

> *Aboriginal and Torres Strait Islander peoples also hold distinct rights through their unique relationship to the land and waters and their status as the first peoples of Australia. Their experience of colonisation distinguishes them from all others within our multicultural nation.*[38]

137. As the Council for Aboriginal Reconciliation have noted, it is an unavoidable reality of Australia's past that Aboriginal and Torres Strait Islander peoples have not had the opportunity to fully enjoy their human rights in this country:

> *This is because of the process of colonisation, the dispersal, removal and dispossession of many Aboriginal and Torres Strait Islander peoples, and a history of discrimination.*[39]

138. Australia is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples (**the Declaration**), which recognises "*historic injustices*" and "*the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies*". Setting out the "*minimum standards for survival, dignity and well-being*", the Declaration repeatedly underscores the right of Indigenous Peoples to their land and to self-determination.

139. In a 2017 report by the Australian Law Reform Commission, the disproportionate incarceration of Aboriginal and Torres Strait Islander persons was noted:

> *In 2016, Aboriginal and Torres Strait Islander people were seven times more likely than non-Indigenous people to be charged with a criminal offence and appear before the courts; 11 times more likely to be held in prison on remand awaiting trial or sentence, and 12.5 times more likely to receive a sentence of imprisonment*.[40]

---

[38] Council for Aboriginal Reconciliation, *Roadmap to Reconciliation* (2000), at http://www.austlii.edu.au/au/orgs/car/recognising_rights/pg3.htm.
[39] Ibid.

[40] Australian Law Reform Commission, Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report No 133 (2017)..

140. In considering the issue, the Report took into account:

> *… the relationships between Aboriginal and Torres Strait Islander offending and incarceration and inter-generational trauma, loss of culture, poverty, discrimination, alcohol and drug use, experience of violence, including family violence, child abuse and neglect, contact with child protection and welfare systems, educational access and performance, cognitive and psychological factors, housing circumstances and employment*. [41]

141. Indigenous persons are likely to be disproportionately affected by the Bill.

142. The Working Group recommends that existing legislation ought to be amended to exclude Indigenous Australians from the possibility of visa cancellation or refusal.

CONDITIONS IN DETENTION

143. Given the likely increase in people in immigration detention, and given after a decision is made to cancel or refuse on character grounds they must remain in immigration detention, the Working Group notes with concern the conditions in Australia's immigration detention facilities.

144. By way of example, at Victoria's Melbourne Immigration Transit Accommodation, the following recent events have occurred:

    a. On the 13th of this month, a 23-year-old Afghan man **died** at MITA, after his medication was allegedly ceased.[42] Another detainee, seeing paramedics treating the man, collapsed, and was hospitalised two days later.[43]
    b. Days later, an Afghan asylum seeker was taken to hospital after trying to set himself on fire.[44]
    c. On 22 July 2019, an Iraqi asylum seeker was hospitalised after sewing his lips together.[45]
    d. In January of this year, hundreds of detainees went on a hunger strike in protest against their living conditions.[46]

[41] Ibid.

[42] Davidson, H., 'Afghan man dies at Melbourne immigration detention centre', Guardian Australia, 13 July 2019, available at https://www.theguardian.com/australia-news/2019/jul/13/afghan-man-dies-at-melbourne-immigration-detention-centre.
[43] Hall, B., 'Iraqi asylum seeker sews his lips together amid mounting despair at MITA, lawyer says', Sydney Morning Herald, 23 July 2019, available at https://www.smh.com.au/national/iraqi-asylum-seeker-sews-his-lips-together-amid-mounting-despair-at-mita-lawyer-says-20190723-p529sr.html.
[44] Baker, N., 'Asylum seeker tries to set himself on fire at Melbourne detention facility', SBS News, 16 July 2019, available at https://www.sbs.com.au/news/asylum-seeker-tries-to-set-himself-on-fire-at-melbourne-detention-facility.
[45] Hall, B., 'Iraqi asylum seeker sews his lips together amid mounting despair at MITA, lawyer says', Sydney Morning Herald, 23 July 2019, available at https://www.smh.com.au/national/iraqi-asylum-seeker-sews-his-lips-together-amid-mounting-despair-at-mita-lawyer-says-20190723-p529sr.html.
[46] 'Hundreds go on hunger strike at Melbourne detention centre', SBS News, 9 January 2019, available at https://www.sbs.com.au/news/hundreds-go-on-hunger-strike-at-melbourne-detention-centre.

e. A two-year-old girl had four teeth surgically removed and another four treated on Thursday after they began to rot during her time in detention. She may not grow front teeth until the age of 7.[47]
f. Another two-year-old girl was forced to wait over seven hours to be taken to hospital after receiving a head injury.[48]
g. Also this month, a lawyer for a family of detainees was forced to call an ambulance for a 15-month-old girl suffering influenza, after complaints were ignored by staff;[49]
h. In 2019, the Australian Human Rights Commission – a government body – reported concerns that the use of restraints may not be necessary, reasonable and proportionate in all circumstances and limited space and privacy at the centre.[50]
i. Reports of increasing violence by guards are not uncommon.[51]

145. The Australian Human Rights Commission (**the AHRC**) has recently published a report on risk assessment practices in onshore detention facilities[52]. The AHRC considers that the methods being currently used to manage risks in detention 'can limit the enjoyment of human rights, in a manner that is not necessary, reasonable and proportionate'. In particular, the ACHR expresses concern in relation to the following issues:

- *Inaccurate risk assessments may result in people in detention being subject to restrictions that are not warranted in their individual circumstances.*
    - *The use of restraints during escort outside detention facilities has become routine, and may in some cases be disproportionate to the risk of absconding.*
    - *Conditions in high-security accommodation compounds and single separation units are typically harsh, restrictive and prison-like.*
    - *Restrictions relating to excursions, personal items and external visits are applied on a blanket basis, regardless of whether they are necessary in a person's individual circumstances.*

[47] Truu, M., 'Two-year-old in immigration detention forced to have rotting teeth surgically removed', SBS News, 26 July 2019, available at https://www.sbs.com.au/news/two-year-old-in-immigration-detention-forced-to-have-rotting-teeth-surgically-removed.
[48] Hall, B., 'Iraqi asylum seeker sews his lips together amid mounting despair at MITA, lawyer says', Sydney Morning Herald, 23 July 2019, available at https://www.smh.com.au/national/iraqi-asylum-seeker-sews-his-lips-together-amid-mounting-despair-at-mita-lawyer-says-20190723-p529sr.html.
[49] Razak, Iskhandar, 'Asylum seeker's baby rushed from Melbourne immigration detention centre to hospital with flu', ABC News, 17 July 2019, available at https://www.abc.net.au/news/2019-07-16/melbourne-immigration-detention-baby-rushed-to-hospital-with-flu/11314074.
[50] 'Risk management in immigration detention', Australian Human Rights Commission, 2019, available at https://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_risk_management_immigration_detention_2019.pdf.
[51] See, for example, https://www.news.com.au/video/id-5348771529001-6032415068001/detainee-accuses-broadmeadows-detention-centre-guards-of-violence.
[52] Australian Human Rights Commission, *Risk management in immigration detention (2019)*, 18 June 2019, available at: https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019 (AHRC Report 2019)

- *Australia's system of mandatory immigration detention—combined with Ministerial guidelines that preclude the consideration of community alternatives to detention for certain groups—continues to result in people being detained when there is no valid justification for their ongoing detention under international law.*[53]

146. In the same report, the AHRC noted that the average length of detention of people has increased and 'has stood at over 400 days since mid-2015'.[54] The proposed changes would lead to a significant increase of length of time spent in detention, particularly as decision-makers take longer to finalise matters as work volume will increase dramatically. As a result, the mental and physical health of people held in immigration detention will deteriorate further as they are held for longer periods for conduct that ordinary Australians would not consider warrants the deprivation of a person's liberty, and their access to family and home.

147. Any provisions resulting in greater numbers of persons in immigration detention should be avoided.

148. In addition, the provisions of current law which trigger mandatory failure of the character test where a person commits any offence relating to immigration detention would benefit from review. In our submission, the well-documented scope and scale of rights violations against those held in immigration detention centres warrants a case by case examination of any decision to refuse or cancel a visa because of a detention-related offence. It is vital that there be the opportunity for assessment of the degree of culpability for detention-related offences against the specific context and relevant mitigating circumstances relating to that offence to ensure that visa cancellation or refusal process cannot be used as an additional tool of punishment against those held in immigration detention who raise complaints about their treatment in detention.

RETROSPECTIVITY

149. The Working Group expresses concern about the retrospectivity of the proposed Bill. It means that people who have committed historical offences will fail the character test, where that non-citizen was previously not considered to fail the character test.

150. Given the impact on individuals, if the Bill were to be passed, the Working Group considers the proposed law ought not be retrospective.

POTENTIAL FOR CHAPTER III INFRINGEMENT

151. The Working Group notes the concerns expressed previously by the Law Council of Australia in this regard.

[53] AHRC Report 2019, *Commissioners Foreword,* available at: https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019
[54] AHRC Report 2019, p. 68

CONCLUSION

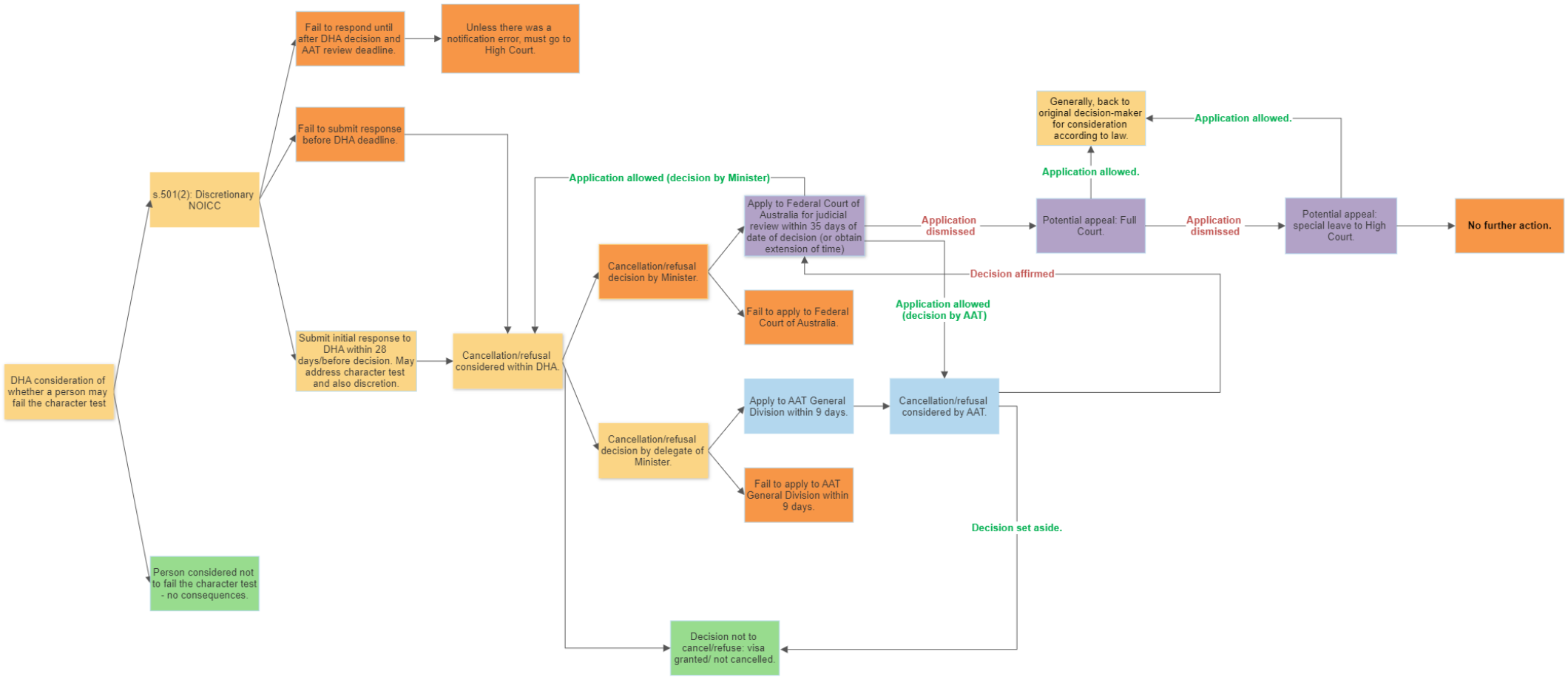
152. The Bill proposes to replace a powerful and flexible tool with a blunt and unsubtle tool that will increase poor and disproportionate decision-making, burdens on review bodies and the detention system, and community apprehension. Importantly, it will, without justification, wrest from those with expertise – the judiciary – assessment of what is considered 'serious', and replace it with a turgid and inflexible definition, the application of which will in many cases be completely inappropriate.

153. The Australian community will not support an opaque, unfair system, and, as more and more people are affected by visa cancellations and refusals, and the public becomes aware of the realities of many cancellations and refusals, an abhorrence of this process is likely to increase. If absurd consequences or outcomes out of line with community standards proceed, the Australian community will lose faith in the administrative system and its objects.

154. The Working Group urges the Committee to exercise due caution in its consideration of the Bill.

155. The Working Group welcomes the opportunity to consult further on a confidential basis. If you would like to discuss any of these matters further, please contact Hannah Dickinson, the Chair of the Working Group, by email at workinggroup@visacancellations.org.

ANNEXURE A
Section 501(2)
Discretionary cancellation by delegate or Minister with natural justice



ANNEXURE B

CASE STUDY RESPONSE

Further to its submission to the Inquiry (Submission 13), the Working Group seeks to provide a brief response to the case studies set out in Submission 15 to the Inquiry by the Department of Home Affairs (the Department).

The Department's submission underscores a central concern advanced by the Working Group relating to the proposed legislation.

It is the experience of the Working Group that individuals with precisely the same profiles as Messrs A, B and C are almost without exception subject to refusal and cancellation processes under the current legislative framework.

The Working Group strongly refutes any suggestion that such individuals would not, under the current framework, face cancellation or refusal. They would. To use the Department's words, there is plainly already "sufficient adverse information" about these individuals to trigger a refusal or cancellation process, and it is disingenuous to suggest otherwise.

Any review of the statistics regarding cancellation would affirm this position.

The Working Group below provides a summary of the provisions available to the Department to cancel or refuse these individuals' visas under the present framework. No new legislation is needed. The Working Group refers to and repeats its submissions regarding the problems that inhere in the proposed legislation and calls for it to be rejected in its entirety. The proposed test is reductive, unnecessary and damaging.

MR A

Mr A would be liable for cancellation of his temporary visa under the following provisions:

- s.501(2), because of a reasonable suspicion that he does not pass the character test under:
  - S.501(6)(c), having regard to his past or present general or criminal conduct, or
  - S.501(6)(d), because of a risk regarding his future conduct in Australia;
- s.501(3), personally by the Minister or Assistant Minister, because of a reasonable suspicion that he does not pass the character test and satisfaction that cancellation is in the national interest;
- s.116(1)(b), if there was a condition on his visa that he not engage in certain conduct;
- s.116(1)(e), if the Department considered his continued presence may or might be a risk to the community, or
- s.116(1)(g), on the basis of:
  - Reg2.43(oa)(if he holds a temporary visa other than a bridging 'E' visa),because he has a conviction, regardless of the penalty, or
  - Reg 2.43(p) (if he is a bridging 'E' visa holder).

If Mr A's temporary visa were cancelled under s.501, which is likely, s.501F of the Act would mean his permanent visa application was taken to have been refused, and any attaching bridging visa cancelled.

If his visa were cancelled under s.116, his permanent visa application could be considered for refusal under s.501.

Subsequent to any cancellation, Mr A would also become ineligible to apply for:

- most further visas by operation of s.48 (if it were a s.116 cancellation);
- all visas except protection visas by operation of s.501E (if it were a s.501 cancellation).

Even in the event Mr A's temporary visa was not cancelled, Mr A would be liable to have his permanent visa refused under the following provisions:

- s.501(2) because of a reasonable suspicion that he does not pass the character test under
  - S.501(6)(c), having regard to his past or present general or criminal conduct, or
  - S.501(6)(d), because of a risk regarding his future conduct in Australia, or
- s.501(3), personally by the Minister or Assistant Minister, because of a reasonable suspicion that he does not pass the character test and satisfaction that refusal is in the national interest.

A person convicted of sexual offences would almost certainly face visa refusal and/or cancellation under the present legislative framework.

MR B

Mr B would be liable for visa refusal under the following provisions:

- s.501(2) because of a reasonable suspicion that he does not pass the character test under
  - S.501(6)(c), having regard to his past or present general or criminal conduct, or
  - S.501(6)(d), because of a risk regarding his future conduct in Australia; or
- s.501(3), personally by the Minister or Assistant Minister, because of a reasonable suspicion that he does not pass the character test and satisfaction that refusal is in the national interest.

In the unlikely situation that a temporary visa was granted, Mr B would be liable for visa cancellation under:

- the same provisions in s.501(2) that allowed visa refusal;
- s.116(1)(b), if there was a condition on his visa that he not engage in certain conduct;
- s.116(1)(e), if the Department considered his continued presence may or might be a risk to the community, or
- s.116(1)(g), on the basis of:
  - Reg2.43(oa)(if he holds a temporary visa other than a bridging 'E' visa),because he has a conviction, regardless of the penalty, or
  - Reg 2.43(p) (if he is a bridging 'E' visa holder).

MR C

Mr C would be liable for visa cancellation under the following provisions:

- s.501(2) because of a reasonable suspicion that he does not pass the character test under
  - S.501(6)(b), because of a reasonable suspicion that he is associated with an organisation that is or has been involved in criminal conduct;
  - S.501(6)(c), having regard to his past or present general or criminal conduct, or ○ S.501(6)(d), because of a risk regarding his future conduct in Australia; or
- s.501(3), personally by the Minister or Assistant Minister, because of a reasonable suspicion that he does not pass the character test and satisfaction that refusal is in the national interest.