16 December 2021

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Committee Secretary
Legal and Constitutional Affairs Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

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

1. We welcome the opportunity to contribute to the Committee's inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2021 (**the Bill**).

2. The Asylum Seeker Resource Centre (**ASRC**) is an independent, not for profit organisation working to support and empower people seeking asylum in Australia. The Human Rights Law Program is an accredited community legal centre working within the ASRC to provide holistic legal support to clients at all stages of the refugee determination process, including character refusal and cancellation processes.

3. We remain deeply concerned by the Government's further push for this controversial, deeply flawed and discredited proposal to further expand powers to cancel or refuse visas on character grounds, when existing laws are already excessive, broad-reaching, involve the exercise of unaccountable Ministerial powers and lack basic procedural fairness safeguards.

4. The minor amendment proposed does little to address the already well documented concerns raised by more than six Parliamentary committee bodies and inquiries, and the almost universal condemnation of this Bill[1] by submitters to those inquiries by organisations with expertise in migration law and human rights.[2] This Bill has been found deficient and dis-credited on multiple occasions and should be permanently consigned to the shredding floor.

[1] More than 45 submissions from organisations with expertise were received by the Committee previously, all condemning this Bill. The only organisations to support it were the Department of Home Affairs and the Police Federation of Australia. See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Charactertest2019/Submissions.
[2] See below outline of the procedural history of this Bill.

5. The Bill would impact more people with their visas cancelled and also have even greater adverse impacts due to interaction with two further legal changes which have taken effect in 2021. The first was the commencement of Ministerial Direction 90 on 15 April 2021 which expanded the instances where a delegate may use their powers to refuse or cancel a visa.[3] This new Direction replaced Ministerial Direction 79, which itself replaced Direction 65, where each Direction has progressively expanded the grounds under which the Department may refuse or cancel a visa for character reasons. Even without this Bill the Government has already substantially expanded grounds for visa cancellation in 2021.

6. The second legal change was passage of the *Migration Amendment (Clarifying International Obligations for Removal) Bill 2021* enacted in May 2021 which provides for indefinite detention, without court oversight, of those whose visas are cancelled or refused but who cannot be removed due to being owed protection obligations under a current "protection finding." This law now forces affected people to decide between lifelong indefinite detention or "voluntarily" returning to a country where the Federal Government recognises their life would be at risk.

7. The provisions of this Bill have predictably already caused significant disquiet in court decisions since enactment of this Law. Courts are being presented with evidence of the immense suffering and injustice caused to those impacted by indefinite administrative detention[4] and must grapple with the fact that these provisions constitute a blatant breach of Australia's obligations under the *International Convention on Civil and Political Rights* (ICCPR) and the *Convention against Torture* (CAT) and breach international law.[5]

8. The minor proposed amendments to earlier iterations of this Bill do not at all address our deep concerns with this Bill. Specifically, we are concerned that:

    a. Defining a 'designated offence' by reference to maximum penalty rather than actual sentence imposed is illogical, arbitrary and disproportionate. It would produce grossly unjust results as visa cancellation can, in the words of Chief Justice Allsop create "potentially life destroying"[6] outcomes for affected people;
    b. The Bill will greatly increase the number of refugees and others owed complementary protection obligations by Australia who will be indefinitely administratively detained in breach of basic human rights and international law;
    c. The Bill does not achieve its stated purpose of providing greater protection to the Australian community and adds nothing to the existing legislative regime;

[3] See Direction No 90, Direction No. 90 - Migration Act 1958 - Direction under section 499 Visa refusal and cancellation under section 501 and revocation of a mandatory, 8 March 2021, https://immi.homeaffairs.gov.au/support-subsite/files/ministerial-direction-no-90.pdf.
[4] *EPU19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 1536 (10 December 2021) (Perry J).
[5] See CJ Allsop's judgment in *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195, [1-15] noting that breach of Australia's treaty obligations is a breach of international law and a serious matter impacting assessment of the national interest.
[6] *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [45].

d. The Bill is poorly drafted and creates confusion and inconsistent treatment between people in different Australian states;
e. The proposed amendments will unduly impact children and other vulnerable people, including survivor-victims of family violence and forced marriage;
f. Convictions in a foreign country are often an unreliable and unjust basis for assessing character, particularly for those fleeing political persecution;
g. The retrospective application of the Bill to offences committed and visa applications submitted prior to commencement undermines the rule of law;
h. The Bill will create distortions and major caseload burdens for already overloaded criminal courts, and providers of legal assistance, as it creates major disincentives for people on visas to plead guilty, in order to avoid a conviction which may trigger visa cancellation.
i. It will also increase caseload burdens for overstretched administrative and judicial bodies including the Department, the AAT and the Federal Court, as well as for providers of legal assistance, who are often acting pro bono.
j. Australia's migration system should not be used as a method of doubly punishing those who have already been punished by the criminal justice system and also other affected third parties including children, spouses and other family members.

9. Overall, we believe there is no justification for the amendments proposed in the Bill, which seek only to serve a political agenda and will offer no greater protection or safety to the Australian community beyond what is already provided for in existing law. In light of the adverse implications for refugees, children and vulnerable persons which are explored in this submission, we urge the Committee to recommend that the Bill not be passed.

Recommendations

Recommendation 1: We submit that the Committee should recommend that the Bill not be passed in its entirety. The impact on refugees, women, children and other vulnerable persons cannot be justified in circumstances where the proposed amendments add nothing to the existing legislative regime. The Government should not be permitted to use the visa refusal and cancellation regime as a political tool to promote a 'tough on crime' agenda or to scapegoat refugees and migrants. This is particularly relevant to a pre-election environment.

We make the further recommendations regarding the existing visa cancellation or refusal regime:

Recommendation 2: Establish criminal court oversight of decisions regarding whether a visa holder who has completed a custodial sentence remains an unacceptable risk to community safety.

Where a court finds this to be the case, subject all ongoing detention of that person to regular court review of any need for their continuing detention to maintain community safety.

A court finding that a person no longer presents an unacceptable risk to community safety should trigger automatic restoration/grant of that person's visa where it has been cancelled or refused on character grounds, and their release from detention.

Recommendation 3: Ensure that all people held in detention having completed their sentence, have access to a full suite of rehabilitation and support programs, including for drug and alcohol abuse, anger management etc and are provided with opportunities to demonstrate that they present no risk to community safety under controlled conditions, such as by utilising existing alternatives to closed detention, including community detention options with monitoring.

Recommendation 4: Review s 501 visa cancellation/refusal powers in their entirety based on independent assessment of whether these provisions serve any legitimate purpose in ensuring community safety and at minimum

- Repeal s501Aand s501BA of the *Migration Act 1958* (Cth) (**the Migration Act**) allowing the Minister to set aside decision of the Administrative Appeals Tribunal (**AAT**) or remove review rights to the AAT.
- Repeal s 500(6L)(c) of the Migration Act requiring that if certain character-related decisions are not made by the AAT within a period of 84 days, the applicant automatically loses their case.
- Amend s 503A(2)(c) of the Migration Act to compel the Minister to provide relevant information to the Courts and Tribunal, and for regular natural justice standards to comment on adverse information, be applied.
- Provide a clear definition of "character"
- Remove mandatory cancellation provisions and replace them individualised assessment of all relevant circumstances in decisions to cancel or refuse visas on character grounds.

Recommendation 5: Repeal s 197C of the Migration Act in its entirety requiring no regard to be given to Australia's non-refoulement obligations and allowing for the indefinite detention of refugees and others owed protection but only where there is a current protection finding.

Recommendation 6: Exempt children from their visas being cancelled. Where children are impacted by the cancellation of their parent's visa or another close relative, enact provisions which require their best interests and right to family unity to be given primacy in the legal framework and also amend Direction 90 accordingly.

Recommendation 7: Repeal all provisions which cause consequential cancellation of the visas of dependents to provide survivor-victims of family violence and their children with legal protection from cancellation of their own visas.

Recommendation 8: Elevate to a primary consideration under Direction 90 consideration of the views of survivor-victims of family violence or forced marriage who oppose the cancellation of their family member's visa.

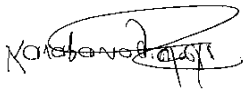
Recommendation 9: Improve the fairness of AAT General Division reviews of visa cancellation/refusal decisions on character grounds including:

- Amend s 69(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Ac**t) to require the Attorney General to provide funds for legal assistance for every person seeking review of a visa cancellation/refusal decisions before the General Division of the AAT.
- Ensure that Directions are made in General Division visa cancellation/refusal maters for:
    a. Every applicant to attend their General Division hearing in person and ABF be required to make such arrangements, including for persons detained at Christmas Island.
    b. Every applicant be entitled to continuity in their place of detention in the 90 days prior to their hearing, except where the transfer is with the consent of the applicant.
    c. Every applicant be entitled to access to high speed internet and quality of communication facilities in the 90 days prior to their hearing.
    d. The Tribunal in General Division or Migration Refugee Division (MRD) matters concerning persons held in detention should routinely make inquiries to detainees about any recent transfers or traumatic incidents they have experienced which may have bearing on their ability to give evidence, so that these issues can be taken into consideration in assessing the applicant's presentation and evidence in the decision.
- Abolish all application fees to the AAT for all persons held in immigration detention or seeking review of a protection visa or associated applications.
- Establish Practice Direction for the General Division regarding hearing arrangements for people in detention and a further Practice Direction for Vulnerable Persons.
- Establish Practice Direction for the General Division for Vulnerable Persons

Recommendation 10: That the Committee recommend that the *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020*, (Cth) not be passed by the Parliament.

10. We would be pleased to provide further information on any parts of this submission should it assist the Committee.

Yours faithfully



Kon Karapanagiotidis OAM
Chief Executive Officer and Founder
Asylum Seeker Resource Centre

A Procedural History of the Bill

11. This Bill was first introduced in the Parliament in October 2018. The Senate Standing Committee for the Scrutiny of Bills reported on 14 November 2018 expressing concerns that the Bill lacked procedural fairness obligations where merits review is largely unavailable, and would likely result in 'more people being held in immigration detention, removed from Australia and potentially separated from their family', and raised concerns as to whether the measures in the Bill unduly trespass on rights and liberties.

12. The Joint Parliamentary Committee on Human Rights reported on 27 November 2018, raising similar concerns. The Bill was also referred to this Committee, which recommended its passage, but noted similar concerns around use of maximum rather than actual sentences as the threshold for failing the character test, the retrospective application, and also questioned whether it was necessary in light of existing visa refusal and cancellation powers. The Bill lapsed with the dissolution of Parliament in April 2019.

13. The Bill was then re-introduced in July 2019 and since then has been before the Parliament for a further 1100 days, and considered by a further three Parliamentary inquiry processes, which have all raised the same concerns,[7] resulting in the Bill being blocked by crossbenchers, ALP and the Greens on 30 October 2021.

14. Despite the Bill routinely lacking support and having been through exhaustive examination, the legislation has been reintroduced, with only very minor amendment, for a third time, which now also comes before this Committee for a third time. We note that none of the concerns or processes regarding previous iterations of this highly controversial Bill are even referred to in the explanatory memorandum.

15. The explanatory memorandum is misleading as it suggests that people convicted for crimes such as "murder, kidnapping and aggravated burglary" along with others, are not already covered by existing visa cancellation laws, which is not true. This misrepresentation of existing law highlights the concerning politicisation of this issue and a worrying lack of accountability for this lack of accuracy and rigour underpinning this Bill and other Bills impacting people on visas.

16. The continued pursuance of this law is deeply troubling, especially with full knowledge of its extensive deficiencies with clear intention to inflict grave human rights violations upon all of the people affected by visa cancellation; the person whose visa is cancelled, as well as their children, spouses and families and the damage that such deeply unfair processes inflict upon the rule of law itself. In our submission the pursuit of this Bill is a malevolent abuse of law and process, and should be steadfastly resisted.

[7] Senate Legal and Constitutional Affairs Legislation Committee; Committee report (13/09/2019)
Considered by scrutiny committee (24/07/2019): Senate Standing Committee for the Scrutiny of Bills; Scrutiny Digest 3 of 2019
Considered by scrutiny committee (30/07/2019): Parliamentary Joint Committee on Human Rights; Report 3 of 2019

B Bill only adds to concerns regarding existing law deficiencies

17. The Bill reintroduced in 2021 is identical to the 2019 version except for one limited provision, discussed further below. It contains all the same flaws and concerns as raised previously. The primary concern remains unaddressed, which is the whole approach of tethering automatic failure of the character test to possible maximum sentences, regardless of any sentence actually imposed by the court and without taking into account the actual conduct of the offender or other case specific facts.

18. The core impact of this Bill is to remove a decision maker's power to assess whether an individual person fails the character test. Instead it creates automatic failure of the character test where a person has any conviction for a designated offence. Failure of the character test then makes it much more likely that the visa will be cancelled or refused.

19. This Bill operates *on top of existing provisions* which already provide a worryingly low threshold for *mandatory cancellation* of visas where a person has, as defined under the Migration Act, a "significant criminal record" :
    - They have been sentenced to a *total* of twelve months' imprisonment or more, regardless of whether they have spent any time in prison; or
    - They have committed *any* offence relating to immigration detention,[8] or
    - Have been assessed by ASIO to be a direct or *indirect risk* to security; or
    - Have been convicted by any Australian *or foreign court of any offence* of a sexually-based offence involving a child, or
    - Have been *acquitted* of an offence due to unsoundness of mind and are detained in a facility
    - Have been *charged with or indicted for* crimes of serious international concern;
    - 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.[9] (emphasis added to aspects of the test which highlight the low threshold for mandatory visa cancellation)

20. Thus anyone who falls into any of these categories, already has their visa mandatorily cancelled under existing law. This Bill impacts only those who do not meet this already

[8] This can relate to any offence committed in immigration detention, bearing in mind the lack of statutory regulation of detention, and well documented lack of oversight of detention conditions and the lack of objectivity, oversight, and one-sided nature of how incidents in detention are recorded and managed by authorities, in an environment where people are often subjected to detention for protracted periods and frequently have very poor mental health.

[9] The integrity of Interpol personnel and processes have been very publicly questioned over several years, including since the jailing and sentencing of the former Interpol President by China for 13 years for allegedly politically motivated corruption charges. These concerns with the integrity of Interpol have been exacerbated by the recent appointment of Major General Ahmed Nasser Al-Raisi, of the United Arab Emirates, despite credible allegations of his direct oversight of torture, including of British detainees, by UAE police. Interpol red notices are known to be abused by some foreign governments for the purpose of pursuing the persecution of dissidents overseas.See for example, *A guide to understanding and challenging persecutory Interpol Red Notices in immigration court and before Interpol,* International Bar Association,, https://www.ibanet.org/article/C67767D4-7F92-4666-B32A-71EDD5258869.

low threshold for mandatory cancellation, i.e. those whose offending has resulted in lighter sentences or who have been caught by the wider discretionary aspects of the general "character test", which as seen below, can be based on any other conduct and does not require any conviction at all. The current general character test catches anyone who is assessed prospectively as:

- Having regard to *any* past and present criminal or *general conduct*, they are considered to be *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 *any* danger to the community or a segment of the community
- 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.

21. We italicise aspects of the test which highlight the extremely wide discretions in the existing general character test. Under existing provisions, a person who is a refugee may be exposed to visa cancellation causing indefinite detention or the risk of *refoulement* based on nothing more objective or rigorous than the decision maker's personal view that they are a bad person.

22. Under current law, people who fall short of the mandatory cancellation threshold but may potentially fall into any of the above categories under the general character test, receive individualised assessment of whether or not they meet the character test. However at this point, this Bill would "kick in" to remove the ability of decision makers to conduct any assessment of how these other broad discretionary criteria may apply to that person, where the person has been convicted of any designated offence.

23. Under this Bill these people would automatically fail the character test, based only on the maximum sentence they *could possibly* have received for any designated offence, irrespective of what sentence they actually received from a court. This is an arbitrary measure as the maximum sentence provided for an offence does not of itself indicate the moral culpability for commission of that offence or indeed the seriousness of offending, in any individual circumstance. Moral culpability and the seriousness of offending is only revealed by the actual sentence, which takes into consideration any relevant mitigating or aggravating circumstances in the particular case.

24. A maximum sentence gives scope for judges to take into account aggravating factors, such as the level of violence used, prior offending, or abuse of a relationship of trust with the victim. The maximum possible sentence is not a measure of how morally culpable *any* commission of that offence must be. This is why this measure should not

be used as the basis for automatic failure of the character test in visa cancellation matters.

25. This Bill specifically targets low-end offending not covered by the mandatory cancellation provisions, but which is already covered by the general character test and which would make failure of that test automatic for those convicted of designated offences, whatever the actual sentence they receive.

26. As seen from above, the existing law already provides extremely robust powers for mandatory cancellation based on a worryingly low threshold. In addition, existing law already provides for visa cancellation based on any other conduct regarding "character"; an ambiguous, inexact concept, which is not even defined in the Migration Act.

27. We are already very concerned about the unfairness of both the mandatory cancellation and general character tests, the latter, which due to the wide discretions involved, provides the perfect device for the Minister to cancel visas at whim. This Bill unjustifiably adds further unfairness by removing the scope for actual assessment of whether a person fails this general character test.

C. "Designated offences": no proper basis for automatic character test failure

28. We note that designated offences are defined in this Bill as those involving:

- Violence, including threat, robbery, and low-level assaults (providing that assault caused either physical or mental harm);
- 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).
- Have been convicted of having aided, abetted, counselled, procured, conspired to commit or induced any of the above offending;[10]

And where either:

- The offence is against an Australian law, for which a *possible* sentence of not less than two years was available to the court, or
- If the offence was against a foreign law, had the act constituting the offence been in the ACT, a sentence of two or more years would have been available to the court.

29. We submit that a "designated offences" approach does not provide a proper basis for automatic failure of the character test. There are countless situations where a person could fall foul of these provisions and yet not have committed a serious offence under any common definition of such. People who have never served a single day of prison,

[10] It is particularly concerning that those indirectly, even unknowingly found to have participated in any way in a bundle of undefined offences by way of 501(7AA)(v)-(vii)) for accessory offences, is deeply concerning and which should not lead to automatic failure of the character test.

will automatically fail the character test, have their visas cancelled and consequently pay the severe price of indefinite detention or permanent separation from family members and be forced return to a country where they have no genuine connection, despite them having lived in Australia for decades.

30. In the process of sentencing, courts may take into account that the person is a first time offender, entered an early guilty plea, has good prospects of rehabilitation, acted under duress, caused minimal harm, was suffering from mental or physical illness, has demonstrated remorse, or assisted police with enquiries. Maximum penalties are designed to be taken into account as a sentencing factor, but are not designed as an objective and uniform assessment of the seriousness of any particular offence committed.

31. It is an entirely illogical prospect that a court could consider it appropriate to wholly suspend a custodial sentence, only for the person to be taken into indefinite immigration detention as a result of visa cancellation by the Minister. It is notable that, in sentencing, criminal courts do *not* take into account the potential impact on a person's visa or migration status.

32. The Minister proposes that other factors and circumstances of the offending will be taken into account as part of the discretionary cancellation or refusal process. It is concerning that the offence-based approach proposed in the Bill includes no legislative requirement for sentencing considerations or other mitigating factors to be taken into account and leaves this entirely dependent on decision maker discretion. We note that many people who are subject to visa refusals or cancellations do not have access to merits review processes.

33. It is particularly concerning that those indirectly, even unknowingly found to have participated in any way in a bundle of undefined offences by way of 501(7AA)(v)-(vii)) for accessory offences, would automatically fail the character test. There is inconsistency and uncertainty in terms of the offences which are designated, and then further uncertainty as to how this designation will be matched against the vast and varied criminal laws in place across different Australian states.

34. It should not be necessary for us to point out that good laws safeguard against, and do not deliberately provide for, disproportionate, arbitrary, inconsistent and draconian responses which are not matched to moral culpability or the seriousness of offending. Decisions to cancel visas on the basis of character should align with wider community standards, common sense and be objectively measurable and proportionate to the severe consequences which follow visa cancellation.

35. It is our criminal courts who have the expertise and role to determine moral culpability and the seriousness of offending on an individual basis. It is not for the Parliament to impose crude, uncalibrated, catch-all measures based on discriminatory notions of "bad" migrants and refugees who it seeks to doubly punish for their mistakes. Under the visa cancellation regime, those who have made Australia their permanent home, are never fully accepted or safe from having their lives unjustly ripped out from under

their feet by these laws. There is a disturbing and persistent racism which underpins visa cancellation laws, including this Bill.

D. Change to this iteration of the Bill does not remedy its flaws

36. The only substantive change to this Bill versus the previous version, goes to what qualifies as a 'conviction for a designated offence' in the case of a common assault or an equivalent offence, as well as indirect offences (inducing, aiding or abetting, conspiring, being a party to the commission of a crime etc).

37. In relation to these specific offences, it only counts as a conviction for a designated offence if the *actus reus*: (or the physical, as opposed to intention-related aspects of the crime);

a. caused or substantially contributed to temporary or permanent bodily harm to another person or harm to another person's mental health (within the meaning of the Criminal Code), or
b. involved family violence

While this slight qualification is better than none, it goes no measure towards tempering the harmful impact of the Bill.

E. Implications for people owed non-refoulement obligations and impact of the *Clarifying International Obligations for Removal Act 2021.*

38. As our work at the ASRC focuses on refugees and people seeking asylum, our primary concerns arising from the Bill relate to the impact of expanded cancellation and refusal powers on persons to whom Australia owes protection obligations or non-refoulement obligations under Australia's treaty obligations in international law.

39. Such obligations may arise under the *Convention relating to the Status of Refugees*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the I*nternational Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*. These treaties create *non-refoulement* obligations for signatories, a principle also embedded in customary international law, which prohibits States from expelling people to places where they may face persecution or serious harm.

40. The consequences of a decision to cancel or refuse a protection visa on character grounds are profoundly serious. The Migration Act expressly purports to override international law by stipulating that *non-refoulement* obligations are irrelevant to the duty contained in s 198 of the Act to remove an unlawful non-citizen from Australia as soon as reasonably practicable after a visa application is refused or cancelled.[11] This means that, even if a person is found to be a refugee or otherwise owed protection obligations, officers of the Department of Home Affairs are **required** to remove the person from Australia if their visa is cancelled or refused on character grounds.

[11] *Migration Act 1958* (Cth), s 197C.

41. The narrow carve out to this obligation to remove people from Australia, notwithstanding international obligations owed to them, is based on the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth). This Act states that in the instance where there is a current "protection finding" in relation to that person as a refugee or under complementary protection provisions,[12] they cannot be forcibly returned to that country. However this provision does not fully protect against refoulement as the status of the "protection finding" can be re-opened and re-assessed at any time throughout the person's indefinite detention.[13] The supposed protection against refoulement of people owed protection obligations provided under s197C(3) of the Migration Act is therefore limited and does not in fact capture all, or likely even most, people whose refugee or special humanitarian visa has been cancelled. This protection from refoulement is qualified by a constant and ongoing reassessment of any "protection finding" which may apply to them. Therefore refoulement to situations of persecution or serious harm remain a risk to many refugees whose visas have been cancelled.

42. Since the passage of this new law in May 2021, it has been distressing to witness implementation of the Government's emerging strategy to pressure detained refugees or others owed protection obligations to "voluntarily" be removed from Australia to countries where it has been found they will face persecution or serious harm. People detained indefinitely in this situation are now imbued with such hopelessness and despair at their situation of indefinite detention and the constant pressure on them by the Removals section of the Australian Border Force (ABF), that they will eventually "voluntarily" agree to removal. It is impossible to take such "voluntary" decisions at face value, given the extremely coercive environment within which these decisions are made, exacerbated by the poor mental health of affected people caused by protracted detention and previous trauma.

43. We are dismayed by the extraordinary cruelty of "wearing down" people owed protection through the application of psychological pressure to compel them to agree to their own removal to situations of harm. This has emerged as the Government's main strategy for dealing with those owed protection obligations but who cannot pass the unduly low and unfair threshold character tests, which prevent them from being granted a visa.

F. Uncertainty regarding the scope and impacts of the Bill

44. Based on the evidence presented to this Committee at previous hearings, this Bill is estimated to increase by four or five-fold the number of people facing visa cancellation or refusal on character grounds.[14] We note that political actors were induced to support the passage of the Act by reassurances from the Government that indefinite detention

[12] Under s 36A(1) or (2) of the Migration Ac *1958* (Cth).
[13] See s197D(2) of the Migration Act *1958* (Cth.
[14] See supplementary submission No 2 made to the Legal and Constitutional Committee inquiry by Henry Sherrell, Peter Mares, Abul Rizvi Dr. Shanthi Robertson, Institute for Culture and Society, Western Sydney University Dr. Laurie Berg, Faculty of Law, the University of Technology Sydney, Kevin Bain dated 30 July 2019.

would only be applicable to around 20 people.[15] Based on these estimates, passage of this Bill would increase that number to 80, 100 or even more, an unknown number.

45. The number is unknown due to the inherent uncertainty in how this Bill will be applied; another compelling reason why this Bill should not be enacted. On the Department's own evidence in the last Inquiry before this Committee, despite having more than two years to prepare evidence of the need for this Bill, it was unable to provide the most basic information to explain how this Bill would be applied in practice: such as a list of offences which would be considered "designated offences" and was also unable to provide even an estimate of the number of offences caught by the Bill or an estimate of the number of people likely affected by the Bill. It was admitted that the Department had been unable to undertake any modelling to produce such estimates, presumably due to a lack of careful examination across the various state jurisdictions, of what might occur if this Bill were to become law. [16]

46. We think the transcript of the Department's evidence to the previous Committee speaks for itself in highlighting our concerns regarding the inherent uncertainty created if this Bill is passed.

> Mr Willard: The purpose of the drafting and the description of the designated offences was to cover all such offences that might be committed in the various jurisdictions.
>
> Senator KIM CARR: Yes. So you have a list of those?
>
> Mr Willard: No, because the intent is to give effect to the type of offence without having to specify each individual offence.
>
> Senator KIM CARR: Why not? You just said there is a clear standard. Why can't you provide us with a list?
>
> Mr Willard: I don't have a list available. The purpose of the bill—
>
> Senator KIM CARR: You can take that on notice, surely.
>
> Mr Willard: I can take it on notice—if it is possible to provide such a list.
>
> Senator KIM CARR: It should be possible. You've just stated to the committee that this bill has been drafted to provide a clear, objective standard. That is the purpose of the bill, you've said. Surely you must have a list that would specify, across all jurisdictions, the existing offences likely to be covered by the definition of a designated offence.
>
> Ms De Veau: Perhaps I can answer that. The very purpose of drafting it the way it has been drafted is to avoid that very thing. States and territories each have their own respective laws, as well as the Criminal Code, and those will change over time—and they often change frequently and quickly. The objectivity comes in relation to both the nature of the violent descriptor and the objective two-year penalty. When states and territories and the

[15] Speeches made in Parliament during the limited debate on the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth). See also Question on notice no. 128 Portfolio question number: BE21-128 2021-22 Budget estimates, where the Department stated that as of 1 March 2021 there were 21 people subject to the new indefinite detention law.

[16]

Commonwealth set a two-year penalty, or any maximum penalty, for an offence, they do so with a reflection of community standards and expectations. The scale of maximum penalties is there to help guide courts and others in relation to the seriousness with which the community takes it. So the objectivity comes in conjunction with the two-year maximum penalty, as well as the conviction having been recorded and descriptors of the types of violent offending that come with—

Senator KIM CARR: To be clear: you cannot provide a list of measures?

Ms De Veau: It no doubt could be compiled, but it might be a different list in a few weeks time.

Senator KIM CARR: It might be, but it's the current list. You've said to this committee that a clear standard will be provided by this bill. I want to see what that looks like in terms of specific measures. If you can't provide that, why not?

Ms De Veau: The measures are the maximum penalty, the conviction, and the descriptor in relation to the violent nature of the offences. It is a combination of those three things that guides you to any particular conviction for a particular offence that might then trigger the application of the consideration of cancellation.

CHAIR: Is it framed this way because offences can change over time?

Ms De Veau: Absolutely.

Senator KIM CARR: How many people are affected?

Mr Willard: It is our expectation that the bill will increase the number of noncitizens who objectively fail the character test and then are referred for discretionary consideration of visa refusal or cancellation.

Senator KIM CARR: The number of people is the question I've put to you. How many?

Mr Willard: The department has looked at a number of sources to determine what the total effective number of people may be. However, providing an exact figure is not possible.

Ms Wimmer: I might explain why. We have cases referred to us. At the moment, we could only comment on the cases that are referred to us. We don't know the population of cases that have not been referred to us that might actually be—

Senator KIM CARR: You've said there are a number of scenarios, so give me the range. How many people are affected according to your different modelling?

Ms Wimmer: What I can tell you is that we've looked at a small sample of referrals that have come to us where we've made a judgement against the current threshold versus these new thresholds. Of a small sample, of 50 cancellation referrals, which were screened under our existing thresholds, 44 of those would now be considered under these new thresholds for cancellation. So they wouldn't be cancelled; they'd be considered.

Senator KIM CARR: Yes, I've got that. That is one scenario. What's your top scenario?

Ms Wimmer: We haven't been able to do that. We could extrapolate from that 50 but it would be extremely rough.

Senator KIM CARR: This does apply retrospectively, doesn't it? So it's all people that are noncitizens in the country. Do you know how many noncitizens have been convicted of an offence? Do you have that figure?

Ms Wimmer: I don't think we have that figure to give you, no. We'd have to talk to each of the jurisdictions to get that figure.

Senator KIM CARR: Why not? It's an objective test. You've just told me that. So how many people would be caught up in this legislation?

Ms Wimmer: As I said, we're unable to tell you that.

Senator KIM CARR: Why not? Surely with an objective test like this—how many noncitizens are there in the country at the moment?

Mr Willard: There are approximately 1.9 million permanent resident visa holders.

Senator KIM CARR: And how many noncitizens do you think have committed an offence?

Ms Wimmer: We don't have that data.

Senator KIM CARR: No estimate? Nothing to go by?

Ms Wimmer: No.

Senator KIM CARR: But this could apply to the 1.9 million if they commit an offence?

Ms Wimmer: That's right. [17]

G. Lock them up, we're not sure why, and then throw away the key…..

47. When questions have been asked through Senate Estimate processes regarding the length of custodial sentences which resulted in the cancellation or refusal of people's visas who are owed protection obligations, who are now subjected to indefinite detention, or "voluntary" removal, and the demographic or profile of those detained, we find a similar lack of data, indicating a lack of care or concern regarding the impact of even the existing visa cancellation laws.

48. For example, despite the Government and the ABF repeatedly publicly stating in October 2019 that no refugees would be transferred to the notorious re-commissioned Christmas Island North West Point detention centre.[18] Yet it turns out that out of the 223 people transferred there by 8 February 2021, 103 of them, almost half, had

[17] Transcript of evidence given to the Legal and Constitutional Affairs Legislation Committee on 19 August 2019 concerning the 2019 Bill by Mr Michael Willard, Acting First Assistant Secretary, Immigration and Community Protection Policy Division, Department of Home Affairs and Ms Sachi, Wimmer First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, available at https://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/e0eca94f-f8d1-4726-948e-d76dc5727b26/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2019_08_19_7106_Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/e0eca94f-f8d1-4726-948e-d76dc5727b26/0000%22.

[18] "The Guardian, Australian government to reopen Christmas Island detention centre during Covid-19 crisi, 5 August 2020, "On Wednesday, the Australian Border Force said on Twitter that no refugees would be transferred to Christmas Island. It said that only "those convicted of serious criminal offences" would be transferred there.

protection or humanitarian visa cancelled or refused, meaning they were persons owed protection obligations.

49. The Government told the Australian public that the people transferred to Christmas Island "*consists of those who have been convicted of crimes involving assault, sexual offences, drugs and other violent offences. This cohort is detained because of their risk to the Australian community*."[19] Yet when a Senator asked about the custodial sentences served by these supposedly incurably dangerous non-refugees, it transpires that five refugees or protected persons indefinitely detained on Christmas Island had not even served a single day of a custodial sentence.[20]

50. When asked for a breakdown of the length of custodial sentences served by the others owed protection held indefinitely out of mind and sight on Christmas Island, into brackets of less than 3, 6 or 12 month custodial sentence periods, the response provided was "*Manual count required, unreasonable diversion of resources*,"[21] indicating that no one has even bothered to record the sentences of these people who are supposedly such a high risk to the community that they must be indefinitely detained because the community will be unsafe if they are ever granted a visa. When asked the average period of time these men had already been held in immigration detention, the response provided was **780 days**.[22]

51. There is an absence of recorded data concerning the detained refugees' affected children and partners. When asked how many of these men owed protection, detained on Christmas Island, had spouses or children living on the Australian mainland, including Australian citizen or permanent resident children or partners, the answer provided was *"This data is not available in a reportable format from Departmental systems."*[23] In other words, no one even knows or cares about how many children or partners of these refugees have been impacted by existing visa cancellation and indefinite detention of refugees' policies.

52. This provides clear evidence that the current system operates indiscriminately and without recording relevant information which would reveal the (unjust) impacts of existing visa cancellation processes upon the refugees and their families who are already experiencing deep suffering and injustice. The idea that four, five times more people, likely even more, may face such callous disregard for their rights if this Bill is passed, underscores the dangerous and reckless gamble with human lives represented by this Bill.

H. No utility or proper purpose of this Bill

[19] ABF Statement regarding Christmas Island, 4 August 2020, https://www.abf.gov.au/newsroom-subsite/Pages/statement-christmas-island-04-08-2020.aspx.
[20] Senate Question 2990, asked by Senator Kristina Keneally to the Minister representing the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, upon notice, on 08 February 2021,BE21-447, response to question 2(c).
[21] Ibid, response to questions 2(d)(e) and (f).
[22] Ibid, response to question 4.
[23] Ibid, response to 2(a) and (b).

53. The proposed Bill seeks to expand powers to cancel and refuse visas, including protection visas. The Explanatory Memorandum for the first iteration of the Bill revealed its true purpose being, "greater numbers of people being liable for consideration of refusal or cancellation of a visa".[24]

54. This version of the Bill is put forward on a different, dubious basis that it is necessary "to ensure that non-citizens who are convicted of certain serious offences, and pose a risk to the safety of the Australian community, do not pass the character test and may be appropriately considered for visa refusal or cancellation."

55. This is a misrepresentation. There is no utility in passing the Bill as it does not empower decision makers to do anything they cannot already do, as has been repeatedly demonstrated to the Government in numerous inquiries. There is no indication in the Explanatory Memorandum or elsewhere that existing cancellation and refusal powers are insufficient, or are in any way hindering the Government's ability to protect the Australian community.

56. Existing laws more than provide for cancellation of visas for serious offences, and unfortunately a great many other circumstances, as is evidenced by the high numbers, almost 10,000 visas cancelled or refused on s501 character grounds alone[25] since the mandatory visa cancellation provisions were introduced in 2014. We expect to see a further huge spike in numbers of this Bill is passed.

57. The concept of 'designated offences' as proposed by the Bill does not bring any criminal conduct within the scope of the character test which is not already covered. Decision makers are already empowered to consider cancellation or refusal in relation to any offence that would fall within the definition of 'designated offence.' For example:

- Designated offences involving violence against a person could be covered by s 501(6)(a), (ba), (c), or (d);
- Designated offences involving non-consensual conduct of a sexual nature could be covered by s 501(6)(a), (ba), (c), (d), or (e);
- Designated offences involving the breach of an order made by a court or tribunal for the personal protection of another person could be covered by s 501(6)(a), (c), or (d);
- Designated offences involving the use or possession of a weapon could be covered by s 501(6)(a), (c), or (d);
- Offences of aiding, abetting, inducing, or being knowingly concerned in the commission of a designated offence could be covered by s 501(6)(a), (b), (c), or (d).

[24] Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018, 10.

[25] A total of 9790 visas were cancelled or refused under s501 of the Migration Act between 2014-2021. This does not include additional visa cancellations under s109, or 116 of the Migration Act. See https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation.

58. The stated aim of the Bill is to provide grounds for non-citizens who commit serious offences to be considered for visa refusal or cancellation.[26] Such grounds clearly already exist.

59. In the absence of any identified need for expanded cancellation and refusal powers, and considering the Bill's inability to achieve its stated aims, we strongly echo the observation of the Scrutiny of Bills Committee that:

> The committee notes that in light of the already broad discretionary powers available for the minister to refuse to issue or cancel the visa of a non-citizen, the explanatory materials have given limited justification for the expansion of these powers by this bill.[27]

60. **The truth is that this Bill will offer no increased protection to the Australian community, but it will result in many more people being unjustly indefinitely detained or at risk of being coerced into "voluntary" return to situations of persecution or other serious harm in breach of international legal obligations.**

61. There needs to be greater accountability for feeding false information to the public and to the Parliament that further visa cancellation powers are needed to protect community safety. This premise is completely false. Existing laws are not only sufficient to protect the community, they are already excessive and punitive, and in need of require urgent reframing to make them proportionate to an accurate depiction and balancing of risk to address the existing injustice they have created.

62. Given the Bill has no apparent utility, it can only be assumed that it has been re-tabled for political purposes, as a Federal election draws nearer and the Government campaigns on a 'tough on crime' platform at the expense of migrant and refugee communities. This is not a proper basis for the passage of law.

I. Impact on survivor-victims of family violence

63. The physical elements of a 'designated offence' in the Bill include breach of 'an order made by a court or tribunal for the personal protection of another person'. This provision will most commonly, and is intended to, apply to intervention orders relating to family violence.

64. This provision highlights our existing concern that family violence has been weaponised to take full executive control of visa cancellation decisions, evidenced by the current approach taken, which frequently results in further harm and less effective protection for survivor-victims of family violence, in whose name these laws have supposedly been created.

[26] Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2021, 1.
[27] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18 of 2021*, 1 December 2021.

65. We are very troubled by three circumstances concerning the impacts of visa cancellation on victim-survivors of family violence and note that some of these concerns also apply to victims of forced marriage. The first is where a person's visa is cancelled due to family violence offences, and where that triggers consequential cancellation of the survivor-victim's visa and dependent children. We are also troubled by circumstances where the victim-survivor of family violence provides clear and fully voluntary evidence of the harm it will do to them and children if the perpetrator's visa is cancelled, yet the visa is cancelled nonetheless. This scenario is frequently seen due to inadequate weight being given to the views of survivors of family violence in visa cancellation processes who do not want their partner or their children's father to be permanently separated. This concern also applies to victims of forced marriage, as clarified below. A further scenario of concern is where a victim-survivor of family violence is wrongly characterised by police as a family violence perpetrator, which, unfortunately, is not uncommon, and could then result in the victim-survivor being convicted of a designated offence and automatically failing the character test, no questions asked, resulting in a high risk their own visa is cancelled.

66. In short, we are very concerned that the visa cancellation framework does not provide adequate protection to victim-survivors of family violence, especially since the introduction of Direction 90 on 15 April 2021, which sets out the primary and other considerations and factors to be considered in deciding whether to cancel a visa. Paragraph 5.2 of Direction 90 includes the following statement:

> In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if theconduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.4(2) (Expectations of the Australian Community) is so serious that *even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measureable risk of causing physical harm to the Australian community*.

Then paragraph 8 sets out the primary considerations for decisions makers deciding whether to cancel a visa. The first of these is "protection of the Australian community from criminal or other seriousconduct." The second is "whether the conduct engaged in constituted family violence." Not only is this second to the fist primary consideration on protecting the Australian community, the framing of this consideration is notably silent in relation to any assessment of the seriousness of that family violence or the weight to be given to the input provided by survivor-victims of that violence.

67. While ostensibly Direction 90 is supposed to provide greater protection to victim-survivors of family violence, in reality it more frequently achieves the opposite. There is a need to place greater weight in Direction 90 and in the visa cancellation process more generally, on the views and wishes of survivor-victims who do not want the

consequence of cancellation of the perpetrator's visa to proceed, either for themselves or for children of the perpetrator. For many survivor-victims, removal of the perpetrator from Australia is experienced as further punishment of them, particularly where it forces separation of a couple in an ongoing relation or where it leaves the victim-survivor without material support or without parental support for the care of children. As stated by the Visa Cancellation Working Group:

> Survivors' voices may be sidelined. Survivors may be subjected to paternalistic, disempowering and dangerous intervention in their lives and against their wishes. They may have little control over the outcomes and processes.[28]

68. Similar issues arise in relation to visa cancellation decisions arising from offending related to forced marriage, where visa cancellation threatens to achieve the opposite of protection and support for the victim. In our experience the first question asked of us by victims of forced marriage is whether family members may lose their visas if the force marriage arrangement is reported. This approach taken to cancelling the visas of family members, irrespective of the views of forced marriage victims, deters them from seeking help and is counterproductive. As stated by the Red Cross:

> Having to talk to the authorities and potentially risk their own family being prosecuted can be really daunting and scary, especially for young people," she says.
>
> Many young people in or at risk of forced marriage tell us they don't want their families to get in trouble. They tell us that they just want to be listened to and for their families to understand why they don't want to get married.[29]

69. As also mentioned above, we are also very concerned by the impact of consequential visa cancellation for dependents of the primary applicant facing cancellation of their visa. Most often, the survivor-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,[30] 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.

70. **In our experience, this creates a perverse situation where survivor-victims of family violence are in fact punished for the violence committed against them.** It also creates a powerful disincentive for survivor-victims to report family violence, as the prospect of losing their visa and that of their children, or if they do not want the perpetrator's visa to be cancelled, deters survivor- victims of family violence from seeking the essential protection from violence that they need.

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[28] See Submission to this Inquiry by the Visa Cancellation Working Group, at 38.
[29] See Red Cross at https://www.redcross.org.au/news-and-media/news/more-support-for-victims-of-forced-marriage
[30] Under s116 cancellation powers.

71. This situation is completely out of step with other national initiatives to encourage reporting and use of available legal mechanisms to provide victims of family violence with effective protection. As advisors, we find ourselves unable to reassure victims of family violence that their migration status will not be disadvantaged because they have sought help and protection from family violence.

72. We note with concern the inaccurate information provided on the Department's website providing assurances that "Visa holders experiencing domestic and family violence *will not have their visa cancelled if their relationship breaks down because of domestic and family violence*." [31] This statement is not accurate based on current provisions of the Migration Act, which provide for consequential visa cancellation under s140 of visas held by dependents of those whose visas are cancelled under s109, s116 and some other cancellation provisions of the Act, including due to family violence.

73. This is not merely theoretical. We have had cases in our service where victims of family violence have reported family violence to the department or the police, which has resulted in the cancellation of their partner's visa (under s109 or s116 of the Migration Act) and the consequential cancellation of their own visas and that of their children, because they are dependents on the main visa holders visa and subject to consequential visa cancellation under s 140 of the Migration Act. This is foreseeable for those holding temporary visas, such as SHEV or TPV holders, owed protection obligations and who therefore have so much at stake if their visa is cancelled. It is very concerning to us that this FAQ misrepresents the law and does not address the possible risks of visa cancellation to some people who report family violence.

74. Specific provisions exist in the Act to protect affected family members who hold Partner category visas from losing their visa should their relationship break down due to family violence.[32] No such provisions exist for other categories of visas, including protection visas. If the Government had any genuine concern for victim-survivors of family violence, it would start by providing them with legal protection from adverse impacts on their own visa status. It chooses not to do so, but rather to use the issue of family violence to cancel visas, even where that will further harm the victim-survivors, in order to advance its main agenda, of cancelling as many visas as possible with as little scrutiny and accountability as possible.

J. Impact on children and young people

75. We are further concerned about the impact of the Bill on children and young people, both in terms of children separated from a parent or other family member whose visa is cancelled, and also cancellation of the child's own visa, which can arise in a range of circumstances.

76. We note that under Direction 90, consideration of the best interests of affected children, is only the third primary consideration for visa cancellation, with protection

[31] https://immi.homeaffairs.gov.au/visas/domestic-family-violence-and-your-visa/how-we-can-help-you.
[32] Provided the person can present sufficient evidence that family violence took place, and that the relationship has ended.

of the Australian community given greatest weight and primacy in the test. In our submission, the best interests of children are not given sufficient weight in visa cancellation decisions, despite the obligation under the *Convention on the Rights of the Child* to ensure that affected children's best interests are given primacy.[33] Based on an analysis of 20 AAT s501 cancellation decisions as of 15 April 2021 involving affected biological children of the applicant facing visa cancellation, the set aside or success rate in these cases involving children facing permanent separation from their parent was only 20%, which is significantly lower than even the overall set aside rate being 33% according to the AAT Annual Report 2020/2021.[34]

77. If rates of visa refusal and cancellations increase, as well, potentially in their tens of thousands as a result of the Bill, it is inevitable that many more families will also be separated and many more children will in essence, lose their parent. In addition to the deficiency of Direction 90 in not giving adequate weight to the best interests of affected children, we note that this consideration is not protected at all in legislation and is left entirely to the discretion of decision makers. The entire Migration Act is completely silent as to the best interests of affected children, or their overarching right to family unity in migration decision making.

78. We also note that the further mechanism in this Bill for automatic failure of the character test, greatly increasing the likelihood of visa cancellation, does not differentiate between adults and children. We take no reassurance from the Minister's statement in the Explanatory Memorandum that refusal or cancellation of a child's visa on the grounds of committing a 'designated offence' would only occur in exceptional circumstances.[35]This statement has no basis in law or evidence. There is no requirement in the Bill, the existing Act, or decision-making guidelines for any 'exceptional circumstances' test to be satisfied before a child's visa can be cancelled. They are subject to the same decision making process as adults.

79. In fact, it appears that the initial Bill was motivated in part by a desire to cancel more children's visas. Jason Wood, then chairman of the Joint Standing Committee on Migration and contributor to the Bill, was reported as saying that "the no age restriction clause was necessary because a lot of Sudanese and other gang-related violence was being committed by youths aged under 18, particularly in Victoria."[36] The same article refers to an incident of a 'home invasion' alleged to have been committed by persons of African appearance in their mid to late teens, about whom Mr Wood stated "these are precisely the sort of violent thugs I want deported."

80. This is not a sole incident. In March 2021 Peter Dutton, then the Home Affairs Minister, described the deportation of people following the cancellation of their visas, including that of a 16 year old boy, causing him to be separated from his Australian family, as

[33] See Article 3(1) of the Convention on the Rights of the Child (CRC).
[34] AAT Annual Report 2020-2021, 48 https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202021/AR2020%e2%80%9321.pdf.
[35] Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018, 13.
[36] Keith Moore, "Immigration Department will deport more sex offenders and violent thugs under new visa law", *Herald Sun,* 22 October 2018.

"taking the trash out."[37] This derogatory language, especially from a Minister with carriage of law-making in this area, belies a social hostility and complete lack of respect and concern for people impacted by visa cancellation laws, including children, which is extremely concerning.

81. The arbitrary concept of 'designated offences' as proposed by the Bill will disproportionately impact children and young people. Children 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.

82. This applies equally to other vulnerable people who may be experiencing homelessness, poor mental health or substance addiction, who receive lower sentences on account of their special circumstances but will be nonetheless exposed to visa refusal or cancellation.

83. Through our involvement with the Visa Cancellation Working Group, we are aware of a significant number of cases involving minors whose own visas have been cancelled. Many face such despair in their situations that they self-select for removal and permanent separation from their families, rather than remain in indefinite detention.

84. In our submission, all children should be exempt from any visa cancellation, including later cancellation based on conduct occurring when they were under 18 years old. Cancelling children's visas, means detaining them, and this must be avoided given the known harm it does to the physical and mental health of young people.[38] Children's best interests should be carefully assessed and given primacy in the visa cancellation framework, alongside their right to be accorded family unity and protected from permanent separation from members of their family.

85. We refer again to our concerns regarding the political motivations behind this Bill and denounce the Government's reprehensible vilification of refugees, especially African communities, and youth. Our Government should be devoting resources to rehabilitation, education and support for all young offenders, particularly where they have been exposed to violence and trauma as children. We urge the Committee not to expose children, victims of domestic violence and other vulnerable people to these proposed amendments which will disproportionately impact their fundamental rights.

K. Foreign convictions

86. The definition in the Bill of a designated offence includes offences against a law in force in a foreign country (Foreign Convictions) qualified only by the need that had the

[37] Minor deported to New Zealand under Australian program Peter Dutton described as 'taking the trash out', 15 March 2021, https://www.theguardian.com/australia-news/2021/mar/15/minor-deported-to-new-zealand-under-australian-program-peter-dutton-described-as-taking-the-trash-out.

[38] See Australian Human Rights Commission National Inquiry into Children in Detention: The Forgotten Children: National Inquiry into Children in Immigration Detention, 2014. https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children.

act constituting the offence been in Australia, a sentence of two or more years would have been available to the court.

87. The inclusion of Foreign Convictions as a ground to refuse or cancel a visa raises serious concerns. Criminal justice systems in foreign countries, including the investigation and prosecution of offences, are often not of an equivalent standard to the Australian criminal justice system. These differences are due to a range of factors including limited resources available to governments, lack of access to legal representation, and fewer checks and balances within government institutions which can enable greater corruption in a country's police force and judiciary. Whilst some of these factors also affect the Australian criminal justice system, these issues often have a greater impact in developing nations, including countries from which people seek asylum. As such, a Foreign Conviction should not automatically impugn a person's character and be considered with the same weight as a conviction under the Australian criminal system.

88. Further, many persons who seek asylum in Australia are fleeing political persecution in their countries of origin, where they have been framed or targeted and wrongly convicted of criminal offences. Such people would be unduly punished if the basis of their protection claim could be relied on by the Australian government to refuse or cancel their protection visa. This would result in an extremely unfair outcome, and would discourage people seeking asylum from disclosing the full extent of their protection claims on account of the risk of visa refusal. People seeking asylum already face many barriers to fully expressing their protection claims, including mental health issues and fear of authorities, and this amendment would add yet another barrier.

89. We note that the existing character test in s 501 of the Migration Act already captures convictions in a foreign country for child sex offences, genocide, war crimes, crimes against humanity, torture, slavery or other crimes of 'serious international concern'. It also captures those who are the subject of an Interpol notice.

90. The Bill further provides that the law in the Australian Capital Territory (ACT) should determine whether a Foreign Conviction warrants the refusal or cancellation of a visa. This involves assessing whether the offence resulting in the Foreign Conviction would be an offence in the ACT and if the penalty in the ACT attracts a maximum penalty of at least two years imprisonment.

91. It is arbitrary for criminal legislation in the ACT to be the benchmark to determine whether a Foreign Conviction justifies the refusal or cancellation of a visa. As each State and Territory in Australia has its own criminal legislation, it is possible that a Foreign Conviction may be an offence in the ACT whilst not being an offence and/or having a different penalty in other Australian States and Territories. The Explanatory Memorandum for the Bill states that this provision was included to ensure that "an offence that is considered a designated offence is an offence that is equal to an offence that would be considered a serious crime in Australia". However, for the reasons outlined above, the inclusion of this provision will not ensure the envisaged outcome and will result in unfair and inconsistent consequences.

L. Poor drafting

92. We are concerned that the current drafting of the Bill and the definitions of 'designated offence' contained in clauses 4 and 6 of the schedule of amendments are unclear and may create confusion.

93. It appears from paragraph 20 of the Explanatory Memorandum that a 'designated offence' is intended to be one which satisfies both the conditions set out in (a), being the physical elements of the offence, and either one of the conditions in (b) or (c), being the maximum sentence elements. As currently drafted, the Bill is easily interpreted as creating a 'designated offence' for any offence which satisfies either (a), (b) or (c) alone. This would clearly capture a vast array of minor and non-violent offences which have a maximum sentence of two years imprisonment or more but do not include the specified physical elements.

94. To avoid confusion the Bill ought to state that *a designated offence is an offence against a law in force in Australia, or a foreign country, in relation to which* ***both*** *of the following conditions are satisfied.* The maximum sentence elements in subsections (b) and (c) ought to be subsumed as alternate limbs of one condition (b). Thus, a designated offence should be required to satisfy both condition (a) and (b)(i) or (b)(ii).

95. We submit that the lack of clarity in the current drafting is further reason that the Committee should recommend the Bill not be passed.

M. Retrospective application

96. We draw the Committee's attention to clause 7 of the schedule of amendments in the Bill, which provides that the new requirements of the character test are intended to apply to visa applications submitted prior to the commencement of the Bill, and to offences committed before that date.

97. We submit that this retrospective application undermines the rule of law and creates legal uncertainty for visa applicants, who should be able to trust that their applications will be assessed in accordance with the law as it stands at the time of their application.

98. It is also unjust to apply the new character requirements to offences committed prior to the commencement of the concept of a 'designated offence.' This would result in visa holders who may have lived in Australia for decades and received a fine or minimal sentence for a 'designated offence' many years ago, become suddenly liable to visa cancellation, regardless of the fact that they could not have predicted their actions may result in visa cancellation at the time. We submit that this is an unacceptable outcome.

N. Double punishment

99. As stated above, character cancellation and refusals have increased drastically recent years. The ASRC rejects the notion that the visa cancellation and refusal regime should be used as a secondary method for punishing those who have already been punished by the criminal justice system.

100. People subject to visa cancellations have often been living in Australia for many years. They often have children, families and other strong community ties in Australia. For many, Australia is all they have ever known, and they may have no living relatives in their countries of birth.

101. It is also frequently the case that criminal offending is driven by circumstances which arose in Australia, such as homelessness, substance addiction, or poor mental health. Australia cannot ethically wash its hands of those who are Australian in all but formal status, and have been affected by circumstances arising in our society.

102. People convicted of crimes serve their sentence in the form of fines, imprisonment or other court order. Visa cancellation or refusal should not be used as a secondary punishment, particularly in the case of refugees and people seeking asylum, where that second punishment may amount to life imprisonment in the form of indefinite detention, or *refoulement* to face death or serious harm.

O. Recommendations

103. **Recommendation 1:** We submit that the Committee should recommend that the Bill not be passed in its entirety. The impact on refugees, women, children and other vulnerable persons cannot be justified in circumstances where the proposed amendments add nothing to the existing legislative regime. The Government should not be permitted to use the visa refusal and cancellation regime as a political tool to promote a 'tough on crime' agenda or to scapegoat refugees and migrants.

We make the further recommendations regarding the existing visa cancellation or refusal regime:

104. **Recommendation 2**: Establish criminal court oversight of decisions regarding whether a visa holder who has completed a custodial sentence remains an unacceptable risk to community safety.

Where a court finds this to be the case, subject all ongoing detention of that person to regular court review of the need for their continuing detention to maintain community safety. A court finding that a person no longer presents an unacceptable risk to community safety should trigger automatic restoration/grant of that person's visa where it has been cancelled or refused on character grounds, and their release from detention.

105. **Recommendation 3:** Ensure that all people held in detention having completed their sentence have access to a full suite of rehabilitation and support programs, including for drug and alcohol abuse, anger management etc and are provided with opportunities to demonstrate that they present no risk to community safety under controlled conditions, such as by utilising existing alternatives to closed detention, including community detention options with monitoring.

106. **Recommendation 4**: Review s 501 visa cancellation/refusal powers in their entirety based on independent assessment of whether these provisions serve any legitimate purpose in ensuring community safety and at minimum

- Repeal s501Aand s501BA of the Migration Act allowing the Minister to set aside decision of the AAT or remove review rights to the AAT.
- Repeal s 500(6L)(c) of the Migration Act requiring that if certain character-related decisions are not made by the AAT within a period of 84 days, the applicant automatically loses their case.
- Amend s 503A(2)(c) of the Migration Act to compel the Minister to provide relevant information to the Courts and Tribunal, and for regular natural justice standards to comment on adverse information, be applied.
- Provide a clear definition of "character"
- Remove mandatory cancellation provisions and replace them individualised assessment of all relevant circumstances in decisions to cancel or refuse visas on character grounds.

107. **Recommendation 5**: Repeal s 197C of the Migration Act in its entirety requiring no regard to be given to Australia's non-refoulement obligations and allowing for the indefinite detention of refugees and others owed protection but only where there is a current protection finding.

108. **Recommendation 6:** Exempt children from their visas being cancelled. Where children are impacted by the cancellation of their parent's visa or another close relative, enact provisions which require their best interests and right to family unity to be given primacy in the legal framework and also amend Direction 90 accordingly.

109. **Recommendation 7:** Repeal all provisions which cause consequential cancellation of the visas of dependents to provide survivor-victims of family violence and their children with legal protection from cancellation of their own visas.

110. **Recommendation 8:** Elevate to a primary consideration under Direction 90 consideration of the views of survivor-victims of family violence or forced marriage who oppose the cancellation of their family member's visa.

111. **Recommendation 9:** Improve the fairness of General Division reviews of visa cancellation/refusal decisions on character ground including:

- Amend s 69(1) of the AAT Act to require the Attorney General to provide funds for legal assistance for every person seeking review of a visa cancellation/refusal decisions before the General Division of the AAT.
- Ensure that Directions are made in General Division visa cancellation/refusal maters for:
  a. Every applicant to attend their General Division hearing in person and ABF be required to make such arrangements, including for persons detained at Christmas Island.
  b. Every applicant be entitled to continuity in their place of detention in the 90 days prior to their hearing, except where the transfer is with the

consent of the applicant.

c. Every applicant be entitled to access to high speed internet and quality of communication facilities in the 90 days prior to their hearing.
d. The Tribunal in General Division or MRD matters concerning persons held in detention should routinely make inquiries to detainees about any recent transfers or traumatic incidents they have experienced which may have bearing on their ability to give evidence, so that these issues can be taken into consideration in assessing the applicant's presentation and evidence in the decision.

- Abolish all application fees to the AAT for all persons held in immigration detention or seeking review of a protection visa or associated applications.
- Establish Practice Direction for the General Division regarding hearing arrangements for people in detention and a further Practice Direction for Vulnerable Persons.
- Establish Practice Direction for the General Division for Vulnerable Persons

112. **Recommendation 10:** That the Committee recommend that the *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020*, (Cth) not be passed by the Parliament.