

17 December 2021

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

*By online submission*

Dear Committee Members,

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

We write this submission in our capacity as Senior Lecturers at the Faculty of Law, University of Technology Sydney. We welcome the opportunity to submit on the Migration Amendment (Strengthening the Character Test) Bill 2021 ('the Bill').

The **Bill** seeks to introduce additional circumstances in which a person will fail the character test in s 501 of the *Migration Act 1958* ('the Act'), thereby enlivening the power of the Minister to cancel or refuse a non-citizen's visa on character grounds. It does this by providing that a person will not pass the character test where the person has been convicted of a 'designated offence'. A **designated offence** is an offence punishable by imprisonment for not less than 2 years, regardless of the actual judicial sentence imposed, in circumstances where one or more of the physical elements of the offence involves:

- (i) violence, or a threat of violence, against a person;<sup>1</sup> or
- (ii) non-consensual conduct of a sexual nature, including sexual assault and the non-consensual commission of an act of indecency or sharing of an intimate image; or
- (iii) breaching an order made by a court or tribunal for the personal protection of another person; or
- (iv) using or possessing a weapon; or
- (v) aiding, abetting, counselling or procuring the commission of an offence that is a designated offence because of any of subparagraphs (i) to (iv); or
- (vi) inducing the commission of an offence that is a designated offence because of any of subparagraphs (i) to (iv), whether through threats or promises or otherwise; or

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<sup>1</sup> Violence against a person includes an act constituting an offence of murder, manslaughter, kidnapping, aggravated burglary, robbery or assault, or an equivalent offence.

(vii) being in any way (directly or indirectly) knowingly concerned in, or a party to, the commission of an offence that is a designated offence because of any of subparagraphs (i) to (iv); or  
(viii) conspiring with others to commit an offence that is a designated offence because of any of subparagraphs (i) to (iv).

The Bill provides that a person's conviction for an offence of common assault, or an equivalent offence, is taken *not* to be a conviction for a designated offence *unless* the act constituting the offence for which the person was convicted:

- (a) causes or substantially contributes to:
  - (i) bodily harm to another person; or
  - (ii) harm to another person's mental health (within the meaning of the *Criminal Code*);<sup>2</sup> whether temporary or permanent; or
- (b) involves family violence (as defined by subsection 4AB(1) of the *Family Law Act 1975*) by the person in relation to another person.

We submit that **the Bill be rejected** for the following reasons:

- a) First and foremost, the Act already contains extensive and broad ministerial powers to refuse to issue or cancel visas, including for persons who have committed a serious offence, under s 501 and s 116 in particular. The inefficient, unjust and uneven consequences of existing powers are well-documented.<sup>3</sup> Further, the Government has not advanced any form of evidence-based case for why the proposed additional powers are necessary or justified.

#### **Detrimental Effects on Select Groups**

- b) Cancellation of visas results in non-citizens being subject to arbitrary (potentially indefinite) detention and forcible removal from Australia. This may cause serious physical and mental harm to individuals and families, which can, in some circumstances, be life-threatening, and lead to an increased risk of Australia not meeting its non-refoulement obligations. The Commonwealth Ombudsman has previously [found](#) that non-citizens whose visas were cancelled on character grounds spent prolonged periods in immigration detention due to departmental backlogs and delays, among other issues. The risk of delays and backlogs will increase if this Bill is passed, as it will result in a larger number of persons being eligible for visa cancellation under s 501.

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<sup>2</sup> The phrase 'harm to another person's mental health' includes significant psychological harm to the person, but does not include a reference to ordinary emotional reactions (for example, distress, grief, fear or anger).

<sup>3</sup> See in particular submissions in response to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018.

- c) As noted by the Parliamentary Joint Committee on Human Rights, the Bill does not differentiate between adults and children, and could lead to the detention of children, limiting the rights of the child including the obligation to consider their best interests. The best interests of children may also not be served by separating families and prolonging separation through the indefinite detention of non-citizens who have minor children.
- d) The Bill may bring about harmful consequences to victim-survivors. This includes victims and family members of perpetrators of domestic and family violence, who may, for example, be reluctant to report crimes out of fear that they will be misidentified as a perpetrator, implicated in any offending and themselves face visa-cancellation; or alternatively, may fear that reporting crimes will lead to disproportionate and undesirable outcomes, such as the breakdown of the family unit and children being left without carers or income providers.
- e) The Bill's visa cancellation powers apply to all non-citizens, including those who have significant ties to, were raised in, or have lived the majority of their life in, Australia. Such persons may have little to no connection with another country. An increased use of visa cancellation powers towards non-citizens with substantial connections to Australia and little connections to other nations will, by extension, harm and punish Australian-based family members and friends whose loved one is removed. The reforms may also further weaken Australia's bilateral relationship with other countries, in particularly the already fractured relationship with New Zealand, where Prime Minister Jacinda Ardern has [criticised](#) the deportation of people from Australia who have 'almost no connection' to New Zealand.
- f) As with existing cancellation powers under s 501, the expanded powers are in direct conflict with Australia's non-derogable non-refoulement obligations to refugees and asylum seekers under international and domestic law. These obligations prohibit returning anyone to a country where they will face persecution or serious human rights violations. The operation of s 197C of the Act entails that non-refoulement obligations will *not* be relevant to the duty of removal under s 198. As such, recognised refugees subject to visa cancellation are at a significantly expanded risk of non-refoulement under the proposed Bill. This is irrespective of representations in previous Explanatory Memoranda and Direction 79 that persons will not, in practice, be refouled under s 197C. Furthermore, refugees and asylum seekers subject to visa cancellation who are not or cannot be refouled potentially face indefinite, life-long detention – a consequence once again exacerbated by the reforms.
- g) We have outlined in detail the unjust, inefficient and uneven consequences of existing cancellation powers in previous research, particularly for asylum seekers on bridging visas and those who have been recognised as refugees (appended).<sup>4</sup> We have demonstrated that through

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<sup>4</sup>Anthea Vogl and Elyse Methven, 'Life in the Shadow Carceral State: Surveillance and Control of Refugees in Australia' (2020) 9(4) *International Journal for Crime, Justice and Social Democracy* 61 ('Life in the Shadow Carceral State'); Anthea Vogl, 'Protection, Crime, and Punishment: Regulation at the Nexus of Crimmigration and Refugee Law' in Catherine

expanded *existing* cancellation powers ‘administrative legal authority has been mobilised in what was once a criminal context—the investigation and punishment of breaches of the criminal law—without affording [refugees and asylum seekers] the most basic substantive and procedural safeguards attached to criminal proceedings.’<sup>5</sup> Further, the effects of cancellation for refugees and asylum seekers *who cannot be returned* are singularly unjust, as they provide a basis for indefinite detention in Australia.

### **Severely Disproportionate Consequences of the Reforms**

- h) Visa cancellation powers are not an appropriate vehicle through which to enact punishment towards individuals for criminal offending. This is particularly so where offending is of a minor nature, such as the offending that may be captured by the Bill. State and territory criminal justice systems are more appropriately set up to tailor punishments towards achieving objectives such as deterrence, protection of the community and victims, rehabilitation, proportionate punishment and denunciation of conduct.
- i) The Bill will increase the ability of the executive to impose extrajudicial and double punishment on non-citizens with minimal accountability or independent scrutiny.
- j) Due to the Bill’s lowering of the threshold for offences considered serious enough to warrant cancellation, visa cancellation may be disproportionate to the crime committed. Many of the offences that the Bill covers are of a minor nature and cancellation operates *in spite of* the criminal court’s assessment and sentencing. The Bill will result in visa cancellation regardless of the objective seriousness (e.g. gravity of harm suffered by any victim, planning by or premeditation of the offender) or subjective circumstances (e.g. mental health of offender, prior criminal record, remorse or contrition) of the offence. By contrast, criminal sentencing processes within the Australian criminal justice system equip judicial officers with the discretion to impose a variety of punishments tailored to the seriousness of the offence and the offender’s circumstances, ranging from having no conviction recorded and good behaviour bonds to imprisonment. There is no such flexibility in the proposed visa cancellation regime. The proposed regime is designed to operate *at odds with* and irrespective of a judicially considered, individual and procedurally fair assessment of appropriate punishment for specific offences.
- k) Further to point (j), the Bill will extend the power to cancel a visa for non-citizens who may have received a relatively minor sentence such as a good behaviour bond, a small fine, or a community service order for the offence in relation to which their visa is cancelled. Attaching

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Dauvergne (ed), *Research Handbook on the Law and Politics of Migration* (Edward Elgar Publishing, 2021) (‘Protection, Crime, and Punishment’).

<sup>5</sup> Vogl and Methven (n 4) 63.

the consequence of detention and deportation to a crime for which a judicial officer has judged the appropriate penalty to be a good behaviour bond, for example, clearly illustrates the arbitrary and disproportionate nature of the expanded visa cancellation power contained within the Bill.

### **Denial of Bare Minimum Standards of Procedural Fairness & Further Expansion of Executive Power**

- l) Merits review rights attached to ministerial decisions made under the Bill are limited, which increases the risk of unjustified and arbitrary cancellation. Individuals find it difficult to access or navigate the system to challenge ministerial decisions, particularly those without legal representation, and vulnerable individuals including children, those who have physical or mental impairments, or non-citizens whose English skills are limited. By functioning in an environment characterised by an erosion of rights to review and a lack of transparency, the Bill will further deny non-citizens their right to justice.
- m) The right to have the Minister's visa cancellation or refusal decision reviewed is curtailed by the Bill's incorporation of an 'objective' ground of visa cancellation – the 'designated offence' ground. The grouping of a vast array of conduct under the umbrella term 'designated offence' will limit the discretion of any reviewer to consider the individual's circumstances, including mitigating factors and the triviality of the offence. The predicted inability to take into account an individual's subjective circumstances in any review of the exercise of ministerial discretion will lead to perverse and unjust outcomes.
- n) Submissions from inquiries and parliamentary committee reports on previous iterations of the Bill have overwhelmingly not supported the Bill and have raised serious concerns about its scope. The minor changes made by the Government in the latest iteration of the Bill have done little to address the concerns of these previous and our present submission.
- o) The Bill gives rise to an undesirable propensity for some Australian politicians to stigmatise, stereotype and scapegoat non-citizens, including refugees, for political gain. By lumping a wide variety of people into the category of designated offenders eligible for visa cancellation, the Bill will distort perceptions of criminality and fuel racist attitudes that incorrectly associate ethnic or national groups with criminal offending. Generic labels applied to non-citizens captured by the provision as 'dangerous', 'violent' or 'sexual' offenders are likely to bolster anti-immigration sentiment, and impede, rather than facilitate, the resettlement of migrants into Australia.

In sum, the visa cancellation regime which the Bill seeks to enact will operate in a punitive, unfair and disproportionate fashion, especially in light of its failure to take into account the circumstances and

seriousness of individual cases. We have serious concerns about its capacity to further stigmatise non-citizens, fracture family units, and undermine human rights. The Minister currently has sweeping powers to cancel visas on character grounds with limited rights for non-citizens to review these decisions. The government has provided no convincing rationale to add an objective designated offence ground to the existing character cancellation powers. The Bill should be rejected.

Sincerely,

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**APPENDED TO SUBMISSION:**

- 1. Anthea Vogl and Elyse Methven, ‘Life in the Shadow Carceral State: Surveillance and Control of Refugees in Australia’ (2020) 9(4) *International Journal for Crime, Justice and Social Democracy* 61.**
- 2. Anthea Vogl, ‘Protection, Crime, and Punishment: Regulation at the Nexus of Crimmigration and Refugee Law’ in Catherine Dauvergne (ed), *Research Handbook on the Law and Politics of Migration* (Edward Elgar Publishing, 2021).**