



AUSTRALIAN  
LAWYERS  
FOR  
HUMAN RIGHTS

PO Box A147  
Sydney South  
NSW 1235  
[www.alhr.org.au](http://www.alhr.org.au)

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

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee Secretary

## **Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019**

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) in respect of its inquiry into the *Migration Amendment (Strengthening the Character Test) Bill 2019 (Bill)*.

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## 1. Summary

- 1.1. This submission reiterates ALHR's concerns raised in the submission to Committee's inquiry in relation to the *Migration Amendment (Strengthening the Character Test) Bill 2018*.
- 1.2. The effect of the Bill is to further expand the powers of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (**Minister**) to refuse to grant visas or to cancel visas by expanding the cohort of non-citizens who are considered for visa refusal or cancellation.
- 1.3. Yet, there is little justification or evidence as to why the current legislative framework is inadequate. Given the serious consequences of visa cancellation on the rights of individuals and their families, it is incumbent upon the Government to provide evidence and justification as to why the proposed changes are necessary and proportionate.
- 1.4. ALHR is concerned that the Bill lowers the threshold for visa refusal and cancellation in an unjustifiable manner. The Bill undermines the criminal law system's determinations about the risk a person poses to the community through sentences of imprisonment. The practical consequence of this Bill is that people who have been convicted of an offence, but have not received a sentence of imprisonment, will nevertheless be taken into detention and be subjected to a further decision-making process as to whether they pose a risk to the community.
- 1.5. ALHR also continues to have concerns because the current decision-making framework lacks the procedural safeguards necessary to ensure that Australia complies with its international human rights obligations. Given this lack of safeguards, ALHR advocates for a restriction of the number of people exposed to a risk of human rights violations, while the Bill seeks to do the opposite.
- 1.6. ALHR recommends that the Bill not be passed and should be withdrawn.

## 2. The 2018 Bill

- 2.1. ALHR notes that the provisions of the Bill were originally proposed via the *Migration Amendment (Strengthening the Character Test) Bill 2018 (2018 Bill)*.
- 2.2. On 15 November 2018 the Senate referred the 2018 Bill to the Committee for inquiry and report. 17 public submissions were made in response to the Committee's 2018 inquiry, including a submission from ALHR. With the exception of the Department of Home Affairs' submission, each submission opposed the 2018 Bill. The Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights also raised concerns about the 2018 Bill.<sup>1</sup>

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<sup>1</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 13 of 2018, 14 November 2018) 8; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human rights scrutiny report* (Report 1 of 2019, 12 February 2019) 69.

- 2.3. The Committee published its report on 17 December 2018. Despite the extensive opposition and concerns raised about the 2018 Bill, the majority of the Committee recommended the Bill be passed,<sup>2</sup> with the Australian Greens and Labor Party Senators publishing dissenting reports.<sup>3</sup>
- 2.4. ALHR respectfully disagrees with the conclusions drawn in the majority report and submits that the majority report did not substantively address or otherwise respond to the concerns raised by the Scrutiny of Bills Committee, Parliamentary Joint Committee on Human Rights or the organisations which made public submissions.
- 2.5. The 2018 Bill lapsed on 11 April 2019 with the dissolution of Parliament.

### 3. Background

- 3.1. The stated purpose of the Bill is to amend s 501 of the *Migration Act 1958* (Cth) (**Migration Act**) to 'provide grounds for non-citizens who commit serious offences, and who pose a risk to the safety of the Australian community, to be appropriately considered for visa refusal or cancellation.'<sup>4</sup> The Explanatory Memorandum to the Bill states that the Bill is 'in response to the recommendations of the Joint Standing Committee on Migration report on migrant settlement outcomes titled 'No one teaches you to become an Australian'.<sup>5</sup> In ALHR's view, this justification is a misrepresentation of the recommendations in the Joint Standing Committee's report, and does not provide reasons for such a drastic expansion of Ministerial power.
- 3.2. ALHR notes that, in relation to the s 501 cancellation framework, the Joint Standing Committee's report found that:
- The majority of submitters to this inquiry largely held the view that the current character and cancellation provisions in the Act were an adequate way of addressing non-citizens who have been involved in criminal activities.<sup>6</sup>
- 3.3. In light of that statement, and contrary to the assertion in the Explanatory Memorandum that expanded cancellation powers are necessary to ensure that the cancellation framework 'aligns with community expectations', it appears that the community already considers that the current legislative framework is adequate. Moreover, the focus of the Joint Standing Committee's report was in relation to migrant young people rather than the s 501 cancellation regime as a whole. While the Committee ultimately recommended that anyone over 18 convicted of a serious offence should have their visa cancelled, the Committee itself provides little analysis as to why this is necessary or why the current legislative framework is inadequate.

<sup>2</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Strengthening the Character Test) Bill 2018 [Provisions]* (Report, 17 December 2018).

<sup>3</sup> Australian Greens, Parliament of Australia, *Dissenting Report* (17 December 2018); Labor Party Senators, Parliament of Australia, *Dissenting Report* (17 December 2018).

<sup>4</sup> Explanatory Memorandum, *Migration Amendment (Strengthening the Character Test) Bill 2019 2*.

<sup>5</sup> Explanatory Memorandum, *Migration Amendment (Strengthening the Character Test) Bill 2019 9*.

<sup>6</sup> Joint Standing Committee on Migration, *No one teaches you to become Australian* (8 December 2017) [7.144].

## 4. The Bill is Excessive and Unnecessary

- 4.1. ALHR notes that the *Migration Act* already provides such grounds to the Minister. In particular, the Minister or their delegate has the power under s 501 of the *Migration Act* to refuse to grant a visa or to cancel a visa in circumstances where the Minister/delegate is not satisfied that a non-citizen passes the ‘character test’.<sup>7</sup> The Minister has the power to personally refuse or grant a visa or cancel a visa in circumstances where the Minister reasonably suspects that a non-citizen does not pass the character test and is satisfied that the refusal or cancellation is in the national interest.<sup>8</sup> The *Migration Act* defines the ‘character test’ with reference to a wide variety of circumstances relating to a non-citizen’s criminal convictions or suspected criminal conduct, as well as circumstances in which a non-citizen poses a risk to the Australia community.<sup>9</sup> These existing powers are therefore already sufficiently wide to facilitate the cancellation of visas for persons who commit serious assaults, aggravated burglary, sexual offences and possession of child pornography.
- 4.2. The effect of the Bill is to further expand the powers of the Minister to refuse to grant visas or to cancel visas by seeking to increase the number of circumstances in which a person would not pass the ‘character test’ and thereby drastically expanding the cohort of non-citizens who can be considered for visa refusal or cancellation. For example, under the current Act, a non-citizen does not pass the ‘character test’ if they have been sentenced to one or more terms of imprisonment anywhere in the world where the total of those terms is 12 months or more.<sup>10</sup> The Bill expands the cohort of people captured by the ‘character test’ to include non-citizens who are convicted of an offence punishable by imprisonment for a term of two years or more, irrespective of what sentence the non-citizen actually received or whether the person actually served out their sentence.<sup>11</sup>
- 4.3. If passed these measures will lead to serious consequences for the expanded cohort of people, who become unlawful non-citizens once their visa is refused or cancelled and are likely to be subject to mandatory immigration detention and potential removal from Australia.<sup>12</sup>
- 4.4. The Bill fails to take into account the role of the criminal law system and judicial discretion in Australia in considering the material facts of an offence and imposing a sentence, including a sentence of imprisonment, which is appropriate in all the circumstances of the case and which therefore reflects the seriousness of the crime and the risk the person poses to the Australian community.

<sup>7</sup> *Migration Act 1958* (Cth) ss 501(1), (2).

<sup>8</sup> *Migration Act 1958* (Cth) s 501(3).

<sup>9</sup> *Migration Act 1958* (Cth) s 501(6).

<sup>10</sup> *Migration Act 1958* (Cth) ss 501(6)(a), (7)(a), (7)(b).

<sup>11</sup> *Migration Amendment (Strengthening the Character Test) Bill 2019* (Cth) sch 1 item 6, (7aa)(b)(ii) and (iii).

<sup>12</sup> *Migration Act 1958* (Cth) ss 13, 14, 501F.

- 4.5. Further, while the Explanatory Memorandum states that the intention of the amendment in the above example is to make it clear that the amendment is to capture a serious offence rather than ‘merely a minor or trifling offence’,<sup>13</sup> ALHR is concerned that this distinction is not articulated in the Bill itself.
- 4.6. There are numerous offences across State and Territory jurisdictions which may be punishable by imprisonment for a term of two years or more, but which upon consideration of the circumstances of the offending, the criminal law system may not find it appropriate to impose the two-year imprisonment sentence and which the Australian community would consider to be a minor or trifling offence. For example, in Western Australia the summary penalty for damaging property by graffiti ranges from a community based order to a two year term of imprisonment.<sup>14</sup> The criminal law system appropriately already has the power to consider the risk a person who damages property by graffiti may pose the community and determine that it does not warrant a two year term of imprisonment. Further, it is implausible that the Australian community would consider that the offence of graffiti is serious enough to warrant the refusal or cancellation of a visa, even though it can potentially attract a two-year term of imprisonment. However, this is the type of offence the Bill captures through its expansion of powers without any proper consideration of the actual sentence imposed by the criminal law system.

## 5. Human Rights Implications of the Bill

- 5.1. ALHR notes the Bill’s Statement of Compatibility with Human Rights states that the Bill is compatible with human rights and freedoms set out in international human rights instruments ratified by Australia.
- 5.2. However, ALHR has serious concerns about the human rights implications of the Bill, in particular that it:
- (a) undermines the right to be equal before the courts and tribunals;
  - (b) does not address the deficiencies within the current decision-making process, including those relating to the risks of:
    - (i) arbitrary detention; and
    - (ii) *non-refoulement*,
 but instead increases the number of people exposed to the deficient process; and
  - (c) applies retrospectively.

<sup>13</sup> Explanatory Memorandum, *Migration Amendment (Strengthening the Character Test) Bill 2019* 7 [37].

<sup>14</sup> *Graffiti Vandalism Act 2016* (WA) s 5.

### 5.3. Equality before the courts and tribunals

- 5.3.1. Australia has obligations under the International Covenant on Civil and Political Rights to ensure that all people are equal before the courts and tribunals.<sup>15</sup> As set out above, the practical impact of the Bill undermines this right because it undermines judicial direction and the determinations the criminal law system makes during sentencing as to whether a person poses a risk to the community and therefore whether the Court should impose a sentence of imprisonment or not. The Bill not only reinforces a discriminatory regime where two people who have committed the same crime are treated very differently depending on whether they are a citizen or not, but also introduces a regime where a non-citizen may commit the same offence, but in a less serious context and receive a less serious sentence, yet still be subject to a more serious outcome, including arbitrary detention and removal from Australia.

### 5.4. Arbitrary detention

- 5.4.1. By expanding the number of people who are captured by the ‘character test’, the Bill also expands the cohort of people subject to a decision-making framework which requires them to remain in detention until they are either granted another visa or removed from Australia, without any time limits placed on the length of detention. The United Nations Human Rights Committee has consistently held that this framework does not comply with international human rights obligations and results in arbitrary detention because although lawful under Australian law, it does not take into account whether detention is reasonable, necessary and proportionate in an individual’s circumstances.<sup>16</sup> In particular, ALHR notes that where decisions to cancel are made personally by the Minister, merits review is excluded and is limited to circumstances where the exercise of the power includes a jurisdictional error.
- 5.4.2. Given that a decision of the Minister may result in mandatory cancellation leading to, in some cases, prolonged or indefinite mandatory detention, there must be strong and compelling reasons to justify any expansion in Ministerial power. Such justification is lacking in the present Bill and ALHR considers that it is not a reasonable, necessary, or proportionate response.

### 5.5. *Non-refoulement*

- 5.5.1. The Bill also expands the cohort of people who face a risk of *refoulement*. Australia has obligations under various international human rights instruments not to return (or *refoule*) a non-citizen to a country where they would face persecution on account

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<sup>15</sup> *International Covenant on Civil and Political Rights*, art 14.

<sup>16</sup> See, eg Human Rights Committee, Views: Communication No 560/1993, 59th sess CCPR/C/59/D/560/1993 (3 April 1997) (‘A v Australia’); Human Rights Committee, Views: Communication No 900/1999, 76th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (‘C v Australia’); Human Rights Committee, Views: Communication No 2094/2011, 108th sess UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) (‘FKAG et al v Australia’); Human Rights Committee, Views: Communication No 2136/2012, 108th sess UN Doc CCPR/C/108/D/2136/2012 (28 October 2013) (‘MMM et al v Australia’); Human Rights Committee, General comment No 35: Article 9 (Liberty and security of person), 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014).

of their race, religion, nationality, membership of a particular social group or political opinion,<sup>17</sup> or who would otherwise face serious human rights violations, such as cruel, inhuman or degrading treatment or punishment and torture.<sup>18</sup>

- 5.5.2. Although the current decision-making process in relation to visa refusal and cancellation on character grounds considers Australia's *non-refoulement* obligations, it does not prevent a decision-maker from ultimately deciding to refuse or cancel the non-citizen's visa. The non-citizen then faces either the risk of *refoulement* or indefinite detention, since any further substantive visa application they make to remain in Australia will also be subject to refusal under the expanded 'character test'.
- 5.5.3. Further, the Bill does not ameliorate the current provisions of the *Migration Act* which allow for non-citizens to be removed from Australia, notwithstanding that Australia owes them *non-refoulement* obligations.<sup>19</sup> Although the Bill's Statement of Compatibility states that '[a]nyone who is found to engage Australia's *non-refoulement* obligations during the refusal or cancellation decision or in subsequent visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations',<sup>20</sup> this commitment is not reflected in any provision of the Act as it stands, nor in the Bill.

## 5.6. Retrospectivity

- 5.6.1. Australia has obligations under the *International Covenant on Civil and Political Rights* to ensure that where a person is convicted of a criminal offence, they are not subject to a heavier penalty than that which was applicable at the time when the criminal offence was committed. Given the seriousness of refusing or cancelling a person's visa, particularly in circumstances which may result in arbitrary detention or *refoulement*, the retrospective application of the proposed measures clearly imposes a heavier penalty than applicable at the time of the offence. Although the Department of Home Affairs' submission states that this is consistent with previous amendments to the character test,<sup>21</sup> in ALHR's view this does not satisfactorily explain why the proposed amendments should apply retrospectively.

## 6. Recommendations

- 6.1. **ALHR recommends that this Bill should not be passed and should be withdrawn.**

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<sup>17</sup> *Refugee Convention* art 33.

<sup>18</sup> *International Covenant on Civil and Political Rights* art 7; *Convention on the Rights of the Child* art 37(a); *Convention on the Rights of Persons with Disabilities* art 15(1); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art 3(1).

<sup>19</sup> *Migration Act 1958* (Cth) s 197C.

<sup>20</sup> Explanatory Memorandum, *Migration Amendment (Strengthening the Character Test) Bill 2019* 12.

<sup>21</sup> Department of Home Affairs, Submission No 15 to Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Strengthening the Character Test) Bill 2018* (November 2018) 6 [2.5.3].



## 7. Conclusion

- 7.1. In ALHR's view, the Australian government has not demonstrated that the measures proposed by the Bill are reasonable, necessary or proportionate to achieve the stated objectives. ALHR considers that the current regime is already deficient in many respects and is inconsistent with Australia's international human rights law obligations. To expose a larger cohort of non-citizens to visa cancellation and refusal in the manner proposed by the Bill will do little to protect the Australian community and will only serve to negatively impact on the human rights of non-citizens who are entitled to them. The Bill therefore should not be passed.
- 7.2. ALHR is available to appear before the Committee or to provide any further information or clarification in relation to the above if the Committee so requires.

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If you would like to discuss any aspect of this submission, please email me at: [president@alhr.org.au](mailto:president@alhr.org.au)

Yours faithfully

Kerry Weste  
President  
Australian Lawyers for Human Rights

### ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

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