Law Council
OF AUSTRALIA

Migration Amendment (Strengthening the Character Test) Bill 2019

Senate Legal and Constitutional Affairs Committee

14 August 2019

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 28 June 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Ross Drinnan, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Law Institute of Victoria (**LIV**), the Law Society of New South Wales (**NSW LS**), the Queensland Law Society (**QLS**), the Law Council's Migration Law Committee within the Law Council's Federal Litigation and Dispute Resolution Section, the Law Council's National Criminal Law Committee and its National Human Rights Committee, for their assistance with the preparation of this submission.

Executive summary

1. The Law Council welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) in relation to the proposed measures contained in the Migration Amendment (Strengthening the Character Test) Bill 2019 (**the Bill**).

2. The Law Council considers that the existing provisions under section 501 of the *Migration Act 1958* (Cth) (**Migration Act**) already provide the Minister with very broad powers to cancel and refuse visas on character grounds. Indeed, the Law Council has previously expressed concern over these powers' expansion given their breadth, as well as the low cancellation thresholds and insufficient safeguards involved.[1]

3. While the Law Council recognises that the Executive should possess the power where necessary to prevent or remove a dangerous individual from obtaining or retaining the right to enter and remain in Australia, a decision to cancel or refuse a visa based on character grounds will almost always have a profound impact on the lives of individuals and their families, and any power to refuse or cancel a visa should be administered cautiously and with proper regard to all circumstances of the individual case. It should also be exercised with appropriate safeguards in place.

4. The Law Council therefore notes that restraint must be exercised with any attempt to expand this power beyond existing parameters and must be accompanied by robust justification. In this regard, the Law Council retains the view that the justification for the expanded measures as proposed in the Bill has not been made out. In particular, it considers that the Bill is neither necessary nor proportionate, and that existing provisions of the Migration Act are sufficient to respond appropriately to individuals who commit serious offences and provide clear risks to the community.

5. While the Bill is based on the need for a 'clear, objective' character test, such provisions already exist in the Migration Act. Currently, a person will fail the character test if they have been sentenced to a term of imprisonment of 12 months or more (which can result in mandatory visa cancellation[2]), or if they have been sentenced to two or more terms of imprisonment which together total 12 months (which can trigger the exercise of a discretion to refuse or cancel a visa). The Bill appears principally likely to capture additional people at the very low end of offending for the proposed designated offences, for whom a court has determined that the level of culpability in the circumstances is below even these thresholds.

6. In such circumstances, under the Migration Act's existing provisions, a person can still fail the character test according to a range of criteria, including whether there is a risk that they pose a danger to the community, or having regard to their past and present criminal/general conduct, they are not of good character. The Law Council considers that in cases which do not meet the existing 'objective' thresholds, such a deliberative exercise, which requires careful consideration of the individual circumstances, is essential. Fairness requires that this process is not formulaic.

7. Of particular concern to the Law Council is the proposed lowering of the threshold for those that may be subject to visa cancellation or refusal on character grounds. This is primarily due to the inclusion of designated offences with a statutory maximum sentence of not less than two years, regardless of the actual judicial sentence given.

[1] Law Council of Australia, Submission No 82 to the Joint Standing Committee on Migration, *Inquiry into Migrant Settlement Outcomes*, 17 February 2017, 5-6.

[2] As discussed below, the person must also be serving a sentence of imprisonment on a full-time basis in custody: Migration Act, s 501(3A).

This may include people who have been given no sentence at all, a fine or a community corrections order. The Law Council submits that this approach has the potential to undermine the sentencing function of the judicial system and the discretion exercised by judicial officers to sentence offenders. The thresholds proposed by the Bill are likely to capture a range of individuals who ordinarily would not be considered to have committed a 'serious offence', having regard to existing definitions in criminal law. Further, if the criminal justice system has determined that, in the circumstances, a convicted person does not present a community risk and imposes a fine or a suspended sentence, it is questionable whether their subsequent visa cancellation is justifiable to 'protect' the community.

8. In the Law Council's view, the primary legislative purpose of the section 501 character power is the protection of the Australian community from a real risk of harm from the specific person in question. The Bill's amendments, if passed, move this focus away from the risk posed by the *individual* to the community, to an entirely different regime. In effect, it is a broad power of cancellation with respect to anyone convicted of many *offence* categories, regardless of the level of risk that they pose. This represents a structural and conceptual change to this area of the law, rather than a mere modification of existing powers.

9. The Law Council is concerned that while the discretion to cancel or refuse a visa must still be exercised if a person fails the character test as proposed by the Bill, limited safeguards are available regarding the appropriate exercise of this power. Depending on the discretionary power exercised, the rules of natural justice and requirements to give a person prior notice and an opportunity to respond may not apply. Moreover, if the Minister exercises the decision personally, there is no right to merits review. Nor is the Minister bound by the Direction, which sets out certain factors to which delegates must have regard in exercising their discretion (including the best interests of the child as a primary consideration). Where the Minister exercises the power in the 'national interest', the grounds on which judicial review can be sought are very limited, and there will be no opportunity of seeking revocation.

10. The Bill is likely to increase Australian taxpayers' outlay on immigration detention, and to exacerbate critical existing pressures on legal assistance services, tribunals and courts. As well as undermining the criminal justice system's core functions, the Bill's unintended consequences may involve:

    - fewer guilty pleas being made, resulting in more contested and protracted court proceedings and additional burdens on the criminal justice system and its participants; and
    - fewer migrants being willing to seek the protection of the law due to fears of visa cancellation – including in situations of dire need, such as family violence.[3]

11. The Law Council considers that there are significant shortcomings within the proposed legislation, and the Law Council is accordingly unable to support the Bill in its present form. However, if the proposed measures are to proceed, the Law Council recommends that the Bill must at the very least be amended to:

    - protect proportionate and reasonable decision-making on a case-by-case basis;

[3] As discussed in paragraph 114 onwards below.

- provide for consideration of the judicial sentence imposed as opposed to the maximum potential sentence allowed by the relevant legislation as set out at proposed paragraph 501(7AA)(b);
- remove the element of 'knowingly concerned' when defining a designated offence due to its uncertainty and potential broad application;
- include clear protections for vulnerable members of the community, including children by expressly stating that a child's visa may only be cancelled in exceptional circumstances. There should further be a statutory requirement to take into account the best interests of the child as a primary consideration in all section 501 decisions;
- introduce legislative safeguards to prevent *refoulement* or a person being placed in prolonged or indefinite detention as a result of a visa refusal or cancellation;
- introduce legislative safeguards to prevent against the possibility that foreign convictions have been made in circumstances in which neither the right to a fair trial nor other relevant international human rights were assured; and
- ensure that any expansion of the existing cancellation or refusal powers are accompanied by additional resourcing for downstream services that will likely be impacted, in particular the legal assistance sector and courts and tribunals.

12. The Law Council recommends that to assist its deliberations, the Committee should seek from the Department of Home Affairs (**the Department**) a detailed list, for all Australian jurisdictions, of the existing offences likely to be covered by the definition of 'designated offence' under proposed paragraphs 501(7AA)(a) and (b), noting that the relevant definitions are loose and open-ended. It also recommends that the Committee seek details from the Department of the:

    - current annual numbers in immigration detention for section 501 cancellations, as well as for section 116 cancellations;
    - average length and cost of their detention;
    - increase in immigration detention over the last decade due to:
        - section 501 cancellations; and
        - section 116 cancellations;
    - increase in immigration detention costs with respect to each of the above categories;
    - likely additional numbers of people whose visas will be cancelled under the Bill;
    - likely increase in appeals to the Administrative Appeals Tribunal (**AAT**) and Federal Court as a result of the Bill, and how this will be resourced;
    - projected increase in numbers of people to be detained as a result of the Bill;
    - projected additional immigration detention costs, as a result of the Bill;
    - projected impact on legal assistance services as a result of the Bill and on access to justice generally; and
    - Bill's projected impact on the criminal court system and all Australian court users, including witnesses and victims of crime.

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

Prior Committee consideration

14. The Law Council notes that the Bill replicates the Migration Amendment (Strengthening the Character Test) Bill 2019 (**the 2018 Bill**). The Committee previously inquired into the 2018 Bill and provided its report in December 2018[4] (**the Committee Report**). The Committee majority recommended that the 2018 Bill be passed.[5]

15. The Law Council's submission draws substantially on its previous submission to the Committee regarding the 2018 Bill. However, it also raises additional points, including key concerns about the Committee Report's findings in reaching this recommendation. It strongly encourages the Committee to reconsider the Bill afresh, having regard to its likely impacts, costs and unintended consequences.

The proposed measures

16. The Bill purports to strengthen the current legislative framework in relation to visa refusals and cancellations on character grounds. It proposes to do so by amending the Migration Act to provide grounds for non-citizens who are convicted of certain offences to be considered for visa refusal or cancellation.

17. Specifically, the provisions of the Bill:

    - amend the character test in section 501 of the Migration Act to insert additional grounds for when a person will be deemed to fail the character test under section 501 of the Migration Act and thereby exposed to visa cancellation or refusal where the non-citizen has been convicted of certain crimes; and
    - make consequential amendments to the definition of 'character concern' in section 5C of the Migration Act.

18. The proposed measures introduce a series of new 'designated offences' that will trigger the character cancellation powers under section 501 of the Migration Act. A designated offence is an offence against a law in force in Australia, or a foreign country, in relation to which the following conditions are satisfied, if one or more of the physical elements of the offence involves:

    - violence against a person, including (without limitation) murder, manslaughter, kidnapping, assault, aggravated burglary and the threat of violence (proposed subparagraph 501(7AA)(a)(i)); or
    - non-consensual conduct of a sexual nature, including (without limitation) sexual assault and the non-consensual commission of an act of indecency or sharing of an intimate image (subparagraph 501(7AA)(a)(ii)); or

[4] Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Strengthening the Character Test) Bill 2018 [Provisions]*, December 2018 (**the Committee Report**).
[5] Ibid, Rec 2.73.

- breaching an order made by a court or tribunal for the personal protection of another person (subparagraph 501(7AA)(a)(iii)); or
- using or possessing a weapon as defined by proposed subparagraph 501(7AA)(a)(iv); or
- aiding, abetting, counselling or procuring the commission of an offence that is a designated offence because of any of proposed subparagraphs 501(7AA)(a)(i) to (iv); or
- inducing the commission of an offence that is a designated offence because of any of proposed subparagraphs 501(7AA)(a)(i) to (iv), whether through threats or promises or otherwise; or
- 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 proposed subparagraphs 501(7AA)(a)(i) to (iv); or
- conspiring with others to commit an offence that is a designated offence because of any of proposed subparagraphs 501(7AA)(a)(i) to (iv).[6]

19. The definition of designated offence in the Bill also requires that the offence be potentially punishable by either life in prison, imprisonment for a fixed period of not less than two years, or imprisonment for a maximum term of not less than two years.[7] Importantly, there is no requirement that the non-citizen is given a custodial sentence, only that under the relevant legislative provision they could have been liable to a sentence of at least two years.

20. The Law Council notes that this proposal is a substantial shift from the existing approach under section 501, which relies on the actual sentencing of an individual rather than the sentencing options attached to the offence itself. As noted by the Senate Standing Committee for the Scrutiny of Bills (**Scrutiny Committee**) upon its consideration of the reforms, the proposed amendments 'would allow the Minister the discretion to cancel or refuse to issue a visa to a person who has been convicted of a designated offence but who may have received a very short sentence or no sentence at all'.[8]

21. A third requirement applies to foreign convictions. This requires that, assuming that the act or omission constituting the offence had taken place in the Australian Capital Territory (**ACT**):

    - the act or omission would have constituted an ACT offence; and
    - the ACT offence would have been punishable to the same extent (eg life imprisonment, imprisonment for a fixed or maximum term of two years).[9]

22. The amendments in the Bill, for the purpose of visa refusal, will apply to any visa application that has not been finally determined at commencement of the amendments or applications made after commencement. For the purposes of a visa cancellation the amendments will apply to anyone who holds a visa and committed or was convicted of a designated offence at any time, only limited by the fact of the cancellation decision being made after the commencement of these provisions. This raises concerns about

[6] Bill, proposed subparagraph 501(7AA)(a).
[7] Bill, proposed subparagraph 501(7AA)(b).
[8] Senate Standing Committee for the Scrutiny of Bills '*Scrutiny Digest 13 of 2018*' (**Scrutiny Committee Report**), [1.26].
[9] Proposed paragraph 501(7AA)(c), referring to proposed subparagraph 501(7AA)(b).

the potential retrospectivity of the proposed measures, an issue that has not been addressed in the Bill nor its explanatory material.

Existing powers of visa cancellation and refusal

23. Section 501 of the Migration Act already provides the Minister with very broad powers to cancel and refuse visas on character grounds. Under the present law, a non-citizen does not pass the character test for a wide range of reasons including:

    - the person has a 'substantial criminal record'.[10] This includes (inter alia) where a person has been sentenced:
        - to a term of imprisonment of 12 months or more;[11] or
        - to two or more terms of imprisonment, where the total of those terms is 12 months or more;[12]
    - the person has been convicted of an offence that was committed during immigration detention[13], or of escaping from immigration detention;[14]
    - the Minister reasonably suspects that the person has been or is a member of a group or organisation, or has had an association with a group, organisation or person, and the relevant group, organisation or person has been or is involved in criminal conduct;[15]
    - having regard to the person's past and present criminal conduct, *and/or* their past and present general conduct, the person is 'not of good character';[16]
    - there is a 'risk' (not a 'real risk' or a 'significant risk') that they would:
        - engage in criminal conduct; or
        - harass, molest, intimidate or stalk another person in Australia; or
        - vilify a segment of the Australian community; or
        - incite discord in the Australian community or a segment of it; or
        - represent a danger to the Australian community or to a segment of it, whether by way of being liable to become involved in activities that are 'disruptive to' it or in violence threatening harm to it, or in any other way;[17] or
    - a court in Australia or a foreign country has convicted or found a person guilty of a sexually based offence involving a child;[18] or
    - the person has, in Australia or a foreign country, been charged with certain offences of serious international concern;[19] or

[10] Migration Act, s 501(6)(a).
[11] Ibid, s 501(7)(c).
[12] Ibid, s 501(7)(d).
[13] Or connected with an escape from immigration detention: ibid, s 501(6)(aa).
[14] Ibid, s 501(6)(ab).
[15] Ibid, s 501(6)(b).
[16] Ibid, s5 01(6)(c)
[17] Ibid, s 501(6)(d).
[18] Ibid, s 501(6)(e).
[19] Genocide, a crime against humanity, a war crime, a crime involving torture or slavery, or a crime otherwise of serious international concern: ibid, s 501(6)(f).

- a person has been assessed by the Australian Security Intelligence Organisation as directly or indirectly a security risk;[20] or
- an Interpol notice has been issued from which it is reasonable to infer that the person would present a risk to the Australian community/a segment of it.[21]

24. Under the Migration Act, following the assessment of whether a person passes the character test:

    - the Minister (or a delegate) may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test;[22]
        - the rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2 in the Migration Act apply. This requires giving the visa holder prior notice of intent to consider cancellation, explain the grounds for cancelling the visa, set out any relevant information that may be used in reaching the decision to cancel the visa and provide the visa holder an opportunity to respond;[23]
    - the Minister (or a delegate) may cancel a person's visa if the Minister reasonably suspects that the person does not pass the character test, *and* the person does not satisfy the Minister that the person passes the character test.[24]
        - the rules of natural justice, and the above requirements to give the person prior notice, reasons and an opportunity to respond apply.[25]
    - under section 501(3), the Minister (*not* a delegate) may either refuse to grant a visa, or cancel a visa, if the Minister reasonably suspects that the person does not pass the character test *and* the Minister is satisfied that the refusal or cancellation is in the national interest.[26]
        - this power may only be exercised personally by the Minister;[27]
        - the rules of natural justice and the code of procedure requirements to give the person prior notice and an opportunity to respond do not apply;[28]
        - the person can seek revocation of the decision.[29] However, to be successful they must satisfy the Minister that they pass the character test.[30]
    - under the subsection 501(3A) mandatory cancellation provisions, the Minister (or a delegate) must cancel a visa if the Minister is satisfied that the person does not pass the character test because:

[20] Ibid, s 501(6)(g).
[21] Ibid, s 501(h).
[22] Ibid, s 501(1).
[23] Ibid, see also Subdivision AB of Division 3 of Part 2.
[24] Ibid, s 501(2).
[25] Ibid, see also Subdivision AB of Division 3 of Part 2.
[26] Ibid, s 501(3).
[27] Ibid, s 501(4).
[28] Ibid, s 501(5).
[29] Ibid, s 501C.
[30] Ibid, s 501C(4).

- the person has a substantial criminal record on the basis that the person has been sentenced to death; or to imprisonment for life; or to a term of imprisonment or 12 months or more;[31] or
- the person has been convicted or found guilty of a sexually based offence involving a child;[32]

and

- the person is serving a sentence of imprisonment on a full-time basis in custody for an offence against a Commonwealth, State or Territory law. Noting that:
    - the rules of natural justice and requirements to give prior notice and an opportunity to respond do not apply to the exercise of this power.[33]
    - the person can, however, seek revocation of the decision.[34]

25. Direction No 79[35] (**the Ministerial Direction**), provides directions to decision-makers regarding whether to exercise their relevant discretions to cancel or refuse a non-citizen's visa under section 501.[36] These are legally binding directions which apply to delegates exercising these powers, rather than to the Minister. For cancellations, they require delegates to have regard to factors including:

    - primary factors - the protection of the Australian community from criminal or other serious conduct; the best interests of minor children in Australia affected by the decision; and the expectations of the Australian community;
    - further factors – the nature and seriousness of the non-citizen's conduct to date; and the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct;[37] and
    - other considerations – including international non-refoulement obligations, the strength, nature and duration of ties, impact on Australian business interests, impact on victims, and extent of impediments if removed.

Consequence of visa cancellation

26. The consequences of having a visa refused or cancelled can be very serious. If a person's visa is refused or their visa is cancelled on character grounds, the person may (and in practice almost invariably will) become an unlawful non-citizen.[38] As a result, they would be subject to mandatory immigration detention[39] (often for prolonged

[31] Ibid, s 501(3A) in conjunction with s501(7)(a)-(c).
[32] Ibid, s501(3A) in conjunction with s501(6)(e).
[33] Ibid, s501(5).
[34] Ibid, s 501CA.
[35] Made under section 499 of the Migration Act.
[36] As well as to revoke a mandatory cancellation under section 501CA.
[37] Ibid.
[38] Migration Act, ss 13, 14, 501F. Under s 501F, once a person's application for a visa is refused or their visa is cancelled under s 501, all visas issued to that person, except a Protection Visa or a type of visa specified in the Migration Regulations 1994 (Cth) are cancelled, and all applications for visas other than a Protection Visa are deemed to be refused.
[39] According to the LIV, access to a bridging visa is provided only in very limited circumstances.

periods while they seek a revocation or are unable to be removed, as discussed below) and removal from Australia.[40]

27. In addition a person who has a visa refused or cancelled on character grounds will be prohibited from applying for another visa (other than a Protection Visa or a Bridging R (Class WR) Visa) while in Australia.[41] If they are removed from Australia following cancellation of their visa, they will not be eligible to be granted most types of Australian visas, and therefore cannot return to Australia.[42] This may mean permanent exclusion from Australia and for some people, permanent separation from family.

28. The Law Council notes that many people who are subject to cancellation have lived in Australia for most of their lives, often from a very young age, and have extensive family ties here. Many are also vulnerable due to their age, health or education and have no ties with their home country.

29. The importance of careful deliberation in section 501 character test decisions, having regard to the potential consequences, was recently outlined by Allsop CJ in *Hands v Minister for Immigration and Border Protection*:[43]

> *By way of preliminary comment, it can be said that cases under s 501 and the question of the consequences of a failure to pass the character test not infrequently raise important questions about the exercise of Executive power. Among the reasons for this importance are the human consequences removal from Australia can bring about… The consequences of these considerations are that where decisions might have devastating consequences visited upon people, the obligation of real consideration of the circumstances of the people affected must be approached confronting what is being done to people. This obligation and the expression of its performance is not a place for decisional checklists or formulaic expression. Mechanical formulaic expression and pre-digested shorthand expressions may hide a lack of the necessary reflection upon the whole consideration of the human consequences involved. Genuine consideration of the human consequences demands honest confrontation of what is being done to people. Such considerations do not detract from, indeed they reinforce, the recognition, in an assessment of legality, that those entrusted with such responsibility be given the freedom of lawful decision-making required by Parliament.*[44]

Prior expansion of powers and effects

30. The Law Council notes that in 2014 the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) was introduced. The effect of the amendments introduced by that Act was to lower substantially the threshold for failing the character test and to expand the Minister's powers to cancel or revoke an individual's visa.

---

[40] Migration Act, ss 189 (unlawful non-citizens must be detained), 196 (an unlawful non-citizen must be detained until eg removed or granted a visa) and 198 (a person must be removed as soon as practicable).
[41] Ibid, s 501E. Under s 501E(2), a person may still apply for a Protection Visa or a visa specified in the Migration Regulations, which specify a Bridging R (Class WR) Visa for this purpose: reg 2.12AA.
[42] See Migration Regulations 1994 (Cth), Schedule 5, clause 5001(c) and (d). The effect of this clause is that a person who has been removed from Australia following cancellation of their visa under sections 501, 501A, 501B or 501BA, and has not subsequently had that cancellation revoked or been granted a visa by the Minister personally, will not be eligible to be granted any visa to which the 5001 criteria apply
[43] [2018] FCAFC 225 (***Hands***).
[44] *Hands*, [3] (Allsop CJ).

31. In previous submissions, the Law Council has submitted that the expanded cancellation powers raised significant concerns given their breadth, as well as the low cancellation thresholds and insufficient safeguards involved.[45] Similar observations have been made by other commentators.[46]

32. The number of visa cancellations and refusals on character grounds has increased dramatically since the commencement of the 2014 reforms.[47] According to website of the Department, between the 2013-14 and 2016-2017 financial years, the number of visa cancellations on character grounds increased by over 1400 per cent.[48] That is, in 2013-2014, there were 76 section 501 cancellations, while in 2016-2017, there were 1277.[49] Its annual report states that over 900 visas were cancelled on character grounds during 2017-2018.[50]

33. This has increased the numbers of people being held in immigration detention in Australia due to visa cancellation. The Australian Human Rights Commission (**AHRC**) has noted that, in October 2013, there were 115 people in detention due to visa cancellation.[51] By December 2016, 591 people were in detention for this reason, most of whose (451) visas had been cancelled under section 501.[52]

34. The Department's June 2019 statistics indicate that of the 1352 people held in Australia's immigration detention facilities, 353 (26 per cent) are for section 501 visa cancellations, while another 357 (26 per cent) are for other kinds of visa cancellations.[53]

35. The periods spent in immigration detention are frequently lengthy. In 2016, the Commonwealth Ombudsman indicated that the average length of time in detention for people on subsection 501(3A) mandatory cancellations who had requested revocation was 153 days.[54] In March 2015, there were 158 cases where people had spent six months or more waiting an outcome, and 21 cases of people had spent 12 months or more.[55]

36. Lengthy detention of individuals for such purposes is not only harmful to the individuals involved and their families, it is costly to the Australian community. While the Law Council does not have current figures, it notes that in 2013-14, the National Commission of Audit estimated the annual cost of holding a person in onshore detention at $239 000.[56] Holding people in community detention was cheaper, at under

---

[45] Law Council of Australia, Submission No 82 to the Joint Standing Committee on Migration, *Inquiry into Migrant Settlement Outcomes*, 17 February 2017, 5-6.
[46] Joint Standing Committee on Migration, Parliament of Australia, *No one teaches you to become an Australian: Report of the inquiry into migrant settlement outcomes* (December 2017), 155.
[47] See <www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>.
[48] Department, 'Visa Statistics – Key Visa Cancellation Statistics' (online), <https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>.
[49] Ibid.
[50] Department, *Annual Report*, 29.
[51] Including due to broader cancellation powers beyond section 501 (eg under s 116 of the Migration Act).
[52] AHRC, *Asylum Seekers, refugees and human rights: Snapshot Report (2ndEdition) (2017)18, citing Department of Immigration and Border Protection, Immigration Detention and Community Statistics Summary* (31 December 2016) 4.
[53] Department, *Immigration Detention and Community Statistics Summary*, 30 June 2019, 7.
[54] Ombudsman's Report, 6.
[55] Ibid.
[56] National Commission of Audit, Government of Australia, *10.14 Illegal Maritime Arrivals,* appendix volume 2, 2014 <http://www.ncoa.gov.au/report/appendix-vol-2/10-14-illegal-maritime-arrival-costs.html>.

$100 000 per year, and keeping a person on bridging visas was cheaper again (around $40 000).[57]

37. The AHRC has further identified the inefficiency of the mandatory visa cancellation process, reporting that up to 50 per cent of all such cancellations are ultimately revoked.[58] Such processes would appear to be unnecessarily swallowing departmental and detention resources.[59]

38. The Law Council's Migration Law Committee further observes that the character test expansions have led not only to more cancellations but also a greater use of the Minister's personal powers, not only through section 501 but also through section 195A, which enables the Minister to grant visas to detainees even where a section 501 cancellation has taken place. This is an inefficient use of Ministerial time. Detainees must remain in prolonged detention while the Department and the Minister consider such matters.

Justification and necessity

39. The Minister's second reading speech accompanying the Bill asserts that the proposed changes are in line with community expectations, and that:

> *Entry and stay in Australia by noncitizens is a privilege, not a right, and the Australian community expects that the Australian government can and should refuse entry to noncitizens, or cancel their visas, if they do not abide by the rule of law….*
>
> *This bill ensures that non-citizens who have been convicted of serious offences, and who pose a risk to the safety of the Australian community, are appropriately considered for visa refusal or cancellation.*

40. A further rationale is that the Minister and delegates require a 'clear and objective ground' with which to consider the cancellation or refusal of a visa to a non-citizen who has been convicted of offences involving:

    - violence against a person, including murder, manslaughter, kidnapping, assault, aggravated burglary and the threat of violence;
    - non-consensual conduct of a sexual nature;
    - using or possessing a weapon; or
    - breaching a court order made for the personal protection of another person.[60]

41. Similar Departmental statements were relied upon by the Committee majority in the Committee Report in recommending the 2018 Bill's passage.[61]

42. The Law Council recognises that it is both necessary and appropriate to regulate people seeking to enter and remain in Australia by reference to questions of character. The Executive should have powers where necessary to prevent a dangerous individual

[57] Ibid Chart 8.7; UNSW Sydney Newsroom, *Commission of Audit reveals offshore processing budget blowout*, (2 May 2014) <https://newsroom.unsw.edu.au/news/law/commission-audit-reveals-offshore-processing-budget-blowout>.
[58] AHRC, *Review processes associated with visa cancellations made on criminal grounds,* Submission to the Joint Standing Committee on Migration, 27 April 2018, 30.
[59] Ibid.
[60] Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, Second Reading Speech, Migration Amendment (Strengthening the Character Test) Bill 2019, House of Representatives, 4 July 2019.
[61] Committee Report, [2.8]-[2.9], [2.69].

from obtaining or retaining the right to enter and remain in Australia. However, a decision to cancel or refuse a visa based on character grounds can have a profound effect on an individual's life and the Law Council submits that caution should be exercised with any attempt to expand this power beyond its existing parameters.

43. Noting the significant implications for visa cancellations or refusals, it is submitted that the need for such an expansion, when weighed against the likely consequences - including permanent removal from Australia, prolonged detention, split families, and increased community costs - has not been made out. This was underlined by the Scrutiny Committee regarding the 2018 Bill when it remarked that:

> *… in light of the already extremely 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.*[62]

Need to capture 'serious offences'

44. The Law Council considers that the existing character test provisions are more than ample to capture 'serious offences', based on community expectations. Indeed, the existing provisions are based on thresholds which are far lower than those contained in the definitions of 'serious offences' which apply in Commonwealth and NSW law. As discussed further below, to meet these definitions, certain offences must be punishable by imprisonment for at least three and five years respectively.[63]

45. Importantly, it is currently not the case that only individuals sentenced to twelve months or more imprisonment fail the character test. Under current legislation, individuals can either fail the character test and have their visas cancelled under the mandatory cancellation provisions,[64] or they can be found to fail it and have their visas cancelled in the exercise of a discretion. For example, a person will already fail the character test if they have, over any period, received a sentence or sentences equal to or exceeding 12 months' imprisonment. This includes people who have received, for example, a nine-month sentence in 1970, and a three-month sentence in 2018.

46. Currently, a delegate of the Minister can also determine that a person fails the character test if they pose any kind of risk to the community on the basis of their criminal or general conduct, or due to an association they may have, regardless of whether they have been convicted of any crime at all. A determination that a person fails the character test means their visa either must or may be cancelled or refused. People have a right to merits review in some cases only, as this is only available where a delegate, and not the Minister personally, makes the decision.[65]

47. Having regard to the powers that already exist to cancel or refuse a visa based on character grounds, the Law Council considers there to be significant overlap between those current provisions and the proposed measures contained in the Bill. For example, the kinds of offences referred to in the Explanatory Memorandum to justify the need for the new laws, such as murder, manslaughter, kidnapping, assault and aggravated burglary,[66] are already covered by existing legislation. Except for assault, almost all instances of these offences will attract a custodial sentence of at least 12 months as a

---

[62] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2018*, [1.30].
[63] *Crimes Act 1914* (Cth), s 15GE (2); *Crimes Act 1900* (NSW), s 4.
[64] Migration Act, s 501(3A), operating in conjunction with s 501(7)(a)-(c).
[65] Migration Act, s 500(1)(b).
[66] Migration Amendment (Strengthening the Character Test) Bill 2019 – Explanatory Memorandum (**Explanatory Memorandum**), 5.

matter of course. Provisions are also available to respond to individuals associated with organised crime and outlaw motorcycle gangs.

Need for a 'clear, objective test' vs a deliberative process

48. While the Committee relied on the need for a 'clear, objective' character test, the Law Council notes that such 'streamlined' character test provisions already exist – that is, whether a person has been sentenced to a term of imprisonment of 12 months or more (which can result in mandatory cancellation[67]), or whether they have been sentenced to two or more terms of imprisonment which together total 12 months (which can result in discretionary cancellation or refusal).

49. Therefore, the Bill appears principally likely to capture additional people at the very low end of offending for the proposed designated offences, for whom a court has determined that the level of culpability in the circumstances is below even the existing thresholds.

50. In such circumstances, under existing provisions, the Minister or delegate would then be able to ask whether the person would fail the test on the basis of the other criteria in subsection 501(6), including whether there is a risk that they pose a danger to the community, or having regard to their past and present criminal/general conduct, they are not of good character. The Law Council considers that in cases not meeting existing objective thresholds, this deliberative exercise is important.

51. The proposed Bill would mean that there would be no need for such an evaluative exercise for the character test element. What is proposed is that a person would automatically fail the character test, based on the fact of a conviction for a designated offence with a two year statutory maximum sentence – regardless of the sentence a person received, whether they were imprisoned at all, and whether they present a community risk, or indeed any individual circumstance of their case - rather than careful consideration and evaluative judgment as to whether a person meets the character test. The Law Council is concerned that this will increase the likelihood of disproportionate decision-making as there will be no real deliberation at this point in the decision-making process. It is also evident when then going onto the next stage (the exercise of discretion, as discussed below), the Bill's purpose is to capture such persons and this is likely to weigh in favour of cancellation.

52. The Explanatory Memorandum states that 'discretionary visa cancellation and refusal decisions are based on objective standards of criminality and seriousness'.[68] However, there are serious issues of fairness when such objectivity gives little or no weight to the mitigating factors that are ordinarily considered by the judiciary following the presentation of all the facts at trial. This is discussed further below.

Direction safeguards – decision-making stage

53. Once a person fails the character test, the discretionary power to cancel or refuse their visa is enlivened. This is the next stage of the process. As noted above, the Direction requires that, in the exercise of this discretion, a Departmental delegate must have regard to certain factors, including the risks to the community, the best interests of the child, community expectations, the nature and seriousness of the conduct, non-refoulement obligations, and the strength, nature and duration of a person's ties.

[67] As discussed, the person must also be serving a sentence of imprisonment on a full-time basis in custody: Migration Act s 501(3A).
[68] Explanatory Memorandum, 7.

54. However, the Direction's requirements do not apply to the Minister. Nor, as discussed, when the Minister makes the decision, does merits review apply.

55. In particular, the Minister can exercise his or her personal discretionary power under subsection 501(3) to refuse or cancel a visa, without affording natural justice, on the basis that:

    - the Minister reasonably suspects that the person does not pass the character test – as noted above, if the Bill is passed, establishing this will not raise difficulties with respect to people convicted of designated offences with the requisite two maximum sentence; and
    - the Minister is satisfied that the refusal or cancellation is in the 'national interest'.

56. The bases on which such a decision can be reviewed by way of judicial review are very limited, particularly due to the breadth of the 'national interest' criterion.[69] While the Minister must give proper, genuine and realistic consideration to the merits of the case,[70] which means engaging in an active intellectual process in determining whether to exercise the subsection 501(3) power,[71] the Full Federal Court has recently remarked in *Carrascalao v Minister for Immigration and Border Protection*[72] that:

> *There can be no doubt that, in this particular statutory context, the expression "national interest" is, like the expression "public interest", one of considerable breadth and essentially involves a political question which was entrusted to the Minister.*[73]

57. Further, the Full Federal Court stated that:

> *We accept the Minister's submission that it was a matter for the Minister to decide, on the merits of any particular case, what national interest factors are engaged in that case… There is no obligation on the Minister, on determining whether or not to exercise his power under s 501(3), to advert to all and every possible consideration which may inform an assessment of the national interest in the particular case.*[74]

58. As Donnelly has observed, 'expressed at this level of generality, it is a matter for the Minister to decide what national interest considerations are relevant'.[75]

59. Further, there are significant limitations on the right of an affected person to seek revocation of a visa cancellation decision under subsection 501(3).[76] As discussed in *Carrascalao*, this:

> *… relates to the fact that, under s 501C(3), the only relevant representations which the affected person can make, and which the Minister is obliged to*

---

[69] *Plaintiff S156/2013 v MIBP* [2014] HCA 22; *Carrascalao v Minister for Immigration and Border Protection* (2017) 347 ALR 173 (***Carrascalao***), 210-211 [158].
[70] *Carrascalao*, 178 [19]; 200, [120]; also *Chetcuti v Minister for Immigration and Border Protection* [2018] FCA 477 (***Checuti***), [17]. The Minister must also exercise the discretion reasonably.
[71] ibid, [35]
[72] Ibid.
[73] Ibid, 210-211,156].
[74] Ibid, [158].
[75] Jason Donnelly, 'Failure to give proper, genuine and realistic consideration to the merits of the case: a critique of *Carrascalao'* (2018) UNSW Law Journal Forum 1, 9.
[76] Unless a relevant exception applies, the Minister is obliged by s 501C(3)(b) to invite the affected person to make representations about the possible revocation of the original visa cancellation decision. The power of revocation is vested only in the Minister personally (s 501C(5)).

consider, are representations that are directed to the issue of satisfaction of the character test. As the Full Court stated in Taulahi No 1 at [51]:

> *The result is that, although s 501C(3) contemplates that a former visa holder whose visa has been cancelled under s 501(3) will have an opportunity to make representations about the revocation of the cancellation decision, the only relevant representations are those that relate to satisfaction of the character test. Because of the definition in s 501(6), however, the application of the character test does not generally allow for any nuanced judgment. Representations about matters that might incline the Minister to revoke the decision as a matter of discretion, even though the former visa holder is unable to satisfy the Minister that he or she passes the character test, cannot under the statutory regime applicable to a decision under s 501(3), form a basis for revocation. Bearing in mind that the rules of natural justice have no application to a decision made under s 501(3), a person whose visa has been cancelled under s 501(3) has therefore no statutorily-conferred opportunity at any stage of the process to persuade the Minister that a visa should not be cancelled on discretionary grounds. The position is different if the Minister proceeds to cancel a visa under s 501(2) of the Migration Act, because in this case the visa holder has an opportunity to inform the Minister of the matters that the visa holder believes are relevant to the Minister's exercise of discretion, even though he cannot satisfy the Minister that he or she passes the character test, so that they may be brought to bear on the Minister's consideration of whether, as a matter of discretion, a visa ought not be cancelled.*

These features of the statutory framework, particularly the displacement of the requirements of natural justice and the limited scope of the representations which an affected person may make in seeking to have the Minister revoke a visa cancellation decision, highlight the need for the Minister to exercise his important power under s 501(3) of the Act with appropriate care and attention, including by engaging in an active intellectual process in reviewing relevant materials placed before him to assist in the discharge of this significant statutory function.[77]

60. The above reinforces that when the Minister personally exercises his or her subsection 501(3) power more, compared to Departmental delegates exercising their discretionary powers, relatively few safeguards will apply to ensure good decision-making in the circumstances envisaged by the Bill.

61. That is, a clear possibility is that if a person fails the character test as proposed by the Bill (designated offence conviction with requisite maximum sentence, which leaves little room for argument), they can be referred by the Department to the Minister for a subsection 501(3) decision. This decision will not be subject to merits review, or, in most cases, any significant threat of judicial review. As noted, the Minister is not bound by the Direction. Because the person will have 'objectively' failed the character test, they will not be able to successfully seek revocation under section 501C.[78] This result

[77] *Carrascalao*, [58]-[60], citing *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177, 51].

[78] As revocation requires satisfying the Minister that they pass the character test: s 501C(4)(b); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, [198] (Gummow and Hayne JJ)

appears questionable in light of the Bill's significant consequences, and the low thresholds which it applies (as discussed and exemplified further below).

62. A number of recent court decisions have determined that the Minister, in exercising his power in relation to section 501 cancellations, has not given proper, genuine and realistic consideration when doing so.[79] Given the intention of the Bill, and that it is likely to lead to a greater workload of cancellations for both the Department and the Minister, this remains a concern.

Case studies

63. The Committee Report relies[80] on the Department's case studies to demonstrate why the Bill's changes are necessary to protect the community, including the following:

> *Mr C is an adult permanent visa holder in Australia who has links to youth gangs. Mr C was found guilty without conviction for theft related offences, for which he received a youth supervision order. He subsequently was also convicted of a violent offence and sentenced to a period of four months imprisonment. Mr C has not been sentenced to a term of imprisonment of 12 months or more and, under the current character provisions, does not objectively fail the character test on the basis of his criminal history.*
>
> *Mr C's visa cannot be considered for cancellation under section 116(1)(e) of the Act on the basis that he may present a risk to the community, as this power does not apply to permanent visa holders who are in Australia. Mr C will remain in Australia as the holder of a permanent visa, unless sufficient adverse information becomes available to find that Mr C does not pass the character test under subjective grounds.*
>
> *However, under the proposed designated offences ground in the* [2018 Bill]*, Mr C would objectively fail the character test as he has been convicted of a violent offence, which is punishable by imprisonment for a maximum term of five years.*[81]

64. The above case study overlooks that Mr C's visa could already be cancelled as he could fail the existing character test under, for example:

- paragraph 501(6)(b) – reasonable suspicion that he has been a member of a group or organisation, or has had an association with a group, organisation or person, and that group, organisation or person has been or is involved in criminal conduct;
- paragraph 501(6)(c) – having regard to the person's past and present criminal or general conduct, the person is not of good character.

65. It therefore queries the Department's and Committee's conclusions that the Bill is necessary. Further, Mr C was apparently a child when some of the relevant offending (theft) occurred. He has been sentenced to four months' imprisonment in total, and the precise nature of his 'violent offence' is not disclosed (but may include assault or threats), nor are any mitigating factors. Given his four month sentence, his offending must be assumed to be relatively minor or alternatively there must have been compelling mitigating factors. The circumstances do not appear to fall within normal community expectations of a 'serious offence'. Nor do they require that as a young

[79] Eg, *Carrascalao* and *Checuti*.
[80] Committee Report, 15.
[81] Department, Submission to the Committee concerning the 2018 Bill, 13.

man, he should automatically fail the character test and be exposed to cancellation and permanent removal from his country or family, without some further evaluation of whether he fails the character test.

66. The Law Council further notes that there is a higher threshold for permanent visa holders, which is one reason why paragraph 116(1)(e) does not and should not apply to Mr C as such a holder.

67. With respect to the remainder of the case studies identified in the Department's submission,[82] the statements that Mr A or Mr B would not 'objectively' fail the character test as they have not been sentenced to 12 months or more, are also problematic. These do not canvass the possibility that both could be considered under the existing character test provisions, outside of mandatory cancellation. They also lack specificity on the nature of the offences involved, the level of culpability and mitigating factors. Neither has received a sentence of imprisonment. Mr A has received fines, good behaviour bonds and intensive correction orders and Mr B has received fines and community correction orders.

68. In short, the examples are less than fully fleshed out and omit important information that ought to be relevant to any proper assessment of whether the person does or should fail the character test. They seem apt to provoke an instinctive reaction by reference to the limited information provided, and in particular by the reference to the class of offences committed, without consideration of the nature of the particular offences or the surrounding circumstances. The problems with the examples reflect the problems with the Bill.

Availability of other powers

69. The Law Council considers that the necessity for the Bill should also be considered in light of the visa cancellation powers available under the Act, which are not discussed in the Explanatory Memorandum. These powers include section 116 cancellations, which for visa holders who are in Australia, generally apply to temporary, rather than permanent, visa holders.[83] Section 116 contains a number of general grounds for cancellation, including where:

    - visa conditions have been breached, and
    - where the presence of the holder in Australia may be a risk to the health, safety or good order of the Australian community, a segment of the community, or an individual or individuals;[84] or
    - a prescribed ground for cancelling a visa applies to the holder.[85] These include, for most categories of temporary visa,[86] Ministerial satisfaction that the holder has been convicted of an offence against a Commonwealth, State or Territory law,[87] regardless of the penalty imposed (if any).[88]

70. The breadth of these powers further raises questions as to the Bill's necessity.

---

[82] Ibid.
[83] Migration Act, s 117(2).
[84] Migration Act, s 116(1)(b) and (e).
[85] Migration Act, s 116(1)(g).
[86] Other than a Subclass 050 (Bridging (General) visa, a Subclass (Bridging (Protection Visa Applicant)) visa or a Subclass 444 (Special Category) visa.
[87] Migration Regulations, reg 2.43(1)(oa).
[88] Ibid.

Reliance on maximum sentencing penalties

71. Proposed paragraph 501(7AA)(b) provides for a minimum standard of punishment for an offence to be considered a 'designated offence' for the purposes of the character test, and includes offences punishable by imprisonment for a maximum term of not less than two years.[89] As outlined above, this approach seeks to shift the threshold for visa cancellation or refusal away from an individual's imposed sentence (which will tend to reflect the seriousness of the actual conduct of the individual) to the maximum penalty for the legislatively defined class of offence, regardless of the actual sentence handed down to the individual.

72. Maximum penalties are reserved for the worst, most serious examples of an offence.[90] They cannot and do not take into account the actual conduct of the offender or other case-specific facts. In many cases the elements of a single named 'offence' may be satisfied by a broad range of acts, committed in a very wide range of circumstances. The Law Council is concerned that this shift fails to appreciate the role of criminal sentencing and the careful consideration that is given by the courts to a range of social factors when an individual is convicted of an offence, including mitigating circumstances such as age, health, disability, moral culpability, or the objective seriousness of the individual's conduct constituting the offence.

73. The Law Council submits that having a cancellation provision based on the maximum possible sentence rather than the actual sentence imposed fails to consider both the legislative structure of the criminal law legislation or the circumstances of the offence and individual concerned, and does not adequately reflect the seriousness of the individual's conduct or risk. The law has long recognised that different circumstances give rise to different standards of culpability. As such, possible maximum sentences are not a proper basis for determining seriousness.

74. While the proposed powers are discretionary in nature as opposed to mandatory, they have the potential to undermine the sentencing function of the judicial system and the discretion it possesses regarding sentencing offenders.

75. The Explanatory Memorandum states that 'discretionary visa cancellation and refusal decisions are based on objective standards of criminality and seriousness'.[91] However, there are serious issues of fairness when such objectivity gives little or no weight to the mitigating factors that are ordinarily considered by the judiciary following the presentation of all the facts at trial.

76. It worth emphasising that in sentencing a person, the judiciary must have regard to community protection. For example, under Victorian legislation, one of the only purposes for which sentences may be imposed include protecting the community from the offender.[92]

77. The Law Council considers the above issues to be serious shortcomings of the proposed legislation.

---

[89] Bill, proposed s 501(7AA)(b)(iii).
[90] See e.g. Sentencing Advisory Council (Vic), *Maximum Penalties* <www.sentencingcouncil.vic.gov.au/about-sentencing/maximum-penalties>.
[91] Explanatory Memorandum, 7.
[92] As well as just punishment, deterrence, rehabilitation, denunciation etc: eg, *Sentencing Act 1991* (Vic), s 5(1).

Low threshold and overly broad

78. The Explanatory Memorandum states that 'the intention of new paragraph 501(7AA)(b) is to make it clear that a designated offence must be a serious offence, and not merely a minor or trifling offence'.[93]

79. The Law Council considers that existing criminal law definitions of a 'serious offence' provide important benchmarks in this regard. Under the *Crimes Act 1914* (Cth) for example, a 'serious Commonwealth offence' must involve a specified matter[94], which is punishable on conviction by imprisonment for a period of three years or more.[95] Meanwhile, under the *Crimes Act 1900* (NSW), a 'serious indictable offence' means an indictable offence that is punishable by imprisonment for life or for a term of five years or more.[96]Against these benchmarks, the Law Council submits that the Bill's thresholds are far too low and overly broad. Despite assurances contained in the Explanatory Memorandum, may in fact capture a significant number of individuals whose offences do not fall under any ordinary definition of 'serious offences'. They include any designated offence with a statutory maximum sentence of just two years, regardless of the judicial sentence imposed. Moreover, the designation of such offences as 'designated offences' triggering automatic failure of the character test may well tend to encourage decision-makers to view instances of such offences as inherently serious for the purpose of character decisions, diverting attention from the need to consider the individual circumstances of each case.

80. Offences which could fall under the category of 'designated offences' include threats and attempted offences which are not carried out, common assault in some jurisdictions[97] and any form of contravention of an intervention order, irrespective of the level of contravention. As the LIV has pointed out, in Victoria, for several of these offences, two years imprisonment is the *maximum* sentence. However ordinarily, very few offenders are given the maximum term of imprisonment as a sentence.

81. Further, the designation of offences by reference to the statutory maximum penalty tends to introduce arbitrary distinctions between states. The offence of assault demonstrates this. The maximum penalty for common assault vary widely across Australian jurisdictions: 21 years' imprisonment in Tasmania;[98] five years' imprisonment in Victoria;[99] three years' imprisonment in Queensland,[100] two years' imprisonment in the Australian Capital Territory,[101] New South Wales[102] and South Australia;[103]; 18 months' imprisonment in Western Australia, and one year's imprisonment in the Northern Territory.[104]

82. The statutory maximum penalty is reserved for the worst category of contraventions of an offence.[105] The Bill will result in even the most minor instances of the commission

[93] Explanatory Memorandum, 7.
[94] *Crimes Act 1914* (Cth), s 15GE (1): this list sets out This includes a broad range of matters including theft, fraud, tax evasion, extortion, controlled substances, armament dealings.
[95] *Crimes Act 1914* (Cth), s 15GE.
[96] *Crimes Act 1900* (NSW), s 4.
[97] Eg, *Crimes Act 1958* (Vic), s 320.
[98] *Criminal Code Act 1924* (Tas), s 389.
[99] *Crimes Act 1958* (Vic), s 320.
[100] *Criminal Code 1899* (Qld), s 335.
[101] *Crimes Act 1900* (ACT), s 26.
[102] *Crimes Act 1900* (NSW), s 61.
[103] *Criminal Law Consolidation Act 1935* (SA), s 20.
[104] *Criminal Code* (NT), s 188(1).
[105] *Ibbs v The Queen* (1987) 163 CLR 447, 451–452; 5; 468.

of particular offences being captured, providing the penalty reserved for the worst instance of that offence – is higher than the penalty threshold.

83. For example, the LIV further notes the inclusion of possession of a weapon in proposed subparagraph 501(7AA)(a)(iv) of the Bill. Whilst the maximum penalty for possession, use or carriage of a prohibited weapon is imprisonment for two years in Victoria, the LIV advises that this is very rarely exercised and, in the period of 1 July 2013 to 30 June 2016, of the 5,614 people found guilty of this charge, only 20.6 per cent received a prison sentence of any length. Only 1.2 per cent received sentences of 18 to 24 months or more.

84. The LIV has also expressed its concern with other types of offending that will be captured by the Bill. Examples that would result in failing the character test include a child who shares an intimate image of their girlfriend or boyfriend without their consent (a summary offence).[106]

85. The Law Council shares these concerns and submits that the proposed measures have the potential to capture a significant number of individuals whose conduct may not fall under the commonly accepted definition of a serious offence, including, for example:

- the situation of a person carrying pepper spray and convicted of possession of a weapon,[107] as discussed by the Scrutiny Committee, which stated:

> *Although this person would only be given a minor fine, this conviction would empower the Minister to cancel their visa, leading to their detention and removal from Australia. As the power to cancel would be based simply on the fact of conviction, there is nothing in the legislation that would require the Minister to consider the person's overall good character, their family or their other connections to Australia or the length of their stay in Australia (noting that this could apply to permanent residents who have lived in Australia for many years).*[108]

- the real example provided recently to the Law Council's Justice Project by a regional solicitor concerning a client who was subject to a family violence prevention order. In Victoria, for example, this order can include any conditions considered necessary or desirable by the court in the circumstances, including emailing or texting the protected person, or being within a specified distance of their home.[109] The maximum penalty for contravening the order is two years.[110] In the case study, the client was a father who had to leave his job to be the primary carer for his three children. Due to his poverty and a lack of public housing, he was unable to secure permanent accommodation. His family was unable to help and he had no other acommodation except for a one week short term stay. He rang the lawyer and said that:

---

[106] Under the *Summary Offences Act 1966* (Vic) s 41DA.
[107] As noted by the Scrutiny Committee, section 5AA of the *Control of Weapons Act 1990* (Vic) and Schedule 3, item 21 of the Control of Regulations 2011, makes it an offence, punishable by up to two years imprisonment, to possess, use or carry a prohibited weapon, including an article 'designed or adapted to emit or discharge an offensive, noxious or irritant liquid, powder, gas or chemical so as to cause disability, incapacity or harm to another person'. See also proposed subparagraph 501(7AA)(iv) which states that using or possessing a weapon is a designated offence: Scrutiny Committee Report, 9-10.
[108] Scrutiny Committee,
[109] Ibid, s 81.
[110] *Family Violence Protection Act 2008* (Vic), s 123(2).

'..he was aware that he was breaching [the order] because he was dropping off the kids with their mother, he knew he would be breached and that he would go to jail, that's exactly what happened. He didn't have any other choices for what to do on housing. So a key priority for us would be ensuring access to housing and making sure that it is secure and sustainable.[111]

If this father was on a visa, he would also, under the Bill's provisions, fail the character test and become liable to cancellation and removal from Australia. This would appear to be a highly disproportionate response in the circumstances.

- the breach of a family violence protection or domestic violence order by a person who is primarily a victim of family violence. The QLS has raised specific concerns in this regard, noting recent reports of domestic violence orders being placed on women in Queensland who are primarily the victims of domestic abuse but are placed under such an order for retaliating against a violent partner.[112] It is recognised that such women are being convicted of breaching the order when they retaliate during a subsequent incident. This is reportedly contributing significantly to increased imprisonment of women in Queensland. If a non-citizen women was subject to such a conviction, she would fail the test pursuant to the Bill and be exposed to the possibility of her visa being refused or cancelled.

86. The Law Council further considers that proposed paragraph 501(7AA)(a) is vague and open-ended. It suggests that the Committee's deliberations would be assisted by the Department providing a list, for all Australian jurisdictions, of the existing offences likely to be covered by the definition of 'designated offence' under the combination of proposed paragraphs 501(7AA)(a) and (b).

Recommendation

- **The Law Council considers that to assist its deliberations, the Committee should seek from the Department a detailed list, for all Australian jurisdictions, of the existing offences likely to be covered by the definition of 'designated offence' under the combination of proposed paragraphs 501(7AA)(a) and (b).**

The inclusion of 'knowingly concerned'

87. Proposed subparagraph 501(7AA)(a)(vii), if enacted, would apply to non-citizens who are in any way, directly or indirectly, knowingly concerned in or otherwise a party to the commission of a designated offence. This is in addition to provisions which would apply if a non-citizen aids, counsels or procures the commission of a designated offence, or induces its commission.[113]

88. The Law Council has previously raised significant concerns with the inclusion of the phrase 'knowingly concerned' in the criminal law context, noting that this gives rise to a series of open questions about the scope of activity captured and a notable absence

[111] Justice Project Final Report (2018), Regional Rural and Remote Australians Chapter, 52.
[112] Hayley Gleeson, 'What happens when a domestic violence victim fights back?' *ABC* (online), 30 July 2019 <https://www.abc.net.au/news/2019-07-30/the-women-behind-bars-breaching-domestic-violence-order/11330408>.
[113] Bill, proposed subparagraphs 501 (7AA)(v) and (vi).

of criminal law jurisprudence to rely on when interpreting the threshold.[114] In a submission in relation to the Crimes Legislation Amendment (Powers and Offences) Bill 2015, the Law Council stated:

> *When might a person be 'knowingly concerned' in the commission of an offence where he or she is not aiding and abetting, counselling or procuring its commission? Plainly enough it should not suffice to be 'concerned about' the offence. For example, a journalist goes 'undercover' to observe the actions of a group of young persons in order to write a story about them and observes them commit offences. The journalist does not assist in the commission of the offences or encourage them, but could the journalist be said to be 'knowingly concerned' in the commission of them? Would such conduct be caught? What if the journalist was instead an undercover police officer, obtaining criminal intelligence?*[115]

89. In that submission, the Law Council recommended against introducing the concept of 'knowingly concerned' into the *Criminal Code Act 1995* (Cth) (**Criminal Code**), without first undertaking a full public consultation process, including with State and Territory jurisdictions and the relevant specialist professional associations. Ultimately the proposed insertion of 'knowingly concerned' as one of the general elements of criminal responsibility was not implemented, based in part on concerns raised by the Law Council and others.

90. The Law Council recognises that there is some limited usage of the phrase 'knowingly concerned' in legislation. For example, it is contained in the *Competition and Consumer Act 2010* (Cth) cartel provisions[116], and is also in the *Criminal Code 2002* (ACT).[117] However, it is not recognised as a general principle of criminal responsibility in the *Criminal Code 1995* (Cth).[118] Further, where it is not, this section purports to characterise as criminal conduct that which is not criminal in the jurisdiction itself. It is unclear to what extent this concept exists across each jurisdiction.

91. In general, the Law Council is concerned that the current Bill's attempt to reintroduce this concept in relation to criminal conduct raises issues of uncertainty and a lack of clarity, as well as introducing a confusion between the concepts of 'intention' and 'knowledge' which are separate concepts under the Criminal Code and in common usage. Should the proposed measures proceed, the Law Council strongly opposes the inclusion of 'knowingly concerned' as a fault element that triggers the cancellation and refusal powers, and refers the Committee to the Law Council's earlier submissions on this point as referenced above. At the very least, this provision must be removed due to its broad nature and ill-defined application in common law or codified criminal law.

92. This is an important issue, which the Committee Report did not consider in depth.[119]

---

[114] See, Law Council of Australia, submission to the Senate Legal and Constitutional Affairs Committee on the Crimes Legislation Amendment (Powers and Offences) Bill 2015 (7 May 2015).
[115] Ibid, [48].
[116] *Competition and Consumer Act 2010* (Cth), s 79(1).
[117] Eg, *Criminal Code Act 2002* (ACT), s 34.
[118] As set out in *Criminal Code Act 1995* (Cth), Pt 2.4 (Extensions of criminal responsibility).
[119] Committee Report, 23.

Effect on vulnerable members of the community

Children and families

93. The Law Council remains deeply concerned about the impact of the proposed measures on children. Whilst the Explanatory Memorandum states that only in exceptional circumstances would a child's visa be cancelled,[120] neither it nor the Bill prescribes what those exceptional circumstances will be. Nor does the Bill limit the power to cancel a visa held by a minor to cases where exceptional circumstances exist.

94. Given the extensive list of offences which can cause a person to fail the character test, there is a high possibility that this will negatively impact families and young people, and the Law Council submits that at the very least, the Bill should expressly state that a child's visa may only be cancelled in exceptional circumstances.

95. The cancellation of a minor's visa is of significant concern for the Law Council and it maintains the view that further protections (such as a discretion to differentiate between adults and children) are required under the proposed measures to prevent such cancellations from occurring.

96. As noted, the cancellation of visas under the provisions proposed in the Bill have the potential to result in families permanently being separated, including children separated from their parents, with devastating consequences. This has implications for Australia's compliance with the *Convention on the Rights of the Child* **(CRC)**[121] which states that 'in all actions concerning children…the best interests of the child shall be a primary consideration'.[122] Further, the International Covenant on Civil and Political Rights[123] (**ICCPR**) states that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.[124]

97. Further, visa cancellation has the practical effect of requiring a whole family to relocate to another country, if the family is to stay together. Alternatively, it splits the family and the long term impact on such a split has yet to be properly measured.

98. The Bill's Statement of Compatibility with Human Rights (**the Compatibility Statement**) states that the rights relating to families and children – including the best interests of any children under 18 and the impact of separation from family members – will be taken into account as part of the consideration whether to refuse or cancel the visa.[125] However, there is no requirement to this effect in the existing Act or the Bill. The Act should include a requirement to take into account the best interests of the child as a primary consideration in section 501 decisions.

99. The Direction, which requires some consideration of such factors, only applies to delegates, and does not apply to the Minister. Further, the best interests of the child form only one 'primary consideration', and the other primary considerations listed are likely to weigh heavily against these interests. For example, these include the 'protection of the Australian community' which emphasises that 'violent and/or sexual

[120] Migration Amendment (Strengthening the Character Test) Bill 2019, *Statement of Compatibility with Human Rights* (**Compatibility Statement**), 13.
[121] Entry into force 2 September 1990, entry into force for Australia 16 January 1991.
[122] CRC, Art 3.
[123] Entry into force 23 March 1976 except Article 41 which came into force generally on 28 March 1979, entry into force for Australia 13 January 1980, except Article 31 which came into force for Australia on 28 January 1993.
[124] ICCPR, Art 23(1).
[125] ICCPR.

crimes are viewed very seriously', and the 'expectations of the Australian community', requiring 'due regard to the Government's views in this respect'.[126] Nor does the Direction indicate that the cancellation of a child's visa should be considered exceptional.

100. The Parliamentary Joint Committee on Human Rights (**PJCHR**), in its discussion of the 2018 version of this bill, concluded that the proposed measures were 'likely to be incompatible with the right to protection of the family and the obligation to consider the best interests of the child as a primary consideration, particularly in relation to the cancellation of a child's visa.'[127] The Committee reiterated those comments in relation to the 2019 version of the bill.[128]

Detainees

101. As noted above, prolonged immigration detention has been a real consequence for many people subject to mandatory visa cancellation, averaging around 150 days for people who seek revocation, but in some cases over one year.[129] Members of the Law Council's Migration Law Committee have observed even longer periods in practice, noting that the processes of challenging a decision can take many years.

102. If the Bill were to become law, it may result in the detention of individuals for far longer periods than their sentences of imprisonment. In some cases, this would include people who were never sentenced to any imprisonment at all. Due to the numbers in detention it has also meant that detainees are being transferred due to operational reasons across the country which leaves them often with relatives unable to visit them. Lawyers also unable to visit their clients to obtain instructions. This obstructs the preparation of responses to cancellation notices and appeals.

103. It has been well established that prolonged periods in immigration detention are harmful to vulnerable individuals, particularly to their mental health and wellbeing. Numerous cases of self-harm have been reported, including recent suicides.[130]

Asylum seekers and refugees

104. If the power to cancel or refuse a visa is exercised in relation to a non-citizen who either holds or has applied for a protection visa, by operation of section 197C and 198 of the Act, the applicant must be removed from Australia.[131]

105. This may conflict with Australia's non-refoulement obligations under international law that prohibit Australia from returning someone to a country where they will face persecution or serious human rights violations.[132] The PJCHR concluded in relation to

---

[126] Eg, Direction, Part A.
[127] PJCHR, *Report 1 of 2019*, 12 February 2019, [2.68].
[128] PJCHR, *Report 3 of 2019*, 30 July 2019, 15.
[129] Ombudsman's Report, 6.
[130] Eg, Helen Davidson, 'Afghan man dies at Melbourne immigration detention centre', *The Guardian* (online), 12 July 2019.
[131] If the visa that was cancelled was a Protection visa, the person will be prevented from making an application for another visa, other than a Bridging R (Class WR) visa (s 501E of the *Migration Act* and regulation 2.12A of the Regulations). The person will also be prevented by s 48A of the *Migration Act* from making a further application for another visa while they are in the migration zone (unless the Minister determines that s 48A does not apply to them: ss 48A, 48B).
[132] Art 33 of the Refugee Convention. Narrow exceptions apply on grounds of national security or public order. Certain non-refoulement obligations also arise under the CAT, the ICCPR and the CROC, sometimes known as 'complementary protection' grounds: see for example, art 3 of the CAT and the Second Optional Protocol to the ICCPR.

the 2018 Bill that 'the proposed expansion of the Minister's power to cancel or refuse a visa is likely to be incompatible with Australia's non-refoulement obligations and the right to an effective remedy.'[133] In its consideration of the 2019 version of the bill the PJCHR reiterated those comments.[134]

106. The Directions' requirements to consider such international obligations are insufficient. They do not apply to the Minister, and their requirement to consider international non-refoulement obligations is not a primary consideration.[135] Because of this, it is given less weight.[136] It also states that the existence of a non-refoulement obligation does not preclude a cancellation of a non-citizen's visa.[137]

107. Members of the Law Council's Migration Law Committee also note that decision-makers frequently have difficulties in understanding the non-refoulement obligations which apply in these and related scenarios.

108. Furthermore, the Migration Act expressly overrides international law by stating that *non-refoulement* obligations are irrelevant to the duty contained in section 198 to remove an unlawful non-citizen as soon as reasonably practicable after a visa application is refused or cancelled.[138] Further, an officer's duty to remove an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the person.[139]

109. The Explanatory Memorandum states that 'anyone who is found to engage Australia's non-refoulement obligations during the refusal or cancellation decision or in subsequent visa or Ministerial intervention processes prior to removal will not be removed in breach of those obligations'.[140] However, the Law Council is concerned that these statements provide no guarantee and in fact conflict with the Migration's Act's express provisions. The PJCHR has stated on numerous occasions in such contexts that reliance on assurances that a broad discretion will not be exercised in a particular way (as opposed to having limitations included in the status) is an insufficient protection.

110. Even if a refugee is not removed due to *refoulement* concerns, there is a significant risk that they will be indefinitely detained, as their visas have been cancelled and there may be no safe destination available. While under the Act, indefinite detention would not occur unless there is *no* country to which it is reasonably practicable to remove the person,[141] indefinite detention is a clear possibility which is specifically envisaged in the Direction. This states that:

> *Given that Australia will not return a person to their country if to do so would be inconsistent with its international non-refoulement obligations, the operation of sections 189 and 196 of the Act means that, if the person's*

---

[133] PJCHR, *Report 1 of 2019*, 12 February 2019, [2.24].
[134] PJCHR, *Report 3 of 2019*, 30 July 2019, 15.
[135] Eg, Directions, 10.1
[136] Ibid, 8(4).
[137] Ibid,10.1(2).
[138] Migration Act, s 197C.
[139] Section 197C provides:
> (1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.
> (2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.

[140] Explanatory Memorandum, 12.
[141] Migration Act, s 198.

Protection visa remains cancelled, they would face the prospect of indefinite detention.[142]

111. Indefinite detention in these circumstances itself risks breaching Australia's international legal obligations.[143] The PJCHR has stated that it 'considers that the expanded bases on which a person's visa may be cancelled, the consequence of which would be that the person is subject to immigration detention, is likely to be incompatible with the right to liberty.'[144]

112. The Law Council is concerned that refugees and asylum seekers may be most at risk of prolonged or indefinite detention following the Bill. Should it progress, it recommends that legislative safeguards are introduced to prevent *refoulement* or a person being placed in prolonged or indefinite detention as a result of a visa refusal or cancellation.

Migrants seeking the protection of the law

113. As noted above, the Law Council's Justice Project enquired into the access to justice barriers experienced by key groups facing significant social and economic disadvantage in Australia. These included recent arrivals, asylum seekers and people who are trafficked and exploited.[145]

114. A key finding was that fear of deportation functions as a unique barrier for many such groups and may exacerbate existing barriers that they face in seeking help for their legal problems. This is particularly the case for people on temporary visas.

115. Submissions to the Law Council emphasised that the vulnerability of not being a permanent resident makes people fearful of exercising their rights, 'even if they know their rights, there are free services that can help them, and they engage with those free services'.[146] For example, WEstjustice reported that many temporary visa holders often choose not to pursue their legal rights, out of fear it may affect their permanent stay in Australia, even where they have had immigration advice. It submitted that:

> *…unless we address the systemic drivers of inequality, like precarious visa arrangements, many [new arrivals] will continue to have difficulty exercising and enforcing their legal rights even if we remove other barriers to access to justice.*[147]

116. The Justice Project also found that recent arrivals are often at risk of exploitation by unscrupulous landlords, employers and creditors. At the same time, they are frequently reluctant to seek help because they distrust authorities or are concerned about the consequences for family members (such as for family violence matters).[148]

117. On this basis, the Law Council is concerned that increasing the likelihood that a person's visa cancellation– or that of relevant family members– is also likely to increase many recent arrivals' reluctance to seek legal advice. For example, a family violence victim may be highly unlikely to seek a protection order which, if breached, would have the effect that her partner or son is permanently removed from Australia. This may

---

[142] Direction, 20.
[143] As set out in the Law Council's *Asylum Seeker Policy* (2015), <https://www.lawcouncil.asn.au/policy-agenda/human-rights/immigration-detention-and-asylum-seekers>.
[144] PJCHR, *Report 1 of 2019*, 12 February 2019, [2.38], reaffirmed in *Report 3 of 2019*, 30 July 2019, 15.
[145] Law Council of Australia, *Justice Project – Final Report* (2018), <https://www.lawcouncil.asn.au/justice-project>.
[146] Ibid, Recent Arrivals Chapter, citing WEstjustice, *Submission No 123*
[147] Ibid.
[148] Ibid, 13-14.

have the perverse effect of driving family violence experienced amongst migrant groups further underground, with dangerous consequences.

Practical implications for expanding cancellation powers

118. As discussed, significant and rapid increases in visa cancellations and refusals have occurred in recent years owing to the expansion of the section 501 character test powers. These have also led to greater numbers of people in immigration detention, often for lengthy periods.

119. The Law Council notes that further expansion of these powers may incur the Australian community significant costs. It is important that the Committee is adequately informed on this basis when weighing up the Bill's merits, noting that it will expand the numbers of people who are subject to visa cancellation/refusal and immigration detention. Indeed, its Compatibility Statement confirms this.[149] However, the Explanatory Memorandum indicates that the Bill will have no financial impact.[150]

120. The Law Council considers that to assist its deliberations, the Committee should seek detailed information from the Department on the:

- current annual numbers in immigration detention for section 501 cancellations, as well as for section 116 cancellations;
- average length and cost of their detention;
- increase in immigration detention over the last decade due to:
  - section 501 cancellations; and
  - section 116 cancellations;
- increase in immigration detention costs with respect to each of the above categories;
- increase in appeal cases to the AAT, the likely increase in appeals to the AAT and Federal Court as a result of the Bill, and how this will be resourced;
- likely additional numbers of people whose visas will be cancelled under the Bill;
- projected increase in numbers to be detained as a result of the Bill, and
- projected additional immigration detention costs, as a result of the Bill.

121. The Law Council further notes that any unnecessary expansion of existing powers will increase the number of visa cancellations and refusals and place an increasing demand on the already limited resources of the AAT, the courts, and the legal assistance sector.

122. With regards to the latter, the Law Council's Justice Project recently highlighted the significant increase in demand for legal assistance following the 2014 expansion of visa cancellation powers.[151] For example, Legal Aid NSW recorded 'close to a doubling of advice and minor assistance in this area.[152] Further expansion of these powers will only serve to exacerbate this demand and put additional strain on a sector that is already chronically under-resourced. It also means that scant legal aid resources must

[149] Compatibility Statement, 10.
[150] Explanatory Memorandum, 2.
[151] The Justice Project, *Final Report – Part 1: Recent Arrivals to Australia* (August 2018), 30.
[152] Legal Aid NSW, *Annual Report 2015-16*, 42.

be diverted from access to justice generally. The Law Council is also aware of high existing pressures on AAT and Federal Court migration workloads.[153] Likely impacts on the criminal courts are further discussed below.

123. The Law Council urges the Committee to have regard to this downstream impact on services when considering the proposed measures, and the importance of expanding resources to impacted services, including the legal assistance sector and affected courts and tribunals should the measures proceed. A failure to do so will be another example demonstrating why the Law Council is advocating for Justice Impact Tests to be introduced to better account for the downstream impacts of new laws and policies on the justice system.[154]

Impacts on the criminal justice system

124. The Law Council is also concerned that an unintended consequence of the Bill may be that it deters non-citizen defendants from entering guilty pleas. This is because, even if there are strong mitigating factors which would lean in favour of a lenient sentence such as a fine or suspended sentence, the person will, if convicted, be subject to visa cancellation and removal under the Bill.

125. This would have flow-on effects for the administration of justice and pressures on court lists. The visa implications flowing from a minor criminal conviction may be disproportionate or potentially amount to double punishment.

126. Fewer guilty pleas may also lead to more contested and protracted court proceedings with greater associated public expense – noting that many criminal courts are already under critical resourcing pressures with associated delays.[155] For example, at 30 June 2017, of the pending caseloads for criminal matters for:

- Supreme Court (non-appeal) matters in NSW, Victoria and Tasmania, 32, 26 and 29 per cent (respectively) had been pending for over a year, with 15 per cent of the Victorian caseload and 9.2 per cent of the NSW caseload pending for over two years;
- District/County Court (non-appeal) matters in NSW and South Australia, 22 and 29 per cent (respectively) were pending for over a year, with 5 per cent of the NSW caseload and 10 per cent of the South Australian caseload pending for over two years; and
- Magistrates' Courts (excluding children's courts) across all states and territories, between 14 per cent and 37 per cent had been pending for over six months, including 37 per cent in Queensland, 35 per cent in Western Australia, 35 per cent in Tasmania, and 29 per cent in South Australia.[156]

127. Additional pressures in this context are not only likely to drive up public costs, but to affect all individuals who need to engage with the criminal court system – including victims of crime and witnesses. Greater numbers of contested trials may be particularly harmful for victims, who would otherwise be spared the pain of enduring such proceedings, including having to give evidence and be cross-examined about painful experiences.

---

[153] Eg, 'Courts swamped by migrant visa appeals' SBS News (online), 23 October 2018; <https://www.sbs.com.au/news/courts-swamped-by-migrant-visa-appeals>.
[154] The Justice Project, *Final Report – Part 2: Governments and* Policymakers (August 2018), 14-26.
[155] As discussed in the Justice Project – Final Report, Courts and Tribunals Chapter, 10-11.
[156] Ibid, citing Productivity Commission, *Report on Government Services 2018, Part C Chapter 7: Courts* (2018) Table 7A.17.

Recommendations:

- **The Law Council considers that to assist its deliberations, the Committee should seek detailed information from the Department on the:**
    - **current annual numbers in immigration detention for section 501 cancellations, as well as for section 116 cancellations;**
    - **average length and cost of their detention;**
    - **increase in immigration detention over the last decade due to:**
        - **section 501 cancellations; and**
        - **section 116 cancellations;**
    - **increase in immigration detention costs with respect to each of the above categories;**
    - **likely additional numbers of people whose visas will be cancelled under the Bill;**
    - **likely increase in appeals to the AAT and Federal Court as a result of the Bill;**
    - **projected increase in numbers of people to be detained as a result of the Bill;**
    - **projected additional immigration detention costs, as a result of the Bill;**
    - **projected impact on legal assistance services as a result of the Bill and how this will impact on ordinary people's access to justice; and**
    - **Bill's projected impact on the criminal court system and all Australian court users, including witnesses and victims of crime.**

Retrospectivity

128. For the purposes of a visa cancellation, the amendments will apply to anyone who holds a visa and committed or was convicted of a designated offence at any time, only limited by the fact of the cancellation decision being made after the commencement of these provisions. This raises concerns about the potential retrospectivity of the proposed measures, an issue that has not been addressed in the Bill nor its explanatory material.

129. The Law Council expresses its ongoing concern with the prospect that the Bill could be used to remove a non-citizen for their historic involvement in a designated offence, which in the absence of the proposed amendments may not have amounted to a failure to pass the character test.

130. The Committee Report notes the Department's justification that previous character test amendments have had retroactive application.[157] However, the Law Council considers that this is an insufficient justification for the measures' retrospective nature, particularly when consideration is given to the considerable and punitive impact on the lives of those affected, and their extended reach well into a person's past.

Potential for infringement of Chapter III of the Constitution

131. Further to the above submissions regarding the low threshold for visa cancellation or refusal under the proposed measures, the Law Society of New South Wales has raised the potential of the proposed measures as currently drafted to infringe Chapter III of the Constitution. In the case of *Djalic v MIMIA* [2004] FCAFC 151, the Full Court of the Federal Court of Australia affirmed that:

> *It is a fundamental principle of the Australian Constitution, flowing from Chapter III, that the adjudication and punishment of criminal guilt for offences against a law of the Commonwealth is exclusively within the province of courts exercising the judicial power of the Commonwealth."*[158]

132. The Full Court went on to state that Commonwealth legislation will collide with Chapter III of the Constitution if 'on its true construction, it authorises the Executive to impose punishment for criminal conduct'.[159] The Full Court stated that a decision to cancel a visa cannot be considered a punishment if it 'can be fairly said to protect the Australian community'.[160]

133. Notwithstanding this broad scope for the Minister or delegate to cancel or deny a visa based on character grounds, there is a risk that the exercise of the broad discretion provided to the Executive by the proposed amendments – for instance, by proposed subsection 501(7AA)(vii) – may infringe Chapter III of the Constitution if there is no evidence that the non-citizen in question poses a future risk to the Australian community.

134. This also is an issue which the Committee report did not consider in depth.[161] However, members of the Law Council's Migration Law Committee query, if the criminal justice system has determined that a convicted person does not present a substantial risk to

[157] Committee Report, 28.
[158] *Djalic v MIMIA* [2004] FCAFC 151, 58.
[159] Ibid, 73.
[160] Ibid, 66.
[161] Committee Report, 23.

the community and imposes a fine or a suspended sentence, whether their subsequent visa cancellation can be justifiably be said to 'protect' the community.

Overseas offences

135. Finally, the Law Council notes that the Bill will apply in respect of convictions in foreign countries.[162] It recognises that a proposed safeguard applies under proposed subparagraph 501(7AA)(c). This requires that the act or omission would have also constituted an ACT offence (if in the ACT); and the relevant ACT offence would have been punishable to the same extent (eg imprisonment for a maximum of two years).[163]

136. However, this does not take account of the fact that foreign criminal justice processes may not afford the same critical criminal justice safeguards, including the right to a fair trial, as in Australia. There may be individuals who are the subject of politically motivated charges or who have been subjected to torture by authorities and who are 'convicted' on this basis.

137. The inclusion of foreign convictions for a broad range of designated offences as a means of failing the character test in the Bill increases the likelihood that other individuals who have been unfairly convicted will be subject to visa cancellation, detention and removal.

Conclusion

138. This submission raises significant concerns regarding the Bill's necessity and proportionality. Existing section 501 visa refusal and cancellation powers have already raised serious concerns given their breadth, low thresholds and insufficient safeguards. Their expansion in recent years has resulted in dramatic increases in the numbers of people who are subject to visa cancellations, many of whom are held in immigration detention prior to removal.

139. The existing section 501 powers are sufficient to capture people who are convicted of serious offences. Where individuals do not automatically fail the existing character test because they do not meet the existing low 'objective' thresholds, they may still fail the test – for example, because there is a risk that they pose a danger to the community, or having regard to their past and present criminal/general conduct, they are not of good character. In these circumstances, a deliberative exercise, which requires careful consideration of the individual circumstances before determining that a person fails the character test, is essential. This is because the possible consequences of character test refusal and cancellation are so significant.

140. The Bill proposes excessively low thresholds for failure to meet the character test. Of particular concern is the inclusion of designated offences with a statutory maximum sentence of not less than two years, regardless of the actual judicial sentence given. This may include people who have been given no sentence at all, a fine or a community corrections order. This approach has the potential to undermine the sentencing function of the judicial system and the discretion exercised by judicial officers to sentence offenders. The thresholds proposed by the Bill are likely to capture a range of individuals who ordinarily would not be considered to have committed a 'serious offence', having regard to existing criminal law definitions.

141. The Bill may also have unintended consequences, including fewer guilty pleas being made by non-citizens who are charged with relevant offences. This may result in more

[162] Proposed paragraph 501(7AA).
[163] Proposed paragraph 501(7AA)(c), referring to proposed subparagraph 501(7AA)(b).

contested and protracted criminal court proceedings, affecting all participants, including victims and witnesses. It may also drive up existing pressures on Australia's already over-congested criminal justice systems.

142. Further, and significant impacts, may be experienced in increased numbers of people who are in immigration detention, requiring legal assistance, and/or seeking review in the AAT and Federal Court. This may be costly to taxpayers, as well as impeding access to justice generally, noting the existing pressures upon legal assistance, tribunals and courts, which are already at critical levels.

143. For the above reasons, the Law Council recommends against the passage of the Bill.

Recommendation

- **The Law Council recommends against the passage of the Bill.**