

APRIL 2020

# MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2019

*Media Briefing*

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VISA  
CANCELLATIONS  
WORKING GROUP

# ABOUT THE VISA CANCELLATIONS WORKING GROUP

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

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

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

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

## MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2019

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The Migration Amendment (Strengthening the Character Test) Bill 2019 (**the Bill**) proposes unnecessary legislative changes that will create unfair outcomes for people who call Australia home and for their families.

The Visa Cancellation Working Group (**VCWG**) issues this briefing to ensure that the public is properly informed. Visa cancellation and refusal are serious matters and can result in long-term detention, forcible removal (including to war-torn countries) and the separation of multi-generation families in Australia.

There is no need for this Bill. The Australian Government is already able to cancel or refuse a person's visa where that person poses a threat to the Australian community, using the powerful and flexible levers existing under the *Migration Act 1958* (Cth) (**Migration Act**). The offences cited in the Bill already can and do cause failure of the character test under the existing legislation.

The Bill will replace a robust system with a blunt and unsubtle tool that will increase poor decision-making and hurt members of the Australian community.

### SUMMARY OF THE BILL

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If passed, the Bill will mean a person **automatically** fails the character test when both criteria are met:

- they have been convicted of any violent, sexual, breach-based (including of IVOs), or weapon possession offence, or where they had *any association* with the commission of such an offence, and
- where a sentence of two or more years was available to the Court.

A person's visa will already be cancelled if they have, over a lifetime, received sentences that add up to 12 months' imprisonment, and they are in criminal custody.

The Bill takes away any flexibility regarding what 'character' means, or regarding the seriousness of an offence. It means more visas are going to be cancelled, more families will be forced through an overwhelming 'double punishment' process, more people will fall through the cracks and fail to exercise their rights, more disproportionate outcomes, and more cost to the taxpayer.

### SUMMARY OF CONCERNS

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In replacing a powerful and flexible tool with a blunt and unsubtle one, the Bill will replace a considered and broad assessment of a person's circumstances with a turgid, clunky and inflexible definition. In addition to forcing all offences into a 'one size fits all' assessment, the Bill will have numerous unforeseen and costly consequences.

For example:

- Offences which do not fall under the commonly accepted definition of 'serious offences' will be caught. For example:
  - verbal threats, such as telling a person you want to slap them, or sending a text that you will punch a person's new partner;
  - assault, such as grasping a person by the sleeve;
  - any form of contravention of an intervention order, including where the offender was approached by the protected person, or even merely responded to a text from that person;
  - a minor sharing an intimate image of their girlfriend or boyfriend,
  - any *attempted* offence of the nature stipulated, being an offence not carried out.
- There is an oddity of standard introduced that is not acceptable to the Australian community, nor does it reflect a common-sense appreciation of the notion of 'character'. For example, a person trafficking commercial quantities of drugs may not automatically fail the character test, but a child who got into a classroom fight would; a person committing repeated million-dollar fraud may not, but a former partner who texted their partner 'Merry Christmas' would; a person committing sabotage against the government may not, but a person who yelled at their boss after being made redundant might.
- Conduct that causes an automatic failure of the character test in one state will not have that result in another state. Similarly, for some offences, it will be difficult to determine whether they fall under the term 'designated offence' and be captured by the Bill.

- The Bill does not allow for any consideration of context or personal circumstances in an assessment of a person's character. For example, a person will fail the character test for relatively minor offences (such as those listed above) without a decision-maker having any regard to backgrounds of trauma, abuse, severe deprivation, or impairment.

The Working Group recommends the Bill should be rejected because:

- A person's visa can already be cancelled for the reasons provided in the Bill. It does not expand or increase the Department's capacity to regulate non-citizens' conduct.
- The Bill arbitrarily and inappropriately widens the character test, leading to diminished integrity of the cancellation regime and to serious harm for individuals and families. It does not align with Australian community standards.
- The Bill ignores the expertise of Australian courts and the sentencing function exercised by those courts.
- The Bill is likely to have a serious impact on the criminal justice space in terms of resourcing and outcomes. It will likely further overburden the State and Territory courts, legal services providers, and prisons because visa holders are less likely to plead guilty to offences, knowing any conviction will result in automatic failure of the character test.
- The Bill is likely to seriously impact the administrative law process by increasing load on the Department, the Tribunals and courts where a person seeks review of a cancellation.
- The Bill is likely to increase the number of people held in immigration detention facilities, where conditions are below acceptable standards.
- The Bill will have unintended consequences because it fails to protect vulnerable individuals, including minors, Aboriginal and Torres Strait Islanders, those with mental illness or cognitive impairment, and those from refugee or asylum seeker backgrounds.
- The Bill is likely to be incompatible with Australia's international obligations.

## INACCURATE STATEMENTS IN MEDIA

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We are concerned much of the media coverage of the Bill has been inaccurate and misleading in the following ways:

1. At present, offenders do **not** need to be sentenced to twelve months or more in order to have their visas cancelled. **Any visa holder whose conduct causes the Department of Home Affairs concern** can have their visa cancelled. This is occurring in record numbers.
2. Cancellations relating to "*murder, assault, sexual assault or aggravated burglary*" (which the Explanatory Memorandum suggests are particular targets) are already explicitly allowed under existing legislation. Many people who are convicted of such offences are already subject to mandatory cancellation under s 501(3A), but otherwise to cancellation processes under s 501(2).
3. The Minister **already has the power to cancel the visas of criminals who do not receive any jail time**, and these cancellations occur regularly. Cancellations can occur in numerous circumstances, including when the Minister or his delegate considers that:
  - they are not of good character due to their general or criminal conduct;
  - a person has been or is associated with a group that he suspects has been or is involved in criminal activity; or
  - there is a risk the person will engage in criminal conduct, be a danger to the community or incite discord.
4. The Department has **clear channels through which they become aware of offending**, including when a person is merely charged with offences, or where there are no charges but an Intervention Order is issued.
5. Failing the character test does not mean a person is immediately deported from Australia. Generally, failure then leads to discretion as to whether or not to cancel or refuse, taking into account factors including balancing the nature of offending, the risk to the Australian community, Australia's international obligations, the bests interest of children and other factors.