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Canberra ACT 2600

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***Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the
Migration Amendment (Strengthening the Character Test) Bill 2019***

Liberty Victoria

1. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations, tracing our history to Australia's first council for civil liberties, founded in Melbourne in 1936. We seek to promote Australia's compliance with the rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. Further information may be found at www.libertyvictoria.org.au.

2. We welcome the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the proposed amendments advanced in the Migration Amendment (Strengthening the Character Test) Bill 2021 (**the Bill**). The focus of our submissions and recommendations reflect our experience and expertise as outlined above.
3. This is a public submission and is not confidential.

Outline

4. The amendments proposed by the Bill apply to all persons, without exception, who hold temporary or permanent Australian visas.
5. Under the *Migration Act 1958* (Cth) (**the Act**), a broad power resides with the Minister and his or her delegates to either refuse or cancel a person's visa if the person's conduct, either criminal or general, leads to a determination that they do not pass the character test: s 501(6) of the Act.
6. A person can *necessarily* fail the character test, or they can fail the character test as a result of *discretionary assessment*. There is no minimum standard of conduct for a character test failure. A person who has *no criminal record whatsoever* can still fail the character test.¹
7. Similarly, a failure of the character test can lead either to mandatory² or discretionary³ visa cancellation, or discretionary visa refusal.⁴
8. In addition to the broad powers that can be exercised by the Minister's delegates, the Minister also has a suite of personal cancellation and refusal powers.⁵
9. The Bill seeks to amend the Act by introducing a further set of circumstances in which a person will necessarily fail the character test: where they have committed a 'designated offence'.
10. Under the Bill, a 'designated offence' is any offence:
 - (1) with a physical element involving violence or a threat of violence against a person, non-consensual conduct of a sexual nature, breach of protection

¹ See, for example, ss 501(6)(b), (ba), (c)(ii), (d), (h).

² s 501(3A).

³ s 501(2).

⁴ s 501(1).

⁵ See, for example, ss 501(3), 501A, 501B, 501BA.

orders, or weapons, or aiding, abetting, counselling, procuring, conspiring, inducing or being knowingly involved in such offending, and

(2) with an available sentence of two years or more.

11. A conviction for 'an offence of common assault, or an equivalent offence' is not, however, a designated offence unless it causes or substantially contributes to bodily or mental health harm to another person, whether temporary or permanent, or if it involves family violence.
12. 'Designated offences' include foreign offences, where the offence, had it been committed in Canberra, would meet the above requirements.
13. Liberty Victoria strongly opposes the Bill and calls for an inquiry into the character visa cancellation and refusal framework.
14. Our principal concerns with the Bill can be summarised as follows:
 - (1) No compelling case has been put forward by the Government to justify the amendments. They do not achieve their intended purpose;
 - (2) The amendments set an arbitrary and inconsistent standard of 'character';
 - (3) The amendments, far from creating an objective standard, create considerable uncertainty;
 - (4) The amendments are inconsistent with Australia's international obligations;
 - (5) The amendments would have a severe impact on particular groups in the Australian community, including victim-survivors of family violence, children, refugees, and people with mental illness; and
 - (6) The amendments would have numerous unintended consequences, including on the criminal and administrative jurisdictions and service providers within those spaces.
15. Each of these matters is further developed below.
16. For context, however, visa cancellation or refusal exposes people to detention (including indefinite detention, particularly where that person is a refugee), forcible removal from Australia (potentially resulting in serious harm or death), permanent family separation, and serious psychological consequences for the individuals and families involved. It is distressing for those affected, and the law is complex and

restrictive. Many affected individuals are unaware of their rights, or unable to access them due to various impediments. Further, breaches of Australia's international obligations are apt to affect our international standing. In this context, proposed amendments must be subject to considerable scrutiny and treated with caution where they are not adequately justified.

17. Liberty Victoria also notes with concern the history of this Bill. Two substantially similar Bills have been advanced unsuccessfully in recent years,⁶ each subject to considerable criticism from the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights, and each the subject of an Inquiry by the Senate Legal and Constitutional Affairs Legislation Committee, in which the overwhelming majority of submissions urged the Bills be rejected. The first iteration of this Bill lapsed at dissolution on 11 April 2019, and the second was negated at second reading on 20 October 2021.
18. Considerable public and private resources have been put toward scrutinising this proposed legislation. There has been a clear case made out that this Bill is inherently flawed. Neither the Bill nor the Explanatory Memorandum engages with the concerns raised by experts across the history of the Bill, and in failing to do so risks wasting public and private resources in pursuit of a fundamentally flawed and dangerous piece of proposed legislation.

No compelling case

19. The Explanatory Memorandum fails to provide an adequate policy justification for the proposed amendments. Further, there are a number of inaccuracies in the Explanatory Memorandum that require clarification.
20. Visa cancellation and refusal is a complex legal issue that has real and often irreversible human consequences. Accordingly, it is essential that the Inquiry proceed from a position of clarity regarding the law as it currently stands, and the law as the Bill proposes. In this respect, we refer to and adopt the summary by the Visa Cancellations Working Group of the present law and the Bill.
21. Critically, the Explanatory Memorandum states that the Bill amends the Act by 'providing a new specific and objective ground to consider visa refusal or cancellation where a non-citizen has been convicted of certain serious offences'.

⁶ Migration Amendment (Strengthening the Character Test) Bill 2018 and Migration Amendment (Strengthening the Character Test) Bill 2019.

22. The current law already provides grounds for non-citizens who commit offences or present safety risks to be considered for refusal or cancellation. As noted above, there is no minimum conviction that allows visa cancellation or refusal. It is misleading to suggest that people committing serious offences cannot already face visa refusal or cancellation.
23. There is nothing in the extrinsic materials that suggests people who commit the offences named in the Explanatory Memorandum—offences involving violence against a person (including murder, kidnapping and aggravated burglary), non-consensual sexual acts, breaching of an apprehended violence order (or similar) or weapons—cannot already have their visas cancelled or refused.
24. To the contrary, many thousands of people are having their visas cancelled or refused for that precise offending, as well as for theft, fraud, driving offences, and non-violent offences. The vast majority of cancellations in the past 12 months were for drug offences, with assault the second most common offence attracting cancellation.⁷
25. The Explanatory Memorandum claims the Bill ‘will ensure the character test aligns directly with community expectations that non-citizens who are convicted of offences such as murder, sexual assault or aggravated burglary will not be permitted to enter or remain in the Australian community’, but also emphasises the discretionary nature of the cancellation. In Liberty Victoria’s submission, the Bill makes it no more likely that a person committing ‘murder, sexual assault or aggravated burglary’ will have their visa cancelled and be deported, because the proposed amendments apply to offences at the other end of the spectrum.
26. We also note that the Explanatory Memorandum states that the Bill is responsive to the 2017 Joint Standing Committee on Migration report on migrant settlement outcomes titled ‘No one teaches you to become an Australian’. This is an unhelpful reference: that report is affected by a range of misunderstandings regarding the law, and those recommendations fall within the category ‘Migrant Youth’. Moreover, that Report appeared to be advocating for *mandatory cancellation* for people committing serious violent offences, as opposed to claiming there were not cancellation powers already in existence for discretionary cancellation. The Report also recommends

⁷ ‘Key visa cancellation statistics’, Department of Home Affairs, available at <https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>.

some changes not be retrospective. This Bill does not expand mandatory cancellation and so is not responsive to this report as claimed.

27. Given the considerable consequences of the Bill, it is incumbent on the Department to make a case that the offending the Bill claims to address is not already addressed within the existing framework. It has not done so.

An arbitrary and inconsistent standard of assessing character

28. The mere availability of a particular sentence does not and cannot solve the question of the seriousness of an offence. The Australian legal system is predicated on an understanding that there are different standards of moral culpability, and a one-size-fits-all approach is neither useful nor appropriate.
29. Assessment of a person's character is a serious matter, and not to be undertaken without due gravity. In all but the most serious cases, a subjective and contextual analysis is required. Where a person is deemed to necessarily fail the character test by virtue of an objective standard, that standard must be high, and in line with community expectations. There are already a range of situations countenanced in the legislation, including if a person has been sentenced to over 12 months' imprisonment (cumulatively across their lifetime, and including suspended sentences),⁸ if the person was convicted of escaping from immigration detention,⁹ or if the person has been convicted or found guilty of a sexual offence involving a child.¹⁰
30. In sentencing a person for criminal offending, decision-makers use their considerable expertise to assess mitigating and aggravating factors to reach a reasoned conclusion. If, for example, the offending is by a fifteen-year-old who has no criminal history but who has suffered ongoing sexual abuse, who showed friends an intimate photograph of her partner, a court might determine that custody was not appropriate and impose a fine. It would not be appropriate for that child to automatically fail the character test. As another example, if a person with impaired cognitive function is charged with assault for threatening someone during a heated argument, a court might impose a non-custodial sentence; again, it would be inappropriate for that person to automatically fail the character test. The same will apply to offences by a homeless person with mental health issues shouting angrily

⁸ s 501(6)(a).

⁹ s 501(6)(ab).

¹⁰ S 501(6)(e).

on the streets. These offences would not fall within the commonly accepted definition of serious offending, but they may fall within conduct impugned by the Bill.

31. In Liberty's submission, the actual sentence imposed by a court is by far the more appropriate standard by which to determine the seriousness of an offence. The expertise of Australian courts is and should remain a valuable resource for administrative decision-makers.
32. To ignore this resource is likely to affect the integrity of administrative decision-making. Presently, administrative decision-makers may not have access to the material before the court in exercising their discretion (such as character and work references, education and rehabilitative course materials, and medical and psychological reports) leading to an inaccurate and incomplete assessment.
33. The inclusion of breach offences is of serious concern to Liberty Victoria. Protection orders may be breached by the sending of a text message, by consent of the protected party, by a phone call, or inadvertently. There is a scale of seriousness which must be recognised. For example, it would offend community standards for a person arranging a doctor visit for their child at the instigation of a protected person and in breach of protection order to automatically fail the character test.
34. The inclusion of relational offending by way of s 501(7AA)(v)-(vii) is also of serious concern. It is too broad, and will affect people with wildly disparate levels of culpability. Additionally, it is likely to catch vulnerable persons including women in relationships with offenders, disincentivising reportage and cooperation. The provision creates uncertainty, increases the likelihood of disproportionate results, and should not be made law.
35. Next, it appears arbitrary that numerous offences, such as the trafficking of commercial quantities of drugs and all so-called 'white-collar' crime, will not be caught by the proposed Bill, whereas many relatively minor offences will be.
36. Liberty Victoria considers that the Bill advances amendments to the character test that result in illogicality, inconsistency, and disproportionate outcomes which would not be supported by the Australian community, especially when fully informed about the powers already in existence.

Uncertainty

37. Far from providing 'further clarity by objectively setting out offences' that will cause character test failure, the Bill introduces greater confusion and incoherence.
38. First, whether or not a person automatically fails the character test under the proposed amendments will vary according to which State or Territory the offence is committed in. One jurisdiction may have a two-year maximum sentence for particular conduct, and another may not.
39. Secondly, the Bill adds in a further layer of administrative assessment which will be highly prone to error. Delegates must assess whether the offence was a designated offence.
40. The Bill requires that the offence 'involves' certain types of conduct. This is plainly overly broad and difficult for delegates to assess. Must they turn to the elements of criminal offending in the particular state in question? Must they turn to the evidence filed in the case?
41. The delegate must assess whether the offence 'involved' 'one or more physical elements that involved violence against a person', and if so, whether that violence caused mental or bodily harm (and then assessing whether that mental harm was a mere emotional reaction for the Criminal Code, or in the alternative, if it involved family violence. The former will necessarily require regard to additional materials such as evidence or sentencing remarks).
42. The Bill does not define bodily harm, leaving that standard to delegates to determine.
43. Further, the Bill does not define to whom mental harm must be caused. Will it be sufficient if a family member or other witness is mentally harmed by an offence?
44. The Department has not provided a list of offences that will be caught. Evidence given at the Inquiries for the Bill's previous iterations indicates that it cannot, and that it is acknowledged that a list, even if compiled, would change frequently. The Department has not even been able to provide an estimate of how many people will be caught by the Bill.
45. The Bill is unwieldy and creates considerable uncertainty in application, the very harm it purports to address.

The Bill is inconsistent with Australia's international obligations

46. The proposed amendments are inconsistent with Australia's international obligations concerning non-refoulement, the rights of the child, and the right to family unity.
47. The provisions contained in the Bill are likely to seriously undermine Australia's compliance with its **non-refoulement obligations** under international law. At present, despite assurances of commitment to Australia's *non-refoulement* obligations, many cancellation and refusal decision-makers decline to take these issues into account, or it is treated as one of many competing considerations. Moreover, s 197C of the Act now confirms that people owed protection obligations will not be removed from Australia, meaning that they will instead be subject to indefinite detention.
48. If, as is likely (and indeed as is intended), visa cancellations and refusals increase as a result of the proposed amendments, it follows that a greater number of people owed non-refoulement obligations will face cancellation or refusal and will be indefinitely detained, including where a person found to be a refugee is convicted of a relatively minor offence, such as the making of a threat.
49. The principle of **family unity** has long since existed as a central component in international human rights instruments and jurisprudence. Beginning with the Universal Declaration of Human Rights,¹¹ which states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State", most international instruments dealing with human rights contain similar provisions for the protection of the unit of a family.¹²
50. The principle of family unity with respect to refugees is expressly provided for in the preamble to the 1951 Convention Relating to the Status of Refugees¹³ (**the Refugee Convention**), which in its preamble recommends governments to take the necessary measures for the protection of the refugee's family, especially with a view to:
 - (1) ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country; and

¹¹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

¹² See the *International Covenant on Civil and Political Rights*, article 23(1), and the *Convention on the Rights of the Child*, preamble.

¹³ As amended by the 1967 Protocol.

- (2) providing special protection to refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.

- 51. The principle of family unity, and obligation of states to act in accordance with it, also derives from other international instruments to which Australia is a signatory, including: the International Covenant on Civil and Political Rights (**ICCPR**), Articles 17 and 23; the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), Article 10; and the Convention on the Rights of the Child (**CRC**), Articles 9 and 10.
- 52. Further, there are no protections for **minors** under the Bill. This affects Australia's compliance with the CRC which states that 'in all actions concerning children...the best interests of the child shall be primary consideration'.¹⁴ Although Direction 90 states that the best interests of the child shall be a primary consideration (amongst four primary considerations), little guidance on how this should occur is given. Moreover, there is no enshrinement of an approach where cancellation or refusal of a child's visa is to occur only in exceptional circumstances.
- 53. The amendments proposed would be inconsistent with Australia's international obligations, the international protection system, as well as longstanding Australian government policy.

Impact on segments of the Australian community

- 54. The Bill is likely to seriously impact victim-survivors of family violence, children, people from refugee, trauma or severely disadvantaged backgrounds, Indigenous Australians, and those with capacity limitations including mental illness and impairments.
- 55. **Victim-survivors of family violence**, particularly women and children, are likely to be harmed by this Bill. The Bill jeopardises the recommendations of the Fourth National Action Plan to Reduce Violence Against Women and Their Children.
- 56. Liberty Victoria is particularly concerned about the misidentification of victims as perpetrators of family violence, leading to risks that victim-survivors of family violence will themselves face visa cancellation or refusal, and that allegations against victim-survivors will be weaponised by perpetrators given the potential consequences.

¹⁴ CRC, Art 3.

57. Liberty Victoria is also concerned by the potential coercion of victim-survivors leading to cancellation or refusal. For example, a victim-survivor of family violence who through her circumstances is coerced into permitting her partner to have contact with their child, in breach of an intervention order, will automatically fail the character test if convicted (again risking misuse by perpetrators).
58. Victim-survivors of family violence, particularly women and children, with precarious migration statuses, should not have their statuses further jeopardised.
59. The Fourth National Action Plan refers to migrant women on temporary visas as a cohort particularly at risk of family violence, due to their insecure visa status and therefore their dependence upon their spouse. In rendering it more likely that perpetrators of family violence may have their visas cancelled, even where a victim-survivor does not want that outcome, the Bill simultaneously exposes their partners and children to visa cancellation or refusal. There are no protections against this outcome in the proposed legislation.
60. The Bill also significantly increases the possibility of the permanent separation of families against the will of those families, potentially side-lining victim-survivors' voices and leaving them without support and with little control over the outcomes and processes.
61. Further, policies including early intervention may be undermined, as may recourse to support, such as counselling and family violence support services, given that information may be, against a survivor's wishes, used adversely against a partner or may be used to jeopardise their status in Australia.
62. Refugees and asylum-seekers are inherently vulnerable, having lost the protection of their home State and being subject to an uneven power relationship in coming into contact with the officials of another State. Moreover, many asylum-seekers have experienced past torture and trauma, making them particularly vulnerable to mental and physical health issues. They may also have linguistic or cultural barriers, mental and physical health issues, and fewer resources.
63. The Commonwealth has an ethical responsibility to deal fairly with refugees and people seeking asylum. This ethical duty arises from the fact that Australia has held itself out as a State which provides protection to such people ever since it became a signatory to the Refugee Convention; and given that such people have arrived to Australian shores seeking our protection.

64. Cancellation or refusal impacts refugees and people seeking asylum in numerous ways, including by exposing them to indefinite detention: that is, where they are barred from obtaining an Australian visa, but unable to be returned to their home country due to Australia's international obligations.
65. **Indigenous Australians** may be non-citizens because they were born in other countries, despite having Indigenous heritage. The disproportionate rate of Indigenous incarceration was described by former attorney-general George Brandis as a "national tragedy".¹⁵
66. In a 2017 report by the Australian Law Reform Commission, the following statistics were given:
- In 2016, Aboriginal and Torres Strait Islander people were seven times more likely than non-Indigenous people to be charged with a criminal offence and appear before the courts; 11 times more likely to be held in prison on remand awaiting trial or sentence, and 12.5 times more likely to receive a sentence of imprisonment.¹⁶
67. Significant numbers of Aboriginal and Torres Strait Islander people have had their visas cancelled. Liberty Victoria considers the cancellation of Aboriginal and Torres Strait Islander people's visas unacceptable, and condemns the increased risk to their status that inheres in this Bill.
68. Those with capacity issues or entrenched disadvantage would also suffer. The current regime is an extremely complex one, and failure to comply with legislative timeframes can lead to a complete derogation of review rights. In our experience, people with mental health or access issues struggle enormously to pursue their rights and are less likely to be able to respond to potential cancellation or refusal in a meaningful way.
69. The proposed amendments would operate in practice to impose significant further hardship on many of those affected.

¹⁵ Thorpe, N., "National tragedy: 35 groups demand action on Indigenous incarceration", *NITV*, 18 September 2018, available at <https://www.sbs.com.au/nitv/article/2018/09/18/national-tragedy-35-groups-demand-action-indigenous-incarceration>

¹⁶ Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133 (2017).

Unintended consequences

70. Liberty Victoria considers that the Bill is likely to adversely impact the operations of:
- (1) The administrative law system, including:
 - a. Primary-stage administrative decision-makers;
 - b. Merits review bodies, such as the Administrative Appeals Tribunal;
 - (2) Australia's Federal Courts;
 - (3) The legal and social assistance sectors, and
 - (4) The criminal justice system, including State and Territory courts, including by way of appeals.
71. The Bill is perhaps partly intended to alleviate the burden on administrative decision-makers at the primary stage by purportedly making character test failures clearer. It does no such thing.
72. A primary-stage decision-maker will still need to assess the offending against the character test (with the exclusion of mandatory cancellations under s.501(3A)):
- (1) They will need to determine whether there is a necessary failure of the character test. This is a complex question with reference to the 'physical elements' of an offence and the location of the offence and the laws of that jurisdiction;
 - (2) If the offence does not lead to necessary character test failure, they will need to assess whether there is a discretionary character test failure;
 - (3) If there is a necessary or discretionary character test failure, they will need to send a Notice of Intention to Consider Cancellation or a Notice of Intention to Consider Refusal to the affected person, annexing Direction 90 and inviting a response within 28 days; and
 - (4) They will then need to consider that response accordingly to law and reach a determination.
73. Given that no procedural advantage is obtained, and given the likely increase in cancellations, the burden on primary-stage decision-makers will be significant. This will cause delay, as well as consequential burden on reviewing bodies such as the

Administrative Appeals Tribunal and Australia's Federal Courts. This has costs implications for the Australian community.

74. Given that cancelled persons going through review processes are held in immigration detention, the burden on the already-stretched detention system will also increase. This has costs implications for the Australian community.
75. There are also serious consequences of the Bill for the criminal jurisdiction, including a reduction in plea resolutions causing severe delay. An accused person is far less likely to plead guilty to an offence attracting visa cancellation, which will result in more contested hearings, with complainants and other witnesses being cross-examined. We endorse the submissions of the Visa Cancellations Working Group in this respect.

Retrospective application

76. We are further concerned that the amendments are retrospective in application. It means that people who have committed historical offences will fail the character test, where that non-citizen was previously not considered to fail the character test. This is fundamentally unfair.
77. Retrospective laws are commonly considered inconsistent with the rule of law as they make the law less certain and reliable. A person who makes a decision based on what the law is may be disadvantaged if the law is changed retrospectively. It is said to be unjust because it disappoints "justified expectations".¹⁷
78. The erosion of such principles is of significant concern to Liberty Victoria, representing a threat to basic principles of our society more broadly.

Conclusion

79. We submit that no compelling case has been provided to justify the proposed amendments. The Bill is unnecessary and does not go any way toward achieving its stated goals, instead proposing a standard out of line with community expectations and afflicted by uncertainty. It ignores a valuable repository of expertise, being determinations by judicial officers. The amendments would have significant adverse impacts on visa holders and their families, many of whom are highly vulnerable, and on Australia's international reputation.

¹⁷ HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 276.

80. For these above reasons, Liberty Victoria strongly opposes the Bill.
81. Thank you for the opportunity to make this submission regarding the important work being undertaken by the Committee. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Michael Stanton or the Liberty office on 9670 6422 or info@libertyvictoria.org.au.

A handwritten signature in black ink that reads "Michael Stanton". The signature is written in a cursive, flowing style.

Michael Stanton
President
Liberty Victoria