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Parliament House  
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 a peak civil liberties organisation in Australia that has worked to defend and extend human rights and freedoms in Victoria since 1936. For more than eighty years we have advocated for civil liberties and human rights. These are spelled out in the United Nations' international human rights treaties, agreed to by Australia. We speak out when such rights and freedoms are threatened by governments or other organisations.
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 2019 (**the Bill**). The focus of our submissions and recommendations reflect our experience and expertise as outlined above.

**Outline**

3. The amendments proposed by the Bill apply to all persons, without exception, who hold temporary or permanent Australian visas.

4. The Bill seeks to amend the *Migration Act 1958 (the Act)* by introducing a twelfth set of circumstances in which a person will necessarily fail the character test enunciated at s.501(6) of the *Act*. where they have committed a 'designated offence'.
5. A 'designated offence' is any offence:
  - with a physical element involving violence, non-consensual conduct of a sexual nature, breach of protection orders, or weapons, **or** aiding, abetting, counselling, procuring, conspiring, inducing or being knowingly involved in such offending, **and**
  - with an available sentence of two years or more.
6. 'Designated offences' includes foreign offences, where the offence, had it been committed in Canberra, would meet the above requirements.
7. A character test failure, depending on the circumstances, empowers mandatory or discretionary visa cancellation, or discretionary visa refusal. The process of cancellation or refusal is complex and fraught.
8. Visa cancellation or refusal exposes people to detention (including indefinite detention, particularly where that person is owed non-refoulement obligations by Australia), forcible removal from Australia (potentially resulting in serious harm or death), family separation, and serious psychological consequences. 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.
9. **Liberty Victoria recommends the Bill not be passed.**
10. Our principal concerns with the Bill can be summarised as follows:
  - a. No compelling case has been put forward by the Government to justify the amendments. They do not achieve the intended purpose.
  - b. The amendments set an arbitrary and inconsistent standard of 'character'.
  - c. The amendments are inconsistent with Australia's international obligations.
  - d. The amendments would have a severe impact on highly vulnerable individuals, including children, refugees, and people with mental illness.
  - e. The amendments would have numerous unintended consequences, including on the criminal and administrative jurisdictions and service providers within those spaces.
11. Each of these matters is further developed below.

### **No compelling case**

12. 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.
13. Visa cancellation 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.

14. Critically, the Explanatory Memorandum states that the Bill amends the Act to:

*... provide grounds for non-citizens who commit serious offences, and who pose a risk to the safety of the Australian community, to be appropriately considered for visa refusal or cancellation.*

15. The current law already provides grounds for non-citizens who commit serious offences or present safety risks to be considered for refusal or cancellation. In our experience, there are systems that ensure these individuals come to the attention of the Department through interactions between federal and State/Territory authorities.

16. In the Explanatory Memorandum, the amendments are described as “*providing a clearer and more objective basis*” for visa refusal and cancellation where people “*pose an unacceptable risk to the safety*” of the community, positing that:

*The amendments expand the framework beyond a primarily sentence-based approach and instead allow the Minister or delegate to look at the individual circumstances of the offending and the severity of the conduct.*

17. This is not the case. The Bill will diminish the ability of the decision-maker to look at the individual circumstances of the offending and the severity of the conduct in determining whether a person meets the character test.

18. The justifications for the introduction of the amendments, as advanced in extrinsic materials, are not achieved by the Bill.

#### **An arbitrary and inconsistent standard of assessing character**

19. The 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.

20. 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 necessary fail the character test by virtue of an objective standard, that standard must be high, and in line with community expectations.

21. 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 limited cognitive function is charged with assault for grasping a person by the sleeve 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 on the streets. These offences would not fall within the commonly accepted definition of serious offending.

22. 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 sentence available for particular conduct, and another may not.

23. 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.
24. 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, leading to an inaccurate and incomplete assessment.
25. The inclusion of breach offences is of serious concern to Liberty. 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. It would offend community standards for a person arranging a doctor visit for their child at the instigation of a protected person to automatically fail the character test.
26. The inclusion of relational offending by way of s.501(7AA)(v)-(vii) is of serious concern to Liberty. 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.
27. 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. The sense of arbitrariness is of concern.
28. Overall, Liberty considers the Bill advances amendments to the character test that result in illogicality, inconsistency, and disproportionate outcomes repugnant to the Australian community.

### **Inconsistent with Australia's international obligations**

29. The proposed amendments are inconsistent with Australia's international obligations concerning non-refoulement, the rights of the child, and the right to family unity.
30. The provisions contained in the Bill are likely to further and 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 prescribes that it is an officer's duty to remove an unlawful non-citizen "*irrespective of whether there has been an assessment... of Australia's non-refoulement obligations*": that is, immediately upon their becoming unlawful by virtue of cancellation. If, as is likely (and indeed as is intended), visa cancellations and refusals increased 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 verbal threat.

31. 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<sup>1</sup>, 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.<sup>2</sup>
32. 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 Refugees<sup>3</sup> (**the Refugee Convention**), which in its preamble it directs signatory states 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,*
- (2) *The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.*
33. 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, Articles 17 and 23 (**ICCPR**); the International Covenant on Economic, Social and Cultural Rights, Article 10; and the Convention on the Rights of the Child, Articles 9 and 10.
34. Further, there are no protections for **minors** under the Bill. This affects Australia’s compliance with the Convention on the Rights of the Child (**CRC**)<sup>4</sup> which states that ‘in all actions concerning children...the best interests of the child shall be primary consideration’.<sup>5</sup> Although Direction 79 states that the best interests of the child shall be a primary consideration (amongst three), 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.
35. The amendments proposed would be inconsistent with Australia’s international obligations, the international protection system, as well as longstanding Australian government policy.

### **Impact on highly vulnerable individuals**

36. The Bill is likely to seriously impact children, people from refugee, trauma or severely disadvantaged backgrounds, Indigenous Australians, and those with capacity limitations including mental illness and impairments.
37. **Refugees and asylum-seekers** are in an inherently vulnerable position by virtue of the fact that they have lost the protection of their home State and are 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

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<sup>1</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

<sup>2</sup> See the *International Covenant on Civil and Political Rights*, article 23(1), and the *Convention on the Rights of the Child*, preamble.

<sup>3</sup> As amended by the 1967 Protocol.

<sup>4</sup> Entry into force 2 September 1990, entry into force for Australia 16 January 1991.

<sup>5</sup> CRC, Art 3.

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.

38. 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 acceded to the Refugee Convention; and also from the proximity of the relationship, where vulnerable people have arrived to Australian shores seeking Australian protection.
39. 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.
40. **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*".<sup>6</sup>
41. 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.*<sup>7</sup>

42. 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.
43. The proposed amendments would operate in practice to impose significant further hardship on many of those affected.

## Unintended consequences

44. Liberty Victoria considers that the Bill is likely to adversely impact the operations of:
  - a. The administrative law system, including:
    - i. Primary-stage administrative decision-makers;
    - ii. Merits review bodies, such as the Administrative Appeals Tribunal;
    - iii. Australia's federal courts;
    - iv. The legal and social assistance sectors;

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<sup>6</sup> 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>.

<sup>7</sup> Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133 (2017)..

- b. The criminal justice system, including:
    - i. State and Territory courts, including by way of appeals;
    - ii. The legal assistance sector.
45. 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. 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)):
- a. 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.
  - b. If the offence does not lead to necessary character test failure, they will need to assess whether there is a discretionary character test failure.
  - c. 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 79 and inviting a response within 28 days.
  - d. They will then need to consider that response accordingly to law and reach a determination.
46. 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.
47. 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.
48. There are also serious consequences of the Bill for the **criminal jurisdiction**, including a reduction in plea resolutions causing severe delay. We endorse the submissions of the Visa Cancellations Working Group in this respect.

### Retrospective application

49. 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.
50. 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*".<sup>8</sup>

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<sup>8</sup> HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 276.

51. The erosion of such principles is of significant concern to Liberty Victoria, representing a threat to basic principles of our society more broadly.

## **Conclusion**

52. 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 the stated goals, instead proposing a standard out of line with community expectations. It ignores a valuable repository of expertise, being determinations by the judiciary. The amendments would have significant adverse impacts on visa holders and their families, many of who are highly vulnerable, and on Australia's international reputation.

53. For these above reasons, Liberty Victoria recommends the Bill not be passed.

**Jessie Taylor**  
**President, Liberty Victoria**