

# ASRC BRIEF

## Migration Amendment (Strengthening the Character Test) Bill 2019

Updated 21 September 2020

### [Asylum Seeker Resource Centre \(ASRC\)](#)

This document includes

1. Key resources and dates
2. Key facts about the bill
3. Key concerns and public messages
4. Political targets

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### Key resources and dates

- *Bill website:*  
[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/CharacterTest2019](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CharacterTest2019)
- *Senate inquiry submissions:*  
[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/CharacterTest2019/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CharacterTest2019/Submissions)
- *Senate inquiry report*  
[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/CharacterTest2019/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CharacterTest2019/Report)
- *Joint media release, ASRC and Visa Cancellations Working Group 2 September 2020*  
<https://www.asrc.org.au/2020/09/02/senators-urged-not-to-grant-further-powers-to-minister-dutton-to-cancel-visas-of-vulnerable-people/>
- Next Parliamentary sitting period - October 6, 7, 8  
Bill has passed the House of Representatives - to be debated and voted on in the Senate  
Full 2020 sitting calendar - <https://www.pmc.gov.au/sites/default/files/publications/parl-sittings2020.pdf>

## Key facts about the bill

- Under the Minister's proposed new powers, if a person has been convicted of an offence that falls into a category carrying a possible term of imprisonment of at least two years, they will automatically fail the 'character test'.
  - Even where they actually receive a light penalty, such as a fine or a short community-based order, indicating a less serious crime, they will still automatically fail the character test, and then likely be subject to immigration detention and forcible removal from Australia.
  - 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.
- The Bill increases the risk that people who are owed refugee or complementary protection obligations may be returned to their country of origin in breach of international law, or remain in indefinite detention in Australia without legal recourse.
- The proposed amendments will unduly impact children, who have never been tried as adults, and other vulnerable people, including victims of domestic violence who are dependent visa holders.
- The Bill is estimated to potentially result in a four -fold increase in the number of visa cancellations, and therefore the number of people in immigration detention. For those owed protection obligations or who cannot be removed, their detention may be indefinite.
- This Bill will very negatively impact on an already gridlocked legal system. Both the AAT and the Courts already have massive backlogs. People must wait in immigration detention for their case to be dealt with, This Bill will massively increase both the numbers of people held in immigration detention and the duration of their detention.
- The Senate committee majority's recommendation to support the bill has given insufficient weight to serious objections raised by the Parliamentary Joint Committee on Human Rights and the Senate's Scrutiny of Bills Committee in their review of the 2018 version of this bill, which is identical to the present bill. The Joint Committee was especially concerned 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.*<sup>1</sup>
- The Scrutiny of Bills Committee commented that in the light of the 'already extremely broad discretionary powers available to the minister', the explanatory materials for the bill had 'given limited justification for the expansion of these powers'.<sup>2</sup>
- Arbitrary threshold
  - The Explanatory Memorandum states that the Bill will ensure that discretionary visa cancellation and refusals are based on objective standards of criminality and seriousness. Instead, the Bill in fact erodes objective standards and seeks to introduce arbitrary and unreasonably low thresholds for failing the character test.
- The consequences of a decision to cancel or refuse a protection visa on character grounds are profoundly serious. The Migration Act 1958 (Cth) (the Act) expressly purports to

<sup>1</sup> Parliamentary Joint Committee on Human Rights, *Report 1 of 2019*, 12 February 2019, pp. 78–79

<sup>2</sup> Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2018*, 14 November 2018, p. 11

override international law by stipulating that non-refoulement obligations are irrelevant to the duty contained in s 198 of the Act to remove an unlawful non-citizen from Australia as soon as reasonably practicable after a visa application is refused or cancelled. 1 This means that, even if a person is found to be a refugee or otherwise owed protection obligations, officers of the Department of Home Affairs are required to remove the person from Australia if their visa is cancelled or refused on character grounds. For most people, this means sending them back to the country where they may face persecution or other serious human rights abuses.

- The definition in the Bill of a designated offence includes offences against a law in force in a foreign country (Foreign Convictions). The inclusion of Foreign Convictions as a ground to refuse or cancel a visa raises serious concerns.
- Retrospective application - the new requirements of the character test are intended to apply to visa applications submitted **prior** to the commencement of the Bill, and to offences committed before that date.

## Key concerns and public messages

- This Bill should be rejected in its entirety.
- This Bill will lead to unfair, arbitrary cancellation of people's visas.
  - It disproportionately penalises people based only on the category of offence and not on their actual level of wrongdoing.
  - The bill is a move away from an individual sentence-based model, to an arbitrary penalty model.
- This Bill will result in an unnecessary increase of numbers in immigration detention
  - Immigration detention serves an administrative purpose, not a punitive purpose.
- Australia's migration system should not be used as a method of doubly punishing those who have already been punished by the criminal justice system.
  - Nor is it fair to punish all the innocent people attached to someone facing visa cancellation, often Australian spouses, children and other close family members who face permanent separation from their loved ones.
  - Immigration detention is not an extension of the prison system
  - This Bill is part of an ongoing effort to turn detention centres into prisons and to criminalise everyone in them, as a way of excusing denial of their basic human rights and dehumanising them.
- There is no need for this bill.
  - This bill creates bad law. There is a reason it wasn't passed when it was first introduced 2 years ago. The Government is recycling bad bills for political point scoring rather than positive law reform.
  - Public policy should be based on evidence, there is a lack of evidence for this bill.
  - Expansion of Ministerial powers is not justified.
  - Minister Dutton already has sufficient, broad powers to cancel visas ( under sections 501, 116 and 109 of the Migration Act).
  - It is extremely difficult to conceive of any kind of criminal conduct, or danger to the community, that is not already captured by these provisions.

- None of the examples provided by the Department in their submissions to the Inquiry would not already be covered by existing visa cancellation powers. There is no legal gap to fill. However this Bill results in extreme overreach and injustice to individuals. Examples of people who would face likely visa cancellation under this Bill:
  - verbal threats, such as telling a person you want to slap them, or sending a text that you will punch the 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.
- This is yet again, a power grab by the Government and is another unnecessary and cruel move by Minister for Home Affairs Peter Dutton.
- The bill could undermine the functioning of the legal system.
  - *[A] core difficulty with the Bill is that due to the non- exhaustive, open- ended nature of the definition of 'designated offence' it is not clear which offences will be captured. The Law Council is concerned that there may be years of litigation ahead in order for the Federal Courts to establish the outside parameters of these provisions<sup>3</sup>. Australian Law Council*
  - The Bill sets a very, very low bar for visa cancellations.
- We urge all Senators to oppose this cruel and unnecessary bill.

## Issues we want to frame and lean into

- **Fairness** - What do we all have in common -- is much better than talking about criminality. Make this a human issue.

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<sup>3</sup> Law Council, responses to questions on notice, 19 August 2019 (received 23 August 2019), p. 1.

## What NOT to say

**DO NOT talk about criminal history, drugs or paedophiles.**

**DO NOT respond to individual cases or examples given by the Government**

- This will play right into the Government's argument.
- **What to say instead:** The bill sets the bar to cancel visas at a very, very low level meaning people will be in danger of being detained indefinitely. Talk about conditions in detention, how long people have been detained, and the Government's refusal to take responsibility. Talk of Government power grab, undermining the legal system, disproportionate penalties.

## Political targets

For the bill to be voted down, we need public support and lobbying to pressure the cross-bench to oppose the bill and to set the frame as to why the bill is unnecessary and another power grab by the Government.

The vote of the Senate crossbench is key to the success/failure of the bill. To vote the bill down, we need ALP plus Greens plus 3 crossbench OR for senators to remain undecided, therefore the Government will not list the bill.

Greens position - oppose the bill

Greens dissenting report

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal and Constitutional Affairs/CharacterTest2019/Report/section?id=committees%2freportsen%2f024307%2f28028](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CharacterTest2019/Report/section?id=committees%2freportsen%2f024307%2f28028)

ALP position - oppose the bill

ALP dissenting report

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal and Constitutional Affairs/CharacterTest2019/Report/section?id=committees%2freportsen%2f024307%2f27974](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CharacterTest2019/Report/section?id=committees%2freportsen%2f024307%2f27974)

Stirling Griff (CA) - oppose the bill

Rex Patrick - likely to oppose the bill

Pauline Hanson's One Nation (PHON) - likely to support the bill

**Jacqui Lambie - unknown**