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Submitted via email to migration@aph.gov.au

Submission to Legal and Constitutional Affairs Legislation Committee on the Migration Amendment (Strengthening the Character Test) Bill 2018

We welcome the opportunity to contribute to the Legal and Constitutional Affairs Legislation Committee on the Migration Amendment (Strengthening the Character Test) Bill 2018.

This submission brings together the evidence-based views of Ms Rebecca Powell and Mr Dave Martin from the Border Crossing Observatory, based at Monash University, Melbourne. Rebecca Powell is the Border Crossing Observatory's Managing-Director and a PhD candidate in Criminology (part time) and Dave Martin is a PhD candidate at La Trobe University Law School. Short biographies of the authors are available at the end of this submission.

We would welcome the opportunity to discuss further with the Committee this submission or our wider research on visa cancellation and deportation of convicted non-citizens under s501 of the Migration Act.

Kind regards,

Ms Rebecca Powell, Managing Director, The Border Crossing Observatory

Mr Dave Martin, PhD Candidate, La Trobe University

Recommendations

- 1. We recommend the fundamental rejection of this Bill. Upholding Australia's international human rights obligations should be given great consideration in any proposed amendments to the character test.**
 - Decision making regarding s501 visa cancellations at both Ministerial and AAT review should be re-weighted towards human rights of affected individuals with due consideration for Australia's international human rights obligations and the negative impact of deportation on families and communities.
 - Continued, or increased access to full merits review is essential to ensure fairness and to bring the criminal deportation system in line with the due process protections provided within the criminal justice system and comply with Australia's international human rights obligations.

- 2. Children under the age of 18 years are protected from deportation regardless of criminal status or association.**

- 3. Executive power in s501 visa cancellation decision making be reduced, particularly concerning the cancellation of visas against children and those who receive non-custodial sentences.**

- 4. From an international ethical standpoint, Australia must take responsibility for offending committed by long term residents.**

Background

On the October 25th the Migration Amendment (Strengthening the Character Test) Bill 2018 was presented to federal parliament with an aim to further strengthen Section 501 of the *Migration Act 1958* concerning visa cancellation and refusal on character grounds. The current Bill provides for a further expansion of Ministerial discretion in s501 visa cancellation, therefore widening the net to make it easier to cancel a non-citizen's visa and deport them from Australia.

Children under the age of 18 and first-time offenders who might ordinarily be given a non-custodial or lower level sentence are more likely to be caught up in these expanded powers. The explanatory memoranda accompanying the Bill contains a clause with specific grounds for not differentiating between adults and persons under the age of 18 in the application of s501. We know of at least one case from June this year reported in the media, where a New Zealander child, aged 17 was detained in a Melbourne immigration detention centre following a visa cancellation under s116 (Roy and Doherty 2018; Trevett and Bennett 2018). This is of utmost concern and, based on human rights considerations in relation to rights of the child, cannot be allowed, let alone be given the opportunity to be enshrined in legislation. Responses of concern to the child's detention were particularly vocal from New Zealand (Roy and Doherty 2018; *New Zealand Herald* 2018; Trevett and Bennett 2018) from a strong basis of this incident being in contravention of Australia's international human rights obligations.

The Bill proposes visa cancellation against non-citizens convicted of 'designated offences'¹ that are associated with serious, violent and sexual assault crime resulting in convictions which are punishable by 2 years in prison, regardless of any mitigating aspects to sentencing,

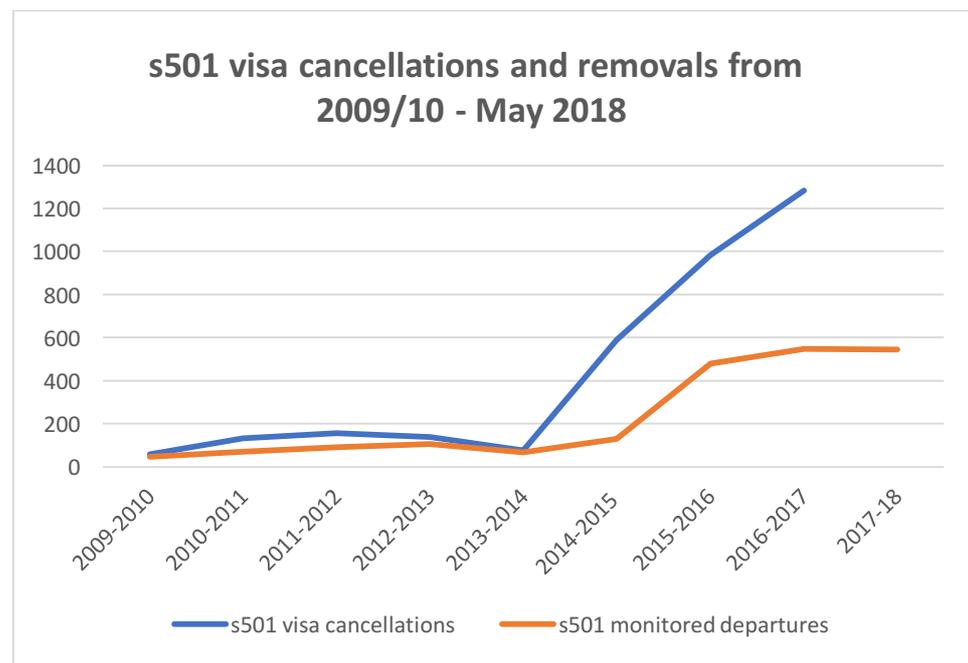
¹ From, Home Affairs Minister, The Hon David Coleman MP, 'Strengthening the character test for non-citizens', 25 October 2018, <https://minister.homeaffairs.gov.au/davidcoleman/Pages/character-test-for-non-citizens.aspx>

"The below list of designated offences will be inserted into s501 of the Migration Act 1958, making it very clear that anyone convicted of these crimes, whether in Australia or overseas, will be at risk of having their visa cancelled or refused.

- violence against a person, including (without limitation) murder, manslaughter, kidnapping, assault, aggravated burglary and the threat of violence; 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; or
- breaching an order made by a court or tribunal for the personal protection of another person; or
- using or possessing a weapon; or
- procuring, or assisting in any way with one of these designated crimes; and
- the offence carries a maximum sentence of two or more years imprisonment."

regardless of any magistrate or judge sentencing discretion, and regardless of any sentence imposed. The proposed amendments increase potential for human rights violations, particularly in regard to rights of the child as well as against those convicted non-citizens receiving non-custodial sentences. Given the potential impact the Bill has on children and first time offenders in particular, possible human rights violations include the right to protection of children against deportation, the right to family life, *non-refoulement* considerations and the right to fairness and due process in the criminal justice system.

If the Bill is passed, this will be the second time section 501 has been amended to expand Ministerial power to cancel visas since it was introduced into legislation in 1999. In December 2014, s501 was amended to require visa cancellation of non-citizens convicted of 12 month prison sentences or more. Since then, there has been a significant increase in visa cancellation and deportations of convicted non-citizens from Australia. From 2013/14 to 2016/17 s501 visa cancellations increased fifteen-fold and the number of removals under s501 increase four-fold from 2014/15 to 2017/18 as the graph below indicates.



Source: Question on Notice, 2018-2019 Budget Estimates, Legal & Constitutional Affairs, BE18/174.

Over time, s501 policy developments can be characterized by the continuing expansion of executive power in visa cancellation decision making with reduced emphasis on mitigating factors. This in turn impacts on administrative decision making as executive powers in s501 visa cancellation widen. Considering convicted non-citizens as a risk to the Australian community is often at the forefront of political rhetoric around s501 policy amendments and reflected in visa cancellation decision making. The introduction of the current Bill to Parliament is no exception with Immigration, Citizenship and Multiculturalism Affairs Minister Coleman stating “The Bill ensures that non-citizens who have been convicted of a serious offence and who pose a risk to the safety of the Australian community are appropriately considered for visa refusal and cancellation”. Protection of the Australian community from harms associated with criminals and future criminal activity have therefore justified the expansion of ministerial power in executive decision making on visa cancellations to the detriment of human rights considerations for individuals affected.

Concerns surrounding the introduction of the current Bill

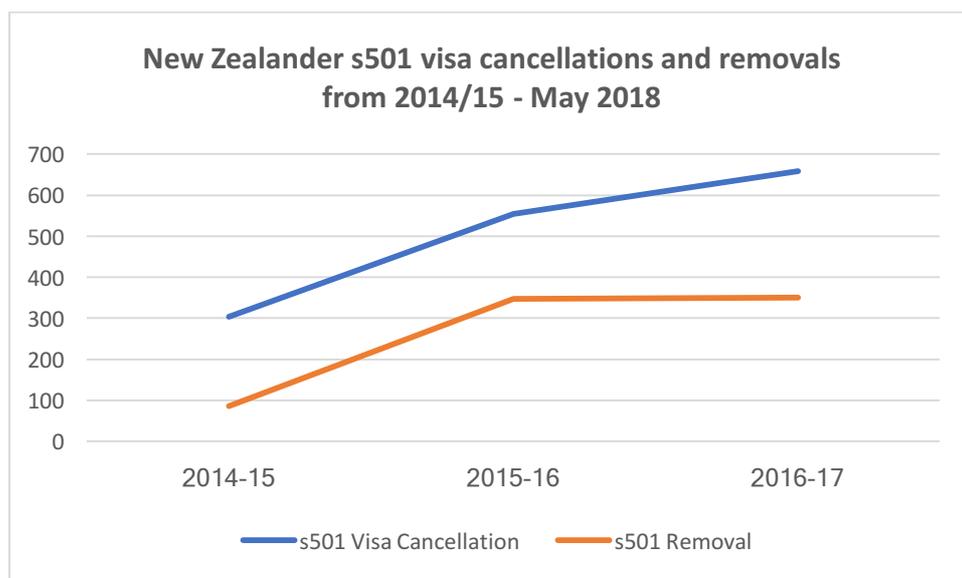
The introduction of the current Bill has arguably stemmed from the December 2017 report from the government’s ‘Inquiry into Migrant Settlement Outcomes’ (Parliament of Australia 2017) that was mandated to,

‘...give particular consideration to social engagement of youth migrants, including involvement of youth migrants in anti-social behaviour such as gang activity, and the adequacy of the Migration Act 1958 character test provisions as a means to address issues arising from this behaviour.’

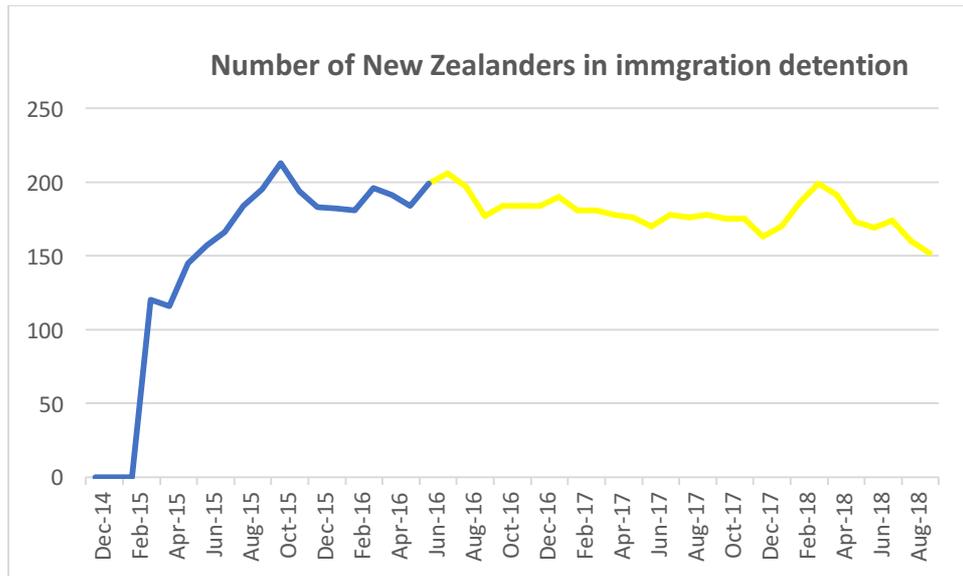
This inquiry was announced shortly after a series of events in Melbourne that gained significant media coverage concerning young people from African and Pasifika backgrounds reportedly involved in gang related activities and violent crimes. Australian Border Force and Victoria Police moved to cancel visas and deport those associated with these crimes, including persons under the age of 18 (Wright and Brown 2017). The Inquiry report ‘No one teaches you to become Australian’ (Parliament of the Commonwealth of Australia, 2017), asserts that the strengthening of the character test will make Australians feel safe and be safer. This context was exploited as a significant issue of bipartisan policy debate and commentary surrounding the recent Victorian state election (Martin 2018).

Jason Wood, the chairman of the Federal Joint Standing Committee on Migration, who has worked on the Bill directly, references Sudanese gangs and children under 18 years old as the target of the proposed changes. In a recent interview with the *Herald Sun* (Moor 2018), he stated, “This no age restriction clause was necessary because a lot of Sudanese and other gang-related violence was being committed by youths aged under 18, particularly in Victoria”. This calls into question how offending by young people is viewed by the government, who look to favour a risk reduction approach by removal as opposed to rehabilitation. Rehabilitation is not mentioned in the Bill. Evidence shows that rehabilitation, particularly for young people, is of benefit to the community by assisting with reintegration, crime prevention and reducing the commission of further offences approach as opposed to rehabilitation (Australian Law Reform Commission 1997).

Based on our extensive research (Keyzer and Martin 2018, The Border Crossing Observatory website), we are concerned by the impact the current Bill will have on New Zealanders, many of whom are currently, or prior to deportation, long term or permanent residents of Australia. Following amendments made to s501 in December 2014, New Zealanders have become the largest nationality group for visa cancellations and deportations under s501 which has included a number of long term residents. They are the largest nationality group in Australia’s immigration detention network since June 2016, as indicated by the yellow section of the line in the second graph below, while they await visa cancellation appeal outcomes and/or removal from Australia.



Source: Question on Notice, 2018-2019 Budget Estimates, Legal & Constitutional Affairs, BE18/174.



Source: Home Affairs, Immigration Detention Statistics

<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/immigration-detention>

If this Bill is passed it will cast a wider net over the number of visa cancellations against non-citizens and will undoubtedly impact an even greater number of New Zealanders living in Australia. Concerns also lie with the application of this Bill against persons perceived to be a risk to the Australian community who are under 18 years of age, and who have been convicted of a 'designated offence' whether or not they have been sentenced for it. Racial targeting towards African and Pasifika youth is also of utmost concern.

When considering convicted non-citizens as a risk to the Australian community, the human rights of individuals who have their visa cancelled, particularly those who are long term residents, are often compromised. The right to due process where a visa is cancelled personally by the Minister, and mitigating considerations such as whether a convicted non-citizen is a child, of if they have children and family in Australia, the length of residence and ties to Australia and lack of access to rehabilitation opportunities as a result of their visa cancellation, are all linked to rights enshrined in UN human rights instruments. These are important human rights considerations that are often secondary in visa cancellation decision making. The system is already weighted far too heavily towards the reduction of risk via deportation and away from these important values.

While protecting the Australian community from criminal offending is a reasonable objective of the government, expanding executive power in visa cancellation has real impacts on the lives and human rights of individuals. The measures for expanded visa cancellation presented in this Bill appear to be directed as a deterrent measure for children involved in allegedly gang-related criminal activity and other offenders. If introduced, the legislation would ensure the deportation of additional categories of people, with serious consequences for fairness and the observance of international human rights commitments.

Disclaimer:

This submission has been developed from the following Op-ed prepared by the authors and published online 23 November 2018.

Martin, D and Powell, R (2018) 'Proposed change to Migration Act opens the way to deporting children' *Right Now*, 23 November 2018. <http://rightnow.org.au/opinion-3/proposed-change-migration-act-opens-way-deporting-children/>

References:

Australian Law Reform Commission (1997) 'Seen and heard: priority for children in the legal process (ALRC Report 84)', 19 November 1997. Available at, <https://www.alrc.gov.au/publications/report-84>

Keyzer, P. and Martin, D. (2018) 'Why New Zealanders are feeling the hard edge of Australia's deportation policy', *The Conversation*, 12 July 2018. Available at, <https://theconversation.com/why-new-zealanders-are-feeling-the-hard-edge-of-australias-deportation-policy-99447>

Martin, L. (2018) 'Victorian election: gang violence at centre of law and order debate' *The Guardian*, 31 October 2018. Available at, <https://www.theguardian.com/australia-news/2018/oct/31/victorian-election-gang-violence-at-centre-of-law-and-order-debate>

Moor, K. (2018) 'Foregin crims purge' *Herald Sun*, 23 October 2018. Available at, <https://www.pressreader.com/australia/herald-sun/20181023/281505047200045>

New Zealand Herald (2018) 'Kiwi teen released from Australian detention', 17 July 2018.

Available at, https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12090326

Parliament of Australia, (2017) 'Inquiry into Migrant Settlement Outcomes', Joint Standing Committee on Migration. Available at,

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/settlementoutcomes

Parliament of the Commonwealth of Australia (2017) 'No one teaches you to become an Australian: Report of the inquiry into migrant settlement outcomes', Joint Standing

Committee on Migration, December 2017. Canberra. Available at,

https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024098/toc_pdf/NooneteachesyoutobecomeanAustralian.pdf;fileType=application/pdf

Roy, E. A. and Doherty, B. (2018) 'Release teenager from Australian immigration detention, urges acting New Zealand PM', *The Guardian*, 4 July 2018. Available at,

<https://www.theguardian.com/australia-news/2018/jul/04/release-teenager-from-australian-immigration-detention-urges-acting-new-zealand-pm>

The Border Crossing Observatory (website) 'Balancing risk and human rights in the deportation of convicted non-citizens from Australia to New Zealand'. Available at,

<https://arts.monash.edu/social-sciences/border-crossing-observatory/borders-and-border-control/balancing-risk-human-rights-deportation-convicted-non-citizens-australia-new-zealand/>

The Parliament of the Commonwealth of Australia, House of Representatives, *Migration Amendment (Strengthening the character test) Bill*, 2018. Available at,

https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6214_ems_7da208f1-0723-41ac-9ec0-fcc0eceaaf8c/upload_pdf/688011.pdf;fileType=application/pdf

Trevett, C. and Bennett, L. (2018) 'Detained teen's Australian lawyer pleased with Winston Peters' comments' *New Zealand Herald*, 3 July 2018. Available at,

https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12082392

Wright, P. and Brown, M. (2017) 'Victorian children committing serious crimes referred to Border Force for deportation', *ABC News*, 19 January 2017. Available at, <https://www.abc.net.au/news/2017-01-19/child-criminals-referred-to-border-force-for-deportation/8193344>

Author biographies

Rebecca Powell

Rebecca Powell is the Managing-Director of the Border Crossing Observatory and the Research Manager of the Migration and Inclusion Centre (MMIC) at Monash University. She has worked as a senior researcher on a number of irregular migration research projects hosted by the Border Crossing Observatory and has previous experience working as an international research consultant on trafficking in persons and smuggling of migrants for the United Nations Office on Drugs and Crime and the Asia Regional Trafficking in Persons Project.

Rebecca is currently completing a PhD by publications part time titled 'I still call Australia home': Balancing risk and human rights in the deportation of convicted non-citizens from Australia to New Zealand.'

Dave Martin

Dave Martin is a member of the Border Crossing Observatory and a PhD candidate at La Trobe University Law School. He is researching the human impacts on New Zealand citizens (and their families) being forcibly removed from Australia under Section 501 of the Migration Act. Dave previously managed a prison organisation in Queensland for eight years.

About the Border Crossing Observatory

The Border Crossing Observatory is an innovative virtual research centre that conducts high quality, independent and cutting edge research on border crossings and border control.

Based at Monash University, the Observatory draws together an international network of critical criminologists and researchers from related disciplines who work in connection with key NGOs to examine border crossings and border control, putting the experiences of human beings at the centre of their analysis.

The Border Crossing Observatory is built on a strong foundation of empirical research. Our researchers adopt inter-disciplinary social science approaches to research migration and border control. Our research seeks to transform knowledge and develop new ways of thinking, bringing new insights into policy debates associated with the regulation of migration.