

**Human rights of New Zealanders residing in Australia: Submission by Community Law Centres o  
Aotearoa to the Office of the High Commissioner for Human Rights**

**Submitted for inclusion in Australia's third Universal Periodic Review, 19 March 2020**

1. This submission is by Community Law Centres o Aotearoa, the peak organisation for Aotearoa/ New Zealand's 24 Community Law Centres. We have a strong interest in the human rights of New Zealand citizens in Australia and work together with organisations across New Zealand and Australia to advocate for their rights. This submission has received the support of the New Zealand Howard League, a CSO focused on penal reform, and the Salvation Army, whose Social Policy & Parliamentary Unit promotes policies that strengthen New Zealand's social framework.
2. Our submission concerns Australia's infringements upon the human rights of New Zealand citizens who have made Australia their home. We specifically are alarmed by the cancellation of large numbers of New Zealand citizens' Australian visas under ss501 and 116 of the Migration Act, and the proposed drastic expansion of Australia's visa cancellation regime. Australia's visa cancellation policy is an egregious breach of its international human rights obligations. We ask that this important issue is included in the Office of the High Commissioner on Human Rights' (*OHCHR*) summary report on issues raised by civil society organisations.
3. Our specific recommendations are that Australia:
  - Does not pass the Migration Amendment (Strengthening the Character Test) Bill 2019;
  - Narrows the scope of ss501 and 116 of the Migration Act as a matter of priority, with the aim of excluding long-term permanent residents from the provisions and bringing Australia into compliance with its international human rights obligations; and
  - Re-establishes a direct path to Australian citizenship for New Zealanders, that is based solely upon their length of residence in Australia.

***Overview of the issue***

4. Since the introduction of the Trans-Tasman Travel Arrangement in 1973, Australian and New Zealand citizens have been able to enter each other's country to visit, live, and work indefinitely, without the need to apply for prior authority. As a result there are a large number of New Zealand citizens in Australia; as at December 2015, there were an estimated 634,560 New Zealand citizens present in Australia.<sup>1</sup> While an Australian citizen has the right to apply for New Zealand residence once they have lived in New Zealand for 5 years, on 26 February 2001 Australia removed its equivalent direct pathway to citizenship for New Zealanders.

---

<sup>1</sup> Harriet Spinks and Michael Klappdor, 'New Zealanders in Australia: a quick guide' *Parliamentary Library Research Paper Series 2016–17* (Parliament of Australia, 29 August 2016).

5. Currently, New Zealanders are issued a 'Special Category Visa' (SCV) upon arrival in Australia, a temporary visa that is specifically for New Zealand citizens. New Zealand citizens arriving in Australia after 26 February 2001 have no direct pathway transition from this temporary status to permanent residence and citizenship; they must seek a skill or income-based visa. Of the 146,000 New Zealand-born migrants who arrived in Australia between 2002 and 2011, only 8.4% had acquired Australian citizenship by 2016, and as a subset of this Māori are particularly disadvantaged, with under 3% acquiring citizenship.<sup>2</sup> This means that there are many New Zealanders who have lived and worked in Australia for most of their lives but remain temporary visa holders, with insecure immigration status and limited access to social services.
6. SCV holders who are residing long-term in Australia are in a very vulnerable position as they cannot access Australian social security benefits, government and social housing, or the National Disability Insurance Scheme. Many New Zealand citizens are permanently marginalized as a result, experiencing financial hardship, homelessness and disengagement from education. The issue this submission will focus on is the vulnerability of New Zealand citizens on temporary visas to visa cancellation on character grounds. In 2014 Australia amended s501 of the Migration Act 1958 to expand powers to cancel and refuse visas on character grounds. Any non-citizen sentenced to a term of imprisonment of 12 months or more is now subject to mandatory visa cancellation.
7. Under s501, sentencing can be made up of two or more sentences and sentences do not have to have been served. This therefore captures people who have served multiple sentences for more minor offending, such as driving without a license or common assault. Because the legislation is retrospective, some affected individuals may have finished their sentence years ago and have worked hard to reform themselves and turn their lives around.
8. The largest group of people deported as a result of this law change has been New Zealanders, with approximately 2000 people deported to New Zealand under this regime so far.<sup>3</sup> Many have lived in Australia for most or all of their lives. They are forcibly removed from their home and sent to a country where they have spent little time (or never lived). They are separated from their family, community, and social supports. The policy has disproportionately affected Māori and Pasifika New Zealand citizens; they made up 60% of deportees as at 2018.<sup>4</sup>
9. Australia is considering legislation (the *Migration Amendment (Strengthening the Character Test) Bill 2019*) that will worsen the situation even further. The Bill proposes to capture any person convicted of a crime with a maximum penalty of more than two years imprisonment, regardless of the actual sentence given. This may include people who have been given no

---

<sup>2</sup> Paul Hamer and Andrew Markus, 'Australian census data show collapse in citizenship uptake by New Zealanders', (*The Conversation*, 23 August 2017), available at <<https://theconversation.com/australian-census-data-show-collapse-in-citizenship-uptake-by-new-zealanders-81742>>; based on Australian Bureau of Statistics, 'Census of Population 2016', available at <<https://www.abs.gov.au/ausstats/abs@.nsf/mf/2024.0>>

<sup>3</sup> For comparison, just 78 people (of all nationalities) whose visas had been cancelled under s 501 were removed from Australia in 2011-12, before these changes. See Australian Human Rights Commission, 'Background paper: Human rights issues raised by visa refusal or cancellation under section 501 of the Migration Act' (June 2013), at 10.

<sup>4</sup> Sylvia Varnham O'Regan, 'Why New Zealand Is Furious About Australia's Deportation Policy' (*New York Times*, 3 July 2018).

sentence, a fine, or a community corrections order, and the change would be retrospective. This Bill is now being considered by the Senate, having already been approved by the House of Representatives.

### ***Visa cancellation process***

10. Under s501(3A) of the Migration Act 1958, “the Minister **must** cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test” on the basis of having “been sentenced to a term of imprisonment of 12 months or more” or having “been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more”.
11. Disturbingly, we are increasingly seeing visas being cancelled before criminal charges have even been heard, under the even broader s116. Section 116(1)(e) permits the Minister to cancel a visa if satisfied that “the presence of its holder in Australia is or may be, or would or might be, a risk to the health, safety or good order of the Australian community”, and this is being interpreted increasingly liberally. Visas may also be cancelled based upon mere suspicion of criminal activity under s501(6)(d), as a person fails the character test if “in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would engage in criminal conduct”.
12. Once a person’s visa is cancelled they become an unlawful non-citizen and, if they do not depart Australia voluntarily, must be detained (including a possibility of offshore detention) pending their removal from Australia.<sup>5</sup> Where a person is not removed from Australia, Australian law allows them to remain in detention indefinitely. New Zealanders now make up the majority of people held in Australian immigration detention centres.
13. The affected person may have an ability to lodge an appeal but must remain in detention while their appeal is ongoing. Appeals can take months or even years to be heard, and periods in detention can be lengthy (sometimes far longer than the person’s sentence of imprisonment was). At mid-2019, the Australian Government reported that the average period of detention was 485 days.<sup>6</sup>
14. Appeal rights against visa cancellation under s501 are limited – in some cases there will be a right to a merits review by the Administrative Appeals Tribunal, but there is no right to review by the Tribunal if the decision is made personally by a Minister (for reference, ministers made approximately 27 per cent of visa cancellation decisions in the 2017/18 financial year).<sup>7</sup> Of those who are able to seek a review by the Tribunal, “around 80 per cent of them are either thrown out or affirm the Government’s decision”<sup>8</sup> and even if the applicant is successful, the Minister can overturn a Tribunal decision.

---

<sup>5</sup> Migration Act 1958, sections 189 and 196.

<sup>6</sup> Department of Home Affairs, ‘Immigration Detention and Community Statistics’, 30 June 2019, at 11.

<sup>7</sup> Joint Standing Committee on Migration, ‘The report of the inquiry into review processes associated with visa cancellations made on criminal grounds’ (*Parliament of the Commonwealth of Australia*, Feb 2019), at 3.68.

<sup>8</sup> Joint Standing Committee on Migration, ‘The report of the inquiry into review processes associated with visa cancellations made on criminal grounds’ (*Parliament of the Commonwealth of Australia*, February 2019), at vii.

### **Impacts of visa cancellation**

15. The majority of New Zealanders deported from Australia are long-term residents who have lived in Australia for a period of 10 years or more.<sup>9</sup> Many accounts have been written of the devastating impacts that visa cancellation has, by detaining people for lengthy periods, separating families, and removing people from the country they consider home to somewhere they have no connection to.<sup>10</sup>
16. Returnees have reported that they feel culturally and socially disconnected from the New Zealand community and struggle to re-establish their life, while also feeling the immense pain of separation from family. In the worst cases, the forced return has sent individuals into cycles of mental illness, addiction, and self-harm or even suicide. At least one New Zealand man is known to have taken his life in a Goulburn prison after learning he was to be deported.<sup>11</sup>
17. The policy also impacts on the removed person's whole family and separates parents from children who rely on them. Young New Zealanders who face removal may have only known life in Australia and are forced to return to a foreign country with no social or familial support. Added to this is the impact of prolonged detainment in immigration detention facilities, which can have serious mental health consequences.<sup>12</sup> The impacts are especially acute for young people, such as a 17-year-old New Zealand citizen boy who recently had his visa cancelled and was placed in an adult detention centre 12 hours away from his family.<sup>13</sup>

### **Inconsistencies with Australia's international human rights obligations**

18. The human rights implications of Australia's current visa cancellation policy are numerous and severe. For example, the current regime is inconsistent with:
  - **The right not to be subject to arbitrary detention,**<sup>14</sup> as individuals are required to remain in detention for prolonged or indefinite periods (until they are either granted another visa or removed from Australia);

---

<sup>9</sup> Rebecca Powell, 'Questions of fairness: New Zealander experiences of Section 501 and the case of Shane Martin', (*Overland*, 6 June 2019), available at < <https://overland.org.au/2019/06/questions-of-fairness-new-zealander-experiences-of-section-501-and-the-case-of-shane-martin/>>

<sup>10</sup> See, for example, 'Section 501' (Māori Television, 2018), available at < <https://www.maoritv.com/docos/section-501-2018>>; Julie Hill, "'You can easily fall off the edge": NZ detainees on the mental toll of Australia's deportation policy' (*The Spinoff*, 26 September 2019); Eleanor Ainge Roy, "I was petrified": the New Zealanders deported from Australia despite decades working there', (*The Guardian*, 7 September 2019); Simon Plumb, 'Anger after tetraplegic 'dumped' in NZ', (*New Zealand Herald*, 18 October 2015).

<sup>11</sup> Sylvia Varnham O'Regan, 'Why New Zealand Is Furious About Australia's Deportation Policy' (*New York Times*, 3 July 2018).

<sup>12</sup> M von Werthern et al., 'The impact of immigration detention on mental health: a systematic review', *BMC Psychiatry* (2018) 18:382.

<sup>13</sup> Radio New Zealand, "'This is a breach of international law'", 22 June 2018, available at < <https://www.rnz.co.nz/national/programmes/ninetoon/audio/2018650448/this-is-a-breach-of-international-law>>

<sup>14</sup> Article 9 of the Universal Declaration of Human Rights and articles 9-11 of the International Covenant on Civil and Political Rights.

- **The right to family life,**<sup>15</sup> as affected people (the majority being long-term residents) are separated from their children and family members and placed in detention, then removed from the country where their family resides and excluded from returning;<sup>16</sup>
- **The child’s right to have their best interests be a primary consideration,**<sup>17</sup> as the mandatory visa cancellation regime leaves no scope for the affected person’s child(ren)’s best interests to be considered (let alone given primary consideration);
- **The right to justice,**<sup>18</sup> as the Minister’s broad powers are not subject to merits review, the Minister is not obliged to afford natural justice, and the Minister can overturn decisions of the appellate tribunals. Also, as the Human Rights Commission argued, “the fact that a person is suspected of posing a slight risk of committing a minor offence should not automatically enliven the visa cancellation power”;<sup>19</sup>
- **The right to be equal before the courts,**<sup>20</sup> as two people who have committed the same crime are treated very differently depending on whether they are a citizen or not. Non-citizens are subject to a far more serious outcome for committing the same offence as citizens, including arbitrary detention and removal from Australia;
- **The right not to face a heavier penalty than the one that was applicable at the time when a criminal offence was committed,**<sup>21</sup> as s501 captures people who served their sentences many years ago. As Australian Lawyers for Human Rights argued: “given the seriousness of refusing or cancelling a person’s visa, particularly in circumstances which may result in arbitrary detention or *refoulement*, the retrospective application ... clearly imposes a heavier penalty than applicable at the time of the offence.”<sup>22</sup>
- **The right not to be arbitrarily deprived of the right to enter one’s own country,**<sup>23</sup> as many of those being removed from Australia are long-term permanent residents who came to live in Australia at a very young age. The strength of their ties to Australia make it their “own country”. We note that in 2011 the UN Human Rights Committee found Australia to have violated this right in the case of a non-citizen who arrived in Australia as an infant. The Committee further held that: “The State party is also under an obligation to avoid exposing others to similar risks of a violation in the future”;<sup>24</sup>
- **The right to be free from racial discrimination,**<sup>25</sup> as vulnerable ethnic minority groups, such as New Zealand citizens of Māori and Pasifika descent, who already face systemic

<sup>15</sup> Articles 17 and 23(1) of the International Covenant on Civil and Political Rights.

<sup>16</sup> We note that Australia’s breaches of these articles in an immigration context were at issue in *Hendrick Winata and So Lan Li v. Australia* CCPR/C/72/D/930/2000, UN Human Rights Committee, 16 August 2001.

<sup>17</sup> Article 3 of the Convention of the Rights of the Child.

<sup>18</sup> Affirmed in customary international law, article 14 of the International Covenant on Civil and Political Rights, and articles 7, 8 and 10 of the Universal Declaration on Human Rights.

<sup>19</sup> Australian Human Rights Commission, ‘Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014: submission to the Senate Legal and Constitutional Affairs Legislation Committee’ (28 October 2014), at 9.

<sup>20</sup> Article 14 of the International Covenant on Civil and Political Rights.

<sup>21</sup> Article 15 of the International Covenant on Civil and Political Rights.

<sup>22</sup> Australian Lawyers for Human Rights, Submission to the Senate Legal and Constitutional Affairs Committee ‘Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019’ (7 August 2019), at 5.6.1.

<sup>23</sup> Article 12(4) of the International Covenant on Civil and Political Rights.

<sup>24</sup> *Nystrom et. al v Australia* (UN Human Rights Committee Communication No. 1557/2007, UN Doc CCPR/C/102/D/1557/2007 (2011)) at 20.

<sup>25</sup> Convention on the Elimination of All Forms of Racial Discrimination.

discrimination (including within the criminal justice system), are disproportionately subject to visa cancellation and thus doubly penalised for criminal offending;

- **The child's rights not to be arbitrarily deprived of their liberty<sup>26</sup> and not to be separated from their parents,<sup>27</sup>** as young people are known to have been subject to visa cancellation and immigration detention (see, for example, the abovementioned case of a 17 year old detained 12 hours away from his family);
- **The right of *non-refoulement*,<sup>28</sup>** as decision-makers are not required to consider *non-refoulement* obligations in making character-based visa cancellations. We note that, even where a refugee is not returned to their country of origin, Australia's indefinite detention policies "have resulted in some refugees being detained either in closed detention facilities, or in community detention, for over five years".<sup>29</sup> Further, s197C provides that Australia's *non-refoulement* obligations are irrelevant for the purposes of exercising removal powers; and
- **The right to freedom of expression,<sup>30</sup>** as non-citizens are liable for visa cancellation on the basis of a slight risk that they may incite discord in a segment of the community (s501(6)(d)(iv)).

19. The passage of the 2014 amendments to s501 were opposed by the Australian Human Rights Commission for precisely such reasons. The Commission's submission to the Senate Legal and Constitutional Affairs Legislation Committee summarised:<sup>31</sup>

*"The Commission is concerned that the Bill lowers the threshold for refusal and cancellation of visas, while also increasing the Minister's personal cancellation powers, in a manner that cannot be justified. This will increase the likelihood of people suffering arbitrary detention and unjustified interference with their family life ... the Commission considers that the restrictions which the Bill would impose on human rights cannot be characterised as necessary and proportionate to achieving legitimate objectives."*

20. The 2014 amendments were implemented notwithstanding fierce opposition, resulting in a system that is "weighted far too heavily towards the reduction of risk via deportation and away from important values enshrined in international human rights laws to which Australia is signatory, including rights to rehabilitation, family and social cohesion, due process and the rights of children."<sup>32</sup> Worse yet, a Bill is currently before the Senate that proposes to drastically expand the cohort of non-citizens that are subject to visa cancellation.

---

<sup>26</sup> Article 37(b) of the Convention of the Rights of the Child.

<sup>27</sup> Article 9 of the Convention of the Rights of the Child.

<sup>28</sup> Article 33 of the Convention Relating to the Status of Refugees

<sup>29</sup> Australian Human Rights Commission, 'Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014: submission to the Senate Legal and Constitutional Affairs Legislation Committee' (28 October 2014), at 5.

<sup>30</sup> Article 19 of the International Covenant on Civil and Political Rights.

<sup>31</sup> Above n 29, at 3 and 7.

<sup>32</sup> Rebecca Powell, 'Questions of fairness: New Zealander experiences of Section 501 and the case of Shane Martin', (*Overland*, 6 June 2019), available at < <https://overland.org.au/2019/06/questions-of-fairness-new-zealander-experiences-of-section-501-and-the-case-of-shane-martin/>>

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

21. The Migration Amendment (Strengthening the Character Test) Bill 2019 is currently being considered by the Senate, having already been approved by the House of Representatives. The Bill proposes to expand the cohort of people captured by the 'character test' to include non-citizens who are convicted of an offence punishable by a maximum term of imprisonment of two years or more, irrespective of what sentence they actually received or whether the person actually served out their sentence.
22. As Australian Lawyers for Human Rights argued in their submission on the Bill, cancelling visas based upon the maximum possible sentence will have alarming results. For example, "in Western Australia the summary penalty for damaging property by graffiti ranges from a community-based order to a two year term of imprisonment ... this is the type of offence the Bill captures through its expansion of powers without any proper consideration of the actual sentence imposed by the criminal law system."<sup>33</sup> This undermines the role of the criminal law system in determining the risk a person poses to the community and imposing a sentence appropriate to the particular circumstances.
23. The severity of the Bill's human rights implications are entirely disproportionate to the Bill's stated aim "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." Numerous CSOs made submissions to the Senate Committee considering the Bill and strongly opposed it due to the serious human rights implications.<sup>34</sup> These CSO's included:
- Australian Lawyers for Human Rights;
  - The Law Council of Australia;
  - The Immigration and Rights Centre;
  - The Visa Cancellations Working Group;
  - The Asylum Seeker Resource Centre; and
  - The Public Law and Policy Research Unit, University of Adelaide.
24. The New Zealand government, UN High Commissioner for Refugees, and Australian Human Rights Commission also made submissions opposing the Bill. Despite such overwhelming opposition, the Senate Committee concluded that "the proposed amendments would appropriately strengthen the existing character test framework" and that "the bill strikes an appropriate balance between the protection of the Australian community and the rights of non-citizens".<sup>35</sup> The Committee recommended that the Senate pass the Bill. On 19 September 2019 Senate introduced the Bill and read it a first time. We are extremely concerned at the consequences should the Bill be passed.

---

<sup>33</sup> Australian Lawyers for Human Rights, Submission to the Senate Legal and Constitutional Affairs Committee 'Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019' (7 August 2019), at 4.6.

<sup>34</sup> 32 written submissions were made. They can be accessed at <  
[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)>

<sup>35</sup> The Senate Legal and Constitutional Affairs Legislation Committee, 'Migration Amendment (Strengthening the Character Test) Bill 2019' (Department of the Senate, September 2019), at 2.86 and 2.89.