COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Migration Amendment (Strengthening the Character Test) Bill 2019

MONDAY, 19 AUGUST 2019

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

To search the parliamentary database, go to:

http://parlinfo.aph.gov.au

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Monday, 19 August 2019

Members in attendance: Senators Kim Carr, Chandler, Stoker.

Terms of Reference for the Inquiry:

To inquire into and report on:

Migration Amendment (Strengthening the Character Test) Bill 2019.

WITNESSES

BASHIR, Ms Gabrielle, SC, Co-Chair, National Criminal Law Committee, Law Council of Australia

CAMPBELL, Ms Leonie, Deputy Director, Policy, Law Council of Australia

FORD, Ms Carina, Member, Migration Law Committee, Law Council of Australia

PILLAI, Dr Sangeetha, Senior Research Associate, Kaldor Centre for International Refugee Law

PRINCE, Mr David, Member, Migration Law Committee, Law Council of Australia

Evidence from Ms Bashir and Dr Pillai was taken via teleconference—

Committee met at 09:07

CHAIR (Senator Stoker): This is a public hearing of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the provisions of the Migration Amendment (Strengthening the Character Test) Bill 2019. The committee's proceedings today will follow the program that's been circulated. These are public proceedings being broadcast live via the web and in Parliament House. I remind witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. The committee prefers evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in confidence, which is described as being 'in camera'. If you are a witness today and you intend to request to give evidence in camera, please bring this to the attention of the secretariat as soon as possible. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

With those formalities over, let me extend a welcome to everyone who is here today. Thank you for taking the time to come and give evidence to the committee today. Information about parliamentary privilege has been provided to you and is available from the secretariat. The committee has received your submissions: No. 29 in the case of the Law Council of Australia and No. 27 in the case of the Kaldor Centre for International Refugee Law. Do you wish to make any corrections or changes to your submission?

Ms Ford: No, we don't.

CHAIR: Thank you very much, Ms Ford. Is there anything you would like to add to the capacity in which you appear today?

Ms Ford: I'm the immediate past chair of the Migration Law Committee of the Law Council of Australia.

Mr Prince: I'm a past chair of the same committee, and both Ms Ford and I still remain on the steering committee for that organisation.

CHAIR: Is there a brief opening statement?

Ms Ford: There is. I'm representing the Law Council of Australia. I am a member of its Federal Litigation and Dispute Resolution Section of the Migration Law Committee. I am appearing alongside my colleagues David Prince, Gabrielle Bashir, Senior Counsel, who I understand will be joining us on the phone, and Leonie Campbell, the secretariat.

As the committee is aware, the Law Council is the peak national body representing the legal profession in Australia. We thank the committee for the opportunity to provide evidence to its inquiry into the Migration Amendment (Strengthening the Character Test) Bill. The Law Council recognises that the executive should possess the power, where necessary, to have discretion to prevent or remove an individual who possesses a real and substantial risk to the community from entering or remaining in Australia. However, a decision to cancel or refuse a visa based on character grounds will often have a profound impact on individuals' and families' lives. Such powers should therefore be administered cautiously and with proper regard to all circumstances of the individual case and with appropriate safeguards in place. The Law Council is concerned that the bill is neither necessary nor proportionate and that the Migration Act already provides overly broad powers to cancel and refuse visas on character grounds. These are more than sufficient to respond appropriately to individuals who commit serious offences and provide a clear risk to the community.

While the bill is based on the need for a clear, objective character test, such provisions already exist. Currently, a person will fail the character test if they have been sentenced to a term of imprisonment of 12 months or more,

or if they have been sentenced to two or more terms of imprisonment which together total 12 months. The bill appears principally likely to catch additional people at the very low end of offending for the proposed designated offences, for whom a court has determined that the level of culpability in the circumstances is below even those thresholds. In such circumstances, currently a person can still fail the character test on a range of criteria, including whether there is a risk that they pose a danger to the community or because of their past and present criminal or general conduct. This requires careful consideration of the individual's circumstances. It is an important deliberative exercise.

Of particular concern is the proposed lowering of the threshold for those that may be subject to visa cancellation or refusal on character grounds. This is based on designated offences with the statutory maximum sentence of not less than two years, regardless of the actual judicial sentence given. This may include people who have been given no sentence at all, a fine or a community corrections order. This approach has the potential to undermine the sentencing function of the judicial system and the discretion exercised by judicial officers to sentence offenders.

The bill's intention is to address serious criminal offences committed by visa holders; however, 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 criminal law definitions. In addition, the determination of the seriousness of the offence committed depends not only on the offence category but also on the gravity of the offence in the particular circumstance of the case, which is often reflected in the punishment or sentence that the court imposes. In the Law Council's view, section 501's primary legislative purpose is the protection of the Australian community from a real and substantial risk of harm from the specific person in question. The amendment bill shifts this purpose substantially towards a blanket approach based on conviction of several categories of offence, regardless of the level of risk an individual poses. This is a significant conceptual change to this area of the law.

Further, if a criminal court has determined that a convicted person does not present a risk to the community and imposes a fine or a suspended sentence, it is questionable whether automatically failing to meet the character test is needed to protect the community. The Law Council remains deeply concerned about the bill's application to and effects on children. While the explanatory memorandum states that only in exceptional circumstances would a child's visa be cancelled, neither it nor the bill prescribes what those exceptional circumstances will be. Nor does the bill limit the power to cancel a visa held by a minor to cases where exceptional circumstances exist.

While a discretion to cancel or refuse a visa must still be exercised if a person fails the character test as proposed by the bill, the Law Council is concerned that limited safeguards are available. Depending on the power exercised, the rules of natural justice and requirements to give a person prior notice and an opportunity to respond may not apply. If the minister exercises the decision personally, there's no right to merit review; nor is the minister bound by the current direction No. 79, which sets out factors to which delegates must have regard in exercising their discretion, such as the best interests of the child. Where the minister exercises the power in the national interest, the grounds on which judicial review can be sought are very limited. Meanwhile, there will be no opportunity for seeking revocation in practice, as the person has failed the character test.

The bill is likely to increase Australian taxpayers' outlay on immigration detention and to exacerbate critical existing pressures on legal assistance services, tribunals and courts. It may result in fewer guilty pleas being made, resulting in more contested and lengthy court proceedings, burdening the criminal justice system and its participants, including victims of crime. Fewer migrants, such as victims of family violence, may be willing to seek the protection of the law, due to fears of visa cancellations.

The Law Council encourages the committee to inquire into these matters prior to reaching a position on the bill. The Law Council considers that there are significant shortcomings within the bill and is therefore unable to support it in its present form. My colleagues and I have happy to answer the committee's questions. Thank you.

CHAIR: Dr Pillai, do you have an opening statement on behalf of the Kaldor Centre?

Dr Pillai: Yes, I will make a quick one. I really appreciate the opportunity to speak to the committee today. Our starting point is just to recognise that, in principle, I think it's entirely appropriate for the government to regulate the circumstances in which noncitizens may remain in Australia and I also think it's appropriate for the government to have reference to questions of character, criminality and community protection when it does this. But, in my view, the Migration Act in its current form already does these things, and in this context the questions that we should ask when any changes to the standards in the act are proposed should be: does the proposed change address circumstances that the existing law does not address? Does the proposed change improve existing processes in some way? Does it better protect individual rights or the community? In the case of this bill I think the answer to each of these questions is no. It's very unclear to me what the purpose of this bill actually is. The

explanatory memorandum says that the bill will provide a specific and objective ground to consider cancellation or refusal of a visa where a noncitizen has been convicted of a certain crime, but this is already achieved by section 501(6) of the Migration Act, which provides that a person will objectively fail the character test in a range of circumstances, including where the person has been sentenced to a total of 12 months imprisonment or more. This bill broadens this standard by—

CHAIR: Doctor, could you slow down a touch? We're just having a little bit of trouble hearing you.

Dr Pillai: No problem. It's unclear to me what the purpose of this bill is. The explanatory memorandum says that the bill is intended 'to provide a specific and objective ground to consider cancellation or refusal of a visa where a non-citizen has been convicted of a serious crime', but this is already achieved by section 501(6) of the Migration Act, which provides that a person will fail the character test in a range of circumstances including where they've been sentenced to a total of 12 months imprisonment or more. The bill seeks to broaden this out by deeming a person to fail the character test on the basis of a conviction where this existing 12-month threshold has not been met on the basis of a combination of physical elements and a maximum available sentence. But the existing regime already allows a person to fail the character test where the 12-month threshold or the other criteria in section 501(6) are not met—where an individual's general or criminal conduct suggests that they are not of good character. That's provided for in section 501(6)(c). This already provides a basis for visa cancellation in all of the circumstances that would be captured by the new designated offences test proposed in the bill. The only difference between section 501(6)(c) and the proposal in the bill is that, under the existing test, a person's conduct needs to be considered holistically alongside all other relevant circumstances when a decision is made about whether they are of good character or not. It's really not clear to me why this needs to be changed. That more subjective standard seems better in all respects—more protective of individual rights as well as more practical than the proposed measures in the bill.

There are a number of practical problems with the proposal in the bill. It has the potential to strain relations with other countries as can be seen from the submission of the New Zealand government. It has the potential to increase pressures on the criminal justice system. Just one way it could do that is that it is likely to lead to a decrease in the number of guilty pleas because the additional consequence of visa cancellation will be available under the proposed measures. So it doesn't improve existing processes. It's also been noted in our submission, and in a number of other submissions, that the bill is likely to undermine a number of international human rights standards and is likely to have a disproportionate effect on vulnerable groups, including people from refugee backgrounds. I'll leave it there, conscious that time is pressing. Thank you.

CHAIR: Thank you very much.

Senator KIM CARR: The Law Council has recommended to the committee that we should seek from the Department of Home Affairs a detailed list of all Australian jurisdictions of existing offences likely to be covered by the definition of a 'designated offence' under the proposed paragraphs 501(7AA)(a) and 501(7AA)(b). I'm wondering: would the Law Council have such a list?

Ms Campbell: We don't have one to hand.

Senator KIM CARR: No, not now, but would you be able to take that on notice? Does your research—

Ms Campbell: We could attempt to put together a list for a jurisdiction perhaps, but we do think it's important that the committee has a good idea of the—

Senator KIM CARR: The department will take my question on notice. I trust that they will be able to provide that list. I think it's a very good idea, but I'm wondering if you have that reference.

Ms Campbell: We can put something together.

Senator KIM CARR: If you could. It's always good to compare these documents, I've found. That would be my first request of you—if you could provide that information to the best of your ability.

Ms Campbell: Sure.

Senator KIM CARR: I take it that both submitters have the view that the current legislative provisions are adequate to meet all of the provisions that the government says are now needed to be strengthened. Is that the submission that both the submitters would make?

Ms Ford: Yes, that's correct.

Dr Pillai: Yes.

Senator KIM CARR: I also note that the number of visa cancellations that have occurred has increased by 1,400 per cent over the period in which there has been a strengthening of these measures—that is, since 2013 with the change of government. Is that sort of number familiar to you?

Ms Campbell: That number is from the department's website.

Senator KIM CARR: Yes.

Ms Campbell: That's right.

Senator KIM CARR: So there's already been an increase in visa cancellation of 1,400 per cent, to your knowledge?

Ms Campbell: Yes.

Senator KIM CARR: Has there been any change in the level of public safety as a result of those changes, that you're aware of?

Mr Prince: I'm not sure that's something we can comment on. What we can comment on is the fact that Ms Ford and I, on a daily basis, run these cases and the sheer increase in volume and the breadth of that which is already caught in the current law. There's been a vast increase, not since 2013. I was talking to my colleague this morning. I remember when the 501 provision first took its current form, and that was in October 1998. Then-Minister Ruddock had the carriage of that. At that point, character was used about five or six times a year, and it was used in the most extreme of circumstances—to refuse entry to the then-leader of the Ku Klux Klan comes to mind, and to David Irving, the British historian who said that the Holocaust did not occur and it was a furphy. I remember when Mr Ruddock stood up and said, in the second reading speech, 'We're going to expand the powers significantly to the 501 in, broadly speaking, its current form, but these powers will continue to be used in unusual, rare and fairly extraordinary cases.' We went from that situation to the current situation, where this power is used on thousands of occasions each year. It's already a very, very significant increase, before you even get to this bill. Some statistics have been suggested by some of the submitters as to a fourfold increase. Ms Ford and I were talking this morning. In our own practice, we would think at least—

Ms Ford: About a 50 per cent increase, I think it will be. I just did a count of files that fall within the past that we've got currently, and 50 per cent would fall within that. That includes, of course, the retrospective nature of this bill, which is an obvious concern, because those who've already gone through the system and maybe have been found to have been of good character will now fall under the provisions and go through that system again. The impact on resources—on the department, the review, the Administrative Appeals Tribunal, the courts—is significant. That's why our view is that this bill does cost, particularly economically in terms of that, and that's something else that maybe would be good to bring up with the department this afternoon.

Ms Bashir: The Law Council also notes that, when there's such a huge increase in demand—and in our submission, at paragraph 123, we've noted that Legal Aid New South Wales recorded close to a doubling of advice and assistance in this area—that is all going on in the context of what has been chronic underfunding of legal aid and, in real terms, a decrease in funding from the Commonwealth, in particular, per capita. That's already the existing situation, where the legal aid and legal assistance centres are under enormous strain and pressure. This would significantly increase the number of cases because it brings it forward to conviction alone and doesn't depend on sentencing, in relation to an automatic cancellation.

Senator KIM CARR: The government will argue that the powers of the minister are deficient. Do you have any evidence to support that conclusion?

Mr Prince: No.

Senator KIM CARR: None whatsoever?

Mr Prince: None whatsoever.

Senator KIM CARR: The government will argue that this is a bill that captures violent crimes. Does it capture any other types of crimes that the government has drawn our attention to?

Ms Bashir: I'm happy to answer that question. With this new proposal for 'designated offence', I hate to use the term 'window-dressing' but of course the more serious offences, such as murder, manslaughter, kidnapping and aggravated burglary, will almost without fail attract the kinds of sentences that will lead to the automatic trigger under sentencing. And of course there's the very broad power in relation to having regard to past and present criminal conduct, past and present general conduct, which has already been referred to by the representative for the Kaldor centre and in our opening statement. But what this does under 'designated offence' is it sets a very, very low bar, including assault and picking up the threat of violence. In criminal law terms, there can be an assault without any actual physical violence. It can be through the threat of the same, so we can see a real lowering of the bar. And then, when one gets down to 'using or possessing a weapon', and 'weapon' has its own definition in the subsection, which picks up 'a thing made or adapted for use for inflicting bodily injury'. In legal terms, we have a calendar of harm, if one likes, from really serious bodily injury—otherwise known as

grievous bodily harm—to serious injury, to now here bodily injury, so it is actually aimed to pick up very, very lowest level of offence and upon conviction only, so not looking at the particular circumstances of the offence.

The definition goes further and it includes 'a thing' where the person who has the thing has a particular intention, but of course the section is merely triggered by the physical element, and the department itself refers to having 'a rock'. So this could include people having, in terms of the 'possession of a weapon', a screwdriver, hammer, rock, stick—really very low level matters—and then of course it purports to pick up all of the ancillary liability offences. So it's going to pick up people who don't actually commit the offence themselves personally but who have what we call 'ancillary liability' connecting to the other person's offence—that is, the principal offender. I will come back to this, but we've made particular comments about our very real difficulty with including in here 'knowingly concerned in' which offences under the act themselves don't even pick up, because the Criminal Code applies to offences under the Migration Act and 'knowingly concerned' is not recognised as a category of criminal culpability under the Criminal Code.

Senator KIM CARR: So this is why you are saying it particularly affects women who are 'knowingly concerned', according to—

Ms Bashir: In terms of the breaching of an order—so let's call it breach of an apprehended violence order—by picking up ancillary liability or aiding and abetting in the breach of an order, it actually could pick up if a woman and her partner had an AVO in place, she needed his help to get the kids to school and she rang him and asked him come and help to do that. She would be charged. We think it is very unclearly drafted, but the physical element of an offence merely has to involve 'aiding and abetting' or 'procuring the commission of' a designated offence, so we are not sure whether that means the person has to be charged or whether the aiding and abetting is picked up by virtue of the designated offence. But if the woman is charged with aiding and abetting a breach of the AVO, a minor circumstance such as that could see someone automatically upon conviction found to be designated in breach of the character test. And, unfortunately, that might seem like pie-in-the-sky stuff, but what we do see a lot is, in particular, Indigenous women—and we look at this because we have a special working group on the over-representation of Indigenous women in custody—being charged with breaches of personal violence orders and with low-level criminal offences that may well be picked up by this act.

CHAIR: So, for clarity, they are going to be Australian citizens, one would expect.

Ms Bashir: We have seen, unfortunately, reported cases—some submissions refer to three reported cases—of persons who are Indigenous, who have been dealt with or are currently being dealt with under the existing character provisions.

Dr Pillai: There is a case currently before the High Court looking at the legality of whether Indigenous people can be dealt with under the visa cancellation provisions in the Migration Act where they don't hold Australian citizenship but have been long-term residents, so that is a live issue. But it definitely is current practice that Indigenous people have had their visas cancelled, and they would stand to under the expanded provisions.

I would also like to echo all of the points that Gabbie just made. Going back to the original question, I would say that the department is unlikely to say that this will target violent, serious offending. In my view, it is a complete fiction to suggest that the maximum penalty for an offence tells you anything about the seriousness of an offence at the minimum end of the scale, which is what is captured by this. I can't think of any circumstance in which a person who has engaged in violent, serious, criminal conduct has not been sentenced to the existing 12-month total threshold that would trigger automatic visa cancellation or, where that is not the case, all the circumstances in their case lead to a reasonable conclusion that they are not of good character.

Senator KIM CARR: This bill also captures offences that have allegedly occurred overseas?

Ms Ford: That's correct.

Senator KIM CARR: It also involves offences that allegedly involve terrorism?

Ms Ford: Yes.

Senator KIM CARR: It also includes individuals who have been convicted of offences overseas?

Ms Bashir: Yes. Currently overseas offences that are picked up are things that are at a very high level, such as genocide, war crimes, crimes against humanity and crimes of international concern. What is now thought to be brought in through this amendment is an offence against a law enforced in a foreign country. So it is incredibly broad. Of course, it must also be an offence in the Australian Capital Territory. We are very concerned about the breadth of this, the kinds of offences that it could pick up and the charges, because, of course, the designated offence is only if one of those conditions is satisfied.

Mr Prince: Perhaps I could add to that. The existing powers already pick up local laws. So any overseas conviction where the head sentence is 12 months is already caught by the current provisions regardless of whether the sentence in that country is 10 years, whereas we might give it a $20 fine. Singapore and marijuana come to mind.

Senator KIM CARR: Let me give you the example. Hakeem Al-Araibi is a footballer from Pascoe Vale in my area. He is now an Australian citizen but at the time of his conviction in Bahrain he was not. He was initially charged with vandalism but he was also charged with terrorism. It was alleged that he was involved in an arson attack. It was alleged that he threw flammable bombs and caused damage to public and private property. He was sentenced to 10 years. At the time, he also said he had an alibi—that is, he was playing football on a public field. Wouldn't he have been covered by this provision?

Mr Prince: He is already covered by the current provisions, let alone the bill.

Senator KIM CARR: But he would have been covered under these provisions. This is a clear case where the judicial processes in Bahrain were somewhat open to question. Wouldn't this provision make visa cancellation mandatory for him?

Ms Ford: Yes. The US is another country where significant penalties are often passed down. Many of those will be a maximum prison sentence of over two years. You will find that many people would fall within that—and those would generally be considered to be minor offences here.

CHAIR: Just to clarify—and I'm sorry, Senator Carr; I don't mean to derail things—the Australian government went to great effort to help that gentleman return to Australia, didn't they? Even though under the—

Ms Ford: I don't know the circumstances of—

CHAIR: existing powers—

Senator KIM CARR: But it's not the point. The point is that, under the provisions of this bill, this football player would have had a mandatory revocation of his visa. Those are the provisions of this bill, the consequence of this bill. It's not about whether the Australian government thought he was a nice fellow; it's about whether he would've been in breach of the law under these measures that are currently before the parliament.

CHAIR: But the point Mr Prince has just made is that the Australian government already had the power prior to this bill to be able to exclude him permanently, should they have wished to, and they did not. Can I just clarify: when the word 'mandatory' is used here, I understand that this bill would make it possible for the minister to revoke a visa in circumstances like that but it doesn't mandatorily require the revocation.

Ms Ford: That's correct. So there's still—

Senator KIM CARR: Discretion for the minister.

Ms Ford: discretion for the minister—

CHAIR: It remains discretionary.

Ms Ford: or the delegate, because obviously the minister doesn't intervene in all matters.

CHAIR: So there remains the opportunity for there to be the discretion to use common sense to allow the interests of the Australian community to prevail. It isn't a forced mandatory outcome.

Ms Ford: No. But by increasing the amount of offences coming through it, and considering that they are going to be considered serious offences, obviously that will weigh in favour of cancelling when you look at the discretion.

CHAIR: Thank you, Senator Carr; I needed to clarify that.

Senator KIM CARR: That's fine because I think it highlights the case very well. They've got the existing powers, the administrative practices of the department and the changes. Surely, it makes the bill totally unnecessary. Doesn't it demonstrate the case that the submitters are actually putting to us? It makes it absolutely unnecessary.

Mr Prince: We can't see any espoused justification for this bill. To put it bluntly, this bill seems to be a solution in want of a problem.

Senator KIM CARR: But there have been so many attempts to increase these provisions since the change of government in 2013. What actually has happened in terms of administrative practice?

Mr Prince: Certainly at the coalface of running these cases it's clear that the department is overwhelmed. In the character section, which is predominantly dealt with in the Melbourne national character section, a typical

character case will take nine to 12 months to work through a case. That's not nine to 12 months of work; that's about 11 months of doing nothing because they're overwhelmed and then they'll do work at the very end.

The character sections already are overwhelmed. The quality of decision-making has deteriorated very significantly in my experience in the past five years, and we are proposing to dramatically—I use that word intentionally—increase the number of cases where a person will automatically be deemed to fail the character test. Then you only have the second step being considered, being the discretion. It should be of very limited comfort to this committee to conclude that the discretion is still there. That should not make you comfortable. It is a very significant thing to be held to fail the character test.

Senator KIM CARR: And what has been the pattern with regard to ministerial interventions? Has it increased? Has it decreased? What's the pattern in terms of the ministry of practice?

Ms Ford: It's definitely increased significantly over time. And the minister can intervene, as you'd be aware, in not only a delegate's decision but also the AAT's decision. So it's in both of those areas that it has increased. In cases where the minister is not satisfied with the decision, that power remains, as long as it's within the national interest.

Senator KIM CARR: And what's the nature of the ministerial interventions? Have they been in favour of the visa holder or against the visa holder?

Ms Ford: Against the visa holder.

Senator KIM CARR: I would have thought, given there's been an increase in the number of visa cancellations by 1,400 per cent, that it's not surprising that a greater level of ministerial action is required.

Ms Ford: And it's a difficult job. There are a lot of cases in front of the minister and a number of judicial review decisions recently which would indicate that the minister has found it difficult to spend adequate time on those cases and the non-refoulement, which is extremely complex.

Senator KIM CARR: That was my final question, but I want to go to this. The recent court case, where the minister questioned the amount of time spent, was actually the subject of considerable attention of the court itself.

Ms Ford: Yes.

Senator KIM CARR: Can you just outline to me that particular circumstance? Are you familiar with that case?

Ms Ford: I am familiar with that case; yes.

Senator KIM CARR: What was the finding of the court? Has there been a finding yet?

Ms Ford: Yes, there has. The court has set aside the decision, so it will now go back to the minister for reconsideration.

Senator KIM CARR: Can you just outline the substance of it?

Ms Ford: It was really based on there not being due regard to the decision-making process due to the amount of time that was spent on it.

Senator KIM CARR: Can you tell me how much time was spent on it?

Ms Ford: I can't remember straight off. There are a couple of cases in this space.

Senator KIM CARR: Minutes, if I recall—

Ms Ford: One was very short. It was within half an hour to an hour of the decision being made.

Mr Prince: This one was about 17 minutes.

Ms Campbell: Perhaps 11.

Ms Ford: Eleven minutes. There are also other cases, though, before the courts at the minute looking at the sheer number of decisions before the minister and whether the time spent is adequate. This is an issue. The minister has a range of powers, not just this power, and they're often very positive discretionary powers that need to be considered.

Senator KIM CARR: Can I finally ask a question to the—

CHAIR: We have four minutes for Senator Chandler.

Senator KIM CARR: It's just one question. The Human Rights Committee of this parliament, the Scrutiny of Bills Committee and various other committees have made the point. In fact this committee, in a report, made the point that this bill may well be in breach of international treaty obligations at different levels. There were numerous points. I ask the Kaldor Centre for International Refugee Law: why is that significant?

Dr Pillai: It's significant because Australia has signed up to the treaties that these obligations arise under. In international law, we're bound by these treaties and have undertaken to reflect them in domestic law. It's also significant because the statement of compatibility with human rights, attached to the explanatory memorandum of the bill, makes the point that the bill is compliant with international obligations. Where that's not the case, it's important to note that. As I think we've all said on this panel today, there's obviously a balancing exercise that needs to be conducted when we're considering whether to introduce new legislation. Sometimes individual rights, including the rights provided for under international treaties, and community protection will be at odds or will appear to be at odds. I appreciate that, but there should be an undertaking to protect these obligations to the best of our ability and certainly to have a really good reason when we don't. What comes out of this is that, while the statement of compatibility with human rights says that the bill is compliant with international obligations, it's been pointed out by so many people that there are a number of bases upon which to question that. Also, there's no practical ground for why we should consider derogating from those obligations, particularly in this case, for all of the reasons that you have identified in your other questions. There's already ample protection in the bill in its existing form to achieve community protection. The proposals in the bill don't actually augment community protection in any meaningful way, so to decrease compliance with international obligations for no purpose seems like a very bad idea to me.

CHAIR: Senator Carr, I have to cut you off. Senator Chandler.

Senator CHANDLER: Particularly the Law Council has spoken a lot today about concerns regarding how broad-ranging the number of offences that could be committed under this new proposed character test might be. In a circumstance where you have a person living in this country on a visa and they, say, assault someone or threaten violence against someone, do you accept that the government does have a role, as the body that administered that visa to them, to ensure that they're not able to harm anybody else and that revoking the visa is an effective way of achieving that end?

Mr Prince: The problem with that question—and I don't mean any offence by this in any way—is that it's so broad as to be basically meaningless. Assault could be someone touching your finger. Assault could be someone leading you to such harm as near death. You can't use words of such generality to deal with cancellation powers. The existing law says—and it really is a recognition that, because phrases like 'assault' are so broad, we're going to use as a yardstick what the criminal justice system, being the expert in assessing harm and risk to the community, has decided the severity of your conduct is deserving of. That's what we use as our yardstick: what you've been convicted of and what sentence was imposed by the courts. We're going to replace that—we're going to ignore the harm that you have caused and we're going to ignore the harm that you potentially do or don't pose, and all we have is the yardstick of 'You've been convicted.' That's it. That's the problem with your question.

Senator CHANDLER: And that there is a sentence attached to the conviction.

Mr Prince: That is, frankly, meaningless.

Ms Bashir: Could I add to that. In terms of the sentence attached, it picks up where there is no punishment—it has been deemed to be expedient. So it's not actually dependent on the sentence, and that's a little bit of the myth of what we see at paragraphs 36 through to 39 of the explanatory memorandum. If a court is sentencing for an offence of assault, it takes into account the objective seriousness of the offence and the moral culpability of the offender. Very importantly, one of the key factors in sentencing is the protection of the community. So we may see a very broad range of sentences imposed upon a conviction for assault, because assaults can be of enormous breadth in character. The person may or may not have a history of offending.

That's why there's so much importance attached by the Law Council to the current provision that relies on the sentencing itself. A conviction for assault doesn't really tell you anything. And two years is not a mandatory sentence; it's the maximum for a worst case. That's why we find it particularly objectionable that this picks up convictions for offences where there's imprisonment for a maximum term of not less than two years. That is an incredibly low threshold. It doesn't feed into what is commonly known at criminal law to be defined as a serious indictable offence, or under the Crimes Act (Commonwealth) as a serious offence, or even, under the act itself, what's defined as a serious Australian offence.

We are very concerned that what the courts understand, looking at all of the circumstances of the offence and the offender—and they're imposing a punishment that includes the element of protection to the community—is very different to a mere conviction for what, if it carries only two years, is a low-level offence in the criminal calendar but can now trigger somebody automatically being deemed to be of bad character.

Senator CHANDLER: That segues quite nicely into my next question: at paragraph 7 of the Law Council's submission, you mention the potential of undermining the sentencing function of the judicial system as a result of

this law. Can you explain to me exactly how it's undermined and how any perceived undermining is different under this proposed bill as opposed to the current law?

Ms Bashir: Would you like me to answer?

Ms Ford:: Yes, sorry. I assumed you would step in, given that's your expertise.

Ms Bashir: That's okay. What it does is: now, upon conviction, all of these things under section 501 can be triggered. That is before someone has even been sentenced; they may not even be bail-refused, so they may be in the community. Depending on how quickly this moves, who knows what is going to happen or what will then follow in terms of sentencing? Then what it does is it relegates what happens in sentencing, including what the courts have taken into account in relation to necessary protection of the community, to an irrelevant consideration, really. This is really more for the Law Council representatives in relation to migration who are dealing with the people who know how this might affect pleas that are entered. Because if people think that a plea of guilty, which may mean a conviction is recorded quite early on, can trigger these provisions even in minor offences, it may mean that the courts end up being clogged by not-guilty pleas. We really won't know that or be able to measure it in an attempt to stave off the automatic provisions coming into effect.

Mr Prince: I have to say that a real concern we have from the migration sphere is people will simply go to trial; they will not plead guilty. The criminal justice system operates at its heart assuming or based upon plea deals, about arrangements—pleas are given. The criminal justice system simply cannot operate without that system. Anyone with a visa who is charged with these offences would really have no choice but to fight, and they would not, could not, in all sanity, enter a plea of guilty.

CHAIR: If a person is not an Australian citizen, so they are a citizen of another nation, do you accept the proposition that there is no entitlement per se for that person to remain in the Australian community?

Ms Ford: No, I guess, is the answer, because the reality is there needs to be discretion there, and that is the whole purpose of the character test. The character test has discretion because there are other factors that come into play that need to be considered.

CHAIR: Take it a step back. If you are not an Australian, is your right to enter and remain in the Australian community a privilege rather than a right?

Ms Ford: It is a privilege; that's correct, yes.

Mr Prince: Just on that point though, the way the visa system works is, if someone is applying for a visa, in the codified system there is a list of criteria, and if a person meets all the criteria they have an ironclad enforceable right to the granting of that visa—that is, the grant of a visa is not a discretion; if you meet the criteria, you have a right to the visa. That is important to understand.

As far as 'maintain a visa' goes, before 1989 we had a system where the act just gave the minister the power to cancel. There was an unfettered power to cancel. Parliament decided, I think with great wisdom, that that was extraordinary and should not stand. We replaced that system with: the government does not have a simple power to cancel at large; we will only cancel in certain defined circumstances.

CHAIR: So when those visas are granted, because conditions have been met, those conditions often include a condition that a person be of good character?

Ms Ford: Yes.

CHAIR: And it is also true to say that, in the wisdom you have described, there have been criteria set out to guide a decision-maker to ensure that, when they do exercise a power to cancel, they do so on the basis of criteria that reflect the community standards rather than being an unconfined discretion. That's true, isn't it?

Mr Prince: I wouldn't agree with that proposition, because the tribunal routinely comments. In the general direction, we have had I think about five iterations of the general direction. There has been a reference to community standards. It is a meaningless statement, frankly. The tribunal now routinely say, 'We don't know what the community standards are. For every 10 people, there are 11 opinions as to what community standards are.' So it is something that really plays little part in the practical application of whether visas are cancelled or refused. We just don't know what it means.

CHAIR: I will come back to that. I think that is a reasonable point. But do you accept that criminal activity is inconsistent with the privilege of being permitted to remain in the Australian community?

Mr Prince: I think, as I said before to Senator Chandler, it is a statement of such generality as to be fairly meaningless. Not all criminality is the same. Serious criminality which affects the safety of the community, yes, I'd agree with the proposition; but stealing a pen from the newsagent, I would say not.

CHAIR: Do you think, though, in circumstances where you're dealing with people who are in Australia, as a matter of the exercise of that privilege, or the grant of that privilege, which is probably more accurate, it's not wholly unreasonable to set a high bar for expecting compliance with the criminal law?

Ms Ford: I think the only issue with that is that it's nearly trying to put every visa holder into one category. Let's take the New Zealand cohort. I think it is important to discuss the New Zealand cohort in that they have the most significant numbers of cancelled visas and refused visas under 501, but, also, many of them have lived here for a long time. Many arrived as children and may not even know that section 501 is held over them. They've lived here their whole lives. In some respects, Australia has also contributed to the situation. It's not as easy as just saying, 'Your visa should be cancelled because it was a privilege.' You have to look at the whole circumstance surrounding it, which is why the discretion is so important in these cases. Even where someone offends, you still need to consider the discretion, as to whether their visa should be cancelled or refused.

Mr Prince: I have another point to add. The more I practise in theory the greater believer I am in reformation of character. Just because someone committed a pretty serious mistake—in one of my cases, 40 years ago—saying that it tarnishes them forever is a big statement.

CHAIR: Yes, I think that's fair.

Mr Prince: For certain offences you'd say, yes, it does. They're all caught by the current provisions. What you are saying is that, when someone committed an offence 40 years ago—this is the retrospectivity of these provisions—for which they received no jail time at all—

CHAIR: Which is why it's important there is discretion.

Mr Prince: No, you've missed the point. That should give you no comfort, frankly. They failed the character test. That changes everything. You're saying that because of something they committed 40 years ago, which attracted no jail time at all, they fail the character test for life. That is an unreasonable proposition. In practical terms, just having the discretion alone is not a comfort.

Ms Bashir: Could I just add two things very quickly? In relation to the original question, it had a premise inbuilt that we don't accept: the premise of it setting a high bar. To the contrary, these amendments, in our submission, will actually effect quite a low bar. We've already explained the reason for our submission in that respect. We would certainly add that we know that permanent residents—this point has been made—who have been raised sometimes by Australian citizens in our society, with Australian community influences on them, are being caught already by these provisions. It's a difficult proposition to endorse.

Dr Pillai: I would like to echo that we also do not believe that the proposals in the bill raise the bar. They confuse something that is dealt with much better under the discretion in the Migration Act in its existing form. I would also like to echo the point about when somebody should be liable to visa cancellation. It's not one size fits all; it depends on the circumstances of the case. This is another area in which international law and the standards set in other countries can assist and be instructive. What we have seen here are visa cancellations for people who have been here since they were two months old. They have been deported to countries where they might hold citizenship, but they've never lived there and they don't know the language or the culture. That is outside the standards that are typically in place in other countries.

The standard set by the bill is out of step with the standards set in comparative jurisdictions for refugees owed non-refoulement obligations and it's out of step with international law. Those are things that can tell us that the bar is not set in the right place. It is the case in all countries that no noncitizen has an unqualified right to remain in a country just because they've been granted a visa. We have thresholds articulated in international law that help us determine what is an appropriate base to set the standard, and this falls well short of those.

CHAIR: The use of the 'low bar' language I accept in your submissions. My use of the language 'high bar' is, I guess, the flipside of the same thing, saying that there's a low bar for the revocation of the privilege, which is how I understand all of your submissions. I guess that is the other side of the same coin that says the Australian community has the right to expect a high bar of compliance with the criminal law from people who are not citizens. So I understand the point that you all make about the low bar. But on what basis can you justify the curtailment of the rights of the Australian community to safety, to being not required to accept noncitizen criminals remaining among them in favour of noncitizens who choose to engage in criminal activity? What justification can you provide—very briefly, because we're short on time—for that proposition?

Mr Prince: This bill does not address that question at all. This bill has nothing to say about the protection of the Australian community; it just does not—there is not one word here. The current law does. The current law looks at the risk this individual poses; this bill does not look at what the person was sentenced to.

CHAIR: The submission has been made by each of you in your own way to say there's no justification for these powers, but it is designed to deal with a particular circumstance that has posed a problem for the minister in being able to exercise the existing powers in the interests of the Australian community. I will give you an example. It's a de-identified case study but it's from a real example—that is, a person who was convicted of offences of violence and stalking with the imposition of a period of imprisonment of six months had his visa cancelled using the existing powers. The AAT overturned that decision because the law didn't make it abundantly clear that the government had the power to so cancel because it was an offence that had a maximum penalty of 12 months or below. That is a real example where the safety of the Australian community is affected by the inability to exercise these powers because there was insufficient objectivity about the circumstances in which the minister was entitled to exercise them. I say that only because you've said there's no justification. There is this circumstance and many more like it to which this set of changes will have the effect of preventing the AAT from so finding once more. I understand that you might think that there should never be a circumstance where that can occur—that may be your view—but that is the factual underpinning for the changes that are proposed. I hope that helps.

Ms Ford: Firstly, it would have been a delegate 's decision, not that of the minister, because you can only go to the AAT if a delegate makes the decision.

CHAIR: I don't think that's material in terms of answering the justification.

Ms Ford: Secondly, it is because the minister would then have had the power to overturn that AAT decision should they have not been satisfied, subject to it being in the national interest to do so. Thirdly, the AAT would have either come to a finding that the person was not at risk, therefore meeting the character test, or found it on the basis of discretion, so that remains even under the new system. If this comes in, there is still discretion as to whether or not to cancel, and the AAT may still make a decision that the minister is not satisfied with. I think it's public knowledge that the minister has on many occasions commented about AAT decisions. This is one example you use and so is the explanatory memorandum and so is the example in the department's statement. They are live cases, so I don't think it is as easy to say the AAT got it wrong, because, in the process of the AAT considering these decisions, they do it with much care and much thought. They apply the direction that is created by the minister in considering it, and it is just that in that case they must have decided to not revoke the cancellation or find in the applicant's favour. So, with all respect, I disagree with your view on that case.

Mr Prince: On that note, these are tough cases to win at the tribunal. It's reasonably rare to succeed at the tribunal on character; there really are a small number of successes. And then, with the bigger ticket cases you do succeed on, the minister will invariably consider interventions of section 501A. There really are a small number of cases that succeed at the tribunal compared to the cases that lose.

Ms Bashir: I would just add that—and I would ask Sangeetha if she has anything to say too—it appears to me, with respect to the original proposition that was put and the example of what can and cannot occur in relation to the powers of the minister, as has been ably explained by our Law Council delegate Carina, that there are some grave misunderstandings about how the current act does and does not, and can and cannot operate. This committee really should have a very clear understanding of this before any recommendations are made. To use an example: that the minister doesn't have the power to come in over the top of a decision is a misunderstanding of how the act operates and the powers already available to the minister.

CHAIR: We need to wrap it up. I thank you all for your contributions today.

DONNELLY, Dr Jason, Private capacity

REILLY, Mr Alex, Director, Public Law and Policy Research Unit, University of Adelaide

SHERRELL, Mr Henry, Private capacity

Evidence from Dr Donnelly and Mr Reilly was taken via teleconference—

[10:12]

CHAIR: Can I welcome Mr Alex Reilly from the Public Law and Policy Research Unit at the University of Adelaide, who is joining us by teleconference. We will soon, hopefully, have Dr Jason Donnelly by teleconference also, and at the table we have Mr Henry Sherrell. Thank you for taking the time to give evidence today. Information about parliamentary privilege has been provided to you and is available from the secretariat. The committee has received your submissions—submissions Nos 19, 21 and 2 respectively, making you, Mr Sherrell, one of the most on-the-ball, quick submitters around. Do you wish to make any corrections to your submissions before we commence?

Mr Sherrell: No.

CHAIR: Do you have any comments to make on the capacity in which you appear?

Mr Sherrell: I'm an independent migration researcher.

Mr Reilly: I am also a professor of law at the University of Adelaide.

Dr Donnelly: I am also a barrister.

CHAIR: You each have an opportunity to make a brief opening statement. Mr Sherrell, would you like to do so?

Mr Sherrell: No.

CHAIR: Professor, would you like to make an opening statement?

Mr Reilly: Yes, I have a few comments. Our submission echoes the concerns of many of the submissions to the inquiry, but I just want to make a few comments on one aspect, which is the meaning and significance of being a permanent resident. When Australia grants a person a permanent resident visa, it makes a commitment to that person that they are now part of the Australian community. Permanent resident visas are granted not only to individuals but to family units. They enable people to establish a new life in Australia, and migration policy focuses on bringing young people with skills to Australia because they benefit the Australian economy and help address increasing demographic problems with an ageing population.

So Australia benefits from offering permanent residence; it's not only a privilege that it grants to a person. Australia voluntarily brings in 160,000 permanent residents a year at the moment. We compete with other countries for the best migrants, and we've set a high bar for how you become a permanent resident in Australia. We allow existing Australian citizens and permanent residents to sponsor partners on permanent resident visas, and any child born to an Australian permanent resident is automatically an Australian citizen. Temporary resident visa holders are far less secure in their residence, and increasingly permanent residents [inaudible] visa holders who have shown a commitment to Australia through a period of temporary residence. Permanent residents are eligible for most of the public services that are available to citizens, and we consider them to be fully part of the Australian community and hope that they will become full members by taking out citizenship.

Through these policies we make certain representations to permanent residents that they and their families are secure members of the community, that they need not live in fear of having their visas cancelled. As a result, permanent residents need not think about their visa status and can get on with living in the community. Of course, the state maintains the power to revoke permanent residency visas and does so in Australia through the mechanism of the character test. When we talk about character in section 501 of the Migration Act, it is not a general assessment of whether a person is good or bad, industrious or lazy, but whether there are sufficiently serious concerns about their moral character as to warrant cancelling their visa and deporting them from Australia—their home. The character issues of concern in relation to visa cancellation are behaviours that have a serious negative effect on the community at large. We weigh up our commitment to permanent residents through granting secure residence against the seriousness of their negative conduct.

I'll stop there. I really just wanted to make those comments to frame the discussion of what we're talking about here. We're not just talking about people who—'Oh, they've done something wrong, so we'll use any opportunity to remove them from the Australian community because of safety concerns.' We have to weigh up any safety concerns we have with the commitment that we have to permanent residents.

I will just add one other thing: that commitment to permanent residents is absolutely crucial to them being able to be effective members of our community and participate fully in a number of ways, and—in the submission we make—even to them feeling that they are able to take some risks to help others. They can't be under a cloud of: if they do something wrong, even if it's not worthy of a sentence of imprisonment, they automatically fail the character test. I'm happy to talk further about any of the other aspects of our submission.

CHAIR: Thank you very much, Professor. I understand Dr Donnelly may now have been able to join the teleconference. Are you on the line, Dr Donnelly?

Dr Donnelly: I am, Chair, thank you.

CHAIR: Do you have any comments to make on the capacity in which you appear?

Dr Donnelly: I appear in my capacity as both an academic and a barrister. I'm a senior lecturer at Western Sydney University in the School of Law and the course convenor of the Graduate Diploma in Australian Migration Law. As a barrister I have had extensive experience, over the last seven to eight years, in deportation related matters.

CHAIR: Thank you. If you would like to make a brief opening statement, could you please do so.

Dr Donnelly: I do wish to make an opening statement. I'll be very brief and otherwise rely upon the written submissions by Professor Anna Cody and me. By way of opening, I broadly make the submission that the Migration Amendment (Strengthening the Character Test) Bill 2019 should be rejected. It is said that the bill ensures that noncitizens who pose a risk to the safety of the Australian community are appropriately considered for visa cancellation. I respectfully submit that that's not in all cases. If a person such as a noncitizen is found guilty of committing a 'designated offence'—the words used in the proposed bill—does the person necessarily pose a risk to the safety of the Australian community? To answer that question, one would of course need to have regard to the subjective considerations at play. With the proposed bill, the subjective considerations are irrelevant for the purposes of the character test question.

The next point I wish to make is about something that has been said quite a lot by the Hon. David Coleman as the minister for immigration, for example in the second reading speech to the bill—that the bill presents a very clear message that members of the Australian community have no tolerance for foreign nationals who commit offences of this kind. I would respectfully say that, as a matter of law and indeed factually, that is not correct. In ministerial direction No. 79, being the policy document which regulates the minister's delegate's decision-making processes in this area, there is a range of considerations which a decision-maker needs to take into account where matters of tolerance are, in fact, the flavour of the day. So it is a matter of looking at a range of considerations where tolerance may be invoked.

The next point I wish to make—and it's an important one and I'm sure it's one the committee is well aware of—is that, since 2013, there's been something like a 1,400 per cent increase in visa cancellations, particularly over the 2013-2014 and 2016-17 financial years. In my respectful submission, there is a lack of cogent and reliable evidence that demonstrates that such significant changes, as have occurred since 2013 onwards, are needed to protect members of the Australian community.

The next point I wish to make briefly is that there is financial strain that will be invoked as a result of these proposed laws if they do come into effect, because obviously it will mean there will be broader discretion for the Department of Home Affairs and the minister to potentially cancel visas, which will then mean further paperwork and further appeals in the tribunal, and that means greater pressure on time and economic resources. As a person with significant professional experience in this area, I can already see that the department and its delegates in the National Character Consideration Centre in Melbourne have had a lot of pressure in trying to get these decisions made. There are already delays of between one and two years, which is a grave concern, not just to noncitizens but to members of the Australian community more broadly, because obviously noncitizens have family members in Australia and social ties in Australia, so it affects a broad range of other people who form part of the Australian community.

The final point I wish to make by way of opening, and it's a very significant point, is that it has been said that the proposed bill is consistent with Australia's international obligations. I respectfully would put to the committee that it's not correct as a matter of law. For example, if a noncitizen's visa is being considered for cancellation or refusal on character grounds and the visa in question is not a protection visa, then the decision-maker, whether it be a delegate of the minister or the tribunal, does not take into account, for example, non-refoulement obligations. That is a significant point because it is said in the proposed law that Australia will act consistently or cognisant with international obligations when that, in fact, is not the case. The further point I will make to that is the effect of section 197C of the Migration Act. It is a very important provision. It effectively says that, despite the fact that

a person may fail the character test, if they are otherwise found to have been owed non-refoulement obligations, they can be refouled back to their country of national origin in breach of Australia's international obligations. That provision makes that point expressly plain.

CHAIR: Thank you very much, Dr Donnelly. We will move on to questions now. I will kick it off if that's okay. Mr Reilly, you've talked a bit about the importance of understanding the effect on permanent residents. They are fair points that you make. Is your position confined to permanent residents such that you would be comfortable with the bill if it did not apply to permanent residents but only to other types of visa holders?

Mr Reilly: It depends on who you have in mind. What kinds of visa holders do you have in mind?

CHAIR: Let's say we're dealing with somebody who's on a holiday visa.

Mr Reilly: Someone on a holiday visa or a temporary work visa or a working holiday maker visa is in a very different situation to a permanent resident because we haven't made that commitment to that person. We've said, 'You can come here for one year or three months for a holiday.' Absolutely, if they do anything that—

CHAIR: The line has frozen a bit there. We'll see if the bandwidth catches up. Could you go back maybe 10 seconds? We lost a bit there.

Mr Reilly: For someone like a working holiday-maker, if they breach any law, I think we are absolutely entitled to say: 'That is enough; you have to leave. We have made no broad commitment to you that you are a member of the Australian community. You are visiting; therefore, the situation is completely different.'

CHAIR: Dr Donnelly, you've referred to the non-refoulement obligations that Australia has. For those playing at home, can we clarify what that means? I will put it in simple terms which probably won't capture the subtleties, but let me know if I am a long way off. The non-refoulement obligations of Australia are the obligation we have not to return people who have been granted refugee status to the country from which they have fled. Is that the guts of it?

Dr Donnelly: That's correct.

CHAIR: And in circumstances where a person has been given protection by the Australian community as a refugee, how would you answer criticism from a member of the public that says there is an expectation that those who are granted protection by Australia comply with the letter of the criminal law as the expectation that is the corollary of what Australia has done for them?

Dr Donnelly: It is a difficult issue. But Australia, being a civilised western industrialised country bound by the rule of law—there are a corollary of considerations that members of the Australian community would be cognisant of. It is a balancing of Australia's human rights obligations against criminal law principles. But, having accepted that a person is a refugee—and, therefore, at a broader level of abstraction, that they risk significant harm, whether it be torture or indeed death, in their country of national origin—and with Australia being a civilised country, it would be a justification, and a strong compelling justification, despite the serious criminality of that noncitizen, that we not refoul that person to their country of origin because of the real risk of serious harm they could face, which includes the death penalty—which we do not have in this country—or torture or inhumane conduct or any other significant form of punishment that is recognised by international law by civilised countries around the world as being unacceptable conduct. It is a difficult one and must be accepted, but there are powerful human rights considerations here. We are dealing with human beings at the end of the day, and it is something we need to give serious consideration to.

Australia has made it plain in the Migration Act that, despite our international obligations under the status of refugees convention, we are not going to comply with fundamental international law principles—that we will potentially refoul a person back to their country of national origin, despite the fact they meet the description of refugee, because they pose a risk of harm to members of the Australian community.

Senator KIM CARR: The *Bills Digest* is a document that senators rely on. I would hope that departmental officials might as well. It tells us that statistics released by the Department of Home Affairs show that visa cancellations on character grounds increased by 1,400 per cent between the 2013-14 and 2016-17 financial years as a result of the introduction of mandatory cancellations in 2014. A breakdown of the cancellations and refusal decisions from the past four years show that the vast majority of cancellations result from the mandatory cancellation provisions. I would ask each of our submitters today: what do they notice about the change in the administrative practices as a consequence of those changes to the law in 2014?

Dr Donnelly: I'm happy to start with answering that question. My direct experience representing many of these noncitizens has been a significantly adverse one in that, of course, many of these noncitizens are in prison serving a significant period of imprisonment throughout different parts of the state, whether in New South Wales,

Queensland, Victoria and so forth. Because they have been in jail for such a long period of time they don't have any money, or their financial situation is quite poor. As a result of that they are not in a position to get legal assistance to assist them in responding to the cancellation of their visas, and they often don't appreciate the significant consequences that flow from their visa being cancelled. That is the first point—a lack of legal assistance and a lack of understanding as to exactly what it means to have their visa cancelled. As was said by my dear colleagues earlier this morning, often a lot of those people have been living in Australia for many years and are not even aware of the character provisions in section 501.

The next point I wish to make is that the time that it's taking the Department of Home Affairs, the delegates, to make these decisions is far in excess of 12 months. Often what is happening is these noncitizens are being granted parole at the first available opportunity, but they're then sent to an immigration detention centre to rot away for another one, two or three years while a decision is being made as to whether their application to get back their visa is successful. Often in my experience it has been unsuccessful and, of course, they need to go to the tribunal to argue to have the decision set aside. In only a very small number of cases they have been successful, but in a great number of cases they have not been successful. The effect of that has been that, even if they are sent back overseas, they've spent another two or three years in immigration detention, which probably exceeds in many cases the actual period they would have spent in prison. That is a significant consequence that the Australian government does need to look at.

Senator KIM CARR: Professor Reilly, what do you say?

Mr Reilly: One of the big changes in 2014 was, of course, the mandatory cancellation with certain types of breaches of the character test. I think what you've pointed out is that one of the unintended consequences sometimes is that suddenly there are a whole lot of other people that come within the remit of cancellation, some of whom probably ought not to be deported. One of the concerns with this bill—I know that in Henry's submission they look at statistics, as do some of the other submissions—is that, when you take away discretion and, in this case, make it an automatic breach of the character test, it's going to trigger a whole lot of other potential cancellations, and we might see those numbers that you mentioned go up considerably more in the coming years.

Senator KIM CARR: I'm just interested to know your observations about what changes have occurred in an administrative practice within the department. What are your observations?

Mr Reilly: I might not be the best person to address that. I don't know if Henry wants to.

Senator KIM CARR: He'll get a chance in a minute.

Mr Reilly: The only thing that I have observed—I'm not a practitioner in this area, so it's not quite my field of expertise—is that, once you've got a mandatory cancellation provision, then you go down a completely different track—

Senator KIM CARR: Your submission deals with this question of numbers. Could you enlarge on that? Why do you think it would increase? And what's your observation about the current practice, given that there has been this massive expansion in the number of visa cancellations?

Mr Sherrell: Dealing with the current bill, the numbers are actually very hard. We don't have good oversight at all on the population of people who will be affected. We know the criteria, but there are a lot of unknowns in immigration. A really large unknown is the number of permanent residents in Australia. Perhaps surprising for a country of immigrants, we don't have an official figure from the department or the government on how many people holding a permanent visa live in Australia—we do know that for temporary visa holders—but it's in the number of millions. We have a population of those who could be affected by these laws of, say, at least 4.3 million, if not higher. As people have alluded to before, some of these people are tourists and backpackers and things like that, but a large number are here for a long time.

In terms of the administration order, the 2014 bill is very black and white. That was the will of the parliament; it was a bipartisan bill. Everyone was affected the same, regardless of whether they'd been in Australia for six weeks or for 40 years. And we did see a large number of cases in the news and in the media of people who had been here for a long time. To take Professor Reilly's point, the administrative process after a person has triggered the 12-month cancellation can be very difficult for people who've lived in Australia for a long time.

Just on the numbers of this bill, we don't know how many people will be affected if this bill passes. When this bill commences, it's my belief that the character test failure kicks in straightaway. So, instantly, we're going to have—

Senator KIM CARR: But you're talking hundreds of thousands?

Mr Sherrell: I would prefer to be a bit more cautious and say tens of thousands. But it will be a significant number. Again, as with the last bill, some of these people will have been here for 12 months. But you're going to get people who entered the country in the fifties, in the sixties and in the seventies who are still living on a permanent visa, and they're—

Senator KIM CARR: So people have been here 30 or 40 years and may well be subject to mandatory deportation.

Mr Sherrell: No, it won't be mandatory deportation; it'll be a mandatory failure of the character test and it will then be discretionary—

Senator KIM CARR: Okay. Now let's go to the question of discretion—

Senator CHANDLER: That's a good point, Mr Sherrell.

Senator KIM CARR: because the ministerial direction No. 79 sets out the binding consideration for decision-makers in the exercising of that discretion, and the government has placed some emphasis on this issue of discretion. It emphasises the changes that have occurred, because this was changed on 28 February this year. That's correct, isn't it?

Mr Sherrell: I believe so, yes.

Senator KIM CARR: It replaced the previous direction, No. 65. The new direction is not significantly different, in that it provides for the consideration of the nature and seriousness of the noncitizen's criminal offence and other serious conduct and so on and others. But it does set down new principles by which that discretion must be exercised. Is that the case?

Mr Sherrell: I believe so, yes.

Senator KIM CARR: What impact will that have, in terms of the administrative practices that have to be followed?

Mr Sherrell: I'm not the best person to answer that question.

Senator KIM CARR: Dr Donnelly, are you able to help us with that?

Dr Donnelly: Yes. I am, respectfully, of the view that there is not a significant difference in application of the administrative processes between ministerial direction 79 and ministerial direction 65. For example, with the new ministerial direction, if a noncitizen commits an offence against a woman—a vulnerable person in the community—then there's a deeming provision; that's taken to be a very serious offence. But, even without that principle being in the predecessor policy, it's obviously inherently still a serious offence to engage in committing offences against vulnerable members of the community, so I don't think, as a matter of administrative practice—certainly not in my experience—that there has been a significant difference, or even much difference at all, in terms of ministerial direction 79 or ministerial direction 65.

But one point I do wish to make is that, obviously, if the minister decides to make a decision himself and is not bound by ministerial direction 79—and, in my experience, more recently that has been a problem—it means that the noncitizen doesn't necessarily know what considerations he or she has to persuade the minister about, because they can go beyond the considerations that are reflected in the directions.

Senator KIM CARR: So the question of procedural fairness doesn't apply?

Dr Donnelly: It does apply to decisions made under certain powers of 501 but not others.

Senator KIM CARR: Yes.

Dr Donnelly: But the law, at present, appears to be that, if the considerations go beyond the ministerial direction, the minister does not need to put the personal notice about considerations, because they're already informed that the minister's not bound by his own policy and that he can go beyond that. Although the considerations in the direction may be of guidance to the minister, he's not bound by those matters.

Senator KIM CARR: Where's the appeal mechanism to a ministerial direction of that type?

Dr Donnelly: If a decision is made by a delegate who is bound to apply the ministerial direction, then the noncitizen can take the matter to the Administrative Appeals Tribunal. But, of course, if the decision's made by the minister personally, then the matter must go to the Federal Court of Australia and there has to be a certain kind of legal error demonstrated. So it's a very weak form of accountability mechanism.

Senator KIM CARR: Professor Reilly has already indicated that people without means are restricted in terms of access to the court proceedings in this country. Is that case?

Dr Donnelly: That is the case, yes. I've accepted a number of pro bono referrals from the Federal Court of Australia, but, of course, they're far between—busy practitioners also need to make a living. The practitioners at the bar try to take these cases when they can, but it's not always possible.

Senator KIM CARR: Not being a lawyer, I'm struck by the access-to-the-law question. It's one that does depend upon the generosity of our legal practitioners, does it not?

Dr Donnelly: Yes, absolutely. One of the interesting points which hasn't been given a lot of consideration but which is, I think, really important in terms of the interaction between criminal law and immigration law is that in criminal law, according to the High Court, if a person is charged with a very serious criminal offence then they're entitled to legal representation, and the court may stay the proceedings permanently if they don't get that legal representation. Interestingly, across the board, if a person is the subject of a visa cancellation notice—or refusal to grant a visa—on character grounds then they have no legal right to representation.

The consequences, dare I say, are the same, if not more severe, for the noncitizen, because if they are banished from this country then, as a general proposition, they're never allowed to come back here ever again. Of course, in many cases, where many of these people have been living here for a long period of time, we're talking about affecting members of the Australian community—their family, friends and associates—and the ties that they've had to this country for many, many, many years.

Senator KIM CARR: That's obviously a very strong point to be made. The question of refugees is one that is given some prominence. The case of Hakeem Al-Araibi is one that I drew attention to in the previous session. This was a man who was sentenced to 10 years jail, convicted in absentia, in a terrorism case in 2012 in Bahrain. It was alleged that he was in possession of incendiary bombs, causing damage to public and private property, and was sentenced to 10 years, if I remember rightly. This was despite the fact that he actually had a pretty substantial alibi: he'd been playing football in a public football match at the time these offences were alleged to have occurred. How would he have been affected under these arrangements?

Dr Donnelly: If the minister had found that he had failed the character test in Australia and otherwise found that, in exercising the discretion, the protection of the Australian community outweighed countervailing considerations—for example, his refugee status and so forth—then, regardless of having be found to be a refugee in Australia, he would be forced to be refouled back to his country of national origin, Bahrain, where he would indeed perhaps be sent to prison for 10 years or suffer significant persecution in that country.

Senator KIM CARR: This was a case which attracted considerable international attention. The Australian Football Federation and the Pascoe Vale Football Club, which is the local club in my area, drew considerable public attention to this matter. He was arrested, if I remember rightly, in Thailand, so the circumstances there were quite difficult. Is there an example where these types of provisions mean that the discretionary arrangements are actually brought into play?

Dr Donnelly: I appeared last year in the case of a North Korean gentleman who escaped North Korea in the late 1980s, then went to China and then came to Australia unlawfully. He was given refugee status in Australia. Subsequently his visa was cancelled because he committed a serious drug offence. At present, his is a perfect example of someone who potentially will be refouled back to North Korea where he faces, in my respectful submission or evidence, death or persecution by the current government. He is currently in an immigration detention centre in Sydney. Despite the fact that he's been found to be refugee, because he poses a risk of harm to members of the Australian community he faces a real risk of being refouled to North Korea. Putting aside my academic and legal background, as a basic Australian, it seems to me to be unthinkable that Australia would do something like that—send someone back to a place like North Korea to be executed.

Senator KIM CARR: I put to you, in a provocative way, perhaps, that it's said that there is a community expectation that we shouldn't tolerate people who break the law—those who are here on various visas, not Australian citizens. It's said that, despite the fact that this might well be in breach of international treaty obligations, we should, somehow or another, be concerned about that. What is the argument as to why we should abide by our international treaty obligations? What is the argument we should be using to respond to this alleged community concern about these things?

Dr Donnelly: The answer in fact lies partly in ministerial direction 79, because, as to the ministerial direction's primary consideration when it looks at expectations of the Australian community, the minister makes it plain that if you commit a serious offence then there's a real prospect that you will have your visa cancelled or you won't get your visa back, and that is one principle of community standards. But in ministerial direction 79, in what is called principle 6.3, it sets out a number of other community standard principles, which perhaps give a level of tolerance to the noncitizen. So it's about balancing consideration of different kinds of community

standards. On the one hand, if a person commits a serious offence then they face a real risk of being kicked out of the country, but, on the other hand, we need to look at other kinds of community standards—for example, the kinds of positive contributions that the noncitizen may have made to the Australian community in the past, their positive conduct, and also how long they've lived in Australia: have they been here for five years, three years or most of their life? If they have been here for most of their life then, as ministerial direction 79 makes plain, the Australian community would exercise a high level of tolerance in relation to their criminality because they have lived here for most of their life.

Of course another community standard is, having regard to our international obligations and how they should come into play, what kind of effect it will have on the noncitizen if they face risk of harm, including death or torture, in their country. Another one is their ties to the Australian community, their family and friends.

So, when ministerial direction 79 talks about community standards, it's not limited to merely, 'If you commit a criminal offence then you're out of the country on the minister's clock.' It's a careful exercise of balancing a range of different principles, some of which I spoke about a moment ago.

Senator KIM CARR: But aren't they all subjective? They're all subjective—every one of those.

Dr Donnelly: They are all subjective, and of course that is, at a broader level of abstraction, giving effect to discretion—a finely balanced discretionary decision to be made by a delegate, the minister or the tribunal.

Senator KIM CARR: Surely that's a responsibility of members of the government—any government—to actually exercise that discretion with due regard to their obligations, not just to act in response to some hypothetical community standard but to acknowledge the rule of law, which means obligations to actually follow principles such as those set down in international treaty obligations? Is that the case or not?

Mr Reilly: Can I jump in? I just want to answer the senator's comment about subjective standards. The big change that this makes is: up till now, to determine whether someone has breached the character test and is a person of bad character, we have had some subjective considerations in place. So either a court has considered that someone has done something serious enough to warrant a sentence of imprisonment of a year, or the minister has had a look at someone's conduct and said: 'This is a dangerous person. This is a person who is a concern to the Australian community. Therefore, they've breached the character test.' What we have now is that someone can breach the character test with no subjective consideration at all, other than the conviction. But a conviction for a crime takes in a massively different range of criminal action or behaviour. And this is the big problem with this particular change. It is a fundamental change in the administrative process for determining whether someone is in breach of the character test, and, once that happens and someone is convicted of a designated offence, then the minister [inaudible] means in terms of cancellation of a visa, and that's where we have the ministerial direction coming in. But that ministerial direction itself doesn't even take into account the severity of the person's conduct. It takes into account other considerations around protection of the Australian community and expectations of the Australian community. So someone could end up committing an extremely minor offence and find themselves excluded from the community.

There are other problems, administratively, with that. A number of submissions have made this point: people will not plead guilty to very minor offending, given these very severe consequences.There was an example given in the last session of someone who had been a stalker and was given a four-month sentence for that. If these provisions come in, that person won't plead guilty to stalking; they will challenge that. Then we'll have a whole lot of other court processes in play to determine the guilt or innocence of people and we'll also have pressure on the courts, knowing that, while this is very minor offending, if they're found guilty they could potentially have their visas cancelled. Inevitably courts will take that into account, even if it's not overt. So administratively this changes things in a number of ways that are quite concerning.

Senator CHANDLER: On that point around ministerial discretion, I'm just not quite understanding why there is a concern that the bill, as it stands, substantially changes the ability of a minister, say where someone has failed the character test, to subjectively determine whether or not the visa is to be revoked. Is anyone able to clarify that for me?

Dr Donnelly: As I understand the proposed bill, obviously if the noncitizen is taken to fail the character test because they've committed a designated offence then, yes—going to limb 2, looking at the exercise of the discretion—of course the decision-maker can have regard to subjective considerations.

Senator CHANDLER: Yes.

Dr Donnelly: But the issue is: when one is given a broad level of discretion by looking at the character test and applying the relevant considerations, it's opening up a real possibility that the noncitizen's visa can be cancelled or refused, and perhaps not rightly so. To say that a person fails the character test and poses a risk of

harm to the Australian community—as in the first question, limb 1—without actually looking at the subjective considerations is illogical or irrational reasoning.

There is substantive case law on this. Just because a person commits a criminal offence doesn't mean they pose more than a minimal or remote chance of committing an offence in the future, which is what the current law is. For a person taken to fail the character test under current law, for example, if the minister can demonstrate that there's more than a minimal or remote chance that the person will engage in criminal conduct in Australia, then fair enough. And that would be my reference to looking at subjective considerations to support the notion that they fail the character test. But under the proposed law none of that needs to be done. The proposition will be: you've committed a serious offence; you fail the character test. So that therefore opens up this whole other consideration.

Although subjective considerations are taken into account in the discretionary process, the government needs to be very, very careful before making that significant leap, because—as I've said before—many of these noncitizens don't have legal representation, don't know what they're doing and are not in a position to get assistance, and they will potentially end up with their visas cancelled or refused, banished from the country for all time.

Mr Reilly: Could I add very briefly an answer to your question. You've got two processes at play. One is: has someone breached the character test? Second: what are the implications of breaching the character test? You're absolutely right that, once someone has been found to breach the character test, there is the question of ministerial discretion about whether that leads to visa cancellation or not.

Senator CHANDLER: Yes.

Mr Reilly: But the point is that initial finding of breaching the character test—up till now we've had very clear criteria about the level of offending or bad conduct that would lead to a breach of the character test. What we have now is: 'No, we don't even look at that. You've just breached the designated offence. As long as there's a conviction, as long as you're guilty of the offence, we don't look at the level of the offending whatsoever.' And that triggers the breach of the character test. Absolutely, that person doesn't necessarily get deported at that point, but it does mean that people who we might otherwise have thought should not be in the position of having their visa considered for cancellation are in that position.

Senator CHANDLER: But don't you accept that there is a level of community expectation that noncitizens who we allow to live in this country should be upholding the law and, if they break certain laws like the ones that have been outlined in the proposed bill, they should face the prospect of having their visa revoked?

Mr Sherrell: In my submission I looked at some Judicial Commission of New South Wales reporting around sentencing in New South Wales at the local courts and we looked at the Magistrates Court. We looked at the crime of common assault. It's a crime which carries a two-year maximum sentence, so it is going to fit the definition of a designated offence. Ninety-three per cent of people who were sentenced for common assault had a non-jail term imposed on them. So these are collections of fines, bonds and suspended sentences. Currently, those people, according to the character test and the Migration Act, are not considered, in general, if they don't have a 12-month jail sentence, to be a threat to the community or to be an ongoing concern to the community.

Senator CHANDLER: On the basis that they weren't sentenced to jail time?

Mr Sherrell: That's right, yes. So this is what this bill will do, regardless of that sentence—say we have 100 people and 93 people are found guilty but given a non-jail sentence, if those people hold a visa, even if they have been in Australia for 40 years and even if this crime was committed in 1991, they will automatically fail the character test. On your proposition of whether the Australian community would support this person continuing to live in Australia after they've broken the law, I think it is very hard to determine what the Australian community would think of that person, particularly given the mitigating circumstances around length of time in Australia.

I think it's relevant to point out some close country comparisons. If you are a permanent resident in New Zealand, for example, and have lived in New Zealand for 10 years, you can't be deported, because the parliament has seen that that's a community standard—'If you have lived here for 10 years, we have decided that that means that we are not going to deport you, because you have this length of residence in the community.'

Senator CHANDLER: Mr Sherrell, just talking about that study that you've looked at, can you refresh my memory. When imposing a sentence on someone who has been found guilty of something like assault, for the sake of the example that you provided, is that judge considering the likelihood of that person reoffending or the safety of the broader community? What considerations will the judge be making when they are passing down that sentence?

Mr Sherrell: I'm not a legal expert; I'm an immigration policy researcher. But I do believe, from my research for this submission, that judges do take into account those factors in sentencing in the local courts in New South Wales, yes.

Senator CHANDLER: Would the other experts on the panel concur with Mr Sherrell on that point?

Dr Donnelly: Yes, absolutely.

Mr Reilly: Yes. The most important thing that is taken into consideration is the gravity of the offence—that is, how serious was the offending? If you have offended before, that is of course very relevant to sentencing. If it is your first time offending, you are less likely to get a custodial sentence.

Senator CHANDLER: Again, I go back to the question that I asked earlier: do you accept that there is a community expectation that, because we are allowing these people the privilege of residence in our country, if they do break the law, if they assault another member of their community, there should be ramifications on their ability to stay in our country? Do you not accept that there is a community safety requirement? Just the same as you take things into consideration when sentencing, that might impact on their good character and therefore their ability to maintain a visa?

Mr Reilly: I do accept that there's a community standard, but it has to be nuanced. It's not just a matter of someone who is a permanent resident having to have a completely clean record.

Senator CHANDLER: But isn't that what the ministerial discretion is for?

Mr Reilly: But, as I said, we're talking about two phases. To find someone guilty or in breach of the character test is a significant finding in itself, and it then triggers this process by which someone will be considered for deportation or considered for having their visa cancelled. That in itself is a big step. Say someone is in a scuffle and they push someone else over, and they both go to court and both get found guilty of the offence. That is not the kind of behaviour where they should then be found to have breached the character test, with no other considerations whatsoever.

Senator CHANDLER: I think there will be some in the community who will disagree with you.

Mr Reilly: That's true—I'm sure there are. But I think it's really important to think through the implication of that. The implication is that the system currently working for what it means to be a permanent resident is changed quite significantly by that kind of finding.

Dr Donnelly: I should also add, on the proposition of community standards, that the effect of the proposed bill may well be to undermine or create a conflict between executive power—delegates of the department making these decisions on the one hand and the court on the other hand. When judges and magistrates make decisions in sentencing proceedings, they are giving effect to community standards. They are appointed by parliament to do that. Of course, they see people from all walks of life, who come before the courts for a whole range of reasons. And, for example, if a magistrate decides not to impose a period of imprisonment but a fine or a community service order or something of that kind, then a judgement has been made on behalf of community standards that that is the appropriate sentence and the person doesn't pose an unacceptable risk of harm to members of the Australian community, which is why they have not been put in prison, for example; therefore, that should be the end of it. The Australian community would also be cognisant that the person has been punished by the courts for their offending. The proposed bill is sort of transferring power from the courts to the executive and saying, 'Actually, it doesn't matter what the courts say. We potentially will take this person off the streets because we believe they pose a risk of harm to members of the Australian community,' without looking at the subjective considerations up-front.

Mr Reilly: Can I add to that point. Of course, the minister can find someone as being of bad character if they haven't committed an offence with one year imprisonment. With any of these offences—designated offences or any other offences—there is already, in section 501, the chance for the minister to decide that someone is of bad character, for a number of reasons.

Senator CHANDLER: But isn't one of the factors in the bill that the minister, in exercising discretion, should consider protection of the Australian community from criminal or other serious conduct? We have one of the examples that you've discussed today—a scuffle in the street and someone being found guilty of assault and then failing the character test. Can't the minister then look at that and say: 'It was a scuffle in the street. The minister has made the determination that that doesn't sufficiently impact upon the Australian community. Therefore, the visa continues as is'? They determine not to revoke the visa.

Mr Reilly: You are absolutely right: the minister can decide not to revoke the visa, but if it is one of the circumstances of very minor conduct—and, by their very nature, we're saying that designated offences don't have

to be serious conduct, with less than a conviction and sentence of one year—that person then is of bad character under the Migration Act. So it triggers the need for the minister to make this determination, on minor conduct, on whether they lose their visa, which is an extraordinarily high level of punishment—to have to leave Australia.

Senator CHANDLER: But they haven't actually been punished at that point; the minister is determining whether or not they'll have their visa revoked.

Mr Reilly: Can I put it to you that being told that you're in breach of the character test and are now at risk of losing your visa in itself is a really high and difficult psychological thing for someone to have to put up with. And then, of course, does the minister make the right decision? We've put a whole category of people into the basket of being of bad character under section 501 of the Migration Act, and then the minister has to determine to whether to exercise discretion on that. Already, there is a huge number of people in that basket because of the way section 501 currently works, and the minister is having to exercise discretion on them. We're adding a whole raft of other people who are not a threat to the Australian community because they have done very minor offending. They don't even reach that threshold of having to protect the Australian community. Can I also make the point that they are part of the Australian community. We say we are trying to protect the Australian community. They need protection from the risk of deportation. That is an important part of this. Their families need protection from that. Their families are part of the community.

CHAIR: We are out of time. Senator Chandler, is there anything further that you need to explore?

Senator CHANDLER: Nothing further.

CHAIR: Thank you very much to our submitters. We greatly appreciate your contribution today.

KING, Her Excellency Dame Annette, High Commissioner, New Zealand High Commission

WHITE, Mr Andrew, First Secretary, New Zealand High Commission

[11:11]

CHAIR: We will now resume the Legal and Constitutional Affairs Legislation Committee's hearing into the Migration Amendment (Strengthening the Character Test) Bill. I welcome Her Excellency Dame Annette King, New Zealand High Commissioner to Australia, and Mr Andrew White, First Secretary at the New Zealand High Commission. Thank you for taking the time to give your evidence to us today. I understand that information about parliamentary privilege has been provided to you and is available from the secretariat. I note that, while the government of New Zealand has not submitted to this inquiry, it has nevertheless made a submission to the committee's earlier inquiry into the Migration Amendment (Strengthening the Character Test) Bill, which the committee received then as submission 4.

High Commissioner King: Kia ora tatou and good morning. I begin by thanking you for the opportunity to speak to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Strengthening the Character Test) Bill. We do appreciate your interest in what we believe this bill does. I'd like to acknowledge First Secretary Andy White, who has done a lot of work on this submission. If there are any questions I can't answer, I've got him along here for support. I am sure you've read the paper that we submitted on 28 November. I don't intend to traverse it all, but I do want to highlight some key points. But, just before I do, I'd like to make some general comments which I suppose will help to set the scene for our submission.

Australia and New Zealand have a unique and longstanding relationship, and a close analysis of our trans-Tasman relationship shows that it's deep rooted—from our longstanding Anzac tradition through to our economic, trade, defence and political ties and our integrated populations. As Prime Minister Morrison said recently, we are whanau, which is the Maori word for family. The McKinsey Global Institute stated in 2015 that Australia and New Zealand are the two most connected countries on the planet. And I'm sure that you looked at the Lowy Institute poll conducted most recently in Australia, which said that New Zealand is Australia's best friend. So I would say that our relationship with Australia is like that with no other country, and I think it's fair to say that is the same for Australia.

As stated in our comments, New Zealand contributes greatly to Australia's economy and society, and successive governments on both sides of the Tasman have recognised the benefits of the trans-Tasman movement of labour, skills and ideas and of being able to live and work in each other's country. Over time, however, the treatment of the two groups they now receive does differ as a consequence of Australian policy changes.

Just another couple of facts are that New Zealanders earn more than Australian-born people, on average, and are more likely to be in work and therefore more likely to pay more tax than the average Australian. Also, and I think this is germane to our comments, New Zealanders have the lowest dual citizenship rates of any nationality living in Australia, other than those countries that forbid dual citizenship—for example, Japan. This has partly arisen out of unintended consequences of the visa treatment that Australia affords them. The average New Zealander in Australia has lived here for over 15 years, and many of them consider Australia to be home. Before 2001, New Zealanders had little incentive to attain Australian citizenship as they were accorded the rights and privileges of a permanent resident. That remains the case for Australians residing in New Zealand today.

Until 2014, New Zealanders were protected from deportation after 10 years of residence. So we believe that New Zealanders have been disproportionately affected by Australia's deportation policy since the changes in 2014. There are a number of reasons for this, which we've highlighted in our paper, and I won't go over them now. It is why the changes, which detrimentally affect New Zealanders living, working and growing up here, are of concern to us. It's about how we treat each other's citizens. It's been pointed out on a number of occasions, most recently by our Prime Minister Ardern, that the 2014 changes have been corrosive to our New Zealand-Australia relationship. It boils down to the disproportionate effect on New Zealand and the lack of reciprocity of treatment. For example, only one per cent of total deportations from New Zealand are to Australia, while more than 50 per cent of total deportations from Australia are to New Zealand.

The underlying principle of New Zealand's deportation policy is that New Zealand accepts some responsibility for the behaviour of those who have lived in New Zealand on a resident-class visa for long periods of time. Australians, effectively, have permanent residence on arrival in New Zealand. We submit that Australia has responsibility for those people who are the product of Australia. Many New Zealanders come here as young children. They are educated here. They are Australians in every way, except they don't have that final citizenship paper.

Like any society, we have a small cohort who turn to criminality—a small number of New Zealanders. Of course, these are the people that we are talking about. But I want to make it clear to the committee that New Zealand acknowledges Australia's sovereign right to take action to protect the community and to manage its borders, and we respect the right of Australian governments to determine the level of criminality by noncitizens that makes them liable for deportation through section 501—the criminal threshold. New Zealand takes a similar approach albeit with protection for long-term residents in New Zealand.

Turning to some of the key concerns in the bill, we are concerned about the deportation of offenders who do not have an accumulative criminal record of 12 months in sentences. The bill's power to deport people based on the classification of the crimes they commit, being punishable by a two-year sentence rather than the actual sentence imposed, would, we believe, greatly widen the net of New Zealanders vulnerable to visa cancellations and deportations. The perception of fairness relies on an independent judge's impartial assessment of the seriousness of an individual's offending. In both our countries, in determining the appropriate sentence to impose, a court is generally guided by common law and sentencing legislation and is required to balance a range of considerations. We are also concerned that the visa cancellation provisions of the Migration Act are being applied to minors, while neither the Migration Act nor this amendment bill explicitly refer to minors. A New Zealand minor's Australian visa was cancelled under the act last year. It was revoked by appeal.

There's been a 400 per cent rise in cancellations for New Zealanders under section 116 of the Migration Act in the last two years for offences that don't necessarily meet the section 501 threshold. The act gives policymakers, including ministers, extraordinary powers, broad powers, under section 116 to cancel temporary visas. Section 116 cancellations uniquely affect New Zealand long-term residents of Australia as they can only be applied to temporary visa holders, and New Zealanders are the only nationality that can reside indefinitely in Australia on a temporary visa. The proposed Migration Act amendment bill to strengthen the character test raises many of the same concerns that the section 116 cancellations did. It's also unclear how the appeal process would work for these new discretionary section 501 visa cancellations. We believe that strengthening the character test is likely to make a bad situation worse for New Zealanders. We do understand that Home Affairs are conducting some analysis of the expected impact of the bill, but we've not yet seen any of that analysis. If it is available, we would be very pleased to receive it. When it is available, could we ask that we receive it? It leaves gaps in the knowledge of how this bill would work.

Despite Australia benefitting from the New Zealand cohort living in Australia, which is generally highly employed and well paid, New Zealanders overall are disproportionately affected by and vulnerable to Australia's deportation policies due to their much lower dual citizenship rate. In an ideal world, we'd continue to build on the unique relationship that I mentioned at the beginning in relation to deportations and we would have as much reciprocity as possible—something that we've valued and had for many years.

Thank you for your attention and the opportunity to briefly outline our submission to you.

CHAIR: Thank you very much, High Commissioner. With those expressions of friendship, we won't hold it against you or your submission that we copped such a whipping in the Bledisloe! We will start with questions from Senator Chandler.

Senator CHANDLER: Thank you. High Commissioner, could you summarise the circumstances in which a noncitizen can be deported from New Zealand on the grounds of criminal record or character issues?

High Commissioner King: We have a sliding scale for deportation depending on the length of time a person has lived in New Zealand and the severity of the crime. I could provide you with a table that shows that. If it's for less than two years, and depending on the seriousness of the crime, they will be deported. It goes up until you reach the 10-year threshold that we've spoken about. After 10 years we don't deport on the grounds that New Zealand has a responsibility for that person living in New Zealand.

Senator CHANDLER: What's the policy background to how you've come to that approach?

High Commissioner King: As I just said, over time in a country a person is socialised into that country, into the norms of that country and the behaviour of that country. We believe that, after a period of time, they have become part of New Zealand and therefore we have a responsibility to take account of the time they've been in New Zealand and the fact that they have become New Zealanders, as permanent residents.

Senator CHANDLER: Talking about the scale that you've just outlined, you have people who've been residents in New Zealand for 10 years at one end and then, I assume, we work backwards from there.

High Commissioner King: Yes.

Senator CHANDLER: What is, for want of a better expression, the minimum type of behaviour that might trigger a deportation or visa cancellation in New Zealand?

Mr White: Perhaps this is the best thing we could do: the submission we made last year to the migration committee had a quite lengthy and clear explanation of precisely what that sliding scale looks like. We're happy to pass that on to you.

Senator CHANDLER: The reason I ask these questions is that I'm interested in understanding what approaches New Zealand might take to deal with a similar cohort of people to the ones we are currently talking about, from a reciprocal perspective. If we apply what we are trying to do in Australia to what you do in New Zealand, are we comparing apples with apples? If that information could be provided—

High Commissioner King: We will provide that.

Mr White: It is perhaps worth pointing out that the primary difference here is that, once a person has been living in New Zealand for 10 years, the ability to deport them essentially disappears regardless of their level of criminality. The cases that we are particularly concerned about, the deportation cases in Australia, are those New Zealanders who have been living here for a very long time.

High Commissioner King: That is fundamentally the big difference between our two countries. Until 2014 you had the same approach in terms of the 10-year rule.

Senator CHANDLER: Thank you for clarifying that. Do you know what percentage of people who have been deported from Australia to New Zealand have reoffended once they have been back in New Zealand?

High Commissioner King: Yes. It is less than 50 per cent.

Senator CHANDLER: But it is still more than 40 per cent?

High Commissioner King: It is about 44 per cent.

Senator CHANDLER: That does seem quite a high number.

High Commissioner King: Yes; and we're not disputing that. Many of these people have lived in Australia for 20, 30 or 40 years and they have come back to New Zealand with very few connections. As any of us knows, family connections, community connections and society connections are the glue that hold societies together. People who have had little to do with New Zealand and been deported back into communities don't have friends and don't have jobs. Even though our agencies reach out to them the vital element is often missing for those people because it is back here in Australia: it is their loved ones. And you can't replace the loved ones in New Zealand for those that are here.

CHAIR: Your Excellency, at point 3 of your submission you note that, before 2001, New Zealanders had little incentive to obtain Australian citizenship, because of the special rights and privileges that existed between Australia and New Zealand, and that there was a change at that point. Although the incentive to gain citizenship in Australia for a New Zealander who has arrived since 2001 has increased, you've noted that awareness of the potential advantages of becoming an Australian are low and that that means many New Zealanders are captured by these types of laws and circumstances where people from other nations may not be. Should I read your submission as suggesting that there might be value in the Australian government making efforts to educate New Zealanders living in Australia about the fact that they are in a different position in the event that laws like this were to proceed?

High Commissioner King: I think there is strength in both our countries informing New Zealanders about the requirements when they come to Australia. It is not inside this bill but you will recall that under Prime Minister Turnbull there was a move to improve the pathway to permanent residency and citizenship for New Zealanders—and we are still working on that. Part of the problem is that New Zealanders, because they can come and live and work here indefinitely, believe that they are part of Australia. Getting the message through that things have changed is an important part of our role—and we do undertake that role. There are also many people who are here in Australia who could claim citizenship but there are other barriers to it. This includes the income threshold and for some it is the cost. Perhaps we could provide you with the difference in the cost of a citizenship application in New Zealand and in Australia. For some it is extremely expensive. These are some of the things that we have been reporting and working on in terms of an improved pathway to citizenship.

Senator KIM CARR: Your Excellency, it is unusual to see officials at the ambassadorial level appear before Senate committees. There is the occasional appearance of the British. And New Zealand—I think this is the first time you have appeared, is it?

High Commissioner King: It's the first time I have appeared. But High Commissioner Seed appeared in, I think, September last year.

Senator KIM CARR: I raise that because it would be fair to say that this reflects the deep concern, the hostility, that the New Zealand government has towards these measures. Would that be fair?

High Commissioner King: I think it shows the concern and disappointment that we have in the changes that have been made, particularly from 2014 on. We have on many occasions—from our previous Prime Minister, John Key, through to our current Prime Minister—raised this at the highest level. We do see that our relationship is not like any other relationship. As whanau, as family and very close friends, we would look to working collaboratively together on issues such as this—as we do in trade, defence and so many other areas. We have a seamless single economic market, for example. But this has become a rub and, as our Prime Minister said, corrosive to the relationship.

Senator KIM CARR: So you are saying it is a bipartisan view within New Zealand about hostility to these measures. You mentioned the previous Prime Minister. So it is not just a question of the current government, being a Labour government; the previous Conservative government shared the same anxieties and hostilities. Would that be fair to say?

High Commissioner King: That's fair to say. You will find it reported in the media—our former Prime Minister, Sir John Key, making similar points.

Senator KIM CARR: The word 'corrosive' is used in your submission and Prime Minister Ardern mentioned it on her visit here in July this year. So it is not just a historic question. Your submission is dated from last year. This is the current view of the New Zealand government. Is that correct?

High Commissioner King: It is, and it was raised in Melbourne in July at the bilateral meeting between Prime Minister Morrison and Prime Minister Ardern.

Senator KIM CARR: When you use a word like 'corrosive'—it is a fairly strong term—I take it that it applies not just to the question of settlement patterns. In what other areas would you say it affects the relationship?

High Commissioner King: I think it mainly is the settlement patterns. In terms of some of the elements that I mentioned where we are so well integrated—defence, intelligence, trade et cetera—I think we are probably stronger in some of those areas than we have ever been. But this one area of people-to-people relationships is where our Prime Minister is pointing out the corrosive effect is. And we also don't want it to be corrosive to our political relationship. You don't need to go back that long to see that we have had a very close political relationship. We could have even joined the Federation at one point—in 1889—

Senator KIM CARR: I would have thought that would be a very difficult question for you to even raise!

High Commissioner King: It was decided by our Prime Minister at the time that he wanted to be the Prime Minister of a country, not a state. I know that hasn't changed. But, for all intents and purposes, the relationship, and the architecture that we have built over time, has made us incredibly close. And this is one area where we do see that it eats away at the people-to-people relationship.

Senator KIM CARR: Your submission points to the fact that you have over 650,000 New Zealanders living in Australia, or about 13 per cent of the New Zealand population. What would you say would be the number of Australians living in New Zealand? Do you have that number?

High Commissioner King: Yes. We estimate that it is around 80,000. In percentage terms, against your population and against our population, it is almost the same. Of course, New Zealanders have been coming to Australia often to fill gaps in the labour market. I have just been to WA and I'm told that you need New Zealanders up there in the mining industry, the fly-in fly-outs that go and work in those areas—truck drivers et cetera.

Senator KIM CARR: There's also a view in some parts of the country that they're one and the same. People perceive them to be the same. We had a Deputy Prime Minister who didn't even realise there was a difference! So this is not an uncommon feature—and maybe it's part of the problem—of people's understanding.

High Commissioner King: I think you're correct. New Zealanders who come to Australia, and I think Australians who go to New Zealand, feel as if they are part of that country when they get there—such is the close relationship—and, unless they get into trouble, they don't realise there is a problem.

Senator KIM CARR: Until they run into direct conflict with the law.

High Commissioner King: Right.

Senator KIM CARR: So you're saying that these measures disproportionately affect New Zealanders.

High Commissioner King: That's right.

Senator KIM CARR: Can you explain why, disproportionately, these are discriminatory measures against New Zealanders?

High Commissioner King: It's particularly because New Zealanders live here on a temporary visa. If you're on a temporary visa, it is much easier to deport people. The overwhelming majority of New Zealanders who come here are on a temporary visa, and we are the only nationality that can reside and work in Australia for long periods of time on a temporary visa. Also it's because we have, as I said, low dual citizenship. New Zealanders haven't taken out Australian citizenship. It's much lower than for people from other countries. It goes back to some of that historical stuff I spoke about, particularly pre-2001.

Senator KIM CARR: But you're saying that this has changed since 2014. I read, at point 4 of your submission, that the change has meant a disproportionate number of people that have been deported have come from, or are being deported to, New Zealand. Is that correct?

High Commissioner King: That's right.

Senator KIM CARR: And they make up less than 10 per cent of the foreign-born population but 50 per cent of the deportations. Is that right?

High Commissioner King: That's right.

Senator KIM CARR: So you're saying that's part of the discriminatory nature of it?

High Commissioner King: Yes, we are.

Senator KIM CARR: Do you think there's any way to salvage this legislation?

High Commissioner King: As I said, we would ideally like to return to some reciprocity and what was there before 2014. That would be the ideal for us. If that is not possible, we would like special consideration for New Zealanders living in Australia—because of the relationship; it is not like any other relationship. The reciprocity part of it is that we have not gone down the same route in terms of our treatment of Australians. And we don't want to go down that route, actually. So, we would say: reciprocity, if it was possible, but, if not, then at least singling New Zealand out for special consideration.

Senator KIM CARR: Concerns have been raised by the Law Council, various refugee groups and various migrant advocacy groups. In particular, concern has been expressed about the effect on women of the so-called aiding and abetting provisions of this bill. Do you think that that is a measure that has particular effect for New Zealanders here?

High Commissioner King: I certainly do. If it's by association, I think it could have a dramatic effect on families and on the woman partner of a person who has got themselves into trouble. By association, they could also be subject to deportation. I think that could have a profound effect on families.

Senator KIM CARR: Do you have a gender breakdown of those that have been deported?

Mr White: No.

High Commissioner King: No.

Senator KIM CARR: You don't have that?

High Commissioner King: I suspect it's overwhelmingly male.

Senator KIM CARR: Yes.

High Commissioner King: We could possibly get that figure, although I would imagine Home Affairs would probably have it.

Senator KIM CARR: I'm sure they will. But if you have it that would be useful.

High Commissioner King: I'm sorry; we don't have it with us.

Senator KIM CARR: I think every Australian will know of New Zealanders who have married into Australian families and have worked here, and will have direct experience of the way in which New Zealanders have integrated within the Australian community.

High Commissioner King: I meet them every day.

Senator KIM CARR: That's right.

High Commissioner King: They are in ministers' offices. They are in the bureaucracy. They're in the community.

Senator KIM CARR: They are even in this parliament, from time to time, as we are constantly reminded!

High Commissioner King: And you'd probably find the same in our own.

Senator KIM CARR: Yes. So the question then is about the effects in terms of safety. The government's arguing that this is a measure to improve public safety. How do you respond to the allegation that this is a proposition to improve public safety by getting rid of these New Zealanders?

High Commissioner King: I would hope it wasn't, in the first place, aimed at New Zealanders. Our argument is that it should not be aimed at New Zealanders. But in terms of—

Senator KIM CARR: That's a consequence, though, isn't it?

High Commissioner King: It's a consequence, exactly. In terms of the government's policy and decision on whether it affects safety of the community, it's very much up to the Australian government to argue the case for that, and that's their policy. We're not saying that we want to make policy for them. We believe that when you look at the number of Australians that we deport back to Australia compared to those that are deported now without the change, it's so different that we don't believe our community is less safe than Australia's.

Senator KIM CARR: The whole principle here about the use of sentencing arrangements, so that it's actual as distinct from available sentencing, has meant there has been a change in the approach that's been taken. How do you respond to that?

High Commissioner King: In some cases it is similar to New Zealand in terms of the law. We haven't argued against that. But we do say that the 10-year rule applies, in this case in terms of deportation. Other than that, in New Zealand it is often based on common law and sentencing guidelines. I think we take a slightly different approach than Australia when it comes to sentencing.

Senator KIM CARR: The question though about discretion comes up regularly in the government's argument. They say it's all subject to discretion. I notice that our detention centres seem to be full of New Zealanders, so there doesn't seem to have been much in the way of discretion. You've drawn attention in your submission to the application of ministerial directive No. 65, which sets down the basis on which discretion is exercised. That directive was replaced with ministerial direction No. 79 on 28 February this year, which is after the date your submission was provided to this committee. How does that change the situation in regard to the application of discretion?

High Commissioner King: I'm not sure.

Mr White: Shall I?

High Commissioner King: Yes.

Mr White: My understanding is that direction No. 79 is very similar to direction No. 65. In terms of the application to New Zealanders, I think there will be very little difference between them.

Senator KIM CARR: Although that's a question of some legal dispute as to the consequence. It's suggested in some quarters, and I'd ask you to have a look at that—maybe you might like to make a supplementary submission to this committee in regard to the effect of the new directions to the Public Service. The reality is, that the minister's discretion is only applicable to the Federal Court but these directions apply to the Public Service. It's been suggested now that the principle that crimes of a violent nature against women and children be viewed as very serious, regardless of the sentence imposed; in fact, it reduces the level of discretion. How do you respond to that proposition? You may wish to take that on notice.

High Commissioner King: One of the issues is about how discretion is used and how consistent it is. We will take it on notice and come back to you.

Senator KIM CARR: Thank you very much.

Mr White: I thought it might be worth noting that the migration committee of the Australian parliament has referred to the possibility of referring to the special situation of New Zealanders in Australia in a ministerial direction. I think that would be a positive movement, from our—

Senator KIM CARR: It would be, if it were followed. If I might intercede, there is a political dimension to all of this. It's based on a highly subjective view about what community standards are and the role of the courts and the appeal mechanisms. You may wish to comment on that and you may not. But it is effectively part of a political campaign to raise this question. Essentially that's how this parliament, I presume, will argue the case when the bill finally gets to the Senate floor.

High Commissioner King: We would hope that the strength of our submission and the strength of New Zealand's views and our relationship with Australia will be taken into account in the parliament when you do debate the bill. I've noticed and read other submissions that in many ways support the submission that we've made. In the end, it will be a political decision—and, of course, we're diplomats, so we don't comment on political decisions.

Senator KIM CARR: You can't possibly comment!

CHAIR: Thank you, Your Excellency and Mr White. We really do appreciate the effort you've put into your submission and your assistance to the committee today.

High Commissioner King: And we thank you.

AL-KHAFAJI, Mr Mohammad, Chief Executive Officer, Federation of Ethnic Communities Councils of Australia

STARK, Ms Lauren, Policy and Project Officer, Federation of Ethnic Communities Councils of Australia

[11:45]

CHAIR: Welcome. Thank you for taking the time to give evidence to us today. Information about parliamentary privilege has been provided to you and is available from the secretariat. The committee has received your submission as submission No. 8. Do you wish to make any corrections to your submission before we begin? It's not a trick—we're not suggesting there's anything wrong in it!

Mr Al-Khafaji: The bill title only. It should say '2019' rather than '2018'. My apologies.

CHAIR: Certainly. If you wish, you may make a brief opening statement before we go to questions. Do you have an opening statement?

Mr Al-Khafaji: Yes, we do. We recognise the need to address community safety concerns with appropriate targeted responses. However, this amendment is unsuitable, ineffective and unjustified. Under the current legislation, those noncitizens who commit serious offences can have their visas cancelled, with the minister or their delegate considering the entire circumstances of a person's life, rather than simply the name and maximum penalty of the crime they committed when failing them on the character test. Already the grounds for doing this are numerous—and some do not require proof of wrongdoing, only a reasonable suspicion that an individual may be involved in certain future activities. Already the minister has extensive personal powers to refuse or cancel a visa on character grounds—decisions which cannot be reviewed on their merit. Already the threshold for cancelling a visa is low, including in cases where the individual has not been convicted of a crime and where the individual does not pose any harm to the community. An individual, therefore, risks having their visa cancelled even if they have never been convicted of a criminal offence.

FECCA questions the need for this bill and is concerned by the consequences of removing nuanced decision-making and replacing it with illogical automation. If the purpose of the bill is to enhance the protection of the Australian community, we believe the community deserves an appropriate justification and explanation of how that purpose is achieved in this bill.

The bill does not allow for any consideration of context or personal circumstances in an assessment of a person's character. FECCA believes in the justice system and its ability to determine a serious crime and to sentence offenders accordingly. We also believe these sentences are in line with the community's expectations and not with the maximum penalty available. The community's expectation of a serious crime does not include grasping someone's sleeve or making a verbal threat. It's FECCA's view that, given the devastating and long-lasting effect on an individual, their family and the community, automatic failure of the character test must be limited only to the most serious crimes, as expertly judged by the courts on the basis of the penalty applied by the judicial system.

Without the consideration of circumstances in the assessment of a person's character, the impact of these changes will reach far beyond serious crimes. It will reach to those who may have lived in Australia for decades and received a non-custodial or minimal sentence many years ago. The retrospective nature of these amendments will separate them from their home and community, despite already completing their sentence. It will reach to any form of contravention of an intervention order. It will also reach to instances where two young men argue and fight, and both receive non-custodial sentences for assault and complete their required community service. The citizen will carry on with their life, and the noncitizen will face visa cancellation, deportation and separation from their family.

We don't dispute that assault can be very serious and have serious consequences for victims. But, again, we know that community expectation of a serious offence includes a substantial custodial sentence. Yet in Victoria in 2017, for the offence of assault, the Magistrates' Court only imposed a sentence of imprisonment in 36 per cent of cases, with just five per cent of those sentences receiving a term in excess of two years.

Finally, FECCA believes that removal of an individual from Australia, including of some who have spent their whole lives in this country, can have devastating impacts on the individual and their family and community. FECCA is particularly concerned about the consequences of the amendments for refugees who have their visas refused or cancelled on character grounds and for long-term permanent residents of Australia who have their visas cancelled on character grounds. An individual may be removed to a country where they do not speak the language, where they have spent very little time or never lived and where they have no familiar social economy connections. Further, those who are unable to be returned to their country of citizenship—for example, refugees

and stateless people—risk indefinite, prolonged periods of arbitrary detention. FECCA is deeply concerned about the risk of separation of mothers and fathers from children, including dependent children and other family members. Visa cancellations have a devastating impact, and FECCA believes that the minister or their delegates should consider the entire circumstances of a person's life rather than simply the name and maximum penalty of the crime they committed to fail the character test. We recommend to the Senate that this bill be rejected.

CHAIR: Thank you very much.

Senator KIM CARR: Can I begin by asking you to explain what you mean when, in your submission on page 2, you talk about the consequences of the aiding and abetting provisions of this bill as part of a designated offence which would disproportionately affect women. What is the evidence for that proposition? How might that happen?

Ms Stark: The proposed inclusion of aiding and abetting will disproportionately affect women because often those who are involved in a relationship with an offender may somehow become involved in a crime that they have committed. This can be in a situation of intimate partner and domestic violence, and often these women are sentenced accordingly by the courts, and this entire circumstance is taken into consideration in their sentencing but isn't taken into consideration in this bill.

CHAIR: Ms Stark, would you also concede that the inclusion of the breach-of-an-order aspect of the expansion of considerations is also designed to disproportionately protect women who face situations of domestic violence and the like?

Ms Stark: Yes. As to the inclusion of the cancellation for contravention of something like an AVO, we concede that it does seek to protect women in these situations. However, without considering the entire circumstance, it's quite easy to prove somebody has breached an AVO and it's a much lower proof than to find someone guilty of a crime. Including that in this bill, we think, creates risk in situations that people should not have their visas cancelled for.

Senator KIM CARR: The question that then arises, as the advocates for these propositions will tell you, is that this is all down to discretion—the discretion of the officials and the discretion, ultimately, of the minister. How do you respond to the proposition that there is an element of discretion in the character test system? What's your evidence, or what view do you have?

Mr Al-Khafaji: We agree that there needs to be some discretion for the minister or their delegate. But these situations are very sensitive and have very long-lasting consequences—people having their visas cancelled and being deported. I think leaving that decision to the courts is in line with community expectations—rather than the minister having the flexibility to cancel someone's visa on suspicion or fail them on character grounds.

Senator KIM CARR: Let's go through that. The current laws have discretion provisions in them, and the minister has had discretionary powers for a very long time. The fact remains that, on the evidence, the number of people who have had visas cancelled has increased by 1,400 per cent. How has the application of discretion actually worked, in your experience?

Mr Al-Khafaji: We are happy to take that question on notice and come back with—

Senator KIM CARR: Would you—in detail? I am particularly interested in a proposition that has been advanced by one submitter, the Visa Cancellations Working Group. They argue that, while automatically failing the character test will not inevitably lead to a refusal—there is a discretionary element, there is an unknown—'the removal of a step of assessment is likely to impact a decision-maker's consideration significantly'. They say:

If, for that decision-maker, the person necessarily fails the character test, a decision to cancel is significantly more likely to follow. A determination which is permitted, or 'endorsed', even where that permission is not directive, has a psychological and practical effect on those who are responsible for application of the law …

What do you say to that proposition?

Mr Al-Khafaji: We agree with that. Let's take as an example refugees and people seeking asylum. They are probably the most vulnerable people and the most vulnerable cases in this situation. Their language skills are not up to scratch. If you just say to them that they will fail the character test because of something they have done, there is a high risk of anxiety throughout the community. That adds to the level of concern that we already have.

Senator KIM CARR: If the government is applying a subjective test of 'community standards' it is not using the legal system as a community standard; it's saying 'We've got this new test'—namely, the actual application of a sentencing arrangement. And they've had this massive increase in the visa cancellation process. Does that not suggest that the discretionary element is actually reducing, not increasing?

Ms Stark: In some ways I would agree. By making some designated offences result in an automatic failure of the test, it does actually take away some of that discretion and, in a way, it does mean that not all of the circumstances of the offence will be taken into account—only in name—and it's maximum penalty, which is not intended to indicate the seriousness of the offence. So, in part, it does remove some of the discretionary power from the minister. But it doesn't mean that the court's decision has been taken more into account; it is actually removing that as well.

Senator KIM CARR: Given that in regard to family law matters, questions of discretion, knowing the facts is actually quite significant—there is an old adage that one shouldn't get too close to external observation. That is what courts are there for—to examine these facts. Does this not provide for a much lower level of judicial review? Isn't that the consequence of this?

Mr Al-Khafaji: Yes, correct. I guess FECCA's position is that there should be compassion in these cases. We're talking about people's future here in Australia. We're talking about people's lives—people who have been living here in Australia for many, many years and may have come across unfortunate situations and, because of a small mistake, their life would be turned upside down, their visa would be cancelled and they would be deported. We think that the courts can adequately address these issues in line with community expectations.

Senator KIM CARR: So your view is that the current bill is not necessary because there's an adequate provision to protect the community? Is that your conclusion?

Mr Al-Khafaji: Correct.

Senator KIM CARR: The character provisions made by the minister, however, are not subject to judicial review other than by the Federal Court. Is that the case?

Mr Al-Khafaji: With the current legislation?

Senator KIM CARR: Yes, that's right. So even that is quite restricted. That's the case?

Mr Al-Khafaji: Correct.

Senator KIM CARR: Have you had a chance to look at the new directive that was issued in February this year with regard to the application of discretion? Have you seen the matter that's referred to as a guide to ministry officers? Have you seen that?

Mr Al-Khafaji: We have noted it, but we have not gone into—

Senator KIM CARR: Would you look at that, please? Perhaps take that on notice.

Mr Al-Khafaji: Yes, we will.

Senator KIM CARR: It's been suggested at one level that it has limited change. On another level, it's been suggested that it actually minimises the capacity for officers administering the provisions to actually take into account these discretionary factors. Would you give a view on that, please, on notice?

Mr Al-Khafaji: Yes, we can.

Senator KIM CARR: Thank you. Finally, I go to the question of international treaty obligations. I will put it to you bluntly: what's it matter if Australia breaches its international treaty obligations?

Mr Al-Khafaji: I think there is huge reputational damage that Australia, as an advanced, compassionate country, is not giving too much consideration to people's circumstances or exercising compassion regarding people's lives. We're talking about vulnerable people here, including refugees, people seeking asylum; possibly women. We know everyone makes mistakes. In a country like Australia, we hope that we can deal with these issues through the court system rather than—

Senator KIM CARR: Yes, that's all true. I'll put it to you bluntly: people such as you, the Law Council and various others are so used to the argument that we are obliged to follow international law, but, when I put a question to you like, 'What does it matter', it takes a while to actually get to the point. With the question of non-refoulement and other areas that have been put—for instance, the Parliamentary Joint Committee on Human Rights draws attention to a whole series of potential breaches of international law—what obligations does this country have to follow international law when it comes to migration?

Mr Al-Khafaji: They're all voluntary obligations.

Senator KIM CARR: So what?

Mr Al-Khafaji: Well, we don't have to, I guess—

Senator KIM CARR: Why should we?

Ms Stark: This country is accountable to its own citizens. If we're going to continue to claim that we're one of the most successful multicultural nations in the world, community expectations about things like this should be taken into consideration. Keeping laws in line with international laws is the expectation of the community. The rights of children and the rights of refugees are in line with those living in Australia and citizens in Australia, so I think it matters.

Senator KIM CARR: How do you know that? How do you know that's in line with community expectations? I might suggest to you that it's not—according to the particularly conservative views in this country—consistent with community expectations. Conservative people couldn't care less if we sent people back to an authoritarian regime that was going to execute folks that it didn't want. Non-refoulement would not mean a dob of glue to people. Many sections of our population couldn't care less about the idea that our responsibility is to protect the family and children. The right of freedom of movement—they couldn't care less about it. What obligations do we have, if we're to follow that line of argument, to international law? Isn't it something a bit more than just community expectations?

Mr Al-Khafaji: Australia, as an advanced country and as a global citizen, has some obligations—

Senator KIM CARR: So you're saying it's a moral argument?

Mr Al-Khafaji: Absolutely, it's a moral argument. We don't have to follow any international laws out there, but we do them because they're the right thing.

Senator KIM CARR: So it's a subjective argument that we actually be good citizens international citizens as well?

Mr Al-Khafaji: Absolutely. If we pretend to be leaders in the world, we need to show how we do that, by not sending people back to countries where they've fled persecution.

Senator KIM CARR: Thank you very much.

Senator CHANDLER: Your submission raises the prospect that this bill removes judicial oversight, by delinking the character test provision in the Migration Act from the court sentencing decision. But surely a criminal court sentencing decision shouldn't be intended to be a form of judicial oversight on a potential migration decision? I feel like we've sort of blurred two concepts here, and that that is not necessarily how a judge would determine a sentence in practice.

Ms Stark: I would say that the judicial system is in the best place to decide the seriousness of an offence, and in determining that seriousness, they can take in all of the evidence, all of their experience and the relevant laws. So, in that matter, them determining what a serious offence is and indicating that with their penalty is how it would apply to this.

Senator CHANDLER: But you're not implying that a judge would consider how a penalty might play out and the impact that that would have. I think that that was a misunderstanding in how you were describing that delinking there.

Mr Al-Khafaji: It's obviously up to the judge to take those things into consideration if they think that is relevant. But in our submission we're not saying that.

Senator CHANDLER: If the character test is failed, the minister still has the ability to determine, on the basis of what crime was committed, whether or not to actually revoke the visa. There is still the element of subjectivity there for the minister to exercise?

Ms Stark: From my understanding, the character test is a large piece of what should be used to make that decision. If the character test is failed, that's something that cannot be argued with. As it stands now, the character test is decided on a number of different factors. With this automation, those factors will be removed, so it will not take into account all of the circumstances.

Senator CHANDLER: But it's still going to be a multiple step process, correct? Determination 1: the character test has been failed. Determination 2: on the basis of this plus the other factors that the minister can take into account, should the visa be revoked?

Mr Al-Khafaji: I guess our fear is that that determination 1 will be the first and last. And I think—

Senator CHANDLER: But the bill isn't written like that?

Mr Al-Khafaji: Sure, but I think that will make the case that the character test has failed, and we will see a high number of people failing the character test and automatically having their visas cancelled.

Senator CHANDLER: But it won't be automatic.

Mr Al-Khafaji: Maybe you can explain to us how determination 2 will be applied.

CHAIR: Sorry, it's not your job to answer questions, I'm afraid, Senator Chandler. I'm going to have to pull you up there. You might want to reframe the question or pursue it some other way.

Senator CHANDLER: It's my understanding that there are a number of different factors that the minister can take into account, including the risk to the Australian community based on the conduct that might have been committed. Don't you think that this would pose another way for the minister to consider the gravity of the crime that's been committed?

Mr Al-Khafaji: Sure, but what I'm trying to understand is: what is it that the minister can't currently do that requires this new legislation?

The minister already has discretion in terms of cancelling someone's visa based on many different factors. That already exists, and what I'm failing to understand is: what is it that we're trying to achieve through this new bill that will automatically fail someone's character test? That is the focus here.

Senator CHANDLER: I'm not meant to answer questions, so I'll take that as a rhetorical question that I'm not meant to answer. Thank you.

Mr Al-Khafaji: But you understand, yes.

CHAIR: Can I explore a few things, mainly for those who are listening at home. I just want to go through the process that the bill has in mind for how we treat a person who has been convicted of a designated offence in relation to their visa outcome. Is it your understanding that, if a person does not meet character requirements because they've been convicted of a designated offence, it doesn't demand cancellation of their visa but rather the decision-maker has an opportunity to consider visa refusal or cancellation? Is that your understanding? So rather than compelling cancellation, it triggers the consideration of whether or not there should be a refusal—is that your understanding?

Ms Stark: That's our understanding.

CHAIR: And does a failure to pass the character test necessarily mean that a noncitizen will have their visa cancelled?

Ms Stark: Our understanding is it doesn't necessarily mean that it will be cancelled, but the chances are higher because that is part of the decision-making process.

Mr Al-Khafaji: And is significant, we believe.

Senator KIM CARR: Do you have any evidence for that?

Mr Al-Khafaji: There is anecdotal evidence. There are many stories out there, especially from refugees and people seeking asylum, that people are already living in fear of committing crimes, even low-level crimes—for example, receiving a fine or a speeding ticket. They're just living in absolute fear that they will be sent home. Even if it's not being applied, there is community fear out there already and this will just exacerbate that.

CHAIR: But, just for clarity, there is no provision in this bill for people who get fines or speeding tickets.

Mr Al-Khafaji: I understand that.

CHAIR: I just wanted to make sure that we're all clear. I understand that's not the submission you're making. So, in the circumstance where there is a discretionary decision to refuse or cancel a visa, it's also true to say that the decision-maker needs to provide that person with natural justice in the process of making that decision and consider a broad range of factors, including things that weigh against refusal or cancellation and in favour of the person whose situation's being considered. That's true, isn't it?

Mr Al-Khafaji: Sure.

CHAIR: I know these aren't especially controversial things; I just want to make sure that those listening at home can understand the framework we're working with. Prior to refusal or cancellation, a person whose visa is being considered will have the opportunity to make submissions and provide information in support of their position. That's right, isn't it?

Mr Al-Khafaji: Yes, it is. Of course the process is there, and we trust that it will be used correctly. But the point here is the first hurdle, which is the character test. If someone fails the character test that will start a process of a defendant trying to explain that they are worthy of staying in this country or not having their visa cancelled. That prolonged period of time of trying to explain that, using the process of natural justice and all of that, will take years. And we know that, if the AAT is being used, the waiting time is very, very long, and these people will live with that fear for months, maybe years, before a decision is made about whether or not they will stay because of something that happened at a bar many years ago.

CHAIR: I understand that's anxiety inducing and a difficult thing.

Mr Al-Khafaji: Of course, and that's very important.

CHAIR: Yes, agreed. Just so I can take this through to its conclusion: when they're exercising the discretionary power to decide whether or not to refuse or cancel a visa, a delegate has to consider a bunch of things within ministerial direction 79. I want to step through those and make sure that that fits with your understanding. They have to consider protection of the Australian community from criminal or other serious conduct; the best interests of minors in Australia—which I'm sure would be an important consideration for the people you represent; the expectations of the Australian community; Australia's international obligations; the impact of victims; and, importantly, the nature and extent of a person's ties and activities here in Australia. Do you accept that that list of considerations attempts to do a balancing exercise between considerations that are about the broader community as well as considerations that are about the individual and their personal interests and circumstances?

Mr Al-Khafaji: Absolutely. These are very important things, and we absolutely support all of that. But, again, I'm still trying to understand what powers the minister does not currently have to deal with things that you have just mentioned that requires this bill.

CHAIR: Can I just confirm that it's your understanding that a person who has an adverse decision made against them using this process will have both rights of merits review and, if they're unsuccessful, they will also have rights of judicial review from that decision?

Mr Al-Khafaji: We believe that's correct.

CHAIR: If, on reflection, you disagree you can always write to us afterwards. But I think you'll find that that is consistent with things. If a person is not an Australian citizen—so they're a citizen of another nation—do you, in a broad sense, accept the proposition that there's no entitlement to remain in the Australian community if you're in that circumstance? It's a privilege, rather than—

Mr Al-Khafaji: Of course, it's a privilege. But what I would say to that is that there are people who have been in Australia for a very long time. They could have been here for 10, 20 or 30 years. We heard from the person giving evidence before us that, for example, some New Zealanders have been here for most of their lives. For us to cancel their visa and send them back home—our international reputation is at risk. This person will lose all their community connections, their family, their friends and their future prospects in this country and will be sent back to a country where they've never lived, even though they might have a citizenship of that country.

Senator KIM CARR: And they can never return.

Mr Al-Khafaji: And they can never return—that's right.

CHAIR: I accept what you're saying, and I also acknowledge that there are so many people who are noncitizens who make enormous contributions here in Australia. They do some wonderful things. Do you accept the proposition that criminal activity is inconsistent with the privilege of being permitted to remain in the Australian community as a noncitizen?

Mr Al-Khafaji: We believe that, under the criminal justice system, the courts can adequately deal with criminals. I think that noncitizens in Australia are much more vulnerable to, for example, visa cancellations and things like that than Australian citizens. We believe that there needs to be consideration made for people who, for example, have lived here for all of their lives who just happen not to be Australian citizens, versus someone who is an Australian citizen—when, for the same crime, the noncitizen's life is in ruins and the other person, the Australian citizen, just carries on or they serve their sentence and move on with their life. I think that we need to be careful about how we deal with those two situations. The vulnerability of those noncitizens is a lot higher.

CHAIR: Thank you very much for your submissions today. We really do appreciate your contribution to the work of the committee.

Senator KIM CARR: Can I ask one question on notice? Do you have any estimates of how many people might be affected by these changes should this bill ever be accepted by the Australian parliament?

Mr Al-Khafaji: It's pretty difficult to—

Senator KIM CARR: You can take it on notice.

Mr Al-Khafaji: Yes, but what I would say is the retrospectivity of this bill also would mean a lot more people would fall into this category.

Senator KIM CARR: Your best estimate will be terrific. Thanks very much.

CHAIR: You're welcome to take it on notice. Thank you very much. The committee will now suspend.

Proceedings suspended from 12:20 to 13:11

RENTON, Ms Lara, Senior Lawyer, Australian Human Rights Commission

SANTOW, Mr Edward, Human Rights Commissioner, Australian Human Rights Commission

Evidence was taken via teleconference—

CHAIR: The Legal and Constitutional Affairs Legislation Committee of the Senate will now resume. I welcome Mr Edward Santow and Ms Lara Renton from the Australian Human Rights Commission via teleconference. I also welcome some year 11 students from All Saints' College in Western Australia. Thank you for coming to listen in on the activities of the committee. I'm sorry we don't have people in person for you to observe, but if you stick around long enough you'll get some of those!

Mr Santow and Ms Renton, thank you for taking the time to give your evidence today. Information about parliamentary privilege has been provided to you and is available from the secretariat. I remind senators and witnesses that the Senate has resolved that an officer of a department of the Commonwealth or of a state or territory shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

The committee has received your submission, as submission No. 4. Do you wish to make any corrections to your submission?

Mr Santow: No, thank you.

CHAIR: Do you have an opening statement?

Mr Santow: I do. Thank you for inviting the commission to give evidence. This bill would amend the character test in the Migration Act by allowing the minister to refuse or cancel a visa if a person is convicted of a designated offence. Designated offences are punishable by imprisonment for a maximum of no less than two years; however, a person will fail the character test even if they are in fact sentenced for a period shorter than two years. It is of course legitimate for the Australian government to protect the community from harm. The commission acknowledges that some visa cancellations on criminal grounds would be proportionate to the pursuit of that aim and would therefore pass muster under international human rights law.

The commission's core concern is that this bill would grant a very broad discretion to cancel visas. For example, it would enable the minister to cancel an individual's visa even if a court sentenced the individual to only a very short term of imprisonment or, indeed, if the court opted to provide no custodial sentence at all. In other words, the bill doesn't provide for full consideration of the particular risk posed by the individual in question. The power turns on the maximum possible sentence rather than the sentence actually imposed upon the individual. This does not pay due regard to the risk that this specific individual poses to the community.

The commission is also concerned that the bill does not require the consideration of important countervailing factors. In particular, visa refusal or cancellation could significantly limit the human rights of affected people by, for example, leading to an individual being subject to arbitrary immigration detention; removed from Australia to a country with which they have little or no connection; or separated from their family, including dependent children who remain here in Australia. The bill also should be considered in the context of the existing character provisions in the Migration Act, which the joint standing committee described earlier this year as operating well and protecting the Australian community. It's difficult to identify a situation where a noncitizen who poses a significant risk to the community would not already fall foul of one of the character provisions in section 501(6).

The commission recommends the bill not be passed, but in the alternative we propose the committee consider a sliding scale approach similar to New Zealand law. That would involve the minister taking into account a noncitizen's connections to Australia and accepting greater responsibility for long-term residents. We are happy to answer questions.

CHAIR: Thank you very much, Mr Santow.

Senator KIM CARR: What is the argument as to why Australians should be concerned about our compliance with international law and application of human rights conventions?

Mr Santow: There's a principled reason and a practical reason. The principled reason is that Australia is a country that believes in the rule of law, that when we set the law we expect others to comply with it and that we will comply with it ourselves. The practical and pragmatic reason is that if Australians travel overseas we would want our citizens to be protected by international human rights law in other countries. So it's really only reasonable to have that pragmatic expectation if we are willing to do so ourselves.

Senator KIM CARR: Of course, we're told that this bill's statement of compatibility concludes that the bill is, in fact, compatible with our human rights obligations. How does the commission respond to that?

Mr Santow: We're concerned that there are situations where a decision will be made by a minister or delegate of the minister that will not comply with human rights, and so the breadth of the discretion, as I put it before, is such that it doesn't provide enough guidance or protection against decision-making that is incompatible with people's human rights. That's the core concern.

Senator KIM CARR: Of course, the various parliamentary committees here have disputed the claim that this bill is, in fact, compatible with our human rights obligations. Do you have any response to those declarations?

Mr Santow: I think there's been some considerable consideration of this bill and related legislation. My understanding is that the Senate Standing Committee for the Scrutiny of Bills, for example, said that the justification for expanding the minister's power has not been made. And when you think that, by expanding that power to remove people from Australia, that inevitably engages their human rights, it inevitably calls for a really clear justification, but that justification has not been provided. As I say, at least that committee—and, I think it's fair to say, the Joint Standing Committee on Migration as well—has expressed some concerns about expanding powers in this area.

Senator KIM CARR: The Joint Committee on Human Rights has suggested that there are possibilities of breaches and non-refoulement issues. There are concerns in regard to immigration detention, and concerns in regard to the rights of protection of the family and children and freedom of movement. Are there any others that you think we should be aware of?

Mr Santow: The human rights associated with the rule of law are really important as well. In addition to the rights you've mentioned, the right to be treated equally before the law is very important. When you have such a broad discretion—and that power, remember, can be exercised not just by the minister but also by delegates of the minister—it can mean that you will have inconsistent decision-making depending on who is the actual delegate with responsibility. That can limit rights associated with equality before the law.

Senator KIM CARR: The argument that the government will present in support of this is that community standards require the toughening of these character tests. Are you familiar with that argument?

Mr Santow: Yes, I am.

Senator KIM CARR: What do you say to that proposition?

Mr Santow: We would accept, as I said before, that the community has a really clear interest in being kept safe and secure. We all have an interest in that. Under international human rights law, the rules on the steps you can take to keep the community safe are also quite clear. You can take this quite quickly to a very absurd point. Perhaps I can give a quick analogy. If we accept the fact that men commit much more violent crime than women, you can make incremental steps to protect community safety, but at some point it will become disproportionate. For example, if someone proposed that all men should be imprisoned, that might, in one sense, improve community safety, but it would be done at too great a cost. I absolutely trust the Australian community to understand that intuitively. But that principle is also bound up in international human rights laws that apply here in Australia, and that is that community safety is very important but every step you take to improve community safety should be absolutely clearly targeted. There must be a really rational connection between the step you're taking to improve community safety and having a discernible impact on actually improving community safety, but also you can't do these steps in a way that would have a disproportionate impact on people's human rights, particularly if they are already vulnerable in some way.

Senator KIM CARR: Well, in fact, it's suggested that this bill's not necessary, because the current provisions do protect the public in regard to public safety. In fact, there has been an expansion, in terms of visa cancellation, of 1,400 per cent. What does the commission say to that proposition about the adequacy of existing legislative measures?

Mr Santow: The current provisions in section 501, particularly subsection (6), the character test, are already very broad. They give the minister and his or her delegates a great deal of power to take steps to cancel or refuse visas to protect the community. We at the commission have not been able to identify common scenarios where those current provisions are inadequate. As I mentioned in my opening statement, the joint standing committee that deals with migration matters did acknowledge that those existing provisions operate well and are 'protecting the Australian community'.

Senator KIM CARR: In fact, the Public Law and Policy Research Unit at the University of Adelaide have made a submission to us. Pages 5 and 6 of that state that if this bill were implemented it would lead to a decrease in the level of public safety. What do you say to that proposition?

Mr Santow: I don't have that submission in front of me, so I don't think I can—

Senator KIM CARR: They're talking about community cohesion, the changes it would lead to in terms of the judicial processes and people's pleading arrangements at courts. They're talking about changes in terms of administrative practice through the operations of the migration laws. Can you conceive of an argument where we would actually see less public safety as a result of these more draconian measures?

Mr Santow: Sorry, I see what you're getting at now, Senator. Maybe I can make two observations. There are two things that might seem immediately to be unintended consequences of a bill like this. The first, as you alluded to, is that it could encourage people who might otherwise make a guilty plea to not do so because in doing so it would make it much more likely that they would ultimately be removed from Australia. Clearly there's a very strong interest in having people who've committed offences make guilty pleas at the first available opportunity, and that is something that helps to protect our community. Another example, which I think was mentioned in submissions, was the risk that people who might be dependent on someone who engages in violent activity might be less likely to report that violent activity to the police or other authorities because they would be worried that that person, particularly if that person is the breadwinner in the family, would then be removed from Australia or that there would be some kind of disproportionate action taken against them—that they wouldn't simply be able to access domestic violence interventions and that sort of thing.

Senator KIM CARR: Can I come back to this issue of community expectations. I put to it you that there are sections of the Australian community that have very little regard for human rights. Think about the way we treat our Aboriginals. Think about our attitude towards law enforcement. Think about our attitude to capital punishment, for instance. I put it to you that if we were to apply that idea of community expectations then sections of the Australian population would have no compunction whatsoever about sending noncitizens back to an authoritarian regime for capital punishment. How does the Human Rights Commission reconcile that view of public expectations with our obligations under international law?

Mr Santow: I think the difficulty with a notion like community expectations is that it is inherently vague or nebulous, so we are very careful not to invoke something like community expectations when we're making a statement about the law and the operation of the law. I think, when you ask people in the community abstract or hypothetical questions along these lines, the way in which you pose the questions will have a very significant impact on the answers. I, along with most people in the community, would probably say that if you are a noncitizen living in Australia you should generally abide by the law. Of course, that seems completely unobjectionable. On the other hand, if you ask the question, 'Should someone be removed if they've only ever been convicted of a very minor offence and not been subject to a custodial sentence, and if they have deep ties to Australia, have shown contrition, have a family here in Australia and would suffer very greatly if they were removed?' I think the general community expectation would probably be very different from the first answer. That's why I think we should exercise some caution when we invoke 'community expectations' as a general idea to justify legislation that will have a significant human rights impact.

Senator KIM CARR: Finally, your submission discusses the issue of the New Zealand model of applying a sliding scale with regard to deportations for people who have committed offences. Can you outline how you'd see such a proposition working in Australia? Should it be accepted by the parliament?

Mr Santow: That proposal is not our preferred option. If the bill were to go ahead in some form then what we are saying is that a way of approaching this issue that would be more compatible with people's human rights would be like section 161 of New Zealand's Immigration Act 2009. Essentially the way that operates is that it makes someone more likely to be deported if they have been in New Zealand for a very short period of time and less likely if they have been there for a longer period of time. It also enables consideration of the severity of the offending of that individual. I think something along those lines might be more effective in achieving the government's purpose here—which we, of course, support—but in a way that is more targeted and less likely to have unintended consequences.

Senator KIM CARR: Thank you very much.

CHAIR: Mr Santow, Senator Carr asked a question a moment ago about the deportation of people who would go back to places where they could face capital punishment and a high chance of being treated poorly. That sounded to me like a question that was assuming the circumstances of somebody who was granted protection by Australia under our obligations to assist refugees. That may or may not have been what was intended, but in any event I just wanted to touch on the point of Australia's non-refoulement obligations. For those who are listening in the gallery, they are the obligations that Australia has to not send back to a country a person who has been granted asylum in Australia as a refugee where to do so would be to send them back to where they came from and put

them back in the danger that we are to protect them from. I'm sure, Mr Santow, you could have put it better than me! Does this bill breach Australia's non-refoulement obligations?

Mr Santow: It's difficult to give a really definitive answer to that question, but I will make an attempt, without being too wordy if I can. The difficulty is that the discretion that this bill would establish would not draw attention to those non-refoulement obligations. It might be lawful for a decision-maker, including the minister—or especially the minister, really—to make a decision that does not take into account those non-refoulement obligations and might thereby, I guess, bring Australia into a breach of international law. The direction No. 79 that would apply to delegates of the minister would establish a different situation, so it would be less likely that an individual delegate of the minister would make that error, but it's still possible.

CHAIR: Mr Santow, can I read to you a little passage from the statement of compatibility with human rights that accompanies the EM for this bill. At page 12, second paragraph, it says:

Australia remains committed to its international obligations concerning non-refoulement. These obligations are considered as part of the decision whether to refuse or cancel a visa on character grounds. Anyone who is found to engage Australia's non-refoulement obligations during the refusal or cancellation decision or in subsequent visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations.

Does that affect your view at all?

Mr Santow: I'm aware that that is an accurate statement of the government's intention. The difference is: imagine you're an individual who arrives in Australia claiming to be a refugee. In that situation, there would be a very detailed process of establishing whether you are indeed a refugee. If you need to appeal that decision then there's an established process through an independent merits review tribunal et cetera. What the statement that you've just alluded to is saying is that, in a kind of less compellable way, in a way that would be less susceptible to careful review, the Australian government will take steps to make sure that it doesn't send someone back to a country where they're likely to be persecuted. I guess what I'm saying is that I accept that we have people of great heart and good faith who make these decisions. It is just that these are difficult decisions, and the consequences of making an error are very, very severe. So if appropriate, stringent safeguards are not in place then it is more likely that an error of this nature will take place.

CHAIR: Can I ask you about something different? We've had some talk, in the course of submissions today, about whether or not this sets up a mandatory kind of regime for cancellation of visas. I just want to put something to you. Do you understand the effect of the bill to be, if a person does not meet character requirements because they have been convicted of a designated offence, that a decision-maker has the opportunity to consider visa refusal or cancellation rather than be mandatorily required to do so?

Mr Santow: That's my understanding.

CHAIR: Is it also your understanding that a failure to pass the character test doesn't necessarily mean the noncitizen will have their visa refused or cancelled but that it's something that is taken into account in the process?

Mr Santow: That's correct.

CHAIR: Is it also true to say that in any discretionary refusal or cancellation the decision-maker has to provide the person with natural justice, has to consider a broad range of factors when deciding to refuse or cancel a visa, including things that support and weigh against that individual 's interest as well as things in favour of them, like their ties to the community?

Mr Santow: Yes. I think what you are describing is the decision-making process for the delegate of the minister—

CHAIR: Yes.

Mr Santow: but the minister can exercise this power personally and so, if that were the case, it would not necessarily have all of the protections you are referring to.

CHAIR: If there is a refusal or cancellation, does the person affected have the benefit both of natural justice in the decision-making process and the opportunity to provide information and submissions and comments to the decision-maker? If they end up with a decision that's been considered in a way that's adverse to them, do they nevertheless have merits review rights and judicial review rights?

Mr Santow: I think what you're putting to me is, if it's the delegate who is intending to make a decision but hasn't actually made a decision to remove someone from Australia or, basically, to cancel their visa, they must first put that to the affected individual. The answer to that question is yes. That person would then have an opportunity to make their case in merits review and, subsequently, judicial review. But, as you would be aware,

Chair, the regime for judicial review in this area of decision-making is incredibly narrow. It's the narrowest form of judicial review in all areas of decision-making at the Commonwealth level. The situation would be different if instead of being the delegate making the decision it were the minister making the decision. If that were the case, there would not be a merits review. There would still be that limited form of judicial review but there would not be a tribunal overseeing that process.

CHAIR: Thank you, very much. Senator Chandler?

Senator CHANDLER: Senator Stoker, you've covered the material I was intending to ask the HRC about.

CHAIR: I'm sorry!

Senator CHANDLER: That's all right.

CHAIR: Is there anything else you want to add?

Senator CHANDLER: No, nothing more.

CHAIR: Do you have anything further, Senator Carr?

Senator KIM CARR: No. I'm just interested to know—I take it the commission has actually read the parliamentary joint commission on human rights?

Mr Santow: The report of the parliamentary joint committee? Yes. I don't have the report in front of me.

Senator KIM CARR: I appreciate that. But it does specify that the committee raised a number of human rights concerns in respect to the previous bill, and this current bill's exactly the same. It concluded that the proposed expansion of ministerial powers to cancel or refuse a visa is likely to be incompatible with Australia's non-refoulement obligations and the right to be an effective remedy, with the committee questioning whether there is sufficiency of existing safeguards against refoulement and the limitations to the availability of merits review.

Mr Santow: Yes, I accept that. The point I was trying to make was probably overly technical. The point I was trying to make is you could make decisions under this bill, if it were passed, that would be compatible with human rights, but our concern is that it would also enable decisions to be made that would not be compatible with human rights. That's the point I was trying to make.

Senator KIM CARR: But a parliamentary committee has found, contrary to what the department is stating to this committee, that there remains a problem.

Mr Santow: That's indeed correct. The role of the Parliamentary Joint Committee on Human Rights is to scrutinise very carefully the statements of compatibility that are provided by the executive branch of government when they introduce a new bill. We take very seriously the views of that parliamentary joint committee.

Senator KIM CARR: Direction No. 79, which commenced on 28 February this year, which replaced the previous direction, No. 65—namely, the directions to administrative officers—in fact sets down the new principles to be established in exercising discretion in the administration of these measures. Is that also your understanding?

Mr Santow: Yes. Direction 79 only applies when the decision is being made by a delegate, not by the minister.

Senator KIM CARR: That's right. Where the minister is involved directly, the only appeal mechanism is through the Federal Court.

Mr Santow: Yes.

Senator KIM CARR: And the application of natural justice principles don't apply?

Mr Santow: That's correct.

CHAIR: Thank you very much, Mr Santow and Ms Renton, for your submissions today. You are excused. Thank you very much for your help.

Mr Santow: Thank you, Chair.

Ms Renton: Thank you.

DICKINSON, Ms Hannah, Chair, Visa Cancellations Working Group

FISHER, Ms Sarah, Manager, Migration Sub-Program, Victoria Legal Aid

GRAYDON, Dr Carolyn, Principal Solicitor and Manager Human Rights Law Program, Asylum Seeker Resource Centre

VERMA, Ms Sanmati, Senior Lawyer, Accredited Specialist in Immigration Law, Visa Cancellations Working Group

Evidence was taken via teleconference—

[13:50]

CHAIR: I welcome representatives of the Asylum Seeker Resource Centre, Victoria Legal Aid and the Visa Cancellations Working Group, each giving evidence via teleconference. Thank you for taking the time to give evidence to us today. Information about parliamentary privilege has been provided to you and is available from the secretariat. In relation to the representatives of Victoria Legal Aid, who, as a government group, are in a slightly different category to the other submitters, I remind senators and witnesses that the Senate has resolved that an officer of a department of the Commonwealth or of a state or territory shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

The committee has received your submissions as Nos 3, 10 and 14 respectively. Do any of you wish to make any corrections to your submissions before we commence?

Ms Fisher: No, I don't believe so.

CHAIR: I invite each of you to make a brief opening statement before we go to questions.

Dr Graydon: I believe each of the three organisations would like to make a brief opening statement, starting with myself. The Asylum Seeker Resource Centre is an independent not-for-profit organisation working to support and empower people seeking asylum in Australia. The Human Rights Law Program is an accredited community legal centre working within the ASRC providing holistic legal support to people seeking asylum at all stages of the refugee determination process. We also assist protection visa holders facing cancellation of their visas or those who are unable to secure legal representation elsewhere.

First, I would like to highlight and emphasise the incredibly high stakes of visa cancellation for those whose visas are cancelled and for their family members and community. Sometimes the consequences for the human beings involved will be far worse than almost any jail sentence. For refugees whose visas are cancelled the consequences of this decision can result in their death or them being subjected to torture or other serious harm caused by being returned to their home country. Visa cancellation often involves permanently ripping families apart. Children, innocent of any crime, can, in effect, lose a parent. Wives and husbands, innocent of any crime, can, in effect, lose their spouse. People who have spent virtually their entire lives in Australia—50, 60 or more years—can find themselves extricated from everything they have ever known and be ejected to a country where they cannot even communicate and to which they have no meaningful connections at all.

These incredibly high stakes place a heavy duty on our parliament and on you as our lawmakers to ensure that such powers can only be exercised justly, proportionately and accountably, with each case carefully decided on its particular facts, taking into account all relevant factors before the ultimate price of visa cancellation, with all of its irreversible consequences, is paid by that person. And this bill achieves the opposite of these requirements. Contrary to common misunderstanding of this bill, this bill does not expand the group of people whose visas can be cancelled. Existing powers already cover all the scenarios put forward by the department. There is no gap in laws regarding the types of conduct that can trigger cancellation. What this bill does is to greatly increase those subject to mandatory failure of the character test. That's the big difference that this bill would make as a law.

Mandatory failure of the character test is like mandatory sentencing. It goes against the basic principle that we must treat people appropriately and equally according to the rule of law. Expanding the scope of those subject to mandatory failure of the character test, especially according to the very low and arbitrary threshold proposed by this bill, will create unjust, disproportionate and arbitrary results, especially for the most vulnerable visa holders: refugees, young people and people with disabilities. Rather than cancellation decisions being based on what sentence a person actually received for their crime, remembering that the criminal courts are the experts on the relevant factors to be carefully weighed up in sentencing decisions, this bill will result in the mandatory failure of

the character test for designated offences carrying a possible sentence of more than two years even if the person who is convicted receives no custodial sentence at all.

This bill is based on a misunderstanding of the scope of existing cancellation laws. It is not the case that only those who have received sentences of 12 months or more can have their visas cancelled. The minister already has the power to cancel the visas even of those who don't serve any custodial sentence—and he already does but on the basis of general or criminal conduct, if a person is considered not of good character, if they're associated with a person involved in criminal activity or where there is a risk they will engage in criminal conduct, represent a risk to the community or incite discord.

This law would increase the number of refugees subject to mandatory failure of the character test, and they would face the most dire consequences of all. Let it be clear that, according to established legal authority, the legal consequence for a person whose protection visa is cancelled is refoulement, meaning forced return of a person contrary to Australia's protection obligations to a country where it has been established that they will be at risk of serious harm and possibly death, torture and other forms of mistreatment and abuse. This legal consequence is written in black and white in sections 198 and 197C of the Migration Act, which mandatorily require the removal of a person as soon as practicable even where they are found to be owed a protection obligation.

To date, the minister has failed in his arguments in court that removal and refoulement are not the necessary legal consequence of protection visa cancellation, on the basis that assessment of protection obligations can be deferred to a later time or that there is an alternative legal consequence: unreviewable, indefinite administrative detention at the minister's pleasure, which in itself is a horrendous position for any minister of a Western liberal democracy to be making before a court.

This bill should be opposed. There is no need for this bill. Existing laws are more than adequate, and it will result in unjust, arbitrary, disproportionate decisions which will destroy lives, breach Australia's human rights obligations and be bad for the rule of law and good governance of us all. I urge the committee to play its role, its watchdog role, and to recommend against the passage of this bill. Thank you.

CHAIR: Thank you very much. Next opening statement, please.

Ms Dickinson: Firstly, our thanks to the committee for the opportunity to give evidence and to provide submissions to this inquiry. We also thank the other bodies providing submissions and our members for their contributions. We concur with the key points made by the Asylum Seeker Resource Centre and the content of the submissions by Victoria Legal Aid. The working group possesses significant expertise regarding character refusals and cancellations. Our members comprise of leading private practitioners, not-for-profit organisations, community legal centres and tertiary institutions. A number of our members are accredited specialists in immigration law, including me and Ms Verma.

In our strong submission, the bill as it is drafted is simply unworkable. It does not do what it hopes to do. It lacks cohesion and is likely to damage the integrity of outcomes for all those it touches—vulnerable persons, criminal and administrative bodies, and detention facilities. It will be costly and damaging for the Australian community.

In attempting to objectively define 'character' in the way that they have, those who drafted the bill have come across the fundamental issue: it's extremely difficult to do so. Assessment of character will usually require careful consideration of a person's circumstances. The bill attempts to shoehorn particular offending, including accessory, breach and threat offences, into a category that will result in the objective condemnation of a person's character. It's inelegant and dangerous. The working group support lawful, consistent, informed, apolitical and proportionate decision-making in this area, given the severity of the consequences that Dr Graydon averted to: detention, family separation and indeed refoulement, in breach of our international obligations.

To proceed in the inquiry, a correct understanding of the current law and the law as it is proposed is critical. We refer the committee to our summary of the current law at page 11 and to the bill at page 12. These are accurate and clear statements of each framework. Comparison of the two reveals that the bill does not streamline the current process, nor does it expand the scope for cancellation or refusal. It simply replaces discretionary consideration of character with objective failure of the character test in broadly drawn categories. These categories are arbitrary, obscure and inappropriate. We disagree with the standard proposed. It lacks consistency and it lacks objectivity. It will lead to different outcomes in different states, it is difficult to apply, and it is blunt and without finesse or proportion.

Under the bill, the expertise of the courts is ousted in favour of a chaotically wide net. Some examples are given at page 15 of our submission, but I would draw the committee's attention to a person trafficking a

commercial quantity of drugs, who would not objectively fail the character test; whereas a former partner who texted their partner 'season's greetings' would be caught. Similarly, a child who got into a classroom fight would be caught, but someone committing widescale fraud may not be caught. Accessories and those knowingly concerned in the offending are also caught. The bill also eschews other framings of 'seriousness'. 'Serious offences' is defined in the Corrections Act in Victoria, at section 104AA, to include serious violence offences and sexual offences. The bill does not draw on that; nor does it draw on community expectations. The standard is far more broad.

The effect will be significantly increased cancellations and an increased burden on the criminal and migration jurisdictions, and all of this will come at an enormous cost to the community. There's also an increased chance that individuals will lose access to their rights. The complexity of the appeals process can be seen in our sample flowchart at annexure A. Vulnerable persons—refugees, those with limited English, minors, those with mental health or capacity issues and those without financial resources—will all be disproportionally affected and face higher barriers. They may lose their right to respond. They may lose their right to appeal. This is particularly the case where they have committed a very minor offence.

We hope this example will provide some clarity for the committee. Person A is the holder of a permanent protection visa, having fled her country with their family at the age of four and being resettled in Australia. She has an intellectual impairment and has no criminal record. She is not aware she is not a citizen of Australia. After repeatedly contacting an ex-partner by phone, an intervention order was issued. Her partner sent her an SMS asking her to drop off an item, which she did without incident. As a result, she was charged with a breach of the order, and she pleaded guilty.

Under the current law, the department could determine whether or not she failed the character test in regard to her general conduct, her history and the offence itself. If it were deemed appropriate, a cancellation process could be initiated. Under the bill, this woman will automatically fail the character test. She will be sent a notice of intention to consider cancellation and will be required to respond within a set time frame. That would set in chain a number of events, throughout which there will be numerous points at which she will lose her rights. She may not respond; she may not apply for review to the tribunal; she may give a poor response that does not properly reflect her circumstances. She might end up in immigration detention for a protracted or indefinite period, or she may be forcibly returned to her country of origin. Very few people in the community would consider this an appropriate outcome, and this is just one of thousands of examples of similar cases that could be provided. Thank you very much.

Ms Verma: We submit that the committee should also be seriously concerned about the practical implications of the bill. This Friday past, the Full Court of the Federal Court of Australia handed down a decision that we say is relevant to the committee's inquiry, that being the Assistant Minister for Immigration and Border Protection v Splendido. We can provide the citation at a later stage, if that is necessary. In that case, Justice Mortimer, as many judges in the Full Court of the Federal Court have done in the past few years, expressed concern over 'a number of unsatisfactory matters concerning the conduct of the decision-making process' in respect of character, which included the extraordinarily long time that the decision had taken in that case.

Interestingly for the committee's purposes, in discussing findings made about risk to the community, Justice Mortimer explained that the judicial process rejects reliance on a 'bare recitation' of a person's criminal history to determine the risk of that person reoffending. This is precisely the framework that the current bill will advance, and which has been a subject of judicial criticism in that case. In relying solely on the criminal record to assess risk, the court held that the minister undertook 'speculation and guesswork'. The committee might rightly be concerned about the integrity of decision-making given the concerns expressed by the courts in this and numerous other cases. Appropriate safeguards need to be in place, and they are not. An opening of the floodgates for cancellations will have the opposite effect.

Further, because the bill has not been costed by the government, it is therefore unclear what further resources will be required by the Department of Home Affairs and the Administrative Appeals Tribunal to implement the bill's provisions. The conduct caught by the bill is, as we've pointed out in our submissions, extraordinarily, unworkably broad. How would departmental officers go about identifying the persons caught, given that they will necessarily be numerous. Because the matters caught are unfairly broad, necessarily we can expect increased traffic at the Administrative Appeals Tribunal and the Federal Court of Australia. The burden on both bodies, the committee will know, is already extraordinary. In particular, I draw the committee's attention to a recent report of former High Court Justice Ian Callinan which suggests that the tribunal is already in crisis. The body is already unable to attend to matters within its direct remit. There is a backlog of tens of thousands of decisions that are

made, and they are being added to every year—that is, a backlog of several years of unmade decisions in areas that concern people's fundamental rights.

Necessarily, these types of pressures impact the quality of decision-making. In turn, this creates increased traffic of appeals to the Federal Court of Australia. Of course, low-quality decision-making undermines the confidence of the community in an administrative process which impacts on the most fundamental rights to remain in the Australian community. We would say the confidence of the community in these provisions is already dangerously low.

Ms Dickinson: In summary, the working group considers that this bill will be enormously damaging not only for vulnerable individuals and their Australian families but for the integrity and, indeed, the operational capacity around administrative law and criminal law systems. It offends the rule of law and the systems already in place to arbitrate such matters and increases the likelihood of breach of our international obligations. The cost to the community would be unjustified. The law, as it stands, is sufficient, and it avoids the uncertainty and bluntness that are endemic to this bill. We urge the committee to recommend that the bill be rejected.

CHAIR: Are there any more opening statements?

Ms Fisher: Just the one. I am the program manager of migration at Victoria Legal Aid. As the committee members would know, Victoria Legal Aid is an independent statutory body set up to provide legal aid services in the most effective and efficient manner. The VLA's migration team runs a number of services, including a daily phone advice service, minor work and litigation files along with court and tribunal duties.

Our clients typically include asylum seekers, refugees, victims of family violence and those facing visa cancellations. Last year we provided almost 2,000 legal services to people with migration issues, and more than 250 of these related to visa cancellations. VLA's criminal law program operates the largest criminal law practice in Victoria. Last year approximately 52,000 clients received a summary crime service from VLA. Through our diverse practice, VLA is uniquely placed to see how the visa [inaudible] affects individuals and their families as well as the criminal justice, family violence and administrative law systems.

Most often, the migration team works with people who are asylum seekers who have held refugee or humanitarian visas granted offshore—people who've been in Australia for a long time and who have family in the community here. A high proportion of the clients to be assisted across the practice have themselves been victims of violence or abuse, including in Australia. These experiences and the trauma that follows can cause lives to come off track, often leading to [inaudible] and mental health issues, which can [inaudible].

Informed by this work, the key points we would like to make to the committee are as follows. First, [inaudible] criminal courts are the most appropriate forum for determining the seriousness of offending risk [inaudible] and penalties. By linking visa cancellations and refusals to the maximum sentence available, rather than to the sentence a person actually receives, the bill would be a movement away from the role of the sentencing court, traditionally regarded as the body's best place to make decisions about punishment, risk and community safety. [inaudible] based on a careful analysis of many factors by the sentencing judge, who face the same visa consequence as someone who receives a full two-year visa sentence, again based on a careful analysis of many factors.

Second, the bill would create uncertainty and injustice. There is significant difficulty with the bill's intention to incorporate a new category of designated offences. The term is broad and poorly defined. There is a real risk of error in its interpretation, which has the potential to [inaudible], delays and additional costs. It is not far-fetched to suggest different implications for people in different states and territories. Far from providing clarity, this is an example of how the bill would lead to uncertainty and injustice.

Third, there would be significant and unintended consequences carrying heavy costs for the immigration detention, criminal justice, family violence and administrative law systems. [inaudible] provisions under the Migration Act would have flow-on effects for the advice a person needs in relation to family violence and summary crime matters. It may, for example, affect a person's decision on whether to enter an early plea of guilty or to contest a charge.

We also anticipate there will be an increased burden on the immigration detention system, with a potentially stark rise in the numbers of people subject to visa cancellations. Changes will be a drain on public resources and impose further pressure on already stretched courts and tribunals. The visa cancellation system as it now operates will provide extensive powers to regulate the entry of persons who may be of character concern.

Based on our practice's experience across migration, criminal justice and family violence, it is our firm recommendation that the bill should not proceed and we [inaudible] the committee to understand the real impact the bill will have on individual [inaudible].

CHAIR: Thank you very much. I will now open up to questions.

Senator KIM CARR: I would like to concentrate on the effect of these measures if the parliament were to accept them. I mean no disrespect to other submitters, but the Visa Cancellations Working Group has submitted a very detailed submission; I will perhaps concentrate a bit on that. First of all, the Visa Cancellations Working Group is made up of what sorts of organisations?

Ms Dickinson: It is made up of numerous organisations from across Australia. We're not limited to Victoria. We have private law firms specialising in migration; we have large organisations, including Amnesty; we have members from the Asylum Seeker Resource Centre and from Justice Connect. It's a very broad remit in terms of our members, and the community will also see specific endorsers of our submissions at page 5.

Senator KIM CARR: So it's made up of lawyers, refugee advocates, human rights organisations, community organisations. And you're saying it's endorsed by groups of that type—legal firms, I see here; essentially, legal organisations? Is that right?

Ms Dickinson: Yes, generally, and academics in the legal field.

Senator KIM CARR: It's a fairly broad range, from the Jesuits to the Tasmanian refugees, with a broad geographical spread as well as a broad legal spread. Would that be a fair description?

Ms Dickinson: Yes.

Senator KIM CARR: Can I go to the effect of the bill, as you see it? Can you indicate—and I'll ask other submitters on this matter—what is your view of the likely impact on the administrative workload of the AAT, the courts and immigration detention facilities and the Commonwealth Department of Home Affairs?

Ms Dickinson: The impact, in our view, would be enormous and very hard to measure. Another submission to this inquiry predicted that there would be a five-fold increase in failures to pass the character test. At the moment, already, enormous delays exist at the primary stage, where delegates of the minister are considering cancellations or refusals. The burden can be seen through further delays in that area. Often people are waiting over a year in detention in order to get an outcome. With more cancellations come more people in detention, longer delays and greater administrative burden in terms of the requirement for delegates or the minister to make a decision. The burden on the tribunal will be a flow-on. About 75 per cent, I believe, of people who have a cancellation will lodge an appeal, and the courts are already experiencing serious delays in adjudicating these matters. It is very difficult to quantify, but we think the system would struggle to cope.

Senator KIM CARR: Can I ask other submitters: would they have a comment on the matter and would anybody have any estimate of the numbers of people they believe would be affected by this bill?

Dr Graydon: I'm not in a position where I'm able to say how many people will be affected but, just to add, the burden to those who are attempting to provide legal representation to people will also be enormous. These cases are complex, require a lot of expertise and often involve people who are impecunious and very vulnerable. So additional time and expertise are required to provide them with what's often pro bono or free legal assistance. And there are simply not enough resources to go around, so many of the people that we're talking about will end up being unrepresented through these processes. And, as highlighted by Hannah, they will lose their rights along the way because they're unable to comply with the time frames and the various requirements of that process. I'd add that it's not only the courts and the department and the tribunal; it is also the fact that we're trying to provide access to justice for many of those who are going through visa refusal or cancellation processes.

Senator KIM CARR: Would anyone else like to add anything?

Ms Fisher: I'd probably agree with my fellow panel members. It's extraordinarily difficult to put a figure on the potential numbers of people captured by this bill, and, as Hannah has pointed out, I think other submitters have indicated it could be a five-fold increase on current numbers. The committee may have access to the numbers of people who are held in detention by virtue of visa cancellations. As of June 2019, 353 people are in detention across Australia because of section 501 cancellations and a further 605 for other categories of cancellations. Those are significant figures. I think there is, overall, a detention population of around 1,352 people. I also note that the average period of detention is 485 days and increasing. So people are spending longer times in detention, and one could foresee people going through the cancellation process under this proposal and going into detention and spending extremely long periods in those facilities.

Senator KIM CARR: Well, the department said that there are 5,074 visa decisions that've been affected in these areas since 2014, through to March last year. So these figures are a year old. How adequately do you think that figure represents the number of people affected?

Ms Dickinson: That sounds about reflective of our experience. One reason we're finding it hard to quantify the effects of this bill could be the uncertainty of the offences framed. If it were possible to frame what offences were caught and then to obtain information from the criminal jurisdictions across Australia then we would be in a position to estimate the increase. But the 5,000-odd number is generally reflective of our experience.

Senator KIM CARR: But you think that a five-fold increase is a reasonable estimate?

Ms Dickinson: Based on the academic research, it would seem reasonable.

Ms Fisher: But even if that were an overestimation, even a doubling of those figures would be of concern.

Senator KIM CARR: Sorry—we're pushed for time a bit here. In the working group's submission, at paragraph 89, it says:

… many offences too numerous to list will still need to be considered against the discretionary character test failure powers. … those convicted of the following offences may still need assessment against the character test:

a. Trafficking in a drug of dependence to a child …

b. Selling a cannabis water pipe …

c. Robbery and theft …

d. Blackmail … and

e. Obtaining property by deception …

These are all Victorian breaches. So would you have any sense at all of how many breaches there would be across the country?

Ms Dickinson: There are thousands of offences across the country. The point that the working group is trying to make there is that no benefit is gained from the framing or definition in the bill as it is to capture certain offences. Firstly, a delegate will need to assess whether the offence falls within the category of the bill—whether it's a designated offence. If it's not, they'll then have to consider it against every other offence in the jurisdiction. Our point is that it's unworkable and unhelpful.

Ms Verma: If I may add, on behalf of the Visa Cancellations Working Group, one thing that adds to the uncertainty of the provisions in the way that they're framed is that they're intended to capture overseas offending. It would be utterly impossible to codify, for all of the sending countries from which Australia receives migrants and refugees, those offences that may attract a sentence of two years or more imprisonment. Already, as the other submitters have said, as to the decisions over that period of time—which we know is the timing from which the government began to drastically amend the character provisions—5,074 decisions over that short period of time is already significant, and the legal sector and the tribunals are struggling to deal with that load. Even doubling that number would bring the existing system into crisis.

Another note from our submission is that the Administrative Appeals Tribunal is now an amalgamated body. Increasing traffic in one of its divisions has implications throughout its remaining divisions. Rightly, given the consequences, a visa cancellation or refusal that leads to somebody being detained, as these provisions of course would, has to be decided within 84 days by the tribunal. It is expert tribunal members who hear those matters. They're pulled away from their other work. They sit across divisions. It basically means that, to attend to even double the workload, with the number of appeals, the most senior members of the tribunal will be pulled away and dedicated to this work. What would then happen to the already three-, four- or five-year delays in migration and other refugee related matters? This is a system-wide crisis waiting to happen, in our submission.

CHAIR: It's been proposed to this committee that, rather than increasing the level of public safety, passing this type of legislation may lead to a decrease in the level of public safety. Can you respond to that proposition?

Ms Fisher: Perhaps you could elaborate a little on—

Senator KIM CARR: It's that the application of these types of measures would lead to a breakdown in social cohesion and would lead to increasing numbers of people not pleading guilty at various court proceedings, because of the double penalties involved, and that there would be knock-on effects for women, particularly as elements of this measure go to the issue of knowingly assisting people who are in breach of the law. There are various other measures that flow on from this. As it said, in responding to so-called community concerns about the levels of public safety, it could actually lead to an increase in the levels of insecurity in the community.

Ms Fisher: I could perhaps start with a response. As the committee would be aware, we have a very large practice which includes family violence practitioners. We did speak to our colleagues who assist us in that area of law before drafting our submission. Our colleagues advised that there is a real risk that victims of family violence are going to be less likely to report on family violence if their partner or the family member, the perpetrator, is a noncitizen as this will have a direct impact on their visa status and their children's right to remain in Australia.

The other issue that was pointed out to us is informed by the work of the Women's Legal Service here in Victoria. There is a similar and quite pervasive problem in the misidentification of primary perpetrators of family violence. According to the research, it's common for refugee women in particular to be misidentified as the primary perpetrator. This is for many reasons. It might be police officers not understanding what's occurring in a domestic dispute. It might be the lack of an interpreter when they're being interviewed by police. It goes to any dynamics in that household. But women who have been misidentified are at risk of having a family violence intervention order imposed on them and, if there's a breach, they are going to fall foul of these proposals. Lastly, there's the impact with the relational offending. These are, very frequently, very vulnerable women in very vulnerable situations, and they may be attached to people who are committing criminal offences and have no way of getting out of those situations. With those relational impacts, they could be caught by this provision as well.

Senator KIM CARR: Supporters of this bill have suggested—in fact, it's outlined in the explanatory memorandum—that community expectations are requiring these measures to be undertaken. I would ask of you: what is your view of this suggestion? The Federation of Ethnic Community Councils made the point that questions of community expectations do vary considerably. Can you outline what your view is of community expectations with regard to these types of issues of people who are migrants or noncitizens in breach of the law?

Ms Dickinson: In the working group's view, the community expects that decision-making be rational and proportionate. The examples we've given on page 15 are given to highlight outcomes of this bill that the community would be repulsed by. Verbal threats, the grasping of a sleeve, the contravention of an intervention order in a minor way, a child offending or a schoolyard fight—these are not things the community expects are going to cause a person to be condemned such that they might forfeit their tenure in Australia. Community expectations may well be that the person might forfeit their right to enter or remain in some cases, but the bill does not further those outcomes, in the working group's view.

Dr Graydon: Under this bill, cancellation or failure of the character test that has been triggered by the designated offence, as opposed to the actual sentence received, creates a whole arbitrariness. If in fact the community's view is that the sentencing is inappropriate, that is a reflection of the entire criminal justice system as opposed to visa cancellation, which shouldn't be a situation of double jeopardy for people who've already done their time.

Ms Fisher: I would add to that. [inaudible] often in the development of sentencing principles across the criminal law jurisdictions. I wouldn't say sentencing principles are fluid, but they're certainly informed by a range of matters, one of which is current community views about certain types of offending. Again we would say that in that sense the criminal court is the best place and the best-informed place to be determining the seriousness of offending as opposed to an arm of the executive.

Ms Verma: I might add a brief comment to that. Both the explanatory memorandum and the submission made by the Department of Home Affairs submit that the bill's provisions are informed by the December 2017 report by the Joint Standing Committee on Migration entitled, *No one teaches you to become an Australian*. There were other submissions to that inquiry; it heard from broad sectors of the community. Importantly, we wish for the committee to appreciate that none of these provisions are in fact recommended in that report. The report touches upon the expansion of the character powers in no way. At most, the report suggests that the parliament may contemplate the application of the existing character powers to persons between the ages of 16 and 18. Those recommendations came in the face of some significant community opposition, including the Federation of Ethnic Community Councils and youth law bodies. That is as far as those recommendations went. It is misleading to this committee for the Department of Home Affairs to say that that report from 2017 is the bedrock of the current provisions; it is simply not.

Importantly, insofar as the joint standing committee suggested the expansion of the character provisions to include persons between the ages of 16 and 18, it is emphatic that any changes to character provisions should not be retrospective. That is a fundamental rule-of-law principle. The proposed provisions in this act are specifically retrospective. They are incoherent or indefensible in two ways: (1) because the definition is overbroad and (2) because it's retroactive. Requiring cancellation and refusal is the most serious consequence that can be brought to bear against any visa holder or visa applicant under the migration regime. It's been said in numerous cases by the court. It's always been observed by the parliament. Removal of a person to immediate detention, refusal or cancellation [inaudible] To introduce indeterminacy to the character test is to undermine community confidence in its operation, full stop. That's what we would say.

Senator KIM CARR: Thank you very much.

Senator CHANDLER: I've got a couple of questions regarding the Asylum Seeker Resource Centre's submission and opening statement. Dr Graydon, you used the expression 'mandatory failure of the character test'.

I understand what you are getting at there, but we still have an element of discretion to be used by the minister or their delegate in determining whether or not a visa will actually be revoked on the basis of failing the character test. Is that correct?

Dr Graydon: Yes, that's correct.

Senator CHANDLER: It's not that we're saying that, just because one fails the character test as it might be redefined under this bill, they are automatically going to get their visa revoked?

Dr Graydon: That's the thing. The opportunities for the visa not to be cancelled or revoked are extremely limited. This makes it mandatory in relation to those specific designated offences as far as they can be defined.

Senator CHANDLER: Yes, it does, but—

Dr Graydon: But it is making an element of the test mandatory once that requirement is met, whereas at present there is more discretion for the weighing-up process. It tilts the balance very significantly.

Senator CHANDLER: Yes, but there is still the ability to exercise discretion and give consideration to what conduct might have been committed and how that balances in terms of protecting the rest of the Australian community. Is that correct?

Dr Graydon: The thrust of the whole bill is to remove or reduce that weighing process and its role in making it mandatory in relation to failure of the character test itself. So, yes, you can still take into consideration other things outside of formally failing the character test, but it does move most of the discretion from that process.

Ms Dickinson: I would quickly note, from the working group's perspective, that what we've seen of the law is that it would reserve some discretion for the decision-maker; but, in a lot of cases, the person who faced cancellation might not have the resources to respond or might not provide a response. They might never get a cancellation notice. There would then be very scant information before the decision-maker. They would only have the criminal record. This is a far from ideal situation and would damage the integrity of the decision itself.

Senator CHANDLER: Sorry; you say that they would only have the criminal record in front of them. What information would the minister or their delegate have in front of them now when they are making that decision?

Ms Dickinson: A lot of these people wouldn't necessarily have failed the character test in the first place.

Senator CHANDLER: But it will be the first situation that they are looking at in assessing whether or not a visa is going to be revoked?

Ms Dickinson: On page 10 we've got a framing of how the current law works and how the proposed law will work. In any case, the delegate will be looking at the representations made by the affected person and the material known to the department in making a decision about what to do. If many more people face visa cancellation for minor offences, many of those people will not be able to provide a quality response or they will not be able to provide a response. This means vulnerable persons are going to have disproportionate outcomes and [inaudible]. So there is discretion, but there are numerous barriers—especially for minor offending by vulnerable people—where people might lose their rights altogether. If they hadn't failed a character test in the first place, they wouldn't have to go through this very burdensome, difficult and stressful approach.

Ms Fisher: And that's burdensome on migration—is it not?—as well.

Senator CHANDLER: Thank you, Ms Fisher. I have one other question around discretion and the ability of a minister or their delegate to make decisions as it pertains to the Asylum Seeker Resource Centre's submission. You say at paragraph 9 of the submission:

There is no utility in passing the Bill as it does not empower decision makers to do anything they cannot already do.

Is that consistent with what we've just discussed? In effect, all you are doing is slightly altering where the decision point may be where the minister weighs up the conduct versus the community expectation.

Dr Graydon: It doesn't alter the scope of behaviours or conduct that could trigger cancellation. It makes the assessment and the weighing process more rigid by having, as I've described it, the mandatory failure of the character test according to designated offences. That is the key difference.

Senator CHANDLER: While we are talking about the discretionary power that the minister or the delegate might be exercising, I have one more question for the Asylum Seeker Resource Centre. In paragraph 7 of your submission you talk about the non-refoulement obligations—and, Dr Graydon, you were quite passionate in discussing those in your initial submission. You've said:

Although Australia has ratified the treaties listed above and the Minister states that no one found to be owed protection will be removed in breach of non-refoulement obligations, this is contradictory to the position in law.

In saying that, the considerations that a minister or their delegate can make in exercising the discretionary power include Australia's international obligations. As we've seen in the statement on human rights included with the explanatory memorandum to the bill, consideration has been given to non-refoulement principles there. So is it really correct to say that it is contradictory to the position in law?

Dr Graydon: In relation to the law, there are two provisions from the Migration Act that I highlighted in my opening statement. Section 198 is about the mandatory power to remove someone as soon as practicable. That should be read alongside section 197C, which states that the fact that someone might be owed a protection obligation is no obstacle to removal. The reading of those two provisions together makes it very clear that, in law, the legal consequence of the translation or refusal of a protection visa is refoulement. There has been a lot of discussion in courts and a lot of decisions looking at the various arguments where the minister has argued that non-appealable personal discretions could potentially intervene. Of course, the minister also has powers to overrule decisions of the Administrative Appeals Tribunal in relation to character decisions. So there is no shortage of ministerial discretions at play in this area. But the discretions do not, of themselves, alter the fact that, under our law, the legal consequence of cancelling a protection visa is refoulement, and the position that the minister hasn't refouled somebody as yet because people are being held in indefinite immigration detention doesn't actually change the position at law. That may be the practice to date, but that's not the position at law, and there's no guarantee it will remain that way in the future.

Ms Verma: This matter is also addressed in great detail in our submission at pages 19 to 22. I'll give you a very blunt example of what the current state of the law is. Let me take a step back. There are two things. First, in the experience of the Visa Cancellations Working Group and all of the legal practitioners who deal in this space, it is the practice of the Department of Home Affairs and the minister to defer consideration of nonrefoulement to the latest possible point in the decision-making process, such that we see decision after decision after decision where a non-protection visa has been considered for refusal or cancellation, arguments that touch upon Australia's refoulement considerations and non-refoulement considerations are avoided, and or deferred until some future process.

A very blunt example of the current state of the law and the current reading of this controversial provision that you might not have seen would be DMH16. The citation appears in our submission. In that case, we had a Syrian asylum seeker who had been found to engage Australia's protection obligations as a refugee. He had been considered under all of the exclusion provisions that exist under refugee convention and he'd still been found to be a refugee. Then, on completely separate bases, because of certain criminal offending, the minister had refused to grant him the protection visa, saying that he was of character concern. In making that decision, the minister said that still, despite the fact that his protection visa had been refused, that was not in breach of Australia's protection obligation, because it would be managed through some other process, which is essentially what the department now says and what the explanatory memorandum now says. Essentially, to put it colloquially, it is: 'Leave it with me. We'll find a nonrefoulement-compliant way to deal with you.'

The court—in that case, the Federal Court—held that the minister was in error in considering that the law allowed any possibility for nonrefoulement to be considered before that person was removed. The court held, rather, that the consequence of the minister's decision was that that person was available immediately—today, tomorrow, any day—for removal to Syria. That is the current state of the law. Whether, by various obfuscatory administrative arrangements, the department happens not to refoul people or happens to keep them languishing in detention, that doesn't change the possibility that, actually, under the Migration Act, under section 198, read with section 197C there is an obligation on removal officers to get rid of that person. So the provision absolutely put people—refugees found to be owed protection—at extreme risk of removal.

Senator CHANDLER: I have one more question for Victoria Legal Aid. You make the point in your submission that different states have different maximum sentences and that therefore the bill might create inequality depending on what state you're in, having committed certain crimes and having different sentences in different states. But isn't it equally true that different states have different sentencing practices, so even under the existing laws you might be more likely to get a sentence in excess of 12 months in one state versus in another? Isn't what we are creating here actually trying to establish some consistency?

Ms Fisher: I'm just thinking of an example here. If you're charged with common assault in Victoria, that is going to be dealt with in the summary crimes system and therefore by the Magistrates Court and therefore not fall foul of the proposal. In New South Wales, it's going to be dealt with in the indictable crime system and is likely to fall foul of the proposed changes to the Migration Act. Regarding consistency across sentencing, I can't really speak to sentencing principles in different jurisdictions. I did do some research into that and I did see commonality in the sentencing principles across the sections that I did consider in Queensland, New South Wales

and Western Australia. They were common across the board. We look at the gravity of the offending, the impact on victims, whether there are mitigating circumstances such as trauma, the maximum available sentence—all of these principles or factors which a court must consider seem to be evident across the pieces of legislation that I did look at. And I'm happy to provide the committee with specific parts of the legislation across the different jurisdictions in Australia, if that's of assistance.

As far as inserting some sort of consistency in decision-making, what we would say about that is that the criminal sentencing court is the appropriate body to objectively assess the seriousness of the offending. It's by virtue of those very sentencing principles that it is in the best position to make that assessment.

Senator CHANDLER: I accept that point. If that is the case, yes, courts are best placed to make that determination. But we're talking about something different when we're talking about the good character test. Am I right in saying that? It's not necessarily a determination in isolation of how severe the crime that you committed is; it's balancing up what the crime was versus community expectations versus safety to the community versus the other criteria that are set out in the ministerial directive. Do you not accept that it's appropriate for the minister or their delegate to be able to exercise that discretion here?

Ms Fisher: It's completely unnecessary. That work is done in the criminal justice system. It looks at all those matters. You're suggesting that the minister should be looking at those matters. The minister already places considerable reliance on a sentence imposed by a criminal court and comments around sentencing. The minister already utilises that as part of his deliberations. It is an unnecessary additional element when the courts are best placed to make that holistic assessment on the seriousness of the offending. They see it day in, day out.

Senator CHANDLER: On the seriousness of the offending, yes, but the court isn't making a determination as to whether or not someone's visa should be revoked.

Ms Dickinson: That's correct. Perhaps I could clarify. From the working group's perspective, we are looking at the first stage of the character test. That's completely separate from the 12-month bar, the mandatory failure, the mandatory cancellation principle. There are a number of ways you can fail the character test. Discretion's separate from that. This bill says that you will necessarily fail the character test if you commit these offences. We say that's inconsistent. And there's no discretion for the minister in there. There is uncertainty in how it applies, but there's no discretion. The discretion comes at the second stage, which already exists. So, even if there is inconsistent sentencing across Australia, that will only affect those people who get a sentence of over 12 months, which is just one of the many ways you can fail the character test. There are problems with that inconsistency, absolutely. But our problem is with this bill and the inconsistencies that appear in it. It doesn't solve any of those problems; it exacerbates them.

Senator CHANDLER: Thank you. That's all from me.

CHAIR: That unfortunately exhausts the time we have available for your submissions. Thank you so much for the contributions that you've made today. I will, with an expression of gratitude for all the work that you've put in, thank you very much and disconnect this teleconference. Have a great afternoon.

Proceedings suspended from 14:54 to 15:07

WEBER, Mr Scott, Chief Executive Officer, Police Federation of Australia

CHAIR: Welcome. Thank you for taking the time to give evidence today. Information about parliamentary privilege has been provided to you and is available from the secretariat. The committee has received your submission as No. 12. Do you wish to make any corrections to your submission?

Mr Weber: No, Chair.

CHAIR: It's not a trick; don't worry! Would you like to make a brief opening statement before we proceed to questions?

Mr Weber: Yes, Chair. I thank the committee. I represent 63,000 police officers across the country of Australia. We're here today to highlight that we support the bill and that the Police Federation of Australia has had this issue ongoing since 2009. It was a very pertinent issue for us. There was the case of Taufahema. It involved the murder Senior Constable Glen McEnally in March 2002 in Sydney. Ever since that date, we've given numerous submissions. We've also appeared in front of numerous committees and sent letters to this house in 2014, 2017 and 2018 highlighting the same issues. If someone commits a serious offence or an offence that involves violence or an offence of a sexual nature, their visas should be reviewed instantaneously.

CHAIR: Thank you.

Senator CHANDLER: Excuse me, Mr Weber, I wasn't on the 2018 committee, so I'll probably ask you questions that you've considered at some point before. Nonetheless, it's still important to get those on the record this time around. Many of the people we've spoken to today have expressed the view that this bill takes away from the role of the courts in deciding sentences. Do you have a different perspective on that?

Mr Weber: Definitely not. Obviously, there's already a very high onus in regard to proving conviction or going down the path of offence. When police officers actually have to take someone before the court or arrest them, there's an extremely high onus there. But then when we actually proceed to a court matter, especially when we're talking about serious violent offences or offences of a sexual nature, they're reviewed by numerous people, including the department of public prosecutions or whatever. That occurs in the different states. Again, when it does go to a court, the threshold is 'beyond reasonable doubt', which is extremely high. When we are talking about those sorts of offences, I think those thresholds, and that evidence, has been gleaned during that period of time. Therefore, if it does go through to the Administrative Appeals Tribunal or has to come to the minister, there's a lot of evidence and information there. Again, and I do note some of the other submissions, I think we're missing the point. We're talking about protecting the victims and society—that is, Australia—and also the people who abide by the law. We're talking about people who commit offences when they are here as guests in Australia, when they should be abiding by the law. When they actually commit those heinous offences, when they commit such violent or sexual offences, all police officers across the country think it should be automatic and instantaneous that their right to stay in Australia be reviewed.

Senator CHANDLER: I like your use of the words 'be reviewed', not 'be revoked', because, as we've discussed a lot today, automatically failing the character test does not automatically mean that your visa will be revoked. Thank you for your clear use of language on that one. You've just talked about the severity of these crimes and the high evidentiary burden that has to be realised before someone can be found guilty of them. We've had a few hypotheticals thrown at us today—that merely touching another person might render you guilty of assault or that holding a rock might render you guilty of possessing a weapon with intent to assault. Is that a realistic way to be looking at the span of crimes that might be considered in invoking this review of the character test?

Mr Weber: No, not at all. They would be rare occurrences at best. But, again, the police officer out on the street has the original jurisdiction and they can make that assessment. It would be a very unlikely case where I would charge someone solely for touching someone on the arm. But we take into account the circumstances. It depends on how old the victim is, the relationship with the offender, what has occurred previously, the person's antecedence—criminal history. All those sorts of issues would come into effect depending on the individual. It's very unlikely, but if it did occur the review process would occur. One would say that the Administrative Appeals Tribunal or the minister would say that it doesn't pass the reasonable person test—and again, touching upon character, it doesn't actually meet that threshold. I think that's a very long bow to draw. In saying that, it could occur, but I don't think the person would ever have their visa removed—

Senator CHANDLER: For holding a rock.

Mr Weber: That's right. We don't get to make those judgements, but as a police officer it would be very unlikely for me to charge someone with those offences. We would look at alternatives.

Senator CHANDLER: There has been a lot of discussion today about community expectations and whether the community expects people to be able to retain a visa when they've committed these types of serious crimes. Do you have a view on that?

Mr Weber: The community would say no, they're not meant to retain those visas.

Senator CHANDLER: Or at least consideration should be given as to whether they should retain those visas?

Mr Weber: Police officers are obviously leaders in the community, especially in regional areas and in smaller locations. They listen to the community. We talk to the community every single day; that's our bread and butter. Police officers' workplace is all of Australia, every single location, and we speak to every type of person across this country, whether they have strong views on this or differing views. But one thing is quite clear across the 63,000 members and from our jurisdictions: we are hearing that if people break the law, if they commit a violent offence or an offence of a sexual nature against law-abiding citizens who are just going about their day-to-day duties, they've lost that right to say, 'I should stay in this wonderful country and still be permitted to walk down the street.' That's what police officers do; we take away that right. We arrest them, take them to our local police stations and charge them. We may refuse bail and they have to go to a court as soon as possible, and then that goes through the entire process. What we're hearing from the general public, and especially from my members and what they're telling us, is that that privilege should be reviewed. A lot of people, when we speak to the general public, say it should be revoked.

Senator CHANDLER: I'm drawing on hypotheticals from what we've heard today: if a non-Australian citizen committed a crime in Australia and was subjected to two years imprisonment, as an Australian citizen would be, do you still think it is reasonable that their visa should be reviewed as part of that? You don't think that they have suffered enough for their crimes?

Mr Weber: Not at all. It should definitely be reviewed. Again, suffering for crimes—we're not here to be punitive. When we do arrest someone, it's actually to make sure that society judges them. That's why they go to the court and go through this process. Again, I think this is just another facet of it. There are so many people in Australia that need assistance from the government, from the community and from all of the welfare services. If someone is here as our guest and still doesn't abide by our rules, they do lose some rights, and that's what occurs when they are arrested, when they are put before a court. I think that's just the next step in regard to this process. It definitely has to occur. It does have to be reviewed.

A prime example, and I did touch upon it, is the incident that occurred in 2002 with Senior Constable Glenn McEnally. The people that were involved in the offence of the manslaughter of Glenn McEnally had numerous criminal records. Again, it's very easy to look back in hindsight and make that assessment, but what I want to make sure of is that that never occurs in the future—not to a police officer and not to any member of the community. If this house, this committee and myself, through the PFA, can stop that from occurring in the future then we have done our job.

Senator CHANDLER: Do you believe that this bill will help to protect the community from harm by removing dangerous offenders from Australia?

Mr Weber: Definitely. That's why we're here today and that's why we've made so many submissions and been before committees like this. This is about protecting the community of Australia. We're very adamant that this bill, and we're very supportive of it, will do that. We don't want to release back into the community people who can commit further offences. We see these sorts of issues time and time again with bail and protection orders. If we can review these offenders as soon as possible after it occurs, I think the Australian community is all for the better and safer.

Senator CHANDLER: Obviously you are not here speaking on behalf of the entire Australian community. I suppose it our role as elected representatives to be considering that. From anecdotal conversations, do you think that the police officers you represent have had, in broad terms, support for that position from their communities?

Mr Weber: Definitely. Reflecting on the times, everyone is doing it hard. There are numerous circumstances across the community. Whether it's an ageing population, crime, perception of crime, finances, getting a job, welfare services or disability services there is a limited amount of resources that Australia has and there is a limited bucket. The general community go: 'Well, hang on a minute. You've come here as our guest. We have supported you through this. You're part of our community, yet you don't abide by our rules.' That needs to be reviewed. If you're not going to abide by it, the general public virtually will show you the door and tell you to leave Australia—because being here is such a great opportunity.

Senator CHANDLER: In your experience, if someone is convicted of one of the charges we are talking about adding into the character test today—an act of serious violence or a sexual offence—how much more likely are

they to commit an offence in the future compared to someone who has no criminal record? I guess what I'm trying to get at here is: what is the community safety element of potentially removing these people from this country?

Mr Weber: Again, I have no statistical data on that. Smart people—professors—analyse that and debate those issues. But one thing I'm quite clear on from when I've worked in local communities and at local police stations is that usually about 80 per cent of our crimes are committed by 10 per cent of our offenders. That 10 per cent are people who constantly come in and out of the door. One of the biggest issues is breaking that cycle. Whether they be welfare, rehab, custodial sentences or community orders, all those sorts of measures are never implemented until it is too late. We want to get ahead of the game, and I think this bill does that, where you can review that visa straight off the bat. It is not talking about revoking; it's another process that is part of the judicial system that keeps the community safe. In one of the previous submissions—I think it was back in 2017—we highlighted that a large proportion of the people that are deported go back to New Zealand and are put under strict control orders. Sometimes they last for five years. They have their DNA taken. They are under some very strict guidelines, yet 51 per cent of them commit offences in the next two years again.

CHAIR: I didn't know that.

Mr Weber: I am pretty sure—don't hold me to account—it is in our 2017 submission.

CHAIR: Sorry, Senator Chandler, I was a bit noisy during your questioning.

Senator CHANDLER: All good; that was my last one.

Senator KIM CARR: Mr Weber, the number of visa cancellations increased 1,400 per cent according to the department's figures. What change has occurred in terms of crimes committed?

Mr Weber: In respect of that change? Crime rates across the states have reduced in most categories. In Victoria and in other states there are some anomalies.

Senator KIM CARR: You think it has had an effect already?

Mr Weber: Across the board I think police have had an effect with crime, and this would be a very small—

Senator KIM CARR: Why is the bill necessary, then?

Mr Weber: The bill is necessary to continue the good work. We're still seeing issues for a long period of time.

Senator KIM CARR: Where are the current laws deficient?

Mr Weber: I think they are still deficient in regard to the character testing and the judiciary. We do have—

Senator KIM CARR: The judiciary?

Mr Weber: anecdotal evidence about some of the punishments.

Senator KIM CARR: Can you explain to me where the judiciary is deficient?

Mr Weber: In regard to sentencing we are sometimes seeing that it doesn't actually meet the threshold.

Senator KIM CARR: Your issue really is the question of sentencing, isn't it?

Mr Weber: No, not in regard to sentencing; making sure all the circumstances are reviewed time and again. Sometimes with this legislation sentencing is a big issue. Many a time we have we raised sentencing as an issue. I think I touched upon it before—making sure that there are appropriate bail conditions and that some measures are put in place. We see this review as another mechanism to make sure that those offenders are reviewed.

Senator KIM CARR: It is the case, isn't it, that the police will approach a court, seeking a custodial sentence, and the court won't agree with them? That happens quite regularly, doesn't it?

Mr Weber: Yes, very regularly.

Senator KIM CARR: Why?

Mr Weber: Because the judiciary takes into account different thresholds. 'Beyond reasonable doubt' is a very high threshold, but time and again it is quite frustrating for police because, if there isn't a custodial sentence or bail, we see that offender the next day.

Senator KIM CARR: Your concern is really that the judiciary doesn't agree with the police.

Mr Weber: We're concerned with protecting the community and sometimes the judiciary doesn't reflect that.

Senator KIM CARR: What makes you feel that public servants would be in a better position than the courts to make decisions about these matters? What facts, what quality of information, would a public servant have that a sentencing judge would not have?

Mr Weber: They would have information from the sentencing judge, information from police, information from the community and also a review of it all. If anything I just think it is another check and balance.

Senator KIM CARR: Do you think the public servants would provide a superior decision?

Mr Weber: They are another check and balance. They have all that information, look at a holistic approach—

Senator KIM CARR: What do you say to the proposition that implementing these laws would actually lead to a decrease in the level of public safety?

Mr Weber: I don't think so at all.

Senator KIM CARR: You have read the submission to that effect? You haven't seen it?

Mr Weber: No, Senator.

Senator KIM CARR: Perhaps I could ask you to take that on notice. The proposition advanced to the committee by the University of Adelaide Public Law and Policy Research Unit is that the propositions advanced by the advocates for this bill—presumably including yourselves—would actually lead to a decrease in the level of public safety, as people would be less likely to plead guilty to various offences, there would be less community cohesion, there would be a higher level of double jeopardy and there would be less discretion in the way in which these laws would be administered as a consequence of these measures. Could you have a look at that submission and perhaps provide us with further advice on whether that affects your view of these measures?

Mr Weber: Thank you, but, just at a glance, I again beg to differ.

Senator KIM CARR: I am sure you will. I have no doubt that, given your long-held view, you will remain convinced. Why is it, though, so often the case that courts in this country don't impose a custodial sentence, yet this bill will act as if they have?

Mr Weber: I think there is a fine line between retribution and rehabilitation, but, in saying that—

Senator KIM CARR: I'm trying get to that from you.

Mr Weber: I think in regard to this the judiciary has really dropped the ball. We have seen it time and again. As police officers, and as a police officer myself, it is very frustrating. We want to protect the community from people who keep reoffending. We see the same people coming in time and again.

Senator KIM CARR: Fair enough, but I just want to get to this point. It is a philosophical difference here: whether or not the courts have dropped the ball and whether or not the discretion that judges exercise in the sentencing practices are appropriate. That is the nub of your submission—that they have dropped the ball.

Mr Weber: In this regard there are a lot of sentencing guidelines. Time and again they don't meet community expectations. From the policing point of view that offender is out there the next day committing another offence. My job is to make sure that they don't commit another offence and that the community is protected and safe.

Senator KIM CARR: You have used the term 'community expectations'. How representative are these community expectations that you are referring to? Surely they are also represented by the judiciary?

Mr Weber: Yes, I believe that as well, but police officers are at the coalface, on the ground, dealing with those victims. We are the ones who hold their hands, listen to their statements, take photos of their kids and houses, go through the crime scene, put up all that evidence, forensic or otherwise, and then go through a process that is beyond the balance of probabilities, beyond fifty-fifty, beyond reasonable doubt, and put that to the courts.

Senator KIM CARR: This is a fundamental principle of our judicial system.

Mr Weber: Of course it is.

Senator KIM CARR: Police quite often have a different view from the judiciary, from the prosecution, as from the defence. That is a fundamental principle of our judicial system.

Mr Weber: That is our Westminster system.

Senator KIM CARR: You'd agree with that, wouldn't you? You are not seeking to change that, are you?

Mr Weber: Not at all.

Senator KIM CARR: It's just that in this case you want to provide a level of double jeopardy.

Mr Weber: Not at all. What we want to provide is a level of safety. We want to provide another step that protects the community, and this is what I think it offers. Again I think we need to realise what we are talking about. People here are committing violent, serious offences against our community, and they should have that next review process to make sure that they abide by our society's standards.

Senator KIM CARR: These provisions don't just cover violence; they cover a whole range of offences?

CHAIR: Sorry to interrupt. Senator Carr, do you have much more?

Senator KIM CARR: No, that's it.

CHAIR: Are you sure? Sorry if I disrupted your flow there.

Senator KIM CARR: You are quite right, Madam Chair. We were going round in circles, playing ping-pong here, but it has no consequence on anything. Thank you very much, Mr Weber. I think we have made the point.

Mr Weber: No dramas at all.

CHAIR: I have a couple of questions before I let you go, if that's alright. Some of the other submitters over the course of the day raised a concern that these proposed changes might create a disincentive to plead guilty for people charged with criminal offences. How does that fit with your understanding of policing in action?

Mr Weber: That could occur by the sentencing itself or the punitive measure that occurred. The maximum penalty could be 15 years—that could be a deterrent in regard to it—or the restrictions put in place in the system. I've heard those arguments many times before. That comes down to having conversations with the defence and prosecution, which occurs in many matters of quite a serious nature but also in a lot of the jurisdictions. At the first instance, most offenders will plead not guilty and continue to plead not guilty until they see the entire brief and have more assistance from their legal advisers and solicitors and barristers. So I don't think so. I don't think it would deter people from pleading not guilty. We have mandatory sentences in numerous states. Higher penalties have been arranged for numerous offences. The guilty to not-guilty ratio virtually stays the same across most of the country.

CHAIR: I've got an expectation—although I haven't checked it, so take that with the grain of salt that's probably necessary—that most of the people who made that submission today would have made the identical submission at the time the previous version of this legislation was put in a bill form and ultimately inserted into the act. So it would be interesting to see evidence of whether or not, in the time since it was inserted into the Migration Act, there was a similar increase in the number of people who declined to pleaded guilty, with all of the consequences that means for the judicial system.

If you are able to take on notice whether or not there's any data you can access that overlaps the implementation of the current regime with data that indicates whether or not there has been, in the last iteration, a disincentive to plead guilty, that would be very interesting.

Mr Weber: Not that I know of, but I will look and I'll take that on notice.

CHAIR: Thank you. There's also been a submission made that this bill would disproportionately harm women. The argument that's been made is that the inclusion of the aiding and abetting type ancillary liability would have an effect that is more likely to impact women than men. Do you have any thoughts on that submission?

Mr Weber: I'm a bit perplexed by that question. I don't think so. If you're leading down the path of domestic violence or—

CHAIR: It just struck me that the inclusion of the criteria of 'breaching an order made by a court or tribunal for the personal protection of another person' would disproportionately protect women who were in a domestic violence type scenario.

Mr Weber: That's correct.

CHAIR: But I didn't, I must say, find especially persuasive the idea that women would be disproportionately aiders and abetters. Is that something you have observed as a police officer, that women are disproportionately aiders and abetters of criminal offences?

Mr Weber: No, not really. Most offenders are male, in most of the crime categories. It's a very broad generalisation of the statistics, but they might be there and help cover up the offence or feel pressured to cover up the offence. But that would be taken on its own merit, and it would be to a lesser degree that that charge would be used. And if it were, the judiciary but also the police and the DPP would take those circumstances into account. It would be very rare that that would occur.

CHAIR: There's been a reference this afternoon to the notion of double jeopardy being in play here and that it would somehow increase as a consequence of this bill being implemented. Double jeopardy is the concept of trying somebody more than once for a criminal offence. That perplexes me a little bit because, in a sense, it conflates a criminal process arising in circumstances where we have two separate and distinct streams of accountability. One is the criminal justice system, in which there is a single opportunity to try a person because of the rules related to double jeopardy. The other is a separate and distinct civil right that relates to a person's visa and their entitlement to enjoy the privilege of being in Australia as a non-Australian. Do you have any response to the idea that's been put forward by some people that this bill amounts to an effective double jeopardy?

Mr Weber: It's very easy to get the two mixed up, I think, sometimes. They're two separate issues, and I'll try to articulate them the best way I can. Going through the criminal process, police officers put the evidence up-front. It's tried in front of the judiciary. That's that offence. What we're saying from a policing point of view but also from our community expectations, to keep the community safe, is that this person is here as a guest of the Australian community. When they come here, they're meant to abide by Australian society's standards and rules of law. When they don't do that and they're here as a guest, what we're saying is: most definitely, that option of being a guest here in Australia should be reviewed. I don't see it as a double jeopardy at all. I just think it's about protecting the community of Australia and living up to the expectations that people want as our society's values in Australia.

CHAIR: Thank you very much for the time that you have put aside to come and assist the committee today. It has been really very helpful to us. You are excused, with our thanks.

DE VEAU, Ms Pip, General Counsel and First Assistant Secretary, Legal Division, Department of Home Affairs

McALLISTER, Mr Malcolm, Assistant Secretary, Compliance and Community Protection Policy Branch, Department of Home Affairs

WILLARD, Mr Michael, Acting First Assistant Secretary, Immigration and Community Protection Policy Division, Department of Home Affairs

WIMMER, Ms Sachi, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs

[15:36]

CHAIR: Welcome. Thank you for taking the time to give evidence today. Information about parliamentary privilege has been provided to you and is available from the secretariat. I remind senators and witnesses that the Senate has resolved that an officer of a department of the Commonwealth or of a state or territory shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. The committee has received the department's submission as submission No. 15. Do you wish to make any corrections to this submission?

Mr Willard: No.

CHAIR: I now invite you to make an opening statement.

Mr Willard: I want to make a very brief opening statement. We have noticed that there has been some reporting about the proceedings of the committee that went to questions of automatic cancellation. I'd just like to provide some advice to clarify that point.

CHAIR: That would be helpful. Thank you.

Mr Willard: The purpose of the bill is to set a transparent threshold as to convictions for designated offences, a threshold that can be clearly understood by visa holders, delegated decision-makers, victims of crime and the wider Australian community. I'd like to be clear that the consequence of not meeting this objective threshold is that there would be further consideration of a discretionary power to refuse or cancel a visa where a noncitizen is convicted of a designated offence, and that is an offence punishable by at least two years imprisonment that involves violence against a person; non-consensual conduct of a sexual nature; breaching an order made by a court, such as an apprehended violence order; or using or possessing a weapon. It's important to note that the conviction itself does not result in the automatic cancellation of a visa or the refusal of a visa and that there is a separate process for consideration of using this discretion that the delegates or the minister would undertake.

CHAIR: Is that the entirety of the opening submission?

Mr Willard: I just wanted to clarify that point.

CHAIR: Thank you very much. Senator Carr.

Senator KIM CARR: Could I just get clear: what's the problem you're trying to fix here?

Mr Willard: The bill introduces an objective element to the character test and it applies in addition to existing subjective and objective elements in the character test. It provides a clear standard, in terms of convictions for designated offences, that is clear for both visa holders and the public as to what type of criminal conduct will involve meeting or not meeting the character test.

Senator KIM CARR: Why do the current arrangements not meet this clear standard?

Mr Willard: The current arrangements involve a number of provisions which do involve objective standards but also involve subjective elements to the character test. This bill clarifies the objective standards that the government is seeking to have in place for meeting the character test in respect of noncitizens who are convicted of a designated offence.

Senator KIM CARR: The submissions have obviously challenged the question of the objectivity of these matters. You are familiar with that, Mr Willard?

Mr Willard: Objectivity in the sense that it sets out specific offences and sets out a period of time in which the person can be sentenced for the offence—and it requires that there be a conviction.

Senator KIM CARR: Would you be able to provide the committee with a complete list of all measures across the Commonwealth that would meet those criteria?

Mr Willard: The purpose of the drafting and the description of the designated offences was to cover all such offences that might be committed in the various jurisdictions.

Senator KIM CARR: Yes. So you have a list of those?

Mr Willard: No, because the intent is to give effect to the type of offence without having to specify each individual offence.

Senator KIM CARR: Why not? You just said there is a clear standard. Why can't you provide us with a list?

Mr Willard: I don't have a list available. The purpose of the bill—

Senator KIM CARR: You can take that on notice, surely.

Mr Willard: I can take it on notice—if it is possible to provide such a list.

Senator KIM CARR: It should be possible. You've just stated to the committee that this bill has been drafted to provide a clear, objective standard. That is the purpose of the bill, you've said. Surely you must have a list that would specify, across all jurisdictions, the existing offences likely to be covered by the definition of a designated offence.

Ms De Veau: Perhaps I can answer that. The very purpose of drafting it the way it has been drafted is to avoid that very thing. States and territories each have their own respective laws, as well as the Criminal Code, and those will change over time—and they often change frequently and quickly. The objectivity comes in relation to both the nature of the violent descriptor and the objective two-year penalty. When states and territories and the Commonwealth set a two-year penalty, or any maximum penalty, for an offence, they do so with a reflection of community standards and expectations. The scale of maximum penalties is there to help guide courts and others in relation to the seriousness with which the community takes it. So the objectivity comes in conjunction with the two-year maximum penalty, as well as the conviction having been recorded and descriptors of the types of violent offending that come with—

Senator KIM CARR: To be clear: you cannot provide a list of measures?

Ms De Veau: It no doubt could be compiled, but it might be a different list in a few weeks time.

Senator KIM CARR: It might be, but it's the current list. You've said to this committee that a clear standard will be provided by this bill. I want to see what that looks like in terms of specific measures. If you can't provide that, why not?

Ms De Veau: The measures are the maximum penalty, the conviction, and the descriptor in relation to the violent nature of the offences. It is a combination of those three things that guides you to any particular conviction for a particular offence that might then trigger the application of the consideration of cancellation.

CHAIR: Is it framed this way because offences can change over time?

Ms De Veau: Absolutely.

Senator KIM CARR: How many people are affected?

Mr Willard: It is our expectation that the bill will increase the number of noncitizens who objectively fail the character test and then are referred for discretionary consideration of visa refusal or cancellation.

Senator KIM CARR: The number of people is the question I've put to you. How many?

Mr Willard: The department has looked at a number of sources to determine what the total effective number of people may be. However, providing an exact figure is not possible.

Ms Wimmer: I might explain why. We have cases referred to us. At the moment, we could only comment on the cases that are referred to us. We don't know the population of cases that have not been referred to us that might actually be—

Senator KIM CARR: You've said there are a number of scenarios, so give me the range. How many people are affected according to your different modelling?

Ms Wimmer: What I can tell you is that we've looked at a small sample of referrals that have come to us where we've made a judgement against the current threshold versus these new thresholds. Of a small sample, of 50 cancellation referrals, which were screened under our existing thresholds, 44 of those would now be considered under these new thresholds for cancellation. So they wouldn't be cancelled; they'd be considered.

Senator KIM CARR: Yes, I've got that. That is one scenario. What's your top scenario?

Ms Wimmer: We haven't been able to do that. We could extrapolate from that 50 but it would be extremely rough.

Senator KIM CARR: This does apply retrospectively, doesn't it? So it's all people that are noncitizens in the country. Do you know how many noncitizens have been convicted of an offence? Do you have that figure?

Ms Wimmer: I don't think we have that figure to give you, no. We'd have to talk to each of the jurisdictions to get that figure.

Senator KIM CARR: Why not? It's an objective test. You've just told me that. So how many people would be caught up in this legislation?

Ms Wimmer: As I said, we're unable to tell you that.

Senator KIM CARR: Why not? Surely with an objective test like this—how many noncitizens are there in the country at the moment?

Mr Willard: There are approximately 1.9 million permanent resident visa holders.

Senator KIM CARR: And how many noncitizens do you think have committed an offence?

Ms Wimmer: We don't have that data.

Senator KIM CARR: No estimate? Nothing to go by?

Ms Wimmer: No.

Senator KIM CARR: But this could apply to the 1.9 million if they commit an offence?

Ms Wimmer: That's right.

Ms De Veau: I think, as Ms Wimmer highlighted, the trigger point of having a conviction for an offence does not in and of itself lead to cancellation. In fact, it won't in and of itself lead to the consideration of cancellation. The matter would need to come before us and then, as the current direction 79 indicates, there is a discretion for a decision-maker as to whether they can—

Senator KIM CARR: But then we come to the issue of—

Ms De Veau: Perhaps I can just finish my answer. Is that all right?

CHAIR: It is all right.

Ms De Veau: Thank you. The decision-maker has a discretion as to whether to consider it. Once considered, there's further very broad ranging consideration as to whether cancellation occurs. So it's not as straightforward as saying, 'Because there are a number of people in Australia who may now meet that trigger threshold, they will (a) be considered or (b) be cancelled.'

Senator KIM CARR: All right. Of the 50 you spoke of before, how many of them will be subject to cancellation?

Ms Wimmer: They wouldn't be subject to cancellation; they'd be subject to consideration for cancellation.

Senator KIM CARR: Yes, but how many?

Ms Wimmer: Forty-four. I will add that, while we can't estimate the population that might be captured through this change, we do think that there will be an increase in the number of referrals to us.

Senator KIM CARR: By how many?

Ms Wimmer: We don't know. We're just saying that the anticipated impact is an increase.

Senator KIM CARR: Okay. According to your website, for 2015-16 we had an increase in the number of visa decisions to the tune of 1,400 per cent—is that correct?

Mr Willard: I think that's the figure for 2013-14 to 2016-17.

Senator KIM CARR: Yes. That's the figure you've got here. And then a 1,900 per cent increase for 2016-17.

Ms Wimmer: Is that visas issued?

Senator KIM CARR: No. These are visa refusals. Visa cancellations was 28, and cancellation refusals was nine, while mandatory cancellations was 1,234.

Ms Wimmer: I'm looking at my data. Under section 501, which is visa cancellations, discretionary and mandatory, for 2016-17 it was more than 1,908; 2017-18, 1,442; and then 2018-19, 1,210.

Senator KIM CARR: The figure I've got is for between 2014 to 31 March 2018. There were 5,074 affected under section 501.

Ms Wimmer: Right. I've got different figures to you but I think it's just a different period that we're looking at.

Senator KIM CARR: How many of those 5,047 would be affected by these changes?

Ms Wimmer: We would have to go back and look at each individual case to determine whether—

Senator KIM CARR: It's not 50, is it?

Ms Wimmer: I couldn't say. I'd have to go back.

Senator KIM CARR: I just can't quite follow, you see. You have a figure here in your annual reports, your various statistical releases by the department, of 5,074 up until March 2018, with 501 refusals, and you've given me a figure of 50.

Ms Wimmer: No, that was a sample that we took of—

Senator KIM CARR: A sample?

Ms Wimmer: We don't keep referrals. A lot of cases are referred to us. We don't keep that data. We just keep the data of the cases that we then consider. So the referrals piece was really what we had on hand that had been referred.

Senator KIM CARR: I see. I'm just wondering how adequate your sample would be if there are 5,074 already on your books—

Ms Wimmer: As I said, it's a very small sample.

Senator KIM CARR: Very small, indeed!

Ms Wimmer: It is. It's indicative only.

Senator KIM CARR: Very, yes. We've had submissions to say that the workload would increase by five times. What do you say to that?

Ms Wimmer: I'd be speculating if I made a comment. As I said, we anticipate—

Senator KIM CARR: That would be wrong, would it?

Ms Wimmer: No, what I think would happen is the referrals would increase. What that means, in terms of consideration for cancellations and cancellation outcomes, I couldn't tell you.

Senator KIM CARR: I see. The Visa Cancellations Working Group has provided us with advice today that suggests if we go through the various groups of people affected, including the AAT—we go to the courts; we go through detention centres—there's a very substantial increase in workloads. Would you agree?

Ms Wimmer: I couldn't talk for those other areas but, as I've mentioned, we anticipate referrals will increase.

Senator KIM CARR: If that's the case, why is it that in the explanatory memorandum you're telling us that this bill will have no financial impact?

Ms De Veau: I think, perhaps, one of the flaws in the argument that might have been put to you, Senator, is the assumption that all of the matters that come to our attention are going to be referred for consideration and then considered in a way that leads to—

Senator KIM CARR: That is a legal question. I'm asking about an administrative question.

Ms De Veau: a decision that is then one not in favour of the person who then appeals. In terms of the consequences of the knock-on effects of AAT work and work for the courts, there is an assumption built into that that there has been a positive referral, the referral has been considered, the visa has been cancelled and the person has then taken up their review rights.

Senator KIM CARR: We've just been told that there will be an increase in the workload. You can argue the toss about the size of it, but we've been told there will be an increase in the workload.

Ms Wimmer: Referrals are only one part of our work. They are what come in our front door for us to assess and triage, about how much we take forward then.

Senator KIM CARR: Sure.

Ms Wimmer: We anticipate that will increase. What it means though for cancellation consideration and more detailed work, we can't make that judgement.

Senator KIM CARR: No, you can't, but you can be certain there will be an increase in workload across the system.

Ms De Veau: Another matter that's relevant to how it impacts the current cases is that the act as it's currently framed, under subsection (6), has a series of potential ways a person can fail the character test. This adds an additional one—

Senator KIM CARR: Yes, it does.

Ms De Veau: and there will be a degree of overlap in the way in which this one operates in relation to the other pre-existing subsections.

Senator KIM CARR: But—whatever you say—there will be an increase in workload. What I'd like to know is how it could be the case that the explanatory memorandum has told this parliament that there will be no financial impact. How do you explain that, Mr Willard? You're the senior officer here.

Mr Willard: I'm not the senior officer here, but the—

Senator KIM CARR: You're the lead officer here for the department.

Mr Willard: budget impact would be absorbed by the department, in terms of the workload, in the context of the eight or more million decisions we make a year on various things.

Senator KIM CARR: I see. So when it says here in the explanatory memorandum that there'll be no financial impact, it just means the department will absorb the extra costs.

Ms Wimmer: I might also add that the way we deal with all of our case load is that we use prioritisation. We would prioritise. We'd prioritise around the severity of cases and the community protection concern. That would continue as it does now. Processes wouldn't change. It would just continue, and we would prioritise cases.

Senator KIM CARR: The proposition here is that you will improve community safety. Given that there's been an increase in visa cancellations of 1,900 per cent, what's the evidence that you've improved community safety?

Mr Willard: That's a very hard one to answer because you're talking about things that might have occurred to people who are no longer here because their visas have been cancelled.

Senator KIM CARR: I just want to know. You've asserted that these measures are 'designed', 'objective', 'clear' and 'standards will be set'. You can't tell me how many people are affected and you can't tell me exactly what the increase in workload is, but you can say to me that this is the case: there has been a 1,900 per cent increase overall. Now, what's the evidence that community safety has been improved?

Ms De Veau: In relation to the previous increase or in relation to—

Senator KIM CARR: The situation. This has really kicked off since 2014.

Ms De Veau: In relation to the previous increase, from 2014—

Senator KIM CARR: I'm just asking the question, given the statistics.

CHAIR: Senator Carr, I think the witness is asking for clarification of the question.

Senator KIM CARR: The question is: there's been a 1,900 per cent increase in the number of mandatory cancellations and various actions taken under 501. These were measures introduced by the government in 2014 in the name of improving community safety. What's the evidence to support that conclusion?

Ms De Veau: I wouldn't point to any data, but I would suggest: if a person in the Australian community came here on licence and on invitation, on behalf of the Australian government, and committed an offence sufficient to have their character cancellation proceed and was then removed from the Australian community, that in and of itself protects the Australian community and adds to the safety of the community.

Senator KIM CARR: I see. Throwing the New Zealanders out has improved our community safety? Is that what it is?

CHAIR: I think what the witness is trying to say is that you are asking her to prove a negative.

Senator KIM CARR: This is the argument you've been putting to us: there will be clear standards now established despite the fact that these measures have been taken since 2014. I want to know what the evidence has been of the change that's occurred in that period? We know the numbers. You've got them here; you published the numbers. What's the improvement been?

Ms De Veau: With respect, I'd suggest that the chair has quite accurately said that, once a person has been removed from the Australian community, it's very difficult to indicate what they may or may not have done. It's a risk based approach in terms of the various considerations that go into character cancellation. Having people no longer in the Australian community who have, quite objectively, clearly committed criminal offences that are obviously of a serious and violent nature is, in and of itself, an end to be attained.

Ms Wimmer: I could also note that our visa case load is increasing. The number of visitors to Australia is increasing. Therefore, even if we do apply new measures, it's very difficult against that backdrop to assess what the impact actually is, given the base load is increasing.

Senator KIM CARR: What is the evidence, then, that departmental officials and the minister are actually able to provide a better understanding of the processes than a judge?

Ms De Veau: I'm more than happy to tackle that one, Senator Carr. It's not intended to be the same consideration or a better consideration; it's a different consideration. Indeed, the courts, in relation to the character cancellation space, have very much confirmed that the ability of the executive government to make a decision in relation to a person's visa is not the same as the punitive nature the Chapter III court takes into account in relation to sentencing a person before the courts for criminal conduct. The executive government is not a Chapter III court and it's not purporting to be a Chapter III court, and the decision in relation to a person's visa is not intended to be a punitive decision. It's of a different nature, and the courts have confirmed that. It's perhaps a trick question to suggest—

Senator KIM CARR: It's not a trick question at all.

Ms De Veau: When I look at the submissions, it's not a proper assertion to suggest that the department is purporting to do the same job or a better job than a judge or that it knows better than a judge when it comes to taking the same considerations into account. The considerations double-up, but they're not the only considerations. It's no different, really, to a doctor who might sexually abuse a patient and is charged with a criminal offence and is sentenced by a court. There is still room, in relation to the administration of the medical profession, for a regulator to say, 'In addition to being sentenced from a civil and administrative point of view, we're going to take a decision in relation to whether that person practices.' It's no different.

Senator KIM CARR: What, then, is added to by these measures that can't be done under the existing legislative regime?

Ms De Veau: It's adding an additional and objective trigger point, a threshold point, that allows consideration. The current considerations still take place, so the mandatory considerations are still there. The existing subsections in section 6 are there, including the very subjective one in relation to considering whether a person has failed the character test by dint of their past or current criminal conduct. That isn't used widely. The reason it is not used widely is that it is so subjective it is very hard for a decision-maker to compare with other decision-makers what that looks like. So, in addition to that one, this new provision will allow a very clear, transparent and objective threshold as to how you meet the character test.

Most of the work is then done with the residual decision-making and discretion. Indeed, most of the case law in relation to character cancellations is around that additional work that decision-makers have to do, once a person fails a character test, in relation to the other factors that need to be taken into account. Those are broad and wideranging and can take into account the particular nature of the offending conduct, the seriousness of the offence, the ties to the community, the length of time the person has been in Australia and the interests of the family and of minors. Indeed, some of the suggestions about the minor nature of offending would clearly be able to be taken into account in that other discretion.

When it comes to review on merits, all of those things are properly considered again. When it comes time to review on judicial review, all of those factors go into a consideration as to whether the decision has been reasonable.

Senator KIM CARR: Okay. So you are relying pretty much on direction No. 79, which was issued on 29 February.

Ms De Veau: And its predecessor, which is in reasonably similar terms.

Senator KIM CARR: Sure, but 79 is the operative one now. What discretion is available to a delegate to not cancel the visa of a person who fails the character test due to a past conviction?

Ms De Veau: I think it is included in here that there is a discretion to consider the revocation and whether that's enlivened. Under the preamble and objectives it doesn't indicate that a decision-maker must consider the cancellation. When the discretion to consider revocation is enlivened—that's in relation to revocation, and it's the same in relation to refusal and granting—once they have made a decision to consider whether there will be a cancellation or a revocation, they move into those other considerations. So it is not mandatory to consider to revoke or to—

Senator KIM CARR: I see. And how is that different from the previous direction?

Ms De Veau: I'd have to take that on notice and make a comparison with direction No. 65.

Senator KIM CARR: I think it is important to do so given you are saying these new objective tests apply.

Ms De Veau: The objective test is really only as to whether the person fails the character test as a trigger. It doesn't impact at all the judicial review rights, the merits review rights, the non-refoulement obligations or,

indeed, the way the 501 matters come to a decision-maker and the way in which they approach the decision-making task.

Senator KIM CARR: If a noncitizen has failed the character test, how would you know about it?

Ms Wimmer: Sorry, I don't quite understand the question.

Senator KIM CARR: If a noncitizen fails the character test due to a past conviction, how is that matter brought to the department's attention?

Ms Wimmer: The way our process works is that we receive referrals from law enforcement agencies. We have agreements with prisons to give us their lists, and we look at their lists to see if there are any noncitizens in the prison system who might be relevant. Our visa processing areas offshore are referring people to us for assessment. The Australian Border Force will refer people to us as well.

Senator KIM CARR: Do you have any discretion not to consider someone's deportation?

Ms Wimmer: We do. We basically undertake our triage process around all of those referrals.

Senator KIM CARR: Would you please take on notice the difference between the two directives?

Ms De Veau: I will take that on notice. I have just been advised that the only change between 65 and 79 was around the emphasis in relation to the violence.

Senator KIM CARR: There was the sexual offences question, was there not?

Mr Willard: It actually went to violence against women and children—vulnerable people—and emphasised the weight that should be given to such violence.

Ms De Veau: I don't understand it to have made any difference in relation to whether or not—

Senator KIM CARR: And there has been some evidence that there is a difference in the legal interpretation. But you'll get the *Hansard*, no doubt. Have you or the minister responded to the Scrutiny of Bills Committee's concerns?

Ms De Veau: I don't know that there has been a response to the findings of the Scrutiny of Bills Committee. I know that, in relation to the human rights one, the minister's responses are included in the report, but I don't know about the Scrutiny of Bills Committee one.

Senator KIM CARR: The Scrutiny of Bills Committee, from memory, has reissued its concerns, and I'm just wondering if there has been a further response.

Ms De Veau: I'll have to take that on notice. I'm not aware of one.

Senator KIM CARR: That is because it expands the discretion of the minister to refuse or cancel a visa without procedural fairness obligations.

Ms De Veau: It makes no change to the current arrangements in relation to procedural fairness. There's nothing in this bill that changes anything around procedural fairness—when natural justice can be and isn't taken into account, what's taken into account for a potential revocation decision—or in relation to either the merits review or a judicial review. There's nothing in this bill at all.

Senator KIM CARR: But the minister doesn't have procedural fairness applied to his test.

Ms De Veau: And this bill does nothing in relation to touching that point.

Senator KIM CARR: That's right. So there is no procedural fairness.

Ms Wimmer: The current arrangements stand.

Ms De Veau: If the minister makes a decision to cancel without natural justice, doing that has to be in the national interest. It's done without natural justice, but there is the ability, once the decision is made, for the person to seek a revocation, and, in that revocation process—

Senator KIM CARR: Is it to the Federal Court?

Ms De Veau: No, the revocation process is to the minister. In a sense, it moves what would normally be the natural justice component so that, rather than having that before the decision, the decision is made and the person then makes their submissions for revocation to the minister and puts forward the subjective features they want to have taken into account. I can take it on notice—the percentage of revocations is quite significant, particularly as it applies to the area where there has been mandatory cancellation, but also where the minister has made a decision.

Senator KIM CARR: There have been recent cases—various court proceedings—on the question of timing, haven't there? We've heard evidence today on that matter in regard to the issue of natural justice as well.

Ms De Veau: As to how long a person has?

Senator KIM CARR: No, how long the minister has taken to consider a matter.

Ms De Veau: There may have been. I'll have to take it on notice.

Senator KIM CARR: On the question of the Parliamentary Joint Committee on Human Rights, has there been a response?

Ms De Veau: I don't know if there has been a response, but, definitely, the minister's responses to the committee for the matters that they raised were included in the report.

Mr Willard: The minister responded in December 2018 to the 2018 version of the bill and the report from the committee.

Senator KIM CARR: There have been no further developments since then?

Mr Willard: Only in the statement of compatibility that's included with the current bill.

Senator KIM CARR: I see, and that has been disputed. Are you aware of that?

Mr Willard: Disputed?

Senator KIM CARR: The statement of compatibility has been disputed.

Mr Willard: In submissions?

Senator KIM CARR: Yes. Has the committee reconsidered that matter? Or are you not aware of that?

Mr Willard: The Joint Committee on Human Rights?

Senator KIM CARR: Yes.

Mr Willard: I'm not aware of it.

CHAIR: One of the things that has been raised with us in the course of today is the submission that these powers aren't necessary. Many people have come before the committee and said, 'The minister has already got enough powers. He doesn't need this. There's been no public case made as to why these powers are needed.' Can you please explain why they're necessary and, if possible, give some examples of situations that show why they're necessary?

Mr Willard: I have some examples that I can provide for the committee. I think the key point is the distinction between a subjective requirement and an objective requirement, in terms of determining whether or not someone meets the character test and, then, whether that discretionary cancellation or refusal process is enlivened. I might use the example of a temporary visa holder—these are real examples but they're depersonalised so that people can't be identified—who has been convicted of violent assault related offences, for which he has received fines, good behaviour bonds, intensive corrective orders—

CHAIR: How many offences are we talking about?

Mr Willard: A number of offences. He hasn't yet been sentenced to a term or terms of imprisonment of 12 months or more. Under the current character provisions, he does not objectively fail the character test on the basis of criminal history. He is able to remain in Australia as the holder of a temporary visa and remains eligible for the grant of a permanent visa, provided all criteria for the grant of a visa are met, unless sufficient adverse information becomes available to find that he does not pass the character test on subjective grounds, which is a more difficult test to meet. Under the proposed amendment, he'd objectively fail the character test, as he has been convicted of a violent offence which is punishable by imprisonment for a maximum term of five years. He'd therefore be considered for discretionary visa refusal or cancellation.

CHAIR: So, just to be clear, that example is directed at dealing with a circumstance where you've got a person who is a repeat violent offender but at that lower threshold. They wouldn't have been captured by the current regime, but they would be captured by what's proposed in the bill?

Mr Willard: Yes.

CHAIR: Okay. I understand that correctly. Next one.

Mr Willard: There's another example: Mr N, who's in Australia and holds a bridging visa held in association with an ongoing permanent visa application. In 2018, while that application was being processed, Mr N was convicted of stalking another person and of threatening to inflict serious injury, for which he received a six-month term of imprisonment. His application was subsequently refused under section 501(1) of the act on the basis that, if he were allowed to remain in Australia, there's a risk he'd engage in criminal conduct or harass, molest, intimidate or stalk another person, which is the subjective ground that currently exists. His associated bridging visa was cancelled by operation of law. On appeal to the AAT, that decision was set aside and his visa was

reinstated, allowing him to remain in Australia as the holder of a bridging visa while his permanent visa application is being processed.

CHAIR: So, to make sure I understand, was this person stalking and threatening violence against a partner in a personal relationship?

Mr Willard: As I understand it.

CHAIR: So it's a domestic type situation?

Mr Willard: Yes, with a threat to harm involved as well as stalking.

CHAIR: We've got stalking and a threat of violence?

Mr Willard: A threat to inflict serious injury.

CHAIR: A threat to inflict serious injury. Nevertheless, that comes beneath the threshold. That is interesting in the sense that it wouldn't have been captured by the current regime but it would be captured by the amendments the bill proposes. But also it suggests to me that this bill has the potential to provide protection to women in a domestic violence context, in a circumstance that wouldn't otherwise be the case. Do you have a comment on the impact of the bill on women, before I bring you back to the examples?

Mr Willard: One of the designated offences specified in the bill goes to convictions based on breaching apprehended violence orders, which are a tool frequently used in respect of domestic violence situations. Again, this would mean that a breach of a conviction on that basis would then involve a referral for consideration of cancellation or visa refusal on character grounds.

CHAIR: So that should protect people who are in a domestic violence situation of any kind, male or female, though we know that there are more female victims of domestic violence than male. One of the submissions we've received today—and I will bring you back to the examples in a moment—is that the aiding-and-abetting-type ancillary liability will disproportionately harm women. Is that something for which you have seen any evidence?

Mr Willard: No. There'd be a requirement that there be a conviction in that respect, and then there's the process in which the circumstances are considered, in considering whether a discretionary cancellation or refusal occur.

Ms De Veau: Chair, I might add to that if I may. Ancillary offences are treated objectively in all the criminal codes as if the person has committed the offence itself.

CHAIR: Quite right.

Ms De Veau: So attempt, aid and abet and those—they're not considered a secondary offence in terms of penalty; they're considered to carry the same maximum penalty that's given to the principal offence. That's a reflection of the seriousness with which society considers those ancillary offences. So it's not as if they are a second class of offending behaviour. Indeed, if there is quite some remoteness, you would think, between the principal offending behaviour and the ancillary offending behaviour of the aider and abetter, there is the discretion of the police as to whether they prosecute. There's the discretion of the DPP as to whether it meets the prosecutorial guidelines and charges are laid. Then, of course, there's the ability of a court to give non-conviction orders. It's only, as Mr Willard just said, when you've got a conviction that you're going to trigger the new objective test. Then, of course, the subjective features of the seriousness of the offence can all be considered as to whether—once having triggered the test that you've failed the character test—you are, in fact, having your visa cancelled. All of those things have a role to play along the lines such that I'd say that there's not much force in the argument that those who commit aiding and abetting are going to perhaps inherently be caught up in this in a way that's in some way unfair.

CHAIR: You're quite right, Ms De Veau. I've been thinking about it in terms of its fundamental implausibility, but you're right that the prosecution process involves a number of filters that would be expected to pick up a circumstance where a woman in a domestic violence type situation is being exploited into an aiding and abetting type situation. They're going to stop at something that's not in the public interest.

Ms De Veau: If it's associated with domestic violence type offences, there are any number of policies and guidelines in relation to how police and prosecutors deal with those matters. As I said, there would be something considered, I would have thought, in relation to how that person is sentenced such that they get a conviction if they have, perhaps unwittingly, been caught up in aiding and abetting the offender to breach an order. In relation to aiding and abetting more broadly, I prosecuted for 20 years and I didn't see any patterns of gender disproportion in relation to those charged with aiding and abetting being women rather than men.

CHAIR: My experience of prosecuting was the same as yours. Mr Willard, can I bring you back to those examples. Perhaps you could tease out a few more for me.

Mr Willard: Mr D, a permanent visa holder in Australia, was convicted in Queensland of a number of crimes, including sexual assault and common assault, and was sentenced to a two-year good behaviour order. As he has not been sentenced to a term of imprisonment of 12 months or more, under the current character provisions he does not objectively fail the character test on the basis of his criminal history. He will remain in Australia as the holder of a permanent visa unless sufficient adverse information becomes available to find that he did not pass the character test under subjective grounds. The sexually based offences that he was convicted of were punishable by imprisonment for a maximum term of 14 years, so he would be subject to discretionary cancellation or refusal action under the migration amendment bill.

CHAIR: That's clear.

Ms De Veau: I'd add that some of the examples that Mr Willard has given demonstrate that there is an overlap. I think this is one of the reasons why some of the submitters say that it's not necessary to include this additional test. There is some overlap in relation to the grounds of considering a person having failed the character test subjectively, because you can view their past and present conduct and their threat to the Australian community in that way under some of the existing provisions. It's that subjective nature that is very hard for one decision-maker and another decision-maker to apply in a way that's consistent, objective and transparent. I think at least one, if not more, of the examples that Mr Willard highlighted shows that a decision-maker has taken the view that subjectively we think they fail the character test under this existing regime, but upon merits review it's found to be a different answer.

CHAIR: One of the submissions that has been made today by other groups—I'm paraphrasing, of course; this isn't their language—was, in essence, that this bill would not, in fact, make anything more objective. I think it's really important that those listening at home understand the ways in which the current arrangements are subjective and the nature of the change, so that people can pinpoint the ways in which it will become objective. Mr Willard, could you please very simply explain what is subjective about the current system and what will become objective if this bill is passed?

Mr Willard: Some of the subjective arms of the current character provisions go to things like past and present conduct and things like intentions to vilify, stalk or harass an individual in the Australian community, which are subjective assessments that have to be made to determine whether or not those grounds are met. The bill would set out clearly that, upon a conviction for a set of designated offences for which a sentence of two years or more can be imposed, the character test would not be met and so the visa holder or visa applicant would be subject to further consideration on character grounds in respect of visa refusal or cancellation.

CHAIR: So do you mean that, by tying the triggers for not meeting the test to designated offences, you'd get a degree of clarity, about whether or not you're captured, that you don't get under the current system because there's an element of subjectivity in determining whether or not what you've done is serious enough to meet the threshold? Am I being clear enough? Tell me if I'm wrong—correct me, please.

Mr Willard: No, that's correct, and it's not clear to the visa holder or the general public what the sorts of offences are that might go to past and present conduct. So, by providing an objective test, it sets a clear threshold for both visa holders and the wider community.

CHAIR: There's been a suggestion that the use of the measure of the maximum sentence that could be imposed for an offence, rather than the sentence that was actually imposed, is, in some way, unfair to the person who is the subject of consideration of a visa. Are you able to explain why that measure has been used and respond to that criticism?

Mr Willard: The amendments acknowledge that certain serious criminal offences, which are those set out as designated offences, have a significant impact on victims, and that noncitizens who commit these crimes, regardless of the sentence imposed, should be appropriately considered for visa refusal or cancellation. It goes to the point that Ms De Veau was making earlier about the different purpose in terms of the criminal consideration and the consideration of executive powers under the Migration Act in terms of someone's right to enter and stay in Australia.

Ms De Veau: Can I add that, if the concern is that there are subjective features that a sentencing exercise takes into account, such that, if you move to a maximum penalty test for failing the character test, you lose, I'd submit that that's incorrect because, as I said, it's about triggering the consideration of the provision with that objective test. So you fail it because you've committed one of these designated offences that carries a maximum penalty of two years imprisonment, but the seriousness of your offending behaviour—so all of those features that a person might say were relevant to a court not sentencing you in a particular way—is equally relevant under the direction

for whether or not you will in fact be cancelled and, once again, on review, relevant to merits review and relevant to the reasonableness of it in judicial review.

CHAIR: Perhaps you're the right person to ask, Ms Wimmer. Can it be expected that these changes will add to the length of the time required for processing visa applications?

Ms Wimmer: The process around which we will actually make decisions will not change. The only thing that changes is the threshold. At the moment, most people who don't commit an offence will obviously feel no impact because they won't be referred. It will only be those people who are referred, as is currently the case, and discretionary cancellation and refusal case processing times are based on their complexity, natural justice requirements and obviously the decision-maker who's actually making that decision—a minister versus a departmental officer. None of those things will change.

CHAIR: Finally, some submitters today have used language that suggests that these changes would, in effect, make cancellation of visas in some sense mandatory. That's not my reading of the bill, but I'd like, if it's at all possible, for someone from the department to put on the record your understanding of whether or not that is the impact of the bill. And, if it's not, what is its true impact?

Mr Willard: It's not the impact of the bill. It establishes an objective threshold that then triggers consideration of whether or not a visa should be refused or cancelled. So it's certainly not a mandatory cancellation process.

CHAIR: I did say that was my last, but I have one more question! There's also been criticism that this bill would, in some way, be harmful to Australia's ability to comply with its international law obligations, particularly in relation to non-refoulement responsibilities. Is there a response that the department can give to that submission?

Ms De Veau: Indeed, I think the minister provided it in the human rights statement of compatibility, but the committee on human rights also addressed it. Non-refoulement—whether a person is returned to a country where they would face harm—is simply not something that is directly contingent on whether their visa is cancelled or not. If there are considerations around non-refoulement, they can be raised at the time of the cancellation of a visa. You will see from the directions that it's one of the factors that must be taken into account. So, in exercising that discretion, you as a decision-maker, or the AAT in the merits review, are turning your mind to the international obligations. Then, if a visa is cancelled and a person is going to be returned, there's an opportunity to apply for protection. So there's a second opportunity at that point in time to consider whether returning a person would breach our international obligations. Then, before a person is removed, there's consideration at that point in time as to whether the removal will breach international obligations.

Australia has always said, and continues to say, that we do not remove people in breach of that international obligation of non-refoulement. There's nothing in these provisions that touches upon that at all. The only way it could, at a stretch, be said to do it is by saying that there might be more people who are owed protection who might have their visa cancelled who would enliven consideration of refoulement obligations. But that doesn't mean that the considerations are going to work their way out in a way that they will be removed from this country contrary to the obligation, because we simply say that we don't do that.

Ms Wimmer: And, in fact, ministerial direction 79 requires the decision-maker to take into consideration Australia's international obligations again.

Senator KIM CARR: Can I just follow up. I want to seek some further advice on the appeals mechanism statistics that the department provided. Of the 5,074 section 501 visa refusals and cancellations, how many were subject to appeal?

Ms Wimmer: We can take that on notice, but I can actually—no, I can't give you that information.

Ms De Veau: I think we will take that on notice. Senator, do you want that to merits review, or judicial review as well?

Senator KIM CARR: Could you give a statistical breakdown of all reviews and the nature of the review.

Ms De Veau: We should be able to that.

Senator KIM CARR: Thank you. I'm told that for the 2016-17 financial year 78 per cent of the 1,234 noncitizens whose visas were mandatorily cancelled sought revocation of the decision and that out of those the decision to revoke the cancellation occurred in approximately 35 per cent of cases. Are you able to confirm that figure? That's in one year.

Mr Willard: I've got the 2018 calendar year figure, Senator. It doesn't quite accord with the one that you have.

Senator KIM CARR: Could you give it to me annually and percentage wise, please, for our report.

Ms De Veau: We will do that, but I'm conscious that these provisions don't make any changes to the mandatory cancellation—

Senator KIM CARR: No, but I want to see what the level of appeal is, to what extent these measures are subject to appeal, and, on the discretion, of those that were cancelled through mandatory actions taken by the department, how many were subject to appeal. If you're saying there's a very important discretionary element there, where did the discretion set in—at the officer level or at the subsequent appeal?

Mr Willard: Senator, just to clarify the request—

Senator KIM CARR: This is section 501.

Mr Willard: It is mandatory cancellations and then looking at revocation outcomes of those cancellations.

Senator KIM CARR: You've indicated to this committee in evidence today that there is a level of discretion by officers as to whether or not they proceed.

Ms De Veau: Both as to the discretionary provisions that this bill alters but also where there is mandatory cancellation and potential revocation.

Senator KIM CARR: Yes, that's right. I would like to know what the appeal mechanisms are. In the case of the AAT decisions, how many were set aside by the minister in each year and what was the rate at which you sought to set aside decisions? I understand that in 2016-17, of the cases reviewed, 29 were varied or set aside. Are you able to confirm that?

Ms De Veau: I'm not quite sure. Senator, can you assist with the source of your statistics?

Senator KIM CARR: The statistics are coming from the *Bills Digest*.

Ms De Veau: We'll check that.

CHAIR: Thank you very much for your attendance and assistance today. We really appreciate the work you have put into your submission. That concludes today's proceedings. The committee has agreed that answers to questions taken on notice at today's hearing should be returned by Friday 30 August. I thank all witnesses who gave evidence today. Thank you also to Hansard, to Broadcasting and to members of the secretariat for their help throughout the day.

Committee adjourned at 16:31