



THE HON ANDREW GILES MP

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MC23-008428

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

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Dear Senator

Thank you for your correspondence of 9 March 2023 to the Minister for Home Affairs and Cyber Security, the Hon Clare O'Neil MP, requesting advice on the *Migration Amendment (Aggregate Sentences) Act 2023*. The Minister appreciates the time you have taken to bring this matter to her attention. Your correspondence has been referred to me as the matter falls within my portfolio responsibilities.

The Migration Amendment (Aggregate Sentences) Bill 2023 was introduced into the Senate on 7 February 2023, and passed both Houses on 13 February 2023. The *Migration Amendment (Aggregate Sentences) Act 2023* (Aggregate Sentences Act) commenced on 17 February 2023, the day after it received the Royal Assent.

The Aggregate Sentences Act amended the *Migration Act 1958* (Migration Act) to make clear that the provisions of the Migration Act, including section 501, apply no differently in relation to a single sentence imposed by a court in respect of two or more offences to the way in which those provisions apply in relation to a sentence imposed by a court in respect of a single offence.

This was in response to the Full Federal Court decision in *Pearson v Minister for Home Affairs* [2022] FCAFC 203 which found that an 'aggregate sentence' (a single sentence imposed in relation to two or more criminal offences of which a person has been convicted) could not count when establishing if a person has a 'substantial criminal record' under s 501(7)(c) of the Migration Act, and therefore, does not enliven the mandatory cancellation provisions.

In the Scrutiny Digest 2 of 2023, the Standing Committee for the Scrutiny of Bills sought advice in regards to the Aggregate Sentences Act.

A copy of the response is enclosed.

Thank you for raising this matter.

Yours sincerely

ANDREW GILES

11 / 5 / 2023

Annex A – Response to queries raised by the Committee

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Scrutiny Digest 1 of 2023

Migration Amendment (Aggregate Sentences) Act 2023

Minister's Response

1.40 The committee requests the Minister's detailed advice as to:

- what alternative approaches were available to respond to the *Pearson* decision and the general concern for community safety; and
- in light of the potential effect of retrospective validation on the integrity of Australia's rule of law system and the significant impact of this bill on individuals, why these alternative approaches could not have been implemented in this case; and
- how the retrospective validation of decisions under the *Migration Act 1958* is intended to interact with decisions which have been successfully invalidated by a court or where proceedings have been instituted.

- **what alternative approaches were available to respond to the Pearson decision and the general concern for community safety?**

Response

The Aggregate Sentences Act was implemented to allow the Government to take urgent action to address the inconsistencies in the application of the character provisions of the *Migration Act 1958* arising from the Full Federal Court's decision in *Pearson*, but does not otherwise change the framework within which the character test operates.

In the Full Federal Court's decision in *Pearson*, the Court held that an aggregate sentence is not able to be counted when establishing if someone has a 'substantial criminal record' and therefore does not enliven the mandatory cancellation provisions in the Migration Act.

This meant that a person who is sentenced to a term of imprisonment for 5 years for committing a violent offence would be found to have a substantial criminal record and would be liable for mandatory cancellation of their visa, whereas if they were convicted for a term of imprisonment of more than 5 years on the basis of that same offence plus another offence, they would not - simply because that sentence was in respect of more than one offence.

The Aggregate Sentences Act does not represent a change in Government policy on how aggregate sentences are dealt with under the Migration Act. Rather, the Act reinstates the previous bi-partisan position that aggregate sentences can be taken into account for all relevant purposes under the Migration Act, including the character test at section 501 of the Migration Act.

The Government considered only the amendments made by the Aggregate Sentences Act would be sufficient to address the issues raised by the Court's decision in *Pearson* and to restore the original policy intention of the relevant provisions of the Migration Act.

- **in light of the potential effect of retrospective validation on the integrity of Australia's rule of law system and the significant impact of this bill on individuals, why these alternative approaches could not have been implemented in this case?**

Response

As stated above, the Aggregate Sentences Act does not represent a change in policy in relation to how aggregate sentences were considered under the Act before the Court's decision in *Pearson*.

In this regard, aside from the brief period of time between the Court's decision in *Pearson* on 22 December 2022, and the commencement of the Aggregate Sentences Act on 17 February 2023, aggregate sentences have always been considered for all purposes of the Migration Act, including for the purpose of the Character test at section 501.

In this sense, the retrospective validation of decisions made prior to the commencement of the Aggregate Sentences Act did not change the Government's policy in relation to persons sentenced to aggregate sentences of 12 months (or more) imprisonment, and restored the application of the character provisions of the Act consistently with how they were previously understood to operate.

As the Government's policy in relation to persons of character concern has not changed, it was appropriate in these circumstances to ensure that those persons affected by the Court's decision in *Pearson* are treated consistently with all other persons sentenced to single or aggregate terms of 12 months or more imprisonment in the interests of community protection.

- **how the retrospective validation of decisions under the Migration Act 1958 is intended to interact with decisions which have been successfully invalidated by a court or where proceedings have been instituted?**

Response

The effect of the Aggregate Sentences Act is that a decision made before 22 December 2022 to refuse or cancel a visa under s501 in reliance on an aggregate sentence is valid, and the non-citizen is an unlawful non-citizen. Unlawful non-citizens are liable for detention and removal from Australia.

The Government recognises that some individuals who were impacted by the Full Federal Court's decision in *Pearson* may have chosen not to seek review or revocation of a mandatory cancellation decision in light of the judgment, or may have otherwise discontinued review processes.

The Aggregate Sentences Act makes provision for refreshed review periods for impacted individuals, on commencement of the legislation, as long as they were within the appropriate timeframe to seek review prior to the *Pearson* decision.

Where a person's visa cancellation or refusal has been validated on commencement of the legislation, they will be restored any review or revocation rights they had immediately before 22 December 2022 (the date the Full Federal Court handed down its judgment in *Pearson*). Any person whose review or revocation proceedings remain on-hand will not be impacted, and those applications will continue to be considered by the Minister or the relevant body, such as the Administrative Appeals Tribunal or a court.

Any person whose revocation and review rights were exhausted as at 22 December 2022 will not have any new review or revocation right re-enlivened due to the passage of the Aggregate Sentences Act.