



Australian Government
Department of Home Affairs

Submission into the inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018

Senate Legal and Constitutional Affairs Legislation
Committee

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1. Introduction

1.1.1. The Department of Home Affairs (Home Affairs) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018, following the introduction of the Bill into the House of Representatives on 25 October 2018.

1.1.2. This submission provides a response to the reason for referral and principal issues of concern, which were raised by the Selection of Bills Committee, and briefly explains key measures of the Bill.

1.2. Reason for referral and principal issues of concern

1.2.1. The Bill was referred to the Committee by the Senate Selection of Bills Committee in its Report No. 13 of 2018, on 14 November 2018. The reason for referral is *‘To provide further scrutiny on the impact of this bill on the Australian community’*.

2. Home Affairs’ submission

2.1. Purpose of the Bill

2.1.1. The Migration Amendment (Strengthening the Character Test) Bill 2018 will ensure non-citizens who are convicted of certain serious offences—and pose an ongoing risk to the Australian community while in Australia or will pose a threat if they are allowed to enter Australia—do not pass the character test and are appropriately considered for visa refusal or cancellation.

2.1.2. The Bill achieves this by amending section 501, and making consequential amendments to section 5C of the *Migration Act 1958*, to introduce a *designated offence* ground to the character test. In effect, these amendments will provide delegates with a clear, objective ground with which to consider refusing or cancelling a non-citizen’s visa due to a conviction for one or more of these offences, including:

- violence against a person;
- non-consensual conduct of a sexual nature;
- breaching an order made by a court or tribunal for the person protection of another person — such as an apprehended violence order;
- using or possessing a weapon; or
- involvement in any of the above.

2.2. Background of the Bill

2.2.1. This Bill has been developed in response to the Joint Standing Committee on Migration's December 2017 report on migrant settlement outcomes entitled, *No one teaches you to become an Australian*.

2.2.2. Following 115 public submissions, the Committee noted that there were community concerns about the escalation of violent crimes, and that: *"These are serious criminal offences which have a major impact on the lives of its victims and the Committee's view is that such serious criminal offences committed by visa holders must have appropriate consequences"*. The Committee recommended that:

- Recommendation 15 - The Committee recommends that the Australian Government amend the Migration Act 1958 requiring the mandatory cancellation of visas for offenders aged between 16 and 18 years who have been convicted of a serious violent offence, such as car jackings or serious assaults. If legislation is amended, this should be accompanied by a caveat that no retrospective liability is thereby created.
- Recommendation 16 - The Committee is also recommending that anyone over 18 years of age who has been convicted of a serious violent offence which is prescribed, such as serious assaults, aggravated burglary, sexual offences and possession of child pornography, have their visa cancelled under section 501 of the Migration Act 1958.

2.2.3. In response to the Joint Standing Committee on Migration's recommendations, the proposed amendments ensure all non-citizens convicted of serious offences may be considered for visa refusal or cancellation under section 501 of the *Migration Act 1958*.

2.3. The current character framework

2.3.1. All non-citizens who wish to enter or remain in Australia must satisfy relevant requirements set out in the *Migration Act 1958* and *Migration Regulations 1994*, including the character test at section 501 of the *Migration Act 1958*. A table explaining the current character framework is at **Annex A**.

2.3.2. A non-citizen may have their visa application refused, or their visa cancelled, if they have been convicted of criminal offences, either in Australia or overseas.

2.3.3. A person is found to objectively fail the character test, including but not limited to, if they have been sentenced to 12 months or more imprisonment or two or more terms of imprisonment that total 12 months or more, including any suspended terms of

imprisonment. If a person is found to fail the character test, their visa can be considered for refusal or cancellation under section 501.

2.4. The meaning of *character concern*

2.4.1. Section 5C of the *Migration Act 1958* contains the definition of *character concern*, which mirrors the character requirements contained in section 501 of the Act.

2.4.2. The definition of *character concern* in section 5C is relevant in determining:

- the circumstances in which the Department can disclose personal information for the purposes of data matching; or
- the reasons for which biometrics captured by the Department can be used.

2.5. The new *designated offences* ground

2.5.1. The designated offence ground, proposed by the Bill, recognises that certain serious offences (the *designated offences*) have a significant impact on victims and their communities. Those convicted for committing such offences will objectively fail the character test.

2.5.2. The Bill proposes to add *designated offences* to the character test. A designated offence, as defined in the Bill, is an offence against a law in force in Australia, or in a foreign country in relation to which the following conditions are satisfied:

- One or more of the physical elements of the offence involves:
 - violence against a person, including (without limitation) murder, manslaughter, kidnapping, assault, aggravated burglary and the threat of violence; or
 - non-consensual conduct of a sexual nature, including (without limitation) sexual assault and the non-consensual commission of an act of indecency or sharing of an intimate image; or
 - breaching an order made by a court or tribunal for the personal protection of another person; or
 - using or possessing a weapon; or
 - aiding, abetting, counselling or procuring the commission of an offence that is a designated offence; or
 - inducing the commission of an offence that is a designated offence, whether through threats or promises or otherwise; or
 - being in any way (directly or indirectly) knowingly concerned in, or party to, the commission of an offence that is a designated offence; or
 - conspiring with others to commit an offence that is a designated offence.
- For an offence against a law in force in Australia—the offence is punishable by:
 - imprisonment for life; or

- imprisonment for a fixed term of not less than two years; or
- imprisonment for a maximum term of not less than two years.
- For an offence against a law in force in a foreign country—if it were assumed that the act or omission constituting the offence had taken place in the Australian Capital Territory:
 - the act or omission would have constituted an offence against a law in force in that territory; and
 - the territory offence would have been punishable by:
 - imprisonment for life; or
 - imprisonment for a fixed term of not less than two years; or
 - imprisonment for a maximum term of not less than two years.

2.5.3. This new ground will apply retroactively—meaning the decision-maker can consider convictions for a designated offence which occurred before, on, or after the commencement of this Bill. This is consistent with other amendments made to the character test, including:

- 1998 amendments to sections 501(6)(a)—relating to a person has a substantial criminal record, 501(6)(c)—relating to past and present criminal or general conduct and 501(6)(d)—relating to a person’s conduct if they were to enter or remain in Australia.
- 2011 amendments to sections 501(6)(aa)—relating to convictions while in, or escaped from immigration detention, and 501(6)(ab)—relating to convictions for escaping immigration detention.
- 2014 amendments to section 501(3A)—the introduction of the mandatory cancellation framework.

2.5.4. The designated offences exclude petty or trivial offences. This is achieved by requiring that an offence, for which the person is convicted of, is punishable by a maximum sentence of at least two years imprisonment. The Bill also requires that the person is convicted of that crime. An allegation against a person or a charge being made by a law enforcement agency would not provide grounds for cancellation or refusal under this ground.

2.5.5. Once these amendments are in effect, a non-citizen convicted of a designated offence will objectively fail the character test and can be considered for visa cancellation or refusal under the *Migration Act 1958*.

- The amendments provide for a discretionary ground only. Prior to any decision using this ground, the non-citizen will have the opportunity to comment and provide

any supporting documents or evidence to the Department as to why their visa should not be cancelled or refused and any countervailing considerations.

- 2.5.6. The Bill does not lower the bar for cancelling or refusing a visa under section 501. The Bill acknowledges the serious nature of these crimes, and importantly the long lasting impact these crimes can have on the victim and the broader community.
- 2.5.7. The addition of a ground for refusal or cancellation for a criminal conviction without the requirement of a minimum sentence is not isolated in the character test. Within the current framework, a person can be considered for refusal or cancellation under section 501, regardless of any sentence imposed where they have been convicted of:
- a sexually based offence against a minor;
 - an offence that was committed while the person was in immigration detention; or
 - offences committed during an escape from immigration detention.
- 2.5.8. De-identified case studies, highlighting the effect of the proposed ground can be found at [Annex B](#).

2.6. Amendments to the meaning of *character concern*

- 2.6.1. Consequential amendments to section 5C will provide that those who have been convicted of a designated offence will meet the definition of *character concern*.
- 2.6.2. The amendments will add the *designated offences*, described in section 501(7), to the definition of *character concern* so that:
- non-citizens who are convicted of a designated offence meet the definition of character concern; and
 - the Department has the ability to identify people who are of character concern.
- 2.6.3. If section 5C is not amended, this will cause an inconsistency in the *Migration Act 1958*.

2.7. Visa refusal or cancellation due to *designated offences*

- 2.7.1. The process for considering discretionary refusal or cancellation will be the same as decisions made using other discretionary powers under section 501.
- 2.7.2. Subsections 501(1) and 501(2) of the *Migration Act 1958* provide the power to refuse or cancel a non-citizen's visa if the person does not pass the character test. These powers may be exercised personally by the Minister or a departmental delegate.
- 2.7.3. These discretionary refusal and cancellation powers must be exercised with natural justice. The affected person is given the opportunity to provide relevant information or

comments to the decision-maker, in response to whether the discretion to cancel or refuse their visa should be exercised.

2.7.4. A non-citizen's visa may be considered for refusal or cancellation by the Minister personally under section 501(3) where the Minister is satisfied that the refusal or cancellation is in the national interest.

- Section 501(3) is exercised without natural justice, however the non-citizen will be entitled to seek revocation of the decision.

2.7.5. When exercising the discretionary power to refuse or cancel a visa, the delegate must consider a wide range of factors contained within binding Ministerial Direction 65, including:

- protection of the Australian community from criminal or other serious conduct;
- best interests of minors in Australia;
- expectations of the Australian community;
- Australia's international obligations;
- impact on victims; and
- the nature and extent of a person's ties to Australia.

2.8. Merits and judicial review rights of affected persons

2.8.1. If a non-citizen's visa is cancelled or refused by a delegate under section 501 using discretionary powers, it may be open to the affected person to seek merits review of the decision. The General Division of the Administrative Appeals Tribunal, an independent merits review body, conducts these reviews.

- The right to merits review is dependent upon a number of factors—including the visa the non-citizen held or applied for and whether the person is located in Australia or offshore.

2.8.2. If the decision to refuse or cancel the visa has been made personally by the Minister, merits review is not available to the affected person.

2.8.3. However, all decisions made under section 501 (including decisions personally made by the Minister) may be reviewable by the Federal Court or High Court.

3. Conclusion

- 3.1.1. The amendments are focused on very serious offences committed by visa holders. By strengthening the character test at section 501 of the *Migration Act 1958*, those convicted of serious offences will objectively fail the character test, and can therefore be appropriately considered for visa refusal or cancellation. The amendments create discretionary powers and provide appropriate measures to enable decision makers to consider a range of matters and circumstances on each individual case.

Annex A — the current character test

Legislation	Character test ground
501(6)(a)	<p>The person has a substantial criminal record (as defined by subsection(7)).</p> <p>(7) For the purposes of the character test, a person has a substantial criminal record if:</p> <ul style="list-style-type: none"> (a) the person has been sentenced to death; or (b) the person has been sentenced to imprisonment for life; or (c) the person has been sentenced to a term of imprisonment of 12 months or more; or (d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or (f) the person has: <ul style="list-style-type: none"> (i) been found by a court to not be fit to plead, in relation to an offence; and (ii) the court has nonetheless found that on the evidence available the person committed the offence; and (iii) as a result, the person has been detained in a facility or institution.
501(6)(aa)	<p>The person has been convicted of an offence that was committed:</p> <ul style="list-style-type: none"> (i) while the person was in immigration detention; or (ii) during an escape by the person from immigration detention; or (iii) after the person escaped from immigration detention but before the person was taken to immigration detention again.
501(6)(ab)	<p>The person has been convicted of an offence against section 197A.</p> <p>Section 197A – A detainee must not escape from immigration detention.</p>
501(6)(b)	<p>The Minister reasonably suspects:</p> <ul style="list-style-type: none"> (i) that the person has been or is a member of a group or organisation, or has had or has an associations with a group, organisation or person; and (ii) that the group, organisation or person has been or is involved in criminal conduct.

Legislation	Character test ground
501(6)(ba)	<p>The Minister reasonably suspects the person has been or is involved in conduct constituting one or more of the following:</p> <ul style="list-style-type: none"> (i) an offence under one or more of sections 233A to 234A (people smuggling); (ii) an offence of trafficking in persons; (iii) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern <p>whether or not the person, or another person, has been convicted of an offence constituted by the conduct.</p>
501(6)(c)	<p>Having regard to either or both of the following:</p> <ul style="list-style-type: none"> (i) the person's past and present criminal conduct; (ii) the person's past and present general conduct; <p>the person is not of good character.</p>
501(6)(d)	<p>If the person was allowed to enter or remain in Australia, there is a risk that the person would:</p> <ul style="list-style-type: none"> (i) engage in criminal conduct in Australia; or (ii) harass, molest, intimidate or stalk another person in Australia; or (iii) vilify a segment of the community; or (iv) incite discord in the Australian community or a segment of that community; or (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.
501(6)(e)	<p>A court in Australia or a foreign country has:</p> <ul style="list-style-type: none"> (i) convicted the person of one or more sexually based offences involving a child; or (ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction
501(6)(f)	<p>The person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:</p> <ul style="list-style-type: none"> (i) the crime of genocide; (ii) a crime against humanity; (iii) a war crime; (iv) a crime involving torture or slavery; or (v) a crime that is otherwise of serious international concern.

Legislation	Character test ground
501(6)(g)	The person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979).
501(6)(h)	An Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

Annex B – case studies

Mr A is a temporary visa holder in Australia with an ongoing application for a permanent visa. Mr A has been convicted of violent assault related offences, for which he has received fines, good behaviour bonds and intensive correction orders. Mr A has not been sentenced to a term of imprisonment of 12 months or more and, under the current character provisions, he does not objectively fail the character test on the basis of his criminal history.

Mr A 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 grant of the visa are met, unless sufficient adverse information becomes available to find that Mr A does not pass the character test under subjective grounds.

Under the proposed designated offences ground in the Migration Amendment (Strengthening the Character Test) Bill 2018, Mr A would 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.

Mr B is an unlawful non-citizen in immigration detention with an ongoing application for a temporary visa. Mr B has been convicted of sexually based offences in Australia against an adult, for which he received fines and community correction orders. Mr B has not been sentenced to a term of imprisonment of 12 months or more, or convicted or found guilty of a sexually based offence involving a child. As such, under the current character provisions, he does not objectively fail the character test on the basis of his criminal history.

Mr B remains eligible for the grant of a temporary visa provided all criteria for grant of the visa are met, unless sufficient adverse information becomes available to find that Mr B does not pass the character test under subjective grounds.

Under the proposed designated offences ground in the Migration Amendment (Strengthening the Character Test) Bill 2018, Mr B would objectively fail the character test as he has been convicted of a sexually based offence, which is punishable by imprisonment for a maximum term of ten years.

Mr C is an adult permanent visa holder in Australia who has links to youth gangs. Mr C was found guilty without conviction for theft related offences, for which he received a youth supervision order. He subsequently was also convicted of a violent offence and sentenced to a period of four months imprisonment. Mr C has not been sentenced to a term of imprisonment of 12 months or more and, under the current character provisions, does not objectively fail the character test on the basis of his criminal history.

Mr C's visa cannot be considered for cancellation under section 116(1)(e) of the Act on the basis that he may present a risk to the community, as this power does not apply to permanent visa holders who are in Australia.

Mr C will remain in Australia as the holder of a permanent visa, unless sufficient adverse information becomes available to find that Mr C does not pass the character test under subjective grounds.

However, under the proposed designated offences ground in the Migration Amendment (Strengthening the Character Test) Bill 2018, Mr C would 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.