

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
legcon.sen@aph.gov.au

22 August 2019

Dear Committee Secretary

Re: Inquiry into the Migration Amendment (Strengthening the Character test) Bill 2019

1. Thank you for inviting the ANU College of Law Migration Program to make a submission to the Committee's inquiry into the proposed legislation. The Migration Program has closed at ANU, and I write in my role as a Visiting Academic at the ANU College of Law. I am joined in this submission by a professional colleague, Sergio Zanotti Staglitorio.¹

2. We have grave concerns about the intent and impact of the proposed legislation. Many submissions to the inquiry have raised these concerns and in particular have focused on serious repercussions of the Bill with regard to those under 18 years of age, children, families and humanitarian and refugee visa holders as well as the impact on the courts and breaches of human rights. We endorse these concerns.

3. Our submission's focus is on the expanded *Character test* under s 501(6) and the definition of '*character concern*' under s 5C of the Migration Act 1958 (Cth). The amendments expand the *Character test* from a sentence-based framework to a test that also involves convictions, whether or not those convictions are followed by sentences. We join with others who have voiced concerns that the proposed amendments are fraught with difficulties that may lead to the violation of fundamental human rights.

4. These provisions seek to 'frame' conduct of a visa holder that has taken place overseas (and led to convictions) within the laws of the Australian Capital Territory. These provisions fail to take into account the mental element of an offence (*mens rea*) or possible defences and in doing so diminish the importance of the courts.

¹ BE GCertAustMigLawPrac JD GDipLegPrac.

5. Indeed, the explanatory memorandum to the Bill reinforces the concept that the Minister will take on the role of the courts in “determining individual circumstances and the severity of the conduct...” regardless of previous court decisions.

“The amendments expand the framework beyond a primarily sentence-based approach and instead allow the Minister or delegate to look at the individual circumstances of the offending and the severity of the conduct”.

Change of focus from *punished* to *punishable*

6. The proposed changes to legislation focus on acts or omissions that are *punishable*, not acts or omissions for which a person was necessarily *punished*. There are circumstances where a law criminalises certain conduct but gives the courts the power to dispense with punishment if some conditions are met. There are many circumstances where a court has no option but to convict a person and yet, given the unique circumstances of a particular case, decides that it would be unjust to punish that person and so does not punish them.

The current *Character test*

7. Under s 501 of the *Migration Act 1958* (Cth), the Minister has the discretionary power to refuse a visa application or to cancel a visa if a non-citizen does not satisfy the *Character test*, as defined under s 501(6). Indeed, if a person satisfies s 501(3A), the Minister is obliged to cancel that person’s visa.

8. Under s 501(6)(a), one of the ways of failing the *Character test* is by having a ‘*substantial criminal record*’, as defined under s 501(7). To oversimplify the latter provision, whether a person has a ‘*substantial criminal record*’ depends on whether that person has been sentenced to death or to imprisonment for 12 months or more.

9. Presently, a conviction of itself does not result in failure to satisfy the *Character test*, except for the following types of convictions:

- convictions for offences committed while a person is in immigration detention or while escaping immigration detention: s 501(6)(aa);
- convictions for escaping from immigration detention: s 501(6)(ab);

- convictions involving child sexual abuse: s 501(6)(e).

Proposed changes to the *Character test*

10. The Bill would introduce a further way in which a person would fail the *Character test*, namely by having been convicted of a '*designated offence*' (a newly defined term), whether or not they have been sentenced for that offence.

11. The definition of '*designated offence*' is broad and essentially encompasses the following physical elements (*actus reus*) under the new 501(7AA)(a), whether the offence is against a law in force in Australia or a foreign country:

- Acts of violence against a person: s 501(7AA)(a)(i);
- Non-consensual sexual conduct, including acts of indecency: s 501(7AA)(a)(ii);
- Breaching a court or tribunal order: s 501(7AA)(a)(iii);
- Using or possessing a weapon: s 501(7AA)(a)(iv);
- Aiding, abetting, counselling, procuring the commission of any of those offences: s 501(7AA)(a)(v);
- Inducing the commission of any of those offences: s 501(7AA)(a)(vi);
- Being (directly or indirectly) knowingly concerned in, or a party to, the commission of any of those offences: s 501(7AA)(a)(vii);
- Conspiring to commit any of the above offences: s 501(7AA)(a)(viii).

12. A distinction is made between an offence against a law in force in Australia and in a foreign country:

- Under the new s 501(7AA)(b), an offence against a law in force in Australia is a '*designated offence*' only if it is punishable by imprisonment for life, for a fixed term of not less than 2 years or for a maximum term of not less than 2 years;
- Under the new s 501(7AA)(c), an offence against a law of a foreign country is a '*designated offence*' only if, had it been committed in the Australian Capital Territory (the Territory), the act or omission constituting the offence would have constituted an offence against a law of the Territory (the '*Territory offence*') and

the *Territory offence* is punishable by imprisonment for life, for a fixed term of not less than 2 years or for a maximum term of not less than 2 years.

13. The explanatory memorandum to the Bill explains that section 501(7AA) (b) “sets an objective standard for determination of what constitutes a *designated offence*” and this ensures that discretionary visa cancellations and refusals are based on “objective standards of criminality and seriousness”.

14. As the intent of the Bill is to focus on serious crimes, we provide some hypothetical examples of how fraught the proposed legislation would be in cases of past serious crimes committed in a foreign country.

Hypothetical examples of the difficulties in ‘framing’² conduct

15. Whether an act or omission that constituted an offence against a law in force in a foreign country is a ‘designated offence’ depends on two requirements being satisfied:

- that act or omission would have constituted a *‘Territory offence’* if it had taken place in the Territory: s 501(7AA)(c)(i); and
- if that act or omission had taken place in the Territory, it would have been punishable in the Territory for life, for a fixed term of not less than 2 years or for a maximum term of not less than 2 years: s 501(7AA)(c)(ii).

Example 1

- *it is an offence against a law of a hypothetical country for a person who is 18 years old or more to have sexual intercourse within the boundaries of that country with another person without consent from that other person;*
 - *under that law, persons who are less than 18 years old are deemed not to consent to any sexual intercourse. In other terms, actual consent on the part of individuals who are less than 18 is irrelevant for the purposes of the above offence;*
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² ‘framing’ is not a term used in the Bill, or the Explanatory Memorandum. It is a term we utilise to illustrate how the proposed changes will take effect.

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- *that offence is punishable in that country by imprisonment for a maximum term of 15 years;*
 - *Person A who is 18 years old has sexual intercourse with Person B who is 17;*
 - *given that Person B was deemed not to have consented, Person A is convicted of the relevant offence in that country;*
 - *whether or not there was actual consent on the part of Person B was never determined at the trial, as it was irrelevant to the offence.*
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16. In contrast, the *Crimes Act 1900* (ACT) includes the following provisions:

54 Sexual intercourse without consent

(1) A person who engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

...

55 Sexual intercourse with young person

...

(2) A person who engages in sexual intercourse with another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 14 years.

17. In that hypothetical example, whether it is an offence against a law of the Territory for an 18-year old to have sexual intercourse with a person who is 17 years old depends on whether or not there has been actual consent on the part of the latter. The Territory would convict if there were no actual consent and would not convict if there were actual consent.

18. The problem faced by the Minister in this case would be determining whether there was actual consent in our hypothetical example. This remains unknown, as that was not determined at the trial in the foreign country.

19. The only way to determine that question would be for the Minister to step into the shoes of the trial judge that convicted Person A and “reopen” the trial. That raises concerns regarding Chapter III of the Australian Constitution.

Example 2

- a law of a hypothetical country criminalises murder and imposes a penalty of imprisonment for a maximum of 25 years;
 - under that law, duress is not a defence to murder;
 - therefore, whether the person who committed murder was under duress was not determined at the trial, as it was unnecessary to make a finding in that respect.
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20. In contrast, subsection 40(1) of the *Criminal Code Act 2002* (ACT) reads as follows:

A person is not criminally responsible for an offence if the person carries out the conduct required for the offence under duress.

21. Once again, the only way the Minister could answer that question is by stepping into the shoes of the trial judge and determining whether the accused was under duress.

Example 3

- the law of a hypothetical country criminalises a given conduct (for example breaching a particular type of court order) even when the requisite *mens rea* is not present. In other words, it is an offence of absolute liability;
 - a person commits an offence against a law of a foreign country by not complying with a court order in that country, but does so with neither intention nor negligence;
 - whether the *mens rea* was present was not determined at the trial, as the offence was one of absolute liability in the foreign country and it was unnecessary to find whether the required mental element was present.
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22. In Australian criminal law, there are usually two elements to a criminal offence: the physical element (*actus reus*) and the mental element (*mens rea*), except for offences of absolute liability. Interestingly, the Bill only (expressly) refers to the physical element.

23. There is no express reference in the Bill to the *mens rea* of an offence. Consequently, it is impossible to determine whether the above conduct would be punishable in the Territory, for it would only be punishable if at least one of the relevant mental elements were established. The only way the Minister could make that determination is by stepping into the shoes of the trial judge.

A person of ‘character concern’

24. Items 1 to 4 of the Bill expand the definition of a person of ‘character concern’ under s 5C of the *Migration Act 1958* (Cth) by including persons who have been convicted of a ‘designated offence’, which is defined under s 5C(1)(a) with the same words employed in the definition of ‘designated offence’ under s 501(7AA).

25. Section 336E ‘decriminalises’ the disclosure of identifying information if the person whose details are disclosed is of ‘character concern’. This would result in the disclosing of identifying information of individuals, in effect a form of public ‘naming and shaming’.

Impact on Human rights

26. We acknowledge and support the numerous submissions to the Inquiry that have raised concerns regarding the potential impact on human rights.

27. Despite the discretionary nature of the majority of the provisions within the Bill, the retrospective nature of the provisions raises the very real potential for indefinite detention of stateless persons, separation or detention of children and families and deep psychological trauma to those who have their visas cancelled. *Attachment A* of the Explanatory Memorandum: *Statement of Compatibility with Human Rights*; expands on the impact the Bill would have on Australia's international obligations. We submit that the conclusions reached in this section ignore the current realities the character provisions are having on individuals, families and those who hold protection or humanitarian visas.

Conclusion

28. The expansion of the character provisions within the *Migration Act 1958* (Cth) relies upon an 'objective' consideration of past court decisions by the Minister. We submit that a consideration such as this would by-pass crucial elements of judicial decision making and would impact adversely on Australian citizens, permanent residents, and potential migrants and visitors. In doing so we invite the committee to consider the numerous appeals and cases before the Tribunal that detail at length the pitfalls in the decision making under the current provisions. In addition, we invite the committee to consider the impact on the families of those who have had their visa cancelled under the current regime and the number of people facing indefinite detention due to their status as stateless or refugee visa holders.

Sergio Zanotti Stagliorio

Marianne Dickie