



Immigration Advice
and Rights Centre

20 December 2021

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Re: Review into the Migration Amendment (Strengthening the Character Test) Bill 2021

The Immigration Advice and Rights Centre (**IARC**), established in 1986, is a community legal centre in New South Wales specialising in the provision of advice, assistance, education, training and law and policy reform in Australian immigration and citizenship law. IARC provides free and independent advice. IARC also produces client information sheets and conducts education/information seminars for members of the public.

IARC welcomes the opportunity to comment on the Committee's review into the *Migration Amendment (Strengthening the Character Test) Bill 2021 (Bill)*. The *Bill* seeks to amend the *Migration Act 1958* (Cth) (**Act**) to provide for additional grounds for non-citizens who have been convicted of a 'designated offence' to be considered for visa refusal or cancellation. Proposed s501(7AA) identifies that a 'designated offence' is an offence against a law in force in Australia, or a foreign country, in relations to which any of the following conditions are satisfied:

a) one of more of the physical elements of the offence involves:

- violence, or a threat of violence, against a person;
- non-consensual conduct of a sexual nature;
- breaching an order made by a court by a court or tribunal for the personal protection of another person;
- using or possessing a weapon;
- ancillary offences in relation to a 'designated offence' referred to above including:

- aiding, abetting, counselling or procuring the commission of a 'designated offence';
 - inducing the commission of a 'designated offence';
 - being in any way (directly or indirectly) knowingly concerned in, or a party to, the commission of a 'designated offence'; or
 - conspiring with others to commit an offence that is a 'designated offence'.
- b) for an offence against a law in force in Australia that is punishable by imprisonment for life, imprisonment for a fixed term of not less than 2 years or imprisonment for a maximum term of not less than 2 years; or
- c) 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 and would have been punishable under the laws of the Territory by imprisonment for life, imprisonment for a fixed term of not less than 2 years or imprisonment for a maximum term of not less than 2 years.

Proposed s 501(7AC) provides that for an offence involving violence against a person, a person's conviction for an offence of common assault, or an equivalent offence, will not be a conviction for a designated offence unless the act constituting the offence:

- causes or substantially contributes to bodily harm to another person, or harm to another person's mental health (within the meaning of the *Criminal Code*), whether temporarily or permanently; or
- involves family violence (as defined by subsection 4AB(1) of the *Family Law Act 1975*) by the person in relation to another person.

Under the proposed amendments, a non-citizen will fail the character test under the *Act* if they are convicted of a designated offence regardless of the circumstances surrounding the offence or whether a custodial sentence is imposed. This, in turn, will trigger the discretion to refuse or cancel their visa.

The proposed amendments are unnecessary

The Committee would be aware that under existing provisions a person will fail the character test under s501(6) of the *Act* if they have a substantial criminal record, which includes a sentence to a term of imprisonment of 12 months or more¹, and will also fail the character test if, *inter alia*:

¹ See s501(6)(a) and s501(7) of the *Act*.

- the Minister reasonably suspects that the person has been associated with a group, organisation or person who has been involved in criminal conduct²; or
- having regard to their past and present criminal and general conduct the person is not of good character³; or
- there is a risk that the person would engage in criminal conduct in Australia or represent a danger to the Australian community or 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 way⁴.

Existing provisions allow the Minister to have regard to the conduct of the person, the sentence imposed or the risk they pose to the community before determining if they fail the character test under the Act and, if they do, whether the discretion to refuse or cancel their visa should be exercised.

The proposed amendments, however, would see an increasing number of people automatically fail the character test and be required to plead the reasons why they should not be removed from their family and community before any meaningful consideration is given to the circumstances surrounding their conviction or whether they pose a risk of harm to the community. While it is true that there remains a discretion under the *Act* to refuse or cancel a visa, the amendments would result in unnecessary distress for Australian families and would see to the permanent exclusion⁵ of many who do not currently fail the character test. This is because Direction No. 90, through its guided principles, direction to decision makers and the mandatory 'Primary' and 'Other' considerations makes the refusal or cancellation outcome more likely.

Impact on families and the community

The decision to cancel or refuse a person's visa under the character provisions and the removal that inevitably follows can have devastating consequences for all involved including the non-citizen, their family, community and, in some cases, the victims of the offence. IARC is aware of numerous people who have been removed from Australia following a decision under the character provisions and, in many of those cases, the removal has left families broken and children without a parent and at great risk of intergenerational disadvantage. The proposed amendments will see to the breakdown of a greater number of Australian families and community.

² See 501(6)(b) of the *Act*.

³ See s501(6)(c) of the *Act*.

⁴ See s501(6)(d) of the *Act*.

⁵ Their permanent exclusion arises from the operation of public interest criterion 4001 and special return criterion 5001 in the Migration Regulations 1994 (Cth).

The case study below demonstrates how the proposed amendments will likely impact the most vulnerable members of our community.

Case study: Allen

Allen arrived in Australia in 1950 at the age of 10 from [REDACTED]. He became married in [REDACTED] and has [REDACTED] adult Australian children and [REDACTED] grandchildren from that relationship. [REDACTED] Allen was diagnosed with schizophrenia. The condition, which has been left untreated, was instrumental to him losing his employment, marriage and ultimately becoming homeless. Allen is now [REDACTED] living rough he has re-established a relationship with his two children and their families.

Allen is convicted of an offence involving violence for punching a man he believed was trying to steal his belongings while he was sleeping in the park. Allen is given a non-custodial sentence.

Under the proposed amendments, the discretion to cancel Allen's visa is automatically engaged. Allen is issued with a notice that the Department intends to consider cancelling his visa. Due to his circumstances and mental health, Allen does not respond to the notice and his visa is cancelled.

The Minister finds that violent offences are viewed very seriously and that the protection of the Australian community justifies the cancellation of Allen's visa. The decision record notes that there is no evidence that the best interests of any minor children would be affected by the decision. While the Minister acknowledged that Allen has lived in Australia for almost his entire life, the Minister finds that there is no evidence that Allen has strong links to family or business and, in any event, the protection of the Australian community outweighs any argument Allen could have made about the impediments to his removal.

Allen will be removed from Australia, where he has lived for [REDACTED] years, and faces permanent separation from his children, grandchildren, and community.

Retrospectivity

Item 7 to the Bill identifies that the proposed amendments will apply retrospectively to any non-citizen who committed or was convicted of the relevant designated offence before, on or after the commencement of the item. No persuasive argument has been advanced to justify the retrospective operation of the Bill which would see non-citizens fail the character test and face removal from Australia for relatively minor historic offences.

Indefinite detention

Where the power to cancel or refuse a visa is exercised in relation to a non-citizen who has engaged Australia's non-refoulment obligations, the Explanatory Memorandum to the Bill identifies that the person cannot be removed to the country of feared harm. The likely consequence, therefore, is that the non-citizen will face the prospects of indefinite detention⁶.

Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) relevantly provides:

Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention...

The Draft General comment No.35 on Article 9 of the ICCPR identifies that "the notion of "arbitrariness" is not equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law⁷. In addition to the known social and psychological harm that will follow, the indefinite detention of non-citizens for relatively minor offences will likely breach Australia's international obligations.

Conclusion

No persuasive argument has been advanced as to why existing provisions are not sufficient to refuse or cancel the visa of a non-citizen who poses an unacceptable risk to the community. It is our view that the proposed amendments are not necessary and will result in the further breakdown of families and communities. The Committee should be mindful that it is no purpose of the character provisions to impose further punishment on a non-citizen who has been convicted of a criminal offence - however serious. What is relevant to the exercise of discretion is the protection of the Australian

⁶ See ss 197C, 189 and 501E of the Act.

⁷ At paragraph 13. See also cases discussed in the Australian Human Rights Commission report No.43 Mr NK v Commonwealth of Australia (Department of immigration and Citizenship) (2011) and the findings under section 6 of the report.

community and other legitimate objectives that arise from the *Act*. The *Bill* does not advance those objectives.

We would welcome the opportunity to expand on any aspect of our submission.

Kind regards,

Ali Mojtahedi
Principal Solicitor