7 August 2019

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Dear Committee Secretary

SENATE INQUIRY INTO MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2019 [PROVISIONS]

Oz Kiwi thanks the **Legal and Constitutional Affairs Legislation Committee** for the invitation to make a submission to the Senate inquiry into the *Migration Amendment (Strengthening the Character Test) Bill 2019*.

Oz Kiwi is the peak body for the issues affecting the rights of New Zealanders residing in Australia. Oz Kiwi thanks the Committee for the opportunity to comment on the inquiry into the *Migration Amendment (Strengthening the Character Test) Bill 2019* Provisions.

Oz Kiwi will not be making a submission to the current inquiry as our position on this matter is already on the record with the Committee [see our hearing evidence from July, 2018]. Suffice to say, the latest Bill will only further exacerbate the negative impacts on temporary visa-holders, including New Zealanders residing long-term on the Special Category Visa.

Our concerns are around the disproportionate impact the current and proposed amendments to the character test have or will have on New Zealanders residing in Australia. Under the proposed 'designated offence' category, the offence of which the person has been convicted need only attract at least a maximum sentence of two years. Any person currently facing court over a charge or charges that carry a two year sentence would also face the double jeopardy of deportation if convicted.

More than 1,500 New Zealanders have been deported since December 2014 when the character test was last amended. They are the largest national cohort being deported under the current law, over half the total number, despite New Zealanders only being approximately 2.5 per cent of the total Australian population. The proposed *Migration Amendment Bill 2019* will only exacerbate the situation.

History of New Zealanders residency in Australia

New Zealanders are in a unique position given they are able to live and work in Australia indefinitely without needing a permanent visa. This 'open door' policy has existed between the two countries since European settlement, and confirmed in the Trans-Tasman Travel Arrangement (TTTA) announced in 1973.

New Zealanders arriving in Australia have been granted a Special Category Visa (SCV) since the introduction of the universal visa system in 1994. The SCV is a nationality-specific visa that allows New Zealand citizens to reside indefinitely in Australia. Since 2001 ministerial declarations have only extended 'permanent resident' [PR] status under citizenship law to certain SCV holders who were living in Australia on or before 26 February 2001. Post-26 February 2001 arrivals are deemed to be ‘temporary’ residents as the SCV only offers a restricted pathway to PR.

Despite New Zealanders effectively holding permanent residence prior to 2001, their take up of citizenship has been lower than other foreign nationals. This is in part due to the considerable rights they held. New Zealanders arriving after February 2001 cannot apply for citizenship, unless they first obtain a permanent visa such a skills-based visa.

Deportation Policy

Oz Kiwi accepts that Australia is an independent sovereign State and, as such, has the right to make laws for the peace and security of Australia. Oz Kiwi has no objection with deportation of non-citizens who commit serious offences in Australia, in a broad policy sense. However, the issue is not with deportation, but the draconian way Section 501 is applied, in particular the:

- virtually unfettered powers granted to the Minister, being the executive arm of government, where such powers are not subject to the scrutiny of the Legislature and Upper House;
- attempt to usurp of the functions of the Judicial arm of government, at least in relation to merits review, antithetical to the separation of powers doctrine which underpins our democracy;
- failure to consider contextual matters – for example, a person who has lived in Australia for 30 years having come to Australia has a young child is a product of Australia, irrespective their country of origin; and
- practical implications of the Minister being able to properly exercise their discretion in relation to Section 501 of the Migration Act 1958 (Cth) if the proposed amendment does not allow for delegation of that authority.

Impact on long-term residents

Oz Kiwi has long been concerned about the impact visa cancellation may have on a person who has been residing in Australia for a long period of time. The proposed *Migration Amendment Bill 2019* will cast the net wider. Prior to 1998, the deportation of non-citizens who had committed criminal offences was covered by Sections 200 and 201 of the Migration Act 1958 (Cth). Under these sections, the Minister could only deport a non-citizen who had been convicted of a crime (punishable by imprisonment for two years or more) if the non-citizen had been resident in Australia for less than ten years. Subsequent amendments to the Act in relation to Section 501, have been used to cancel the visas of permanent residents who have lived in Australia for more than ten years.

Disproportionate number of New Zealanders affected

Since the Section 501 law change in December 2014 the number of New Zealanders held in Australian immigration detention has increased markedly, to the point where New Zealanders have become the largest nationality group. Several factors have led to the increasing number of New Zealanders in immigration detention, including:

- that any individual who has resided for a decade is no longer protected; and
- retrospective application of the amendment so that any previous conviction can be considered; and
- cumulative application where shorter sentences can be collated to make 12 months; and
- reduction from 24 months to 12 months of sentencing fails the character test.

The lower take-up rate of citizenship, especially by long-term New Zealand residents of Australia, means they are particularly vulnerable to the Section 501 amendment.

Impact on families

Under Article 17 of the International Covenant on Civil and Political Rights (ICCPR), all people have the right to be free from ‘arbitrary or unlawful interference’ with their family. In some circumstances, the refusal or cancellation of a person’s visa leading to their subsequent detention and/or removal from Australia could result in Australia being in breach of its obligations under those articles.

Individuals whose visas are cancelled under the *Migration Act (1958)* are often long-term residents who either moved to Australia as a child, or who have lived here for many years. Many of them have family members in Australia who are long-term residents themselves or even Australian citizens.

The lengthy detention and/or removal of a person from Australia after their visa cancellation may result in that person being separated from family members who reside in Australia. Depending on the reason they failed the character test, a person who is removed may then effectively be permanently excluded from Australia, and consequently prevented from even visiting family members in Australia.

RECOMMENDATIONS

Oz Kiwi recommends that if the net is going to be cast wider in relation to designated powers:

- the powers of Minister should be curtailed;
- a merits review process be retained; and
- any non-citizen who has either lived in Australia for more than 10 years, or who arrived in Australia before the age of 10, should not have their visa cancelled.

Yours sincerely

Joanne Cox
Acting Chair, Oz Kiwi