



Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Strengthening the Character Test) Bill 2019 [Provisions]

Department of Home Affairs responses to Questions on
Notice.

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**HOME AFFAIRS PORTFOLIO
DEPT HOME AFFAIRS**

PARLIAMENTARY INQUIRY QUESTION TAKEN ON NOTICE:

*Senate Legal and Constitutional Affairs Legislation Committee - Migration
Amendment (Strengthening the Character Test) Bill 2019 [Provisions]*

19 August 2019

QoN Number: SCLA/001

Subject: List of Designated Offences

Question Submitted by: Kim Carr

Question:

Senator KIM CARR: Would you be able to provide the committee with a complete list of all measures across the Commonwealth that would meet those criteria?

Mr Willard: The purpose of the drafting and the description of the designated offences was to cover all such offences that might be committed in the various jurisdictions.

Senator KIM CARR: Yes. So you have a list of those?

Mr Willard: No, because the intent is to give effect to the type of offence without having to specify each individual offence.

Senator KIM CARR: Why not? You just said there is a clear standard. Why can't you provide us with a list?

Mr Willard: I don't have a list available. The purpose of the bill—

Senator KIM CARR: You can take that on notice, surely.

Mr Willard: I can take it on notice—if it is possible to provide such a list.

Answer:

Each State and Territory has the power to enact its own criminal laws. The Bill does not list specific offences or seek to prescribe them in legislation as offences vary in name and characterisation across each State and Territory, and may change at any time.

To ensure that relevant offences across all States and Territories are captured, both on commencement of the Bill and in the future, a designated offence is defined by the Bill as an offence in force in Australia or a foreign country:

- where one or more of the physical elements of the offence involves certain factors, such as use or possession of a weapon or violence against a person;
- the offence is punishable by imprisonment for life or a fixed or maximum sentence of not less than 2 years imprisonment; and
- where the offence is contrary to law in a foreign country, the act or omission that constitutes that offence is assumed to have taken place, and be against a law, in the Australian Capital Territory and be punishable in the same way as set out above.

To provide a comprehensive list of all offences in Australia which would fall within the definition of a 'designated offence' would be an onerous task, taking considerable time to compile and verify. Even were such a list compiled, it would be out-of-date when relevant criminal legislation in the States and Territories changed. This can happen quickly and at any time.

If the Bill listed offences or prescribed them in legislation, this would require continual amendment as and when criminal law changed. It is for this reason that the Bill was drafted in this way; it obviates such amendment.

The definition of a 'designated offence' as set out in the Bill provides an objective, readily discernible ground for failing the character test which will remain up-to-date and applicable, irrespective of changes to State and Territory criminal law.

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*Senate Legal and Constitutional Affairs Legislation Committee - Migration
Amendment (Strengthening the Character Test) Bill 2019 [Provisions]*

19 August 2019

QoN Number: SCLA/002

Subject: Comparison between Direction No 79 and 65

Question Submitted by: Kim Carr

Question:

Senator KIM CARR: Sure, but 79 is the operative one now. What discretion is available to a delegate to not cancel the visa of a person who fails the character test due to a past conviction?

Ms De Veau: I think it is included in here that there is a discretion to consider the revocation and whether that's enlivened. Under the preamble and objectives it doesn't indicate that a decision-maker must consider the cancellation. When the discretion to consider revocation is enlivened—that's in relation to revocation, and it's the same in relation to refusal and granting—once they have made a decision to consider whether there will be a cancellation or a revocation, they move into those other considerations. So it is not mandatory to consider to revoke or to—

Senator KIM CARR: I see. And how is that different from the previous direction?

Ms De Veau: I'd have to take that on notice and make a comparison with direction No. 65.

Answer:

Consistent with Direction no. 65, Direction no. 79 provides guidance to delegates exercising their discretion under section 501 and 501CA of the *Migration Act 1958*.

A Direction issued by the Minister under section 499 of the *Migration Act 1958* requires a person or body having functions or powers under this Act to take into account certain factors when performing those functions, or exercising those powers.

The new ministerial direction ensures that crimes of a violent nature, particularly against women and children, are viewed very seriously when considering character-related visa refusals, cancellations and revocations decisions, regardless of the sentence imposed.

- Paragraph 6.3(3) of the overarching principles of the Direction now includes reference to women and children.

- A new subparagraph (b) was included in paragraphs 9.1.1, 11.1.1 and 13.1.1. These paragraphs provide that in deciding whether to refuse or cancel a visa on character grounds under section 501, or to revoke the mandatory cancellation of a visa under section 501CA, a decision-maker must give consideration to the nature and seriousness of a non-citizen's criminal offending or other serious conduct by having regard to a number of factors. Those factors now include the principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed.
- Consequential amendments were made to the requirement for decision-makers to have regard to the sentence imposed by courts in newly renumbered paragraphs 9.1.1(1)(f), 11.1.1(1)(f) and 13.1.1(1)(d) to exclude this requirement for subparagraph (b), and remove duplicate references to minors in newly renumbered paragraphs 9.1.1(1)(c), 11.1.1(1)(c) and 13.1.1(1)(c).

Direction no. 79 did not change a delegate's ability to consider any other relevant factors or change the weight given to other considerations when considering whether to exercise their discretion under section 501 or 501CA of the Migration Act, including, but not limited to:

- 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.

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PARLIAMENTARY INQUIRY QUESTION TAKEN ON NOTICE:

*Senate Legal and Constitutional Affairs Legislation Committee - Migration
Amendment (Strengthening the Character Test) Bill 2019 [Provisions]*

19 August 2019

QoN Number: SCLA/003

Subject: Response to the Scrutiny of Bills Committee

Question Submitted by: Kim Carr

Question:

Senator KIM CARR: And there has been some evidence that there is a difference in the legal interpretation. But you'll get the Hansard, no doubt. Have you or the minister responded to the Scrutiny of Bills Committee's concerns?

Ms De Veau: I don't know that there has been a response to the findings of the Scrutiny of Bills Committee. I know that, in relation to the human rights one, the minister's responses are included in the report, but I don't know about the Scrutiny of Bills Committee one.

Senator KIM CARR: The Scrutiny of Bills Committee, from memory, has reissued its concerns, and I'm just wondering if there has been a further response.

Ms De Veau: I'll have to take that on notice. I'm not aware of one.

Answer:

No. The Department has not provided an additional response to the Scrutiny of Bills Committee. The Committee considered the Bill in 2018 and the Minister responded at that time. The Committee reiterated its previous findings and has not asked for further comment from the Minister.

**HOME AFFAIRS PORTFOLIO
DEPARTMENT OF HOME AFFAIRS**

PARLIAMENTARY INQUIRY QUESTION TAKEN ON NOTICE

*Senate Legal and Constitutional Affairs Legislation Committee - Migration
Amendment (Strengthening the Character Test) Bill 2019 [Provisions]*

19 August 2019

QoN Number: SCLA/004

Subject: Percentage of Revocations

Question Submitted by: Senator Kim Carr

Question:

Ms De Veau: If the minister makes a decision to cancel without natural justice, doing that has to be in the national interest. It's done without natural justice, but there is the ability, once the decision is made, for the person to seek a revocation, and, in that revocation process—

Senator KIM CARR: Is it to the Federal Court?

Ms De Veau: No, the revocation process is to the minister. In a sense, it moves what would normally be the natural justice component so that, rather than having that before the decision, the decision is made and the person then makes their submissions for revocation to the minister and puts forward the subjective features they want to have taken into account. I can take it on notice—the percentage of revocations is quite significant, particularly as it applies to the area where there has been mandatory cancellation, but also where the minister has made a decision.

Answer:

**s501 character cancellations where revocation is available
- since 11 December 2014 by s501 power**

s501 Cancellation Power	Number of cancellations	Number that sought revocation	Percentage that sought revocation
s501(3A) Mandatory Cancellation	4458	3413	77%
s501(3)(b) No Natural Justice	52	17	33%
s501BA(2) Set Aside Non-Adverse No Natural Justice ¹	13	2	15%
Total	4523	3432	76%

¹ Section 501BA of the Act allows the Minister to set aside a decision of the AAT or delegate to revoke a mandatory cancellation decision, and cancel the visa, if the Minister is satisfied that cancellation is in the national interest.

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PARLIAMENTARY INQUIRY QUESTION TAKEN ON NOTICE:

*Senate Legal and Constitutional Affairs Legislation Committee - Migration
Amendment (Strengthening the Character Test) Bill 2019 [Provisions]*

19 August 2019

QoN Number: SCLA/005

Subject: How long has the Minister taken to consider a matter?

Question Submitted by: Kim Carr

Question:

Senator KIM CARR: There have been recent cases—various court proceedings—on the question of timing, haven't there? We've heard evidence today on that matter in regard to the issue of natural justice as well.

Ms De Veau: As to how long a person has?

Senator KIM CARR: No, how long the minister has taken to consider a matter.

Ms De Veau: There may have been. I'll have to take it on notice.

Answer:

There have been a number of judicial review proceedings where the applicants argued that the Minister did not have sufficient time to give genuine and realistic consideration to the cancellation of their respective visas under the character provisions of the Migration Act.

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Senate Legal and Constitutional Affairs Legislation Committee - Migration
Amendment (Strengthening the Character Test) Bill 2019 [Provisions]..

19 August 2019

QoN Number: SCLA/006

Subject: Appeals mechanism statistics for 501 Visa Refusals and Cancellations

Question Submitted by: Senator Kim Carr

Question:

Senator KIM CARR: Can I just follow up. I want to seek some further advice on the appeals mechanism statistics that the department provided. Of the 5,074 section 501 visa refusals and cancellations, how many were subject to appeal?

Ms Wimmer: We can take that on notice, but I can actually—no, I can't give you that information.

Ms De Veau: I think we will take that on notice. Senator, do you want that to merits review, or judicial review as well?

Senator KIM CARR: Could you give a statistical breakdown of all reviews and the nature of the review.

Ms De Veau: We should be able to that.

Senator KIM CARR: Thank you. I'm told that for the 2016-17 financial year 78 per cent of the 1,234 noncitizens whose visas were mandatorily cancelled sought revocation of the decision and that out of those the decision to revoke the cancellation occurred in approximately 35 per cent of cases. Are you able to confirm that figure? That's in one year.

Mr Willard: I've got the 2018 calendar year figure, Senator. It doesn't quite accord with the one that you have.

Senator KIM CARR: Could you give it to me annually and percentage wise, please, for our report.

Ms De Veau: We will do that, but I'm conscious that these provisions don't make any changes to the mandatory cancellation—

Senator KIM CARR: No, but I want to see what the level of appeal is, to what extent these measures are subject to appeal, and, on the discretion, of those that were cancelled through mandatory actions taken by the department, how many were subject to appeal. If you're saying there's a very important discretionary element there, where did the discretion set in—at the officer level or at the subsequent appeal?

Mr Willard: Senator, just to clarify the request—

Senator KIM CARR: This is section 501.

Mr Willard: It is mandatory cancellations and then looking at revocation outcomes of those cancellations.

Senator KIM CARR: You've indicated to this committee in evidence today that there

is a level of discretion by officers as to whether or not they proceed.

Ms De Veau: Both as to the discretionary provisions that this bill alters but also where there is mandatory cancellation and potential revocation.

Senator KIM CARR: Yes, that's right. I would like to know what the appeal mechanisms are. In the case of the AAT decisions, how many were set aside by the minister in each year and what was the rate at which you sought to set aside decisions? I understand that in 2016-17, of the cases reviewed, 29 were varied or set aside. Are you able to confirm that?

Ms De Veau: I'm not quite sure. Senator, can you assist with the source of your statistics?

Senator KIM CARR: The statistics are coming from the Bills Digest.

Ms De Veau: We'll check that.

Answer:

The table below provides the number of appeals to the AAT (merits review) and the courts (judicial review) following a s501 decision.

Since 11 December 2014, the Minister has made twelve (12) s501A decisions, using the non-delegable power to set aside a non-adverse decision of the AAT.

As the provisions in this Bill do not relate to mandatory cancellations, we have not included data on the revocations of mandatory cancellations.

s501 Decisions – Merits Review						
Financial Year	Applicant withdrawal	Department loss	Department win	Department withdrawal	Pending decision	Total
2014-2015			2			2
2015-2016	3	5	14			22
2016-2017	24	31	102	4		161
2017-2018	18	49	154	4		225
2018-2019	19	76	226	14		335
2019-2020	3	5	5			13
(Pending cases)					102	102
Total	67	166	503	22	102	860

s501 Decisions – Judicial Review						
Financial Year	Applicant withdrawal	Department loss	Department win	Department withdrawal	Pending decision	Total
2014-2015	1		3			4
2015-2016	16	7	26	11		60
2016-2017	13	10	68	15		106
2017-2018	51	29	95	36		211
2018-2019	21	37	135	27		220
2019-2020	1	5	6	4		16
(Pending cases)					167	167
Total	103	88	333	93	167	784