



27 November 2018

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

Dear Committee Secretary

## **SENATE INQUIRY INTO MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2018**

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 make a submission to the inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018.

This submission will focus on how the current *Migration Act 1958 (Cth)* (the Act) character test sees a disproportionate number of New Zealanders being deported, and raises concerns that the proposed *Migration Amendment Bill 2018* will exacerbate the situation.

### **Introduction**

For the best part of two centuries New Zealanders and Australians have been migrating, living, working, conducting business, and pursuing sporting and cultural activities between the two countries. Indeed, our countries share a largely common culture.

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. The strengthening of the free movement of people was subsequently recognised as an objective of both parties in the preamble to the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) of 1983. Free movement of people across the Tasman is also essential to the current Single Economic Market (SEM) agenda.

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. It has been included in both the repealed *Australian Citizenship Act 1948* and the *Citizenship Act 2007 (Cth)* as a visa that can fulfil permanent residence requirements, subject to ministerial declaration. However, since 2001 ministerial declarations have only extended 'permanent resident' status under citizenship law to certain SCV holders who were living in Australia by 26 February 2001.

### **New Zealanders low take-up of citizenship**

Historically New Zealanders have had a far lower citizenship take-up rate compared to other migrant groups as citizenship had little effect on their rights. Academics Paul Hamer<sup>1</sup> and Andrew Markus analysed Australian census data and found that of the 146,000 New Zealand-born migrants who arrived in Australia between 2002 and 2011, and still resident by 2016, only 8.4 percent had gained Australian citizenship. This

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<sup>1</sup> [Australian census data show collapse in citizenship uptake by New Zealanders](#), 23 August 2017.



compares to citizenship uptake rates of between 40 to 50 percent by 2016 for New Zealand-born people arriving in Australia between 1985 and 2000. The researchers ascribe the low numbers to the restrictions imposed in February 2001, denying Kiwis arriving after that point from applying directly for citizenship, unless they first obtained 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 that visa cancellation may have on a person who has been residing in Australia for a long period of time. The proposed *Migration Amendment Bill* 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

Since the s501 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 s501 amendment.

The number of New Zealanders being held in immigration detention was first recorded in March 2015<sup>2</sup>. They were the fifth largest group by nationality at 4.5 per cent (78 men and 6 women). By August of 2015 New Zealanders were the second highest national population group with 184 (including 19 women), behind Iranians at 407 people.

In June 2016 New Zealanders became the largest population group in immigration detention at 12.6 per cent with 199 New Zealanders (183 men and 16 women). They have remained the largest group; as of September 2018 there were 152 New Zealanders or 11.6 per cent of detainees (135 men and 17 women).

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<sup>2</sup> Department of Home Affairs, [Immigration Detention Statistics](#).

This figure contrasts with New Zealanders comprising approximately 2.5 per cent of the Australian population.

Since s501 was amended in December 2014 1,200 New Zealanders have been deported. Visa cancellations have increased tenfold under the revised s501. Of the 2,850 people deported between July 2014 and June 2017, 51 per cent were New Zealanders<sup>3</sup>.

The Commonwealth Ombudsman's report<sup>4</sup> from December 2016 illustrates the growth in deportation figures since 2015. Between 2006 and 2013 the annual figure fluctuated between 58 and 157. In 2014-15 it increased to 580 and doubled again in 2015-16 to 983. For the first two years following the s501 amendment 697 (57 per cent) of the 1,219 people deported were New Zealanders.

### **Impact on families**

Under Article 17 of the 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.

### **Character Concern**

This does not appear to be a defined term and should be defined.

### **Designated Offence**

Broadly speaking, Oz Kiwi sees no issue with the definition of designated offence, provided it is qualified by the Recommendations below.

## **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  
Deputy Chair, Oz Kiwi

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<sup>3</sup> Sydney Criminal Lawyers, [Paul Gregoire and Ugur Nedim](#), 7 March 2018

<sup>4</sup> [Administration of Section 501 of the Migration Act 1958](#) December 2016



**APPENDIX – CASE STUDIES OF NEW ZEALAND S501 DETAINEES**

No	Duration	Deported (Y/N)	Charges/Sentence	Length of time in Australia	Family residing in Australia
1	12 months	Appealing	Aggregated assault, grievous bodily harm	18 years as a school child.	Parents, three siblings, four children of his own. Extended family also in Australia.
2	2016	Deported	Criminal damage, theft, providing false details	Since 1982 aged 2	Parents, two siblings, two children, aunt and uncle plus cousins. Has no family in NZ
3	Since 2015	Appeal failed, volunteered to return to NZ and appeal from there.	Assault	Since 1985 aged 4	Mother, Australian partner and two children who are separated from him due to partner's health issues as she needs support of her family.
4	2015	Deported	12 month sentence for shoplifting	Since 1979 aged 6	Has a toddler child with current Australian partner. Also has three stepchildren with Australian partner. Has no family or connection to NZ.
5	Not available	Appealing	Juvenile gang member, drug addict, last sentenced in 2000. Served 4 of 6.5 years.	1982 aged 1	Australian wife helped him get clean from drugs, their newborn baby had died while he was in jail in 2004. He is very close to his nephews particularly and is the main male role model in their lives. Father, sisters, nieces and nephews live in Australia.
6	2016	Appealing	Theft, criminal damage, assault and drug possession related to his addiction	mid 1980's as an infant	Mother, aunt and uncle, siblings, cousins in Australia. Only elderly grandparents are in NZ.
7	2017	Appealing	14 months for assault (first offence)	Since 2006	Has an Australian partner and three young children.
8	2017	Appealing	2.5 years for possession of a gun. Juvenile offending including driving offences, breach of supervision order, one assault (only a fine) in New Zealand.  Driving offences, one count of possession of a gun in WA.	Since 2007	Mother lives in Australia. Australian partner and toddler child also reside in WA.
9	2017	Deported	numerous driving offences (fines) Drug possession dangerous weapon charge (18 months jail)	25 years	Mother, Australian partner and three Australian citizen children for whom he is sole carer. Was working in own business when arrested in 2016.
10	2017	Appealing	Supply of prohibited drug - 3.5 years (first conviction)	Since 1988	Mother, siblings and nieces and nephews in Australia. Does not know NZ and has no family there.

No	Duration	Deported (Y/N)	Charges/Sentence	Length of time in Australia	Family residing in Australia
11	2017	Appealing	assault (family violence) 12 months - served one third of that	Since 1990	Parents, siblings and one niece in Australia. Does not know NZ and has no family there. Separated from his partner with whom he has two young children.
12	Not available	Appealing	Wilful damage and theft first offence - 18 months fully suspended	Since 1988	Mother, siblings, Grandmother, aunts and uncles plus cousins in Australia. Extended family all here, no connection to NZ.
13	2016	Appealing	Assault (family violence) 18 months - fully suspended	Since 1998	Wife and nine children, ex-partner and one child, four grandchildren.
14	2016	Appealing	NZ: various minor offences - driving fines, common assault. One six month sentence for fraud - cheque forging in 1979.  Aust: driving while disqualified, drink driving (fines)	Since 2010	Picked up at Customs when re-entering Aust in 2016. No convictions with jail sentences in Aust, only one jail sentence in NZ dating from 1979.  Wife, children and grandchildren all reside in Aus.
15	Two years	Yes, can't afford to appeal the decision	4 years for drug offences and an action of attempt to maim injure or harm with a projectile	Arrived late 1990's, resided for 16 years.	Moved to Australia as a child with his parents and siblings who all still live in Australia. Has an Australian partner and young child.
16	3 years	Appealing deportation	Common assault, GBH	Has lived in Australia for 22 years	Has six children with two partners. They are all Australian citizens.