Submission to the Senate Legal and Constitutional Affairs Legislation Committee

regarding its inquiry into the provisions of the

Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011

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Introduction

This Bill seeks to further extend the laws and rules regarding the 'character test' in the Migration Act 1958. In our view the character test as it stands is already unsatisfactory, allowing a real prospect of arbitrary decisions being made which can produces unjust and disproportionate outcomes.

The risks of the existing character test were outlined in the Senate Legal and Constitutional Affairs Committee report in March 1998 into the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997 which introduced the current legislative framework for the test.

The provisions are already so broad as to risk politicised decision-making. The well-known case of Dr Mohamed Haneef demonstrated the sort of injustice that can occur when immediate political factors excessively influence decisions in this area.

The statistics provided in Attachment E from Submission 16 to this Inquiry from the Department of Immigration and Citizenship (DIAC) shows a sharp rise in the number of visa cancellation decisions made personally by the Minister – and thus exempt from Natural Justice and Merits Review – of 46 in the year 2006-07 and 36 in the year 2007-08, compared to decisions numbering in single figures in the preceding and following years. It is difficult to believe that consistently objective criteria were applied across this time frame.

Outline

The Explanatory memorandum states that a purpose of the Bill is:

> *'in part, in response to the criminal behaviour during the recent disturbances at the Christmas Island and Villawood Immigration Detention Centres, which caused substantial damage to Commonwealth property. It is intended that these strengthened powers will also provide a more significant disincentive for people in immigration detention from engaging in violent and disruptive behaviour, and will deal appropriately with those who, by engaging in criminal activity in immigration detention, demonstrate a fundamental disrespect for Australian laws, standards and authorities.'*

It is submitted that the existing character test and provisions of article 1F of the Refugee Convention are adequate to deal with these cases for the purposes of migration law. It is the role of the criminal law to deal with offences against the Commonwealth such as damage to Commonwealth property. It is not appropriate for the character test to be amended to provide a 'disincentive' for people to engage in 'disruptive behaviour'. The criminal law already has provisions for dealing with those engaging in violent behaviour and criminal activity.

The proposal to prevent someone from obtaining the full benefits of refugee protection because of what would otherwise be a minor conviction that does not fail the character test is an unwarranted, emotive and unprincipled response to some problems in immigration detention centres.

This does not address one of the major factors giving rise to the problem in the first place. It will set up two classes of people in the refugee and humanitarian category, as existed under the Temporary Protection Visa (TPV) model from 1999-2008. The TPV model was flawed for a number of reasons. There is no evidence it provided any sort of deterrent to refugees arriving by boat – if anything the evidence is to the contrary - and studies by mental health experts such as Dr Zachary Steele and Prof Derrick Silove show a significant "increase in risk for developing depression and post-traumatic stress disorder compared to refugees with permanent protection visas."[1]

The inability of the Department of Immigration and Ciitizenship (DIAC) to progress the cases of many people in immigration detention is a major cause of the frustration of detainees, leading to the riots. Admittedly DIAC is often unable to prevent the delay because they have not received security clearances for detainees. However, it is the inability of the security checking agencies to process the cases quicker that leads to the delays for DIAC and in turn means people are in detention for much longer periods than necessary.

Acting to reform this process is much more likely to have beneficial effects, compared to the measures in this Bill. Applicants who are assessed as meeting Australia's protection obligations could be given a release into the community with strict reporting conditions. Already there are a significant number of immigration cleared protection visa applicants living in the community who wait for periods in excess of 12 months for a security clearance. They remain on bridging visas, usually with permission to work, whilst this process is undertaken. WE are directly aware of several cases where the waiting time from a positive assessment, either by a case officer following an interview, or the Refugee Review Tribunal (RRT), exceeds 18 months.

The character test is already strong enough. Every person must pass the test before they get a visa for Australia – whether this is skilled, family reunion, spouse or refugee. This amendment means that people who meet Australia's protection obligations and are therefore positively assessed as a refugee will have a higher hurdle to meet than anyone else. Furthermore, they will be punished by only being granted a temporary visa which precludes family reunion and also precludes making any other applications. This reinstates one of the worst parts of the old TPV regime.

A similar change was introduced by the Howard government in 2001with the insertion of the following provision into the permanent protection visa criteria:

> 866.222A In the case of an applicant referred to in paragraph 866.211(a), the applicant has not, in the last 4 years, been convicted of an offence against a law of the Commonwealth, a State or Territory for which the maximum penalty is imprisonment for at least 12 months.
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> 866.222B In the case of an applicant referred to in paragraph 866.211(b), the applicant, and the claimant referred to in the paragraph, meet the requirement of clause 866.222A.

[1] "Temporary Protection Visas Compromise Refugees' Health: New Research", University of New South Wales, 30 January 2004. http://www.unsw.edu.au/news/pad/articles/2004/jan/TPV_HealthMNE.html

This meant that anyone who met the protection obligations requirement of s36(2), but did not meet the above criterion, would only be eligible for a Temporary Protection Visa subclass 785. The Refugee Law Guidelines (15.12.2-007 – 31.12.2007) stated:

> *'Migration law does not provide for the penalty actually imposed by the court or mitigating circumstances such as, the nature of the offence or other circumstances relevant to the offence committed to be taken into account.'*

This meant that although there may have been strong mitigating factors which were taken into account by a court exercising criminal jurisdiction to impose a lesser penalty, none of these mitigating factors were available to case officers.

A regulation change from 15 October 2007 inserted the new subclauses: 866.222A(2) and 866.222B(2), which are in identical terms:

> *(2) The Minister may waive the requirement under subclause (1) if the Minister is satisfied that it is in the public interest to do so.*

Although no guidelines regarding the exercise of the waiver were made available publically, in practice this meant that case officers were able to exercise their discretion and grant the permanent protection visa rather than leave the refugee in TPV limbo.

The proposed change to the character test will reintroduce an assessment based purely on conviction alone, regardless of mitigating circumstances. This is not an appropriate mechanism for administrative assessment and inserts a highly onerous provision when none is needed. It would be like inserting a provision in skilled migration that a person who has ever failed an exam could not be granted a permanent skilled migration visa.

The character test already has three threshold criteria for assessment. Section 501 provides that an applicant for a visa does not pass the character test if:

> (a) the person has a substantial criminal record (as defined by subsection (7)); or
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> (b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or
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> (c) having regard to either or both of the following:
>
> (i) the person's past and present criminal conduct;
>
> (ii) the person's past and present general conduct;
>
> the person is not of good character

The section further provides:

(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to 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 way.

It is contended that the existing provisions in s501 are more than adequate to deal with the issue of preventing those in 'detention from engaging in violent and disruptive behaviour, and will deal appropriately with those who, by engaging in criminal activity in immigration detention' as identified in the explanatory memorandum. The insertion of a new provision which makes the test simply one of conviction only, creates an unnecessary hurdle for those assessed as meeting Australia's protection obligations.

The criminal justice system can deal with these cases under existing laws. The character test is already strong enough, the proposed changes are not required.

Recommendation

That the Senate not support the legislation.