



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

28 November 2018

www.alhr.org.au

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

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Migration Amendment (Strengthening the Character Test) Bill 2018

Australian Lawyers for Human Rights (**ALHR**) welcomes the opportunity to make this submission in relation to the Migration Amendment (Strengthening the Character Test) Bill 2018 (the **Bill**).

Summary

1. The effect of the Bill is to further expand the powers of the Minister for Immigration, Citizenship and Multicultural Affairs (the **Minister**) to refuse to grant visas or to cancel visas by expanding the cohort of non-citizens who are considered for visa refusal or cancellation. Yet, there is little justification or evidence as to why the current legislative framework is inadequate. Given the serious consequences of visa cancellation on the rights of individuals and their families, it is incumbent upon the Government to provide evidence and justification as to why the proposed changes are necessary and proportionate. ALHR is concerned that the Bill lowers the threshold for visa refusal and cancellation in an unjustifiable manner. The Bill undermines the criminal law system's determinations about the risk a person poses to the community through sentences of imprisonment. The practical consequence of this Bill is that people who have been convicted of an offence, but have not received a sentence of imprisonment, will nevertheless be taken into detention and be subjected to a further decision-making process as to whether they pose a risk to the community.
2. ALHR also continues to have concerns because the current decision-making framework lacks the procedural safeguards necessary to ensure that Australia complies with its international human rights obligations. Given this lack of safeguards, ALHR advocates for a restriction of the number of people exposed to a risk of human rights violations, while the Bill seeks to do the opposite.
3. ALHR recommends that the Bill not be passed and should be withdrawn.

Background

4. The stated purpose of the Bill is to amend s 501 of the *Migration Act 1958* (Cth) to ‘provide grounds for non-citizens who commit serious offence, and who pose a risk to the safety of the Australian community, to be appropriately considered for visa refusal or cancellation.’¹ The Explanatory Memorandum to the Bill states that the Bill is ‘in response to the recommendations of the Joint Standing Committee Migration report on migrant settlement outcomes titled ‘No one teaches you to become an Australian’.² In ALHR’s view, this justification is a misrepresentation of the recommendations in the Joint Standing Committee’s report, and does not provide reasons for such a drastic expansion of Ministerial power.
5. ALHR notes that, in relation to the s 501 cancellation framework, the Joint Standing Committee’s report found that:

*The majority of submitters to this inquiry largely held the view that the current character and cancellation provisions in the Act were an adequate way of addressing non-citizens who have been involved in criminal activities.*³

6. In light of that statement, and contrary to the assertion in the Explanatory Memorandum that expanded cancellation powers are necessary to ensure that the cancellation framework ‘aligns with community expectations’, it appears that the community already considers that the current legislative framework is adequate. Moreover, the focus of the Joint Standing Committee’s report was in relation to migrant young people rather than the s 501 cancellation regime as a whole. While the Committee ultimately recommended that anyone over 18 convicted of a serious offence should have their visa cancelled, the Committee itself provides little analysis as to why this is necessary or why the current legislative framework is inadequate.
7. ALHR notes that the *Migration Act 1958* (Cth) (the **Act**) *already* provides such grounds to the Minister. In particular, the Minister or their delegate has the power under section 501 of the Act to refuse to grant a visa or to cancel a visa in circumstances where the Minister/delegate is not satisfied that a non-citizen passes the ‘character test’.⁴ The Minister has the power to personally refuse or grant a visa or cancel a visa in circumstances where the Minister reasonably suspects that a non-citizen does not pass the character test and is satisfied that the refusal or cancellation is in the national interest.⁵ The Act defines the ‘character test’ with reference to a wide variety of circumstances relating to a non-citizen’s criminal convictions or suspected criminal conduct, as well as circumstances in which a non-citizen poses a risk to the Australia community.⁶ These existing powers are therefore already sufficiently wide to facilitate the cancellation of visas for persons who commit serious assaults, aggravated burglary, sexual offences and possession of child pornography.
8. The effect of the Bill is to further expand the powers of the Minister to refuse to grant visas or to cancel visas by seeking to increase the number of circumstances in which a person would not pass the ‘character test’ and thereby drastically expanding the cohort of non-citizens who can be considered for visa refusal or cancellation. For example, under the current Act, a non-citizen does not pass the ‘character test’ if they have been sentenced to one or more terms of

¹ Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018, 2.

² *Ibid*, 9.

³ Joint Standing Committee on Migration, “No one teaches you to to become Australian” 2017, [7.144].

⁴ *Migration Act 1958* (Cth) ss 501(1), (2).

⁵ *Migration Act 1958* (Cth) s 501(3).

⁶ *Migration Act 1958* (Cth) s 501(6).

imprisonment anywhere in the world where the total of those terms is 12 months or more.⁷ The Bill expands the cohort of people captured by the 'character test' to include non-citizens who are convicted of an offence punishable by imprisonment for a term of two years or more, irrespective of what sentence the non-citizen actually received or whether the person actually served out their sentence.⁸

9. If passed these measures will lead to serious consequences for the expanded cohort of people, who become unlawful non-citizens once their visa is refused or cancelled and are likely to be subject to mandatory immigration detention and potential removal from Australia.⁹
10. The Bill fails to take into account the role of the criminal law system and judicial discretion in Australia in considering the material facts of an offence and imposing a sentence, including a sentence of imprisonment, which is appropriate in all the circumstances of the case and which therefore reflects the seriousness of the crime and the risk the person poses to the Australian community.
11. Further, while the Explanatory Memorandum states that the intention of the amendment in the above example is to make it clear that the amendment is to capture a serious offence rather than 'merely a minor or trifling offence',¹⁰ ALHR is concerned that this distinction is not articulated in the Bill itself.
12. There are numerous offences across State and Territory jurisdictions which may be punishable by imprisonment for a term of two years or more, but which upon consideration of the circumstances of the offending, the criminal law system may not find it appropriate to impose the two year imprisonment sentence and which the Australian community would consider to be a minor or trifling offence. For example, in Western Australia the summary penalty for damaging property by graffiti ranges from a community based order to a two year term of imprisonment¹¹ The criminal law system appropriately already has the power to consider the risk a person who damages property by graffiti may pose the community and determine that it does not warrant a two year term of imprisonment. Further, it is implausible that the Australian community would consider that the offence of graffiti is serious enough to warrant the refusal or cancellation of a visa, even though it can potentially attract a two year term of imprisonment. However, this is the type of offence the Bill captures through its expansion of powers without any proper consideration of the actual sentence imposed by the criminal law system.

Human rights implications of the Bill

13. ALHR notes that the Bill's Statement of Compatibility with Human Rights states that the Bill is compatible with the human rights and freedoms set out in international human rights instruments ratified by Australia.
14. However, ALHR has serious concerns about the human rights implications of the Bill, in particular that it:
 - undermines the right to be equal before the courts and tribunals; and

⁷ *Migration Act 1958* (Cth) ss 501(6)(a), (7)(a), (7)(b).

⁸ Migration Amendment (Strengthening the Character Test) Bill 2018 (Cth) sch 1 item 6, (7aa)(b)(ii) and (iii).

⁹ *Migration Act 1958* (Cth) ss 13, 14, 501F.

¹⁰ Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018, 7 [37].

¹¹ *Graffiti Vandalism Act 2016* (WA) s 5.

- o does not address the deficiencies within the current decision-making process, including those relating to the risks of:
 - i. arbitrary detention; and
 - ii. *non-refoulement*,

but instead increases the number of people exposed to the deficient process.

Equality before the courts and tribunals

15. Australia has obligations under the *International Covenant on Civil and Political Rights* to ensure that all people are equal before the courts and tribunals.¹² As set out above, the practical impact of the Bill undermines this right because it undermines judicial direction and the determinations the criminal law system makes during sentencing as to whether a person poses a risk to the community and therefore whether the Court should impose a sentence of imprisonment or not. The Bill not only reinforces a discriminatory regime where two people who have committed the same crime are treated very differently depending on whether they are a citizen or not, but also introduces a regime where a non-citizen may commit the same offence, but in a less serious context and receive a less serious sentence, yet still be subject to a more serious outcome, including arbitrary detention and removal from Australia.

Arbitrary detention

16. By expanding the number of people who are captured by the ‘character test’, the Bill also expands the cohort of people subject to a decision-making framework which requires them to remain in detention until they are either granted another visa or removed from Australia, without any time limits placed on the length of detention. The United Nations Human Rights Committee has consistently held that that this framework does not comply with international human rights obligations and results in arbitrary detention because although lawful under Australian law, it does not take into account whether detention is reasonable, necessary and proportionate in an individual’s circumstances.¹³
17. In particular, ALHR notes that where decisions to cancel are made personally by the Minister, merits review is excluded and is limited to circumstances where the exercise of the power includes a jurisdictional error. Given that a decision of the Minister may result in mandatory cancellation leading to, in some cases, prolonged or indefinite mandatory detention, there must be strong and compelling reasons to justify any expansion in Ministerial power. Such justification is lacking in the present Bill and ALHR considers that it is not a reasonable, necessary, or proportionate response.

Non-refoulement

18. The Bill also expands the cohort of people who face a risk of *refoulement*. Australia has obligations under various international human rights instruments not to return (or *refoule*) a

¹² *International Covenant on Civil and Political Rights* art 14.

¹³ See, eg Human Rights Committee, Views: Communication No 560/1993, 59th sess CCPR/C/59/D/560/1993 (3 April 1997) (‘A v Australia’); Human Rights Committee, Views: Communication No 900/1999, 76th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (‘C v Australia’); Human Rights Committee, Views: Communication No 2094/2011, 108th sess UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) (‘FKAG et al v Australia’); Human Rights Committee, Views: Communication No 2136/2012, 108th sess UN Doc CCPR/C/108/D/2136/2012 (28 October 2013) (‘MMM et al v Australia’); Human Rights Committee, General comment No 35: Article 9 (Liberty and security of person), 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014).

non-citizen to a country where they would face persecution on account of their race, religion, nationality, membership of a particular social group or political opinion,¹⁴ or who would otherwise face serious human rights violations, such as cruel, inhuman or degrading treatment or punishment and torture.¹⁵

19. Although the current decision-making process in relation to visa refusal and cancellation on character grounds considers Australia's *non-refoulement* obligations, it does not prevent a decision-maker from ultimately deciding to refuse or cancel the non-citizen's visa. The non-citizen then faces either the risk of *refoulement* or indefinite detention, since any further substantive visa application they make to remain in Australia will also be subject to refusal under the expanded 'character test'.
20. Further, the Bill does not ameliorate the current provisions of the Act which allow for non-citizens to be removed from Australia, notwithstanding that Australia owes them *non-refoulement* obligations.¹⁶ Although the Bill's Statement of Compatibility states that '[a]nyone who is found to engage Australia's *non-refoulement* obligations during the refusal or cancellation decision or in subsequent visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations',¹⁷ this commitment is not reflected in any provision of the Act as it stands, nor in the Bill.

Conclusion

In ALHR's view, the Australian government has not demonstrated that the measures proposed by the Bill are reasonable, necessary or proportionate to achieve the stated objectives. ALHR considers that the current regime is already deficient in many respects and is inconsistent with Australia's international human rights law obligations. To expose a larger cohort of non-citizens to visa cancellation and refusal in the manner proposed by the Bill will do little to protect the Australian community and will only serve to negatively impact on the human rights of non-citizens who are entitled to them.

Recommendation

The Bill should not be passed and should be withdrawn.

If you would like to discuss any aspect of this submission, please email me at:

¹⁴ *Refugee Convention* art 33.

¹⁵ *International Covenant on Civil and Political Rights* art 7, *Convention on the Rights of the Child* art 37(a); *Convention on the Rights of Persons with Disabilities* art 15(1); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art 3(1).

¹⁶ *Migration Act 1958* (Cth) s 197C.

¹⁷ Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2018, 12.

Yours faithfully

Kerry Weste
President
Australian Lawyers for Human Rights

ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.