



**Law Council**  
OF AUSTRALIA

# **Migration Amendment (Strengthening the Character Test) Bill 2018**

**Senate Legal and Constitutional Affairs Committee**

**30 November 2018**

## Table of Contents

|  |           |
|--|-----------|
| <b>About the Law Council of Australia</b> .....                            | <b>3</b>  |
| <b>Acknowledgement</b> .....   | <b>4</b>  |
| <b>Executive summary</b> .....   | <b>5</b>  |
| <b>Timing for submissions</b> .....  | <b>6</b>  |
| <b>The proposed measures</b> .....   | <b>6</b>  |
| <b>Existing powers of visa cancellation and refusal</b> .....              | <b>7</b>  |
| <b>Justification for expanding powers</b> .....                            | <b>9</b>  |
| <b>Practical implications for expanding cancellation powers</b> .....      | <b>9</b>  |
| <b>Reliance on maximum sentencing penalties</b> .....                      | <b>10</b> |
| <b>Low threshold</b> .....   | <b>11</b> |
| <b>Impact on vulnerable members of the community</b> .....                 | <b>11</b> |
| <b>The inclusion of ‘knowingly concerned’</b> .....                        | <b>12</b> |
| <b>Retrospectivity</b> .....   | <b>13</b> |
| <b>Potential for infringement of Chapter III of the Constitution</b> ..... | <b>13</b> |
| <b>Overseas offences</b> .....   | <b>14</b> |

## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful to the Law Institute of Victoria, the Law Society of New South Wales, the Law Society of South Australia and the New South Wales Bar Association for their assistance with the preparation of this submission. The Law Council also acknowledges input received from the Migration Law Committee and Constitutional Law Committee within the Law Council's Federal Litigation and Dispute Resolution Section, and the Law Council's National Human Rights Committee.

## Executive summary

1. The Law Council welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee (**the Committee**) in relation to the proposed measures contained in the Migration Amendment (Strengthening the Character Test) Bill 2018 (**the Bill**).
2. The Law Council considers that the existing provisions under section 501 of the *Migration Act 1958* (Cth) (**Migration Act**) already provide the Minister with very broad powers to cancel and refuse visas on character grounds. Indeed, the Law Council has in its previous submissions expressed concern over the expansion of these cancellation powers given their breadth, as well as the low cancellation thresholds and insufficient safeguards involved.<sup>1</sup>
3. While the Law Council recognises that the Executive should possess the power where necessary to prevent or remove a dangerous individual from obtaining or retaining the right to enter and remain in Australia, it is recognised that a decision to cancel or refuse a visa based on character grounds will almost always have a profound impact on the lives of individuals and their families, and any power to refuse or cancel a visa should be administered cautiously and with proper regard to all circumstances of the individual case.
4. The Law Council therefore notes that restraint must be exercised with any attempt to expand this power beyond existing parameters and must be accompanied by robust justification. In this regard, the Law Council submits that the justification for the expanded measures as proposed in the Bill has not been made sufficiently clear.
5. Of particular concern to the Law Council is the proposed lowering of the threshold for those that may be subject to visa cancellation or refusal on character grounds. This is primarily due to the inclusion of designated offences with a potential sentence of not less than two years, regardless of the actual judicial sentence given. The Law Council submits that this approach has the potential to undermine the sentencing function of the judicial system and the discretion it possesses with regards to sentencing offenders.
6. The additional concerns as outlined in this submission highlight what the Law Council considers to be significant shortcomings within the proposed legislation, and the Law Council is accordingly unable to support the Bill in its current form. However, if the proposed measures are to proceed, the Law Council recommends that the Bill must at the very least be amended to:
  - (a) protect proportionate and reasonable decision-making on a case-by-case basis;
  - (b) provide for consideration of the judicial sentence imposed as opposed to the maximum potential sentence allowed by the relevant legislation as set out at proposed paragraph 501(7AA)(b);
  - (c) remove the element of 'knowingly concerned' when defining a designated offence due to its uncertainty and potential broad application;
  - (d) remove aiding and abetting as a specific offence, due to the risk it has for vulnerable individuals;

---

<sup>1</sup> Law Council of Australia, Submission No 82 to the Joint Standing Committee on Migration, *Inquiry into Migrant Settlement Outcomes*, 17 February 2017, 5-6.

- (e) include clear protections for vulnerable members of the community, including children by expressly stating that a child's visa will only be cancelled in exceptional circumstances;
- (f) ensure overseas offences are qualified to reflect Australian sentencing and offence standards; and
- (g) ensure that any expansion of the existing cancellation or refusal powers are accompanied by additional resourcing for downstream services that will likely be impacted, in particular the legal assistance sector and courts and tribunals.

## Timing for submissions

7. As a preliminary point, the Law Council notes the short timeframe that has been provided in which to make submissions to the Committee. Despite being referred to the Committee on 15 November 2018 with a reporting date of 18 January 2018, submitters have been afforded less than two weeks in which to provide input. Given the significant adverse legal effect upon visa applicants and the holders of visas (including mandatory detention under section 189 of the Migration Act), this timeframe does not reflect a proper opportunity for the consideration of these matters.
8. This timeframe raises particular challenges for peak bodies such as the Law Council, that must undergo a process of consultation with constituent bodies to ensure its submissions accurately reflect the views of its membership.
9. While it is hoped that this submission assists the Committee in its scrutiny of the Bill, it is noted that the Law Council's ability to provide a comprehensive analysis of the proposed measures is curtailed by these tight timeframes.

## The proposed measures

10. The Bill purports to strengthen the current legislative framework in relation to visa refusals and cancellations on character grounds. It proposes to do so by amending the Migration Act to provide grounds for non-citizens who are convicted of certain offences to be considered for visa refusal or cancellation.
11. Specifically, the provisions of the Bill:
  - amend the character test in section 501 of the Migration Act to insert additional grounds for when a person will be deemed to fail the character test under section 501 of the Migration Act and thereby exposed to visa cancellation or refusal where the non-citizen has been convicted of certain crimes; and
  - make consequential amendments to the definition of 'character concern' in section 5C of the Migration Act.
12. The proposed measures introduce a series of new 'designated offences' that will trigger the character cancellation powers under section 501 of the Migration Act. A designated offence is an offence against a law in force in Australia, or a foreign country, in relation to which the following conditions are satisfied, if one or more of the physical elements of the offence involves:
  - violence against a person, including (without limitation) murder, manslaughter, kidnapping, assault, aggravated burglary and the threat of violence; or
  - non-consensual conduct of a sexual nature, including (without limitation) sexual assault and the non-consensual commission of an act of indecency or sharing of an intimate image; or

- breaching an order made by a court or tribunal for the personal protection of another person; or
- using or possessing a weapon as defined by proposed subparagraph 501(7AA)(a)(iv); or
- aiding, abetting, counselling or procuring the commission of an offence that is a designated offence because of any of proposed subparagraphs 501(7AA)(a)(i) to (iv); or
- inducing the commission of an offence that is a designated offence because of any of proposed subparagraphs 501(7AA)(a)(i) to (iv), whether through threats or promises or otherwise; or
- being in any way (directly or indirectly) knowingly concerned in, or a party to, the commission of an offence that is a designated offence because of any of proposed subparagraphs 501(7AA)(a)(i) to (iv); or
- conspiring with others to commit an offence that is a designated offence because of any of proposed subparagraphs 501(7AA)(a)(i) to (iv).

13. The definition of designated offence in the Bill also requires that the offence be potentially punishable by either life in prison, imprisonment for a fixed period of not less than two years, or imprisonment for a maximum term of not less than two years. Importantly, there is no requirement that the non-citizen is given a custodial sentence, only that under the relevant legislative provision they could have been eligible for a sentence of at least two years.

14. The Law Council notes that this proposal is a substantial shift from the existing approach under section 501, which relies on the actual sentencing of an individual rather than the sentencing options attached to the offence itself. As noted by the Senate Standing Committee for the Scrutiny of Bills (**Scrutiny Committee**) upon its consideration of the reforms, the proposed amendments 'would allow the minister the discretion to cancel or refuse to issue a visa to a person who has been convicted of a designated offence but who may have received a very short sentence or no sentence at all'.<sup>2</sup>

15. The amendments in the Bill, for the purpose of visa refusal, will apply to any visa application that has not been finally determined at commencement of the amendments or applications made after commencement. For the purposes of a visa cancellation the amendments will apply to anyone who holds a visa and committed or was convicted of a designated offence at any time, only limited by the fact of the cancellation decision being made after the commencement of these provisions. This raises concerns about the potential retrospectivity of the proposed measures, an issue that has not been addressed in the Bill nor its explanatory material.

## Existing powers of visa cancellation and refusal

16. It is noted that section 501 of the Migration Act already provides the Minister with broad powers to cancel and refuse visas on character grounds. Under the present law, a non-citizen does not pass the character test for a range of reasons including:

- the person has been sentenced to imprisonment for a period of 12 months or more;<sup>3</sup>
- the minister reasonably suspects that the person is/has been a member of a group involved in criminal conduct;<sup>4</sup>

<sup>2</sup> Senate Standing Committee for the Scrutiny of Bills 'Scrutiny Digest 13 of 2018', [1.26].

<sup>3</sup> *Migration Act 1958* (Cth), s501(7)(c).

<sup>4</sup> *Ibid*, s501(6)(b).

- having regard to the person's past and present general/criminal conduct there is a 'risk' (the test is not a 'real risk' or a 'significant risk') that they would either engage in criminal conduct, incite discord in the Australian community, harass another person in Australia, vilify a segment of the community or represent a danger to the community;<sup>5</sup> or
  - having regard to the person's past and present general and/or criminal conduct, they are not of good character.<sup>6</sup>
17. The Law Council notes that in 2014 the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) was introduced which substantially lowered the failure threshold of the character test and expanded the Minister's powers to cancel or revoke an individual's visa. The amount of visa cancellations and refusals on character grounds has increased dramatically since the commencement of these reforms.<sup>7</sup>
18. In previous submissions, the Law Council has submitted that the expanded cancellation powers raise significant concerns given their breadth, as well as the low cancellation thresholds and insufficient safeguards involved.<sup>8</sup> Similar observations have been made by Youthlaw and Smart Justice for Young People.<sup>9</sup>
19. In his second reading speech, the Minister for Immigration, Citizenship and Multicultural Affairs stated that the current threshold of being sentenced to a term of imprisonment of 12 months or more 'is not capturing all those found guilty of serious criminality, including those who may not serve any custodial sentence and who may pose a continued risk to the safety of the community'. In response, the Law Institute of Victoria (LIV) has pointed out that it is currently not the case that only individuals sentenced to twelve months or more imprisonment fail the character test. Under current legislation, individuals can either necessarily fail the character test, or they can be deemed to fail it through the exercise of discretion. For example, a person will already automatically fail the test if they have, over any period, received a sentence or sentences equal to or exceeding 12 months' imprisonment. This includes people who have received, for example, a nine-month sentence in 1970, and a three-month sentence in 2018.
20. Currently, a delegate of the Minister can also decide that a person may fail the character test if they pose any kind of risk to the community on the basis of their criminal or general conduct, or due to an association they may have, regardless of whether they have been convicted of any crime at all. A determination that a person fails the character test means either their visa must or may be cancelled or refused. Only in some cases will a person have the right to merits review as merits review is generally only available where a delegate of the Minister makes the decision not the Minister personally.
21. Having regard to the powers that already exist to cancel or refuse a visa based on character grounds, the Law Council considers there to be significant overlap between those current provisions and the proposed measures contained in the Bill. For example, the kinds of offences referred to in the Explanatory Memorandum to justify the need for the new laws, such as murder, manslaughter, kidnapping, assault and aggravated burglary, would already be covered by existing legislation. In operation, the amendments may further convolute what is already a complicated area of the Migration Act.

---

<sup>5</sup> Ibid s501(6)(d).

<sup>6</sup> Ibid, s501(6)(c).

<sup>7</sup> See <[www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation](http://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation)>.

<sup>8</sup> Law Council of Australia, Submission No 82 to the Joint Standing Committee on Migration, *Inquiry into Migrant Settlement Outcomes*, 17 February 2017, 5-6.

<sup>9</sup> Joint Standing Committee on Migration, Parliament of Australia, *No one teaches you to become an Australian: Report of the inquiry into migrant settlement outcomes* (December 2017), 155.



## Justification for expanding powers

22. The Minister's second reading speech accompanying the Bill asserts that the proposed changes are in line with community expectations, and that:

*Entry and stay in Australia by noncitizens is a privilege, not a right, and the Australian community expects that the Australian government can and should refuse entry to noncitizens, or cancel their visas, if they do not abide by the rule of law.*

23. The Law Council recognises that it is both necessary and appropriate to regulate people seeking to enter and remain in Australia by reference to questions of character. The Executive should have powers where necessary to prevent or remove a dangerous individual from obtaining or retaining the right to enter and remain in Australia. However, the Law Council emphasises that a decision to cancel or refuse a visa based on character grounds can have a profound effect on an individual's life and submits that caution should be exercised with any attempt to expand this power beyond its existing parameters.
24. Noting the significant implications for visa cancellations or refusals, it is submitted that the need for such an expansion has not been made sufficiently clear. This issue of insufficient justification was raised by the Scrutiny Committee in its consideration of the Bill when it reported:

*... in light of the already extremely broad discretionary powers available for the minister to refuse to issue or cancel the visa of a non-citizen, the explanatory materials have given limited justification for the expansion of these powers by this bill.<sup>10</sup>*

25. The Law Council also urges restraint in the widening of powers for deportation because of the adverse social impacts of exercising these powers. Many of the people whose visas are cancelled have grown up in Australia and are ill-equipped to cope with life in what may be to them a strange country and in some case one they have never lived in. Many of them speak only English. Many suffer from mental health problems or other disabilities which also make them ill-equipped to rehabilitate themselves without social and family support.
26. Rather than use the removal power on a large scale, the resources which are used up in these processes would, in many cases, be better used as reinvestments in Australia's justice, mental health and rehabilitation systems directed to dealing with people who have, for probably complicated reasons, come to be problems for others, themselves and others.

## Practical implications for expanding cancellation powers

27. The Law Council notes that any unnecessary expansion of existing powers will increase the number of visa cancellations and refusals and place an increasing demand on the already limited resources of the Administrative Appeals Tribunal, the Courts, detention facilities and the legal assistance sector. With regards to the latter, the Law Council's Justice Project, a comprehensive, national review into the state of access to justice in Australia published in August 2018, highlighted the significant increase in demand for legal assistance following the expansion of visa cancellation powers.<sup>11</sup>

---

<sup>10</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2018*, [1.30].

<sup>11</sup> The Justice Project, *Final Report – Part 1: Recent Arrivals to Australia* (August 2018), 30.

28. It is submitted that further expansions of these powers will only serve to exacerbate this demand and put additional strain on a sector that is already chronically under-resourced. Indeed, the Bill's Statement of Compatibility with Human Rights confirms that 'the practical effect of these amendments will be greater numbers of people being liable for consideration of refusal or cancellation of a visa as they would not, or no longer meet, character requirements set out in section 501 of the Migration Act'.<sup>12</sup>
29. The Law Council urges the Committee to have regard to this downstream impact on services when considering the proposed measures, and the importance of expanding resources to impacted services, including the legal assistance sector and affected courts and tribunals should the measures proceed. A failure to do so will be another example demonstrating why the Law Council is advocating for Justice Impact Tests to be introduced to better account for the downstream impacts of new laws and policies on the justice system.<sup>13</sup>

## Reliance on maximum sentencing penalties

30. Proposed paragraph 501(7AA)(b) provides for a minimum standard of punishment for an offence to be considered a 'designated offence' for the purposes of the character test, and includes offences punishable by imprisonment for a maximum term of not less than two years.<sup>14</sup> As outlined above, this approach seeks to shift the threshold for visa cancellation or refusal away from an individual's imposed sentence (which reflects the seriousness of the actual conduct) to the offence itself and its maximum possible penalty, regardless of the actual sentence handed down to the individual.
31. It is noted that maximum penalties are reserved for the worst, most serious examples of an offence.<sup>15</sup> The Law Council is concerned that this shift fails to appreciate the role of criminal sentencing and the careful consideration that is given by the courts to a range of social factors when an individual is convicted of an offence, including mitigating circumstances such as age, health, disability, moral culpability, or the objective seriousness of the relevant offence.
32. The Law Council submits that having a cancellation provision based on the maximum possible sentence rather than the actual sentenced imposed fails to consider both the legislative structure of the criminal law legislation or the circumstances of the offence and individual concerned, and does not adequately reflect the seriousness of the individual's conduct or risk. The law has long recognised that different circumstances give rise to different standards of culpability. As such, possible maximum sentences are not a proper basis for determining seriousness.
33. While the proposed powers are discretionary in nature as opposed to mandatory, they have the potential to undermine the sentencing function of the judicial system and the discretion it possesses with regards to sentencing offenders. The Law Council considers these issues to be serious shortcomings of the proposed legislation and does not support the Bill in its current form.

---

<sup>12</sup> Migration Amendment (Strengthening the Character Test) Bill 2018, *Statement of Compatibility with Human Rights*, 10.

<sup>13</sup> The Justice Project, *Final Report – Part 2: Governments and Policymakers* (August 2018), 14-26.

<sup>14</sup> Migration Amendment (Strengthening the Character Test) Bill 2018, proposed section 501(7AA)(b)(iii).

<sup>15</sup> See e.g. Sentencing Advisory Council (Vic), *Maximum Penalties* <[www.sentencingcouncil.vic.gov.au/about-sentencing/maximum-penalties](http://www.sentencingcouncil.vic.gov.au/about-sentencing/maximum-penalties)>.

## Low threshold

34. The Explanatory Memorandum states that 'the intention of new paragraph 501(7AA)(b) is to make it clear that a designated offence must be a serious offence, and not merely a minor or trifling offence'.<sup>16</sup> The Law Council submits that the Bill is overly broad and despite assurances contained in the Explanatory memorandum, may in fact capture a significant number of individuals whose offences do not fall under the commonly accepted definition of 'serious offences'. This is primarily due to the inclusion of any offence with a potential sentence of not less than two years, regardless of the judicial sentence given.
35. In this context, the LIV has pointed out that offences which could fall under this category include damaging property, driving whilst disqualified, shop theft, dangerous driving, verbal threats, common assault in some jurisdictions and any form of contravention of an intervention order irrespective of the level of contravention. In Victoria, most of these offences two year's imprisonment is the maximum sentence. However ordinarily, very few offenders are given the maximum term of imprisonment as a sentence.
36. The LIV has further noted that similar issues arise with the inclusion of possession of a weapon in proposed subparagraph 501(7AA)(a)(iv) of the Bill. Whilst the maximum penalty for possession, use or carriage of a prohibited weapon is imprisonment for two years in Victoria, the LIV advises that this is very rarely exercised and, in the period of 1 July 2013 to 30 June 2016, of the 5,614 people found guilty of this charge, only 20.6 per cent received a prison sentence of any length. Only 1.2 per cent received sentences of 18 to 24 months or more.
37. The LIV has also expressed its concern with other types of offending that will be captured by the Bill. Examples of offending that would necessarily result in failing the character test include:
- a child who shares an intimate image of their girlfriend or boyfriend;
  - a person who has an article of disguise in their custody or possession;
  - any theft offences; and
  - any attempted offence, even if not carried out, with a two-year possible sentence.
38. The Law Council shares these concerns and submits that the proposed measures have the potential to capture a significant number of individuals whose conduct may not fall under the commonly accepted definition of a serious offence.

## Impact on vulnerable members of the community

39. The Law Council notes that the inclusion of 'aiding [or] abetting'... in the commission of a designated offence<sup>17</sup> could have a considerable impact on vulnerable individuals and in particular women involved in a relationship with the offender. This could serve to de-incentivise individuals from cooperating with authorities. In this regard, the LIV reports that its members have experienced circumstances where individuals are already concerned about assisting authorities because of a risk their visas could be subject to cancellation.

---

<sup>16</sup> Migration Amendment (Strengthening the Character Test) Bill 2018, *Explanatory Memorandum*, [37].

<sup>17</sup> Migration Amendment (Strengthening the Character Test) Bill 2018, proposed section 501(7AA)(a)(v).

40. Further, the Law Council raises a concern about the impact of the proposed measures on children. Whilst the Explanatory Memorandum states only in exceptional circumstances would a child's visa be cancelled,<sup>18</sup> it does not prescribe what these exceptional circumstances will be. Given the extensive list of offences which can cause a person to fail the character test, there is a high possibility that this will negatively impact families and young people, and the Law Council submits that at the very least, the Bill should expressly state that a child's visa will only be cancelled in exceptional circumstances;
41. The cancellation of a minor's visa is of significant concern for the Law Council and it is submitted that further protections (such as a discretion to differentiate between adults and children) are required under the proposed measures to prevent such cancellations from occurring.

## The inclusion of 'knowingly concerned'

42. Proposed subparagraph 501(7AA)(a)(vii), if enacted, would apply to non-citizens who are in any way, directly or indirectly, knowingly concerned in or otherwise a party to the commission of a designated offence.
43. The Law Council has previously raised significant concerns with the inclusion of the phrase 'knowingly concerned' in the criminal law context, noting that this gives rise to a series of open questions about the scope of activity captured and a notable absence of criminal law jurisprudence to rely on when interpreting the threshold.<sup>19</sup> In an earlier submission in relation to the Crimes Legislation Amendment (Powers and Offences) Bill 2015, the Law Council stated:

*When might a person be 'knowingly concerned' in the commission of an offence where he or she is not aiding and abetting, counselling or procuring its commission? Plainly enough it should not suffice to be 'concerned about' the offence. For example, a journalist goes 'undercover' to observe the actions of a group of young persons in order to write a story about them and observes them commit offences. The journalist does not assist in the commission of the offences or encourage them, but could the journalist be said to be 'knowingly concerned' in the commission of them? Would such conduct be caught? What if the journalist was instead an undercover police officer, obtaining criminal intelligence?<sup>20</sup>*

44. In that submission, the Law Council recommended against introducing the concept of 'knowingly concerned' into the *Criminal Code Act 1995 (Cth)* (**Criminal Code**), without first undertaking a full public consultation process, including with State and Territory jurisdictions and the relevant specialist professional associations. Ultimately the then proposed insertion of 'knowingly concerned' as one of the general elements of criminal responsibility was not implemented based in part on these concerns raised by the Law Council and others.
45. It is submitted that the current Bill's attempt to reintroduce this concept in relation to criminal conduct raises these previously identified issues of uncertainty and a lack of clarity, as well as introducing a confusion between the concepts of 'intention' and 'knowledge' which are separate concepts under the Criminal Code and in common usage. Should the proposed measures proceed, the Law Council strongly opposes the

---

<sup>18</sup> Migration Amendment (Strengthening the Character Test) Bill 2018, Statement of Compatibility with Human Rights, 13.

<sup>19</sup> See, Law Council of Australia, submission to the Senate Legal and Constitutional Affairs Committee on the Crimes Legislation Amendment (Powers and Offences) Bill 2015 (7 May 2015).

<sup>20</sup> *Ibid*, [48].

inclusion of 'knowingly concerned' as a fault element that triggers the cancellation and refusal powers, and refers the Committee to the Law Council's earlier submissions on this point as referenced above.

## Retrospectivity

46. As noted earlier, for the purposes of a visa cancellation the amendments will apply to anyone who holds a visa and committed or was convicted of a designated offence at any time, only limited by the fact of the cancellation decision being made after the commencement of these provisions. This raises concerns about the potential retrospectivity of the proposed measures, an issue that has not been addressed in the Bill nor its explanatory material.
47. The Law Council expresses its concern with the prospect that the Bill could be used to remove a non-citizen for their historic involvement in a designated offence, which in the absence of the proposed amendments may not have amounted to a failure to pass the character test. It is submitted that there has been insufficient justification for the possible retrospective nature of the proposed measures, particularly when consideration is given to the considerable impact on the lives of those that may be affected by the reforms.

## Potential for infringement of Chapter III of the Constitution

48. Further to the above submissions regarding the low threshold for visa cancellation or refusal under the proposed measures, the Law Society of New South Wales has raised the potential for the proposed measures as currently drafted to infringe Chapter III of the Constitution. In the case of *Djalil v MIMIA* [2004] FCAFC 151, the Full Court of the Federal Court of Australia affirmed that:

*It is a fundamental principle of the Australian Constitution, flowing from Chapter III, that the adjudication and punishment of criminal guilt for offences against a law of the Commonwealth is exclusively within the province of courts exercising the judicial power of the Commonwealth.*<sup>21</sup>

49. The Full Court went on to state that Commonwealth legislation will collide with Chapter III of the Constitution if 'on its true construction, it authorises the Executive to impose punishment for criminal conduct'.<sup>22</sup> The Full Court stated that a decision to cancel a visa cannot be considered a punishment if it 'can be fairly said to protect the Australian community'.<sup>23</sup> The Full Court also held that the Minister or delegate may take into account 'the expectations of the Australian community that non-citizens should obey Australian laws while in Australia' in deciding whether to cancel a visa pursuant to section 501, without their action equating to the imposition of a punishment.
50. Notwithstanding this broad scope for the Minister or delegate to cancel or deny a visa based on character grounds, there is a risk that the exercise of the broad discretion provided to the Executive by the proposed amendments – for instance, by proposed subsection 501(7AA)(vii) – may infringe Chapter III of the Constitution if there is no evidence that the non-citizen in question poses a future risk to the Australian community.

---

<sup>21</sup> *Djalil v MIMIA* [2004] FCAFC 151, 58.

<sup>22</sup> *Ibid*, 73.

<sup>23</sup> *Ibid*, 66.

## Overseas offences

51. Finally, the Law Council notes a concern that the same low threshold for triggering the proposed powers will apply to designated offences committed overseas, noting that many foreign jurisdictions have different and considerably higher sentences when compared to Australia.
52. A recent highly publicised example of this was when the dual Australian/Latvian journalist Peter Greste, was sentenced to seven year's incarceration in Egypt for 'reporting which was damaging to national security'. As the proposed Bill currently stands, it is suggested that a non-citizen in the position of Mr Greste would fail the character test.