

## **Overarching objective of the proposed Act amendment**

The objective of the proposed amendment is to make it clear that any conviction for a criminal offence in immigration detention would mean that the person convicted fails the character test. As the power to refuse or cancel a visa under section 501 is a discretionary power, it will remain a matter for the Minister or delegate to consider factors in relation to the nature of the conviction, any sentence applied and countervailing considerations before deciding whether to exercise the discretionary power to refuse or cancel a visa.

### **1. When was the Character Test introduced?**

The existing character provisions came into effect on 1 June 1999 with the enactment of the current section 501.

### **2. In its submission, National Legal Aid proposed an alternative approach in which the amendments would be limited to offences prescribed by regulations.**

*How could this work?*

If the amendment were limited to offences prescribed by *Migration Regulations 1994* ('the Regulations'), this would limit the application of the proposed amendment to conviction of specific offences under Commonwealth laws and State/Territory laws that have been prescribed. This approach could lead to inconsistent and arguably unfair results for people in immigration detention.

For the reasons discussed below, the suggested alternative approach is not preferred.

Prescribing offences in the Regulations presents a number of difficulties. Significantly, prescribing offences risks omitting serious offences and/or may not be all encompassing of the types of offences for which a person may be convicted while they are in immigration detention.

For example, if offences relating to potential riots in detention were "prescribed" such as criminal damage and arson, then conviction of serious offences involving personal violence against another detainee that were not prescribed, which do not attract a sentence upon conviction of more than 12 months imprisonment, would not result in failure of the character test. This would lead to inconsistent and arguably unfair results for immigration detainees.

Given that people in immigration detention can be subject to both Commonwealth and State/Territory offence provisions, ensuring that all relevant offences were covered in a prescribed list would be problematic.

It is for these reasons that the current amendments are broad in scope so as to encompass conviction of any offence committed in immigration detention,

during an escape from immigration detention, or during a period where a person has escaped from immigration detention.

Further, at any time a Commonwealth or State/Territory law was amended, the Regulations would need to be updated to reflect the relevant amendments. Therefore, prescribing specific offences in the Regulation risks the list of prescribed offences losing currency and diluting the effectiveness of the proposed amendment.

Alternatively, if the Regulations were to prescribe classes of offences, rather than specify particular offences, this carries the risk that some offences may not be captured by the description of the class of offences. Further, such an approach is likely lead to increased litigation by persons challenging that the offence for which they were convicted does not fall within the description of the class of offence.

*What offences would be prescribed?*

Given that a range of both Commonwealth and State/Territory offences can be applied to criminal behaviour committed by persons in immigration detention, both Commonwealth and State/Territory offences would need to be prescribed. It would need to canvas a wide range of offences, including offences against property and persons. However, for the reasons discussed above, prescribing offences in the Regulations would be problematic and is not the preferred approach.

*What other measures would be appropriate to deal with behaviour/offences not included in the prescribed list?*

As noted in the above, we believe it would be difficult to identify each and every offence that should be prescribed in the Regulations. The clearest and most effective way to deal with offences in immigration detention is to have a clear and objective law that any person who is convicted of committing an offence in immigration detention automatically fails the character test. It would then remain a matter for the Minister or delegate to consider factors relating to the nature of the conviction, any sentence applied and countervailing considerations before deciding whether to exercise the discretionary power under section 501 to refuse or cancel a visa.