

30 July 2019

Senate Legal and Constitutional Affairs Legislation Committee

Submission to the Inquiry Migration Amendment (Strengthening the Character Test) Bill 2019 [Provisions]

We would like to raise four issues concerning the Bill. We acknowledge the previous Committee inquiry report and write to complement previous submissions, as opposed to rehashing existing arguments.

Signatures

- Henry Sherrell (corresponding author)
- Peter Mares, author *Not Quite Australian: how temporary migration is changing the nation* (Text 2016)
- Abul Rizvi, former Deputy Secretary, Department of Immigration
- Dr. Shanthi Robertson, Institute for Culture and Society, Western Sydney University
- Dr. Laurie Berg, Faculty of Law, the University of Technology Sydney
- Kevin Bain

1. Who will the Bill affect?

A number of submissions to the previous Inquiry noted different groups of people would be disproportionately affected. However no clarity was provided on the scope or scale of the proposed changes.

The introduction of the ‘designated offence’ and subsequent mandatory failure of the character test upon conviction of a designated offence, regardless of sentencing, will immediately expand the number of people failing the character test.

While it is not possible to confidently state exactly how many people will be affected, there is evidence to suggest it could be by a factor of five, including people who are unlikely to be an ongoing threat to the Australian community.

However existing data sources point to a substantial increase in the number of people who will fail the character test. Recent analysis from the Judicial Commission of NSW can help demonstrate the nature of the increase. A recent report, [Common offences in the NSW Local Court 2015](#), documents the number of proven statutory offences sentenced in NSW local courts in 2015. There were the following number of sentences for:

- 6,868 ‘common assault’
- 4,023 ‘Knowingly contravene AVO’
- 4,002 ‘Assault occasioning actual bodily harm’

These three types of offence each meet the definition of a designated offence under the proposed criteria as well as meeting the threshold of two years or longer for the maximum

penalty. The Judicial Commission analysis documents the nature of sentencing. A small minority of sentences for these crimes result in jail periods: 6.8 per cent of common assault sentences, 16.9 per cent of contravening AVO sentences, and 21 per cent of assault occasioning in actual bodily harm sentences.

This means 87 per cent of criminal sentences for these crimes in the NSW local court in 2015 resulted in non-jail sentences (12,906 out of the 14,893 sentences). Instead, fines, behaviour bonds, dismissals and discharges without conviction, community service orders, and suspended sentences were the relevant penalty. As a specific example in relation to common assault, 41 per cent of sentences were good behaviour bonds and a further 15 per cent were fines. The median length of the bond was 12 months while the median fine was \$600.

Unfortunately these statistics do not delineate by Australian citizenship or visa status, meaning it is not possible to precisely state the potential effects of the Bill. However with 87 per cent of sentences for the above three offences being non-jail penalties in NSW local courts in 2015, the scope of the Bill will drastically increase the number of visa holders subject to potential deportation given a failed character test. As noted in previous submissions, New Zealand citizens and humanitarian migrants are likely to be disproportionately affected by the provisions.

This has the potential to have large and immediate effects on future visa cancellations, depending on how the Minister and delegates in the Department of Home Affairs choose to administer the provisions. Given the existing suite of powers under the character test, combined with mandatory cancellation for visa holders sentenced to at least 12 months jail, this Bill will primarily affect people who are sentenced to a range of non-jail sentences, reflecting the fact that many will not be an ongoing risk to the Australian community. It has the potential to inflict a double punishment, with the second punishment of removal and permanent exclusion from Australia being disproportionate to the nature of the original offence.

2. 'Clear and objective' status

In his second reading speech, the Minister outlined his rationale for the Bill, stating “Strengthening the character test in this way provides a clear and objective ground for which to consider the cancelling the visa of or refusing to grant a visa to a noncitizen...”.

However it is unclear how the Bill provides a clear or objective ground for consideration to cancel the visa. While the Bill introduces mandatory failure for the character test using the designated offence, it remains a discretionary power to cancel a visa on these grounds. In anything, the introduction of an automatic character test failure creates heightened uncertainty about the contextual nature of individual cases and whether people should be subject to deportation given they have failed the character test.

There is nothing clear or objective about the proposed powers, particularly in relation to a number of difficult categories, such as people who have spent a long time period in

Australia, including those who came here as infants or young children, people who have deep family and community connections in Australia, and people who do not have active connections in the country they would be deported to. Given the substantial reduction in the criminal threshold to fail the character test, there will be a lack of historical guidance in relation to similar cases, particularly people who fail the character test and are subject to relatively small monetary fines and/or dismissals and discharges without conviction.

The Morrison Government and the Minister for Immigration and Border Protection have not provided relevant examples of non-citizen character concerns that cannot be addressed by existing provisions in the Migration Act.

3. Retrospective application

A number of previous submitters raised the serious nature of retrospective application of the Bill. Using the Judicial Commission of NSW analysis above, and if visa holders have a similar criminal profile compared to the general population, it is plausible on commencement of the Bill, the number of people who fail the character test will automatically expand by a factor of five.

This would be the largest expansion of the character test provisions in the Migration Act in history, affecting untold numbers of people who have been sentenced to a range of non-jail penalties over the past decades.

While difficult to compare, this may be one of the most significant retrospective applications of new legislation in recent Parliamentary history, particularly for a Bill with negative consequences for people. Given the retrospective application, similar to the 2014 character test changes, there will likely be a step-change in the number and rate of visa cancellations and deportations from Australia.

4. Administration of migration and citizenship law in the context of the character test

It is unclear how a significantly larger population of visa holders who have failed the character test will be administered by the Minister and their delegates in the Department of Home Affairs.

There are a number of potential scenarios. These are clearly unknown as there is substantial administrative scope for current and future Australian Governments in relation to the Migration Act. There is the potential for a new Ministerial Direction concerning the character test if the Bill is passed, particularly in assisting delegates of the Minister take into account the severity of the crime balanced with other factors, such as the visa holders connection to the Australian community.

The Bill may have no substantive effect on the number of visa cancellations and deportations. It is possible for visa holders to have failed the character test and for this to have no effect on their visa status, nor on any future visa applications. However in this scenario, many additional people will be aware they have failed the character test and this

may manifest itself in general unease and tension about long-term certainty of Australian residency.

It may be a policy decision by the Australian Government not to immediately deport visa holders who have failed the character test, given visa cancellation under the Bill will be discretionary. However it may emerge that a visa holder who has now failed the character test is unable to successfully apply for future visas, a de-facto form of deportation if the applicant would meet all other visa criteria.

Further, there may be implications for citizenship. While the 'good character' provisions in the Australian Citizenship Act are wholly unrelated to the character test provisions in the Migration Act, it may emerge over time that citizenship policy leans more heavily on the application of migration policy. This may lead to a large and growing number of permanent residents who are unable to access Australian citizenship given their failure of the character test.

In conclusion, this Bill will further exacerbate the divide between Australian citizens and non-citizens. The Bill will result in an unprecedented expansion of people who fail the character test, given the retrospective nature of the provisions. Given the lower threshold for failing the character test, it is likely a number of people who are not an ongoing threat to the Australian community will be negatively affected by the provisions of this Bill. Instead of providing a 'clear and objective' process to assess the character test, the use of the maximum penalty is an arbitrary measure which discounts all context whatsoever regarding the behaviour of individuals.

Finally, existing character provisions and other powers under the Migration Act already provide the Minister for Home Affairs and his delegates with extensive powers to cancel or deny visas and to remove non-citizens from Australia. The proposed measures in this bill are unnecessary for the protection of the community and the maintenance of public order.