

Chapter 1

Introduction

1.1 On 15 November 2018, the Senate referred the provisions of the Migration Amendment (Strengthening the Character Test) Bill 2018 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 18 January 2019.¹

Conduct of this inquiry

1.2 Details of the inquiry were advertised on the committee's website, and the committee directly invited a range of organisations to make a written submission. The committee called for submissions to be received by 28 November 2018, but accepted some submissions after that date. In total, the committee accepted 15 submissions.

1.3 All submissions are listed at appendix 1 of this report and available at the committee's website.

1.4 The committee thanks all submitters for their involvement in this inquiry.

Structure of this report

1.5 This report consists of two chapters:

- This chapter provides a brief overview of the bill as well as the administrative details of the inquiry.
- Chapter 2 discusses the need for the bill, key issues raised in evidence to the inquiry, and provides the committee's view and recommendation.

Purpose of the bill

1.6 The stated purpose of the bill is to strengthen the current legislative framework regarding visa refusals and cancellations on character grounds.² The bill amends the *Migration Act 1958* (the Act) to provide grounds for non-citizens who commit a serious offence and pose a risk to the safety of the Australian community, to be considered for their visa to be refused or cancelled.³

1.7 The Minister for Immigration, Citizenship and Multicultural Affairs, the Hon. Mr David Coleman MP (the Minister), introduced the bill into the House of Representatives on 25 October 2018. In introducing the bill, the Minister stated:

Australia is an accessible and attractive destination to visit, to do business and to live. We are a welcoming, multicultural, open and cohesive society. At the same time, we need to ensure that we remain safe and secure. The

1 *Journals of the Senate (Proof)*, No. 129, 15 November 2018, p. 4147.

2 The Hon. Mr David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *House of Representatives Hansard*, 25 October 2018, p. 1.

3 Migration Amendment (Strengthening the Character Test) Bill 2018 explanatory memorandum (Explanatory Memorandum), p. 2.

government will not tolerate criminal behaviour of noncitizens. 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. Those who choose to break the law and fail to uphold the standards of behaviour expected by the Australian community should expect to lose that privilege.⁴

1.8 The Minister explained that the current character test, applied to visa applicants and holders, does not capture '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'.⁵ The bill would therefore address this gap by providing for discretionary cancellation or refusal, regardless of whether a custodial sentence is imposed or not.

1.9 In addition, the Minister suggested the measures in the bill would provide clarity and certainty for decision-makers when considering whether to refuse or cancel a visa:

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 who has been convicted of offences that involve violence against a person, including murder, manslaughter, kidnapping, assault, aggravated burglary and the threat of violence, non-consensual conduct of a sexual nature, using or possessing a weapon or breaching an order made by a court or tribunal for the personal protection of another person.⁶

Background

1.10 Section 501 of the Act concerns the refusal or cancellation of visas on character grounds, and has undergone significant change since 2014.

1.11 This section will outline the changes made to the character and visa cancellation provisions in 2014, the current provisions, and the context within which the proposed changes to the current provisions have been introduced.

Migration Amendment (Character and General Visa Cancellation) Bill 2014

1.12 The Migration Amendment (Character and General Visa Cancellation) Bill 2014 (the 2014 character bill) was introduced by the then Minister for Immigration and Border Protection, the Hon Scott Morrison MP, into the House of Representatives on the 24 September 2014. The purpose of the 2014 character bill, Mr Morrison explained, was:

4 The Hon. Mr David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *House of Representatives Hansard*, 25 October 2018, p. 1.

5 The Hon. Mr David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *House of Representatives Hansard*, 25 October 2018, p. 1.

6 The Hon. Mr David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *House of Representatives Hansard*, 25 October 2018, p. 1.

...to strengthen the character and general visa cancellation provisions in the Migration Act to ensure that non-citizens who commit crimes in Australia, pose a risk to the Australian community or represent an integrity concern are appropriately considered for visa refusal or cancellation. The bill also introduces a mandatory cancellation power for non-citizens who objectively do not pass the character test and are in prison.⁷

1.13 The 2014 character bill was introduced following a review in 2013 by the then Department of Immigration and Border Protection into the character and general visa cancellation framework. That review recommended that changes be made to the Act in order 'to strengthen the integrity of the migration programme, including amendments to better capture particular kinds of criminal activity and non-citizens who engage in migration fraud'.⁸

1.14 Prior to the introduction of this bill, the character and visa cancellation provisions of the Act had remained unchanged for some time:

The character provisions in Part 9 of the Migration Act have been in place in their current form since 1999, and the general visa cancellation provisions in Subdivision D of Division 3 of Part 2 of the Migration Act have remained largely unchanged since 1994. Since that time, the environment in relation to the entry and stay in Australia of non-citizens has changed dramatically, with higher numbers of temporary visa holders entering Australia for a variety of purposes.⁹

1.15 The 2014 character bill proposed three key amendments to the Act:

- Amending section 501 of the Act to:
 - broaden the existing grounds for not passing the character test; and
 - allow the minister to require the head of an agency of a state or territory to disclose to the minister personal information that is relevant to whether the person passes the character test, and the possible refusal or cancellation of their visa under section 501.
- Amending the general visa cancellation provisions in the Act to:
 - enhance measures for dealing with noncitizens who present an integrity, identity or fraud risk;
 - introduce lower thresholds for cancelling temporary visas, reflective of the lower tolerance for behavioural concerns in the temporary visa context; and

7 The Hon. Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 24 September 2014, p. 10325.

8 Migration Amendment (Character and General Visa Cancellation) Bill 2014 explanatory memorandum, p. 1.

9 Migration Amendment (Character and General Visa Cancellation) Bill 2014 explanatory memorandum, p. 1.

- introduce stronger personal ministerial decision making powers in relation to the general visa cancellation provisions, consistent with those in the character provisions.
- Introducing mandatory visa cancellation under section 501 of the Act in certain circumstances.¹⁰

1.16 The 2014 character bill received Royal Assent on 10 December 2014.

Current character and general visa cancellation provisions

1.17 The current provisions of the Act enable the Minister to refuse to grant a visa if the visa applicant does not satisfy the Minister that they pass the character test.¹¹ Further, the Minister may cancel an existing visa if the Minister reasonably suspects that the visa holder does not pass the character test, and the visa holder does not satisfy the Minister that they pass the character test.¹²

1.18 A person may not pass the character test if any of the criteria contained in section 501(6) are satisfied, including:

- the person holds a substantial criminal record, as defined by section 501(7);¹³
- the person has been convicted of an offence committed while in immigration detention, escaping from immigration detention or after escaping immigration but before being placed in immigration detention again;¹⁴
- the person has committed an offence against section 197A of the Act;¹⁵
- a reasonable suspicion by the Minister that the person has been, is a member of or has an association with a group or organisation involved in criminal conduct;¹⁶
- a reasonable suspicion by the Minister that the person has been or is involved in certain conduct, including a people smuggling offence under sections 233A to 234A of the Act, people trafficking offences or crimes of international concern such as the crime of genocide, crimes against humanity, war crimes or crimes involving torture or slavery;¹⁷

10 The Hon. Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 24 September 2014, pp. 10326–10327.

11 *Migration Act 1958* (Cth), s. 501(1).

12 *Migration Act 1958* (Cth), s. 501(2).

13 *Migration Act 1958* (Cth), para. 501(6)(a).

14 *Migration Act 1958* (Cth), para. 501(6)(aa).

15 *Migration Act 1958* (Cth), para. 501(6)(ab).

16 *Migration Act 1958* (Cth), para. 501(6)(b).

17 *Migration Act 1958* (Cth), para. 501(6)(ba).

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- a consideration that the person is not of good character, with regard to the person's past and present criminal and general conduct;¹⁸
 - a risk that the person's entry or continued presence in Australia would pose a risk to the community, including engaging in criminal conduct, harassing or molesting another person in Australia, or vilifying a segment of the Australian community;¹⁹ and
 - a person being convicted by a court (either in Australia or a foreign country) in relation to sexually based offences involving a child.²⁰

1.19 Further, the Minister must cancel a visa where the visa holder has been sentenced to a custodial sentence of 12 months' duration or more, or has been found guilty of a sexual crime involving a child.²¹

1.20 When the Minister or delegate considers refusing or cancelling a visa under section 501, the decision-maker should have regard to the 2014 *Direction No. 65 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* (Ministerial Direction No. 65, the Direction), which provides factors to be taken into account when making the decision and how they apply.²² The Direction divides such factors into 'primary' and 'other' considerations, and assists a decision-maker to make decisions according to these factors, giving more weight to 'primary' factors.²³

1.21 A visa applicant or holder who does not satisfy the character test and consequently has their visa refused or cancelled may appeal a refusal or cancellation within 28 days of the decision. Further applications to the Administrative Appeals Tribunal (AAT) or judicial review may be sought where a visa is not restored.²⁴

1.22 In 2016, the Commonwealth Ombudsman completed an own motion investigation into section 501 of the Act. As part of its report, the Commonwealth Ombudsman illustrated that the number of visas cancelled under section 501 had increased dramatically since the 2014 amendments to section 501 of the Act.

18 *Migration Act 1958* (Cth), para. 501(6)(c).

19 *Migration Act 1958* (Cth), para. 501(6)(d).

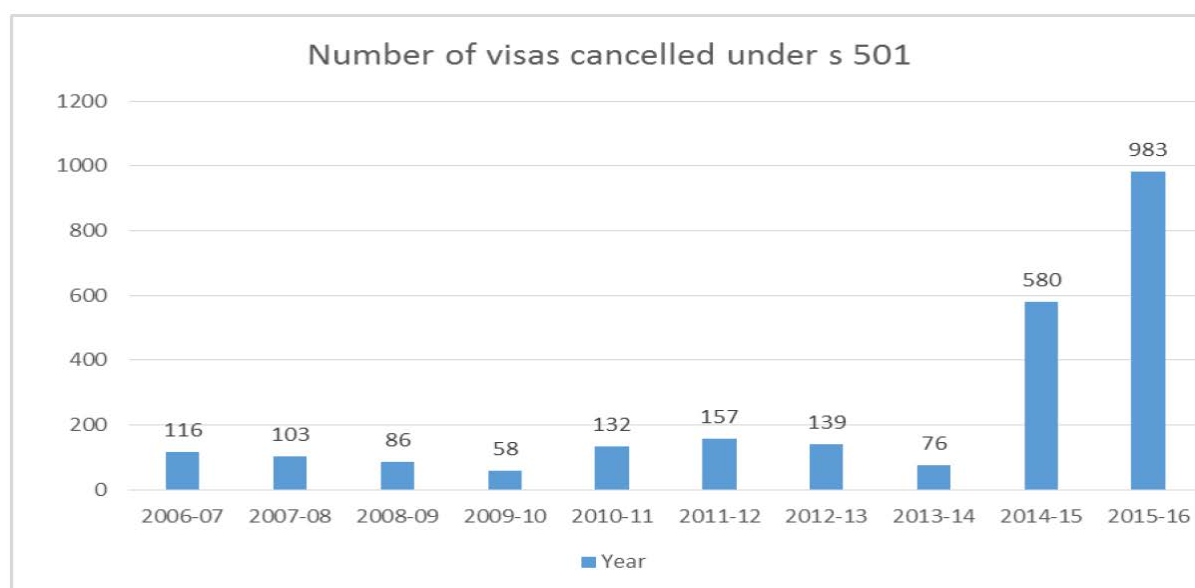
20 *Migration Act 1958* (Cth), para. 501(6)(e).

21 *Direction No. 65 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* ('Direction No. 65').

22 *Direction No. 65*.

23 *Direction No. 65*.

24 Department of Home Affairs, *Character requirements for visas*, <https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/character> (accessed 21 November 2018).

Figure 1.1: Number of visas cancelled under s 501

Source: Commonwealth Ombudsman, *The Department of Immigration and Border Protection: The administration of section 501 of the Migration Act 1958*, December 2016, p. 6.

1.23 Chapter 2 discusses the Commonwealth Ombudsman report in greater detail.

'No one teaches you to become an Australian'

1.24 The amendments proposed by the bill were developed in response to the report of the Joint Standing Committee on Migration's (JCSM), *No one teaches you to become an Australian*.²⁵ In his second reading speech, the Minister referred to this report, which 'noted that strengthening the character provisions will make Australians feel safer and be safer'.²⁶

1.25 In its report, the JCSM stated 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.²⁷

1.26 However, the JCSM also noted that there exist 'community concerns about the escalation of violent crimes such as homicide, serious assault, rape, indecent assault, aggravated burglary, motor vehicle theft and rioting; particularly in Victoria', and expressed the view that 'such serious criminal offences committed by visa holders must have appropriate consequences'.²⁸

25 Department of Home Affairs, *Submission 15*, p. 4.

26 The Hon. Mr David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *Parliamentary Debates*, 25 October 2018, p. 1.

27 Joint Standing Committee on Migration, *No one teaches you to become an Australian*, December 2017, p. 154.

28 Joint Standing Committee on Migration, *No one teaches you to become an Australian*, December 2017, p. 174.

1.27 In considering the character and cancellation provisions of the Act, the JCSM acknowledged the 'concerns of submitters about extending the character provisions in the *Migration Act 1958* to under 18 year olds', and that there are 'a lack of services to assist in the participation of young people from migrant and refugee backgrounds in mainstream Australian society'.²⁹ The JCSM also considered that a person aged over 16 whose visa is cancelled cannot be deported until that person reaches 18 years of age.³⁰

1.28 The JCSM ultimately made the following recommendations in respect of the character and cancellation provisions of the Act:

Recommendation 15

7.228 The Committee recommends that the Australian Government amend the *Migration Act 1958* requiring the mandatory cancellation of visas for offenders aged between 16 and 18 years who have been convicted of a serious violent offence, such as car jacking's [sic] or serious assaults. If legislation is amended, this should be accompanied by a caveat that no retrospective liability is thereby created.

Recommendation 16

7.229 The Committee is also recommending that anyone over 18 years of age who has been convicted of a serious violent offence which is prescribed, such as serious assaults, aggravated burglary, sexual offences and possession of child pornography, have their visa cancelled under section 501 of the *Migration Act 1958*.³¹

1.29 The Department of Home Affairs has noted that, in response to these recommendations, the proposed amendments to the Act 'ensure all non-citizens convicted of serious offences may be considered for visa refusal or cancellation under section 501 of the *Migration Act 1958*'.³²

1.30 The JCSM is currently conducting an inquiry into review processes associated with visa cancellations made on criminal grounds, and at the time of tabling this report has not yet reported its findings.³³

Key provisions of the bill

1.31 This section outlines the key provisions of the bill in general terms.

29 Joint Standing Committee on Migration, *No one teaches you to become an Australian*, December 2017, p. 174.

30 Joint Standing Committee on Migration, *No one teaches you to become an Australian*, December 2017, p. 175.

31 Joint Standing Committee on Migration, *No one teaches you to become an Australian*, December 2017, p. 175.

32 Department of Home Affairs, *Submission 15*, p. 4.

33 See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/Visacancellationprocess.

Definitions of 'character concern' and 'designated offence'

1.32 The bill proposes to amend the meaning of 'character concern' contained in section 5C of the Act. Proposed paragraph 5C(1)(a) would clarify that a non-citizen who has been convicted of one of the offences set out in the Act would be of character concern.³⁴ It refers to offences contained in proposed subsection 5C(3) for the purposes of the definition of character concern.³⁵

1.33 Proposed paragraphs 5C(3)(a)-(c) introduce a new definition of 'designated offence'. They state that for the purposes of subsection 5C(1), a designated offence constitutes an offence against a law in force in Australia or a foreign country, which includes:

- one or more of the physical elements involves a number of specific acts, including (but not limited to): violence against a person, non-consensual conduct of a sexual nature, breaching an order made by a court or tribunal for the personal protection of another person, using or possessing a weapon, aiding or abetting the commission of an offence, and others;³⁶
- an offence punishable by: imprisonment for life, imprisonment for a fixed term of two years or more, or imprisonment for a maximum term of two years;³⁷ or
- an offence against the law in force in a foreign country punishable in a foreign country, if it were assumed that the act or omission constituting the offence had taken place in the Australian Capital Territory (ACT), and the act was against the law in the ACT and punishable as mentioned in paragraph 5C(3)(a).³⁸

Refusal or cancellation of visa on character grounds

1.34 The bill proposes to amend the application of the character test contained in section 501 of the Act to incorporate the definition of character concern by the proposed changes to section 5C. Currently, the Act provides that the character test contained in subsection 501(6) sets out the circumstances in which a non-citizen does not pass the character test.³⁹ Proposed paragraph 501(6)(aaa) would provide that a non-citizen does not pass the character test if the non-citizen is convicted of a designated offence as defined by proposed subsection 501(7AA).⁴⁰ The explanatory

34 Migration Amendment (Strengthening the Character Test) Bill 2018 (Strengthening the Character Test Bill), Schedule 1, Item 2, proposed paragraph 5C(1)(a).

35 Explanatory Memorandum, p. 3.

36 Strengthening the Character Test Bill, Schedule 1, Item 4, proposed subparagraphs 5C(3)(a)(i)–(v).

37 Strengthening the Character Test Bill, Schedule 1, Item 4, proposed paragraph 5C(3)(b).

38 Strengthening the Character Test Bill, Schedule 1, Item 4, proposed paragraph 5C(3)(c).

39 Migration Act, subsection 501(6).

40 Explanatory Memorandum, p. 2.

memorandum to the bill states that the intention of this item is 'to ensure that a non-citizen who has been convicted of a *designated offence* is included in a class of persons who do not pass the *character test*'.⁴¹

1.35 Proposed subsection 501(7AA) introduces the elements of a designated offence for the purposes of the character test in subsection 501(6) of the Act. Proposed subparagraphs 501(7AA)(a)(i)–(viii) replicate the factors set out in proposed paragraph 5C(3)(a).

Application of amendments

1.36 Proposed item 7(2) of the bill states that amendments made in proposed paragraph 501(6)(aaa) will apply to a decision to grant or refuse to grant a visa if the application for the visa was made prior to the commencement of the bill and had not been finally determined, or the application for the visa is made on or before the commencement of the amendments.⁴² It also applies to a decision made on or after the commencement to cancel a visa.⁴³

Consideration by other Parliamentary committees

1.37 This bill has been considered by both the Scrutiny of Bills Committee (the Scrutiny Committee) and the Parliamentary Joint Committee on Human Rights (PJCHR). This section contains a summary of these committees' reports on the bill.

Scrutiny of Bills Committee

1.38 The Scrutiny Committee drew attention to the bill's broad discretionary powers and whether there existed a trespass on personal rights and liberties.⁴⁴ It stated that the bill's explanation of the practical consequences of the amendments, namely that more people would be liable for consideration of refusal or cancellation of a visa due to the stricter character requirements, would 'result in more people being held in immigration detention, removed from Australia and potentially separated from their family'.⁴⁵

1.39 The Scrutiny Committee raised a number of other concerns, such as:

- the proposed amendment to refuse or cancel a person's visa where they have committed a designated offence but served a very short sentence or no sentence at all;⁴⁶
- the exclusion of natural justice requirements for decisions taken in regards to section 501 visa rejections or cancellations;⁴⁷ and

41 Explanatory Memorandum, p. 4 (original emphasis retained).

42 Strengthening the Character Test Bill, Schedule 1, Item 7(2)(a).

43 Strengthening the Character Test Bill, Schedule 1, Item 7(2)(b).

44 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2018*, 14 November 2018, p. 9 ('Scrutiny Digest').

45 Scrutiny Digest, p. 9.

46 Scrutiny Digest, p. 10.

- questions regarding merits review and the capacity for the minister to overturn a decision made by the AAT.⁴⁸

1.40 The Scrutiny Committee concluded by stating that section 501 of the Act already provides the minister with considerable and broad discretionary power to refuse or cancel a visa, and does not contain procedural fairness obligations or adequate merits review. It therefore queried whether the bill unduly trespasses on rights and liberties, and suggested amending the test under the relevant section.

Parliamentary Joint Committee on Human Rights

1.41 The PJCHR expressed a number of concerns with the bill. The PJCHR noted that it has previously considered the power of the minister to cancel or refuse a visa on character grounds in relation to the character bill which sought to amend section 501 of the Act.⁴⁹

1.42 The PJCHR stated that the proposed amendments may breach Australia's 'non-refoulement' obligations under the *International Covenant on Civil and Political Rights* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The report observed that the statement of compatibility with human rights in the bill's explanatory memorandum acknowledges that the removal of a person from Australia following the refusal or cancellation of a visa engages the non-refoulement obligation. The statement of compatibility also expressed Australia's commitment to its international obligations concerning non-refoulement, an obligation that is considered as part of the decision of whether to cancel or refuse a visa.

1.43 However, the PJCHR noted that section 197C of the Act states that, for the purposes of exercising removal powers, Australia's non-refoulement obligations are irrelevant in regards to an unlawful citizen, and:

Therefore, notwithstanding the commitment in the statement of compatibility not to remove a person in breach of non-refoulement obligations, there is no statutory protection available to ensure that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia.⁵⁰

1.44 The PJCHR further observed that there is no right to merits review of a decision that is made personally by the minister to refuse or cancel a person's visa on character grounds. It further stated that while judicial review of the minister's decision may be available, the PJCHR has previously found that 'judicial review in the

47 Scrutiny Digest, p. 10.

48 Scrutiny Digest, pp. 10–11.

49 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report 12 of 2018*, 27 November 2017, p. 2 ('Human Rights Scrutiny Report').

50 Human Rights Scrutiny Report, p. 5.

Australian context is not likely to be sufficient to fulfil the international standard required of "effective review" of non-refoulement decisions'.⁵¹

1.45 The PJCHR expressed concern on a number of other issues in relation to the bill, including:

- whether the bill is compatible with the right to liberty, with respect to potential arbitrary detention under international human rights law where a person may be subject to indefinite or prolonged detention due to being unable to return to their home country;⁵²
- whether the bill is compatible with the prohibition on expulsion without due process, including the availability of judicial review;⁵³
- whether the bill is compatible with the right to respect for the family and the obligation to consider the best interests of the child;⁵⁴
- whether the bill is compatible with the right to freedom of movement;⁵⁵ and
- powers to collect personal information based on 'character concern'.⁵⁶

1.46 The PJCHR sought advice from the minister on a number of matters in relation to these concerns. As at the time of tabling this report, the minister had not yet responded to the PJCHR's requests.

51 Human Rights Scrutiny Report, p. 6.

52 Human Rights Scrutiny Report, pp. 7–12.

53 Human Rights Scrutiny Report, pp. 12–15.

54 Human Rights Scrutiny Report, pp. 16–18.

55 Human Rights Scrutiny Report, pp. 18–20.

56 Human Rights Scrutiny Report, pp. 20–22.