



Australian Government
Department of Home Affairs

Submission to the inquiry into Migration Amendment (Strengthening the Character Test) Bill 2019

Senate Legal and Constitutional Affairs Legislation
Committee

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1. Introduction

- 1.1.1. The Department of Home Affairs (Home Affairs) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into Migration Amendment (Strengthening the Character Test) Bill 2019, following the introduction of the Bill into the House of Representatives on 4 July 2019.
- 1.1.2. This submission provides a response to the reason for referral and principal issues for consideration which were raised by the Senate Selection of Bills Committee, and briefly explains key measures of the Bill.

1.2. Reason for referral and principal issues for consideration

- 1.2.1. The Bill was referred to the Committee by the Senate Selection of Bills Committee in its Report No. 2 of 2019, on 4 July 2019. The reason for referral is:
- *“This will lower an already low bar for refusing or cancelling the visas of non-citizens, for reasons such as sharing intimate images, verbally threatening someone, associating with members of a gang, or holding a rock in a threatening way.”; and*
 - *‘To inquire into the contents of the Bill and allow stakeholders to inform the Committee of detailed concerns’.*

2. Home Affairs’ submission

2.1. Purpose of the Bill

- 2.1.1. The Migration Amendment (Strengthening the Character Test) Bill 2019 (the Bill) will ensure non-citizens who are convicted of certain serious offences—and pose an ongoing risk to the Australian community while in Australia or will pose a threat if they are allowed to enter Australia—do not pass the character test and are appropriately considered for visa refusal or cancellation.
- 2.1.2. The Bill achieves this by amending section 501, and making consequential amendments to section 5C of the *Migration Act 1958*, to introduce a *designated offence* ground to the character test. In effect, these amendments will provide the Minister and delegates with a clear, objective ground with which to consider refusing or cancelling a non-citizen’s visa due to a conviction for one or more of these offences that carries a maximum sentence of at least two years, including:
- 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 — such as an apprehended violence order;

- using or possessing a weapon; or
- involvement in any of the above.

2.2. Background of the Bill

2.2.1. This Bill has been developed in response to the Joint Standing Committee on Migration's December 2017 report on migrant settlement outcomes entitled, *No one teaches you to become an Australian*.

2.2.2. Following 115 public submissions, the Committee noted in its report that there were community concerns about the escalation of violent crimes, and that: *"These are serious criminal offences which have a major impact on the lives of its victims and the Committee's view is that such serious criminal offences committed by visa holders must have appropriate consequences"*. The Committee recommended that:

- Recommendation 15 - 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 jackings or serious assaults. If legislation is amended, this should be accompanied by a caveat that no retrospective liability is thereby created.
- Recommendation 16 - 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*.

2.2.3. In response to the Joint Standing Committee on Migration's recommendations, Migration Amendment (Strengthening the Character Test) Bill 2018 was introduced to the House of Representatives on 25 October 2018 to ensure that all non-citizens convicted of serious offences may be considered for visa refusal or cancellation under section 501 of the *Migration Act 1958*.

2.2.4. On 21 February 2019, the Joint Standing Committee on Migration urged the Australian Government to pass and enact the Migration Amendment (Strengthening the Character Test) Bill 2018 in their report entitled *The report of the inquiry into review processes associated with visa cancellations made on criminal grounds*.

- The Committee stated that the Bill would ensure violent offenders can be removed from Australia at the earliest possible opportunity and would address community concerns about non-citizens who commit acts of violence in Australia.

2.2.5. The Bill was before the House of Representatives and lapsed at the dissolution of Parliament on 11 April 2019.

2.2.6. On 4 July 2019, following commencement of the 46th Parliament, the Migration Amendment (Strengthening the Character Test) Bill 2019 was introduced to the House of Representatives.

2.3. The current character framework

2.3.1. All non-citizens who wish to enter or remain in Australia must satisfy relevant requirements set out in the *Migration Act 1958* and *Migration Regulations 1994*, including the character test at section 501 of the *Migration Act 1958*. A table explaining the current character framework is at [Annex A](#).

2.4. The meaning of *character concern*

2.4.1. Section 5C of the *Migration Act 1958* contains the definition of *character concern*, which mirrors the character requirements contained in section 501 of the Act.

2.4.2. The definition of *character concern* in section 5C is relevant in determining:

- the circumstances in which the Department can disclose personal information for the purposes of data matching; or
- the reasons for which biometrics captured by the Department can be used.

2.5. The new *designated offences* ground

2.5.1. The designated offence ground, proposed by the Bill, recognises that certain serious offences (*a designated offence*) have a significant impact on victims and their communities. The Bill proposes to add a designated offence ground to the character test.

2.5.2. To ensure that relevant offences across all states and territories are captured, a designated offence is defined by the Bill as an offence against a law in force in Australia, or in a foreign country in relation to which the following conditions are satisfied:

- 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*; or
 - aiding, abetting, counselling or procuring the commission of an offence that is a designated offence; or

- inducing the commission of an offence that is a designated offence, whether through threats or promises or otherwise; or
- being in any way (directly or indirectly) knowingly concerned in, or party to, the commission of an offence that is a designated offence; or
- conspiring with others to commit an offence that is a designated offence.
- For an offence against a law in force in Australia—the offence is punishable by:
 - imprisonment for life; or
 - imprisonment for a fixed term of not less than two years; or
 - imprisonment for a maximum term of not less than two years.
- For an offence against a law in force in a foreign country—if it were assumed that the act or omission constituting the offence had taken place in the Australian Capital Territory:
 - the act or omission would have constituted an offence against a law in force in that territory; and
 - the territory offence would have been punishable by:
 - imprisonment for life; or
 - imprisonment for a fixed term of not less than two years; or
 - imprisonment for a maximum term of not less than two years.

2.5.3. A *weapon*, for the purpose of a designated offence, includes:

- a thing made or adapted for use for inflicting bodily injury; and
- a thing where the person who has the thing intends or threatens to use the thing, or intends that the thing be used, to inflict bodily injury.

2.5.4. The Bill does not list specific offences or seek to prescribe them in legislation as offences vary in name and characterisation across each state and territory.

- By way of example, the Australian Capital Territory has an offence for the unauthorised possession or use of a firearm other than a prohibited firearm (maximum sentence five years for possession of one or two such firearms). Victoria does not have a precisely equivalent offence but does make it an offence to possess an unregistered firearm (both maximum sentences of two years for longarms, four years for handguns).

2.5.5. The *designated offence* definition only intends to capture serious offending by requiring that a non-citizen is convicted of a designated offence, and that offence be punishable by a maximum sentence of at least two years imprisonment. See [Textbox 1](#) for examples of offending that would not meet the definition of a designated offence but may engage other grounds of the character test.

Textbox 1: Offences which would not meet the definition of a *designated offence*

Allegations or charges for an offence without a conviction

A non-citizen who is only accused or charged of an offence would not be considered for visa refusal or cancellation due to a *designated offence*. For example:

- In New South Wales, contravening an Apprehended Violence Order carries a maximum penalty of two years imprisonment. However, to meet the definition of a *designated offence*, the non-citizen must be convicted. For example:
 - If the Police chose not to pursue the person in Court—the person will not have a conviction and the offence will not meet the definition of a *designated offence*.
 - If the Court finds the person not guilty—for example, an accidental or unwitting breach—then the person will not have a conviction and the offence will not meet the definition of a *designated offence*.

Convictions for offences that do not carry a maximum sentence of at least two years imprisonment

Some offences may not carry the required maximum penalty even if the offence involves one of the physical elements that forms the basis of a *designated offence*. For example:

- In Queensland, a person must not possess a knife in a public place or a school, without a reasonable excuse, and this offence carries a maximum penalty of one year's imprisonment. If a non-citizen was convicted of this offence, they would not fail the character test on the proposed designated offence ground.

Convictions for offences that do not involve one of the physical elements that form the basis of a designated offence

Other offences may carry the required maximum sentence, but the offence may not involve the necessary physical elements of a designated offence—such as violence against a person, non-consensual sexual acts, breaching an order made by a court or tribunal for the personal protection of another person or possessing or using a weapon. For example:

- In Western Australia a person must not destroy, damage or deface the property of another person by graffiti without consent of the person, and this offence carries a maximum penalty of two years imprisonment. A conviction for this offence would not meet the definition of a *designated offence* as it does not involve one of the required physical elements.
- In South Australia, possession or consumption (without a prescription) of amphetamines for personal use attracts a maximum penalty of two years imprisonment. A conviction for this offence would not meet the definition of a *designated offence* as it does not involve one of the required physical elements.

- 2.5.6. The addition of a criminal conviction for a visa refusal or cancellation ground, without the requirement of a minimum sentence, is not isolated in the character test. Within the current framework, a person can already be considered for refusal or cancellation under section 501, regardless of any sentence imposed, where they have been convicted of:
- a sexually based offence against a minor;
 - an offence that was committed while the person was in immigration detention; or
 - offences committed during an escape from immigration detention.
- 2.5.7. The *designated offence* ground will apply retroactively—meaning the decision-maker can consider convictions for a designated offence which occurred before, on, or after the commencement of this Bill. This is consistent with other amendments made to the character test, including:
- 1998 amendments to sections 501(6)(a)—relating to a person having a substantial criminal record, 501(6)(c)—relating to past and present criminal or general conduct and 501(6)(d)—relating to a risk that the person would engage in certain undesirable conduct if they were to enter or remain in Australia.
 - 2011 amendments to sections 501(6)(aa)—relating to convictions while in, or escaped from immigration detention, and 501(6)(ab)—relating to convictions for escaping immigration detention.
 - 2014 amendments to section 501(3A)—the introduction of the mandatory cancellation framework.
- 2.5.8. The designated offence ground complements existing provisions in the character test by ensuring that non-citizens who have been convicted of a designated offence, can, at a minimum, be considered for visa refusal or cancellation—regardless of the sentence imposed.
- 2.5.9. De-identified case studies, highlighting the effect of the proposed *designated offence* ground can be found at **Annex B**.

2.6. Amendments to the meaning of *character concern*

- 2.6.1. Consequential amendments to section 5C will provide that those who have been convicted of a designated offence will meet the definition of *character concern*.
- 2.6.2. The amendments will add the *designated offences*, described in section 501(7), to the definition of *character concern* so that:
- non-citizens who are convicted of a designated offence meet the definition of character concern; and
 - the Department has the ability to identify people who are of character concern.

2.6.3. If section 5C is not amended, this will cause an inconsistency in the *Migration Act 1958*.

2.7. Visa refusal or cancellation due to a *designated offence*

2.7.1. If a non-citizen objectively does not pass the character test on this ground, the Minister or delegate has discretion to consider refusal or cancellation of a visa using existing discretionary refusal and cancellation powers under section 501.

2.7.2. Subsections 501(1) and 501(2) of the *Migration Act 1958* provide the power to refuse or cancel a non-citizen's visa if the person does not pass the character test. These powers may be exercised personally by the Minister or a departmental delegate.

2.7.3. If the Minister or their delegate is considering visa refusal or cancellation under subsection 501(1) or 501(2) of the *Migration Act 1958*, the affected person is given the opportunity to provide relevant information or comments to the decision-maker, in response to whether the discretion to cancel or refuse their visa should be exercised.

2.7.4. When a delegate is exercising the discretionary power to refuse or cancel a visa, the delegate must consider a wide range of factors contained within Ministerial Direction 79, including:

- protection of the Australian community from criminal or other serious conduct;
- best interests of minors in Australia;
- expectations of the Australian community;
- Australia's international obligations;
- impact on victims; and
- the nature and extent of a person's ties to Australia.

2.7.5. In circumstances where the Minister uses their non-delegable, non-compellable powers to refuse or cancel a visa due to designated offences, the Minister can refuse or cancel a non-citizen's visa without natural justice.

- Section 501(3), relating to the Minister's personal decision to refuse or cancel a visa in the national interest, is exercised without natural justice. However the non-citizen will be entitled to seek revocation of the decision. As part of the revocation process, a non-citizen can put forward information and comments as to why the refusal or cancellation should be revoked.

2.7.6. Failing the character test on this new *designated offences* ground will not, in every case, result in visa refusal or cancellation. Rather, the new ground provides the Minister or their delegate with the opportunity to appropriately consider visa refusal or cancellation.

2.7.7. Further, only those who do not pass the character test may have their visa refused or cancelled under section 501. There are no provisions in the *Migration Act 1958* that

result in the consequential cancellation of family members who hold a visa associated with a non-citizen who has had their visa cancelled under section 501.

- In the case of family and domestic violence, a victim's visa will not be consequentially cancelled under section 501, if the primary visa holder (and perpetrator) is cancelled due to character concerns. Victims of domestic and family violence associated with a non-citizen whose visa was cancelled due to character concerns are assessed on a case-by-case basis.

2.7.8. The Government remains committed to Australia's international obligations. The individual circumstances of a non-citizen who does not pass the character test on this ground can be taken into account in both considering visa refusal and cancellation, and throughout the removals process.

- The Department approaches the possible refusal or cancellation of minors with a high degree of caution and consultation. A visa refusal or cancellation under section 501 of the *Migration Act 1958* is made after full consideration of the person's individual circumstances, the best interests of the child, and Australia's international obligations—including those under the Convention on the Rights of the Child.
- The Government recognises that Australia's *non-refoulement* obligations are absolute. All removals from Australia will be in compliance with Australia's *non-refoulement* obligations.

2.8. Merits and judicial review rights of affected persons

2.8.1. If a non-citizen's visa is cancelled or refused by a delegate under section 501 using discretionary powers, it may be open to the affected person to seek merits review of the decision. The General Division of the Administrative Appeals Tribunal, an independent merits review body, conducts these reviews.

- The right to merits review is dependent upon a number of factors—including the visa the non-citizen held or applied for and whether the person is located in Australia or offshore.

2.8.2. If the decision to refuse or cancel the visa has been made personally by the Minister, merits review is not available to the affected person.

- However, all decisions made under section 501 (including decisions personally made by the Minister) may be reviewed by the Federal Court or High Court.

3. Conclusion

- 3.1.1. The Bill provides fairness to affected persons, while ensuring that the Department maintains the ability to refuse or cancel persons who pose a risk to the Australian community.
- 3.1.2. The amendments are focused on serious offences committed by visa holders or applicants. By strengthening the character test in section 501 of *the Migration Act 1958*, those convicted of serious offences that carry a maximum penalty of at least two years will objectively fail to pass the character test, and can therefore be appropriately considered for visa refusal or cancellation. The ground is discretionary and provides appropriate measures that enable decision-makers to consider a range of matters and circumstances on each individual case.

Annex A — the current character test

Legislation	Character test ground
501(6)	For the purposes of section 501, a person does not pass the <i>character test</i> if:
501(6)(a)	<p>The person has a <i>substantial criminal record</i> (as defined by subsection (7)).</p> <p>(7) For the purpose of the character test, a person has a <i>substantial criminal record</i> if:</p> <ul style="list-style-type: none"> (a) the person has been sentenced to death; or (b) the person has been sentenced to imprisonment for life; or (c) the person has been sentenced to a term of imprisonment of 12 months or more; or (d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or (f) the person has: <ul style="list-style-type: none"> (i) been found by a court to not be fit to plead, in relation to an offence; and (ii) the court has nonetheless found that on evidence available the person committed the offence; and (iii) as a result, the person has been detained in a facility or institution.
501(6)(aa)	<p>The person has been convicted of an offence that was committed:</p> <ul style="list-style-type: none"> (i) while the person was in immigration detention; or (ii) during an escape by the person from immigration detention; or (iii) after the person escaped from immigration detention but before the person was taken into immigration detention again.
501(6)(ab)	<p>The person has been convicted of an offence against section 197A.</p> <p>Section 197A – A detainee must not escape from immigration detention.</p>
501(6)(b)	<p>The Minister reasonably suspects:</p> <ul style="list-style-type: none"> (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and (ii) that the group, organisation or person has been or is involved in criminal conduct.
501(6)(ba)	<p>The Minister reasonably suspects the person has been or is involved in conduct constituting one or more of the following:</p> <ul style="list-style-type: none"> (i) an offence under one or more of sections 233A to 234A (people smuggling); (ii) an offence of trafficking in persons;

Legislation	Character test ground
	<p>(iii) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern</p> <p>whether or not the person, or another person, has been convicted of an offence constituted by the conduct.</p>
501(6)(c)	<p>Having regard to either or both of the following:</p> <p>(i) the person's past and present criminal conduct;</p> <p>(ii) the person's past and present general conduct;</p> <p>the person is not of good character.</p>
501(6)(d)	<p>If the person was allowed to enter or remain in Australia, there is a risk that the person would:</p> <p>(i) engage in criminal conduct in Australia; or</p> <p>(ii) harass, molest, intimidate or stalk another person in Australia; or</p> <p>(iii) vilify a segment of the Australian community; or</p> <p>(iv) incite discord in the Australian community or a segment of that community; or</p> <p>(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.</p>
501(6)(e)	<p>A court in Australia or a foreign country has:</p> <p>(i) convicted the person of one or more sexually based offences involving a child; or</p> <p>(ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction</p>
501(6)(f)	<p>The person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:</p> <p>(i) the crime of genocide;</p> <p>(ii) a crime against humanity;</p> <p>(iii) a war crime;</p> <p>(iv) a crime involving torture or slavery;</p> <p>(v) a crime that is otherwise of serious international concern.</p>
501(6)(g)	<p>The person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the <i>Australian Security Intelligence Organisation Act 1979</i>).</p>
501(6)(h)	<p>An Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.</p>
	<p>Otherwise, the person passes the <i>character test</i>.</p>

Annex B – case studies

Mr A is a temporary visa holder in Australia with an ongoing application for a permanent visa. Mr A has been convicted of violent assault related offences, for which he has received fines, good behaviour bonds and intensive correction orders. Mr A has not been sentenced to a term (or terms) of imprisonment of 12 months or more and, under the current character provisions, he does not objectively fail the character test on the basis of his criminal history.

Mr A is able to remain in Australia as the holder of a temporary visa and remains eligible for the grant of a permanent visa provided all criteria for grant of the visa are met, unless sufficient adverse information becomes available to find that Mr A does not pass the character test under subjective grounds.

Under the proposed designated offences ground in the Migration Amendment (Strengthening the Character Test) Bill 2019, Mr A would objectively fail the character test as he has been convicted of a violent offence, which is punishable by imprisonment for a maximum term of five years.

Mr B is an unlawful non-citizen in immigration detention with an ongoing application for a temporary visa. Mr B has been convicted of sexually based offences in Australia against an adult, for which he received fines and community correction orders. Mr B has not been sentenced to a term (or terms) of imprisonment of 12 months or more, or convicted or found guilty of a sexually based offence involving a child. As such, under the current character provisions, he does not objectively fail the character test on the basis of his criminal history.

Mr B remains eligible for the grant of a temporary visa provided all criteria for grant of the visa are met, unless sufficient adverse information becomes available to find that Mr B does not pass the character test under subjective grounds.

Under the proposed designated offences ground in the Migration Amendment (Strengthening the Character Test) Bill 2019, Mr B would objectively fail the character test as he has been convicted of a sexually based offence, which is punishable by imprisonment for a maximum term of ten years.

Mr C is an adult permanent visa holder in Australia who has links to youth gangs. Mr C has a criminal history which includes being found guilty without conviction for various theft related offences, for which he received a youth supervision order. As a result of further offending, he was convicted of a violent offence and sentenced to a period of four months imprisonment. Mr C has not been sentenced to a term (or terms) of imprisonment of 12 months or more and, under the current character provisions, does not objectively fail the character test on the basis of his criminal history.

Mr C's visa cannot be considered for cancellation under section 116(1)(e) of the Act on the basis that he may present a risk to the community, as this power does not apply to permanent visa holders who are in Australia.

Mr C will remain in Australia as the holder of a permanent visa, unless sufficient adverse information becomes available to find that Mr C does not pass the character test under subjective grounds.

However, under the proposed designated offences ground in the Migration Amendment (Strengthening the Character Test) Bill 2019, Mr C would objectively fail the character test as he has been convicted of a violent offence, which is punishable by imprisonment for a maximum term of five years.

