



VISA

Victorian
Immigration Solicitors'
Alliance
PTY LTD

13 December 2021

Senator the Hon Sarah Henderson
Chair
Senate Legal and Constitutional
Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator Henderson

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Migration Amendment (Strengthening the Character Test) Bill 2021

The Victorian Immigration Solicitors' Alliance: VISA thanks the Senate Legal and Constitutional Affairs Legislation Committee (Committee) for the opportunity to provide a submission on the Migration Amendment (Strengthening the Character Test) Bill 2021 (2021 Bill).

Who are VISA?

The Victorian Immigration Solicitors' Alliance: VISA is a professional alliance of Australian Immigration Solicitors & Barristers, "Migration Lawyers" and Associated Practitioners dedicated to advocacy, community awareness and continuing professional development of Australian Immigration Law.

We are a community of Migration, Legal and Ancillary Professionals who share a common set of goals; including the fostering of a greater appreciation within the wider society and Government of the valuable role that Legal Practitioners: Solicitors & Barristers – "Immigration Lawyers", more than any other group, bring to the administration of justice and the rule of law as it relates to the Australian Migration System.

The controversy

The premise of this Bill - as set out in the Explanatory Memorandum (EM) - states that the objective is to ensure that non-citizens who are convicted of certain serious offences, and pose a risk to the safety of the Australian community, do not pass the character test.

We, at VISA, concur with Law Council of Australia, in that the "purported objective [of this Bill is] unnecessary and misguided."

Executive Summary

This 2021 Bill wishes to expand the circumstances by which a person would not satisfy the character test in subsection 501(6) of the *Migration Act 1958* (Cth) (**Migration Act**) and thereby be subject to refusal or cancellation of their visa.

But for one change, this Bill is identical in substance to the Migration Amendment (Strengthening the Character Test) Bill 2019 (**2019 Bill**).

Of which the Law Council submitted that that 2019 Bill should not pass:

While... 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 ... [the Bill] ... is neither necessary nor proportionate, and the existing provisions of the Migration Act are sufficient to respond appropriately to individuals who commit serious offences and provide clear risks to the community.

In October 2021, the Senate voted on and did not pass the 2019 Bill. The Senate voted on a bill which includes Government amendments which have been retained in the 2021 Bill. While these changes have slightly narrowed the scope of the Bill, by and large it is the same Bill. Consequently, we at VISA, still believe this 2021 Bill should not pass.

The Character Test

Section 501 of the Migration Act provides for a two-step test for the Minister (or delegate) to refuse a visa application or cancel a visa on character grounds:

- (1) the decision-maker considers whether the person does not pass the character test;¹ and
- (2) the Minister:
 - a. (personally) *may* refuse or cancel the visa if he or she *reasonably suspects* the person does not pass the character test and is satisfied that the refusal or cancellation is on the national interest;²
 - b. (or delegate) *may* refuse or cancel the visa if he or she *is satisfied* that person does not pass the character test;³
 - c. (or delegate) *must* refuse or cancel the visa if he or she *is satisfied* that person does not pass the character test because the person has a substantial criminal record or has been convicted or found guilty of sexually based offences involving a child.⁴

That is, in most cases, a finding that a person does not pass the character test (in step (1)) enlivens a discretionary power to refuse or cancel the visa (in steps 2(a) and (b)).

¹ These are set out in subsection 501(6) of the Migration Act.

² *Ibid*, subsection 501(3)

³ *Ibid*, subsections 501(1) and (2).

⁴ *Ibid*, subsection 501(3A).

The Bill

The 2021 Bill wishes to expand the character test itself (ie, in step (1)).⁵

Thus expanding the circumstances in which a person would not satisfy the character test to include convictions for certain “designated offences” where the maximum penalty is two years, **regardless** of the sentence given (or even whether a custodial sentence is given at all).⁶

The Explanatory Memorandum (**EM**) for the Bill states that the objective is to ‘ensure that non-citizens who are convicted of certain serious offences, and pose a risk to the safety of the Australian community, do not pass the character test’.⁷

As noted above, VISA, concurs with Law Council of Australia, in that the "purported objective [of this Bill are] unnecessary and misguided."

To protect the community from people who pose a risk to it.

If the purpose of the Bill is, as it purports, to protect the community from people who pose a risk to it, that is already addressed in the Migration Act. The Minister or delegate, already has the power, upon receiving information that a visa holder was convicted of an offence, to consider whether their continued presence in Australia gave rise to a risk they would represent a danger to the community and thus do not pass the character test.

That power is found in the Migration Act, which already provides that a person does not satisfy the character test if, in the event the person was allowed to enter or to remain in Australia, there is a risk the person would represent a danger to the Australian community or to a segment of that community.⁸

Similarly, the Act already provides that a person does not satisfy the character test if the person has been sentenced to a term of imprisonment of either 12 months or more, or to multiple terms of imprisonment which add up to 12 months.⁹

Consequently, as pointed out by the Law Counsel, the effect of the 2021 Bill is to broaden the circumstances in which non-citizens will not satisfy the character test to include people at the lower end of offending. That is those who have been convicted of an offence but not sentenced to either 12 months imprisonment, or to a sentence which would result in being imprisoned for all the offences to 12 months.

⁵ It will make identical consequential amendments to the definition of ‘character concern’ in section 5C of the Migration Act.

⁶ Item 6 of Schedule 1 to the 2021 Bill.

⁷ Explanatory Memorandum, 2021 Bill, 1.

⁸ Subparagraph 501(6)(d)(v) of the Migration Act.

⁹ Ibid, paragraph 501(6)(a), read with paragraphs 501(7)(c) and (d).

VISA concurs with the Law Council's view that:

if the criminal justice system has determined that, a convicted person does not present a community risk and imposes a fine or a suspended sentence, it is questionable whether their subsequent visa cancellation is justifiable to 'protect' the community.

Similarly VISA agrees with the Law Councils comments as to broader policy ramifications arising from the 2021 Bill include that it would:

- have broader ramifications for the criminal justice system, by deterring non-citizens from entering guilty pleas, which may lead to more contested and protracted court proceedings with greater associated public expense;¹⁰
- further increase the number of cancellation decisions (which have already increased dramatically since the character test was last expanded in 2014),¹¹ thus increasing the number of people in immigration detention and exacerbating critical existing pressures on legal assistance services, tribunals and courts.

Designated offence

The so-called "designated offence" is defined as an offence committed in Australia or overseas which is punishable by at least a maximum sentence of two years imprisonment and involves violence or threats of violence, non-consensual conduct of a sexual nature, breaching an order made by a court or tribunal for personal protection of another person, or using or possessing a weapon.

The laws state an offence must "cause or substantially contribute ... to bodily harm", "harm to another person's mental health" or involve "family violence" to ensure "low-level offending is not captured".

As noted by the Law Council "in the 2019 Bill, a designated offence included an offence in which one or more of the physical elements of the offence involves violence, or a threat of violence, against a person, including an act constituting an offence of assault."

However, in the 2021 Bill, the change is that an act constituting an offence of common assault will only be a designated offence if the act:

- (a) causes or substantially contributes to:
 - (i) bodily harm to another person; or
 - (ii) harm to another person's mental health (within the meaning of the Criminal Code);whether temporary or permanent; or

¹⁰ The Law Council's 2019 submission, [125]-[128].

¹¹ Ibid, [119]-[124].

(b) involves family violence (as defined by subsection 4AB(1) of the *Family Law Act 1975*) by the person in relation to another person.

The problem, as noted by the Law Counsel, is the changes proposed do not capture all conceivable mitigating factors, which could reasonably suggest that a person convicted of a designated offence does not pose a risk to the safety of the community. We also commend the Law Council's 2019 submission which describes other examples such as a person carrying pepper spray being convicted of possession of a weapon, and a father who drops his children off with their mother in breach of a family violence prevention order – a conviction for either would be a designated offence and result in the person not satisfying the character test, despite the mitigating factors.¹²

Therefore, VISA concurs with the Law Counsel that the sentencing “judge” is best placed to assess the risk a convicted person may pose to the community.

Human Rights

VISA is concerned that, as noted by the Committed, this Bill is at risk of being incompatible with a number of human rights, due to the expanding of bases on which visas may be cancelled and increased the risk of a person being arbitrarily deprived of liberty in the absence of any opportunity to challenge mandatory detention.

Additionally, VISA is very concerned that “... in relation to non-citizens who have strong ties to Australia, including close family members in Australia, ... that the measure significantly risks impermissibly limiting the right to return to one's 'own country' (as part of the right to freedom of movement), the right to protection of the family, and the rights of the child.” (Report)

VISA also concurs with Asylum Seeker Resource Centre principal solicitor Carolyn Graydon, when she said the laws would increase the number of people facing deportation — many of whom have lived their entire lives in Australia.

[This process] will tear apart families [and] result in people facing indefinite detention that have already completed any criminal justice sentence that they were [given],” she told SBS News.

Refugee Council of Australia senior policy officer Asher Hirsch said the Council shared these concerns, warning the powers would “substantially violate” Australia’s International obligations.

“It’s an unfair system where we have two standards for people who are non-citizens they are doubly punished,” he said. “Where vulnerable people can find themselves in very precarious situations.”

¹² Other examples at set out in the Law Council's 2019 submission – see [79]-[86].

Similarly, VISA agrees with Refugee Council of Australia's senior policy officer Asher Hirsch when he said the powers would "substantially violate" Australia's international obligations.

"It's an unfair system where we have two standards for people who are non-citizens they are doubly punished," he said. "Where vulnerable people can find themselves in very precarious situations."

Family violence

Paragraph 501(7AC)(b) which provides that conviction for an offence of common assault, or an equivalent offence, which involves family violence as defined by subsection 4AB(1) of the *Family Law Act 1975* (Cth,) will be a **designated offence**.

Where Subsection 4AB(1) of the *Family Law Act 1975* (Cth) defines 'family violence' as: '*violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful*'. That is, it does not necessarily involve bodily harm.

As noted by the Law Counsel, "this provision is in effect an exception to proposed paragraph 501(7AC)(a) which provides that conviction for an offence of common assault which do not involve bodily harm or harm to mental health will not be a designated offence."

The issue with the Bill is this: the same act will be subject to different consequences depending on the identity of the person who committed it.

Although VISA concurs with the Law Counsel and acknowledges that this provision reflects a recognition of the serious nature and the scourge that is family violence and a commitment to address it, we do not believe, that the Migration Act should mandate that a person does not pass the character test simply by virtue of a conviction for which a particular maximum sentence is applicable, regardless of their actual sentence or the risk that they currently propose to the community.

In closing VISA would commend the 2019 Law Counsel's submission and the premiss that the increased likelihood of the perpetrator's visa being cancelled due to this Bill, 'may have the perverse effect of driving family violence experienced amongst migrant groups further underground, with dangerous consequences'.¹³

Regards

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¹³ Law Council's 2019 submission, [118].