2 SEPTEMBER 2019

MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2019

Supplementary submission to the Inquiry

VISA
CANCELLATIONS
WORKING GROUP

SUPPLEMENTARY SUBMISSION

1. The Visa Cancellations Working Group (**the Working Group**) refers to its previous submissions regarding the Inquiry into the recently tabled Migration Amendment (Strengthening the Character Test) Bill 2019 (**the Bill**), made both in writing and by way of oral evidence at the Senate Committee hearing. The Working Group is grateful to the Committee for the opportunity to contribute to the Inquiry.

2. Following the Senate Committee hearing on 19 August 2019, it is apparent that there remain issues to address. The Working Group makes the following submissions.

UNCERTAINTY

3. The Working Group remains very concerned about the uncertainty inherent in the Bill. Evidence given at the hearing did nothing to alleviate those concerns, and indeed exacerbated them.

4. At the hearing, representatives of the Department of Home Affairs (**the Department**) were unable to provide any of the following:

    a. A list of which offences in which jurisdictions would fall under the category 'designated offence'. Indeed, the Department was unsure that such a list could even be compiled. They could not advance a rough number of offences that would be caught.

    b. An estimate, even roughly, of how many people would be affected. Indeed, they noted that they "haven't been able to" model such figures, indicating that they have attempted to do so.

    c. A figure for how many non-citizens have been convicted of an offence.

    d. Any support for a proposition that existing laws have increased community safety, and that the Bill will increase community safety.

    e. Any figures for how many people affected by s.501 sought review.

5. The Department stated that any list of designated offences would change rapidly, even in the space of two weeks. This is of great concern and undermines the claim that certainty and objectively will be attained by the Bill.

Calculating a figure for increase

6. To calculate the likely increase, a list of offences would need to be furnished. That list would be extensive: a preliminary assessment by the Working Group indicates at least 40 Victorian offences would be caught, outside of other State and Territory offences. This is to say nothing of the overseas offences possibly caught.

7. Figures regarding non-citizens committing those offences would then be needed, or, at the very least, a figure for how many of those offences are committed Australia-wide, and the proportion of non-citizens committing offences in Australia as against the citizen population.

8. We again note our concerns about offences which *might* fall under the term, depending on their circumstances. These could not be quantified and must remain uncertain.

9. It is very likely that undertaking the above analysis would indicate an immense increase in people expected to necessarily fail the character test under the Bill. It is the Working Group's position

that the systems dealing with visa cancellations are already close to crisis point. *Any* increase will be challenging and may lead to systemic crisis.

10. Plainly, and as we stated in our initial submissions, a decision-maker will need to consider the case (as they would now, when the case is referred to the Department or otherwise comes to its attention), match it up against the relevant law in the relevant jurisdiction as it stands at the time, and decide whether to exercise the discretion to institute a cancellation process. At the point of cancellation, they will again need to assess against the relevant law in case of a change. Again, this undermines the claim that certainty and objectively will be attained by the Bill.

ADMINISTRATIVE BURDEN

11. As pointed out in our testimony before the Committee, there already exists a critical amount of decision-making pressure on the Department, the Administrative Appeals Tribunal, and the Federal Courts. All bodies are under considerable strain and are struggling to deal with existing caseloads, manifesting in delays.

12. A drastic expansion in character refusal and cancellation powers will add to the burden, both on the Department, and on the already beleaguered General Division of the Tribunal. As noted in evidence before the Committee, cases concerning visa refusal or cancellation under s.501 are accorded special priority by the Tribunal, given that in most cases they must by law be determined within 84 days or will be deemed to be affirmed.[1] Reviews in 'character' cases are usually conducted by senior members, and are resource-intensive. Following the amalgamation of the Tribunal in 2015, members now sit across divisions, such that increased traffic in one division has an impact in all others. Specifically, an increase in lodgements in the General Division, relating to character, would likely draw resources away from the Migration and Refugee Division, where the backlog of cases is already years long.[2]

13. Under the Act, a person whose visa is refused or cancelled on character grounds is taken to have had all other visas refused or cancelled on the same grounds, and is thus liable for detention. The expense of increased community compliance activities and detention cannot be underestimated.

14. We also reiterate that if the Tribunal is unable to comply with its s.500(6L) 84-day time limit for decision-making, the cancellation or refusal decision is taken to be affirmed. This is hugely problematic for the integrity of decision-making and reputationally.

15. The Department's costing figure for the changes is zero, but they agree there will be an increase in referrals and workload. They indicate the Department will 'absorb' the cost. This is an entirely unsatisfactory answer and should concern the Committee.

EFFICIENCY OF THE CURRENT SYSTEM

16. The Committee should have regard to evidence given by the Department regarding referrals. Cases are referred to them by various agencies. There can be no question that the Department are presently unaware of cases of concern. There can be no question that the Department currently have, and use, the power to refuse or cancel visas in cases of concern.

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[1] *Migration Act 1958 (Cth)*, s 500(6L)(c).

[2] We draw the Committee's attention to the recent report on the Administrative Appeal Tribunal's processed conducted by former Justice Ian Callinan, available at https://www.ag.gov.au/Consultations/Documents/statutory-review-tribunals-act-2015/report-statutory-review-aat.pdf. The report notes an *'intimidating'* backlog in migration and refugee decisions – nearing 55,000. Currently, the relevant divisions of the Tribunal are able to finalise only around 17,000 decisions per year. This means the existing backlog is likely to take years to clear.

INCREASED RISK OF *REFOULEMENT*

17. We reiterate our concerns regarding the impact of the Bill in terms of our international obligations, particularly in light of the evidence given to the Inquiry by the Department.

18. We note the evidence of the Department to the Committee on the topic of *non-refoulement*. A representative of the Department indicated that *non-refoulement*, under the Direction, is one of the factors that "*must*" be taken into account. She indicates that decision-makers, as a matter of course, do take *non-refoulement* into account. She also states that Australia 'simply' does not breach its *non-refoulement* obligations. Unfortunately, these statements do not reflect the legal position.

19. In our view, *non-refoulement* is unsatisfactorily dealt with under the current character regime, and will continue to be so under the Bill. Successive decisions, subject to recent court authority, display the Minister's willingness to defer consideration of protection obligations to a later point in the visa holder's immigration processes. Even in circumstances where it is a protection visa being considered for refusal or cancellation, the current Ministerial direction makes it clear that the existence of *non-refoulement* obligations will <u>not</u> be treated as a primary consideration. In many cancellation cases, it is not considered *at all* despite being raised squarely by the relevant person. Rather, the Minister states that the obligations will be considered at some point in the future, or, in cases where protection visas are being considered for refusal or cancellation, decisions the Working Group have seen acknowledge that it is possible that a person's non-refoulement claims may *never* be considered prior to removal.

20. It may assist the Committee to request information regarding the number of delegate, Ministerial, and Tribunal decisions that defer *non-refoulement* considerations to a future date, or acknowledge that such considerations may never be ventilated.

21. As noted above, persons whose visas are cancelled or refused under s.501 are liable for immigration detention. Once detained, such persons are liable for removal from Australia under s.198 of the *Act.* Since 2014, s.197C has expressly required the removal of persons from detention, *whether or not non-refoulement obligations were assessed or found to be owed to the person.*

22. The Department's evidence is an insufficient, and indeed incorrect, response to the matters we have raised above. An expansion of the character powers leads to an increase in number of the persons liable for detention. In turn, once in detention, such persons become automatically liable for removal, whether or not protection obligations are owed. Consideration of Australia's *non-refoulement* obligations is routinely deferred by decision-makers, even where they acknowledge the obligations may never be considered.

23. Thus, expanding the scope of the existing character powers necessarily expands the scope for Australia's breach of its *non-refoulement* obligations.

RESPONSE TO EXAMPLES PROVIDED BY THE DEPARTMENT

24. Firstly, an important caveat: nothing is known about the nature or detail of the offences advanced in the Department's hypotheticals, or about the persons' circumstances, including even what visa they hold (be it family, skilled, protection or otherwise).

25. We refer to and repeat our detailed submissions on these points.

26. Significant caution must therefore be exercised in assessing these hypotheticals and they are of limited use to the Committee for these reasons and those advanced below.

'A temporary visa holder' (TVH)

27. TVH has been convicted of violent assault-related offences, but has not yet been subject to a term or terms of imprisonment of 12 months or more. He does not objectively fail the character test.

28. Factually, TVH's conduct has not been considered by the courts to warrant imprisonment at all.

29. It was misleading and wrong for the Department to claim, as they explicitly did at the hearing, that TVH would not be captured by the current regime.

30. Under the current law, TVH would almost certainly be referred to the Department by law enforcement agencies. Whether he failed the character test would then be considered. If it was considered that he did, because of s.501(6)(c) or (d) of the Act (which, in our experience, is very likely), TVH's visa could be cancelled under:

    a. Section 116(1)(e) of the Act;
    b. Section 501(2) of the Act, or
    c. Section 501(3) of the Act.

31. TVH would be invited to provide submissions as to why the visa should not be cancelled. The decision-maker would have discretion as to whether or not to cancel.

32. The Committee might benefit from information from the Department about how many non-citizens convicted of numerous counts of 'assault-related offences' have not faced cancellation or refusal processes.

33. Nothing would change under the present law, as enunciated by the Department at the hearing and in submissions. The differences are in the likely outcome, the lack of regard to circumstances, and the opportunities for the loss of review rights:

    a. TVH would automatically, without any regard to his circumstances, fail the character test;
    b. Failure of a character test is a powerful directive and can certainly be expected to affect ultimate outcomes;
    c. Accordingly, the cancellation process is more likely to proceed, without regard to comments from sentencing judges or mitigating material. The burden on the Department to assess these materials *prior* to commencing cancellation proceedings would cause enormous cost and delay. The Committee may be assisted by information from the Department about what they will consider, and what information they will seek, before instituting proceedings.
    d. TVH may, for various reasons set out in our submissions, either fail to respond at all to a Notice of Intention to Consider Cancellation, or fail to provide appropriate material.

34. If TVH is an applicant for a permanent visa, it could be refused under s.501(1) or (3). He would be required to declare his history, and provide a police clearance, as part of the application process. His history would certainly come to the Department's attention.

Mr N

35. The example of Mr N, provided by the Department, is also misleading. It is entirely unclear why this example was provided.

36. Mr N holds a bridging visa in association with an ongoing permanent visa application. He was convicted of stalking another person and of threatening to inflict serious injury and received a six-month term of imprisonment. His application was refused under s.501(1), and his bridging visa cancelled by operation of law. The Administrative Appeals Tribunal, after hearing his review application, determined to exercise its discretion in Mr N's favour. We must assume the Tribunal set aside the decision to refuse under s.501(1), and so his permanent visa was effectively returned to the Department for final processing. No information is given about the outcome.

37. Factually, the Department was permitted to cancel Mr N's bridging visa at various stages under:

    a. Section 116(1)(e);
    b. Section 116(1)(g), because of:
        i. Reg 2.43(oa) (if he held a bridging visa A, B, C, or D), because he was convicted of an offence);
        ii. Reg 2.43(p) (if he held a bridging visa E), because he was convicted or charged of an offence;
        iii. Reg 2.43(q) (if he held a bridging visa E), because he was under investigation by a law enforcement agency);
    c. Because of a failure of the character test under s.501(6)(c) or (d) of the Act, under:
        i. S.501(2), or
        ii. S.501(3).

38. It appears the Department did not consider these avenues appropriate. They were aware of his offending and had these options available. This is indicative they did not consider these avenues appropriate. It can be inferred that they would not consider pursuit of cancellation appropriate under the proposed terms of the Bill.

39. Additionally, were Mr N's permanent visa granted, the Minister could still use his numerous existing powers to cancel that visa. The proposed Bill does not effect any change there.

40. Again, it was suggested by a member of the Committee that that case would not have been captured by the current regime. It plainly was, and it went through the available review processes. That would not change under the proposed regime **at all**. No bearing on the outcome in that case would be achieved by the Bill.

Mr D

41. Mr D holds a permanent visa and was convicted of a number of crimes including sexual assault and common assault and was sentenced to a two-year good behaviour order. The absence of a custodial sentence for these offences indicates significant mitigating factors or minimal seriousness on the scale.

42. In this example, the Department explicitly, and somewhat bizarrely, states that despite this history and the Department being aware of it, there is not "*sufficient adverse information*" to find Mr D does not fail the character test because of his "past and present criminal conduct" or his "past and present general conduct" (s.501(6)(c)) or because there is a risk that he would engage in criminal conduct, harass, molest, intimidate or talk another person, vilify the community, incite discord, or represent any kind of danger to a person or the broader community (s.501(6)(d)).

43. If the Department does not consider Mr D to be caught by any of the above, it is highly questionable whether he should face a cancellation process, which the Department considers he would under the new Bill.

44. In the Working Group's experience, Mr D would almost certainly face cancellation processes under s.501(2) or (3) of the current Act. The Committee might benefit from information from the

Department about how many non-citizens convicted of sexual assault and common assault have not faced cancellation or refusal processes.

45. The same concerns as apply to TVH in respect of outcome and opportunity for loss apply here.

FURTHER INFORMATION REQUIRED

The Working Group suggests that there is a serious lack of information about the effect of the law available, and proposes the following information needs to be obtained:

- Details regarding the modelled financial and practical impact on the Administrative Appeals Tribunal, on immigration detention, on primary decision-making, and on the relevant courts
- Statistics on the numbers of murders, assaults, sexual assaults, and aggravated burglaries committed by non-citizens that did not result in a cancellation or refusal process under the current laws.
- Information regarding the number of delegate, Ministerial, and Tribunal decisions that defer *non-refoulement* considerations to a future date, or acknowledge that such considerations may never be ventilated.
- Clarity regarding when non-refoulement will be considered, by whom, and at what stage.
- Information regarding how many people affected by s.501 either do not respond or do not seek review.