



Australian Government
Department of Home Affairs

Department of Home Affairs submission to the Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2021 [Provisions]

Legal and Constitutional Affairs Legislation Committee

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1. Introduction

1. The Department of Home Affairs (the Department) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2021 (the Bill).
2. This submission provides an overview of the measures in the Bill, and explains the rationale for the Bill and its intended operation.

2. Background of the Bill

3. The Bill is in response to the December 2017 Joint Standing Committee on Migration report on migrant settlement outcomes entitled "No one teaches you to become an Australian" – particularly recommendations 15 and 16:

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 jacking's 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.

4. The Bill departs from the approach in the recommendations, in particular:
 - **The amendments provide a discretionary, rather than mandatory cancellation power.** Discretionary refusals and cancellations allow the delegate to consider a broad range of factors when deciding to refuse or cancel a visa—including factors that may weigh in the affected person's favour.
 - **The amendments apply equally to minors and adults.** The Committee's recommendations would have created a mandatory cancellation framework that was two-tiered (one for adults, and one for minors, and applied tougher criteria on minors than it would adults).
 - **The amendments apply retrospectively.** The designated offences ground will apply to all convictions, regardless of whether the conviction occurred before, on, or after the commencement of the Bill. Other discretionary powers used in relation to convictions work the same way. This ensures that the decision-maker can consider past convictions to cancel or refuse the visa of someone who continues to pose a risk to the Australian community.
5. On 25 October 2018, the Government introduced the Migration Amendment (Strengthening the Character Test) Bill 2018 into the House of Representatives.
6. The Bill was considered by three Parliamentary Committees – the Senate Standing Committee for the Scrutiny of Bills; the Senate Legal and Constitutional Affairs Legislation Committee; and the Parliamentary Joint Committee on Human Rights.

7. On 21 February 2019, the Joint Standing Committee on Migration tabled “*The report of the inquiry into review processes associated with visa cancellations made on criminal grounds*”. In that report the committee reflected positively on the 2018 Bill:
 - *This important legislation will ensure violent offenders can be removed from Australia at the earliest possible opportunity.*
 - *The Committee believes this legislation would address a number of community concerns around non-citizens who commit acts of violence in Australia. As such, the Committee urges the Australian government to pass and enact this legislation without delay.*
8. The Bill lapsed at dissolution of the House on 11 April 2019.
9. On 4 July 2019, the Migration Amendment (Strengthening the Character Test) Bill 2019 was introduced in the House of Representatives. The Bill was identical to the one introduced in 2018. The Bill passed the House and was introduced in the Senate on 19 September 2019. Proposed government and non-government amendments to the 2019 Bill were circulated in the Senate. On 20 October 2021, the second reading of the 2019 Bill was negatived in the Senate.
10. The provisions in the Migration Amendment (Strengthening the Character Test) Bill 2021 are substantively the same as the provisions contained in the previous versions of the Bill. However, the Bill incorporates the proposed government amendments to the Migration Amendment (Strengthening the Character Test) Bill 2019 that were circulated on sheet QJ105 in the Senate on 19 October 2021, that is, the Migration Amendment (Strengthening the Character Test) Bill 2021 explicitly stipulates that convictions for low-level offending such as minor scuffles will not be taken to be convictions for a designated offence. However, any offence of common assault that involves family violence will be taken to be a designated offence regardless of whether the offence causes bodily harm or harm to a person’s mental health.

2.1. The current character framework

11. 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 in relation to the character test in section 501 of the Migration Act.
12. A non-citizen may be refused the grant of a visa, or have their visa cancelled, if they have been convicted of criminal offences, either in Australia or overseas. The character test is set out in subsection 501(6) of the Migration Act and includes both objective and subjective grounds on which a person does not pass the character test. For example, a person does not pass the character test on objective grounds if:
 - the person has been convicted of an offence; and
 - received a sentence greater than 12 months; or alternatively
 - multiple sentences that add to 12 months or more.
13. If a person objectively fails the character test, their visa will be considered for visa refusal or cancellation.
14. Other grounds on which a person may fail the character test involve subjective considerations and discretion on whether or not to refuse or cancel the visa. This area of decision-making can be more complex; as it may go to a person’s criminal history and general conduct. An example of this would be where a person is:
 - convicted of serious offences—involving violence, the breach of an order made to protect a person (for example, an Apprehended Violence Order (AVO)), weapon use or possession, sexual assault or any other non-consensual conduct of a sexual nature; and
 - does not receive a 12 month sentence.

15. The subjectivity of these grounds has proven to be difficult to defend in merits and judicial review.
16. The Department has had decisions overturned at review, despite the Department's assessment that the person poses a risk to the Australian community.

PHNR & Minister for Immigration and Border Protection (Migration) [2017] AATA 1742 (10 October 2017)

PHNR, born in Iraq, first arrived in Australia on 24 December 2012 as an unauthorised maritime arrival. He subsequently applied for a Temporary Protection (Class XD) visa.

Relevantly, on 23 October 2014, the applicant was convicted in the District Court of Nauru of two counts of indecent assault, for which he was sentenced to 3 months' and 6 months' imprisonment, respectively.

On 18 July 2017, a delegate refused to grant the visa on the basis that PHNR did not pass the character test, pursuant to s 501(6)(d)(i) of the Act, as there was a risk that he would engage in criminal conduct in Australia if allowed to remain.

In its examination of the circumstances of his offending, as well as the risk of PHNR reoffending or otherwise engaging in criminal conduct in the future, the Tribunal determined that he did not fail the character test on the basis of s 501(6)(d)(i) of the Act. Accordingly, on 10 October 2017, the Tribunal set aside the delegate's decision.

Under the proposed designated offences provision in the Bill, PHNR would objectively fail the character test as he has been convicted of a violent and/or sexually based offence, the Australian equivalent of which is punishable by imprisonment for a maximum term of seven years.

3. Overview of the Bill

3.1. Purpose of the Bill

17. The Bill will provide an additional, objective ground to consider refusal or discretionary cancellation of a visa under section 501 of the Migration Act where a person has been convicted of a serious crime but does not meet the substantial criminal record definition in sub section 501(7) of the Migration Act.
18. The requirement for a 12-month sentence has not been removed. However, the 12-month sentence threshold does not effectively capture all persons who have committed a serious crime, or crimes, in Australia and overseas.
19. The Bill does not in any way seek to undermine the Courts or their role. Rather, the Bill creates a new ground for failing the character test based on the seriousness of the offence, which in turn is determined by the maximum sentence imposed by the relevant States and Territories.
20. The Bill achieves this by amending section 501 to establish a new *designated offences* ground in the character test. The Bill also makes consequential amendments to section 5C of the Migration Act to ensure the meaning of *character concern* also incorporates the new designated offences definition, and is aligned with section 501 as amended.

21. A designated offence is an offence committed in Australia or in a foreign country punishable by at least a maximum sentence of no less than two years' imprisonment and involves:
- violence, or a threat of violence, against a person; or
 - non-consensual conduct of a sexual nature; or
 - breaching an order made by a court or tribunal for the personal protection of another person; or
 - using or possessing a weapon; or
 - procuring, or assisting in any way with the commission of one of these designated offences.
22. The Bill also provides that, for an offence with one or more physical elements that involve violence, or a threat of violence, against a person, a person's conviction for an offence of common assault (or equivalent) will not be taken to be a conviction for a designated offence, unless the act constituting the offence:
- causes or substantially contributes to bodily harm to another person, or harm to another person's mental health, in both cases either temporarily or permanently; or
 - involves family violence (as defined by subsection 4AB(1) of the *Family Law Act 1975*).
23. This ensures that convictions for low-level assaults that neither cause nor contribute to a person's bodily harm or harm to a person's mental health (whether temporarily or permanently) will not fall within the scope of a designated offence, while also ensuring that any offence involving family violence is included.

3.2. The designated offences ground

24. The amendments in the Bill reflect that certain serious criminal offences (designated offences) have a significant impact on victims, and that non-citizens who commit these crimes, regardless of the sentence actually imposed, should be appropriately considered for visa refusal or cancellation.
25. The Bill establishes a new *designated offences* ground in the character test in subsection 501(6) of the Migration Act as outlined in paragraph 21. The Bill provides a non-exhaustive list of the types of acts that would constitute violence against a person, noting that the precise terminology for such offences would depend upon the State or Territory where the relevant offence was committed.
26. In effect, a non-citizen who has been convicted of a designated offence will objectively fail the character test in the Migration Act, regardless of whether or not a custodial sentence has been imposed.
27. The Bill expressly excludes petty and trivial offending, by providing that an offence for which the person is convicted is only a designated offence where it is punishable by at least a maximum sentence of no less than two years' imprisonment.
28. The Bill further narrows the scope of designated offences relating to violence against a person to clarify the circumstances in which convictions involving violence against a person are taken to be a designated offence, as explained at paragraph 22. This reflects the proposed government amendments to the 2019 Bill that were circulated on sheet QJ105 in the Senate on 19 October 2021.

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 most jurisdictions, contravening an Apprehended Violence Order carries a maximum penalty of two years' imprisonment.

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 unintended 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 the Australian Capital Territory, 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 six months imprisonment. If a non-citizen was convicted of this offence alone, they would not fail the character test on the 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 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 alone 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.

3.3. Family/Domestic Violence and visa cancellation

29. The Government considers the prevention of family violence and the protection of vulnerable people, particularly women and children from this harm, as an ongoing and urgent priority.

30. The existing character and general cancellation provisions of the Migration Act currently provide broad grounds to refuse or cancel a visa due to family violence offending. The Bill will strengthen this by providing a clear, objective basis on which to do so, where family violence is involved, through the *designated offences* ground.

Lunavat and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 1329 (15 May 2020)

On 30 June 2017, Mr Lunavat, a citizen of India, applied for a Subclass 186 (Employer Nomination Scheme) visa. On 19 September 2019, Mr Lunavat was sent a Notice of Intention to Consider Refusal of his visa application under s 501(1) of the Act. The notice was issued on the basis that Mr Lunavat had pleaded guilty and been convicted in the Hornsby Local Court of Assault Occasioning Actual Bodily Harm (Domestic Violence) and had been sentenced to a 12-month good behaviour bond.

On 25 February 2020, a delegate refused to grant the visa on the basis that Mr Lunavat did not pass the character test, pursuant to s 501(6)(d)(i) of the Act, as there was a risk that he would engage in criminal conduct in Australia if allowed to remain.

On 2 March 2020, Mr Lunavat applied to the Tribunal for review of the delegate's decision. In its examination of the circumstances of his offending, as well as the risk of Mr Lunavat reoffending or otherwise engaging in criminal conduct in the future, the Tribunal determined that he did not fail the character test on the basis of s 501(6)(d)(i) of the Act. Accordingly, on 15 May 2020, the Tribunal set aside the delegate's decision.

Under the proposed designated offences provision in the Bill, Mr Lunavat 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.

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

31. The Bill will ensure that non-citizens who are convicted of certain serious offences do not pass the character test, and are able to be appropriately considered for visa refusal or cancellation. A person who has been convicted of a designated offence is more likely to pose an ongoing risk to the community allowed to enter and remain in Australia.
32. The designated offences ground will apply irrespective of whether the person committed or was convicted of the relevant designated offence before, on or after the commencement of the amendments. This is consistent with the approach adopted in previous amendments to the character test. It ensures that the decision-maker can appropriately consider past convictions under section 501 in relation to possible visa refusal or cancellation on character grounds, where a person with previous convictions for one or more designated offences may continue to pose a risk to the Australian community.
33. It would remain a matter for the decision-maker, in the circumstances of the individual case, to consider factors in relation to the nature of the conviction, any sentence applied and countervailing considerations before deciding whether to exercise the discretionary power under section 501.
34. Failure to pass the character test does not result in the automatic cancellation or refusal of the visa. An appropriately trained departmental delegate (or the Minister) will take into account a number of factors prior to determining whether or not the visa should be refused or cancelled.
35. When exercising the discretion to refuse or cancel a visa, a delegate must consider a wide range of factors contained within a Ministerial Direction, including the extent of any impediments that the person may face if removed from Australia, the length of time the person has resided in Australia, ties that the person has to the Australian community and the effect of the decision on any minors affected by the decision. These considerations are balanced against the requirement to protect the Australian community. This means any decision to refuse or cancel a visa is a proportionate response to the individual circumstances of each case.
36. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation.
37. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct may be so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measureable risk of causing physical harm to the Australian community.
38. In the case of family and domestic violence, a victim's visa will not be consequentially cancelled under section 501, if the visa of the primary visa holder (and perpetrator) is cancelled on character grounds.

39. Minors convicted of a designated offence could be considered for visa refusal or cancellation. However, the best interests of the child are and will remain to be a primary consideration in the decision to refuse or cancel a minor's visa on character grounds. As such, the refusal or cancellation of a minor's visa on these grounds would only occur in exceptional circumstances.

3.5. Amendments to the meaning of *character concern*

40. Section 5C of the Migration Act provides the meaning of *character concern* for the purposes of the Act. It sets out the circumstances in which a non-citizen will be of character concern, mirroring the grounds contained in the character test in subsection 501(6) of the Migration Act. 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.
41. The term *character concern* is used in relation to the meaning of personal identifier in section 5A of the Migration Act, which is also relevant to the purposes for which personal identifiers can be collected under section 257A, and in relation to permitted disclosures of identifying information, including personal identifiers, in section 336E.
42. Together, these provisions allow for the collection and disclosure of certain types of information, including for the purpose of identifying non-citizens who have a criminal history or who are of character concern.
43. The Bill makes consequential amendments to the meaning of *character concern* in section 5C of the Migration Act, to ensure that it will continue to mirror the character test in section 501, as amended by the Bill. It will be amended to provide that a non-citizen is also of character concern where they have been convicted of a designated offence.

3.6. Merits and judicial review rights of affected persons

44. The Bill, if passed, may have a consequential impact upon other bodies or systems, including the Administrative Appeals Tribunal and the immigration detention network. However, the primary purpose of this Bill is to protect Australia from non-citizens convicted of serious offences who pose a risk to the safety of the community.
45. The amendments to the character provisions do not change or otherwise affect the existing arrangements relating to natural justice or review rights for decisions made under section 501 of the Migration Act.
46. Prior to visa cancellation or refusal by a delegate of the Minister, the affected non-citizen 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.
47. In the event a person does not pass the character test, the following primary considerations at paragraph 8 of the Direction must be applied to the specific circumstances of their case:
- a) protection of the Australian community from criminal or other serious conduct;
 - b) whether the conduct engaged in constituted family violence;
 - c) the best interests of minor children in Australia;
 - d) expectations of the Australian community.

48. Paragraph 9(1) of the Direction requires that other considerations must be taken into account where relevant. These include but are not limited to:

- a) international non-refoulement obligations;
- b) extent of impediments if removed;
- c) impact on victims;
- d) links to the Australian community, including:
 - i. strength, nature and duration of ties to Australia;
 - ii. impact on Australian business interests.

49. The non-citizen is given the opportunity to seek merits review of certain decisions of a delegate of the Minister to refuse or cancel a visa under section 501. In addition, judicial review of a decision made under section 501 (including decisions personally made by the Minister) is available.

3.7. Compliance with international obligations

50. The amendments in the Bill are consistent with 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.

51. Australia's international obligations concerning non-refoulement are considered as part of the discretionary decision whether to refuse or cancel a visa on character grounds. A non-citizen will not be removed to a country in relation to which the person has been found to engage non-refoulement obligations through the protection visa process.

52. 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 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.

3.8. Compliance with International Human Rights

53. The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 to the extent it may limit some human rights, those limitations are reasonable, necessary and proportionate to the objective of protecting the Australian community from the risk of harm posed by non-citizens who have been convicted of designated offences.

4. Conclusion

54. The amendments in the Bill are focused on serious offences committed by non-citizens. By strengthening the character test in section 501 of the Migration Act, those convicted of designated offences will objectively fail the character test, and can therefore be appropriately considered – on a discretionary basis – for refusal of the grant of a visa or cancellation of a visa.

55. While the Bill will establish a new ground in the character test, that ground will operate within the established framework under section 501 and related provisions of the Migration Act, with a Ministerial Direction and departmental policy and procedural instructions to support decision-makers appropriately to consider relevant matters and circumstances in each individual case.