

SUBMISSION ON BEHALF OF
RUSSO MAHON LAWYERS
TO THE
SENATE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS
ON THE
MIGRATION AMENDMENT (STRENGTHENING THE
CHARACTER TEST AND OTHER PROVISIONS) BILL 2011

1. Introduction

The Federal Government has reacted to recent disturbances at the Christmas Island and Villawood Immigration Detention Centres with the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* ('The Bill'). The Bill amends the *Migration Act 1958* (Cth) ('The Act'). The amendments will enable the Minister to refuse to grant, or to cancel, a visa or temporary safe haven visa when a person has been convicted of a criminal offence while in immigration detention; and increases the penalty for the manufacture, possession, use or distribution of weapons by immigration detainees from three to five years imprisonment.

The Bill seeks to protect the collective interest of the Australian community from the risk of harbouring non-citizens who may be of bad character. However, a balance must be struck between our national interests, and the rights of non-citizens seeking asylum in Australia, who are suspected to be not of good character, to a transparent enquiry, subject to external review by an independent Court or tribunal.

This submission will examine the effectiveness of the Bill in balancing these competing interests.

2. Proposed Legislative Changes

The Bill amends sections 501 and 500A of the Act to provide additional grounds upon which the Minister or his delegate may decide to refuse to grant, or to cancel a visa on character grounds. The Minister retains his discretion to refuse to grant, or to cancel, a visa under sections 501 and 500A. However, the Bill makes it clear that from the date of commencement, 26 April 2011, a person will fail the character test if they have been convicted of an offence committed in immigration detention, during an escape from immigration detention, during a period where a person has escaped from immigration detention, or if the person has been convicted of the offence of escaping from immigration detention, whether the conviction or offence occurred before, on or after that commencement. Where a person does not pass

the character test because of the new paragraphs 501(6)(aa), 501(6)(ab), 500A(3)(d) and 500A(3)(e), the Minister or his delegate has the power to refuse to grant, or to cancel, a visa on these new character grounds.

2.1. The Character Test

The amendments outlined above supplement the character powers already available under the Act, including the Minister's power to take into account past and present criminal conduct, and past and present general conduct, in determining whether or not a person passes the character test. However, it is the Government's intention that any conviction for an offence covered by this Bill results in the person automatically failing to pass the character test.¹

The last decade has seen an incremental development of character tests in migration law to include subjective criteria such as the likelihood of future conduct, rather than simply being based on police record checks and past patterns of conduct.² The current version of section 501 was passed in Parliament by way of the *Migration legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998*. A parliamentary inquiry by the Senate Legal and Constitutional Legislation Committee into the *Migration legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997* reported in March 1998. Concerns provoked by the character test were reflected in comments made by the Australian Labour Party senators in a Minority Report and the Australian Democrats in a Dissenting Report. Despite these submissions, the Bill was passed with no amendments and became operational in 1999. The same Bill had failed to pass the previous Parliament.³

The current character test is inherently subjective, and lacks sufficient clarity in definition and scope. It has received criticism for failing to take into account historical convictions where the person has successfully rehabilitated; political

¹ *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011*, Explanatory Memorandum, page 1.

² Rimmer, S. H., 'Dangers of character tests under Australian migration laws' (2010) 17 *Australian Journal of Administrative Law* 229, page 229.

³ Rimmer, S. H., 'Dangers of character tests under Australian migration laws' (2010) 17 *Australian Journal of Administrative Law* 229, page 234.

convictions resulting from an oppressive regime; mental illness associated with criminal activity where medical intervention has established a cure or control; and criminal association where the association is innocent.

The concerning outcomes of the character test include: a marked increase in the number of visa refusals or cancellations on character grounds; broader and more subjective grounds for those refusals under ministerial discretion; new categories of long term residence being affected; and a decreased ability to scrutinise or object to such results.⁴

The case of Dr. Mohamed Haneef is one example of the adverse effects of the character test. In July 2007, Dr. Haneef was a 30 year old married doctor from India who had been working in a Gold Coast Hospital on a working visa since September 2006. Dr. Haneef was arrested in Brisbane and detained without charge for 12 days. The Minister for Immigration cancelled Dr. Haneef's work visa on character grounds within hours of his release on bail in relation to allegations of terrorism association. A dispute over interpretation of the words in the relevant section allowed successful judicial review. It has been said that a change in government before the court proceedings were completed prevented the visa being re-cancelled. An inquiry into the actions of Dr. Haneef was conducted by former New South Wales Supreme Court Judge, the Hon John Clark QC. The report was released on 23 December 2008 and cleared Dr. Haneef of any wrong doing.⁵

It is submitted that the proposed Bill does not address any of the concerns raised in submissions which opposed the previous *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997*. Instead, the Bill increases the scope of the current character test, providing for automatic disqualification to any person for any conviction for an offence covered by the Bill. These provisions undermine our judicial system and the role of Courts,

⁴ Rimmer, S. H., 'Dangers of character tests under Australian migration laws' (2010) 17 *Australian Journal of Administrative Law* 229, page 229.

⁵ Rimmer, S. H., 'Dangers of character tests under Australian migration laws' (2010) 17 *Australian Journal of Administrative Law* 229, page 239 and 230.

as the arbiter of fact, to consider matters in full context before determining the appropriate outcome.

2.2. Ministerial Discretion and the Restriction of Review Rights

The current legislative framework has received criticism due to the degree of ministerial discretion and lack of access to independent review. Natural justice is not exercised in relation to a decision by the Minister to cancel a visa under section 501(2). A person is not entitled to go to the Administrative Appeals Tribunal (AAT), listen to the Minister's reasons, or present a counter argument.⁶ Moreover, section 503A of the Act enables the Minister to rely on information supplied to him in confidence by the Australian Federal Police (AFP) or other security agencies. The Minister can decline to disclose this information, even to the court or tribunal reviewing his or her decision. Judicial review remains an option only for those with the financial and other resources to pursue it within the strict time limits placed on applications to the Federal Court. Offshore visa applicants have no standing to seek review in an Australian Court.⁷

A Senate Select Committee on Ministerial Discretion in Migrant Matters was established in 2003 to examine sections 417 and 351 of the Act, which allowed the Minister to substitute a decision over the Department of Immigration and Citizenship (DIAC) or the tribunals. Although it did not consider the character provisions, the Committee highlighted that *"In assessing the appropriateness of the ministerial discretion powers, the Committee is concerned that vesting a non-delegable, non reviewable and non-compellable discretion with the Immigration Minister without an adequate accountability mechanism creates both the possibility and perception of corruption. At a minimum, the Committee wants to see external scrutiny of decision making made an integral part of the ministerial discretion system."*⁸

⁶ Rimmer, S. H., 'Dangers of character tests under Australian migration laws' (2010) 17 *Australian Journal of Administrative Law* 229, page 238.

⁷ Rimmer, S. H., 'Dangers of character tests under Australian migration laws' (2010) 17 *Australian Journal of Administrative Law* 229, page 239.

⁸ Senate Select Committee, no 36, p 131.

The United Nations High Commissioner for Refugees has echoed these concerns, stating that ministerial discretion should act as a safeguard but is not *"in itself sufficient to secure the obligations of Australia under the 1951 Convention because by its very nature it is non-compellable and non-reviewable"*.⁹

3. Conclusion and Recommendations

We appreciate the importance of protecting the Australian community from the risk of harbouring non-citizens who may be of bad character. However, we are concerned that the Bill is merely a knee jerk reaction made in a political climate of fear and cultural difference. The amendments fail to address the underlying causes of recent incidents seen at the Christmas Island and Villawood Immigration Detention Centres, such as lengthy processing times, appeal procedures and the structure of immigration detention.

Non-citizens applying for asylum and visa entitlements in Australia represent one of the least powerful groups of people, often with limited English and understanding of our legal system.¹⁰ Ministerial decisions made under the character test have significant consequences for these people. Failing a character test can lead to detention, deportation and a denial of citizenship. It is inappropriate for decisions which have such serious consequences on the lives of disadvantaged persons to be made under a legislative framework that is so subjective and lacking in transparency.

The essence of natural justice requires that an accused person is entitled to know what it is that he or she has been accused of, and that he or she is entitled to a hearing before an impartial adjudicator.¹¹ The Bill strengthens the Minister's power and does nothing to address concerns in providing natural justice to persons seeking to dispute the outcome of a character test. In order for principles of natural justice to be upheld, any discretionary mechanism dealing with issues of

⁹ United Nations High Commissioner for Refugees Submission, *Senant Select Committee inquiry into ministerial discretion in Migration Matters, 2004, p 8*

¹⁰ Betts, K., 'The Character Bill and Migration Rights' (1998) 6 *People and Place* 3, page 1.

¹¹ Betts, K., 'The Character Bill and Migration Rights' (1998) 6 *People and Place* 3, page 9.

character in relation to non-citizens would need to have the following four features in order to be effective:

- The person who exercised the power must be identifiable;
- Clearly stated guidelines for the exercise of powers should be available, preferably in the primary legislation;
- Reasons should be given when a power is exercised; and
- Some form of external review should be available.¹²

¹² Human Rights Commission, *Human Rights and the Migration Act 1958* (Report No 1, Sydney, 1985), p 64.

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