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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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FECCA submission to the Migration Amendment (Strengthening the Character Test) Bill 2021

The Federation of Ethnic Communities' Councils of Australia (FECCA) is the national peak body representing Australia's culturally and linguistically diverse communities and their organisations.

FECCA provides advocacy, develops policy, and promotes issues on behalf of its constituency to government and the broader community. FECCA strives to ensure that the needs and aspirations of Australians from diverse cultural and linguistic backgrounds are given proper recognition in public policy.

FECCA supports multiculturalism, community harmony, social justice, and the rejection of all forms of discrimination and racism to build a productive and culturally rich Australian society. FECCA's policies are developed around the concepts of empowerment and inclusion and are formulated with the common good of all Australians in mind.

Key points

- FECCA recommends to the committee that the *Migration Amendment (Strengthening The Character Test) Bill 2021* should not be passed.
- FECCA's concerns with the 2018 and 2019 version of the Strengthening the Character Test Bill have not been addressed.
- The Amendment has not been adequately justified and the effects to individuals and communities have not been appropriately considered.
- The current review process for refusals and cancellations is complex, expensive, has strict timeframes and has no access to legal representation.
- The inclusion of 'aiding and abetting' will disproportionally affect women involved in a relationship with an offender.
- Visa cancellation measures should be limited only to the most serious crimes as judged by the courts, given the devastating and long-lasting impact on the individual, their family and community.
- The removal of an individual from Australia—including some who have spent their whole lives in this country—can have a devastating impact on the individual, their family and community.
- The reference to 'community expectations' throughout the explanatory memorandum is not representative of the general community in Australia.
- It is unjust to apply the new character requirements to offences committed before the amendments are brought into effect.

Discussion

FECCA is concerned the Amendment has not been adequately justified. We are also concerned by the consequences of removing nuanced decision making and replacing it with blunt automation. Without the consideration of circumstance in the assessment of a person's character the impact of these changes will reach far beyond 'serious crimes'. If the purpose of the Bill is to enhance the protection of the Australian community, we believe the community deserves an appropriate justification and explanation of how that purpose is achieved with this Bill.

Access to Justice and Legal Representation

FECCA is concerned that the proposed amendments, as they relate to decisions made under section 501 of the Migration Act, may lead to grave injustices and the eroding of individual human rights and freedoms.

The current visa cancellation regime allows for the Minister to refuse or cancel a visa if a person fails a 'character test'. Already the grounds for doing this are numerous and in some cases do not require proof of wrongdoing but only a 'reasonable suspicion' that an individual may be involved in certain future activities. Already the Minister has extensive personal powers to refuse or cancel a visa on character grounds, decisions which cannot be reviewed on their

merit. Already the threshold for cancelling a visa is low, including in cases where an individual has not been convicted of a crime and where the individual does not pose any harm to the community. An individual therefore risks having their visa cancelled even if they have never been convicted of a criminal offence. The proposed amendments further increase the Minister's powers and the non-reviewable nature of Ministerial decisions bypasses aspects of judicial oversight with serious consequences for individuals and their families subject to these decisions.

The removal of an individual from Australia—including some who have spent their whole lives in this country—can have a devastating impact on the individual, their family and community. Unchecked executive power creates a climate of fear and opacity both for Australians with family members who are not yet citizens and for the broader community of migrants currently in Australia.

FECCA is particularly concerned about the consequences of the amendments for refugees and for long-term permanent residents of Australia who have their visas refused or cancelled on character grounds. An individual may be removed to a country where they do not speak the language; where they have spent little time (or never lived); and where they have no familial, social or economic connections. Further, those who are unable to be returned to their country of citizenship, for example refugees and stateless people, risk indefinite prolonged periods of arbitrary detention. FECCA is deeply concerned about the risk of separation of mothers and fathers from children, including dependent children, and other family members. The inclusion of 'aiding and abetting' will disproportionally affect women, involved in a relationship with an offender, who are often victims of intimate partner and domestic violence and sentenced accordingly by the courts.

For those who may have lived in Australia for decades and received a fine or minimal sentence many years ago, the retrospective nature of the amendments will separate them from their home and community despite already completing their sentence. FECCA believes it is unjust to apply the new character requirements to offences committed before the amendments are brought into effect.

Currently the Migration Act adversely impacts on highly vulnerable sections of Australia's community who have no access to free legal assistance and the proposed amendments will only further restrict their access to justice. The current review process for refusals and cancellations is characterised by great expense to the individual, no access to legal representation and a strict timeframe for review which relies on the subject of the order understanding the complexities of the AAT. This amendment will put additional pressure on volunteer legal representation and result in more people without access to justice.

Departure from Judicial Sentence and the Role of the Courts

The Minister and delegate already have the ability to cancel a visa based on:

- section 501(6)(a) if they have a substantial criminal record and they have been sentenced to at least 12 months imprisonment (cumulative)
- section 501(6)(b) if they have been, or are, a member or associate of a group, organisation or person that has been involved in criminal conduct

- section 501(6)(c) if they are not of good character due to their past and present criminal and general conduct
- section 501(6)(d) if they present a risk that they would engage in criminal conduct or represent a danger to the Australian community
- section 501(6)(e) if they have been convicted by a court of a sexually based offence involving a child or found guilty of such an offence (or charge proven) even if the person was discharged with[out] conviction.

The proposed amendments remove aspects of judicial oversight by including imprisonment for a maximum term of not less than two years and accordingly remove the impact of the courts' consideration on the individual circumstances on the offending and the severity of the conduct.

Maximum penalties are intended to limit the penalty available to the courts who then sentence according to circumstance rather than prescribing an imprisonment period irrespective of other factors. The proposed amendments would consider visa cancellation appropriate for a person who has committed low-level assault despite being sentenced an appropriate non-custodial penalty by the courts. For example, in Queensland assault includes 'a person who threatens to assault another person with intent to commit an indictable offence' and carries a maximum penalty of five years which meets the proposed amendments for visa cancellation. The addition of 'providing that assault caused either physical or mental harm' further complicates the decision-making process and increases opacity.

The proposed amendments do not fit with the intent of 'maximum penalty' in criminal legislation, nor does it fulfil the purpose of 'mak(ing) it clear that a designated offence must be a serious offence, and not merely a minor or petty offence' as stated in the explanatory memorandum. In no way does the maximum penalty available to the courts define the seriousness of a crime. Bypassing judicial oversight, by expanding the Bill beyond a sentence of 12 months imprisonment, to a non-custodial judicial sentence for a crime whose potential penalty is two years, allows the Minister and the Department to assume the role of the court in assessing criminal conduct. A role traditionally held by established law enforcement processes in states and territories in determining the seriousness of a given offence. These existing institutions should be relied upon.

It is FECCA's view that, given the devastating and long-lasting impact on the individual, their family and community, automatic failure of the Character Test be limited only to the most serious crimes as judged by the courts on the bases of the penalty applied by the judicial system.

Community Expectations

At 30 June 2017, overseas born prisoners accounted for 18% of all prisoners (7,294 prisoners) while overseas born persons accounted for just over one-third (35%) of the Australian population aged 17 years and over[1]. This proportions of the criminal population do not justify the strengthening of the amendments, nor do the 'community expectations' on this issue.

[1] See http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2017~Main%20Features~Country%20of%20birth~9

FECCA is concerned that the amendment has not been adequately justified or the effects to individuals and communities appropriately considered.

FECCA is concerned that the explanatory memorandum refers to ‘community expectations’ throughout but the source of information on these expectations is not representative of the community of Australia. FECCA suggests that a ‘serious offence’ in the amendments differs from the expectations of the community, who respect the established law enforcement processes including the authority of judicial sentencing in defining and penalising serious offenders with at least 12 months of jail time. Judicial sentences are in line with the community expectations and not the maximum penalty available. FECCA suggests that the community would not expect for the Minister of Home Affairs to have unchecked executive power to drastically change the lives of people in Australia. Regarding the retrospective application of the amendments, FECCA suggests that the community would not expect that a person who received a suspended sentence ten years ago will now fail the character test.

Given the non-reviewable nature of Ministerial decisions and the serious consequences for individuals and their families subject to these decisions, FECCA believes that consultation with the community on their expectations to form a basis for ‘community expectations’ is necessary.