

1 June 2011



Law
Institute
Victoria

Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Committee Secretary

Re: Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011

Thank you for the invitation to provide input the Senate Committee on Legal and Constitutional Affairs regarding the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* (the Bill).

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 14,500 members. The LIV's Administrative Law and Human Rights Section Migration Law and Refugee Law Reform Committees are made up of legal practitioners experienced in immigration and refugee law, many of whom have extensive experience in the operation of character test in s501 of the *Migration Act 1958* (Cth) (Migration Act).

LIV members are extremely concerned about the proposed amendments to s500A(3) and s501 of the Migration Act in the Bill, which will extend the Minister's discretion to refuse a visa or a temporary safe haven visa to a person by providing that a person does not pass the "character test" if the person is convicted of an offence while in immigration detention (Schedule 1, cls 2 and 4).

The LIV endorses the submission of the Law Council of Australia, of which we are a constituent body, and provides the following additional comments.

1. Changes inconsistent with the purpose of the character test

In our view, the proposed amendments to s500A(3) and s501 are inconsistent with the purpose of the character test. Direction 41 (Visa Refusal and Cancellation under s501) (by former Minister for Immigration and Citizenship Chris Evans under s499 of the Migration Act) states that the objectives of the character test are to "protect the Australian community for unacceptable risks of harm as a result of criminal activity or other serious conduct by non-citizens" (clause 5.1(2)). In contrast, the Explanatory Memorandum to the Bill implies that the purpose of the Bill is to deter people from committing offences in immigration detention, by stating that "the Government is sending a strong and clear message that the kind of unacceptable behaviour seen recently in immigration detention centres will not be tolerated now or in the future" (p2).

Deterrence operates by punishing people who are convicted of an offence in immigration detention, however minor or serious, by enabling the Minister to deprive a person of a visa that she or he would otherwise be entitled to. The LIV is very concerned about punishment of people in immigration detention, who are mostly asylum seekers, are extremely vulnerable, who might be otherwise of good character and who are unlikely to have committed an offence but for their situation in immigration detention. The current government has previously rejected the notion that individual asylum seekers should be punished for the purpose and general deterrence and we recall the words of the previous Minister for Immigration and Citizenship, Senator Chris Evans, in the context of ending the Pacific Solution, which he stated "was about the cynical politics of punishing refugees for domestic political purposes".¹

The Law Institute of Victoria
is a member of



Law Council
OF AUSTRALIA

Law Institute of Victoria Ltd
ABN 32 075 475 731

Ph (03) 9607 9311 Fax (03) 9602 5270
Email lawinst@liv.asn.au
470 Bourke Street Melbourne 3000 Australia
DX 350 Melbourne GPO Box 263C Melbourne 3001
Website www.liv.asn.au

The LIV believes there is no justification to introduce a much lower bar for those asylum seekers who arrive by boat, and are therefore held in immigration detention pursuant to s189 of the Migration Act, when asylum seekers arriving by other means are subject to the current character test in s501.

2. The extension of the character test to any conviction if committed in a certain place

We are concerned that the Bill introduces more severe consequences arise for offences committed in particular places and we suggest that the singling out of immigration detention is discriminatory against asylum seekers. We are unaware of any evidence that people who commit offences in immigration detention repeat offend outside immigration detention or create a risk to the general community solely on the basis of their offending in immigration detention and therefore we query the justification for the changes.

3. The extension of the character test to convictions, with no regard to the sentence imposed

Until now, the character test in s501 and s 500A has focused on serious offending, by providing that a person does not pass the character test for example if they have a substantial criminal record, which is determined in s501(7), by reference to the sentence imposed (the lowest of which is 12 months imprisonment). The Bill provides that a person who has been convicted of an offence while the person was in immigration detention does not pass the character test, without any consideration of the seriousness of the offence committed.

The current focus on the sentence imposed by a court, rather than the fact of conviction, is important because it recognises that the facts and circumstances of offending are always different and reflect varying levels of culpability.

Further, we are concerned that the proposed changes to the character test provide an indirect way for the government to avoid Australia's obligations under the Convention relating to the Status of Refugees (the Refugee Convention). The Refugee Convention provides a threshold for criminality as a bar to refugee status (under Article 1F), which applies to serious crimes and crimes against peace, war crimes, and crimes against humanity. As discussed above, the changes proposed by the Bill remove any consideration of the seriousness of an offence, by instead deeming seriousness by nature of the place an offence was committed.

4. Retrospectivity

The LIV strongly opposes clause 6 of Schedule 1 of the Bill, which purports to extend the application of the changes to the character test to any decision under s500A and s501, regardless of when the conviction or offence occurred. The LIV does not accept that there is any policy justification to override the general rules against retrospectivity of laws.

We warn the government against using the s501 discretion for political purposes, rather than to protect the community for unacceptable risk of harm, and point to the outcome in *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273, which highlights that the Minister cannot take irrelevant considerations into account when deciding to cancel a person's visa on character grounds.

The LIV urges the Senate Committee on Legal and Constitutional Affairs to recommend that the Bill not be passed in its entirety.

Please contact Laura Helm, Lawyer, Administrative Law and Human Rights on _____ or _____ in relation to this matter.

Yours sincerely,

Caroline Counsel

President
Law Institute of Victoria

ⁱ Speech by the (then) Minister for Immigration and Citizenship, Chris Evans, *Refugee Policy Under The Rudd Government – The First Year*, Parramatta Town Hall, Monday 17 November 2008 (available at <http://www.minister.immi.gov.au/media/speeches/2008/ce081117.htm>).