

## **Western Sydney University Submission, School of Law**



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## Introduction

1. On 25 November 2021, the Senate referred the [Migration Amendment \(Strengthening the Character Test\) Bill 2021 \[Provisions\]](#) (the **Bill**) to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 28 January 2022.
2. The deadline for submissions to this inquiry is 17 December 2021.
3. This submission has been prepared by Professor Anna Cody, Mr John Juriansz, and Dr Jason Donnelly from the School of Law at Western Sydney University (**WSU**).
4. The submitters respectfully contend that the Bill should not be enacted for the following reasons.

## Unjustified Necessity for Statutory Changes

5. The [Explanatory Memorandum](#) to the Bill states:

The Bill strengthens the character test in section 501 of the Migration Act by providing a new specific and objective ground to consider visa refusal or cancellation where a non-citizen has been convicted of certain serious offences against Australian or foreign laws involving violence against a person (including murder, kidnapping and aggravated burglary), non-consensual sexual acts, breaching of an apprehended violence order (or similar) or weapons.<sup>1</sup>

6. The submitters are not persuaded that the proposed changes outlined in the Bill are necessary.
7. First, non-citizens convicted of offences such as murder, kidnapping, aggravated burglary, non-consensual sexual acts, other violent offences, and reoffending connected with the utilisation of weapons are very likely to already be covered by the current statutory regime in [s 501 of the Migration Act 1958 \(Cth\)](#) (the **Act**).

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<sup>1</sup> Explanatory Memorandum, Migration Amendment (Strengthening the Character Test) Bill 2021 [Provisions], 1, 10.

8. For example, [s 501\(6\)\(a\) of the Act](#) makes plain that a non-citizen is taken to fail the character test if that person has a substantial criminal record as defined by [subsection 501\(7\) of the Act](#). That latter provision provides that a person has a substantial criminal record if, *inter alia*, the person has been sentenced to a term of imprisonment of 12 months or more or the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more.
9. Non-citizens convicted of murder, kidnapping, aggravated burglary, and serious offences associated with non-consensual sexual acts and utilisation of weapons are already likely to receive a sentence of imprisonment of at least 12 months. In those circumstances, there is no compelling necessity to expand the character test in the terms proposed by the Bill.
10. Secondly, a relevant non-citizen is unlikely to pose an unacceptable risk of harm to the Australian community where that non-citizen has not been sentenced to a term of imprisonment of 12 months or more for the offences mentioned above.
11. It is trite to indicate that the relevant sentencing court would have come to that sentence (i.e., less than 12 months' imprisonment) having taken into account the objective seriousness of the non-citizens offending, any relevant aggravating factors, and otherwise having balanced those matters against competing subjective considerations.
12. Thirdly, the [Explanatory Memorandum](#) indicates that the statutory amendments proposed by the Bill are to ensure that non-citizens who are convicted of certain serious offences and pose a risk to the safety of the Australian community do not pass the character test and may be appropriately considered for visa refusal or cancellation.<sup>2</sup>
13. With respect, the submitters are not persuaded the stated purpose for the Bill is in actual alignment with the proposed provisions. For example, as outlined above, the Bill is said to be necessary to ensure that those non-citizens who

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<sup>2</sup> Ibid.

'pose a risk to the safety of the Australian community' do not pass the character test such as to enliven the statutory discretion in [s 501 of the Act](#).

14. However, whether a non-citizen poses a risk to the safety of the Australian community is irrelevant under the proposed changes. The proposed statutory amendments deem non-citizens to fail the character test when they have been convicted of a so-called designated offence.<sup>3</sup>

15. Moreover, the submitters are not persuaded that the mere conviction of a designated offence is co-extensive with that person posing a risk to the safety of the Australian community in the future. The question of risk is an inherently complex issue that requires various factors to be considered.

16. Thirdly, the [Explanatory Memorandum](#) further states that the amendments in the Bill:

...will ensure the character test aligns directly with community expectations that non-citizens who are convicted of offences such as murder, sexual assault or aggravated burglary will not be permitted to enter or remain in the Australian community.<sup>4</sup>

17. With respect, the submitters are not persuaded by this espoused purpose. As a starting point, the proposed statutory changes to the character test do not align directly with the above-stated purpose. The proposed changes mandate the deemed failure of the character test by non-citizens that fall within the scope of the designated offence provisions.<sup>5</sup> However, the proposed statutory amendments do not mandate an outcome that non-citizens convicted of murder, sexual assault, or aggravated burglary must be removed from Australia.

18. Accordingly, using the words "*will not be permitted to enter or remain in the Australian community*" is a misleading statement. Even if a non-citizen is taken to fail the character test by reference to the new designated offence regime, the

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<sup>3</sup> Migration Amendment (Strengthening the Character Test) Bill 2021, Sch 1, cl 4.

<sup>4</sup> Explanatory Memorandum, above n 1, 1.

<sup>5</sup> Migration Amendment (Strengthening the Character Test) Bill 2021, Sch 1, cls 4-7.

question of whether the non-citizen can remain in the Australian community is a question of discretion left to the administrative decision-maker.

19. Moreover, the submitters are not persuaded that the amendments in the Bill necessarily ensure the character test aligns with community expectations.<sup>6</sup> No probative evidence has been adduced in support of the subjective assertion that the statutory amendments will ensure the character test in [s 501 of the Act](#) aligns directly with community expectations.

20. The question of community expectations is not necessarily limited to a deemed normative principle related to the protection of the Australian community. For example, it may well be that the concept of community expectations could also encapsulate individual considerations related to a non-citizen and Australia acting in conformity with its international law obligations.<sup>7</sup>

21. Fourthly, it can be accepted that the relevant offences mandated by the proposed designated offence regime are, at a broad level of generality, serious. However, that fact alone should not necessarily invoke a deemed objective failure of the character test for the relevant non-citizen.

22. Even if a non-citizen does not fail the character test because of having a substantial criminal record within the meaning of [subsection 501\(7\) of the Act](#), there are other current safeguards in place. For example, under [subsections 501\(6\)\(c\)-\(d\) of the Act](#), a non-citizen does not pass the character test if,

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:

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<sup>6</sup> Explanatory Memorandum, above n 1, 1.

<sup>7</sup> [DKXY v Minister for Home Affairs \[2019\] FCA 495 \[30\]-\[32\]](#); Jason Donnelly, 'Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door' (2017) 24 *Australian Journal of Administrative Law* 99, 112-113.

(i) engage in criminal conduct in Australia; or

.....

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way;

23. The jurisdictional facts reflected in [subsections 501\(6\)\(c\)-\(d\) of the Act](#) provide the Minister with a fairly broad level of power to already determine that a non-citizen does not pass the character test on account of either their past or present general or criminal conduct.

24. [Subsections 501\(6\)\(c\)-\(d\) of the Act](#) justifiably require the Minister to demonstrate that the non-citizen poses a risk of harm to the Australian community as part of determining whether a non-citizen fails the character test. The fundamental difficulty with the proposed statutory amendments reflected in the Bill is that the proposed statutory regime unjustifiably avoids the question of future risk when assessing whether a person fails the character test.

### Financial Considerations

25. The [Explanatory Memorandum](#) indicates that the proposed statutory amendments “*will have a low financial impact*”.<sup>8</sup> Without seeing the impugned data relevant to this issue, the submitters are not persuaded that the statutory enactment of the Bill would have a low financial impact.

26. At its heart, the proposed statutory amendments seek to expand the character test in [s 501 of the Act](#). An obvious inference or implication is that more non-citizens will be liable to fail the character test than under the current statutory regime. This will inevitably increase the workload of ‘s 501 delegates’ within the Department of Home Affairs (the **Department**) and will require considerable economic resources to meet the practical consequences that flow from

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<sup>8</sup> Explanatory Memorandum, above n 1, 2.

expanding the circumstances in which a person is deemed to fail the character test.

27. The financial consequences are not necessarily limited to the Department. For example, the non-citizen who receives an unfavourable decision from the Department may exercise relevant statutory review rights before the Administrative Appeals Tribunal (the **Tribunal**). Those statutory review rights are reflected in [s 500 of the Act](#).

28. Accordingly, the proposed statutory amendments are also likely to increase the workload undertaken by statutory members in the General Division of the Tribunal. This is concerning, given that the [Tribunal's Annual Report for 2020-2021](#) noted the following:

Recognising that we are not sufficiently resourced to substantially reduce our significant on hand caseload, we will continue to engage with Government about additional member appointments, commensurate increases to staffing levels to support members and appropriate funding.<sup>9</sup>

29. It is not clear to the submitters, with respect, whether the financial analysis undertaken concerning the Bill has had regard to the financial and practical consequences for the Tribunal.

### **Operation of the Proposed Statutory Changes**

30. **Unsupported Statement.** The [Explanatory Memorandum](#) indicates that the Bill will amend the Act to insert new [paragraph 501\(6\)\(aaa\)](#) into the character test.<sup>10</sup> It is said that this item intends to ensure that a non-citizen who has been convicted of a designated offence is included in a class of persons who do not pass the character test.<sup>11</sup> Further, it is said that generally, the discretion to cancel or refuse to grant a visa will not be exercised for low-level, petty or historical offending.<sup>12</sup>

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<sup>9</sup> Administrative Appeals Tribunal, Annual Report, 2020-2021, 9.

<sup>10</sup> Explanatory Memorandum, above n 1, 5.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid, 11.

31. The submitters are not persuaded that generally, the discretion to cancel or refuse to grant a visa would not be exercised for low-level, petty, or historical offending. There are at least three reasons for this view.
32. First, there is no express principle reflected in [Direction no. 90](#) (the current ministerial direction under [s 499 of the Act](#)) that provides that low level, petty or historical offending would not generally lead to the adverse exercise of discretion.
33. Secondly, various principles reflected in [Direction no. 90](#) appear to be inconsistent with the impugned assertion. For example, paragraph 5.2(2) of [Direction no. 90](#) mandates that non-citizens who engage or have engaged in criminal conduct should expect to be denied the privilege of coming to or to forfeit the privilege of staying in Australia.
34. Moreover, paragraph 5.2(3) provides that the expectation of the Australian community applies regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community. That latter principle is also repeated in paragraph 8.4(3) of [Direction no. 90](#).
35. Thirdly, read in context, [Direction no. 90](#) mandates a legal framework that is generally in favour of exercising the relevant statutory discretion in [s 501 of the Act](#) adversely to a non-citizen.
36. For example, three of the four primary considerations<sup>13</sup> can only weigh adversely to a non-citizen. In other words, the current ministerial direction has been created in such a manner to generally operate to the detriment of a non-citizen's ability to be present in the Australian community.
37. **Application of Amendments.** The application of the proposed statutory amendments is dealt with in cl 7 of the Bill. [Clauses 7\(2\)-\(3\) of the Bill](#) provide as follows:<sup>14</sup>

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<sup>13</sup> Being the protection of the Australian community (paragraph 8.1), family violence (paragraph 8.2) and expectations of the Australian community (paragraph 8.3).

<sup>14</sup> Migration Amendment (Strengthening the Character Test) Bill 2021, Sch 1, cl 7.



(2) Paragraph 501(6)(aaa) of the [the Act], as in force on and after the commencement of this item, applies to:

(a) a decision to grant or refuse to grant a visa, if:

- (i) the application for the visa was made before that commencement and had not been finally determined as at that commencement; or
- (ii) the application for the visa is made on or after that commencement; and

(b) a decision made on or after that commencement to cancel a visa.

(3) The provisions of the [the Act] mentioned in subitems (1) and (2) apply as mentioned in those subitems in relation to a person whether the person committed or was convicted of the relevant designated offence before, on or after the commencement of this item.

38. It follows that the proposed statutory amendments would have retrospective application. A non-citizen would be taken to fail the character test under [s 501 of the Act](#) if they were convicted with a designated offence (even if that conviction occurred before the proposed amendments in the Bill came into legal effect in Australia).

39. The submitters are not persuaded that the proposed statutory amendments outlined in the Bill should have retrospective application. The rule of law doctrine means that justice will be done according to laws that are certain and knowable in advance.<sup>15</sup> In that context, the submitters contend that the proposed retrospective operation of the Bill is inconsistent with an important principle of the rule of law doctrine.

40. **Potential Undermining of Judicial Power.** The general upshot of the proposed designated offence regime is to mandate, objectively, that the non-citizen fails the character test if they engage in conduct that falls within the

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<sup>15</sup> Nicholas Cowdery, 'Magna Carta: 800 Years Young' (2015) 40 *Australian Bar Review* 101, 104; Jason Donnelly, 'Utilisation of National Interest Criteria in the Migration Act 1958 (Cth) – A Threat to Rule of Law Values?' (2017) 7(1) *Victoria University Law and Justice Journal* 94, 98.

scope of a designated offence.<sup>16</sup> This statutory regime operates to allow the Minister to potentially remove the non-citizen from the Australian community or refuse a visa to such a person. The obvious consequence of such a finding is that the non-citizen is taken to pose an unacceptable risk of harm to the Australian community, such that they should have no place in it.

41. The criminal justice system will generally have already dealt with a non-citizen found to have engaged in conduct that falls within the scope of a designated offence. In circumstances where a sentencing judge has found the non-citizen guilty of an impugned designated offence but otherwise found it appropriate to allow the non-citizen to remain in the Australian community generally dictates that the person is not an unacceptable risk of harm to the Australian community.

42. It must be kept steadily in mind that in sentencing an offender, sentencing judges broadly give effect to the expectations of the Australian community. For example, [s 3A of the Crimes \(Sentencing Procedure\) Act 1999 \(NSW\)](#) provides that the purposes of sentencing an offer include:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.

43. The proposed statutory regime mandated by the Bill has the real potential to create an inconsistency in the exercise of judicial and executive power.

44. For example, a non-citizen appropriately sentenced for a designated offence

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<sup>16</sup> Migration Amendment (Strengthening the Character Test) Bill 2021, Sch 1, cl 6.

may remain in the Australian community (after careful consideration by a sentencing judge). However, under the proposed changes mandated by the Bill, the very same non-citizen may be removed from the Australian community because of failing the character test and the relevant executive decision-maker exercising the discretion unfavourably to the person.

45. The proposed changes may invoke a situation where the exercise of executive power prohibits the non-citizen from lawfully giving effect to a criminal sentence. For example, having been convicted of a designated offence, the non-citizen may be sentenced to undertake a community corrections order within the meaning of [s 8 of the Crimes \(Sentencing Procedure\) Act 1999 \(NSW\)](#). However, the non-citizen would be unable to comply with that sentence in circumstances where their visa was cancelled, and they were taken into immigration detention (thus expressly frustrating a criminal sentence).
46. Ultimately, the fundamental objectives concerning the sentencing exercise include, *inter alia*, protection of the Australian community, having regard to principles of deterrence, and otherwise recognising the harm done to the victim. Given those considerations have been comprehensively addressed under the sentencing regime in the criminal justice system, there is a real danger that repetitively having regard to the same objectives in the exercise of executive power is to double count the same conduct against the non-citizen.
47. Accordingly, the submitters respectfully contend that the impugned provisions of the Bill tend to impermissibly infringe upon the exercise of judicial power in the circumstances described above.
48. **Intention and the Proposed Provisions.** The submitters are concerned with various language reflected in the [Explanatory Memorandum](#). For example, that document makes plain that the proposed new [subparagraphs 501\(7AA\)\(a\)\(v\) to \(viii\)](#) are intended to capture non-citizens with, *inter alia*, links to activities that pose a risk to the Australian community, such as (but not limited to) organised crime and outlaw motorcycle gangs.<sup>17</sup>

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<sup>17</sup> Explanatory Memorandum, above n 1, 7.

49. In that context, the [Explanatory Memorandum](#) asserts:

This makes it clear that the intention is that non-citizens who are criminals or who are associated with criminal activity should not remain in, or be allowed to enter, Australia.<sup>18</sup>

50. The stated intention, as outlined above, is inconsistent with the proposed statutory provisions in the Bill. Although the proposed provisions mandate the non-citizen objectively fails the character test if they have engaged in conduct that falls within the scope of a designated offence, that does not inflexibly lead to a conclusion that the non-citizen should not remain in, or be allowed to enter, Australia. The ultimate question is a matter of discretion.

51. The submitters observe the preceding as such sweeping statements and language reflected in the [Explanatory Memorandum](#) is misleading in material respects and does not appropriately reflect the true state of affairs. Given that such documents can be utilised in the statutory construction of impugned provisions,<sup>19</sup> the submitters seek to emphasise that the [Explanatory Memorandum](#) should appropriately reflect what the proposed statutory revisions seek to achieve.

52. **Sidestepping Sentencing Outcomes.** [Clause 4\(3\)\(b\) of the Bill](#) mandates an important jurisdictional fact concerning the proposed designated offence regime as follows:

(c) for an offence against a law in force in Australia—the offence is punishable by:

(i) imprisonment for life; or

(ii) imprisonment for a fixed term of not less than 2 years; or

(iii) imprisonment for a maximum term of not less than 2 years;<sup>20</sup>

53. Accordingly, rather than focus on the actual sentence imposed upon the non-

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<sup>18</sup> Ibid.

<sup>19</sup> [Acts Interpretation Act 1901 \(Cth\), s 15AB\(2\)\(e\)](#).

<sup>20</sup> Migration Amendment (Strengthening the Character Test) Bill 2021, Sch 1, cl 4.

citizen, the proposed regime focuses on whether the actual offence is punishable by the prescribed period of two years or more for the character test.

54. Such an approach ignores the actual sentence imposed upon the non-citizen in determining whether the applicant fails the character test in the context of the designated offence regime. The submitters are concerned that the proposed Bill is seeking to intentionally bypass the sentence imposed upon a non-citizen to find a non-citizen fails the character test.
55. Given the preceding, the proposed amendments to the character test set a fairly low threshold (as many offences throughout Australia mandate a maximum term of imprisonment of not less than two years). Moreover, the proposed new character test also seeks to undermine the statutory threshold reflected in [subsection 501\(7\)\(c\) of the Act](#) - which requires the non-citizen to have been sentenced to a term of imprisonment of 12 months or more.
56. In other words, [subsection 501\(7\) of the Act](#) mandates a character test that readily appreciates the actual sentence imposed upon a non-citizen (legitimately, in that context, giving direct application to the sentence imposed in the criminal justice system). Conversely, the proposed new [subsection 501\(7AA\)\(b\) of the Act](#) ignores the actual sentence imposed, rather giving effect to the prescriptive maximum term of imprisonment set by Parliament that may have little connection with what the non-citizen received.
57. At a broad level of generality, there is a danger in employing an objective test to mandate that a non-citizen fails the character test. For the submitters, by mandating the non-citizen fails the character test, an obvious conclusion is that the non-citizen poses a risk of harm to the Australian community. However, given the objective nature of the designated offence regime, the decision-maker is not even considering whether the non-citizen poses a risk of harm to the Australian community when considering whether they fail the character test. That is a fundamental reason why the proposed bill should be rejected.
58. The [Explanatory Memorandum](#) strangely indicates that the proposed statutory provisions '*acknowledge that the cancellation or refusal of a non-citizen's visa*

*can have serious consequences, including permanent exclusion from Australia*'.<sup>21</sup> Respectfully, the submitters contend that this assertion is without merit and unjustified.

59. Nothing within the meaning of the Bill acknowledges that the cancellation or refusal of a non-citizen's visa can have serious consequences, including permanent exclusion from Australia. On the contrary, the Bill seeks to introduce significant statutory amendments to the character test to invoke potential serious adverse human consequences<sup>22</sup> in exercising the character test power in [s 501 of the Act](#).

60. Moreover, as observed earlier in these submissions, the current ministerial direction concerning [s 501 of the Act](#) is inherently directed to generally dictating an adverse outcome for exercising that discretionary power.

61. **Human Rights Implications.** Concerning the [Statement of Compatibility with Human Rights](#), that document concludes:

The Bill is compatible with human rights as, 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.<sup>23</sup>

62. Respectfully, as expressed, the submitters do not agree that the designated limitation on human rights invoked by the proposed statutory amendments in the Bill is necessarily compatible with human rights and Australia's international law obligations.

63. For example, the United Nations Human Rights Committee has previously recognised that Australia's application of character provisions in the Act was incompatible with Australia's obligations under international law.<sup>24</sup>

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<sup>21</sup> Explanatory Memorandum, above n 1, 7-8.

<sup>22</sup> [Hands v Minister for Immigration and Border Protection \[2018\] FCAFC 225 \[3\]](#).

<sup>23</sup> Explanatory Memorandum, above n 1, 18.

<sup>24</sup> *Nystrom v Australia*, UN Doc CCPR/C/102/D/1557/2007 (18 August 2011).

64. In [Nystrom](#),<sup>25</sup> the Committee, in dealing with the question of arbitrariness, referred to its earlier General Comment on freedom of movement, observing that *‘even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances’* and that *‘there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.’*

65. The international jurisprudence reflected in [Nystrom](#) was recently applied by the Administrative Appeals Tribunal in the decision of [Clegg](#),<sup>26</sup> where Member Reitano found at [113] in the context of the case before the Tribunal:

I incline to the view that a decision having the effect of depriving Mr Clegg of the right to enter his own country, or that would interfere with his family, would in the particular circumstances be disproportionate to the need to protect the Australian community from the commission of further offences by him. In particular, the likelihood of him committing further offences is, having regard to the findings I have made, low. The drastic outcome of preventing Mr Clegg from entering Australia or of interfering with his family life is, when measured against the low risk of him reoffending, a disproportionate response.

66. Both [Clegg](#) and [Nystrom](#) neatly demonstrate that, contrary to subjective assertions, the lawful operation of the character test in the Act is not always compatible with human rights – especially when having regard to the exceptionally adverse consequences involved – permanent exclusion from Australia forever.

## Conclusion

67. It is said that the Bill introduces measures that enhance the Government’s ability to protect the Australian community.<sup>27</sup> This is said to enhance the trend of Australia’s strong cancellation powers and low tolerance for criminal

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<sup>25</sup> *Nystrom v Australia*, UN Doc CCPR/C/102/D/1557/2007 (18 August 2011).

<sup>26</sup> *Joshua Steven Clegg v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 3383.

<sup>27</sup> Explanatory Memorandum, above n 1, 12.

behaviour by non-citizens.<sup>28</sup>

68. The submitters respectfully contend that the proposed Bill is neither necessary nor reasonably appropriate to be enacted at the current time. For reasons already given, the current character test regime in [s 501 of the Act](#) sufficiently addresses character concerns related to non-citizens.

69. While there has no doubt been a trend of amending the Act to adversely impact non-citizens, that has been markedly at the expense of protecting and promoting the human rights of non-citizens and their Australian family and friends that are affected by these character-related decisions.

70. The submitters are ultimately concerned that the Bill goes too far in purporting to give effect to the overarching objective of the Act, which is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.<sup>29</sup>

**16 December 2021**

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<sup>28</sup> Ibid.

<sup>29</sup> [Migration Act 1958 \(Cth\), s 4\(1\)](#).