



New South Wales  
Council for Civil Liberties

## **NSWCCL SUBMISSION**

# **Migration Amendment (Strengthening the Character Test) Bill 2018**

**28 November 2018**

### **About NSW Council for Civil Liberties**

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

### **Contact NSW Council for Civil Liberties**

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The Council for Civil Liberties (NSWCCL) thanks the Legal and Constitutional Committee for the opportunity to make a submission to its inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018. We would be glad to speak directly to Committee members about these important matters.

### Summary

- i. This bill is not about protecting the Australian people.
- ii. This bill will subject people who are of no danger to society to the rigours of indefinite detention, or to being deported.
- iii. The bill would allow the Minister the discretion to cancel or refuse to issue a visa to a person who has been convicted of a designated offence but who may have received a very short sentence, or no sentence at all.<sup>1</sup>
- iv. The bill presupposes that careful decisions of the courts, made after proper process, input by experts and the experienced judgement of judges, are inferior to decisions made by the Minister with the aid of his Department. Sentences, after all, take account of the desirability of deterrence—both of the individual and of others. That is, they take into account the dangers to the community.
- v. The bill contains no exceptions for children.
- vi. The bill ignores the processes of rehabilitation.
- viii. A determination that a person fails the character test, depending on how it is made, means either that their visa must be, or may be, cancelled or refused. There is a right to

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<sup>1</sup> Senate Standing Committee for the Scrutiny of Bills Scrutiny *Digest 134 of 2018*, [1.26]. The Scrutiny Committee also notes that 'in the light of the extremely broad discretionary powers available for the minister to refuse or cancel the visa of a non-citizen, the explanatory materials have given limited justification for the expansion of these powers by this bill'. This is an understatement.

merits review only in some cases. The extraordinary, unjust, power already given to the Minister and his delegates needs no extension—rather, it should be cut back.

**Recommendation: the bill should be rejected.**

**1. What this bill is about.**

Despite what has been said in the Explanatory Memorandum, this bill is not about outlaw motorcycle gangs, murderers, people who commit serious assaults, sexual assault or aggravated burglary. People who are convicted of such crimes do not receive sentences of less than a year, unless their actual offences are minor—and if so they are known not to be a danger to the community.

Contrary to a misconception being put about, judges and magistrates do not lighten sentences in order to ensure that convicted persons are not subjected to the cancellation of their visas and thrust into detention or sent overseas. For judicial officers are prevented from doing this by the laws of several states and also by a determination of the High Court.

It is clear that generally a judge is not entitled to deliberately fashion a sentence to avoid statutory consequences.

The NSW CCA has made it plain that the prospect of deportation is an irrelevant consideration which is not to be taken into account.!

The NSW Court of Criminal Appeals is particularly pertinent on this point – cases include *Pham* 2005 NSWCCA 94 at 13, *AC* 2016 NSWCCA 107 at 70 *Arrowsmith* 2018 SASFC 47 at 37 and *Kristensen* 2018 NSWCCA 1

In any case, under the existing act, persons can already be deemed to have failed the character test if they pose any risk to the community, on the basis of their criminal or general conduct, or due to an association they have.

**2. The motivation for the bill.**

If the concern behind the bill were about protecting people, the proposers would be embarrassed about releasing dangerous criminals into other societies—especially when there are few nations in a better position than Australia to effect the reform of

miscreants, or to control them if reform fails. They would be embarrassed about the cancellation of visas of refugees who, in detention, take out their frustration and despair by physical resistance to their sometimes cruel guards. They would be embarrassed about sending people who have been in Australia since childhood to countries they have no connection with, countries which cannot be seen as having any responsibility for those persons' actions. It is hard not to believe that there are different, less noble, motivations for the bill.

### **3. Harsh penalties for minor offences.**

Because the bill permits visa cancellation on the basis of possible maximum sentences, it will legitimate harsh penalties on people whose crimes are minor. Given the treatment that has been perpetrated against asylum seekers who have committed the most minor of crimes in detention, this is not fanciful.

It is not hard to think of such offences, even for the four categories included in proposed paragraph 501(7AA)(a) of the bill.

#### *a. Offences under the four categories—proposed paragraph 501(7AA)(a).*

A person subject to a court order might contact an ex-partner, in contravention of an order made for the personal protection of that partner, for the most urgent of reasons, or forgetfully, especially when there has been no actual violence in the past. (Such cases are regrettably not unusual.)

As the Law Institute of Victoria has pointed out, a child who shares an intimate picture with a boyfriend or a girlfriend would automatically fail the character test.

A pair of punches to the body, occurring for the first and only time in an individual's life, regrettable though they are, do not imply that the offender is a threat to society. Yet they would fail the test.

Thus proposed paragraph 501(7AA)(a) is woefully inadequate in its attempted restriction of the offences covered to serious crimes. There is a failure of imagination by those who have put it forward.

*b. Aiding or abetting the commission of offences under the four categories.*

This group of “designated offences” is most likely to involve the family members of an offender. Where the offences are already minor—and in the cases the bill is intended to catch, *all* the offences are minor—the involvement of partners or children will be trivial.

This section will also strongly discourage people from letting the police know of offences in which they or those they care about have played a small part.

#### **4. Catching out children.**

There are no exceptions made for children under these amendments—or in section 501 as it is. The Explanatory Memorandum does state that only in exceptional circumstances would a child’s visa be cancelled—but that is a mere promise. There is no account even there, and certainly not in the bill, of what those circumstances might be.

Children, of course should not (bad parenting aside) be separated from their parents. Nor should parents lose their visas because of the actions of their children.

If the bill is to progress, CCL recommends that a section be included preventing the cancellation of the visas of children on character grounds.

#### **5. Gainsaying the courts.**

The shift from actual sentences to the maximum available sentences fails to appreciate the role of maximum sentences. They are for the worst cases of an offence. The actual sentences given take account of mitigating circumstances such as disability and especially moral culpability, and also the likely threat to society. (Parole decisions also take account of those threats.) And, of course, they also take into account the actual gravity of the actions committed. Taking account of maximum sentences ignores those factors. As such, possible maximum sentences are not an appropriate basis for determining seriousness, nor for judging the likely threat to society posed by a defendant.

## **6. Ignoring rehabilitation.**

Whether or not a convicted person who has served their sentence is a continuing threat to the community is a matter to be judged after society's attempts at rehabilitation have been completed. These attempts go on after the prisoner has been released, and are often successful.<sup>2</sup>

The bill is unnecessary and it is unwise. It should be rejected.

**Pauline Wright**  
**President**  
**NSW Council for Civil Liberties**

**Contact in relation to this submission**

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<sup>2</sup> The recidivism rate for all crimes is about 42%.