

## Technical Amendments: ‘character test’

### Background

- 5.1 The technical amendments incorporated in Schedule 2 of the Bill generally attracted little attention in submissions and evidence. The exception was the proposed changes to section 501A (the ‘character test’). Amnesty, RILC, IARC, NCCA, UNHCR, the Islamic Council of Victoria (ICV), ACBC, and ARC provided comment, which is detailed below.
- 5.2 As it stands, the current paragraph 501A(1)(c) implies that the AAT has the power to *grant* a visa when reviewing a decision made by the delegate of the Minister. The implication that subsection 501A(1) confers a power to grant a visa is incorrect, because the power to grant a visa is dealt with in section 65 of the *Migration Act 1958*.<sup>1</sup>

### Section 501A

- 5.3 Section 501 of the *Migration Act 1958* deals with the refusal or cancellation of a visa on character grounds. A person is identified as not passing the ‘character test’ if:
- they have a substantial criminal record; or
  - they have associated with someone, or a group or organisation whom the Minister reasonably suspects has been or is involved in criminal conduct; or

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<sup>1</sup> *Explanatory Memorandum*, p. 10.

- they are not of good character in the light of their past and present criminal and general conduct; or
- there is a significant risk that the person, if allowed into Australia, would be involved in activities which are violent or disruptive.<sup>2</sup>

5.4 Section 501A deals with the cancellation or refusal of a visa and the substitution of a non-adverse decision under section 501.

5.5 Currently section 501A applies if:

...the Administrative Appeals Tribunal... makes a decision (the “original decision”):

to grant a visa to a person as a result of not exercising the power conferred by subsection 501(1) to refuse to grant a visa to the person.<sup>3</sup>

## Proposed amendments

5.6 The amendment proposes to clarify the Act under paragraph 501A(1)(c) by removing the reference to granting a visa in it and also in transitional arrangements in the *Migration Legislation Amendment (Strengthening of Provisions relating to Character) Act 1998*. According to DIMA the changes do not go beyond the policy already endorsed by the passage of that Act.<sup>4</sup>

5.7 The amendment also proposes to clarify the power of the Minister:

- to substitute an adverse decision under section 501A even if the person passes the character test in section 501 [through an addition after paragraph (d) of subsection 501A(1)]; and
- to substitute an adverse decision at any stage after an approval on character grounds has been given [new subsection 501A(4A)].

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2 Paragraph 501(6)(d) sets out these grounds in detail. They include engaging in criminal conduct; harassing/molesting/stalking another person; vilifying a segment of the community; inciting discord in the community; or becoming involved in disruptive/violent activities.

3 *Migration Act 1958*, paragraphs 501(A)(1)(b) and (c)

4 DIMA, Submission, p. 57.

## Concerns

### General principles

- 5.8 RILC voiced its opposition to the general principle of the existing section 501 of the Act, which the Bill seeks to clarify. In relation to the provision that natural justice did not apply to the Minister's actions, it submitted that:
- the Committee should use this opportunity to re-visit the wisdom of s 501A(3) and should recommend its abolition.<sup>5</sup>
- 5.9 Amnesty and RILC suggested that the 'character test' went beyond the permissible character exclusions allowed in the Convention Relating to the Status of Refugees and argued that the powers should not be extended.<sup>6</sup>
- 5.10 NCCA claimed that the Minister's ability to substitute an adverse decision contravened the doctrine of separation of powers.<sup>7</sup>
- 5.11 Amnesty, RILC and NCCA drew attention to what they saw as evidence of the unsatisfactory outcomes of ministerial discretion in relation to the special arrangements for the Kosovars and safe haven provisions, particularly in the case of those Kosovars who refused to return voluntarily.<sup>8</sup>
- 5.12 The NCCA stated that these kinds of unreviewable decisions, placed in the hands of the Minister, do not allow for certainty or transparency in the decision-making process.<sup>9</sup>
- 5.13 The Committee noted these views were all comments on the existing Act, not on the particular Bill, and concluded that consideration of them was outside its immediate concern.

### Enhancement of Minister's powers

- 5.14 RILC, NCCA, and IARC expressed concern that the amendment expanded the Minister's discretionary powers.<sup>10</sup>
- 5.15 In evidence presented to the Committee, UNHCR stated that it did not see the Bill as enhancing the Minister's powers.<sup>11</sup>

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5 RILC, Submission, p. 43.

6 Amnesty, Submission, p. 25; RILC, Submission, p. 42.

7 NCCA, Submission, p. 118.

8 Amnesty, Submission, p. 25; RILC, Submission, p. 43; NCCA, Submission, p. 112.

9 NCCA, Submission, p. 112.

10 RILC, Submission, p. 41; NCCA, Evidence, p. 59; IARC, Submission, p. 107.

## Inherent problems

- 5.16 The main arguments advanced against ministerial power to set aside a decision were by:
- UNHCR, RILC and ACBC, who contended that the setting aside could be subjective;<sup>12</sup>
  - ACBC and IARC, who argued that it could be arbitrary;<sup>13</sup>
  - NCCA, which claimed that the exercise of the power was not transparent;<sup>14</sup> and
  - ACBC, RILC, ICV and UNHCR, who claimed that the decision was not subject to review by any court.<sup>15</sup>
- 5.17 In relation to the last claim, DIMA maintains that the Minister’s decisions under section 501A are reviewable by the Federal Court.<sup>16</sup>
- 5.18 The Committee considered that issues of apparent inherent problems related to existing legislation, rather than the Bill under consideration.

## Unintended consequences

- 5.19 RILC, IARC, NCCA, and UNHCR identified a range of potential unintended consequences. RILC and IARC considered that it would inject long-term uncertainty into the visa process because the Minister could overturn a favourable decision at any time, even if the person had been settled in Australia for many years.<sup>17</sup>
- 5.20 The Committee considered that this was not a strong argument against the Bill because the power already existed under the Act. Further, DIMA indicated to the Committee that the original enactment of section 501A was to enable the Minister to act quickly to overturn, in the national

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11 UNHCR, Evidence, p. 88.

12 RILC, Submission, pp. 41-42 notes that the Minister only requires reasonable suspicion that a person does not pass the character test and that the principle of natural justice does not apply; UNHCR, Submission, p. 137; ACBC, Submission, p. 147.

13 IARC, Submission, pp. 107-108; ACBC, Submission, p. 144.

14 NCCA, Submission, pp. 112, 121.

15 ACBC, Submission, p. 147 - “apparently unreviewable...beyond the review of the law”; RILC, Submission, p. 41-42 - “cannot be reviewed by any court”; ICV, Submission, p. 141 - “unchallengeable power to reverse earlier decisions”. The UNHCR, Submission, p. 138 comment “a decision by the Minister is...[not] reviewable”, was withdrawn (UNHCR, Evidence, p. 88).

16 DIMA, Evidence, p. 26.

17 RILC, Submission, p. 43; IARC, Submission, p. 107.

interest, a decision which did not reflect community standards.<sup>18</sup> The Committee considered that the power was unlikely to be invoked years after the decision was made and was therefore not grounds for rejection of the changes proposed in the Bill.<sup>19</sup>

- 5.21 UNHCR claimed that people smuggled into Australia could conceivably be excluded because they had clearly associated with people engaged in criminal conduct (which is a ground for 'character' rejection).<sup>20</sup> This, UNHCR explained, was a speculative example of a possibly unintended consequence:

...to test the extremes of the implications of what may be found in this bill.<sup>21</sup>

- 5.22 The Committee believed that this was not likely to occur and that it was speculative and therefore not grounds for rejection of the changes proposed in the Bill.

- 5.23 NCCA claimed that overstayers who voluntarily leave are considered to have had "a complete disregard for immigration laws". It expressed concern that such a judgement might be made about other individuals with the consequence that they could fail the 'character test' on flimsy grounds.<sup>22</sup>

- 5.24 NCCA offered, as an example, an unsuccessful claimant for a protection visa who had formed an attachment prior to leaving. Should they make an application from their home country to rejoin their spouse, the fact that they were in their country of origin:

without overt evidence of severe persecution (ie imprisonment or death) could be taken as evidence that their claim for protection in Australia was an abuse of process, and therefore again, a "complete disregard for immigration laws".<sup>23</sup>

- 5.25 Again, the Committee considered that this potential issue could arise under the present legislation and did not relate directly to the Bill. It was therefore not considered an argument against the Bill.

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18 DIMA, Submission, p. 288.

19 The power under section 501A would have no effect on a migrant once they had become an Australian citizen. DIMA, Submission, p. 289.

20 UNHCR, Submission, p. 137.

21 UNHCR, Evidence, p. 89.

22 NCCA, Submission, p. 118.

23 NCCA, Submission, p. 118.

## Conclusions

- 5.26 The Committee considered that criticisms of the ‘character test’ related mainly to the existing Act, rather than to the Bill’s technical amendments. It therefore supported Schedule 2 of the Bill.

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### Recommendation 6

- 5.27 **The Committee recommends that the technical amendments in Schedule 2 of the Bill be proceeded with.**