



Australian Government
Department of Immigration and Citizenship

26 November 2008

Dr Jacqueline Dewar
Secretary
Parliamentary Joint Committee on the Australian Crime Commission
Parliament House
Canberra ACT 2600



Dear Dr Dewar

**Supplementary submission to the Joint Committee on the Australian Crime Commission
Inquiry into the legislative arrangements to outlaw serious and organised crime groups**

I am writing further to my appearance before the Committee at the hearing of 6 November 2008. I undertook to provide the Committee with further information on how legislation and policy spells out the criteria for determining that a person is not of good character. An excerpt of the relevant section of transcript follows:

Mr WOOD—Is it possible to give us, on notice, some examples or what the legislation states so that we can be aware of what the criteria are, or is it like some magical science which you cannot really—

Mr Frew—We can absolutely give you what the legislation states, and I have prepared a very short history that I may even read into the record if that would suit you.....

The further information can be found at Attachment A. It includes the relevant legislation that relates to character, together with an abridged policy document that supports the legislation.

I also wish to provide supplementary evidence to elucidate points made in my evidence concerning the student visa program and processing arrangements for the character checking of student visa applicants.

As I mentioned, the student program contributes substantially to the Australian economy. The latest research snapshot published by Australian Education International cites Bureau of Statistics data to state that International education activity contributes \$14.2 billion in export income to the Australian economy in 2007-08. The Department of Immigration and Citizenship granted more than 278,000 student visas in 2007-08. There were more than 365,000 student visa holders in Australia as at 30 September 2008.

All applicants for a student visa are required to meet legislative criteria that relate to character. The evidence provided by applicants to meet these criteria can vary according to the individual evidence circumstances of an applicant.

people our business

All student visa applicants must complete a character declaration that includes questions concerning previous criminal history. In addition, case officers retain discretion to request penal checks in individual cases where there is any doubt as to whether an applicant meets the character requirement. Where there is no indication of character concern, applicants for student visas are not required to obtain penal checks.

Thank you for the opportunity to provide a further submission to the Committee.

Yours sincerely

Todd Frew
First Assistant Secretary
Border Security Division


2/12/08

Relevant legislation

Migration Act 1958

Section 501. Refusal or cancellation of visa on character grounds

Decision of Minister or delegate — natural justice applies

501. (1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: ***Character test*** is defined by subsection (6).

- (2) The Minister may cancel a visa that has been granted to a person if:
- (a) the Minister reasonably suspects that the person does not pass the character test; and
 - (b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister — natural justice does not apply

- (3) The Minister may:
- (a) refuse to grant a visa to a person; or
 - (b) cancel a visa that has been granted to a person;
- if:
- (c) the Minister reasonably suspects that the person does not pass the character test; and
 - (d) the Minister is satisfied that the refusal or cancellation is in the national interest.
- (4) The power under subsection (3) may only be exercised by the Minister personally.
- (5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3).

Character test

- (6) For the purposes of this section, a person does not pass the ***character test*** if:
- (a) the person has a substantial criminal record (as defined by subsection (7));
or
 - (b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or
 - (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 significant risk that the person would:
- (i) engage in criminal conduct in Australia; or
 - (ii) harass, molest, intimidate or stalk another person in Australia; or
 - (iii) vilify a segment of the Australian community; or
 - (iv) incite discord in the Australian community or in a segment of that community; 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.
- Otherwise, the person passes the *character test*.

Substantial criminal record

- (7) For the purposes of the character test, a person has a *substantial criminal record* if:
- (a) the person has been sentenced to death; or
 - (b) the person has been sentenced to imprisonment for life; or
 - (c) the person has been sentenced to a term of imprisonment of 12 months or more; or
 - (d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or
 - (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution.

Periodic detention

- (8) For the purposes of the character test, if a person has been sentenced to periodic detention, the person's term of imprisonment is taken to be equal to the number of days the person is required under that sentence to spend in detention.

Residential schemes or programs

- (9) For the purposes of the character test, if a person has been convicted of an offence and the court orders the person to participate in:
- (a) a residential drug rehabilitation scheme; or
 - (b) a residential program for the mentally ill;
- the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program.

Pardons etc.

- (10) For the purposes of the character test, a sentence imposed on a person is to be disregarded if:
- (a) the conviction concerned has been quashed or otherwise nullified; or

- (b) the person has been pardoned in relation to the conviction concerned.

Conduct amounting to harassment or molestation

- (11) For the purposes of the character test, conduct may amount to harassment or molestation of a person even though:
- (a) it does not involve violence, or threatened violence, to the person; or
 - (b) it consists only of damage, or threatened damage, to property belonging to, in the possession of, or used by, the person.

Definitions

- (12) In this section:

court includes a court martial or similar military tribunal.

imprisonment includes any form of punitive detention in a facility or institution.

sentence includes any form of determination of the punishment for an offence.

Note 1: Visa is defined by section 5 and includes, but is not limited to, a protection visa.

Note 2: For notification of decisions under subsection (1) or (2), see section 501G.

Note 3: For notification of decisions under subsection (3), see section 501C.

Migration Regulations 1994
Public Interest Criteria 4001

Either:

- (a) the applicant satisfies the Minister that the applicant passes the character test; or
- (b) the Minister is satisfied, after appropriate inquiries, that there is nothing to indicate that the applicant would fail to satisfy the Minister that the person passes the character test; or
- (c) the Minister has decided not to refuse to grant a visa to the applicant despite reasonably suspecting that the applicant does not pass the character test; or
- (d) the Minister has decided not to refuse to grant a visa to the applicant despite not being satisfied that the applicant passes the character test.

Abridged Policy document - Section 501

Section 501 of the *Migration Act 1958* (the Act) provides that the Minister for Immigration and Citizenship (or a delegate) may refuse to grant or cancel a visa if a non-citizen does not satisfy the Minister that they pass the 'character test', as defined in section 501(6).

In general terms, a non-citizen does not pass the character test if:

- they have a substantial criminal record – that is, *inter alia* a sentence of imprisonment of 12 months or more, or multiple sentences that add up to two years or more;
- they have (or have had) an association with a person or with a group or organisation, whom the Minister reasonably suspects is (or has been) involved in criminal conduct;
- they are not of good character having regard to their past and present criminal and/or general conduct; or
- there is a significant risk that they will engage in criminal conduct, harass or molest another person, vilify a segment of the community, incite discord in the community, or represent a danger to the community.

Where a non-citizen does not pass the character test, the Minister (or a delegate) has the discretion to refuse to grant the non-citizen a visa, or to cancel any visa they hold. If a visa held by a non-citizen who is in Australia is cancelled, the non-citizen becomes an unlawful non-citizen and would ordinarily be detained and removed from Australia as soon as reasonably practicable.

Substantial Criminal Record

Under section 501(6)(a), a non-citizen does not pass the character test if they have a substantial criminal record. A 'substantial criminal record' is defined in section 501(7). A non-citizen has a substantial record if they have been:

- sentenced to death;
- sentenced to imprisonment for life;
- sentenced to a single term of imprisonment for 12 months or more;
- sentenced to two or more terms of imprisonment (whether on one or more occasions), where the total of those terms is two years or more;
- acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result they have been detained in a facility or institution.

Where a non-citizen has a substantial criminal record as defined under section 501(7), they automatically fail the character test. There is no scope to take into account mitigating factors in order to find they pass the character test. However, these factors may be taken into account in the exercise of the discretion to refuse to grant or to cancel the visa.

According to section 501(12) a 'sentence' is defined as any determination of the punishment for an offence; and 'imprisonment' includes any form of punitive detention in a facility or institution. Therefore, only sentences of punitive detention (even where the sentence has been suspended) are relevant to the definition for a 'substantial criminal record'.

Association

Under section 501(6)(b), a non-citizen does not pass the character test if they have or have had an 'association' with a non-citizen, or a group or organisation, whom the Minister (or a delegate) reasonably suspects is (or has been) involved in criminal conduct'.

Past and Present Criminal &/or General Conduct

Under section 501(6)(c), a non-citizen does not pass the character test if they are not of good character, having regard to either or both of the following:

- the non-citizen's past and present criminal conduct (section 501(6)(c)(i));
- the non-citizen's past and present general conduct (section 501(6)(c)(ii)).

A non-citizen will not pass the character test if they are not of good character on the basis of either section 501(6)(c)(i) or (ii), however as a matter of policy, the case officer should consider the non-citizen against both grounds, where appropriate.

Examples of general conduct that may indicate the non-citizen is not of good character

Direction 21 provides guidance on what types of general conduct may indicate that a non-citizen may fail the character test.

Examples of general conduct which may lead a decision-maker to conclude the non-citizen is not of good character, include, but are not limited to, the following:

- activities that indicate that the non-citizen has a contempt or disregard for the law or for human rights. For example:
 - engaging in disreputable business activities or fraud
 - involvement in drug related activities
 - political extremism
 - extortion
 - involvement in war crimes or crimes against humanity
- any criminal conduct that has not resulted in a criminal conviction.
- dishonourable or early discharge from the armed forces as a result of disciplinary action in circumstances which would be regarded as serious in Australia.

Good conduct must also be considered

The decision-maker must also take into account any recent good conduct in order to form a complete picture of a non-citizen's character. For example, acts of good conduct subsequent to acts of bad conduct may indicate a non-citizen's character has reformed.

However, the decision-maker must be of the view that the non-citizen has genuinely reformed. If they are not fully persuaded that the good conduct indicates this, the non-citizen will fail the character test.

The recent acts of good conduct may then also be taken into account in the exercise of the discretion.

Public Interest Criterion 4001

All persons who wish to enter or remain in Australia must satisfy the character requirements of section 501 of the Act.

Penal checks are part of the procedure by which visa applicants establish that they can or cannot meet the character requirements for entry to Australia, and are usually linked to the class of visa being applied for by Public Interest Criterion (PIC) 4001.

Penal checking must be conducted for any visa applicant:

- who is 16 years of age or over; and
- whose stay in Australia will exceed 12 months and for whom PIC 4001 is a criterion for visa grant (unless the visa class they are applying for is exempted).

Where PIC 4001 is not a criterion for grant of a particular visa subclass, all visa applicants are required to be of good character and may have their visa refused under section 501 if they are found not to pass the Character Test.

Where there is any doubt as to whether an applicant meets character requirements, penal checks should be requested.

Where there is no indication of character concerns, applicants for certain visa subclasses are not required to obtain penal clearance certificates, despite PIC 4001 being a criterion for grant.

These subclasses are:

- subclasses 570, 571, 572, 573, 574, 575 and 576 (Student);
- subclass 457 (Temporary Business (Long Stay)); and
- subclass 442 (Occupational Trainee)