New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

Migration Amendment (Strengthening the Character Test) Bill 2019

Legal and Constitutional Affairs Legislation Committee

August 5, 2019

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

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 2019.

In view of the severe consequences that can follow visa cancellation, NSWCCL seeks the opportunity to present material to the Legal and Constitutional Committee directly.

This bill is identical to the Strengthening the Character Test Bill 2018, a deeply flawed and unjust proposal, which was subject to substantial criticism from some of Australia's most august bodies, including the Australian Human Rights Commission, the Australian Law Council, The Federation of Ethnic Communities Councils of Australia, the Parliamentary Joint Committee on Human Rights,[1] the Scrutiny of Bills Committee, as well as the Government of New Zealand and the NSW Council for Civil Liberties. The only change has been a grammatical correction in the Explanatory Memorandum.

Summary

i. This bill is not about protecting the Australian people from serious dangers. It is a disproportionate response to visa holders who have committed minor crimes.
ii. This bill will subject people who are of no danger to society to the rigours of indefinite detention, or to being deported. There will be serious consequences for their families. There is no evidence that "the community" would want such outcomes.
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.[2]
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

[1] Report 12 of 2018, November 27 pp. 2-22, Report 1 of 2019, July 30, pp.69-97.
[2] Senate Standing Committee for the Scrutiny of Bills Scrutiny Digest 134 of 2018, [1.26]. The Scrutiny Committee also noted 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.

made by the Minister with the aid of his Department. Sentences, after all, take account both of the seriousness of the crime and 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 merits review is available only in some cases. (The courts can only deal with errors of law.) The extraordinary, unjust, power already given to the Minister and his delegates needs no extension—rather, it should be cut back.

ix. Some examples of how the powers are used raise serious concerns about the existing law, and the procedures that are applied. We have moved from deporting people who clearly are a danger and high risk, such as unrehabilitated murderers, to deporting people because a minister cannot be sure that they are not a danger to the community. This change in the risk assessment is unreasonable, and ignores the ability of people to rehabilitate and the ability of the community to accept manageable risk. Worse, we are prepared to send a person off to his likely execution, whose two crimes concerned drug dealing. It would be extraordinary if the Australian people accepted such actions, if they knew about them.

Recommendation 1: The bill should be rejected.

Recommendation 2: If the bill is to progress, a section should be inserted preventing the cancellation of the visas of minors on character grounds.

Recommendation 3: There should be an independent review, preferably by the Australian Law Reform Commission, of the 17 sections of the Migration Act that constitute the character test and its consequences, and of the application of that legislation in practice. Such a review should also examine the merits of the New Zealand approach, which limits visa cancellation to people who have lived in that country for less than 10 years.

1. What this bill is about.

Despite what has been said in the Explanatory Memorandum,[3] this bill is not about outlaw motorcycle gangs, murderers, people who commit serious assaults, sexual assault of 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.

Harming such people by putting them in indefinite detention, or separating them from their families by sending them away, is arbitrary and disproportionate. It can have dramatic and awful consequences for their families. It is contrary to Australia's obligations under the International Covenant on Civil and Political Rights.

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 Court of Criminal Appeals has made it plain that the prospect of deportation is an irrelevant consideration which is not to be taken into account. Cases include Pham 2005 NSWCCA 94 at 13, AC 2016 NSWCCA 107 at 70, Arrowsmith 2018 SASCFC 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 past or present criminal or general conduct, or due to an association they have. This is already too wide a categorisation for people to fail the character test.

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

[3] E.g., on page 7.

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.

The boasts of the Minister for Home Affairs, that more visas were cancelled in twelve months than were cancelled in six years under the recent Labor Governments[4] are relevant here. If, as the Minister averred, 'visa cancellation numbers [were] at about 3,400, the highest number in this federation'[5], there is reason to be concerned about the motivation for this bill. That is, it is hard not to believe that there are motivations other than a desire to keep Australia safe, such as a desire, contrary to the constitution, to punish people who have already been punished, or pure vindictiveness.

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. Under section 503 of the Act, a person who fails the character test is not entitled to remain here. The person is detained and then deported; or if that is not possible (where a person is at risk of death if sent to the country of his or her citizenship, or where the person is stateless[6]), may be kept in detention for long periods, or even for life.[7] The Department, or its leaders, are proposing to do serious harm to minor offenders.

[4] Interview with Ray Hadley, http:minister:homeaffairs.gov.au/peterdutton/Pages/Had-Inf.aspx
[5] https://startsat60.com/news/crime/david-degning-grandpa-dpeorted-back-to-britain
[6] See, however, the Choe case outlined below.
[7] It should not be forgotten that indefinite detention leads to mental illness and suicide attempts.

Given the treatment that has been perpetrated against asylum seekers who have committed the most minor of crimes in detention, this is not fanciful.

The bill will create more suffering, and because of overcrowding, worse conditions in detention centres.

It is not hard to think of minor offences, even for the four categories included in proposed paragraph 501(7AA)(a) of the bill, that will lay a person open to visa cancellation.[8]

It is not only the persons who have committed minor crimes who will suffer as a result of the application of this legislation. The bill will bring about separation of parents from their children, and spouses from each other. The spouses and their children will thus also be victims. Where the primary visa holder is the offender, secondary visa holders—his/her spouse and children—will lose their visas also. Or where the offender is the only or principal money earner, they will lose their means of support.

Moreover, in the past and recently, individuals have been removed to countries where they cannot speak the language, where they have spent little time and only as infants, or have never lived, and where they have no means of support, no family or other connections.

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

Under this bill, a person would fail the character test for offences that are in fact quite trivial, and do not in fact mean that the person is, in any natural sense of the words, a threat to society. A person subject to a court order, for instance, 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

[8] See section 4 below.

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 the assailant 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.

5. **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[9]—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.

6. **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. It is true that Ministerial Direction 79 lists the best interests of minor children in Australia as one of three primary considerations to be taken into account in determining whether a visa should be cancelled. The examples of David Degning and Jagdeep Singh below do not give confidence in the way this requirement is implemented.

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

[9] They have, after all, been given minimal sentences.

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

7. **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 the material facts of the offences, mitigating and other 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. Basing visa cancellation on 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.

8. **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.[10] The judgement of the Minister should not be made on the basis of the crimes committed alone, but on a careful assessment of the individual.

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

9. **The need for a comprehensive review of the existing legislation and its implementation.**

Some examples:

[10] The recidivism rate for all crimes is about 42%. How many of those whose visas have been cancelled would never have offended again?

The 'Choe' case.

The Guardian reported[11] that the Department of Immigration was about to deport a North Korean born refugee, despite recognising that he would probably be executed or sent to a forced labour camp[12] on arrival at his birth country. He had two convictions for supplying a drug, but the New South Wales District Court had found that he had good prospects for rehabilitation. The Department is reported as having determined that execution was not an insurmountable hardship sufficient to stop his deportation. Shockingly, the Administrative Appeal Tribunal upheld the decision, holding that 'protection of the Australian community and community expectations outweigh other considerations.' It seems a human life is not worth much in modern Australia.

David Degning.

Mr. Degning arrived in Australia at the age of 6. In 2009, he committed the serious offence of having intercourse with a person with a cognitive impairment. He pleaded guilty in 2013 and was given a suspended 17 month sentence. (The court, in effect, did not judge that he was a danger to others.) He had a further conviction for drunk driving, and failed to declare his convictions on two passenger arrival cards some years before his visa was cancelled. It is hard to see how this failure shows that he is a danger to Australia.[13]

The first he knew that his visa had been cancelled was when his home was invaded by 16 Border Force officers at 5.00 a.m., and he was taken off to detention. He was to be deported to the United Kingdom, where had no connections. The Minister's extraordinary decision was overturned by the Federal Court—eighteen months later.

Jagdeep Singh

[11] The Guardian, December 28, 2018, Australian edition. See also The Sydney Morning Herald of the same date.
[12] Many prisoners do not survive the torture, other mistreatment and bad conditions in these camps.
[13] The Minister is reported to have averred that Mr. Degning's failure to declare his convictions showed that he did not respect the law—and so that he might harm the community. This is a truly remarkable non sequitur. Why did no one in the Department pick him up on this?

Mr. Singh was a taxi driver, who was convicted of indecent assault of an adult woman. He was not given a sentence of imprisonment, but an eighteen months corrections order, indicating that the magistrate did not consider him a danger to the community, and that the offence, though serious, did not warrant a jail sentence. Nevertheless, his visa was cancelled by a delegate of the Minister. Justice Logan of the Administrative Appeals Tribunal overruled that decision, on the grounds that Mr. Singh needed only six weeks to get his affairs in order—arrangements for his children, to sell his unit, collect papers from a university and so on—matters his wife could not attend to owing to her working full-time.

The affair was subject to adverse comment in certain sections of the media. Then the Minister got involved, and overrode the decision of the AAT.

It is hard to fathom what motivated him in any way that would do him credit. There was no benefit to Australian society. No breach of Australia's borders was involved. And there is absolutely no connection between the Minister's decision and discouraging people from getting on boats and drowning.

At best this was a mindless, fundamentalist, adherence to an unjustifiable policy—beyond its intended bounds. At worst, it was motivated by a desire to "get back"—vindictive vengeance.

Jacob Symonds lived in Australia since he was one, but was deported to New Zealand. Notoriously, Alex Viane, who never set foot in New Zealand, was deported there. It was plainly Australia's responsibility to deal with those men.

There have been older, extraordinary cases.

Robert Jovicic.

Mr. Jovicic lived in Australia since he was two years old. After living here for 36 years, and in the latter part of that being repeatedly convicted of crimes related to his heroin addiction, he was deported to Serbia, even though he could not speak Serbo-Croat, and had no means of support there. He became destitute.[14]

Stefan Nystrom

Mr. Nystrom lived in Australia since he was 27 days old, and was deported to Sweden after committing serious offences, many of them as a minor. He could not speak a word of Swedish. Sending such people out of the country is absurd. And wrong.

The temptation of a Minister or his or her advisors to use the character test for purposes other than keeping notorious criminals out of Australia in the first place was made plain by the Haneef case. Dr Mohamed Haneef, an Indian national, was arrested at Brisbane airport on 2 July 2007 in connection with a failed London bomb plot. He was held for twelve days before being charged with providing support to a terrorist organisation. He had in fact given a SIM card with some unused data available to his cousin, who had subsequently used it in a failed terrorist attack. He was held for twelve days on this charge, before it sank in that SIM cards are purchasable for a small price at supermarkets. Dr Haneef was given bail, but the then Minister for Immigration, being convinced Dr. Haneef was involved in the terrorist plot, cancelled his visa. Dr. Haneef was deported, and his expertise lost to Australia. The then Minister for Immigration was wrong. Those officers of the Australian Federal Police who advised him were wrong. The members of the then Department of Immigration who advised him were either wrong, or acceded to his demands without managing to show him he was wrong. None of them knew what every regular shopper in a supermarket knew, that SIM cards were widely and cheaply available. And when these things were pointed out to the Minister and a court granted Dr. Haneef bail, the Minister used the character test in s. 501 to wreck his reputation and have him deported. That is, the minister refused to admit, or could not be persuaded, that he was wrong. It took a court case to overturn his decision.

[14] How does making a man destitute and at risk of dying compare with his crimes? Which is graver?

Since then, an obdurate minister has been given the power to overturn decisions of the Administrative Appeals Tribunal. Such decisions undermine the independence and respect of the merits review system, and are contrary to the rule of law.

It is clear that the law as it stands allows too much unfettered power to the Minister.

It is also unjust to expect another country to deal with a person who becomes a criminal in Australia, especially one who has lived here for a long time or from infancy before offending.

NSWCCL calls for an independent review, preferably by the Australian Law Reform Commission, of the 17 sections of the Migration Act that constitute the character test and its consequences, and of the application of that legislation in practice. Such a review should also examine the merits of the New Zealand approach, which has a tiered deportation system, and which limits visa cancellation to people who have lived in that country for less than 10 years.

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