



Law Council  
OF AUSTRALIA

Office of the President

16 December 2021

Senator the Hon Sarah Henderson  
Chair  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Senator Henderson

### Migration Amendment (Strengthening the Character Test) Bill 2021

1. The Law Council of Australia (**Law Council**) thanks the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) for the opportunity to provide a submission on the Migration Amendment (Strengthening the Character Test) Bill 2021 (**2021 Bill**).
2. The Law Council thanks its National Human Rights Committee, the National Criminal Law Committee, its Federal Litigation and Dispute Resolution Section's Migration Law Committee and the Law Institute of Victoria for their input into this brief submission.

### Introduction and headline view

3. The 2021 Bill would expand the circumstances in which a person would not satisfy the character test in subsection 501(6) of the *Migration Act 1958* (Cth) (**Migration Act**) and thus be subject to a decision of the Minister (or delegate) to refuse or cancel their visa.
4. Subject to one change, the 2021 Bill is the same in substance as the Migration Amendment (Strengthening the Character Test) Bill 2019 (**2019 Bill**), which was subject to an inquiry by the Committee. The Law Council made a submission to that inquiry (**the Law Council's 2019 submission**; attached to this submission) and appeared before the Committee.<sup>1</sup>
5. In that submission, the Law Council submitted that the 2019 Bill should not pass:<sup>2</sup>

*While... the Executive should possess the power where necessary to prevent or remove a dangerous individual from obtaining or retaining the right to enter and remain in Australia ... [the Bill] ... is neither necessary nor proportionate, and the existing provisions of the Migration Act are sufficient to respond appropriately to individuals who commit serious offences and provide clear risks to the community.*

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<sup>1</sup> Evidence to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 19 August 2019, 1-11.

<sup>2</sup> The Law Council's 2019 submission, [3]-[4] – see Attachment.

6. In October 2021, the Senate voted on and did not pass the 2019 Bill.<sup>3</sup> The Senate voted on a Bill which included Government amendments which have been retained in the 2021 Bill. While these changes narrow the scope of the Bill slightly, they do not affect the Law Council's view, which is that the 2021 Bill should not pass.
7. In this further brief submission, the Law Council has:
  - set out an overview of the character test power in section 501 of the Migration Act;
  - set out an overview of the changes made to the character test power by the 2021 Bill, which details its misgivings; and
  - addressed the changes introduced to the character test power as compared to the 2019 Bill, which the Law Council considers exemplify rather than resolve the issues with the proposed scheme.

### Overview of the character test power

8. Section 501 of the Migration Act provides for a two-step test for the Minister (or delegate) to refuse a visa application or cancel a visa on character grounds:
  - (1) the decision-maker considers whether the person does not pass the character test;<sup>4</sup> and
  - (2) the Minister:
    - a. (personally) *may* refuse or cancel the visa if he or she *reasonably suspects* the person does not pass the character test and is satisfied that the refusal or cancellation is in the national interest;<sup>5</sup>
    - b. (or delegate) *may* refuse or cancel the visa if he or she *is satisfied* that the person does not pass the character test;<sup>6</sup>
    - c. (or delegate) *must* refuse or cancel the visa if he or she *is satisfied* that the person does not pass the character test because the person has a substantial criminal record or has been convicted or found guilty of sexually based offences involving a child and the person is serving a sentence of imprisonment on a full-time basis in a custodial institution for an offence against a law of the Commonwealth, a State or Territory.<sup>7</sup>
9. That is, in most cases, a finding that a person does not pass the character test (in step (1)) enlivens a discretionary power to refuse or cancel the visa (in steps 2(a) and (b)).

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<sup>3</sup> Commonwealth, *Parliamentary Debates*, Senate, 20 October 2021, 4-16.

<sup>4</sup> These are set out in subsection 501(6) of the Migration Act.

<sup>5</sup> *Ibid*, subsection 501(3)

<sup>6</sup> *Ibid*, subsections 501(1) and (2).

<sup>7</sup> *Ibid*, subsection 501(3A).

## Overview of the 2021 Bill

10. The 2021 Bill would not amend the decision-making powers in step (2). The 2021 Bill would instead expand the character test itself (ie, in step (1)).<sup>8</sup>
11. Specifically, it would expand the circumstances in which a person will not satisfy the character test to include convictions for certain designated offences where the maximum penalty prescribed is two years, regardless of the sentence given (or even whether a custodial sentence is given at all).<sup>9</sup> A very large number of criminal offences have prescribed maximum penalties of two years or more.
12. The Explanatory Memorandum (**EM**) for the Bill states that the objective is 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’.<sup>10</sup> However, the amendments go well beyond this stated objective and are thus disproportionate. They are also unnecessary.
13. The Migration Act already provides that a person does not satisfy the character test if, in the event the person was allowed to enter or to remain in Australia, there is a risk the person would represent a danger to the Australian community or to a segment of that community.<sup>11</sup> That is, the purported purpose of the Bill – to protect the community from people who pose a risk to it – is already directly addressed by other measures in the Migration Act. Specifically, it is already possible for the Minister or delegate, upon receiving information that a visa holder was convicted of an offence, to consider whether their continued presence in Australia would give rise to a risk they would represent a danger to the community and thus do not pass the character test.
14. The Migration Act also already provides that a person does not satisfy the character test if the person has been sentenced to a term of imprisonment of 12 months or more, or to multiple terms of imprisonment which add up to 12 months or more.<sup>12</sup> Noting this, in effect the work done by the 2021 Bill is to expand the circumstances in which a person will not satisfy the character test to include people at the lower end of offending, who have been convicted of an offence but not sentenced to 12 months imprisonment or more, or to a sentence which would result in being imprisoned for all the offences to 12 months or more.
15. The Law Council’s view is that, if the criminal justice system has determined that, in the circumstances, a convicted person does not present a community risk and imposes a fine or a suspended sentence or other non-custodial options, it is questionable whether their subsequent visa cancellation is justifiable to ‘protect’ the community. It is also questionable whether offences which carry a maximum penalty of two years can be described as being serious offences, in the sense that they are so serious as to justify removal from the country. By way of comparison, to meet the definition of a ‘serious

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<sup>8</sup> It will make identical consequential amendments to the definition of ‘character concern’ in section 5C of the Migration Act, it may be permissible to obtain personal identifiers, or make a disclosure of identifying information, if it is for the purpose of identifying a person who is a ‘character concern’: see ss s 5A(3)(g), s 257A(1), s 336E(2)(a)(iii) and s 336E(2)(ec) of the Migration Act.

<sup>9</sup> Item 6 of Schedule 1 to the 2021 Bill.

<sup>10</sup> Explanatory Memorandum, 2021 Bill, 1.

<sup>11</sup> Subparagraph 501(6)(d)(v) of the Migration Act.

<sup>12</sup> Ibid, paragraph 501(6)(a), read with paragraphs 501(7)(c) and (d).

offence' under Commonwealth and NSW criminal law,<sup>13</sup> the offences must be punishable by imprisonment for at least three and five years respectively.<sup>14</sup>

16. The 2021 Bill will have broader practical ramifications.
17. It will adversely impact the criminal justice system, by deterring non-citizens from entering guilty pleas to any offences, which may lead to more contested and protracted court proceedings with greater associated public expense.<sup>15</sup>
18. Further, lowering the character test threshold to include lower end offenders will increase the number of people who do not pass the character test, and thus the number of decisions as to whether or not the person should have their visa cancelled and the number of decisions to cancel the visa (which have already increased dramatically since the character test was last expanded in 2014).<sup>16</sup>
19. The increase in the number of character test decisions will place an administrative burden on the Department, and the increase in cancellation decisions will further increase the number of people in immigration detention and exacerbating critical existing pressures on legal assistance services, tribunals and courts.

### **The differences between the 2019 Bill and the 2021 Bill**

20. The main substantive difference between the 2019 Bill and the 2021 Bill is that the latter carves out some convictions for an offence of assault from being a 'designated offence'.
21. In the 2019 Bill, a designated offence included an offence in which one or more of the physical elements of the offence involves violence, or a threat of violence, against a person, including an act constituting an offence of assault.
22. In the 2021 Bill, the change is that an act constituting an offence of common assault will only be a designated offence if the act:
  - (a) causes or substantially contributes to:
    - (i) bodily harm to another person; or
    - (ii) harm to another person's mental health (within the meaning of the *Criminal Code Act 1995* (Cth));whether temporary or permanent; or
  - (b) involves family violence (as defined by subsection 4AB(1) of the *Family Law Act 1975* (Cth) (**Family Law Act**)) by the person in relation to another person.
23. The EM for the 2021 Bill describes the kind of assaults carved out by this provision as 'low level' assaults.<sup>17</sup> This change appears in effect a concession that, due to the existence of certain mitigating factors, not all persons convicted of a designated offence pose a risk to the safety of the community by virtue merely of that conviction.
24. However, this change does not capture all relevant mitigating factors which could reasonably suggest that a person convicted of a designated offence does not pose a

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<sup>13</sup> *Crimes Act 1914* (Cth), subsection 15GE(2); *Crimes Act 1900* (NSW), section 4.

<sup>14</sup> See also, the Law Council's 2019 submission, [44]-[47].

<sup>15</sup> The Law Council's 2019 submission, [125]-[128].

<sup>16</sup> *Ibid*, [30]-[38] and [119]-[123].

<sup>17</sup> Explanatory Memorandum, 2021 Bill, [54].

risk to the safety of the community. The Law Council's 2019 submission describes other examples such as a person carrying pepper spray being convicted of possession of a weapon, and a father who drops his children off with their mother in breach of a family violence prevention order – a conviction for either would be a designated offence and result in the person not satisfying the character test, despite the mitigating factors.<sup>18</sup>

25. The Law Council's view is that judicial sentencing is a more accurate and reliable indication of the risk a convicted person may pose to the community, at the time that the criminal process occurs, than mere conviction alone.
26. In all State and Territory courts, the risk a convicted person poses to the community is a permissible purpose for sentencing a person.<sup>19</sup>
27. Further, most Acts dictate matters which must be considered in determining a sentence.<sup>20</sup> Some explicitly list aggravating and mitigating factors. While the small extent of injury is a common mitigating factor, others can include: the offender was provoked or acting under duress; is unlikely to re-offend, has good prospects of rehabilitation; or was not fully aware of the consequences of his or her actions because of the offender's age or any disability.
28. The EM observes that these kinds of matters could be weighed up by the Minister or delegate in their exercise of the discretion to refuse the visa application or to cancel the visa to a person who they consider does not satisfy the character test (ie, step 2 of the process, as described above):

*It would, however, remain a matter for the Minister or a delegate to consider the factors in relation to the nature of the conviction, any sentence applied and countervailing considerations before deciding whether to exercise the discretionary power under section 501 of the Migration Act to refuse to grant or cancel a visa.*

29. Unlike most State and Territory sentencing Acts, the Migration Act does not mandate the consideration of any factors in the exercise of that discretion. However, the Minister has given a written direction under section 499 of the Migration Act to guide delegates in the exercise of the character test power (**Direction 90**).<sup>21</sup> Direction 90 obliges delegates to take into account primary and other considerations in the exercise of the discretion in the character test power, with the primary considerations to generally outweigh the other considerations.<sup>22</sup>

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<sup>18</sup> Other examples are set out in the Law Council's 2019 submission – see [79]-[86].

<sup>19</sup> Section 3 of the *Sentencing Act 2017* (SA); paragraph 3A(c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW); paragraph 5(1)(e) of the *Sentencing Act 1991* (Vic); paragraph 7(1)(c) of the *Crimes (Sentencing) Act 2005* (ACT); paragraph 6(4)(b) of the *Sentencing Act 1995* (WA); paragraph 9(1)(e) of the *Penalties and Sentencing Act 1992* (Qld); and paragraph 5(1)(e) of the *Sentencing Act 2017* (NT). In Tasmania, the *Sentencing Act 1997* (Tas) does not regulate the purpose of sentencing, but paragraph 3(b) of that Act provides that the purpose of the Act as a whole is to 'promote the protection of the community as a primary consideration in sentencing offenders'

<sup>20</sup> Section 11 of the *Sentencing Act 2017* (SA); section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW); subsection 5(2) of the *Sentencing Act 1991* (Vic); paragraph 6(2) of the *Sentencing Act 1995* (WA); section 33 of the *Crimes (Sentencing) Act 2005* (ACT); subsection 9(2) of the *Penalties and Sentencing Act 1992* (Qld); and subsection 5(2) of the *Sentencing Act 2017* (NT).

<sup>21</sup> Direction No. 90 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA, 8 March 2021, <[link](#)>.

<sup>22</sup> *Ibid*, paragraph 7(2).

30. Relevantly, the primary considerations include 'protection of the Australian community from criminal and other serious conduct' and 'whether the conduct engaged in constituted family violence'.<sup>23</sup>
31. The Law Council considers there are three key issues with Direction 90.
32. First, it does not apply to the Minister's personal character test decisions. Further, the Minister's personal character test decisions are not merits reviewable,<sup>24</sup> which can affect the fairness, consistency and accountability in executive decision-making. Personal decisions of the Minister are judicially reviewable, but the court cannot consider the merits of the decision, only whether it was made lawfully.
33. Further, when responding to a natural justice letter in relation to whether or not a visa should be cancelled or refused under section 501 of the Migration Act, the person affected is not often advised as to whether or not Direction 90 applies. This is because the person is often not notified prior to the decision being made whether or not a delegate of the Minister or the Minister herself or himself will make the decision.
34. Finally, Direction 90 is not a legislative instrument and thus is not subject to the oversight of Parliament.
35. It is a principle of the rule of law that executive power should be carefully defined by law.<sup>25</sup> Principle (j) of the Guidelines issued by the Senate Standing Committee for the Scrutiny of Delegated Legislation lists, as matters more appropriate for parliamentary enactment than delegated legislation, those which have a serious impact on personal rights and liberties.<sup>26</sup> A decision to cancel a person's visa on character grounds has very serious consequences on a visa holder, including the finalisation of all other pending visa applications without permitting merits review rights,<sup>27</sup> immigration detention, family separation including from Australian citizen and permanent resident family members, being unable to apply for any other visa other than a Protection visa or Bridging Visa R to permit removal,<sup>28</sup> removal from Australia which would likely incur a debt to the Commonwealth,<sup>29</sup> and possibly permanent exclusion from Australia.<sup>30</sup>

### **The Law Council's position on the 2021 Bill**

36. Given the discretion in step (2) of the character test is broad, and the consequences of its exercise are significant – the Law Council considers that the bases upon which a person will not pass the character test (step (1)) should be limited to factual circumstances which genuinely suggest the relevant person is of such poor character that they pose an abiding risk to the Australian community.
37. The Law Council considers that the proposed amendment, which as noted will apply to people who may not be subject to a custodial sentence at all, does not set a high enough threshold.

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<sup>23</sup> Ibid, paragraphs 8(1) and (2) respectively.

<sup>24</sup> Migration Act, paragraph 500(1)(b).

<sup>25</sup> Law Council, Rule of Law Principles, Principle 6, <[link](#)>.

<sup>26</sup> Standing Committee for the Scrutiny of Delegated Legislation, 'Guidelines' (1<sup>st</sup> edition), <[link](#)>, 27.

<sup>27</sup> Migration Act, paragraph 501F.

<sup>28</sup> Migration Act, paragraph 501E and Migration Regulations 1994 (Cth), reg 2.12AA.

<sup>29</sup> This may impact further visa applications (if eligible to apply) because of Public interest criterion 4004 which requires that a person not have a debt to the Commonwealth or to have entered into appropriate arrangements to repay the debt. See Migration Regulations 1994 (Cth), schedule 4, 4004.

<sup>30</sup> See the Law Council's 2019 submission, [26]-[29].

38. As a general point, the Law Council considers it preferable that the Migration Act be amended so that any considerations relevant to the discretionary decision to refuse or cancel a visa on character grounds be set out in the Act itself.

### Discussion of the family violence provision

39. The reasons the Selection of Bills Committee gave for referring the 2021 Bill to the Committee were that the:

*Bill has changed from the original version first introduced over three years ago. It now has significant implications for victims of domestic violence and needs adequate time for detailed consideration.*

40. This appears to be a reference to proposed paragraph 501(7AC)(b) which provides that conviction for an offence of common assault, or an equivalent offence, which involves family violence as defined by subsection 4AB(1) of the Family Law Act will be a designated offence.

41. Subsection 4AB(1) of the Family Law Act defines 'family violence' as: '*violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful*'. That is, it does not necessarily involve bodily harm.

42. This provision is in effect an exception to proposed paragraph 501(7AC)(a) which provides that conviction for an offence of common assault which does not involve bodily harm or harm to mental health will not be a designated offence.

43. In this way, the 2021 Bill provides that the same act will be subject to different consequences depending on the identity of the person who committed it. That is, if a schoolteacher or taxi driver is convicted of common assault after threatening a person with violence, but not causing physical or mental harm to the person, that is not a designated offence. However, if the same act is committed by a parent or partner who is subsequently convicted of common assault, that would be 'family violence' and the person would not pass the character test as a result.

44. The EM explains the inclusion of proposed paragraph 501(7AC)(b) in these terms:<sup>31</sup>

*[A] conviction for common assault, where the act constituting the offence involves family violence, will be a designated offence, irrespective of whether the assault causes bodily harm or harm to a person's mental health. This aligns with the Government's position on combatting family violence*

45. The Law Council acknowledges this provision reflects a recognition of the seriousness of family violence and a commitment to address it, but the provision fails to acknowledge the complexities of family violence and steps that may be put in place by a person to avoid re-offending or breaching family violence orders. The Law Council's view of this provision is the same as it takes on the Bill generally: the Migration Act should not mandate that a person does not pass the character test simply by virtue of a conviction for which a particular maximum sentence is applicable, regardless of their actual sentence or the risk that they currently propose to the community.

46. The 2021 Bill increases the likelihood that people convicted of family violence related offences will fail to satisfy the character test and have their visa cancelled – both due to

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<sup>31</sup> Explanatory Memorandum, 2021 Bill, [54].

this family violence exception which applies to common assault convictions and because of proposed subparagraph 501(7AA)(a)(iii), which provides that breaching an order made by a court or tribunal for the personal protection of another person is a designated offence.

47. Perversely, this may have unintended punitive consequences for victims of family violence, whose reporting of the act may result in the father of their children failing the character test and ultimately having their visa cancelled and removed from Australia altogether.
48. Further, women who are aware and understand the operation of the provisions may be deterred from seeking help for an act of family violence to avoid that result.
49. It is unclear what consultation has occurred with migrant women and family violence groups regarding whether this legislation is the most appropriate and best way of tackling family violence from their perspectives or whether it will have unintended consequences.
50. Further, there are gaps in visas available to victims of family violence.
51. The family violence provisions under the Migration Regulations 1994 (Cth) allow applicants or holders of some temporary partner visas and Global Talent visa applicants access to permanent residency if they can demonstrate that the relationship was genuine; that family violence occurred; and that the violence, or part of the violence, occurred during the course of the relationship.<sup>32</sup>
52. However, the family violence provisions do not apply to dependent temporary visa holders, such as international students or skilled workers. Further, secondary applicants who qualified for a visa by virtue of being a spouse of a primary applicant are susceptible to cancellation of a visa if the spousal relationship ends under a power to cancel the visa which arises if a fact upon which a decision to grant the visa was based, wholly or partly, no longer exists.<sup>33</sup>
53. As noted in the 2019 submission, the increased likelihood of the perpetrator's visa being cancelled in these circumstances 'may have the perverse effect of driving family violence experienced amongst migrant groups further underground, with dangerous consequences'.<sup>34</sup>
54. To ensure the safety of these visa holders and to ensure consistency of approach that it has recommended, the Law Council has written to the Australian Government to seek that:
  - the family violence provisions be expanded out to other temporary visas to provide a pathway to permanent residency for those who have applied for permanent residency as dependents;
  - a new temporary visa be available for temporary visa holders who have not lodged permanent residence applications, but who have experienced family violence and

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<sup>32</sup> See subclauses 100.221(4), 801.221(6), 820.211(8) and (9), 820.221(3) and 858.321 (3) of Schedule 2 to the Regulations.

<sup>33</sup> Paragraph 116(1)(a) of the Migration Act.

<sup>34</sup> Law Council's 2019 submission, [118].

therefore are unable to comply with their current visa conditions; or are at risk of or have had their visas cancelled.

55. However, the Committee's potential support for addressing these gaps should not be seen as a means of resolving the issues raised by the Bill, which remains unnecessary and disproportionate and should be rejected on its own merits.

## Contact

56. If you would like to discuss this submission, please do not hesitate to contact me directly on [REDACTED]. Alternatively, please contact Mr Matthew Wood, Senior Policy Lawyer, on 02 6246 3755 or [Matthew.Wood@lawcouncil.asn.au](mailto:Matthew.Wood@lawcouncil.asn.au), in the first instance should you require further information or clarification.

Yours sincerely,

[REDACTED]

**Dr Jacoba Brasch QC**  
**President**