

16 February 2022

Balance needed in visa cancellation decisions

Deciding to cancel a person's visa will almost always have a profound impact on their and their families' lives and should involve a weighing-up exercise with proper regard made to an individual's circumstances.

"The key change the Migration Amendment (Strengthening the Character Test) Bill 2021 makes to Australia's laws is to expand the circumstances in which a person does not pass the character test, and may have their visa cancelled, to designated offences with a statutory maximum sentence of not less than two years, regardless of the actual sentence given.

"The Law Council considers this proposed amendment to be disproportionate, as it could permit cancellation or refusal of visas for persons convicted of a designated offence but who have received only a short sentence, a fine or a community corrections order.

"The Law Council considers the amendment to be unnecessary, as under the current law, it is already open to the Minister to determine that a person does not pass the character test because, having regard to the person's past and present criminal conduct, the person is not of good character. This ground does not depend on the sentence handed down by a court, or the maximum applicable sentence for the relevant offence.

"Given the significance of a visa cancellation, the Law Council considers that a determination that a person does not satisfy the character test should be based on proper regard to an individual's circumstances and the risk they pose to the community, with that assessment subject to independent review, rather than by virtue of a conviction alone. This is particularly important where a person receives, for example, only a community corrections order for the relevant offence.

The Law Council is also concerned about recent comments that soft decisions in the courts are enabling people to get around existing migration laws and that lawyers are part of the problem in the system.

"Courts are required to sentence offenders according to law and established sentencing principles, which recognise that the facts and circumstances of every case are different. It is not appropriate to question outcomes in a generalised way, or without knowing what factors contributed to a sentence imposed on an individual, but it is important that if errors may have been made, then superiors courts can review these decisions in appeals," Mr Liveris said.

"It is also important that public discussion about criminal sentencing is fair and balanced. Attacks on the independence of the judiciary do not make Australia safer. They have the reverse consequence of eroding public confidence in the courts and undermine the rule of law.

"Criticism of Australia's judicial system, which is amongst the best in the world, is not only unhelpful to this debate, but overlooks the vital role it plays in protecting our community and people's rights. This includes the principle that everyone deserves access to justice, including representation by a lawyer."

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