



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
www.alhr.org.au

29 March 2022

By email only

Dear Senator

RE: Please reject the Migration Amendment (Strengthening the Character Test) Bill

Australian Lawyers for Human Rights (**ALHR**) writes to urge you to oppose the *Migration Amendment (Strengthening the Character Test) Bill* in its entirety when it comes before you today. The Bill failed to pass the Parliament before the 2019 election and was then blocked by the Senate in October 2021. The measures undermine our criminal justice system and are inconsistent with Australia's international human rights law obligations.

This is a Bill that would see thousands of Australian residents face detention and deportation. It will disproportionately impact refugees and migrant families. Where persons subject to the proposed laws cannot be deported, they will be subject to arbitrary and indefinite detention.

The Bill undermines our criminal justice system

The Bill undermines our criminal justice system and judicial discretion. It is the role of our criminal justice systems to consider the material facts of what this Bill deems a 'designated offence' and impose a sentence, including imprisonment, which is appropriate with regard to all the circumstances of the case and which therefore reflect the seriousness of the crime and the risk a person poses to the Australian community.

The practical consequence of this Bill is that people who have been convicted of a designated offence, but who have not received a sentence of imprisonment, will nevertheless be taken into detention and be subjected to a further decision-making process as to whether they pose a risk to the community.

ALHR endorses the Asylum Seeker Resource Centre's statement that::

“There are countless situations where a person could fall foul of these provisions and yet not have committed a serious offence under any common definition of such. *People who have never served a single day of prison* (emphasis added), will automatically fail the character test, have their visas cancelled and consequently pay the severe price of indefinite detention or permanent separation from family members and be forced return to a country where they have no genuine connection, despite them having lived in Australia for decades.”¹

The Bill is inconsistent with Australia’s international legal obligations

ALHR has serious concerns about the human rights implications of the Bill, in particular that it:

- (a) undermines the right to be equal before the courts and tribunals;
- (b) does not address the deficiencies within the current decision-making process, including those relating to the risks of:
 - (i) arbitrary detention; and
 - (ii) non-refoulement, but instead increases the number of people exposed to the deficient process; and
- (c) applies retrospectively.

The Bill is inconsistent with the rule of equality before the courts and tribunals

Australia has obligations under the *International Covenant on Civil and Political Rights* to ensure that all people are equal before the courts and tribunals.² As set out above, the practical impact of the Bill undermines this right because it undermines the determinations that the criminal law system makes during sentencing as to whether a person poses a risk to the community and, therefore, whether the Court should impose a sentence of imprisonment or not.

The Bill not only reinforces a discriminatory regime where two people who have committed the same crime are treated very differently depending on whether they are a citizen or not, but also introduces a regime where a non-citizen may commit the same offence, but in a less serious context and receive a less serious sentence, yet still be subject to a more serious outcome, including arbitrary detention and removal from Australia.

The Bill proposes arbitrary and indefinite detention

By expanding the number of people who are captured by the ‘character test’, the Bill also expands the cohort of people subject to a decision-making framework which requires them to remain in detention until they are either granted another visa or removed from Australia, without any time limits placed on the length of detention.

¹ Asylum Seeker Resource Centre; *Submissions re Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2021*, 16 December 2021

² International Covenant on Civil and Political Rights, art 14.

³ See, e.g., *International Covenant on Civil and Political Rights*, art 14, No 560/1993, 59th sess

The United Nations Human Rights Committee has consistently held that this framework does not comply with international human rights obligations and results in arbitrary detention because it does not take into account whether detention is reasonable, necessary and proportionate in an individual's circumstances.³

Given that a decision of the Minister may result in mandatory cancellation leading to, in some cases, prolonged or indefinite mandatory detention, there must be strong and compelling reasons to justify any expansion in Ministerial power. Such justification is lacking in this Bill and ALHR considers that it is not a reasonable, necessary, or proportionate response.

Non-refoulement

The Bill expands the cohort of people who face a risk of refoulement. Australia has obligations under various international human rights instruments not to return (or refoule) a non-citizen to a country where they would face persecution on account of their race, religion, nationality, membership of a particular social group or political opinion,⁴ or who would otherwise face serious human rights violations, such as cruel, inhuman or degrading treatment or punishment and torture.⁵

Although the current decision-making process in relation to visa refusal and cancellation on character grounds considers Australia's non-refoulement obligations, it does not prevent a decision-maker from ultimately deciding to refuse or cancel the non-citizen's visa. The non-citizen then faces either the risk of refoulement or indefinite detention, since any further substantive visa application they make to remain in Australia will also be subject to refusal under the expanded 'character test'.

Retrospectivity of the Bill is dangerous and against the rule of law

Australia has obligations under the *International Covenant on Civil and Political Rights* to ensure that where a person is convicted of a criminal offence, they are not subject to a heavier penalty than that which was applicable at the time when the criminal offence was committed.

³ See, eg Human Rights Committee, Views: Communication No 560/1993, 59th sess CCPR/C/59/D/560/1993 (3 April 1997) ('A v Australia'); Human Rights Committee, Views: Communication No 900/1999, 76th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) ('C v Australia'); Human Rights Committee, Views: Communication No 2094/2011, 108th sess UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) ('FKAG et al v Australia'); Human Rights Committee, Views: Communication No 2136/2012, 108th sess UN Doc CCPR/C/108/D/2136/2012 (28 October 2013) ('MMM et al v Australia'); Human Rights Committee, General comment No 35: Article 9 (Liberty and security of person), 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014).

⁴ Refugee Convention art 33.

⁵ International Covenant on Civil and Political Rights art 7; Convention on the Rights of the Child art 37(a); Convention on the Rights of Persons with Disabilities art 15(1); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 3(1).

Given the seriousness of refusing or cancelling a person's visa, particularly in circumstances which may result in arbitrary detention or refoulement, the retrospective application of the proposed measures clearly imposes a heavier penalty than applicable at the time of the offence.

In addition to this, relying on foreign convictions, especially where refugee claims have been raised on the basis of political persecution, is a wholly unjust and unreasonable basis for cancelling a person's visa.

Conclusion

ALHR urges you to reject this Bill in its entirety.

The Government has not demonstrated that the measures proposed by the Bill are reasonable, necessary or proportionate to achieve the stated objectives.

The Bill is inconsistent with Australia's international human rights law obligations.

To expose a larger cohort of non-citizens to visa cancellation and refusal in the manner proposed by the Bill will do little to protect Australians and will only serve to negatively impact on the fundamental human rights of visa holders in our community.

Yours faithfully,

Kerry Weste,
President, ALHR
president@alhr.org.au

Catilin Caldwell
Co-Chair ALHR Refugee Rights Committee
refugees@alhr.org.au

About ALHR

ALHR was established in 1993 and is a national association of more than 800 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and Specialist National Thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.