

Legislative brief

Andrew & Renata Kaldor Centre
for International Refugee Law

Migration Amendment (Strengthening the Character Test) Bill 2019

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This legislative brief sets out the ways in which the proposed changes to s 501 of the *Migration Act 1958* (Cth) in the Migration Amendment (Strengthening the Character Test) Bill 2019 ('the Bill') would interact with existing ministerial powers to cancel a non-citizen's visa on character grounds.

Currently, non-citizens are subject to automatic visa cancellation on character grounds in a number of circumstances. These include:

- where the person has been sentenced to one or more terms of imprisonment totalling at least 12 months, and
- where the person has been found guilty of a sexually based offence involving a child, irrespective of whether a conviction was recorded or a sentence imposed.

Where the threshold for automatic visa cancellation has not been met, ss 501(2) and (3) of the *Migration Act*, in their current form, grant the Minister for Immigration a broad discretion to cancel a non-citizen's visa in circumstances where the Minister reasonably suspects that the person does not pass the character test. Relevantly, s 501(6)(c) provides that a person will fail the character test if they are not of good character, having regard to their past and present criminal or general conduct. Effectively, this means that under the existing law, any non-citizen, irrespective of whether or not they have been convicted of a crime, is liable to visa cancellation if the Minister has reasonable grounds to form a view that they are not of good character. In addition, s 116(e) enables the Minister to cancel a non-citizen's visa where their presence in Australia is or may be a risk to the good order of the Australian community or to the health or safety of the community, a segment of the community or one or more individuals.

The Bill proposes the introduction of a category of 'designated offences,' characterised by particular types of conduct and a maximum sentencing term of at least two years imprisonment. Under the proposed changes, any non-citizen who convicted of a 'designated offence,' in Australia or abroad will be deemed to fail the character test, irrespective of the

actual sentence imposed. This will not lead to automatic visa cancellation, but will enliven the Minister's discretionary cancellation powers in ss 501(2) and 501(3).

Sections 501(2), 501(3) and 501(6)(c) in their current form already provide the Minister with the discretion to cancel a non-citizen's visa where they have been convicted of any of the 'designated offences' in the Bill, and where the conviction supports a reasonable suspicion that the person is not of good character. In fact, these provisions extend far further in that they also allow for visa cancellation where a person has not been convicted of any crime, but their general conduct supports a conclusion that they are not of good character. Section 116(e) provides an additional avenue for visa cancellation where a non-citizen poses a risk to the Australian community or individuals within it.

In its submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Bill, and in oral evidence to the Committee, the Department of Home Affairs detailed a number of de-identified case studies, said to highlight individuals who would be candidates for visa cancellation under the changes proposed in the Bill but not under the existing law. In each of these case studies, ss 501(2), 501(3) and 116 already allow for discretionary visa cancellation, on character or community protection grounds.

The only circumstance in which a person would be vulnerable to discretionary visa cancellation under the measures proposed in the Bill, but not under the existing law, is where they have been convicted of a 'designated offence', but the conduct giving rise to the conviction was so trivial that it could not reasonably support a suspicion that the person is not of good character. This could include, for example a conviction for assault for making a verbal threat to slap a person, or for grasping a person by the sleeve.

Finally, the effect of the measures proposed in the Bill would be to deem a non-citizen to fail the character test where they have been convicted of a 'designated offence' at any point in the past. This will impose mandatory failure of the character test, and the prospect of discretionary visa cancellation, on a large class of individuals. Some of these individuals will have lived in Australia for many decades, with no recent criminal history. A number will have previously been considered by the Minister or Department, and have been determined via that process to pass the character test. In addition to the rule of law concerns raised by this retrospective element of the Bill, the process of identifying all historical convictions that give rise to failure of the character test under the new standard, and considering whether discretionary visa cancellation would be appropriate in each case is likely to add significantly to the workload of the Department.

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