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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Canberra ACT 2600

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FECCA submission regarding the Migration Amendment (Strengthening the Character Test) Bill 2018

The Federation of Ethnic Communities' Councils of Australia (FECCA) is the national peak body representing Australia's culturally and linguistically diverse (CALD) communities and their organisations.

FECCA provides advocacy, develops policy and promotes issues on behalf of its constituency to Government and the broader community. FECCA strives to ensure that the needs and aspirations of Australians from diverse cultural and linguistic backgrounds are given proper recognition in public policy.

FECCA supports multiculturalism, community harmony, social justice and the rejection of all forms of discrimination and racism so as to build a productive and culturally rich Australian society. FECCA's policies are developed around the concepts of empowerment and inclusion and are formulated with the common good of all Australians in mind.

FECCA would welcome the opportunity to expand on this submission as required. For enquiries please contact FECCA Acting CEO Mohammad Al-Khafaji at mohammad@fecca.org.au or on (02) 6282 5755.

Key Points

- FECCA recommends to the committee that the Migration Amendment (Strengthening The Character Test) Bill 2019 should not be passed.
- FECCA is concerned that the amendment has not been adequately justified or the effects in individuals and communities appropriately considered.
- FECCA is concerned that the current review process for refusals and cancellations is characterised by great expense to the individual, no access to legal representation and a strict timeframe for review which relies on the subject of the order understanding the complexities of the Administrative Appeals Tribunal (AAT).
- FECCA is concerned that the inclusion of 'aiding and abetting' will disproportionately affect women, involved in a relationship with an offender, who may be victims of domestic violence.

- It is FECCA's view that, given the devastating and long-lasting impact on the individual, their family and community, visa cancellation measures be limited only to the most serious crimes as judged by the courts on the bases of the penalty applied by the judicial system.
- FECCA believes the removal of an individual from Australia—including some who have spent their whole lives in this country—can have a devastating impact on the individual, their family and community.
- FECCA is concerned that reference to 'community expectations' throughout the explanatory memorandum is not representative of the general community in Australia.
- FECCA believes it is unjust to apply the new character requirements to offences committed before the amendments are brought into effect.

Discussion

Access to Justice and Legal Representation

FECCA is concerned that the proposed amendments as they relate to decisions made under section 501 of the Migration Act may lead to grave injustice and the eroding of individual human rights and freedoms. The current visa cancellation regime allows for the Minister to refuse or cancel a visa if a person fails a 'character test'. Already the grounds for doing this are numerous and some do not require proof of wrongdoing, only a 'reasonable suspicion' that an individual may be involved in certain future activities. Already the Minister has extensive personal powers to refuse or cancel a visa on character grounds, decisions which cannot be reviewed on their merit. Already the threshold for cancelling a visa is low, including in cases where an individual has not been convicted of a crime and where the individual does not pose any harm to the community. An individual therefore risks having their visa cancelled even if they have never been convicted of a criminal offence. The proposed amendments seek to further increase Minister's powers and bypass aspects of judicial oversight.

FECCA is particularly concerned about the consequences of the amendments for refugees who have their visas refused or cancelled on character grounds and for long-term permanent residents of Australia who have their visas cancelled on character grounds. An individual may be removed to a country where they do not speak the language; where they have spent little time (or never lived); and where they have no familial, social or economic connections. Further, those who are unable to be returned to their country of citizenship, for example refugees and stateless people, risk indefinite prolonged periods of arbitrary detention. FECCA is deeply concerned about the risk of separation of mothers and fathers from children, including dependent children, and other family members. The proposed inclusion of 'aiding and abetting' will disproportionately affect women, involved in a relationship with an offender, who are often victims of intimate partner and domestic violence and sentenced accordingly by the courts.

Currently the Migration Act adversely impacts on highly vulnerable sections of Australia's community who have no access to free legal assistance and the proposed amendments will only further restrict their access to justice. The current review process for refusals and cancellations is characterised by great expense to the individual, no access to legal representation and a strict timeframe for review which relies on the subject of the order understanding the complexities of the AAT. The removal of an individual from Australia—including some who have spent their whole lives in this country—can have a devastating impact on the individual, their family and community. Unchecked executive power creates a climate of fear and opacity both for Australians with family members who are not yet citizens and for the broader community of migrants currently in Australia.

For those who may have lived in Australia for decades and received a fine or minimal sentence many years ago, the retrospective nature of the amendments will separate them from their home and community despite already completing their sentence. FECCA believes it is unjust

to apply the new character requirements to offences committed before the amendments are brought into effect.

Departure from Judicial Sentence and the Role of the Courts

The Minister and delegate already have the ability to cancel a visa based on:

- section 501(6)(a) if they have a substantial criminal record and they have been sentenced to at least 12 months imprisonment (cumulative)
- section 501(6)(b) if they have been, or are, a member or associate of a group, organisation or person that has been involved in criminal conduct
- section 501(6)(c) if they are not of good character due to their past and present criminal and general conduct
- section 501(6)(d) if they present a risk that they would engage in criminal conduct or represent a danger to the Australian community
- section 501(6)(e) if they have been convicted by a court of a sexually based offence involving a child or found guilty of such an offence (or charge proven) even if the person was discharged with[out] conviction.

Yet the explanatory memorandum states that '(t)he amendments expand the framework beyond a primarily sentence-based approach and instead allow the Minister or delegate to look at the individual circumstances of the offending and the severity of the conduct'.²

The proposed amendments remove aspects of judicial oversight by including 501(7aa)(b)(iii) imprisonment for a maximum term of not less than 2 years and accordingly remove the impact of the courts consideration on the individual circumstances on the offending and the severity of the conduct.

Maximum penalties are intended to limit the penalty available to the courts who then sentence according to circumstance rather than prescribing an imprisonment period irrespective of other factors. The proposed amendments would consider visa cancellation appropriate for a person who has committed low-level assault despite being sentenced an appropriate non-custodial penalty by the courts. For example, in Queensland assault includes 'a person who threatens to assault another person with intent to commit an indictable offence' and carries a maximum penalty of 5 years which meets the proposed amendments for visa cancellation.

The proposed amendments do not fit with the intent of 'maximum penalty' in criminal legislation, nor does it fulfil the purpose of 'make(ing) it clear that a designated offence must be a serious offence, and not merely a minor or trifling offence' as stated in the explanatory memorandum. In no way does the maximum penalty available to the courts define the seriousness of a crime. Bypassing judicial oversight, by expanding the Bill beyond a sentence of 12 months imprisonment, to a non-custodial judicial sentence for a crime whose potential penalty is 2 years, allows the Minister and the Department to assume the role of the court in assessing criminal conduct. A role traditionally held by established law enforcement processes in states and territories in determining the seriousness of a given offence. These existing institutions should be relied upon.

It is FECCA's view that, given the devastating and long-lasting impact on the individual, their family and community, visa cancellation measures be limited only to the most serious crimes as judged by the courts on the bases of the penalty applied by the judicial system. FECCA is concerned that the justification for the proposed amendments has not achieved in drafting.

Community Expectations

The explanatory memorandum states that ‘this Bill will introduce measures that enhance the Government’s ability to protect the Australian community’. FECCA wishes to emphasise that within the Australian community today, 29 per cent of the estimated resident population in Australia had been born overseas (7.1 million persons) as at 30 June 2017¹. These are people and communities that make up multicultural Australia. From 2017 the Scanlon Foundation’s Life in Australia panel survey, three out of four respondents endorsed the view that ‘multiculturalism has been good for Australia’².

At 30 June 2017, overseas born prisoners accounted for 18% of all prisoners (7,294 prisoners) and overseas born persons accounted for just over one-third (35%) of the Australian population aged 17 years and over³. This proportions of the criminal population do not justify the strengthening of the amendments, nor do the ‘community expectations’ on this issue. FECCA is concerned that the amendment has not been adequately justified or the effects in individuals and communities appropriately considered.

FECCA is concerned that the explanatory memorandum refers to ‘community expectations’ throughout but the source of information on these expectations is not representative of the community of Australia. FECCA suggests that a ‘serious offence’ in the amendments differs from the expectations of the community, who respect the established law enforcement processes including the authority of judicial sentencing in defining and penalising serious offenders with at least 12 months of jail time. FECCA suggests that the community would not expect for the Minister of Home Affairs to have unchecked executive power to drastically change the lives of people in Australia. Regarding the retrospective application of the amendments, FECCA suggests that the community would not expect that a person who received a suspended sentence ten years ago will now fail the character test.

Given the non-reviewable nature of Ministerial decisions and the serious consequences for individuals and their families subject to these decisions, FECCA believes that consultation with the community on their expectations to form a basis for ‘community expectations’ is necessary.

¹ See <http://abs.gov.au/ausstats/abs@.nsf/Latestproducts/3412.0Main%20Features32016-17?opendocument&tabname=Summary&prodno=3412.0&issue=2016-17&num=&view=>

² See https://scanlonfoundation.org.au/wp-content/uploads/2018/10/ScanlonFoundation_MappingSocialCohesion_2017-1.pdf

³ See <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2017~Main%20Features~Country%20of%20birth~9>