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The Dangers of Character Tests:
Dr Haneef and other cautionary tales

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Summary

This Discussion Paper describes the rise of character provisions in Commonwealth laws over the last 10 years. The use of character testing has increased in traditional areas, such as migration and citizenship, and has moved into new areas of law, such as the employment of persons in critical industries and criminal law. The first time character testing has been examined in a thematic way across several legal and policy subject areas, the paper finds that character tests are often framed in subjective terms and are part of executive decision-making, raising issues of transparency and accountability. This phenomenon has been incremental, which is why it is important to pause and reflect on the changes over the last decade.

A character test was generally applied to a person seeking some kind of privilege—for example a visa, citizenship, or an important job. Traditionally, the evidence examined during character judgement comprises a person's past statements, activities and conduct, including any police record, criminal charges or gaol terms. The decision-maker considers, on the basis of this factual evidence, the likelihood that a person will repeat any previous undesirable behaviour.

The nature and use of character tests in Australian law has changed over the last decade. In recent years, character tests have expanded in scope to include subjective criteria such as the likelihood of future conduct, rather than simply being based on police record checks and past patterns of conduct. They have also become increasingly subject to ministerial discretion or national security considerations, making them almost impossible to appeal.

Yet the consequences of failing such a test are now more serious than ever. Because of changes to migration and citizenship laws over the last decade and the expanded reach of new counter-terrorism laws, failing a character test can lead to detention, deportation, and a denial of citizenship. A person can be rendered stateless, permanently locked out of a profession as an aviation worker or pilot, or put on trial for a terrorist offence. In this way, someone else's assessment of a person's character can now define that person's destiny as never before.

Character tests are examined in their initial context of migration law, exploring the politics behind the changes to the legislation that introduced the section 501 test. In 1999, the discretion of the minister to refuse people under the character provisions of the *Migration Act 1958* (Cth) (Migration Act) was widened dramatically. The effects of this have played out in several high-profile incidents in recent years, notably in the case of Dr Mohamed Haneef in late 2007.

The stricter character test in section 501 may have unfairly affected many more individuals and families. Ministerial rejections and removals on character grounds have increased from only a few before 1999 to many hundreds since. For example, a total of 116 visas were cancelled by the minister under section 501 during the last financial year compared to less than 10 over the whole of the previous decade. Government figures show there have been 94 visas refused or cancelled on character grounds between July 2007 and May 2008.

Character tests can now also capture permanent residents who have lived in Australia nearly all their lives. If they have committed a criminal offence or immigration fraud, application of the character test can lead to permanent deportation. Section 501 can be used as a simpler alternative process for removing an individual compared with lengthier and more rigorous deportation processes required by section 201 of the Migration Act.

Character issues are also important in the role of the Australian Security and Intelligence Organisation (ASIO) when assessing the national security risk posed by aliens. For example, ASIO assessments underpinned the long-term detention of two Iraqi refugees on Nauru, and the deportation of US activist Mr Scott Parkin. The paper considers how ASIO national security assessments are made, whether they constitute a form of character testing, and what accountability mechanisms are in place to challenge such assessments.

The legal terrain in which Australian permanent residents and citizens—rather than aliens and non-citizens—can be subject to a character test and its consequences is widening. Changes to citizenship laws are documented, including how the new scheme replicates many of the negative features of the Migration Act character test and the ASIO assessment regime. The question also arises whether the increasing use of character tests may overlap with the counter-terrorism measures introduced since 2001, which affect citizens and aliens alike. The post-2001 laws are directed not only at terrorists but also at people who have not committed any unlawful act themselves but may merely be associated somehow with someone in the world who has.

Character tests which allow for wide ministerial discretion or ASIO clearances, are appearing in other branches of Commonwealth employment law such as clearances for public service positions, parliamentary staffers and aviation and maritime workers. The paper goes on to ask whether the new background checking system for aviation and maritime workers is a version of character testing, therefore making it possible to predict problems over the lack of procedural fairness inherent in these tests.

This paper contends that the current construction of character tests and the way they are implemented do not comply with the right to due process and are not compatible with the rule of law. If they are to be an expression or an enforcement of ‘Australian values’, character tests in migration, citizenship, criminal and employment law require urgent amendment. The criteria in section 501 represent Australian values in a particularly narrow and subjective way. Even Nelson Mandela and Gandhi could be deemed to be of bad character under this test.

The subjectivities involved in determining character have made it relatively easy for politicians and security agencies to err on the side of caution, or ‘profiling’, and get it wrong. The lack of accountability in discretionary ministerial decision-making and the inability to question intelligence mean that a person whose character is impugned will probably never even know why. The consequences of such decisions for the individuals concerned are so serious that it is inappropriate for the decisions to be so subjective and lacking in accountability. The mishandling of the Dr Haneef case highlights concerns about ‘due process’ and privacy, which are likely to have wide ramifications for permanent residents and Australian citizens.

This paper makes eight policy recommendations:

1. that section 501 of the Migration Act be repealed or amended to provide for clarity and natural justice
2. that data on refusals on character grounds across the areas of migration, citizenship and employment law be collected and tabled in Parliament
3. that a Parliamentary inquiry be held into the interaction of character tests in the areas of migration, citizenship, employment and criminal law

4. that the Inspector-General of Intelligence and Security (IGIS) hold an inquiry into the administrative processes by which ASIO assessments are made
5. that the IGIS is able to review the substance of ASIO assessments and the evidence on which they are based, as well as procedural issues
6. that refugee applicants be allowed to access the Administrative Appeals Tribunal (AAT) to challenge a character finding
7. that adverse ASIO assessments be made reviewable in substance, in the sense that the essence of the case against an applicant should be conveyed to that person by the AAT or the court
8. that when undertaking character testing, ministers use ministerial discretion as the last-resort safeguard it was intended to be rather than viewing it as constituting the system itself.

Character might be destiny, and it might be necessary for Australia to continue to conduct inquiries into the character of individuals for various public interest reasons. However, a decade of new developments in character testing offers an opportunity for reflection and evaluation. This research concludes that it is safest to judge people according to what they do rather than any prejudicial view of whom they might become or associate with.

1. Introduction

Character is that which reveals moral purpose, exposing the class of things a man chooses and avoids.

Aristotle (384-322 BC)

1.1 What is ‘character’?

In 500 BC, Heraclitus of Ephesus wrote that ‘a man’s character is his destiny’. Philosophers have been puzzling over the role that ‘character’ plays in a person’s life ever since, and wondering how to define the inherent complexity of attributes that may determine a person’s moral and ethical actions and reactions. Nevertheless, like many complex human phenomena, character has long been simplified and codified by law. Without any evident philosophical reflection, a series of changes to character tests under Australian law suggests that, in this country, judgements about one’s character have indeed become a determinant of one’s destiny.

This paper examines the primary character tests required by Commonwealth law in the areas of migration, citizenship and national security. It assesses the effects of the changes that have been introduced over the last decade and how they work. This chapter introduces the idea of character in Australian law and discusses how character issues have generally been interpreted by Australian courts in the past. The increase in character testing over the last decade and where character tests can be found in current legislation is explained.

It used to be that character became an issue when an Australian voluntarily sought to step into an important public role. For example, under the Australian Constitution, persons cannot stand for election in the Federal Parliament if they are ‘attainted of treason, or have been convicted and are under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer’ (section 44(ii)).¹

Individuals being admitted as solicitors or wanting a seat on a corporate board have to satisfy their peers that they are ‘fit and proper persons’. They will voluntarily offer up their character for scrutiny in return for the benefits of public office or a senior executive position. Even then, these determinations are not always simple, particularly when an individual does not fit the often homogenous model of the profession they wish to join (Dal Pont 2007).

The High Court of Australia (High Court) has decided that the question of who is a ‘fit and proper person’ is a value judgement and heavily context-driven, a decision made in relation to whether Mr Alan Bond was a ‘fit and proper person’ to hold a licence under the *Broadcasting Act 1942* (Cth).²

¹ The test of imprisonment is an easily-determined objective consideration. However, constitutional scholars have disagreed over whether the phrase ‘attainted of treason’ implies something less than a conviction for treason and what that might be, leading to calls for an amendment. See G Sawyer, *The Constitutional Qualifications of Members of Parliament* (1981).

² *Australian Broadcasting Tribunal v. Bond & Ors* (1990) 170 CLR 321.

Justices Toohey and Gaudron said:

The expression fit and proper person, standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities ... depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have the confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.³

The High Court appears to be saying that it is meaningless to ask ‘is this person fit and proper?’ in the abstract; context is required. It appears that the correct question asks ‘is this person “fit and proper” for the activities they are undertaking or seeking to undertake?’ Activities are relevant to character only because they define the context in which the character question is asked. Having defined the nature of the inquiry, it is an analysis of conduct that will inform the answer. The easy part of that inquiry has always been objective evidence of criminal conduct, tested in depth by a judge and jury. The controversial part of the ‘fit and proper’ person test has always been the test for ‘general conduct’ and the attempt to extrapolate whether a person is likely to behave in the same manner again.

We can see the difficulty in this examination of ‘general conduct’ by the wording of the joint judgement of Justices Burchett, Branson and Tamberlin in the leading Federal Court of Australia (Federal Court) case of *Baker*:

Just as a person’s criminal conduct on a few occasions may be very revealing of character, so also some instances of general conduct, as we understand the term, displayed but once or twice, may lay character bare very tellingly.⁴

In other words, a person’s character can be judged on the basis of a few isolated incidents.

‘Character’ is therefore composed of criminal conduct and general conduct, patterns of behaviour, isolated incidents and predictions about how a person is likely to behave in the future. The scope and rigour of the inquiry will depend on what benefit the person is seeking. This exercise has historically been conducted in the context of people stepping forward into public office; however, over the last decade, this has begun to change.

³ *Australian Broadcasting Tribunal v. Bond & Ors* (1990) 170 CLR 321 at 36.

⁴ *Minister for Immigration and Ethnic Affairs v Baker* (1997) 45 ALD 136 at 147. See also *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422.

1.2 A decade of changing views about character

There have been three main changes to the way character tests have been applied in the last 10 years.

First, the ‘fit and proper person’ formula has proliferated with the phrase, ‘fit and proper person’, now occurring in a growing number of regulatory contexts. One has to be a fit and proper person to become a marriage celebrant, to receive government funding for non-governmental organisations (NGOs), or to obtain permits or licences to sell liquor, possess firearms, mine, broadcast, export prescribed goods or drive a taxi.⁵ The standards and responsibilities imposed upon a person by the ‘fit and proper’ test will vary according to the terms and objects of the legislative instrument under which the test is imposed, and the nature of the benefit sought.

Aside from ‘fit and proper person’ applications, character tests now also apply to people who simply want to stay in their current roles. This includes migrants on working visas inside Australian territory, and people working in professions thought to be terrorist target areas such as aviation and transport. This circumstance is discussed in Chapter 4.

The third change is that the new breed of character decisions have become less contextualised, expressed as they are in the widest terms and subject to increasing discretion. Arguably, this could be seen as part of the long trend towards unfettered executive power under the Howard Government, which was successfully challenged only rarely by the High Court under Chief Justice Gleeson (McHugh 2002, p. 3). The strong preference for executive power by then Prime Minister Howard was partly determined by global events in the last decade such as the attacks in the US, Bali, Madrid and London, and Australian participation in the wars in Iraq and Afghanistan. It is fair to say that most of the Western world is struggling to find the balance between protecting its populations against terrorism and preserving the rule of law.

These three changes around character issues rest on political factors that are unique to Australian society, or at least find unique expression here. Decisions about the character of non-citizens, new citizens or workers in critical industries are not taken in a political vacuum. Australia has a long history of unease about its immigration policies. As academic Glenn Nicholls observes, Australia has one of the highest deportation rates and the most expansive deportation laws because deportation is ‘regarded as withdrawing a hospitality or generosity that has been abused’ (Nicholls 2006, p. 3). Nicholls quotes Prime Minister Stanley Bruce who sought to target for deportation people with an ‘un-Australian and anti-social outlook from whom it is necessary to withdraw our hospitality’ (2006, p. 4), and Labor Senator Robert Ray, ‘[t]hose who choose to stay and impose themselves on Australia’s generosity will feel the full weight of its laws’ (2006, p. 7).

This disquiet came to a head during the last decade around the phenomenon of boat arrivals. A recent discussion paper from The Australia Institute analyses the previous Coalition Government’s rhetoric about asylum seekers and its manipulation of public opinion regarding immigration policy (Fear 2006). Simply as a consequence of their

⁵ A range of careers require a police check, but this is an objective inquiry.

mode of arrival, many migrants and Australians of Middle Eastern appearance are already tainted with perceptions of illegality as a consequence of this public discourse.⁶

As Robert Manne says:

There is a widespread view that people who have arrived illegally ... are likely to behave illegally once here ... some of the most ugly and vicious outpourings of hatred had occurred in discussion of boat people/illegal immigrants ... (2004, p. 34).

In this sense, the children overboard affair of 2001 can be seen as a kind of pre-emptive character assassination of those arriving by boat.⁷ In the last decade, a discernable change meant that value judgements were being made about individual characters in a heightened political context of fear of terrorism and cultural difference.

1.3 What are character tests and where are they found?

Under the various pieces of Commonwealth legislation referred to in this paper, there are three types of character tests:

1. straight criminal record checks
2. broader but ill-defined ‘good character tests’
3. national security assessments.

Sometimes these three categories of test are all addressed under one provision, the banner of character, but sometimes they are dealt with separately by different agencies even in relation to the same Act. Each of these types of assessment has their own pitfalls in terms of how they are defined and applied. The consistency and transparency with which they are applied varies depending on whether the decision maker is the Department of Immigration and Citizenship (DIAC), the Department of Foreign Affairs and Trade (DFAT), the relevant minister, or the Australian Security and Intelligence Organisation (ASIO). Finally, the available appeal/review rights vary, depending on the decision-maker and the nature of the decision. The following section attempts to outline the main legal areas that will be examined in detail in the substantive chapters.

Migration

In the context of migration law, the main character provision under examination in this paper is section 501 of the *Migration Act 1958* (Cth) (hereafter referred to as the Migration Act). Section 501 provides that a person’s visa may be cancelled if the minister considers that the person has failed to pass the character test (subsection 501(2)).

The requirements of the character test are set out in subsection 501(6). If the person has been sentenced to a term of imprisonment of 12 months or more, this constitutes a ‘substantial criminal record’, which can trigger ministerial refusal (subsection 501(7)). There is also the more general category of ‘future risk to Australian citizens’.

⁶ See, for example, D Marr and M Wilkinson, *Dark Victory* (2003) and M MacCallum, *Girt by Sea: Australia, the Refugees and the Politics of Fear* (2002).

⁷ See further Senate Select Committee, *Inquiry into a certain maritime incident*, tabled 23 October 2002.

The factors which can be taken into account when exercising this discretion are:

- the past and likely future conduct of the individual concerned, whether strictly criminal or merely reflecting on that person's 'good character'
- the past or likely future response of the Australian community, or some sector of the community, to that person's presence in Australia.

ASIO can also force the cancellation of a person's visa if they are found to be a security threat under the terms of the *Australian Security Intelligence Organisation Act 1979* (Cth) (the ASIO Act).

Citizenship

The *Australian Citizenship Act 2007* (Cth) (hereafter referred to as 'the new Citizenship Act') commenced on 1 July 2007 and is the legal basis for all citizenship provisions. There has been a 'good character' requirement in citizenship applications in Australian law since 1948 but the new regime has introduced a number of changes. These include the introduction of more stringent character checks for those in home countries applying for citizenship and the incorporation of ministerial discretion (section 13) and the need for ASIO clearances (section 20). This means that, in addition to sitting the new citizenship test, permanent residents will have to undergo a new form of character test, some aspects of which they will not be able to easily appeal.

Transport security

The new requirement for stringent background checks for aviation and maritime workers is found in the *Aviation Transport Security Act 2004* (Cth), the *Aviation Transport Security Regulations 2005* (especially Regs 8.02 and 8.03) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (especially reg. 6.08). The new checking regime run by the Attorney-General's Department is set out in the *AusCheck Act 2007* (Cth) (hereafter the 'AusCheck Act'). These reforms mean that to be permitted into certain areas, all maritime and aviation workers must undergo an ASIO clearance process. The new AusCheck scheme allows personal information collected for the purposes of the AusCheck database to be used for national security and law enforcement purposes. This precedent is discussed further in Chapter 4.

Counter-terrorism measures

Australia's new counter-terrorism laws seem to be moving further into the territory of criminalising people's status rather than their conduct. There is overlap between character tests in migration law and new counter-terrorism offences in the subjective elements and unfettered executive power involved in both areas of law. This is discussed further in the context of the Dr Haneef case in Chapter 2.

The overall purpose of this paper is to examine, for the first time, the phenomenon of character testing in a thematic way across several legal and policy subject areas. This chapter has considered how character has generally been interpreted by Australian courts in the past, the increase in character testing over the last decade and where character tests can be found in current legislation. What is most interesting and perplexing about examining the evolution of the concept of character in Australian law is the sense of

paradox. Just as psychological and academic perceptions of character are becoming more complex, nuanced and contingent, legal definitions are becoming tighter and increasingly linked to essential immutable characteristics. The first area of law where this hypothesis is examined is the character test regime in Australia's migration laws.

2. Character and the *Migration Act 1958*

2.1 Introduction: testing the character of aliens

This chapter examines the role of character tests in the context of migration law. For aliens, character issues arise in two ways:

- through a ministerial decision that a person is not of good character under section 501 (discussed in this chapter)
- through an adverse ASIO assessment that a person poses a threat to national security (discussed in Chapter 3).

Both are problematic in that the current processes lack clarity in definition and do not provide natural justice to the person whose character is under investigation.

The term ‘natural justice’ is defined in this paper to mean the basic rules and procedures that are to be followed by any person or body charged with the responsibility of determining disputes. Based on Roman concepts, the rules of natural justice require a decision-maker to act fairly, in good faith and without bias or conflict of interest (*nemo iudex in parte sua* — no person may judge their own case). They also require a decision-maker to allow each party adequate opportunity to present their case and respond to the case against them (*audi alteram partem* — the right to be heard) (Binmore 2005). These are the basic requirements of the right to a fair hearing under the United Nations (UN) International Covenant on Civil and Political Rights.⁸

The new character test in section 501 has led to four major outcomes:

- a marked increase in the number of refusals on character grounds
- broader and more subjective grounds for those refusals under ministerial discretion
- new categories of long-term residents being affected
- a decreased ability to scrutinise or object to such refusals.

The case study involving Dr Haneef in section 2.7 and the deportation of long-term residents in section 2.8 below provide evidence of how these changes are impacting on individuals.

2.2 The history of section 501

The Constitution grants the Commonwealth exclusive powers to deal with immigration and aliens. The new scope of character tests was initiated in the context of migration law. Australia’s immigration laws are contained primarily in the Migration Act. By way of context, the *Migration Reform Act 1992* (Cth) revolutionised Australian migration law by creating a system of visas as the sole mechanism by which non-citizens enter and stay in Australia. The 1992 Act also established statutory provisions which govern how decisions on visa applications and

⁸ Article 14, see General Comment 13, UN Human Rights Committee.

cancellations are to be made. Finally, it expanded the right of many individuals to an independent review of decisions.

Until 1999, the character provisions in the Migration Act had only been used in a handful of cases. They were, however, high-profile cases, which generated significant media attention. The most controversial example occurred on 3 May 1994, when the then Minister for Immigration, Local Government and Ethnic Affairs, Senator Nick Bolkus, refused to grant a visa to Mr David Irving. Mr Irving is an English historian who has challenged accepted facts about the genocide of the Jewish people during the Third Reich. The minister determined that Mr Irving was not of good character. However, this determination was not based on Mr Irving's views but on his conviction for certain offences overseas (ranging from defaming the dead to contempt of court), and the fact that he had been deported from Germany and Canada. On 30 July 1996, the Federal Court dismissed Mr Irving's appeal against the minister's decision.⁹

Similarly, in November 1996, the then Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock MP, refused to grant a visa to Mr Gerry Adams, the leader of Sinn Fein, on the basis that Adams was not of good character.¹⁰ Mr Adams has since been lauded for his role in the Northern Ireland peace process. Finally, in mid 1997, Mr Lorenzo Ervin, a member of the Black Panthers who had been convicted of air piracy and kidnapping in the US in 1969, received considerable publicity when the then Acting Minister for Immigration and Multicultural Affairs, Senator Amanda Vanstone, cancelled his visa. Mr Ervin sought judicial review of the decision in the High Court. However the case was never heard because, on 10 July 1997, counsel for the minister proposed that the decision cancelling Ervin's visa be set aside.¹¹ At the time these cases occurred, concern was raised that the failure to grant visas to persons such as Mr Irving and Mr Adams, and the cancellation of Mr Ervin's visa, might restrict the free expression of political ideas in Australia (Langsam 1997).¹²

In 1998, chiefly as a reaction to these cases, the current version of section 501 was passed in Parliament by way of the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998.¹³ A Parliamentary inquiry by the Senate Legal and Constitutional Legislation Committee into the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997 reported in March 1998. The civil liberties concerns provoked by these cases were reflected in comments made by the ALP senators in a Minority Report (ALP 1997, p. 40), and the Australian Democrats in a Dissenting Report (Bartlett 1997, p. 43).

Despite these concerns, the Bill was passed with no amendments and became operational in 1999. In 2006, Senator Andrew Bartlett of the Australian Democrats

⁹ *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 139 ALR 84.

¹⁰ See *Adams v Minister for Immigration and Multicultural Affairs*, (unreported), Federal Court, Drummond J, 2 July 1997.

¹¹ See *Re: The Minister for Immigration and Multicultural Affairs Ex parte Ervin B29/1997*.

¹² Joseph O'Reilly, then executive director of the Victorian Council for Civil Liberties, stated in 1997 that 'a consistent reading of the (existing) policy would exclude both Aung San Su Kyi and Nelson Mandela ... it is to avoid controversy at home rather than let terrorists in, that we exclude these people'. See D Langsam, *Ervin? Irving? Adams? Arafat? Kalejis? Not all good characters* (1997).

¹³ The same Bill had failed to pass in the previous Parliament.

attempted to introduce a Private Member's Bill, the Migration Legislation Amendment (Provisions Relating to Character and Conduct) Bill 2006, to repeal the provisions, but it lapsed in 2007 with the proroguing of Parliament.

2.3 Who has the power to deport?

Both DIAC and the Immigration Minister have the power to cancel or refuse a visa on character grounds under the Migration Act. The minister can also delegate his or her powers to DIAC with different tests or consequences attached, depending on who exercises the power. The choice determining whether DIAC or the minister will exercise the power, requires no public justification and is beyond judicial review. In recent years, the Immigration Minister has tended to take decisions to deport based on the character test in section 501. For example, a 2006 Senate inquiry received a considerable amount of evidence about the use of section 501 to deport long-term Australian residents on character grounds. The evidence indicated that the Commonwealth had abandoned reliance on the criminal deportation provisions (section 201) administered by DIAC in favour of the wider ministerial power to cancel visas on character grounds under section 501, even where a person has been convicted of a criminal offence (Senate 2006, p. 280).¹⁴ Once a visa is cancelled under section 501, an individual is prohibited from ever being able to return (Murphy 2007).

There are nine grounds on which DIAC can legally cancel or refuse a visa, including a character assessment as the delegate of the minister, health grounds, financial grounds, criminal record, an opinion that the person will not abide by visa conditions or suspicion of document fraud. These grounds are determined on the basis of objective inquiries by DIAC officials. For example, a person becomes liable for deportation if they have been convicted of an offence carrying a gaol sentence of over 12 months.

Guidelines for the application of section 501 are found in DIAC documents called Ministerial Series Instructions and Ministerial Direction 21. These need to be read together with the Migration Regulations to find the Public Interest Criterion in relation to character tests. In a 2006 investigation, the Commonwealth Ombudsman found these guidelines insufficient to support good decision-making and, as a result of the Ombudsman's report, Ministerial Direction 21 and Migration Series Instruction 254 are undergoing revision to provide better guidelines to departmental officials (Ombudsman 2006).

The shift in decision-making to the Immigration Minister under section 501 means that character testing has become much more subjective and more difficult to challenge. Other provisions in the Migration Act enable DFAT, the Foreign Minister or ASIO to make determinations on character-related grounds as well. The ASIO assessment regime is examined in Chapter 3.

¹⁴ For a more detailed discussion on this area, see the examination by Senate Legal and Constitutional Affairs Committee in Chapter 9 of *The Administration and Operation of the Migration Act 1958*, tabled 2 March 2006. See also pp. 12-13 of the Commonwealth and Immigration Ombudsman Report No 1 of 2006.

2.4 The increasing number of character refusals

DIAC does not provide, in an easily accessible manner, accurate data recording the total number of people, both onshore and offshore, who have been rejected by the minister and the department on character grounds since 1999. Government figures provided to Parliament show there have been 68 visas cancelled on character grounds this financial year to the end of May 2008 (Allison 2008). There have been 27 visas refused on character grounds by the new Rudd Government in the 2007–08 financial year to the end of March (Nader 2008b; Ellison 2008). One refusal was made by the minister in person; the rest were made by departmental delegates. As a result of these 27 refusals, 25 individuals are currently in immigration detention, the majority in Villawood. Of the 25 individuals, eight come from New Zealand, five from the UK and the rest from a wide range of countries. All but one person has been in Australia for over 11 years, two for over 40 years. All 25 individuals have been in immigration detention for over 100 days and one person has been detained for over 1 000 days. The list of criminal offences committed by these people includes murder, assault and violent robbery but also deception, property damage, perjury, trespass and driving offences (Allison 2008).

This 2008 data shows a decrease in character refusals and cancellations from the numbers made under the previous government. The DIAC Annual Report for 2006–07 provides data on character decisions made by the minister under section 501, relating both to offshore applications and to removals of people from Australian territory. Reporting under the heading of ‘Prevent unlawful entry’ (Output 1.3.2), DIAC records that in 2006–07, the minister personally made section 501 decisions in 46 cases. A total of 116 visas were cancelled under section 501 in the same period. In the previous period of 2005–06, six such decisions were made. In the same period 2006–07, delegates of the minister made 582 section 501 decisions comprising 70 cancellation decisions, 178 refusal decisions and 334 warnings (DIAC 2007, p. 48).

In 2006, the Commonwealth Ombudsman released an ‘own motion’ investigation report into DIAC’s administration of section 501 in relation to long-term residents (Ombudsman 2006). Figures from that report highlight the increasing delegation of ministerial decision-making power to DIAC officials.

- In 2002–2003, 236 decisions were made under section 501 to cancel visas, of which the minister made 189 (80 per cent) and the department 47 (20 per cent).
- In 2003–2004, 112 decisions were made under section 501 to cancel visas, of which the minister made 17 (15 per cent) and the department 95 (85 per cent).
- In 2004 to March 2005, 105 decisions were made under section 501 to cancel visas, of which the minister made 13 (12 per cent) and the department 92 (88 per cent) (Ombudsman 2006, pp. 9–10).

It is difficult to determine whether the data are the result of DIAC trying to exercise greater restraint or merely a consequence of the makeup of the caseload.

The current data on refusals or cancellations made by the minister or a delegate represents a sharp increase from a handful of cases over the previous decade to

hundreds of cases in this decade. It remains uncertain how many cases are refused by DIAC on the grounds of criminal conduct.

Limitations of the data

Even with this marked increase from the previous decade, character refusals represent a relatively small proportion of total refusals and cancellations under immigration law. As of April 2008, figures on all departmental refusals for the last four years have been available. In a response to a question on notice asked by Democrat Senator Natasha Stott Despoja, the new Immigration Minister, Senator Chris Evans, tabled the numbers of visa rejections made by DIAC since 2004 (Stott Despoja 2008).¹⁵ The figures finally tabled in March 2008, nearly a year after Senator Stott Despoja lodged the question, are high. Almost 650 000 visa applications have been rejected since 2004, averaging 400 rejections a day (Viellaris 2008). This represents a rejection rate of around 15 per cent of the overall total of 4.3 million visa applications in the same four-year period.

The figures are not broken down into the various legal grounds for rejection and so include rejections for health reasons, funding and other concerns. Discrete figures recording how many of the people were refused on character grounds because of their criminal records are not available (Stott Despoja 2008). The minister stated in his answer to Senator Stott Despoja in April that it would be too difficult to break down the data on overall departmental refusals to give figures on those refusals due to criminal records (Stott Despoja 2008). That it is 'too difficult to break down' data on the reasons why visas were rejected seems an inadequate response, given the ramifications of these rejections for the individuals concerned.

Obtaining data about how the minister exercises his or her discretion has been difficult in the overall context of ministerial discretion under the Migration Act. In the 2006 inquiry into the operation of the Migration Act, the Senate Legal and Constitutional Affairs Committee criticised the fact that data on the use of ministerial discretion across the board was sketchy and unhelpful despite the explicit recommendation to capture such data in the 2004 inquiry into ministerial discretion (Senate 2006, p. 129; Senate 2004, p. xii).

It is important for two reasons that data identifying refusals based on character tests across the areas of migration, citizenship and employment law be collected and tabled in Parliament. First, refusals on character grounds lead to serious consequences for the individuals concerned and secondly, because it is a useful way of identifying trends and issues to do with process.

2.5 Subjective grounds for character refusals

Section 501 allows the minister to cancel a visa where it is determined that the holder does not pass the character test, a decision that may be based on whether the person has been sentenced to a term of imprisonment of 12 months or more either in Australia or their country of origin. While the principle is clear, equating a prison term with someone's overall character is problematic. There is no requirement to

¹⁵ The question from Senator Stott Despoja was prompted by the visa cancellation on character grounds of US hip-hop star, Cordozar Calvin Broadus Jr, aka Snoop Dogg, for the April 2007 MTV Awards. See H Westerman, 'Canberra shuts the door on gangsta rapper' (2007).

balance any criminal conviction against the possibility that the person, if removed, might be returned to persecution or torture, rendered stateless or face long periods of detention while their return is diplomatically negotiated.

In addition, the minister is able to cancel a visa where it is determined that a person 'has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct'. This association ground was the subject of the Dr Haneef case, examined below.

Section 501 also contains the more general category of future risk to Australian citizens. If the past or likely future response of the Australian community or a sector of the community to a person's presence in Australia is likely to be negative, the minister can cancel the visa. This is ultimately a subjective inquiry.

DIAC issues fact sheets (nos. 78 and 79) on character testing. Fact Sheet 78, 'Controversial Visa Applicants', provides a profile of 'people of concern' in character terms on the basis of future risk to citizens. Among others, the criteria defining people of concern include:

- the likelihood that they will vilify or defame the Australian community or part of the Australian community
- a record of causing law and order problems, for example, when addressing public rallies
- acting in a way likely to be insensitive in a multicultural society; for example, advocating within particular ethnic groups the adoption of political, social or religious values well outside those acceptable to Australian society
- being liable to provoke an incident in Australia because of the conjunction of their activities and proposed timing of their visit, and the activities and timing of a visit by another person who may hold opposing views
- the likelihood that their presence in Australia will be contrary to Australia's foreign policy interests.

Some of the criteria on the full DIAC list are consistent with Australia's obligations under international law, such as a state's right to exclude from refugee protection a person who would otherwise fit the refugee definition but has committed a war crime or a serious non-political crime. But other criteria are of concern. For example, it would be difficult to determine whether a person who addresses public rallies has 'caused' a 'law and order problem', and is therefore of concern to Australia.

Police action to restrain provocative speech should be applied only to those who are actually threatening violence or an imminent breach of the peace (Bronitt and McSherry 2005). Provocative speech might also constitute racial vilification or sedition, but these crimes require the demonstration of intent to incite violence. Refusing someone entry to Australia because they *might* commit this kind of criminal behaviour in the future needs to be carefully considered.¹⁶

¹⁶ See further K Gelber and A Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007).

The criteria represent ‘Australian values’ in a particularly narrow and subjective way, in the sense that they aim to exclude the sort of people we do not want. As Dr Mary Crock from the Law Council of Australia explained in her evidence to the 1997 Senate Legal and Constitutional Legislation Committee inquiry hearings, if the proposed character test were strictly applied, ‘people such as Nelson Mandela and Gandhi ... would be deemed to be of bad character’ (Crock 1997, p. 195).

Use of the character test, despite its inherent subjectivity, may on occasions be necessary to protect the public interest. But extra care should be taken to ensure that these already subjective criteria are not open to further political manipulation. Vague laws (especially with coercive or punitive effect), may breach the fundamental right to liberty and security of the person. For example, a visit by the Dalai Lama or a West Papuan leader might cause problems for Australian foreign policy but that is no reflection on their character. The point is that these criteria are subjective and therefore open to several interpretations.

Sometimes public interest concerns over the perception of an immediate security threat can collide with the longer-term public interest expectations of accountability and transparency in government processes. There is always tension between these two public service goals. The Dr Haneef case study examined below provides a good example in recent times. This paper argues that acknowledging this tension is important, and that therefore periodic evaluation of sensitive areas of law based on all available evidence is required.

2.6 Impact of ministerial discretion on review rights

This section examines the argument that natural justice is an essential requirement for people who undergo a character test. There are two factors which combined have implications for the ability of a person to seek review of a ministerial decision:

- refusals on character grounds are made by the minister on the basis of executive discretion
- the decisions are based on subjective criteria.

It is therefore difficult to appeal or correct a character finding.

Those who currently seek to dispute the outcome of character tests experience an almost total denial of natural justice. To begin with, natural justice is not exercised in relation to the decision by the minister to cancel a visa (Migration Act subsection 501(2)). Further, a person is not entitled to go to the Administrative Appeals Tribunal (AAT), listen to the minister’s reasons or present a counter-argument. The merits of the case are not reviewable by an umpire of any kind.

Judicial review allows a person to object to the way a decision about their character was made in the Federal Court, and this remains an option for those with the financial and other resources to pursue it within the strict time limits placed on applications to the Federal Court.¹⁷ However, offshore visa applicants have no standing to seek any review in an Australian court. Even where it is granted to onshore cases, judicial

¹⁷ See Migration Act, paragraph 476A(1)(c).

review is only marginally effective because the judge is not able to determine whether a decision is right, merely that the formalities have been observed.

In contrast to decisions made by the minister, some aspects of character tests made by DIAC in relation to people on Australian territory are reviewable by the AAT on the merits. Matters involving national security are heard by members of the Security Appeals Division who have special clearances and procedures to deal with classified information. However, the minister can issue a certificate under section 502 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) excluding review by the AAT.¹⁸ Review by the High Court on the grounds of its constitutionally entrenched power of judicial review is then the only avenue left available. Even in the courts, the Attorney-General can issue a certificate to block certain evidence being seen, even by the judge under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

In 2003, a Senate Select Committee on Ministerial Discretion in Migration Matters was established. Its terms of reference were limited to an examination of sections 417 and 351 of the Migration Act, which allow the minister to substitute a decision over DIAC or the tribunals. It did not consider the character provisions. Nevertheless, the committee did find that the use of ministerial discretion under then Minister Philip Ruddock had increased exponentially. Committee members warned that:

In assessing the appropriateness of the ministerial discretion powers, the Committee is concerned that vesting a non-delegable, non-reviewable and non-compellable discretion with the Immigration Minister without an adequate accountability mechanism creates both the possibility and perception of corruption. At a minimum, the Committee wants to see external scrutiny of decision making made an integral part of the ministerial discretion system (Senate 2004, p. 131).

The United Nations High Commissioner for Refugees (UNHCR) criticised the Australian refugee status determination system in the context of the 2004 inquiry into ministerial discretion, stating that ministerial discretion should act as a safeguard but is not ‘in itself sufficient to secure the obligations of Australia under the 1951 Convention because by its very nature it is non-compellable and non-reviewable’ (UNHCR 2004, p. 8).

The difficulty of obtaining successful judicial review of ministerial decisions is reinforced by the minister’s ability, pursuant to section 503A of the Migration Act, to rely on information supplied to him in confidence by the Australian Federal Police (AFP) or other security agencies. The minister can decline to disclose such information, including to the court reviewing his or her decision.

2.7 The Dr Haneef case study

The case study of Dr Haneef (see box) shows how the review facility of section 501 works in practice in the courts. In many ways, it is a positive example of the court’s capacity to protect an individual from executive action unauthorised by law, but perhaps only because of the extreme elements of that case. What is clear is that the

¹⁸ As occurred in the Lorenzo Ervin case (the Black Panther case), *Re: The Minister for Immigration and Multicultural Affairs Ex parte Ervin* B29/1997.

review was about the process—whether or not the minister had applied the language of the section correctly to Dr Haneef; it did not represent an opportunity for Dr Haneef to vindicate his character on its merits in a public forum.

The character of Dr Haneef

Dr Haneef is a 27-year-old married doctor from India. He had been working in a Gold Coast hospital on a section 457 working visa since September 2006 (Marr 2007). On 29 June 2007 (UK time), two car bombs were defused in London. On 1 July 2007 (UK time), there was a terrorist car bomb attack on Glasgow Airport (UK) and a man named Kafeel Ahmed died from burns in the attempted car bombing. His brother, Sabeel Ahmed, a doctor working in England, was arrested and charged with withholding information from police.

Criminal aspects of the case

On 2 July, Dr Mohamed Haneef was arrested in Brisbane while attempting to fly home to India. Dr Haneef stated that he was flying home to see his wife and recently born child, who had been re-admitted to hospital with jaundice. After being detained without charge for 12 days, Dr Haneef was eventually charged on 14 July with recklessly assisting a terrorist organisation. The charge was based on the evidence that Dr Haneef had given his second cousin, Kafeel's brother Sabeel Ahmed, a mobile phone SIM card in July 2006, shortly before he left the UK to visit India prior to taking up work in Australia.

Dr Haneef's arrest followed a request by UK authorities, received at 5.00 am on 2 July (AEST), that the Australian Federal Police (AFP) assist in locating him. The basis of the request was the apparent connection between Dr Haneef and the SIM card in a mobile phone found when the UK police took Dr Sabeel Ahmed into custody. The AFP and Queensland Police also executed a number of search warrants on the Gold Coast and seized property belonging to Dr Haneef.

At the time of his arrest, Dr Haneef was not on any AFP or Australian watch list. He was intending to travel to his home in Bangalore via Singapore on a one-way ticket obtained for him by his father-in-law because, as he alleged, he did not have sufficient funds in his bank account at the time.

The offence for which Dr Haneef was arrested (and which was relied on as justifying the detention without charge) was pursuant to section 102.7(1) of the Commonwealth Criminal Code. It alleged that Dr Haneef knew that the organisation to which he had given the SIM card was a terrorist organisation. When he was eventually charged, 12 days later, the allegation was changed to an offence pursuant to section 102.7(2), in which it was alleged that Dr Haneef was merely reckless as to whether the organisation was a terrorist organisation.

On Saturday 14 July, Magistrate Ms Jacquie Payne heard a bail application made by Dr Haneef's lawyers. In argument, the Crown relied on an allegation that the SIM card was found in the burning Jeep used by Mr Kafeel Ahmed to attack Glasgow airport. Ms Payne reserved her decision until the following Monday morning.

On Monday 16 July, Dr Haneef was granted bail by Ms Payne. Section 15AA of the Crimes Act provides that bail is not to be granted to a terror suspect unless there are 'exceptional circumstances'. Magistrate Payne drew on several High Court authorities to find that the 'cumulative effect' of a number of factors meant that Dr Haneef's circumstances were exceptional enough to release him into the community. These included that:

- he was not alleged to have been directly involved with the group behind the abortive attacks in London and Glasgow

- the SIM card he gave to his second cousin was not alleged to have been used in an attack; he left it with his family member when leaving Britain
- he was a doctor studying with the Australian College of Physicians
- he had no criminal history and a good employment record
- his passport had been taken
- he was likely to be placed under surveillance if released.

Ms Payne set a committal mention date for August 31 (SMH Editorial 2007). On the same day, within hours of his being granted bail, the then Minister for Immigration and Citizenship, Mr Andrews, cancelled Dr Haneef's 457 work visa. The intention was to hold Dr Haneef in immigration detention during whatever period was necessary for his trial to occur. However, on 27 July, the Director of Public Prosecutions announced that he had reviewed the evidence and that there was no reasonable prospect of proving the charge. Mr Andrews responded by ordering that Dr Haneef be placed into residential detention, subject only to reporting requirements, at Kangaroo Point in Brisbane. On the following day, Dr Haneef requested that he be allowed to return to India and this was permitted by Mr Andrews. Dr Haneef had been detained without charge for 12 days; he had spent a total of 25 days in custody.

The collapse of the criminal case against Dr Haneef began on 20 July when ABC journalist, Mr Raphael Epstein, relying on UK sources, revealed that the SIM card had not been found in the burning Jeep at Glasgow Airport as the bail court had been incorrectly informed. Rather, the card had been found when Dr Sabeel Ahmed, a man who was charged only with withholding information, was arrested (Keim 2008). Further revelations occurred in April 2008, when Dr Sabeel Ahmed's sentence hearing in a court at the Old Bailey in London was told that UK authorities had obtained an email sent from Mr Kafeel Ahmed to his brother, Sabeel. The sentencing judge, Justice Calvert-Smith, accepted that the email showed that there was 'no sign' of Sabeel 'being an extremist or party to extremist views'. The email was also accepted as showing that Sabeel had no knowledge of his brother's terrorist activities (McKenna 2008).

Migration aspects of the case

The Minister for Immigration cancelled Dr Haneef's work visa on character grounds within hours of his having been granted bail in relation to the terrorism association charge. Dr Haneef sought judicial review of the minister's decision in the Federal Court on the grounds of jurisdictional error. Justice Spender of the Federal Court found the minister's decision invalid. The case went to appeal in the Full Court of the Federal Court, which also found the minister's decision invalid.¹⁹

On 21 August 2007, in the case of *Haneef v Minister for Immigration and Citizenship*,²⁰ Justice Spender found that the minister had misconstrued the requirements of the character provision in section 501. He set aside the decision to cancel the visa.

The case concerned the correct construction of the words in section 501:

a person does not pass the character test if:
 ... the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct.

¹⁹ *Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203.

²⁰ *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273.

Dr Haneef's legal team argued that section 501 required some nexus between the relationship that the visa holder has to the other person and the criminal activity of that other person. In other words, an 'innocent' association is not enough to convey complicity. The minister's lawyers argued that no such nexus is required; that any association is sufficient, or alternatively, all that the 'association test' requires is that the visa holder be a 'friend' or a 'good mate' (at paragraph 9).²¹

The matters relied upon by the minister to establish a relevant 'association' were as follows:

- Dr Haneef and the Ahmed brothers were second cousins
- Dr Haneef had stayed in the same boarding house accommodation in the UK as Dr Sabeel Ahmed
- Mr Kafeel Ahmed lent money to Dr Haneef
- Dr Haneef had left his mobile phone with some credit remaining on his SIM card with Dr Sabeel Ahmed
- Dr Haneef had corresponded with Dr Sabeel Ahmed regarding the birth of his daughter in a chat room on 26 June 2007.

Justice Spender found at paragraph 188 of his reasons:

Having regard to the context, it seems to me impossible to conclude that Parliament would have intended that a person fail the character test where relationship of a visa holder with a person, group or organisation was utterly remote from the criminality [of] that person, group or organisation.

But possibly the most important part of Justice Spender's judgment came at paragraph 68, as follows:

It is right to acknowledge the political character of the Minister's office, and his accountability to the Parliament, and of the government ultimately to the electorate. The Minister is nonetheless susceptible to the requirements of the law that he act within the jurisdiction conferred by the Parliament on him.

The Commonwealth's appeal to the Full Court of the Federal Court failed when that Court handed down its decision on 21 December 2007. Despite the original decision having been overturned and that decision confirmed by an appeal court, the minister was at liberty to consider, once again, cancellation of Dr. Haneef's visa. In fact, Senator Chris Evans, the minister in the new government elected on 24 November 2007, announced on the day the appeal court handed down its decision that he had considered a new brief of evidence from the AFP and found no basis to cancel the visa. This meant that Dr Haneef was free to return to Australia, if he so desired. In January 2008, Senator Evans also announced that he had elected not to seek to appeal the decision further and that the Commonwealth would not be applying for special leave from the High Court.

Many policy questions remain unresolved. An inquiry into the actions taken against Dr. Haneef, which may address some of these, has been announced by Attorney-General, Robert McClelland. It is being conducted by former New South Wales Supreme Court Judge, the Hon. John Clarke QC and will report in September 2008.

²¹ See further the decision of Justice Emmett in *MIMA v Kuen Chan* [2001] FCA 1552.

The case study of Dr. Haneef shows that the core of the dispute was whether innocent association could reasonably support a cancellation or refusal of a visa on character grounds. It is important to emphasise, however, that it was the accident of the minister's construction of the law that made successful judicial review possible. The construction relied upon by the minister had been preferred in an earlier case, *MIMA v Kuen Chan* [2001] FCA 1552, which established that even an 'innocent' association is sufficient to satisfy the test. There is little doubt that the minister, Mr Andrews, could have applied the test eventually approved by the Full Federal Court and come up with the same decision.

In the case of Dr. Haneef, the accident of a dispute over interpretation of the words in the relevant section allowed successful judicial review. It may also be the case that the accident of a change of government (and relevant minister) before the Court proceedings were completed, prevented the visa being re-cancelled.

The character of Dr Haneef was relevant to the association element in section 501 but also interacted with the new association offence in the counter-terrorism laws. To the extent that an assessment of character might be based on an assessment of a person's associations, an adverse 'character assessment' *in fact* provided the motivation for Dr Haneef's arrest, detention and charge. However, whether his arrest, detention and charge were, on the facts available, justified by law is highly arguable. Certainly, the charge was not and that is why it was quickly dropped. However, the AFP has made it clear that Dr Haneef is still under investigation by no less than nine officers (Allard 2008). Furthermore, the AFP is continuing investigations into his Gold Coast hospital colleague, Indian-trained doctor Mohammed Asif Ali (McKenna 2008).

What became clear in the Dr Haneef case was that police, prosecutors and, it appears, even Magistrate Gordon made assumptions about the content of Australia's anti-terror laws (and perhaps the extent to which those laws allowed subjective assessments of character based on prior association to found liability) without proper reference to the details of those laws. The Dr Haneef case has also shown that the real source of the danger with Australia's counter-terror laws is not confined to what those laws say but extends as well to what people, including AFP and ASIO officers, think those laws say. The Clarke Inquiry needs to assess how administering agencies practise the law in complex and unanticipated ways (Bronitt 2005).

The case shows that decisions about character expose a person to serious consequences, including detention and must, therefore, be taken with due care and scrutiny. Character decisions also affect legal processes in unorthodox ways. For example, it is worth noting that because his visa was cancelled, Dr Haneef chose not to post bail and was therefore not released from custody. He allegedly made this decision because had he posted bail and been released, he would have been taken immediately into immigration detention, possibly to Villawood in Sydney (Russo 2007). Dr Haneef's lawyers and the AFP also released material to the media during the investigation, which is unusual.

This invites the need for further and more nuanced discussion not only about the inter-relationship between character tests and the content of our counter-terrorism laws but also about character assessments and the (mis)application of those laws. This discussion has to be cognisant of the message that incidents like the Dr Haneef case

send to the international community and to Australia's migrant community about the goals of social cohesion.

The Dr Haneef affair shows how a distant relative's character in the UK determined Dr Haneef's destiny in Australia. A similar case could occur again tomorrow. The flaw is inherent in the laws, not just bungled policy or institutional fault (Prince 2005). Safeguards are necessary to prevent further erosion of the rule of law by unchecked executive power. The case of Dr Haneef shows that when migration laws and counter-terrorism measures rely on the subjectivities of character testing, these laws can go awry.

2.8 Impact of character changes on individuals

This section examines the consequences when a visa is refused or cancelled under section 501. The *Migration Reform Act 1992* (Cth) essentially reversed the onus of proof by requiring a person to establish their right to stay or, if they fail to do so, be removed. The evidence over the last decade contained in available statistics and case law points to the conclusion that section 501 is used as an alternate expedited procedure to section 201 in order to remove criminal deportees and to deal with suspected immigration fraud.

The deportation provisions under section 201 of the Act are far-reaching and the separate processes of notice, hearings and rights can often result in a lengthy procedure.²² A power of deportation under section 201 prevails if a non-citizen, who has been in Australia as a permanent resident for a period of less than 10 years, has been convicted of an offence and the sentence is for more than one year. Section 203 further provides that non-citizens can be deported if they are convicted of an offence against a state or territory law that is prescribed for the purposes of the section. When DIAC makes decisions about deportation on criminal grounds under section 201, people who have been resident for over 10 years or more are exempt from criminal deportation. In contrast, the cancellation of a visa under section 501 leads to a person being declared an unlawful non-citizen and falling under the detention and removal provisions of the Migration Act (sections 189 and 198).²³ Where a permanent resident with over 10 years of residence experiences a section 501 refusal because of a conviction for a serious criminal offence, it is section 203 that provides for possible deportation.

There have been over 300 cases of long-term residents removed on character grounds since the 1999 amendments, many of whom were removed because they had been convicted of a criminal offence punishable by over 12 months imprisonment. Over the last few years, these cases represent a small percentage of total removals but a steep increase from the handful of cases over the previous decade. They illustrate a position held by the previous Immigration Minister, Philip Ruddock, that permanent residents who had broken the law should be deported, no matter what their personal situations. Therefore, when section 501 was introduced in 1999, a consequence was that even if a person had lived for most of their life in Australia but had neglected to take out citizenship, the minister could have them deported to their country of origin if they failed the character test.

²² See Chapters 10 and 11 of M Crock, *Immigration and Refugee Law in Australia* (1998).

²³ For example, see *Williams and MIAC* [2007] AATA 1012.

Ministerial cancellations on character grounds occur for people who have received a gaol term of over one year. There are some elements of discretion prevailing under Direction 21 but there are no compulsory balancing criteria required. For example, the rule applies despite evidence of mental illness or the effect on the deportee's children and family who remain in Australia. Examples include the publicised cases of Mr Ali Tastan, who suffered severe schizophrenia but was deported to Turkey after 30 years in Australia, and Mr Robert Jovicic, who, despite being mentally ill, was deported to Serbia after having lived in Australia since he was two years old. Both of these men were eventually allowed to return to Australia as a result of significant diplomatic pressure from the countries of origin and another exercise of ministerial discretion by the new minister, Senator Evans (Topsfield 2008).²⁴

The decision to cancel long-term visas on character grounds was challenged by the Full Federal Court in 2005. The Court said that it was wrong to banish permanent residents who were only aliens 'by the barest threads'.²⁵ The Ombudsman's 2006 report recommended that the use of section 501 to cancel permanent residency should not be applied to people who arrived as minors and stayed for more than 10 years (Ombudsman 2006, p. 2).

Despite these findings, in the case of *Nystrom* in 2006, the High Court held that 33-year-old Mr Stephan Nystrom could be deported to Sweden despite his having lived in Australia all his life except for the 27 days after his birth in Sweden when his mother was on a holiday.²⁶ Mr Nystrom had a string of criminal convictions, including aggravated rape committed as a teenager. In the absence of any legal human rights protection for non-citizens at the Commonwealth level, the High Court found that the minister had the executive power to deport felons, so long as their parents had not taken out citizenship for their child. A citizen cannot be deported no matter what their criminal record may be.

Another development in the past decade has been the use of section 501 in suspected immigration fraud cases. It is an offence under the Migration Act to give false information or provide false documents in an immigration matter (for example section 234). However, instead of charging people with an offence, the suspected person's visa is sometimes cancelled on character grounds under section 501.²⁷ The increase in such cases has led some migration lawyers to raise concerns that there could be a bias against some individuals because DIAC officials believe certain caseloads are more likely to attempt immigration fraud (AAP 2008).²⁸ Again, the concern is that section 501 is being used as an expeditious alternative to remove persons that would otherwise be able to access a more rigorous appeal process.

²⁴ See further J Burnside 'Citizens' rights and the rule of law in a civil society: not just yet' (1998). See also J Topsfield, 'Deportee left to wander the mean streets of Ankara' (2005); and D Carrick, 'Deporting non-citizen criminals' (2006).

²⁵ *N v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 at 1.

²⁶ *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50.

²⁷ For example, *Fanchon and MIAC* [2008] AATA 20.

²⁸ For example, *Scorgie v Minister for Immigration and Citizenship* [2008] FCAFC 101.

2.9 Conclusion: review or repeal?

After surveying 10 years of the operation of section 501, it is clear that there needs to be an evaluation of its use. It is possible that there is a need for a discretionary mechanism in the Migration Act to deal with issues of character in relation to non-citizens but this is a case that needs to be made. Were a case to be made, the findings of this chapter suggest that such a mechanism would need to have the following four features in order to be effective:

- the person who exercised the power should be identifiable
- clearly-stated guidelines for the exercise of powers should be available, preferably in the primary legislation
- reasons should be given when a power is exercised, and
- some form of external review should be available (Human Rights Commission 1985, p. 64).

Currently, none of these criteria is being met by the character test in section 501. It is often difficult to know who was responsible for a particular character decision, DIAC, ASIO, the Immigration Minister or even the Foreign Minister. The Commonwealth Ombudsman has directed that the relevant guidelines be revised. Decisions to refuse people, both onshore and offshore, are being taken at an increased volume and are being made by the minister or delegate under the exercise of discretion and on the basis of subjective criteria, which is impacting on an applicant's ability to have refusals reviewed on the merits. Judicial review exists for those non-citizens who are onshore and have managed to engage the Australian legal process, but it is problematic and expensive. Character testing is interacting with counter-terrorism laws in unanticipated ways. Finally, new classes of applicants such as long-term residents are being subjected to deportation in a manner that was unforeseen in 1998.

It is time to evaluate whether the review or repeal of section 501 of the Migration Act is necessary.

3. ASIO and the *Migration Act 1958* (Cth)

3.1 Introduction: Is ASIO a good judge of character?

This chapter considers the impact of character in assessments of non-citizens made by ASIO under the Migration Act. The following questions are considered:

- How are ASIO assessments relevant to character decisions under the Migration Act? For example, under what provisions might ASIO trigger or compel a visa refusal/cancellation?
- How often are visas refused or cancelled based on ASIO assessments?
- What are the grounds on which ASIO may issue an adverse assessment, and do these grounds represent a character test?
- What appeal or review rights are available to those who receive an adverse assessment and any decision based thereon?

The chapter also provides case studies of the adverse ASIO assessments of two Iraqis on Nauru and of US activist Scott Parkin. Barrister Julian Burnside QC and solicitor Anne Gooley combined the situation of these three litigants to launch a public interest test case in the Federal Court. The chapter goes on to describe the ongoing court battle between these three people and ASIO about whether a person has the right to see adverse ASIO files relating to them. The case highlights the procedural difficulties of the current process. The case will set a legal precedent if the applicants succeed in gaining access to their files, but this will not necessarily lead to increased transparency in the decision-making process.

It should be emphasised that in contrast to character refusals under the operation of section 501 discussed in Chapter 2, adverse ASIO assessments are rare occurrences. In 2006–07, ASIO completed 53 387 security assessments in relation to individuals seeking entry to Australia and issued only seven adverse findings (ASIO 2008, p. 30). The internal process ASIO follows in making an assessment is not public, but presumably follows the principles set out in the *Australian Government Protective Security Manual*.

This paper is not arguing that ASIO should not undertake national security assessments of applicants who wish to enter Australia. Rather, it focuses on how these assessments are made and what accountability mechanisms are in place. This is especially relevant now as the new citizenship laws and new employment requirements in critical industries incorporate ASIO assessments (see Chapter 4). ASIO reports that the volume of clearance work has been increasing steadily and the agency will soon also face an additional caseload from the recent changes to the citizenship laws (ASIO 2008, p. 5).

3.2 ASIO assessments under the Migration Act — character testing?

The Migration Act provisions require ASIO to determine whether a person seeking to enter Australia is a risk to national security. For example, an ASIO clearance can be refused on national security grounds because a person is judged capable of

committing an act of ‘politically motivated violence’ in the future. There are also overtly political grounds; for example, the Foreign Minister might consider that a person will prejudice Australia’s foreign relations, or has some tenuous relationship with weapons of mass destruction (a post-Iraq amendment). In these circumstances, the Foreign Minister does have the power to cancel visas (rather than veto decisions) under section 116 of the Migration Act as prescribed by regulation 2.43 and the Immigration Minister has no power to overturn this decision.

ASIO would argue strongly that their security assessments are not character tests. Although in the different context of unauthorised arrivals, a rare insight into the role of ASIO in migration-related assessments was gained through a parliamentary process in August 2002. In the course of this inquiry, then Director-General of ASIO, Mr Dennis Richardson, explained that boat people were not seen by the agency as a terrorist threat after a review of 6 000 boat arrivals:

ASIO’s role in the processing of illegal arrivals is to provide security assessments. We do not do character checks, nor do we make assessments on character grounds. That is the responsibility of the Department of Immigration. ASIO’s security assessments are designed to ascertain whether someone poses a direct or indirect threat to Australia’s security, being defined in the ASIO Act as:

- (i) espionage;
- (ii) sabotage;
- (iii) politically motivated violence;
- (iv) promotion of communal violence;
- (v) attacks on Australia’s defence system; or
- (vi) acts of foreign interference (Richardson 2002, p. 35).

The argument advanced by this paper is, however, that when an ASIO official is making a determination as to whether a person is likely to engage in a future act or threat of politically-motivated violence in particular, questions of character are raised. Reflecting the High Court discussion of ‘fit and proper person’ in the *Bond* case, ASIO is presumably undertaking its assessment based on a combination of a person’s history of criminal conduct and general conduct, including patterns of behaviour and isolated incidents, and thus making a prediction about how a person is likely to behave in the future. The scope and rigour of the inquiry will depend on what information is available to ASIO through intelligence sources and will be influenced by the general security risks Australia is facing at the time.

3.3 ASIO assessments and offshore applications

There is a difference in the way ASIO applies assessments to people outside Australian territory trying to get in and to those who are already here. A person offshore might apply for a visa, fulfil the health requirements and be selected for a place in the program, but then receive an adverse ASIO assessment. Where an applicant fails an ASIO clearance in this situation, they have no recourse to appeal the decision either under international or Australian law and there is no obligation on Australia’s part to receive them as immigrants, not even under the offshore refugee

and humanitarian program. A non-citizen cannot apply to the Administrative Appeals Tribunal (AAT) for merits review.²⁹

The only recourse left to an offshore person is to lodge a complaint to the Inspector-General of Intelligence and Security (IGIS), currently Mr Ian Carnell. The IGIS is a reviewer of the security agencies with strong coercive powers, similar to a Royal Commission (except for a contempt power). The IGIS generally conducts inspections of agency activities and can also investigate complaints. While this level of formal scrutiny offers reassurance, it is notable that the only accountability mechanism in this situation can offer no substantial justification or criticism of ASIO's actions beyond ascertaining that they are procedurally sound. The current IGIS also examines the propriety of decisions, such as procedural fairness, proportionality and integrity of assessments (IGIS 2007). In many ways, the IGIS fulfils the same type of function as judicial review. An example of the complaint lodged by Mr Rhuhel Ahmed is given below (see box).

The character of Mr Rhuhel Ahmed

The IGIS made an inquiry into ASIO's assessment of Mr Rhuhel Ahmed on 12 March 2007. Mr Ahmed, a UK national, planned to visit Australia to promote the release of a new film, *The Road to Guantanamo*. The film recounts the story of Mr Ahmed and two fellow UK nationals who were captured in Afghanistan in 2001 and subsequently detained in the US complex located at Guantanamo Bay, Cuba, until their eventual release in March 2004. Mr Ahmed's visa was refused on the basis of an adverse security assessment by ASIO. The IGIS found that the assessment was properly made (IGIS 2008), but did not elaborate on the information or rationale behind the decision, presumably for reasons of national security.

The previous IGIS, Mr William Blick, recommended that at least refugee applicants be allowed access to the AAT for merits review (IGIS 2007). Refugee and humanitarian cases pose a particular dilemma. When people are on Australian territory or under Australia's effective control, the potential risk they might pose to the national security of Australia is obviously more pronounced. However, Australia faces additional obligations under international law that require it to comply with treaties covering the right of all persons not to be detained without trial and not to be deported back to torture or persecution.³⁰ How these two factors work together in practice is not always clear-cut. Two Iraqi asylum seekers, Mr Mohammed Sagar and Mr Muhammad Faisal, became caught in the middle of a politically-generated legal black hole when they were not on Australian territory but rather were detained by Australia on Nauru and could not return to their countries of origin (see box below).

The refugee process itself already allows for people to be rejected on the grounds that they present a serious danger to the host state.³¹ The 1951 Refugee Convention does not consider the possibility that a signatory state will exclude a refugee who has not committed a serious crime, especially when that refusal will result in the indefinite detention of a refugee, an act also in breach of the Convention. The predicament of Mr Sagar and Mr Faisal was unique to Australia.

²⁹ *Leghaei v Director-General of Security* [2005] FCA 1576.

³⁰ Note Articles 9(1) and 10(1) of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the Convention against Torture (CAT).

³¹ Article 1F(2)(b), 1951 United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954.

The characters of Mr Mohammed Faisal al Delimi and Mr Muhammad Sagar

Mr Faisal and Mr Sagar were among more than 1 500 asylum seekers held on Nauru or Papua New Guinea's Manus Island as part of an immigration strategy by Australia aimed at deterring others from trying to reach the country's mainland. The strategy was introduced in 2001 after a Norwegian freighter, the MV Tampa, rescued 433 asylum seekers from a leaking Indonesian fishing boat off the north-western coast of Australia, but was then denied permission to land those people in Australia.³²

By 2006, the claims of nearly all of the asylum seekers who had been on Nauru since 2001 had been processed and they had been accepted either into Australia or another country or they had returned voluntarily to their countries of origin. However, Mr Faisal and Mr Sagar, who had arrived in 2001, were recognised as refugees by the Immigration Department in September 2005 but were refused residence in Australia following their ASIO assessments. The decision effectively gave the two men a choice between detention on Nauru or returning to Iraq, where Australia acknowledged they faced a real danger of persecution.

Michael Gordon of The Age newspaper charted the mental state of the men over the six years of their detention.³³ In one article, he quotes Mr Sagar as stating in 2006:

People tell me they wish me a happy life and that this would end. I say, 'I don't want to be happy. I just want my life back ... whether it would be happy or sad doesn't matter. I just want it back' (2006d).

Gordon goes on to ask a question:

How can a country that prides itself on upholding principles of natural justice and the rule of law tolerate a situation where two men are detained for five years without being told what they are accused of? (2006d)

The detention of the two men ended in 2007. After Australian immigration authorities initially refused to grant a visa to Mr Faisal, citing an assessment by intelligence officials that he posed a security risk, he became suicidal. He was transferred to a psychiatric hospital in Brisbane in August 2006. After arriving in Australia, Mr Faisal was able to lodge a fresh visa application and a re-assessment by intelligence officials cleared him of posing any security threat. He was granted a permanent visa in February 2007 (UN News Centre 2007).

Mr Sagar however, was 'left on Nauru' — the title of his website, which recorded his time on the island as the 'forgotten man' (Gordon 2006d). In February 2007, he finally left Nauru after the UNHCR arranged a resettlement place for him in a 'Scandinavian country' (UN News Centre 2007). The grounds of his adverse security assessment were never revealed and the matter was never resolved. The ongoing court case over the rights of these men to see the grounds of their adverse ASIO assessments is examined below.

3.4 ASIO assessments and onshore applications

This section considers the process of ASIO assessments relevant to a person on Australian territory (an 'onshore' application). As noted above, there are advantages to being an onshore applicant because the person can instigate review rights additional to a complaint to the IGIS. But there are also disadvantages because, like section 501, an adverse ASIO assessment can trigger the automatic cancellation of a visa and

³² See further D Marr and M Wilkinson, *Dark Victory* (2003).

³³ See further M Gordon, 'Living in Limbo'; 'Nauru sets record refugee visa free'; 'Will this man lose the will to live'; 'Last man standing'; 'Last Nauru detainee's agony ends' (2006).

therefore lead to detention and deportation. The case of US activist Scott Parkin in 2005 provides a recent example of an onshore case (see box below).

In Mr Parkin's case, the applicable law states that an applicant for a tourist visa must meet certain public interest criteria and the minister must be satisfied that the granting of the visa is in the national interest. The public interest criteria are set out in Schedule 4 of the Migration Regulations 1994, 'Public interest criteria and related provisions 4002'. They require that the applicant 'is not assessed by the competent Australian authorities (usually ASIO) to be directly or indirectly a risk to Australian national security'. Eventually, it was revealed that Scott Parkin's visa was cancelled under subsection 116(3) of the Migration Act as prescribed by Migration Regulation 2.43 after ASIO made an adverse security assessment against him.

As a result, the Immigration Minister effectively had no choice but to cancel the visa. This was confirmed in *Tian v MIMIA* [2004] FCAFC 238, where their Honours found:

Section 116(3) does not permit the Minister to exercise any discretion at all. If the prescribed circumstances exist, and they are the circumstances provided for in regulation 2.43(2), the Minister must cancel the visa. In our opinion, the words of the section are clear. The subsection is mandatory. No discretion arises if the prescribed circumstances referred to in s 116(3) and provided for in regulation 2.43(2) exist. The Minister must cancel the visa.

Mr Scott Parkin

According to the Friends of Scott Parkin website, Scott Parkin is a 'stand-up' guy from Houston, Texas. He is described as a 'grass-roots environmental and peace activist with the organisation Houston Global Awareness Collective (HGAC) with a Masters thesis in history'. The reported aim of his visit to Australia was to continue the HGAC's campaign to expose Halliburton's support for the occupation of Iraq (Topsfield 2005). On a tourist visa, Parkin participated in a protest in Sydney during the Forbes Global CEO Conference in September 2005, organising a piece of street theatre outside the Australian headquarters of Kellogg Brown & Root (KBR), a subsidiary of Halliburton. Halliburton is an oil services company, which received a substantial share of the contracts to rebuild Iraq (Topsfield 2005a).

On 10 September 2005, after breakfast at a Melbourne café, Mr Parkin was arrested by six officials from the AFP and the Immigration Department. He was held in solitary confinement for five days in the Melbourne Assessment Prison for 'questioning detention' and deported back to the US on 15 September 2005 (Jackson 2005, p. 3). US authorities did not take any action against Mr Parkin (Jackson 2005, p. 3).

Mr Parkin was never questioned by ASIO or charged by the AFP in relation to a particular offence. He was not detained or questioned by US authorities upon his return to America.

3.5 Appealing an ASIO adverse assessment

The grounds on which an adverse assessment can be made by ASIO have been considered. This section considers appeal rights. Appealing an adverse ASIO assessment is very difficult for a non-citizen; only Australian citizens are entitled to the reasons behind an adverse assessment of their character.³⁴ The attempts by Mr

³⁴ *Australian Security Intelligence Organisation Act 1979*, sections 37(2) and 38(2)(b).

Scott Parkin, deported US activist, and the two Iraqi asylum seekers on Nauru to seek access to the grounds of their adverse ASIO assessments in a joint legal action is examined in some detail below.

As evidenced by the Street review into the operation of ASIO (Street *et al* 2008), it is difficult, for a variety of reasons, to be confident that ASIO always gets assessments right. Australia is often forced to rely on the security agencies of other countries (Flood 2004), although this is a debate outside the scope of this paper. Nevertheless, regardless of whether or not ASIO makes meritorious decisions, those decisions resulting in adverse assessments are problematic because neither the applicant nor the AAT is entitled to obtain the material on which the assessments are made. ASIO would argue that review by the IGIS and the Security Appeals Division of the AAT is sufficient. Australian courts have also held that the intelligence agencies, including ASIO, are subject to judicial review and must abide by natural justice.³⁵

However, in reality, it is difficult to obtain the information necessary to prove that an intelligence agency is acting improperly, and courts often find themselves incapable of assessing security risks (Bush 2008, p. 80). ASIO and the IGIS are exempt from the operation of the *Freedom of Information Act 1982 (Cth)* (FoI Act) and other Commonwealth agencies are exempt ‘in relation to a document that has originated with, or has been received from’ ASIO or the IGIS.³⁶ This lack of access to adverse information denies an applicant any meaningful opportunity to present a case against a visa refusal, a circumstance that is examined further in the landmark ongoing case of *Parkin v O’Sullivan* below.

3.6 The Parkin case: testing the parameters

The Federal Court decision in *Parkin v O’Sullivan* [2007] FCA 1647, allowing the release of adverse ASIO security assessments in the discovery process, is an historic precedent. The judgment was upheld by the Full Federal Court in July 2008. The case involved the deportation of US activist Scott Parkin on 15 September 2005, and the non-acceptance into Australia from Nauru of two asylum seekers, Mr Mohammed Sagar and Mr Muhammad Faisal. As described above, Mr Faisal and Mr Sagar were recognised as refugees by the DIAC in September 2005 but refused residence in Australia after their ASIO assessments. Barrister Julian Burnside QC and solicitor Anne Gooley combined the situation of the three litigants in a public-interest test case in the Federal Court.

The ASIO Act does not prohibit a court from ordering discovery of an adverse security assessment. The Director-General of ASIO, Paul O’Sullivan, argued however that the intention of the Act is to preclude a non-citizen, who is the subject of an adverse security assessment, from receiving a copy of the assessment and the material relied on in preparing it or from having that assessment reviewed by the AAT. This, he submitted, should be taken into account when determining whether the court should exercise its discretion to order discovery. During the hearing, the barrister for ASIO confirmed that the men themselves might genuinely have no

³⁵ *The Church of Scientology v. Woodward* (1983), 57 ALJR 42.

³⁶ *Freedom of Information Act 1982 (Cth)*, section 7(2A), schedule 2, part 1.

knowledge of the grounds for their adverse assessments, because these might have been due to their ‘associations’ in their home countries.³⁷

Justice Sundberg found in the original 2006 hearing that:

The applicants’ claim is that they have done nothing to justify their security assessments. Therefore ASIO must be wrong to conclude that they are security threats. In order to demonstrate this to a court they need to understand why and on what basis ASIO has formed the view that it has. It stands to reason that they do not yet have the evidence to demonstrate this; that is why they have sought discovery. The Director-General’s argument is circular. It is, in effect, that because the applicants do not have the evidence they need, they therefore have no case and so do not need that evidence. In the circumstances of these applicants, it is not possible to say whether they do or do not have any chance of making out a good case. It would be premature at this stage to say that there is no live issue between the parties.³⁸

Justice Sundberg determined that the ASIO Act does not prohibit the discovery of an adverse security assessment. Discovery would not involve impermissible ‘fishing’ for information. He exercised his discretion to allow discovery, thus obliging ASIO to compile a list of the documents in their possession and provide it to the applicants. Justice Sundberg held that the parties were to agree on orders allowing access, by 17 November 2006. If they were not able to reach a solution, each party was required to file a written submission to the court by 1 December 2006.

On 28 November 2006, ASIO was granted leave to appeal this decision after lawyers for the security agency argued that providing a list of documents relevant to the Parkin, Sagar and Faisal case would cause ‘irreparable harm’ to Australia’s national security.³⁹ On 22 May 2007, the Full Bench of the Federal Court revoked ASIO’s leave to appeal and ordered that the matters be heard by the primary judge.⁴⁰

On 2 November 2007, primary judge Justice Sundberg again ordered discovery of documents related to the case, including Mr Parkin’s adverse security assessment. This was a classified ASIO ‘determination’ setting out the criteria applied to the security assessment and the records of ASIO’s advice to the Minister for Immigration, which led to the cancellation of Mr Parkin’s visa.⁴¹ ASIO’s appeal of the order was heard by the Full Federal Court in Melbourne on 28 February 2008 and Justices Ryan, North and Jessup handed down their decision on 18 July.⁴² ASIO lost the appeal on the basis that the applicants were not engaged in impermissible ‘fishing’ for information using the discovery process, but were instead trying to ascertain the basic elements of the case against them. The court therefore ordered ASIO to comply with the original discovery request. The decision could determine the parameters of discovery and ‘due process’ in this area if allowed to stand. ASIO is now considering an appeal to the High Court.

³⁷ Communication with A. Gooley, 16 May 2008.

³⁸ *Parkin v O’Sullivan* [2006] FCA 1413.

³⁹ *O’Sullivan v Parkin* [2006] FCA 1654.

⁴⁰ *Parkin v O’Sullivan* [2007] FCA 1647.

⁴¹ *Parkin v O’Sullivan* [2007] FCA 1647.

⁴² *O’Sullivan v Parkin* [2008] FCAFC 134.

Although the case may set a precedent, there are six important limitations to note. These factors are important to the issue of character because they go to the heart of whether a person's character, once impugned by an intelligence agency, can be rehabilitated by accessing the courts.

1. The case applies only to the discovery process, which is subject to judicial discretion. Discovery is the pre-trial process where each party has to present to the other a full list of documents and witnesses that might be relevant to the case.
2. Discovery is not the same thing as production. It may be that a litigant is entitled to know what documents exist relevant to a dispute, but the litigant cannot compel production of those documents.
3. Production may not be to the litigant. A court may place confidentiality orders on the production of the discovered material, which may exclude the litigant him or herself from access but at least allow their lawyer or the judge to see the material.
4. The Attorney-General, using the discretion pertaining to the position, can prevent the assessments being provided under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (section 38F).
5. In situations where the assessments are finally disclosed, ASIO need only provide evidence that they perceived a risk to national security from a particular applicant. National security is extremely broadly defined in the legislation. ASIO does not have to prove criminal conduct of any kind.
6. Even if, at last, the litigant sees the documents and is exonerated by a court or tribunal, the intense media speculation around these cases may mean that permanent damage to that person's reputation has been done (Gooley 2007, p. 9).

Moreover, even where there is a final High Court judgment against ASIO for discovery, the same long legal process could be commenced over the production of the documents. Legal processes are slow, which can be an important consideration if a client is in detention pending the outcome of a case. It may be more productive to investigate new ways of communicating the basic facts of the case against them to an applicant or their representative without divulging national security information.

The IGIS and Scott Parkin

The courts were not the only sources of scrutiny in these three cases. The IGIS has, pursuant to subsection 8(1) of the *Inspector-General of Intelligence and Security Act 1986* (Cth), conducted an investigation into the treatment of Mr Parkin by ASIO. The report of that investigation is dated 29 November 2005 and concludes:

- (a) ASIO did not have, at the relevant time, information which would have justified recommending against the grant of a visa and took a close interest in Mr Parkin because of information received about his activities once he was in Australia.

- (b) There is no evidence or reason to think that ASIO's security assessment in respect of Mr Parkin was influenced from elsewhere within the Australian Government or by external bodies.
- (c) The security assessment [after his arrival in Australia] was based on credible and reliable information and the legislative requirements were met.
- (d) ASIO did not act improperly in the course of speaking to Mr Parkin about the possibility of an interview with him (2005, p.96).

This finding by the IGIS suggests an uncertain outcome for the applicants. The Commonwealth will not be compelled to give them visas even in the situation that they are successful in seeing the adverse ASIO reports and in proving jurisdictional error. Under section 501 of the Migration Act, the Immigration Minister has complete discretion to refuse a person a visa on character grounds (see Chapter 2).

3.7 Conclusion: the need for accountability

This chapter has argued that, despite ASIO's disavowal, the ASIO assessment regime involves character issues and the process therefore requires greater transparency as to its operation. A more serious issue is the denial of natural justice when a person challenges an adverse assessment. Although the number of cases of adverse ASIO assessments is low, the impact on individuals so assessed is severe, as shown by the cases of Mr Parkin and the Iraqi refugees on Nauru.

Despite this, when the citizenship laws were revamped in 2007, many aspects of character testing under the migration regime, especially the increased role of ASIO, were imported into the new Citizenship Act. The next chapter outlines some problems that may arise as a result of this development.

4. Character and Australian citizens

4.1 Introduction: re-examining the character of Australian citizens

The previous two chapters looked at the ways in which the Australian Government tests the character of non-citizens. Over the last decade, the introduction of character testing into areas of the law affecting permanent residents and citizens has constituted a significant new phase.

The first half of this chapter outlines the major changes made in 2007 to the citizenship laws under the *Australian Citizenship Act 2007* (Cth) (the ‘new Citizenship Act’), which is now the legal basis for all citizenship provisions. The new regime has introduced a number of changes but this chapter is primarily concerned with the impact of the stringent character checks in home countries on those who apply for citizenship and the incorporation of ministerial discretion into character testing.

Character testing potential new citizens

There has been a ‘good character’ requirement in citizenship applications in Australian law since 1948. In the new Act, the phrase has been left undefined, despite a clear recommendation from a Senate inquiry into the *Provisions of the Australian Citizenship Bill 2005 and the Australian Citizenship (Transitional and Consequential) Bill 2005* to align the new test with the provisions of the Migration Act. This has left open a question as to whether character, for the purposes of citizenship, may be judged by an even higher standard than the current stringent migration tests, because the context of good character as an eligibility requirement of citizenship is central to the new Act.⁴³ The new Australian Citizenship Instructions are clear that the standard is now different but they give no guidance as to how it is different.

The new tests incorporate a strong national security element and were announced in the context of counter-terrorism measures (Howard 2005), strengthening the links between character tests and status-based terrorist offences. They include ministerial discretion and ASIO assessments, thus giving rise to the same concerns about natural justice and due process explained in the preceding chapters.

Character testing citizens in critical industries: aviation and maritime workers

The second half of this chapter looks at the new checks applicable to transport and maritime security workers, a trend which strengthens the argument that character issues will increasingly affect Australian citizens. From 1998 anyone who seeks to work in protected areas of Australian airports or as a pilot must obtain an Aviation Security Identification Card (ASIC). In order to receive one of these cards, a person must undergo a series of background checks, which include a police record check, a DIAC unlawful citizen check and an ASIO security clearance. The process, now known as AusCheck, has also applied to maritime workers since 2005. Serious concerns were raised in Parliament about the sensitive personal information that would be gathered and stored by the AusCheck process and for what other purposes it might be used. The ASIO clearance required by these checks is also controversial.

⁴³ See *Re Minar v Minister for Immigration and Multicultural Affairs* (1997) 48 ALD 771.

4.2 The 2007 citizenship changes

The process and requirements for a foreign-born person to become an Australian citizen—that is, to be ‘naturalised’—are governed by the Commonwealth under section 51(19) of the Australian Constitution, which gives Parliament the power to make laws with respect to ‘naturalization and aliens’.

Historically, the grant of Australian citizenship incorporated ministerial discretion, permanent residency requirements, age requirements, English language proficiency and adequate knowledge of the responsibilities and privileges of Australian citizenship in addition to the good character requirement.⁴⁴ However, many of these core requirements operate in different ways under the new Citizenship Act, particularly because of the addition of national security requirements.

The new regime has introduced three main changes:

1. extension of the period of permanent residency before citizenship to four years
2. more stringent character checks in home countries on people applying for citizenship, incorporating ministerial discretion and ASIO clearances
3. the introduction of a compulsory multiple choice citizenship test.

These three changes are discussed in turn below.

Residency

The residency requirements for Australian citizenship under the new Citizenship Act stipulate that applicants will need:

- four years of lawful residence in Australia immediately prior to making the application for Australian citizenship, with at least 12 months as a permanent resident
- no more than a total of 12 months of absence from Australia during the four years prior to application, and no more than three months of absence during the 12 month permanent residency period prior to application.

The proposal to extend the period of permanent residency to four years before citizenship eligibility was uncontroversial. Australia’s residency requirements ‘compare favourably with other countries, which require longer periods of residence before a person is entitled to citizenship’ (Rubenstein 2002, p. 109). Nonetheless, because refugees who arrive by boat have been on rolling Temporary Protection Visas for many years, they will have to wait a further year as a permanent resident for citizenship.

⁴⁴ Section 13 of the *Australian Citizenship Act 1948*, entitled ‘Grant of Australian citizenship’.

New character requirements

Subsection 13(f) of the new Citizenship Act imposes a ‘good character’ requirement requiring a person to satisfy the minister that they are of ‘good character’ before they can be granted Australian citizenship. There are frequent references to character tests throughout the Act but no definition of what constitutes ‘good character’. DIAC directs decision-makers to be guided by the ‘ordinary use of the words in making assessments’. Decision-makers are told that ‘an applicant may be presumed to be of good character unless there is evidence to the contrary’, typically a serious criminal record. Section 13(11) prevents the minister from granting citizenship to someone serving a prison sentence for a serious offence, a prohibition that continues for some time after the sentence is over. But DIAC states that ‘general conduct and associations may also be relevant’ (emphasis added).⁴⁵

The new citizenship test

If a person does not have Australian parents, part of the requirement for citizenship under the new Citizenship Act is passing a citizenship test. The citizenship test is relevant to questions about character as it is clearly designed to promote certain Australian values, and to assess the suitability of applicants for Australian life. Critics have argued that citizenship testing was established in order to exclude certain kinds of people and that it disadvantages non-English-speaking migrants (Grattan 2008). The first two government reports on the test appear to confirm this assertion, documenting the high failure rates amongst the most recently arrived refugee communities from Iraq and Afghanistan (DIAC 2008). The Rudd Government appointed an independent committee to conduct a review of the Australian citizenship test in April 2008.⁴⁶

Waleed Aly has commented that the test seems to have been designed by the Howard Government to deliver ‘contradictory messages’, demanding both ‘greater integration from migrants, yet making the barriers to obtaining citizenship higher’:

The tests would ask pointless questions about Don Bradman and Phar Lap, not because this assisted migrants with integration in any practical way, but because it was intended to send a symbolic message to a specific constituency in the electorate. A sector that seeks reassurance that the only migrants who will make it through are the good ones (Aly 2008).

4.3 Questions about character tests in the new citizenship laws

In the absence of a definition of good character, it is uncertain what form the test will take under the new citizenship laws and whether it will be different from the section 501 test in the Migration Act. In the case of *Re Kakar*, the AAT said that, in the context of the old *Australian Citizenship Act 1948* (Cth), the term ‘character’ ‘refers to the enduring moral qualities of the person ... and involves a comparison between his attributes and the reasonable and ordinary standards of behaviour and social conduct found within the Australian community’.⁴⁷ This broad definition provides no

⁴⁵ Previous guidelines were provided in DIAC’s Australian Citizenship Instructions 5.4, and the Ministerial Series Instruction, *The character requirement: Instructions exempt from public disclosure*.

⁴⁶ See further <http://www.citizenshiptestreview.gov.au/index.htm>.

⁴⁷ *Re Kakar and Minister for Immigration and Multicultural Affairs* [2002] AATA 132.

guidance as to what the courts will now decide in relation to the standard and content of the character test for new citizens.

Ministerial discretion, character tests and ASIO clearances were the subject of heated debate during Senate scrutiny of the new citizenship laws (Senate Legal and Constitutional Affairs 2006). A point that was not canvassed directly by the senators involved the number and type of character refusals at the citizenship application level. These cases should be rare because people with a substantial criminal record or people Australia felt were security threats would not reach the stage of permanent residency, or even admission to Australia. Instead, they would be excluded by the operation of the minimal character requirements and criminal deportation provisions of the Migration Act. Therefore, the changes to the new Citizenship Act would be invoked only infrequently to catch people who might have fallen through the gap due to earlier, more lenient immigration policies. The existence of the character test at the citizenship stage represents the last opportunity for the Australian Government to deport a person (Forrester 2007, p. 27).

4.4 The new role of national security in citizenship

After the 11 September 2001 attacks in the US, the Howard Government felt the need to tighten the national security aspects of the citizenship regime, especially in the context of passport security (Sydney Morning Herald 2005). As part of its policy platform for the 2004 federal election, the Coalition pledged to '[e]nhance Australia's Border Control Systems by strengthening ASIO's capacity to undertake background security checks on persons seeking to lawfully enter Australia' (Howard 2004). It was also at this time that the Government committed to background checks for pilots and aviation and maritime workers, which resulted in the new AusCheck regime examined in detail below.

The new Citizenship Act prohibits the minister approving applications from those assessed by ASIO to be direct or indirect risks to Australia's security, a prohibition applying to all applications whether they relate to citizenship by descent, by conferral or by resumption.

'National security offence' is defined in section 3 of the Act as:

- (a) an offence against Part II or VII of the *Crimes Act 1914*; or
- (b) an offence against Division 72 of the *Criminal Code*; or
- (c) an offence against Part 5.1, 5.2 or 5.3 of the *Criminal Code*; or
- (d) an offence against the *Australian Security Intelligence Organisation Act 1979*; or
- (e) an offence against the *Intelligence Services Act 2001*; or
- (f) an offence covered by a determination in force under section 6A.

The offences referred to in (a), (b) and (c) include offences against the government (treachery, sabotage) plus disclosure of official secrets, possession of explosives and

lethal devices, sedition and treason, espionage and terrorism. Sedition and many of the terrorism offences have been very widely defined.

Despite the breadth of the offences listed, it is paragraph (f) that is the most problematic as it permits the Attorney-General to decide what constitutes a national security offence on a rolling basis, even after an application has been made but not yet decided.

A person whose actions are caught by such a determination from the Attorney-General can apply to the AAT for a review of the adverse security assessment.⁴⁸ As noted above, however, there are claims that assessments involving national security issues are ‘virtually impossible to challenge because of the lack of information made available to the subject and their legal team’ (Kerr 2005, p. 4).

For example, the Attorney-General can, for security reasons, certify that a person is either not to be notified of an adverse security assessment or not to be informed of the grounds for such an assessment.⁴⁹ Senator Nettle claimed that the regime ‘effectively gives ASIO the power to decide who can and can’t become a citizen’ (Kerr 2005, p. 4).

This points to the need for a different debate about the accountability of intelligence information in Australia, a debate which Liberal MP Petro Georgiou has recently attempted to begin via the introduction of a Private Member’s Bill in early 2008 (Independent Reviewer of Terrorism Laws Bill 2008). This Bill, based on the UK model, aimed to establish a new independent statutory office to review terrorism laws based on the UK model (Georgiou 2008). The Bill did not receive support from the new Rudd Government.

4.5 The political context of character testing in citizenship

Decisions about the character of permanent residents and their suitability for citizenship are taken in the context of both the national security outlook and the current political perspective. The politics of the issue of character testing became apparent during the passage of the citizenship bills through Parliament. During the debate, the need for the new character requirements was deliberated using the controversial example of Sheik Al-Hilali. The idea put forward by Coalition speakers was that the early deportation of the Sheik would have solved the problem of divisive speech, sexism and racism in the Australian Muslim community. Mr Alan Cadman MP made several strong suggestions in the House of Representatives that the Sheik deserved to be deported because he should never have been made a citizen and did not properly take the oath (Cadman 2006).

The debates highlighted a certain double-standard with regard to the behaviour of citizens from a migrant background compared to that of other citizens. Mr Alan Cadman MP has remarked:

Cronulla was not an accident: Cronulla was a process whereby a group of people failed to understand their commitment and responsibilities and the privileges of being Australian (Cadman 2006, p. 14).

⁴⁸ See section 54 of the ASIO Act.

⁴⁹ See subsection 38(2) of the ASIO Act.

It is notable that Mr Cadman thought only the Muslims involved in the Cronulla riots had failed their citizenship oath.

Dealing with divisive speech

It is important to question the logic that defines divisive speech as a reason for deportation based on loosely-defined character grounds. This is particularly important in a political environment where Muslim Australians and non-citizens are singled out for discriminatory treatment as a Human Rights and Equal Opportunity Commission (HREOC) *IsmaÚ (Listen)* report found in 2004 (HREOC 2004). The majority of the 1 423 participants in the *IsmaÚ* survey reported experiencing various forms of prejudice because of their race or religion and these experiences increased after international incidents such as the attacks of 11 September 2001 and the October 2002 Bali bombings. The displays of prejudice were further exacerbated by particular national and local events such as public debates over asylum seekers and the trial, conviction and sentencing of gang-rapists in Sydney in 2001–2002. Such experiences ranged from offensive remarks about race or religion to physical violence (HREOC 2004, p. 3).

In the highly symbolic terrain of citizenship laws, it is important to be aware of any possibility of discrimination or negative messaging towards those people Australia is encouraging to become citizens. The next section analyses how changes in the national security framework have prompted new vetting measures aimed at assessing the character of Australian citizens. This has taken the form of the AusCheck scheme, which relates to workers in the aviation and maritime industries.

4.6 Testing the character of aviation and maritime workers

In the post-11 September world, measures to ensure aviation security have become more stringent. The desire of government to assert greater control over airports and docks has had repercussions for Australian citizens and those on work visas in critical transport industries. In 2006, a Parliamentary Committee reviewing aviation security stated that:

Two frontline areas that underpin aviation security are the proper character of aviation industry personnel established through sound background security checks and the control of secure airport areas (Joint Committee of Public Accounts and Audit 2006, p. 2).

Since 1998, anyone who wants to work in protected areas of Australian airports or become a pilot must obtain an Aviation Security Identification Card (ASIC). This scheme was tightened in 2005 and became the ‘AusCheck scheme’ in September 2007. The Secretary of the Attorney-General’s Department has delegated decision making functions under the *AusCheck Act 2007* to officers within AusCheck, which is a division of the Attorney-General’s Department. To be considered eligible for an ASIC card, a person must undergo a series of background checks, which include a police record check, a DIAC unlawful citizen check (if not an Australian citizen) and an ASIO security clearance. Maritime workers are now also covered by these

AusCheck arrangements under the new Maritime Security Identification Card (MSIC) regime, which commenced in 2005.⁵⁰

The regulatory regime for aviation and maritime security is complex. The background checks for ASIC and MSIC to determine eligibility are coordinated by the Attorney-General's Department AusCheck scheme, but policy responsibility remains with the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government.⁵¹ The details of the schemes including important aspects of the review process are not in the *AusCheck Act 2007*, but are instead contained in the *Aviation Transport Security Regulations 2005* and the *Maritime Transport and Offshore Facilities Security Regulations 2003*. Under these regulations, the issuing bodies (which are industry based) also play a major role in determining eligibility and issuing ASICs and MSICs,

The AusCheck scheme was in part a response to significant industry concerns and workplace problems over the length of time taken to conduct and report on the results of background tests (Joint Committee of Public Accounts and Audit 2006). Another issue is the use of private contractors in the clearance process. For example, the AFP uses a contractor, OSA, to do the data entry for MSIC and ASIC check requests (Salinger 2007). The more controversial aspect of these checks is the ASIO clearance. ASIO must be convinced that a worker has not been in the past, nor is ever likely to be in the future, involved in 'politically motivated violence'. The ASIC Fact Sheet defines this as 'any act of violence or threat of violence or unlawful harm that is intended or likely to achieve a political objective, whether in Australia or elsewhere' (Department of Infrastructure, Transport, Regional Development and Local Government 2008).

A complication inherent in this process is that ASIO has often had a different definition of politically motivated violence, as opposed to legitimate protest, than members of trade unions (Cain 1994). The Hope Royal Commission's documents from the Whitlam Government review of ASIO in the 1970s were released by the National Archives in Canberra on 28 May 2008 (Waterford 2008). Mr George Brownbill, deputy to Justice Hope, reflected on that era in the following terms:

The ASIO files disclosed numerous cases where gossip and tittle-tattle about people and their so-called communist sympathies was recounted to certain figures in the Menzies governments and then revealed in some cases under parliamentary privilege. As we found out later and with more detailed inquiry, much of this was no more than slander under privilege. That is, the evidence was just not there (Hammer 2008).

⁵⁰ The MSIC scheme, while it is similar to the ASIC scheme, has different criteria for assessment. These include different criminal history criteria and a requirement that if a person is not an Australian citizen, that they are not precluded by visa conditions from working in Australia.

⁵¹ Both the ASIC and MSIC schemes include provision for the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government to consider whether, notwithstanding that a person has an adverse criminal record or a qualified security assessment, they may still be issued with an ASIC/MSIC. This process is set out in regulation 6.29 of the *Aviation Transport Security Regulations 2005* and regulation 6.08F of the *Maritime Transport and Offshore Facilities Security Regulations 2003* respectively.

Aside from that historical issue, the question that needs to be examined in 2008 is whether ASIO should be able to block a person from keeping a job they already have, based on what is essentially an unreviewable decision. Chapter 3 has listed concerns about the lack of clarity and natural justice in ASIO assessments relating to non-citizens. A citizen can challenge an adverse security assessment in the AAT but the Attorney-General can grant a certificate, which in substance prevents the applicant and the applicant's lawyer from being present at the Tribunal while the government witnesses give their evidence and while the government's lawyers make their submissions (Burnside 2008, p. 5).

In addition, there is no facility to correct inaccurate personal information held by ASIO. In 2003, when the introduction of the ASIC was being debated in the Senate, the Liquor, Hospitality, and Miscellaneous Workers Union (LHMU) raised concerns in the following terms about the 80 000 workers who would be subject to the new ASIO clearance:

These additional requirements are in a completely different category to the traditional criminal records check that is undertaken by a wide variety of government departments. Any citizen has the right to gain access to his/her criminal record and through that access ensure that any criminal record information is accurate and up to date, for example some criminal record information is protected by so-called expungement laws which allow the expungement of old criminal records. That is not the case under the proposed new scheme where the quality of the records upon which reliance will be made to make decisions potentially adverse to employees is unknown (2003, p. 4).

The scope of the AusCheck scheme

The AusCheck scheme, as it currently stands, includes formal police background checks and security clearances by ASIO. Regulation 6 of the AusCheck Regulations 2007 set out the information that an issuing body is required to provide to AusCheck in order for AusCheck to conduct a background check. This application information is essentially identity and contact information. The application process also requires the issuing body to confirm that the person being checked has been given a notice about how AusCheck will use their personal information to conduct the background check. AusCheck uses this information to obtain, through CrimTrac, a criminal history record in respect of the person being checked. In 2007, the Aviation Transport Security Amendment Regulations 2007 (No. 2) enabled some applicants who have a criminal record but have not been convicted of a serious crime in the last decade to apply for a card successfully in some cases.

The Australian Council of Trade Unions (ACTU) reports that, since the amendments, several instances of people being refused passes have been brought to the attention of unions.⁵² Most of these cases involve employees of contractors. The Transport Workers Union (TWU) has also had some minor issues in NSW since the scheme began. However, it is possible that unions might not be aware of the full extent of disquiet regarding the use or misuse of character tests for several reasons: applicants might be rejected at the point of their employment application and among contractors there are lower levels of unionisation. Many contract workers may also be non-

⁵² Communication to author, March 2008.

citizens and this triggers a raft of migration issues as detailed in Chapter 2 of this paper.

Future expansion of the AusCheck regime

A cause for apprehension is the possible expansion of the AusCheck scheme to take account of wider character issues in the future. When the AusCheck legislation was being passed through Parliament, serious concerns were raised by unions, privacy advocates and lawyers about how sensitive personal information would be gathered and stored by the AusCheck process and for what other purposes it might be used. Generally, they advocated that Parliamentary approval be sought for any extension of the scheme, in order to prevent ‘function-creep’ (Salinger 2007, p. 75).

For example, personal information gathered for the purpose of background checks under the scheme can be made available to criminal and security intelligence agencies (subsection 14(2)). It is not yet clear whether inclusion of personal information in the AusCheck database might one day expose employees to investigation by criminal and security intelligence agencies, and under what circumstances this could happen.

Lack of access to review

The Law Council of Australia (Law Council) described difficult cases in its submission on the AusCheck Bill 2006. They noted that:

The consequences of an unfavourable background check can have a very detrimental impact on a person’s employment opportunities. For example, Mr Kevin Johnson lost a job which he had held for five years when the area he was working in at Brisbane airport was reclassified as a secure area and he was refused an ASIC. Mr Justin Cowdrey’s offer of employment at the Broome Airport was withdrawn when he was refused an ASIC because of a six year old assault conviction for which he had received a suspended sentence ...

For that reason, it is important that background checking processes are transparent, afford natural justice to affected persons, and provide opportunities for appropriate review (2007, p. 8).

The Law Council recommended that if Parliament authorised the establishment of a centralised agency to coordinate and conduct background checking, it should also establish the minimum standards of fairness, which must be observed in the process. The Council noted that a person will be forced to go through various avenues of appeal depending on how and by which agency they have been rejected. For example, the AAT Act sets out the procedures to be followed by the Security Appeals Division if an application is made for review of an ASIO security assessment, but the AusCheck Act is silent on review procedures for an agency decision. Instead the review processes are laid out in the regulations.

The Law Council goes on to explain that ‘the rights of a person whose livelihood is threatened by an unfavourable background check’ should not be ‘left to myriad regulations or indeed ... not left to subordinate legislation at all’ (2007, p. 9). To rectify the scheme, the Council recommended the following steps to the Senate Inquiry into the AusCheck Bill 2006:

It is still possible and desirable to establish consistent minimum standards with respect to:

- a. the degree of information which must be provided to an individual who is subject to a background check about the results of that check;
- b. the statement of reasons which must be provided to an individual explaining the basis of any discretionary evaluation made about him or her as a result of a background check,
- c. the available avenues for challenging the accuracy of the information gathered in the course of a background check; and
- d. the available avenues for challenging the merits of any discretionary decision made on the basis of a background check. (Law Council 2007, p. 10)

Fortunately, several of these suggestions were adopted in the Senate Legal and Constitutional Affairs Committee recommendations and resulted in government amendments in the Senate. The wide-ranging, regulation-making power that allowed AusCheck to look at broader employment or behavioural issues was removed, partly because of accusations by the Australian Democrats that it resembled the identity card regime that had been defeated in 2005 (OPC 2007). Nevertheless, it is an expansion of the scheme that can be resurrected in the future. Significant privacy concerns raised in the Senate remain unaddressed, such as the details of review processes being contained in regulations. The natural justice processes in regulation 8 of the *AusCheck Regulations 2007*. Regulation 12 of the *AusCheck Regulations 2007* provides a right to seek a review by the AAT of an unfavourable criminal history decision made by AusCheck. The Secretary of the Department of Infrastructure is also able to approve the issue of an ASIC or MSIC notwithstanding an adverse criminal record. There are also separate rights of review for decisions of the issuing body and the Secretary of the Department of Infrastructure in respect of ASICs and MSICs in both the *Aviation Transport Security Regulations 2005* and the *Maritime Transport and Offshore Facilities Security Regulations 2003*.

Privacy concerns

In February 2007, the Privacy Commissioner noted with concern that the establishment of a background checking service as a prerequisite to obtaining or maintaining employment would involve the collection and handling of significant amounts of personal, potentially sensitive information.

Serious privacy issues surrounding the AusCheck Bill remain although some important steps have been taken to rectify the deficiencies of the original Bill. The employee records exemption in the *Privacy Act 1988* (Cth) means that Australian employees and contractors in the aviation and maritime industries could have less privacy protection in employment matters than other employees. Senator Natasha Stott Despoja argues that '[i]n situations where criminal record checks form part of the personnel files of current or former employees of the aviation and maritime industries, almost certainly, surely, their privacy will be exposed' (Stott Despoja 2007). However, the criminal record checks conducted by AusCheck do not form part of personnel files.

One recommendation of Senator Stott Despoja was taken up, that:

Where pre-employment vetting is carried out, there should be an obligation on AusCheck to inform applicants at the time that applications are sought of the fact and the extent of the proposed check. This lets an applicant decide whether to proceed with their application. It is the ‘no surprises’ approach (Stott Despoja 2007, p. 96).

This is given effect by the regulation 5 of the AusCheck Regulations 2007 which requires the issuing body to confirm that the person being checked has been given a notice about how AusCheck will use their personal information to conduct the background check. AusCheck has provided printed copies of this notice to all issuing bodies to give to ASIC and MSIC applicants. The notice is also available on AusCheck’s website.⁵³ Moreover, in late 2006 AusCheck contracted with Salinger Consulting Pty Ltd (Salinger & Co) to conduct a Privacy Impact Assessment (PIA) of the background checking service for the ASIC and MSIC schemes. Of the 65 recommendations in the PIA, a total of 63 recommendations have been agreed to in whole or in part.

Privacy and related concerns about clearances are not solely related to the AusCheck scheme. The role of AusCheck should be looked at in the context of its place within the ASIC regulatory scheme as it is the complete regulatory scheme that has an effect on outcomes for an individual. The Australian Security Vetting Service in the Attorney-General’s Department deals with clearances for some ministerial staffers and cleared positions in the Australian Public Service. Many public servants find this process intrusive, and there is little real ability to appeal an adverse assessment.

Earlier this year, new ministerial staffers in the Rudd Government underwent the requirements for high-level public service and Parliamentary clearances.⁵⁴ They were asked intrusive questions, which included listing a history of sexual partners, any extra-marital affairs, homosexual experiences and drug use (Markson 2008). Part of the rationale for these clearances is to protect the person with access to high office from blackmail attempts and to establish that person’s probity. However, it is understandable that individuals subjected to this process would be concerned, both that their privacy be maintained and that the information be carefully guarded, especially where private contractors are involved. But the same concern should be extended to the privacy of workers in critical industries who have not elected to work in proximity to important information.

The question must be asked: why should staffers, aviation and maritime workers have lesser rights to natural justice and privacy than other Australian citizens? Why did these important developments not receive more debate in the public sphere? It appears that the incremental trend towards questioning the character of Australian citizens is, in part, based on their implicit consent. And which sectors of employment may next be deemed critical areas of national security — hospitals, banks, the food industry?

⁵³ http://www.ag.gov.au/www/agd/agd.nsf/Page/OrganisationalStructure_NationalSecurityandCriminalJustice_AusCheck_AusCheckPrivacyPolicy.

⁵⁴ Ministerial staff are employed under the *Members of Parliament (Staff) Act 1984*, administered by the Department of Finance.

4.7 Conclusion: annual built-in review necessary

This chapter has made the following four points:

- Character issues, which used to affect alien non-citizens, are now affecting permanent residents and citizens. Unfortunately, the same procedural deficiencies and lack of access to natural justice have also been imported into the new citizenship regime.
- Second, counter-terrorism measures have justified new obstacles relating to the conferral of citizenship and employment in certain industries.
- Third, the privacy concerns and natural justice issues prompted by the new citizenship laws and the AusCheck scheme have not been addressed.

A solution to these problems may be the development of a review process to enable Parliament to track the impact of the new regime, and to introduce mechanisms that demand accountability from ASIO and other agencies in relation to their assessments of both permanent residents and citizens.

5. Conclusion

This paper has examined character testing in the three main areas of legislative amendment over the last 10 years, migration law, citizenship law and the law relating to employment in critical industries. Commonwealth laws are being tainted by the uncertainties inherent in attempts to predict the vagaries of character.

Codifying character in such a powerful way in Australian law requires a denial of its complicated and intangible nature in favour of a more legally tenable understanding of it as objective, knowable and immutable. Applying such a reductionist approach in situations as important as citizenship, employment and terrorism prevention is likely to produce contested and unforeseen outcomes. Because of this, fundamental questions must be asked about the role of character tests in Australian law and how the nature and scope of these test have been altered by the legislative changes of the last decade, including:

- Are discretionary character tests, such as section 501 of the Migration Act, a good idea?
- What about other discretionary character tests in Commonwealth law?
- Does the law demand an unspecified higher standard of behaviour from non-citizens than is expected from public office holders?

New Immigration and Citizenship Minister, Senator Chris Evans, is currently considering the issue of ministerial discretion, including its role in making character assessments. Senator Evans caused a stir when he told a Senate Estimates Committee that he was uncomfortable with the wide powers bestowed upon him under the Migration Act.

In a general sense I have formed the view that I have too much power. The Act is unlike any Act I have seen in terms of the power given to the Minister to make decisions about individual cases. I am uncomfortable with that not just because of a concern about playing God but also because of the lack of transparency and accountability for those ministerial decisions, the lack in some cases of any appeal rights against those decisions and the fact that what I thought was to be a power that was to be used in rare cases has become very much the norm (Evans 2008a, p. 22).

Public reaction to the minister's position included the argument that he should not be allowed to abrogate his responsibility (Aldred 2008, p. 15); that the minister should make the 'hard calls' because he alone can be called to account by voters if the decision is wrong. Such reasoning is based on the opinion that bureaucrats are unelected, judges are only interested in applying 'black letter' law, and security agencies are not to be trusted with the task (Aldred 2008, p. 15). Other comments supported Minister Evans and comparisons were made between the current systems in Australia and those in the 18th century Court of Versailles (Manne 2008, p. 14).

In a speech to the Migration and Refugee Review Tribunals in March 2008, Minister Evans noted this public debate over his desire to divest himself of powers and explained that his concern with section 501 was in the context of the large increase in

cases involving ministerial discretion, 4 000 in 2007 alone (Evans 2008b). The Minister has since received the results of a review by Elizabeth Proust, recommending legislative reform was necessary in the long term (Proust 2008).

Senator Evans' honest examination of his new role is to be applauded, but this paper argues from a different premise: that not only the content and execution of character tests need reform but also the power conferred on the decision-maker. It is a heavy burden for individuals to bear, no matter how well-intentioned. To fix the problem, Australia needs, as Aristotle would say, good laws, not good men. It also needs good lawyers. The Hon. Justice Spigelman AC, Chief Justice of New South Wales, has described judges and lawyers as 'boundary riders maintaining the integrity of the fences that divide legal constraint from the sphere of freedom of action' (Spigelman 2007). Except for some efforts mentioned in this paper, this is not always the role lawyers and judges have played in migration and counter-terrorism matters. The profession has preferred instead to defer to an ever-increasing executive power with little accountability. The time for deference needs to end with a call instead for evidence and logic on matters such as the examination of character.

This paper contests the role of character tests in the context of migration laws. The character test in section 501 lacks clarity in definition and scope and does not afford any measure of natural justice to non-citizens whose character is under investigation. Refusal and deportation rates have soared since the test was strengthened in 1999, and many individuals have faced positions of great hardship as a result. The case of Dr Haneef shows that Australia's new counter-terrorism laws may draw on the same subjective elements and unfettered executive power as character tests. The affair showed how an overseas relative's character in the UK determined Dr Haneef's destiny in Australia.

Despite these problems with migration laws, when the citizenship laws were revamped in 2007, many aspects of the migration regime, especially the increased role of ASIO, were imported into the new Citizenship Act. Character issues, which previously affected alien non-citizens adversely, now also affect permanent residents and citizens adversely. Counter-terrorism measures have been used to justify new hurdles relating to the conferral of citizenship and employment in certain industries. These moves may prove radical in the long term and deserve more debate. Privacy concerns and natural justice issues have not been fully addressed by the new AusCheck scheme, currently applied to Australian citizens in certain sectors and possibly to other sectors in the future.

Ultimately, Australia is sending mixed messages to current and would-be citizens: new citizens are apparently being asked to be better than current citizens, better than Federal Parliamentarians, better than lawyers and board members.

The evidence in this paper supports a number of policy recommendations:

- The first priority is that section 501 of the Migration Act and all similar provisions in Commonwealth law should be repealed or amended to provide for clarity, transparency and natural justice.

- The second priority is that data on refusals on character grounds across migration, citizenship and employment law be collected and tabled in Parliament.
- Third, the case studies and case law discussed in this paper show a prima facie need for an inquiry to be held in the current Parliament into the interaction of character tests across migration, citizenship, employment and criminal law.
- Four, there is a need, even if the decision in the Parkin case is positive, to ensure that adverse ASIO assessments are made reviewable in substance not just in form, with a minimum requirement being that the affected person is given some indication of the basis of the adverse assessment by the tribunal or court. Measures to improve the review process could include: that the IGIS, assisted by the Administrative Review Council, hold an inquiry into the internal administrative processes by which ASIO assessments are made; that the IGIS is further empowered to review the propriety of ASIO assessments and the evidence on which they are based; and that as a minimum refugee applicants be allowed to access the AAT to challenge a character finding.
- Ministers in the Rudd Government should make an undertaking that they will use ministerial discretion around issues of character as the last-resort safeguard it was intended to be and not as constituting the system itself. Such an undertaking might form an element of the newly reinvigorated Standards of Ministerial Ethics in relation to the principles of fairness and accountability.
- Finally, and more broadly, the development of character tests with the purpose of aligning people as ‘like us’ or ‘not like us’, should be rejected.

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