



Character as Destiny: The dangers of character tests in Commonwealth law

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It is an absolute pleasure to be here, exploring citizenship and Australian values in the gardens of Manning Clark House. This is my first public appearance as the Acting Executive Director of the Australia Institute, a leading progressive think tank, based here in Canberra. The Institute was founded in 1994, and has established a reputation for leading the public debate on issues of social and environmental justice.

The context

Heraclitus of Ephesus wrote in 500 BC 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 complex attributes that may determine a person's moral and ethical actions and reactions. Nevertheless, like many complex human phenomena, character has long been codified and defined by law. Without any evident philosophical reflection, a series of changes to character tests under Australian law testify to the fact that in this country, character is increasingly destiny.

It used to be that character became an issue when an Australian sought to step up into an important public role. For example, under our Constitution, you cannot stand for election in the Federal Parliament if you 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'.¹ A person being admitted as a solicitor or wanting a seat on a corporate board has to satisfy their peers that they are a 'fit and proper' person. In other words, a person will voluntarily offer up their character for scrutiny in return for the wondrous benefits of public office.

The High Court has decided that the question of who is a 'fit and proper' person is a value judgment and heavily context-driven. This decision was made in relation to whether Alan Bond was a 'fit and proper' person to hold a licence under the Broadcasting Act.² Shockingly, the High Court found that he wasn't, nevertheless, he still got a university named after him. Instead of issues of character applying only to Australians who want to step into more senior public roles, such tests now apply to people who just want to stay in their current roles, such as migrants on working visas inside Australian territory, permanent residents trying to become citizens and people working in key professions thought to be terrorist target areas such as aviation and transport.

My argument is that in recent years, character tests in Australia have expanded in their scope to include subjective criteria such as the likelihood of future conduct, rather than being based on police record checks and past patterns of conduct. They have become increasingly discretionary Ministerial decisions or have been made subject to national security considerations and therefore almost impossible to appeal. Yet the consequences of failing such a test are more serious than ever.

¹ Section 44(ii).

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

Due to changes to the migration and citizenship laws, as well as the reach of new counter-terrorism laws, falling afoul of a character test could get you deported, stuck in indefinite detention, unable to gain citizenship and permanently rendered stateless, permanently locked out of your profession as an aviation worker or pilot or put on trial for a terrorist offence.

I contend that the current construction of character tests and the way they are implemented are neither compliant with the right to due process, nor compatible with the rule of law. As an expression or an enforcement of Australian 'values', character tests in migration, citizenship, criminal and employment law require urgent amendment.

Character and migration

As with many dangerous legal precedents, the new extended scope of character tests started off in the context of migration law. There is an extended discussion of character and migration law in the longer research paper, but in today's presentation I want to make two main points.

1. The current criteria for what makes a non-citizen considered to be of 'bad character' is too wide, too 'fuzzy' and not compliant with international human rights standards. It is therefore too subject to political manipulation.
2. The ability to appeal or correct a character finding is nearly impossible, meaning that natural justice and due process are not granted to affected persons - they have little or no chance to know or refute the evidence raised against their character.

Criteria too wide

Either the Department (section 201) or the Minister (section 501) can cancel or refuse a visa on character grounds under the *Migration Act 1958* ('Migration Act'), depending on their whim. There are various criteria for doing so ranging from the strictly objective (sentenced to a term of imprisonment of 12 months or more), to the more difficult realm of value judgements (for example, ASIO clearance refused on national security grounds, for example, because a person is judged capable of committing an act of 'politically motivated violence'). There are also overt political grounds (such as the Foreign Minister thinks a person will prejudice Australia's foreign relations, or has something to do with weapons of mass destruction. I am not making that up. It is section 116 of the Migration Act 1958 as prescribed by Migration Regulation 2.43. In which case, the Foreign Minister can override the decision of the Immigration Minister).

[Section 501 of the Migration Act](#) is the most problematic section in my view. It provides that the Minister may cancel a visa if the Minister considers that the person does not pass the character test. One element is that the person has been sentenced to a term of imprisonment of 12 months or more, either in Australia or their country of origin. That is clear. The problem is that there is no requirement to weigh up the conviction with questions over whether the person if removed would be returned to persecution or torture or rendered stateless or would wind up for many years in detention while their sad situation is sorted out.

There is also the more general category of future risk to Australian citizens which I find alarming. If the Minister thinks that the past or likely future response of the Australian community, or some sector of the community, to that person's presence in Australia is likely to be negative, the Minister can cancel the visa. I call this the Big Brother test, because it appears to be judging whether someone is likely to be popular or not.

The Immigration Department puts out some handy fact sheets (no. 78 and [no. 79](#)). In the fact sheet on '[Controversial Visa Applicants](#)', DIAC provide a profile of 'people of concern' in character terms. I have brought a pile of these with me for your perusal, and will only highlight a few.

People of concern are those who may meet the following criteria:

- holding of extremist views such as belief in the use of violence as a 'legitimate' means of political expression
- likelihood of the Australian community or part of the Australian community being vilified or defamed
- having a record of causing law and order problems, eg. when addressing public rallies
- acting in a way likely to be insensitive in a multicultural society, eg. advocating within particular ethnic groups the adoption of political, social or religious values well outside those acceptable to Australian society
- being active in political movements directed towards the non-peaceful overthrow of their own or other governments
- having planned, participated in, or been active in promoting politically-motivated violence or criminal violence and/or being likely to propagate or encourage such action in Australia
- 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
- being a war criminal, or a person suspected or accused of war crimes or any association with a person or group involved in war crimes
- being known to be, or suspected of being, involved in organised crime
- posing some threat or harm to the Australian community or part of it
- likelihood of the person's presence in Australia being contrary to Australia's foreign policy interests

- claiming to represent a foreign State or government which is not recognised by Australia, or
- any other credible material which may be relevant to Public Interest Criteria 4001 or 4003 of the Regulations.

There are some criteria on this list which resonate 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 there are some criteria which are of distinct concern. People who address public rallies and whip up the crowd are of concern, apparently, which presumably could shut out any overseas counterparts of Doug Cameron and Sharan Burrows. I personally believe we need several thousand more folk of that sort. One might even suggest that people 'likely to be insensitive in multicultural societies' could encompass members of the NSW Liberal party distributing leaflets in the Lindsay electorate during the 2007 election campaign. A visit by the Dalai Lama or a West Papuan leader might cause problems for our foreign policy but that is no reflection on their character. As for the danger of the overlapping visit, the mind boggles. Australia should not invite Jennifer Aniston at the same time as Angelina Jolie?

The criteria represent Australian values in the sense of excluding the sort of people we apparently do not want. But it is a very narrow and subjective view. Australia is better served by basing any criteria on objective human rights standards agreed on throughout the world.

Denial of Natural Justice

My second criticism relates to the almost total denial of natural justice for those who dispute the outcome of character tests. Natural justice does not apply in relation to the decision of the Minister to cancel a visa. This means that merits review before a tribunal is not available. Judicial review is still available, but there are very strict time limits placed on applications to the Federal Court.³ Judicial review is not very helpful. The judge can only assess whether the formalities were observed in making the decision, not whether it was a good or bad or wrong decision. For example, in the Dr Haneef case, it was only clear media statements by then Minister Kevin Andrews that he was cancelling Haneef's visa to keep him in jail for questioning because Haneef had been granted bail. This illustrated to the judge that Andrews was improperly using the Migration Act to achieve a criminal justice outcome and allowed the judge to quash the decision. Even then, all Andrews would have had to do was make the same decision again quietly. Haneef could easily still be detained today, the AFP have made clear he is still under investigation.

Some aspects of character tests are reviewable, not by the Migration Review Tribunal, but by the Administrative Appeals Tribunal, known by its acronym the AAT. However, the Minister can issue a certificate under section 502 of the Act excluding review by the AAT.⁴ Review by the High Court on the grounds of its constitutionally entrenched power of judicial review is then the only avenue left available.

Appealing an adverse ASIO clearance is even harder. The attempts of Scott Parkin, deported US activist and the two Iraqi asylum seekers on Nauru to seek access to

³ See paragraph 476A(1)(c)

⁴ As occurred in the Lorenzo Ervin case (the Black Panther case) - High Court of Australia *Re: The Minister for Immigration and Multicultural Affairs Ex parte Ervin* B29/1997

the grounds of their adverse ASIO assessments is examined in some detail in the longer research paper.

ASIO would argue strongly that their security assessments are not character tests,⁵ and that review by the Inspector-General of Intelligence Services⁶ and the Security Appeals Division of the AAT is sufficient. I argue that when an ASIO official is making a determination of whether a person is likely to engage in an act or threat of politically motivated violence, then questions of character are raised. I do have confidence as a result of the Flood and Street reviews that ASIO always gets these assessments right. This leads to a brief discussion of the new counter-terrorism laws and the heightened security and political environment in which character decisions are being made, which all converged in the case of Dr Mohammed Haneef, my major case-study.

The new consequences of being 'a bad character'

As you are all no doubt aware, on 29 June 2007, two car bombs were defused in London. On 1 July 2007, there was a terrorist car bomb attack on Glasgow Airport (UK). The next day Dr Mohamed Haneef was arrested in Brisbane and charged on 14 July with recklessly providing assistance (a mobile phone SIM card) to a relative later charged over the UK attacks. On 16 July, after being granted bail by a Brisbane magistrate, Dr Haneef had his 457 work visa revoked by the Immigration Minister and was held in detention pending his committal hearing on 31 August. On

⁵ Evidence of Mr Denis Richardson to the Joint Standing Committee on Foreign Affairs, Defence and Trade Human Rights Subcommittee Reference: Aspects Of HREOC's Annual Report 2000-01 Concerning Immigration Detention Centres. Thursday, 22 August 2002: <http://www.aph.gov.au/hansard/joint/commttee/j5748.pdf>

⁶ See for example Annex 3 to the IGIS Annual Report 2006-7. Ian Carnell, Inspector-General of Intelligence and Security inquiry into ASIO's assessment of Mr Rhuheh Ahmed 12 March 2007. Mr Ahmed, who is a United Kingdom national, planned to visit Australia to promote the cinema release of a new film "The Road to Guantanamo". The film Mr Ahmed intended to promote recounts the story of Mr Ahmed and two fellow UK nationals who were captured in Afghanistan in 2001 and subsequently detained in the United States of America complex located at Guantanamo Bay, Cuba, until their eventual release in March 2004. His visa was refused on the basis of an adverse security assessment made of Mr Ahmed by the Australian Security Intelligence Organisation (ASIO).

27 July the Director of Public Prosecutions, after reviewing the material, withdrew the charge. The Immigration Minister returned Dr Haneef's passport and he returned to India on 28 July. He had been detained for a total of 14 days without charges.

The Minister for Immigration cancelled Dr Haneef's work visa on character grounds directly after he had been granted bail in relation to terrorism association charges. Dr Haneef appealed the Minister's decision to the Federal Court.⁷ The Federal Court found the Minister's decision invalid and the case went on appeal. In January 2008, the Rudd Government decided not to continue the appeal, allowing Haneef to re-enter Australia if he wishes on his 457 visa but leaving most of the legal and policy issues unresolved. The new Attorney-General has announced an inquiry into the affair.

In the Haneef case we see laid out clearly for the first time the interrelationship between character tests and the wide reach of the counter-terrorism laws to capture a person who has in fact not committed any unlawful act themselves, but may be associated somehow with someone in the world who has. Many of the new provisions, including association, proscription, B-Party intercepts, preventative detention and control orders, rest on the basis that the security of the Australian community can best be served by criminalising membership of a group. For example, a B-Party intercept means that security agencies can tap your phone in case their actual suspect calls you. Association offences lend new urgency to your mother's warning to 'be careful of the company you keep'. In the longer research paper I use the Dr Haneef case as an extended case study to discuss how these offences can be considered 'status crimes', where people are criminalised for who they are rather than what they actually do.

⁷ Minister for Immigration & Citizenship v Haneef [2007] FCAFC 203 (21 December 2007)

The terrain is therefore widening for Australian citizens to experience 'character' issues. Character tests which allow for wide Ministerial discretions are appearing in other branches of Commonwealth law, such as citizenship, public service clearances, clearances for Ministerial staffers and aviation and maritime security workers. The Haneef incident therefore highlights concerns about unclear criteria and 'due process' which are likely to have serious ramifications for permanent residents and Australian citizens. I will turn now to the concerns I have about character tests in the new Citizenship Act.

Citizenship and character

The *Australian Citizenship Act 2007* is now the legal basis for all citizenship provisions. It commenced on 1 July 2007. The new regime has introduced a number of changes. I am concerned with the introduction of more stringent character checks in home countries when applying for citizenship, incorporating Ministerial discretion. I have four key points to make.

1. There has always been a 'good character' requirement in citizenship applications in Australian law since 1948. But the phrase in the new Act has been left undefined, despite a clear recommendation from the Senate inquiry to align the new test with the provisions of the Migration Act. This means there is now a question of whether character for the purposes of citizenship may be judged by an even higher standard than the current stringent migration tests.⁸ The Australian Citizenship Instructions show that the standard is definitely different but does not elaborate how.

⁸ See *Re Minar v Minister for Immigration and Multicultural Affairs* (1997) 48 ALD 771

2. The new tests incorporate a strong national security element and were announced in the context of counter-terrorism measures,⁹ increasing my concern about the links between character tests and status-based terrorist offences. It seems to me that running the risk that your current visa might be cancelled and you could then be charged with a terrorist offence might put off the more faint-hearted permanent residents from applying for citizenship.
3. The new tests involve high levels of Ministerial discretion and ASIO assessments, which gives rise to the same concerns about natural justice and due process explained above; and
4. During the debate in Parliament, the need for the new character requirements was deliberated using the inflammatory example of Sheik Al-Hilali, which I think sent an unfortunate message to would-be citizens.

To elaborate on point 1, subsection 13(f) of the Citizenship Act imposes a 'good character' requirement, i.e. a person must satisfy the Minister that they are of 'good character' to be granted Australian citizenship. There is no definition of 'good character' in the Act. DIAC guidelines direct 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'. In most cases the evidence will be of a serious criminal record: section 13(11) prevents the Minister granting citizenship to someone

⁹ Prime Minister John Howard, 'Counter-Terrorism Laws Strengthened', *media release*, 8 September 2005.

serving a prison sentence for serious offences and for a certain period afterwards. But DIAC states that 'general conduct and *associations* may also be relevant'.¹⁰

In the case of *Re Kakar*, the AAT said that, in the context of the *Australian Citizenship Act 1948*, the term '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'.¹¹ There is a lingering question as to what the courts will decide in relation to the standard and content of the character test for new citizens.

Cases may be rare because people who had a substantial criminal record or whom Australia felt were security threats would not reach the stage of permanent residency or even admission to Australia due to the operation of the minimal character requirements and criminal deportation provisions of the Migration Act. In my opinion, the changes to the Citizenship Act are mostly atmospheric or intended to catch people who may have fallen through the gap due to earlier, more lenient immigration policies. Let us be clear though, one of the concrete benefits of citizenship is that the Government forever loses its ability to deport you.

I find this lack of clarity in the citizenship provisions problematic and leaning towards hypocritical. We appear to be asking new citizens to be better than us, better than our Federal Parliamentarians, better than our lawyers and board members. We celebrate our rogues gallery of larrikins and naughty sportspeople, and yet send the message that foreigners will be rigorously scrutinised according to a magic formula we will keep hidden from them. It reminds me of a playground game where the popular kids will arbitrarily change the rules to keep the uncool kids on their toes and aware of their inferior status.

¹⁰ 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*.

¹¹ *Re Kakar and Minister for Immigration and Multicultural Affairs* [2002] AATA 132

The new role of ASIO

In relation to the second point, after the 11 September 2001 events, especially in the context of passport security, the Government felt the need to tighten the national security aspects of the citizenship regime.¹² As part of its policy platform for the 2004 federal election the Coalition pledged itself to 'Enhance Australia's Border Control Systems by strengthening ASIO's capacity to undertake background security checks on persons seeking to lawfully enter Australia'.¹³ This was also the time that the Government committed to background checks for pilots and aviation and maritime workers, and hence the new AusCheck regime, which is a whole other nightmare examined in the longer research paper.

The 2007 Citizenship Act contains a new prohibition on the Minister approving applications from those assessed by the Australian Security Intelligence Organisation (ASIO) to be direct or indirect risks to Australia's security. This prohibition would apply to all applications, whether they are regarding citizenship by descent, by conferral or by resumption (for example section 17).

A person can apply to the AAT for a review of an adverse security assessment.¹⁴ As noted above, however, there are claims that such assessments are 'virtually impossible to challenge because of the lack of information made available to the subject and their legal team'.¹⁵

For example, the Attorney-General for security reasons can certify that a person is either not to be notified of an adverse security assessment or not to be informed of

¹² Sydney Morning Herald editorial 'Holes in the fence', 30 April 2005.

¹³ Prime Minister's press release, 5 October 2004.

¹⁴ See section 54 of the ASIO Act

¹⁵ Senate Legal and Constitutional Affairs, Inquiry into the Provisions of Australian Citizenship Bill 2005 and Australian Citizenship (Transitionals and Consequentials) Bill 2005, 27 February 2006.

the grounds for such an assessment.¹⁶ Senator Nettle claimed that the regime 'effectively gives ASIO the power to decide who can and can't become a citizen'.¹⁷

This leads to a different debate we need to have about the accountability of intelligence information in Australia, a debate which Mr Georgiou has recently begun in earnest and about which I hope to produce further research.

In relation to the final point about Sheik Al-Hilali, Alan Cadman MP made several strong suggestions in Hansard that he deserves to be deported because he should never have been made a citizen and did not really take the oath properly.

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.¹⁸

I was very upset at the time and am still upset that Cadman thought only the Muslim participants in the Cronulla riots had failed their citizenship oath. Even when we are discussing full and formal membership of Australian society, we still seem to have one eye on the ability to taint, physically remove and detain people.

None of the Ministerial or ASIO decisions about the character of non-citizens are taken in a political vacuum. A recent Australian Institute longer research paper by author Josh Fear entitled *Under the Radar: Dog-whistle politics in Australia* analyses the previous Coalition Government's rhetoric about asylum seekers and its manipulation of public opinion regarding immigration policy.¹⁹ Many migrants and Australians of Middle Eastern appearance are already tainted with illegality. As Robert Manne says:

¹⁶ See subsection 38(2) of the ASIO Act

¹⁷ Senate Legal and Constitutional Affairs, Inquiry into the Provisions of Australian Citizenship Bill 2005 and Australian Citizenship (Transitionals and Consequentials) Bill 2005, 27 February 2006.

¹⁸ House of Representatives, *Debates*, 31 October 2006, p. 14.

¹⁹ See, for example, David Marr and Marian Wilkinson's *Dark Victory* (2003) and Mungo MacCallum's *Girt by Sea: Australia, the Refugees and the Politics of Fear* (2002)

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 ...²⁰

In this sense, the children overboard affair can be seen as a kind of character assassination. In other words, as we know and can never discount, value judgements about individual characters are being made in the political context of fear of terrorism and cultural difference. As the final lines of the Constantine Cavafy poem 'Waiting for the Barbarians' say:

And now, what's going to happen to us without barbarians?

They were, those people, a kind of solution

Conclusion

What is most interesting and perplexing about the concept of character in Australian law is the sense of paradox. Just as psychological and academic perceptions of character are becoming more complex, protean, constructed and contingent, legal definitions are becoming tighter, harder and more and more linked to essential inherited characteristics.

Are discretionary character tests such as section 501 of the Migration Act a good idea? What about other discretionary character tests in Commonwealth legislation? Are we asking for an unspecified higher standard of behaviour from non-citizens than we expect from our public office holders?

New Immigration Minister Senator Chris Evans is currently considering the value of the character test. Senator Evans caused a stir when he told an Estimates Committee he was uncomfortable with the wide powers bestowed under the Migration Act.

²⁰ Robert Manne. 2004. 'The Howard Years: A Political Interpretation' in Manne, R. (ed.), *The Howard Years*, Black Inc. Agenda, Melbourne, p. 34.

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.²¹

Mary Aldred declared in *The Age* newspaper that Senator Evans should not be allowed to 'abrogate his responsibility'.²² She believes that the Minister should make the hard calls because only the Minister could be made to face the voters if he or she got the decisions wrong. Her reasoning was that bureaucrats are unelected, judges only interested in applying black letter law and security agencies were not to be trusted with the task.

Aldred's opinion piece prompted some fierce responses in the letters pages, some comparing the current system with the 18th century Court of Versailles. In a March 2008 speech to the Migration and Refugee Review Tribunals, the Minister 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; 4000 last year.²³

My argument has rested on a different premise, that the content and execution of character tests need reform, not just the decision-maker, although I applaud Evans' honest examination of his new role.

²¹ Commonwealth of Australia. Senate Standing Committee on Legal and Constitutional Affairs Estimates (Additional Budget Estimates) *Proof Committee Hansard*, Tuesday, 19 February 2008, Canberra, p. 22.

²² Mary Aldred, 'The buck stops with the Immigration Minister', *The Age*, 3 March 2008. Accessed online 25 March 2008 <<http://www.theage.com.au/news/opinion/the-buck-stops-with-the-immigration-minister/2008/03/02/1204402269514.html?page=fullpage#contentSwap1>

²³ Senator Chris Evans, Address to the 2008 National Members' Conference of the Migration Review Tribunal and Refugee Review Tribunal, The Windsor Hotel, Melbourne, 29 February 2008.

I think that the subjective nature of the criteria for determining character have made it all too easy for politicians and security agencies to err on the side of caution or 'profiling' and get it wrong. The lack of accountability in Ministerial discretionary decision-making and inability to question intelligence information mean that a person whose character is impugned will probably never even know why. The consequences for getting such a decision wrong are so serious for the individual concerned that there must be a better method for making and reviewing such decisions. Section 501 of the Migration Act and all its kin in Commonwealth law should be repealed.

Character might be destiny, but I prefer the philosophy of Albus Dumbledore from the Harry Potter novels: 'It is our choices, Harry, that show what we truly are, far more than our abilities'. People should be judged according to what they do, not according to any prejudicial or frightened view of whom they might become or who they might know. A country which had rules based on that philosophy would be displaying some character.