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In 500BC, 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 complex of 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.

A character test is traditionally applied to decide whether a person should be granted some kind of privilege - for example, a visa, citizenship, or an important job. When trying to judge character, the evidence examined usually includes a person's past statements, activities and conduct, including any police record, criminal charges or jail terms. The decision-maker considers on the basis of this evidence the likelihood that a person will act in the same way again.

Character testing under Commonwealth laws is on the rise and the fundamentals are changing. Over the past 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 problem is, the new form of character tests is often framed in subjective terms and can be made under ministerial discretion, raising issues of transparency and accountability.

Falling foul of a character test could lead to detention and deportation - as happened to Dr Mohamed Haneef - an inability to gain citizenship, being permanently locked out of a profession as an aviation or maritime worker, or put on trial for a terrorist offence. In this way, someone else's assessment of your character can now define your destiny as never before.

In the last full financial year (2006-07), 178 visas were refused on "character" grounds. Section 501 of the Migration Act 1958 provides that the minister may refuse or cancel a visa if the minister considers that the person represents a "future risk to Australian citizens", has spent time in jail or "associates" with suspected criminals.

This test unfairly caught Dr Haneef. The affair showed how the character of a relative in Britain determined Dr Haneef's destiny in Australia. Even Nelson Mandela and Mahatma

Gandhi could be deemed to be of bad character under this test. This phenomenon has been incremental, which is why it is important to pause and reflect on the changes over the past decade. Are discretionary character tests such as section 501 of the Migration Act a good idea? Are we asking for an unspecified higher standard of behaviour from non-citizens than we expect from our public office holders?

Immigration Minister Senator Chris Evans is currently considering the value of ministerial discretion, including the character test, in the context of the large increase in cases involving this - there were 4000 last year.

Senator Evans caused a stir when he told an estimates committee in April that he was uncomfortable with the wide powers bestowed under the Migration Act, because he felt he had "too much power" and was "playing God". He has been criticised for this, with one contributor to this newspaper (Mary Aldred, Opinion 3/3) declaring that Senator Evans should not be allowed to abrogate his responsibility. Her reasoning was that bureaucrats are unelected and judges are only charged with interpreting and applying the law.

I argue that the content and execution of character tests need reform, not just the power conferred on the decision-maker, although Evans' honest examination of his new role is to be applauded. But to fix our problem, Australia needs, as Aristotle would say, good laws, not good men.

We will also need good lawyers. Justice Spigelman, AC, Chief Justice of NSW, 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".

Except for some outstanding individual efforts, this is not always the role lawyers and judges have played in migration and counter-terrorism matters. We have preferred instead to defer to ever-increasing executive power without accountability. The time for deference needs to end, with a call instead for evidence and logic on matters such as the examination of character.

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 such decisions to be so subjective and devoid of accountability. To codify "character" into such a powerful place in Australian law requires a denial of its complicated and intangible nature in favour of a more legally tenable understanding of character as objective, knowable and immutable. Applying such a reductionist approach in situations as consequential as citizenship, employment and terror charges is bound to produce contested and unforeseen outcomes. Because of this, fundamental questions must be asked of the role of character tests in Australian law.

Any tests whose purpose is to align people as like "us", or not like "us" should be rejected.

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