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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST)  
BILL 2018**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration, Citizenship and Multicultural  
Affairs, the Hon. David Coleman MP)

# **MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2018**

## **OUTLINE**

The Migration Amendment (Strengthening the Character Test) Bill 2018 (the Bill) amends the *Migration Act 1958* (the Migration Act) to provide grounds for non-citizens who commit serious offences, and who pose a risk to the safety of the Australian community, to be appropriately considered for visa refusal or cancellation.

Specifically, the provisions of the Bill:

- amend the character test in section 501 of the *Migration Act 1958* to provide grounds to consider visa cancellation or refusal where the non-citizen has been convicted of a serious crime.
- make consequential amendments to the definition of character concern in section 5C of the *Migration Act 1958*.

## **FINANCIAL IMPACT STATEMENT**

These amendments will have a no financial impact.

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

A Statement of Compatibility with Human Rights has been completed in relation to the amendments in this Bill and assesses that the amendments are compatible with Australia's human rights obligations. A copy of the Statement of Compatibility with Human Rights is at [Attachment A](#).

## **MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2018**

### **NOTES ON INDIVIDUAL CLAUSES**

#### **Clause 1      Short Title**

1. Clause 1 provides that the short title of the Bill, once enacted, will be the *Migration Amendment (Strengthening the Character Test) Act 2018*.

#### **Clause 2      Commencement**

2. Clause 2 of the Bill sets out the times at which the various provisions of the Act commence.

3. Subclause 2(1) of the Bill provides that each provision of the Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

4. Table item 1 provides that the whole of this Act will commence on the day after the Act receives the Royal Assent.

5. The note in subclause 2(1) makes it clear that the table relates only to the provisions of the Act as originally enacted. The table will not be amended to deal with any later amendments to the Act.

6. Subclause 2(2) of the Bill provides that any information in column 3 of the table is not part of the Act. Information may be inserted in this column, or information in it may be edited, in any published version of the Act. There is currently no information in column 3 of the table.

#### **Clause 3      Schedules**

7. This clause provides that each Act specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned. In addition, any other item in a Schedule to this Act has effect according to its terms.

### **SCHEDULE 1 – Amendments**

#### **Item 1      Before subsection 5C(1)**

8. This item inserts the words *Character concern* as a heading to current subsection 5C(1) of the Migration Act. This heading makes it clear that subsection 5C(1) describes the definition of *character concern*.

#### **Item 2      After paragraph 5C(1)(a)**

9. This item inserts new paragraph 5C(1)(aa) which makes it clear that a non-citizen who has been convicted of one of the offences set out in this Act will be of *character concern*. The relevant offences are set out in new subsection 5C(3) for the purposes of the definition of *character concern*, and discussed in detail at Item 6 of this Schedule.

**Item 3 Before subsection 5C(2)**

10. This item inserts the words *Substantial criminal record* as a heading to subsection 5C(2). This heading makes it clear that subsection 5C(2) describes the definition of *substantial criminal record*.

**Item 4 At the end of section 5C**

11. Current section 5C defines the term *character concern*, and provides the circumstances under which a non-citizen is of *character concern*. The term *character concern* is used in relation to the meaning of *personal identifier* in subsection 5A(3) of the Migration Act and in relation to permitted disclosures of identifying information in subsection 336E(2) of the Migration Act.

12. Item 4 inserts new subsections 5C(3) and 5C(4) to the existing definition of *character concern*, and defines *designated offence* for the purposes of subsection 5C(1).

13. New paragraphs 5C(3)(a)-(c) describe the conditions that must be satisfied in order for an offence to be considered a *designated offence*. These conditions are discussed in detail at item 6 of this Schedule.

14. New subsection 5C(4) provides the definition of a *weapon* for the purposes of subparagraph 5C(3)(a)(iv). This definition is discussed in detail at item 6 of this Schedule.

15. The intention of this item is to align the definition of *character concern* in subsection 5C of the Migration Act with new subsection 501(7AA), as inserted by item 6 of this Schedule.

**Item 5 After paragraph 501(6)(a)**

16. This item inserts new paragraph 501(6)(aaa) into the part of the Migration Act known as the *character test*. The existing *character test* in subsection 501(6) of the Migration Act sets out the circumstances under which a non-citizen does not pass the *character test*.

17. New paragraph 501(6)(aaa) provides that a non-citizen does not pass the *character test* if the non-citizen is convicted of a *designated offence*. A *designated offence* is defined by new subsection 501(7AA), as inserted by item 6 of this Schedule.

18. The intention of this item is to ensure that a non-citizen who has been convicted of a *designated offence* is included in a class of persons who do not pass the *character test*.

**Item 6 After subsection 501(7)**

19. This item inserts new subsection 501(7AA) into Part 9 of Division 2 of the Migration Act. This new subsection sets out the elements of a *designated offence* for the purposes of the *character test* in subsection 501(6) of the Migration Act.

20. New subsection 501(7AA) provides that a *designated offence* is an offence against a law in Australia or a law in a foreign country that satisfies the conditions set out in new paragraphs 501(7AA)(a)-(c).

21. New paragraph 501(7AA)(a) sets out a requirement for the offence to involve one or more of the physical elements set out in new subparagraphs 501(7AA)(a)(i)-(viii).

22. New subparagraph 501(7AA)(a)(i) provides that one of the physical elements that may form the basis of a *designated offence* involves violence against a person. New subparagraph 501(7AA)(a)(i) sets out some examples of types of violent offences that are intended to be captured. This list includes murder, manslaughter, kidnapping, assault aggravated burglary and the threat of violence.

23. The intention of new subparagraph 501(7AA)(a)(i) is to provide examples of offences that include violence against a person, but it is not intended to limit the offences that involve a physical element of violence against a person from being a *designated offence* for the purposes of the *character test*. Other offences where a physical element of the offence involves violence against a person but which are not listed in new subparagraph 501(7AA)(a)(i), or an offence similar to those listed but identified differently in the jurisdiction it was committed in, are intended to be captured by this subparagraph where the conditions in new paragraphs 501(7AA)(b) and (c) are also satisfied.

24. New subparagraph 501(7AA)(a)(ii) provides that one of the physical elements that may form the basis of a *designated offence* involves non-consensual conduct of a sexual nature. New subparagraph 501(7AA)(a)(ii) sets out some examples of offences that involve non-consensual conduct of a sexual nature that are intended to be captured. This includes sexual assault, and the non-consensual commission of an act of indecency or sharing of an intimate image.

25. The intention of new subparagraph 501(7AA)(a)(ii) is to provide examples of offences that include non-consensual conduct of a sexual nature, but it is not intended to limit offences that involve non-consensual conduct of a sexual nature from being a *designated offence* for the purposes of the *character test*. Other offences where a physical element of the offence involves non-consensual conduct of a sexual nature but which are not listed in new subparagraph 501(7AA)(a)(ii), or an offence similar to those listed but identified differently in the jurisdiction it was committed in, are intended to be captured by this subparagraph where the conditions in paragraphs 501(7AA)(b) and (c) are also satisfied.

26. New subparagraph 501(7AA)(a)(iii) provides that one of the physical elements that may form the basis of a *designated offence* involves breaching an order made by a court or tribunal for the personal protection of another person. This includes any order of such nature regardless of how it is described in the jurisdiction it was ordered.

27. The intention of new subparagraph 501(7AA)(a)(iii) is to provide grounds for the breaching of an order made by a court or a tribunal for the personal protection of another person to be a physical element of a *designated offence* for the purposes of the *character test*. The nature of the breach is not intended to be material in determining whether the physical element has been satisfied, the breach of the order in and of itself should be considered as satisfying the physical element required for a *designated offence* to have occurred, where the conditions in paragraphs 501(7AA)(b) and (c) are also satisfied.

28. New subparagraph 501(7AA)(a)(iv) provides that one of the physical elements for a *designated offence* involves the use or possession of a weapon. This includes any offence

involving the use or possession of a weapon, regardless of how it is described in the jurisdiction in which the offence was committed.

29. The term *weapon* is defined is defined for the purposes of 501(7AA)(a)(iv) by subsection 501(7AB) of the Act and is discussed in detail at paragraphs 45 - 48 of this Schedule.

30. The intention of new subparagraph 501(7AA)(a)(iv) is to provide that, where a physical element of an offence involves use or possession of a weapon, this will be a *designated offences* for the purposes of the *character test*, where the conditions in paragraphs 501(7AA)(b) and (c) are also satisfied.

31. New subparagraphs 501(7AA)(a)(v)-(viii) provide that if an offence is a *designated offence* as a result of new subparagraphs 501(7AA)(a)(i)-(iv), and a non-citizen is involved in:

- aiding, abetting, counselling or procuring the commission of such a *designated offence* (new subparagraph 501(7AA)(a)(v))
- inducing the commission of such a *designated offence* through threats or promises or otherwise (new subparagraph 501(7AA)(a)(vi))
- being in any way, directly or indirectly, knowingly concerned in or otherwise a party to the commission of such a *designated offence* (new subparagraph 501(7AA)(a)(vii)), or
- conspiring with others to commit such a *designated offence* (new subparagraph 501(7AA)(a)(viii))

Then those actions will also form the requisite physical element for a *designated offence*.

32. The intention of new subparagraphs 501(7AA)(a)(v)-(viii) is to ensure that not only those non-citizens that commit *designated offences*, as specified in new subparagraphs 501(7AA)(a)(i)-(iv), but also those non-citizens who commit certain ancillary offences in respect of the commission of such *designated offences*, will not pass the *character test* , where the conditions in paragraphs 501(7AA)(b) and (c) are also satisfied.

33. It intends to capture those non-citizens with links to those activities that pose a risk to the Australian community, such as (but not limited to) organised crime, outlaw motor cycle gangs or those who, without committing the physical elements as set out in subparagraphs 501(7AA)(a)(i)-(iv), have a level of involvement in the commission of a *designated offence* that gives rise to an offence in and of itself. This makes it clear that the intention is that non-citizens who are criminals or who are associated with criminal activity should not remain in, or be allowed to enter, Australia.

34. New paragraph 501(7AA)(b) sets out the second of the conditions that must be satisfied in order for a *designated offence* to have occurred. This operates in conjunction with new paragraph 501(7AA)(a) and new paragraph 501(7AA)(c).

35. New paragraph 501(7AA)(b) provides that, where an offence is against a law in force in Australia, it must be punishable by one of the punishments set out in new subparagraphs 501(7AA)(b)(i)-(iii) to be considered a *designated offence*:

- Imprisonment for life (501(7AA)(b)(i)); or

- Imprisonment for a fixed term of not less than 2 years (501(7AA)(b)(ii)); or
- Imprisonment for a maximum term of not less than 2 years) (501(7AA)(b)(iii)).

36. The purpose of new paragraph 501(7AA)(b) is to provide for a minimum standard of punishment for an offence to be considered a *designated offence* for the purposes of the *character test*.

37. The intention of new paragraph 501(7AA)(b) is to make it clear that a *designated offence* must be a serious offence, and not merely a minor or trifling offence. These provisions acknowledge that the visa cancellation or refusal of a non-citizen due to having committed a *designated offence* for the purposes of the *character test* does have lasting consequences for non-citizens, including permanent exclusion from Australia in some cases.

38. It also sets an objective standard for the determination of what constitutes a *designated offence*, which relies upon established existing criminal law and law enforcement processes in states and territories to determine the seriousness of a given offence.

39. This will ensure that discretionary visa cancellation and refusal decisions are based on objective standards of criminality and seriousness.

40. New paragraph 501(7AA)(c) provides the circumstances in which an offence that is against a law in force in a foreign country is taken to be a *designated offence*, where the conditions in paragraphs 501(7AA)(a) and (b) are also satisfied.

41. Such an offence is considered a *designated offence* if it were assumed that the act or omission that formed the basis of the offence occurred in the Australian Capital Territory and:

- the act or omission that formed the basis of the offence would have also been an offence against a law in force in the Australian Capital Territory (501(7AA)(c)(i)); and
- the offence, if committed in the Australian Capital Territory, would have been punishable as set out in new subparagraphs 501(7AA)(b)(i)-(iii) (501(7AA)(c)(ii)).

42. The intention of these amendments is to ensure that an offence that is considered a *designated offence* is an offence that is equal to an offence that would be considered a serious crime in Australia.

43. This will ensure that discretionary decisions to cancel or refuse a visa on the basis of a non-citizen having committed a *designated offence* in a foreign country are based on an objective standards, and in line with the Australian community's understanding of a serious offence.

44. New paragraph 501(7AB) defines *weapon* for the purposes of subparagraph (7AA)(a)(iv).

45. The purpose of new paragraph 501(7AB) is to clarify what may constitute a *weapon* under new subparagraph 501(7AB)(a)(iv), which provides that the use or possession of a weapon may be the physical element for a *designated offence*.

46. Paragraph 501(7AB) provides that a weapon includes:

- A thing made or adapted for use for inflicting violence or injury on a person (501(7AB)(a)); and
- A thing where the person who has the thing intends or threatens to use the thing, or intends that the thing be used, to inflict violence or injury to a person (501(7AB)(b))

47. The intention of new paragraphs 501(7AB)(a) and (b) is to make clear that a weapon, for the purposes of a *designated offence* includes an object that is readily identifiable as a weapon, for example, a gun (501(7AB)(a)), or an object that is not necessarily readily identifiable as a weapon, but it is the intention of the person possessing it to use it as a weapon, for example, a rock that a person intends to use to hit someone on the head (501(7AB)(b)).

48. The purpose of new subparagraphs 501(7AB)(a) and (b) is to make ensure that a weapon, for the purposes of new subparagraph 501(7AB)(a)(iv), is not limited to objects that are ordinarily used as weapons but includes any object which the person who has the object intends to use to cause violence or injury to another person.

#### **Item 7            Application of Amendments**

49. Item 7 sets out the application provisions that relate to items 1 to 6 of this Schedule.

50. Subitem 7(1) provides that the amendments made by items 1-4 of this Schedule apply in relation to the disclosure of identifying information for the purposes of subsection 336E(2) of the Migration Act on or after the commencement of those items.

51. Subitem 7(2) provides that the amendments made by item 5 and 6 of this Schedule apply in relation to a decision to grant or refuse to grant a visa:

- If the application for the visa was made but not finally determined before the commencement of this item; or
- If the application for the visa is made on or after the commencement of this item.

52. Subitem 7(2) also provides that the amendments made by item 5 of this Schedule apply to a decision made to cancel a visa on or after the commencement of this item.

53. Subitem 7(3) provides that the amendments made by items 1-6 of this Schedule apply as mentioned in subitems 7(1) and 7(2) whether the person committed or was convicted of the relevant designated offence before, on, or after the commencement of item 7.



**STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**Migration Amendment (Strengthening the Character Test) Bill 2018**

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

**Overview of the Bill**

The Australian Government remains committed to protecting the Australian community from the risk of harm posed by non-citizens. To continue the trend of Australia's strong cancellation powers and low tolerance for criminal behaviour by non-citizens, this Bill will introduce measures that enhance the Government's ability to protect the Australian community.

The Bill is in response to recommendations by the 2017 Joint Standing Committee on Migration report on migrant settlement outcomes titled 'No one teaches you to become an Australian'. The Bill strengthens the character test in section 501 of the *Migration Act 1958* (Migration Act) by providing a new specific and objective ground to consider visa cancellation or refusal where a non-citizen has been convicted of offences involving violence against a person (including murder, assault and kidnapping), weapons, breaching of an apprehended violence order (or similar) or non-consensual sexual acts.

The Bill also makes consequential amendments to the definition of *character concern* in section 5C of the Migration Act to include the offences set out in the new ground of section 501 that this Bill introduces. The term character concern is used in relation to the meaning of personal identifier in section 5A of the Migration Act, which is also relevant to the purposes for which personal identifiers can be collected under s257A, and in relation to permitted disclosures of identifying information, including personal identifiers, in section 336E. Together these provisions allow for the collection and disclosure of certain types of information, including for the purpose of identifying non-citizens who have a criminal history or who are of character concern.

The amendments will ensure the character test aligns directly with community expectations, that non-citizens who commit offences such as murder, assault, sexual assault or aggravated burglary will not be permitted to remain in the Australian community. It provides further clarity by objectively setting out offences that adversely impact upon the inalienable right of law-abiding citizens and non-citizens to be protected, as recommended by the Joint Standing Committee on Migration's report.

**Human rights implications**

This Bill engages the following rights:

- Right to liberty – Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).
- Non-refoulement obligations – Article 3(1) of the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) and Articles 6 and 7 of the ICCPR.
- Expulsion of aliens – Article 13 of the ICCPR.
- Right to respect for the family – Articles 17(1) and 23(1) of the ICCPR.
- Consideration of the best interests of the child – Article 3 of the Convention on the Rights of the Child (CRC).
- Right to privacy – Article 17(1) of the ICCPR.

The practical effect of these amendments will be greater numbers of people being liable for consideration of refusal or cancellation of a visa as they would not, or no longer meet, character requirements set out in section 501 of the Migration Act.

Where a person's visa is cancelled or refused in Australia, they will be liable for detention under section 189 of the Act, may be removed from Australia, and/or may be separated from the family unit. This Statement of Compatibility addresses the potential human rights implications that may result from these practical effects along with other possible implications that may arise from this Bill.

### **Right to liberty**

Article 9(1) of the ICCPR states:

*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

The amendments do not change the framework within which the character cancellation powers function. These new grounds do not enliven mandatory cancellation powers. The amendments only seek to provide additional, specified grounds to consider refusing or cancelling a visa. The decision to refuse or cancel a visa using these grounds will be discretionary.

Currently the character provisions in the Act enable a visa to be refused or cancelled on the basis of offences where the non-citizen has received a sentence of 12 months or more or was convicted of sexual criminal offences involving a child. While there is also a provision that allows consideration of refusal or cancellation of a visa based on a person's past and present criminal or general conduct, the amendments in this Bill provide a clearer and more objective basis for refusing or cancelling the visa of a non-citizen whose offending has not attracted a sentence of 12 months or more, but who nonetheless poses an unacceptable risk to the safety of law-abiding citizens and non-citizens. For example, the breach of an Apprehended Violence Order (or similar). The amendments expand the framework beyond a primarily sentence-based approach and instead allow the Minister or delegate to look at the individual circumstances of the offending and the severity of the conduct.

If an individual's visa is cancelled or refused, the person is liable for immigration detention under section 189 of the Act.

As set out above, Article 9 of the ICCPR is a prohibition on arbitrary detention. The concept of arbitrariness goes beyond mere lawfulness and requires that the detention of the individual is reasonable, necessary and proportionate to achieve a legitimate aim. The object of the Bill is to amend the character test to provide a specific and objective ground to consider cancellation or refusal of a visa where a non-citizen has been convicted of a serious crime. It aligns with community expectations that non-citizens who have committed serious offences should not be allowed to remain in the Australian community. The UN Human Rights Committee has recognised in the ICCPR context that “The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory [...] Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment” (CCPR General Comment 15, 11 April 1986).

Legislative amendments that extend the grounds upon which a person’s visa may be cancelled or refused, the result of which may be subsequent detention, add to a number of existing laws that are well-established, generally applicable and predictable. This will be the case also for these amendments. The Bill expands the scope of people who may be considered for visa cancellation or refusal, however it presents a reasonable response to achieving a legitimate purpose under the ICCPR – the safety of the Australian community and the integrity of the migration programme. The new powers will enable the Department to better target individuals with serious criminality or unacceptable behaviour and, in line with community expectations, it is appropriate that a person who engages in these activities should not be entitled to hold a visa. The consequence of this may be their detention and subsequent removal from Australia. Decision-makers exercising the discretion to refuse or cancel a person’s visa are guided by comprehensive policy guidelines and Ministerial Directions, and take into account the individual’s circumstances and relevant international obligations. This means the visa decision, and any consequent detention or refusal, is a proportionate response to the individual circumstances of each case.

The detention of a person under these circumstances is therefore considered neither unlawful nor arbitrary under international law. In addition, the Government has processes in place to mitigate any risk of a person’s detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman Own Motion enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister’s personal intervention powers to grant a visa or residence determination where it is considered in the public interest.

### **Non-refoulement obligations**

Article 3(1) of the CAT states:

*‘No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’*

Articles 6 and 7 of the ICCPR also impose on Australia an implied non-refoulement obligation. Article 6 of the ICCPR states:

*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

Article 7 of the ICCPR states:

*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

Australia remains committed to its international obligations concerning non-refoulement. These obligations are considered as part of the decision whether to refuse or cancel a visa on character grounds. Anyone who is found to engage Australia's non-refoulement obligations during the refusal or cancellation decision or in subsequent visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations.

### **Expulsion of aliens**

Article 13 of the ICCPR states:

*'An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.'*

As the cancellation of a visa held by a non-citizen lawfully in Australia can lead to removal, the cancellation process as a whole can amount to expulsion as contemplated in Article 13 of the ICCPR.

Decisions to cancel a visa on character grounds are made in accordance with section 501 of the Migration Act and the relevant procedures and review mechanisms available are not being amended by this Bill. To the extent that a larger number of people may have their visa cancelled as a result of this amendment, possibly leading to their expulsion, the processes are in accordance with the procedural requirements of Article 13 and review of the decisions is available – merits review by the Administrative Appeals Tribunal and/or judicial review for decisions made by a delegate, and judicial review of decisions made by the Minister personally.

### **Rights relating to families and children**

Article 3(1) of the CRC states:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'*

Article 17(1) of the ICCPR states:

*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'*

Article 23(1) of the ICCPR states:

*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

Article 24(1) of the ICCPR states:

*Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.'*

Where an individual's visa is cancelled or refused, they may be detained and/or removed from Australia under the provisions of the Migration Act, which may result in separation of the family unit. The rights relating to families and children — including the best interests of any children under 18 and the impact of separation from family members — will be taken into account as part of the consideration whether to refuse or cancel the visa. While rights relating to family and children generally weigh heavy against cancellation or refusal, there will be circumstances where they may be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record or past behaviour or associations. The amendments in the Bill allow for a more considered deliberation of community expectations and threats posed by individuals by specifying certain offences that will enliven consideration of visa refusal or cancellation, which will then allow consideration of the surrounding circumstances.

Any separation from family members in Australia caused by an unlawful non-citizen being detained or removed as a result of having their visa cancelled or refused pursuant to the new ground of the character test will not be inconsistent with Articles 17, 23 and 24 of the ICCPR and Article 3 of the CRC as the decision to refuse or cancel will appropriately weigh the impact of separation from family and the best interests of any children against the non-citizen's risk to the community.

Like other section 501 provisions within the *Migration Act 1958*, the specific grounds introduced by this Bill does not differentiate between adults and persons under the age of 18. However, the best interests of the child are, and will remain to be, a primary consideration in any decision whether to refuse or cancel a child's visa on character grounds. As such, the refusal or cancellation of a child's visa on these grounds would only occur in exceptional circumstances.

### **Right to privacy**

Article 17(1) of the ICCPR states:

*'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'*

As the Bill consequentially amends section 5C of the Migration Act, expanding the definition of 'character concern', it also extends the circumstances in which the Department can collect and disclose identifying information for the purpose of identifying non-citizens who are of character concern — to include those who have been convicted of a designated offence.

The amendments are to achieve a legitimate purpose under the ICCPR — to protect the Australian community from non-citizens who pose an unacceptable risk. Permitting the collection and disclosure of identifying information, such as photographs, signatures and other personal identifiers as defined in section 5A of the Migration Act, for the purpose of identifying persons of character concern, is a reasonable and proportionate measure to achieve the intended operation of the character provisions for purpose of protecting the Australian community. Any interference with the privacy of a person who has been convicted of a designated offence, in order to help identify them, would therefore not be unlawful or arbitrary.

### **Conclusion**

The Bill is compatible with human rights as, to the extent it may limit some human rights, those limitations are reasonable, necessary and proportionate to the objective of protecting the Australian community from the risk of harm posed by non-citizens who have been convicted of designated offences.

**The Hon David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs**