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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST)  
BILL 2021**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, the Honourable Alex Hawke MP)

## MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2021

### OUTLINE

The Migration Amendment (Strengthening the Character Test) Bill 2021 (the Bill) amends the *Migration Act 1958* (the Migration Act) to ensure that non-citizens who are convicted of certain serious offences, and pose a risk to the safety of the Australian community, do not pass the character test and may be appropriately considered for visa refusal or cancellation.

The Bill is in response to recommendations by the 2017 Joint Standing Committee on Migration report on migrant settlement outcomes entitled “No one teaches you to become an Australian”. Recommendations 15 and 16 suggested that those convicted of a serious offence should have their visas cancelled under character provisions.

The Bill strengthens the character test in section 501 of the Migration Act by providing a new specific and objective ground to consider visa refusal or cancellation where a non-citizen has been convicted of certain serious offences against Australian or foreign laws involving violence against a person (including murder, kidnapping and aggravated burglary), non-consensual sexual acts, breaching of an apprehended violence order (or similar) or weapons.

It would, however, remain a matter for the Minister or a delegate to consider the factors in relation to the nature of the conviction, any sentence applied and countervailing considerations before deciding whether to exercise the discretionary power under section 501 of the Migration Act to refuse to grant or cancel a visa. In other words, a determination that a person does not pass the character test under the new ground would enliven the discretion whether to refuse to grant or cancel a visa but would not dictate the outcome of the exercise of the discretion.

The amendments in the Bill will ensure the character test aligns directly with community expectations that non-citizens who are convicted of offences such as murder, sexual assault or aggravated burglary will not be permitted to enter or remain in the Australian community.

Specifically, the provisions of the Bill:

- introduce a ***designated offence*** ground to the character test in section 501 of the Migration Act. A designated offence would be an offence punishable by at least a maximum sentence of no less than two years’ imprisonment, involving:
  - violence, or a threat of violence, against a person; or
  - non-consensual conduct of a sexual nature; or
  - breaching an order made by a court or tribunal for the personal protection of another person; or
  - using or possessing a weapon; or
  - procuring, or assisting in any way with the commission of one of these designated offences.
- provide that, for an offence involving ***violence against a person***, a person’s conviction for an offence of common assault, or equivalent, will not be taken to be a conviction for a designated offence unless the act constituting the offence:

- causes or substantially contributes to bodily harm to another person, or harm to another person's mental health (within the meaning of the *Criminal Code*), in both cases either temporarily or permanently; or
- involves family violence (as defined by subsection 4AB(1) of the *Family Law Act 1975*) by the person in relation to another person; and
- make consequential amendments to the definition of ***character concern*** in section 5C of the Migration Act.

## **FINANCIAL IMPACT STATEMENT**

These amendments will have a low 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 2021**

**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 2021*.

**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 legislation that is 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

### *Migration Act 1958*

#### **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 term ***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 a ***designated offence***, as set out in the Bill, will be of character concern. The relevant criteria for a ***designated offence*** are set out in new subsections 5C(3) to (7), for the purposes of the term ***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 current subsection 5C(2). This heading makes it clear that subsection 5C(2) describes the term ***substantial criminal record***, for the purposes of subsection 5C(1).

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

11. Current section 5C contains the meaning of ***character concern***, and sets out the circumstances in which a non-citizen will be of character concern. The term ***character concern*** is used in relation to the meaning of ***personal identifier*** in current subsection 5A(3) of the Migration Act, which is also relevant to the purposes for which personal identifiers can be collected under section 257A, and in relation to ***permitted disclosures*** of identifying information, including personal identifiers, in current subsection 336E(2) of the Migration Act. 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.

12. This item inserts new subsections 5C(3) to (7) into the meaning of ***character concern***, and sets out the criteria for a ***designated offence*** for the purposes of subsection 5C(1).

13. New paragraphs 5C(3)(a) to (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 a non-exhaustive list of the types of acts that would constitute ***violence against a person*** for the purposes of new subparagraph 5C(3)(a)(i). This is discussed in detail at item 6 of this Schedule.

15. New subsection 5C(5) provides that a person’s conviction for an offence of common assault, or an equivalent offence, is taken not to be a conviction for a designated offence unless certain circumstances exist. These circumstances are discussed in detail at item 6 of this Schedule.

16. New subsection 5C(6) provides the definition of a **weapon** for the purposes of new subparagraph 5C(3)(a)(iv). This definition is discussed in detail at item 6 of this Schedule.
17. New subsection 5C(7) provides the circumstances in which a person's conviction for an ancillary offence is taken not to be a conviction for a designated offence. These circumstances are discussed in detail at item 6 of this Schedule.
18. The intention of item 4 is to align the meaning of **character concern** in section 5C of the Migration Act with new subsections 501(7AA) to (7AE), as inserted by item 6 of this Schedule.

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

19. This item inserts new paragraph 501(6)(aaa) into the **character test**. The existing character test in subsection 501(6) of the Migration Act sets out the circumstances in which a non-citizen will not pass the character test.
20. New paragraph 501(6)(aaa) provides that a non-citizen does not pass the character test if the non-citizen has been convicted of a designated offence. The criteria for a designated offence is set out in new subsections 501(7AA) to (7AE), as inserted by item 6 of this Schedule.
21. 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.
22. Failure to pass the character test on this ground does not necessarily mean the non-citizen's visa will be cancelled or refused. Once it has been determined that a non-citizen does not pass the character test on this ground they may be considered for visa refusal or cancellation. A delegate of the Minister must have regard to the factors prescribed in the relevant Ministerial direction made under section 499 of the Migration Act. Generally, the discretion to cancel or refuse to grant a visa will not be exercised for low level, petty or historical offending.

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

23. This item inserts new subsections 501(7AA) to (7AE) into Division 2 of Part 9 of the Migration Act.
24. New subsection 501(7AA) sets out the elements of a **designated offence** for the purposes of the **character test** in subsection 501(6) of the Migration Act. New subsection 501(7AA) provides that a **designated offence** is an offence against a law in force in Australia, or in a foreign country, that satisfies the conditions set out in new paragraphs 501(7AA)(a) to (c).
25. 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) to (viii).

26. New subparagraph 501(7AA)(a)(i) provides that one of the physical elements that may form the basis of a designated offence involves violence, or a threat of violence, against a person, as defined in new subsections 501(7AB) and (7AC) (see discussion at paragraphs 48 to 54 below).
27. The intention of new subparagraph 501(7AA)(a)(i) is to clarify the scope of a designated offence where one of more of the physical elements involves violence, or a threat of violence, against a person, by reference to new subsections 501(7AB) and (7AC).
28. 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, including sexual assault and the non-consensual commission of an act of indecency or sharing of an intimate image.
29. 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 them. 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.
30. 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.
31. 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.
32. 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.
33. The term **weapon** is defined for the purposes of new subparagraph 501(7AA)(a)(iv) in new subsection 501(7AD) and is discussed in detail at paragraphs 55 to 59 below.
34. 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 offence for the purposes of the character test, where the conditions in new paragraphs 501(7AA)(b) and (c) are also satisfied.

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

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

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

36. The intention of new subparagraphs 501(7AA)(a)(v) to (viii) is to ensure that not only those non-citizens that commit designated offences, as specified in new subparagraphs 501(7AA)(a)(i) to (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 new paragraphs 501(7AA)(b) and (c) are also satisfied.

37. New subparagraphs 501(7AA)(a)(v) to (viii) are intended to capture non-citizens with links to activities that pose a risk to the Australian community, such as (but not limited to) organised crime, outlaw motorcycle gangs or those who, without committing the physical elements as set out in new subparagraphs 501(7AA)(a)(i) to (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.

38. 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).

39. 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 penalties set out in new subparagraphs 501(7AA)(b)(i) to (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)).

40. 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.

41. 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 petty offence. These

provisions acknowledge that the cancellation or refusal of a non-citizen's visa can have serious consequences, including permanent exclusion from Australia.

42. New paragraph 501(7AA)(b) also sets an objective standard for the determination of what constitutes a designated offence, based on established criminal law and law enforcement processes in states and territories.
43. This will ensure that discretionary visa cancellation and refusal decisions are based on objective standards of criminality and seriousness.
44. New paragraph 501(7AA)(c) sets out the circumstances in which an offence against a law in force in a foreign country is taken to be a designated offence, where the conditions in new paragraphs 501(7AA)(a) and (b) are also satisfied.
45. Such an offence will be a designated offence if the act or omission constituting the offence, had it occurred in the Australian Capital Territory, would have been:
  - an offence against a law in force in the Australian Capital Territory (501(7AA)(c)(i)); and
  - punishable as set out in new subparagraphs 501(7AA)(b)(i), (ii) or (iii) (501(7AA)(c)(ii)).
46. The intention of new paragraph 501(7AA)(c) is to ensure that an offence that is considered a designated offence is one that is equal to an offence that would be considered serious in Australia.
47. This will ensure that discretionary decisions to cancel or refuse to grant a visa on the basis of a non-citizen having committed a designated offence in a foreign country are based on an objective standard, and in line with the Australian community's understanding of a serious offence.
48. New subsection 501(7AB) provides that, for the purposes of new subparagraph 501(7AA)(a)(i), **violence against a person** includes an act constituting an offence of murder, manslaughter, kidnapping, aggravated burglary, robbery or assault, or an equivalent offence.
49. The purpose of new subsection 501(7AB) is to provide a non-exhaustive list of the types of acts that would constitute violence against a person, noting that the terminology for such offences may vary depending on the State or Territory where the offence occurs.
50. New subsection 501(7AC) provides that, despite new subparagraph 501(7AA)(a)(i) and subsection 501(7AB), a person's conviction for an offence of common assault, or an equivalent offence, is taken not to be a conviction for a designated offence unless the act constituting the offence for which the person was convicted:
  - causes or substantially contributes to bodily harm to another person, or harm to another person's mental health (within the meaning of the *Criminal Code*), in both cases either temporarily or permanently; or
  - involves family violence (as defined by subsection 4AB(1) of the *Family Law Act 1975*) by the person in relation to another person.

51. Section 146.1 of the *Criminal Code* defines ***harm to a person's mental health*** as including significant psychological harm to the person, but not including a reference to ordinary emotional reactions (for example: distress, grief, fear or anger).
52. Subsection 4AB(1) of the *Family Law Act* 1975 provides that ***family violence*** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the ***family member***), or causes the family member to be fearful.
53. The effect of new subsection 501(7AC) is to clarify that a conviction for an offence of common assault, or equivalent, is taken not to be a conviction for a designated offence unless the act constituting the offence causes, or substantially contributes to, either temporary or permanent bodily harm or harm to another person's mental health, or involves family violence.
54. The purpose of new subsection 501(7AC) is to ensure that low-level assaults, including threats, that neither cause, nor contribute, to a person's bodily harm or harm to a person's mental health, and do not involve family violence, will not fall within the scope of a designated offence. This means that a person convicted of such an assault will not fail the character test as a result of that conviction, as they will not have been convicted of a designated offence. However, a conviction for common assault, where the act constituting the offence involves family violence, will be a designated offence, irrespective of whether the assault causes bodily harm or harm to a person's mental health. This aligns with the Government's position on combatting family violence.
55. New subsection 501(7AD) defines ***weapon*** for the purposes of new subparagraph 501(7AA)(a)(iv).
56. The purpose of new subsection 501(7AD) is to clarify what may constitute a weapon under new subparagraph 501(7AA)(a)(iv), which provides that the use or possession of a weapon is a physical element for a designated offence.
57. New subsection 501(7AD) provides that a weapon includes:
  - a thing made or adapted for use for inflicting bodily injury (501(7AD)(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 bodily injury (501(7AD)(b)).
58. The intention of new paragraphs 501(7AD)(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(7AD)(a)), or an object that is not necessarily readily identifiable as a weapon, but is intended to be used as a weapon, for example, a rock that a person intends to use to hit someone on the head (501(7AD)(b)).
59. The purpose of new paragraphs 501(7AD)(a) and (b) is to ensure that a weapon, for the purposes of new subparagraph 501(7AA)(a)(iv), is not limited to objects that are ordinarily used as weapons but includes any object which is intended to cause violence or injury to another person.

60. New subsection 501(7AE) provides that, despite new subparagraphs 501(7AA)(a)(v) to (viii), a person's conviction for an offence covered by any of those subparagraphs because of the operation of new subparagraph 501(7AA)(a)(i) (as affected by new subsection 501(7AB)), in relation to the commission of an offence (the *primary offence*) by another person, is taken not to be a conviction for a designated offence if, were the other person to be convicted of the primary offence, that conviction would not be a conviction for a designated offence because of the operation of new subsection 501(7AC).

61. The purpose of new subsection 501(7AE) is to ensure that, where a person is convicted of an offence where one or more of the physical elements involves violence against a person, but such conviction is taken not to be a conviction for a designated offence by operation of new subsection 501(7AC) (as described above), then a person convicted of any ancillary offence (as set out in new subparagraphs 501(7AA)(a)(v) to (viii)) is also taken not to have been convicted of a designated offence. This means that the person would not fail the character test as a result.

#### **Item 7 Application of amendments**

62. Item 7 sets out the application provisions that relate to the amendments in this Schedule.

63. Subitem 7(1) provides that new paragraph 5C(1)(aa) of the Migration Act applies, for the purposes of current subsection 336E(2), in relation to a disclosure of identifying information that is made on or after commencement of this item.

64. Subitem 7(2) provides that new paragraph 501(6)(aaa) of the Migration Act applies in relation to a decision to grant or refuse to grant a visa, if:

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

65. Subitem 7(2) also provides that new paragraph 501(6)(aaa) applies to a decision made on or after commencement of this item to cancel a visa.

66. Subitem 7(3) provides that new paragraphs 5C(1)(aa) and 501(6)(aaa) of the Migration Act apply as mentioned in subitems 7(1) and (2) in relation to a person whether the person committed or was convicted of the relevant designated offence before, on or after the commencement of this item.

67. The amendments in this Bill are intended to strengthen the character test and ensure it aligns with community expectations that non-citizens who are convicted of offences such as murder, sexual assault or aggravated burglary will not be permitted to enter or remain in the Australian community.

68. The application provision in subitem 7(3) supports this intention by ensuring that a person who has committed or been convicted of a designated offence may be considered for visa refusal or cancellation under section 501, regardless of when the relevant conduct or conviction occurred.

69. If a person does not pass the character test under the new designated offence ground, the discretion whether to cancel or refuse to grant a visa would be enlivened. This would not dictate the outcome of the exercise of the discretion.
70. It would remain a matter for the Minister, or the Minister's delegate, in the circumstances of the individual case to consider factors in relation to the nature of the conviction, any sentence applied and countervailing considerations before deciding whether to exercise the discretionary power under section 501.
71. When considering visa refusal or cancellation, a delegate of the Minister must have regard to the factors set out in the relevant Ministerial direction made under section 499 of the Migration Act. Generally, the discretion to cancel or refuse to grant a visa will not be exercised for low-level, petty or historical offending.
72. The amendments to the character provisions do not change or otherwise affect the existing arrangements relating to natural justice or review rights for decisions made under section 501 of the Migration Act.

**Attachment A****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 2021**

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 introduces measures that enhance the Government's ability to protect the Australian community.

The Bill follows on from issues considered by the 2017 Joint Standing Committee on Migration report on migrant settlement outcomes titled 'No one teaches you to become an Australian'. In its recommendations 15 and 16, the Committee recommended that those convicted of a serious violent offence, such as serious assaults, aggravated burglary, sexual offences and possession of child pornography, should have their visas cancelled under character provisions.

The Bill strengthens the character test in section 501 *Migration Act 1958* (the Migration Act) to ensure that non-citizens who are convicted of certain serious criminal offences may be considered for visa refusal or cancellation, regardless of the length of sentence imposed. The amendments in the Bill acknowledge that certain serious criminal offences (*designated offences*) have a particularly significant impact on victims, and that a person who is convicted of such an offence should be appropriately considered for visa refusal or cancellation under section 501.

The Bill amends section 501 of the Migration Act to introduce a new ground on which a person convicted of a *designated offence* (in Australia or overseas) objectively fails the character test, and may be considered on a discretionary basis for visa refusal or cancellation on character grounds, regardless of the actual sentence imposed. The Bill also makes consequential amendments to the definition of *character concern* in section 5C of the Migration Act.

To fail the character test on the *designated offence* ground, the non-citizen would need to be convicted of an offence that is punishable by at least a maximum term of not less than two years' imprisonment and that involves:

- violence against a person, or
- non-consensual conduct of a sexual nature, or
- breaching an order made by a court or tribunal for the personal protection of another person, or
- using or possessing a weapon, or
- procuring, or assisting in any way with one of these designated crimes.

The Bill also provides that, for an offence with one or more physical elements that involve violence against a person, a person's conviction for an offence of common assault (or equivalent) will not be taken to be a conviction for a designated offence, unless the act constituting the offence:

- causes or substantially contributes – temporarily or permanently – to bodily harm to another person or harm to another person's mental health (within the meaning of the *Criminal Code*); or
- involves family violence (as defined by subsection 4AB(1) of the *Family Law Act 1975*) by the person in relation to another person.

Any offence of common assault that involves family violence will be taken to be a designated offence regardless of whether the offence causes bodily harm or harm to a person's mental health. This aligns with the Government's position on combatting family violence.

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 section 257A, 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 in the Bill will ensure the character test aligns directly with community expectations that non-citizens who commit offences such as murder, 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, Inhuman or Degrading Treatment or Punishment* (CAT) and Articles 6 and 7 of the ICCPR.
- Expulsion of aliens – Article 13 of the ICCPR.
- Rights relating to family and children – Articles 17(1) and 23(1) of the ICCPR and 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 who objectively do not satisfy the character test set out in section 501 of the Migration Act and who are liable for consideration of refusal or cancellation of a visa on that basis.

Where a non-citizen'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, objective 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 non-citizen'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 in Australia. 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. However the Bill does not include some forms of lower-level offending in the scope of a **designated offence**, namely convictions for low-level assaults that neither cause nor contribute to a person's bodily harm or harm to a person's mental health (whether temporarily or permanently), and do not involve family violence.

If a non-citizen'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 non-citizen 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 non-citizen'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 objectively fail the character test and be considered for visa cancellation or refusal on that basis, 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 non-citizens 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 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.

Whether the person is placed in an immigration detention facility ('held detention'), or is subject to other arrangements, is determined by using a risk-based approach. Detention Review Committees are held regularly to review all cases held in detention to ensure the ongoing lawfulness and reasonableness of the person's detention, by taking into account all the circumstances of the case. This regular review takes into account any changes in the client's circumstances that may impact on immigration pathways including returns and removal, to ensure the continued lawfulness of detention and to ensure alternative placement options have been duly considered. Recent amendments to the *Migration Regulations 1994* also enhance the options available to the Minister in considering whether to grant a Bridging Visa in such circumstances, by providing a larger suite of bridging visa conditions relating to the safety and security of the Australian community, that the Minister may consider imposing in order to grant a visa while also mitigating risks to the Australian community.

### Non-refoulement obligations

Article 3(1) of the CAT states:

*No State Party shall expel, return ("refoul") 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 discretionary decision whether to refuse or cancel a visa on character grounds. A non-citizen will not be removed to a country in relation to which the person has been found to engage *non-refoulement* obligations through the protection visa process.

In particular, where the visa which is refused or cancelled under section 501 is not a protection visa, the person is not prevented by section 501E of the Migration Act from applying for a protection visa (subsection 501E(2) of the Migration Act). Where the visa which is refused or cancelled is a protection visa, or where the person subsequently makes a protection visa application, the person will be protected from removal in breach of Australia's *non-refoulement* obligations where a **protection finding** is or has been made in the course of considering that protection visa application. This is set out in subsection 197C(3) of the Act. Where a person has **protection finding**, it is irrelevant that the visa was refused or cancelled, or could be refused, on another basis, such as character. A person with a **protection finding** cannot be removed to the relevant country unless they request this in writing, or where the Minister makes a decision under section 197D that, for example due to improving country conditions, a **protection finding** would no longer be made in the person's case. A decision under section 197D is subject to merits review.

As such, this amendment does not affect Australia's commitment to complying with its *non-refoulement* obligations in relation to Article 3 of the CAT and Articles 6 and 7 of the ICCPR.

### 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.

The majority of discretionary decisions to cancel or refuse a visa on character grounds are made under section 501(1) of the Act for refusals and section 501(2) of the Act for cancellations. Such decisions afford natural justice prior to the making of the decisions, allowing the person to comment and provide any supporting documents or evidence to the Department as to why their visas should not be cancelled or refused, and provide any countervailing considerations. This is the case for both decisions made by the Minister personally, and decisions made by delegates of the Minister.

In a limited number of cases, a non-citizen's visa may be considered for refusal or cancellation by the Minister personally under section 501(3), without natural justice, where the Minister is satisfied that refusal or cancellation is in the national interest. National interest is determined by the Minister personally, and the Minister's satisfaction that a decision is in the national interest must be attained reasonably.

Although these rare decisions to refuse or cancel the visa in the national interest under section 501(3) are made without affording the non-citizen an opportunity to provide reasons as to why their visa should not be cancelled or refused or any countervailing considerations, the non-citizen is able to seek revocation of the decision. Further, it is open to the Minister to make a decision to revoke the cancellation or refusal if the non-citizen satisfies the Minister that they pass the character test.

Like all decisions made on character grounds, decisions of the Minister made personally, including where made in the national interest, are subject to judicial review. During judicial review, the Court could consider whether or not the power given by the Migration Act has been properly exercised. For a discretionary power such as a personal decision by the Minister under the Migration Act, this could include the consideration of whether the power has been exercised in a reasonable manner.

### 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.*

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 and 23 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. In particular, delegates must treat the best interests of affected children in Australia as a primary consideration.

Like other section 501 provisions within the Migration Act, the specific grounds introduced by this Bill do 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 the 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. Alex Hawke MP,  
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

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