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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MIGRATION AMENDMENT (CHARACTER AND GENERAL VISA
CANCELLATION) BILL 2014**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Border Protection,
the Hon. Scott Morrison MP)

Migration Amendment (Character and General Visa Cancellation) Bill 2014

OUTLINE

The Migration Amendment (Character and General Visa Cancellation) Bill 2014 (the Bill) amends the *Migration Act 1958* (the Migration Act) to implement a number of reforms to the character and general visa cancellation provisions in the Migration Act arising in part from the Review of the Character and General Visa Cancellation Framework (the Review) conducted by the Department of Immigration and Border Protection in 2013.

The character provisions in Part 9 of the Migration Act have been in place in their current form since 1999, and the general visa cancellation provisions in Subdivision D of Division 3 of Part 2 of the Migration Act have remained largely unchanged since 1994. Since that time, the environment in relation to the entry and stay in Australia of non-citizens has changed dramatically, with higher numbers of temporary visa holders entering Australia for a variety of purposes.

In this context, the Review recommended that a number of amendments be made to the Migration Act to strengthen the integrity of the migration programme, including amendments to better capture particular kinds of criminal activity and non-citizens who engage in migration fraud.

The amendments to the Migration Act that are proposed to be made by the Bill will strengthen the character and general visa cancellation provisions and reform the approach to the cancellation of visas of non-citizens who are in prison.

The amendments to the Migration Act that are proposed to be made by the Bill will strengthen the powers to refuse to grant, or to cancel, a visa on character grounds by inserting additional grounds on which a person will not pass the character test. These are:

- the Minister reasonably suspects that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person that has been or is involved in criminal conduct, whether or not the person, or another person, has been convicted of an offence constituted by the conduct;
- the Minister reasonably suspects that the person has been or is involved in conduct constituting an offence of people-smuggling or an offence of trafficking in persons as described in the Migration Act, or the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern, whether or not the person or another person has been convicted of an offence constituted by the conduct;
- a court in Australia or a foreign country has convicted the person of one or more sexually based offences involving a child, or found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was charged without a conviction;
- the person has, in Australia or a foreign country, been charged with or indicted for one or more of the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery, or a crime that is otherwise of serious international concern;
- the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security;
- an Interpol notice in relation to the person is in force (from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community).

The amendments that are proposed to be made to the Migration Act by the Bill will also strengthen the powers to refuse to grant or cancel a visa on character grounds by:

- providing that in the event that a person were allowed to enter or to remain in Australia, there is a risk (as opposed to a significant risk) that the person would engage in any of the conduct referred to in subparagraphs 501(6)(d)(i) – (v) of the Migration Act;
- providing that a person has a substantial criminal record (and so does not pass the character test) if the person has been sentenced to 2 or more terms of imprisonment where the total of those terms is 12 months (rather than 2 years or more, as is currently the case);
- providing that a person has a substantial criminal record (and so does not pass the character test) if a court has found the person unfit to plead in relation to an offence but the court has found that the person committed the offence, and as a result the person has been detained in facility or institution;
- clarifying that if a person has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms;
- clarifying that for the purposes of the character test, a sentence or a conviction imposed on a person is only to be disregarded if both the person has been pardoned in relation to the conviction concerned, and the effect of that pardon is that the person is taken never to have been convicted of the offence;
- inserting a new mandatory ground for the cancellation without notice of a visa under section 501 of the Migration Act that will apply where:
 - the person is serving a full-time sentence of imprisonment for an offence against the law of the Commonwealth, a State or a Territory; and
 - the Minister is satisfied that the person has a substantial criminal record (and so does not pass the character test) because they have been sentenced to death, sentenced to imprisonment for life, or sentenced to a term of imprisonment of 12 months or more.
- clarifying that a decision to cancel a visa under this new mandatory ground for cancellation is not a decision that is reviewable by the Administrative Appeals Tribunal;
- providing that where this new power to cancel a visa is exercised, the Minister, acting personally, or a delegate of the Minister may revoke the cancellation if satisfied that the person passes the character test or there is another reason why the cancellation should be revoked;
- providing that decisions of a delegate of the Minister not to revoke the cancellation of a visa of a non-citizen who is in prison is a decision that is reviewable by the Administrative Appeals Tribunal;
- providing that where the cancellation of the visa of a person in prison has been revoked by a delegate of the Minister or the Administrative Appeals Tribunal, the Minister may, acting personally, set aside that revocation decision and cancel the visa if satisfied that the person does not pass the character test and the cancellation of the visa is in the national interest;
- clarifying that a decision under section 65 of the Migration Act to refuse to grant a protection visa is a decision that is reviewable by the Administrative Appeals Tribunal, other than a decision to which a certificate under section 502 applies;

- inserting a new power for the Minister to require the head of an agency of a State or Territory to disclose to the Minister personal information about a person whose visa may be cancelled under section 501 of the Migration Act, subject to certain specified exceptions;
- clarifying that a person who holds a permanent visa that was granted by the Minister acting personally is not excluded from entering Australia or being in Australia under section 503 of the Migration Act;
- clarifying that the prohibition in section 501E of the Migration Act on making an application for a visa (which applies to a person in respect of whom a decision was made under section 501, 501A or 501B) does not apply to a person who was granted a permanent visa by the Minister acting personally.

The amendments that are proposed to be made to the Migration Act by the Bill will also strengthen Subdivision D of Division 3 of Part 2 of the Migration Act by:

- clarifying that the Minister may cancel a visa under paragraph 116(1)(a) of the Migration Act in circumstances where a decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that did not exist (as well as where the decision was based on a particular fact or circumstance that no longer exists);
- clarifying that the Minister may cancel a visa under paragraph 116(1)(e) of the Migration Act if the presence of its holder in Australia is or may be, or would or might be, a risk to the health, safety or good order of the Australian community or a segment of the Australian community, or the health or safety of an individual or individuals;
- inserting into section 116 of the Migration Act a new ground for cancellation of a visa if the Minister is not satisfied as to the visa holder's identity;
- inserting into section 116 of the Migration Act a new ground for cancellation of a visa if the Minister is satisfied that incorrect information (that is not covered by Subdivision C of Division 3 of Part 2) was given by or on behalf of the visa holder to:
 - an officer; or
 - an authorised system; or
 - the Minister; or
 - any other person, or a tribunal, performing a function or purpose under the Migration Act; or
 - any other person or body performing a function or purpose in an administrative process that occurred or occurs in relation to the Migration Act;

and the incorrect information was taken into account in or in connection with making a decision that enabled the person to make a valid application for a visa or a decision to grant a visa to the person;

- clarifying that subsection 117(2) of the Migration Act (which prevents the Minister from cancelling a permanent visa where the visa holder is in the migration zone and was immigration cleared on last entering Australia) does not apply to the new grounds for cancellation of a visa in section 116 set out above;
- inserting a new Subdivision into Division 3 of Part 2 of the Migration Act that contains new personal powers of the Minister to cancel visas on the grounds in sections 109 and 116 of the Migration Act where a decision was made not to cancel the visa on those grounds and the Minister is satisfied that those grounds exist and that it would be in the public interest to cancel the visa (new sections 133A and 133C of new Subdivision FA);

- inserting a provision whereby the Minister may revoke a decision made by the Minister personally to cancel a visa under new Subdivision FA of Division 3 of Part 2 of the Migration Act if the Minister is satisfied that the ground for cancelling the visa does not exist;
- clarifying that a decision that was made personally by the Minister to cancel a visa under section 109 or section 116 or subsection 140(2) of the Migration Act is not reviewable by the Migration Review Tribunal under Part 5 of the Migration Act;
- providing that a decision to cancel a visa that is made under new section 133A or 133C of the Migration Act is not reviewable by the Migration Review Tribunal under Part 5 of the Migration Act;
- clarifying that any decision to cancel a protection visa that is made personally by the Minister is not reviewable by the Refugee Review Tribunal under Part 7 of the Migration Act;
- clarifying that a decision of a delegate of the Minister to cancel a bridging visa held by a non-citizen who is in immigration detention because of that cancellation is reviewable by the Migration Review Tribunal under Part 5 of the Migration Act.

The Bill also contains transitional provisions in respect of the above amendments and consequential amendments.

FINANCIAL IMPACT STATEMENT

The financial impact of the Bill is low. Any costs will be met from within existing resources of the Department of Immigration and Border Protection.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation has been consulted and assessed that a regulation impact statement is not required. The advice reference is 16910.

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 (CHARACTER AND GENERAL VISA CANCELLATION)
BILL 2014****NOTES ON INDIVIDUAL CLAUSES****Clause 1 Short title**

1. Clause 1 provides that this Act may be cited as the *Migration Amendment (Character and General Visa Cancellation) Act 2014*.

Clause 2 Commencement

2. Subclause 2(1) provides that each provision of this 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.
3. Table item 1 provides that Schedules 1 to 3, and anything in this Act not elsewhere covered by this table, commence on the day this Act receives the Royal Assent.
4. Table item 2 provides that items 1 to 25 in Schedule 1 commence on the day after this Act receives the Royal Assent.
5. Table item 3 provides that items 26 and 27 of Schedule 1 commence the day after this Act receives the Royal Assent. However if items 13 and 14 of Schedule 1 Part 1 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* commence on or before the day after this Act receives the Royal Assent, the provisions do not commence at all.
6. Table item 4 provides that items 28 to 32 of Schedule 1 commence on the day after this Act receives the Royal Assent.
7. Table item 5 provides that Schedule 2 commences the day after this Act receives the Royal Assent.
8. A note explains that this table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.
9. Subclause 2(2) provides that any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

Clause 3 Schedule(s)

10. 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, and any other item in a Schedule to this Act has effect according to its terms.

SCHEDULE 1 – Character test amendments

Migration Act 1958

Item 1 Paragraph 5C(2)(d)

11. This item omits “(whether on one or more occasions), and the total of those terms is 2 years”, and substitutes “, where the total of those terms is 12 months” in paragraph 5C(2)(d) in Part 1 of the Migration Act.
12. Paragraph 5C(2)(d) of the Migration Act currently provides that, for the purposes of subsection 5C(1), a non-citizen has a *substantial criminal record* if the non-citizen has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), and the total of those terms is 2 years or more. The effect of the amendment is to provide in paragraph 5C(2)(d) that a non-citizen has a substantial criminal record if the non-citizen has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more.
13. The intention of this item is to align the meaning of substantial criminal record within the definition of *character concern* in subsection 5C(2) of the Migration Act with the meaning of *substantial criminal record* in subsection 501(7) of the Migration Act as amended by item 13 of this Schedule. 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.

Item 2 Paragraph 500(1)(a)

14. This item inserts “, other than decisions to which a certificate under section 502 applies” after “201” in paragraph 500(1)(a) of Part 9 of the Migration Act.
15. This amendment rearranges the wording of section 502 of the Migration Act to insert the words “other than decisions to which a certificate under section 502 applies” in paragraph 500(1)(a) rather than at the end of subsection 500(1). This amendment does not change the meaning of paragraph 500(1)(a) and is consequential to the further amendments to subsection 500(1) in items 3 to 6 of this Schedule.

Item 3 Paragraph 500(1)(b)

16. This item inserts “(subject to subsection (4A))” after “501” in paragraph 500(1)(b) of Part 9 of the Migration Act.
17. The effect of this amendment is to provide in paragraph 500(1)(b) of the Migration Act that applications may be made to the Administrative Appeals Tribunal (AAT) for review of decisions of a delegate of the Minister under section 501 (subject to subsection 500(4A)). Subsection 500(4A) is amended by item 7 of this Schedule and sets out the decisions that are not reviewable under section 500 (relating to AAT review) or under Part 5 or 7 (relating to Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT) review) of the Migration Act.

18. The purpose of this amendment is to clarify the interaction of subsections 500(1) and 500(4A) of the Migration Act, such that it is clear that a decision by a delegate of the Minister to cancel a visa under section 501 is not a merits reviewable decision if it is mentioned in subsection 500(4A).

Item 4 After paragraph 500(1)(b)

19. This item inserts a new paragraph 500(1)(ba) in subsection 500(1) in Part 9 of the Migration Act.
20. New paragraph 500(1)(ba) of the Migration Act provides that applications may be made to the Administrative Appeals Tribunal for review of decisions of a delegate of the Minister under subsection 501CA(4) not to revoke a decision to cancel a visa. Subsection 501CA(4) is inserted by item 18 of this Schedule and provides for revocation of a decision under new subsection 501(3A) (inserted by item 8 of this Schedule) to cancel a visa without notice where the Minister is satisfied that the person does not pass the character test and the person is in prison.
21. The purpose of this item is to ensure that merits review of a decision of a delegate of the Minister not to revoke a decision to cancel a visa under new subsection 501CA(4) of the Migration Act is available.

Item 5 Paragraph 500(1)(c)

22. This item omits “to refuse to grant a protection visa, or to cancel” and substitutes “, other than a decision to which a certificate under section 502 applies, to refuse under section 65 to grant” in paragraph 500(1)(c) of Part 9 of the Migration Act.
23. The effect of this amendment is to provide in paragraph 500(1)(c) of the Migration Act that applications may be made to the AAT for review of a decision, other than a decision to which a certificate under section 502 applies, to refuse under section 65 to grant a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention or paragraph 36(2C)(a) or (b) of the Migration Act. This amendment acknowledges that decisions to cancel a protection visa on the basis of Article 1F, 32 or 33(2) of the Refugees Convention would always be made under section 501 (refusal or cancellation of visa on character grounds) and are therefore already covered under paragraph 500(1)(b).
24. This amendment also ensures that only decisions of a delegate of the Minister to cancel a visa under section 501 of the Migration Act are AAT-reviewable decisions. Consistently with other personal decisions of the Minister to cancel a visa under section 501, it is intended that decisions made personally by the Minister to cancel a protection visa on the basis of Article 1F, 32 or 33(2) of the Refugees Convention are not reviewable by the AAT.

Item 6 Subsection 500(1)

25. This item omits “; other than decisions to which a certificate under section 502 applies” from subsection 500(1) of Part 9 of the Migration Act.
26. This amendment acknowledges that a certificate under section 502 of the Migration Act is relevant only to paragraphs 500(1)(a) and (c) of the Migration Act. The amendments in items 2 and 5 of this Schedule rearrange the wording of subsection 500(1) to insert these words into paragraphs 500(1)(a) and 500(1)(c). This amendment does not change the meaning of subsection 500(1) and is consequential to the previous amendments to subsection 500(1) in items 2 and 5 of this Schedule.

Item 7 At the end of subsection 500(4A)

27. This item inserts new paragraph 500(4A)(c) in subsection 500(4A) in Part 9 of the Migration Act.
28. New paragraph 500(4A)(c) of the Migration Act provides that a decision of a delegate of the Minister under subsection 501(3A) to cancel a visa is not reviewable by the Administrative Appeals Tribunal under section 500, or by the Migration Review Tribunal or the Refugee Review Tribunal under Part 5 or 7 of the Migration Act. New subsection 501(3A) is inserted by item 8 of this Schedule and provides that the Minister must cancel a visa without notice where the Minister is satisfied that the person does not pass the character test because of the existence of a substantial criminal record because of the operation of paragraph 501(7)(a), (b) or (c) or sexually based offences involving a child, and the person is in prison.
29. This item ensures that a decision to cancel a visa under subsection 501(3A) of the Migration Act is not merits reviewable, regardless of whether the decision is made by the Minister personally or a delegate of the Minister. However, a person whose visa has been cancelled under subsection 501(3A) is able to seek revocation of the decision under new section 501CA inserted by item 18 of this Schedule. Merits review of a decision of a delegate not to revoke the decision to cancel the visa is available under new paragraph 500(1)(ba) inserted by item 4 of this Schedule.

Item 8 After subsection 501(3)

30. This item inserts new subsections 501(3A) and 501(3B) in Part 9 of the Migration Act.
31. New subsection 501(3A) of the Migration Act provides that the Minister must cancel a visa that has been granted to a person if:
- the Minister is satisfied that the person does not pass the *character test* because of the operation of:
 - paragraph 501(6)(a) (substantial criminal record), because of the operation of paragraphs 501(7)(a), (b) or (c); or
 - paragraph 501(6)(e) (sexually based offences against children); and
 - the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.
32. This item ensures that the visa of a non-citizen who is in prison and objectively does not pass the character test because they have a substantial criminal record (as set out in subsection 501(7) of the Migration Act and amended by items 13 to 15 of this Schedule) or because of a sexually based offence involving a child (as set out in new paragraph 501(6)(e) inserted by item 12 of this Schedule) must be cancelled without notice to the visa holder.
33. A person whose visa has been cancelled under subsection 501(3A) of the Migration Act is able to seek revocation of this decision under new section 501CA inserted by item 18 of this Schedule. Merits review of a decision of a delegate not to revoke the decision to cancel the visa is available under new paragraph 500(1)(ba) inserted by item 4 of this Schedule.
34. The intention of this amendment is that a decision to cancel a person's visa is made before the person is released from prison, to ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued.

35. New subsection 501(3B) of the Migration Act provides that subsection 501(3A) does not limit subsections 501(2) and 501(3) of the Migration Act. This puts beyond doubt that the visa of a person who is in prison may alternatively be cancelled under existing subsection 501(2) (cancellation with notice by the Minister personally or a delegate) or existing subsection 501(3) (cancellation without notice by the Minister personally) in a situation where subsection 501(3A) does not apply.

Item 9 Subsection 501(5)

36. This item inserts “or (3A)” after “(3)” in subsection 501(5) in Part 9 of the Migration Act.
37. The effect of this amendment is to provide in subsection 501(5) of the Migration Act that the rules of natural justice, and the Code of Procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under new subsection 501(3A) which is inserted by item 8 of this Schedule. This amendment ensures that the visa of a person who is in prison and objectively does not pass the character test is cancelled without notice. However, new section 501CA inserted by item 18 of this Schedule provides that as soon as practicable after making the decision to cancel, the Minister must notify the person of the cancellation and invite the person to make representations to the Minister about revocation of the decision to cancel. A decision of a delegate of the Minister not to revoke the decision to cancel is reviewable by the AAT under new paragraph 500(1)(ba) inserted by item 4 of this Schedule.

Item 10 Paragraph 501(6)(b)

38. This item repeals paragraph 501(6)(b) of the Migration Act and substitutes a new paragraph 501(6)(b) and a new paragraph 501(6)(ba) in Part 9 of the Migration Act.
39. Paragraph 501(6)(b) of the Migration Act currently provides that for the purposes of section 501, a person does not pass the *character test* if the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct.
40. New paragraph 501(6)(b) of the Migration Act provides that, for the purposes of section 501 of the Migration Act, a person does not pass the *character test* if the Minister reasonably suspects:
- that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and
 - that the group, organisation or person has been or is involved in criminal conduct.
41. The intention of this amendment is to lower the threshold of evidence required to show that a person who is a member of a criminal group or organisation, such as a criminal motorcycle gang, terrorist organisation or other group involved in war crimes, people smuggling or people trafficking, does not pass the character test. The intention is that membership of the group or organisation alone is sufficient to cause a person to not pass the character test. Further, a reasonable suspicion of such membership or association is sufficient to not pass the character test. There is no requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder.
42. New subparagraph 501(6)(ba) of the Migration Act provides that for the purposes of section 501, a person does not pass the *character test* if the Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following:

- an offence under one or more of sections 233A to 234A (people smuggling);
- an offence of trafficking in persons;
- the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern;

whether or not the person, or another person, has been convicted of an offence constituted by the conduct.

43. The purpose of this amendment is to ensure that a person does not pass the character test if the Minister reasonably suspects that the person has been involved in one of the listed serious offences, without requiring that the person has been convicted of the offence.

Item 11 Paragraph 501(6)(d)

44. This item omits the word “significant” from paragraph 501(6)(d) of Part 9 of the Migration Act.

45. Paragraph 501(6)(d) of the Migration Act currently provides that for the purposes of section 501, a person does not pass the *character test* if in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

- engage in criminal conduct in Australia; or
- harass, molest, intimidate or stalk another person in Australia; or
- vilify a segment of the Australian community; or
- incite discord in the Australian community or in a segment of that community; or
- represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

46. The purpose of this amendment is to clarify the threshold of risk that a decision maker can accept before making a finding that the person does not pass the character test in relation to paragraph 501(6)(d) of the Migration Act. The intention is that the level of risk required is more than a minimal or trivial likelihood of risk, without requiring the decision-maker to prove that it amounts to a significant risk.

Item 12 After paragraph 501(6)(d)

47. This item inserts new paragraphs 501(6)(e), (6)(f), (6)(g) and (6)(h) in Part 9 of the Migration Act.

48. New paragraph 501(6)(e) of the Migration Act provides that a person does not pass the “character test” if a court in Australia or a foreign country has convicted the person of one or more sexually based offences involving a child or found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction.

49. For the purposes of new paragraph 501(6)(e) of the Migration Act, the term “sexually based offences involving a child” would include, but would not be limited to, offences such as child sexual abuse, indecent dealings with a child, possession or distribution of child pornography, internet grooming, and other non-contact carriage services offences. This amendment is intended to apply irrespective of the level of penalty or orders made in relation to the offence.

50. The purpose of this amendment is to ensure that a person who has been found by a court to have engaged in sexually based offences involving a child objectively does not pass the character test. Currently, such offences may be considered under subsection 501(6) of the Migration Act when deciding whether a person fails the character test, but this amendment removes the subjectivity from this assessment in cases where the person does not fail the **substantial criminal record** test in subsection 501(7) because a sentence of imprisonment of at least 12 months has not been imposed.
51. New paragraph 501(6)(f) of the Migration Act provides that a person does not pass the “character test” if the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:
- the crime of genocide;
 - a crime against humanity;
 - a war crime;
 - a crime involving torture or slavery;
 - a crime that is otherwise of serious international concern.
52. The purpose of this amendment is to ensure that where a person has been charged with or indicted for one of these serious offences, the person objectively does not pass the character test regardless of whether the person also fails the “substantial criminal record” limb of the character test in subsection 501(7) of the Migration Act.
53. New paragraph 501(6)(g) of the Migration Act provides that a person does not pass the **character test** if the person has been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).
54. New paragraph 501(6)(h) of the Migration Act provides that a person does not pass the **character test** if an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.
55. The purpose of new paragraphs 501(6)(g) and (h) of the Migration Act is to acknowledge that a person who is the subject of an adverse ASIO assessment or Interpol notice is likely to represent a threat to the security of the Australian community or a segment of that community. These amendments ensure that a person objectively does not pass the character test if either of these provisions apply to them, without the need to further assess them against the subjective criteria in subsection 501(6) of the Migration Act.
56. The Minister may decide to cancel the visa of a person who does not pass the character test because one or more of new paragraphs 501(6)(e) to (h) of the Migration Act applies to them. Cancellation may occur with notice by the Minister or delegate under existing subsection 501(2) or without notice by the Minister personally under subsection 501(3). Further, the visa of a non-citizen who is in prison and to whom paragraph 501(6)(e) relating to sexually based offences involving a child applies, must be cancelled under new subsection 501(3A) inserted by item 8 of this Schedule.

Item 13 Paragraph 501(7)(d)

57. This item omits “(whether on one or more occasions), where the total of those terms is 2 years”, and substitutes “, where the total of those terms is 12 months” in paragraph 501(7)(d) of the Migration Act.

58. The effect of this amendment is to provide in paragraph 501(7)(d) of the Migration Act that the person has a “substantial criminal record” if the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more. This reduces the total term of imprisonment required from 2 years to 12 months.
59. The purpose of this amendment is to ensure that repeat or serial offenders who may have been sentenced to a series of lesser terms of imprisonment for multiple offences at the lower end of the scale but which cumulatively had up to a period of 12 months or more, objectively do not pass the character test. A series of sentences such as these raise significant concerns as to the person’s character, including that there may be a history and high risk of recidivism and a clear disregard for the law.
60. When the character test in its current form was introduced in 1999, the aggregate sentencing period was set at 2 years based on an assessment that it would be sufficient to cover most cases of character concern. However, experience has shown that this is not the case, and particularly in the offshore refusal caseload, there are many visa applicants who have serious criminal histories, whose aggregate sentences fall between 12 and 24 months. In addition, when the character test was introduced, it was clear that the intention was that concurrent sentences would be included in calculating aggregate sentences. The Explanatory Memorandum for the 1998 Bill states that sentences should be “totalled” irrespective of the time and place at which each sentence was imposed. The proposed amendment in this Bill puts that construction beyond doubt.
61. The Minister may decide to cancel the visa of a person who does not pass the character test because the person has a *substantial criminal record* in accordance with subsection 501(7) of the Migration Act. Cancellation may occur with notice by the Minister or delegate under existing subsection 501(2) or without notice by the Minister personally under subsection 501(3).
62. The words “(whether on one or more occasions)” are omitted from paragraph 501(7)(d) of the Migration Act because they are unnecessary following the insertion of new subsection 501(7A) by item 15 of this Schedule.

Item 14 At the end of subsection 501(7)

63. This item adds new paragraph 501(7)(f) in Part 9 of the Migration Act.
64. New paragraph 501(7)(f) of the Migration Act provides that for the purposes of the *character test*, a person has a *substantial criminal record* if the person has:
- been found by a court to not be fit to plead, in relation to an offence; and
 - the court has nonetheless found that on the evidence available the person committed the offence; and
 - as a result, the person has been detained in a facility or institution.
65. In this context, the word “detained” does not relate to “immigration detention” (as defined in subsection 5(1) of the Migration Act) but has its ordinary meaning.
66. The purpose of this amendment is to extend the meaning of *substantial criminal record* to include non-citizens who have been found by a court to be unfit to plead but on the evidence available have been found by the court to have committed an offence, and who have been detained in a mental health facility or other institution.

67. This amendment expands on existing paragraph 501(7)(e) of the Migration Act, which relates to a person who has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution. Paragraph 501(7)(e) has been found to be inadequate as it does not capture a person who has received, for example, an indicative or non-punitive order of imprisonment or detention, and consequently has not been “acquitted” of the offence. Nor can such a person be found to have been sentenced to a term of imprisonment within the meaning of paragraphs 501(7)(b) to (d).
68. The Minister may decide to cancel the visa of a person who does not pass the character test because the person has a *substantial criminal record* in accordance with subsection 501(7) of the Migration Act. Cancellation may occur with notice by the Minister or delegate under existing subsection 501(2) or without notice by the Minister personally under subsection 501(3). Further, the visa of a non-citizen who is in prison and to whom subsection 501(7) applies, must be cancelled under new subsection 501(3A) inserted by item 8 of this Schedule.
69. When deciding whether to refuse to grant or cancel the person’s visa, or revoke a cancellation made under new subsection 501(3A) of the Migration Act, the seriousness of the offence and any indicative sentence of imprisonment (where available) would be taken into account by the Minister or delegate when deciding whether to refuse to grant or cancel the person’s visa, or revoke the cancellation of the visa. This is consistent with the current approach towards a person who has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and the person has been detained in a facility or institution.
70. This amendment ensures that the character test is reflective of modern jurisprudence in such matters.

Item 15 After subsection 501(7)

71. This item inserts a new subsection 501(7A) in Part 9 of the Migration Act. This item also inserts the new heading “Concurrent sentences” before new subsection 501(7A).
72. New subsection 501(7A) of the Migration Act provides that, for the purposes of the character test, if a person has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms.
73. The purpose of this amendment is to clarify that the terms of imprisonment count towards the total of 12 months’ imprisonment irrespective of how the sentences are to be served (whether consecutively or concurrently). This is the original intention of the words “(whether on one or more occasions)” included in paragraph 501(7)(d) of the Migration Act and which have been replaced by this new subsection.
74. The note after subsection 501(7A) of the Migration Act gives the example of a person who is sentenced to 2 terms of 3 months imprisonment for 2 offences, to be served concurrently. For the purposes of the character test, the total of those terms is 6 months.
75. When the character test was introduced, it was clear that the intention was that concurrent sentences would be included in calculating aggregate sentences. The Explanatory Memorandum for the 1998 Bill states that sentences should be “totalled” irrespective of the time and place at which each sentence was imposed. The proposed amendment in this Bill puts that construction beyond doubt.

Item 16 Paragraph 501(10)(b)

76. This item repeals current paragraph 501(10)(b) of the Migration Act and substitutes new paragraph 501(10)(b) in Part 9 of the Migration Act.
77. New paragraph 501(10)(b) of the Migration Act provides that for the purposes of the *character test*, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if both:
- the person has been pardoned in relation to the conviction concerned; and
 - the effect of that pardon is that the person is taken never to have been convicted of the offence.
78. Currently, a sentence imposed on a person or a conviction of a person for an offence is to be disregarded if the person has been pardoned. However, in some jurisdictions the effect of a pardon is to relieve a person of the consequences of their conviction without actually nullifying or quashing the conviction, while in others it has the effect of nullifying or quashing the conviction. The effect of this amendment is to ensure that a conviction is only to be disregarded if the effect of the pardon is that the person is taken never to have been convicted of the offence.
79. The full circumstances of the conviction and the reason for any pardon will be considered when deciding whether to refuse to grant or cancel the person's visa.

Item 17 After section 501B

80. This item inserts new section 501BA - Cancellation of visa – setting aside and substitution of non-adverse decision under section 501CA in Part 9 of the Migration Act.
81. New subsection 501BA(1) of the Migration Act provides that section 501BA applies if:
- a delegate of the Minister; or
 - the Administrative Appeals Tribunal;
- makes a decision under section 501CA (the *original decision*) to revoke a decision under subsection 501(3A) to cancel a visa that has been granted to a person.
82. New section 501CA of the Migration Act is inserted by item 18 of this Schedule and provides for revocation of a decision under new subsection 501(3A) (inserted by item 8 of this Schedule) to cancel a visa without notice where the Minister is satisfied that the person does not pass the character test and the person is in prison.
- Action by Minister – natural justice does not apply*
83. New subsection 501BA(2) of the Migration Act provides that the Minister may set aside the original decision and cancel a visa that has been granted to the person if:
- the Minister is satisfied that the person does not pass the character test because of the operation of paragraph 501(6)(a) or 501(6)(e); and
 - the Minister is satisfied that the cancellation is in the national interest.

84. New subsection 501BA(3) of the Migration Act provides that the rules of natural justice do not apply to a decision under subsection 501BA(2). However, natural justice will have already been provided to the non-citizen through the revocation process available under s 501CA.

Minister's exercise of power

85. New subsection 501BA(4) of the Migration Act provides that the power under subsection 501BA(2) may only be exercised by the Minister personally. The intention is that this is a personal power of the Minister to ensure that, despite a decision of a delegate or tribunal to revoke a visa cancellation, the Minister retains the ability in exceptional cases, where it is in the national interest, to remove a person who does not pass the character test from the community.

Decision not reviewable under Part 5 or 7

86. New subsection 501BA(5) of the Migration Act provides that a decision under subsection 501BA(2) is not reviewable under Part 5 or Part 7 of the Migration Act (which relate to MRT and RRT review). Decisions made personally by the Minister under section 501 are not merits reviewable. This is in recognition of the fact that the government is ultimately responsible for ensuring that decisions reflect community standards and expectations.
87. This item inserts a note at the end of new section 501BA of the Migration Act which explains that for notification of decisions under subsection 501BA(2), see section 501G. Section 501G is amended by items 20 to 22 of this Schedule.

Item 18 After section 501C

88. This item inserts new section 501CA in Part 9 of the Migration Act.
89. New subsection 501CA(1) of the Migration Act provides that this section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person. New subsection 501(3A) is inserted by item 8 of this Schedule and provides that a visa of a person in prison must be cancelled without notice if the Minister is satisfied that the person does not pass the character test on certain objective grounds.
90. New subsection 501CA(2) of the Migration Act provides that for the purposes of section 501CA, ***relevant information*** is information (other than non-disclosable information) that the Minister considers:
- would be the reason, or part of the reason, for making the original decision; and
 - is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.
91. New subsection 501CA(3) of the Migration Act provides that as soon as practicable after making the original decision, the Minister must:
- give the person, in the way the Minister considers appropriate in the circumstances:
 - a written notice that sets out the original decision; and
 - particulars of the relevant information; and

- inviting the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.
92. The requirement to give notice to the person and invite the person to make representations about revocation of the decision to cancel allows the person the opportunity to satisfy the Minister or delegate that the person passes the character test, or that there is another reason why the original decision should be revoked.
93. New subsection 501CA(4) of the Migration Act provides that the Minister may revoke the original decision if:
- the person makes representations in accordance with the invitation; and
 - the Minister is satisfied:
 - that the person passes the character test (as defined by section 501); or
 - that there is another reason why the original decision should be revoked.
94. New subsection 501CA(5) of the Migration Act provides that if the Minister revokes the original decision, the original decision is taken not to have been made.
95. New subsection 501CA(6) of the Migration Act provides that any detention of the person that occurred during any part of the period, beginning when the original decision was made and ending at the time of the revocation of the original decision, is lawful and the person is not entitled to make any claim against the Commonwealth, an officer or any other person because of the detention.
96. New subsection 501CA(7) of the Migration Act provides that a decision not to exercise the power conferred by subsection 501CA(4) is not reviewable under Part 5 or Part 7 of the Migration Act. However, the decision is reviewable by the AAT under paragraph 500(1)(ba) inserted by item 4 of this Schedule. This is consistent with review rights for other decisions of a delegate of the Minister made under section 501.

Item 19 At the end of section 501E

97. This item inserts new subsections 501E(3) and 501E(4) in Part 9 of the Migration Act.
98. New subsection 501E(3) of the Migration Act provides that subsection 501E(1) does not prevent a person, at the application time, from making an application for a visa if, before the application time, the Minister had, acting personally, granted a permanent visa to the person.
99. Subsection 501E(1) of the Migration Act provides that a person is not allowed to make an application for a visa in the migration zone if the Minister has made a decision under section 501, 501A or 501B to refuse or cancel a visa, and the decision has been neither set aside nor revoked.
100. The purpose of this amendment is to ensure that a person who has been granted a permanent visa through the exercise of a Minister's personal power after the person's visa has been refused or cancelled under section 501 of the Migration Act, is not prevented by section 501E from applying from a further visa such as a Resident Return visa.

101. New subsection 501E(4) of the Migration Act provides that subsection 501E(1) does not prevent a person, at the application time, from making an application for a visa if:
- before the application time, the person was granted a visa of a kind referred to in subsections 501E(2) or 501E(3); and
 - the person would, but for the operation of subsections 501E(2) or 501E(3), have been prevented from applying for that visa.
102. The purpose of this amendment is to clarify that a person is not prevented by section 501E of the Migration Act from applying for a visa if they have subsequently been granted a protection visa or a specified visa under subsection 501E(2) or a visa referred to in subsection 501E(3).

Item 20 Subsection 501G(1)

103. This item inserts “, 501BA, 501CA” after “501B” in subsection 501G(1) of Part 9 of the Migration Act.
104. The effect of this amendment is to provide in subsection 501G(1) of the Migration Act for notification of a decision made under sections 501BA (which is inserted by item 17 of this Schedule) and 501CA (which is inserted by item 18 of this Schedule).
105. Where the Minister personally decides under new section 501BA of the Migration Act to set aside the decision of a delegate or tribunal to revoke the cancellation of a visa under new subsection 501(3A) (inserted by item 8 of this Schedule), or where the Minister or delegate decides under new section 501CA not to revoke a decision to cancel a visa, the Minister must give the person a written notice that complies with paragraphs 501G(1)(c) to (f) (as applicable in the circumstances).

Item 21 After paragraph 501G(1)(b)

106. This item inserts new paragraph 501G(1)(ba) in Part 9 of the Migration Act.
107. New paragraph 501G(1)(ba) of the Migration Act provides in effect that if a decision is made under new section 501CA (inserted by item 18 of this Schedule) to not revoke a decision to cancel a visa that has been granted to a person, the Minister must give the person written notice that complies with paragraphs 501G(1)(c) to (f).
108. An application for review of a decision under section 501CA of the Migration Act not to revoke the cancellation of a visa under subsection 501(3A) can be made to the AAT under new paragraph 500(1)(ba) inserted by item 4 of this Schedule.

Item 22 Paragraphs 501G(1)(f) and (2)(a)

109. This item inserts “or section 501CA” after “(2)” in paragraphs 501G(1)(f) and 501G(2)(a) of Part 9 of the Migration Act.
110. The effect of the amendment to paragraph 501G(1)(f) of the Migration Act is to provide that if the decision was made by a delegate of the Minister under section 501CA and the person has a right to have the decision reviewed by the AAT, the written notice that the Minister must give to the person under subsection 501G(1) must comply with subparagraphs 501G(f)(i) to (vi). The purpose of this amendment, together with the amendments made by items 20 and 21 of this Schedule, is to provide in subsection 501G(1) for notification of a decision under section 501CA not to revoke a decision to cancel a visa.

Item 23 Subsection 501H(1)

111. This item omits “or 501B”, and inserts “, 501B or 501BA” in subsection 501H(1) of Part 9 of the Migration Act.
112. The effect of this amendment is to provide in subsection 501H(1) of the Migration Act that the power under section 501BA to refuse to grant or cancel a visa is in addition to any other power under the Migration Act, as in force from time to time, to refuse to grant or cancel a visa.
113. Section 501BA of the Migration Act is inserted by item 17 of this Schedule and provides for the Minister to personally set aside and substitute a decision made by a delegate or tribunal under section 501CA, which is inserted by item 18 of this Schedule.

Item 24 Subsection 501H(2)

114. This item inserts “501BA,” after “501B,” in subsection 501H(2) of Part 9 of the Migration Act.
115. The effect of this amendment is to provide in subsection 501H(2) of the Migration Act that a reference in Part 5 to a decision made under section 501 includes a reference to a decision made under section 501BA, which is inserted by item 17 of this Schedule and provides for the Minister to personally set aside and substitute a decision made by a delegate or tribunal under section 501CA, which is inserted by item 18 of this Schedule. Part 5 of the Migration Act relates to merits review by the MRT.

Item 25 After section 501K

116. This item inserts a new section 501L in Part 9 of the Migration Act.
117. New section 501L provides for disclosure of information to the Minister.
118. New subsection 501L(1) of the Migration Act provides that the Minister may, by written notice, require the head of an agency of a State or Territory to disclose to the Minister personal information that:
- is of a kind specified in the notice; and
 - relates to a person, or a person included in a class of persons, specified in the notice.
119. New subsection 501L(2) of the Migration Act provides that the Minister must not give a notice under subsection 501L(1) to the head of an agency of a State or Territory unless the Minister reasonably believes:
- that the head of the agency has, or can reasonably acquire, the information; and
 - the information is relevant for the purposes of considering whether:
 - a person satisfies the Minister that the person passes the *character test* (as defined in section 501); or
 - the Minister reasonably suspects, or is satisfied, that a person does not pass the *character test*.
120. It is intended that an agency of a State or Territory may include a criminal justice or corrective services agency or body.

121. The intention of this item is to obtain information from an agency of a State or Territory, which may include correctional institutions or agencies responsible for the administration of justice or law enforcement, that is relevant to whether a person passes the character test. Such information may include prison lists, information on persons who have received suspended sentences, or any other information that can be considered relevant to a person's character.
122. New subsection 501L(3) of the Migration Act provides that the head of an agency of a State or Territory who is given a notice under subsection 501L(1) must, as soon as practicable after the notice is given, comply with the notice to the extent that he or she has, or can reasonably acquire, the information specified in the notice.
123. New subsection 501L(4) of the Migration Act provides that despite subsection 501L(3), the registrar (however described) of a court of a State or Territory is not required to comply with a notice under subsection 501L(1) to the extent that the information specified in the notice, in relation to a person specified in the notice, is information that relates to proceedings that have not been finally determined by the court.
124. New subsection 501L(5) of the Migration Act provides that the head of an agency of a State or Territory is not excused from complying with a notice under subsection 501L(1) on the ground that disclosing the information specified in the notice would contravene a law of the Commonwealth, a State or a Territory that:
- primarily relates to the protection of the privacy of individuals; and
 - prohibits or regulates the use and disclosure of personal information.
125. A law that relates to the protection of the privacy of individuals does not include a law that relates to secrecy or to orders made by a court.

Immunity from suit

126. New subsection 501L(6) of the Migration Act provides that a person is not liable to:
- any proceedings for contravening a provision of a law referred to in subsection 501L(5); or
 - civil proceedings for loss, damage or injury of any kind suffered by another person;
- merely because the person gives information to the Minister for the purposes of ensuring that the head of an agency of a State or Territory complies with a subsection 501L(1) notice.
127. New subsection 501L(7) of the Migration Act defines, for the purposes of section 501L, the terms **agency**, and **head**.
128. **Agency** of a State or Territory includes the following:
- the Crown in right of a State or Territory;
 - a Minister of a State or Territory;
 - a State or Territory government department;
 - an instrumentality of a State or Territory, including a body corporate established for a public purpose by or under a law of a State or Territory;
 - a company in which a controlling interest is held by any one of the following persons, or by 2 or more of the following persons together:

- the Crown in right of a State or Territory;
- a person or body covered by a Minister of a State or Territory or an instrumentality of a State or Territory, including a body corporate established for a public purpose by or under a law of a State or Territory;
- a State or Territory court;
- a State or Territory tribunal;
- a State or Territory parole board.

129. **Head** of an agency means:

- if the agency is a State or Territory court – the registrar (however described) of the court; or
- otherwise – the principal officer (however described) of the agency.

Item 26 Subparagraph 502(1)(a)(iii)

130. This item omits “to refuse to grant a protection visa, or to cancel” and substitutes “to refuse under section 65 to grant” in subparagraph 502(1)(a)(iii) in Part 9 of the Migration Act.

131. The effect of this amendment is to provide in subparagraph 502(1)(a)(iii) of the Migration Act that if the Minister, acting personally, intends to make a decision to refuse under section 65 to grant a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention, in relation to a person, and it is in the national interest, the Minister may include a certificate declaring the person to be an excluded person. This amendment removes the reference to cancellation of a protection visa relying on the relevant Articles of the Refugees Convention.

132. This amendment acknowledges that decisions to cancel a protection visa on the basis of Article 1F, 32 or 33(2) of the Refugees Convention would always be made under section 501 of the Migration Act (refusal or cancellation of visa on character grounds).

Item 27 Paragraph 503(1)(c)

133. This item omits “to refuse to grant a protection visa, or to cancel” and substitutes “to refuse under section 65 to grant” in paragraph 503(1)(c) of Part 9 of the Migration Act.

134. The effect of this amendment is to provide in paragraph 503(1)(c) of the Migration Act that a person in relation to whom a decision has been made to refuse under section 65 to grant a protection visa relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention, is not entitled to enter Australia or to be in Australia at any time during the period determined under the regulations. This amendment removes the reference to cancellation of a protection visa relying on the relevant Articles of the Refugees Convention.

135. This amendment acknowledges that decisions to cancel a protection visa on the basis of Article 1F, 32 or 33(2) of the Refugees Convention would always be made under section 501 (refusal or cancellation of visa on character grounds). The exclusion of persons in relation to whom a decision has been made under section 501 is dealt with in paragraph 503(1)(b) of the Migration Act.

Item 28 Subsection 503(4)

136. This item inserts “or to a holder of a permanent visa that was granted by the Minister acting personally” after “visa” in subsection 503(4) of Part 9 of the Migration Act.

137. The effect of this amendment is to provide in subsection 503(4) of the Migration Act that section 503 does not apply to a holder of a criminal justice visa or to a holder of a permanent visa that was granted by the Minister acting personally.
138. The purpose of this amendment is to ensure that section 503 of the Migration Act does not operate to exclude from Australia a person who has been granted a permanent visa through the exercise of a Minister's personal power after a decision referred to in paragraphs 503(1)(a) to (c) has been made.

Item 29 Application of amendments made by items 10 to 16

139. This item sets out the application provisions for items 10 to 16 of this Schedule.
140. This item provides that the amendments made by items 10 to 16 apply to:
- a decision to grant or refuse to grant a visa, if:
 - the application for the visa was made before the commencement of this item and had not been finally determined as at that commencement; or
 - the application for the visa is made on or after the commencement of this item; and
 - a decision made on or after the commencement of this item to cancel a visa.

Item 30 Application of amendments made by items 2, 5, 6, 19, 26 and 27

141. This item provides that the amendments made by items 2, 5, 6, 19, 26 and 27 of this Schedule apply to a decision to refuse to grant a visa or to cancel a visa, or an application for a visa (as the case requires) made on or after the commencement of this item.

Item 31 Application of amendment made by item 28

142. This item provides that the amendments made by item 28 of this Schedule applies to a visa granted personally by the Minister, whether before, on or after the commencement of this item.

Item 32 Application of amendments made by items 3, 4, 7, 8, 9, 17, 18 and 20 to 24

143. Subitem 32(1) provides that the amendments made by items 3, 4, 7, 8, 9, 17, 18 and 20 to 24 of this Schedule apply to a decision made on or after the commencement of this item to cancel a visa under subsection 501(3A) of the *Migration Act 1958*, whether the sentence of imprisonment on the basis of which the visa is cancelled was imposed before, on or after the commencement of this item.
144. Current arrangements under section 501 of the Migration Act allow for visa cancellation to occur at any time during a person's term of imprisonment. In practical terms this is generally towards the end of a prisoner's sentence, but this is not required by the legislation and in many cases a person's visa is cancelled some years prior to the end of their prison term. Where a person's visa has already been considered for cancellation under section 501 in respect of the sentence of imprisonment they are currently serving their visa will not be considered for cancellation under subsection 501(3A).

145. Subitem 32(2) provides that despite subitem 32(1), the Minister must not cancel a person's visa under subsection 501(3A) of the *Migration Act 1958* if:
- before the commencement of this item, but during that imprisonment the Minister considered cancelling the person's visa under subsection 501(2) of the *Migration Act 1958*, but decided not to cancel the visa; and
 - since that decision, no further sentence of imprisonment has been imposed on the person.

SCHEDULE 2 – GENERAL VISA CANCELLATION AMENDMENTS***Migration Act 1958*****Item 1 Subsection 33(1)**

1. This item inserts “, FA” after “F” in subsection 33(10) of Division 3 of Part 2 of the Migration Act.
2. This is a consequential amendment to include a reference to new Subdivision FA of Division 3 of Part 2 of the Migration Act in subsection 33(10). New Subdivision FA is inserted by item 12 of this Schedule. The effect of this amendment is that Subdivision FA does not apply in relation to special purpose visas.

Item 2 Subparagraph 48(1)(b)(ii)

3. This item inserts “133A (Minister’s personal powers to cancel visas on section 109 grounds), 133C (Minister’s personal powers to cancel visas on section 116 grounds),” after “116 (general power to cancel),” in subparagraph 48(1)(b)(ii) in Division 3 of Part 2 of the Migration Act.
4. The effect of this amendment is to provide that a non-citizen in the migration zone who does not hold a substantive visa, and held a visa that was cancelled under new sections 133A or 133C of the Migration Act, as inserted by item 12 of this Schedule, may, subject to the regulations, apply for a visa of a class prescribed for the purposes of section 48, but not for a visa of any other class.
5. The purpose of this amendment is to ensure that a person whose visa has been cancelled by the Minister exercising his personal powers to cancel under new section 133A of the Migration Act (on section 109 grounds) or new section 133C (on section 116 grounds) can only apply for a class of visa prescribed in the regulations and not for any other class of visa.

Item 3 Paragraph 116(1)(a)

6. This item repeals paragraph 116(1)(a) in Division 3 of Part 2 of the Migration Act and substitutes a new paragraph 116(1)(a) and inserts a new paragraph 116(1)(aa).
7. New paragraph 116(1)(a) of the Migration Act provides that the Minister may cancel a visa if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists.
8. New paragraph 116(1)(aa) of the Migration Act provides that the Minister may cancel a visa if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on the existence of a particular fact or circumstance, and that fact or circumstance did not exist.
9. The purpose of this amendment is firstly to put beyond doubt that the ground for cancellation applies where the facts on which the decision to grant the visa under section 65 of the Migration Act was based no longer exist. Secondly, the amendment puts beyond doubt that the ground for cancellation applies where the decision to grant the visa was based on a fact or circumstance which did not exist at that time or may never have existed, as well as when the fact or circumstance ceases to exist at a later point in time.

10. The item reinforces the obligations set out in Subdivision C of Division 3 of Part 2 of the Migration Act that a person must provide correct answers or information when seeking to apply for, or continue to hold, a visa.

Item 4 Paragraph 116(1)(e)

11. This item repeals paragraph 116(1)(e) in Division 3 of Part 2 of the Migration Act, and inserts a new paragraph 116(1)(e).
12. New paragraph 116(1)(e) of the Migration Act provides that the Minister may cancel a visa if the Minister is satisfied that the presence of the visa holder in Australia is, or may be, or would or might be, a risk to the health, safety or good order of the Australian community, or a segment of it, or to the health or safety of an individual or individuals.
13. The purpose of this amendment is firstly to clarify that this ground for cancellation applies where the risk of harm is to an individual, or a segment of the Australian community, as well as to the broader Australian public. Secondly, the amendment seeks to lower the threshold of this cancellation ground, so that it exists where there is a possibility that the person may (or might upon their arrival in Australia) be a risk to the health, safety or good order of an individual or community in Australia, as well as where there is demonstrated to be an actual risk of harm.

Item 5 After subsection 116(1)

14. This item inserts new subsections 116(1AA) and 116(1AB) after subsection 116(1) in Division 3 of Part 2 of the Migration Act.
15. New subsection 116(1AA) of the Migration Act provides that, subject to subsections 116(2) and (3), the Minister may cancel a visa if the Minister is not satisfied as to the visa holder's identity.
16. This amendment provides the Minister with a discretion to cancel a visa if, for example, two or more documents or pieces of information about a person's identity have been given, furnished or provided by, on behalf of, or in relation to the applicant or visa holder that are inconsistent with each other and it is not possible to form a conclusion regarding which document or piece of information is genuine. Contradictory or inconsistent information or documents relating to a person's identity will prevent the Minister from being satisfied as to a person's true identity. The Minister's discretion to cancel a visa also applies where the Minister is not satisfied as to the visa holder's identity for any other reason.
17. The purpose of subsection 116(1AA) of the Migration Act is to make clear the Government's position that a person must always provide correct information about their identity at any stage before, during or after the visa application process. If there is doubt about the person's identity, the Minister has the discretion to cancel the person's visa.
18. New subsection 116(1AB) of the Migration Act provides that the Minister may cancel a visa (the "current visa") if the Minister is satisfied that:
 - incorrect information was given, by or on behalf of, the person who holds the current visa to an officer, an authorised system, the Minister, a tribunal or any other person performing a function or purpose under the Migration Act or any other person or body performing a function or purpose in an administrative process that occurred or occurs in relation to the Act; and

- the incorrect information was taken into account in, or connection with, making a decision that enabled the person to make a valid application for a visa or a decision to grant the visa; and
 - the giving of the incorrect information is not covered by Subdivision C.
19. The new subsection applies regardless of when or by whom the information was given and whether it was given in relation to the current visa or to a visa previously held. This reflects the reasonable expectation that non-citizens provide correct information during all of their transactions with the department, and are honest and truthful at all times.
20. The purpose of new subsection 116(1AB) of the Migration Act is to provide that incorrect information must not be given to the Department at any time, not just where the information is provided as part of a person's visa application as required in Subdivision C of Division 3 of Part 2 of the Migration Act. For example, the new cancellation ground would apply where incorrect information is given which informs the grant of a visa which does not require an application to be made or which is granted through ministerial intervention, or incorrect information given during an administrative process in relation to the Migration Act for the purpose of responding to Australia's international obligations to the person under a relevant International Instrument.

Item 6 Subsection 116(2)

21. This item inserts “under subsection (1), (1AA) or (1AB)” after the words “cancel a visa” in subsection 116(2) in Division 3 of Part 2 of the Migration Act.
22. The effect of this amendment is to provide in subsection 116(2) of the Migration Act that the Minister is not to cancel a visa under subsection 116(1), (1AA) or (1AB) if there exist prescribed circumstances in which a visa is not to be cancelled.
23. This is a consequential amendment to make the wording of this provision consistent with subsection 116(3) and subsection 117(1), as amended by items 7 and 8 of this Schedule, by referring to the specific cancellation provisions within section 116 of the Migration Act.

Item 7 Subsection 116(3)

24. This item inserts “, (1AA) or (1AB)” after “subsection (1)” in subsection 116(3) in Division 3 of Part 2 of the Migration Act.
25. The effect of this amendment is to provide in subsection 116(3) of the Migration Act that if the Minister may cancel a visa under subsection 116(1), (1AA) or (1AB), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled. The purpose of this amendment is to allow the regulations to prescribe circumstances in which a visa must be cancelled if the grounds in new subsections 116(1AA) or (1AB) (inserted by item 5 of this Schedule) apply.

Item 8 Subsection 117(1)

26. This item omits “section 116” and substitutes “subsection 116(1), (1AA) or (1AB)” in subsection 117(1) in Division 3 of Part 2 of the Migration Act.
27. The effect of this amendment is to provide in subsection 117(1) of the Migration Act that subject to subsection 117(2), a visa held by a non-citizen may be cancelled under subsection 116(1), (1AA) or (1AB) as set out in paragraphs 117(1)(a) to (d).

28. This is a consequential amendment to make the wording of this provision consistent with subsections 116(2) and 116(3) as amended by items 6 and 7 of this Schedule, by referring to the specific cancellation provisions within section 116.

Item 9 Subsection 117(2)

29. This item omits “section 116” and substitutes “subsection 116(1),” in subsection 117(2) in Division 3 of Part 2 of the Migration Act.
30. The effect of this amendment is to provide in subsection 117(2) of the Migration Act that a permanent visa cannot be cancelled under subsection 116(1) if the holder of the visa is in the migration zone and was immigration cleared on last entering Australia. The purpose of this amendment is to provide that subsection 117(2) only prevents the cancellation of a permanent visa in the migration zone if the ground for cancellation is in subsection 116(1). It is intended that a permanent visa can be cancelled in the migration zone if the cancellation grounds relating to identity and the giving of incorrect information in new subsections 116(1AA) or 116(1AB) (inserted by item 5 of this Schedule) apply. This is consistent with the cancellation grounds in Subdivision C of Division 3 of Part 2 of the Migration Act (visas based on incorrect information may be cancelled) which apply to both permanent and temporary visas. It is intended that where the identity of a visa holder is in doubt, or a person has obtained a visa through the provision of incorrect information, a visa should be liable for cancellation whether it is a temporary or permanent visa.

Item 10 After paragraph 118(c)

31. This item inserts new paragraphs 118(ca) and 118(cb) in section 118 of Division 3 of Part 2 of the Migration Act.
32. Section 118 of the Migration Act lists the cancellation powers of the Migration Act and provides that each of these powers are not limited, or otherwise affected, by each other. New paragraph 118(ca) refers to section 133A (Minister’s personal powers to cancel visas on section 109 grounds) and new paragraph 118(cb) refers to section 133C (Minister’s personal powers to cancel visas on section 116 grounds).
33. This is a consequential amendment to include the Minister’s new personal powers to cancel visas in section 133A of the Migration Act on section 109 grounds and section 133C on section 116 grounds (inserted by item 12 of this Schedule), to the list of cancellation powers that do not limit or otherwise affect each other.

Item 11 Paragraph 118(f)

34. This item inserts the words “on character grounds” after the word “cancel” in paragraph 118(f) of Division 3 of Part 2 of the Migration Act.
35. The effect of this amendment is to refer in paragraph 118(f) of the Migration Act to section 501, 501A or 501B (special power to refuse or cancel on character grounds).
36. The purpose of this item is to distinguish the special power to refuse or cancel visas referred to in this paragraph from the Minister’s personal powers to cancel visas set out in new paragraphs 118(ca) and 118(cb) of the Migration Act and to more accurately describe the function of sections 501, 501A or 501B.

Item 12 After Subdivision F of Division 3 of Part 2

This item inserts a new Subdivision FA in Division 3 of Part 2 of the Migration Act – Additional personal powers for Minister to cancel visas on section 109 or 116 grounds.

37. New sections 133A to 133F in new Subdivision FA of the Migration Act contain additional personal discretionary powers for the Minister to cancel visas on section 109 or 116 grounds.

Section 133A – Minister’s personal powers to cancel visas on section 109 grounds*Action by Minister – natural justice applies*

38. New subsection 133A(1) of the Migration Act provides that if a notice was given under section 107 to the holder of a visa in relation to a ground for cancelling the visa under section 109, and the MRT, the RRT, the AAT or a delegate of the Minister decided either that the ground did not exist or not to exercise the power in subsection 109(1) to cancel the visa (despite the existence of the ground), the Minister may set aside that decision and cancel the visa if:

- the Minister considers that the ground exists; and
- the visa holder does not satisfy the Minister that the ground does not exist; and
- the Minister is satisfied that it would be in the public interest to cancel the visa.

39. A note explains that the grounds for cancellation under section 109 are non-compliance with any of sections 101, 102, 103, 104 or 105.

40. New subsection 133A(2) of the Migration Act provides that the procedure set out in Subdivision C of Division 3 of Part 2 of the Migration Act does not apply to a decision under subsection 133A(1). This puts beyond doubt that common law natural justice applies in relation to a decision made personally by the Minister under subsection 133A(1).

41. New subsection 133A(7) of the Migration Act (below) provides that this power may only be exercised by the Minister personally.

42. Ultimately, the community holds the Minister responsible for decisions within his portfolio, even where those decisions have resulted from merits review. Therefore, it is appropriate that the Minister have the power to be the final decision-maker in the public interest.

Action by Minister – natural justice does not apply

43. New subsection 133A(3) of the Migration Act provides that the Minister may cancel a visa held by a person who has been immigration cleared (whether or not the immigration clearance was because of the visa the person currently holds) if the Minister is satisfied that:

- a ground for considering cancelling the visa under section 109 exists; and
- it would be in the public interest to cancel the visa.

44. A note explains that the grounds for cancellation under section 109 of the Migration Act are non-compliance with any of the sections 101, 102, 103, 104 or 105.

45. New subsection 133A(4) of the Migration Act provides that the rules of natural justice and the Code of Procedure set out in Subdivision C of Division 3 of Part 2 of the Migration Act do not apply where the Minister, acting personally, makes a decision under subsection 133A(3). The Minister has the choice under subsection 133A(1) to cancel the visa after giving the visa holder the opportunity to comment on the proposed cancellation. However, in some circumstances the Minister needs to be able to cancel a visa quickly without notice. In this case, however, the person is invited to make representations to the Minister about revocation of the decision to cancel under new section 133F inserted by this item.
46. New subsection 133A(5) of the Migration Act provides that the Minister may cancel a visa under subsection 133A(3) whether or not:
- the visa holder was given a notice under section 107 in relation to the ground for cancelling the visa; or
 - the visa holder responded to any such notice; or
 - the MRT, RRT, AAT or a delegate of the Minister decided that the ground did not exist or decided not to exercise the power in subsection 109(1) to cancel the visa (despite the existence of the ground).
47. New subsection 133A(6) of the Migration Act provides that, if the decision was made under paragraph 133A(5)(c), the power under subsection 133A(3) to cancel a visa is a power to set aside the original decision of the MRT, the RRT, the AAT or the delegate and then to cancel the visa.
48. The intention of new subsections 133A(3) to (6) of the Migration Act is to allow the Minister to personally cancel a visa on section 109 grounds without notice where there has been no earlier consideration by a delegate or tribunal as to whether the visa should be cancelled on section 109 grounds, or where a section 107 notice has been issued but a decision has not yet been made (regardless of whether the person has responded to the section 107 notice). The amendment also allows the Minister to set aside a decision of a delegate or tribunal not to cancel the visa, and cancel the visa without notice.
49. From time to time there may be a situation that requires visa cancellation action to be taken quickly and decisively, and without notice. In these cases, once the visa is cancelled, the non-citizen will be able make submissions as to why the cancellation should be revoked. It is appropriate that the Minister have the power to cancel visas quickly, where he or she is satisfied that it is in the public interest to do so.

Minister's exercise of power

50. New subsection 133A(7) of the Migration Act provides that the power in subsections 133A(1) or 133A(3) to cancel a visa may only be exercised by the Minister personally.
51. New subsection 133A(8) of the Migration Act provides that Minister does not have a duty to consider whether to exercise the power in subsections 133A(1) or 133A(3) whether or not the Minister is requested to do so, or in any other circumstances.
52. These provisions make clear that the powers in subsections 133A(1) and 133A(3) of the Migration Act are non-delegable and non-compellable.
53. New subsection 133A(9) of the Migration Act provides that subsection 138(4) does not prevent the Minister setting aside a decision of a Tribunal or a delegate and cancelling a visa

in accordance with section 133A. Subsection 138(4) provides that the Minister has no power to vary or revoke the decision after the day and time the record is made, but it is intended that this provision not prevent the Minister from setting aside a decision under new section 133A.

Section 133B – Other provisions relating to the exercise of powers in section 133A

54. Subsection 133B(1) of the Migration Act provides that, subject to subsection 133B(2), the possible non-compliances that can constitute a ground for the cancellation of a visa under subsection 133A(1) or 133A(3) include non-compliances that occurred at any time (whether before or after the commencement of this section), including non-compliances in respect of any previous visa held by the person.
55. Subsection 133B(2) of the Migration Act provides that section 115 (application of Subdivision C) applies in relation to section 133A in the same way that it applies in relation to Subdivision C. Section 115 contains provisions detailing the application of Subdivision C of Division 3 of Part 2 of the Migration Act to applications for visas or entry permits made, and passenger cards filled in, before, on or after 1 September 1994.
56. New subsection 133B(3) of the Migration Act provides that, to avoid doubt, subsections 133A(1) and 133A(3) apply:
 - whether or not the Minister became aware of the ground for cancelling the visa because of information given by the visa holder; and
 - whether the non-compliance because of which the ground is considered to exist was deliberate or inadvertent.
57. This new provision mirrors sections 110 and 111 in Subdivision C of Division 3 of Part 2 of the Migration Act.
58. New subsection 133B(4) of the Migration Act provides that steps taken for the purposes of the Minister exercising the power in subsection 133A(1) or 133A(3) in relation to an instance of possible non-compliance by a person do not prevent:
 - a section 107 notice being given to that person because of another instance of possible non-compliance; or
 - the exercise of the power in subsection 133A(1) or 133A(3) in relation to the person because of another instance of possible non-compliance.
59. New subsection 133B(5) of the Migration Act provides that the non-cancellation of a visa under section 133A despite an instance of non-compliance does not prevent the cancellation, or steps for the cancellation, of the visa because of another instance of non-compliance.
60. These two new provisions mirror section 112 in Subdivision C of Division 3 of Part 2 of the Migration Act. The provisions make clear that if the Minister considers cancellation of a person's visa on one occasion under section 133A and has not yet cancelled the visa or decides not to cancel the visa, the Minister is not prevented from considering cancellation of the visa for another instance of non-compliance.

Section 133C – Minister’s personal powers to cancel visas on section 116 grounds

Action by Minister – natural justice applies

61. Subsection 133C(1) provides that, if notification was given under section 119 to the holder of a visa in relation to a ground for cancelling the visa under section 116, and the MRT, the RRT, the AAT or a delegate of the Minister decided that the ground did not exist, or decided not to exercise the power in section 116 to cancel the visa (despite the existence of the ground), the Minister may set aside that decision and cancel the visa if:
- the Minister considers that the ground exists; and
 - the visa holder does not satisfy the Minister that the ground does not exist; and
 - the Minister is satisfied that it would be in the public interest to cancel the visa.
62. A note explains that the Minister’s power to cancel a visa under subsection 133C(1) is subject to section 117, and refers the reader to subsection 133C(9) inserted by this item.
63. Subsection 133C(2) provides that the procedures set out in Subdivisions E and F do not apply to a decision under subsection 133C(1). This puts beyond doubt that common law natural justice applies in relation to a decision made personally by the Minister under subsection 133C(1).
64. Subsection 133C(7) below provides that this power may only be exercised by the Minister personally.
65. Ultimately, the community holds the Minister responsible for decisions within his portfolio, even where those decisions have resulted from merits review. Therefore, it is appropriate that the Minister have the power to be the final decision-maker in the public interest.

Action by Minister – natural justice does not apply

66. Subsection 133C(3) provides that the Minister may cancel a visa held by a person if the Minister is satisfied that:
- a ground for cancelling the visa under section 116 exists; and
 - it would be in the public interest to cancel the visa.
67. A note explains that the Minister’s power to cancel a visa under subsection 133C(3) is subject to section 117, and refers the reader to subsection 133C(9) inserted by this item.
68. New subsection 133C(4) provides that the rules of natural justice, and the procedures set out in Subdivisions E and F of Division 3 of Part 2 of the Migration Act, do not apply where the Minister, acting personally, makes a decision under subsection 133C(3). The Minister has the choice under subsection 133C(1) to cancel the visa after giving the visa holder the opportunity to comment on the proposed cancellation, however in some circumstances the Minister needs to be able to cancel a visa quickly without notice. In this case, however, the person is invited to make representations to the Minister about revocation of the decision to cancel under section 133F inserted by this item.

69. New subsection 133C(5) provides that the Minister may cancel a visa under subsection 133C(3) whether or not:
- the visa holder was given a notification under section 119 relating to the ground for cancelling the visa; or
 - the visa holder responded to any such notification; or
 - the MRT, RRT, AAT or a delegate of the Minister decided that the ground did not exist or decided not to exercise the power in section 116 to cancel the visa (despite the existence of the ground); or
 - a delegate of the Minister decided to revoke, under subsection 131(1), a cancellation of the visa in accordance with section 128 in relation to the ground.
70. New subsection 133C(6) provides that if a decision was made as mentioned in paragraph 133C(5)(c), the power under subsection 133C(3) to cancel a visa is a power to set aside the original decision of the MRT, the RRT, the AAT or the delegate and then to cancel the visa.
71. The intention of new subsections 133C(3) to (6) is to allow the Minister to personally cancel a visa on section 116 grounds without notice where there has been no earlier consideration by a delegate or tribunal as to whether the visa should be cancelled on section 116 grounds, or where a section 119 notification has been issued but a decision has not yet been made (regardless of whether the person has responded to the section 119 notification). The amendment also allows the Minister to set aside a decision of a delegate or tribunal not to cancel the visa, and cancel the visa without notice.
72. From time to time there may be a situation that requires visa cancellation action to be taken quickly and decisively, and without notice. In these cases, once the visa is cancelled, the non-citizen will be able make submissions as to why the cancellation should be revoked. It is appropriate that the Minister have the power to cancel visas quickly, where he or she is satisfied that it is in the public interest to do so.

Minister's exercise of power

73. New subsection 133C(7) provides that the power in subsections 133C(1) or 133C(3) to cancel a visa may only be exercised by the Minister personally.
74. New subsection 133C(8) provides that the Minister does not have a duty to consider whether to exercise the power in subsection 133C(1) or 133C(3), whether or not the Minister is requested to do so, or in any other circumstances.
75. These provisions make clear that the powers in subsection 133C(1) and 133C(3) are non-delegable and non-compellable.
76. New subsection 133C(9) provides that section 117 applies in relation to the power in subsection 133C(1) or (3) in the same way as it applies to the cancellation of a visa under section 116. This has the effect that a visa held by a non-citizen may be cancelled under section 133C:
- before the non-citizen enters Australia; or
 - when the non-citizen is in immigration clearance; or
 - when the non-citizen leaves Australia; or
 - while the non-citizen is in the migration zone.

77. Further, a permanent visa cannot be cancelled under section 133C if the holder of the visa is in the migration zone and was immigration cleared on last entering Australia.
78. New subsection 133C(10) provides that subsection 138(4) does not prevent the Minister setting aside a decision of a Tribunal or a delegate and cancelling a visa in accordance with section 133C. Subsection 138(4) provides that the Minister has no power to vary or revoke the decision after the day and time the record is made, but it is intended that this not prevent the Minister from setting aside a decision under new section 133C.

Section 133D – Cancellation under subsection 133A(1) or 133C(1) – method of satisfying Minister of matters

79. New section 133D provides that the regulations may provide that, in determining for the purposes of subsection 133A(1) or 133C(1) whether a person, or a person included in a specified class of persons, satisfies the Minister that the ground for cancelling the person's visa does not exist, any information or material submitted by or on behalf of the person must not be considered by the Minister unless the information or material is submitted within the period, and in the manner, ascertained in accordance with the regulations.
80. The purpose of new section 133D is to provide that the visa holder who is given the opportunity to satisfy the Minister that a ground for cancelling the person's visa does not exist, must make their representations within the prescribed timeframe and in the prescribed manner.

Section 133E – Cancellation under subsection 133A(1) or 133C(1) – notice of cancellation

81. New subsection 133E(1) provides that if a decision is made under subsection 133A(1) or 133C(1) to cancel a visa that has been granted to a person, the Minister must give the former holder of the visa a written notice that sets out the decision, specifies the provision under which the decision was made and sets out the reasons (other than non-disclosable information) for the decision.
82. New subsection 133E(2) provides that the notice is to be given in the prescribed manner.
83. New subsection 133E(3) provides that a failure to comply with section 133E in relation to a decision does not affect the validity of the decision.
84. The purpose of new section 133E is to set out the notification requirements for decisions made under subsection 133A(1) or subsection 133C(1) to cancel a visa (where the cancellation is made with prior notice to the visa holder).

Section 133F - Cancellation under subsection 133A(3) or 133C(3) – Minister may revoke cancellation in certain circumstances

85. New subsection 133F(1) provides that section 133F applies if the Minister exercises the personal discretionary power to make a decision (the "original decision") under subsection 133A(3) or subsection 133C(3) to cancel a visa that has been granted to a person. A decision under subsection 133A(3) or subsection 133C(3) is made without prior notice to the visa holder.

86. New subsection 133F(2) defines “relevant information” for the purposes of section 133F to be information (other than non-disclosable information) that the Minister considers:
- would be the reason, or a part of the reason, for making the original decision; and
 - is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.
87. New subsection 133F(3) provides that as soon as practicable after making the original decision, the Minister must give the person, in the way the Minister considers appropriate in the circumstances, a written notice setting out the original decision and particulars of the relevant information. The Minister must also invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.
88. New subsection 133F(4) provides the Minister with the discretion to revoke the original decision if the person makes representations in accordance with the invitation and if the person satisfies the Minister that the ground for cancelling the visa referred to in subsection 133A(3) or 133C(3) (as the case requires) does not exist.
89. New subsection 133F(5) provides that the Minister’s personal discretionary power to revoke the original decision to cancel a visa in subsection 133F(4) may only be exercised by the Minister personally.
90. New subsection 133F(6) provides that, if the Minister revokes the original decision to cancel a visa, that cancellation decision is taken not to have been made. This subsection has effect subject to subsection 133F(7).
91. New subsection 133F(7) provides that any detention of the person that occurred during any part of the period beginning when the original decision was made and ending at the time of the revocation of the original decision is lawful, and the person is not entitled to make any claim against the Commonwealth, an officer or any other person because of the detention.
92. The purpose of this amendment is to provide an opportunity for a person whose visa has been cancelled without prior notice to make representations to the Minister about revocation of the original decision.

Item 13 Paragraph 139(a)

93. This item omits “E and F” from paragraph 139(a) in Division 3 of Part 2 of the Migration Act and substitutes “E, F and FA”.
94. This is a consequential amendment to include a reference to new Subdivision FA inserted by item 11 of this Schedule, with the effect that if a visa is held by 2 or more non-citizens, Subdivision FA applies as if each of them were the holder of the visa and to avoid doubt, if the visa is cancelled because of one non-citizen being its holder, it is cancelled so that all those non-citizens cease to hold the visa.

Item 14 Subsections 140(1) and (2)

95. This item omits “116 or 128” from subsections 140(1) and 140(2) in Division 3 of Part 2 of the Migration Act, and substitutes “116 (general power to cancel), 128 (when holder outside Australia), 133A (Minister’s personal powers to cancel visas on section 109 grounds), 133C (Minister’s personal powers to cancel visas on section 116 grounds)”.
96. This is a consequential amendment to include a reference to new sections 133A and 133C, which are inserted by item 11 of this Schedule, with the effect that if a person’s visa is cancelled because of sections 133A or 133C, a visa held by another person because of being a member of the family unit of the person is also cancelled. Further, if a person’s visa is cancelled under new sections 133A and 133C and another person to whom subsection 140(1) does not apply holds a visa only because the person whose visa is cancelled held a visa, the Minister may, without notice to the other person, cancel the other person’s visa.

Item 15 Paragraph 140(4)(b)

97. This item inserts “133F” in paragraph 140(4)(b) in Division 3 of Part 2 of the Migration Act, after “131”.
98. This is a consequential amendment to include a reference to new section 133F, which is inserted by item 11 of this Schedule, with the effect that if a visa is cancelled under subsections 140(1), (2) or (3) because another visa is cancelled, and the cancellation of the other visa is revoked under section 133F, the cancellation under subsection 140(1), (2) or (3) is also revoked.

Item 16 Paragraph 191(2)(d)

99. This item inserts “, FA” after “Subdivision C, D” in paragraph 191(2)(d) in Division 7 of Part 2 of the Migration Act.
100. This is a consequential amendment to include a reference to new Subdivision FA, inserted by item 11 of this Schedule, with the effect that a person detained because of subsection 190(2) must be released from immigration detention if the officer becomes aware that the non-citizen’s visa is not one that may be cancelled under Subdivision FA of Division 3 of Part 2 of the Migration Act.

Item 17 Subsections 192(1) and (4)

101. This item inserts “, FA” after “Subdivision C, D” in subsections 191(1) and 191(4) in Division 7 of Part 2 of the Migration Act.
102. This is a consequential amendment to insert a reference to new Subdivision FA, which is inserted by item 11 of this Schedule, with the effect that if an officer knows or reasonably suspects that a non-citizen holds a visa that may be cancelled under Subdivision FA, the officer may detain the non-citizen. Further, a non-citizen detained under subsection 192(1) must be released from questioning detention if the officer becomes aware that the non-citizen’s visa is not one that may be cancelled under Subdivision FA.

Item 18 Paragraph 338(3)(c)

103. This item inserts “section 133A or 133C,” after the words “made under” in paragraph 338(3)(c) in Division 2 of Part 5 of the Migration Act.

104. This is a consequential amendment to insert a reference to new sections 133A and 133C, which are inserted by item 11 of this Schedule, in paragraph 338(3)(c), with the effect that a decision to cancel a visa held by a non-citizen who is in the migration zone at the time of the cancellation is an MRT-reviewable decision unless the decision was made under section 133A or 133C.
105. The purpose of this amendment is to ensure that MRT review is not available where a decision to cancel a visa is made personally by the Minister. Decisions made personally by the Minister under section 501 of the Migration Act are not merits reviewable. This is in recognition that the government is ultimately responsible for ensuring that decisions reflect community standards and expectations. Cancellation grounds under section 109 and 116 include those relating to national security, foreign interests, the health, safety and good order of the Australian community and the integrity of the Migration Programme. It is incongruous that a cancellation decision taken by the Minister personally should then be subject to full merits based administrative review.

Item 19 At the end of subsection 338(3)

106. This item inserts a new paragraph 338(3)(d) in Division 2 of Part 5 of the Migration Act.
107. New paragraph 338(3)(d) provides that a decision to cancel a visa held by a non-citizen who is in the migration zone at the time of the cancellation is an MRT-reviewable decision unless the decision was made personally by the Minister under section 109 or 116 or subsection 140(2).
108. The purpose of this amendment is to ensure that MRT review is not available where a decision to cancel a visa is made personally by the Minister. Decisions made personally by the Minister under section 501 of the Migration Act are not merits reviewable. This is in recognition that the government is ultimately responsible for ensuring that decisions reflect community standards and expectations. Cancellation grounds under section 109 and s116 include those relating to national security, foreign interests, the health, safety and good order of the Australian community and the integrity of the Migration Programme. It is incongruous that a cancellation decision taken by the Minister personally should then be subject to full merits based administrative review.

Item 20 Paragraph 338(4)(b)

109. This item inserts the words “of a delegate of the Minister” after the words “a decision” in paragraph 338(4)(b) in Division 2 of Part 5 of the Migration Act.
110. The purpose of this item is to provide that a decision to cancel a bridging visa held by a non-citizen who is in immigration detention because of that cancellation is only an MRT reviewable decision if the decision is made by a delegate of the Minister. A decision to cancel made personally by the Minister is not an MRT-reviewable decision.
111. The purpose of this amendment is to ensure that MRT review is not available where a decision to cancel a visa is made personally by the Minister. Decisions made personally by the Minister under section 501 of the Migration Act are not merits reviewable. This is in recognition that the government is ultimately responsible for ensuring that decisions reflect community standards and expectations. Cancellation grounds under section 109 and 116 include those relating to national security, foreign interests, the health, safety and good order

of the Australian community and the integrity of the Migration Programme. It is incongruous that a cancellation decision taken by the Minister personally should then be subject to full merits based administrative review.

Item 21 Before paragraph 411(2)(a)

112. This item inserts a new subparagraph 411(2)(aa) in subsection 411(2) in Division 2 of Part 7 of the Migration Act.
113. New paragraph 411(2)(aa) provides that any decision to cancel a protection visa that is made personally by the Minister is not an RRT-reviewable decision.
114. The purpose of this amendment is to ensure that MRT review is not available where a decision to cancel a protection visa is made personally by the Minister. Decisions made personally by the Minister under section 501 of the Migration Act are not merits reviewable. This is in recognition that the government is ultimately responsible for ensuring that decisions reflect community standards and expectations. Cancellation grounds under section 109 and s116 include those relating to national security, foreign interests, the health, safety and good order of the Australian community and the integrity of the Migration Programme. It is incongruous that a cancellation decision taken by the Minister personally should then be subject to full merits based administrative review.

Item 22 Application of amendments made by items 1 to 17

115. Item 22 sets out the application provisions that relate to items 1 to 17 of this Schedule.
116. Subitem 22(1) provides that the amendments made by items 1 to 17 apply in relation to a visa held on or after the commencement of those items (even if the visa was granted before that commencement).
117. Subitem 22(2) provides that if a notification was given under section 119 of the Migration Act before the commencement of the amendments made by items 3 and 4 of this Schedule, the Migration Act continues to apply in relation to that notification as if those amendments had not been made.
118. Subitem 22(3) provides that subsection 116(1AB) of the Migration Act, as inserted by item 5 of this Schedule, applies to information given before, on or after commencement of that item.
119. Subitem 22(4) provides that the Minister cannot set aside a decision and cancel a visa, under any of the following provisions of the Migration Act as amended by item 12 of this Schedule, if that decision was made before the commencement of that item:
- (a) subsection 133A(1);
 - (b) subsection 133A(3), as it has effect because of subsection 133A(6);
 - (c) subsection 133C(1);
 - (d) subsection 133C(3), as it has effect because of subsection 133C(6).

Item 23 Application of amendments made by items 18 to 21

120. Item 23 sets out the application provisions that relate to items 18 to 21 of this Schedule.
121. Item 22 provides that the amendments made by items 18 to 21 apply to decisions made on or after the commencement of those items.

Statement of Compatibility with Human Rights

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

Migration Amendment - Reform of the Character and General cancellation provisions Bill 2014

This amendment 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 and reasons for this Bill

The Australian Government is committed to protecting the Australian community from the risk of harm by non-citizens. The Government has a low tolerance for criminal, non-compliant or fraudulent behaviour by non-citizens and should be able to refuse entry to people, or cancel their visas, where they have committed serious crimes or present a risk to the community. Facilitation of entry needs to be complemented with strong cancellation powers and processes to ensure that the Government's ability to protect the Australian community and maintain the integrity of the Migration Programme is maintained into the future.

The provisions proposed in this Bill have been developed in response to the findings of a comprehensive review of the character and general visa cancellation framework performed by my department in 2013. There were a number of drivers behind the undertaking of such a review, including work with other agencies through the Border Protection Taskforce and ongoing consultation with the character programme's service delivery network on emerging trends and challenges. While provisions already existed within in the *Migration Act 1958* ('the Act') to address the risk to the community posed by non-citizens of possible character concern, the review identified that there was a need for these provisions to be revised and updated. The character provisions in the Act have been in place since 1999, while the general visa cancellation provisions under sections 109 and 116 had remained largely unchanged since 1994, which meant that many of the existing provisions were no longer reflective of modern jurisprudence. Further, Australian migration patterns and processes have changed significantly since the introduction of these cancellation provisions with higher volumes of limited stay visa holders coming to Australia and streamlined processes facilitating entry for tourism, economic and other purposes. The review concluded that while the character and visa cancellation (and refusal) framework was generally sound, it was clear there remained a small number of non-citizens who were not effectively and objectively being captured for consideration. The review proposed that this situation could be rectified by targeted Act amendments to provide for better identification and coverage of cohorts of non-citizens who had engaged in criminal or fraudulent behaviour, or other behaviour of concern, for consideration of visa cancellation or refusal.

The amendments introduced by this Bill will strengthen the power to refuse to grant, or to cancel a visa, on character grounds under section 501 by:

- adding additional grounds on which a person will fail the character test, which include sexually based offences involving a child or children; charges, or an indictment, for the crime of genocide, crimes against humanity, war crimes, crimes involving torture or slavery and other crimes of serious international concern; or the person having been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security; or, an Interpol notice has been issued in relation to the person from which it is reasonable to infer that the person poses a risk to the Australian community;

- including a new provision regarding a person who has received one or more sentences which, served concurrently or cumulatively, total 12 months or more;
- inserting a requirement that holders of information in State and Territory criminal justice bodies that pertains to a person's character must provide that information to the Minister when given notice to do so;
- including broadening of the existing association power to consider refusal to grant, or cancellation on character grounds, of a visa where the Minister reasonably suspects that a person has been or is a member of, or is otherwise involved or associated with, a group or organisation that the Minister reasonably suspects has been or is involved with criminal conduct;
- strengthening the Minister's power to consider refusal to grant a visa, or cancellation of a visa, on character grounds where the Minister reasonably suspects that a person has been or is involved or associated with, a person that the Minister reasonably suspects has been or is involved with certain criminal conduct;
- inserting a new power to make the cancellation of a visa mandatory where the visa holder is in prison and fails the character test on specified grounds;
- clarifying that a person fails the character test where they have been pardoned in relation to a conviction, and the effect of that pardon is only to relieve them of the consequences of the conviction; and
- clarifying that a visa holder may fail to pass the character test if the visa holder is found unfit to plead but a court has held that the person had committed the offence and the person is consequently held in a mental health facility or other institution.

In addition, in relation to general cancellation powers in sections 109 and 116 of the Act, the amendments proposed by this Bill:

- introduce a new ground for cancellation of a visa if the Minister is not satisfied of the person's identity;
- introduce a new ground for cancellation of a visa where a person has given incorrect information when they are seeking to make an application for a visa or are undertaking a process that may lead to an application for a visa, or a subsequent visa, being made;
- strengthen the Minister's personal powers to cancel a visa;
- enable the Minister to personally exercise an extraordinary power to set aside the decision of a review tribunal and substitute his or her own decision to cancel a visa; and
- clarify that if the Minister exercises a personal power to cancel a visa, that decision is not merits reviewable.

The Bill also creates transitional provisions in respect of the above amendments and makes minor technical amendments to the Principal legislation arising out of the above amendments.

Section 501 Reforms

Without the proposed amendments within section 501, non-citizens in prison who fail the character test can be released from prison prior to a visa cancellation or refusal process being finalised. This has meant that serious criminals who potentially presented a significant risk to the community could reside lawfully in the community while their suitability for doing so was under consideration.

The 12 month sentence length threshold for the substantial criminal record test did not effectively capture people guilty of all serious criminality, such as child sex offenders, due to changes in sentencing structures over time. Child sex offenders are increasingly being sentenced to lesser terms of imprisonment and instead being placed on diversionary programmes and/or listings on sex offender registers, leading to these offenders not failing the test and being allowed to enter or

remain in Australia. The substantial criminal record test was also not capturing people who had received multiple or concurrent sentences of between 12 and 24 months, even though such people had been convicted of multiple serious offences and demonstrated a clear disregard for law.

The objective grounds of the character test were not adequately capturing persons: suspected or accused of engaging in genocide, crimes against humanity, war crimes, crimes involving torture or slavery and other crimes of serious international concern; subject of an adverse security assessment, or an Interpol Notice. While these cohorts could generally be considered against one of the subjective limbs of the test, it could often be difficult to make out the case due to the increasingly technical and narrow interpretation of some of the subjective character provisions over time.

Case law and the interpretation of the relevant thresholds and evidence required to satisfy a decision-maker a person failed a subjective element of the test had led to some people of character concern not being easily captured for consideration under section 501, such as persons: suspected of involvement in war crimes activities, but not indicted by an international court; suspected of involvement in criminal activities, or who have links to organisations involved in criminal, people smuggling or people trafficking. For these cohorts, the nature of their suspected crimes or alleged conduct means that it is reasonable that they be liable for consideration under the character provisions and a decision made about whether they should be permitted entry to, or stay in, Australia, due to the serious nature of their alleged conduct.

The character test was specifically excluding non-citizens from consideration where they had been convicted to a term of imprisonment of 12 months or more but who had received a pardon. This included circumstances where the effect of the pardon was not to nullify or quash the conviction, but was merely to relieve the person of the consequences of the conviction. This had led to certain criminals with serious convictions passing the character test.

The character test was not reflecting current judicial practice in managing people who commit crimes and who suffer from a serious mental illness. The current character test provides that a person fails the test where a person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result had been detained in a facility or institution. The test did not cover the other various ways in which jurisdictions within Australia addressed court and sentencing proceedings for mentally ill people who had committed a serious crime. In particular, the test was not capturing people found not fit to plead due to a serious mental illness, where the offence was proven and of a serious nature, and where they were detained in a facility or institution.

Information sharing and section 501 decisions

Information from various State and Territory agencies, including those responsible for justice administration, law enforcement and correctional institutions, is crucial to determinations as to whether specific individuals pass or do not pass the character test. Difficulties have arisen because some States and Territory legislation does not recognise the Commonwealth's right to obtain relevant information about a non-citizen who may not pass the character test in order for a decision to be made about whether to refuse to grant or to cancel that person's visa under section 501 of the Act. This is due to the lack of uniformity in the privacy legislation of the Commonwealth and the States and Territories. While my department has sometimes been able to make informal arrangements with particular State and Territory agencies to facilitate the disclosure of such personal information, this is not a satisfactory or a consistent approach.

Whilst there were some established processes in place in the visa application framework as authorisation forms part of an application, this did not extend to holders of an Electronic Travel Authority, special category visa, or visas deemed as held on introduction of the *Migration Regulations 1994*, such as the transitional permanent visa. There had also always been difficulties

obtaining information on non-citizens entering, or in, the prison system, or those convicted to a wholly suspended sentence of 12 months more. This meant there were potentially large numbers of people in the community with criminal histories that were not being considered for visa cancellation.

Incorrect Information

The cancellation provisions under section 109 were only enlivened where a person provided incorrect information as part of a visa application or on a passenger card. These provisions did not adequately provide for incorrect information provided in non-statutory processes, such as entry interviews, refugee status assessments, or in processes relevant to the Minister considering the grant of a visa or the allowing of a visa application using his or her personal powers under the Act.

Identity

There was no explicit power within the Act to enable cancellation of a person's visa where evidence indicated that a person had lied about their identity.

Temporary visa holders

Over time interpretation of the 'health, safety or good order' provision in section 116(1)(e) meant it could only be used in limited circumstances. In particular, the term 'is, or would be' had been interpreted by the judiciary to mean the visa holder must be an actual risk, rather than a possible risk, and to cancel a visa under this ground there must have been objective evidence such as a confession from the visa holder of the intention to engage in conduct that jeopardised the health, safety or good or of the Australian community.

No Minister powers for general cancellation decisions

The general cancellation powers did not contain powers for the Minister to make, substitute or set-aside a decision personally and for such a decision to not be merits reviewable.

Compatibility with human rights

This Bill addresses the issues raised above through targeting reforms to three main areas of the Act to provide my department with the necessary tools to protect the Australian community and maintain integrity of the migration programme, through:

- The introduction of a new section 501 power to provide for mandatory cancellation without notice, but with the ability to seek revocation, for non-citizens in full-time criminal detention who fail the character test to ensure that issues regarding their entitlement to continue to hold a visa, and the risk they pose to the Australian community, can be assessed prior to their release into the community;
- Amendments to strengthen the existing sections 500, 501, 116 and 109 to better capture non-citizens of character or integrity concern, and to provide the Minister with enhanced decision making powers for greater assurance of outcomes; and
- Amendments to the Act to support the collection and disclosure of certain information to support decision making under section 501.

These amendments do not change the framework within which the character and general cancellation powers function. Generally, where the powers are enlivened, a discretion then exists to cancel or refuse a visa, this will continue to form part of the decision making process. The new mandatory prison cancellation ground includes a revocation process, and will not apply to a person

who had already been considered under section 501 based on their current conviction for which they are serving a sentence. A person will generally continue to be afforded with natural justice prior to a decision being made, or be invited to make representation about revoking the cancellation decision where a decision has been made without notice. As part of either process, the decision-maker will be required to take any information provided by the client and a number of other considerations such as Australia's human rights obligations into consideration as part of forming their decision.

The practical effect of these amendments will be greater numbers of people being liable for consideration under the character and general cancellation provisions.

Where a person's visa is cancelled or refused 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.

Some human rights contain express limitation clauses which set out the specific parameters within which these rights may be limited. These clauses include prescribed purposes that may justify the limitation of the right, such as national security, public order, public health, public safety, public morals, and the protection of the rights and freedoms of others. Each amendment in this Bill is aimed at further enhancing the Act's powers in the interest of national security and maintaining public order and safety, by strengthening my department's ability to identify, assess and reduce any risk to the Australian community that a non-citizen may present.

Detention of an unlawful non-citizen

Right to security of the person and freedom from arbitrary detention.

The right to security of the person and freedom from arbitrary detention is contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

'Article 9

1. *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.*

Australia takes its obligations to people in immigration detention very seriously. The Australian Government's position is that the detention of individuals requesting protection is neither unlawful nor arbitrary *per se* under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable.

In the context of Article 9, detention that is not 'arbitrary' must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.

The object of the Act is to 'regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'. 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).

This Bill does not limit a person’s right to security of the person and freedom from arbitrary detention. Australia’s migration framework states that unlawful non-citizens (i.e. non-citizens who do not hold a valid visa) will be subject to mandatory detention. 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. While this Bill widens the scope of people being considered for visa cancellation or refusal, these amendments present a reasonable response to achieving a legitimate purpose under the Covenant – the safety of the Australian community and integrity of the migration programme - through new powers to enable my department to better identify and target cohorts of people with serious criminality, or unacceptable behaviours or associations, and where deemed necessary for their removal from the Australian community through their detention and subsequent removal from Australia. Any questions of proportionality will be resolved by way of comprehensive policy guidelines on matters to be taken into account when exercising the discretion to cancel a person’s visa, or whether to revoke a mandatory cancellation decision.

The result of this Bill will be larger numbers of non-citizens being captured for consideration of visa cancellation. However, where a person’s visa is cancelled under the general cancellation powers, they will continue to be eligible to apply for a Bridging visa. Where a person’s visa is cancelled or refused on character grounds the person will continue to be ineligible to apply for any other visa, including a Bridging visa. These persons are liable for detention as they have been found to pose an unacceptable risk to the Australian community. However, the new mandatory cancellation of people in prison will ensure that the majority of people will go through these processes whilst they are still in prison.

The detention of a person under these circumstances is considered neither unlawful nor arbitrary under international law. 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 personal intervention powers to grant a visa or residence determination where it is considered in the public interest.

Australia’s non-refoulement obligations

This Bill may lead to:

1. a lawful non-citizen, to whom Australia owes protection obligations, who is serving a term of imprisonment and who fails the character test under section 501 of the Act, having their visa cancelled without notice; or
2. a lawful non-citizen, to whom Australia owes protection obligations, who is found to fail the character test, or a lawful non-citizen who is being considered for cancellation under one of the general visa cancellation grounds in section 116, or 109, having their visa cancelled.

Article 3(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (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.

My department recognises these *non-refoulement* obligations are absolute and does not seek to resile from or limit Australia's obligations. *Non-refoulement* obligations are considered as part of a decision to cancel a visa under character grounds. Anyone who is found to engage Australia's *non-refoulement* obligations during the cancellation decision or visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations. The amendments outlined in this Bill do not engage Australia's *non-refoulement* obligations.

Rights relating to families and children

'Article 3

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

'Article 24

- 1. 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 a person's visa is cancelled or refused they will either be detained under section 189, or may remain in another form of detention depending on their situation, until such time as they are released or removed under section 198. This may result in the separation of the family unit. However, the right relating to families and children will be taken into account as part of any request for visa revocation where the visa is mandatorily cancelled without notice, or where a decision to cancel or refuse a visa on character grounds is made. In both circumstances rights relating to families and children will be weighed against factors such as the risk the person presents to the Australian community. Delegates making a decision under the character grounds are bound by

relevant Ministerial Direction which requires a balancing exercise of these countervailing considerations. A similar process will be built into the revocation process for mandatory prison cancellations. Delegates making a decision under the general cancellation grounds will continue to be guided by policy which includes the consideration of CRC. While rights relating to family and children generally weigh heavy against cancellation or refusal, there will be circumstances where this will be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record or past behaviour or associations.

My department takes all matters concerning families and children seriously. The Government's position is that the application of migration laws which consider the individual circumstances of applicants and their relationships with family members is consistent with the above CRC provisions.

Other human rights implications associated with this Bill

New elements in this Bill that may be considered to engage human rights obligations are the:

- Amendment to s501 to introduce mandatory prison cancellation;
- Amendment to enhance the association limb of the character test;
- Amendment to s501 to capture persons who have received a pardon;
- Amendment to s501 to capture persons found not fit to plead on mental health grounds;
- Amendment to provide my department with ability to require other agencies to provide information to my department for the purposes of determining whether a person is liable for visa cancellation under s501 or s116;
- Amendment to s500 to restore the situation that all decisions made personally by the Minister under s501 to cancel a visa are not merits reviewable; and,
- Amendment to provide that personal decisions made by the Minister under section 109 or 116 are not merits reviewable.

Amendment to s501 to introduce mandatory prison cancellation

This amendment is aimed at reducing the risk of serious criminal non-citizens being released from prison into the community prior to the full consideration of their case. This amendment provides that a non-citizen's visa must be cancelled without notice where they are in prison and do not pass the character test on substantial criminal record grounds. The person will be notified of the decision after visa cancellation and given the opportunity to seek revocation of the decision. Merits review of decisions made by a delegate not to revoke would be available at the Administrative Appeals Tribunal ('the AAT'). Personal decisions of the Minister not to revoke would not be merits reviewable, but continue to be subject to judicial review.

This amendment may be viewed as limiting a person's right to freedom of movement.

'Article 12

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.'*

However, the right to freedom of movement is a right of people who are lawfully within the country and which may be restricted in certain circumstances. The United Nations Human Rights Committee has made it clear that whilst prisoners enjoy all the rights in the ICCPR, they are subject to restrictions that are unavoidable in a closed environment (General Comment 21). This amendment does not limit a person's freedom of movement as they are already being held in

criminal custody. If immigration detention continues beyond the criminal sentence, any restrictions this amendment presents would form a legitimate objective towards protecting the Australian community from the risk of serious criminals being released into the community before an assessment on the level of risk they present has been made. This is a proportionate response to reduce this risk, as it provides for the revocation process to take place while the person remains in prison.

Amendment to s501 to enhance the association limb of the character test

This amendment covers people who are reasonably suspected of being, or having been, members of, or otherwise involved or associated with, a listed group or organisation or class of group or organisation, or are reasonably suspected of being, or having been, involved in certain listed activities or types of activities. The previous subjective grounds meant that capturing these groups or activities was difficult and required a high level of certainty to be demonstrated. Given the very serious conduct involved, it was considered appropriate to objectively identify these groups and activities as not passing the character test.

This amendment may be viewed as limiting a person's right to peaceful assembly and freedom of association with others. The right to freedom of assembly and association is contained in Articles 21 and 22 of the ICCPR.

'Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.'

'Article 22

- 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
- 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*

The right to peaceful assembly protects the right of individuals and groups to meet and to engage in peaceful protest. The right to freedom of association protects the right to form and join associations to pursue common goals. This amendment does not limit this right under Article 21 of the ICCPR. While the Government supports a person's right to freedom of association it does not support associations that present a risk to the Australian community. These amendments are targeted specifically at criminal motorcycle gangs, terrorist organisations, organised criminal groups, people smuggling, people trafficking, or involvement in war crimes, genocide or human rights abuses for the purpose of protecting the Australian community from the risk that people with these types of associations or memberships may present to national security, public order, public safety, public morals, and the protection of the rights and freedoms of others. While the effect of these amendments effectively prohibits or creates a disincentive for the membership of particular

organisations, any restrictions this amendment may present on a person are seen as reasonable, proportionate, and necessary and aimed at achieving a legitimate objective which is to protect the Australian community. This amendment does not limit this right under Article 22 of the ICCPR. These changes are considered to be a proportionate measure to reduce this risk.

Amendment to s501 to capture persons who have received a pardon

This amendment was introduced to better define those pardons which could result in a person passing the character test. Previously, people who received a pardon which relieved them of the consequences of their conviction (i.e., where they were released from prison prior to the completion of their sentence) did not fail the character test. This presented the risk of a person who had committed a serious crime such as murder or attempted murder being able to lawfully enter and reside in the Australian community. This amendment seeks to mitigate that risk by ensuring that unless the pardon has the effect of completely quashing or nullifying the person's conviction, that they will still be liable for character consideration where their original sentence was of the requisite length to fail the character test.

This amendment may be viewed as limiting a person's right to the presumption of innocence as it will now capture persons for consideration where they have received a formal pardon. The presumption of innocence is contained in Article 14(6-7) of the ICCPR.

'6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.'

This amendment does not engage Article 14 of the ICCPR as the amendment is not applicable to persons whose conviction has been reversed, or to persons who have been pardoned on the grounds of new facts.

This amendment only captures people who have received a pardon on the bases of relieving them of the consequences of their conviction, and where their guilt has not been absolved. This amendment is considered reasonable and necessary given the original conviction may still be for a serious crime. This amendment is a proportionate response given it only enlivens the consideration process. The circumstances of the original conviction will inform any decision to cancel or refuse the visa.

Amendment to s501 to capture persons found not fit to plead on mental health grounds

This amendment captures people for character consideration found unfit to plead but found on the evidence available to have committed an offence, and where the person is detained in a facility or institution as a result.

The amendment may be seen to enliven Article 26 of the ICCPR as it may be seen to discriminate against people who have a disability.

'Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Discrimination on any ground, including discrimination on the grounds of the person's health or social status, is expressly listed in Article 26. The rights of people with disabilities are expressly covered by the Convention on the Rights of Person with Disabilities (CRPD) which recognises the barriers that people with a disability may face in realising their rights. The rights under all human rights treaties apply to everyone, including people with disability. However, the CRPD applies human rights specifically in the context of people with disability. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This amendment is not intended to distinguish people with a mental illness for the purposes of limiting, restricting or not recognising their equal rights with other members of the community or for the purpose of treating them differently. This amendment captures a small cohort of people who, whilst not legally found to be guilty of an offence, have been found to have engaged in the conduct which constitutes the offence charged and who have been detained by the court in a facility or institution as a result.

Prior to this amendment, this cohort passed the character test and could not be considered for visa cancellation or refusal. The principle of this amendment is aimed at providing a mechanism for my department to mitigate any risk of a person who has been found guilty of committing an offence being released from care or prison into the Australian community without first being considered under the character provisions. The seriousness of the offence and any indicative sentence of imprisonment where available will be taken into account when deciding whether to cancel or refuse the visa under this ground.

This amendment is reasonable as it is consistent with the current approach that finds a person who has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and the person has been detained in a facility or institution as not passing the character test. This amendment is a proportionate response as it enlivens visa cancellation or refusal consideration only, with the full circumstances of the case being assessed during the consideration process and to take into account the person's rights under Article 26 of the ICCPR. This amendment does not enliven Article 26 of the ICCPR as this right can be limited if it is for maintaining public order and safety of the Australian community. Further, in line with Article 12 of the CRPD which requires countries to ensure that people with a disability can exercise legal capacity in all aspects of their life and receive appropriate support to do this if required, the person will be provided with extra assistance in responding to notice given by my department.

Amendment to provide my department with ability to require other agencies to provide information to my department for the purpose of determining whether a person is liable for visa cancellation under s501

This amendment was introduced to address difficulties in information sharing as some State and Territory legislation did not recognise the Commonwealth's authority to obtain relevant information about non-citizens who may be liable for consideration under section 501. The 2011 ANAO audit report "Administering the Character Requirements of the Migration Act 1958" recommended that a formal basis for obtaining this information was necessary to support the identification and assessment of visa holders of character concern against the character requirements of the Act. Currently, without an explicit power to require States and Territories to provide information, it is either not possible, or not without risk, to attempt to put in place formal arrangements to share information. Further, my department's new enforcement powers under the Australian Privacy Principles may not give my department sufficient coverage without this amendment to the Act.

This amendment will allow my department to compel an agency of a State or Territory to provide personal information relevant to identify and assess non-citizens for cancellation or refusal under Part 9 of the Act. The types of personal information that would be relevant to whether a non-citizen is liable for consideration are potentially wide, but would include:

- bio-data of persons entering Australian correctional institutions;
- information on persons who have received suspended sentences;
- information on persons sentenced but released by Courts due to 'time served';
- information on persons directed to be held in mental health institutions, or transferred from prison to mental health institutions within sentence tenure; and
- any information that can be considered relevant to the assessment of a person's character in the ordinary sense.

This amendment may be seen as limiting a person's right to privacy and reputation. The prohibition on interference with privacy and attacks on reputation is contained in Article 17 of the ICCPR and involves the collection, security, use, disclosure or publication of personal information.

'Article 17

1. *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.*
2. *Everyone has the right to the protection of the law against such interference or attacks.'*

Limitations on privacy must be authorised by law and must not be arbitrary. The term unlawful means that no interference can take place except as authorised under domestic law. The law should be precise, and not give decision-makers too much discretion in authorising interferences with privacy.

This amendment has been written to be precise for section 501 purposes only. This amendment is necessary as the new Australian Privacy Principles (the 'APPs'), the Act and the various State and Territory privacy legislations do not provide sufficient coverage for my department to identify and assess all liable non-citizens. This amendment is a reasonable response to providing my department with the ability to properly identify and assess the circumstances of persons who may present a risk to public order, public safety, and the protection of the rights and freedoms of others and therefore, it is not arbitrary. Detailed Memoranda of Understanding will be developed to form the terms of the information sharing agreements and will be in accordance with the APPs.

Amendment to s500 to restore the situation that **all** decisions made personally by the Minister under s501 to cancel a visa are not merits reviewable

Decisions made personally by the Minister under section 501 to cancel a visa are intended to not be merits reviewable by the AAT. The Act currently provides that only a decision under section 501 made by a delegate is reviewable by the AAT. However, the High Court's judgement in *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46 found that some personal decisions by the Minister under section 501 of the Act are reviewable by the AAT. The High Court interpreted paragraph 500(1)(c) of the Act to mean that any decision to refuse to grant or to cancel a visa that relied on Articles 1F, 32 or 33 of the Refugees Convention was subject to review by the AAT, even where the decision was made personally by the Minister under section 501, provided that the Minister has not issued a certificate declaring the person to be an excluded person under section 502.

This Bill restores the intended position that no decisions made by the Minister personally under section 501 of the Act are reviewable by the AAT. However, a decision under section 65 of the Act to refuse to grant a protection visa on refusal grounds reflecting the exclusions of Article 1F, 32 or 33(2) will continue to be merits reviewable by the AAT, irrespective of whether the decision was made by the Minister acting personally or by a delegate of the Minister, unless the Minister makes the decision personally and issues a certificate under section 502 excluding the person from being entitled to seek merits review.

Anyone who is found through visa or Ministerial Intervention processes to engage Australia's *non refoulement* obligations will not be removed in breach of those obligations. There are a number of personal non-compellable powers available for the Minister to allow a visa application or grant a visa where this is in the public interest.

As cancellation can lead to removal, processes as a whole can amount to expulsion as contemplated in Article 13 of the ICCPR.

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.'

Any decision made by the Minister to refuse a Protection visa will continue to be subject to judicial review and therefore consistent with Article 13.

Amendment to provide that personal decisions made by the Minister under section 109 or 116 are not merits reviewable and allow the Minister to set-aside a decision of a delegate or Tribunal

These amendments were created to strengthen decision-making powers under section 109 and s116 and provide the capacity for the Minister to set aside a non-adverse decision by a delegate or Tribunal and substitute an adverse decision, where the Minister believes it is on the public interest to so do. These provisions encompass cancellation grounds which relate to integrity, fraud and security risks, and circumstances where the Minister is not satisfied as to a visa holder's identity. While these new provisions provide the Minister with enhanced powers it is expected it will only be

used in limited situations where there is a clear public interest requirement and where there is a justifiable reason to limit access to merits review in the public interest.

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.'

While merits review can be an important safeguard, there is no express requirement under the ICCPR or the CAT that it is required in the assessment of *non-refoulement* obligations. Anyone who is found through visa or Ministerial Intervention processes to engage Australia's *non-refoulement* obligations will not be removed in breach of those obligations. All persons impacted by the personal decisions made by the Minister under section 109 or 116 will remain able to access judicial review which satisfies the obligation in Article 13 to have review by a competent authority.

Conclusion

These amendments are for a legitimate purpose and are compatible with human rights. These amendments are designed to strengthen and build upon the existing character and general visa cancellation framework and are consistent with the original intent of the provisions to provide the Government with sufficient capability to address character and integrity concerns. This Bill addresses the dramatic changes in the environment relating to the entry and stay of non-citizens in Australia since mid to late 1990s and reflects this Government's and the Australian community's low tolerance for criminal, non-compliant or fraudulent behaviour by those who are given the privilege of holding a visa to enter and stay in Australia. To the extent that these amendments may limit human rights, the Government considers those limitations as reasonable, proportionate and necessary.

The Hon. Scott Morrison MP, Minister for Immigration and Border Protection