2016

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT (CHARACTER CANCELLATION CONSEQUENTIAL PROVISIONS) BILL 2016

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Border Protection, the Hon. Peter Dutton MP)
The Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016 (the Bill) amends the Migration Act 1958 (Migration Act) to ensure that the substantive amendments to the Migration Act made by the Migration Amendment (Character and General Visa Cancellation) Act 2014 (Character Act) are given their full effect and that character related provisions are dealt with consistently throughout the Migration Act.

In particular, the Bill:

- amends the definition of character concern to be consistent with the character test in subsection 501(6) as amended by the Character Act. The effect of this amendment is that non-citizens who meet the amended, broader definition of being of character concern may have a personal identifier disclosed in accordance with the permitted disclosure provisions in the Migration Act;
- ensures that the Minister’s power to cancel a visa in section 501BA of the Migration Act (inserted by the Character Act) does not limit or affect, and is not limited or affected by, other visa cancellation powers in the Migration Act;
- allows the detention of a person whose visa is reasonably suspected of being subject to cancellation under section 501BA, and requires the release of such a person if the officer becomes aware that their visa will not be cancelled under that provision or other specified provisions;
- ensures that a person who had their visa cancelled by the Minister personally under section 501BA does not need to be informed of the provisions of sections 195 and 196. This complements the amendment to section 501E which prevents such a person from making a further valid visa application while in Australia (other than for a protection visa or a visa specified in the regulations);
- ensures that a person whose visa was cancelled by the Minister personally under section 501BA has any outstanding visa applications refused and any other visas they hold cancelled by operation of law;
- ensures that a person whose visa is cancelled by the Minister personally under section 501BA is not entitled to be in Australia or enter Australia during the period determined by the regulations after the making of such a decision;
- ensures clear removal powers for a non-citizen whose visa has been mandatorily cancelled under subsection 501(3A) (mandatory cancellation of visas of certain non-citizens in prison, inserted by the Character Act) and who was invited to make representations about the cancellation but either did not do so within the timeframe, or did so and their visa cancellation was not revoked;
- ensures decisions made by the Minister personally under sections 501BA and 501CA are reviewable by the Federal Court rather than the Federal Circuit Court;
- ensures that a decision under section 501CA not to revoke a visa cancellation decision under subsection 501(3A) is subject to the same rules that govern review of other section 501 decisions by the Administrative Appeals Tribunal; and
• ensures confidential information given to the Department in the context of the exercise of a power under section 501CA or 501BA is protected from further disclosure (other than in certain specified circumstances) and may be protected by court order from disclosure to the applicant, their legal representative or any other member of the public.

FINANCIAL IMPACT STATEMENT

These amendments will have low financial impact.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation has been consulted separately in regard to each measure in the Bill. The overall assessment is that a regulation impact statement is not required.

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.
NOTES ON INDIVIDUAL CLAUSES

Clause 1  Short Title
1. Clause 1 provides that the short title by which this Act may be cited is the Migration Amendment (Character Cancellation Consequential Provisions) Act 2016.

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.

3. Table item 1 provides that sections 1 to 3 of this Act and anything in this Act not elsewhere covered by the table will commence on the day on which this Act receives the Royal Assent.

4. Table item 2 provides that Schedule 1 to this Act commences the day after this Act receives the Royal Assent.

5. 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  Schedules
6. This clause provides that legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned. In addition, any other item in a Schedule to this Act has effect according to its terms.
SCHEDULE 1—Amendments

Migration Act 1958

Items 1 to 4

Paragraphs 5C(1)(b) and 5C(1)(d), at the end of subsection 5C(1) and at the end of subsection 5C(2)

7. Items 1 to 3 amend the definition of ‘character concern’ at subsection 5C(1) in Part 1 of the Migration Act, to reflect the wording of the character test at subsection 501(6) of the Migration Act. Item 4 is a consequential amendment to reflect the wording at subsection 501(7) to clarify when, for the purposes of ‘character concern’, a non-citizen has a substantial criminal record. The purpose of these amendments is to ensure consistency between the definition of character concern with the amendments made to the character test in subsection 501(6) by the Character Act.

8. Item 1 repeals current paragraph 5C(1)(b) and substitutes new paragraphs 5C(1)(b) to 5C(1)(bc) into the definition of character concern to reflect the wording of the character test at paragraphs 501(6)(aa) to 501(6)(ba). Item 2 omits the word ‘significant’ in the definition of ‘character concern’ to reflect the wording of the character test at paragraph 501(6)(d) where the word ‘significant’ is not used. Item 3 adds new paragraphs 5C(1)(e) to 5C(1)(h) to the definition of ‘character concern’ to reflect the wording of the character test at paragraphs 501(6)(e) to 501(6)(h).

9. These items expand the definition of ‘character concern’ to include reference to non-citizens who have been convicted of, charged with, or indicted for, people smuggling, human trafficking, the crime of genocide (among other crimes of serious international concern) child sex offences, non-citizens subject to an Interpol notice or adverse security assessment, and non-citizens who have been found not fit to plead in relation to an offence but have been found to have committed the offence, and have been detained in a facility or institution. It also includes non-citizens who are reasonably suspected of association with criminal groups or persons involved in criminal conduct. The definition also includes a non-citizen convicted of an offence that was committed in immigration detention, during an escape from immigration detention or was convicted of the offence of escaping from immigration detention. This ensures that the definition of character concern is broad enough to identify those persons who may not pass the character test.

10. The definition of character concern is relevant to the disclosure of identifying information in section 336E in Division 3 of Part 4A of the Migration Act. Subsection 336E(1) provides that a person commits an offence if their conduct causes the disclosure of identifying information and the disclosure is not a permitted disclosure.

11. Permitted disclosures of identifying information are set out in subsection 336E(2) of the Migration Act. By way of example, paragraph 336E(2)(ec) provides that a permitted disclosure is a disclosure that is for the purpose of identifying non-citizens who have a criminal history or who are of character concern.
12. The amendments proposed at items 1-4 have the potential to increase the overall number of non-citizens who meet the definition of character concern and who may therefore have a personal identifier disclosed, where that disclosure is a permitted disclosure under the Migration Act. The policy intention is that the definition of character concern be consistent with the character test in subsection 501(6).

13. However, the amendments described at items 1-4 do not alter the framework or the existing safeguards which govern the collection, use and disclosure of identifying information. The robust privacy protection framework in Part 4A of the Migration Act, which creates a series of rules and offences that govern access to, disclosure of, modification of and destruction of identifying information (including personal identifiers) are not amended by this Bill.

Item 5 Paragraph 118(f)
14. This item omits “or 501B” and substitutes “, 501B or 501BA” in paragraph 118(f) in Subdivision D of Division 3 of Part 2 of the Migration Act.

15. Section 118 of the Migration Act provides that the various cancellation provisions in the Migration Act, including section 501, 501A or 501B are not limited, or otherwise affected, by each other.

16. The intention of section 118 is that none of the cancellation powers should limit or affect one another, and it was never intended that the cancellation power under section 501BA should limit or affect, or be limited or affected by, other cancellation powers. Therefore, the effect of this amendment is to provide in section 118 that the cancellation power under section 501BA does not limit or is not affected by other cancellation powers in the Migration Act.

Item 6 Paragraph 191(2)(d)
17. This item omits “or 501A” and substitutes “, 501A or 501BA” in paragraph 191(2)(d) of Subdivision A of Division 7 of Part 2 of the Migration Act.

18. This amendment means that where a person is detained because of subsection 190(2) of the Migration Act (where an officer suspects on reasonable grounds that a person in Australia is an unlawful non-citizen if they fail to provide a personal identifier in certain circumstances), they 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 section 501, 501A or 501BA (among other provisions).
**Item 7**  Subsections 192(1) and (4)

19. This item omits “or 501A” and substitutes “, 501A or 501BA” in subsections 192(1) and 192(4) of Subdivision A of Division 7 of Part 2 of the Migration Act.

20. The effect of this amendment in relation to subsection 192(1) of the Migration Act is that if an officer knows or reasonably suspects that a non-citizen holds a visa that may be cancelled under section 501BA, the officer may detain the non-citizen (subject to subsection 192(2)). The purpose of this amendment is to ensure that subsection 192(1) operates consistently with respect to all of the character provisions. Subsection 192(1) now provides that an officer may detain a non-citizen if the officer knows or reasonably suspects that the non-citizen holds a visa that may be cancelled under section 501, 501A or 501BA (among other provisions).

21. The amendment in relation to subsection 192(4) of the Migration Act means that where a non-citizen is detained under subsection 192(1), they 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 501, 501A or 501BA (among other provisions).

**Item 8**  Subparagraph 193(1)(a)(iv)

22. This item omits “or 501B” from subparagraph 193(1)(a)(iv) in Subdivision A of Division 7 of Part 2 of the Migration Act, and substitutes “, 501B or 501BA”.

23. Subparagraph 193(1)(a)(iv) of the Migration Act provides that sections 194 and 195 do not apply to a person detained under subsection 189(1) because of a decision the Minister has made personally under section 501, 501A or 501B to refuse to grant a visa to the person or to cancel a visa that has been granted to the person.

24. Broadly speaking, section 194 of the Migration Act requires an officer to inform a person who has been detained under section 189 of sections 195 and 196. Section 195 sets out the timeframe within which a detainee may apply for a visa and prevents the detainee from applying for a visa other than a bridging visa or a protection visa after that time. Section 196 provides that an unlawful non-citizen must be kept in immigration detention until, relevantly, they are removed from Australia or granted a visa.

25. This effect of this amendment is that a person who has had a visa cancelled by the Minister personally under section 501BA does not need to be informed that they may only apply for a visa within 2 working days after section 194 of the Migration Act was complied with in relation to his or her detention. Further, the person does not need to be made aware of section 196. The policy position is that a person whose visa is cancelled personally by the Minister under section 501BA does not need to be informed of these matters. This is because a person will have previously had their visa cancelled by a delegate under subsection 501(3A), and so will have been detained under section 189 and informed of sections 195 and 196 at that point.
26. This item is consistent with the amendment to the Migration Act made by item 18, which amends section 501E to include a reference to decisions made by the Minister personally under section 501BA. This amendment would mean that a non-citizen who has had a visa cancelled by the Minister personally under section 501BA will be unable to apply for a further visa while they remain in the migration zone, except for a protection visa, or a visa specified in the regulations for the purposes of this section (currently a Bridging R (Class WR) visa is specified).

Item 9  Subsection 196(4)

27. This item inserts “, 501A, 501B, 501BA or 501F” after “section 501” in subsection 196(4) of Subdivision A of Division 7 of Part 2 of the Migration Act.

28. Current subsection 196(4) of the Migration Act relevantly provides that, subject to paragraphs 196(1)(a), (b) and (c), if a person is detained as a result of the cancellation of their visa under section 501, the detention is to continue unless a court finally determines that the detention is unlawful or that the person is not an unlawful non-citizen.

29. Amended subsection 196(4) of the Migration Act now includes a reference to all the relevant provisions under which a visa can be cancelled on character grounds – that is, section 501A, 501B, 501BA or 501F. This gives effect to the policy intention that a person whose visa has been cancelled on character grounds (whether by a delegate of the Minister, or by the Minister personally under section 501A, 501B or 501BA) is to be kept in immigration detention unless a court finally determines that the detention is unlawful or that the person is not an unlawful non-citizen.

Item 10  Paragraph 198(2A)(c)

30. This item inserts “or 501CA” after “section 501C” in paragraph 198(2A)(c) in Subdivision A of Division 8 of Part 2 of the Migration Act.

31. Subsection 198(2A) of the Migration Act sets out one of the situations in which an officer must remove as soon as reasonably practicable an unlawful non-citizen. Broadly speaking, subsection 198(2A) provides for the removal of an unlawful non-citizen who is covered by subparagraph 193(1)(a)(iv), has been invited under section 501C to make representations to the Minister about revocation of a visa cancellation decision under subsection 501(3) or 501A(3) and either did not do so within the timeframe, or did so and the Minister decided not to revoke the cancellation decision.

32. Subparagraph 193(1)(a)(iv) of the Migration Act currently provides that sections 194 and 195 do not apply to a person detained under subsection 189(1) because of a personal decision of the Minister to refuse to grant or to cancel a visa under section 501, 501A or 501B.

33. The effect of this amendment is that subsection 198(2A) of the Migration Act will apply to a non-citizen whose visa has been mandatorily cancelled personally by the Minister under subsection 501(3A), and who is invited by the Minister personally, in
accordance with section 501CA, to make representations to the Minister about revocation of a decision to cancel a visa under subsection 501(3A), and who has not made representations in accordance with the invitation and the period for making representations has ended, or who has made such representations and the Minister has decided not to revoke the original decision (where the other limbs of subsection 198(2A) have been met). This ensures a clear removal power for people whose visas are cancelled by the Minister personally under subsection 501(3A) and who are invited by the Minister personally to make representations about that visa cancellation decision under section 501CA.

Item 11  After subsection 198(2A)

34. This item inserts new subsection 198(2B) after subsection 198(2A) in Subdivision A of Division 8 of Part 2 of the Migration Act.

35. New subsection 198(2B) of the Migration Act provides that an officer must remove as soon as reasonably practicable an unlawful non-citizen if:
   - a delegate of the Minister has cancelled a visa of the non-citizen under subsection 501(3A); and
   - since the delegate’s decision, the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and
   - in a case where the non-citizen has been invited, in accordance with section 501CA, to make representations to the Minister about revocation of the delegate’s decision – either:
     - the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or
     - the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the delegate’s decision.

36. 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 (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
     - paragraph (6)(e) (sexually based offences involving a child); 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.

37. New subsection 198(2B) of the Migration Act provides a clear basis for removal from Australia of a non-citizen whose visa has been cancelled by a delegate of the Minister (as opposed to by the Minister personally) under subsection 501(3A), and where the cancellation decision has not been revoked under section 501CA and the non-citizen
has not applied for a substantive visa that could be granted while the non-citizen is in the migration zone. The note at the end of the amendment provides the type of visas for which the non-citizen may apply.

**Item 12 Paragraphs 476(2)(c) and 476A(1)(c)**

38. This item omits “or 501C” and substitutes “, 501BA, 501C or 501CA” in paragraphs 476(2)(c) and 476A(1)(c) in Division 2 of Part 8 of the Migration Act.

39. Section 476 of the Migration Act concerns the jurisdiction of the Federal Circuit Court. Current paragraph 476(2)(c) relevantly provides that the Federal Circuit Court has no jurisdiction in relation to a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B or 501C.

40. Section 476A of the Migration Act concerns the jurisdiction of the Federal Court. Current paragraph 476A(1)(c) relevantly provides that the Federal Court has original jurisdiction in relation to a migration decision if and only if the decision is a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B or 501C.

41. This amendment ensures that a decision made personally by the Minister under section 501BA or 501CA is reviewable by the Federal Court rather than by the Federal Circuit Court. This is consistent with all other character decisions made personally by the Minister, which are reviewable by the Federal Court and not the Federal Circuit Court.

**Items 13 to 17 Subsections 500(6A), (6B), (6C) and (6D) and paragraphs 500(6F)(a), (6G)(a), (6H)(a), (6J)(a), (6K)(a) and (6L)(a)**

42. These items insert a reference to a decision under subsection 501CA(4) of the Migration Act not to revoke a decision to cancel a visa into subsections 500(6A), 500(6B), 500(6C) and 500(6D) and paragraphs 500(6F)(a), 500(6G)(a), 500(6H)(a), 500(6J)(a), 500(6K)(a) and 500(6L)(a) in Division 2 of Part 9 of the Migration Act.

43. The provisions that these items amend set out procedural rules relating to the review of decisions under section 501 by the Administrative Appeals Tribunal. These amendments give effect to the policy intention that a decision under section 501CA not to revoke a visa cancellation under subsection 501(3A) should be subject to the same rules that govern review of other decisions under section 501 by the AAT. These include rules that govern the lodgement of documents with the AAT, when the AAT can hold a hearing and when the AAT is taken to have affirmed the decision under review.

**Item 18 Paragraph 501E(1)(a)**

44. This item omits “or 501B” and substitutes “, 501B or 501BA” in paragraph 501E(1)(a) in Division 2 of Part 9 of the Migration Act.

45. Subsection 501E(1) of the Migration Act prevents a person who has had a visa application refused or a visa cancelled under section 501, 501A or 501B from applying
for another visa while the person remains in the migration zone, unless that decision was either set aside or revoked before the application time.

46. The effect of this amendment is that a person whose visa has been cancelled by the Minister personally under section 501BA is prevented from making a further visa application while they are in the migration zone. This gives effect to the policy intention that all persons who have had visa applications refused or visas cancelled under any of the character provisions in Part 9 of the Migration Act should be prevented from making a further valid visa application (other than for a protection visa or a visa specified in the regulations) while they remain in the migration zone. Currently a Bridging R (Class WR) visa is specified for the purposes of this provision.

**Item 19** **Subsection 501F(1)**

47. This item omits “or 501B” and substitutes “, 501B or 501BA” in subsection 501F(1) in Division 2 of Part 9 of the Migration Act.

48. Section 501F of the Migration Act currently applies if the Minister decides under section 501, 501A or 501B to refuse to grant a visa to a person or to cancel a visa that has been granted to the person. Subsection 501F(2) provides that if the person has made another visa application that has neither been granted nor refused and the visa applied for is neither a protection visa nor a visa specified in the regulations for the purposes of this subsection, the Minister is taken to have decided to refuse that other application.

49. Further, subsection 501F(3) of the Migration Act provides that if the person holds another visa and that other visa is neither a protection visa nor a visa specified in the regulations for the purposes of this subsection, the Minister is taken to have decided to cancel that other visa.

50. The effect of this amendment is that if a person’s visa has been cancelled by the Minister personally under section 501BA of the Migration Act, any application that they have made for a visa (other than for a protection visa or a visa specified in the regulations for the purposes of subsection 501F(2)) is taken to have been refused. Further, any other visa that the person holds is taken to be cancelled, provided it is neither a protection visa nor a visa specified in the regulations for the purposes of subsection 501F(3).

51. This amendment gives effect to the policy intention that people who have had their visas cancelled by the Minister personally under section 501BA should be in the same position as other people who have had their visa applications refused or cancelled on character grounds, in relation to their ability to continue to hold a visa and be granted a further visa for which they have applied.

**Item 20** **Paragraph 503(1)(b)**

52. This item omits “or 501B” and substitutes “, 501B or 501BA” in paragraph 503(1)(b) in Division 2 of Part 9 of the Migration Act.
53. Paragraph 503(1)(b) of the Migration Act provides that a person in relation to whom a decision has been made under section 501, 501A or 501B is not entitled to enter Australia or be in Australia at any time during the period determined under the regulations.

54. The effect of this amendment is that a person whose visa has been cancelled by the Minister personally under section 501BA is not entitled to enter Australia or be in Australia at any time during the period determined under the regulations.

55. This amendment gives effect to the policy intention that people who have had their visas cancelled by the Minister personally under section 501BA should be in the same position as other people who have had their visa applications refused or visas cancelled under section 501, 501A or 501B, in that they should not be entitled to be in Australia or enter Australia during the period determined by the regulations after the making of such a decision.

**Item 21  Subsections 503A(1) and (2) and 503B(1)**

56. This item omits “or 501C” (wherever occurring) and substitutes “, 501BA, 501C or 501CA” in subsections 503A(1), 503A(2) and 503B(1) in Division 2 of Part 9 of the Migration Act.

57. Broadly speaking, current section 503A of the Migration Act protects the disclosure of confidential information communicated to an authorised migration officer by a gazetted agency that is relevant to the exercise of a power under section 501, 501A, 501B or 501C (other than in certain limited circumstances).

58. This amendment gives effect to the policy intention that confidential information communicated to an authorised migration officer by a gazetted agency that is relevant to the exercise of a power under section 501CA or 501BA receives the same level of protection as the confidential information that is relevant to the exercise of a power under section 501, 501A, 501B or 501C.

59. Subsection 503B(1) of the Migration Act broadly provides that if confidential information is given to the Department by a gazetted agency that is relevant to the exercise of a power under section 501, 501A, 501B or 501C, and the information is relevant to proceedings before the Federal Court or the Federal Circuit Court, the Federal Court or the Federal Circuit Court can make orders to ensure that the information is not disclosed to the applicant, their legal representative or any other member of the public.

60. The amendment ensures that confidential information that is relevant to the exercise of a power under section 501CA or 501BA in the context of proceedings before the Federal Court or the Federal Circuit Court potentially receives the same level of protection from disclosure to the applicant in the proceedings, their legal representative or any other member of the public, as confidential information that is relevant to the exercise of a power under section 501, 501A, 501B or 501C.
Item 22  Application of amendments

Subitem 22(1) – Consequences of cancellation under section 501BA

61. Subitem 22(1) provides that the amendments made by items 8, 18 and 19 of this Schedule apply in relation to a decision under section 501BA of the Migration Act made after the commencement of item 22.

62. This means that after the commencement of item 22, a person who has had their visa cancelled by the Minister personally under section 501BA does not need to be informed about sections 195 and 196 of the Migration Act. After the commencement of that item, such a person will also be prevented by section 501E of the Migration Act from making a valid application for a visa while they remain in the migration zone. Further, after the commencement of item 22, any visa held by such a person will be taken to be cancelled, and any visa application they make will be taken to be refused, in accordance with section 501F.

Subitems 22(2) and (3) – Application of removal-related amendments

63. Subitem 22(2) provides that the amendment made by item 10 of this Schedule applies in relation to an invitation under section 501CA of the Migration Act given before or after the commencement of item 22.

64. The retrospective application of items 10 and 11 is necessary to provide a clear removal pathway for persons who have had their visas mandatorily cancelled under subsection 501(3A) and who were not successful in having that cancellation revoked under section 501CA before commencement, either because they failed to make representations to seek revocation of the cancellation within the applicable timeframe, or because the Minister decided not to revoke the original cancellation.

65. Currently, a person whose visa is mandatorily cancelled under subsection 501(3A), and is unsuccessful in having that cancellation revoked, can become liable for removal under the existing powers under section 198. In that sense, the retrospective application of the amendments made by items 10 and 11 will not create different consequences for persons to whom it applies, but does provide clarity in relation to the mandatory cancellation cohort, and more clearly articulates when a person in this cohort becomes liable for removal. These amendments also do not reach back and change what the law was before commencement and so are not retrospective in that sense.

Subitem 22(4) – Application of amendment relating to judicial review

66. Subitem 22(4) provides that the amendment made by item 12 of this Schedule applies in relation to a decision under section 501BA or 501CA of the Migration Act made after the commencement of item 22.

67. The prospective application of the amendments to paragraphs 476(2)(c) and 476A(1)(c) will mean that a decision made personally by the Minister under section
501CA or 501BA after commencement will be reviewable by the Federal Court, rather than by the Federal Circuit Court. This is consistent with the policy position that all people who are the subject of decisions made under section 501, 501A, 501B, 501BA, 501C or 501CA to refuse to grant or to cancel a visa on character grounds that are made by the Minister personally may seek judicial review by the Federal Court rather than the Federal Circuit Court. Character decisions often involve similar issues and legal principles and it is important that they are heard in the Federal Court, which is experienced in this area.

*Subitem 22(5) – Application of merits review-related amendments*

68. Subitem 22(5) provides that the amendments made by items 13 to 17 of this Schedule apply in relation to a decision made after the commencement of item 22.

69. This means that decisions made after commencement under subsection 501CA(4) not to revoke a visa cancellation decision under subsection 501(3A) will be subject to the same rules that govern review of decisions by the AAT under other character provisions in Part 9 of the Migration Act. The prospective application of this amendment ensures that applicants for merits review of a subsection 501CA(4) are subject to a consistent set of procedures and requirements.

*Subitem 22(6) – Application of amendment relating to exclusion from Australia*

70. Subitem 22(6) provides that the amendment made by item 20 of this Schedule applies in relation to a decision under section 501BA of the Migration Act made before or after the commencement of item 22.

71. The retrospective application of this item is necessary to ensure that a person whose visa is cancelled personally by the Minister under section 501BA of the Migration Act before commencement is excluded from Australia in the same way as a person whose visa is cancelled personally by the Minister under that provision after commencement. This amendment will remove the existing anomaly whereby section 501BA decisions do not result in exclusion from Australia, by ensuring that all persons whose visas are cancelled under any of the character provisions are treated consistently in terms of their ability to return to Australia.

72. This amendment does not reach back and change what the law was before commencement and so is not retrospective in that sense. It applies after commencement to exclude from Australia non-citizens who are the subject of a section 501BA decision that was made before commencement. In any event, the impact of this provision applying to decisions made prior to commencement is likely to be small as the Minister is yet to exercise his power under section 501BA to cancel a visa. If the Minister does exercise his power under section 501BA prior to commencement, the retrospective application of item 20 ensures that the law applies consistently to this exercise of power and to other exercises of power under the character provisions.
Subitem 22(7) – Application of amendment relating to confidential information

73. Subitem 22(7) provides that the amendment made by item 21 of this Schedule applies in relation to information communicated before or after the commencement of item 22.

74. The retrospective application of this provision is necessary to ensure the protection of confidential information relevant to the exercise of a power under section 501CA or 501BA of the Migration Act that was given to the Department before commencement. Confidential information provided in relation to the exercise of one of the character cancellation powers needs to be protected for use in the exercise of any of the other character cancellation powers. This is particularly the case where some character cancellation powers are not enlivened until another power has been used (for example, the Minister’s power to set-aside a non-adverse delegate or Tribunal decision is only enlivened once the power in section 501 has been exercised).

75. Generally, information that is covered under section 503A is made confidential for the purposes of protecting witnesses or ongoing investigations of organised criminal activities. In many cases, a law enforcement agency or an intelligence agency is not prepared to disclose confidential information to the Department without the protection that section 503A gives this information. These amendments strengthen protection for criminal intelligence and related information that is critical to decision making under section 501BA and 501CA.

76. The application of the amendment at item 21 to information communicated before commencement will ensure that confidential information provided to the Department prior to the introduction of this amendment is now protected and dealt with by the same administrative procedures used for all of the character cancellation and revocation powers. This will typically apply to information which was provided to the Department for a prior consideration of the non-citizen’s character under a different section 501 power, and which is crucial to the more recent consideration under section 501CA or 501BA.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016

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

Overview of the Bill

The Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016 (the Bill) amends the Migration Act 1958 (the Migration Act) to give full effect to the substantive amendments made by the Migration Amendment (Character and General Visa Cancellation) Act 2014 (the Character Act).

The amendments proposed in this Bill are technical and consequential amendments arising out of the Character Act. The amendments made to the Migration Act by the Character Act commenced on 11 December 2014. Among other things, the Character Act introduced subsection 501(3A) into the Migration Act, which provides for the mandatory cancellation of visas held by non-citizens in prison who do not pass certain limbs of the character test (specifically, because they have a substantial criminal record on the basis of being sentenced to death, sentenced to imprisonment for life or sentenced to a term of imprisonment of 12 months or more, or they have been convicted of, found guilty of, or found a charge proved against them for, a sexually-based offence involving a child).

As soon as practicable after making that cancellation decision, the Minister or the Minister’s delegate must give the former visa holder a written notice setting out the decision and invite the person to make representations about revocation of the decision (501CA(3)).

Following the cancellation of a visa under subsection 501(3A) of the Migration Act, if the former visa holder makes representations in accordance with the invitation under section 501CA, the Minister or the Minister’s delegate can revoke the cancellation decision if satisfied that the non-citizen passes the character test or there is another reason why the original cancellation decision should be revoked. A decision by a delegate under section 501CA not to revoke the cancellation decision is reviewable by the Administrative Appeals Tribunal (the AAT).

Section 501BA of the Migration Act was inserted by the Character Act to allow the Minister to personally set aside, in the national interest, a decision made by a delegate or the AAT under section 501CA to revoke a decision to cancel a visa under subsection 501(3A). This provision was inserted into the Migration Act to ensure consistency with the Minister’s other personal powers across the character provisions.

The consequential amendments set out in this Bill give full effect to the substantive amendments made to the Migration Act by the Character Act by:

- amending the meaning of character concern at subsections 5(C)(1) and 5(C)(2) of the Migration Act to reflect the character test as set out in subsection 501(6) of the Migration Act;
- including a reference to section 501BA in paragraph 118(f) of the Migration Act, ensuring that this power is not limited by any other general or character cancellation powers;
including a reference to section 501BA of the Migration Act in paragraph 191(2)(d) and subsections 192(1) and 192(4). This will ensure that detention powers and end of detention provisions for non-citizens who have their visa cancelled under section 501BA of the Migration Act, are consistent with those for non-citizens whose visas are cancelled under section 501 or 501A;

including a reference to a decision made by the Minister under section 501BA of the Migration Act in subparagraph 193(1)(a)(iv). This will ensure that a non-citizen detained under subsection 189(1) because of a decision made personally by the Minister under section 501BA to cancel a visa does not need to be informed that they may only apply for a visa within two working days after section 194 of the Migration Act was complied with in relation to his or her detention. This is consistent with the arrangement when a non-citizen is detained following the Minister’s personal decision under sections 501 or 501A;

inserting a reference to sections 501A, 501B, 501BA and 501F in subparagraph 196(4) to ensure that a non-citizen cancelled under these powers will remain in held immigration detention unless a court finally determines that the detention is unlawful, or that the non-citizen is not unlawfully in Australia;

inserting a reference to section 501CA in paragraph 198(2A)(c) to include a non-citizen who has been invited to make representations to the Minister about revocation of a cancellation decision made under subsection 501(3A);

inserting a specific removal power at new subsection 198(2B) of the Migration Act in relation to a non-citizen who has had a visa cancelled by a delegate under subsection 501(3A). This will put beyond doubt that non-citizens who do not make representations in accordance with an invitation under section 501CA of the Migration Act, or who make representations outside the legal timeframes, or whose request for revocation is refused, are required to be removed as soon as reasonably practicable;

including a reference to a decision made by the Minister personally under section 501BA or 501CA in sections 476 and 476A of the Migration Act, ensuring that a decision made by the Minister personally under section 501BA or 501CA is reviewable by the Federal Court rather than the Federal Circuit Court;

including a reference to a decision under subsection 501CA(4) of the Migration Act in subsections 500 (6A), 500(6B), 500(6C), 500(6D) and paragraphs 500(6F)(a) and 500(6G)(a), 500(6H)(a), 500(6J)(a), 500(6K)(a) and 500(6L)(a) of the Migration Act. These amendments ensure that these provisions, which currently apply to review by the AAT of decisions made under section 501 of the Migration Act, will also apply to decisions made under subsection 501CA(4) not to revoke a decision to cancel a visa;

including a reference to a decision made by the Minister personally under section 501BA of the Migration Act in section 503. This will ensure that a non-citizen whose visa is cancelled by the Minister personally under section 501BA can be subject to a period of exclusion from Australia, as is the case for the other character cancellation grounds;

including a reference to sections 501BA and 501CA in sections 503A and 503B of the Migration Act. These amendments will ensure the protection of confidential information provided by a gazetted agency that is relevant to the exercise of power under sections 501BA, 501C and 501CA, and allow the Federal Court and the Federal Circuit Court to make orders protecting this information from the applicant in court proceedings, the legal representative of the applicant, or any other member of the public; and

including a reference to a decision made by the Minister under the new section 501BA in sections 501E and 501F of the Migration Act. This will ensure that a non-citizen whose visa has been cancelled personally by the Minister under section 501BA is prevented from
making another visa application in Australia and is taken to have any other visas they hold cancelled and any outstanding visa applications refused.

**Human Rights implications**

These amendments do not expand visa cancellation powers or the grounds upon which a person may have their visa cancelled; they also do not alter the detention powers or framework already established in the Migration Act. Nor does this Bill propose any changes to the mandatory cancellation and revocation powers. The practical effect of these amendments will be to make the powers under sections 501CA and 501BA consistent in their application with other section 501 cancellation powers. The amendments will ensure, among other things, that the relevant exclusion periods for non-citizens whose visas are cancelled under one of the various character visa cancellation powers can be uniformly applied, that judicial jurisdiction in respect to these powers are consistent, and that protected information remains non-disclosable. The Bill also ensures that there is a clear removal power for non-citizens whose visas are cancelled under subsection 501(3A) where the cancellation decision is not revoked under section 501CA.

Where a non-citizen’s visa is cancelled or refused under section 501 of the Migration Act, they will be ineligible to make further visa applications (with limited exceptions) and will thus be liable for detention under section 189 of the Migration Act. They may also be removed from Australia, and 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 ensuring consistency with the powers in the rest of the Migration Act in the interest of national security and maintaining public order and safety, by strengthening the Department’s ability to reduce any risk to the Australian community that a non-citizen may present.

**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.*

2. *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest*

Australia takes its obligations to non-citizens 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 Migration Act is to ‘regulate, in the national interest, the coming into, and presence in, Australia of non-citizens’ (subsection 4(1)). The UN Human Rights Committee has recognised that “The [ICCPR] 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” (Human Rights Committee General Comment 15, 11 April 1986, paras 5-6).

This Bill does not limit a non-citizen’s right to security of the person and freedom from arbitrary detention. Australia’s migration framework states that unlawful non-citizens in Australia (i.e. non-citizens who do not hold a visa that is in effect) will be subject to mandatory detention. Legislative amendments that extend the grounds upon which a non-citizen’s visa may be cancelled or refused, the result of which may be subsequent detention, add to a number of existing laws that are well-established, generally applicable and predictable. This will be the case also for these amendments.

While this Bill may result in a limited increase in the number of non-citizens who will be ineligible to apply for a visa and subsequently liable for detention under the Migration Act, these amendments present a reasonable response to achieving a legitimate purpose under the ICCPR – the safety of the Australian community and integrity of the migration programme. Any questions of proportionality are resolved by way of comprehensive policy guidelines on matters to be taken into account when exercising the discretion to cancel a non-citizen’s visa, or whether to revoke a mandatory cancellation decision.

Where a non-citizen’s visa is cancelled or refused on character grounds the non-citizen will be ineligible to apply for any other substantive or bridging visa, apart from a protection visa. These non-citizens will be liable for immigration detention as they have been found to pose an unacceptable risk to the Australian community. However, it is anticipated that as the mandatory cancellation and revocation processes become business as usual, the majority of non-citizens will go through these processes while they are still in prison serving their custodial sentence.

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

The United Nations Human Rights Committee has expressed a view that Article 9(2) of the ICCPR requires all persons deprived of their liberty to be informed of the reasons for their detention. This Bill proposes provisions to the effect that a non-citizen who has had a visa cancelled by the Minister personally under section 501BA does not need to be informed of sections 195 and 196 of the Migration Act, which respectively provide that they may only apply for a visa within 2 working days and that their detention will continue until they are removed, deported, or granted a visa. However, a non-citizen who has their visa cancelled under section 501BA will have previously had their visa cancelled under section 501, and so will have been detained under section 189 and informed of sections 195 and 196 at that point. Further, the Department complies with Article 9(2) through the Very Important Notice (Form 1423) that is given to all non-citizens on their detention under section 189 of the Migration Act. This form provides comprehensive information to detainees about their detention, visas they may apply for, their personal property and where to find more information.
Removal of unlawful non-citizens from Australia

A decision to cancel a non-citizen’s visa renders them an unlawful non-citizen and liable for detention. A cancellation or refusal decision is separate to any action by a removals officer to consider whether criteria set out in section 198 apply to a particular unlawful non-citizen and whether it is reasonably practical to remove that person from Australia.

This Bill does not alter the removal framework already in place under section 198, but seeks to put beyond doubt that an unlawful non-citizen is available for removal from Australia in circumstances where the non-citizen has had a visa cancelled by a delegate under subsection 501(3A) of the Migration Act and was entitled to make representations about revocation of the cancellation decision but did not do so within the requisite timeframe under section 501CA, or in circumstances where the non-citizen has made representations but has had their request for revocation refused. This amendment adds to a number of existing lawful grounds for removal of unlawful non-citizens that are predictable, reasonable and well-established.

Australia’s non-refoulement obligations

Australia has obligations under the ICCPR and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) not to return a person to a country in certain circumstances. This Bill may lead to an unlawful non-citizen, to whom Australia owes protection obligations, being ineligible to apply for a visa to remain in Australia; however, Australia’s implementation of the below obligations are complemented by the ability of the Minister of Immigration and Border Protection (the Minister) to exercise his or her non-compellable powers under the Migration Act to grant a visa.

Article 3(1) of the CAT states:

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

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

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

Article 7 of the ICCPR states:

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

The Department recognises that 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 section 501 decision not to revoke cancellation of a visa under character grounds. Anyone who is found to engage Australia’s non-refoulement obligations during the cancellation consideration will not be removed in breach of those obligations, even in circumstances where the visa is cancelled. Where a person’s visa is cancelled on character grounds and is owed non-refoulement obligations, the Government has processes in place to mitigate any risk of a non-citizen’s detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister’s personal intervention powers to grant a visa or residence determination where it is
considered in the public interest. The amendments outlined in this Bill do not breach Australia’s *non-refoulement* obligations.

*Respect for the family and children*

Respect for the family is contained in Article 3 of the Convention on the Rights of the Child (CRC) and Articles 17(1), 23(1), and 24 of the ICCPR.

**Article 3 CRC**

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 ICCPR**

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 ICCPR**

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

**Article 24 ICCPR**

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.

This Bill does not propose any changes to the discretionary revocation process or the Ministerial decision making process. In both circumstances the best interests of any child or children affected by the decision is a primary consideration, which is weighed against factors such as the risk the person presents to the Australian community. In addition, while section 501 of the Migration Act is applicable to minors, it is generally not used to cancel the visas of minors who have a criminal record, nor does it allow the cancellation of the visas of dependant family members.

Where a person’s visa is cancelled or refused, relevantly under section 501, 501A, 501B or 501BA of the Migration Act, they will either be detained under section 189 of the Migration Act, or may remain in another form of detention depending on their situation, until such time as they are released from that other form of detention or removed under section 198 of the Migration Act. If they depart Australia they will be permanently excluded from applying for a visa to enter and remain in Australia. This may result in the separation of the family unit.

However, the rights 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. Delegates making a decision on character grounds are bound by a relevant Ministerial Direction which requires a balancing exercise of these countervailing considerations. The best interests of any child or children affected by the decision will be a primary consideration. While rights relating to family and children generally weigh heavily against cancellation, 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.
The 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 and ICCPR provisions.

**Right to fair trial**

Items in this Bill that may be considered to engage the right to a fair trial are the amendments to sections 476 and 476A of the Migration Act, which ensure that personal decisions made by the Minister to cancel a visa under sections 501CA or 501BA of the Migration Act are not reviewable by the Federal Circuit Court, but instead are reviewable by the Federal Court.

The right to a fair trial is protected in Articles 14 and 16 of the ICCPR.

*Article 14 (1)*

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

*Article 16*

Everyone shall have the right to recognition everywhere as a person before the law.

Decisions made personally by the Minister under section 501 of the Migration Act to cancel a visa are intended to not be reviewed by the AAT or the Federal Circuit Court. This Bill restores the intended position that decisions made by the Minister personally under section 501 of the Migration Act are reviewable by the Federal Court. This, in part, is in recognition that AAT review is not available for personal decisions of the Minister, and recognition that AAT members and Federal Circuit Court judges fulfil similar roles in Australia’s judicial system. It is appropriate that judicial review of a decision by an elected Minister of Parliament is undertaken by a suitably senior member of the judiciary. As decisions made by the Minister personally under section 501 of the Migration Act remain reviewable by the Federal Court, this limitation is proportionate and does not exclude persons from the right to a fair trial.

**Right to freedom of movement**

The amendment in this Bill to paragraph 198(2A)(c) and section 501E and section 503 of the Migration Act, and the insertion of new section 198(2B), may be viewed as limiting a person’s right to freedom of movement.

*Article 12 ICCPR*

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.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.
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 amendment to paragraph 198(2A)(c) and the insertion of new subsection 198(2B) will limit a non-citizen’s freedom of movement only in circumstances where that non-citizen has become unlawful due to cancellation of their visa under section 501CA or 501BA of the Migration Act and has been detained under section 189 on that basis. Therefore, an unlawful non-citizen’s right to liberty of movement and freedom to choose his residence is reasonably restricted in light of the non-citizen being unlawfully in Australia.

The amendment to section 501E operates to bar a person whose visa has been cancelled under section 501BA from applying for other visas, and the amendment to section 503 extends its application to persons to whom section 501BA applies. This is a proportionate response to reduce the risk of serious non-citizen criminals who have had a visa cancelled under section 501 of the Migration Act entering Australia.

In any event, it is the Government’s view that a person’s right to freedom of movement does not extend to countries to which that person is not a citizen or in relation to which a person no longer has a lawful right to enter and/or reside. It is the Government’s position that a person who enters a State under that State’s immigration laws cannot regard the State as his or her own country when he or she has not acquired nationality in that country.

This Bill does not seek to enhance cancellation and refusal powers, but to ensure that legislative provisions which apply to the other personal powers of the Minister within the character provisions apply equally to section 501BA. Further, the non-citizen’s ties to the Australian community, including their length of residence, are taken into account by delegates when considering whether to exercise the discretion to revoke the cancellation of the visa. The proposed amendments are therefore compatible with human rights because insofar as they engage Australia’s human rights obligations, the Government’s view is that they present a reasonable limitation of the right to freedom of movement, and that the safety of the Australian community, particularly in the current security environment, is considered to be both a pressing and substantial concern and a legitimate objective of this proposal.

Right to Privacy and Reputation

The right to privacy and freedom from attacks on reputation are protected in Article 17 of the ICCPR.

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.

The legislative amendments to subsections 5C(1) and 5C(2) proposed by this Bill align the definition of ‘character concern’ with the content of the ‘character test’ in subsection 501(6). These amendments will facilitate the lawful disclosure of non-citizens’ identifying information where non-citizens are of character concern, under subparagraph 336E(2)(a)(iii) of the Migration Act. That provision relevantly permits the disclosure of identifying information where the disclosure would be for the purpose of data-matching in order to identify non-citizens who have a criminal history or who are of character concern.

The amendments do not expand the types of identifying information that can be collected from non-citizens, or the circumstances in which it may lawfully be disclosed, but ensure that the definition of ‘character concern’ encompasses all elements of the current character test. As such, the Bill’s
amendment to the meaning of ‘character concern’ at section 5C of the Migration Act does not alter the current requirements relating to the disclosure of identifying information, thus maintaining adequate legal privacy protections for non-citizens.

The robust framework in Part 4A of the Migration Act, which creates a series of rules and offences that govern the access, disclosure, modification and destruction of identifying information (including personal identifiers) are not amended by the Bill. Under section 336E of the Migration Act, a person commits an offence if their conduct causes the disclosure of identifying information and the disclosure is not a permitted disclosure. The permitted disclosures are set out in subsection 336E(2).

The legislative amendments in this Bill at section 503A will limit disclosure by the Department, the Federal Court and the Federal Circuit Court, of confidential information which is protected by section 503A of the Migration Act. These amendments strengthen protection for criminal intelligence and related information that is critical to decision making under sections 501BA and 501CA of the Migration Act but do not expand the types of information for which disclosure is limited by section 503A of the Migration Act.

While Article 17 of the ICCPR does not set out the reasons for which the guarantees in it may be limited, the limitations contained in other articles suggest that the right may be lawfully restricted by legitimate objectives in appropriate circumstances. For example, those which are necessary in a democratic society in the interests of national security, public order, the protection of public health or the protection of the rights and freedoms of others.

The Government’s position is that the amendments in this Bill are reasonable and justified by national security and public safety considerations and thus do not constitute arbitrary or unlawful interferences with the matters protected by Article 17.

Conclusion

These amendments are for a legitimate purpose and are compatible with human rights. These amendments are designed to strengthen the existing character 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. To the extent that these amendments may limit human rights, the Government considers those limitations as reasonable, proportionate and necessary.

The Hon. Peter Dutton MP, Minister for Immigration and Border Protection