Migration (Validation of Port Appointment) Bill 2018
Questions on notice

1. Can the Department provide to the Committee a copy of the proposed Government amendments

A copy of the proposed Government amendments accompanies this response. The Department respectfully requests that the Committee not make the amendments publicly available as they have not been tabled in Parliament or circulated.

2. Can the Department respond to the issues of unintended consequences raised in Mr Guo's submission, namely:

- **whether, in passing the Bill, Australian citizens would be liable to be placed in immigration detention or visa holders would have their visas cancelled; if they entered Australia via the Territory of Ashmore and Cartier Islands as a 'proclaimed port' during the period 23 January 2002 to 1 June 2013, and were not immigration cleared in the Territory**

The Department is not aware of any instance where a question has arisen as to whether an Australian citizen who entered the waters of the Territory of Ashmore and Cartier Islands on returning to Australia, 'bypassed' immigration clearance. The Department's position is that an Australian citizen who entered the waters of the Territory of Ashmore and Cartier Islands - for example to take shelter from bad weather - would, if they were returning to Australia from overseas, go through the immigration clearance process when they sailed on to another port, for example Darwin. Section 167 of the *Migration Act 1958* (Migration Act) expressly contemplates a person who enters Australia at a port being able to comply with immigration clearance requirements at an "on-port". There would be no question of an Australian citizen who complies with immigration clearance requirements at an "on-port" being taken into immigration detention merely because they had entered the waters of the Territory of Ashmore and Cartier Islands at an earlier point. In any event, section 189 of the Migration Act, which confers powers in relation to immigration detention, applies only to unlawful non-citizens. It cannot apply to Australian citizens.

If a non-citizen who holds a visa to travel to and enter Australia enters Australia by entering the waters of the Territory of Ashmore and Cartier Islands, it is not correct to say that "the person's legitimate visa will be cancelled by operation of law", regardless of the circumstances. Section 174 of the Migration Act provides that if the holder of a visa is required to comply with section 166 of the Migration Act and does not comply, the visa ceases to be in effect. However, as noted above, a person can comply with the immigration clearance requirements of section 166 of the Migration Act at an "on-port", which is the most likely scenario in the present context. A person can also be taken to have complied with section 166 of the Migration Act if, with the permission of a clearance officer, they comply with the relevant requirements on a vessel before it enters Australia, although this may be unlikely to have occurred in the present context.

- **Whether traditional Indonesian fishermen accessing the Territory of Ashmore and Cartier Islands for their traditional activities would affect Australia's relations with Indonesia or result in a breach of the *Fisheries Management Act 1991***

It is relevant to note that Indonesian traditional fishermen visiting the Territory of Ashmore and Cartier Islands are taken to have been granted special purpose visas, by virtue of having a prescribed status for the purposes of section 33(2)(a) of the Migration Act: see reg. 2.40(1)(t) of the *Migration Regulations 1994* (Migration Regulations). Further, such fisherman comprise one of the prescribed classes of persons who are not required to comply with section 166 of the Migration Act: see item 9 of Part 2, Schedule 9 to the Migration Regulations.

Recognition is given to traditional fishing by the 1974 Memorandum of Understanding (MOU) between Australia and Indonesia which is referred to in Mr Guo's submission. Under the MOU, traditional fishers are permitted to fish within a defined area which includes the area adjacent to the Territory of Ashmore and Cartier Islands. The Appointment of the proclaimed port in the Territory of Ashmore and Cartier Islands under the Migration Act has no impact on the operation of the MOU or on the ability of Indonesian traditional fishermen to conduct their traditional activities in accordance with the MOU. It follows that, contrary to the suggestion in the submission, validation of the Appointment by enactment of the Bill will have no impact on Australia's relations with Indonesia.

We have also consulted the Australian Fisheries Management Authority (AFMA) and the Department of Agriculture and Water Resources (DAWR) in relation to this aspect of Mr Guo's submission. DAWR advises that section 102 of the *Fisheries Management Act 1991* (the FM Act) imposes an offence on the master of a foreign fishing boat who brings the boat into a port in Australia or an external Territory in certain circumstances. To the extent that Ashmore lagoon is a 'port' under section 102(1) of the FM Act, AFMA would exercise its discretion not to prosecute for that offence, if an Indonesian national is fishing as permitted under the MOU. This approach has been applied consistently by AFMA for many years.

3. Can the Department respond to the questions recommended by the AHRC in their submission:

- **the number of non-citizens who entered the relevant waters of the Territory of Ashmore and Cartier Islands between 23 January 2002 and 31 May 2013 without a valid visa**
- **the number of non-citizens who entered the relevant waters of the Territory of Ashmore and Cartier Islands between 13 August 2012 and 31 May 2013 without a valid visa**

The Department does not have the resources or time to provide exact figures by the Committee's deadline. Information on the movement of persons into and out of the Territory of Ashmore and Cartier Islands has never formed part of the Department's

movement records database. This database records only the movement of persons through Australia's international air and sea ports. There is no single Departmental database or system that records the information requested in relation to the movement of persons in the Territory of Ashmore and Cartier Islands. To provide this number, the Department would be required to undertake a detailed and extensive investigation into the individual circumstances of each person, on a case-by-case basis. Relevant factors that would need to be considered in each investigation include (without limitation) which SIEV a person arrived on, which Navy or Customs vessel they were transferred to, where the person entered Australia and whether they entered Australia via an excised offshore place, and what date they entered Australia.

It is likely that most, if not all, of the people who entered the relevant waters before 13 August 2012 have already had their protection obligations and asylum applications processed. Those found to be owed protection would likely be in the Australian community on permanent protection visas, or are now Australian citizens.

We do not have an exact figure of the number of non-citizens who entered the relevant waters of the Territory of Ashmore and Cartier Islands between 13 August 2012 and 31 May 2013 without a valid visa. Our records indicate that since 13 August 2012, approximately 2265 persons arrived on boats that were believed to have carried at least some persons who entered the relevant waters. However, not all of the persons on those boats entered the relevant waters. A small number of people were taken directly to Darwin (mainly for medical reasons) and so were never treated as UMAs. In addition, not all persons who entered the relevant waters are affected by the Bill. Some of these persons were taken on to Christmas Island and so would have obtained UMA status on arrival there. The Department estimates that around 1600 – 1800 persons entered the relevant waters and are affected by the Bill.

- **in particular, how many of the people in each of the groups described in (a) and (b), if any:**

  (i) are in Australia and have not yet made an application for a protection visa

  (ii) have made an application for a protection visa that is yet to be finally determined

  (iii) have been granted a protection visa

  (iv) have had their application for a protection visa refused and finally determined but are still in Australia

  (v) have been taken to a regional processing country

  (vi) have been taken to a regional processing country and are still in that country

Without undertaking a detailed assessment for each case, which would take considerable time and resources, it is not possible to provide the figures sought. However according to the data we have about the fast track cohort more broadly, we have been able to ascertain the following estimated numbers about the whole fast track cohort which may be helpful to the Committee as indicative for the group of people affected by the Appointment:

- 0.3% of persons who are capable of becoming fast track applicants have not made an application for a protection visa.
- 41% of fast track applicants have their visa application on hand with the Department;
- 40% of fast track applicants have had visas granted;
- 18% of fast track applicants have had their visa application refused by the Department (but not necessarily finally determined);
    - 13% of fast track applicants have had their visa application refused and finally determined but remain onshore;
- Departmental records indicate that 49 persons who may be affected by the Bill were taken to a regional processing country; and
- Of the 49 persons who may be affected by the Bill, Departmental records indicate that none of them are currently in a regional processing country.

- **How the persons in each of the categories above would have been treated if the 2002 appointment had not been made, and the extent of any detriment such persons may suffer if the 2002 appointment is retrospectively validated.**

The Appointment was designed to ensure that illegal maritime arrivals who entered certain waters in the Territory of Ashmore and Cartier Islands would thereby become 'offshore entry persons', now 'unauthorised maritime arrivals' under the Migration Act. It is this status which determined the way in which these people were processed under the Migration Act.

Even without this status, however, someone who arrives in Australia without a valid visa is still an unlawful non-citizen and therefore subject to the detention provisions in the Migration Act.

All of the affected persons have had the opportunity to seek protection and have their claims for protection assessed. The Department is and always has been committed to efficiently assessing each protection claim, on its individual merits, on a case-by-case basis, with reference to up-to-date information on conditions in the asylum-seeker's home country. Principles of procedural fairness apply at all stages of visa decision making. Affected persons who have been refused a visa have also had the opportunity for merits review (as permitted by the Migration Act) and to seek judicial review in the courts.

Australia is committed to meeting its non-refoulement obligations and does not remove individuals to situations where they face a real risk of torture, cruel, inhuman and degrading treatment or punishment, arbitrary deprivation of life or the death

penalty. Mechanisms which provide the Government with the ability to address non-refoulement obligations include:

- consideration of whether the applicant meets the definition of a refugee or the complementary protection criteria under the Migration Act as part of the Protection Visa process,
- consideration of the use of the Minister's personal powers under the Migration Act to intervene in a case when the Minister thinks it is in the public interest to do so; and
- consideration of whether Australia's non-refoulement obligations are engaged, as part of the pre-removal clearance for persons on an involuntary removal pathway.

In relation to the affected persons, given that the Migration Act was amended on multiple occasions between 2002 and 2013, the way in which these persons would have been processed had the Appointment not been made (i.e. as unlawful non-citizens who arrived as unauthorised arrivals as opposed to unauthorised maritime arrivals) would depend on a number of circumstances including:

    - when the person entered Australia;
    - the relevant migration law at the time of entry to Australia; and
    - the relevant migration law at the time the person's visa application was assessed and decided.

The main procedural differences between how unauthorised maritime arrivals were processed under the Migration Act compared to unlawful non-citizens who arrived as unauthorised arrivals, between 2002 and now are as follows:

- Between 2002 and approximately 2007:
    - unauthorised maritime arrivals were subject to the visa application bar in section 46A of the Migration Act when they arrived in Australia which meant they were not eligible to apply for any visa. This bar could be lifted if the Minister considered it in the public interest to do so. A non-statutory assessment of whether *non-refoulement* obligations were owed was conducted to inform recommendations to the Minister. If the bar was lifted, it meant that an unauthorised maritime arrival could apply for a temporary protection visa. If a temporary protection visa was granted, it was valid for 3 years after which the visa holder was generally able to apply for a permanent protection visa.
    - In comparison, unauthorised arrivals had the option of applying for a permanent protection visa, without ministerial intervention and without having to apply for a temporary protection visa first.
    - Whilst there was a significant difference in the process that applied to the two groups the ultimate visa outcome, subject to eligibility requirements, remained the same – a permanent protection visa.

- In 2008 temporary protection visas were removed. Between approximately 2008 and 2014:

    - unauthorised maritime arrivals were still subject to the visa application bar in section 46A of the Migration Act. Again, this bar could be lifted if the Minister considered it in the public interest to do so. A non-statutory assessment of whether *non-refoulement* obligations were owed was conducted to inform recommendations to the Minister. If the bar was lifted, it meant that an unauthorised maritime arrival could apply for a permanent protection visa.
    - In comparison, unlawful non-citizens who arrived as unauthorised arrivals would have been able to apply for permanent protection visas without ministerial intervention.
    - Again, whilst there was a difference in the process that applied to the two groups the ultimate visa outcome, subject to eligibility requirements, remained the same – a permanent protection visa.

- In 2014 temporary protection visas were reinstated.
    - All applications for permanent protection visas were converted to applications for temporary protection visas for all unauthorised arrivals no matter their method of arrival:
    - Unauthorised maritime arrivals are still subject to the visa application bar in section 46A of the Migration Act. If the Minister considers it to be in the public interest, he or she can lift the bar and allow an unauthorised maritime arrival to apply for a temporary protection visa or a safe haven enterprise visa. All potentially affected persons in the IMA legacy caseload had the bar lifted to allow them to apply.
    - Unlawful non-citizens who arrived as unauthorised arrivals are also only able to apply for a temporary protection visa or a safe haven enterprise visa.
    - Again, the visa outcome, subject to eligibility requirements, remains the same – a temporary protection visa or a safe haven enterprise visa.

Affected persons who arrived on or after 13 August 2012 have also been treated as Fast Track applicants under the Migration Act. This essentially means that whilst they have had the same fulsome assessment of their protection claims under the Migration Act they were subject to slightly tighter procedural fairness timeframes. It also means that instead of having to make an application for merits review to the Administrative Appeals Tribunal, persons refused a visa by the Department were automatically referred by the Department to the Immigration Assessment Authority (IAA) for merits review (unless the person was found to be an excluded fast track review applicant). The High Court has recently confirmed the robustness of the merits review process of the IAA. In *Plaintiff M174 v Minister for Immigration and Border Protection*, the High Court held that "when conducting a review of a fast track reviewable decision, [the IAA] is not concerned with correction of error on the part of the Minister or delegate but is engaged in a de novo consideration of the merits of the decision that has been referred to it". The IAA considers the application for a protection visa afresh and must 'determine for itself whether or not it is satisfied that the criteria for the grant of the visa have been met'. The judicial review rights remain the same under the Migration Act.

The impact of retrospectively validating the Appointment, in relation to the affected persons, would be that they would not be able to obtain a court declaration that they are not an unauthorised maritime arrival; if they have been to the IAA they would not be able to obtain a court declaration quashing the IAA's decision for lack of jurisdiction; and they would not be able to seek review by the AAT of a refusal decision (rather, their application will be reviewed by the IAA unless the person is an excluded fast track review applicant).

4. The number of boats, and their boat identification numbers, which went into the affected waters in the Territory of Ashmore and Cartier Islands between 2002 and 2013

The Department's records indicate there were 202 suspected illegal entry vessels (SIEVs) intercepted in the vicinity of the Territory of Ashmore and Cartier Islands during the period requested by the Committee. However, we note four of these SIEVs (734, 736, 775 and 785) were intercepted in the vicinity of the Territory of Ashmore and Cartier Islands after 1 June 2013, when unauthorised maritime arrival status was extended to persons who entered Australia by sea without a visa at any place in Australia.

Although we can identify the SIEVs which were intercepted in the vicinity of the islands, the Department does not have the resources or time to provide the exact number of boats that entered the affected waters during the specified period, within the Committee's deadline.

The SIEV numbers of the 202 identified as intercepted in the vicinity of the Territory of Ashmore and Cartier Islands are attached at Attachment A to this response document. Departmental records indicate that two of the SIEVs do not carry SIEV numbers and therefore are not in the Attachment.

Not all passengers on these SIEVs are affected by the Bill. For example, up until early 2011 the then Government's practice was to take passengers from boats intercepted near the Territory of Ashmore and Cartier Islands to Christmas Island, whereby they would have become offshore entry persons (now, UMAs) by virtue of their arrival there.

5. Any other impacts if the Bill is not passed and the Territory of Ashmore and Cartier Islands is not a proclaimed port under the Migration Act going forward

The Appointment was an important element of the border protection arrangements designed to address unauthorised boat arrivals. It was designed to ensure that unauthorised boat arrivals who entered certain waters of the Territory of Ashmore and Cartier Islands, an 'excised offshore place' for the purposes of the Migration Act, would thereby become 'offshore entry persons', now UMAs. Their entry into Australia as UMAs, in particular between 13 August 2012 and 1 June 2013, was also relevant to determining their status as fast track applicants under the Migration Act.

As previously highlighted to the Committee, the Bill confirms the validity of the Appointment and any thing done under the Migration Act in reliance on the Appointment. In effect, it reiterates an intention of the Government that has been in place since 2002. This is not a case of a new or changed law being backdated that imposes new obligations that were not known at the time, or that changes the law as it was thought to have applied and operated at the time. Rather, the purpose of validation legislation such as this is to ensure the law had effect as it was thought to have applied at the time, and to maintain the validity of actions taken in good faith on the basis of what was thought to be the law when the action was taken.

As such, if this Bill is not passed, the affected persons may derive a migration outcome which was never intended by the policy framework which applied at the time. This, in turn, has the potential to be perceived as a softening of the Government's border protection policies.

6. Can the Department provide examples of other validating legislation

The *Migration Amendment (Validation of Decisions) Act 2017* (the MAVD Act) (a copy of which is provided with this response) is a 'standalone' validating Act administered by the Department. The MAVD Act commenced on 6 September 2017. It is similar to the Bill in its intent – that is, to validate past decisions in the event that a Court were to make a relevant declaration of invalidity. In the case of the MAVD Act, it validates decisions made under the *Migration Act*, in the event that section 503A was held to be invalid by a Court. The Explanatory Memorandum for the MAVD Act notes that the original MAVD bill was introduced as a result of High Court litigation (the cases of *Graham* and *Te Puia*). Similar to the Bill, the MAVD Act provides a carve-out to avoid any risk that its provisions would involve an impermissible interference with judicial power. To that end, the MAVD Act expressly provides that it does not apply to any cases where judgment is reserved as at commencement of the provisions or judgment has been delivered by a Court before these provisions commence, and the Court's judgment either set aside or declares invalid certain decisions made by the Minister under certain sections of the *Migration Act*.

The Federal Court upheld the MAVD Act in *Haapu v MIBP (No 2)* [2017] FCA 1623 [13]ff . In particular, Justice Siopis noted the following at [15] of his judgment:

> *[15] The status of Mr Haapu's review application does not fall within the circumstances identified in s 503E(2) of the amended Migration Act. The consequence is that the arguments which prevailed before the High Court in Graham and Te Puia are not now available to Mr Haapu.* ***The further consequence is that, insofar as there may have at one time been merit in Mr Haapu's review application, as a consequence of this statutory intervention*** [that is, the MAVD Act]***, that is no longer the case. This is another reason for dismissing Mr Haapu's application.*** [Emphasis added]

Attachment A

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Migration Amendment (Validation of Decisions) Act 2017

No. 95, 2017

An Act to amend the *Migration Act 1958*, and for related purposes

Note: An electronic version of this Act is available on the Federal Register of Legislation (https://www.legislation.gov.au/)

Contents

Migration Amendment (Validation of Decisions) Act 2017

No. 95, 2017

An Act to amend the *Migration Act 1958*, and for related purposes

[*Assented to 5 September 2017*]

The Parliament of Australia enacts:

1 Short title

This Act is the *Migration Amendment (Validation of Decisions) Act 2017*.

2 Commencement

(1) 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.

Commencement information

Column 1	Column 2	Column 3
Provisions	**Commencement**	**Date/Details**
1. The whole of this Act	The day after this Act receives the Royal Assent.	6 September 2017

Note: 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.

(2) 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.

3 Schedules

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—Validation of decisions

Migration Act 1958

1 Before section 504

Insert:

503E Validation of decisions

(1) If:

(a) section 503A is not a valid law of the Commonwealth (in whole or in part); and

(b) the Minister made a decision under section 501, 501A, 501B, 501BA, 501C or 501CA before the commencement of this section;

the decision is not invalid, and is taken never to have been invalid, merely because:

(c) the Minister:

(i) relied on; or

(ii) had regard to; or

(iii) failed to disclose in accordance with any applicable common law or statutory obligation;

information that was covered, or purportedly covered, by subsection 503A(1) or (2); or

(d) the Minister made the decision on the basis of an erroneous understanding of:

(i) section 503A; or

(ii) the protection that section 503A would provide against an obligation to disclose information.

(2) However, subsection (1) does not affect rights or liabilities arising between parties to proceedings in which:

(a) judgment is reserved by a court as at the commencement of this section; or

(b) judgment has been delivered by a court before the commencement of this section;

and the judgment sets aside, or declares invalid, a decision made by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA.

[*Minister's second reading speech made in—*
House of Representatives on 21 June 2017
Senate on 16 August 2017]

(148/17)

2016-2017

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT (VALIDATION OF DECISIONS) BILL 2017

EXPLANATORY MEMORANDUM

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

MIGRATION AMENDMENT (VALIDATION OF DECISIONS) BILL 2017

OUTLINE

The Migration Amendment (Validation of Decisions) Bill 2017 (the Bill) amends the M*igration Act 1958* (Migration Act) to preserve existing section 501 character decisions made relying on information provided by gazetted law enforcement and intelligence agencies, which is protected, or purportedly protected, from disclosure under section 503A.

FINANCIAL IMPACT STATEMENT

These amendments will have a low financial impact.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

MIGRATION AMENDMENT (VALIDATION OF DECISIONS) BILL 2017

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short Title

1. The short title by which this Act may be cited is the *Migration Amendment (Validation of Decisions) Act 2017*.

Clause 2 Commencement

2. Subclause 2(1) sets out when the provisions of the Act commence.

3. The whole of the Act will commence on the day after the Act receives the Royal Assent.

4. 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

5. 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

Background

6. This amendment is in response to current proceedings in the High Court of Australia, *Graham and Te Puia*, in which the validity of section 503A of the Act is being challenged.

Migration Act 1958

Item 1 Section 503E Validation of decisions

7. This item inserts new section 503E before existing section 504.

8. New subsection 503E(1) provides that if section 503A is not a valid law of the Commonwealth (in whole or in part), new subsection 503E(1) will prevent decisions made by the Minister under section 503A from being invalid merely because the decision relied on, or had regard to confidential information protected, or purportedly protected, by existing subsection 503A(1) or (2). This includes decisions made by a delegate of the Minister.

9. New subsection 503E(1) applies to decisions made by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA before this item commences.

10. Such a decision made by the Minister is not invalid, and is taken never to have been invalid merely because the Minister:

- relied on; or
- had regard to; or
- failed to disclose in accordance with any applicable common law or statutory obligation;

information that was protected, or purportedly protected, by subsection 503A(1) or (2) of the Act.

11. Further, such a decision is not invalid, and is taken never to have been invalid merely because the Minister made the decision based on an erroneous understanding of section 503A or the protection that section would provide against an obligation to disclose information.

12. The effect of this amendment is to preserve the validity of past decisions to refuse a visa application or cancel a visa on character grounds, or decisions not to revoke such a refusal or cancellation, where the decision relied on section 503A protected information, in the event that section 503A itself is found not to be valid, in whole or in part.

13. New subsection 503E(2) ensures that subsection (1) does not apply to decisions that are the subject of court proceedings in which judgment is reserved by a court as at commencement of this item, or in which a judgment has been delivered by a court before commencement of this item, setting aside or declaring invalid the decision.

14. This item does not affect a person's ability to seek judicial review of a decision described in paragraph 9 on any other ground, that is, on a ground not mentioned in paragraphs 10 and 11. Nor does this item affect a person's right to seek merits review of a relevant decision to the extent that such review is provided under existing law.

Attachment A

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Migration Amendment (Validation of Decisions) Bill 2017

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

Section 503A of the *Migration Act 1958* (Cth) (the Act) provides that information supplied to the Department of Immigration and Border Protection by gazetted agencies (e.g. law enforcement or intelligence agencies) for the purposes of making a decision to refuse or cancel a visa under section 501 of the Act is protected from disclosure, including to a court.

The purpose of this Bill is to uphold the visa cancellations or visa application refusals of certain non-citizens of character concern who have committed crimes in Australia and pose a risk to the Australian community. This Bill does this by amending the Act to deem decisions that relied on information purportedly protected under section 503A to have been validly made, notwithstanding their reliance on section 503A information. These amendments will not apply to cases where people have challenged in a court a decision to refuse their visa application or to cancel their visa based on section 503A information, and judgment is reserved, or has been delivered, by a court at the time of commencement.

There are current matters before the High Court of Australia that challenge the constitutional validity of section 503A. Through these amendments the Australian Government wishes to put beyond doubt that existing decisions to refuse or cancel visas under section 501 of the Act remain valid at law, notwithstanding their reliance on confidential information protected by section 503A.

Human rights implications

The amendments have been assessed against the seven core international human rights treaties.

Where a non-citizen's visa is cancelled or refused under section 501 of the 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 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.

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. This Bill introduces a legislative amendment that preserves the grounds upon which certain non-citizen's visas were cancelled, or their applications refused, the result of which may be subsequent detention, supporting existing laws that are well-established, generally applicable and predictable.

This amendment presents a reasonable response to achieving a legitimate purpose under the ICCPR – the safety of the Australian community and integrity of the migration programme – as it seeks to uphold certain character refusal or cancellation decisions in the event of a High Court ruling on the validity of section 503A. These non-citizens pose an unacceptable risk to the Australian community if their cancellation or refusal decisions are overturned and they are required to be released from immigration detention into the community.

This Bill will not prevent the affected non-citizens from individually challenging their decisions in a court. 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.

Article 17(1) and Article 23(1) of the ICCPR and Article 16(1) of the Convention on the Rights of the Child (CRC) – prohibition of the unlawful and arbitrary interference with family and protection of the family unit

Article 17(1) of the ICCPR states that:

> *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 16(1) of the CRC replicates Article 17 of the ICCPR, however in so doing, makes the obligation specific to children.

Article 23(1) of the ICCPR provides that:

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

The United Nations Human Rights Committee has noted that Articles 17 and 23 of the ICCPR "*must be read against Australia's right, under international law, to take reasonable steps to control the entry, residence and expulsion of aliens*".

The amendments seek to maintain the validity of character refusal and cancellation visas that have relied on information purportedly protected under section 503A. As is currently the case, individuals without a valid visa will be an unlawful non-citizen, and will be liable for detention and removal from Australia. This may result in the separation of family members in some cases. Legislative amendments that contemplate cancellation of a visa and subsequent detention add to a suite of existing laws that are well-established, generally applicable and predictable. The amendment does not expand visa cancellation powers or impact the grounds upon which a person may have had their visa cancelled. Further, the amendments present a reasonable response to achieving a legitimate purpose under the Covenant – the protection of the Australian community from the risk that certain visa holders present.

The amendments cannot be said to give rise to the unlawful or arbitrary interference with family and as such are consistent with Articles 17(1) and 23(1) of the ICCPR or Article 16(1) of the CRC.

Non-refoulement obligations

The amendments potentially engage Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT) and Articles 6, and 7 of the International Covenant on Civil and Political Rights (ICCPR) because one eventual consequences of confirming the validity of decisions to refuse or cancel a visa may be removal from Australia.

Article 3(1) of the CAT provides that:

> 1. *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.*

Article 6 of the ICCPR states that:

> *Every human bring 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 provides that:

> *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.*

Although the amendments make clear that decisions under section 501 to refuse a visa application or cancel a visa that relied on information protected from disclosure under section 503A remain valid, the amendments do not set out that removal from Australia would be the automatic consequence of these decisions remaining valid. The amendments simply maintain the status quo for affected persons by preserving decisions that have already been made, and do not affect any existing legal rights or liabilities that are currently in place. Consideration of a person's engagement with Australia's non-refoulement obligations are undertaken before a non-citizen is considered to be available for removal from Australia. Any removal from Australia is conducted in accordance with

Australia's non-refoulement obligations. As such, the amendments are consistent with Article 3 of the CAT and Articles 6 and 7 of the ICCPR.

Conclusion

These amendments are for a legitimate purpose and are compatible with human rights. The Bill maintains the status quo for affected persons who have already been assessed as non-citizens of character concern in accordance with section 501 of the Act. To the extent that these amendments may limit human rights, the Government considers those limitations as reasonable, proportionate and necessary.

The Hon Peter Dutton, Minister for Immigration and Border Protection