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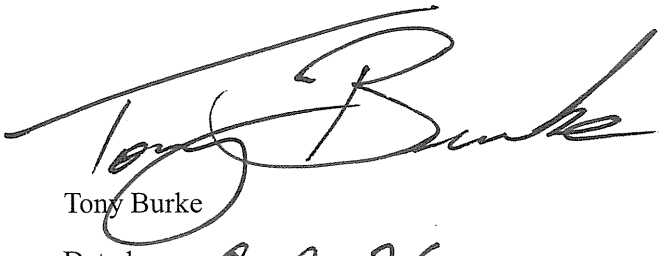
DIRECTION NO. 123

MIGRATION ACT 1958

DIRECTION UNDER SECTION 499

Visa refusal and cancellation under section 501
and
revocation of a mandatory cancellation of a visa under section 501CA

I, Tony Burke, Minister for Home Affairs and Minister for Immigration and Citizenship, give this Direction under section 499 of the *Migration Act 1958*



Tony Burke

Dated 18.9.26

Minister for Home Affairs, Minister for Immigration and Citizenship

Part 1. Preliminary

1. Name of Direction

This Direction is 'Direction no. 123 — Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA'.

It may be cited as Direction no. 123.

2. Commencement

This Direction commences on 31 October 2026.

3. Revocation

Direction no. 110, given under section 499 of the *Migration Act 1958* (the Act) and commenced on 21 June 2024, is revoked with effect from the date this Direction commences.

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4. Interpretation

Note 1: A number of expressions used in this Direction are defined in section 5 of the Act, including ***immigration detention, minor, non-citizen, remove, substantive visa, visa applicant, visa holder***.

Note 2: The following expressions have the same meaning as in the Act: ***character test, visa***.

(1) In this Direction:

decision-maker means a delegate of the Minister, or a body (such as the Administrative Review Tribunal), making a decision under section 501 or 501CA of the Act.

domestic and family violence refers to conduct by one person towards another person with whom they are, or were, in a family or domestic relationship, that is directly or indirectly:

- threatening, coercive, controlling or dominating; or
- physically, sexually, emotionally, psychologically or economically abusive

and includes exposing a child or relative to such conduct.

Without limiting the definition of domestic or family violence, such conduct includes:

a) assault, including sexual assault; or

b) physical violence; or

c) conduct causing death, injury or harm to any person, child, relative, associate, animal or property regardless of the non-citizen's stated intention for engaging in the conduct; or

d) creating fear or apprehension, including for the safety or wellbeing of any person, child, relative, associate, animal or property regardless of the non-citizen's stated intention for engaging in the conduct; or

e) coercive conduct or a pattern of coercive conduct, aimed at intimidating a person, establishing or maintaining control of a person or depriving them of their autonomy or an asset or income whether in whole or part; or

f) bullying, harassment, offensive, derogatory, tormenting or taunting conduct or abuse including verbally or by use of mobile, electronic and digital technologies; or

g) image based abuse, including non-consensual publication of private and/or identifying information, the non-consensual creation or possession of a genuine or altered intimate image, or the non-consensual publication or communication of a genuine or altered intimate image; or

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h) stalking, or engaging in surveillance, monitoring or any other conduct intended to track a person's movements, activities or interpersonal associations without that person's consent, including through mobile, electronic or digital technologies and devices; or

i) neglect, maltreatment, exploitation, failing to provide, withholding or preventing access to needs including food, care, medication or medical attention; or

j) breaching Court orders relating to domestic or family violence; or

k) attempting to commit, procuring someone else to commit, or threatening to commit domestic or family violence conduct; or

l) exposing a child, relative or associate to domestic or family violence, which includes that child, relative or associate seeing, hearing or otherwise experiencing the effects of domestic or family violence.

forced marriage is taken to have occurred where a party to the marriage (the victim):

a) entered into the marriage without freely and fully consenting:

   i. because of the use of coercion, threat or deception against the victim or another person; or

   ii. because the victim was incapable of understanding the nature and effect of the marriage ceremony; or

b) was under 16 when the marriage was entered into.

In either (a) or (b), even if the marriage is recognised under the *Marriage Act 1961*

family or domestic relationship for the purposes of the definition of domestic and family violence, includes but is not limited to:

- a spouse, de facto partner or a person who has, or has had, an intimate personal relationship with the relevant person (regardless of duration); or
- persons who are related to each other, including parents, children, siblings, grandparents, aunts, uncles whether related directly, by marriage (stepfamily and in-laws), by recognised cultural family group, or by legal adoption; or
- a relationship between persons who share domestic life whether or not they live in the same residence; or
- a caregiving relationship, including both formal and informal relationships, characterised by the provision of personal care, support and assistance.

(2) In this Direction, ***serious conduct*** includes behaviour or conduct of concern that does not constitute any criminal offence.

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Examples: public acts (including dissemination or endorsement) that involve ideas based on superiority over or hatred of other persons on the basis of race, colour, national or ethnic origin; intimidatory behaviour or behaviour that represents a danger to the Australian community; involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law; advocacy of conduct that might have the effect of leading a person to engage in conduct constituting a hate crime; being a member of, or having an association with, a group, organisation or persons that has been or is involved in criminal conduct

(3) In this Direction, ***serious character concerns*** include behaviour or conduct of concern that does not constitute a criminal offence. Examples include the kinds of conduct listed at paragraph 8.3(2)(a)-(g).

5. Preamble

5.1. Objectives

(1) The objective of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. Relevantly, a non-citizen who does not pass the character test (see Annex A for explanation) is liable for refusal of a visa or cancellation of their visa.

(2) Specifically, under subsection 501(1) of the Act, non-citizens may be refused a visa if they do not satisfy the decision-maker that they pass the character test. Under subsection 501(2), non-citizens may have their visa cancelled if the decision-maker reasonably suspects that they do not pass the character test, and the non-citizens do not satisfy the decision-maker that they do pass the character test. Where the discretion to refuse to grant or to cancel a visa is enlivened, the decision-maker must consider the specific circumstances of the case in deciding whether to exercise that discretion.

(3) Under subsection 501(3A) of the Act, the decision-maker must cancel a visa that has been granted to a person if the decision-maker is satisfied that the person does not pass the character test because of the operation of paragraph (6)(a) (on the basis of paragraph (7)(a), (b) or (c) or paragraph (6)(e))) and the non-citizen 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. A non-citizen who has had their visa cancelled under section 501(3A) may request revocation of that decision under section 501CA of the Act. Where the decision-maker considering the request is not satisfied that the non-citizen passes the character test, the decision-maker must consider whether there is another reason to revoke the cancellation given the specific circumstances of the case.

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(4) The purpose of this Direction is to guide decision-makers in performing functions or exercising powers under section 501 and 501CA of the Act. Under section 499(2A) of the Act, such decision-makers must comply with a direction made under section 499.

5.2. Principles

The principles below provide the framework within which decision-makers should approach their task of deciding whether to refuse or cancel a non-citizen's visa under section 501, or whether to revoke a mandatory cancellation under section 501CA. The factors (to the extent relevant in the particular case) that must be considered in making a decision under section 501 or section 501CA of the Act are identified in Part 2.

(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.

(2) The safety of the Australian Community is the highest priority of the Australian Government.

(3) Non-citizens who engage, have engaged in, advocated for, or encouraged criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.

(4) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community. The Australian community recognises the simple presence of such non-citizens causes harm to the social fabric of our nation.

(5) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time.

(6) With respect to decisions to refuse, cancel, and revoke cancellation of a visa, Australia may afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age.

(7) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or

the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation.

(8) The inherent nature of certain conduct such as domestic or family violence or conduct affecting minor children is so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or not revoking a mandatory cancellation, even if the information available at the time of consideration suggests that the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.

(9) The Australian community expects non-citizens to abide by the rules and standards established by the migration framework, including departing Australia when the privilege of remaining here has ceased or been forfeited. The Australian community recognises the significant majority of non-citizens who do abide by those rules.

Part 2. Making a decision

6. Making a decision

Informed by the principles in paragraph 5.2, a decision-maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.

7. Taking the relevant considerations into account

(1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.

(2) The primary consideration at 8.1 below (protection of the Australian community) is generally to be given greater weight than other primary considerations. Otherwise, primary considerations should generally be given greater weight than the other considerations.

(3) One or more primary considerations may outweigh other primary considerations.

8. Primary considerations

In making a decision under section 501(1), 501(2) or 501CA(4), the following are primary considerations:

(1) protection of the Australian community from criminal or other serious conduct;

(2) whether the conduct engaged in constituted domestic or family violence;

(3) expectations of the Australian community;

(4) the best interests of minor children in Australia, including the interests of child victims

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8.1. Protection of the Australian community

(1) When considering protection of the Australian community, decision-makers should keep in mind that the safety of the Australian community is the highest priority of the Australian Government. To that end, the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. In this respect, decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, have been, and will continue to be law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community;

(2) Decision-makers should also give consideration to:

a) the nature and seriousness of the non-citizen's conduct to date; and

b) the risk to the Australian community, should the non-citizen commit further offences or engage in other serious conduct, in the event they were granted the visa, the visa is not cancelled, or the mandatory cancellation revoked, as the case may be.

8.1.1. The nature and seriousness of the conduct

(1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to the following:

a) without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:

i. violent and/or sexual crimes;

ii. crimes against women or children, particularly but not limited to crimes of a violent and/or sexual nature, regardless of the sentence imposed;

iii. acts of domestic or family violence, regardless of whether there is a conviction for an offence or a sentence imposed, particularly acts of domestic or family violence against children or exposing children as witnesses;

b) without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:

i. causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;

ii. crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties;

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iii. any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c));

iv. where the non-citizen is in Australia, a crime committed or other serious conduct engaged in while the non-citizen was in immigration detention, during an escape from immigration detention, or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again, or an offence against section 197A of the Act, which prohibits escape from immigration detention;

v. engaging in conduct constituting a hate crime, or advocacy or conduct that might have the effect of leading another person to engage in conduct constituting a hate crime;

vi. any crime that involves a drug offence or damage to property where the non-citizen was sentenced to a term of imprisonment of not less than five years.

c) the sentence imposed by the courts for a crime or crimes;

d) the impact of the offending on any victims of offending or other conduct and their family, where information in this regard is available and the non-citizen whose visa is being considered for refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness;

e) the frequency of the non-citizen's offending and/or whether there is any trend of increasing seriousness;

f) the cumulative effect of repeated offending;

g) whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending;

h) whether the non-citizen has offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour);

i) where the offence or conduct was committed in another country, whether that offence or conduct is classified as an offence in Australia.

8.1.2. The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

(1) In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the

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harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

(2) In assessing the risk that may be posed by the non-citizen to the Australian community if the visa were not refused, not cancelled, or the mandatory cancellation were revoked, as the case may be, decision-makers must have regard to, cumulatively:

a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and

b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:

i. information and evidence on the risk of the non-citizen re-offending; and

ii. evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).

(3) Where a non-citizen will remain in Australia on a temporary visa if the visa were refused, or cancelled, or the mandatory cancellation were not revoked, as the case may be, decision-makers should proceed on the basis that the Government's view is that the risk to the Australian community is better protected by:

a) ensuring that the non-citizen, as the holder of a temporary visa, is available for removal from Australia if it becomes reasonably practicable (including to a country that is a party to a third country reception arrangement), even if their removal is not reasonably practicable at the time of the decision or in the foreseeable future; and

b) the possibility that any temporary visa held by the non-citizen would be subject to conditions directed to the risk that the non-citizen poses or could in the future be made subject to such conditions.

(4) Beyond the guidance above, decision-makers are not required to assess the risk of harm to the Australian community in any particular way or to ascribe any particular characterisation to the quality of the risk.

8.2. Domestic or family violence committed by the non-citizen

(1) The Government has serious concerns about conferring on non-citizens who engage in domestic or family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness of the domestic or family violence engaged in by the non-citizen (see paragraph (3) below).

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(2) This consideration is relevant in circumstances where:

a) a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve domestic or family violence; and/or

b) there is information or evidence from independent and authoritative sources (including but not limited to domestic or family violence or protection orders, and police records of attendance at domestic or family violence events regardless of whether charges were brought in respect of that event) indicating that the non-citizen is, or has been, or may have been, involved in the perpetration of domestic or family violence, and the non-citizen being considered under section 501 or section 501CA has been afforded procedural fairness.

(3) In considering the seriousness of the domestic or family violence engaged in by the non-citizen, the following factors must be considered where relevant:

a) the frequency of the non-citizen's conduct and/or whether there is any trend of increasing seriousness;

b) the cumulative effect of repeated acts of domestic or family violence;

c) rehabilitation achieved at time of decision since the person's last known act of domestic or family violence, including:

i. the extent to which the person accepts responsibility for their domestic or family violence related conduct;

ii. the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);

iii. efforts to address factors which contributed to their conduct;

d) the effect or likely effect of the domestic or family violence on the victim of the conduct and on the witnesses of the conduct, particularly where the victim or witness was a minor child; and

e) whether the non-citizen has engaged in further domestic or family violence since being formally warned, since a final violence intervention order (howsoever described) was made, or since otherwise being made aware by a Court, law enforcement or other authority, about the consequences of further acts of domestic or family violence, noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non-citizen's migration status, should the non-citizen engage in further acts of domestic or family violence.

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8.3. Expectations of the Australian Community

(1) The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia, recognising the harm this does to the social fabric of the community. The Australian community expects non-citizens to abide by the rules and standards established by the migration framework, including departing Australia when the privilege of remaining has ceased or been forfeited.

(2) In addition, visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, including but not limited to the following kind:

a) acts of domestic or family violence; or

b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage; or

c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect; or

d) commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or

e) involvement or reasonably suspected involvement in human trafficking or people smuggling, or in crimes that are of serious international concern including, but not limited to, war crimes, crimes against humanity and slavery; or

f) worker exploitation; or

g) engaging in hate speech, inciting violence/discord/racial disharmony, or advocacy that might have the effect of leading a person to engage in hate speech, inciting violence/discord/racial disharmony.

(3) The above expectations of the Australian community apply regardless of whether:

a) the non-citizen poses a measurable risk of causing physical harm to the Australian community; and/or

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b) the non-citizen will remain in Australia on a temporary visa or other visa designed to facilitate their removal from Australia as soon as it becomes reasonably practicable.

(4) This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case.

8.4. Best interests of minor children in Australia affected by the decision

(1) Decision-makers must make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA is, or is not, in the best interests of a child affected by the decision.

(2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to refuse or cancel the visa, or to not revoke the mandatory cancellation of the visa, is expected to be made.

(3) Decision-makers should consider the best interests of any child victims of the non-citizen, including the potential impact on child victims of any future offending.

(4) If there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

(5) In considering the best interests of the child, the following factors must be considered where relevant:

a) the nature and duration of the relationship between the child and the non-citizen, including whether the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);

b) the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;

c) the impact of the non-citizen's prior conduct, and any possible future conduct, and whether that conduct has had, or could have, a negative impact on the child, including their physical, emotional, psychological and economic development and/or evidence that the child has suffered or experienced any trauma arising from the non-citizen's conduct;

d) the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;

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e) whether there are other persons who already fulfil a parental role in relation to the child;

f) any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);

g) evidence that the child has been the subject of any form of abusive or neglectful conduct by the non-citizen, be it physical, sexual, emotional, psychological or economic;

h) any risk of the child becoming the subject of any form of abusive or neglectful conduct by the non-citizen be it physical, sexual, emotional, psychological or economic;

i) evidence that the child has been exposed to domestic or family violence;

j) any risk of the child being exposed to domestic or family violence perpetrated by the non-citizen or further serious or criminal conduct perpetrated by the non-citizen;

k) evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

9. Other considerations

(1) In making a decision under section 501(1), 501(2) or 501CA(4), the considerations below must also be taken into account, where relevant, in accordance with the following provisions. These considerations include (but are not limited to):

1) the strength, nature and duration of ties to Australia

2) legal consequences of the decision;

3) extent of impediments if removed.

9.1. The strength, nature and duration of ties to Australia

(1) Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

(2) Where consideration is being given to whether to cancel a non-citizen's visa or whether to revoke the mandatory cancellation of their visa, the decision-maker must also consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision-makers must have regard to:

a) how long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that less weight should generally be given where the non-citizen began offending or engaging in other serious conduct soon after arriving in Australia or soon after reaching 18 years of age.

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b) any positive contribution made by the non-citizen to the Australian community;

c) the strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia.

9.2. Legal consequences of decision under section 501 or 501CA

(1) Decision-makers must consider the direct and immediate statutory consequences under the Migration Act of a decision under section 501 or 501CA. Except where otherwise required by law, decision-makers are not required to consider the statutory consequences under any other Act of a decision under section 501 or 501CA.

(2) Decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under section 189, noting also that section 197C(1) of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has *non-refoulement* obligations in respect of an unlawful non-citizen.

(3) A *non-refoulement* obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has *non-refoulement* obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act, particularly the concept of 'protection obligations', reflects Australia's interpretation of *non-refoulement* obligations and the scope of the obligations that Australia is committed to implementing.

(4) International *non-refoulement* obligations will generally not be relevant where the person concerned does not raise such obligations for consideration and the circumstances do not suggest a *non-refoulement* claim.

(5) Without limiting the generality of paragraph 9.2(1), decision-makers should proceed on the basis of the information available and are not required to, and generally should not, speculate about circumstances that may result from future administrative decisions, including whether another visa would be granted or whether the non-citizen would be removed to a country other than the country by reference to which the protection finding was made.

9.2.1. Non-citizens covered by a protection finding

(1) Where a protection finding (as defined in section 197C of the Act) has been made for a non-citizen in the course of considering a protection visa application made by the non-citizen, this indicates that *non-refoulement* obligations are engaged in relation to the non-citizen.

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(2) Section 197C(3) ensures that, except in the limited circumstances specified in section 197C(3)(c), section 198 does not require or authorise the removal of an unlawful non-citizen to a country in respect of which a protection finding has been made for the non-citizen in the course of considering their application for a protection visa. This means the non-citizen cannot be removed to that country in breach of *non-refoulement* obligations, even if an adverse visa decision under section 501 or 501CA is made for the non-citizen and they become, or remain, an unlawful non-citizen as a result. Instead, the non-citizen must remain in immigration detention as required by section 189 unless and until they are granted another visa or they can be removed to a country other than the country by reference to which the protection finding was made.

(3) Decision-makers should also be mindful that where the refusal, cancellation or non-revocation decision concerns a protection visa, the person will be prevented by section 48A of the Act from making a further application for a protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them — see sections 48A and 48B of the Act). Further, as a result of a refusal or cancellation decision under section 501 or a non-revocation decision under section 501CA, the person will be prevented from applying for any other class of visa (see section 501E of the Act).

9.2.2. Non-citizens not covered by a protection finding

(1) Claims which may give rise to *non-refoulement* obligations can also be raised by a non-citizen who is **not** the subject of a protection finding, in responding to a notice of intention to consider cancellation or refusal of a visa under section 501 of the Act, or in seeking revocation of the mandatory cancellation of their visa under section 501CA. Where such claims are raised, they must be considered.

(2) However, where it is open to the non-citizen to apply for a protection visa, it is not necessary at the section 501/section 501CA stage to consider *non-refoulement* issues in the same level of detail as those types of issues are considered in a protection visa application. The process for determining protection visa applications is specifically designed for consideration of *non-refoulement* obligations as given effect by the Act and where it is open to the person to make such an application a decision-maker, in making a decision under section 501/section 501CA, is not required to determine whether *non-refoulement* obligations are engaged in respect of the person. Having considered the person's representations, the decision-maker may choose to proceed on the basis that if and when the person applies for a protection visa, any protection claims they have will be assessed, as required by section 36A of the Act, before consideration is given to any character or security concerns associated with them.

(3) *Non-refoulement* obligations that have been identified for a non-citizen with respect to a country, via an International Treaties Obligations Assessment or some other process outside the protection visa process, would not engage section 197C(3) to preclude removal of the non-citizen to that country. In these circumstances, in making a decision under section 501 or 501CA, decision-makers should carefully weigh any *non-*

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refoulement obligation against the seriousness of the non-citizen's criminal offending or other serious conduct. However, that does not mean an adverse decision under section 501 or 501CA cannot be made for the non-citizen. A refusal, cancellation or non-revocation decision will not necessarily result in removal of the non-citizen to the country in respect of which the *non-refoulement* obligation exists. For example, consideration may be given to removal to another country.

9.3. Extent of impediments if removed

(1) Decision-makers must consider the extent of any impediments that the non-citizen may face if removed from Australia, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

a) the non-citizen's age and health;

b) whether there are substantial language or cultural barriers; and

c) any social, medical and/or economic support available to them in that country.

(2) Where a non-citizen is unable to be removed from Australia to their home country:

a) decision-makers are not required to consider the extent of impediments under paragraph 9.3(1) that the non-citizen may face if removed to their home country.

b) If the non-citizen has permission to enter and remain in a third country, decision-makers must consider the extent of impediments that the non-citizen may face if removed to the third country. However, decision-makers should generally not speculate whether a non-citizen may be removed to a particular third country.

(3) Where a non-citizen has already returned to their home country, decision-makers must consider the extent of impediments under paragraph 9.3(1) that the non-citizen may face if they remain in their home country. Less weight should generally be given to the extent of impediments where the non-citizen was voluntarily removed to their home country.

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ANNEX A - Application of the character test

Section 1. Overview of the character test

Discretionary visa cancellation or refusal

(1) Under section 501 of the Act, a person may be refused a visa if the non-citizen does not satisfy the decision-maker that they pass the character test. A person may have their visa cancelled if the decision-maker reasonably suspects that the person does not pass the character test, and the person does not satisfy the decision-maker that they pass the character test.

(2) Persons who are being considered under section 501 of the Act must satisfy the decision-maker that they pass the character test set out in section 501(6) of the Act. In practice, this requires the decision-maker to determine, on the basis of all relevant information including information provided by the person, that the person does not pass the character test by reference to section 501(6) of the Act.

(3) Section 501(6) of the Act prescribes the circumstances in which a person does not pass the character test. A person need only be found to not pass one ground, in order to not pass the character test.

(4) In considering a person with unresolved criminal matters, decision-makers should note:

a) where a person already fails the character test, any other outstanding criminal matters would not generally prevent consideration of their case under section 501;

b) a person who does not already fail the character test, and is the subject of criminal charges in Australia, which have not yet been finalised before the relevant court, would not generally be considered under section 501 until the charges have been finally determined;

c) where a person is in Australia, and they are facing charges in another country, and the charges will not be resolved in absentia, the conduct that is the subject of those charges may be considered in the context of section 501(6)(c)(i) and/or (ii).

(5) If the person does not pass the character test, section 501(1) of the Act enables a visa to be refused and section 501(2) of the Act enables a visa to be cancelled.

Mandatory visa cancellation

(1) Under section 501(3A), a person's visa must be cancelled if:

a) the decision-maker is satisfied that the person does not pass the character test because of the operation of:

i. paragraph 501(6)(a) (substantial criminal record), on the basis of paragraph 501(7)(a), (b) or (c) (the person has been sentenced to death, imprisonment for life, or to a term of imprisonment of 12 months or more); or

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ii. paragraph 501(6)(e) (sexually based offences involving a child); and

b) 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.

(2) In considering whether a person is liable for mandatory cancellation, decision-makers should note:

a) that the term 'serving a sentence of imprisonment, on a full-time basis' does not include periodic detention or home or residential detention. However, a person who has been serving a sentence of imprisonment on a full-time basis and who is participating in a work release scheme, or is permitted home visits is liable for mandatory cancellation;

b) that mandatory cancellation is not enlivened unless and until a decision maker makes a finding that they are satisfied that the requirements as set out in section 501(3A)(a) and (b) are met. Once a decision maker is satisfied that these requirements are met, the decision maker must cancel the person's visa.

(3) The purpose of mandatory cancellation of the visas of certain visa holders who are in prison is to ensure that persons who pose a risk to the safety of the Australian community remain either in criminal or immigration detention until that risk has been assessed. In this context, there are some circumstances in which it may not be appropriate for a decision-maker to consider whether a person does not pass the character test (and is therefore liable for the cancellation of his or her visa). These circumstances include where a non-citizen is serving a sentence of imprisonment but will not have a visa which is in effect at the end of that sentence. This situation may arise:

a) where a person in prison has been granted a Bridging E visa (BVE) in order to maintain their lawful status while in prison. In circumstances where the BVE will cease upon the person's release from prison, it is not recommended that mandatory cancellation consideration be commenced.

b) where a person is the holder of a criminal justice visa (CJV). CJVs are granted to non-citizens whose entry and/or continued presence in Australia is required for the purposes of the administration of criminal justice. A criterion for a CJV is that a criminal justice stay certificate (CJSC) or a criminal justice stay warrant (CJSW) about the non-citizen is in force. If the CJSC or CJSW is cancelled any CJV granted because of the CJSC or CJSW is cancelled by operation of section 164 of the Act. The only other power under which CJVs may be cancelled is on character grounds under section 501 of the Act. However, in circumstances where the CJV holder is serving a sentence of imprisonment, this is unlikely to be appropriate.

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Section 2. Application of the character test

1. Substantial criminal record (section 501(6)(a))

(1) A person does not pass the character test if the person has a substantial criminal record. The term 'substantial criminal record' is defined in section 501(7) of the Act.

(2) For the purposes of the character test, a person has a substantial criminal record if:

a) the person has been sentenced to death; or

b) the person has been sentenced to imprisonment for life; or

c) the person has been sentenced to a term of imprisonment of 12 months or more (including an aggregate sentence for more than one offence – see s 5AB of the Act); or

d) the person has been sentenced to 2 or more terms of imprisonment where the total of those terms is 12 months (if a person has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms)**; or

e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or

f) the person has been found by a court to not be fit to plead, in relation to an offence; and as a result, the person has been detained in a facility or institution.

**Example: A person is sentenced to 2 terms of 3 months imprisonment for 2 offences, to be served concurrently. For the purposes of the character test, the total of those terms is 6 months.

2. Immigration detention offences (section 501(6)(aa) & (ab))

(1) A person does not pass the character test if the person has been convicted of an offence that was committed;

a) while the person was in immigration detention; or

b) during an escape by the person from immigration detention; or

c) after the person escaped from immigration detention but before the person was taken into immigration detention again.

(2) A person does not pass the character test if the person has been convicted of an offence against section 197A.

3. Membership/Association (section 501(6)(b))

(1) A person does not pass the character test if the Minister reasonably suspects:

a) that the person has been or is a member of a group or organisation, or has or has had an association with a group, organisation or person; and

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b) that the group, organisation or person has been, or is, involved in criminal conduct.

(2) A suspicion is less than a certainty or a belief, but more than a speculation or idle wondering. For a suspicion to be reasonable, it should be:

a) a suspicion that a reasonable person could hold in the particular circumstances; and

b) based on an objective consideration of relevant material.

(3) A member is a person who belongs to a group or organisation. The evidence required to establish reasonable suspicion of membership of a group or organisation will depend on the circumstances of the case. Decision-makers should note that failure of this limb of the character test does not require an assessment that the person was sympathetic with, supportive of, or involved in the criminal conduct of the group or organisation. It is sufficient under this element of the test that the decision-maker has a reasonable suspicion that:

a) the person has been, or is a member of a group or organisation; and

b) the group or organisation has been, or is, involved in criminal conduct.

(4) In establishing association, the following factors are to be considered:

a) the nature of the association;

b) the degree and frequency of association the person had or has with the individual, group or organisation; and

c) the duration of the association.

(5) Decision-makers should note that in order for a person to fail the association limb of the character test, the delegate must have a reasonable suspicion that the person was sympathetic with, supportive of, or involved in the criminal conduct of the person, group or organisation — mere knowledge of the criminality of the associate is not, in itself, sufficient to establish association. In order to not pass the character test on this ground, the association must have some negative bearing upon the person's character.

(6) In some cases the information concerning association will be protected from disclosure under the Act. In all cases, great care should be taken not to disclose information that might put the life or safety of informants or other people at risk.

4. Involvement in certain criminal activities (section 501(6)(ba))

(1) A person does not pass the character test if the Minister reasonably suspects the person has been, or is involved in, conduct constituting one or more of the following:

a) an offence of people smuggling (as described in sections 233A to 234A of the Migration Act;

b) an offence of trafficking in persons;

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c) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern.

(2) In order to fail this limb of the character test, a person is not required to have been convicted of an offence constituted by the conduct.

5. Spreading hatred and extremism (section 501(6)(baa))

(1) A person does not pass the character test if subsection 501(6A) applies to the person.

(2) Subsection 501(6A) applies to the person if the Minister reasonably suspects any of the matters below are satisfied.

Note: 'member', 'association', 'terrorist organisation', 'state sponsor of terrorism', 'prohibited hate group', and 'hate crime' are defined in s 5(1) of the Migration Act.

5.1. Membership of an organisation (section 501(6A)(a))

(1) The person is, or has been, a member of an organisation; and

(2) at any time the person was a member of the organisation, the organisation was a terrorist organisation, a state sponsor of terrorism or a prohibited hate group.

5.2. Association with an organisation (section 501(6A)(b))

(1) The person has, or has had, an association with an organisation; and

(2) at any time during the person's association, the organisation was a terrorist organisation, a state sponsor of terrorism or a prohibited hate group; and

(3) the person intends, or intended, by the association, to support terrorism, extremism or hatred or to further acts of terrorism, extremism or hatred.

For the purposes of s 501(6A), a person has an association with an organisation if the person meets or communicates with the organisation. An association may consist of a single meeting or communication.

5.3. Conduct constituting a hate crime (section 501(6A)(c))

(1) The person has been or is involved in conduct constituting a hate crime (whether or not the person, or another person, has been convicted of an offence constituted by the conduct).

5.4. Making or endorsement of statements (section 501(6A)(d))

(1) The person has made one or more public statements, or has endorsed a statement publicly, (whether in Australia or overseas, and including online statements) that involves the dissemination of ideas based on superiority over or hatred of other persons on the basis of race, colour, or national or ethnic origin; and

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(2) in the event the person were allowed to enter or to remain in Australia, there is a risk of harm to the Australian community or to a segment of that community.

Antisemitic statements are an example of statements that involve harmful ideas based on superiority over or hatred of other persons on the basis of ethnic origin.

5.5. Encouragement of statements (section 501(6A)(e))

(1) The person has encouraged one or more other persons to make a statement publicly (whether in Australia or overseas, and including an online statement) that involves the dissemination of ideas based on superiority over or hatred of other persons on the basis of race, colour, or national or ethnic origin; and

(2) in the event the person were allowed to enter or to remain in Australia, there is a risk of harm to the Australian community or to a segment of that community.

Antisemitic statements are an example of statements that involve harmful ideas based on superiority over or hatred of other persons on the basis of ethnic origin.

6. Not of good character on account of past and present criminal or general conduct (section 501(6)(c)(i) and (ii))

(1) A person does not pass the character test if the person is not of good character, having regard to their past and present criminal and/or their past and present general conduct.

(2) The concepts of criminal conduct and general conduct are not mutually exclusive. Conduct can be both general and criminal at the same time or it may be either general or criminal conduct: *Wong v Minister for Minister Immigration and Multicultural Affairs* [2002] FCAFC 440 at [33].

(3) In considering whether a person is not of good character, all the relevant circumstances of the particular case are to be taken into account to obtain a complete picture of the person's character.

a) In *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411, Lee J said at [34] 'the words "of good character" mean enduring moral qualities reflected in soundness and reliability in moral judgement in the performance of day to day activities and in dealing with fellow citizens. It is not simply a matter of repute, fame or standing in the community but of continuing performance according to moral principle. A person of ill repute by reason of past criminal conduct may nonetheless, on objective examination at a later stage in life, be shown to be a person reformed and now of good character.'

(4) In order to fail this limb of the character test, a person need not necessarily have a recent criminal conviction, or have been involved in recent general conduct which would indicate that they are not of 'good character'. However, the conduct in question must be sufficient to indicate a lack of enduring moral quality that outweighs any consideration of more recent good behaviour.

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a) In *Godley*, Lee J went on to say 'For a finding to be made under section 501(6)(c) that a person is not of good character it is necessary that the nature of the conduct said to be criminal , be examined and assessed as to its degree of moral culpability or turpitude. Furthermore, there must be examination of past and present criminal conduct sufficient to establish that a person at the time of decision is not then of good character. The point at which recent criminal conduct, (as the term 'present criminal conduct' is to be understood), becomes past criminal conduct must be a matter of judgement. If there is no recent criminal conduct that circumstances will point to the need for the Minister to give due weight to that fact before concluding that a visa applicant is not of good character'.

'Before past and present general conduct may be taken to reveal indicia that a visa applicant is not of good character continuing conduct must be demonstrated that shows a lack of enduring moral quality. Although in some circumstances isolated elements of conduct may be significant and display lack of moral worth they will be rare, and as with consideration of criminal conduct, there must be due regard given to recent good conduct.'

6.1. Past and present criminal conduct

(1) In considering whether a person is not of good character on the basis of past or present criminal conduct, the following factors are to be considered:

a) the nature and severity of the criminal conduct;
b) the frequency of the person's offending and whether there is any trend of increasing seriousness;
c) the cumulative effect of repeated offending;
d) any circumstances surrounding the criminal conduct which may explain the conduct such as may be evident from judges' comments, parole reports and similar authoritative documents; and
e) the conduct of the person since their most recent offence, including:
   i. the length of time since the person last engaged in criminal conduct;
   ii. any evidence of recidivism or continuing association with criminals;
   iii. any pattern of similar criminal conduct;
   iv. any pattern of continued or blatant disregard or contempt for the law; and
   v. any conduct which may indicate character reform.

6.2. Past and present general conduct

(1) The past and present general conduct provision allows a broader view of a person's character where convictions may not have been recorded or where the person's conduct may not have constituted a criminal offence.

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a) in considering whether the person is not of good character, the relevant circumstances of the particular case are to be taken into account, including evidence of rehabilitation and any relevant periods of good conduct.

(2) The following factors may also be considered in determining whether a person is not of good character:

a) whether the person has been involved in activities indicating contempt or disregard for the law or for human rights. This includes, but is not limited to:

i. involvement in activities such as terrorist activity, activities in relation to trafficking or possession of trafficable quantities of proscribed substances, political extremism, extortion, fraud; or

ii. a history of serious breaches of immigration law, breach of visa conditions or visa overstay in Australia or another country; or

iii. involvement in war crimes or crimes against humanity;

b) whether the person has been removed or deported from Australia or another country and the circumstances that led to the removal/deportation; or

c) whether the person has been:

i. dishonourably discharged; or

ii. discharged prematurely;

from the armed forces of another country as the result of disciplinary action in circumstances, or because of conduct that, in Australia would be regarded as serious.

(3) Where a person is in Australia and charges have been brought against that person in a jurisdiction other than an Australian jurisdiction, and those charges will not be resolved in *absentia*, the conduct that is the subject of those charges may be considered in the context of its impact on the person's overall character.

7. Risk in regards to future conduct (section 501(6)(d))

(1) A person does not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a risk that the person might engage in any of the conduct specified in section 501(6)(d) of the Act. The types of conduct specified are discussed below.

(2) The grounds are enlivened if there is evidence suggesting that there is more than a minimal or remote chance that the person, if allowed to enter or to remain in Australia, might engage in conduct specified in section 501(6)(d) of the Act.

(3) It is not sufficient to find that the person has engaged in conduct specified in paragraph 501(6)(d) of the Act in the past. There must be a risk that the person might engage in the future in the specified conduct set out in section 501(6)(d) of the Act.

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7.1. Risk of engaging in criminal conduct in Australia (section 501(6)(d)(i))

(1) A person does not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a risk that the person might engage in criminal conduct in Australia.

(2) The reference to criminal conduct must be read as requiring that there is a risk of the person engaging in conduct for which a criminal conviction could be recorded.

7.2. Risk of harassing, molesting, intimidating or stalking another person in Australia (section 501(6)(d)(ii))

(1) A person will not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a risk that the person might harass, molest, intimidate or stalk another person in Australia.

(2) 'Harassment', 'molestation' intimidation' and 'stalking' are to be given their ordinary meaning. Section 501(11) of the Act clarifies the scope of conduct amounting to harassment or molestation. Conduct and behaviours that may fall under this category include, but are not limited to, the following:

a) conduct that could be construed as harassment or intimidation (whether or not it breaches the terms of an Apprehended or Domestic Violence (or similar) Order);

b) conduct that potentially places children in danger, such as unwelcome and/or inappropriate approaches, including, but not limited to, approaches made through electronic media; or

c) conduct that would reasonably cause an individual to be severely apprehensive, fearful, alarmed or distressed regarding the person's behaviour or alleged behaviour towards the individual, any other individual, or in relation to their property or that of any other individual.

7.3. Risk of vilifying a segment of the community, of inciting discord or of representing a danger through involvement in disruptive and/or violent activities (section 501(6)(d)(iii), (iv) and (v))

(1) In deciding whether a person does not pass the character test under section 501(6)(d)(iii), (iv) or (v) of the Act, factors to be considered include, but are not limited to, evidence that the person:

a) might hold or advocate extremist views such as a belief in the use of violence as a legitimate means of political expression;

b) might vilify a part of the community;

c) has a record of encouraging disregard for law and order; Note: For example, in the course of addressing public rallies.

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d) has engaged or threatens to engage in conduct likely to be incompatible with the smooth operation of a multicultural society;

Note: For example, advocating that particular ethnic groups should adopt political, social or religious values well outside those generally acceptable in Australian society, and which, if adopted or practised, might lead to discord within those groups or between those groups and other segments of Australian society.

e) participates in, or is active in promotion of, politically motivated violence or criminal violence and/or is likely to propagate or encourage such action in Australia;

f) is likely to provoke civil unrest in Australia because of the conjunction of the person's intended activities and proposed timing of their presence in Australia with those of another individual, group or organisation holding opposing views.

(2) The operation of section 501(6)(d)(iii), (iv) or (v) of the Act must be balanced against Australia's well established tradition of free expression. The grounds in these sub-paragraphs are not intended to provide a charter for denying entry or continued stay to persons merely because they hold and are likely to express unpopular opinions. However, where these opinions may attract strong expressions of disagreement and condemnation from the Australian community, the current views of the community will be a consideration in terms of assessing the extent to which particular activities or opinions are likely to cause discord or unrest.

8. Sexually based offences involving a child (section 501(6)(e))

(1) A person will not pass the character test if a court in Australia or a foreign country has convicted them of one or more sexually based offences involving a child or found them guilty of such an offence, or found a charge proven against them, even if the person was discharged without conviction.

(2) Sexually based offences involving a child include, but are not limited to offences such as:

a) child sexual abuse;

b) indecent dealings with a child;

c) possession or distribution of child pornography;

d) internet grooming; and

e) other non-contact carriage service offences.

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(3) This provision applies irrespective of the level of penalty or orders made in relation to the offence.

9. Crimes under International Humanitarian Law (section 501(6)(f))

(1) A person will not pass the character test if the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:

a) the crime of genocide;

b) a crime against humanity;

c) a war crime;

d) a crime involving torture or slavery;

e) a crime that is otherwise of serious international concern.

10. National security risk (section 501(6)(g))

(1) A person will not pass the character test if the person has been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).

11. Certain Interpol notices (section 501(6)(h))

(1) A person will not pass the character test if an Interpol notice in relation to the person is in force, and it is reasonable to infer from that notice that the person would present a risk to the Australian community or a segment of that community.