

RULE OF LAW

INSTITUTE OF AUSTRALIA

30 May 2011

The Secretary
Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011

The Rule of Law Institute of Australia wishes to make a submission on the above Bill. Our concern is that the provisions of the Bill will apply retrospective to the announcement by the Minister of his intention to introduce laws into the Parliament.

Under the provisions of the Bill certain acts by individuals prior to the announcement by the Minister will be taken into account in his assessment for visa eligibility. RoLIA believes that it would be more appropriate that the law only apply to acts committed after the commencement date for the legislation (that is, 26 April 2011).

RoLIA believes that retrospective laws undermine the rule of law and should be avoided wherever possible. In support of our position we note there is a strong body of jurisprudence on the rule of law which opposes retrospectivity in law making. Australia's seminal text on the Rule of Law by Geoffrey Walker MUP 1988 at page 315 provides a neat summary of this principle:

A statute cannot be certain if it is retroactive. Such a law can never in any real sense be *promulgated*. It cannot guide a person's conduct and therefore cannot be obeyed.

Retrospective law is bad law for the following reasons:

- All individuals have an obligation to know what the law is and also to know what the consequences will be for breaking the law (the 'ignorance is no excuse' principle). If the law is applied retrospectively this principle is rendered irrelevant.
- Retrospective law is arbitrary, and often is directed at certain groupings or individuals, whereas under the rule of law all citizens should be treated equally before the law.

It is with the preceding in mind that we recommend that the committee report to the Senate that

the Bill not be passed in its current form, and only be passed when it is truly prospective in character.

Yours sincerely

Richard Gilbert
Chief Executive Officer

