Refugee Legal:

Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2021.

A. Introduction

1. Refugee Legal (formerly the Refugee and Immigration Legal Centre) is a specialist community legal centre providing free legal assistance to asylum-seekers and disadvantaged migrants in Australia.1 Since its inception over 33 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention. Refugee Legal is the largest provider of free legal assistance to such people in Australia.

2. Refugee Legal specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a longstanding member of the peak Department of Home Affairs/Immigration and Border Protection-NGO Dialogue and other consultative fora. Refugee Legal has substantial casework experience and is a regular contributor to the public policy discourse on refugee and general migration matters.

3. Refugee Legal has extensive experience in the provision of pro-bono legal assistance to persons subjected to visa cancellations on character grounds.

4. We thank the committee for the opportunity to make these submissions to you in relation to the *Migration Amendment (Strengthening the Character Test)* Bill 2021 ('2021 Bill').

5. Our principal submission is that the 2021 Bill should be rejected in its entirety, substantially for the same reasons advanced to separate inquires in relation to the *Migration Amendment (Strengthening the Character Test)* Bills 2018 and 2019 ('2018 Bill' and '2019 Bill' respectively). The 2021 Bill is in identical form to the earlier 2018 and 2019 Bills save for one change. That change seeks to address only one of the defects in the earlier incarnations of the Bill, and does so deficiently. It does not address the other profound problems with the Bill.

6. We attach our earlier submissions as follows, and continue to rely on them:

   i. *Our Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019*, dated 7 August 2019 ('2019 Submissions'- 4pp), which in turn attached:
   ii. Our *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018*, dated 5 December 2018 ('2018 Submissions'- a further 7 pp); and
   iii. Our *Submission to the Joint Standing Committee on Migration's Inquiry into Visa Cancellations made on Criminal Grounds* (13 pp).

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7. Our most detailed analysis relating to the proposed amendments is contained in the 2018 submissions, with additional comments in our brief 2019 submissions. We refer to and rely on all of these submissions in our response to the 2021 Bill.

8. In this regard, we set out below a short summary of non-exhaustive issues we have identified in the proposed Bill, with a guide to where earlier discussion can be found in our attached 2018 and 2019 submissions. Additionally, we make some brief submissions in this covering letter in relation to the change between the 2018 and 2021 Bills, and reiterate the way in which the proposed Bill would further harm victims of domestic violence, while purporting to protect them.

Summary of the major issues with the 2018 and 2019 Bills

9. For reasons outlined in our previous submissions to this Committee, and echoed by other submissions to this Committee's previous inquiries into the 2018 and 2019 Bills the 2021 Bill contains major shortcomings with profound consequences to affected people, including the following:

   i. There is no compelling need for the amendments-our 2018 submissions [13]-[15]. There is already substantial power in s 501 of the Act to refuse or cancel a visa on character grounds, including criminal conduct or conviction for an offence of violence or a sexual offence. In the most serious instances, where the person has been imprisoned for 12 months or more, or the person has been convicted of a sexually based offence involving a child and been imprisoned as a consequence, the Minister or delegate *must* cancel the relevant visa- he or she has no discretion. [2] In the case of other offences, the Minister or delegate must usually[3] consider whether the criminal conduct is such as to cause the person to fail the character test. Following this, a decision maker may exercise their residual discretion to cancel or not cancel the visa. This two-stage approach is appropriate given the wide range of circumstances that can constitute the same offence, and the profound consequences of visa refusal or cancellation on individuals, families including children and communities.

   ii. Any perceived administrative advantage to be gained by the amendments is illusory, and will likely cause severe hardship. According to the Second Reading Speech for the 2019 Bill,[4] the intent of the Bill was to provide a 'clear and objective ground' on the basis of which the Minister and delegates could consider exercising the discretion to refuse or cancel a visa in the case of a broader category of offences. Thus, the perceived advantage could seem to be reduction in the amount of consideration the Minister and delegates would need to give to certain criminal convictions, because the mere fact of conviction of a designated offence would be sufficient to fail the character test. This purported gain in administrative convenience is illusory, given the necessity now recognised to exclude certain minor offences introduces further complication, as we explain below. More importantly, it would also remove the opportunity to take into account the actual circumstances of the offence in determining whether or not a person fails to meet the requirements of the character test, and subject people to visa

[2] S501 (3A), (6) and (7)
[3] There are a limited number of other specific offences which will cause automatic failure of the character test- see for example s 501(6)(ba) and (f)- which concern serious international offences.
[4] There is no Second Reading Speech for the 2021 Bill, only an Explanatory Memorandum.

cancellations and refusal processes which often have devastating consequences on people's lives.

iii. The serious incursions on basic rights the amendments would cause takes many forms. First, they constitute a further and concerning expansion of the power of the Executive, and a usurpation of judicial discretion by seeking to use the maximum sentence as the criterion for application, instead of the actual sentence imposed - our 2018 submissions [16]-[19], and [38]-[39]. The Parliamentary Digest commentary on the 2019 Bill includes a helpful summary of the substantial opposition to this aspect of the 2018 Bill.[5]

iv. Next, the categories of offences caught by the proposed amendments are too broad, and so on many occasions the consequence of their application, which is a person automatically being deemed a person of bad character, will be disproportionate to the actual conduct involved - our 2018 submissions [20]-[23].

v. The proposed amendments would have particularly severe consequences for vulnerable people, including victims of domestic violence, children and refugees - our 2018 submissions [24]-[30] and 2019 submissions [8]-[20]. Minors convicted of a designated offence would automatically fail the character test, and therefore be at heightened risk of being subject to serious psychological harm as a result of indefinite detention. Children of a parent who fails the character test by reason of conviction for a designated offence could be left parentless. Domestic violence victims would be discouraged from reporting to police, for fear of the immigration consequences.

vi. The inclusion of convictions in foreign courts is of great concern and in many cases would depart from fundamental principles of international protection, particularly given the possibility of politically motivated convictions of persons seeking asylum or conviction in a foreign judicial system that does not conform to procedural fairness, or indeed in some instances the person is convicted by his persecutors – see our 2018 submissions [31]-[37].

vii. The inclusion of accessorial offences is also concerning given the inconsistency with which they are applied – see our 2018 submissions [40]-[42].

viii. The proposed amendments have the potential to increase the burden on the criminal justice system by substantially reducing pleas of guilty – see our 2018 submissions [43].

ix. In short, the 2018 and 2019 Bills purported to address a deficiency in the law that in reality did not exist. Yet in so doing, they would operate to cause significant harm to vulnerable people without substantial gain in administrative efficiency.

The 2021 Bill

10. The only issue with the earlier Bills that is addressed in the 2021 Bill is, in part, the issue identified at 9(iv) above. This is because the only change is to address the very wide scope of

[5] Note 1 above, under the heading 'Available versus actual sentence'.

assault in the list of designated offences, by excluding assaults (if they occur outside of a family violence context) that do not cause bodily or mental harm,[6] and associated accessorial offences.

11. While this may be a recognition that the list of designated offences was too wide, the proposed change has, in effect, introduced further complication due to the uncertainty of what constitutes bodily or mental harm. It also adopts a definition of family violence that is very broad. Thus, it is a further example of a purported attempt to ease a perceived administrative burden actually creating more work, and potential hardship, rather than less. We expand on this submission below.

Exclusion of certain offences

12. The Explanatory Memorandum to the 2021 Bill states in relation to this exclusion:

> *'The purpose of new subsection 501(7AC) is to ensure that low-level assaults, including threats, that neither cause, nor contribute, to a person's bodily harm or harm to a person's mental health, and do not involve family violence, will not fall within the scope of a designated offence. This means that a person convicted of such an assault will not fail the character test as a result of that conviction, as they will not have been convicted of a designated offence. However, a conviction for common assault, where the act constituting the offence involves family violence, will be a designated offence, irrespective of whether the assault causes bodily harm or harm to a person's mental health. This aligns with the Government's position on combatting family violence."*[7]

13. While we agree with the aim of this change from the 2019 Bill is, in practice it will introduce further difficultly for administrators, visa holders and reviewers, and is not guaranteed to remove the potential for hardship and arbitrary application, and the often devastating consequences to people who are affected.

14. First, the Minister or a delegate will need to examine the circumstances of the offence to see if the exclusion applies, thus defeating the aim of eliminating that step. In this regard, we note that there is no definition in the Bill, or in the Commonwealth Criminal Code to which it refers, of 'bodily harm'. Confusingly, there is a definition of 'harm' in the Criminal Code, but that refers to 'physical harm'. Is that different to 'bodily harm'? There is a definition of 'harm to a person's mental health' in the Criminal Code, which the Bill adopts by incorporation. The definition provides some guidance in that it excludes 'mere ordinary emotional reactions such as those of only distress, grief, fear or anger' and expressly includes 'significant psychological harm', but it is otherwise an inclusive, not exhaustive definition.

15. As a matter of criminal law, the creation of fear in the victim is sufficient to constitute an assault. The amendment requires harm to mental health constitute more than 'mere ordinary emotional reaction' so as to prevent the exclusion applying. There is substantial ambiguity as to when fear reaches the requisite threshold greater than a mere emotional reaction. Further, the harm that causes the exclusion not to apply need only be temporary, adding to the conceptual and practical difficulties of applying the exclusion.

[6] Proposed ss 501(7AC)
[7] https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r6816

16. These are not meretechnical trivialities. What they show is the real difficulty of seeking to capture appropriate offences, but excluding inappropriate ones, when the very same offence can be constituted by such a wide range of circumstances, some of which could never be reasonably considered as demonstrating such poor character as to justify consideration of cancellation of a visa. The above observations demonstrate the creation of an wholly undesirable situation where administrative decision makers are tasked with functions usually discharged by judicial officers.

17. A further example, in relation to a category of proposed designated offences that is not subject to any exception, illustrates this. Proposed subsection 7AA(a)(iii) provides that 'breaching an order made by a court or tribunal for the personal protection of another person' is a designated offence. Note that this category does not require that the breach involved violence. Nor is it limited to orders arising from domestic violence – it could be simply making a telephone call, or indeed receiving one. In Victoria, personal protection other than in a domestic context is afforded by the *Personal Safety Intervention Orders Act* 2010. Under that Act, the maximum penalty for contravention of a personal safety intervention order is two years imprisonment.[8] Thus a conviction for such an offence would automatically cause a visa holder to fail the character test under the proposed Bill. Yet a contravention could range from a violent confrontation, to minor conduct, such as addressing, in a non-threatening manner, a neighbour with whom one is in dispute and who has obtained a non-contact order.

18. Similarly, there is a huge range of potential offences of 'non-consensual conduct of a sexual nature' that would all be caught under the one catch-all proposed subsection 7AA(a) (ii). Again, this category does not require any violence, or threat of violence, as an element. Should a minor who shares on one occasion an intimate image of his or her former consensual partner without that partner's consent be treated the same as an adult abuser of children? Plainly no, yet the conviction of either person would have the same consequence of the person automatically failing the character test.

Family violence offences

19. As set out in our 2018 and 2019 submissions, making a conviction for family violence an automatic trigger for cancellation consideration ignores the devastating impact visa cancellation can have on the dependent victims of a perpetrator, and the implications for reporting if those victims become aware that they may lose their source of financial support or migration justification for living in Australia. It removes agency from the victims of that violence, to express their own views as to the character of the perpetrator.

20. The attempt to carve out family violence from the exclusion also introduces further interpretative complexity. The definition of family violence in the Bill adopts the definition from the *Family Law Act* 1975 (Cth), which applies in a very different context. The definition of 'family violence' in s 4AB(1) f that Act is 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family, or causes the family member to be fearful'. In the family law context, the behaviour does not need to be violence, or the threat of violence, directed towards a person. Examples in s 4AB(2) of the *Family Law Act* of behaviour that 'may' constitute family violence include non-physical behaviour such as

[8] *Personal Safety Intervention Orders Act* 2010 (Vic), s 100.

'intentionally damaging or destroying property' (s 4AB(2)(e)); 'unreasonably denying the family member the financial autonomy that he or she would otherwise have had' (s 4AB (2)(g)); and 'preventing the family member from making or keeping connections with his or her family, friends or culture' (s 4AB (2)(i)).

21. It follows that it introduces confusion to apply the family law definition to the migration context, where under the proposed Bill, the behaviour would need to contain 'violence, or the threat of violence, against a person' for conviction for that behaviour to constitute a designated offence (proposed ss 7AA(a)(i)). This would make the task of interpretation of this part of the proposed Bill for administrators, visa holders and reviewers very difficult.

Conclusion

22. We urge the Committee to oppose the passage of this Bill. We would welcome an opportunity to provide further oral submissions at a hearing.

Refugee Legal:
Defending the rights of refugees

17 December 2021

Refugee Legal:

Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019.

A. Introduction and outline of submissions

1. Refugee Legal (formerly the Refugee and Immigration Legal Centre) is a specialist community legal centre providing free legal assistance to asylum-seekers and disadvantaged migrants in Australia.1 Since its inception over 30 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention. Refugee Legal is the largest provider of free legal assistance to such people in Australia and in the last financial year our total client assistance was over 13,800.

2. Refugee Legal specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a longstanding member of the peak Department of Home Affairs/Immigration and Border Protection-NGO Dialogue and other consultative fora. Refugee Legal has substantial casework experience and is a regular contributor to the public policy discourse on refugee and general migration matters.

3. Refugee Legal has extensive experience in the provision of pro-bono legal assistance to persons subjected to visa cancellations on character grounds.

4. Refugee Legal welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019. We note that this Bill is in identical form to the Migration Amendment (Strengthening the Character Test) Bill 2018, for which this committee held an inquiry in 2018 (see "the 2018 Inquiry"). In relation to our submissions to this inquiry we refer to and rely on our submissions to the 2018 Inquiry, a copy of which is attached, together with a submission referred to therein, being Refugee Legal's submission to the Joint Standing Committee on Migration Inquiry into the review processes associated with visa cancellations made on criminal grounds.

5. We continue to submit that the Bill should not be passed for reasons set out in our previous submission to the 2018 Inquiry.

6. In addition, we make the following supplementary submissions which address the following issues:

    a. the impact of visa refusal and cancellation on children and young people;
    b. the impact on minors affected by visa refusal or cancellation; and
    c. the lack of access to free legal assistance

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7. We also endorse the submission of the Visa Cancellations Working Group ("the Working Group") dated 7 August 2019.

B. Impact of visa refusal and cancellation on children and young people

8. Further to paragraph 28 of our submission to the 2018 Inquiry, Refugee Legal continues to hold profound concerns with respect to the cancellation and refusal of visas of minors, particularly in circumstances where the amendments will result in children convicted of relatively minor offences automatically failing the character test. We elaborate on our principal concerns below.

9. Many children in youth detention and the youth justice system come from backgrounds of abuse, family violence, and disadvantage.[2] They are the product of a damaged and unprotected childhood.[3] Many have suffered trauma, and experience mental ill-health, disability, substance abuse and interrupted education, requiring intensive therapeutic intervention. The focus of the youth justice system Australia wide is on rehabilitation, with dedicated sentencing principles applying to young offenders. Visa cancellation, prolonged immigration detention, and removal from Australia, particularly where there is no effective family support in the other country, runs counter to these principles and to our international obligations under the Convention on the Rights of the Child ('CROC').[4]

10. In our experience, the impact of immigration detention with an unknown end date on a young person with a traumatic background is especially concerning, and yet this is the mandatory consequence of visa refusal or cancellation under the s501 provisions. Immigration Detention Centres do not provide a rehabilitative environment for young people. Immigration detention is more likely to compound psychological and physical vulnerabilities and ill-health, and to impede rehabilitation.

11. Ministerial Direction 79 contains no guidance for decision-making with respect to cancellation and refusal of visas held by minors or with regard to offending as a minor.[5] No distinction is drawn between principles and considerations applicable to adults and minors. As a matter of general principle, Refugee Legal is opposed to the cancellation and refusal of visas of minors on character grounds. If the practice is to continue however, we submit that decision making principles for visa refusal and cancellation for minors should be transparent, accord with basic principles of procedural fairness and be specifically stipulated in Ministerial Direction 79. For example, that regard be had to facts and circumstances pertaining to a child's age and background as it relates to the nature and seriousness of the offending.

12. Refugee Legal further submits that in order for Australia to comply with the CROC, minors served with s501 notices must be guaranteed access to free legal assistance to respond, and the notices should clearly set out how to access this legal assistance. Minors should always be afforded natural justice in the visa refusal and cancellation process.

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2 Sentencing Children and Young People in Victoria Speech given by Judge Paul Grant at the launch of the Sentencing Advisory Council Report on "Sentencing Children and Young People in Victoria" 11 April 2012 p4

3 Judge Burke, Chair of the Youth Parole Board, 2010-11 Annual report at p.5.

4 They also run counter to international obligations under other treaties to which Australia is party, including the International Covenant on Civil and Political Rights.

5 The Best Interests of Minor Children in Australia as set out in Direction 79 relates to other children, not the visa holder or visa applicant .

C. Impact on minors affected by visa refusal/cancellation

13. Refugee Legal submits that the severe impact of s501 visa refusal and cancellation on children in Australia has not been given sufficient attention.

14. Whilst Ministerial Direction 79 directs that the Best Interests of Minor Children in Australia affected by a visa refusal or cancellation is a primary consideration, Refugee Legal is gravely concerned about the fundamentally inadequate assessment of the best interests of affected individual children in Australia being undertaken by decision makers at all levels of the administrative process. Current processes do not afford basic rights to procedural fairness in line with the ordinary protections of Australian law.

15. In particular, children generally have no voice in the visa refusal or cancellation decision making process under s501. It is a decision however which has the potential to inflict severe and lasting impact on the emotional, psychological well-being and development of a child in Australia. For example, visa refusal or cancellation can result in the permanent separation of a child from their parent or family member since a person removed from Australia under s501 cannot return. In our experience, children are also suffering emotional and psychological trauma and damage throughout the period of a pending visa refusal or cancellation process, living with the constant knowledge that their parent or other close relative may be separated from them forever. The reliance of successive governments on remote immigration detention following visa refusal or cancellation adds to a child's distress and trauma by creating severe restrictions on meaningful contact and communication.

16. The impact of the proposed amendments would be to increase the numbers of minor children in Australia negatively impacted by the visa refusal or cancellation process and to the consequence of permanent separation from a parent or other significant family member. This is manifestly inconsistent with Australia's obligations under the Convention on the Rights of the Child.[6]

D. Lack of access to free legal assistance

17. Refugee Legal is concerned that the proposed amendments will unnecessarily increase the numbers of non-citizens considered for cancellation through broadening the provisions for automatic failure of the character test. The amendments set an inappropriately low bar, and the consequence of visa cancellation will be disproportionate to the particular character concern a person may have or be suspected of having.

18. The process of responding to a Notice issued under the s501 provisions pertaining to visa cancellation or refusal is complex and onerous. All evidence and submissions must be in writing at both the primary and merit review stages. Strict and varying timelines for response, submission and appeal apply. In order for a person to meaningfully respond they are required to address a combination of considerations which are complicated, multifaceted and technical in nature. At the Administrative Appeals Tribunal General Division, the Minister is legally represented, and the Migration Act 1958 specifies distinct procedural rules with regard the conduct of the s501 review process with regard to timelines and evidence.7 In our experience, it is essential that people facing refusal or cancellation of their visa have access to legal

6 It is also inconsistent with other treaties that Australia is party to such as the International Covenant on Civil and Political Rights

7 s 500 of the *Migration Act 1958*

assistance to ensure that they are able to properly present their case throughout the primary and review processes.

19. A significant proportion of people impacted by visa refusal and cancellation experience various forms of disadvantage and vulnerability and are unable to afford legal assistance.

20. There is limited access to free legal assistance for these matters in Australia and existing resources are under significant strain. If the Bill passes, there will be a significant increase in the numbers people who need legal assistance but who cannot access it. This will lead to the prospect of a systematic denial of procedural and substantive justice and the real prospect of miscarriage of justice. The consequences of this as set out in our submissions are extremely grave including, indefinite immigration detention, the risk of removal in breach of non-refoulement obligations or where there is significant risk to life relating to vulnerability, and lasting damage to children in Australia in breach of Australia's international obligations under the Convention on the Rights of the Child.

E. Conclusion

For these reasons, we submit that the Bill should not be passed.

Refugee Legal:
Defending the rights of refugees

7 August 2019

Refugee Legal:

Submission to the Senate Legal and Constitutional Affairs Legislation Committee: Migration Amendment (Strengthening the Character Test) Bill 2018

Introduction – Refugee Legal

1. Refugee Legal (formerly the Refugee and Immigration Legal Centre) is a specialist community legal centre providing free legal assistance to refugees, asylum-seekers and disadvantaged migrants in Australia.[1] Since its inception over 30 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention. Refugee Legal is the largest provider of free legal assistance to such people in Australia and in the last financial year our total client assistance was over 14,000.
2. Refugee Legal specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a longstanding member of the peak Department of Home Affairs/Immigration and Border Protection-NGO Dialogue and the Department's Protection Processes Reference Group. Refugee Legal has substantial casework experience and is a regular contributor to the public policy discourse on refugee and general migration matters.
3. Refugee Legal has extensive experience in the provision of pro-bono legal assistance to persons subjected to visa cancellations on character grounds.
4. We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2018 (**the Bill**). The focus of our submissions and recommendations reflect our experience and expertise, as briefly outlined above.

Outline of submissions

5. Refugee Legal has significant concerns with the amendments proposed by the Bill to the *Migration Act 1958* (**the Act**), and for the following reasons, we submit the Bill should not be passed:
   - No compelling case has been made out as to why the proposed amendments are necessary.
   - The proposed amendments represent a further concerning and unwarranted expansion of Executive power.
   - The amendments purport to unnecessarily extend the scope of the current character requirements by imposing further significant penalties that are entirely

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disproportionate to the particular character concerns that a person may have, or are merely suspected of having.

- The amendments would remove critical legal safeguards and have profoundly adverse consequences for many vulnerable people, including children, refugees, and persons experiencing disadvantage.
- The proposed extended reliance on purported criminal convictions in foreign criminal jurisdictions is an entirely inappropriate and unjust basis for assessing character, particularly for those fleeing political persecution.
- The amendments would undermine judicial discretion by providing for character to be determined by a maximum criminal penalty for a criminal offence, as opposed to the criminal penalty applied by the court having regard to the particular circumstances, including the person's moral culpability.
- The proposed extension of the character test to include convictions for accessory offences concerning a host of undefined offences is inappropriate due to the uncertainty and inconsistency in how these provisions are applied.
- The Bill has the potential to have serious adverse implications for the criminal justice system.

6. Each of these matters is further developed below. We have also included a number of case studies to illustrate our submissions. Where these case studies are based upon our clients' experiences, the names and stated facts have been de-identified and altered to preserve confidentiality.

Existing Legal Framework

7. Currently, section 501 of the Act provides the Minister, his/her delegates, and the Administrative Appeals Tribunal (General Division) (**the AAT**) on review, with a discretion to refuse to grant and cancel a visa if the person fails to meet the 'character test'.[2] Where the visa applicant or visa holder satisfies the Minister, a delegate or the AAT that they pass the character test, then the power to refuse or cancel the visa is not enlivened. However, where the person does not satisfy the decision-maker that he or she passes the character test, the decision-maker must exercise the discretion and decide whether the visa should be refused or cancelled.

8. Critically, the considerations and procedure for the decision-maker when exercising the discretion are very different than those that apply when considering if they pass the character test. Relevantly, the matters that delegate and the AAT *must* take into account when assessing whether to exercise the discretion to cancel or refuse a visa on character grounds are prescribed by the Minister in a Ministerial Direction.[3]

9. Under current law, a person will fail the character test in circumstances including (but not limited to) the following:

    - the person is found by the Minister, a delegate or the AAT not to be of 'good character', having regard to the person's past and present general and criminal conduct;
    - the Minister, a delegate or the AAT is satisfied that if the person were to remain

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[2] As specified in s 501(6).
[3] Made under s 499(1) of the Act. The current applicable direction is *Direction 65 - Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* (commenced 23/12/2014).

in Australia, there is a risk that the person would:

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

- the person has a substantial criminal record, being where:
  - the person has been sentenced to a term of imprisonment of 12 months or more, or 2 or more terms of imprisonment, where the total of those terms is 12 months or more[4]; or
  - 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
  - the person has been found by a court to not be fit to plead, in relation to an offence; and the court has nonetheless found the person committed the offence; and as a result, the person has been detained in a facility or institution;
  - the person is convicted of the criminal offence of escaping from immigration detention or commits any offence while held in immigration detention; or
- the Minister, a delegate or the AAT reasonably suspects that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person, and that the group, organisation or person has been or is involved in criminal conduct; or
- the Minister, a delegate or the AAT reasonably suspects that the person has been or is involved in conduct relating to people smuggling, trafficking in persons, the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern (whether or not they have been convicted of such an offence)
- a court in Australia or a foreign country has convicted the person of one or more sexual offences involving a child, or found the person guilty but the person was discharged without a conviction
- the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following: the crime of genocide; a crime against humanity; a war crime; a crime involving torture or slavery; a crime that is otherwise of serious international concern; or
- the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to national security, or an Interpol

[4] It is important to note that with respect to terms of imprisonment, concurrent prison sentences are counted separately. For 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. Further, where a person has been convicted of an offence and the court orders the person to participate in a residential drug rehabilitation scheme or a residential program for the mentally ill; the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program.

notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

10. Additionally, s 5C of the Act currently specifies the circumstances under which a non-citizen is deemed to be of "character concern" for the purposes of the Act. This term is defined for the purposes of the authority in s 336E(2) that provides an authority to disclose identifying information for reasons including to identify persons of character concern who may be liable to visa cancellation or refusal under s 501. The definition of character concern in s 5C mirrors the character test in s 501(6).

The proposed amendments

11. The Bill purports to expand the character test to also include where the person has been convicted of a 'designated offence', defined to include, among other offences:
    - Any offence against a law in force in Australia or a foreign country, concerning:
        - violence against a person,
        - non-consensual conduct of a sexual nature,
        - breaching an order made by a court or tribunal for the personal protection of another person;
        - using or possessing a weapon;
        - conspiring with others to commit one of the above offences;
        - aiding, abetting, counselling, procuring, inducing the commission of the above offences; or
        - being in any way (directly or indirectly) knowingly concerned in, or a party to, the commission of any of the above offences; and
    - Any offence against a law in force in Australia where the offence is punishable by imprisonment for a fixed term or maximum term of not less than 2 years; and
    - Any offence against a law in force in a foreign country where, if it was committed in the Australian Capital Territory, the offence is punishable by imprisonment for a fixed or maximum term of not less than 2 years.

12. The Bill also purports to amend the definition of "character concern" in s 5C to ensure consistency with the proposed expansion of the character test.

No compelling case

13. No compelling case has been made for why the proposed amendments are necessary. It is also our submission that the existing legal framework currently allows for the cancellation and refusal of visas for people captured by the above offending.

14. The Explanatory Memorandum states that purpose of the amendments to the Act proposed by the Bill are to:

> *[…] provide grounds for non-citizens who commit serious offences, and who pose a risk to the safety of the Australian community, to be appropriately considered for visa refusal or cancellation.*[5]

and

> *[…] amend the character test in section 501 of the Migration Act 1958 to provide grounds to consider visa cancellation or refusal where the non-citizen has been convicted of a serious crime.*[6]

15. In our submission, this stated policy objective is already accommodated by the current legal framework. As provided above, the character test in s 501 of the Act already provides the Minister, his/her delegates, and the AAT, with broad powers to cancel and refuse visas on character grounds. This includes, among other grounds, where:

- the Minister, a delegate or the AAT finds that the person is not of 'good character' having regard to their past and present general and criminal conduct (in Australia and elsewhere); and/or
- the Minister, a delegate or the AAT finds that the person is risk of engaging in criminal conduct in the future; and/or
- the person has been sentenced to a term of imprisonment of 12 months or more (including concurrent sentences), or 2 or more terms of imprisonment, where the total of those terms is 12 months or more.

Unwarranted expansion of Executive power

16. We submit that the amendments proposed by the Bill would operate in practice to further and unnecessarily extend the Executive's power over character-based decision-making.

17. Under current law, those people identified as targets of the Bill who are not immediately caught by the current criminal conviction threshold limbs of the character test would generally be considered against the 'good character' and 'future risk' limbs. Importantly, these limbs demand a subjective evidence-based appraisal by the decision-maker prior to there being a finding that the person fails the character test, and thereby being exposed to the refusal/cancellation discretion (as directed by the Minister in the applicable Ministerial Direction).

18. It is our submission that the proposed amendments would result in a significant increase in the number of people failing the character test automatically without any requirement for an individualised assessment of their character or future risk in accordance with established administrative law principles (including substantive and procedural law safeguards). Following this, a far greater number of people would then be exposed to the discretionary power to refuse or cancel his or her

[5] Migration Amendment (Strengthening the Character Test) Bill 2018, Explanatory Memorandum, Outline, p2.
[6] Migration Amendment (Strengthening the Character Test) Bill 2018, Explanatory Memorandum, Outline, p2.

visa, a process governed by the direction of the Minister of the day.[7]

19. In this regard, the amendments proposed would effectively 'tie the hands' of decision-makers with respect to the character test and expose a greater number of people to the criteria for character decisions prepared by the Executive.

Disproportionate penalties

20. We contend that the additions to the character test proposed by the Bill would operate in practice to impose significant penalties that are entirely disproportionate to any character concerns that a person may have, or are merely suspected of having.

21. The proposed additions capture a wide range of offences, and crucially, without regard to any future risk of offending, the circumstances of offending or an assessment of the person's character more generally. Further, by relying on the maximum term of imprisonment specified in law for the particular offence, as opposed to the actual criminal penalty handed to the person, the proposed additions would lead to absurd and grossly unfair and unjust results.

22. For example, in the State of Victoria the maximum penalty for 'theft' is 10 years imprisonment[8], and for 'handling stolen goods' is 15 years.[9] The penalties are similar for criminal offences committed in the Australian Capital Territory, against which the foreign offences are measured. Similarly, under the Act a person found guilty of informing others that he or she is a registered migration agent, when he or she is not, is liable to 2 years imprisonment.[10]

23. Following this, it is submitted that by specifying the criminal conviction threshold by reference to maximum terms of imprisonment for the relevant offence, as opposed to the actual term of imprisonment (if any), the proposed amendments carry the real risk of leading to manifestly unjust and absurd results. This in turn would unnecessarily expose many people, many of who may be highly vulnerable, to an extensive and onerous visa cancellation process. For those in immigration detention this would also likely lead to extensive delays in the processing of their visa and further unnecessary time in immigration detention.

Case Study

Ali is an Afghani national who arrived in Australia on a student visa aged 16 years of age. Upon arrival at the airport in Melbourne, Ali advised officers in immigration clearance that he wished to apply for asylum. Following this, Ali was refused immigration clearance and a delegate of the Minister cancelled Ali's student visa before transferring him to an immigration detention facility. Ali subsequently received pro bono assistance from a community legal centre to lodge a protection visa.

Around 10 months after being placed in immigration detention, Ali is found to be a refugee by a delegate. However, because Ali disclosed in his student and protection visa application

[7] Made under s 499(1) of the Act. The current applicable direction is *Direction 65 - Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* (commenced 23/12/2014).
[8] *Crimes Act 1958* (Vic), Division 2 - Theft and similar or associated offences, Section 74 – Theft.
[9] *Crimes Act 1958* (Vic), Division 2 - Theft and similar or associated offences, Section 82 – Handling stolen goods.
[10] *Migration Act 1958* (Cth), Part 3, Division2, Section 283.

forms that he had previously been charged and convicted in Afghanistan with receiving stolen goods (being a wrist watch given to him by his uncle), his protection visa is transferred to the character processing section and a s 501 delegate of the Minister issued him with a Notice of Intention to Consider Refusal of his protection visa on character grounds.

Despite accessing further pro bono assistance from the community legal centre to provide a detailed response in writing, a final decision on his visa is not made for another 9 months. Ali spent a total of 19 months in locked immigration detention, and the last 9 months were a result of the character cancellation process triggered by him failing the character test.

Profound consequences

24. The consequences of an adverse character decision affecting a person's visa can often be grave and permanent. In many instances these consequences may far outweigh the adverse impact of any term of imprisonment that person may be serving or have already served. These consequences can include:

    - Where the person has been found to be owed protection in Australia:
        - indefinite detention in a locked immigration detention facility without any prospect of release; or
        - forced return to the country in relation to which they have been found by the Australian government to be at a real risk of serious human rights abuses[11]; and/or
    - Permanent separation from immediate family, including Australian citizen children and spouses;
    - Forced relocation of the person affected as well as their Australian citizen and permanent resident children and spouse, to a country where they may have no cultural or personal connection, including where they may not speak the local language, and where they may struggle to subsist; and
    - A permanent bar on returning to Australia.

25. It is essential that the legal framework governing character-based visa decision-making under the Act operates with these extreme consequences in mind. These profound consequences demand those affected be afforded a fair hearing of their case to mitigate the otherwise very real risk of him or her being unjustly subject to these life-changing, and in some instances, life-threatening, consequences.

26. Unnecessarily exposing large numbers of people to the prospect of their visas being cancelled greatly heightens the risk of unjust cancellation decisions and can lead to the serious consequences detailed above. As we explained in detail in our submission to the Joint Standing Committee on Migration's inquiry into the review processes associated with visa cancellations made on criminal grounds[12], the process by which the Minister or a delegate decides whether to refuse or cancel a

[11] *Migration Act 1958*, s 197C. See: *BGM16 v Minister for Immigration and Border Protection* [2017] FCAFC 72 per Mortimer and Wigney JJ at [75]; and *DMH16 v Minister for Immigration and Border Protection* [2017] FCA 448 per North ACJ at [26].

[12] Joint Standing Committee on Migration's inquiry into the review processes associated with visa cancellations made on criminal grounds, Submissions received by the Committee, available at: https://www.aph.gov.au/DocumentStore.ashx?id=06c93c6c-248a-49c1-9b14-e157998bb685&subId=566499 [accessed 4 December 2018].

person's visa under s 501 is conducted entirely *on the papers*. That is, at no time is the person affected given an opportunity to explain in-person, including with the assistance in their own language, why their visa should be cancelled.

27. For this reason, the amendments heighten the risk of vulnerable people, including those in immigration detention, those receiving medical treatment and those who cannot communicate in English, to having their visa unjustly refused or cancelled on character grounds. Even in cases where the person's visa is not ultimately cancelled, being exposed to such a difficult, stressful and often prolonged process, can on its own cause serious hardship to vulnerable people.

28. The expansion of automatic failure of the character test will particularly harm children. Children convicted of relatively minor offences will now automatically fail the character test. Refugee Legal has assisted children in immigration detention subject to this process and has witnessed first-hand the profound, and often permanent, psychological harm this process causes them.

29. We note that current government policy states "[t]he s501 provisions relating to character-related visa refusals and cancellations *apply equally to minors* (that is, persons under 18) as to adults. *There are no legal impediments within the Migration Act to refusing a visa to a minor or cancelling a visa held by a minor*" [emphasis added].[13] As well as being inconsistent with the central policy tenant of juvenile justice is rehabilitation[14], we submit the proposed amendments are also inconsistent with Australia's obligations under the *Convention on the Rights of the Child*[15]. This includes the foundational principle in Article 3(1):

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the* ***best interests of the child shall be a primary consideration****.*[emphasis added]

30. On this basis, if enacted, the Bill would have a significant adverse impact on the lives of vulnerable people, including children, refugees, people seeking asylum and victims of domestic violence.

Case Study

Nabila is a 16 year old stateless ethnic Rohingya from Myanmar who was resettled as a refugee by UNHCR from Indonesia to Australia as an unaccompanied minor. While waiting for her refugee claim to be processed by UNHCR in Indonesia she was not permitted to work. Unable to feed herself, on one occasion she stole a loaf of bread from a local shop. Subsequently, she was charged and convicted of theft. Nabila informed UNHCR and the Australian government of this conviction prior to receiving her refugee visa for Australia.

Following the enactment of the amendments proposed by the Bill, Nabila applies for Australian citizenship. In the application form she discloses his criminal conviction in

[13] Department of Home Affairs, Procedures Advice Manual, *s501 - The character test, visa refusal and visa cancellation*, 3. Procedural Instruction, Juveniles and juvenile offences [accessed 5 December 2018].
[14] Australian Institute of Criminology, 'Measuring juvenile recidivism in Australia' https://aic.gov.au/publications/tbp/tbp044/measuring-juvenile-recidivism-australia [accessed 5 December 2018].
[15] Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Indonesia. Not long after this Nabila receives a 'Notice of Intention to Consider Cancellation' of her permanent refugee visa, referring to her having failed the character test.

Nabila does not read/write English and lives in a remote community where she works on a relative's farm. She is not aware of the contents of the letter and fails to provide a written response to the case against her to the Department. Following this, her visa is cancelled and she is made unlawful and the time to apply to the AAT has passed. Nabila is liable to being detained indefinitely in an immigration detention facility.

Reliance on foreign criminal convictions

31. The current character test in s 501 of the Act recognises criminal charges, indictments and convictions in foreign jurisdictions limited to the following:
    - sexually based offences involving a child;
    - the crime of genocide;
    - a crime against humanity;
    - a war crime;
    - a crime involving torture or slavery; and
    - a crime that is otherwise of serious international concern.
32. We note that, with the exception of child sex offences, these offences fall within international criminal law, as opposed to foreign domestic jurisdictions. These existing foreign/international offences must be contrasted with the significant expansion of foreign criminal offences caught by the character test, many of which can only be classified as significantly less objectively serious.
33. Refugee Legal has profound concerns for refugees and people seeking asylum who have previously been subject to forms of persecution in their home country that include wrongful and politically motivated criminal convictions. For these, often highly vulnerable people, many of which are survivors of torture and trauma, the proposed additions to the character test fail to recognise that many foreign criminal justice jurisdictions are perpetrators of persecution themselves.
34. Refuge Legal holds additional concerns that even where a person is not a victim of a wrongful conviction motivated by political or other reasons that enliven Australia's international obligations, the proposed amendments fail to recognise that a significant number of foreign legal systems, which are likely to be applicable, fail to adhere to the rule of law or otherwise afford justice.
35. As an illustration, we note the Department reported that the most common country of nationality for people granted permanent protection visas in Australia in the 2017-18 Financial Year was Iraq.[16] We further note that the Department of Foreign Affairs and Trade (**DFAT**) current country information report for Iraq (prepared for the purposes of onshore protection status determination processed) relevantly advises as follows in respect of the judicial system in that country:

    DFAT assesses that politics and sectarianism continue to influence judicial appointments and decisions, and removing or diminishing this influence has

[16] Department of Home Affairs, Visa Statistics, Onshore Humanitarian program 2017-18 as at 30 June 2018, available at: https://www.homeaffairs.gov.au/research-and-stats/files/ohp-june-18.pdf [accessed 5 December 2018].

been a key demand of recent popular protests. Members of the judiciary continue to face significant pressure, including intimidation and violence, particularly in cases involving organised crime, corruption and the activities of militias. Armed groups have targeted judges with violence. Corruption is common and courts lack resources, including forensic capabilities. In the Kurdistan Region, legislation requires the Kurdish Judicial Council to be independent from the KRG Ministry for Justice, although the US State Department reported in 2017 that the KRG continued to influence politically sensitive cases.[17]

36. Similarly, for Iran, the country that sourced the highest number of irregular maritime arrival protection visa grants for the month of October 2018[18], DFAT reports as follows in its country information report for Iran:

Human rights observers criticise the judiciary for its lack of independence and denial of due process to detainees, and for the failure of trials to meet international standards of fairness. According to Freedom House, the government uses the judicial system to silence critics and opposition members. In her August 2017 report, the UN Special Rapporteur said that the lack of independence of the judicial system, in particular the Revolutionary Courts, was 'alarming', and that these courts were less a forum for granting justice than an extension of the coercive executive branch operating to control criticism and independent actions for securing rights. DFAT concurs with these views.[19]

37. In this regard, the proposed amendments greatly heighten the risk of grossly unjust consequences for vulnerable people.

Case Study

Yun is a Chinese national and dissident blogger who escaped from China and fled to Australia in early 2015. To mitigate the risk of being identified by the Chinese authorities when departing China, Yun used her cousin's passport at the airport when departing. Subsequently, Yun was informed by her family members that she had been convicted in absentia by the local criminal court for treason, stealing state secrets, identity theft and fraud related offences.

Yun lodged an application for a protection visa after arriving in Australia in early 2016 but due to her lack of English language skills and failure to access pro bono assistance in time, her visa application was not lodged until the day after her visitor visa expired. For this reason, the bridging visa granted to Yun while her protection visa was processed prohibited her from working, studying and accessing Medicare. In 2017, a delegate interviewed Yun and shortly after found her to be a refugee. However, due to the expanded character test including foreign convictions she is found not to pass the character test. The delegate then refers her application to the character cancellation processing area of the Department. Some months

[17] Department of Foreign Affairs and Trade, DFAT Country Information Report – Iraq (09/10/2018), available at: https://dfat.gov.au/about-us/publications/Documents/country-information-report-iraq.pdf [accessed 5 December 2018].
[18] Department of Home Affairs, Visa Statistics, IMA Legacy Caseload Report on Status and Processing Outcomes October 2018, available at: https://www.homeaffairs.gov.au/research-and-stats/files/ima-oct-2018.pdf [accessed 5 December 2018].
[19] Department of Foreign Affairs and Trade, DFAT Country Information Report – Iran (07/06/2018), available at: https://dfat.gov.au/about-us/publications/Documents/country-information-report-iran.pdf [accessed 5 December 2018].

later a s 501 delegate sends Yun a Notice of Intention to Consider Refusal of her protection visa on character grounds.

It is now over 3 years since Yun lodged her protection visa application and she still has not received a final decision. Because she has not been permitted to work she has been homeless and entirely dependent on charitable organisations for food and shelter. She also suffers from a number of serious medical conditions that she is unable to access treatment for due to her being destitute and not being eligible for Medicare.

Judicial discretion

38. It is submitted that the proposed amendments would in many cases substantially and inappropriately distort the assessment of a person's character by deferring to the maximum criminal penalty for the particular offence(s), as opposed to being guided by the penalty ultimately given to them by the court. This failure to allow consideration of judicial discretion is entirely at odds with the gathering of an accurate picture of a person's past criminal offending, their culpability, and ultimately, their character as an individual.

39. It is our further submission that Australia's criminal courts are appropriately placed to determine the seriousness of offending, and that that assessment is reflected in the criminal penalties they give. The discretion vested with these judicial officers is in express recognition of the fact that there are different standards of culpability, and different levels of seriousness within any set of offending.[20] In this regard, it is our submission that to fail to recognise this weakens character related decision making ignores and denigrates the integrity of the criminal justice process in Australia.

Accessory offences

40. It is our submission that the proposed extension of the character test to include convictions for accessory offences to a raft of undefined offences is inappropriate due to the uncertainty and inconsistency in how these provisions operate.

41. The Victorian State Government's Department of Justice has previously reported in this regard:

> *The authorities do not state a consistent fault principle for accessories. Sometimes they require a purpose, to bring about a crime; sometimes knowledge; sometimes an intention in a wide sense; sometimes they are satisfied with an intention to play some part in bringing it about; sometimes they use a formula that embraces recklessness. As so often happens, the courts are chiefly concerned to achieve a result that seems right in the particular case, leaving commentators to make what they can of what comes out.*[21]

42. Additionally, Refugee Legal questions the utility of the accessory offences provision. If the purpose of the accessory offences is to "capture those non-citizens

[20] See, for example, *R v Silva [2015] NSWSC 148*, where the defendant received a two-year sentence for manslaughter in circumstances where she had been subjected to ongoing family violence.
[21] State Government of Victoria, Department of Justice, Complicity Reforms, Criminal Law Review (2014), available at: https://assets.justice.vic.gov.au/justice/resources/f1e26f1d-2d4a-4c0f-9cd5-192adc0b8028/complicity-reforms.doc [accessed 5 December 2018].

with links to those activities that pose a risk to the Australian community, such as (but not limited to) organised crime, outlaw motor cycle gangs or those who, without committing the physical offence"[22], it is submitted that such offences fall squarely within the existing cancellation framework.[23]

Implications for the criminal justice system

43. It is our submission that the proposed amendments, if enacted, would have adverse flow-on effects for the criminal justice system. These flow-on effects would likely include an increase in the number of non-citizens pleading not guilty to criminal offences in recognition that any conviction will lead to them failing the character test It is recognised that a person pleading guilty assists the justice system. It means a trial is not necessary, and facilitates expedient resolution of matters. On this basis, it is contended that the proposed amendments may lead to an additional strain on the criminal jurisdiction, as courts are forced to resolve matters other than by pleas, including at trials, and on appeals.

Conclusion

For these reasons, we submit that the Bill should not be passed.

Refugee Legal:
Defending the rights of refugees

5 December 2018

Defending the rights of refugees.

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[22] Migration Amendment (Strengthening the Character Test) Bill 2018, Explanatory Memorandum, Outline, at [33].
[23] See: *Migration Act 1958* (Cth), s 501(6)(b).

Refugee Legal:

Submission to the Joint Standing Committee on Migration's inquiry into the review processes associated with visa cancellations made on criminal grounds.

Introduction – Refugee Legal

1. Refugee Legal (formerly the Refugee and Immigration Legal Centre) is a specialist community legal centre providing free legal assistance to asylum-seekers and disadvantaged migrants in Australia.[1] Since its inception over 30 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

2. Refugee Legal specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Immigration Advice and Application Assistance Scheme (**IAAAS**) with the Department of Home Affairs (**the Department**) and a member of the peak Department-NGO Dialogue and the Department's Protection Processes Reference Group. Refugee Legal has substantial casework experience and is a regular contributor to the public policy debate on refugee and general migration matters.

3. We welcome the opportunity to make a submission to the Joint Standing Committee on Migration's inquiry into the review processes associated with visa cancellations made on criminal grounds (**the Inquiry**). The focus of our submissions and recommendations reflect our experience and expertise as briefly outlined above.

Outline of submissions

4. On review of the Inquiry's terms of reference we understand its purpose is to review the value of the existing merits review processes undertaken by the Administrative Appeals Tribunal (**AAT**) within the context of the entire character-related visa decision-making framework, including primary decisions by delegates of the Minister for Immigration and Border Protection (**the Minister**) and decisions made personally by the Minister, with a particular focus on identifying any inefficiencies within the AAT process. Noting the above, we submit as follows:

   (a) The consequences of a decision to cancel or refuse a visa can often be grave, and in many cases far outweigh the gravity of any previous criminal penalty. For this reason it is fundamental that the decision-making process afford persons subject to it a fair hearing of their case to mitigate the risk of an unjust decision;
   (b) Within the context of the entire character-related visa decision making framework, the AAT is critical to ensuring in practice that persons access a fair hearing of their case, and more generally, that an unjust decision is not made; and
   (c) The Department's primary character-related visa decision-making processes and the Minister's personal powers operate in some circumstances to not only deny people due process and a fair hearing of their case but also cause them and their families unwarranted hardship and uncertainty, and an unnecessary expense for the Australian taxpayer.

[1] Refugee Legal (Refugee and Immigration Legal Centre) is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. Refugee Legal brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

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Profound consequences

5. The consequences of an adverse character decision affecting a person's visa can often be grave and permanent. In many instances these consequences may far outweigh the adverse impact of any term of imprisonment that person may be serving or have already served. These consequences can include:

    - Where the person has been found to be owed protection in Australia:
        - indefinite detention in a locked immigration detention facility without any prospect of release; or
        - forced return to the country in relation to which they have been found by the Australian government to be at a real risk of serious human rights abuses[2]; and/or
    - Permanent separation from immediate family, including Australian citizen children and spouses;
    - Forced relocation of the person affected as well as their Australian citizen and permanent resident children and spouse, to a country where they may have no cultural or personal connection, including where they may not speak the local language, and where they may struggle to subsist; and
    - A permanent bar on returning to Australia.

6. It is essential that the legal framework governing character based visa decision-making under the *Migration Act 1958* (**the Migration Act**) operates with these extreme consequences in mind. These profound consequences demand those affected be afforded a fair hearing of their case to mitigate the otherwise very real risk of him or her being unjustly subject to these life-changing, and in some instances, life-threatening, consequences.

> ***Case Study 1***
>
> *Ali was resettled as a refugee by UNHCR to Australia as an unaccompanied minor from Iraq over thirty years ago. He grew up in Australia with his adopted Christian family and does not speak Arabic. He is now married with a wife and two infant children who are dependent on him. Ali's permanent visa was mandatorily cancelled following him being convicted of a series of offences involving dealing with stolen goods. He is currently held in immigration detention on Christmas Island. Due to the significant cost his wife and young children who live in Melbourne have not been able to visit him. In the event the cancellation of his visa is not revoked he faces being detained indefinitely on Christmas Island for the foreseeable future, or forced return to Iraq, a country where he would not only be at risk of being targeted and killed but also where he is unfamiliar with the culture and language and would not be able to subsist.*

Fair hearing

7. The Migration Act provides for a number of broad powers under which the Minister and his or her delegates may cancel or refuse a person's visa, or refuse to revoke a cancellation for reasons associated with that person criminal's offending and/or alleged criminal offending. Some of these provisions also provide for visa cancellation and refusal on character grounds in the absence of any criminal conviction by a court.[3] The Migration Act, together with the *Administrative Appeals Act 1975* (**the AAT Act**), also provide for persons subject to adverse character-based decisions under the Migration Act to access merits review by the AAT, in the event the earlier decision had not been made personally

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[2] *Migration Act 1958*, s 197C. See: *BGM16 v Minister for Immigration and Border Protection* [2017] FCAFC 72 per Mortimer and Wigney JJ at [75]; and *DMH16 v Minister for Immigration and Border Protection* [2017] FCA 448 per North ACJ at [26].
[3] *Migration Act 1958*, ss 501(6); 500A; 116(1)(b); 116(1)(c); 116(1)(e); and 116(1)(g).

by the Minister.[4] Where the Minister intervenes and makes a personal decision no merits review is available for that decision.

8. The High Court has held that an essential element of any legal or administrative process in Australia that adversely affects a person's rights or interests is a real and meaningful opportunity for that person to present his or her case, be told the substance of the case to be answered and be given an opportunity of replying to it.[5] Most significantly, unlike at the AAT review stage, for the preceding primary stage at the Department persons are not afforded an oral hearing before the Minister's delegate prior to the decision being made. Instead, this first-instance process demands that all information and correspondence be provided in writing, in English, and the decision is made 'on the papers'. In our longstanding experience, we note that this means that some people affected are prevented from providing any form of meaningful evidence in support of their case. We have observed that the most common vulnerabilities preventing persons to respond in writing in these circumstances include:

    - Illiteracy; and/or
    - Insufficient English language skills; and/or
    - Mental and physical health reasons; and/or
    - Disability and acquired brain injuries; and/or
    - Inability, either through lack of financial capacity or due to the remote location of their detention, to access legal assistance; and/or
    - Inability to comprehend complex legal and evidentiary issues.

9. Critically, this denial of an oral hearing combined with the inability on behalf of many to provide the necessary written information and evidence in support of their case often leads to the delegate's decision being made without any proper understanding of their circumstances. In these instances that decision is liable to being unjust and entirely disproportionate to the consequences that follow.

10. Importantly, the legislation entitles review applicants at the AAT to appear before the Tribunal in-person to give evidence in-person, with the assistance of an interpreter where required. On this occasion the person has the opportunity to explain orally directly to the decision-maker why their visa should be restored and the serious and permanent implications for them and their families if it is not. He or she also has the opportunity to present any witnesses they might have to give evidence in support of his or her case, which might include a spouse or other close family. In this regard, the AAT exists as an essential safety-net for persons who do not have the capacity to meaningfully respond to the Department in sufficient detail and in written English.

11. It is important to note that the AAT's jurisdiction is an adversarial one where the Minister is represented in that process by his or her legal representatives. In this regard, at the hearing not only does the presiding Tribunal member(s) get the opportunity to question the person to explore any concerns they may have, including about their past offending and risk of recidivism, but so does the Minister through their legal representatives (which they generally do through cross-examination).

Case Study 2

Upon arriving in Australia as a teenager Ali was identified as having a learning disability. He dropped out of school not long after and has never been proficient in reading and writing. He was first notified of the cancellation of his visa while he was in a correctional facility in Victoria but not long after he

[4] *Migration Act 1958,* s 500.
[5] *Kioa v West* [1985] HCA 159 CLR 550 per Mason J at 582.

was moved to the immigration detention centre on Christmas Island. Luckily, before the 28 day period expired his wife was able to send a request to the Department requesting revocation of the visa cancellation decision. However, his wife's English is limited and there was not much time so she didn't include any information about Ali's background or her and the children. Subsequently, a delegate made a decision on the papers not to revoke the cancellation. His wife then helped him apply to the AAT where he was invited to appear at a hearing before the Tribunal with his wife. There he and his wife gave evidence about their personal circumstances. His local church pastor also gave evidence in his support. Ali was asked a number of questions by the Tribunal member and cross examined by the Minister's lawyers about the circumstances of his previous offending. On the basis of that oral evidence and his limited criminal history the AAT set aside the delegate's decision and Ali's visa was restored.

The AAT

12. The AAT is mandated under statute to provide a mechanism of review that: is accessible; is fair, just, economical, informal and quick; and is proportionate to the importance and complexity of the matter; and promotes public trust and confidence in the decision-making of the Tribunal.[6] One of the primary policy drivers for the establishment of the AAT was to improve the quality of administrative decision-making by officers of the Australian Government. This aim has been said to be achieved in part due to the availability of review of Government decisions leading to the relevant departments of state to introduce procedures and systems which lead to more acceptable and justifiable decision-making to reduce the incidence of applications for review.[7]

13. The AAT is legally obligated to undertake its review of the primary decision "on the merits and must make the legally correct decision or, where there can be more than one [legally] correct decision, the preferable decision".[8] In this regard, Tribunal members are prohibited by law from making decisions based on their own moral or ideological beliefs or opinions. The law that binds the decision-making of the AAT consists of: primary legislation, as enacted by the Legislature; secondary or delegate legislation as made by the Executive; and case law as made by the Judiciary. AAT decisions are subject to judicial review and if a court finds the Tribunal did not make a decision that conformed with law, it would generally quash the Tribunal decision and remit the matter back to it to reconsider according to law.

14. Reviews of character-based decisions performed by the AAT are subject to strict codes of procedure specified in the Migration Act and the AAT Act. These codes of procedure provide for a fair hearing of a person's matter and accord due process in the making of the decision. As discussed above, unlike for decisions by the Minister and his or her delegates, the AAT has a statutory right to afford the person concerned an oral hearing for their case.

Personal powers of the Minister

15. The Minister has a broad range of non-compellable non-delegable personal decision-making powers to intervene in character related decision-making processes. These intervention powers have the effect of over-ruling any previous decision by his or her delegate or the AAT.[9] These personal powers were inserted in the Migration Act by the

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[6] *Administrative Appeals Tribunal Act 1975*, s 2A.
[7] The Hon. Justice Garry Downes AM, Former President of the Administrative Appeals Tribunal, *Structure, Power and Duties of the Administrative Appeals Tribunal of Australia*, Bangkok, 21 February 2006, at [44].
[8] Administrative Appeals Tribunal (Cth), About the AAT, What We Do, Functions and Powers, Review of Decisions, available at: http://www.aat.gov.au/about-the-aat/what-we-do [accessed 4 May 2018].
[9] *Migration Act 1958*, ss 500A(1); 500A(3); 501(3); 501A(2); 501A(3); 501B(2); 501BA(2); and 501C(4).

Migration Amendment (Character and General Visa Cancellation) Act 2014 that came into effect on 11 December 2014. Importantly, these personal powers of the Minister:

- do not afford the person affected with an oral hearing to explain their case;
- are not required to comply with the rules of natural justice or a statutory code of procedure unlike the AAT and his or her delegates;
- are exempt from any form of review other than judicial review by the Federal Court of Australia (**the Federal Court**);
- are subject to only one precondition on the exercise of the power, the Minister believes that it is in the "national interest" for him or her to intervene; and
- can be made at any time during the process, including subsequent or prior to the delegate and AAT's decisions.

16. As stated above, personal decisions by the Minister are exempt under the legislation from complying with the rules of natural justice. Natural justice is a cornerstone principle in the Australian legal system and a presumed part of all governmental decision-making that affects a person's rights or interests, including their personal liberty, status, livelihood, and proprietary rights.[10] Further, despite judicial authority in the immigration context stating that the Minister is in some instances generally bound by the rules of common law procedural fairness in the making of his or her personal decisions, the due process afforded to persons affected by such decisions is generally of a far more limited form.[11] Additionally, although persons adversely affected by personal decisions by the Minister are entitled to seek judicial review in the Federal Court of Australia, because on judicial review the Court is limited to considering only whether the Minister made a legal error, even where the person affected is successful in court the consequence is the matter is remitted back to the Minister for reconsideration within the same restrictive framework with limited avenues for a fair hearing of his or her case.

17. Finally, it is noted that the only precondition on the Minister exercising his or her personal powers in this regard is that he or she believes it to be in the "national interest" to do so. The High Court has held that this term is one which it is difficult to give a precise content[12], and described it as "a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any object the legislature could have had in view'".[13] In this regard, we submit that the personal powers of the Minister are liable to being exercised by the Minister according to his or her personal or political whim. It is Refugee Legal's experience that "public interest" powers in the migration context have been characterised by arbitrary, inconsistent and unpredictable outcomes. Decisions lack ordinary standards of transparency and accountability under the rule of law, and are routinely devoid of rhyme or reason.

18. In this respect, people who are the subject of personal decisions by the Minister are at a much higher risk of being denied a fair hearing than those eligible to access the AAT. This denial and exposure to a heightened risk of an unjust outcome cannot be more significant given the dire consequences these people face.

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[10] See: *Kioa v West* [1985] HCA 159 CLR 550 per Mason J at 582.
[11] See: *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177.
[12] *Osland v Secretary, Department of Justice* [2008] HCA 37 at [57] per Gleeson CJ, Gummow, Heydon and Kiefel JJ.
[13] *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaurdon JJ; [1989] HCA 61, quoting *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; (1947) 74 CLR 492 at 505. See also *Osland v Secretary, Department of Justice (No 2)* [2010] HCA 24; (2010) 241 CLR 320 at 329-330 [13]- [14] per French CJ, Gummow and Bell JJ.

Uncertainty and inefficiency

Personal decisions by the Minister

19. It is submitted that the nature and presence of the Minister's personal powers to intervene in character-related visa decision making processes can lead to significant uncertainty and inefficiency for the jurisdiction. Due to the Minister's personal powers permitting him or her to intervene at any time, persons subject to character-related visa cancellation processes have no certainty as to:

    - who will make the decision, the Minister, a delegate, or the AAT;
    - what the decision-making process will be, including whether they will be given an oral hearing to explain their case; and
    - how long the process will take.

20. Further, the legislation does not provide a time limit on when the Minister may make this 'over-riding' decision. This could be many years after the person affected had his or her case considered by a delegate, and also after they have had their case heard by the AAT, and after a considerable expense to the Australian taxpayer and any pro bono legal assistance providers has been incurred in respect of those processes. In this regard the Minister's personal powers can in some instances represent a level of unnecessary duplication within the process. Further, this ongoing uncertainty also has a significantly detrimental effect on the person and their family given the dire consequences and unpredictability of the Minister's intervention powers.

> ***Case Study 3***
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> *Upon the cancellation of his visa being revoked Ali was released from immigration detention and transferred back to Melbourne where he resumed living with his wife and children. He also obtained a well-paid job through his friend from church and was feeling good that he was again supporting his wife and children. Early morning, around 9 months after the AAT made its decision, Australian Border Force officers came to his house and informed him that his visa had been cancelled by the Minister and that he was to be re-detained. Following this he was handcuffed and transported to a detention centre in Melbourne before being transferred to another immigration detention centre in regional Western Australia. His wife called a lawyer to ask for assistance and they advised her that Ali could apply to the Federal Court for judicial review of the Minister's decision but that could initially cost around $10,000, and even if they were successful the Minister would only be required to make the decision again so the prospects of having his visa restored were very low.*

21. Adding to this uncertainty is that the only precondition on the Minister exercising his or her personal powers is that he or she believes it to be in the "national interest". The High Court has held that this term cannot be given a confined meaning and 'what is in the national interest is largely a political question'.[14] The High Court has further held "[w]hen we reach the area of ministerial policy giving effect to the general public interest, we enter the political field. In that field a Minister or a Cabinet may determine general policy or the interests of the general public free of procedural constraints.[15] In this regard, the personal powers of the Minister are liable to being exercised by the Minister according to his or her personal or political whim. It is submitted that these decisions lack ordinary standards of transparency and accountability under the rule of law, and are routinely devoid of rhyme or reason.

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[14] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at 46 [40].
[15] *O'Shea* (1987) 163 CLR 378 per Brennan J at 411.

22. It must be noted that as an alternative to intervening, in the event the Minister does not agree with a particular decision of the AAT it is open to him or her to seek judicial review of that decision. This judicial scrutiny further ensures that, where the AAT is found to have made a legal error, the risk of further errors of the same kind are mitigated. This also assists to increase the quality and efficiency of the AAT's decision-making and also the certainty of outcomes for persons affected. Further, in the event the government does not agree with the legal criteria applied by the AAT or manner in which the relevant legislation has been construed by the courts, it may introduce government-sponsored amendments to the primary legislation in Parliament or make delegated legislation where appropriate (such as regulations, instruments and Ministerial Directions). Such processes are entirely consistent with the rule of law and good governance under a constitutional democracy.

23. It is submitted that the Minister's use of his or her personal powers in this context can also lead to a significant burden on the courts. Only the Federal Court has jurisdiction to hear an application for judicial review of a personal decision by the Minister. This differs from applications for judicial review of decisions by the AAT which must first be heard by the lower Federal Circuit Court of Australia (**FCC**). In recent years there has been a significant increase in applications in the Federal Court for judicial review of personal decisions by the Minister. This has lead to further delays for not only these applicants but also other litigants at that Federal appellant level.

Extended periods in immigration detention

24. It is submitted that the current character-related visa cancellation processes undertaken by delegates of the Minister are leading to unnecessary and extended periods of immigration detention.

25. Unlike for the AAT which is legally bound to finalise its review of a character-based visa decision within 84 days[16], there are no such time limits applicable decisions made personally by the Minister or by his or her delegates. It is our experience that the Department often takes a significant period of time to make the primary decision, particularly for cases concerning requests to revoke a mandatory cancellation of a visa.[17] In these circumstances the visa is usually cancelled while the person is in criminal detention serving a term of imprisonment, at which time the person is given 28 days to make a formal request to the Department for the decision to be revoked. However, it is our observation that the subsequent decision by the Department does not generally occur before the person's prison sentence ends. Following this, when they finally due for release from criminal detention because they remain an unlawful non-citizen they are transferred to an immigration detention facility. We further observe that it is also often a considerable time after this when the Department finally makes the decision whether to revoke or not revoke the cancellation decision. This can be sometimes years after the ground for mandatory cancellation arose, and a significant time after the person lodged their formal request with the Department for revocation.

26. Information published by the Australian government's National Commission of Audit in 2014 estimated the annual cost of detaining one person in immigration detention was $239,000.[18]

27. It is submitted that in these instances this extended and unnecessary delay not only leads to a significant and unnecessary financial burden on the Australian taxpayer but can lead

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[16] *Migration Act 1958*, Part 9, s 500(6L).
[17] under Section 501CA of the *Migration Act 1958*.
[18] National Commission of Audit, *Towards Responsible Government, The Report of the National Commission of Audit, Phase One*, February 2014, available at: http://www.ncoa.gov.au/report/docs/phase_one_report.pdf [accessed 10 May 2018].

to unnecessary extended periods of immigration detention and hardship lead to untold hardship for those who ultimately have their visas restored, and their families.

Case Study 4

In 2014, Andrew, a citizen of Canada, was convicted of offences related to cannabis cultivation and sentenced to 6 months imprisonment with a 6 months suspended sentence. Shortly before this his fiancée, Lisa, who he had been living with in Melbourne, had discovered she was pregnant. However, her due date was not until a month after Andrew's release date and despite everything that had happened they remained very committed to each other and were excited about starting a family. One month before Andrew was due to be released he received a letter from the Department informing him that his visa had been mandatory cancelled and that he had 28 days in which to request that this decision be revoked. Andrew contacted his criminal lawyer who referred him to a specialist immigration lawyer. They assisted him to quickly prepare a comprehensive written response as well as medical evidence about the pregnancy. As a surprise to Andrew on the day of his release from prison he met with Australian Border Force officials who transferred him to Villawood Immigration Detention Centre in Sydney. Andrew and his immigration lawyer attempted on a number of occasions to contact the Department to ascertain the status of his request for revocation, but were each time told that his case would be considered in due course. Subsequently, Lisa gave birth to their child in his absence and there were medical complications for her during the birth and she was hospitalised for a number of weeks. Subsequently, around 10 months after Andrew was transferred to Villawood a delegate of the Minister made a decision to revoke the cancellation of his visa.

Access to justice

28. As we have noted above, in our experience the people who are affected by character-based visa decisions are amongst the most vulnerable, particularly given they often lack capacity to advocate for themselves or access appropriate legal assistance. We contend that the risk of an unjust outcome on this basis is further heightened by: the recognised significant complexity of the legal and policy frameworks governing character-based decisions; and the strict non-extendable deadlines imposed by the legislation where a failure to comply can lead to a negative decision without any further opportunity (including a bar on accessing to merits review by the AAT).

29. Persons undergoing these character-related decision-making processes are not eligible for government-funded assistance. For this reason, and due to the particular vulnerabilities affecting many of them, a significant number are forced to try to advocate for themselves and this can lead to final decisions being made without the decision-maker being made aware of essential information that might have altered the course of the decision. Additionally, without representation these people are often inappropriately forced to rely on other immigration detainees and prisoners to assist them to prepare written information as well as on staff at the detention facility to send and receive essential and time critical written correspondence on their behalf. We are aware of instances where these staff have failed to send correspondence on time or notify the person concerned, leading to the case being dismissed without any further opportunity. In some instances, this can mean not only a negative decision but a bar on accessing review by the AAT. In these circumstances there is no other option but a lengthy judicial review process that for many would have limited prospects of success.

30. This absence of legal assistance and inappropriate reliance on staff in immigration and correctional facilities leads to further unnecessary expense borne by the taxpayer as cases that would otherwise be successful are delayed further and those affected are subjected to further periods in immigration detention. More importantly these significant barriers to justice can ultimately lead to unjust outcomes and exposure of those affected,

including Australian citizen and permanent resident spouses and children, to those serious consequences detailed previously.

Criminal justice system

31. We observe that it is not uncommon in criminal matters for courts to order that criminal sentences incorporate a parole period or a community corrections/supervision order post completion of the prison sentence. However, in the circumstances of a person affected by a character-based visa cancellation or refusal, when that person is released from prison he or she is detained an immigration detention facility. In this regard, the relevant period of court ordered supervision in the community cannot be complied with. We are also aware of instances where a Court had found that a community based corrections order was the more appropriate penalty on conviction over a custodial sentence but was reluctantly forced to order a term of imprisonment because the person did not hold a visa and would not be eligible to satisfy the requirements of the community corrections order.

32. We submit that these inconsistencies between the character-related visa cancellation framework and the criminal justice system is entirely inappropriate and needs to be addressed.

Conclusion

33. In reference to the Inquiry's terms of reference we conclude as follows:

- The consequences of character-related visa decisions can be profound and in many cases far outweigh the gravity of any previous criminal penalty. For this reason, it is absolutely fundamental that such decision-making processes afford persons subject to it a fair hearing of their case to mitigate the risk of an unjust decision;
- The AAT is absolutely critical to ensuring that persons access a fair hearing of their case, and more generally, that an unjust decision does not eventuate;
- The particular vulnerabilities of those people affected further demand that these decision-making processes afford the participants a fair hearing of their case, and in particular an oral hearing before the decision-maker who ultimately decides their fate; and
- The Department's primary decision-making processes and the Minister's personal powers operate in some circumstances to not only deny people due process and a fair hearing of their case but also to cause them and their families unwarranted hardship and uncertainty, and also unnecessary financial burden on the Australian taxpayer.