

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

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.

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

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 more⁴; 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 imprisonment⁸, 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, Division 2, 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 abuses¹¹; 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 grounds¹², 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 rehabilitation¹⁴, 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. Refugee 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 2018¹⁸, 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 offence²², 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

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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).