Submission to the Legal and Constitutional Affairs Committee

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

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I am an academic with a long standing interest in immigration and refugee law who has been making submissions to this and other federal parliamentary committees since 1985. In 1999-2000 I assisted then Senators Brian Harradine and Andrew Bartlett in their work as Committee members on the major review undertaken into Australia's refugee and humanitarian program.[1] Author of many books,[2] articles and reports[3] on immigration and refugee law, I am an accredited specialist in immigration law who has been selected by my (practitioner) peers for inclusion in Best Lawyers/ Australia.

I welcome the opportunity to make a submission on the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011which in my view is disproportionate in its response; motivated by popularist politics; and regressive. It is legislation that if enacted and applied could put Australia in breach of a raft of international obligations, including non-derogable obligations assumed as parties to the UN Convention and Protocol relating to the Status of Refugees[4] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[5] The most disappointing aspect of the Bill is that it speaks to a government and system that would mete increasingly harsh punishments on individuals who find themselves in situations of great vulnerability and frustration. Both the government and the Opposition should instead be looking at the root causes of the problems that it is seeking to redress: bad policy exacerbated by an addiction to mandatory detention.

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1 See Senate Legal and Constitutional Affairs Committee *A Sanctuary Under Review: An examination of Australia's Refugee and Humanitarian Programs* (Canberra: 2000). *See* Mary Crock, "A Sanctuary Under Review: Where to From Here for Australia's Refugee and Humanitarian Processes" (2000) 23 University of NSW Law Journal 246-288.

2 See, most recently, Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Sydney: Federation Press, 2011).

3 See Mary Crock, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection: A Study of Laws, Policy and Practices in Australia* (Sydney: Themis Press, 2006); and Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection: A Comparative Study of Laws, Policy and Practices in Australia, the United Kingdom and the United States of America* (Sydney: Themis Press, 2007).

4 The Refugees Convention was signed at Geneva on 28 July 1951. (See Aust TS 1954 No. 5, 189 UNTS No. 2545, 137). The Protocol was signed on 31 January 1967, and ratified on I3 December 1973. (See, Aust TS 1973 No. 37. 606 UNTS No 8791. 267). (The Refugee Convention).

5 See ATS 1989 No 21. Australia signed this treaty on 10 December 1985 and it came into force on 26 June 1987 ("Torture Convention").

1 The Effect of the Bill

The proposed amendments to ss 500A and 501 of the *Migration Act* 1958 (Cth) (the Act) would deem of 'bad character' all non-citizens convicted of any offence whatsoever committed:

(i) while in immigration detention;
(ii) during an escape from immigration detention; or
(iii) while absent without leave (having escaped) from a detention centre.

The amendments also make it clear that persons convicted with the offence of escaping from immigration detention under s 197A would similarly be deemed to be of bad character. The Bill would also increase the penalties for the offence of escaping from immigration detention and weapons related offences committed while in detention from 3 to 5 years.

In practical terms, persons convicted of these offences would fail the character test in s 501(6). This has three consequences. First, individuals deemed to be of bad character are liable to removal from Australia under s 501 of the Act. Second, persons deemed to be of bad character are banned from making further applications for visas other than a protection visa.[6] Such persons may also be released from detention on a subcl 070 Removal Pending visa.[7] Third, any person so excluded on grounds of bad character would thereafter be banned in perpetuity from re-entering Australia.[8]

The available information suggests that the amendments will be accompanied by changes to the *Migration Regulations* 1994 that will provide for the grant of temporary protection visas to persons who meet the Refugee Convention definition of refugee and who cannot be removed from Australia in consequence. This part of the package is not before the Committee, however, leaving it very unclear what the precise consequences of the legislation will be.

One effect of the legislation that is clear is that detainees convicted of any offence in detention would become liable for removal – the Act providing in s 198 for the automatic removal of persons whose visas have been cancelled. In this respect the amendments would place an onus on the individual to beg mercy of the incumbent Minister for Immigration (so as to prevent the operation of s 198: see s 198(2A)). In the case of refugees, it would place an extra burden on the refugee to plead against removal where international law creates a right *not* to be removed.

2 Why the Bill is objectionable

a The Bill would permit the denial of protection to refugees convicted of trivial offences

The most objectionable aspect of the proposed legislation is that, on its face, the amendments would empower the Minister for Immigration to cancel or refuse a protection visa to a non-citizen who has been convicted of a potentially trivial offence, provided the offence was committed while in immigration detention. The Refugee Convention requires state parties to commit to the principle of non-refoulement or non-return of persons who meet the definition of refugee in all but limited circumstances. Countries may refuse protection to refugees who have either committed specified crimes before entry (Art 1F) or who have been convicted of 'particularly serious crimes' after entry such that they represent a threat to security or public

6 But see s 48A of the Act which prevents a second application for a protection visa.
7 See *Migration Regulations* 1994, reg 2.12AA; and Sch 2, Subcl 070.
8 See *Migration Regulations* 1994, Sch5, 5001.

order (Art 32(1) and 33(2)). The Convention permits countries to prioritise the public interest of their nationals, but the emphasis is on exempting protection obligations in respect of individuals whose criminal behaviour threaten national security or public order.[9] If Australia wishes to comply with the spirit of its obligations under the Convention, it should not make laws that would permit its officials to deny protection to refugees on trivial grounds. **These laws would allow for the expulsion and refoulement of refugees who have neither committed a particularly serious crime nor posed a threat of any kind to Australia's national security**.

It is no answer to state that Ministers would not (in practice) apply the law on its face in this manner. If the Parliament is to take seriously its obligations under the Refugee Convention, it should not pass laws that would permit Ministers to act in ways that are in breach of Australia's international obligations. As many will attest, the amendments are patently not needed if their purpose is to protect the Australian community. Sections 500A and 501 are already draconian in their effect, making Australia's laws considerably tougher than those of comparator nations such as the United Kingdom. The Act already classifies offences punishable by 12 months in prison as particularly serious crimes.[10] This compares with equivalent regulations in the United Kingdom specifying offences punishable by two years in gaol – and a requirement that an individual pose a threat or danger to the community.[11]

b The Bill would operate in a discriminatory manner

Because these laws would only apply to refugees who have been detained – and not to refugees processed in the community (who could equally commit a range of petty offences) – the argument could be made that this Bill operates to discriminate against refugees by reason of their manner of entry into Australia. This is because Australia only detains asylum seekers who arrive without a visa. Those who enter on a visa and seek to 'change their status' on refugee grounds are allowed to wait out any processing time in the community.

Article 31(1) of the Refugee Convention prohibits state parties from imposing penalties, on account of their illegal entry or presence, on refugees in certain circumstances. Australia's treatment of detained asylum seekers in the manner proposed in the Bill *would* arguably be punitive in nature and in breach of Art 31. In the past, the government has argued that Art 31(1) applies only to frontline refugee-receiving states. Hence, the refugees to whom the no-penalty provisions apply are those "coming directly from a territory where their life or freedom was threatened in the sense of Article 1". The argument is that the boat people intercepted en route to Australia do not meet this description. The official Australian line is that the arrivals represent

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9 See UNHCR Executive Committee Conclusion N0 7 (XXVIII), 1977 On Expulsion (1977); UNHCR *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (2003), [38]-[40]; Guy Goodwin-Gill and Jane McAdam *The Refugee in International Law* (3rd Ed 2007), 177; and Mary Crock and Laurie Berg *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (2011), 423ff.

10 Offences committed in the detention centres already attract penalties of 3 years in prison.

11 See *Nationality, Immigration and Asylum Act 2002)Specification of Particularly Serious Crimes Order,* Discussed in *EN (Serbia) v Sec State for the Home Department; Sec State for the Home Department c KC (South Africa)* [2009] EWCA Civ 630.

"secondary refugee flows". Relative to the way other countries treat the issue of unauthorised arrivals, this is an interpretation that brings no credit to Australia.

c The Bill would permit the denial of protection in breach of other human rights instruments

Arguments about the legality of the proposed amendments are not limited to fine interpretations of Art 31 of the Refugee Convention. Were the provisions to be used to send people back to face death, torture, injury and or gross abuse of their human rights, Australia's involvement arguably places it in breach not only of Art 33 of the Refugee Convention, but also of a range of international human rights instruments. These include the Torture Convention[12]; the International Covenant on Civil and Political Rights,[13] and – given the high number of children amongst the asylum seekers intercepted - the Convention on the Rights of the Child.[14] Returning persons with disabilities to situations of emergency and torture would certainly violate Articles 11 and 16 of the UN Convention on the Rights of Persons with Disabilities. Again, it is no answer to say that individual Ministers would intervene to make sure these obligations were met. Increasingly, Labor Ministers are showing themselves to be extremely reluctant to countermand decisions made by their officials, making the discretional safety nets extremely unreliable.

d The Bill would impose unreasonable penalties on non-refugees

Although the application of this legislation to refugees is bound to attract most comment, the sting in the proposed legislation is also likely to be felt by immigration detainees who have not made a refugee claim. The alteration of the rules governing skilled migration and foreign students has already begun to see many more (former) students incarcerated in immigration detention centres. The impact of these amendments on individuals who find themselves in a place and time of extreme vulnerability is unconscionable. It is a measure that could be very cruel in its operation insofar as it might result in permanent exile.

e The Bill fails to acknowledge the real source of the problem

Without condoning the violent behaviours that have been exhibited in Australia's detention centres, another objectionable feature of this Bill is that it does nothing to address the root causes of the unrest and violence against which it is targeted. Over the last three years, government policy in the area of irregular maritime arrivals (IMAs) has been dramatically misconceived –

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12 See, in particular, the non-refoulement obligation in Art 3.

13 Hereafter "ICCPR". See UN Doc A/6316 (1966), 999 UNTS 171, 16 December 1966. Article 6 of that instrument enshrines the right to life, and Article 7 the right not to be subjected to cruel, inhuman or degrading treatment or punishment. Article 10(1) of the ICCPR requires that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

14 The Convention on the Rights of the Child was adopted by the UN General Assembly in 1989. See UN Doc A/RES/44/25 (1989). Note that Art 22 of this instrument makes no distinction between children asylum seekers and children who have been determined formally to meet the UN definition of refugee. For an account of the rights enshrined in this instrument relevant to asylum seeker children, see Mary Crock, "You Have to be Stronger than Razor Wire: Legal Issues Relating to the Detention of Refugees and Asylum Seekers" (2002) 10 A J Admin L 33, at 37-38; and Mary Crock, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection: A Study of Laws, Policy and Practices in Australia* (Sydney: Themis Press, 2006) 256.

based always on a blind faith in various iterations of deterrent theory. It has been reactive to immediate pressures generated through saturation media and Opposition hype, with little space made for sensible and measured policy responses. Processing freezes of 3 and 6 months were always going to cause severe processing backlogs. This in turn generated problems with overcrowding and inconsistent decisional outcomes: the process became opaque to detainees who became increasingly desperate with the passage of time.

The failure to completely dismantle the Pacific Strategy in 2008 was fatal. As soon as it became known that IMAs recognised as refugees would be resettled in Australia, Christmas Island became a magnet to people smugglers. Made accessible to the media (in the new policy of openness), the Island also became a magnifying glass, as journalists were able to observe and comment on the pressures building inside the limited capacities of the detention facilities on the Island. The situation has been exacerbated by the separation and isolation of men and their incarceration in a proliferation of remote detention facilities around Australia. The continued adherence to the mandatory detention model has inevitably resulted in the system spiralling out of control – as was the case under the conservative governance of Prime Minister John Howard. The death by suicide (and/or one suspected homicide) of five young persons in 8 months is testament to the cruelty and failure of the policy.

The Bill is regressive insofar as it fails to address the root causes of the unrest in the detention centres. As such, it is likely to be ineffectual in improving behaviours in the detention centres.

3 What the government and parliament should be doing

The *Migration Act* 1958 contains more than enough provisions to punish individuals who commit serious crimes or who pose a genuine threat to the community. What it lacks is clear guidance to the administration to ensure that non-citizens are treated with expedition, dignity and respect in both the asylum and enforcement processes. Rather than heap penalties on damaged and stressed individuals who are being pushed into extreme situations, attention should be given to ensuring that individuals are detained for good reason (only) and for the shortest possible periods of time. The amendments first proposed in 2008 would have gone some way towards improvement, but the measures appear to have been abandoned during the current term of Labor governance.

Specific areas where pressure could be taken off the detention system would be in making provision for the release of persons found to be refugees, pending completion of full character checks. More use could also be made of the Removal Pending visa for stateless persons who cannot be removed from Australia. Efforts to move families with children into community detention should be redoubled: delays in this occurring have been unconscionable.

Of course, the best way to take pressures off the detention centres would be to abandon offshore processing altogether; and to place IMAs in situations that are proximate to decision makers and support systems. This suggestion is such an obvious one, but sadly, Australia's politicians (other than the Greens) seem to be fixated with the (fallacious idea) that the country would be flooded with illegal migrants if these changes were to be made.

Given the modest size of the irregular migration problem facing Australia in world terms, parliament can and should do a lot better than what is proposed in this Bill.