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Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

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Dear Committee,

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

We welcome the opportunity to provide a submission on the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011.

Introduction

The Bill is a response to recent disturbances in detention facilities on Christmas Island and at Villawood which resulted in damage to Commonwealth property. Its stated aim is to strengthen the government's capacity to deny a visa on character grounds to people who have committed an offence while in immigration detention, during an escape from immigration detention, or during a period of escape from immigration detention. The Bill is intended to

provide a more significant disincentive for people in immigration detention from engaging in violent and disruptive behaviour, and will deal appropriately with those who, by engaging in criminal activity in immigration detention, demonstrate a fundamental disrespect for Australian laws, standards and authorities.¹

At the outset, it should be noted that the existing character test regime under sections 500A and 501 of the Migration Act 1958 (Cth) already breaches Australia's obligations under international law. The scope and nature of matters that may be taken into account in refusing to grant a visa under the Migration Act exceed the grounds permitted under

¹ Explanatory Memorandum to the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011.

article 1F of the Refugee Convention. Similarly, the considerations permitted in cancelling an existing visa go beyond the limited exception to the principle of *non-refoulement* in article 33(2) of the Refugee Convention.

Under section 501 as it currently stands, refusal or cancellation is at the discretion of the Minister, subject to the applicant or visa-holder failing a character test set out in sub-section (6). A person will automatically fail the test if he or she has a ‘substantial criminal record’, defined in sub-section (7). This includes a prison term of at least 12 months. If passed, the Bill will expand the triggers for automatic failure of the character test to include, in part, conviction of ‘an offence’ committed while in immigration detention, or during escape from immigration detention.

The Bill should be rejected because:

- it is contrary to Australia’s obligations under international refugee and human rights law;
- it is unnecessary, since domestic criminal law already provides appropriate redress for damage caused in detention facilities or the community;
- it could have exceptionally damaging and life-threatening consequences for individuals to whom it is applied.

Granting a visa

The Refugee Convention provides exhaustive grounds on which refugee status can be denied. In terms of character-related grounds, article 1F provides that:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime *outside the country of refuge* prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations (emphasis added).

These are the *only* grounds on which a person who otherwise meets the refugee definition in article 1A(2) can be denied protection under the Refugee Convention.² They are deliberately very narrowly circumscribed because the consequences of exclusion are extremely serious.

Imposing additional criteria, as the character test in section 501 of the Migration Act permits, is fundamentally at odds with Australia’s obligations under the Refugee Convention. The present Bill will create further grounds which will continue and extend this breach. This signals a clear disregard for the humanitarian purpose of the Refugee Convention which recognizes that refugee status is not something that should be denied for any petty criminal act, but only for the most extreme and serious crimes.

² International human rights law now precludes removal – see below.

Cancelling a visa

In addition, article 33(2) of the Refugee Convention contains an exception to the prohibition on *refoulement*. It provides that the principle of *non-refoulement* does not extend to

a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

This is a very high threshold, again because of the very serious consequences of cancelling a refugee's visa (since both article 1F and article 33(2) apply to people who are at risk of persecution if removed).

Article 33(2) is *not* intended to operate as an exclusion clause. In other words, it is not meant to operate at the point of refugee status determination (ie in respect of a grant of a visa), but rather is intended to apply if a refugee subsequently commits an offence in the country of refuge. Thus, this provision is relevant to cancellation decisions, but should not play any part in decisions about granting a visa.

Importantly, a key element of this provision is that the refugee is a *danger* to the community because of his or her criminal activity or on national security grounds. Danger, in this context, is vastly different from the notion of 'bad character' in the Bill. As Lauterpacht and Bethlehem explain, the assessment is about prospective risk (not past conduct), supported by evidence.³ Given the fundamental character of the prohibition of *refoulement*, and the humanitarian character of the 1951 Convention more generally, the threshold for exceptions must be high. Accordingly, the danger to the security of the country contemplated by article 33(2) 'must therefore be taken to be very serious danger rather than danger of some lesser order.'⁴ This is supported by article 1F, which only excludes from an initial grant of refugee status people who have committed acts of a particularly grave nature. Since the threshold of prospective danger in article 33(2) is higher than that in article 1F, 'it would hardly be consistent with the scheme of the Convention more generally to read the term "danger" in Article 33(2) as referring to anything less than very serious danger.'⁵

³ Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003) 135. As the Joint Standing Committee on Migration has stated, 'risk assessments for section 501 detainees should focus on evidence, such as a person's recent pattern of behaviour, rather than suspicion or discrimination based on a prior criminal record': Joint Standing Committee on Migration, *Immigration Detention in Australia: A New Beginning: First Report of the Inquiry into Immigration Detention in Australia* (December 2008) 53, www.aph.gov.au/house/committee/mig/detention/report/fullreport.pdf.

⁴ Lauterpacht and Bethlehem, *op cit*, 136.

⁵ *Ibid.* See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* UN Doc HCR/IP/4/Eng/Rev.1 (2nd edn, Geneva, 1992) para 155ff.

This was underscored by the Federal Court of Australia in *A v Minister for Immigration and Multicultural Affairs*.⁶ There, Burchett and Lee JJ cautioned that in any article 33(2) consideration, it was essential to consider *all* the circumstances of the case, including the nature of the crime, the circumstances of the individual, and the prospective danger he or she was considered to pose. Since the principle of *non-refoulement* is ‘concerned with some of the most precious of human rights, including life itself’,⁷ it would be illogical if the mere fact of conviction could outweigh an assessment of the danger posed by the individual to the host State. This is because an approach in terms of the penalty imposed alone will likely be arbitrary.

Subsequent legislative amendments to the Migration Act rejected this approach. Section 91U defines a ‘particularly serious crime’ for the purposes of article 33(2) by virtue of length of sentence. The amendments to the character test proposed by the Bill go significantly further, since ‘it is intended by the Government to ensure that *any* conviction for an offence of the kind covered by this Bill results in the person *automatically* failing to pass the character test.’⁸

This is fundamentally at odds with what international law requires: an assessment of all the circumstances of the case, including balancing the actions of the individual against the risk to the State. This necessarily requires an in-depth assessment of the background to the commission of the offence, the individual’s behaviour, and the actual terms of any sentence imposed,⁹ since ‘what is at issue here is action by the State in manifest disregard of what is recognized as serious danger (persecution) to the life or liberty of a refugee.’¹⁰

International human rights law

Although the Refugee Convention contains limited exceptions to refugee status and *non-refoulement*, international human rights law contains *no* such exceptions. Under international human rights law, the principle of *non-refoulement* is absolute. It precludes removal to arbitrary deprivation of life, the death penalty, torture, or cruel, inhuman or degrading treatment or punishment. This means that there are now very few, if any, circumstances in which a refugee can lawfully be removed from Australia (even if article 1F or article 33(2) applies). Cancelling or refusing to grant a visa on character grounds to a person who otherwise meets the refugee definition in article 1A(2) of the Convention, or who has a complementary protection need, will breach international law if the result is removal to a place of risk.

Criminal law

Domestic criminal law is sufficient to respond to any offences committed by a person while in immigration detention, or during escape from immigration detention.¹¹ Denial

⁶ [1999] FCA 227.

⁷ *Ibid*, para 5.

⁸ Explanatory Memorandum, *op cit* (emphasis added).

⁹ See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, Oxford, 2007) 239–40; Lauterpacht and Bethlehem, *op cit*, 128ff, esp 133–34.

¹⁰ Goodwin-Gill and McAdam, *op cit*, 240.

¹¹ For examples, see Savitri Taylor, ‘Exclusion from Protection of Persons of ‘Bad Character’: Is Australia Fulfilling its Treaty-Based Non-Refoulement Obligations?’ (2002) 8 Australian Journal of Human Rights 83.

of a protection visa to a person whose life or fundamental freedom is at risk if removed is *not* an appropriate or lawful response, and is fundamentally at odds with the very purpose of the international refugee protection regime. Indeed, the government would better achieve the Bill's objectives by taking heed of the numerous recommendations to abolish mandatory detention, the negative psychological impacts of which have been documented at length. While this submission does not condone rioting or property damage in detention, it argues that the actions of detainees must be understood in context. To divorce the criminal behaviour the Bill seeks to redress from the context in which it is occurring is to completely misunderstand and mischaracterize it. The general impact of mandatory detention on physical and mental health and well-being, combined with delays in processing protection claims, the lack of implementation of the New Directions in Detention approach, and delays with security assessments, may lead to levels of distress, frustration and feelings of powerlessness that push people over the edge.¹²

As the Uniting Church in Australia has observed:

it is clear that most asylum seekers are highly traumatised on arrival in Australia. To then mandatorily detain them, could be considered as placing people in situations which are unbearable. Subject to such systemic trauma, asylum seekers may take desperate action within the detention centre. Whilst the Uniting Church does not condone violence, it is possible to see that situations may easily escalate because of the detention itself, the lack of immediate appropriate translation services and cultural awareness.¹³

Conclusion

This submission argues strongly that the Bill should be rejected for the reasons outlined above. Not only is it inconsistent with Australia's obligations under international refugee and human rights law, but it targets a symptom and not a primary cause of the problem: Australia's dysfunctional system of mandatory detention and processing. Viewing riots in detention as delinquent behaviour is to miss the point entirely. Rather, such actions signal a dire need for assistance and reform, not simply retribution.

Yours sincerely,

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¹² Australian Human Rights Commission, *Immigration Detention at Villawood: Summary of Observations from Visit to Immigration Detention Facilities at Villawood* (2011) http://www.hreoc.gov.au/human_rights/immigration/idc2011_villawood.html.

¹³ Uniting Church in Australia, *Submission No 7 to Senate Inquiry into Migration Legislation Amendment Bill (No 6) 2001* (14 September 2001) 3, cited in Taylor, *op cit*.