Law Council
OF AUSTRALIA

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

Senate Committee on Legal and Constitutional Affairs

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Introduction

1. The Law Council of Australia is pleased to provide the following comments on the provisions of the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* ('the Bill') to the Senate Committee on Legal and Constitutional Affairs.

2. This Bill was introduced by the Minister for Immigration and Citizenship on 11 May 2011. It seeks to amend the *Migration Act 1958* (Cth) ('the Migration Act') by expanding the scope for visa applications to be refused or for visas to be cancelled where a person has been convicted of a criminal offence while in immigration detention.

3. The Explanatory Memorandum provides that the changes proposed in the Bill are in part a response:

> *to the criminal behaviour[1] during the recent disturbances at the Christmas Island and Villawood Immigration Detention Centres, which caused substantial damage to Commonwealth property. It is intended that these strengthened powers will also 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.*[2]

4. If enacted, the Bill will amend the Migration Act to:

   (a) provide in section 501 that the Minister may refuse to grant, or to cancel, a visa where a person does not pass the character test because the person has been convicted of any offence committed while they are in immigration detention, or for any offence committed during or following a person's escape from detention;

   (b) provide in section 500A that the Minister may refuse to grant a temporary safe haven visa, or may cancel a temporary safe haven visa, where a person has been convicted of any offence committed while they are in immigration detention, or for any offence committed during or following a person's escape from detention; and

   (c) increase the maximum penalty in section 197B for the manufacture, possession, use or distribution of weapons by immigration detainees from three to five years imprisonment.

[1] The criminal behaviour referred to in the Explanatory Memorandum includes activities undertaken by groups of detainees in Silverwater Correction Centre in western Sydney on 20 April 2011 where a number of buildings within the centre were destroyed by fire. No persons were injured. Some of the detainees involved in these activities were charged with criminal offences under the Commonwealth Crimes Act and the Crimes Act of New South Wales. It has been reported that the detainees who have been charged will reappear in court on 15 June 2011. See for example, 'Bowen threatens new laws for asylum rioters' ABC Online, 26 April 2011 available at http://www.abc.net.au/news/stories/2011/04/26/3200251.htm; 'Asylum Seekers in Legal Puzzle after Riot", The Australian, 26 April 2011 available at http://www.theaustralian.com.au/news/nation/asylum-seekers-legal-puzzle-after-riot/story-e6frg6nf-1226050756219; 'Confusion in Villawood riot case', Sydney Morning Herald, 6 May 2011 available at http://www.smh.com.au/nsw/confusion-in-villawood-riot-case-20110505-1eaao.html#ixzz1NQOY4ZCM.

[2] *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* Explanatory Memorandum p. 1

5. As will be outlined in further detail below, the Law Council has a number of concerns with the Bill and strongly recommends that the Bill not be passed. These concerns include:

- general concerns with the content and operation of the Minster's powers under section 501 of the Migration Act, including whether the existing test and amendments comply with Australia's international human rights obligations;
- the lack of demonstrated necessity for the amendments which seek to extend the Minister's existing broad discretion to cancel a visa or refuse a visa application on character grounds, by ensuring that a person automatically fails the character test if he or she is convicted of any offence while in immigration detention, regardless of the seriousness of that offence;
- the fact that the amendments only concern activities in immigration detention and the therefore are likely to most affect offshore entry persons;
- the retrospective operation of the key amendments in the Bill which seeks to apply to decisions being made about visa applications from or after 26 April 2011, even if the relevant criminal conduct or conviction occurred prior to this date; and
- the lack of demonstrated necessity for increasing the maximum penalty for the offence in section 197B of the Migration Act.

The Character Test in section 501 of the Migration Act

Existing Character Test in section 501

6. In order to appreciate the impact of the proposed amendments and to determine whether they are a necessary, proportionate and effective response to addressing the policy objective cited in the Explanatory Memorandum, it is useful to understand the scope of the existing character test in section 501 of the Migration Act.

Content of the Character Test

7. Under the Migration Act, all non-citizens (regardless of mode of arrival) must be assessed against the character requirement contained in section 501. Under this provision, a visa may be refused or a non-citizen's visa may be cancelled if they do not satisfy the Minister for Immigration and Citizenship (the Minister) or the Minister's delegate that they pass the 'character test'.

8. Subsection 501(1) provides that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

9. A person's visa may be cancelled under subsection 501(2) of the Migration Act if:

- the Minister reasonably suspects that the person does not pass the character test and
- the person does not satisfy the Minister that they pass the character test.

10. This power can be exercised by the Minister personally, or more commonly by certain Department of Immigration and Citizenship (DIAC) officers.

11. The Minister also has the power to refuse a visa application or cancel a person's visa under subsection 501(3) of the Migration Act if:

- the Minister reasonably suspects that the person does not pass the character test and
- the Minister is satisfied that the cancellation is in the national interest.

12. The power under subsection 501(3) can only be exercised by the Minister personally. When exercising this power the Minister is not bound to observe the rules of natural justice or the code of procedure set out in Subdivision AB of Division 3 of Part 2 of the Migration Act.[3]

13. Subsection 501(6) of the Migration Act provides that a person does not pass the character test if the person:

- has a 'substantial criminal record', which is defined in subsection 501(7) as a criminal record where the person has been
  - sentenced to death or to imprisonment for life;
  - sentenced to imprisonment for 12 months or more;
  - sentenced to two or more terms of imprisonment where the total of these terms is two years or more;
  - acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result they have been detained in a facility or institution;
- has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct;
- is deemed to be not of good character, having regard to either the person's past and present criminal conduct and/or the person's past and present general conduct; or
- there is a significant risk that, if the person were allowed to enter or remain in Australia, he or she 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

[3] *Migration Act 1958* (Cth) s501(5).

activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

14. Further guidance on the interpretation and application of these grounds is contained in Ministerial Direction No. 41, which commenced on 15 June 2009.[4] Ministerial Direction No. 41 applies to visa refusal and cancellation decisions made by DIAC officers under section 501. When making decisions personally, the Minister may refer to the Direction, but is not obliged to follow it.

Applying the Character Test

15. If the Minister – or a DIAC officer acting as the Minister's delegate – determines that a person does not pass the section 501 character test, the person's visa application is not automatically refused or their visa is not automatically cancelled. The Minister or the DIAC officer must first decide whether to exercise their discretion to refuse the application or cancel the person's visa.

16. If a DIAC officer is making the decision, he or she is required to consider a number of factors, as set out in Ministerial Direction No. 41. For example, Ministerial Direction No. 41 provides that, in deciding whether to refuse a visa application or cancel a person's visa under section 501, the following primary considerations must be taken into account:[5]

- the protection of the Australian community from serious criminal or other harmful conduct, particularly crimes involving violence;[6]
- whether the person was a minor when they began living in Australia;[7]
- the length of time the person has been ordinarily resident in Australia prior to engaging in criminal activity or other relevant conduct;[8] and
- relevant international obligations, such as the *non-refoulement* obligations contained in the Convention and the Protocol Relating to the Status of Refugees, the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

17. Ministerial Direction No. 41 sets out a range of other considerations that may be relevant and, if so, must be taken into account in determining whether to refuse a visa application or cancel a person's visa under section 501.[9] Such considerations include the person's age;[10] health[11] and whether they have any links to the country to which they would be removed.[12]

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[4] *Direction [no. 41] - Visa refusal and cancellation under s501*, given under section 499 of the *Migration Act 1958* (Cth) and signed on 3 June 2009. At http://www.immi.gov.au/media/fact-sheets/79-ministerial-direction-41.pdf (viewed 19 May 2011).
[5] Ministerial Direction No. 41,, para 10(1).
[6] This includes assessing the seriousness and nature of the relevant conduct, and the risk that the conduct may be repeated, see Ministerial Direction No. 41,, paras 10.1, 10.1.1 and 10.1.2.
[7] Ministerial Direction No. 41, para 10.2.
[8] Ministerial Direction No. 41, para 10.3. This paragraph includes a note stating that a period of more than ten years of residence in Australia prior to a person engaging in criminal activity or activity which bears negatively on the person's character would be 'an important consideration'.
[9] Ministerial Direction No. 41, paras 11(1) and 11(3). See also para 9(1).
[10] Ministerial Direction No. 41, para 11(3)(b).
[11] Ministerial Direction No. 41, para 11(3)(c).
[12] Ministerial Direction No. 41, para 11(3)(d).

18. Under section 501F of the Migration Act, when a person's visa is cancelled under section 501 any other visa the person holds is also cancelled and they become an unlawful non-citizen, unless they also hold another visa that is a protection visa[13] or within the limited categories specified in the Migration Regulations. [14]

19. Pursuant to sections 501E, if the person whose visa was refused under section 501 is also applying for another visa, that other application will also be refused unless it is for a protection visa or a visa permitted by regulation. In practical terms, the combination of sections 501E and 501F will mean that cancellation means permanent removal from Australia and/or prolonged detention in most cases. If the person becomes an unlawful non-citizen, the person must be taken into immigration detention and be detained until they are either granted a visa or removed from Australia.[15] A person whose visa was cancelled under section 501 may also be permanently excluded from entering Australia if their visa was cancelled because of a substantial criminal record, past and present criminal conduct, or a combination of past and present criminal and general conduct.[16]

Review of a decision made under section 501

20. A person whose visa has been refused or cancelled under section 501 has limited options to obtain a review of this decision, which vary depending on whether the decision was made by a DIAC officer or by the Minister.

21. If the decision was made by a DIAC officer, it can be subject to merits review by the Administrative Appeals Tribunal (AAT), which involves the AAT reviewing the original decision and determining if it is the correct or preferable decision. The AAT can affirm, overturn or vary the original decision.[17] This option is not available where the decision to refuse or cancel a visa has been made personally by the Minister. [18]

22. If the AAT decides that the decision to refuse the visa under sub-section 501(1) or cancel the visa under sub-section 501 (2) should not have been made, the Minister can set aside this decision but may then refuse or cancel the person's visa exercising his or her power personally under sub-section 501(3).[19] The Minister also has the power, in certain circumstances, to set aside an original DIAC decision to refuse or cancel a person's visa,[20] or an original DIAC decision to refrain from refusing to grant or refrain from cancelling a person's visa.[21] The Minister can then substitute the original decision with his or her own decision to refuse or cancel the

[13] For example, protection visas available to onshore asylum seekers are known as Class XA visas. To obtain such a visa, the application must meet the definition of refugee under the Refugee Convention. For further information see DIAC Website at http://www.immi.gov.au/visas/humanitarian/onshore/866/.
[14] The *Migration Regulations 1994* (Cth) Reg 2.12AA currently specifies the Bridging R (Class WR) visa as the only visa relevant for the purposes of sections 501E and 501Fof the Migration Act.
[15] *Migration Act 1958* (Cth), ss 189(1), 196(1).
[16] *Migration Regulations 1994* (Cth), Schedule 5, clause 5001(c).
[17] *Administrative Appeals Tribunal Act 1975* (Cth), s 43(1).
[18] *Migration Act 1958* (Cth), s 500(1)(b).
[19] *Migration Act 1958 (Cth)*, ss 501A(1)(b), 501A(1)(d), 501A(2), 501A(3).
[20] *Migration Act 1958 (Cth)*, ss 501B(1), 501B(2).
[21] *Migration Act 1958 (Cth)*, ss 501A(1)(a), 501A(1)(d), 501A(2), 501A(3). Under section 501A the Minister may set aside a DIAC decision to refrain from exercising the power to cancel a person's visa under section 501(2) and substitute it with his or her own decision to cancel the person's visa. The Minister may do so under section 501A(2) if: the Minister reasonably suspects that the person does not pass the section 501 character test; the person does not satisfy the Minister that they pass the section 501 character test; and the Minister is satisfied that the cancellation is in the national interest. Alternatively, the Minister may do so under section 501A(3) if: the Minister reasonably suspects that the person does not pass the section 501 character test; and the Minister is satisfied that the cancellation is in the national interest.

person's visa. The Minister can do this even if the person has applied to the AAT for review of the original DIAC decision to refuse or cancel their visa.[22]

23. All decisions to refuse or cancel a person's visa under section 501, whether made by a DIAC officer or by the Minister personally, may be subject to judicial review by the Federal Court or the High Court of Australia.[23] However, this is a limited form of review and is restricted to reviewing the lawfulness of an administrative decision, rather than considering whether it was the correct decision.

24. The privative clause in section 474(1) of the Migration Act further restricts the availability of judicial review in respect of certain decisions made under the Act. This provision states that certain decisions, such as those under section 501, are 'privative clause' decisions and are 'final and conclusive' and 'must not be challenged...in any court'. However the High Court has stated that these privative clauses cannot remove the right under section 75(5) of the Constitution for aggrieved applicants to challenge decisions of Commonwealth officers where there is 'jurisdictional error' and no lawful decision has been made. In such cases, a suitable prerogative writ can be granted.[24]

25. This means that in order to review a decision of the Minister under section 501, it must be demonstrated that the Minister erred in some way such as misunderstanding the nature of the jurisdiction to be exercised, misconceiving his or her duty, or misunderstanding the nature of the opinion which he or she is to form.[25] As noted above, the Migration Act also makes it clear that a failure to observe natural justice cannot be the basis for establishing jurisdictional error.[26]

26. In attempting to challenge a Minister's decision under subsection 501(3), applicants face the further hurdle that they may be refused access to the information on which the Minister's decision was based. Section 503A of the Migration Act, for example, protects from disclosure confidential information provided to the Minister by law enforcement agencies or intelligence agencies to assist the Minister in making a decision under section 501. The Minister can choose to disclose the information despite the operation of section 503A, but he or she can not be compelled to do so.

Nature of the proposed amendments

27. Schedule 1, Item 4 of the Bill seeks to add two new subparagraphs to subsection 501(6), which currently contains the grounds on which a person will fail the character test under section 501. The new subparagraphs would provide that, in addition to the existing grounds, a person fails the character test if:

- the person has been convicted of an offence that was committed:
  - while the person was in immigration detention; or
  - during an escape by the person from immigration detention; or

[22] *Migration Act 1958 (Cth)*, s 501B(5).
[23] As a result of amendments to the Migration Act, the Federal Magistrates Court, subject to certain specific exceptions provided for in subsection 476(2), has the same original jurisdiction in relation to migration decisions as the High Court under paragraph 75(v) of the Constitution. The Federal Court has only limited jurisdiction in relation to migration decisions with its original jurisdiction in this area limited to the specific circumstances outlined in section 476A of the Migration Act.
[24] *Plaintiff S157/2002 v Godwin* (2003) 211 CLR 476 at 506.
[25] See *Re Patterson; Ex parte Taylor* [2001] HCA 51; (2001) 182 ALR 657 at [82]- [83] per Gaudron J.
[26] *Migration Act 1958* (Cth) s501(3).

- after the person escaped from immigration detention but before the person was taken into immigration detention again; or

- the person has been convicted of an offence against section 197A.[27]

28. The Explanatory Memorandum to the Bill provides that the purpose of this amendment is to provide an additional basis upon which the Minister or his delegate may decide to refuse to grant a visa, or to cancel a visa, on character grounds. It explains that:

> *[u]nder the current provisions, if a person has been convicted of an offence but has been sentenced to a term of imprisonment of less than 12 months, the person will still be able to pass the character test. This imposes a significant limitation on the ability of the Minister to appropriately respond to the violent, destructive and criminal behaviour which has been occurring in immigration detention.*
>
> *It is intended that this additional basis for failing the character test will only apply to persons who have been convicted of an offence by a court, at the time of the Minister's consideration of whether a person passes the character test, whether the conviction or offence concerned occurred before, on or after the commencement date of 26 April 2011. It does not matter what penalty is imposed by a court as a result of the conviction. This creates a clear and objective basis for a person to fail the character test.*[28]

Law Council's Concerns with the proposed amendments

29. The Law Council has a number of concerns with the proposed amendments to subsection 501(6). These amendments further expand the already broad scope of the character test by including convictions for specific criminal offences that may not currently result in an automatic failure of the test.

30. While the type of behaviour potentially captured by the amendments ranges from very serious criminal disturbances within or outside of immigration detention, such as those involving personal violence or extensive damage to property, they also capture criminal behaviour of a relatively minor nature such as breaking a government owned window or setting fire to a rubbish bin. Unlike the existing grounds relating to criminal behaviour in section 501 which refer to single sentences of more than 12 months imprisonment or combined sentences of two years, the amendments do not distinguish between criminal behaviour resulting in the mere recording of a conviction and behaviour attracting significant sentences of imprisonment.

31. The Law Council is of the view that these amendments exacerbate its many existing concerns with the content and operation of the character test in section 501.

32. The Council further submits that the amendments have not been demonstrated to be necessary or effective to address the type of policy objectives the Government has outlined in the Explanatory Memorandum.

33. The nature of these concerns is outlined further below.

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[27] *Migration Act 1958* (Cth) s197A provides that it is an offence to escape from immigration detention, which attracts a maximum penalty of five years imprisonment.
[28] Explanatory Memorandum pp. 4-5.

General Concerns with section 501

34. The Law Council has long standing concerns regarding the broad nature of the Minister's discretionary power under section 501 which can have serious impacts on a person's human rights, particularly given that the use of such power is subject to only limited forms of review.

35. As noted above, under section 501, the Minister has a range of powers to cancel or refuse to grant a visa,[29] which include the power under section 501A to refuse or cancel a person's visa if a DIAC officer or the AAT decides not to exercise their respective powers to refuse or cancel the person's visa. The Minister can do so even if the person satisfied the original decision-maker that they pass the section 501 character test.[30] Further, under section 501B, in certain circumstances the Minister can set aside a decision by a DIAC officer to refuse or cancel a person's visa, and substitute it with his or her own decision to refuse or cancel the person's visa.[31] The Minister can do so even if the person has applied to the AAT for merits review of the original DIAC decision.[32]

36. In making these decisions, the Minister is not required to comply with the rules of natural justice[33] and does not have to comply with the considerations set out in Ministerial Direction No. 41.

37. The broad nature of the Minister's powers is particularly concerning because the Minister's decisions are subject to limited external review. As noted above a decision by the Minister to refuse or cancel a person's visa under section 501, or a decision by the Minister to substitute a decision of a DIAC officer or the AAT under section 501A or 501B, is not subject to merits review by the AAT and is only subject to judicial review by the courts if the decision may be affected by 'jurisdictional error'.

38. While the proposed amendments do not alter the nature of the Minister's discretion under section 501 or the available avenues for review of decisions made under the provision, they further intensify the nature of these concerns as they give rise to the potential for a person to have their visa cancelled or refused on the basis of a minor criminal conviction related to immigration detention.

39. The amendments potentially attach very significant consequences (including deportation and prolonged detention) to relatively minor criminal convictions related to immigration detention – where chronic overcrowding and isolated facilities often give rise to experiences of heightened stress, anxiety and trauma – without ensuring that the decision that gives rise to these consequences is subject to meaningful external review.

Failure to comply with Australia's international human rights obligations

40. The Law Council also has concerns that the test in section 501 of the Migration Act may fail to comply with a number of international human rights Conventions to which Australia is a party. These concerns are further exacerbated by the nature of the proposed amendments.

[29] *Migration Act 1958 (Cth),* ss 501(2), 501(3).
[30] *Migration Act 1958 (Cth),* s 501A(1).
[31] *Migration Act 1958 (Cth)*, ss 501B(1), 501B(2)..
[32] *Migration Act 1958 (Cth)*, s 501B(5).
[33] *Migration Act 1958* (Cth), ss 501(3), 501(5), 501A(3), 501A(4).

Refugee Convention

41. The Law Council is of the view that the existing character test has the potential to contravene Australia's primary obligation under the Refugee Convention not to *refoule* (return) a refugee to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.[34]

42. The Law Council notes that this *non-refoulement* obligation does not apply to a person found to be a refugee under the Convention[35] if there are reasonable grounds for regarding that person as a danger to Australia's security, or to a refugee who has been convicted of a 'particularly serious crime' and who constitutes a danger to the Australian community.[36] This means that in some cases, the grounds under which a person may be excluded from the *non-refoulement* obligation under the Refugee Convention may overlap with the grounds under which a person will fail the section 501 character test under the Migration Act (for example, because they have a 'substantial criminal record'[37]).

43. However, some of the grounds under which a person will fail the section 501 character test are much broader than the grounds under which a person can be excluded from the *non-refoulement* obligation under the Refugee Convention. [38] This is particularly the case when the proposed amendments are considered, which provide that a person will fail the character test if he or she is convicted of an offence in immigration detention or escaping from such detention, regardless of the seriousness of that offence. The proposed amendments clearly move the character test well beyond the scope of the exception to the *non-refoulement* obligation under the Refugee Convention which is limited to those persons who present a danger to the security of the country.[39]

44. This means that a person assessed by Australia as being a refugee could nonetheless fail the section 501 character test, leaving them open to the risk of visa refusal or cancellation and removal to a country where they could face persecution.

45. The Law Council notes that pursuant to Ministerial Direction No. 41, DIAC officers must take the *non-refoulement* obligations in the Refugee Convention in to account as a primary consideration when deciding whether to refuse or cancel a person's visa under section 501.[40] However, the impact of this requirement is potentially undermined by the fact that the Direction also provides that a person's visa can be refused or cancelled under section 501, regardless of the *non-refoulement* obligations under the Refugee Convention:

> *Notwithstanding international obligations, the power to refuse to grant a visa or cancel a visa must inherently remain a fundamental exercise of Australian sovereignty. The responsibility to determine who should be allowed to enter or*

[34] *Convention relating to the Status of Refugees*, Article 33(1).
[35] Article 1F of the Refugee Convention provides for the exclusion of certain classes of undesirable persons from the definition of 'refugee': persons who have committed 'crimes against peace, a war crime or a crime against humanity'; persons who have committed 'a serious non-political crime outside the country of refuge'; or acted in contravention of the principles and purposes of the United Nations.
[36] *Convention relating to the Status of Refugees*, Article 33(2).
[37] See for example *Migration Act 1958* (Cth), s501(6)(a).
[38] *Migration Act 1958* (Cth), s 501(6)(c).
[39] *Migration Act 1958* (Cth), s 501(6)(c).
[40] Ministerial Direction No. 41, para 10(1)(d)(ii).

to remain in Australia in the interests of the Australian community ultimately lies within the discretion of the responsible Minister.[41]

46. Australia also has *non-refoulement* obligations under the International Covenant on Civil and Political Rights (ICCPR),[42] the Convention on the Rights of the Child (CRC)[43] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[44][45] These obligations apply regardless of whether the person is owed protection under the Refugee Convention and are absolute which means, for example, that the person's expulsion or removal cannot be justified on grounds of national security or criminal record if there are substantial grounds for believing that there is a real risk of the types of harms covered by these Conventions occurring.

47. As with the *non-refoulment* obligations under the Refugee Convention, Ministerial Direction No 41 requires DIAC officers to take these obligations into account when deciding whether to refuse or cancel a person's visa under section 501.[46] The Direction also explains that "[t]here is no balancing of other factors if the removal of a person from Australia ... if that removal ... would amount to refoulement under the ICCPR or the CAT".[47] However, as noted above, the Direction also notes that despite these international obligations, the ultimate responsibility for determining who should be allowed to enter or to remain in Australia lies within the discretion of the responsible Minister.[48]

48. The Law Council further notes that unlike DIAC officers, the Minister is not obliged to follow Ministerial Direction No 41 when exercising his or her section 501 powers personally.

International Covenant on Civil and Political Rights

49. The consequences of the character test in section 501 of the Migration Act may also lead to breaches of Australia's obligations under Article 9(1) of the ICCPR which prohibits arbitrary detention.

50. As noted above, where a person's visa has been cancelled or refused under section 501, the person will become an unlawful non-citizen (unless they also hold a protection visa or another type of visa specified in the Migration Regulations)[49] and will be subject to mandatory immigration detention. Pursuant to the Migration Act, such persons must be detained until they are either granted a new visa or removed from Australia.[50] For many people this means they will be held in immigration detention for prolonged periods, while they seek review of the decision to cancel their visa, while travel documents are arranged, or while a claim for a protection visa is assessed. For example, the Australian Human Rights Commission has previously reported that as of May 2008, of 25 people in immigration detention whose visas

[41] Ministerial Direction No. 41, note accompanying para 10.4..
[42] International Covenant on Civil and Political Rights (ICCPR) Articles 6(1), 7; *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* (1989),).
[43] *Convention on the Rights of the Child* (CRC) Articles 6(1), 37(a).
[44] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 3(1).
[45] The Law Council notes that the Commonwealth Government has introduced legislation that attempts to codify some of Australia's protection obligations under these Conventions in the Migration Act – see *Migration Amendment (Complementary Protection) Bill 2011* (Cth).
[46] Ministerial Direction No. 41, paras 10(1)(d), 10.4.
[47] Ministerial Direction No. 41, para 10.4.3(1)(c).
[48] Ministerial Direction No. 41, ,note accompanying para 10.4..
[49] *Migration Act 1958* (Cth), ss 13,14, 501E, 501F(3).
[50] *Migration Act 1958* (Cth), ss 189(1), 196(1).

had been cancelled under section 501, all but one had been in detention for more than 100 days; eight had been in detention for more than 300 days; and one had been in detention for more than 1000 days.[51]

51. In the past, where complaints have been submitted by individuals who have been held in detention for prolonged or indefinite periods, the Australian Human Rights Commission has found that prolonged and indefinite detention constituted arbitrary detention, in breach of article 9(1) of the ICCPR.[52]

52. In order to ensure that persons are not detained arbitrarily, Australia would need to reconsider its current policy of mandatory immigration detention prescribed in the Migration Act. The Law Council and many of its constituent bodies, including the New South Wales Law Society, the Law Institute of Victoria and the Queensland Law Society, have consistently called for an end to this policy[53] which has also attracted criticism from international human rights bodies including most recently the UN Human Rights Council following the Universal Periodic Review of Australia in January 2011.[54]

53. The mandatory detention of unlawful non-citizens is also contrary to the UN High Commissioner on Refugees' *Revised Guidelines on Applicable Criteria and Standards Relating To The Detention Of Asylum Seekers*, which provide that the detention of asylum-seekers is 'inherently undesirable' and prescribe that:.

> *There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements …), these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose. [emphasis in original]*[55]

54. As noted by the Human Rights Committee of the Law Society of New South Wales, there is also a risk that a decision to cancel or refuse a visa under section 501 of the Migration Act may result in a breach of article 10 of the ICCPR, which protects the right of persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person. This is due to the conditions experienced in certain immigration detention facilities that have been well documented as giving

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[51] See Australian Human Rights Commission Background paper: Immigration detention and visa cancellation under section 501 of the Migration Act (Updated March 2010) available at http://www.hreoc.gov.au/human_rights/immigration/501_migration_2010.html**.** See also Question 423, Senate Hansard (17 June 2008), p 2626.

[52] See, for example Human Rights and Equal Opportunity Commission, *Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights (Report No. 13)* (2001). available at http://humanrights.gov.au/legal/humanrightsreports/hrc_report_13.html. This view has also been held by the United Nations Human Rights Committee in a number of cases. See, for example UN Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

[53] For a summary of the Law Council's advocacy in this area see http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/detention.cfm.

[54] For further information about the Universal Periodic Review including the recommendations adopted by the UN Human Rights Council see http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/international.cfm.

[55] UNHCR Revised Guidelines On Applicable Criteria And Standards Relating To The Detention Of Asylum Seekers, (February 1999) Guideline 2 Available at http://Www.Unhcr.Org.Au/Pdfs/Detentionguidelines.Pdf

rise to the real risk of mental illness and have been criticised as failing to meet international human rights standards.[56]

55. The existing character test also does not appear to fully comply with Article 13 of the ICCPR, which provides that aliens in the territory of a State Party should only be expelled from that country in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against their expulsion and to have their case reviewed by, and be represented for the purpose before a competent authority. As noted above decisions under section 501 are inherently difficult to review and persons seeking review can encounter significant difficulties when seeking to access the information upon which the decision to expel the person is made; and seeking to challenge the validity of relying upon that information as a grounds for expulsion. For these reasons, available avenues for review often prove to be hollow forms of redress for a person seeking to exercise their article 13 right to submit reasons against expulsion and to have their case reviewed by a competent authority.

Failure to demonstrate that the amendments are necessary

56. In addition to the above general concerns with the character test in section 501, the Law Council is of the view that the Commonwealth Government has failed to demonstrate that the amendments to section 501 are necessary to provide a significant disincentive for people in immigration detention from engaging in violent and disruptive behaviour, as cited in the Explanatory Memorandum as a primary purpose of the Bill.

57. The Explanatory Memorandum goes on to provide that:

> *The Australian community also expects non-citizens who seek to remain in Australia to be of good character. To meet this expectation, the Government must have the ability to act decisively and effectively, and must have the legislative authority to refuse to grant a visa or to cancel a visa for those non-citizens who are not of good character.*[57]

58. The Law Council submits that this policy objective is already met by the existing expansive scope of the character test in section 501 of the Act.

59. As outlined above, section 501 already provides the Minister and his or her delegates with considerable legislative authority to refuse to grant a visa or to cancel a visa for those non-citizens who are not of good character. This authority – which can be exercised quickly and is subject to only limited external review - already empowers the Government to act decisively and effectively to exclude certain persons from the Australian community on character grounds.

60. The strong deterrent effect of section 501 is derived from both the seriousness of the consequences of a visa refusal or cancellation and by the fact that the power has been frequently exercised by the Minister and DIAC officials in the past. For

[56] For example see Green, J.P., *The health of people in Australian immigration detention centres.* Medical Journal of Australia, 2010. 192(2): p. 1; Asylum Seeker Resource Centre, *Destitute and uncertain; The reality of seeking asylum in Australia*. 2010: Melbourne; Australia Human Rights Commission's 2010 report on *Immigration Detention in Darwin*, available at http://www.hreoc.gov.au/human_rights/immigration/idc2010_darwin.html; the Australian Human Rights Commission's 2011 summary report on *Immigration detention in Leonora* available at http://www.hreoc.gov.au/human_rights/immigration/idc2011_leonora.html

[57] Explanatory Memorandum pp. 1-2

example, there were 58 visas cancelled and 156 visa applications refused under the character provisions in 2009–10.[58]

61. Further, the Law Council is of the view that the existing character test in section 501 would be sufficient to provide a "significant disincentive for people in immigration detention from engaging in violent and disruptive behaviour" of the type recently reported as occurring at Villawood Detention Centre and Christmas Island.

62. This is because the existing character test contained in section 501 of the Migration Act already provides that a person will fail the test if he or she has a 'substantial criminal record', which includes a sentence of imprisonment for 12 months or more, two or more terms of imprisonment totaling two or more years; or having been institutionalized after being acquitted on grounds of unsoundness of mind or insanity. Subsection 501(7) also makes it clear that 'term of imprisonment' includes time that a court has ordered a person to spend in drug rehabilitation or a residential program for the mentally ill.

63. This grounds of the existing test would be likely to cover those persons who engage in violent or seriously disruptive behaviour while in immigration detention or who "demonstrate a fundamental disrespect for Australian laws, standards and authorities". For example, the two offences relating to immigration detention in the Migration Act – escaping from detention[59] and manufacturing or possessing weapons while in detention[60] – carry penalties of five and three years imprisonment.[61] Other offences that relate to disruptive behaviour in immigration detention – such as the Commonwealth offence of destroying or damaging Commonwealth property,[62] or the state offences of affray,[63] riot[64] or damaging property by fire[65] – all attract significant penalties of imprisonment, ranging from five to 15 years. The range of these penalties (three to 15 years imprisonment) suggests that unless the offending behaviour was of a relatively minor nature or there were other mitigating circumstances, a sentence of 12 months imprisonment or more could often be expected in relation to these offences.

64. Even if the person who engages in disruptive or violent behaviour while in immigration detention is not sentenced to a term of imprisonment for 12 months or more for a criminal offence, the person could fail the existing character test if he or she is deemed to be not of good character, having regard to either the person's past and present criminal conduct and/or the person's past and present general conduct.[66] This means, for example, that if a detainee has been involved in a particular incident in immigration detention and has a history of engaging in criminal

[58] DIAC Annual Report 2009-2010 p. 157 available at http://www.immi.gov.au/about/reports/annual/2009-10/pdf/diac-annual-report-2009-10-full-version.pdf
[59] *Migration Act 1958* (Cth) s197A
[60] *Migration Act 1958* (Cth) s197B
[61] NB this Bill seeks to increase the penalty for the offence in section 197B from three years to five years imprisonment – see further discussion below.
[62] *Crimes Act 1914* (Cth) s29 Destroying or damaging Commonwealth property, attracts a maximum penalty of 10 years imprisonment.
[63] *Crimes Act 1900* (NSW) section 93C Affray – using or threatening violence towards another and creating a scene of fear – attracts a maximum penalty of 10 years imprisonment
[64] *Crimes Act 1900* (NSW) section 93B Riot – 12 or more persons use or threaten unlawful violence for a common purpose – attracts a maximum penalty of 15 years imprisonment
[65] *Crimes Act 1900* (NSW) section 195 Damaging or destroying property – attracts a maximum penalty of 5 years, with increased penalties for aggravated offences such as the use of fire.
[66] *Migration Act 1958* (Cth) s501(6)(c)

conduct whilst in detention or has a history of behaviour that suggests a blatant disregard for the law[67] he or she could fail the character test on this ground.

65. A person also fails the test if there is a significant risk that, if allowed to enter or remain in Australia, they would represent a danger to the community or 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. This part of the character test appears to be broad enough to also encompass behaviour of concern even if a person is not convicted of an offence arising from that behaviour.

66. The primary difference between the existing character test and the proposed amended test is that currently, criminal behaviour while in immigration *may* result in the person failing the character test (for example if that behaviour attracts a penalty of 12 months or more imprisonment or if considered against a history or background of similar behaviour suggests that the person is not of good character), while under the amended test, such behaviour will *automatically* result in a failure of the character test (regardless of its seriousness or whether there are other mitigating factors to take into account).

67. The proposed amendments, which focus on conviction rather than sentence, ignore the fact that circumstances of offending are always different and reflect varying levels of culpability As the Human Rights Committee of the New South Wales Law Society has noted, this has the potential to result in unfairness to persons seeking protection in Australia, who may have their visa application refused or visa cancelled as a result of minor disruptive behaviour while in immigration detention – such as breaking a window or setting fire to a rubbish bin.

68. The Law Council submits that if the Commonwealth Government is serious about reducing the frequency and gravity of violent and disruptive behaviour within immigration detention centres, further consideration should be given to the causes of this behaviour. Recent reports from the Australian Human Rights Commission and others suggest that overcrowding is a major problem in many mainland immigration detention centres and on Christmas Island and that this is having a serious negative impact on detainee's health and wellbeing and providing the conditions for disruptive behaviour to occur.[68]

69. For example, in its May 2011 report on *Immigration detention at Villawood*,[69] the Commission said that it was troubled by the "palpable sense of frustration and incomprehension expressed by many people, which appeared to have contributed to marked levels of anxiety, despair and depression, leading to high use of sedative, hypnotic, antidepressant and antipsychotic medications and serious self-harm incidents". The Commission also noted the psychological impacts of detainees' prolonged detention including "high levels of sleeplessness, feelings of hopelessness and powerlessness, thoughts of self-harm or suicide, and feeling too depressed, anxious or distracted to take part in recreational or educational activities".

[67] Ministerial Direction No 41 para 7.3.1

[68] See for example Australian Human Rights Commission Media Release "Potential for suicide and self-harm is a real concern " (26 May 2011), available at http://www.hreoc.gov.au/about/media/news/2011/44_11.html;; Australia Human Rights Commission's 2010 report on *Immigration Detention in Darwin*, available at http://www.hreoc.gov.au/human_rights/immigration/idc2010_darwin.html; the Australian Human Rights Commission's 2011 summary report on *Immigration detention in Leonora* available at http://www.hreoc.gov.au/human_rights/immigration/idc2011_leonora.html.

[69] Australian Human Rights Commission, *Immigration Detention at Villawood*, (May 2011) available at http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.html

70. Delays in the processing of visa applications are also leading to detainees spending longer periods in detention without sufficient knowledge of their future immigration status. Reports suggest that this uncertainty and delay is further contributing to the conditions that give rise to disruptive behaviour.[70]

71. In making these observations, the Law Council does not suggest that criminal or violent behaviour in immigration detention should go unpunished or that such behaviour should not be taken into account when determining whether the person should be granted a visa or have a visa cancelled. However, in the view of the Law Council, the existing character test in 501 already provides the Commonwealth Government with expansive powers to assess the character. In this context, the proposed amendments have not been demonstrated to be either a necessary or an effective response to the policy concerns identified by the Commonwealth Government in the Explanatory Memorandum.

The amendments apply unequally

72. A further concern raised by the Refugee Law Reform Committee of the Law Institute of Victoria (LIV), one of the Law Council's constituent bodies, is that the proposed amendments continue a legislative approach which treats people differently depending on their mode of arrival. The amendments will largely affect only those who arrive by boats, who are always placed in immigration detention[71] and, the vast majority of whom are asylum seekers who are seeking protection from persecution. Asylum seekers and other non-citizens who arrive in Australia by plane and are processed onshore are far less likely to be detained in immigration detention and are thus considerably less likely to be affected by the proposed amendments.

73. The amendments are thus effectively directed at the need to deter detainees from engaging in disturbances in immigration detention, rather than the need to ensure all non-citizens arriving in Australia are of good character.

74. As noted above, the existing character test in section 501 already provides that persons who have engaged in criminal activity resulting in a single sentence of more than 12 months imprisonment or total sentences of more than tow years will fail the character test. The proposed amendments lower this bar– but only for asylum seekers arriving in Australia by boat or otherwise detained in immigration detention.

75. As the LIV's Refugee Law Reform Committee notes, no evidence has been provided to suggest that people who commit offences in immigration detention repeat offences outside immigration detention or create a risk to the general community solely on the basis of their offending in immigration detention. .

[70] For example see Australian Human Rights Commission, *Immigration Detention at Villawood*, (May 2011) available at http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.html ; Australian Human Rights Commission has said mandatory detention for asylum seekers is damaging" *The Australian* (26 May 2011) available at http://www.theaustralian.com.au/national-affairs/villawood/story-fn59niix-1226063281629.

[71] The Law Council notes that asylum seekers and other non-citizens arriving by boat may not always remain in immigration detention facilities. DIAC uses a number of programs to provide flexibility in the provision of services to people in immigration detention. These arrangements include community detention, detention in immigration residential housing or immigration transit accommodation and foster care arrangements (for unaccompanied minors). It is also Government policy not to detain children in immigration detention, and efforts are undertaken to house children and families in low-security facilities, such as immigration residential housing, immigration transit accommodation and community detention. See DIAC Fact Sheet 82 - Immigration Detention (January 2010) available at http://www.immi.gov.au/media/fact-sheets/82detention.htm/.

Temporary Safe Haven Visas in section 500A

76. Under section 37A of the Migration Act, the Minster can grant a person a class of temporary visa to travel to, enter and remain in Australia know as a 'temporary safe haven visa' (TSHV). Under this provision, the Minister has the power, by notice published in the *Gazette*, to either extend, or shorten, the period of the visa.[72] The Minister does not have a duty to consider whether to extend the term of a TSHV[73] and accordingly, a decision by the Minister not to consider extending the term of a temporary safe haven visa is not reviewable. The Act further provides that decisions to grant a TSHV are subject to the privative clause provision in section 474 and are therefore subject to the same limits on judicial review described above in relation to section 501.

77. Subsection 500A(1) of the Migration Act currently provides that the Minster may refuse to grant a person a TSHV, or may cancel the person's TSHV on similar grounds as those outlined in existing subsection 501(6), namely that

    (a) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or

    (b) the person is not of good character, having regard to his or her past and present criminal or general conduct; or

    (c) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

        (i) engage in criminal conduct in Australia; or

        (ii) harass, molest, intimidate or stalk another person in Australia; or

        (iii) vilify a segment of the Australian community; or

        (iv) incite discord in the Australian community or in a segment of that community; or

        (v) 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

    (d) the person is a threat to national security; or

    (e) the person's presence in Australia would prejudice Australia's international relations.

78. Subsection 500A(3) further provides that the Minister may refuse to grant to a person a TSHV, or may cancel a person's THSV visa if:

    (a) the person has been sentenced to death;[74] or

[72] Migration Act 1958 (Cth) ss37A(2) and 37A(3).
[73] Migration Act 1958 (Cth) 37A(6)
[74] Subsection 500A(4) provides that a sentence imposed on a person is to be disregarded if:
(a) the conviction concerned has been quashed or otherwise nullified; or
(b) the person has been pardoned in relation to the conviction concerned.

(b) the person has been sentenced to imprisonment for life;[75] or

(c) the person has been sentenced to a term of imprisonment of 12 months or more. [76]

79. Subsection 500A(6) makes it clear that the powers under subsections (1) and (3) may only be exercised by the Minister personally, and thus are not subject to review by the AAT. However, when the Minister makes a decision under section 500A to refuse to grant or to cancel a TSHV he or she must table a statement in Parliament that sets out the decision and the reasons for the decision.[77]

80. Subsection 500A(11) makes it clear that the rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision to cancel or refuse a TSHV under section 500A.

81. If the Minister has refused or cancelled a person's TSHV, it results in automatic refusal or cancellation of THSV to each immediate family member of the person.

Nature of the Proposed Amendments

82. The amendments proposed in Schedule 1 Item 2 of the Bill would amend subsection 500A(3) to provide that, in addition to refusing or cancelling a person's TSHV on the grounds that the person has been sentenced to death, life imprisonment or a term of imprisonment of 12 months or more, the Minister can refuse or cancel a person's TSHV if the person has been convicted of an offence that was committed:

- while the person was in immigration detention; or
- during an escape by the person from immigration detention; or
- after the person escaped from immigration detention but before the person was taken into immigration detention again; or
- the person has been convicted of an offence against section 197A.

83. The purpose of these amendments is described in the Explanatory Memorandum to the Bill as follows:

> *... to strengthen the consequences of criminal behaviour by persons in immigration detention and in particular to provide an additional basis upon which the Minister or his delegate may decide to refuse to grant a temporary safe haven visa, or to cancel a temporary safe haven visa, on character grounds.*[78]

[75] Subsection 500A(4) also applies to this subparagraph.
[76] Subsection 500A(4) also applies to this subparagraph, as does subsection 500A(5) which provides that a a person has been convicted of an offence and the court orders the person to participate in:
(a) a residential drug rehabilitation scheme; or
(b) 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.
[77] *Migration Act 1958* (Cth) s500A(7).
[78] Explanatory Memorandum pp. 4-5

Law Council's Concerns with the Proposed Amendments

84. The Law Council has general concerns with the broad discretionary nature of the Minister's powers under section 500A and the fact that decisions made by the Minister are not bound by the principles of natural justice and are subject to only limited avenues of review.

85. The Law Council notes that unlike decisions made under section 501, decisions by the Minister under section 500A to cancel or refuse a TSHV must be tabled in Parliament, providing an important form of external scrutiny for these decisions that may go some way to providing transparency and accountability in this decision making process.

86. However, despite this mechanism, great care must be taken before further expanding the Ministers already broad powers under section 500A, particularly given the consequences that could flow for a person whose visa is cancelled or refused under this provision. This could include deportation from Australia and/or prolonged detention and has significant consequences for the person's immediate family members whose THSVs will also be automatically cancelled or whose applications for visas will be refused.

87. TSHVs are specifically designed to provide quick, effective protection for certain categories of refugees fleeing situations of persecution or violence and have been used relatively sparingly, particularly in recent years. They were first introduced to allow the Commonwealth Government to create a special, temporary protection visa for Kosovo refugees. They are now used to provide temporary safe haven in Australia for people who have been displaced by upheaval in their country and for whom the Australian Government considers this to be the most appropriate assistance.[79]

88. In 2008–09, five people who had been living in International Organization for Migration (IOM) facilities in Indonesia for five years or more were granted Humanitarian Stay (Temporary) (subclass 449) visas and then subsequently granted three year Temporary (Humanitarian Concern) (subclass 786) visas once they arrived in Australia.[80] No such visas were granted in 2009-2010.[81]

89. While the Law Council does not dispute the need for the Commonwealth Government to retain the power to ensure persons receiving TSHVs are of good character, there is little provided in the Explanatory Memorandum to justify why the existing test in section 500A is insufficient to meet this policy objective.

90. Like the test in section 501, under section 500A, the Minister already has the power to cancel a person's TSHV or to refuse an application for a TSHV if the person has been engaged in criminal activity and has been sentenced to more than 12 months imprisonment. Similarly, the Minster can exercise this power if he or she is satisfied that the person is not of good character, having regard to his or her past and present criminal or general conduct.

91. The Law Council queries the necessity of the proposed amendments to section 500A on the same grounds as those discussed above in relation to the proposed amendments to section 501 and submits that the Committee should recommend that the amendments relating to section 500A not be passed.

[79] DIAC Annual Report 2008-2009.
[80] DIAC Annual Report 2008-2009.
[81] DIAC Annual report 2009-2010 p. 105.

Retrospective Operation of Certain Provisions

92. Schedule 1 Item 6 of the Bill provides that the amendments made by Items 2 to 5 of the Bill, which includes the amendments made to the character test in subsection 501(6) and the Minister's power to refuse or cancel a person's TSHV in section 500A, apply for the purposes of making a decision under those provisions on or after 26 April 2011, whether the conviction or immigration detention offence concerned occurred before, on or after that date.

93. The Explanatory Memorandum explains that the date of 26 April 2011 was chosen as this was the date of the Minister's public announcement in response to the disturbances at a number of immigration detention centres during the first weeks of April 2011 that foreshadowed this legislative change and "put all immigration detainees on notice that the Australian government takes criminal behaviour very seriously and will take appropriate measures to respond to it."[82]

94. The Law Council and particularly the following of its constituent bodies - the New South Wales Law Society, the Law Institute of Victoria and the Queensland Law Society - have serious concerns with this Item of the Bill, which in effect seeks to give the key amendments in the Bill retrospective effect.

95. It is central to the principle of the rule of the law that the law must be both readily known and available, and certain and clear, so that people are able to know in advance whether their conduct might attract criminal sanction or a civil penalty or other serious personal consequence.[83] For that reason legislative provisions which create such consequences should not be retrospective in their operation. This principle is enshrined in both common law[84] and in certain statues, such as section 4 of the *Legislative Standards Act 1992* (Qld) which mandates that legislation "not adversely affect rights and liberties, or impose obligations retrospectively". Retrospective laws which impose criminal offences or sanctions are also prohibited under international law.[85]

96. Although the relevant amendments in the Bill do not create new criminal offences or sanctions, they relate to decisions that have very serious and potentially life changing consequences for the visa holder or the visa applicant. For example, decisions made under the amended provisions could result in a person who would otherwise have been eligible for a visa being ineligible to apply for such a visa or being refused a visa. This may in turn result in the person being deported to another country, permanently excluded from re-entering Australia and/or being detained in immigration detention for a potentially prolonged period.

97. The policy reasons for giving effect to these amendments as of 26 April 2011 do not justify such a serious departure from the rule of law, nor does the fact that the Minister publicly announced his intention to amend the law in this way on 26 April 2011 sufficiently remedy the impact on the rule of law. While persons engaged in the disturbances in immigration detention facilities during April 2011 are assumed to have known that their actions *may* result in them failing the character test in section 501 or the test in section 500A, they could not have known that if their actions resulted in a criminal conviction, they would *automatically* fail these tests.

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[82] Explanatory Memorandum p. 2.
[83] Law Council of Australia Policy Statement on Rule of Law Principles, March 2011, available at http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/rule-of-law.cfm.
[84] See for example *University of Wollongong v Metwally* (1984) 158 CLR 447 at 47.
[85] See for example UN Declaration of Human Rights Article 11; ICCPR Article 15.

98. For these reasons, in addition to its general opposition to the passage of the Bill, the Law Council strongly opposes Item 6 of the Bill.

Increasing Penalties for Certain Offences

Nature of the proposed amendments

99. There are two offences contained in the Migration Act that relate to conduct while in immigration detention. Section 197A provides that detainees must not escape from immigration detention – which attracts a maximum penalty of five years imprisonment.[86] Section 197B provides that a detainee is guilty of an offence if he or she manufactures, possesses, uses or distributes a weapon[87] – which currently attracts a maximum penalty of three years imprisonment.[88]

100. Schedule 1 Item 1 of the Bill seeks to amend the maximum penalty relating to the offence in section 197B to a maximum of five years imprisonment.

101. The Explanatory Memorandum seeks to justify this increase in penalty on the following basis:

> *The Australian community expects that there be robust sanctions to deal with people in immigration detention who prepare to threaten or inflict harm on other people and the intended increase in the maximum penalty under this item reflects the seriousness with which the community views this offence.*
>
> *The increase in the maximum penalty enhances the deterrent effect of the provision on persons in immigration detention from manufacturing, possessing, using or distributing weapons.*
>
> *The increase in penalty for this offence aligns with the penalty for escape from immigration detention in section 197A, which is 5 years imprisonment.*
>
> *The increase in penalty for this offence is not inconsistent with other penalties provided in Commonwealth legislation, for example, section 49 of the Aviation Transport Security Act 2004, an offence involving the carriage or possession of a weapon on board an aircraft; penalty 7 years.*[89]

102. The Law Council queries whether the information in the Explanatory Memorandum sufficiently justifies the proposed significant increase in penalty for the offence in section 197B.

103. When this offence was first introduced in 2001, the Parliament, in its capacity to represent the views of the community, considered the appropriate maximum penalty for this offence to be three years imprisonment.[90] Nothing in the Explanatory Memorandum describes why this penalty no longer accords with the seriousness with which the community views this offence or whether there has been a significant increase in this type of offending that would warrant a more punitive approach.

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[86] Migration Act 1958 (Cth) s197A.
[87] Subsection 197B(2) provides that *weapon* includes:
(a) a thing made or adapted for use for inflicting bodily injury; or
(b) a thing where the detainee who has the thing intends or threatens to use the thing, or intends that the thing be used, to inflict bodily injury.
[88] Migration Act 1958 (Cth) s197B.
[89] Explanatory Memorandum pp. 3-4
[90] *Migration Legislation Amendment (Immigration Detainees) Act 2001* (Cth)

104. The Law Council questions the utility of the analogy provided in the Explanatory Memorandum between the possession of a weapon in immigration detention offence and other Commonwealth offences such as possessing a weapon on board an aircraft. It is arguable that the nature of these two offences, including their location and context, is sufficiently different to justify a difference in maximum penalty. For example, the *Aviation Transport Security Act* was implemented in response to terrorism threats and to strengthen Australia's defence against terrorist attacks. This can be sharply contrasted with the offence in section 197B of the Migration Act, which forms part of a system of immigration detention established under the Migration Act to enable the orderly processing of persons with a legal right to seek protection or asylum in Australia.

105. The Law Council also notes that the particular conditions in immigration detention facilities such as Villawood have recently been reported as giving rise to "palpable sense of frustration and incomprehension expressed by many people, which appeared to have contributed to marked levels of anxiety, despair and depression, leading to high use of sedative, hypnotic, antidepressant and antipsychotic medications and serious self-harm incidents". [91]

106. As noted above, recent reports from the Australian Human Rights Commission and others suggest that conditions and delays in detention are the largest contributing factor to unrest within the Australian detention system. This suggests that seeking to enhance the deterrent effect of the offence in section 197B by increasing the maximum penalty is not likely to be effective where offences are carried out in the circumstances found by the Australian Human Rights Commission.

107. With these issues in mind and in the absence of further material justifying the two year increase in maximum penalty for the offence in section 197B, it is difficult to exclude the conclusion that this amendment is motivated by a need for the Government to be seen to be taking a punitive approach to this type of offending without any evidence that such an approach is necessary or effective.

Conclusion

108. For the reasons outlined above, the Law Council submits that the Committee should recommend that the Bill not be passed.

[91] Australian Human Rights Commission, *Immigration Detention at Villawood*, (May 2011) available at http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.html

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.