THE UNIVERSITY OF SYDNEY

Dr Ben Saul BA(Hons) LLB(Hons) *Sydney* DPhil *Oxford*
Professor of International Law, Sydney Centre for International Law
Australian Research Council Future Fellow

Senate Legal and Constitutional Affairs Committee
Online submission

28 January 2014

Dear Committee,

Re: Migration Amendment Bill 2013 – Schedule 3: Security Assessments

This submission addresses the human rights law compatibility of Schedule 3 of the Bill, concerning security assessments. I am counsel for 51 refugees who have been indefinitely detained for about four years due to adverse security assessments, in their successful communications before the United Nations Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

The Bill would legislatively entrench serious violations of Australia's obligations under international human rights law and as such should not be enacted in its present form. In 2013 the UN Human Rights Committee found that the indefinite detention of refugees in consequence of their adverse security assessments violated Articles 9(1), 9(2), 9(4) and 7 of the ICCPR: see *F.K.A.G. et al. v Australia,* Communication No. 2094/2011 (20 August 2013) and *M.M.M. et al v Australia*, Communication No. 2136/2012 (20 August 2013). The UN identified around 150 breaches of Australia's international law obligations. I **attach** the decisions.

The Parliament should not simply substitute the flawed regulation-based scheme with a statutory one until these basic human rights defects are rectified. The Bill makes a technical adjustment to the legal basis of security assessments but makes no attempt to bring the security assessment regime into conformity with the ICCPR, basic fairness, or humane treatment.

The Committee should be alarmed by the exceptionally poor quality and conclusions of the Statement of Compatibility with Human Rights attached to the Bill in respect of Schedule 3. The Statement claims that the Schedule 3 is compatible with the ICCPR, including on the basis of UN Human Rights Committee jurisprudence.

Fundamental legal claims in the Statement are wholly wrong. The Statement negligently ignores the most relevant case law of the UN Committee, which directly contradicts some of the key legal views expressed in the Statement. In particular, in *FKAG v Australia* and *MMM v Australia*, the UN Committee found specifically in relation to refugees detained in consequence of Australia's security assessment regime that:

- **46 refugees were illegally detained under Article 9(1) of the ICCPR**, because Australia did not individually justify their detention, inform them of the specific reasons why they threatened security, did not use less invasive means of addressing any security risks, and did not afford them adequate legal safeguards;

Faculty of Law
Law Building F10
The University of Sydney
NSW 2006 Australia

ABN 15 211 513 464
CRICOS 00026A

- **46 refugees had no effective judicial remedies in the Australian courts for illegal detention, contrary to Article 9(4) of the ICCPR**;
- **Some of the refugees were not adequately informed of the reasons for their detention, contrary to Article 9(2) of the ICCPR**; and
- **46 refugees were treated in an inhuman or degrading manner in detention contrary to Article 7 of the ICCPR**, because the arbitrary nature of the refugees' detention, its protracted or indefinite nature, the lack of information or procedural rights provided to the refugees, and the difficult conditions of detention, are cumulatively inflicting serious psychological harm on them (including through suicide attempts).

The UN Committee directed Australia to provide the refugees with an effective remedy, including release from detention on appropriate conditions, rehabilitation and compensation. It also asked Australia to prevent future violations and to review its migration laws. Australia must respond to the UN Committee by late February 2014. **Thus far, Australia has not complied with any of the remedies requested by the UN, nor has it reformed its migration laws.**

The Bill's Statement of Compatibility asserts (at p. 9) that there is no violation of Article 9(1) when the UN case law is applied. That claim is obviously wrong in light of the UN Committee's findings in the *FKAG* and *MMM* cases. The Statement omits to mention Articles 9(2), 9(4) or 7 at all, all of which are violated by the security assessment regime. The Statement also claims there is no violation of Article 10(1) (humane and dignified treatment in detention), but omits to mention that the UN found violations of Article 7 (inhuman or degrading treatment).

Australia made lengthy legal submissions to the UN Committee when taking part in the *FKAG* and *MMM* proceedings. The UN rejected the legal arguments being put yet again in the Statement to the Bill. I note that the UN Committee has previously criticised Australia's persistent, bad faith refusal to accept its findings on Australia's human rights obligations:

> Rejecting the Committee's interpretation of the Covenant when it does not correspond with the interpretation presented by the State party in its submissions to the Committee undermines the State party's recognition of the Committee's competence under the Optional Protocol to consider communications.[1]

Not only is the security assessment regime illegal, it is also procedurally unfair, unprincipled, and unnecessary in policy terms, as I have written elsewhere.[2] It is entirely possible to guarantee national security while ensuring fairness to affected individuals – as already occurs through balanced procedures in Britain, Europe, Canada, and New Zealand. It is also possible to protect security without resorting to the extremist measure of indefinite detention without charge. I note that freedom from arbitrary, unlawful detention is a 'traditional' common law freedom which the present Government claims to be particularly concerned about.

I urge the Parliament to uphold Australia's international obligations, and not to maintain the illegal, rights-infringing status quo. Please be in touch if I can be of any further assistance.

Yours sincerely
Ben Saul

[1] UN Human Rights Committee, Concluding Observations: Australia (24 July 2000), UN Doc. A/55/40.

[2] Ben Saul, 'Security and Fairness in Australian Public Law' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014), chapter 5 (93-118); Ben Saul, 'Indefinite Security Detention and Refugee Children and Families in Australia: International Human Rights Law Dimensions' (2013) 20 *Australian International Law Journal* 55-75; Ben Saul, 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law' (2012) 13 *Melbourne Journal of International Law* 685-731; Ben Saul, 'Fair Shake of the Sauce Bottle': Reform Options for Making ASIO Security Assessments of Refugees Fairer' (2012) 37 *Alternative Law Journal* 221; Ben Saul, 'The Kafka-esque Case of Sheikh Mansour Leghaei: The Denial of the International Human Right to a Fair Hearing in National Security Assessments and Migration Proceedings in Australia' (2010) 33 *UNSW Law Journal* 629-661.