THE UNIVERSITY OF SYDNEY

Sydney Centre for International Law

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

30 May 2011

Dear Committee Secretary,

Re: Inquiry into the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011

Thank you for the opportunity to make a submission to your inquiry into the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 ("the Bill").

The Sydney Centre for International Law is a leading centre for research and policy on international law in the Asia-Pacific region. In this submission, we highlight the international law issues raised by the Bill and express our concerns about its consistency with Australia's international legal obligations. **In summary, we submit that the Bill is inconsistent with Australia's obligations under international law for three reasons:**

(1) It provides for the revocation of protection to refugees on the basis of minor criminal offences that pose no real threat to the community;
(2) It treats detained refugees unequally vis-à-vis other aliens or refugees; and
(3) It imposes harsher penalties on certain refugees on account of their illegal entry.

The proposed amendments to ss 500A and 501 of the Migration Act 1958 (Cth) (the "Migration Act") would empower the Minister to refuse or revoke refugee protection on the basis of a conviction for any crime committed in detention, no matter how minor and even if the conviction attracted no prison sentence. The availability of expulsion on the basis of minor crimes is made clear in paragraph 32 of the Bill's Explanatory Memorandum, which draws attention to the fact that the Minister will not be bound by the previous requirement that a person be convicted of a crime and sentenced for a minimum of 12 months. This places Australia in potential breach of its obligations under arts 7(1), 31(1), 32 and 33 of the *Convention Relating to the Status of Refugees*, amended by the 1967 Protocol (the "Refugee Convention" or the "Convention"). The proposed amendment to s 197B likewise breaches arts 7(1) and 31(1) because of its unequal effects.

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1. Inconsistency with Articles 32 and 33 of the Refugee Convention

Articles 32 and 33 of the Refugee Convention establish the limited circumstances in which a State party may refuse or revoke protection for a refugee based on crimes committed within that State. Article 32(1) allows expulsion (to a safe third country) on the grounds of national security or public disorder. Article 33(2) permits *refoulement* to a place of persecution only if there are reasonable grounds for regarding the person as a danger to the security of the State, or if they are convicted of a particularly serious crime and thus constitute a danger to the community. These articles should be seen as two aspects of a common obligation,[1] providing essentially that protection should not be revoked except on grounds of national security or serious crimes causing community danger.

The proposed amendments are clearly not directed towards national security, including as generously defined under Australian law,[2] which is concerned with guarding against attacks on the political integrity of the State.[3] Section 500A(1)(d) of the Migration Act already provides for expulsion on national security grounds, and it is highly unlikely that any offence attracting less than one year imprisonment would satisfy this standard. The Explanatory Memorandum makes reference to the need to deter future refugees from coming to Australia, yet this in no way satisfies the 'national security' exception under the Refugee Convention.[4]

The second limbs of both article 32(1) and 33(2) of the Refugee Convention allow the denial of protection on the basis, essentially, of serious crimes that threaten the community. Though they use different constructions, the standards are comparable (though higher in s 33(2), given the risks to which a *refouled* person will likely be exposed). Art 32(1) uses the narrow language of "public order" as opposed to the much broader term of "public policy", reflecting a deliberate decision by the Convention drafters to give the phrase a narrow interpretation whereby only the commission of a "serious crime", rather than any crime, can be grounds for expulsion.[5] This is confirmed by Executive Committee Conclusion No. 7 (1977) which stated that expulsion measures should only be taken in "very exceptional cases".[6] Grahl-Madsen suggested that this ground may only be invoked where normal punishment methods under the criminal justice system could not maintain or restore public order.[7]

Article 33(2) similarly allows *refoulement* only in cases of "*particularly* serious crimes" [emphasis added] the commission of which constitute a threat to the community. International jurisprudence and the UN Background Note on these two articles have not precisely defined

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[1] James Hathaway, *The Rights of Refugees under International Law* (2005) 664.
[2] ASIO Act 1979 (Cth), s. 4.
[3] James Hathaway, *The Rights of Refugees under International Law* (2005) 678.
[4] Ibid 346.
[5] Ibid 685.
[6] UN High Commissioner for Refugees, *Executive Committee Conclusion No. 7 (XXVIII) – 1977 on Expulsion* (1977).
[7] Atle Grahl-Madsen, *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)* (1963, pub'd 1997) 131 <http://www.unhcr.org/refworld/docid/4785ee9d2.html> at 27 May 2011.

what constitutes a "serious crime". Similarly, this is not defined in art 1F(b) of the Convention (which concerns the commission of serious crimes outside the country of refuge and by definition precludes the grant of refugee status from the outset). Nonetheless, international jurisprudence indicates that the term normally refers to violent crimes such as homicide, rape, child molestation, armed robbery, arson, and drug trafficking.[8] It is also important to note that art 33(2) further requires that such acts mean that the person constitutes a threat to the community. Experts agree that the article is only to be used as a last resort, when less onerous means of protecting the community from serious crime are unavailable.[9]

For purposes of comparison, Parliament may wish to note that the UK Supreme Court, in interpreting the Home Secretary's power to deport refugees under the *Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order*, held that an offence attracting imprisonment for at least two years does not automatically constitute a 'particularly serious crime' for the purposes of art 33 of the Convention. Moreover, proof of the commission of a serious crime does not alone justify deportation; danger to the community must also be shown.[10] The Bill plainly proposes a much lower standard than that which was rejected in the UK.

We submit that the proposed amendments breach the Refugee Convention by providing for a withdrawal of protection in circumstances that fall outside the narrow grounds afforded by articles 32(1) and 33(2) of the Convention. By permitting denial of protection for any crime, they ignore the strict requirements of seriousness and community danger in arts 32(1) and 33(2) of the Convention. The proposed amendments are also of concern in so far as they provide no guidance for the Minister regarding the exercise of his or her discretion. International and domestic jurisprudence indicate that when exercising the grave powers granted by arts 32 and 33, States should ensure that each case is individually considered in all its circumstances, including mitigating factors and the danger expulsion may pose for the individual in question.[11] No such assurance is provided by the proposed amendments.

Finally, the proposed amendments are entirely unnecessary. Existing provisions of the Migration Act already afford Australians protection against persons committing crimes who pose a threat to the community: ss 500A and 501 currently provide for the refusal or cancelation of visas for people imprisoned for 12 months or more or who otherwise threaten the community.

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[8] Hathaway, above n 1, 349; UN High Commissioner for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (2003) [38]-[40]; Paul Weis, *The Refugee Convention, 1951: the travaux préparatoires analysed, with a commentary* (1995) 342; Guy Goodwin and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007) 177.

[9] UN High Commissioner for Refugees , above n 7, [10].

[10] *EN (Serbia) v. Secretary of State for the Home Department; Secretary of State for the Home Department v. KC (South Africa)* [2009] EWCA Civ 630.

[11] Godwin-Gill and McAdam, above n 7, 137; *Betkoshabeh v Minister for Immigration and Multicultural Affairs* (1998) 157 ALR 95 at 102; Hathaway, above n 1, 348; Weis, above n 7, 322, 342; UN High Commissioner for Refugees, above n 5.

2. Inconsistency with Articles 7(1) and 31(1) of the Refugee Convention

The proposed amendments to ss 197B, 500A, and 501 have the effect of unequally burdening or penalising refugees in detention compared to other refugees and visa holders, potentially breaching Australia's obligations under arts 7(1) and 31(1) of the Refugee Convention.

Article 7(1) provides that a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

Article 31(1) provides that a Contracting State shall not impose penalties on refugees in detention on account of their illegal entry or presence. The term "penalty" is not defined in Article 31. The UNHCR and respected jurists have outlined that the object and purpose of Article 31(1) is "the avoidance of penalization on account of illegal entry or illegal presence. An overly formal or restrictive approach to defining ['penalty'] will not be appropriate".[12] In the United Kingdom, the Social Security Commissioner has determined that any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry should be regarded as a penalty within the meaning of Article 31, unless objectively justifiable on administrative grounds.[13] Alternatively, 'penalty' has been construed as any sanction that in substance is not merely preventive, but has a retributive or deterrent impulse.[14]

The proposed amendments in the Bill impose penalties upon refugees in detention that are disproportionate to those to which other aliens and refugees are subject for similar criminal conduct. Under Australian law, criminal offences involving the possession or distribution of a weapon, with definitions of "weapon" similar to that stipulated in s 197B, tend to carry penalties of between 6 months and 2 years imprisonment.[15] Under s 27D of the *Summary Offences Act 1998* (NSW) the unlawful possession of offensive weapons or instruments in a place of detention carries a maximum penalty of 2 years imprisonment. Under the Bill, the maximum penalty for the manufacture, possession, use or distribution of weapons by immigration detainees is to be increased from 3 to 5 years imprisonment.

The Minister's assertion in the Explanatory Memorandum that the increased penalty provided for in Section 197B of the Migration Act is not inconsistent with other penalties in Commonwealth legislation fails to take into account a number of considerations. The example given by the Minister is specific to the possession of weapons on aircraft, which carries a penalty of imprisonment for up to 7 years. This is not an appropriate comparison, however, as

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[12] Guy S. Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection' in Erika Feller, Volker Turk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 185-252.

[13] Decision of the Social Security Commissioner in Case No CIS 4439/98 (25 November 1999), Commissioner Rowland, para 16, in Goodwin-Gill, above n 11, 209.

[14] Goodwin-Gill, above n 11, 195.

[15] Examples of such penalties are in s 6 of the *Control of Weapons Act* (Vic) (1 year imprisonment); s 15(1) of the *Summary Offences Act 1953* (SA) ($2500 or 6 months imprisonment); s 15(1b) of the *Summary Offences Act 1953* (SA) ($7500 or 18 months imprisonment); s 50 of the *Weapons Act 1990* (Qld) (2 years imprisonment); s 547D of the *Crimes Act 1900* (NSW) (6 months imprisonment and 5 penalty units).

the possession of weapons on aircraft across most Australian jurisdictions is subject to significantly higher penalties than the possession of weapons generally,[16] and must be viewed in the light of obligations under transnational crime treaties which require Australia to ensure the safety of civilian aircraft against serious violence such as terrorism.

These comparisons demonstrate that the proposed amendment to s 197B would accord to those in immigration detention different treatment from that accorded to non-detainees in contravention of art 7(1) of the Refugee Convention. For the same reason, the proposed amendment to s 197B also breaches art 31(1). It is a penalty because it affords less favourable treatment to refugees in detention than others, and thus punishes them for "illegal" entry.

Unlike the proposed amendments to s 197B, s 501 of the Migration Act applies to all visa holders (not just holders of protection visas). All aliens are thus amenable to deportation if, for example, they are convicted a crime and sentenced to 12 months imprisonment (s 501 6(a)). Only detained refugees, however, would face the prospect of expulsion if convicted of any crime whatsoever, including minor ones. If a refugee detained following arrival in Australia by boat convicts a minor offence while in detention, they would face a risk of expulsion under the proposed amendments, whereas a refugee convicted of the same crime after arrival in Australia by air would not. The imposition of this additional penalty solely upon holders of protection visas in detention amounts to unequal treatment contrary to Australia's obligations under articles 7(1) and 31(1) of the Refugee Convention.

We also note that many offences committed in immigration detention in Australia must be understood against the background of serious psychological harm which is medically documented as stemming from detention in certain circumstances, and which can adversely affect the behaviour of detainees.[17] It would be highly inappropriate for the law to enhance the punishment of detainees for the predictable mental health consequences of poor government policy choices concerning mandatory detention.

In view of the foregoing concerns, we urge Parliament to refrain from adopting these unnecessary and potentially illegal measures, thereby upholding Australia's venerable record and reputation as a State respectful of the international rule of law.

Yours sincerely,

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[16] Section 246A of the *Crimes Act 1958* (Vic) gives a maximum of 15 years imprisonment for conduct endangering the safe operation of aircraft. Sections 205 and 207 of the *Crimes Act 1900* (NSW) provide for a maximum of 14 and 7 years respectively, for endangering the safety of aircraft and placing dangerous articles on aircraft. These penalties should be contrasted with those given below for more general criminal activity.

[17] Australian Human Rights Commission, *2011 Immigration Detention at Villawood* (Sydney, 2011).