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Specialised services for refugees

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***Submission to inquiry into the Migration
Amendment (Strengthening the Character Test and
Other Provisions Act) 2011***

The Victorian Foundation for Survivors of Torture Inc (Foundation House) appreciates the opportunity to make this submission on the Bill.

Our interest in the Bill

Foundation House was established in 1987 to assist survivors of torture and trauma, of refugee backgrounds, who have settled in Victoria. Today, we provide services to more than 3000 survivors each year in the form of counselling, advocacy, family support, group work, psycho-education and complementary therapies.

We provide services not only to refugees who have been granted permanent residence but also to asylum seekers in immigration detention (including in community detention) and on bridging visas.

The Bill may affect the prospects of a number of asylum seekers being granted permanent visas to settle in Australia. The potential consequences for affected

individuals are profound.

Our comments in the Bill

We have had the benefit of studying the submission of the United Nations High Commissioner for Refugees which the Committee has published. We endorse its analysis and conclusions that “further broadening of the grounds of the character test is unnecessary and may have a disproportionately harsh impact upon refugees and asylum-seekers who have been detained for prolonged periods, and who are particularly vulnerable.”

Our comments are restricted to certain aspects of the Bill, though we are mindful that there are significant concerns about the character test more generally which we hope will be addressed by the Parliament in due course.¹ The Bill will exacerbate such concerns.

The particular focus of our concern is the amendment to section 501 which specifies the grounds on which the Minister for Immigration and Citizenship or the Minister’s delegates may refuse to grant a visa to a person, or may cancel a person’s visa, if they do not satisfy the Minister that they pass the character test. There is a similar amendment relating to section 500 which concerns temporary safe haven visas.

The Bill provides an additional ground on which a person will not pass the character test i.e. that the person was convicted of an offence committed while in immigration detention or during an escape or following an escape, before being detained again (501(6)(aa)).

The Explanatory Memorandum states that this additional ground is necessary because a current criterion - that a person fails the character test if he or she has been sentenced to a term of imprisonment of 12 months or more - “imposes a significant limitation on the ability of the Minister to appropriately respond to the violent,

¹ See Susan Harris Rimmer, *The Dangers of Character Tests: Dr Haneef and other cautionary tales*, The Australia Institute, 2008.

destructive and criminal behaviour which has been occurring in immigration detention." (paragraph 32)

We ask the Legal and Constitutional Committee to consider two questions:

- Is the amendment necessary to deal with "violent, destructive and criminal behaviour" in immigration detention such as that which has occurred recently?
- Is the Bill well crafted to address such conduct?

(i) Is the amendment necessary?

On the basis of our study of the legislation and jurisprudence, we submit that the Government has not provided a compelling argument that the additional ground is necessary.

As indicated above, the Explanatory Memorandum asserts that the amendment is necessary because the Minister's ability to respond appropriately to recent events is unduly constrained by the requirement for a court to have sentenced a perpetrator to 12 months or more imprisonment.

However, the Explanatory Memorandum does not refer to additional grounds in the *Migration Act* which do not impose such a limitation. In particular, the *Migration Act* provides that a person does not pass the character test if she or he is not of good character because of "the person's past and present criminal conduct" (501(6)(c)(i)) and "the person's past and present general conduct" (501(7)(c)(ii)). In 2009 the Minister for Immigration and Citizenship issued a Direction under s499 of the *Migration Act* providing direction to decision-makers with respect to section 501. The Direction outlines a number of factors for decision-makers to consider in determining whether a person is not of good character on the basis of criminal conduct and they include "the nature, severity and frequency of the offence/s" (7.3.1(1)(a)). The factors do not include the penalty imposed by a court.

Therefore, on its face, the *Migration Act* does not unduly

prevent the Minister and delegates from considering whether individuals convicted of violent and destructive conduct while in immigration detention should be deemed to have failed the character test.

Is the Bill well crafted?

According to the Explanatory Memorandum "it is intended by the Government to ensure that any conviction for an offence *of the kind covered by this Bill* results in a person automatically failing to pass the character test." (Outline) (emphasis added).

However, the Bill does not specify any kind of offence and its scope is therefore not limited to "violent" and "destructive" conduct. A person who is convicted of *any* offence committed while in immigration detention will not pass the character test. This will apply not only to adults in immigration detention facilities but also to children in community detention.

The breadth of offences that would result in people failing the character test and at risk of being denied or deprived of visas is illustrated by the following conduct prohibited by the Victorian *Summary Offences Act 1966* (Vic). No doubt there are similar offences in other Australian States and Territories.

Section 4(d): any person who in a public place flies a kite; or plays at a game to the annoyance of any person is guilty of an offence (5 penalty units);

Section 10: any person who posts any placard bill sticker or other document on or writes or paints on or otherwise defaces any road bridge or footpath or any house building ... or other structure whatsoever ... shall be guilty of an offence (15 penalty units);

Section 17(1): any person, who in or near a public place or within the view or hearing of any person, (a) sings an obscene song or ballad or (b) writes or draws exhibits or displays an indecent or obscene

word figure or representation, shall be guilty of an offence.

Statements by the Minister for Immigration and Citizenship and the Explanatory Memorandum indicate that the Government's intention was only to deter and punish particularly reprehensible conduct of the kind that has recently occurred and which is cited in the Explanatory Memorandum as the justification for the Bill.

It may be contended that the Minister can be trusted to apply the new law with discretion, despite its breadth. However, Parliament should not vastly expand the Executive's potentially draconian powers when it would be very simple to amend the Bill to restrict it to the scope the Government states is necessary.

Destructive and violent actions of a number of people in detention have aroused significant hostility in the community which may well affect the attitudes of decision-makers towards visa applicants who are by statute deemed to have failed the character test. There is a real risk that visas will be denied to individuals who have committed offences that are very far from the violent and destructive conduct that the Government states the Bill is designed to address.

We submit that if the inquiry does conclude that the *Migration Act* test needs to be amended to deal adequately with violent and destructive conduct in immigration detention, the Bill should be amended so that it is clearly restricted to such conduct.

Conclusion

The Victorian Foundation for Survivors of Torture believes that the Bill is neither a necessary nor proportionate response to recent events in immigration detention facilities. Its impact on vulnerable individuals could be extremely harsh.

If the Bill does proceed, it should be amended to reduce the serious risk of harming individuals who are not the intended targets of the measure.

The Committee should propose a broad review of the character test.