Refugee Council of Australia

SUBMISSION TO THE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO THE *MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST AND OTHER PROVISIONS) BILL 2011*

The Refugee Council of Australia (RCOA) is the national umbrella body for organisations involved in supporting and representing refugees and asylum seekers, with a membership of more than 700 organisations and individuals. RCOA promotes the adoption of flexible, humane and constructive policies by government and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants.

RCOA is alarmed by the amendments set out in the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* (henceforth, the Bill). Rather than address the issues related to long-term, indefinite detention, this Bill is likely to exacerbate the issues further. RCOA maintains that this Bill was not developed in concert with a sound evidence base and that the amendments put forward are both damaging to vulnerable people and ineffective in achieving the "deterrent effect" desired by the Government.

Amendments to subsection 500A and 501

The Government has not – neither through the Bill nor its explanatory memorandum – demonstrated how the proposed changes will act as a deterrent of the stated behaviour. According to the explanatory memorandum, the proposed changes are a:

> *…response to the criminal behaviour 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.*

The explanation goes on, however, to state that the Government will "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". The explanation that the amendment has been proposed to act as a disincentive for violent and disruptive behaviour does not hold up, as people may be refused a protection visa based not on their participation in "violent and disruptive behaviour" but on their partaking in minor, nonviolent offences. While RCOA does not condone these offences, we recognise that the current provisions for the Minister to make an adverse character finding are sufficient.

As the Law Council of Australia highlights in its submission, the current provisions in the *Migration Act* afforded to the Minister more than suffice for him or her to be able to make an adverse character finding about an individual convicted of an offence carrying a sentence of 12 months or

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more. The present assessment also considers repetitive character traits and actions, therefore the Bill does not capture conduct that is not already captured by the current provisions. With regard to character assessments, the *Migration Act* presently contains guidance for those of concern and is sufficiently strong and direct.

The amendment proposed at subsection 500A(4) has the potential to have dire consequences for refugees placed in difficult situations, many of which are created and sustained by current Government policy and procedure. While RCOA, as stated above, does not condone acts of violence or that cause property damage, we are alarmed by the current immigration detention regime and believe that the conditions leading up to the recent incidents at immigration detention centres must be thoroughly examined and addressed.

The amendment at subsection 500A(4) has been proposed following incidents of unrest and damage in some immigration detention facilities. The Government has acknowledged that immense overcrowding was a factor in one incident and has taken steps to alleviate this overcrowding. The fact remains, however, that often vulnerable people were living in cramped, stressful, inappropriate conditions for extended periods of time. Many individuals and groups – including its own professional advisory councils – warned the Government that tensions were rising and that the likelihood of unrest was growing.

Vastly increased waiting times, a lack of information, separation from family and hopelessness have become the reality and standard in immigration detention in Australia. These conditions are not conducive to a calm and stable environment. Placing people under such pressure and in large groups can very easily lead to desperate responses. We have seen a long history of protest, hunger strikes, unrest and tragically suicides in all detention centres operated under Australia's asylum system.

The proposed amendment of Subsection 500A(4) could see a person convicted of any offence, carrying a jail sentence or otherwise put in a position of constant limbo or even physical harm. Being caught up in a group protest inside a centre could leave a father, husband, mother detained for life in Australia, living in our community with no durable solution and no right to family reunion or sent back to a country where they face torture, trauma or inhumane treatment.

The case could easily be made that a misdemeanour carried out in these pressurised, unsuitable environments is one that is out of character for an individual. Combine these settings with past experiences including torture and trauma, and the case for discretion becomes obliquely apparent.

Increased penalty for subsection 197B

The Government has not provided sufficient explanation or evidence to increase the penalty for subsection 197B (the manufacture, possession, use or distribution of a weapon). The current penalty of three (3) years imprisonment goes beyond the maximum penalty for a similar offence at the state level. For instance, possession of a weapon in a detention centre (prison) in New South Wales is an offence carrying a two (2) year sentence. To increase the penalty from three to five years in immigration detention is out of sync with what occurs in similar jurisdictions. The explanatory memorandum aligns this offence with that of carrying a weapon on board an aircraft, and RCOA does not agree that that possession of a weapon on board an aircraft is analogous to possession in immigration detention. The explanatory memorandum also sets out that this offence should carry the same penalty as escape from immigration detention, and again, there is little

evidence to support this analogy. If the Government seeks to increase the maximum penalty, it must demonstrate why the current penalty is not sufficient and how the proposed change will act as a deterrent. The explanations provided to date are insufficient, therefore the amendments should be disregarded.

Conclusion

Given the current inquiries underway into incidents at Villawood and Christmas Island detention centres and the possibility of an inquiry into the system of immigration detention itself, the Bill is both premature and unnecessary. From these independent and Parliament-driven inquiries, we are awaiting information regarding the lead up to incidents, the precautionary measures adopted, the use of force and the actions of authorities involved, including staff contracted to manage detention facilities. Without pre-empting the findings and recommendations of these reports and inquiries, it would seem reasonable that recommendations and subsequent changes may be made that would have long-term benefits for staff, detainees and the wider community. To pass harsh legislation targeting a very small minority but likely to impact adversely on many individuals is not a reasoned approach.

Rather than the proposed amendments, RCOA recommends that the Government consider how to alleviate the pressures of immigration detention. Overcrowding issues could be lessened through the use of either the residence determination provisions already afforded to the Minister or through the current bridging visa system. RCOA is happy to provide further information and current programs in place that demonstrate the efficacy and humanity of these alternatives to detention.

The Refugee Council of Australia recommends that no part of the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* be adopted.