

**AMNESTY
INTERNATIONAL**



Submission to the
**Senate Legal and Constitutional
Affairs Legislation Committee**

inquiry into
*Migration Amendment (Detention
Reform and Procedural Fairness) Bill
2010*

submitted by
Amnesty International Australia
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Contact: Ms Tamara Lions

Executive summary

Amnesty International has long campaigned for reform of Australian immigration detention practices to comply with Australia's international human rights obligations. In particular, Amnesty International remains concerned with the policies of indefinite mandatory detention, excision and offshore processing.

Amnesty International supports the changes to the Migration Act 1958 proposed in the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* as they address these key issues directly and establish a human rights based approach to immigration detention practices.

The implementation of the legislation would substantially improve Australia's immigration practices in line with international human rights standards.

About Amnesty International

Amnesty International is a worldwide movement of more than 3 million people across 160 countries working to promote the observance of all human rights enshrined in the Universal Declaration of Human Rights and other international standards. Amnesty International undertakes research and action focused on preventing abuses of human rights, including rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination.

Protecting the rights of refugees and asylum seekers is an essential component of Amnesty International's global work. We aim to contribute to the worldwide observance of human rights as set out in the *Universal Declaration of Human Rights*, the 1951 *UN Convention of the Status of Refugees* ("Refugee Convention") and other internationally recognised standards. Amnesty International works to prevent human rights violations that cause refugees to flee their homes. At the same time, we oppose the forcible return of any individual to a country where it is probable that he or she would face serious human rights abuse.

Background

Amnesty International has consistently called on successive governments to reform immigration detention practices in order to fully honour Australia's human rights obligations.

It is important that there is a legislative foundation for Australia to develop and maintain a more humane immigration detention framework that is consistent with international human rights standards. Amnesty International believes that the two main obstacles to this goal are the continuing regime of mandatory indefinite detention and the excision of certain islands from Australia's migration zone.

From the established international law in this area, Amnesty International has developed the following set of principles to guide administrative migration detention policy:

- Immigration detention should not be mandatory. The need for detention should be individually assessed and used as a last resort only where there is a proven need to undertake health, character, identity or security assessments.
- Immigration detention should not be used to discourage asylum seekers, as this contravenes obligations under the Refugee Convention, specifically Article 31.
- Immigration detention should never be used for an indefinite duration. The psychological impact of indefinite detention is irrefutable, breaching international principles of humane treatment of persons in detention and the prohibition of cruel, inhumane or degrading treatment.
- Immigration detention should be applied in accordance with clear legal criteria and subject to judicial review, while also being conducted in a transparent and accountable manner.
- Immigration detention should be governed by standards that protect human rights and dignity, including those set out in the UN *Minimum Standards for the Treatment of Prisoners*, and the *Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment*.¹

Amnesty International remains opposed to the policy of offshore processing maintained by successive Australian governments. Amnesty International considers that offshore processing of asylum seekers, such as on Christmas Island, circumvents important domestic and international legal protections for refugees. Amnesty International has repeatedly urged successive governments to reinstate Christmas Island, and all other Australian territory, to Australia's migration zone and abolish the two-tiered system of processing asylum seekers.

Issues addressed in the legislation

Part 1 - Establishing asylum seeker principles

The table below compares the asylum seeker principles proposed in the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*, Amnesty International's detention principles and the Department of Immigration and Citizenship's Key Detention Values.

¹ Amnesty International Australia's submission to The Joint Standing Committee on Migration Regarding the Inquiry into Immigration Detention in Australia, August 2008

| Proposed asylum seeker principles | Amnesty International principles | Current Immigration Detention Values |
|---|--|---|
| (2) The asylum seeker principles established in this section are based on principles contained in international conventions and treaties to which Australia is a signatory, as they relate to refugees and asylum seekers. | Immigration detention should be governed by standards that protect human rights and dignity, including those set out in the UN <i>Minimum Standards for the Treatment of Prisoners</i> , and the <i>Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment</i> . | |
| (3)(a) Immigration detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of such detention including the appropriateness of both the accommodation and the services provided must be subject to regular review. | <p>Immigration detention should not be mandatory. The need for detention should be individually assessed and used as a last resort only where there is a proven need to undertake health, character, identity or security assessments.</p> <p>Immigration detention should not be used to discourage asylum seekers, as this contravenes obligations under the Refugee Convention.</p> | <p>1. Mandatory detention is an essential component of strong border control.</p> <p>2. To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention:</p> <ul style="list-style-type: none"> a. all unauthorised arrivals, for management of health, identity and security risks to the community b. unlawful non-citizens who present unacceptable risks to the community and c. unlawful non-citizens who have repeatedly refused to comply with their visa conditions. <p>4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.</p> |
| (3)(b) Detention in immigration detention facilities must only be used as a last resort and for the shortest practicable time. | Immigration detention should never be used for an indefinite duration. The psychological impact of indefinite detention is irrefutable, breaching international principles of humane treatment of persons in detention and the prohibition of cruel, inhumane or degrading treatment. | <p>5. Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.</p> <p>3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC).</p> |
| <p>(3)(c) People in immigration detention facilities must be treated fairly and reasonably within the law.</p> <p>(3)(d) Living conditions in immigration detention must ensure the inherent dignity of the human person.</p> | Immigration detention should be applied in accordance with clear legal criteria and subject to judicial review, while also being transparent and accountable. | <p>6. People in detention will be treated fairly and reasonably within the law.</p> <p>7. Conditions of detention will ensure the inherent dignity of the human person.</p> |
| Any person making any decisions about refugees, asylum seekers, immigration detention or a related matter under this Act, must have regard to the asylum seeker principles set out in subsection (3). | | |

The table above shows that the proposed asylum seeker principles in section 4AAA of the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* are broadly consistent with the detention principles developed by Amnesty International.

However, the proposed legislation does not make any specific reference to international conventions and treaties. Amnesty International suggests the legislation refer specifically to the following conventions and treaties:

- The International Covenant on Civil and Political Rights.
- The United Nations Convention Relating to the Status of Refugees.
- The United Nations Minimum Standards for the Treatment of Prisoners.
- The United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment.

It should also be noted that some of the proposed asylum seeker principles are already reflected in the Department of Immigration and Citizenship's current Key Immigration Detention Values². In particular, that:

- Detention that is indefinite or otherwise arbitrary is not acceptable.
- People in detention will be treated fairly and reasonably within the law.
- Conditions of detention will ensure the inherent dignity of the human person.

On 29 July 2008, the Minister for Immigration and Citizenship, the Hon Christopher Bowen MP, explained that the Key Immigration Detention Values had been adopted to facilitate changes to the immigration detention system. He said,

"...the set of values adopted are designed to drive the development of a very different detention model."

However, it is clear that this has not been the case. At present, Amnesty International does not consider that the Key Immigration Detention Values are being upheld in practice in the immigration detention system.

It is evident that there are people being held indefinitely in immigration detention. Further, conditions inside some detention centres, such as on Christmas Island where detainees are often housed in tents, do not always ensure the 'inherent dignity of the human person'³. The principle that 'children, including juvenile foreign fishers and their families will not be detained in an immigration detention centre'⁴ is also being breached, with over 300 children still in immigration detention, including juvenile foreign fishers.

² Department of Immigration and Citizenship, Key Immigration Detention Values, available online on <http://www.immi.gov.au/managing-australias-borders/detention/about/key-values.htm>.

³ *Ibid.*

⁴ *Ibid.*

Amnesty International supports the principles proposed in the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*. However, it is not clear whether the requirement in subsection (4) that:

'Any person making any decisions about refugees, asylum seekers, immigration detention or a related matter under this Act, must have regard to the asylum seeker principles set out in subsection (3)'

will necessarily guarantee that the principles are upheld in practice, particularly in light of the current failings of the Government's Key Immigration Detention Values.

Part Two - Facilitating judicial review of detention decisions

Amnesty International welcomes amendments Part 2 of the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*.

Amnesty International has long advocated that immigration detention in Australia be subject to regular review and external oversight. While the Commonwealth Ombudsman reviews have proven to be a good first step, detention must also be subject to judicial review.

In 2008, Amnesty International argued that regular judicial review of detention was a necessary measure to prevent against unduly protracted or indefinite detention. The organisation believes that any person within Australia who is detained as a result of an administrative decision should be availed of the right to test that decision in the courts. It is completely unacceptable that the application of the rule of law is removed from some persons.

Judicial oversight should apply not just to those in detention centres, but also to asylum seekers in alternate forms of detention. In *Irregular migrants and asylum seekers: alternatives to immigration detention*, Amnesty International stated that:

'Judicial review provides crucial oversights of the use of alternative measures, to guard against their disproportionate, unnecessary or discriminatory use, as well as providing an effective remedy against such violations'.⁵

The amendments proposed in Part Two set clear limits on time spent in detention as well as requirements for authorities to outline reasons for detention. Importantly, the changes allow for judicial review of cases so that a magistrate decides if continued detention is appropriate.

⁵ Amnesty International Australia, *Irregular migrants and asylum seekers: alternatives to immigration detention*, April 2009, AIA POL 33/001/2009.

Part Three - Repealing excised offshore places

Amnesty International welcomes the amendments proposed in Part 3 of the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* to repeal provisions for excised offshore places.

Amnesty International considers that offshore processing of asylum seekers, such as on Christmas Island, circumvents important domestic and international legal protections for refugees.

Amnesty International has repeatedly urged the Government to reinstate Christmas Island and other excised territories to Australia's migration zone and abolish the two-tiered system of processing asylum seekers. The current system effectively allows for asylum seekers who have reached the mainland, and those who are intercepted by boat outside the zone, to be treated differently. Furthermore, the practice of offshore processing seems to create inconsistency in the application of immigration law for certain parts of the Australian territory, and yet still provides no guarantee that asylum seekers processed on Christmas Island, or the other excised zones who are found to be genuine refugees, will be resettled in Australia.

The proposed amendments to the Migration Act would remove the provisions relating to excised offshore places, effectively ending the policy. As such, Amnesty International fully supports the legislation.

Part Four - Restoring fair process and procedural fairness

Amnesty International supports the changes proposed in Part 4 of the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* to restore fair process and procedural fairness to asylum seekers under the Migration Act.

Part Five - Amending the duration of detention

Amnesty International welcomes the amendments proposed to subsections 42(4), and 189(1)(2) of the Migration Act that would essentially establish detention as the exception rather than the rule. This is a necessary provision to ensure detention is used only 'as a last resort'.

In April 2009, Amnesty International released a report entitled, *Irregular migrants and asylum seekers: alternatives to immigration detention*.⁶ This document highlights the need for a legislated presumption against the use of immigration detention, arguing that alternative non-

⁶ Amnesty International Australia, *Irregular migrants and asylum seekers: alternatives to immigration detention*, April 2009, AIA POL 33/001/2009.

custodial measures should always be considered first and given preference before resorting to detention.

Detention of irregular migrants and asylum seekers will only be lawful when the authorities can demonstrate in each individual case that alternatives will not be effective, that it is necessary and proportionate to achieve one of three recognised legitimate objectives: to prevent absconding, to verify identity or to ensure compliance with a removal order. In all cases where detention is used it must be on grounds prescribed by law.

Detention as a last resort

However, Amnesty International is concerned that a measure “of last resort” is a vague term that lends itself to a wide range of interpretations. To ensure clarity, transparency and fairness in the process, Amnesty International recommends that clear guidelines be established to determine what constitutes a 'last resort'.

Length of detention

Specifying that the detention of non-citizens should be “for the shortest practicable time” was a positive step reflected in the Key Immigration Detention Values. However, at present this is clearly not operating in practice.

Amnesty International continues to assert that to end indefinite detention, maximum periods of detention must be legislated. In 2008, the organisation recommended that, “Detention of individuals must have reasonable maximum time limits set. After this limit is over, assuming an individual does not pose a risk to the community, the individual should be automatically released.”⁷

The proposed new section 195C establishes that detention under section 189 must not exceed 30 days unless a magistrate is satisfied of the need for continued detention. Amnesty International welcomes this limit on detention, as well as the powers given in subsection 5 to the magistrate to order the immediate release of the detainee. These changes would substantially improve the length of time detainees spend in detention.

Mandatory detention

Amnesty International remains strongly opposed to the policy of mandatory detention for immigration purposes. We are concerned that despite the important steps the government has

⁷ Amnesty International Australia, Submission to The Joint Standing Committee on Migration Regarding the Inquiry into Immigration Detention in Australia, August 2008.

taken to realign its immigration policy with international human rights standards, it has also repeatedly stated its commitment to mandatory detention.

Amnesty International considers the current system of mandatory non-reviewable detention to contravene several international human rights agreements to which Australia is a party. Article 9 of the *International Covenant on Civil and Political Rights* prohibits arbitrary detention and provides that a detained person must be able to take proceedings before a court; Articles 3 and 9 of the *Universal Declaration of Human Rights* establish the right to liberty and freedom from arbitrary detention; and Article 31(1) of the *Refugee Convention* provides that refugees should not be subjected to any form of punishment due to their illegal entry. Amnesty International urges the Australian Government to end mandatory detention.

Criticism of Australia's immigration detention system

The United Nations has been critical of Australia's treatment of asylum seekers and refugees, particularly through the Universal Periodic Review process. The Australian Government's response to those concerns was to highlight the 'substantial changes to Australia's detention system' brought about by the adoption of the Immigration Detention Values⁸. The Government's response fails to adequately address the concerns raised during the Universal Periodic Review.

Conclusion

Amnesty International supports the introduction of the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*.

Overall, the reforms to immigration detention in Australia proposed in the Bill would bring Australia's immigration detention system into line with international human rights standards.

Amnesty International Australia urges the Senate Legal and Constitutional Affairs Legislation Committee to support this legislation.

⁸Australian Government, Universal Periodic Review National Report - Australia, available online at [http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/\(8AB0BDE05570AAD0EF9C283AA8F533E3\)~National+Report4November2010.pdf/\\$file/National+Report4November2010.pdf](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~National+Report4November2010.pdf/$file/National+Report4November2010.pdf), point 137, p.22.