

**AMNESTY
INTERNATIONAL**



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

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

May 2011

Submitted by Amnesty International Australia

Contact: Tamara Lions, Government Relations Advisor

Phone:

Email:

Address: PO Box 1028, Civic Square, Canberra, ACT, 2601



1. Executive summary

The *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* proposes changes to the *Migration Act 1953* to ensure that if a person in detention commits and is convicted of a criminal offence, they will automatically fail the Character Test, providing grounds for the refusal or cancellation of an Australian visa. The purpose of this legislative amendment is to discourage criminal behaviour among detainees in immigration detention.

Amnesty International suggests that as is currently the practice, criminal behaviour by detainees is most appropriately dealt with by the criminal justice system. Any additional punishment, in the form of automatically failing the Character Test and being denied a visa, is unreasonable.

Amnesty International does not condone criminal behaviour by detainees in Australian detention centres, but believes the additional punishment proposed in the legislation is overly punitive and unnecessary.

Amnesty International suggests the urgent need to explore alternatives to mandatory detention, and, for those who are detained, minimizing sources of frustration and tension by improving conditions in immigration detention and communication with asylum seekers about the progress of their applications.

2. About Amnesty International

Amnesty International is a worldwide movement of more than 3 million people across 150 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. The organisation aims 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.

3. Background

From 13 to 21 March 2011, a group of approximately 200-300 people detained in the Christmas Island immigration detention centre were involved in protest activities that included escapes from detention, violence and destruction of property. The Australian Federal Police took control of the facility and used tear gas and bean bag bullets to control the situation and restore order to the facility.

From 20 to 28 April 2011, a group of around 100 detainees in the Villawood immigration detention centre were involved in protests.

On 26 April 2011, in response to these protests, the Government introduced the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011*.

The legislation amends the *Migration Act 1953* so that detainees convicted of any criminal offence while in detention automatically fail the Character Test, grounds for cancelling or refusing a permanent visa.

4. Issues for Consideration

Amnesty International is concerned that the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* breaches Australia's obligations under the 1951 Convention relating to the Status of Refugees. In particular, this Bill breaches Article 31(1) of the Convention which states that:

“Contracting States shall not impose penalties, on account of their illegal entry of presence ...”

In previous submissions Amnesty International has outlined how Australia's policy of mandatory, indefinite detention breaches Article 31(1). Amnesty International believes that detaining asylum seekers on the basis of the manner of their arrival is imposing a penalty of the kind referred to in Article 31 (1). Once again, as this Bill only applies to those asylum seekers who arrive undocumented and are detained, it clearly provides an additional penalty in breach of Article 31(1).

Amnesty International believes the following parts specifically highlight how this Bill amounts to a penalty in breach of Article 31(1), as well as raising other serious issues of concern.

a) The legislation may punish people twice for one crime

Amnesty International does not condone criminal behaviour by detainees in Australia's immigration detention centres. Amnesty International believes that when people detained in immigration detention commit a crime, they should be prosecuted and punished under Australian law through the criminal justice system.

The *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* would impose an additional punishment on detainees in immigration detention by ensuring that following a criminal conviction while in detention, the detainee would automatically fail the Character Test. This would then amount to grounds for which the Minister to deny them a visa. Denial of a visa would essentially be a second punishment for a crime which had already been dealt with through the criminal justice system.

Amnesty International does not support the proposition that a person's immigration status should be a means of punishment for criminal behaviour. In the prison system, it is made quite clear that sentences imposed by a court should be the only punishment a criminal receives for a crime. The *Standard Guidelines for Corrections in Australia* (Revised 2004) states that:

“People are sent to prison as punishment not *for* punishment. Prison systems should ensure that prisoners are not further punished for their crimes over and above the sentence imposed by the Court.”¹

In the same way, Amnesty International argues that detainees should not be punished over and above the sentence imposed on them by the criminal courts by having their applications for a visa automatically denied.

b) The legislation punishes detainees unreasonably

Amnesty International does not consider automatically failing the Character Test as fair or reasonable punishment for criminal behaviour. Significantly, those failing the Character Test could face either indefinite mandatory detention or some form of temporary protection visa.² Amnesty International has

¹ Joint fAustralian State Governments, *Standard Guidelines for Corrections in Australia (Revised 2004)*, Part 1 Section 1.21, Accurate Administration of Sentences, p.14 (emphasis added), available online at http://www.aic.gov.au/criminal_justice_system/corrections/reform/~media/aic/research/corrections/standards/au-st-stand_2004.ashx.

² As outlined by the Minister in his press release “Tougher character test to send a clear message”, 26 April 2011, see <http://www.minister.immi.gov.au/media/cb/2011/cb164699.htm>

previously highlighted how both possibilities would place Australia in breach of its international human rights obligations.³

Australia's policy of mandatory non-reviewable detention places it in breach of several international human rights instruments. Article 9 of the 1966 International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, prohibits arbitrary detention and provides that a detained person must be able to take proceedings before a court that can determine the lawfulness of detention and order release where detention is unlawful. The rights to liberty and freedom from arbitrary detention are also protected in Articles 3 (right to liberty) and 9 (prohibition on arbitrary detention) of the Universal Declaration of Human Rights.

Under the proposed legislation, a detainee convicted of a crime while in detention would automatically fail the Character Test regardless of the seriousness of the crime committed. Currently, an asylum seeker only fails the Character Test if they have 'a substantial criminal record', that is, if they have been 'sentenced to a term of imprisonment for 12 months or more'. Under the proposed legislation, there is no distinction between serious crimes such as assault and lesser offences such as petty theft.

Furthermore, unlike punishment in the criminal justice system such as imprisonment, being denied a visa may have unquantifiable, ongoing, long-term consequences. For example, a detainee found to be a refugee, but who fails the Character Test due to a criminal conviction while in immigration detention and is denied a visa, would face significant uncertainty and the possibility of indefinite detention in Australia. As well as breaching Australia's international obligations, it is widely accepted that prolonged and indefinite detention has a detrimental effect on mental health⁴. Amnesty International is concerned that the legislation would impose unreasonable consequences on asylum seekers.

Amnesty International has serious concerns for asylum seekers and refugees who become stranded in detention indefinitely because of their immigration status. This legislative amendment may lead to people spending longer periods in detention which would compound the already significant problems in the immigration system. Some of these problems have been highlighted by members of the medical profession and by the Australian Human Rights Commission.

On the surface, this Bill suggests that those failing the Character Test will remain indefinitely detained. However, Amnesty International is aware that the Minister has announced that individuals who fail the Character Test could be released from detention on some form of provisional visa. The two potential visas mentioned by the Minister for this purpose were the Removal Pending Bridging Visa (RPBV) and the Safe Haven Visa (SHV). Amnesty International has previously expressed serious concerns with the human rights impact of these visas.⁵

The fact that the Minister has explicitly stated that the visas he is likely choose do not permit family reunion, is of particular concern. Keeping families separated indefinitely is a disproportionately harsh penalty. As well as causing further trauma to a group of people who have already suffered severe human rights abuses, it is also likely to have the unfortunate consequence of increasing the numbers of undocumented arrivals, as families wishing to reunite will have no other option but to engage people smugglers and undertake dangerous sea journeys.

Alternatively, women and children will be left vulnerable in countries of first asylum, with no male protection and no prospect of resettlement. UNHCR finds it extremely difficult to convince other resettlement countries to accept vulnerable women and children if they already have a husband in a safe third country. The principle of "derivative status" should apply in ensuring refugee families are not unduly separated, however this legislation coupled with stated policy will directly compromise this principle.

³ See Amnesty International, 2005, "The Impact of Indefinite Detention: the case to change Australia's mandatory detention regime", pp 30-34.

⁴ Australian Human Rights Commission, May 2011, *Immigration Detention at Villawood: Summary of observations from visit to immigration detention facilities at Villawood*, available online at http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.pdf, p. 20.

c) The legislation is inconsistent with the Key Immigration Detention Values

Amnesty International believes the proposed legislation would breach the Department of Immigration and Citizenship's Key Immigration Detention Values. The Key Immigration Detention Values state that:

"People in detention will be treated fairly and reasonably within the law."⁶

As outlined above, Amnesty International does not consider the proposed legislation as fair or reasonable treatment.

d) Special note on protests at Christmas Island and Villawood immigration detention centres

The Government has indicated that the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* was introduced in response to protests at the Christmas Island and Villawood detention facilities in March and April 2011⁷.

Amnesty International does not wish to condone or excuse the criminal behaviour that occurred during the protests. However, the extenuating circumstances surrounding these incidents must be acknowledged. The protests at Christmas Island were largely due to the length of time that detainees had spent in detention as well how overcrowded the facility had become.

A decision in April 2010⁸ to suspend the processing of new asylum applications from Sri Lanka and Afghanistan contributed to a backlog of claims and increased delays⁹. As a result, asylum seekers have had to spend extended periods in detention on Christmas Island.

In addition to this, the Government's policies of mandatory detention and offshore processing, combined with a steep increase in arrivals, have resulted in overcrowding at the Christmas Island detention facility. According to the Commonwealth Ombudsman, the Christmas Island detention facilities have a nominal operation capacity of 744¹⁰. In December 2010, there were 3,000 people detained on Christmas Island and at the time of the protests in March there were 2,500¹¹. Operating the facility at three times its capacity led to reduced access to recreational and education services, hygiene and cleanliness problems as well as reduced access to medical and dental services, including mental health services¹².

Amnesty International notes the progress the Government has made in reducing numbers on Christmas Island, however, at 6 May 2011, there were a total of 1,127 people accommodated in the Christmas Island facility, still well over the nominal operation capacity of 744.

Amnesty International considers overcrowding and long periods of time spent in detention to be detrimental to detainees' health and wellbeing, leading to stress, frustration and mental health issues. Detainees expressed their frustration in these incidents through protesting. Regrettably this resulted in violence and destruction of property.

It should be noted however, that while a small number of individuals express their frustration by lashing out, others withdraw and become clinically depressed, others self harm and others end up taking their

⁶ Department of Immigration and Citizenship, July 2008, *Key Immigration Detention Values*, available online at <http://www.immi.gov.au/managing-australias-borders/detention/about/key-values.htm>.

⁷ Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 Explanatory Memorandum, available online at http://www.austlii.edu.au/au/legis/cth/bill_em/matctaopb2011736/memo_0.html.

⁸ Minister for Immigration and Citizenship, media release 9 April 2010, available online at <http://www.minister.immi.gov.au/media/media-releases/2010/ce10029.htm>.

⁹ The Australian, 2 October 2010, Backlog of work tackled as Gillard government ends freeze on asylum claims, available online at <http://www.theaustralian.com.au/national-affairs/backlog-of-work-tackled-as-gillard-governments-ends-freeze-on-asylum-claims/story-fn59niix-1225933014625>.

¹⁰ Commonwealth Ombudsman, February 2011, Christmas Island immigration detention facilities, available online at http://www.ombudsman.gov.au/files/christmas_island_immigration_detention_facilities_report.pdf, p. 2.

¹¹ Minister for Immigration and Citizenship, 16 March 2011, Update on Christmas Island incident (transcript), available online at <http://www.minister.immi.gov.au/media/cb/2011/cb160379.htm>.

¹² Commonwealth Ombudsman, February 2011, Christmas Island immigration detention facilities, available online at http://www.ombudsman.gov.au/files/christmas_island_immigration_detention_facilities_report.pdf, pp. 14-15.



own life. Amnesty International has grave concerns that if the causes of the frustrations are not addressed self harm and suicides will increase.

If the proposed legislation is partly in response to the protests at Christmas Island and Villawood, the Government must acknowledge the role detention conditions play in exacerbating frustration and stress among detainees.

e) Exclusion under the 1951 Refugee Convention

The 1951 Refugee Convention already contains provisions for those who commit serious non-political crimes to be excluded from refugee protection. While noting that Article 1 F(b) of the Convention explicitly refers to “a serious non-political *committed outside the country* of refuge prior to his admission”, (emphasis added) it does provide useful guidance on why only a “serious” non-political crime should be considered when excluding someone from refugee status. As noted by UNHCR:

“Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F(b) even if technically referred to as “crimes” in the penal law of the country concerned.”¹³

In applying exclusion it is also necessary to strike a balance between the nature of the offence and the degree of persecution feared. There must be a degree of proportionality, with all the relevant factors, including mitigating circumstances, taken into account. The proposed legislation clearly sets a threshold far tougher than that envisaged under the 1951 Refugee Convention and as such is not in keeping with the spirit of protection to which Australia has voluntarily submitted itself by acceding to the Refugee Convention.

5. Recommendations

Amnesty International recommends that the legislation not be implemented.

Amnesty International finds the amendments proposed in *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* overly punitive and unreasonable.

Instead, Amnesty International recommends improving conditions in detention centres, implementing better communication processes with asylum seekers about their claims and reducing processing times.

Amnesty International recommends expanding the use of community detention

Amnesty International also strongly advocates the use of less restrictive, alternatives to immigration detention centres. In its 2009 report on alternatives to immigration detention, Amnesty International stated that:

Under international human rights law, states are obliged to first consider and, where possible, apply alternatives to immigration detention. In accordance with international human rights standards, immigration detention should be the exception and used only as a last resort when alternative, less restrictive measures would be ineffective or have failed.¹⁴

Amnesty International recommends implementing a human-rights based approach to immigration detention.

Amnesty International has encouraged successive governments to reform immigration detention practices in order to fully honour Australia’s obligations under major human rights treaties. Amnesty International has developed the following set of principles based on international law to guide administrative migration detention policy:

¹³ UNHCR “Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees”, Geneva, 1992, p36

¹⁴ Amnesty International, April 2009, Irregular migrants and asylum seekers: alternatives to immigration detention, AIA POL 33/001/2009.



- Immigration detention should not be mandatory. The need for detention should be assessed on a case by case basis 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.
- 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 transparent and accountable.
- 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*¹⁵.

Amnesty International believes that improving immigration detention practices in line with these principles would help to reduce criminal behaviour among people in detention.

7. Conclusion

Amnesty International understands that the Government wishes to discourage people in detention from engaging in criminal behaviour. Amnesty International is supportive of this in principle, and in no way condones criminal behaviour by detainees in immigration detention.

However, the changes proposed under the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* are unreasonable and would punish asylum seekers twice for an offence for which they had discharged their debt to Australian society by fulfilling a gaol term. The amendments are overly punitive and unnecessary, as criminal behaviour is dealt with effectively by the criminal justice system.

Amnesty International believes implementing a human rights-based approach to immigration policy and ending the policies of mandatory detention, excision and offshore processing would do much to improve conditions for asylum seekers and refugees in Australia's immigration system. This would reduce the factors leading to criminal behaviour among those in immigration detention.

Amnesty International thanks the Senate Legal and Constitutional Affairs Legislation Committee for the opportunity to comment on the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* and urges the Committee not to support the Bill.

¹⁵ Amnesty International Australia, August 2008, submission to The Joint Standing Committee on Migration Regarding the Inquiry into Immigration Detention in Australia.

