



Australian
Human Rights
Commission

everyone, everywhere, everyday

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

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Australian Human Rights Commission Submission
to the Senate Legal and Constitutional Committees

31 May 2011

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1 Introduction

1. The Australian Human Rights Commission welcomes the opportunity to make this submission to the Senate Standing Committees on Legal and Constitutional Affairs in its Inquiry into the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011.
2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution.

2 Background

3. This submission draws on extensive work the Commission has undertaken on Australia's immigration laws and policies over the past decade, including national inquiries,¹ examinations of proposed legislation,² inspections of immigration detention centres and reports on the conditions therein,³ the investigation of complaints from individuals in immigration detention⁴ and the development of minimum standards for the protection of human rights in immigration detention.⁵
4. This submission draws, more specifically, on the Commission's work on visa cancellation under section 501 of the *Migration Act 1958* (Cth) (Migration Act), including reports of inquiries into complaints by people who have been detained after they failed the character test and had their visas cancelled by the Minister.⁶
5. The Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 (the Bill) proposes to amend certain provisions of the Migration Act in response to recent disturbances in immigration detention centres at Christmas Island and Villawood.⁷
6. In particular, the Bill proposes to amend the Migration Act to:
 - provide that the Minister for Immigration and Citizenship may cancel or refuse to grant a visa, including a temporary safe haven visa, on the grounds that an applicant has been convicted of
 - an offence committed whilst in immigration detention or
 - the offence of escaping from immigration detention
 - provide that convictions for these offences should be disregarded if a conviction has been quashed or nullified or if the convicted person has been pardoned.

3 Summary

7. The Commission submits that the Bill should not be passed as the amendments it proposes to the Migration Act are unnecessary and may result in breaches of Australia's international human rights obligations.

8. The proposed amendments providing additional grounds on which the Minister may cancel or refuse to grant a visa are unnecessary. If the Minister wished to cancel or refuse to grant a visa in response to a disturbance at a detention centre, he could do so on a number of grounds currently contained in the Migration Act.
9. Furthermore, the proposed additional grounds would result, in effect, in some individuals involved in immigration detention centre disturbances receiving an additional tier of punishment over and above that imposed by the courts. This could potentially lead to breaches of Australia's obligations under the *International Convention on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CRC).⁸
10. Finally, the Commission believes that the amendments proposed by the Bill are not the most effective way to address the problem they are intended to remedy. In the Commission's view, it is not a lack of or inadequacy in sanctions in the Migration Act that is causing disturbance within Australia's immigration detention system but rather the prolonged and indefinite detention of a significant number of asylum seekers. The Commission believes that reforming Australia's system of mandatory and indefinite immigration detention would be a more effective way of preventing further unrest amongst asylum seekers.

4 The proposed additional grounds on which the Minister may cancel or refuse to grant a visa are unnecessary

11. The proposed new grounds on which the Minister may cancel or refuse to grant a visa are unnecessary because the grounds currently contained in the Migration Act are sufficiently broad.
12. The *Convention Relating to the Status of Refugees 1951*, to which Australia is a party, permits states to refuse to grant protection to people who have committed war crimes or other serious non-political crimes as well as people who constitute a danger to the community.⁹
13. These provisions are incorporated into and expanded upon in the Migration Act, which states that the Minister may cancel or refuse to grant a visa (including a safe haven visa) if:
 - a. a person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct,¹⁰ or
 - b. having regard to a person's past and present criminal and/or general conduct, the person is not of good character,¹¹ or
 - c. a person represents a risk to the safety of the Australian community or parts of it,¹² or
 - d. a person has been sentenced to death, life imprisonment or a term of imprisonment of 12 months or more.¹³

14. The Minister may also cancel or refuse to grant safe haven visas and other kinds of visas on a number of additional grounds.¹⁴
15. The Migration Act, therefore, already provides several bases on which most persons who are involved in disturbances within immigration detention centres could have their applications for visas refused or their existing visas cancelled, as the case may be.
16. For instance, a person who engages in disruptive or violent conduct at an immigration detention centre may be convicted of an offence and sentenced to a term of imprisonment of over 12 months, on which ground the Minister may cancel or refuse to grant a visa.
17. Additionally, the Minister may cancel or refuse to grant a visa on the ground that the past and present general conduct of a person who engages in disruptive behaviour demonstrates that he or she is not of good character. The Minister has suggested that courts have tended to interpret the term 'general conduct' to mean a series of events or a pattern of behaviour rather than a single isolated occasion.¹⁵ However, the courts are yet to conclusively decide this issue.¹⁶ Furthermore, in any case, the consequences of failing the character test are of such a serious nature that they should only apply in circumstances where a person has committed a sufficiently grave offence or when there is an established pattern of poor general conduct.
18. The Commission submits that the grounds upon which the Minister may cancel or refuse to grant a visa are already sufficiently broad. The Commission is concerned that the Bill proposes to further expand the circumstances in which the Minister can refuse to grant protection to a refugee in Australia beyond those provided by the *Refugee Convention*.

5 The amendments could result in the imposition of additional punishment on some individuals

19. The proposed amendments may result in the imposition of an additional tier of punishment on a person over and above that already imposed by a court.
20. People who have been involved in disturbances in immigration detention centres may currently be prosecuted, convicted and sentenced under the *Criminal Code Act 1995* (Cth). Courts may impose penalties such as fines or terms of imprisonment on people who have breached Australian law whilst detained.
21. The Migration Act, if amended in the way the Bill proposes, would enable the Minister to cancel or refuse to grant a visa on the basis that a person has been convicted of any offence whilst in immigration detention. Whatever the intention of this power, its practical effect would be to further punish a detainee who has engaged in a disturbance whilst in immigration detention, over and above any penalty imposed by the courts.

22. Sanctions for criminal conduct in Australia are imposed by courts of law. It is not appropriate for penalties for criminal conduct to be distributed through the administrative system of migration law and policy.
23. In the Commission's view, it is also not appropriate for such sanctions to be imposed retrospectively, as the Bill apparently proposes, for offences committed before its passing.¹⁷

6 The amendments could result in breaches of Australia's international obligations

24. The cancellation of a person's visa or the refusal to grant a person a visa on the basis that he or she has been convicted of crimes whilst in immigration detention may breach Australia's international human rights obligations.
25. Australia is obliged under the *Convention Relating to the Status of Refugees* not to expel or return people to countries where they would be subject to torture or would face persecution because of their race, religion, nationality, membership of a particular social group or political opinion.¹⁸ Australia also has non-refoulement obligations under the and the *Convention Against Torture*, as well as the ICCPR and CRC.¹⁹
26. Under ss 189 and 196 of the Migration Act, a person who does not hold a valid visa must be detained until he or she is granted a visa or removed from Australia. People who are found to be refugees but who are refused visas or have their visas cancelled because they have failed the character test therefore face the prospect of indefinite detention if they cannot be removed from Australia, particularly in circumstances where people are stateless or originate from countries in which there is ongoing unrest.
27. Australia is bound by art 9(1) of the ICCPR and art 37(b) of the CRC, which provide that all persons have the right to freedom from arbitrary detention.²⁰ Detention includes immigration detention.²¹ The requirement that detention not be 'arbitrary' is separate and distinct from the requirement that a detention be lawful. The United Nations Human Rights Committee has said that 'arbitrariness' includes elements of inappropriateness, injustice, lack of predictability and proportionality.²² This finding has been echoed by Australian courts.²³
28. Detention may therefore be found to be arbitrary where it is prolonged or indefinite in circumstances which are inappropriate, are unjust or lack predictability or proportionality. The prospect of indefinite detention is arguably a disproportionate response to the commission of a potentially minor offence whilst in immigration detention. Such disproportionality may render detention arbitrary, in breach of Australia's obligations under art 9(1) of the ICCPR or art 37(b) of CRC.
29. The Commission understands that people who have been found to be refugees but who fail the character test may be granted a temporary visa such as a Removal Pending Bridging Visa (RPBV), rather than continuing to be detained.

An RPBV entitles its holder to remain in the Australian community until he or she can be safely removed from Australia. An RPBV holder's family members are not automatically entitled to protection under Australian law.²⁴

30. Being granted an RPBV rather than a Protection Visa can have serious consequences for refugees in Australia. A person's right to family unity under arts 17 and 23 of the ICCPR and art 8 of the CRC, for instance, may be denied or compromised by their status as an RPBV holder. The grant of an RPBV rather than a Protection Visa, therefore, may also be a disproportionate response to the commission of potential minor offences whilst in immigration detention.

7 The proposed amendments are not the most effective way to address the problem they are intended to remedy

31. The Commission submits that it is not a lack of or inadequacy in sanctions in the Migration Act that results in disturbances in Australia's immigration centres, but rather the conditions and prolonged nature of that detention. Therefore, the amendments proposed by the Bill are not the most effective way of preventing further unrest across the immigration detention network. The Commission continues to call on the government, as it has for more than a decade, to reform Australia's system of mandatory and indefinite immigration detention and bring it into line with Australia's international obligations.
32. Throughout 2010-11, the Commission visited a number of immigration detention centres and highlighted serious concerns about the numbers of people who continue to be held in such centres for prolonged and indefinite periods.²⁵
33. The Commission found that prolonged or indefinite detention, coupled with limited access to mental health care, minimal if any opportunity for excursions, lengthy delays in the processing of refugee claims, serious delays with security assessments and a lack of regular updates on progress with cases, can have devastating impacts on people's mental health.²⁶
34. Detainees in some immigration detentions centres experienced persistent boredom, frustration and stress.²⁷ Other centres were characterised by significant anger, high levels of distress, feelings of powerlessness and a pervasive sense of helplessness amongst detainees.²⁸ In at least one immigration detention complex, the conditions for suicidality were very high.²⁹ Levels of actual and attempted self-harm were a concern at all the immigration detention centres visited by the Commission.
35. In short, Australia's immigration detention centres are currently extremely tense and volatile environments.
36. The Commission does not condone acts of violence or property destruction in immigration detention facilities. However, the context of the recent disturbances in immigration detention must be taken into account.
37. Further disturbances similar to those that recently occurred at Christmas Island and Villawood remain a distinct possibility within Australian immigration

detention centres for as long as people are subject to prolonged and indefinite detention.

38. The Commission recommends reform of Australia's system of mandatory and indefinite immigration detention, in order to create a more ordered and stable system which meets Australia's international human rights obligations.

¹ See, especially, Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004), at http://www.humanrights.gov.au/human_rights/children_detention_report/report/PDF/alr_complete.pdf (viewed 26 May 2011) and Human Rights and Equal Opportunity Commission, *Those who've come across the seas – Detention of unauthorised arrivals* (1998), at http://www.humanrights.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf (viewed 26 May 2011).

² The Commission's submissions on immigration issues are available at <http://humanrights.gov.au/legal/submissions/indexsubject.html#refugees> (viewed 26 May 2011).

³ The Commission's reports on inspections of immigration detention facilities are available at http://humanrights.gov.au/human_rights/immigration/detention_rights.html#9_3 (viewed 26 May 2011).

⁴ Reports are available at http://humanrights.gov.au/legal/HREOCA_reports/index.html (viewed 27 July 2009).

⁵ Human Rights and Equal Opportunity Commission, *Immigration Detention Guidelines* (2000). At http://humanrights.gov.au/pdf/human_rights/asylum_seekers/idc_guidelines.pdf (viewed 26 May 2011).

⁶ See, eg, *Mr El-Marsi v Commonwealth (Department of Immigration and Citizenship)* [2009] AusHRC 41, at <http://www.humanrights.gov.au/legal/humanrightsreports/AusHRC41.html> and *Mr NK v Commonwealth (Department of Immigration and Citizenship)* [2011] AusHRC 43, at <http://www.humanrights.gov.au/legal/humanrightsreports/AusHRC43.html> (both viewed 31 May 2011).

⁷ Explanatory Memorandum, Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 (Cth), 1.

⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, arts 1F and 33 (entered into force 22 April 1954). See also *Protocol Relating to the Status of Refugees*, 606 UNTS 267 (entered into force 4 October 1967).

¹⁰ *Migration Act 1958* (Cth), ss 501(6)(b), 500A(1)(a).

¹¹ *Migration Act 1958* (Cth), ss 500A(1)(b)(i) and (ii), 501(6)(c)(i) and (ii).

¹² *Migration Act 1958* (Cth), ss 501(6)(d)(i)-(v), 500A(1)(c)(i)-(v).

¹³ *Migration Act 1958* (Cth), ss 501(7)(a)-(c), 500A.

¹⁴ *Migration Act 1958* (Cth), ss 501(7)(d) and (e), 501(8), 500A(1)(d) and (e), 500A(5).

¹⁵ Doorstop interview with Chris Bowen, Minister for Immigration and Citizenship (Fairfield, 26 April 2011); James Carleton, interview with Chris Bowen (ABC Radio National, 26 April 2011).

¹⁶ Courts and tribunals in the past have been inclined to find that a person is not of good character on the basis of their 'past and present general conduct' if there is evidence that they have been involved in a series of episodes of misconduct. However, there is no conclusive judicial statement to this effect and it is open to the courts to find that a person's conduct on one of two isolated occasions may be sufficient to establish that a person is not of good character. In *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187, for example, Justices Burchett, Branson and Tamberlin said in obiter, 'some instances of general conduct, as we understand the term, displayed but once or twice, may lay character bare very tellingly' (at 195).

¹⁷ Item 6 of the Bill states that the amendments relating to the character test apply for the purposes of decision-making from the commencement of the Bill, whether the relevant conviction or offences occurred before, on or after that commencement.

¹⁸ Refugee Convention, art 33.

¹⁹ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).

²⁰ Article 9 of the ICCPR provides 'Everyone has the right of liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.' Article 37(b) of the CRC provides 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'.

²¹ United Nations Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2003) 130, [1]. See also *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999; *Baban v Australia*, Communication No 1014/2001 UN Doc CCPR/C/78/D/1014/2001.

²² See *Van Alphen v The Netherlands*, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988, [5.8]; *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993, [9.2].

²³ See, eg, *MIMIA v Al Masri* (2003) 126 FCR 54, [152].

²⁴ See *Migration Act 1958* (Cth), s 36.

²⁵ See Australian Human Rights Commission, *Immigration Detention at Christmas Island* (2010), pt 5.3; Australian Human Rights Commission, *Immigration Detention at Darwin* (2010), pt 5; Australian Human Rights Commission, *Immigration Detention at Leonora* (2011), pt 5; Australian Human Rights Commission, *Immigration Detention at Villawood* (2011), pt 6. At http://www.humanrights.gov.au/human_rights/immigration/index.html (viewed 26 May 2011).

²⁶ See *Immigration Detention at Christmas Island*, above, pt 19.2(b).

²⁷ See *Immigration Detention at Darwin*, note 22, pts 9.2 and 9.3; *Immigration Detention at Leonora*, note 22, pt 8.2.

²⁸ See *Immigration Detention at Christmas Island*, note 22, pt 19.2(b); *Immigration Detention at Villawood*, note 22, pt 11.2.

²⁹ *Immigration Detention at Villawood*, above, pt 11.3