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Submission to the Senate Legal and Constitutional Committee concerning the Migration Amendment (Immigration Detention Reform) Bill 2009

The NSW Council for Civil Liberties thanks the Senate Committee for its invitation to comment on this Bill.

The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a non-government organisation in special consultative status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL was established in 1963, and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive use of power by the State against its people.

Recommendations

1. That proposed subsection 4AAA(1) be replaced by an affirmation that the purpose of detaining a non-citizen is to enable preliminary processing to ensure that there are no significant health or security risks to the nation of the person entering or remaining in Australia.

2. That the Senate Committee support the changes proposed in Item 3.

3. That the Senate Committee recommend that Subsections 196(1),(2) & (3) of the Migration Act be repealed.

4. That the Committee recommend that Section 501 of the Act be amended to apply only to convictions of crimes which are recognised as serious crimes (carrying a two-year penalty) in Australia. The decision should be taken by a new, genuinely independent tribunal, whose members would have substantial fixed terms with an appeal available on leave to the Federal Magistrates Court. If the court gives leave to appeal, that appeal would be a true appeal on the merits of the case, rather than judicial review. The non-citizen, if already in Australia, should be able to be present at the hearings, and in any case to be represented by legal counsel of his or her choice. The rules of natural justice should apply, and the onus of proof lie with the state. The option of denying visas on this ground should not apply to stateless persons; nor to persons who have lived in Australia for more than ten years, nor to persons who have lived in Australia for two years without committing a crime, nor to

persons who will be subjected to human rights abuses if deported.

If this is not done, the reverences to Section 501 should be removed from proposed Subsection 189(1A).

A. Australia's obligations to refugees.

Refugees, having suffered severe trauma in the countries from which they have fled, often suffer more after they escape. Refugee camps in Pakistan and in parts of Africa in particular are subject to cholera and dysentery; women and children are raped; camps are subject to attacks from the very groups from which the refugees have fled. Because there is a risk that their relatives will be killed if they are caught while trying to escape, many dispose of documents which could be used to establish their identities.

Many of the countries to which refugees flee in the first instance are not signatories of the United Nations *Convention Relating to the Status of Refugees* (the Refugee Convention). Refugees are at risk of being refouled—and some countries through which they travel make a practice of going just that.

Australia has obligations under the Refugee Convention towards those who arrive here, and toward those who are in the camps. In view of the conditions in the camps and the time it takes to determine that their claims are legitimate, we have an obligation not to make it harder for refugees to escape from their countries of first refuge to places where they will be safe. We have no business adding to their trauma by putting them in immigration detention for long periods, nor in trying to deter others from making their escape.

Australia also has relevant obligations under the International Covenant on Civil and Political Rights. On no less than five occasions, the UN Human Rights Committee has made it clear that Australia's mandatory immigration detention policy violates international human rights standards. Specifically, the Committee has condemned the policy for contravening the *International Covenant on Civil and Political Rights* ('the ICCPR') in the following ways:

• it amounts to arbitrary detention (contrary to article 9(1));
• it is not subject to substantive judicial review (contrary to article 9(4));
• it amounts to an arbitrary interference with the family (contrary to articles 17(1)
and 23(1));
• it fails to afford children the protection of the state (contrary to article 24(1));
• it amounts to cruel, inhuman or degrading treatment (contrary to article 7); and,
• it fails to treat detained people with humanity and with respect for their inherent dignity (contrary to article 10(1)).

Although the fourth of these has in part been dealt with and is further dealt with in this bill, the other findings remain true.

The Council for Civil Liberties accordingly welcomes the Migration Amendment (Immigration Detention Reform) Bill (the Bill), with strong reservations.

B. Item 1. The Principles.

Principle (1)(a) refers to the risks of a non-citizen entering or remaining in Australia, without specifying what those risks are. CCL contends that the only risks which could give a justification of any kind of the detention of asylum seekers are those to health and security. These justify detention only for preliminary processing.

Although proposed subsection 1899(1A) (Item 9) would define 'unacceptable risk', it is clear that that is not what is meant here. "Risk' should be defined as referring to the risk of the introduction of serious communicable diseases and the risk to security.

Principle (1)(b) implies that detention will contribute to resolving a person's immigration status. It is not at all clear that this is so. The experience of the past few years has not been that even prolonged detention contributes to determining the genuineness of refugee claims. Instead, the system has encouraged the unreasonable view that asylum seekers must prove their claims beyond any doubt whatsoever, before they can be given a permanent residence visa.

Recommendation 1: That proposed subsection 4AAA(1) be replaced by an affirmation that the purpose of detaining a non-citizen is to enable preliminary processing to ensure that there are no significant health or security risks to the nation of the person entering or remaining in Australia.

C. Item 3. The Detention of Minors.

'MARGOT [O'Neill]: Do you ever worry about any of the children who were damaged in detention and feel a little responsible for what happened to them?'
PHILIP [Ruddock]: No look I don't sit there and say to myself "I am in some way personally responsible in relation to ensuring that the laws of Australia were upheld."…I mean I would say in relation to any of these children if they have been in any way injured through the experience, the totality of the experience, you ask yourself "Who put them in that situation?" I'd say parents who put children on boats where they could lose their lives like that. You know others would say "But think of how much they were suffering" and I'm saying "Do you put your kids through that?" I mean I don't go and put my kid into a situation where I believe it is life threatening.'

MARGOT: But they left a situation they thought was life threatening. I don't think that they did it because they thought it was fun'[1]

The notion that children should be kept in a situation which causes them severe psychological damage because to release them might lead parents to use their children to obtain release from detention themselves has thankfully been abandoned. So too have been the despicable attempts to blame the parents for the illnesses.[2] *We* are responsible for what our institutions do to children.

CCL welcomes the next steps in the process, which ensures that minors are not detained in immigration detention centres at all, and that the best interests of a minor are a primary consideration of where he or she is detained.

Recommendation 2: That the Senate Committee support the changes proposed in Item 3.

D. Item 9. Mandatory Detention: Court Review.

CCL reiterates that, for the reasons given in section A above, mandatory detention for purposes other than preliminary processing to ensure there are no security or health risks, is unacceptable.

Under proposed section 189 and the existing section 196 of the Migration Act, some "unlawful non-citizens" must be kept in immigration detention until they are granted visas or removed from Australia. Notoriously, this process can take years. Subsections (1,2 & 3) of section 196 prevent a court from releasing them, for example on the grounds that the detention is cruel, or unnecessary.[3]

In December 2002, a working group of the United Nations Human Rights Committee reported that the conditions of detention of in such centres were in many ways similar to prison conditions. They commented '…to the knowledge of the delegation, a system combining mandatory, automatic, indiscriminate and indefinite detention without real access to court challenge is not practised by any other country in the world'[4]. As Julian Burnside QC argues, 'Prolonged detention of innocent people is morally wrong. It is profoundly damaging to the individuals involved. In addition, it blunts the moral sensitivity of the community that tolerates it.'[5]

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[1] Interview with Philip Ruddock, former Attorney-General, in Margot O'Neill *Blind Conscience,* University of New South Wales Press 2008, p.208.
[2] See for instance examples on pp.76f of *Blind Conscience*.
[3] For a longer discussion see Julian Burnside, *Watching Brief: Reflections on Human Rights, Law and Justice,* Scribe Chapter 9.
Publications, Carlton North, Victoria 2007
[4] Quoted in Burnside *Watching Brief* ch. 9.
[5] *Watching Brief* p. 121. See also the section 'Crimes Against Humanity'

In its 2009 *Concluding Observations* on Australia's Report submitted under Article 40 of the International Covenant on Civil and Political Rights, the Human Rights Committee reiterates its concern:

'23. While noting with satisfaction the State party's commitment to use detention in immigration detention centres only in limited circumstances and for the shortest practicable period, the Committee remains concerned at its mandatory use in all cases of illegal entry, the retention of the excise zone, as well as at the non-statutory decision-making process for people who arrive by boat to the Australian territory and are taken in Christmas Island. The Committee is also concerned at the lack of effective review process available with respect to detention decisions. (art. 9 and 14)

> The State party should: a) consider abolishing the remaining elements of its mandatory immigration detention policy; b) implement the recommendations of the Human Rights Commission made in its Immigration Detention Report of 2008; c) consider closing down the Christmas Island detention centre; and d) enact in legislation a comprehensive immigration framework in compliance with the Covenant.'

Recommendation 3: That the Senate Committee recommend that Subsections 196(1),(2) & (3) of the Migration Act be repealed.

E. Item 9: Unacceptable risks—Section 501.

Proposed subsection 189(1A) says that a person is an unacceptable risk to the Australian community if the person has been refused a visa or had it cancelled under Section 501. That section gives the Minister the power to reject or revoke a visa on character grounds. It follows that a person then becomes "an unacceptable risk", and can be detained indefinitely.

The CCL submits that that section is defective in multiple respects.

1. Procedural faults.

Under subsection (3), there is no access to an independent tribunal for review on the merits of the Minster's decision. The rules of natural justice do not apply; so the person whose visa is cancelled (the non-citizen) need not be given an opportunity to demonstrate that the Minister is misinformed or mistaken. The Minister may make a factually perverse decision, and there be no way of combating it. Unless the Minister delegates the powers given in subsections (1) and (2), there is no appeal on the merits of the case under those subsections either.

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pp. 28-29.

These provisions are recipes for inferior and mistaken decisions. The Haneef affair indicates how they can be misused.

The consequences which follow a decision of the Minister that a person fails the character test may be that the non-citizen is detained and then deported, or if that is not possible, (where a person is at risk of death if sent to the country of his or her citizenship, or where the person is stateless), may be kept in detention for long periods, or even for life. It is entirely unacceptable, that a person may be detained for long periods without trial, without a hearing, without being told the grounds of the decision, and without the opportunity for a review on the merits of the case other than by the Minister. It is a serious breach of the rule of law.

Section 503A compounds the problem. By protecting information supplied by law enforcement agencies and intelligence agencies, it makes it likely that the bad reasons for bad decisions will not be made public. A culture of denial will remain unchallenged. It makes it possible, and it becomes increasingly likely, that innocent persons will be scapegoated to protect reputations and careers.

2. The onus of proof.
Under subsections (1) and (2) of section 501, it is left to the non-citizen to satisfy the Minister that he or she passes the character test. This reversal of the onus of proof is unreasonable. How are persons to prove that they have no criminal record in their countries of origin; that their past conduct does not show that their character is suspect, that they have had no association with criminal groups, and that there is no significant risk that they will incite discord or threaten other people's property? In particular, how is a refugee to demonstrate these things in the face of hatred and lies from the authorities in their own countries?

3. Faults in the definition of 'substantial criminal record'.
As it stands, subsection (7) defines 'substantial criminal record' on the basis of the penalty imposed. It could apply to a woman sentenced by a sharia court on the grounds of adultery, for example, or to religious offences. There is no requirement that the offence for which the person has been convicted is a recognised crime in Australia, and one which carries a similar penalty in Australian courts.

4. Faults in the character test (Subsection (6)).

Clause (6)(b) allows a visa to be cancelled because of an association with a person or an organisation that the Minister suspects has been involved in criminal conduct. There is no restriction on the degree of criminality, nor on whether the criminal conduct would be criminal conduct under Australian law.

Clause (6)(c)(i) is vague as to what criminal conduct is sufficient to

show that the non- citizen is not of good character, while (6)(c)(ii) uses the even vaguer expression 'the person's past and present general conduct'. Legislation which carries such grave consequences should be clear and explicit; decisions should be made on objective criteria.

Clause (6)(d)(ii) combined with subsection (11) implies that a person fails the character test for merely threatening damage to someone's property.

5. General considerations.

The temptation of the Minister or his or her advisors to use the character test for purposes other than that of keeping notorious criminals out of Australia has been made plain by the Haneef case. But this is not an isolated instance. Its misuse can also be seen in the cases of Stefan Nystrom and Robert Jovcic.[6]

Recommendation 4: That the Committee recommend that Section 501 of the Act be amended to apply only to convictions of crimes which are recognised as serious crimes (carrying a two-year penalty) in Australia.

(i). The decision should be taken by a new, genuinely independent tribunal, whose members would have substantial fixed terms with an appeal available on leave to the Federal Magistrates Court.

(ii). If the court gives leave to appeal, that appeal would be a true appeal on the merits of the case, rather than judicial review.

(iii). The non-citizen, if already in Australia, should be able to be present at the hearings, and in any case to be represented by legal counsel of his or her choice.

(iv). The rules of natural justice should apply, and the onus of proof lie with the state.

(vi). The option of denying visas on this ground should not apply to stateless persons; nor to persons who have lived in Australia for more than ten years, nor to persons who have lived in Australia for two years without committing a crime, nor to persons who will be subjected to human rights abuses if deported.

If this is not done, the references to Section 501 should be removed from proposed Subsection 189(1A).

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[6] Both of these were long-term residents of Australia, who, having committed crimes here, were deported to their countries of citizenship. Robert Jovecic was deported to Serbia, whose languages he could not speak, and became destitute. Stefan Nystrom, who had lived in Australia since he was 27 days old, was deported to Sweden.

It is true that under a more recent ministerial directive, such cases will not recur. But the fact that they could occur at all is a fault in the law.

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