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

Introduction

Liberty Victoria thanks the Senate Legal and Constitutional Committee for the opportunity to submit to the Inquiry on the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 ("the Bill").

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations and is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at www.libertyvictora.org.au.

Liberty Victoria has profound concerns over the proposed amendments outlined in the Bill and explanatory memorandum.

Liberty Victoria notes that there is a Bill before Parliament which seeks to strengthen Australia's complementary protection framework. We note that this Bill, if enacted, may have a significant role in softening the effect of the Bill the subject of this submission. Liberty Victoria supports and encourages the passage of the Complementary Protection Bill, but this submission is not influenced by its existence in any way.

Legislative Context

The Bill was foreshadowed by the Minister for Immigration and Citizenship Mr Chris Bowen on 26 April 2011, in response to unrest in the Christmas Island and Villawood Immigration Detention Centres. Minister Bowen set out the government's rejection of disruptive and destructive behaviour in detention, and stated an intention to amend the *Migration Act 1958* (Cth) ("the Act") in order to broaden his discretion to find that a person fails the character test where he or she has been convicted of a criminal offence in immigration detention, during an escape from immigration detention, during a period where a person has escaped from immigration detention, or if the is convicted of an offence of escaping immigration detention.

The Bill has three main purposes:

1. To amend s 501 of the Act to provide additional grounds upon which the Minister or his delegate may decide to refuse to grant, or to cancel, a visa on character grounds;

2. To amend s 500A of the Act to provide additional grounds upon which the Minister or his delegate may decide to refuse to grant a temporary safe haven visa, or to cancel a temporary safe haven visa on the basis of conviction of an offence committed while in immigration detention; and

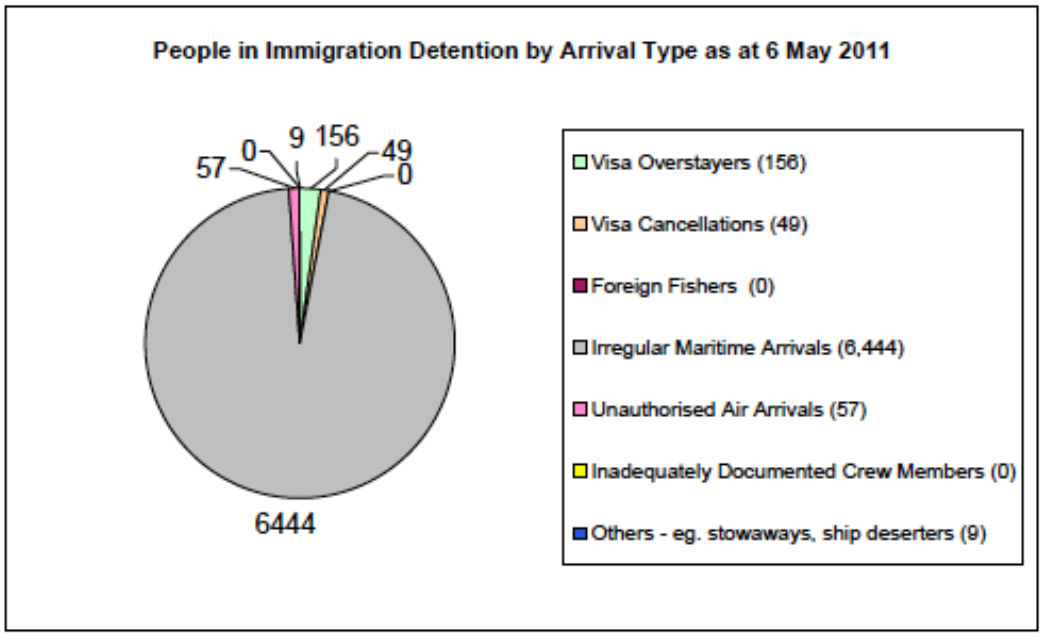
3. To increase the maximum penalty in s 197B of the Act for the manufacture, possession, use or distribution of weapons by immigration detainees from 3-5 years.

In the past, Liberty Victoria has expressed deep misgivings about the operation of s 501, particularly as it related to long-term Australian residents. While that particular problem is not likely to be aggravated by the reforms proposed, Liberty Victoria is concerned about broadening the already vast discretionary power held by the Minister under s 501. Fundamentally, it is feared that harsher and more frequent operation of the discretion under s 501 will result in the refusal to grant visas to people whose return to their country of origin would constitute *refoulement*. The alternative would be lifetime detention, which would be unconscionable.

The obligation upon states signatories to the UN Convention Relating to the Status of Refugees ("the Convention") not to *refoule* (that is, not to return a person to a territory where he or she may face persection) is the fundamental principle of international refugee law. States engaging in the forbidden practice of *refoulement* are in flagrant breach of international refugee law.

Liberty Victoria is of the view that – should the Bill operate in the manner foreshadowed in its explanatory memorandum – it is inevitable that *refoulement* would occur, placing Australia further in breach of its international obligations.

The chart below shows that of 6,715 people in immigration detention as at 6 May 2011, 6,444 are 'irregular maritime arrivals'. For the purposes of this submission it is assumed that the vast majority of those 'irregular maritime arrivals' are asylum seekers and as such are unable or unwilling to return to their countries of origin due to a fear of persecution on the basis of their race, religion, nationality, political opinion or membership of a particular social group.



Source: www.immi.gov.au

This frames the proposed amendments as applying overwhelmingly to immigration detainees who are asylum seekers.

As at 6 May 2011, 65.6% of immigration detainees had been detained for more than 6 months. 22% had been detained for more than 12 months.

Length of time in detention as at 6 May 2011		
Period Detained	Total	% of Total
7 days or less	97	1.4%
1 week - 1 month	371	5.5%
1 month - 3 months	675	10.1%
3 months - 6 months	1172	17.5%
6 months - 12 months	2867	42.7%
12 months - 18 months	1385	20.6%
18 months - 2 years	116	1.7%
Greater than 2 years	32	0.5%
Total	6715	100%

Source: www.immi.gov.au

Domestic Legal Issues

Introduction

We note that there is a wide range of circumstances in which people in immigration detention may cause damage to people or property. One obvious contributing cause is the psychological stress of prolonged detention with no knowledge of when, or whether, that detention will end. All the psychiatric literature demonstrates that the stress of detention will eventually cause people to break.[1] When they break, they will damage themselves or the things around them. When they break, they will be punished by the civil courts. It is important to recognize that the proposed amendments will further punish them for breaking under the stress which the detention system itself imposes.

Uncertainty of application

Anecdotal evidence from within the Christmas Island detention facility suggests that the arrests made after the riots were arbitrary and based more on a person's general reputation within the centre rather than their actual participation in the incidents. There have also been suggestions that people who entered the affray and attempted to calm others were also arrested and charged with various offences.

[1] We deal with this in more detail below

Application to Minors

Liberty Victoria is very concerned about the potential application of the proposed amendments to minors. Liberty Victoria strongly objects to the policy of mandatory indefinite detention, but finds it particularly repugnant when applied to children and unaccompanied minors. Immigration detention is a hostile, unhealthy and utterly inappropriate environment for a child to spend any time at all, let alone many months or years of uncertainty. There are inevitable behavioural issues that arise from prolonged immigration detention. While objecting entirely to the proposed amendments, Liberty Victoria particularly condemns any application of the proposed amendments to children and young people. It is distressing to consider the possibility that a young person lashing out in frustration – even if only against a piece of property – might be refused a future of safety and security on the basis of an expression of anxiety and depression brought on by Australia's policy of mandatory detention.

Retrospective operation

Liberty Victoria is of the view that the retrospective operation of any Act is problematic. In this instance, however, retrospective operation could have significant, life-altering consequences for individuals whose lives may be directly threatened as a result of the operation of the proposed amendments. Liberty Victoria objects in the strongest possible terms to the Bill, but submits that if the Bill is to be enacted, it should not operate retrospectively.

Removal of 'seriousness threshold'

In the current s 501, the minimum threshold to activate the Minister's discretion is where a person has committed an offence attracting a prison sentence of 12 months or more. In the proposed amendment, that lower 'seriousness' threshold is removed, ensuring that a person convicted of *any* offence of the kind described by the Bill *automatically* fail the character test. The explanatory memorandum to the Bill clearly states that this is the intended effect of the amendments. Liberty Victoria objects strongly to this amendment, as its potential consequences are vastly disproportionate to the offences from which they may flow. This is discussed further below, in the context of Article 1F of the Convention.

Mental state of accused persons

Liberty Victoria wishes to express concern at the possibility that there will be very little scope for a thorough, equitable criminal procedure in dealing with these matters. Liberty Victoria is particularly concerned that accused persons may not have access to competent legal representation. It is further concerned about the degree to which issues such as post traumatic stress disorder, psychiatric illness and other mental health issues will be taken into account in the treatment of these matters by courts. As outlined below, there is a great deal of literature evidencing the role of past trauma on a person's later violent or aggressive behaviours. Liberty Victoria is concerned that not only will past traumas in the homeland be disregarded as a possible cause of uncharacteristic violent behaviour, but that significant trauma and distress experienced in immigration detention might also be overlooked.

Liberty Victoria is of the view that no person should be subject to any punishment under the proposed amendments without a thorough psychiatric assessment by a qualified trauma / torture expert. Liberty Victoria further submits that, given the seriousness of the proposed consequences, accused persons must be afforded the benefit of the doubt.

Access to legal representation

Liberty Victoria is concerned that people charged with relevant offences may not be afforded full and competent legal representation when brought before a court. Liberty Victoria believes that it is essential that courts be made aware of the consequences likely to flow from a conviction of an offence of the relevant type, and that defendants be afforded competent legal representation without fail. Liberty Victoria is deeply concerned at the disproportionate consequences of a conviction of this nature, and believes that it is imperative that courts hearing these matters be made aware of the full effects of conviction by a qualified legal representative.

Sentencing consequences

Liberty Victoria has concerns about ministerial interference in the judicial process. While s 501 in its current form often causes a 'double punishment', the proposed amendments are even more severe, and could (on a literal interpretation) see people refused a visa and returned to persecution for an offence as minor as low-level property damage. The proposed amendments seek to remove the power to decide the extent of punishment out of the hands of the court.

It is debatable whether a court would be comfortable that conviction (even of a summary offence) would be likely to lead to deportation & *refoulement*. Liberty Victoria wishes to raise the possibility that courts may be reluctant to convict people charged with such offences as the potential consequences are so disproportionate to the offences.

International Legal Issues

As previously mentioned, the Bill raises significant issues with regards to international law and Australia's obligations under international instruments.

Refoulement & Article 1F

As previously stated, the prohibition on return of a person to a country where his or her life or freedom may be threatened is enshrined in Article 33 of the Convention:

> Article 33. - Prohibition of expulsion or return ("*refoulement*")
>
> 1. No Contracting State shall expel or return ("refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

It is clear from subsection (2) that the only exception to the prohibition on *non-refoulement* is where there are reasonable grounds for believing that a person may pose a danger to the security of the country or where he or she has been convicted of *a particularly serious crime*, and may therefore constitute a danger to the community (emphasis added).

The removal of the 'seriousness threshold' is flagrantly inconsistent with subsection (2). It is clear from the wording of the Bill and the explanatory memorandum that the intention of the drafters is to depart entirely from the strict bounds of the exception. By any view, it is a serious breach of a fundamental tenet of international refugee law. In the view of Liberty Victoria, this is utterly unacceptable.

Article 1F of the Convention is an indicator of the type of criminal behaviour sufficiently serious as to revoke a person's entitlement to protection:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> > (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> >
> > (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> >
> > (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

The proposed removal of the 'seriousness threshold' is nonsensical in the shadow of Article 1F, which explicitly provides that in order to avoid application of the Convention to an asylum seeker, a country must have serious reasons for considering that the person has committed crimes in the realm of war crimes, crimes against peace or crimes against humanity, *inter alia*.

The summary offences with which people are usually charged in immigration detention centres (property damage, summary assault) are so far out of the realm of the offences contemplated by Article 1F as to render the proposed amendments absurd. The word 'disproportionate' cannot begin to describe the politically motivated overreaction from which this Bill has arisen.

Known effects of immigration detention on mental health

There is a vast bank of knowledge and research on the adverse mental health impacts of mandatory indefinite detention. It seems superfluous, but is necessary, to review the basic facts below.

Suicide and self-harm in immigration detention

During a lecture to the University of Melbourne Law School on Thursday 14 April 2011, Commonwealth Ombudsman Allan Asher noted that levels of apparent suicides in immigration detention are significantly higher than in other detention or imprisonment contexts in Australia:

> *Most critically, I am concerned about the high number of apparent suicides within the immigration detention network when compared to previous periods of high numbers in immigration detention and to other detention environments such as Australian prisons and police custody facilities.*

In his article *Suicide and self-harm among asylum seekers: counting the costs, mobilising for change***,** Michael Dudley states that:[2]

> *Some years ago, suicidal behaviors' in IDCs were apparently between 10 and 100 times the national average, with male IDC rates much greater than comparable prison rates. Pre-pubertal children were self-harming, a trend virtually unknown in the general population. A small number of definite or probable suicides in this small population suggested a rate five times that of the general community rate, though this required cautious interpretation.*

Since the time on which Dudley's statistics are based, there has been a significant increase in rates of self-harm in immigration detention.

[2] www.files.**suicide**preventionaust.org/ENewsletters/March/Ragg%202.pdf

In a report released by the Australian Human Rights Commission on 26 May 2011, the following concerns were stated:

(a) Impacts of prolonged and indefinite detention on mental health

The Commission has long held serious concerns about the detrimental impacts on people's mental health and wellbeing when they are held in immigration detention facilities for prolonged and indefinite periods of time. The Commission has repeatedly raised these concerns with DIAC and successive Ministers for Immigration, and in public reports regarding conditions in immigration detention facilities. The Commission's concerns have escalated over the past year as thousands of people are being detained for prolonged periods, and clear evidence has become available of the poor mental health of many people in detention. This includes high rates of self-harm and five apparent suicides in immigration detention facilities – three of which occurred at Villawood IDC.

During its visit, the Commission was seriously concerned about the noticeable impacts of holding people in detention for prolonged and indefinite periods. Many people spoke of feelings of frustration, distress and demoralisation after being detained for a long period of time, and many spoke of the uncertainty and anxiety caused by being detained for an indefinite period of time.

People also spoke about the psychological impacts of their prolonged detention, including high levels of sleeplessness, feelings of hopelessness and powerlessness, thoughts of self-harm or suicide, and feeling too depressed, anxious or distracted to take part in recreational or educational activities. The Commission was troubled by the palpable sense of frustration and incomprehension expressed by many people. This appeared to have contributed to marked levels of anxiety, despair and depression, leading to high use of sedative, hypnotic, antidepressant and antipsychotic medications and serious self-harm incidents.

11.3 Self-harm and suicide

(a) Self-harm

The Commission has raised concerns about self-harm among people in immigration detention in a number of recent reports, and has also directly raised concerns with DIAC and the Minister for Immigration. The Commission has become increasingly alarmed over

> the past few months about the high rates of self-harm across the detention network, including at Villawood. During its visit, the Commission heard about a number of self-harm incidents, including voluntary starvation and ingestion of detergent and chemicals. At Villawood IDC the Commission met with people who had visible scars from self-harming, and with one person who had recently been hospitalised following serious self-harm.
>
> DIAC provided the Commission with records indicating that over a six month period there were 18 reported incidents of actual or attempted self-harm at Villawood IDC. This included people who cut themselves, people who struck their head, and a man who attempted to hang himself the day after another man apparently committed suicide at Villawood IDC.

It is Liberty Victoria's view that asylum seekers are driven to violence against themselves by virtue of their mandatory indefinite detention. This is a view shared by countless reports of clinical psychiatrists and other mental health professionals. It is Liberty Victoria's submission that people driven to violence against themselves are also driven to outward expressions of violent or aggressive behaviour towards others by the same factors. In this way, Liberty Victoria submits that it is the conditions of detention, rather than the 'bad characters' of asylum seekers that precipitate aggressive behaviour in detention. Rather than punishing the behaviour, Liberty submits Parliament should instead look at addressing the cause. To that end, mandatory indefinite detention, which is a scourge on Australia's legal landscape, should be abolished immediately.

The cycle of trauma and violence

In an article entitled 'The impact and implications of trauma and abuse', the International Justice Project stated the following:

> *Trauma encompasses a multitude of issues including, but not limited to, physical, sexual, emotional, and environmental abuse. The impact of trauma upon later violent behavior have however, only recently begun to be addressed. Trauma and abuse are widely accepted to be life altering experiences, however connecting such experiences to later violent behavior can be problematic. The experiences, which at one point would have invoked sympathy, are pushed aside as unconnected to the behavior exhibited. There*

remains a denial of both the element of causation and the construct of violent crime in relation to earlier traumatic or abusive experiences.

Liberty Victoria submits that this issue should be examined closely when looking at behaviour in immigration detention.

It is unacceptable for people to be detained in overcrowded, unsanitary, stressful conditions for indefinite periods of time. The unavailability of medical and mental health services, social supports, education and recreation only serves to exacerbate the harshness of experience of immigration detention. While Liberty Victoria does not condone violent behaviour, it believes some sort of physical reaction to months or years in immigration detention is a foreseeable consequence of indefinite detention.

Conclusion

Liberty Victoria objects in the strongest possible terms to the enactment of the proposed legislation. Section 501 of the *Migration Act* is already deeply flawed and unfair, and has caused enormous suffering and inequity in its current form. The proposed amendments to the section would increase its harshness exponentially and have potentially disastrous consequences that are not only unfair and inhumane, but illegal under international law. Liberty Victoria respectfully requests that the Committee recommend that the Bill not progress in its current form. There is no rhyme or reason behind the extent of its harshness and it should be abandoned forthwith.

Liberty Victoria would welcome the opportunity to make oral submissions to the Committee on this inquiry. If the Committee wishes to discuss this matter please do not hesitate to contact Julian Burnside QC on or Jessie Taylor on .