

**AMNESTY
INTERNATIONAL**



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

Comments on

***Inquiry into Migration Amendment (Immigration Detention
Reform) Bill 2009***

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Submitted by

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1. Executive summary

Amnesty International welcomes the Government's commitment to reforming Australia's immigration detention system. The *New Directions in Detention* constitute an important and positive first step in bringing immigration detention in Australia into line with international human rights standards.

In legislating to reflect these new values through the *Migration Amendment (Immigration Detention Reform) Bill 2009*, the Government is helping to ensure that Australia does not return to the inhumane practices that saw the United Nations condemn Australia's policy in this area on 17 separate occasions. 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.

However, this bill fails to address several areas of immigration detention policy where Australia remains in breach of its obligations under international law. Consequently, Amnesty International urges the Government to continue the process of reforming immigration detention policy in order to fully conform to the human rights treaties to which it is party. Amnesty International believes that the two main obstacles to this goal are: the continuing regime of mandatory detention; and the excision of certain islands from Australia's migration zone.

In April 2009, Amnesty International released a report entitled, *Irregular migrants and asylum seekers: alternatives to immigration detention*.¹ This document highlights the need for a legislated presumption against the use of immigration detention, and an obligation to provide less restrictive alternatives to detention for most asylum seekers. In addition, the report stresses that, "The conditions or criteria for each alternative must not discriminate against particular groups of non-nationals."

Amnesty International is concerned that the proposed amendments continue to allow detention practices on Christmas Island that amount to discrimination based on mode of arrival.

2. About Amnesty International

Amnesty International is a worldwide movement of more than 2.7 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. We aim to contribute to the worldwide observance of human rights as set of

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

Amnesty International has always advocated that governments implement a human rights-based framework for analysing and developing immigration detention policy. The organisation has repeatedly encouraged the Australian Government to reform its immigration detention practises in order to fully honour its obligations under major human rights treaties. From the established international law in this area, it is possible to develop 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.
- 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, inhuman 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*.²

Furthermore, Amnesty International 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.³

4. New Directions in Detention

Amnesty International welcomed the Minister for Immigration and Citizenship's July 2008 speech, *New Directions in Detention* in which he announced changes to Australia's immigration detention policy.⁴ The speech was an important step in bringing aspects of the Australian refugee status determination process into conformity with our international obligations.

Since this announcement, Amnesty International has urged the Government to legislate these changes into Australian law. In Amnesty International's *2008 Submission to the Joint Standing Committee on Migration's Inquiry into Immigration Detention in Australia*, we argued that "any policy reform must be met with corresponding changes to Australia's Migration Act 1958."⁵ This is an important step in ensuring that aspects of the previous policy, which resulted in the inhuman treatment of asylum seekers and damaged Australia's international human rights record, is consigned to history.

The *Migration Amendment (Immigration Detention Reform) Bill 2009* constitutes a welcome return to the prioritisation of human rights principles in the *Australian Migration Act*. However, despite supporting this amendment, Amnesty International remains concerned about several aspects of Australia's immigration law and policy that remain in violation of international human rights standards.

5. Migration Amendment (Immigration Detention Reform) Bill 2009

In Amnesty International's 2008 submission to the Inquiry into Immigration Detention in Australia, we made a number of recommendations that would improve immigration law. Although it is welcomed that several of these recommendations have been addressed in the proposed amendments, Amnesty International believes that there are key changes missing from the bill that are needed to ensure Australia meets its international obligations.

5.1 Principle of detention

Amnesty International supports the proposed amendment to section 4AAA of the Migration Act, which "affirms as a principle that a non-citizen must only be detained in a detention centre...as a measure of last resort...and for the shortest practicable time."⁶

However, we are concerned that the purpose of detaining non-citizens remains, at least in part, to "resolve the non-citizens immigration status" as prescribed by Section 4AAA(1)(b). This would appear to contravene the principles set out in *New Directions in Detention* that stipulate, "Once checks have been successfully completed, continued detention while immigration status is resolved is unwarranted."⁷

Furthermore, Amnesty International is concerned that "a measure of last resort" is vague term that lends itself to a wide range of interpretations. To ensure clarity, transparency and fairness in the

process, we recommend that clear guidelines be established to determine what constitutes a 'last resort'.

Specifying that the detention of non-citizens should be “for the shortest practicable time” is a positive step. Despite this, 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.”⁸

Amnesty International is disappointed that the bill fails to specify a framework for review of detention, despite the Minister outlining a system of three-monthly Departmental and six-monthly Ombudsman reviews in *New Directions in Detention* speech. The organisation believes that a legislated system of review is crucial to ensuring that the length and conditions of detention are consistent with Australia's international obligations.

Amnesty International is also concerned that the proposed legislation does not clearly state that the detention principles apply to all detainees, including those in excised offshore territories. We believe it is vital that Australian legislation clearly states that there are no circumstances where unlawful non-citizens may be detained solely as a result of their mode of arrival in Australia.

5.1.1 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 taken to realign its immigration policy with international human rights standards, it has also repeatedly stated its commitment to mandatory detention. As noted above, this stated deterrent is in contravention of the *Refugee Convention*.

A system of mandatory non-reviewable detention contravenes several international human rights agreements to which Australia is a party. Article 9 of the *International Covenant of 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.

In addition, we strongly recommend that immigration detention in Australia be subject to regular review and external oversight. While the Ombudsman reviews promised in *New Directions in Detention* would

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.⁹

5.2 Children in detention

The amendment stipulating that a “minor must not be detained in a detention centre established under this Act” under section 4AA¹⁰ is also strongly supported by Amnesty International. Changing Australian law to ensure that there are no circumstances in which children and unaccompanied minors are kept in an immigration detention centre is an important step that brings Australia closer into line with principles enshrined in international law.

However, we continue to have serious concerns about the alternate detention facilities used to house minors on Christmas Island. Although not labelled as ‘immigration detention centres’, the Phosphate Hill and construction camp facilities are inappropriate for the detention of children and unaccompanied minors. Amnesty International believes that a result of a lack of available resources for community detention has resulted in the prolonged detention of children in these inappropriate facilities, putting Australia at odds with certain articles of the *UN Convention on the Rights of the Child* (CROC). Current practice contravenes Article 37(b) which provides that detention of children must be a measure of last resort for the shortest possible period, as well as Article 3(1) which states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.¹¹

Amnesty International firmly believes that the interests of children and unaccompanied minors would be much better served by processing their requests for asylum on mainland Australia where, nearly all

children could be placed in community detention. Removing all children from Christmas Island would also fulfil Australia's obligations under Article 27 of the CROC, which provides the right to a standard of living adequate for physical, mental, spiritual, moral and social development and Article 31 which provides the right to recreation and play.

5.3 Temporary community access permission

Amnesty International broadly supports the amendments proposed for section 5 that would allow eligible detainees to leave detention facilities for a specified time without a State designated supervisor. This is consistent with our 2008 recommendation that steps be taken to facilitate an increase in excursions out of detention centres.

However, in most cases Amnesty International believes that people who are deemed not to pose a security or flight risk for a temporary period would be better placed in the community full time for the duration of their status determination.

5.4 Criteria for detention

Amnesty International welcomes the proposed change to subsection 189(1) that narrows the criteria for immigration detention from the broad category of 'unlawful non-citizen'. Stipulating specific circumstances in which an individual must be detained increases transparency in the process. Amnesty International welcomes the fact that this amendment will allow for the majority of asylum seekers to live in the community. This is more humane, practical and cost effective option.

Amnesty International urges the Government to remove the requirement that this more humane approach does not apply to unlawful non-citizens on excised offshore places. We maintain that the decision to detain asylum seekers who arrive by boat should be made in accordance with the same criteria used to detain those that arrive by aircraft. Treating asylum seekers differently based solely on their mode of arrival is an arbitrary and unnecessarily punitive measure that contravenes Australia's responsibilities under the *Refugee Convention*.

Amnesty International understands that the Government is currently considering changes to regulations that would help to ensure that detention on Christmas Island is conducted within the same regulatory framework as detention on mainland Australia. The organisation urges the Committee to continue to monitor this process and make sure that Australia ends the practice of treating asylum seekers differently based solely on their mode of arrival.

5.5 Residence determination

Amnesty International supports the amendment that repeals Section 197AF which currently states that, “The power to make, vary or revoke a residence determination may only be exercised by the Minister personally”. Allowing departmental officials to carry out residence determinations will streamline the process, which in the past has been subject to lengthy delays. It is imperative that vulnerable people identified by the Department and support groups are moved out of immigration detention and placed in more appropriate community detention arrangements as soon as their health, identity and security checks are completed.

6. Ongoing opposition to excision

In Amnesty International’s 2008 Submission to the Inquiry into Immigration Detention in Australia, the organisation urged the government to “end the use of “excised” offshore locations for visa processing purposes in order to allow all asylum seekers an equal opportunity to apply for a visa.”¹²

Unlike asylum seekers who arrive by aircraft, those who arrive by boat are detained on Christmas Island and dealt with outside the jurisdiction of the Australian legal system and the Migration and Refugee Review Tribunals. In his July 2008 announcement, Senator Evans promised that asylum seekers on Christmas Island would have “access to independent review of unfavourable decisions.”¹³

Amnesty International understands that this process is currently being established, but remains concerned that no substantial information or guidelines of the review process has been publicly released. A compelling rationale still needs to be provided for a policy that discriminates against a group of people on the arbitrary criteria of their mode of arrival.

Furthermore, the remote location of Christmas Island (over 2000 kilometres from the mainland), and the inadequate existing infrastructure on the Island have led to a limited level of access to legal, health and community support services for detainees. In addition, it is evident that there are significantly fewer services available to detainees on Christmas Island to those on mainland Australia.

Especially concerning is the situation of children and unaccompanied minors on Christmas Island. The children kept in alternate detention arrangements are guarded constantly and are not free to leave the fenced perimeter of the facilities. Minors detained on the mainland are not subjected to these restrictive conditions, and Amnesty International believes that it is unacceptable that children are punished because of the limited scope for community detention on Christmas Island.

While Amnesty International respects that all parties are endeavouring to create a system of detention that is identical in practice to the mainland, it is increasingly obvious that logistically, this is not possible. The practical limitations of Christmas Island have resulted in a system where asylum seekers not only have fewer legal rights, but also less access to important services such as counselling, medical

assistance and legal advice. A further increase in offshore arrivals will have the effect of underlining the short comings of the current policy.

A recent Neilsen poll commissioned by Amnesty International Australia found that 69% of Australians believe that asylum seekers who arrive in Australia by boat should have access to the same legal protections as those who arrive by plane. A majority of these people, however, believe that 60% of asylum seekers arrive by boat. The actual number is less than 10%, with the remainder arriving by plane.

The findings of this survey show that a clear majority of Australians disagree with the conditions imposed by the excision policy and support Amnesty International's position that all people seeking asylum in Australia should receive equal treatment under the law.¹⁴

As such, the Government should immediately move to end this discriminatory policy by providing the same legal protections to all asylum seekers and processing all protection claims on the mainland. We urge the Australian Government to utilise the momentum it has generated in these reforms and abolish the discriminatory and wasteful policy of excision.

7. Conclusion

Amnesty International welcomes the proposed legislation and supports the Government in its efforts to reform the refugee determination process in Australia. The Government's commitment to "increase clarity, fairness and consistency in the way the Minister and the Department of Immigration and Citizenship respond to unlawful non-citizens" is a commendable sentiment that is reflected in the *Migration Amendment (Immigration Detention Reform) Bill 2009*. Overall, this bill brings Australia's immigration detention system closer into line with international human rights standards.

In a period when many other governments around the world appear to be increasing the harshness of their immigration detention regimes, it is encouraging that Australia is taking a step in a more positive and sustainable direction. Amnesty International applauds the Government's commitment to reform its detention framework to greater reflect the principles enshrined in international human rights law.

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

However, the organisation remains concerned that even if this bill is passed, a number of aspects of Australian immigration law and policy will continue to significantly contravene Australia's human rights obligations. To address this situation, Amnesty International recommends that the Australian

Government end the excision of offshore territories, and extend the same legal rights and services to all asylum seekers in Australia. Furthermore, we believe that to properly respect the human rights of all individuals in immigration detention, it is crucial that there be greater judicial oversight of the process.

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

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

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

4 Speech entitled "New Directions in Detention", Restoring Integrity to Australia's Immigration System given at ANU, 29 July, see <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> [accessed 26 July 2009]

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

6 Migration Amendment (Immigration Detention Reform) Bill 2009

7 Speech entitled "New Directions in Detention", Restoring Integrity to Australia's Immigration System given at ANU, 29 July, see <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> [accessed 26 July 2009]

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

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

10 Migration Amendment (Immigration Detention Reform) Bill 2009

11 United Nations, Convention on the Rights of the Child, November 1989, <http://www2.ohchr.org/english/law/crc.htm> [accessed 28 July 2009]

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

13 Speech entitled "New Directions in Detention, Restoring Integrity to Australia's Immigration System" given at ANU, 29 July 2008, <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> [accessed 26 July 2009]

14 Amnesty International Australia, Majority of Australians support equal legal protections for all asylum seekers, 29 July 2009, <http://www.amnesty.org.au/news/comments/21417/> [accessed 30 July 2009]