

To: Senate Standing Committee on Legal and Constitutional Affairs

From: Civil Liberties Australia **CLA**

## **Re: Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010**

Australia is a compassionate and wealthy country: however this is not reflected in our treatment of asylum seekers. Aspects of the migration legislation are:

- inhumane,
- in breach of basic fundamental human rights, and
- warrant immediate revision.

The proposed Migration Amendment Bill is long overdue and a requirement if Australia is to rectify its tarnished reputation in relation to how asylum seekers are received. Amendment of the Migration Act is a necessity in order to fulfil our international obligations under major human rights treaties.

For instance, the Universal Declaration of Human Rights begins in Article 1 by stating that 'All human beings are born free and equal in dignity and rights ... and should act towards one another in a spirit of brotherhood.' The International Covenant on Civil and Political Rights asserts that everyone has the right to liberty and shall not be subjected to arbitrary detention (Article 9) while Article 31 of the Refugee Convention demands that States shall not impose penalties, on account of refugees' illegal entry or presence where they have come from a territory where their life or freedom was threatened. Australia is currently failing to adequately fulfil these obligations.

This submission addresses each of the main aspects provided for in the Bill to demonstrate the necessity for its adoption by the government.

### Ending offshore processing and the excision policy

The current offshore processing and excision policy is fabricating reality. It is also an attempt to pick and choose elements of ethics and morality, with one ear deaf to pleas, and an eye closed to hardship.

Australia's territorial jurisdiction should be the same for refugee responsibility as it is for oil and mineral rights. In accordance with Article 57 of the Law of the Sea Convention, Australia declared in 1994 that its Economic Exclusion Zone extended to 200 nautical miles, giving it the sovereign rights to exploit all types of resources in this zone. A nation has no right to try to be "half-pregnant" in terms of international laws. Doing so is taking the first steps on a downward spiral that could lead to the

possibility of Ashmore Reef being turned into a Guantanamo-like "cabinet room", where people instead of documents would be paraded on dry land for a few seconds to claim they arrived in a part of Australia that effectively has reverted to terra nullius (*belonging to no-one*). "Trolley-washing" of documents (wheeling them in/out of a Cabinet room to claim exemption) is a Freedom Of Information snow job; an equivalent practice – the island-dipping of refugees – is a legal spin cycle.

The apparent motivation behind the excision policy was to further strengthen Australia's territorial integrity. There is clearly a political tension between the desire to uphold state sovereignty by controlling migration through excessive measures such as this, and the legal requirement to implement obligations under the Refugee Convention. The balance must be shifted in favour of fulfilling our international commitments by repealing this excision policy, a political tool rather than a legitimate policy.

The term 'boat people' is a label which almost entirely deprives the people it describes of any humanity. In the proposal to end this detrimental offshore processing the Bill ensures that those asylum seekers who arrive by boat are afforded the same legal rights and protections as those arriving on the mainland by other means.

#### Ensuring that detention is only used as a last resort

Article 9 of the ICCPR ensures that everyone has the right to liberty and that no one shall be subjected to arbitrary detention. The right to liberty is one of the most fundamental human rights and thus every effort should be made to ensure that this right is guaranteed to all. Australia's justice system is based on detention being imposed upon guilty, convicted people; the overwhelming majority of asylum seekers are innocent. Australia should never jail human beings who are clearly innocent (children), and should give the benefit of the doubt to all people (certainly mothers) rather than apply a negative, blanket approach to everyone. It is deplorable that human rights, particularly the rights of the child, are currently secondary to our government's political motivations manifested in Australia's immigration policies.

Detention is only acceptable if there is a reasonable suspicion that an asylum seeker may be other than who he/she says. Those people who arrive by boat have resorted to desperate measures to escape from their home state where many fear some of the most abhorrent forms of persecution. They are not looking for some back-door entry into the immigration system; they are looking for protection. Australia's legal system – apart from the refugee section of it – operates on the basis of innocent until proven guilty. Ensuring that detention becomes the exception rather than the rule is paramount to putting the welfare of vulnerable people above domestic politics.

## Ending indefinite and long-term detention

The problem with indefinite and long-term detention is that a nation becomes inured to it, over time. Witness the USA, where they have only just decided to hold trials after detaining prisoners at Guantanamo Bay for nearly 10 years.

Refugees are daughters and sons of humanity, as much as Australia's residents are. They don't stop being human, and deserving of humane treatment, because they are a different colour or they speak a different language. Indefinite detention is anathema to Australia's traditional respect for giving everybody a fair go: it seriously inconveniences refugees, but it fundamentally diminishes us as a nation and as international citizens.

The proposal that any person who is detained must be provided with the reasons for detention and the grounds for their continuing detention is welcomed. It will ensure that those who are detained are assured procedural fairness and given the right to dispute the order for detention. If detention is deemed to be the only option, it should be mandatory that it is accompanied by due process that is timely. Thirty days to resolution should be the outer limit...or the person is confirmed as a legitimate refugee if no adverse finding is proven in that time. A judicial hearing could be available for special cases requiring additional time, with approval for continuing investigation being permitted for one additional 30-day period only.



## Introducing a system of judicial review of detention beyond 30 days

It is dangerous when any nation allows bureaucrats to lock people up without at least a magistrate's (and, preferably, a senior judge) oversight. Judicial review of refugee detention is a must if Australia is to be a 'rule of law' country for all its people. The vast majority of 'boat people' will end up being 'Australian people', so

anticipatory detention is the equivalent of locking up your soon-to-be next-door neighbour.

It is understood that, in some cases, establishing identity is difficult; but in the vast majority of cases, giving the claimant the benefit of the doubt would result in people swiftly moving into the community. This would lessen their burden on detention infrastructure, as well as being far more humane. Thirty days is adequate time to make an initial assessment, and to decide whether or not a person should, *prima facie*, qualify for refugee status. If claimants are detained beyond 30 days, it is effectively 'administrative jail.' Ensuring that nobody is detained for longer than 30 days without judicial review is a positive step in the right direction to ensure that asylum seekers are assured the same rights to liberty as any other person. It is unbelievable that the Australian Government has been able to get away with long term detention until now; it is time to treat these people who have escaped persecution in their home country with the respect that Australia shows its citizens.

In summary, the Australian Government has maintained legislation which is not only inconsistent with its obligations under international law but which deprives people of one of their most fundamental human rights, the right to liberty. The proposed amendment provides the opportunity for the Government to change the way we receive and treat asylum seekers, an opportunity to treat them as people rather than detaining them without question. Because the current system is an international disgrace, this opportunity to repair Australia's tarnished international human rights reputation and to treat asylum seekers in the humane manner that every person deserves must not be wasted. The amendment is long overdue; failure to pass it would make a mockery of the Australian attitude to provide help to others in less fortunate, often life-threatening situations, and to share our beautiful, bounteous and hospitable nation with people who need protection. Immediate reform is essential. CLA welcomes the Migration Amendment Bill and resolutely advocates for its adoption by the government.

 Civil Liberties Australia A04043

Lead author: Jenny Nutter; co-author Bill Rowlings  
Cartoon: thanks to David Pope, *Canberra Times*