

CHAPTER 3

Key Issues

Introduction

3.1 Most submissions to this inquiry did not condone violence and several argued for changes to broader aspects of the Migration Act, beyond the scope of the Bill, such as ending or reducing mandatory detention.¹ The majority of the submissions, including the submission from the Commonwealth Ombudsman,² did not support the Bill for a number of reasons including:

- other causes of the recent violence including: mental health, professionalism, communication with detainees, overcrowding, and length of detention;
- consistency with international law and the 1951 Refugee Convention;
- whether there would be natural justice and sufficient rights of review;
- the reduced threshold for seriousness of offences that are captured;
- the retrospective commencement and capturing of past offences;
- different treatment of detainees, other refugees, and Australians; and
- changes to penalties for weapons offences.

Causes of the recent violence

3.2 The EM notes that the purpose of the Bill is to discourage violence in detention centres, such as the recent violence in Villawood and on Christmas Island.

these strengthened powers will also provide a more significant disincentive for people in immigration detention from engaging in violent and disruptive behaviour, and will deal appropriately with those who, by engaging in criminal activity in immigration detention, demonstrate a fundamental disrespect for Australian laws, standards and authorities.³

3.3 Asylum Seekers Christmas Island were of the view that the Bill incorrectly assumed that the recent violence in detention centres was a reaction to, or sought to change, unfavourable outcomes, submitting:

The amendment is premised on the misguided notion that clients take part in violent behaviour in reaction to, or in the hope of changing the outcome of a failed refugee assessment or appeal. It assumes that their behaviour is a wilful and petulant response to a justly dealt outcome that they did not

1 NSW Council for Civil Liberties, *Submission 8*, p. 2.

2 Commonwealth Ombudsman, *Submission 31*, p. 1.

3 EM, p. 1.

happen to agree with. This overly simplistic assumption is fundamentally wrong on a number of levels.⁴

3.4 The NSW Council for Civil Liberties argued that it was inappropriate to attempt to attribute motives to the recent violence at this stage, stating :

The mental health and motives of the persons who are presently charged with criminal offences arising out of the April 2011 Villawood riots and other incidents are yet to be dealt with in the criminal justice system. Accordingly, it would be wrong at this time to make specific statements about the mental health or motivation of any individual.⁵

3.5 Other submitters, such as the Office of the United Nations High Commissioner for Refugees (UNHCR), suggest other causes of the violence:

UNHCR is of the view that these additional criminal charges are not only unnecessary, since the Minister already has wide-ranging discretion with regard to the granting of visas, but may be considered unreasonably punitive. While offences relating to immigration detention, or escape from immigration detention, may not be acceptable, there may be extenuating circumstances which should be taken into account within the Minister's discretion. Put simply, the fact that a refugee may, out of impatience or frustration caused by his/her predicament in detention, lead to a criminal offence, does not of itself go to the core issue of that person's character and suitability for a permanent protection visa.⁶

Mental health

3.6 A number of organisations noted the impact of detention on the mental health of detainees. Submitters such as Professor Jane McAdam, Liberty Victoria and Amnesty International argued that this should be considered as an underlying cause of the self-harm and violence that took place in the Christmas Island and Villawood detention centres in early 2011.⁷ These views are also echoed in the submission from the Sydney Centre for International Law (SCIL):

We also note that many offences committed in immigration detention in Australia must be understood against the background of serious psychological harm which is medically documented as stemming from detention in certain circumstances, and which can adversely affect the behaviour of detainees. It would be highly inappropriate for the law to enhance the punishment of detainees for the predictable mental health

4 Asylum Seekers Christmas Island, *Submission 7*, p. 3.

5 NSW Council for Civil Liberties, *Submission 8*, p. 2.

6 UNHCR, *Submission 2*, p. 4.

7 See Professor Jane McAdam, *Submission 6*, p. 5; Liberty Victoria, *Submission 11*, pp 9–11; Amnesty International, *Submission 17*, pp 5–6.

consequences of poor government policy choices concerning mandatory detention.⁸

3.7 Organisations such as the Refugee Council of Australia, the Australian Human Rights Commission and National Legal Aid argued that the amendments were not justified and/or would be ineffective as a deterrent.⁹ Similarly, the Refugee Advice + Casework Service noted that:

[T]he Bill cannot be expected to be an effective 'disincentive' for such behaviour among a community of people who often have complicated mental health issues which are exacerbated by their experience of prolonged detention.¹⁰

Conditions and communication in detention centres

3.8 A number of organisations, including Amnesty International, and the Australian National University (ANU), College of Law, Migration Law Program questioned the justification for the amendments, arguing that the current provisions provide sufficient deterrence. The organisations submitted that the violence is a result of poor conditions in the detention centres.¹¹ Others organisations contended that a lack of communication and that slow processing of claims are contributing causes of the recent violence.¹² There were suggestions from a number of submitters for improved communication with detainees. For example Asylum Seekers Christmas Island quoted from a letter from a detainee:

[A]fter a week some people came from Ombudsman to listen to detainees problems. They came and sat down with clients' representatives and promised they would pass on detainees concerns to Department of Immigration. But after a couple of months no one noticed even a slight change in immigration way of processing the cases. Instead of applying a change, they started to [promise] detainees that everything would be better in March and there would be noticeable changes. There will be a speed up in processing cases and a lot more promises. But when March came not only nothing special had happened, but also people started to get rejected for the second time. There [were] a lot [of] rejection[s] for the first 10 days in March. That caused even more anger and frustration for detainees because of the false promises from immigration and vows that were never met.¹³

8 Sydney Centre for International Law, *Submission 5*, p. 5.

9 Refugee Council of Australia, *Submission 19*, p. 1; Australian Human Rights Commission, *Submission 22*, pp 4–5; National Legal Aid, *Submission 25*, p. 4.

10 Refugee Advice + Casework Service (AUST), *Submission 9*, p. 4.

11 Amnesty International, *Submission 17*, p. 5; Migration Law Program, College of Law, ANU, *Submission 27*, p. 3.

12 See, for example, Refugee Council of Australia, *Submission 19*, p. 2; Federation of Ethnic Communities' Councils of Australia, *Submission 23*, p. 2.

13 Asylum Seekers Christmas Island, *Submission 7*, p. 7.

3.9 However, DIAC informed the committee that it has an established induction program aimed at ensuring detainees were well informed of relevant issues and the processes that would need to work through:

There are a range of opportunities, including orientation and an induction process, that people go through when they come into immigration detention, which explain to them the legal framework of what is happening to them, what they can expect in immigration detention in terms of care and services and how to live and function in that environment. Certainly, if the legislation enters into force, part of our implementation plan is to ensure that the messaging to immigration detainees is adjusted accordingly so that there is a very clear understanding at what is at stake should they get a criminal conviction at some later time. So we are very keen to ensure that people understand the consequences of possible future action and can make sensible decisions about good behaviour, rather than commit a crime and find out the full ramifications of that afterwards.

There is information provided to them at the point of induction into the detention environment. Sometimes the point of detention is at a more informal setting, in a field or a shop or on a street or, in the case of irregular maritime arrivals, it might be on the jetty. When they get into a centre, which is generally shortly thereafter, there is a process of induction where those sorts of messages are given, and we would make sure that those messages are very clear and very strong and that they reflect the changed legislation if it enters into force.¹⁴

3.10 Liberty Victoria alleged that following the recent violence, detainees were incorrectly arrested in some cases:

Anecdotal evidence from within the Christmas Island Detention facility suggest that the arrests made after the riots were arbitrary and based more on a person's general reputation within the centre rather than 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.¹⁵

3.11 The AFP informed the inquiry hearing that there were no wrongful arrests:

For the Christmas Island riots we actually just charged 18 people before the court on Christmas Island on Sunday, 12 June. We still have pending matters in relation to the Villawood riots. I would have to say that we would reject that. We have briefs of evidence to support the charges, so I would not support that.¹⁶

14 Mr Robert Illingworth, DIAC, *Committee Hansard*, 16 June 2011, p. 14.

15 Liberty Victoria, *Submission 11*, p. 4.

16 Commander Jennifer Hurst, AFP, *Committee Hansard*, 16 June 2011, p. 13.

3.12 Amnesty International argued that overcrowding, remoteness and lack of resources are contributing causes of the violence and riots.¹⁷ The sheer number of detainees and the longevity of their detention were raised by a number of submitters.

Indefinite detention

3.13 In addition to concerns about the length of detention, a number of submissions suggested that refugees who failed the character test and subsequently had their visa cancelled or refused would be placed in indefinite detention.¹⁸ However, the DIAC informed the committee that:

...the Government also believes that immigration detention that is indefinite or otherwise arbitrary is not acceptable. Immigration detention comes to an end when a person is granted a visa or departs Australia. If clients are cooperative, they can achieve an outcome much faster.¹⁹

The position of the department is that unauthorised arrivals are subject to mandatory detention for health, character and security checks. Once those checks have been completed for people claiming protection—if they are granted protection—obviously they are granted a visa, but, while those checks are underway, detention is mandatory but not indefinite.²⁰

3.14 The committee notes the establishment on 16 June 2011 of the Joint Select Committee on Australia's Immigration Detention Network, which will inquire into a broad range of matters such as the causes of violence in more detail.

International Law and the 1951 Refugee Convention

3.15 A number of organisations raised concerns that the amendments may not comply with international law and the 1951 Refugee Convention.²¹ The SCIL argued that the Bill does not satisfy any of the three circumstances (national security, serious crimes that threaten the community, or particularly serious crimes) in which a state party may refuse or revoke protection under the Refugee Convention.²² Noting that under the proposed amendments, the fact that the Minister would not be bound by the previous requirement that a person be convicted of a crime and sentenced for a minimum of 12 months, The SCIL contended that:

17 Amnesty International, *Submission 17*, p. 5.

18 See, for example, Amnesty International, *Submission 17*, pp 3–4; Refugee Council of Australia, *Submission 19*, p. 2; Australian Human Rights Commission, *Submission 22*, p. 6.

19 DIAC, *Submission 16*, p. 4.

20 Dr Wendy Southern, DIAC, *Committee Hansard*, 16 June 2011, p. 12.

21 Refugee Advice + Casework Service (AUST), *Submission 9*, p. 3; ANU College of Arts & Social Science, *Submission 14*, p. 1; Castan Centre for Human Rights Law, *Submission 12*, pp 2–5; Law Council of Australia, *Submission 13*, pp 11–14; Amnesty International, *Submission 17*, p. 3; Human Rights Law Centre, *Submission 15*, p. 1; Australian Human Rights Commission, *Submission 22*, p. 6.

22 Sydney Centre for International Law, *Submission 5*, p. 2.

This places Australia in potential breach of its obligations under arts 7(1), 31(1), 32 and 33 of the *Convention Relating to the Status of Refugees*, amended by the 1967 Protocol (the “Refugee Convention” or the “Convention”). The proposed amendment to s 197B likewise breaches arts 7(1) and 31(1) because of its unequal effects.²³

3.16 Mr Nicholas Poynder, appearing for the Refugee Council of Australia, noted similar concerns:

if you were to remove the protection of the refugees convention from a person because of criminal conduct which falls below particularly serious crimes or where they are not a danger to the community—if you were to remove people on those grounds or where conduct falls short of those grounds, then you would be committing refoulement, which is in breach of the refugees convention, and thereby be in breach of international law.²⁴

3.17 Mr Poynder also conceded during the committee's hearing that:

the legislation is not in itself in breach of international law.²⁵

3.18 DIAC submitted that international obligations are taken into account in exercising discretion following a failed character test:

The Government's approach is consistent with Australia's obligations under international law known as *non-refoulement* obligations, not to return persons in certain circumstances. ... While the intent of these amendments is to enliven the Minister's discretion to refuse or cancel a visa for people who have engaged in unacceptable and criminal behaviour, the Government will continue to meet its international obligations. Most importantly, in terms of Australia's international obligations the Government will not return people to whom it owes *non-refoulement* obligations to a place where there is a real risk of these significant types of harm.

In circumstances where it is not possible to remove refugees, or other persons who engage these obligations, whose permanent visa has been refused or cancelled on character grounds – and consistent with Government policy as well as Australia's obligations under international human rights instruments – such persons will also not be detained indefinitely. The Government has made it clear that it will consider the grant of existing temporary visas under the Act to manage persons who are owed *nonrefoulement*, but whose permanent visa has been refused or cancelled on character grounds. In such cases, the Minister may consider the exercise of his personal power under section 195A of the Act to grant a visa placing these persons in the community with appropriate support arrangements until such time that their removal from Australia is possible.

23 Sydney Centre for International Law, *Submission 5*, p. 1.

24 Mr Nicholas Poynder, Refugee Council of Australia, *Committee Hansard*, 16 June 2011, p. 6.

25 Mr Nicholas Poynder, Refugee Council of Australia, *Committee Hansard*, 16 June 2011, p. 6.

Other obligations relating to the presence of refugees in Australia will also continue to be met.

Some people owed Australia's *non-refoulement* under these new arrangements will be granted a temporary visa because they fail the character test. The grant of a permanent Protection visa to persons who are owed *nonrefoulement* and pass the character test will, however, continue to be the norm for the majority of asylum seekers.²⁶

3.19 The committee also heard that the temporary visa arrangements have a range of limitations, such as the holder being unable to travel and being unable to be reunited with family members.²⁷ During the committee's hearing, DIAC further clarified the separation between international obligations under Article 33 of the Refugee Convention and the character test as part of the domestic mechanisms for granting visa, which include the character test:

The issue, from looking at some of the submissions, as I have, and from hearing some of the evidence tonight, seems to be that there is a perception that the changes would affect Australia's capacity to provide protection, whereas the statement of the minister was very clear—that what he is essentially indicating is that the provisions would be used in a way to withhold a permanent visa to a person owed protection and, instead, replace it with a temporary visa. It is not a question of sending a person back to face persecution; it is a question of: what sort of protection does a person get?²⁸

I guess the fundamental point is that there is nothing in the Migration Act, as it currently stands, or in these amendments, that actually requires somebody to be returned to their country of origin where they would face persecution or other danger, in breach of any international obligations. There is always an opportunity to provide protection, including, during the normal course of events—for example, under section 501, a departmental decision maker would refuse a visa on character grounds. There is still the ministerial discretion in section 195A to grant a visa of whatever type, if that is what is necessary to prevent refoulement.²⁹

3.20 The committee is satisfied that the amendments, like the existing character test, are not in breach of articles 31, 32, and 33 of the Refugee Convention, as the character test does not affect the decision as to whether or not a person is owed protection. However, the committee suggests it would be helpful to people seeking to understand the operation of the amendments if that were set out clearly in the EM.

26 DIAC, *Submission 16*, p. 8.

27 Ms Kate Temby, Australian Human Rights Commission, *Committee Hansard*, 16 June 2011, p. 9.

28 Mr Robert Illingworth, DIAC, *Committee Hansard*, 16 June 2011, pp 11–12.

29 Mr Garry Fleming, DIAC, *Committee Hansard*, 16 June 2011, p. 12.

Natural justice and rights of review

3.21 The Law Council of Australia was critical of the existing and proposed character test provisions from a natural justice perspective.³⁰ This view was shared by Russo Mahon Lawyers, which submitted:

The current legislative framework has received criticism due to the degree of ministerial discretion and lack of access to independent review. Natural justice is not exercised in relation to a decision by the Minister to cancel a visa under section 501(2). A person is not entitled to go to the Administrative Appeals Tribunal (AAT), listen to the Minister's reasons, or present a counter argument. Moreover, section 503A of the Act enables the Minister to reply on information supplied to him in confidence by the Australia Federal Police (AFP) or other security agencies. The Minister can decline to disclose this information, even to the court or tribunal reviewing his or her decision. Judicial review remains an option only for those with the financial and other resources to pursue it within the strict time limits placed on application to the Federal Court. Offshore visa applicants have no standing to seek review in an Australian Court.³¹

3.22 Russo Mahon Lawyers expressed the view that for natural justice to be upheld, a character test should involve the following attributes:

- the person who exercised the power must be identifiable;
- clearly stated guidelines for the exercise of powers should be available, preferably in primary legislation;
- reasons should be given when a power is exercised; and
- some form of external review should be available.³²

3.23 Statistics on selected character programs indicate that from 1 July 2010 to 31 March 2011 there were 90 visa cancellation decisions (of which two were made by the Minister) and 77 visa refusal decisions (none of which were made by the Minister). Since, 2005–06 (for refusals) and since 2008–09 (for cancellations) there have been a total of 5 decisions made by the Minister, indicating that that vast majority (99.5%) of decisions are made by delegates.³³

3.24 The committee considers that the Migration Act satisfies the first two points listed above, and in the case of delegate decisions, the last two are also satisfied. The committee also notes that that in addition to judicial review, the Minister is subject to Parliamentary scrutiny, as demonstrated during Budget Estimates in May 2011, for example:

30 Law Council of Australia, *Submission 13*, pp 7–8, 10.

31 Russo Mahon Lawyers, *Submission 4*, p. 4.

32 Russo Mahon Lawyers, *Submission 4*, pp 5–6.

33 DIAC, *Submission 16*, p. 37.

- DIAC officials took on notice questions relating to the nature of information that was provided to the Minister in support of the two visa cancellation decisions.³⁴
- Committee members have demonstrated their resolve to investigate such matters during estimates through further questioning on the recent violent incidents in detention centres and the implications for visa decisions.³⁵

3.25 While the committee is satisfied that the amendments in the Bill do not change the existing natural justice and rights of review arrangements, the committee considers that it would be useful for people seeking to understand the operation of the amendments if that were set out clearly in the EM.

Seriousness of offences

3.26 A key aspect of the Bill is that the character test would be amended so that a person would fail if they have been convicted of any offence any offence while they are in immigration detention.

3.27 The consequences arising from minor offences potentially leading to a failed character test was a key concern in many submissions.³⁶ The Law Council of Australia noted that the amendments remove the features of the existing character test that require a decision maker to focus on matters such as the gravity of offence and type of sentence imposed. If someone commits what would generally be regarded as a fairly minor offence, like breaking a window or damaging a rubbish bin, and they are convicted of that, they will now automatically fail the character test.³⁷ As Liberty Victoria argued:

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 any kind described by the Bill *automatically* fail the character test. The explanatory memorandum to the Bill clearly states that this is the intended effects 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.³⁸

3.28 In its submission, National Legal Aid proposed an alternative approach:

34 *Committee Hansard*, 24 May 2011, pp 3–5.

35 *Committee Hansard*, 24 May 2011, pp 7–8.

36 Castan Centre for Human Rights Law, *Submission 12*, p. 2; Public Affairs Commission of the Anglican Church in Australia, *Submission 20*, p. 2; Social Issues Executive, Anglican Diocese of Sydney, *Submission 21*, p. 2; Law Institute of Victoria, *Submission 26*, p. 2.

37 Ms Rosemary Budavari, Law Council of Australia, *Committee Hansard*, 16 June 2011, p. 2.

38 Liberty Victoria, *Submission 11*, p. 5.

One suggestion may be that the amendments should be limited to offences prescribed by regulation. In other words the amendments should refer to “prescribed offences” and prescribed offences should be defined as those prescribed by regulations to the Migration Act 1958. The prescribed offences could include all of the serious offences that may arise out of immigration detention such as damage by fire and assault. This would promote good order within immigration detention but also avoid a disproportionate impact on people in immigration detention being charged and convicted of minor offences.³⁹

3.29 The Senate Standing Committee for the Scrutiny of Bills also raised concerns in its Alert Digest and queried whether offences should be specified in some way:

Further, the Committee is very concerned that the application of the new provisions could mean that criminal behaviour which may be relatively minor can, of itself, justify the exercise of these powers (without the need for any assessment of the circumstances and details of the offence) and this outcome may be thought to be disproportionate in some cases. The Committee seeks the Minister's advice as to why the existing powers are thought inadequate to respond to criminal acts by those whom are or should be lawfully detained under the Act and whether, if new powers are considered necessary, it is appropriate to specify types of offences or a minimum term of imprisonment for the offences rather than including all offences.

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.⁴⁰

3.30 In response to a question notice regarding the potential to prescribe relevant offences in regulations, DIAC contended:

For the reasons discussed below, the suggested alternative approach is not preferred. Prescribing offences in the Regulations presents a number of difficulties. Significantly, prescribing offences risks omitting serious offences and/or may not be all encompassing of the types of offences for which a person may be convicted while they are in immigration detention.

For example, if offences relating to potential riots in detention were “prescribed” such as criminal damage and arson, then conviction of serious offences involving personal violence against another detainee that were not prescribed, which do not attract a sentence upon conviction of more than 12 months imprisonment, would not result in failure of the character test. This would lead to inconsistent and arguably unfair results for immigration detainees.

39 National Legal Aid, *Submission 25*, p. 3.

40 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 5 of 2011*, 15 June 2011, pp 25–27.

Given that people in immigration detention can be subject to both Commonwealth and State/Territory offence provisions, ensuring that all relevant offences were covered in a prescribed list would be problematic. It is for these reasons that the current amendments are broad in scope so as to encompass conviction of any offence committed in immigration detention, during an escape from immigration detention, or during a period where a person has escaped from immigration detention.

Further, at any time a Commonwealth or State/Territory law was amended, the Regulations would need to be updated to reflect the relevant amendments. Therefore, prescribing specific offences in the Regulation risks the list of prescribed offences losing currency and diluting the effectiveness of the proposed amendment.

Alternatively, if the Regulations were to prescribe classes of offences, rather than specify particular offences, this carries the risk that some offences may not be captured by the description of the class of offences. Further, such an approach is likely lead to increased litigation by persons challenging that the offence for which they were convicted does not fall within the description of the class of offence.⁴¹

Retrospective issues

3.31 The Bill indicates that the amendment to the character test would commence on 26 April 2011. The EM indicates that amendments also take into account past and present criminal conduct, and past and present general conduct.⁴²

Prior conduct, offences and convictions

3.32 The Bill has a retrospective element in that persons who committed offences prior to commencement may also be subject to the strengthened character test.⁴³ The Rule of Law Institute of Australia (RoLIA) elaborated on this point further, stating:

Retrospective laws undermine the rule of law and should be avoided wherever possible. We note there is a strong body of jurisprudence on the rule of law which opposes retrospectivity in law making.⁴⁴

3.33 DIAC confirmed that the Bill applies to past offences and criminal records, indefinitely and there is no cut off:

because you are actually considering, at a point in time, the character of a person who is understandably affected by things they had done in the past. It is a backward-looking test in that regard.⁴⁵

41 DIAC, answer to question on notice, 16 June 2011 (received 21 June 2011).

42 EM, p. 1.

43 Law Council of Australia, *Submission 13*, p. 21; Law Institute of Victoria, *Submission 26*, p. 2; Commonwealth Ombudsman, *Submission 31*, p. 1; National Legal Aid, *Submission 25*, p. 3.

44 Rule of Law Institute of Australia, *Submission 10*, p. 1.

3.34 The committee heard that if the bill is passed, it would potentially affect people in detention who have been charged, if they are subsequently convicted.⁴⁶

For the Christmas Island riots we actually just charged 18 people before the court on Christmas Island on Sunday, 12 June. We still have pending matters in relation to the Villawood riots.⁴⁷

3.35 The powers under the Migration Act allow the Minister to take into account past criminal and general conduct as when the character test was introduced it also applied to criminal records, past associations and past criminal or general conduct.⁴⁸

3.36 The committee is satisfied that the amended character test would need to have a backward-looking aspect in relation to past convictions and that it is not an arbitrarily retrospective law in that regard. The committee further notes the precedent of the existing character test, which has the same backward-looking aspect.

26 April 2011 commencement

3.37 For the 26 April 2011 commencement of the character test amendments, DIAC noted in their submission that:

It is the intention of the Government that the amendments to the character test would apply to anyone convicted of an offence in relation to the recent events at Australian immigration detention centres. The Minister announced on 26 April 2011 that his intention was that the provisions would take effect from that date. Therefore all detainees were on notice as of that date of their liability to be considered under the proposed new arrangements. The Australian community expects there to be consequences for destructive and criminal behaviour. Commencing these amendments to the character provisions on 26 April 2011 ensures this Bill delivers those consequences.⁴⁹

3.38 The Senate Standing Committee for the Scrutiny of Bills noted in its Alert Digest:

Given the nature of the individual interests which may be affected by decisions made under sections 500A and 501 of the *Migration Act*, it is suggested that 'legislation by press release' is not appropriate. As discussed in its *Report on the 39th Parliament*, the Committee consistently draws attention to reliance on Ministerial announcements which contain an implicit requirement that persons arrange their affairs in accordance with such announcements rather than in is made by Parliament, not by the Executive. The practice is of particular concern in the context of the application of laws which have the capacity to affect significant individual

45 Mr Robert Illingworth, DIAC, *Committee Hansard*, 16 June 2011, pp 12–13.

46 Mr Robert Illingworth, DIAC, *Committee Hansard*, 16 June 2011, p. 12.

47 Commander Jennifer Hurst, AFP, *Committee Hansard*, 16 June 2011, p. 13.

48 Mr Garry Fleming, DIAC, *Committee Hansard*, 16 June 2011, p. 13.

49 DIAC, *Submission 16*, pp 9–10.

liberty interests. The Committee therefore seeks the Minister's advice as to the justification for the proposed approach, taking into account the Committee's concern that they may unduly trespass on personal rights and liberties.

*Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*⁵⁰

3.39 The committee is however of the view that given the amended character test applies to past convictions, regardless of when they occurred, the 26 April 2011 commencement date does not trespass on personal rights and liberties any more or less than any other potential commencement date.

Double punishment and different treatment?

3.40 A number of organisations raised the issues of whether detainees are being punished twice and treated differently to other refugees and visa holders.⁵¹ Ms Budavari from the Law Council of Australia noted that:

I guess the implications of the bill do not constitute double jeopardy in the traditional meaning of the phrase. However, there is an argument that if someone is prosecuted for an offence committed in immigration detention, as people have been before the court today in relation to the Christmas Island incidents, they are given a punishment by the court and that that should be sufficient punishment, and anything further than that is unnecessary.⁵²

3.41 While also suggesting that detainees are potentially receiving greater punishment than Australians for the same crimes, Liberty Victoria argued that it may be a matter to be considered by courts during sentencing.⁵³ As the NSW Council for Civil Liberties noted:

[U]nless the punishments imposed by this Bill are taken into account by Courts sentencing refugees resulting in a reduction of sentences applied to refugees, refugees will effectively receive greater punishment compared to other members of the Australian community who are convicted of similar offences. In practice, no reduction of sentence for a refugee is likely to compensate for the additional punishment imposed by this Bill.⁵⁴

50 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 5 of 2011*, 15 June 2011, pp 27–28.

51 Amnesty International, *Submission 17*, p. 3; Social Issues Executive, Anglican Diocese of Sydney, *Submission 21*, p. 5; Federation of Ethnic Communities' Councils of Australia, *Submission 23*, p. 3; Migration Law Program, College of Law, ANU, *Submission 27*, p. 2.

52 Ms Rosemary Budavari, Law Council of Australia, *Committee Hansard*, 16 June 2011, p. 4.

53 Liberty Victoria, *Submission 11*, pp 6–7.

54 NSW Council for Civil Liberties Inc., *Submission 8*, p. 3.

3.42 Professor Crock from the University of Sydney noted in her submission that:

Because these laws would only apply to refugees who have been detained – and not to refugees processed in the community (who could equally commit a range of petty offences) – the argument could be made that this Bill operates to discriminate against refugees by reason of their manner of entry into Australia. This is because Australia only detains asylum seekers who arrive without a visa. Those who enter on a visa and seek to "change their status" on refugee grounds are allowed to wait out any processing time in the community.

Article 31(1) of the Refugee Convention prohibits state parties from imposing penalties, on account of their illegal entry or presence, on refugees in certain circumstances. Australia's treatment of detained asylum seekers in the manner proposed in the Bill *would* arguably be punitive in nature and in breach of Art 31. In the past, the government has argued that Art 31(1) applies only to frontline refugee-receiving states. Hence, the refugees to whom the no-penalty provisions apply are those "coming directly from a territory where their life or freedom was threatened in the sense of Article 1". The argument is that the boat people intercepted en route to Australia do not meet this description. The official Australian line is that the arrivals represent "secondary refugee flows". Relative to the way other countries treat the issue of unauthorised arrivals, this is an interpretation that brings no credit to Australia.⁵⁵

3.43 An alternative view has been raised in the Parliament in May 2011. During the second reading of the Bill in the House of Representatives on 31 May 2011, Mr Scott Morrison, MP, moved an amendment to the Bill to ensure that the provisions relating to general criminal conduct under the character test would apply to all persons who are not citizens, not just those who are or should be held in detention.⁵⁶ The amendment was not agreed to by the House of Representatives. The Bill was passed in its current form by the House of Representatives on 31 May 2011.

Changes to penalties for weapons

3.44 The Law Council of Australia questioned whether sufficient justification for the increased penalty for weapons had been provided in the EM or DIACs submission.⁵⁷ The SCIL argued that the proposed amendments are inconsistent with articles 7(1) and 31(1) of the Refugee Convention because:

The proposed amendments in the Bill impose penalties upon refugees in detention that are disproportionate to those to which other aliens and refugees are subject for similar criminal conduct. Under Australian law, criminal offences involving the possession or distribution of a weapon, with definitions of "weapon" similar to that stipulated in s 197B, tend to carry

55 Professor Mary Crock, *Submission 30*, pp 3–4.

56 *House of Representatives Hansard*, 31 May 2011, pp 29–34.

57 Ms Rosemary Budavari, Law Council of Australia, *Committee Hansard*, 16 June 2011, p. 3.

penalties of between 6 months and 2 years imprisonment. Under s 27D of the *Summary Offences Act 1998* (NSW) the unlawful possession of offensive weapons or instruments in a place of detention carries a maximum penalty of 2 years imprisonment. Under the Bill, the maximum penalty for the manufacture, possession, use or distribution of weapons by immigration detainees is to be increased from 3 to 5 years imprisonment.

The Minister's assertion in the Explanatory Memorandum that the increased penalty provided for in Section 197B of the Migration Act is not inconsistent with other penalties in Commonwealth legislation fails to take into account a number of considerations. The example given by the Minister is specific to the possession of weapons on aircraft, which carries a penalty of imprisonment for up to 7 years. This is not an appropriate comparison, however, as and must be viewed in the light of obligations under transnational crime treaties which require Australia to ensure the safety of civilian aircraft against serious violence such as terrorism.⁵⁸

3.45 The Senate Standing Committee for the Scrutiny of Bills stated:

In terms of Standing Order 24 (1)(a)(i), the first two reasons for the increase do not of themselves substantively address the question of whether the increase for this offence may be considered proportionate. In the Committee's view it is also relevant that the legislation gives a very broad definition of 'weapon'. On this issue it is notable that the definition of 'weapon' in the *Aviation Transport Security Act 2004* is more circumscribed and determinate in its operation: it refers specifically to 'firearms' or things which are prescribed by the regulations to be a weapon. By contrast, whether or not a person commits an offence in relation to a weapon under the *Migration Act* may depend upon subjective intentions and whether threats have been made (regardless of any objective assessment of danger posed by the weapon). The Committee therefore seeks the Minister's advice as to whether the proposed increase in penalty is proportionate given the breadth of the definition of 'weapon' in this context.

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.⁵⁹

58 Sydney Centre for International Law, *Submission 5*, p. 4.

59 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 5 of 2011*, 15 June 2011, pp 24–25.

Conclusion

3.46 The committee has considered issues raised by submitters, witnesses, and the Senate Standing Committee for the Scrutiny of Bills. The issues raised include consistency with international law and the 1951 Refugee Convention; natural justice and sufficient rights of review; seriousness of offences; retrospective commencement and capturing of past offences; different treatment of detainees; and changes to penalties for weapons offences. The committee considers that DIAC has been able to satisfactorily clarify most of the issues.

Recommendation 1

3.47 The committee recommends that the Explanatory Memorandum be modified to:

- **explain how the amendments, and the existing character test are not in breach of articles 31, 32, and 33 of the refugee convention, as the character test does not affect the decision as to whether or not a person is owed protection, only the type of protection that they may receive;**
- **note that the amendments in the Bill are not changing the existing natural justice and rights of review arrangements;**

Recommendation 2

3.48 The committee recommends that the Senate pass the Bill.

**Senator Trish Crossin
Chair**