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Submission to the

Legal and Constitutional Affairs Legislation Committee

**Inquiry into the Migration Amendment (Strengthening the
Character Test and Other Provisions) Bill 2011 [Provisions]**

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The Castan Centre for Human Rights Law does not support this Bill. The aim of the Bill is to ensure that any person in immigration detention will be automatically deemed to fail the “character test” if he or she is convicted of an offence committed whilst he or she was in immigration detention, or if they escape or commit an offence while escaping from such detention.

The Character Test

The amendment is unnecessary. The amendments are clearly designed to have a deterrent effect, that is to prevent unrest, in or escape from, immigration detention because persons engaging in such conduct will risk automatic failure of the character test. Such a deterrent effect already exists as the Minister has the power to decide that a person fails the character test because of past criminal conduct, including criminal conduct inside a detention centre.

The amendment would breach the human right of equality before the law, enshrined in Article 26 of the *International Covenant on Civil and Political Rights*, which reads:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Immigration detainees would automatically fail the character test simply because of the location of their offence, rather than the more relevant criterion of the gravity of an offence. For example, an immigration detainee who is convicted of a minor offence while in detention would fail the character test under this amendment; whereas an immigrant who is not detained and who commits a more serious offence has a chance of passing the character test, as the Minister retains a discretion to decide in that person’s favour. This circumstance amounts to unequal treatment before the law because those in immigration detention are treated worse than other immigrants and asylum seekers.

Consequences of Failing the Character Test

The consequences of failing the character test are severe. The Minister may refuse such a person a visa. This raises the possibility of a person being denied refugee status even if he/she is a genuine refugee, in breach of Australia’s obligations under the *Convention Relating to the Status of Refugees* (Refugee Convention) as amended by the *Protocol Relating to the Status of Refugees*¹ (Refugee Protocol) protection, if he or she is convicted of an offence whilst in detention or as a result of escaping from detention.

Because detention is mandatory in Australia for anyone without a visa, and Australia cannot return a refugee to a place where he or she may be persecuted (without breaching non-refoulement obligations), the Bill makes any refugee who falls into the above category vulnerable to indefinite detention. Indefinite detention is not only highly damaging to the mental health and the well-being

¹ The Refugee Protocol of 1967 removed the temporal and geographic restrictions in the original definition of ‘refugee’ under the refugee convention.

of refugees, it also places Australia in breach of its human rights obligations. Article 9(4) of the ICCPR provides:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Refugees subjected to indefinite detention because of the proposed bill would have no real right to challenge their detention or seek release.² There are also strong arguments that indefinite detention breaches Article 7 of the ICCPR (entailing cruel or inhuman treatment), especially if it results in mental harm and deterioration.³ Unless specific reasons could be given to demonstrate that the indefinite detention of a person was necessary (e.g. the person posed a danger to the community or was very likely to abscond if released), such detention would also constitute arbitrary detention contrary to Article 9(1) of the ICCPR.⁴

There have been reassurances from the Minister for Immigration that those denied protection visas would be given temporary bridging visas, rather than be detained indefinitely.⁵ The Minister is referring to the 'Removal Pending Bridging Visa' (RPBV) which came into effect in May 2005. The RPBV allows the release, pending removal, of people in immigration detention who have been cooperating with efforts to remove them from Australia, but whose removal is not reasonably practicable at that time.

There are many problems associated with the use of the RPBV. The RPBV is discretionary and past practice for the release of long term detainees has been inconsistent. RPBV permits the Minister for Immigration to subject a refugee to many onerous conditions. For example under the RPBV, the refugee must report to the Minister and his delegates at any time or place specified for that purpose, must inform the Minister of any changes in address and must be available for removal from Australia at all times.

The RPBV places Australia in breach of its international obligations. Article 23 of the Refugee Convention states that refugees are to be accorded the same treatment with respect to public relief and assistance as is accorded to the nationals of a host country. However, RPBV holders are limited in the support they receive and the rights they are able to enjoy. RPBV holders have access only to special benefits and rent assistance for which eligibility criteria apply and are ineligible for Newstart, sickness allowance, youth allowance, Austudy, and a range of other benefits. They have no access to HECS and are effectively excluded from Tertiary education due to the imposition of full fees. RPBV

² Such refugees could issue a formal challenge to his or her detention, but there would be no substantive possibility of success. This circumstance breaches article 9(4) as per *A v Australia*, UN Doc CCPR/C/59/D/560/1993, 3 April 1997 (see para 9.5).

³ *C v Australia*, UN Doc CCPR/C/76/D/900/1999, 28 October 2002.

⁴ "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

⁵ See Chris Bowen MP, 'Changes to the character test under the Migration Act, visa processing times, refugee support services' Interview with Sally Warhaft, ABC Melbourne, (28 April 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb164786.htm>> .

holders are not eligible for most Department of Immigration and Citizenship funded services and federally funded English language programs such as the Adult Migrant English Program or the Advance English for Migrants Program.⁶ These restrictions are particularly harsh because a person granted an RPBV may have no option but to stay in Australia for many years if the situation in his or her home country does not improve.

Article 28 of the Refugee Convention requires States Parties to provide travel documents to refugees staying lawfully in their territory. RPBV holders are denied travel documents and forfeit their protection in Australia if they leave the country.

Australia is also in breach of its international human rights obligations in its denial of family reunion to RPBV holders. RPBV holders are not able to sponsor family members to join them in Australia and the prohibition on their travel effectively denies them the opportunity to see family in a third country. As a State Party to the *International Covenant on Economic, Social and Cultural Rights* Australia is required to give, under Article 10(1):

the widest possible protection and assistance...to the family, which is the natural and fundamental unity of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

Furthermore, the *International Covenant on Civil and Political Rights* states at Article 23(1):

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

When considering this issue in relation to refugees, the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (1951) recommended that host nations take the necessary measures to protect the families of refugees.

An empirical study of the immediate and longer term consequences of the policy of Temporary protection conducted by the Centre for Applied Research at RMIT University found that temporary protection visas deny refugees a sense of certainty, hope and material security and can be a barrier to labour market participation and access to health services.⁷ Holders of a RPBV are in a particularly vulnerable position because they may never be entitled to permanent residency in Australia. They can therefore never plan for their future and for the futures of their children.

The former Minister for Immigration under the Labor government, Senator Chris Evans labelled Temporary Protection Visas (TPVs) as 'inhumane, unfair and ineffective'.⁸ TPVs were abolished by the Labour government in August of 2008. The current proposal would place offenders in immigration detention in a worse position than holders of TPVs. Unlike TPV holders, holders of a Return Pending Bridging Visa can never make permanent their status within Australia. Such extreme

⁶ RPBV holders may have access to the English as a Second Language service for school-aged children.

⁷ Greg Marston *Temporary Protection: Permanent Uncertainty: The Experience of Refugees Living on Temporary Protection Visas*. Centre for Applied Research RMIT University. 2003.

⁸ Minister for Immigration, Refugee Policy Under The Rudd Government – The First Year.

Address to the Refugee Council of Australia (17 November 2008)

<<http://www.minister.immi.gov.au/media/speeches/2008/ce081117.htm> >.

measures that negatively impact on the health, well being, and rights of refugees are out of proportion with the crimes in question and should be abandoned.

Conclusion

The 'problem' of boat people is political but not real, given the very small numbers involved compared to, for example, illegal overstayers, who cause no political ripples at all.⁹ This government should not seek to solve a problem that has affected its political standing by inflicting tougher measures on people in immigration detention, who are exercising their right to seek asylum (as permitted under international laws to which Australia is a party) just as those who arrive by plane do. Mandatory immigration detention for unauthorised boat arrivals is a breach of human rights, as found on numerous occasions by the UN Human Rights Committee.¹⁰ Furthermore, it is clear that many detainees suffer mental illnesses brought on by the harshness and uncertainty of immigration detention.¹¹ The government should not exacerbate its already poor human rights record in this regard¹² by enacting this unnecessary and vindictive amendment.

⁹ As of 30 June 2010, approximately 53,900 people in Australia had overstayed their visas. This was 5,200 people more than in the previous year (see Australian Government Department of Immigration and Citizenship, *Annual Report 2009-10*, p 159). Overstayers amount to approximately .02% of Australia's population (see <http://www.immi.gov.au/media/fact-sheets/86overstayers-and-other-unlawful-non-citizens.htm>).

¹⁰ See, eg, *A v Australia*, UN Doc CCPR/C/59/D/560/1993, 3 April 1997; *Bakhtiari v Australia*, UN Doc CCPR/C/79/D/1069/2002, 29 October 2003.

¹¹ See, eg, *C v Australia*, UN Doc CCPR/C/76/D/900/1999, 28 October 2002.

¹² See, eg, statement by Navi Pillay, UN High Commissioner for Human Rights, quoted in 'Australia defends mandatory detention policy for refugees' ABC Radio Australia News (26 May 2011) <<http://abcasiapacificnews.com/stories/201105/3226706.htm?desktop>>; Catherine Branson, President and Human Rights Commissioner, Australian Human Rights Commission, 'Potential for suicide and self-harm is a real concern' (news release, 26 May 2011) <http://www.hreoc.gov.au/about/media/news/2011/44_11.html>.