

REFUGEE ADVICE + CASEWORK SERVICE (AUST) INC.



Mr Jon Bell
Inquiry Secretary
Senate Standing Committee on Constitutional and
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By e-mail:

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Dear Mr Bell,

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

Thank you for the opportunity to provide a submission to this inquiry.

1. Refugee Advice + Casework Service (Aust) Inc. (RACS)

RACS, the oldest Community Legal Centre specialising in providing advice to asylum seekers, was originally set up in NSW in 1987 to provide a legal service to meet the specific needs of asylum seekers. RACS provides assistance to asylum seekers in the community and in detention centres around Australia.

A not-for-profit incorporated association, RACS relies primarily on income through the Immigration Advice and Application Assistance Scheme (IAAAS) administered by the Department of Immigration and Citizenship (DIAC), donations from the community, an extensive volunteer network and a Management Committee. RACS' principle aims may be summarised as follows:

- to provide a free, expert legal service for individuals seeking asylum in Australia;
- to provide referral for counselling and assistance on related welfare issues such as accommodation, social security, employment, psychological support, language training and education;

- to provide a high standard of community education about refugee law, policy and procedure;
- to establish a resource base of current information and documentation necessary to support claims, for use by RACS, community organisations and lawyers assisting refugee claimants;
- to participate in the development of refugee policy in Australia as it relates to the rights of those seeking asylum in this country; and
- to initiate and promote reform in the area of refugee law, policy and procedures.

At a broader level, RACS aims to promote public awareness of the legal issues facing asylum seekers and to advocate for a refugee determination process which both protects and promotes the rights of asylum seekers in the context of Australia's international legal obligations.

RACS has been representing applicants in immigration detention for many years, and has become increasingly concerned about prolonged delays in the finalisation of the protection claims and visa grants. RACS currently has clients who are recognised as genuine refugees, yet have been detained for more than 15 months awaiting security clearances. RACS also has clients who were refused protection visas in the first instance only to be recognised following a review that did not occur for a further 8 months, who must subsequently face additional delays for security clearances. It is with this experience and in this context which the current crisis in immigration detention centres must be considered.

2. Character Assessment

The Bill amends sections 500A and 501 of the *Migration Act 1958* so that persons who are convicted of, inter alia, committing a criminal offence in an immigration detention centre or escaping from an immigration detention centre can fail the character test. Under s 501, the Minister may refuse to grant a visa to a person who does not pass the character test.

RACS appreciates that the Government has legitimate concerns about deterring criminal behaviour in order to ensure safety and protect Commonwealth property in immigration detention centres. However, a refugee will already fail the character test under s 501 if they have a substantial criminal record,¹ or if, having regard to their past and present criminal conduct, they are not of good character.²

Section 501 in its current form enables the Minister to fairly apply the character test by considering, inter alia, a person's substantial criminal record or past and present criminal conduct or past and present general conduct in determining whether or not a person passes the character

¹ *Migration Act 1958* (Cth), s 501(6)(a). A substantial criminal record is defined in s 501(7)(c) as including a sentence to a term of imprisonment of 12 months or more.

² *Migration Act 1958* (Cth), s 501(6)(c).

test. RACS is concerned that the Bill will distort an accurate assessment of the character of refugees who have committed minor offences while in detention.

The Bill, in its intention to ensure that a conviction for criminal conduct relating to immigration detention will *automatically* result in the asylum seeker failing the character test³, is contrary to the humanitarian purpose of the *Convention Relating to the Status of Refugees* ('Refugee Convention'). Article 1F indicates that only crimes against peace, war crimes or crimes against humanity, serious non-political crimes, and acts contrary to the purposes and principles of the United Nations should exclude a person from claiming protection as a refugee. Although Article 1F does not address crimes committed in the country of refuge, it indicates that only the most serious criminal offences should preclude refugees from protection⁴.

Additionally, to propose that minor offences could prevent a person from receiving refuge is contrary to the international human rights principle of proportionality and inconsistent with Articles 32 and 33 of Refugee Convention. The Minister should weigh carefully the gravity of the offence committed against the permanent and significant consequences which flow from the denial of a protection visa⁵. RACS is concerned that the Bill evinces an intention to automatically preclude certain persons from making successful protection claims, such that a genuine refugee may be unable to gain protection by reason of a criminal offence which is not an objectively serious criminal offence. The denial of a protection visa has obvious significant adverse consequences, including precluding permanent protection and prohibiting family reunion. This lacks proportionality, and, as noted below, fails to account for the exceptional conditions of indefinite detention and their mental health impacts.

Such an outcome is clearly inconsistent with Articles 32 and 33 of the Refugee Convention, which provide that States shall not expel refugees from their territory unless they present a danger to national security or public order. The range of gravity of offences which are included within the Bill's proposed amendments go well beyond matters which constitute a threat to national security or public order, and could often be satisfied by relevantly minor infringements. Although Articles 32 and 33 concern persons who are refugees lawfully within the receiving State, Article 31 indicates that asylum seekers who arrive illegally should not be punished by fact of that illegal arrival where they present to authorities and show good cause for their illegal entry. Such is frequently the case for persons held in detention centres. The Bill is contrary to Article 31 in so much as it distinguishes between asylum seekers in

³ Parliament of the Commonwealth of Australia, *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011*, Explanatory Memorandum, pg 1.

⁴ The *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, Article 1F.

⁵ UN High Commissioner for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, [76]-[78], available at: <http://www.unhcr.org/refworld/docid/3f5857d24.html> [accessed 27 May 2011]

detention and those in the community, in this case in regard to the application of the character test.

3. The Effect of Prolonged Detention on Asylum Seekers

Additionally, the proposed amendment fails to acknowledge the detrimental effect that long-term detention has on the psychological and mental health of asylum seekers, and the contribution that detention conditions may make to the behaviour of asylum seekers.⁶ Many refugees enter detention centres already suffering from post-traumatic stress syndrome stemming from their experience of persecution in their country of origin.⁷ Refugees who have experienced long-term detention report that the tedium and restrictive routine of detention environments creates a psychological experience of confinement and deprivation, a mounting sense of injustice, depression, fractured personal relationships, and often overwhelming sentiments of isolation, hopelessness and demoralisation.⁸ It is this combination of past trauma, aggravated by the psychological damage caused by prolonged detention, which can manifest itself in criminal behaviour by asylum seekers in detention.

The proposed amendment contained in the Bill fails to acknowledge these underlying causes of unrest in detention centres, and further precludes the Minister from considering mitigating circumstances, such as mental illness, in the application of the character test. Furthermore, insofar as unrest in detention centres is intricately connected to the experience of mental illness in detention, such behaviour cannot inherently be equated with a 'fundamental disrespect for Australian laws, standards and authorities', such as to justify automatic failure of the character test.⁹ For the same reason, the 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 The advantage of the current version of s 501 enables the Minister to consider past and present criminal or general conduct in light of all these relevant circumstances.

4. Recommendations

RACS does not endorse the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011*. The proposed amendment is unnecessary, in that the current s 501 adequately allows for consideration of criminal conduct in determining whether a person satisfies the character test. In particular, RACS does not endorse:

⁶ G.J. Coffey et al., "The meaning and mental health consequences of long-term immigration detention for people seeking asylum", *Social Science & Medicine* 70 (2010) 2070-2079.

⁷ Medical professionals estimate that at least 20-30% of refugees have been the victims of past violent acts. See, for example, International Rehabilitation Council for Torture Victims, *About Refugees, Asylum Seekers, IDPs and Torture* (March 2006).

⁸ G.J. Coffey et al., n4, 2073-2074.

⁹ Parliament of the Commonwealth of Australia, *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011*, Explanatory Memorandum.

¹⁰ Ibid.

- Asylum seekers ipso facto failing the character test if they have been convicted of an offence committed in immigration detention, during an escape from immigration detention, or during a period where a person has escaped from immigration detention.
- The increase in the maximum penalty in section 197B for the manufacture, possession, use or distribution of weapons by immigration detainees from 3 to 5 years imprisonment.

RACS would instead recommend to the Committee the capping of the length of time that asylum seekers spend in detention as the most effective way of reducing unrest in immigration detention centres. Capping, if not eliminating, the time an asylum seeker can be held in detention would also promote the humanitarian purpose of the Refugee Convention.

Please do not hesitate to contact Sally Johnston on (02) 9114 1600 if you require any further information or assistance with any aspect of this submission.

Yours sincerely,

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:

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