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

Submission from the Social Issues Executive, Anglican Church, Diocese of Sydney

The Social Issues Executive (SIE) of the Anglican Church, Diocese of Sydney advises the leadership and people of the Diocese on matters of public concern. This submission is made by and on behalf of the SIE. We thank the Minister and the Senators for the opportunity to contribute to their deliberations on this important Bill.

For the last ten years, the SIE is on the public record as opposing the severity of Australia's mandatory immigration detention policy. If there is some limited place for it, immigration and asylum is ill-served by departmental and legal processes that promote protracted periods of detention, in conditions that none of us would find acceptable. The use of this regime to deter irregular entrance into the country has repeatedly attracted international condemnation.

The Bill's Explanatory Memorandum explicitly states that its proposed changes 'are, in part, in response to the criminal behaviour during the recent disturbances at the Christmas Island and Villawood Immigration Detention Centres, which caused substantial damage to Commonwealth property.' Regrettable though those instances were, they arguably reflect serious defects in the nation's policies and processes of immigration detention. The Bill's overtly reactionary amendments pay no attention to these deeper failures. It is a politically motivated response, which will not serve to create good law.

Of course given that we do have detention centres and staff who run them, we accept the need to protect the safety of staff and the facilities of each centre. We also acknowledge that an expectation of orderly behaviour should be publicised to immigration detainees; that visa applicants should make their applications in good faith; and that they should demonstrate some measure of 'good character'. The alteration of the Act to include convictions (not only sentencing) for some offences does constitute a valid ground for visa disqualification and for character test failure.

But we have serious concerns about the Bill, in three areas:

1. The new test is disproportionate. Items 2 and 4 of the Bill add a new basis for visa disqualification and for character test failure to the *Migration Act 1958*. But the new test is disproportionate, and compromises whatever integrity the Act may now have.

Currently, Sec. 500A(3) of the Act refers only to very serious considerations against the claimant, involving terms of imprisonment greater than 12 months. Similarly, in Section 501(6a) and (7) of the Act, a person fails the character test only if they have a 'substantial criminal record'. But the Bill completely shifts relevant objections to the claimant in the direction of *insubstantial* considerations. The amendment disqualifies a person for *any* offence while in, escaping or escaped from detention. Hence they may be disqualified on the basis of an entirely 'insubstantial' record. This is a massive expansion of executive power.

To maintain consistency with the rest of the Act, visa disqualification or character test failure should only occur *if a person to has been convicted of an offence punishable by imprisonment* ***for 12 months or more***.

Otherwise, minor offences may disqualify a person. Such a regime would fail to take into account the severe stresses experienced by anyone in immigration detention. These stresses begin with the circumstances of their flight, are magnified by the 'culture shock' of their situation in Australia, and are often inflamed by inappropriately lengthy periods of detention. In the worst cases, instances of misunderstanding, conflict or personality clash between residents and staff may escalate to become 'offences', so disqualifying the applicant. The integrity of the legislation is therefore compromised when it blends the immediate circumstances of an application with much more important considerations about the applicant.

2. The bill includes a disturbing retrospectivity. We recognise, with the Explanatory Memorandum, that the Minister for Immigration and Citizenship publicly announced this legislative change on 26 April 2011, to put immigration detainees on notice to avoid 'criminal behaviour'. We recognise that the practice of backdating the commencement of legislation to such announcements is not normally considered retrospective, and has become common. But it does confuse the word of the Minister with the rule of law duly enacted by Parliament, Royally assented and properly published.

But that is not the main problem in this case. A more pernicious occurrence of retrospectivity occurs in Item 6. Decisions made after the 26 April commencement can pivot on convictions that occurred '**before**, on or after that commencement'. This 'before' is open to abuse, especially now that insubstantial offences are in view. The provision effectively means that *any* offence while in, escaping or escaped from detention, no matter how minor or far back, can be brought to bear against *anyone* whose case is being considered after April 26. Conceivably, all such cases are now 'up for grabs'. All applications now in process may be 'restarted', with officers of the Crown trawling through an applicant's history for any minor offence that might disqualify

them. Such a redrafting of the rules for people whose claims are now in process is highly questionable.

3. Ongoing ramifications. Once the Act includes these amendments, serious ramifications follow.

First, current and future applicants under the Act will effectively need to maintain completely flawless records from the moment they meet Australian authorities, no matter the circumstance of their flight, the degree of their 'culture shock' or the conditions of their detention. This requirement is draconian. It expects of prospective citizens a degree of saintliness that we simply do not expect of ourselves.

Secondly, the Bill fails a public interest test, simply because of its financial implications. The cavalier 'Financial Impact Statement' in the Explanatory Memorandum is entirely contestable when it asserts that '[t]he financial impact of these amendments is none. These costs will be met from within existing resources of the Department of Immigration and Citizenship.' Obviously, the new test will impose a regulatory burden, and will open up all kinds of new avenues of legal testing. That will in turn create a cumbersome bureaucratic process, and will add to the workload of our courts. All of this new activity will of course cost money. Similarly, upon what grounds the Office of Best Practice Regulation 'advised that a regulatory impact statement is not required' can only be guessed at. We note that all of these undesirable sequelae arise, by the Minster's own admission, from an attempt to respond to an isolated circumstance (the recent riots, and their political fallout).

Conclusion. If Australia expects prospective citizens to deal with Australia in good faith, then the officers of the nation must also demonstrate good faith toward them. A loyal populace begins with just processes. But the expectations in this Bill are unfair. Its provisions do not stop only at those involved in recent riots. Potentially, *all* decisions in process after 26th April are 'up for grabs', all over again. Furthermore all future asylum seekers and immigration detainees caught in small moments of folly, whether provoked by circumstances at the time of their application, or whether occurring long before, are in danger of visa disqualification and character test failure on minimal grounds. The amended Act will expect of prospective citizens a degree of saintliness that few of us expect of ourselves.

We ask the Senators and the Minister to reconsider elements of this Bill. For once the wider failures of immigration detention are finally addressed, the citizens of this nation want to be able to call Australia 'fair'.

Rev. Dr Andrew J. B. Cameron
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