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National Legal Aid

1 June 2011

Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600
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Dear Chairperson,

RE: Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011, National Legal Aid submission

National Legal Aid

National Legal Aid (NLA) represents the Directors of the eight State and Territory Legal Aid Commissions (Commissions) in Australia. The Commissions are independent statutory authorities established under respective State or Territory enabling legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance to disadvantaged people. NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the Federal and State and Territory legal systems; or
- obtain adequate information about access to the law and the legal system.

1. General comment in relation to the Bill

The Bill amends the Migration Act 1958 to strengthen the consequences of criminal behaviour by persons in immigration detention. The amendments will:

- enable the minister to refuse to grant, or to cancel, a visa or temporary safe haven visa when a person has been convicted of a criminal offence while in immigration detention, it is intended that this should include any conviction for

the offence of escaping from immigration detention as well as any conviction for an offence committed during or following a person's escape from detention up to the time of their being returned to immigration detention;

- increase the penalty for the manufacture, possession, use or distribution of weapons by immigration detainees from three to five years imprisonment.

Many individuals in immigration detention are those who are seeking asylum, either in the process of applying or seeking some form of review of a refusal decision.

Criminal acts committed while in detention, or in the course of escaping detention, should attract criminal penalties commensurate to the offending and all relevant circumstances when a person is found guilty of an offence.

The current provisions of s. 501 of the Migration Act aim to strike a balance, in weighing the seriousness of an offence in the eyes of the Australian community against the impact that a cancellation of a visa has on an individual and their family. The most commonly used determinant enlivening the need for an assessment of character is when an individual receives a sentence of imprisonment of over one year, or has received two or more years of cumulative imprisonment sentences. These provisions provide a measure of seriousness.

By moving to a convictions only basis, there is no measure of seriousness other than the minimal measure of a recorded conviction. Sentencing laws across Australia provide decision-makers a discretion to record a conviction for even the most trivial of offences, so these proposed amendments would cast the net far wider in capturing matters for consideration of cancellation.

Context of offending

NLA suggests that the context of offending is relevant.

Detention may extend to many months, and be in remote and isolated facilities, while, for the most part, assessments of the genuineness or otherwise of asylum claims are considered and, where accepted, security assessments are completed. Significant delays in processing asylum seekers' applications can be entirely beyond their control.

As at 6 May 2011, there were 6,715 people in immigration detention across Australia and more than half of those people had been in detention for longer than six months.

Many individuals in this situation have been identified by professional medical staff as having significant mental and physical ailments, which may manifest as behaviours or lead to participation in activities that can constitute criminal offending. The connection between detainees mental health and the potential for offending is one that has been highlighted by medical assessments we are aware of.

Legal Aid Commission experience shows a strong connection between mental and physical health and minor level offending.

NLA refers to the material above as it helps to contextualise the environment in which relatively minor offending which would not otherwise occur in the non-detention environment could happen. NLA therefore believes that this Bill has the potential to create injustice in relation to an individual's application for asylum.

There is a wide range of offences that may occur while a person is in immigration detention or in connection with an escape from immigration detention. The potential offences range from minor offences which would ordinarily attract a fine to very serious offences such as damage by fire or assault.

It is suggested that to include any offence in the amendments is too broad and may result in a disproportionate impact of conviction for a person in immigration detention when an offence is relatively minor. The potential impact of a conviction for a minor offence may also impact upon a person's decision whether or not to plead guilty or not guilty to the offence charged. This may result in more charges concerning people in immigration detention resulting in trials.

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.

Convictions before Commencement

As the amendments to the law aim to maintain future good order in immigration detention it is considered there is no need for the new provisions to have retrospective coverage and retrospectivity would unfairly impact upon those currently in immigration custody who have been charged or convicted of offences. The new provisions should therefore only apply to convictions which have occurred after commencement.

2. Specific comments in relation the Bill

A. Visa refusals

Consideration may be given to refusal of a visa on character grounds where the visa applicant has already been found to meet the 'at time of application' and 'at time of decision' criteria for the provision of a visa.

The character test involves consideration of activities, including criminal activities in Australia and abroad. Under the existing law, where a person commits an offence after applying for a visa, that criminal behaviour is taken into consideration in assessing whether they meet the character test as a 'time of decision' criterion. This Bill would create an additional stage of assessment which will be burdensome, consume resources, and which we suggest is unnecessary given that the character test already enables visa cancellation across a broad range of offending.

The only way a refusal of a visa application can work is if the individual remains in detention while consideration is given to their character and criminal offending. In practice, this means that an individual will be detained far longer than would ordinarily be required for what may be relatively minor matters.

As with all offences, the criminal process for dealing with charges arising out of offences allegedly committed in detention can take a significant period of time to be dealt with. Even for the most insignificant of charges, this will be a long and drawn out process: gathering evidence sufficient for charges to be laid, prosecuting the person through the applicable criminal law processes, various listings of the matter while the charges are negotiated to pleas of guilty or not guilty, any final hearing and, if found guilty of some or all charges, consideration of recording a conviction and the appropriate sentence. It is unclear whether DIAC intends to delay the migration assessment during such criminal proceedings, with the applicant being held in detention, or whether the ordinary steps of visa approval will be completed and the individual provided with a visa, but then later notified of an intention to consider cancellation.

Accordingly, NLA has some concerns that this Bill would introduce a burdensome standard likely to cause delay, increase the administrative burden on DIAC, and cause harm to already traumatised individuals in detention.

B. Visa cancellations

Visa cancellations cannot be made against individuals in immigration detention, because they do not hold visas. Cancellation can only be used in relation to individuals granted a visa and released from immigration detention. In these circumstances the cancellation would be likely to be of a protection visa held by a person who has been found to be a refugee, that is, someone who is owed protection obligations by Australia and who has a well founded fear of returning to his or her country.

NLA submits that grounds currently set out in s. 501 are sufficient for the Minister to determine whether individuals who have committed offences in immigration detention should be liable for visa cancellation on character grounds.

3. Suggested steps if the Bill is passed

It is suggested that if this Bill is passed, then its implementation must be supported by appropriate resource allocation to the detention facilities. This will facilitate the following changes that will mean that the need to use this power will be minimised.

- Provide appropriate detention facilities to ameliorate the conditions that lead to the behaviours of concern. This includes establishing centres with adequate access to support services and opportunities to undertake activities while waiting for migration decisions.

- Managing all steps in the refugee processing system to ensure that delays are kept to a minimum and that applicants are kept informed as to the progress of their applications. It is suggested that the delays in processing are a significant cause of stress and contribute to behavioural difficulties.

In order to send a 'clear message' and have the desired effect of minimising disruptive behaviour in detention centres, people must be informed when they are placed in detention what conduct is considered to be criminal conduct, and what the possible consequences are including in relation to visas. It is submitted that this is essential because detainees may come from countries where the law and legal system and they way they operate can be significantly different to the situation in Australia.

Information and explanations must be given in a language and form that can be readily understood by each detainee. It is suggested that signed and witnessed acknowledgement documents be obtained.

Conclusion

Thank you for the opportunity to make this submission. Should you require any further information, please do not hesitate to contact us.

Yours sincerely,

Andrew Crockett
Chair
National Legal Aid