Submission on the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on migration laws

PIAC appreciates this opportunity to comment on the proposed Migration Amendment (Detention Reforms and Procedural Fairness) Bill 2010 (the Bill).

PIAC has a long-standing interest in the *Migration Act 1958* (Cth) (the Migration Act), as well as a long history in advising, representing and advocating for immigration detainees. Between 2002 and 2004, PIAC was the solicitor on the record in eleven habeas corpus applications for the release of immigration detainees from detention. Following the decision of the High Court in *Al-Kateb v Godwin* [2004] HCA 37, PIAC — along with a number of other advocacy groups across Australia — was instrumental in helping to persuade federal Members of Parliament that indefinite immigration detention was no longer tenable. This resulted in changes being made to the immigration detention regime such that all of PIAC's clients who were still being held in indefinite detention were released.

In *Minister for Immigration and Multicultural and Indigenous Affairs v B and B* [2004] HCA 20, PIAC acted for Amnesty International Australia in a successful application for leave to file written submissions as amicus curiae. This case sought to establish that the Family Court had

jurisdiction over children in immigration detention, including the power to release them from detention.

PIAC has also acted for clients whose visas have been cancelled under s 501(2) of the Migration Act (for committing minor criminal offences), for clients seeking bridging visas, and for unaccompanied minors in relation to their visa protection applications.

PIAC has been a Project Partner with Professor Mary Crock of the University of Sydney in research regarding unaccompanied children who are seeking asylum and the effectiveness of the legal process for these children. This research has resulted in the publication of some landmark reports,[1] which have greatly increased public awareness of the treatment and experience of unaccompanied children in immigration detention and have influenced government decision making in the area.

PIAC has also provided submissions to a number of inquiries relating to immigration detention, including a submission to the Senate Legal and Constitutional Committee Inquiry into the provisions of the Migration Legislation Amendment (Identification and Authentication) Bill 2003,[2] a submission to the People's Inquiry into Immigration Detention,[3] and more recently a submission to the Joint Standing Committee on Migration on the inquiry into Immigration Detention in Australia.[4]

PIAC welcomes this Bill. The Bill is a significant step towards Australia processing asylum seekers in a humane and timely fashion, which is in line with both our international obligations and the rule of law. Importantly, the Bill would ensure Australia's international obligations under the Universal Declaration on Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), Convention Relating to the Status of Refugees, and the Convention Against Torture (CAT), are upheld and reflected in domestic law.

PIAC commends the following aspects of the Bill to the Senate Legal and Constitutional Affairs Committee:

- repealing the excision of parts of Australian territory from Australia's migration zone;
- ensuring detention is only used as a measure of last resort, thus ending the policy of mandatory detention of all asylum seekers who arrive by boat;
- ending indefinite and long-term detention;

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1 Mary Crock, *Seeking Asylum Alone – Australia: a study of Australian law, policy and practice regarding unaccompanied and separated children*, 2006; Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone – A Comparative Study: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US*, 2007.

2 Public Interest Advocacy Centre, Inquiry into the provisions of the Migration Legislation Amendment (Identification and Authentication) Bill 2003*: Submission to the Senate Legal and Constitutional Committee*, 2003.

3 Public Interest Advocacy Centre, Immigration Detention in Australia: the Loss of decency and humanity*: Submission to the People's Inquiry into Immigration Detention,* 2006.

4 Public Interest Advocacy Centre, Immigration Detention in Australia: Towards humanity and decency*: Submission to the Joint Standing Committee on Migration*, 2008.

- restoration of asylum seekers' rights to procedural fairness; and
- introduction of a system of judicial review of detention beyond 30 days.

Specific Comments

Schedule 1 – Amendment Migration Act 1958

Part 1 – Amendment establishing asylum seeker principles

PIAC welcomes the Bill's proposal to introduce overriding principles that would guide the interpretation of the Migration Act. This amendment calls for the principles to be regarded by all those making decisions about refugees, asylum seekers, or immigration detention.

The specific asylum seeker principles are relevant and appropriate. They are based on Australia's obligations under the UDHR, ICCPR, the Convention Relating to the Status of Refugees, and CAT.

Courts are required under domestic Australian law to interpret legislation purposively. Section 15AA of the *Acts Interpretation Act 1901* (Cth) provides:

> "In the interpretation of a provision of an Act, the construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) will be preferred to a construction that would not promote that purpose or object."

The Migration Act is one of the most frequently amended pieces of Australian legislation. It has been amended 44 times since it was enacted in 1958. Many statutes that amend the Migration Act themselves contain objects clauses. As a result it can be difficult to determine, the legislature's overall objective in respect of the Migration Act, or in respect of the interaction of various provisions of the Migration Act. The NSW Attorney-General, the Hon Greg Smith, described another piece of frequently-amended legislation, the *Bail Act* 1978 (NSW) (the Bail Act) as "patchwork quilt that is difficult to read and understand".[5] By comparison, the Bail Act has been amended 17 times since enactment.

The introduction of asylum seeker principles would provide the courts with a clear guide to the interpretation of the legislation. According to Professor Julia Black, principles are 'general rules … [that] are implicitly higher in the implicit or explicit hierarchy of norms than more detailed rules: they express the fundamental obligations that all should observe.' Black states that principles-based regulation avoids 'reliance on detailed, prescriptive rules and rel[ies] more on high-level, broadly stated rules or principles'[6].

Principles-based legislation is outcome based, rather than process based, and it provides regulatory flexibility. The principles can be applied to new and changing situations. The principles

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5 Anne Patty, Premier acts on promise to review juvenile detention, *Sydney Morning Herald*, Sydney, June 10th 2011.

6 J Black, *Principles Based Regulation: Risks, Challenges and Opportunities* (2007) London School of Economics and Political Science, 3.

can 'future proof' legislation, as they provide a framework for government to respond to new issues as they arise without having to create new rules.[7] The asylum seeker principles would provide a filter through which to read more specific provisions and a valuable tool to assist in statutory interpretation.

Part 2 – Amendments facilitating judicial review of detention decision

Amendment of subsections 42(4), 189(1) and 189(2)

PIAC supports the removal of the rigid obligation to detain persons without a visa, replacing that obligation with a discretion to do so.

This amendment would allow the decision maker (eg, the Refugee Review Tribunal or the Minister for Immigration's delegate) to exercise compassion where appropriate. Equally, the wording also allows for the detention of asylum seekers if the decision maker forms the view that detention is required. Additionally, community detention is a cheaper option than the current system. Human Rights Commission President Catherine Branson QC described community-based alternatives as "cheaper, more effective and more humane" than the use of bridging visas or Community Detention.[8]

Insertion of section 195B – Detainee may apply for an order of release

PIAC strongly supports the inclusion of s 195B. Section 195B requires a person who is detained to be given, in writing, a copy of the reasons and grounds for the decision. Critically, s 195B(3) allows for judicial review of the decision.

Following the proposed repeal of all provisions relating to the excised offshore places,[9] this provision will apply to all unlawful non-citizens who have been detained (regardless of whether they arrived on Australia's mainland or by boat offshore).

More detailed comments with regard to judicial review are made below in respect of Part 4 of the Bill.

Insertion of section 195C – Order for continued detention

PIAC welcomes the introduction of a maximum detention period of 30 days, unless an order is made in accordance with this section.

PIAC is of the view that this section needs to be expanded to include a finite list of criteria that may allow for an order for continued detention. PIAC believes that the only valid reasons for an order for continued detention are if the applicant poses:

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7 Ibid; Australian Law Reform Commission, *Australian Privacy Law and Practice – Regulating Privacy* Report No 108, 2008.

8 Catherine Branson, *Commission looks forward to working with the Government to strengthen human rights protection*, 8 June 2100, Australian Human Rights Commission, http://www.humanrights.gov.au/about/media/media_releases/2011/50_11.html.

9 *Migration Amendment (Detention Reform and Procedural Fairness) Bill, 2010*, (Cth), s 5(1).

1. a serious health risk to the Australian community; or
2. a serious security risk to Australia.

Part 3: amendments repealing excised offshore places provisions

PIAC strongly supports the Bill's proposal to repeal all provisions in the Migration Act relating to excised offshore places. PIAC is of the view that the current two-tiered system for determining if an asylum seeker is entitled to refugee status is unjust and corrodes the rule of law.

There are generally considered to be two key elements to the rule of law. First, the rule of law guards against arbitrary decision-making by the legislature or the executive. This is the notion that 'individuals ought not to be subjected to wide discretionary powers'.[10] This principle has a long history in the Anglo-Australian legal system; Locke, for instance, stated that '[t]he legislative, or supreme authority, cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorised judges.'[11] The second key element is 'the idea of legal equality, or of the universal subjection of all classes [of people] to one law administered by the ordinary Courts'.[12]

Australia's current two-tiered system does not allow for equality before the law; non-citizens who arrive at an excised offshore place are treated differently, and detrimentally, to those who arrive onshore. Currently, a non-citizen who enters Australia at an excised offshore place without legal authorisation can only submit a valid visa application if the Minister of Immigration personally intervenes, determining it is the public interest to do so.[13] The process of ministerial intervention is non-compellable and non-reviewable.[14] It is also in stark contrast with the process that applies in respect of people who apply for asylum after they have entered Australia on a valid visa.

In *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41, the High Court ruled in a joint unanimous judgment, that asylum seekers detained on Christmas Island (an area designated as an "excised offshore place" by the Migration Act) were entitled to the protections of the Migration Act. Accordingly, the Commonwealth was obliged to afford asylum seekers a minimum level of procedural fairness when assessing their claims. The spirit behind this ruling seems to be a reluctance on the part of the High Court to permit the removal of procedural rights from people solely on the basis of how they arrived in Australia. The two-tiered system imposed by the Migration Act runs counter to this spirit.

Australia should have a single system for determining refugee status, and this system should provide all applicants with access to a single, fair system of review. A single-tiered system is achievable by the repealing of the excised offshore places provisions.

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10 Jeffrey Jowell, *"The Rule of Law Today"* in Jowell and Oliver (eds), *The Changing Constitution* (5th ed., 2004) at 7.

11 John Locke, *The Second Treatise of Civil Government* (first published in 1690, revised ed. 1948), 68 [136].

12 AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed., 1915), 114.

13 *Migration Act, 1958,* (Cth), s 46A.

14 *Migration Act, 1957*, (Cth), s 46A(7).

Part 4 – Amendments restoring fair process and procedural fairness

Judicial review is a mechanism allowing courts to supervise administrative decision making. The Court's role in judicial review is to ensure administrative decision makers do not act outside the powers that the legislature has given them.[15] A privative clause is a provision in a piece of legislation that aims to restrict or exclude judicial review of an identified class of administrative decisions.[16]

Under the current legislation, the grounds on which the Federal Court can review migration decisions are contained in ss 476 and 476A of the Migration Act. They include certain types of error of law, and restricted grounds related to failure of jurisdiction, improper exercise of power, fraud or bias. Some grounds of review, which would otherwise be available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) or as a result of applications made under s 39B(1) of the *Judiciary Act 1903* (Cth), are not available when the Federal Court is exercising its migration jurisdiction. Grounds of review that are unavailable include failure by a decision-maker to observe natural justice, taking irrelevant considerations into account, failing to take relevant considerations into account and *Wednesbury* unreasonableness.[17] The privative clauses found in s 474 states that decisions under the Act are final.

As a result of the inclusion of Part 8 in the Migration Act in 1994, the ability to apply for judicial review under the ADJR Act was removed. Section 75 of the Constitution preserves an important minimum guarantee of judicial review. However, an application under s 75 of the Constitution is often a more complex and expensive means of review than under the previously available ADJR Act.

In *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, a challenge was made to s 474(1) of the Migration Act, a privative clause that on its face attempts to shield decisions of the Refugee Review Tribunal (and other decision-makers) from judicial review except on very narrow grounds. The High Court rejected the challenge to the validity of s 474(1), but held that the provision, on its proper construction, does not oust the entrenched jurisdiction of the Court, conferred by s 75(v) of the Constitution, to grant writs of mandamus and prohibition and injunctive relief. In order to avoid possible infringement of Chapter III of the Constitution, the Court gave s 474(1) a very narrow construction, such that it provides no protection against review for jurisdictional error by the Tribunal. Parliament's attempt to curtail the scope of judicial review of migration decisions therefore failed.[18] As a result of this decision, the privative clause in s 474 the Migration Act is not achieving what the legislators set out for it to do.

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15 Peter Cane and Leighton McDonald, *Principles of Administrative Law* (OUP, 2008), 48.

16 Mary Crock and Edward Santow "Privative Clauses and Limits of the Law" in Matthew Groves and HP Lee (eds.), *Australian Administrative Law: Fundamental, Principles and Doctrine* (CUP, 2007) 346.

17 Wednesbury unreasonableness occurs where a decision maker exercises a power in a manner that is so unreasonable that no reasonable person could have so exercised the power: *Associated Provincial Picture Theatre Houses Ltd v Wednesbury Corp [1948]* 1 KB 223.

18 Ronald Sackville, *Refugee Law: The Shifting Balance* (2004) 26 *Sydney Law Review* 37.

PIAC strongly welcomes the changes in Part 4 of the Bill, in particular the removal of s 474 of the Migration Act and the removal of Part 8 of the Migration Act in its entirety. PIAC sees no principled justification for administrative decisions made under the Migration Act to be assessed differently to administrative decisions made under other Commonwealth legislation. The removal of Part 8 of the Migration Act would allow judicial review under the ADJR Act. This would also lead to the Migration Act providing clearing rules with regard to natural justice. It would provide a fairer law where the procedural rights of the individual are respected.

Conclusion

PIAC strongly supports the current Bill. As noted, PIAC would welcome the inclusion of a finite list of criteria for detention of asylum seekers beyond thirty days under s 195C the Bill – namely, that detention would apply to asylum seekers who pose a genuine security or health risk to the Australian community.

PIAC believes the Bill would make the Migration Act fairer and more efficient, treating all applicants as equal under the law, and respecting the rights of the individual and the right to procedural fairness.