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

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Law and Bills Digest Section

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

**Date introduced:** 11 May 2011

**House:** House of Representatives

**Portfolio:** Immigration and Citizenship

**Commencement:** Item 1 commences the day after the Act receives Royal Assent while items 2 to 6 commence retrospectively on 26 April 2011.

**Links:** The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through [http://www.aph.gov.au/bills/](http://www.aph.gov.au/bills/). When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at [http://www.comlaw.gov.au/](http://www.comlaw.gov.au/).

**Purpose**

The purpose of this Bill is to amend the *Migration Act 1958* (the Act) to permit a non-citizen's application for a visa to be refused or an existing visa to be cancelled if they are convicted of an offence:

- while in immigration detention
- during an escape from immigration detention
- following an escape from immigration detention, or
- for escaping from immigration detention.

It also proposes to increase the maximum penalty for the manufacture, possession, use or distribution of a weapon by immigration detainees.

The stated policy intent underpinning these proposed amendments is to punish and deter criminal behaviour in immigration detention centres.¹

**Background**

This Bill seeks to (amongst other things) amend the character test currently contained in section 501 of the Act. Before discussing the mechanics of the test, it is first interesting to recall the rather short legislative history of the provision.

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¹. Explanatory Memorandum, Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011, p. 1.

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Legislative history of section 501

The precursor to section 501 of the current Act was introduced by the Migration (Offences and Undesirable Persons) Amendment Act 1992. Section 5 of that Act introduced section 180A which contained a character test in the following terms:

180A.(1) The Minister may refuse to grant a visa or an entry permit to a person, or may cancel a valid visa or a valid entry permit that has been granted to a person, if:

(a) subsection (2) applies to the person; or

(b) the Minister is satisfied that, if the person were allowed to enter or to remain in Australia, the person would:

(i) be likely to engage in criminal conduct in Australia; or

(ii) vilify a segment of the Australian community; or

(iii) incite discord in the Australian community or in a segment of that community; or

(iv) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or violence threatening harm to, that community or segment, or in any other way.

(2) This subsection applies to a person if the Minister:

(a) having regard to:

(i) the person's past criminal conduct; or

(ii) the person's general conduct;

is satisfied that the person is not of good character; or

(b) is satisfied that the person is not of good character because of the person's association with another person, or with a group or organisation, who or that the Minister has reasonable grounds to believe has been or is involved in criminal conduct...²

The Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998 repealed and replaced section 501 in its present form.³ It came into effect on

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1 June 1999. In his second reading speech for the Bill, then Minister for Immigration and Multicultural Affairs, Philip Ruddock described the purpose of the Bill:

The purpose of this bill is to ensure that the government can effectively discharge its fundamental responsibility to prevent the entry and stay in Australia of non-citizens who have a criminal background or have criminal associations.

In introducing the concept of a character test, the then Minister stated:

Under this test, the onus will be on visa applicants and visa holders to satisfy decision makers that they can pass the test. This will redress a significant deficiency in the legislation arising from the changes made in 1992. Since that time, decision makers have been required to establish that a person is not of good character before they could refuse a visa to an applicant or cancel a visa. This has meant that whenever there has been doubt about the criminal background or criminal associations of a non-citizen, the doubt has been resolved in the non-citizen’s favour. I understand that this was not the intention of the 1992 amendments.

This bill takes us back to the situation that existed before 1992 by placing the onus of proof on the visa applicant to demonstrate that he or she is of good character. This means that, where there are real doubts about the criminal background or criminal associations of a visa applicant or visa holder, the objective of protecting the Australian community will take precedence in immigration decision making.

With respect to the ‘deeming provisions’—that is, those persons who will automatically be taken to have failed the test, the then Minister noted:

This bill also seeks to establish clear benchmarks for criminal behaviour that would automatically lead to a non-citizen failing the character test. Non-citizens who have been convicted [of] a single sentence of detention of 12 months or more, or where the length of several sentences aggregates to 2 years or more, will fail the character test. This will truncate the character assessment process and cover most non-citizens of character concern who come to notice. This will provide more certainty as to who is able to pass the character test.

Academics and interest groups alike have previously criticised the operation of section 501 on the basis that it is too broad and vests too much non-reviewable discretion in the Minister personally.4 For example, the Australian Human Rights Commission (AHRC) has repeatedly highlighted the potentially serious consequences that may flow from exercise of the Minister’s discretion and has argued that the powers should be reduced and measures put in place to provide for transparent and

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accountable decision-making processes which are subject to review. To this end, it is also worth mentioning a number of cases where the character test has been applied to remove long-term permanent residents with criminal records, such as the cases of Robert Jovicic, Clifford Tucker, and Andrew Moore all of which attracted significant media attention. Leaving aside any commentary on the merits or otherwise of such decisions, the detrimental and sometimes fatal consequences flowing from deportation cannot be understated and has contributed to concerns about how the test is applied.

Refusal or cancellation of visa on character grounds

Decisions of the Minister or delegate

Existing section 501 provides that the Minister or his delegate (certain DIAC officers) may refuse to grant a person a visa if the person does not satisfy the Minister that the person passes the character test. The Minister or his delegate may also cancel a visa that has already been granted if:

- The Minister reasonably suspects that the person does not pass the character test; and
- The person does not satisfy the Minister that the person passes the character test.

The ‘character test’ is defined in existing subsection 501(6). It provides that a person does not pass the character test if:

- they have a ‘substantial criminal record’ (defined to include those sentenced to a term of imprisonment of 12 months or more)
- they have, or have had, an association with an individual, group or organisation suspected of having been, or being, involved in criminal conduct
- having regard to the person’s past and present criminal conduct, the person is found not to be of good character
- having regard to the person’s past and present general conduct, the person is found to be not of good character


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• there is a significant risk that the person will engage in criminal conduct in Australia, harass, molest, intimidate or stalk another person in Australia, vilify a segment of the Australian community, or incite discord in the Australian community or in a segment of that community, or represent a danger to the Australian community or a segment of that community. [Emphasis added].

If a person is deemed to fail the character test, delegates have discretion whether to refuse the visa application or to cancel an existing visa. Exercise of this discretion by delegates must be made in accordance with Ministerial Direction no. 41 which are made by the Minister pursuant to section 499 of the Act. 8

A decision by a delegate to refuse to grant or to cancel a visa under section 501 can usually be reviewed by the Administrative Appeals Tribunal (AAT) and judicially reviewed by the courts. However, it is relevant to note in the context of merits review that existing sections 501A(2) and (3) provide that the Minister can personally set aside a decision of a delegate or the AAT not to refuse or cancel a visa, and substitute another decision to refuse to grant or cancel the visa, where the Minister is satisfied that it is in the national interest to do so. Such decisions are not merits reviewable but are subject to judicial review. 9

In 2008—09, the Department of Immigration and Citizenship (DIAC) assessed 671 cases for refusal or cancellation under section 501. During 2008—09 it subsequently cancelled 86 visas and refused visas to 123 people under section 501. In 2009—10, 1518 cases were assessed by DIAC. It subsequently cancelled 58 visas under section 501 and refused 156 visas. 10 It is not known how many of these decisions were subsequently appealed and the outcome.

**Decisions exercised by the Minister personally**

Existing sections 501(3) and (4) provide that the Minister may refuse to grant or cancel a visa if he:

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• reasonably suspects that the person does not pass the character test, and
• is satisfied that the refusal or cancellation is in the ‘national interest’.  

The common law rules of natural justice and the code of procedure set out in the Act do not apply to these decisions made by the Minister personally. The Minister can be guided by Direction no. 41 but is not bound by it. Such decisions are also not reviewable by a merits review tribunal such as the AAT but the legality of the decision is subject to judicial review by the Federal Court or the High Court.

In 2008—09, the Minister personally considered only one case under section 501. He did not subsequently cancel any visas but refused a visa to one person. In 2009—10 the Minister did not refuse any visas under section 501 but cancelled one under section 501A(2). In the current financial year (up to 31 March 2011), the Minister has cancelled only two visas under section 501.

In the context of this Bill, it is also relevant to note section 500A of the Act which gives the Minister the power to personally refuse or cancel a temporary safe haven visa on grounds similar (though not identical) to those contained in existing subsection 501(6). The common law rules of natural justice and the code of procedure set out in the Act also do not apply to these decisions but the Minister must table before both houses of parliament a statement setting out his decision and the reasons for his decision. Few of these visas have been granted in recent times but during the period 1998—99 to 2000—01 the Government granted 5915 Temporary Safe Haven visas to Kosovars and East Timorese who were in need of protection.

In the context of examining the ambit of the Minister’s discretionary powers under the Act it is also relevant to note that all offshore entry persons (also known as irregular maritime arrivals or IMAs) are unable to lodge a valid visa application unless the Minister personally considers that it is in the

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11. The Act does not contain a definition of what constitutes the ‘national interest’. It is open to the Minister to determine what the national interest is in relation to each case: DIAC, ‘PAM3-Migration Act: s501 the character test, visa refusal and visa cancellation’, LEGENDcom database, viewed 2 June 2011.
12. The Minister is thus not required to give notice of an intention to consider a decision to refuse or cancel a visa, or give the person the opportunity to comment before the decision is made. However, the applicant will be provided with an opportunity to make representations as to whether the decision should be revoked under s501C: DIAC, ‘PAM3-Migration Act: s501 the character test, visa refusal and visa cancellation’, LEGENDcom database, viewed 2 June 2011.
13. The Hon. Chris Bowen, MP was sworn in as Minister for Immigration and Citizenship on 14 September 2010. His predecessor, Senator the Hon. Chris Evans was sworn in as Minister for Immigration and Citizenship on 3 December 2007.
15. DIAC, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the provisions of the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011, op. cit., Appendix E.

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public interest to permit them to do so. Those persons determined to be refugees must get the Minister’s permission to lodge a valid visa application (commonly known as lifting the bar). The Minister does not have a duty to consider exercising this discretion. However, if the Minister determines that it is not in the public interest to permit an application to be lodged, the refugee would presumably remain in detention, alongside those who have received an adverse security assessment by ASIO and await resettlement to another country (or repatriation to their home country when circumstances permit).

If, on the other hand the Minister exercises his discretion to permit a refugee who has engaged in criminal conduct to lodge an application for a visa he is recognising that to do so is in the public interest. This may stem from the fact that Australia has international obligations which it is obligated to honour in good faith.

**Basis of policy commitment**

On 26 April 2011, Minister for Immigration and Citizenship, Chris Bowen, MP announced that the Government would be introducing amendments to the Migration Act during the next session of Parliament to ‘strengthen the consequences of inappropriate and criminal behaviour in immigration detention.’ It was of the view that strengthening the powers under the Migration Act would remove any doubt around the character test and create a more significant disincentive to engage in destructive behaviour of the kind seen at the Christmas Island Immigration Centre in March 2011 and the Villawood Immigration Detention Centre in April 2011.

The Minister also announced that:

> ... subject to natural justice he intended to use the full extent of his powers to prevent people who have been involved in criminal, violent or destructive behaviour, from being allowed to apply for a permanent protection visa. These powers include only granting refugees provisional visas, which do not permit family reunion and may be cancelled where they no longer require protection.

Following this announcement, the Minister suggested that the Government might consider issuing Bridging (Removal Pending) visas (RPBV) to people who have had their visa refused or cancelled on character grounds but who cannot presently be returned to their country of origin, as is currently

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18. Existing section 46A of the Migration Act
20. Ibid.
the case.21 This visa came into effect on 11 May 2005 following amendments to the Migration Act and Migration Regulations 1994 by the former Coalition government.

Similar to Temporary Protection Visas (now repealed) the RPBV permits the visa holder to remain in Australia, but not to leave and/or re-enter Australia. It also does not allow for sponsorship of family members. The visa ceases when the visa holder leaves Australia or when the Minister is satisfied that removal is reasonably practicable or the holder breaches one of the numerous mandatory conditions attached to it.22 However, when discussing the proposed temporary visa arrangements in its submission to the Senate Committee inquiry DIAC did not explicitly mention RPBVs. It simply clarified that the Minister could exercise his powers under section 195A of the Act to grant ‘the most appropriate visa’ and the type of visa which might be granted could ‘vary on a case by case basis’.23

As mentioned, the Minister acknowledges that the amendments proposed in this Bill are partly in response to recent incidences of unrest at the Christmas Island and Villawood immigration detention centres. However, it is important to recognise that protest activity (manifested in a variety of ways) has been occurring in nearly all immigration detention centres throughout Australia and with greater prevalence over the last few years. As Australian Human Rights Commission President, Catherine Branson QC recently stated:

‘The Commission has been deeply concerned for some time about the detrimental impacts of prolonged and indefinite detention on people’s mental health and wellbeing, but these concerns have escalated over the past 12 months as thousands of people are being detained for long periods’. As of 6 May there were 6715 people in immigration detention across Australia and more than half of those people had been in detention for longer than six months. ‘There have been six deaths in immigration detention facilities over the last nine months, including the apparent suicides of three men in three months at the Villawood detention centre,’ she said.24

These observations appear to reinforce statistics released by DIAC that during the three month period commencing 18 November 2010 to 28 February 2011, there were 107 incidences of self-harm (excluding hunger strikes) in immigration detention centres. Fifteen of these involved children under the age of 18 years. Only Maribynong immigration detention centre in Melbourne reported no

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incidences of self-harm.\textsuperscript{25} During the period 1 July 2007 to 28 February 2011, there were 472 reports of voluntary starvation.\textsuperscript{26}

Statistics released by the DIAC also indicate that:

As at 13 May 2011, there were 6730 people in immigration detention, including 5124 in immigration detention on the mainland and 1606 in immigration detention on Christmas Island...

The number of people in immigration detention who had arrived unlawfully by air or boat as at 13 May 2011 was 6522, representing about 97 per cent of the total immigration detention population.\textsuperscript{27}

In response to such incidences, DIAC has consistently asserted that such actions will not assist or alter the outcomes of any visa applications.


The following table indicates the length of time people have spent in immigration detention (as at 13 May 2011): 28

<table>
<thead>
<tr>
<th>PERIOD DETAINED</th>
<th>TOTAL</th>
<th>% OF TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 days or less</td>
<td>164</td>
<td>2.4%</td>
</tr>
<tr>
<td>1 week - 1 month</td>
<td>309</td>
<td>4.6%</td>
</tr>
<tr>
<td>1 month - 3 months</td>
<td>756</td>
<td>11.2%</td>
</tr>
<tr>
<td>3 months - 6 months</td>
<td>1116</td>
<td>16.6%</td>
</tr>
<tr>
<td>6 months - 12 months</td>
<td>2635</td>
<td>39.2%</td>
</tr>
<tr>
<td>12 months - 18 months</td>
<td>1581</td>
<td>23.5%</td>
</tr>
<tr>
<td>18 months - 2 years</td>
<td>139</td>
<td>2.1%</td>
</tr>
<tr>
<td>Greater than 2 years</td>
<td>30</td>
<td>0.4%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>6730</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

Source: Department of Immigration and Citizenship.

As at 13 May 2011, 6079 people were undergoing a refugee status assessment; 47 people were awaiting a decision from DIAC on their protection visa application; 40 were seeking independent merits review of a negative protection visa application; 11 were awaiting the outcome of an application remitted for decision by the RRT or the courts; and 57 people were in immigration detention whose protection visa applications had been refused. 29

Protest activity at Christmas Island and Villawood

The following summary of the two incidences that occurred at the Christmas Island and Villawood immigration detention centres has been compiled from largely contemporaneous statements from official sources.

According to the Minister for Immigration and Citizenship, up to 70 people breached the perimeter fence of the North West Point facility on Friday 11 March 2011. On Saturday 12 March, another group of approximately 100 people breached the perimeter of the fence to stage a peaceful protest near Christmas Island Airport. On Sunday 13 March about 300 detainees inside the centre engaged

28. Ibid.
29. Ibid.

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in more protest action. Damage was done to facilities including fencing, some accommodation and door locks. The Australian Federal Police (AFP) used tear gas and ‘beanbag bullets’ to quell this protest. No injuries were sustained by the AFP or Serco staff (the Government’s immigration detention service provider) but one detainee was taken to hospital with a broken leg.\footnote{30}

On Monday 14 March 2011 further protest action was taken by about 100 to 200 detainees. There was damage to property—some buildings were damaged, including by a fire, and some CCTV equipment was damaged. There were no serious injuries and the AFP was able to regain control without resorting to tear gas or any associated weapons.\footnote{31}

In an effort to restore order, the Government publicly issued a notice to all detainees on Christmas Island and all mainland detention centres on 17 March 2011. It stated (amongst other things) that detainees’ concerns about delays in finalising cases was understandable and that the Government had taken steps to improve and speed up processes which they anticipated would make a significant improvement in timeframes. This included new streamlined processes for security checking and the appointment of additional reviewers to conduct merits review of unsuccessful cases.\footnote{32}

However, in the evening of 17 March 2011 there were more violent protests at the North West Point detention centre on Christmas Island involving a group of around 200 protesters. Buildings were damaged, fires were lit, and there were violent approaches to the AFP. Numerous protesters were carrying improvised weapons—including accelerant-based weapons, poles, bricks, pavers, concrete rocks and so forth.\footnote{33}

On the evening of Wednesday 21 April 2011, there was a ‘major disturbance’ at Villawood Immigration Detention Centre in Sydney involving about 100 detainees. Nine buildings within the Fowler complex were set alight, including a medical centre, kitchen, laundry and computer room. There was no apparent substantial damage to accommodation buildings. Twenty-two people were subsequently taken to Silverwater correctional facility and six had charges laid against them. In addition,


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three asylum seekers who had been determined not to be refugees staged a rooftop protest which, for two of them, lasted 11 days.\textsuperscript{34}

On 14 June 2011, the Australian Federal Police issued a media release advising that a total of 18 charges had been laid against 18 people following their investigation into the series of incidents at Christmas Island in March 2011. The offences included:

- burglary contrary to section 401 of the \textit{West Australian Criminal Code 1913}
- possessing stolen/unlawfully obtained property contrary to section 428 of the \textit{West Australian Criminal Code 1913}
- damage/destroy Commonwealth property contrary to section 29 of the \textit{Crimes Act 1914}
- damage / destroy property contrary to section 445 of the \textit{West Australian Criminal Code 1913}, and
- harm / threaten Commonwealth public official contrary to sections 147.1 and 147.2 \textit{Criminal Code Act 1995}.\textsuperscript{35}

Independent inquiries

On 18 March 2011 the Minister for Immigration and Citizenship announced the terms of reference for a review into the management and security of the Christmas Island Immigration Detention Centre by Ms Helen Williams AO, former Secretary of the Department of Human Services, and Dr Allan Hawke AC, former Secretary of the Department of Defence. The review, which is expected to be completed in July, will investigate and report on a range of issues associated with the management and security of the detention centre. In particular:

- The clarity of roles and responsibilities between Serco and DIAC in managing security at the centre and in managing the incident
- How breaches of security were achieved, what access occupants of the centre had to tools to assist with such breaches and, if relevant, how such access occurred
- The extent of any prior indicators or intelligence that would have assisted in the prevention and/or management of the incident
- The adequacy of infrastructure, staffing and client management in maintaining appropriate security at the centre
- The adequacy of training and supervision of DIAC and Serco staff
- The effectiveness of the communication and coordination between the relevant government


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On 21 April 2011, the Minister arranged for the terms of reference for this review to be extended to cover the incident at Villawood.37

On 14 April 2011 the Commonwealth Ombudsman announced his decision to conduct an ‘own motion’ investigation into the use of force by the AFP and the Government’s immigration detention service provider, SERCO, on Christmas Island in March 2011.38

In addition to these inquiries, it appears a Joint Select Committee on Australia’s Immigration Detention Network may also be appointed, the terms of reference for which are yet to be finalised.39

Committee consideration

Senate Legal and Constitutional Affairs

The provisions of the Bill were referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry.40 Details of the inquiry are at the inquiry webpage. The reasons for referral and principal issues for consideration were the Bill’s ‘interaction with existing legislative requirements under domestic laws’ and its interaction with Australia’s international obligations.41

The Committee received 31 submissions and held a public hearing in Canberra on 16 June 2011. At time of writing, the Committee had not yet tabled its report.

The main issues raised by submitters are discussed under the heading ‘position of major interest groups’.

41. Ibid.

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Scrutiny of Bills Committee

The Senate Standing Committee for the Scrutiny of Bills considered the Bill in its Alert Digest of 15 June 2011. In brief, the Committee sought the Minister’s advice as to:

- whether the proposed increase in penalty for the weapons offence is proportionate
- why the existing powers under the Act are thought inadequate to respond to criminal acts
- whether, if new powers are considered necessary, it is appropriate to specify types of offences or a minimum term of imprisonment for the offences rather than including all offences
- the justification for the retrospective application

These issues are discussed in further detail under the heading ‘Main issues’.

Policy position of non-government parties/independents

Shadow Minister for Immigration and Citizenship, Scott Morrison MP, has long been agitating for the Minister to exercise his powers under the Act to cancel visas granted to persons whom he considers are not of good character, such as those involved in the explosion on SIEV 36. In his second reading speech before the House, he confirmed that ‘the Coalition is supportive of the Bill and how it is put forward’ but was of the view that it does not go far enough—it should apply to all visa holders not just those who are in detention. An amendment to this effect was put forth by Scott Morrison but it was subsequently negatived. He has also repeatedly queried why the Minister has ‘not used the general conduct provisions that were available to him before and after the Christmas Island riots’ and why, if they are inadequate, amendments to them have not been sought. In this context, it is also relevant to note that the Shadow Minister issued a media release on 1 May 2011 in which he stated:

If the Coalition forms Government, as Minister I will authorise the Department of Immigration and Citizenship and their agents, namely Serco, through a formal protocol to be established in Government, to take punitive actions against those who violate the Code. Such sanctions will range from denial of privileges, such as internet, phone access and visitation rights through to suspension of immigration processing, confinement or fines to pay for damaged property. This protocol will also include authorisation for DIAC and their agents to use reasonable force to

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ensure compliance with the Code and other lawful instructions by authorised officers, including the AFP and state police forces. Repeat offences against the Code would also face more serious sanctions, provided for under s501 of the Migration Act. The Code will be in addition to sanctions that relate to criminal conduct, where offenders will be charged, face a custodial sentence and denial of a visa, permanent or temporary.\(^{47}\) [Emphasis added].

Scott Morrison has acknowledged Australia’s international obligations with respect to the return of refugees but has made it clear that those that ‘act up’ would face indefinite detention, resettlement to another country, or repatriation to their home country if and when circumstances permit:

There’s some difficulty around this, I will grant the government this, if someone has been found to be a refugee under the United Nations Convention, we are unable to return them to their home country, but that doesn’t mean we give them a visa. What we’re proposing for those who are found in a situation where they act up, is they wouldn’t be given a visa. It’s just like someone who doesn’t get a security clearance from ASIO. They’re held in detention until it’s safe enough to go home or they are accepted into another country. But the bottom line is they don’t come into Australia and that’s how I think it should be applied.\(^{48}\)

An article published in *The Australian* on 28 April 2011 canvassed the views of non-government parties and independents on the proposed changes to the character test. It reported that Greens immigration spokesperson, Senator Hanson-Young described the plan as inhumane. She reportedly stated that ‘rather than looking at how we can fix those systematic problems, the government is desperately looking at an excuse to reintroduce temporary protection visas’. It also reported that while Independent MP Bob Katter would not support a tougher character test, Senator Nick Xenophon said he wanted to see the detail before he committed to a position. Independent MP Andrew Wilkie would not comment but the article speculated that he would be unlikely to support a tougher stance.\(^{49}\)

### Position of major interest groups

Academics and major interest groups who made submissions to the Senate Committee inquiry are broadly opposed to this Bill for a number of reasons. They argue (amongst other things) that:

- the Bill is unnecessary because the existing mechanisms within the Act that enable visa refusal or cancellation on the basis of character are sufficient
- existing criminal law is sufficient to respond to any offences committed by persons in immigration detention or during escape from detention


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the Bill is premature because independent inquiries currently underway into the recent incidences of unrest are yet to be concluded

- deemed failure of the character test for a person convicted of any offence (including minor or non-violent offences) is too broad
- the proposed amendments are in breach or may result in a breach of international refugee and human rights law
- the increase in penalty for the offence contained in section 197B (manufacture, possession, use or distribution of a weapon) is not consistent with penalties imposed for comparable offences in State jurisdictions
- the proposed amendments will impose another tier of punishment on a person in addition to the punishment imposed by a court
- the retrospective application of key amendments contained in the Bill will adversely and unduly impact upon those involved in the recent unrest
- the amendments contained in the Bill could potentially have exceptionally damaging and life-threatening consequences for people
- the Bill may not achieve the policy objective of the Government, is not the most effective way to address the problem, or targets the symptom and not the cause of the problem (prolonged mandatory detention, processing delays, overcrowding, mental health issues and so forth)
- the amendments contained in the Bill will have a disproportionately harsh impact on asylum seekers and refugees who have been detained for prolonged periods
- the Bill operates to discriminate against refugees by reason of their manner of entry into Australia
- existing sections 501 and 500A already vest broad discretionary powers with the Minister, who in personally exercising such powers is not bound by natural justice, the code of procedure or Direction no. 41, and is subject to only limited avenues of review (not merits review), and
- the Government has not put forth evidence showing that a person who commits an offence in immigration detention is likely to commit repeat offences outside immigration detention or be a risk to the general community.  

Some of these issues will be discussed in further detail below under the heading ‘Main issues’.

Financial implications

The Explanatory Memorandum notes that there will be no financial impact arising from the amendments contained in this Bill.  

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50. See for example submissions to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the provisions of the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011, op. cit., by: Australian Human Rights Commission (AHRC), Refugee Council of Australia (RCA), Law Council of Australia, University of NSW Gilbert + Tobin Centre of Public Law, University of Sydney Centre for International Law, United Nations High Commissioner for Refugees (UNHCR), Australian National University, Refugee Advice and Casework Service (RACS).


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Main issues

Are the amendments necessary?

The Minister has expressed concerns about the limitations of section 501 and his ability to exercise the powers conferred therein:

... we have an existing character test of course, which says if you fail the character test the department or the minister can deny you a visa. Now, at the moment the long-standing law has been that the character test is triggered if you get a sentence of twelve months or more in relation to any conviction; or general character, but the courts have held general character to require some sort of series of events, rather than just a one-off event. Now, I think the circumstances in Christmas Island and Villawood have underlined the need for a different approach to say that if you are convicted of any offence during your time in immigration detention, that would trigger the character test.\(^\text{52}\) [Emphasis added].

The Australian Human Rights Commission appears to dispute this interpretation. While they acknowledge that ‘courts and tribunals in the past have been inclined to find that a person is not of good character on the basis of their ‘past and present general conduct’ if there is evidence that they have been involved in a series of episodes of misconduct’ they argue that ‘there is no conclusive judicial statement to this effect and it is open to the courts to find that a person’s conduct on one or two isolated occasions may be sufficient to establish that a person is not of good character’. By way of example, they cite the comments of Justices Burchett, Branson and Tamberlin in Minister for Immigration and Ethnic Affairs v Baker (1997) 73 FCR 187, who said ‘some instances of general conduct, as we understand the term, displayed but once or twice, may lay character bare very tellingly’.\(^\text{53}\)

The Senate Scrutiny of Bills Committee has similarly queried the justification for the amendments and requested the Minister’s advice as to why the existing powers are considered to be inadequate:

...The legislation already enables the Minister or delegate to consider past and present criminal conduct in determining whether to exercise the discretionary powers under the existing 'character test' outlined in sections 501 and 500A... The Committee seeks the Minister’s advice as to why the existing powers are thought inadequate to respond to criminal acts by those whom are or should be lawfully detained under the Act.\(^\text{54}\)

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\(^\text{54}\) Senate Scrutiny of Bills Committee, op. cit., p. 26.
Does the punishment fit the crime?

The amendments proposed in this Bill mean that a person will fail the character test if they are convicted of an offence:

- while in immigration detention
- during an escape from immigration detention
- after they have escaped from immigration detention, or
- for escaping from immigration detention.

There is no requirement under this Bill that the offence be of a particularly serious nature or that the perpetrator be sentenced to any term of imprisonment. Moreover, there is no requirement on DIAC or the Minister to show that the person has a criminal history, is likely to re-offend, or that the person is likely to be a future risk to the Australian community. Rather, anyone convicted of any offence in the prescribed circumstances will automatically fail the character test under section 501, irrespective of the nature of the offence or the harm inflicted (if any).

The Senate Scrutiny of Bills Committee has expressed concern that:

...the application of the new provisions could mean that criminal behaviour which may be relatively minor can, of itself, justify the exercise of these powers (without the need for any assessment of the circumstances and details of the offence) and this outcome may be thought to be disproportionate in some cases.\(^\text{55}\)

It has thus sought the Minister’s advice as to ‘whether, if new powers are considered necessary, it is appropriate to specify types of offences or a minimum term of imprisonment for the offences rather than including all offences’.\(^\text{56}\)

As previously mentioned, failure of the character test may enliven exercise of the discretion under the Act to refuse a visa or cancel an existing visa. The consequences that may follow visa refusal or cancellation under section 501 or 500A include:

- continued detention
- removal from Australia
- issuance of a temporary visa (perhaps without family reunification rights)
- a prohibition on applying for other visas
- refusal of other visa applications and cancellation of other visas
- periods of exclusion and special return criteria may apply.\(^\text{57}\)

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\(^{56}\) Ibid.
\(^{57}\) For further information see sections 501E, 501F and 503 of the Migration Act and special return criteria 5001 in Migration Regulations 1994.
According to statistics provided by DIAC, of the total 820 cases considered for cancellation under section 501 in 2009—10, only 58 were subsequently cancelled. Similarly, of the 741 cases considered for refusal in 2009—10, only 156 were subsequently refused pursuant to section 501 of the Act. As previously mentioned, it is not known how many of these decisions were subsequently overturned or affirmed on appeal.

Do the amendments conflict with Australia’s international obligations?

According to Professor Jane McAdam from the University of New South Wales, the existing character test regime under sections 500A and 501 already breach Australia’s obligations under international law because the scope and matters that may be considered in refusing to grant a visa exceed the exhaustive grounds permitted under article 1F of the 1951 Refugee Convention, which relevantly states:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations. [Emphasis added].

Thus, McAdam asserts that:

Imposing additional criteria, as the character test in section 501 of the Migration Act permits, is fundamentally at odds with Australia’s obligations under the Refugee Convention. The present Bill will create further grounds which will continue and extend this breach. [Emphasis added].

Similarly, she argues that the considerations permitted in cancelling an existing visa go beyond the limited exception to the principle of non-refoulement contained in article 33(2) of the 1951 Refugee Convention which states:

Prohibition of expulsion or return (“refoulement”)

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58. DIAC, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the provisions of the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011, op. cit., Appendix E.

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1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

McAdam argues that ‘danger, in this context, is vastly different from the notion of ‘bad character’ in the Bill’:

Importantly, a key element of this provision is that the refugee is a danger to the community because of his or her criminal activity or on national security grounds... Given the fundamental character of the prohibition of refoulement, and the humanitarian character of the 1951 Convention more generally, the threshold for exceptions must be high.60

She also emphasises that international human rights law precludes removal to arbitrary deprivation of life, the death penalty, torture, or cruel, inhuman or degrading treatment or punishment which means:

... there are now very few, if any, circumstances in which a refugee can lawfully be removed from Australia (even if article 1F or article 33(2) applies). Cancelling or refusing to grant a visa on character grounds to a person who otherwise meets the refugee definition in article 1A(2) of the Convention, or who has a complementary protection need, will breach international law if the result is removal to a place of risk.61

The 1951 Refugee Convention stipulates that ‘every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order’ (article 2). A refugee who commits a crime in his country of refuge is, like every other person, subject to due process of law. In its submission to the Senate Committee the United Nations High Commissioner for Refugees (UNHCR) expressed the view that:

In UNHCR’s view, involvement in criminal activities in the country of asylum which does not lead to loss of refugee status or to expulsion, should not per se restrict the entitlement to rights guaranteed to refugees by the 1951 Refugee Convention, or impose additional punishment to that faced by other persons in the same situation.62

60. ibid.
61. ibid.

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In their joint submission to the Senate Committee, Professor Ben Saul and Dr Fleur Johns of the University of Sydney similarly argue that the proposed amendments to section 501 and 500A, and the increase in penalty to the offence of manufacture, possession etc of weapons potentially breach Australia’s obligations under articles 7(1) and 31(1) of the 1951 Refugee Convention because ‘they have the effect of unequally burdening or penalising refugees in detention compared to other refugees and visa holders’. 63 In brief, article 7(1) provides that a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally while article 31(1) provides that a Contracting State shall not impose penalties on refugees in detention on account of their illegal entry or presence.

They argue that:

...the proposed amendment to s 197B would accord to those in immigration detention different treatment from that accorded to non-detainees in contravention of art 7(1) of the Refugee Convention. For the same reason, the proposed amendment to s 197B also breaches art 31(1). It is a penalty because it affords less favourable treatment to refugees in detention than others, and thus punishes them for “illegal” entry.

Unlike the proposed amendments to s 197B, s 501 of the Migration Act applies to all visa holders (not just holders of protection visas). All aliens are thus amenable to deportation if, for example, they are convicted a crime and sentenced to 12 months imprisonment (s 501 6(a)). Only detained refugees, however, would face the prospect of expulsion if convicted of any crime whatsoever, including minor ones. If a refugee detained following arrival in Australia by boat convicts a minor offence while in detention, they would face a risk of expulsion under the proposed amendments, whereas a refugee convicted of the same crime after arrival in Australia by air would not. The imposition of this additional penalty solely upon holders of protection visas in detention amounts to unequal treatment contrary to Australia’s obligations under articles 7(1) and 31(1) of the Refugee Convention. 64

For completeness, it is relevant to note that the Minister for Immigration and Citizenship assured Parliament that the Government would not return people to a place where they have a well-founded fear of persecution:

Under these new provisions, a person who has been convicted of a criminal offence while in immigration detention could be refused a visa or have a visa cancelled. In keeping with

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64. Ibid.

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Australia’s international protection obligations, in such cases we will not return people to a place where they have a well-founded fear of persecution.\(^{65}\) [Emphasis added].

However, Direction no. 41 reminds delegates that ‘notwithstanding international obligations, the power to refuse to grant a visa or cancel a visa must inherently remain a fundamental exercise of Australian sovereignty. The responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies within the discretion of the responsible Minister’.\(^{66}\)

Professor Mary Crock of the University of Sydney in her submission to the Senate Committee expressed the view that ‘it is no answer to state that Ministers would not (in practice) apply the law on its face in this manner. If the Parliament is to take seriously its obligations under the Refugee Convention, it should not pass laws that would permit Ministers to act in ways that are in breach of Australia’s international obligations’.\(^{67}\)

**Is the increase in penalty for the weapons offence proportionate?**

**Item 1** proposes to increase from three to five years the maximum penalty for the offence of using, manufacturing, possessing, or distributing a weapon while in immigration detention (in existing section 197B).

The term ‘weapon’ is defined in existing subsection 197(2) to include:

- a thing made or adapted for use for inflicting bodily injury, or
- a thing where the detainee who has the thing intends or threatens to use the thing, or intends that the thing be used, to inflict bodily injury.

The Minister’s second reading speech states that ‘the increase in the maximum penalty for this offence reflects the seriousness with which the community views this offence’.\(^{68}\) While the Explanatory Memorandum notes that the increase will enhance the deterrent effect of the offence, will align it with the penalty for escaping from detention (in existing section 197A), and make it more consistent with other penalties provided in Commonwealth legislation, for example section 49 of the

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66. C Evans (former Minister for Immigration and Citizenship), Direction no. 41—Visa refusal and cancellation under section 501, op. cit.
68. C Bowen, Second reading speech, op. cit.

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Aviation Transport Security Act 2004 which is an offence involving the carriage or possession of a weapon on board an aircraft which carries a maximum penalty of seven years.\(^{69}\)

It is not known how many people (if any) have been convicted of an offence against existing section 197B.

The Senate Scrutiny of Bills Committee sought the Minister’s advice as to whether the proposed increase in penalty is proportionate given the breadth of the definition of ‘weapon’.\(^{70}\) It noted that:

...the definition of a weapon is framed very broadly. For example, one may threaten to use a thing to inflict bodily injury without there being any real or significant risk that injury may in fact result... On this issue it is notable that the definition of ‘weapon’ in the Aviation Transport Security Act 2004 is more circumscribed and determinate in its operation: it refers specifically to ‘firearms’ or things which are prescribed by the regulations to be a weapon. By contrast, whether or not a person commits an offence in relation to a weapon under the Migration Act may depend upon subjective intentions and whether threats have been made (regardless of any objective assessment of danger posed by the weapon).\(^{71}\)

In their joint submission to the Senate Committee, Professor Ben Saul and Dr Fleur Johns of the University of Sydney similarly argue that:

Under Australian law, criminal offences involving the possession or distribution of a weapon, with definitions of “weapon” similar to that stipulated in s 197B, tend to carry penalties of between 6 months and 2 years imprisonment. Under s 27D of the Summary Offences Act 1998 (NSW) the unlawful possession of offensive weapons or instruments in a place of detention carries a maximum penalty of 2 years imprisonment...

The Minister’s assertion in the Explanatory Memorandum that the increased penalty provided for in Section 197B of the Migration Act is not inconsistent with other penalties in Commonwealth legislation fails to take into account a number of considerations. The example given by the Minister is specific to the possession of weapons on aircraft, which carries a penalty of imprisonment for up to 7 years. This is not an appropriate comparison, however, as the possession of weapons on aircraft across most Australian jurisdictions is subject to significantly higher penalties than the possession of weapons generally, and must be viewed in the light of obligations under transnational crime treaties which require Australia to ensure the safety of civilian aircraft against serious violence such as terrorism.\(^{72}\)[Footnotes omitted].

Will the Bill apply retrospectively?

Section 3 of the Bill provides that items 2 to 6 commence on 26 April 2011, the day the Government announced that it was planning to introduce ‘a range of measures to strengthen the consequences

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69. Explanatory Memorandum, op. cit., p. 4.
70. Senate Scrutiny of Bills Committee, op. cit., p. 25.
71. Ibid.
72. Sydney University Centre for International Law, op. cit.

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of inappropriate and criminal behaviour in immigration detention’. However, Item 6 contains an application clause which essentially provides that these amendments apply whether the conviction or offence occurred before, on or after 26 April 2011. Thus, those convicted of an offence committed in circumstances prescribed by proposed new paragraphs 501(6)(aa) or (ab) will be deemed to fail the character test after 26 April 2011.

Offences that occurred any time before 26 April 2011 (for which a conviction is yet to be secured) may also be caught for the purposes of a decision being made with respect to visa refusal or cancellation after 26 April 2011.

As the DIAC submission to the Senate Committee inquiry noted:

It is the intention of the Government that the amendments to the character test would apply to anyone convicted of an offence in relation to the recent events at Australian immigration detention centres. 73

The increase in penalty for the offence of escaping from immigration detention (contained in existing section 197B) does not have retrospective application. This amendment commences the day after the Act receives Royal Assent.

The Senate Scrutiny of Bills Committee considered that the retrospective commencement of the amendments to sections 500A and 501 could unduly trespass on personal rights and liberties. It thus sought the Minister’s advice as to the justification for such an approach. In doing so, it expressed strong views on the inappropriateness of what it termed ‘legislation by press release’:

Although the amendments do not retrospectively impose criminal liability, decisions which have very serious consequences for individuals will be made on the basis of legislative provisions which are given retrospective operation. One central element of the rule of law is that persons should be able to guide their actions by reference to the law and that the legal consequences of breaches of the law should be capable of being known with a tolerable level of clarity in advance. To this extent, the rule of law is sometimes said to promote personal liberty. As these amendments ‘strengthen the [adverse] consequences of criminal behaviour’ (see the explanatory memorandum at page 5) and do so with retrospective effect, there is a clear argument that they do unduly trespass on personal liberty.

The explanatory memorandum ‘notes on individual clauses’ for Clause 2 simply states that the items will commence on 26 April 2011, but provides no context or rationale for the approach. At page 2 the explanatory memorandum appears to suggest that the proposed approach is justified because on 26 April 2011 the Minister made a public announcement of the legislative changes proposed in this bill—thereby putting ‘all immigration detainees on notice that the Australian government takes criminal behaviour very seriously and will take appropriate measures to respond to it.’

73. DIAC, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the provisions of the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011, op. cit.
However, in the Committee’s view this does not adequately respond to concerns about the retrospective operation of the legislation. Given the nature of the individual interests which may be affected by decisions made under sections 500A and 501 of the Migration Act, it is suggested that ‘legislation by press release’ is not appropriate. 74

Key provisions

Item 1 proposes to increase from three to five years the maximum penalty for the offence of using, manufacturing, possessing, or distributing a weapon while in immigration detention (in existing section 197B).

Item 2 amends the basis upon which the Minister can refuse or cancel a temporary safe haven visa. Proposed new paragraphs 500A(3)(d) and (e) provide that the Minister’s discretion is enlivened if a person is convicted of an offence:

- while in immigration detention
- during an escape from immigration detention
- after they have escaped from immigration detention but before being taken back into detention, or
- for escaping from immigration detention pursuant to existing section 197A.

Item 3 amends existing subsection 500A(4) to the effect that the conviction of a person for an offence is to be disregarded if:

- the conviction has been quashed or otherwise nullified, or
- the person has been pardoned for the conviction.

Item 4 amends the character test currently set out in existing subsection 501(6) of the Act. In identical terms to item 2, proposed new paragraphs 501(6)(aa) and (ab) provide that a person does not pass the character test if they are convicted of an offence:

- while in immigration detention
- during an escape from immigration detention
- after they have escaped from immigration detention but before being taken back into detention, or
- for escaping from immigration detention pursuant to existing section 197A.

In identical terms to item 3, Item 5 amends existing subsection 501(10) to the effect that the conviction of a person for an offence is to be disregarded if:

- the conviction has been quashed or otherwise nullified, or
- the person has been pardoned for the conviction.

74. Senate Scrutiny of Bills Committee, op. cit., p. 27.

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Item 6 contains an application clause which provides that the amendments made by items 1 to 5 apply for the purposes of making a decision on or after the commencement of those items, whether the conviction or offence occurred before, on or after 26 April 2011.

Concluding comments

It is difficult to say whether this Bill will achieve the Government’s desired policy outcome—that is, to restore law and order to immigration detention facilities across the country. To this end, it is perhaps relevant to recall that similar measures were introduced by the former Government some ten years ago to curb escalating violence in numerous immigration detention centres. In his second reading speech, the then Minister for Immigration and Multicultural Affairs, Philip Ruddock, when introducing legislation in 2001 to create (amongst other things) the offence of escape from immigration detention and the creation of the offence in relation to weapons noted:

It is both alarming and regrettable that in recent times there have been a number of major incidents of antisocial and violent behaviour at immigration detention centres. Members will recall that there have been major disturbances at the Woomera, Curtin and Port Hedland immigration reception and processing centres. In fact, yesterday there was a major disturbance at the Curtin immigration reception and processing centre. There have been violent protests, burning of buildings, assaults on officers and other detainees, and mass escapes. The violent actions of some detainees have endangered both other detainees and staff, and caused considerable damage to Commonwealth property. We need enhanced powers to discourage and, where necessary, to more effectively manage this inappropriate behaviour in detention centres.

These enhanced powers clearly have not effectively discouraged the ‘inappropriate behaviour’ that is again being seen in Australian immigration detention facilities, and with renewed protest activity occurring at immigration detention centres after the Government’s announced crack down, it is arguable that these measures, in isolation, may similarly prove inadequate.

Some of the strongest criticisms levelled against this Bill are that it is an inappropriate and disproportionate response to a problem of the Government’s own making. Moreover, existing powers within the Migration Act are sufficient to address criminal behaviour of immigration detainees and that the proposed amendments conflict with Australia’s obligations under international law. The only point of consensus that can be extrapolated appears to be that shorter

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77. See for example, AHRC, ‘Self-harm and suicides in immigration detention are major concerns’, op. cit.

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processing times and thus, shorter periods of time spent in immigration detention would successfully curb protest activity and in turn restore order to the facilities. However, whether the Government can simultaneously tackle the source of the problem and thus effectively and genuinely achieve the policy objective it desires in this Bill remains to be seen.