

**AMNESTY INTERNATIONAL
AOTAEROA NEW ZEALAND**

SUBMISSION ON THE
IMMIGRATION (MASS ARRIVALS)
AMENDMENT BILL
(PCO 15375/23.0)

8 JUNE 2012

**AMNESTY
INTERNATIONAL**



Introduction

- 1.0 Amnesty International works to promote and defend the observance of all human rights enshrined in the Universal Declaration of Human Rights and other international standards. Protecting the rights of refugees, asylum seekers and others seeking international protection is an essential component of the Organisation's global work.
- 1.1 Amnesty International Aotearoa New Zealand (**AIANZ**) welcomes the opportunity to make a submission regarding the Immigration (Mass Arrivals) Amendment Bill (**the Bill**).
- 1.2 The right to seek asylum¹ is a basic human right afforded to those who require refuge from persecution and have often had to flee their home country as a result of suffering traumatic experiences.
- 1.3 The Explanatory Note states that the purpose of the Bill is to address the risk of a mass arrival of illegal immigrants in New Zealand and contains measures to:
- Enhance New Zealand's ability to deter people smuggling; and
 - Enable the effective and efficient management of a mass arrival of illegal migrants.
- 1.4 AIANZ acknowledges that the New Zealand Government is responsible for preserving the integrity of New Zealand's borders and recognises the need for streamlined and efficient processes. However, as a signatory to the 1951 UN Refugee Convention (**the Convention**), however, New Zealand has important international legal obligations to consider when formulating immigration related legislation and policies:
- "States are responsible for protecting the fundamental human rights of their citizens. When they are unable or unwilling to do so – often for political reasons or based on discrimination – individuals may suffer such serious violations of their human rights that they have to leave their homes, their families and their communities to find sanctuary in another country. Since, by definition, refugees are not protected by their own governments, the international community steps in to ensure they are safe and protected."²*
- 1.5 New Zealand has an internationally recognised strong reputation for promoting and protecting human rights and has been a leader in the formulation of refugee jurisprudence. If the Bill was to be implemented into legislation in its current form New Zealand's long standing reputation would be compromised.
- 1.6 This submission outlines why the amendments proposed by the Bill:
- Do not effectively address its stated purpose; and
 - If implemented, would be in breach of both domestic and international legal obligations.

¹ Article 14, Universal Declaration of Human Rights (UDHR)

² UNHCR 'The 1951 Convention relating to the Status of Refugees and its 1967 Protocol' 2011.
<http://www.unhcr.org/4ec262df9.html>

The Bill does not effectively address its stated purpose

(a) Deterring “people smugglers”

2.0 In order to avoid breaching its legal obligations to asylum seekers, the New Zealand Government must be cautious not to blur the distinction between the illegal activities of “people smugglers” and the legal and essential actions taken by asylum seekers and refugees fleeing persecution.

2.1 With regard to the deterrence of “people smugglers”:

- The Crimes Act 1961 already makes it an offence to knowingly arrange for an unauthorised migrant to enter New Zealand for material benefit (with a maximum penalty of 20 years imprisonment and/or a \$500,000 fine);
- ‘The principle aim of asylum seekers and refugees is to reach a place of safety. Most asylum seekers have very limited or no understanding of the migration policies of destination countries before arrival’³, therefore imposing legislative penalties on asylum seekers is not going to reduce people smuggling, as while individuals still need to escape persecution there will be demand for the services of “people smugglers”.

Recommendation: Address people smuggling as a separate issue so as to ensure international legal obligations to provide protection to asylum seekers and refugees are not breached in the process.

Recommendation: The New Zealand Government should continue to provide aid and support to countries in conflict in order to reduce the numbers of people who need to flee their home countries to find safety.

(b) Effective and efficient management of a mass arrival of illegal migrants

2.2 In 2009, following ‘the most comprehensive review of immigration legislation in 20 years’⁴, the *Immigration Act 2009 (the Act)* was introduced and came into effect on 29 November 2010 (less than two years ago). The key proposals for change and review at that time⁵ included such factors as:

- A single refugee and protection determination system that incorporated New Zealand's core immigration-related international obligations;
- A streamlined deportation process that is more efficient while maintaining fairness; and
- More flexible and responsive monitoring and detention provisions that maintain a commitment to human rights.

2.3 The Act has recently been reviewed to ensure it contains mechanisms to effectively and efficiently manage the arrival of individuals in New Zealand. It is difficult to understand what has changed so dramatically since that review to require such urgent and extreme amendments that are currently proposed in the Bill.

2.4 The New Zealand Government must not mislead the general public about the current refugee and asylum seeker situation in New Zealand. The tone of the Bill (created by

³ Robinson, V., & Segrott, J. (2002). *Understanding the decision-making of asylum seekers*. London: Home Office.

<http://webarchive.nationalarchives.gov.uk/20110218135832/http://rds.homeoffice.gov.uk/rds/pdfs2/hors243.pdf>

⁴ <http://www.dol.govt.nz/actreview/>

⁵ <http://www.dol.govt.nz/actreview/update/leg-paper.asp>

the chosen terminology) should be reflective of reality, rather than one which instils unnecessary fear.

- 2.5 The repeated use of the term “illegal immigrant” has negative connotations and implies a need for fear. A more humane, less derogatory, and still correct, term such as “individual” or “asylum seeker” would be a simple replacement. The reality is that these individuals are likely to have had to flee their country because of persecution, war or violence. This is why Amnesty International consistently calls on governments to take action and provide support at the source of the issue – in the countries from which these individuals are fleeing - to address the reasons that force asylum seekers onto boats.

Recommendation: Replace use of term “illegal immigrant” throughout with the term “individual”.

Recommendation: If New Zealand genuinely wishes to ensure that asylum seekers and refugees don’t make the dangerous journey on boats to find safety, it needs to take action at the source of the issue.

- 2.6 The term “mass” is used throughout the Bill, however the Bill applies to the arrival of groups of only ‘11 people or more’. The term “mass” is therefore misleading and confusing for its current purpose. The English Oxford Dictionary defines “mass” as ‘a large number of people or objects crowded together’⁶. In the context of asylum seekers, a group of 11 people is not a ‘large number’, by New Zealand’s or any other country’s standards and the arrival of such a number does not justify amending the Act.

Recommendation: If the intention is for the legislation to apply to “mass arrivals” then this should be redefined in accordance with the numbers upon which the calculations in the Regulatory Impact Statement, and other supporting documentation, are based, which is around 500 persons (significantly more than 11).

New Zealand’s legal obligations (international and domestic)

- 3.0 AIANZ submits that the proposed amendments in relation to detention, access to justice, suspension of claims, limits on family reunification, and time delays in granting residency, if implemented would result in the New Zealand Government being in breach of relevant domestic and international legal obligations.

(a) Detention

- 3.1 The Bill allows for detention of mass arrivals, under a group warrant, for an initial period of up to six months. AIANZ submits that such an amendment is in breach of the New Zealand Government’s legal obligations in relation to an individual’s:
- Right to life, liberty and security⁷;
 - Right to freedom from arbitrary detention⁸;
 - Right to due process⁹; and
 - Right not to be penalised on account of illegal entry or presence¹⁰.

⁶ <http://oxforddictionaries.com/definition/mass?q=mass>

⁷ Article 3, UDHR and NZBORA (ss 8 and 22)

⁸ Article 9, UDHR and NZBORA (s 23)

⁹ NZBORA (s 27)

3.2 As a starting point, the ‘inherent undesirability’ of detention altogether must be recognised:

“The detention of asylum-seekers is, in the view of UNHCR inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.”¹¹

3.3 Detention must only be used:

- If ‘necessary’¹²;
- As a matter of last resort¹³; and
- After all possible alternatives to detention have been exhausted¹⁴.

3.4 There is already a regime in the Act for the detention of individuals who arrive in New Zealand pending their removal¹⁵. The major concern with a period of detention such as this is the negative impact it would have on the well being of the concerned individual. In February, Amnesty International in Australia recently documented the findings of its ‘Detention Facilities Visit 2012’ and of relevance state:

*“The initial findings of Amnesty International’s recent detention centre visits, reiterate the organisation’s long held position that the indefinite and prolonged detention of asylum seekers in Australia is a failed policy that contravenes human rights standards... **The most serious and damaging conditions faced by men, women and children in Australian immigration detention are the length of time and the indefinite nature of their imprisonment.** It was overwhelmingly evident that the lack of an endpoint to their internment, coupled with the constant uncertainty, fear and monotony, is more than most people are able to cope with for an extended period - let alone people who are already survivors of torture and trauma.”¹⁶*

Recommendation: Alternatives to detention should be given serious consideration and applied wherever possible.

Recommendation: Where detention is deemed to be a necessity, a maximum 30 day time limit should be adhered to, so that all asylum seekers are moved into the community once health, character and identity checks are complete.

¹⁰ Article 31, 1951 Convention relating to the Status of Refugees

¹¹ UNHCR’s Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers February 1999 <http://www.unhcr.org/refworld/pdfid/3c2b3f844.pdf>

¹² Article 31, Convention on Refugees

¹³ See 11 above

¹⁴ See 11 above

¹⁵ Attorney General Legal Advice, Consistency with the New Zealand Bill of Rights Act 1990: Immigration (Mass Arrivals) Amendment Bill, 3 April 2012 [at 10]

¹⁶ <http://www.amnesty.org.au/images/uploads/news/Amnesty-International-Australia-DetentionFacilitiesVisit-2012-FINAL.pdf> Amnesty International Australia Detention Facilities Visit 2012 (22 February 2012)

Recommendation: Claims should be processed individually, to avoid delay, discrimination, and ultimately unnecessary detention, which will likely arise if the claims process is determined by the size or mode of transport of the arrival.

Recommendation: In order to ensure protection, the detention of vulnerable individuals, particularly women and children, for any period of time should be avoided wherever possible.

(b) Access to justice

- 3.5 The Bill removes the right of all claims to be heard before the Immigration and Protection Tribunal for subsequent claims along with the removal of certain rights of judicial review.
- 3.6 AIANZ submits that such an amendment is in breach of the New Zealand Government's legal obligations in relation to an individual's:
- Right to justice; and
 - Right to due process¹⁷.
- 3.7 AIANZ is concerned that the proposed process is not subject to normal administrative and judicial review processes, and therefore could be considered discriminatory. It is often the case that such individuals have difficulty obtaining the resources necessary to access other paths to justice (such applying for leave to the High Court for Judicial Review) where the right to subsequent claims and judicial review is removed. It is noted that the Court of Appeal 'has accepted similar provisions in the Employment Relations Act 2000...[and] the Tax Administration Act'¹⁸ however AIANZ disputes that these pieces of legislation are relevant for comparison given the limited nature of human rights impacts in comparison to refugee and asylum seeker related matters.

Recommendation: Any amendments must safe-guard the individual's rights to justice and due process, in order for the New Zealand Government to comply with its international and domestic legal obligations.

(c) Suspension of claims

- 3.8 The Bill empowers the suspending of the processing of all refugee and protection claims by regulation.
- 3.9 AIANZ is deeply concerned about any empowerment to suspend claims, due to the negative impact this will have on genuine refugees. In 2010, Amnesty International condemned the Australian Government's suspension of the processing of new asylum claims by Afghan and Sri Lankan nationals (on the basis that 'continuing improved security and human rights situations' in those countries justified the sudden blanket suspension) as being fundamentally inconsistent with Australia's international obligations under the Convention.

¹⁷ NZBORA (s 27)

¹⁸ Attorney General Legal Advice, Consistency with the New Zealand Bill of Rights Act 1990: Immigration (Mass Arrivals) Amendment Bill, 3 April 2012 [at 28]

3.10 AIANZ has grave concerns that (as outlined above) the resulting indefinite and uncertain nature of their status would again have a negative impact on the well being of the concerned individual

Recommendation: **The power to suspend processing should be excluded in order to ensure that individual asylum claims are assessed on a case by case basis and in an expeditious manner.**

(d) Family reunification and time delay in gaining residence

3.11 Alongside the announcement of the Bill was the introduction of policies to limit family reunification for those claiming refugee status as a result of “mass arrival” to immediate family only. AIANZ submits that limiting family reunification is in breach of the New Zealand Government’s international legal obligations in relation to an individual’s:

- Right to respect and protection of family life¹⁹;
- Right to freedom from discrimination²⁰; and
- Right not to be penalised on account of illegal entry or presence²¹.

3.12 Further, this power would be in breach of the Immigration Act itself, which states that to achieve its purpose of ‘managing immigration in a way that balances national interest...and the rights of individuals’²² objectives may include ‘supporting families’²³ and ‘support[ing] the settlement of migrants, refugees, and protected persons’²⁴.

3.13 The right to respect and protection of family life is also supported by the UNHCR and Amnesty International similarly supports the view that:²⁵

- The family is the natural and fundamental group unit of society;
- The refugee family is essential to ensure the protection and well being of its individual members;
- Flexible and expansive family reunification criteria is required, that is also culturally sensitive and situation specific; and
- The refugee family is essential to the successful integration of resettled refugees.

Recommendation: **The New Zealand Government should adopt guidelines and procedures that focus on the need of the refugee to be reunited with his or her family.**

3.14 AIANZ has similar concerns regarding the proposal that permanent residency not be granted until after the reassessment of refugee status occurs (three years after the original assessment). Not only is such a policy contrary to the requirement for the New Zealand Government to ‘expedite naturalisation’²⁶ but again the indefinite nature of their status (as outlined above) would likely have a negative impact on the wellbeing of the concerned individual.

¹⁹ Article 16, UDHR

²⁰ Article 7, UDHR and NZBORA (s 19)

²¹ Article 31, 1951 Convention relating to the Status of Refugees

²² Section 3(1) of the Immigration Act 2009

²³ Section 3(2)(b)(ii) of the Immigration Act 2009

²⁴ Section 3(2)(g) of the Immigration Act 2009

²⁵ ANNUAL TRIPARTITE CONSULTATIONS ON RESETTLEMENT Geneva, 20-21 June 2001 Background Note for the Agenda Item: FAMILY REUNIFICATION IN THE CONTEXT OF RESETTLEMENT AND INTEGRATION

<http://www.unhcr.org/3b30baa04.pdf>

²⁶ Article 34, 1951 Convention relating to the Status of Refugees

Recommendation: To ensure residency claims are dealt with expeditiously the requirement the period for reassessment should be reduced considerably from the proposed three years.

Conclusion

4.0 For the reasons outlined above AIANZ submits that the Bill:

- Is not necessary given that a comprehensive review of the legislation was completed in 2009 and no substantial changes have occurred since to justify amendment;
- Does not achieve the purpose of deterring people smuggling and sacrifices the human rights of individual asylum seekers for the sake of apparently enhanced efficiency;
- In its general approach and tone, is inconsistent with the Convention's fundamental principles of 'non-discrimination' and 'non-penalization'²⁷ and this approach and tone alone (notwithstanding the legality of the substantive content) risks negatively impacting on New Zealand's long standing reputation;
- (If it is deemed that further amendments to the Act are necessary), is at serious risk of breaching New Zealand's domestic and international legal obligations and therefore negatively impacting further on New Zealand's long standing reputation; and
- Is inconsistent with the purpose of the Act ('to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals'²⁸) as it creates a clear imbalance by focussing too heavily on the need for efficient processing and the deterrence of "people smugglers" without taking necessary consideration of the need to protect the affected individual's human rights.

²⁷ <http://www.unhcr.org/3b66c2aa10.pdf>

²⁸ See 24 above