Law Institute Victoria

# Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009

## Submission to the Senate Legal and Constitutional Committee

**31 July 2009**

***Queries regarding this submission should be directed to:***

*Contact persons* *Laura Helm*
*Ph* *(03) 9607 9380*
*Email* *lhelm@liv.asn.au*

© Law Institute of Victoria (LIV).

No part of this submission may be reproduced for any purpose without the prior permission of the LIV.

The LIV makes most of its submissions available on its website at www.liv.asn.au

# Table of Contents

# Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to comment on the *Migration Amendment (Immigration Detention Reform) Bill* 2009 (the Bill).

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 15,000 members. LIV members have experience in representing people in immigration detention. The LIV has long been active in advocating for policy and law reform of immigration detention through its Refugee Law Reform Committee. In 2008, the LIV made a detailed submission to the Joint Standing Committee on Migration (the JS Committee) *Inquiry into Immigration Detention in Australia*, in conjunction with Liberty Victoria and The Justice Project (the LIV joint Immigration Detention submission).[1]

# General Comments

The Bill seeks to implement the Government's *New Directions in Detention* policy, announced on 29 July 2008.[2] We understand that the Bill does *not* seek to implement the first report of the JS Committee.[3] The LIV welcomes many of the recommendations made by the JS Committee in its first report, *Immigration Detention in Australia: A new beginning – Criteria for Release from Detention* (the first report), which will improve transparency and oversight regarding detention decision-making. While we are pleased with aspects of the Bill and the Government's policy changes, we are disappointed that the recommendations do not appear to have influenced this Bill. We look forward to the Government's response to the reports.

The LIV welcomes the changes to mandatory detention in the Bill, which provide that detention will be mandatory only if certain criteria are met.[4] We consider that detention of unauthorised arrivals is acceptable only for the purposes of management of health, identity and security risks to the community.[5] We are concerned, however, that the proposed changes will not result in changes to detention practice. We elaborate further on these concerns below.

The LIV remains deeply concerned that the Bill does not remove provision for indefinite detention in the *Migration Act*, and that there continues to be no judicial oversight of the lawfulness and merits of a person's immigration detention.

# Specific comments on the Bill

Schedule 1 to the Bill sets out amendments to the *Migration Act* 1958 (Cth) (Migration Act) relating to immigration detention. The following sets out our comments on specific aspects of Schedule 1.

## Item 1: After section 4 insert 4AAA Immigration detention

Item 1, inserting a new s4AAA, sets out principles relating to the detention of non-citizens. In proposed s4AAA, Parliament affirms as a principle that the purpose of detaining a non-citizen is to manage risks to the Australian community and to resolve the non-citizen's immigration status and, importantly, that a non-citizen must be detained only as a measure of last resort and for the shortest practicable time.

---

[1] LIV submissions are available on our website at https://www.liv.asn.au/members/sections/submissions/

[2] EM, [1].

[3] The LIV has received correspondence from the Minister for Immigration and Citizenship, Senator Evans, stating that the Government's response to the first report of the JS Committee is being finalised (3 July 2009).

[4] Set out in proposed new subss189(1), (1A), (1B) and (1C).

[5] See generally Law Institute of Victoria, Liberty Victoria and The Justice Project, submission to the Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia* (LIV joint Immigration Detention submission).

## Effect of s4AAA

Neither the Bill nor the Explanatory Memorandum to the Bill (the EM) specify how the principles in s4AAA are to affect the interpretation of the Migration Act.

The current formulation of s4AAA is in similar terms to existing s4AA of the Migration Act, in which Parliament affirms as a principle that a minor "shall only be detained as a measure of last resort". Section 4AA was introduced in 2005 by the *Migration Amendment (Detention Arrangements) Act 2005* (Cth). In a submission to the JS Committee in 2008, the Human Rights and Equal Opportunity Commission (HREOC) (as it then was) commented that s4AA of the Migration Act is a statement of principle only and does not create legally enforceable rights (para 51).[6]

The LIV considers that the effect of s4AAA in its current form is unclear. In particular, it is uncertain whether the principles affirmed in s4AAA affect the interpretation of the Migration Act according to s15AA(1) of the *Acts Interpretation Act* 1901 (Cth). Section 15AA(1) of the *Acts Interpretation Act* 1901 (Cth) provides that "[i]n the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

The LIV therefore recommends that s4AAA be amended to insert an express interpretative obligation to clarify that in the interpretation of a provision of the Migration Act, and in the exercise of a discretion conferred under the Act, a construction that promotes the principles articulated in s4AAA should be preferred.

We consider that, in the absence of judicial oversight of immigration detention, this interpretive obligation is important. Without a clear direction about the effect of s4AAA, we are concerned that amendments introduced in the Bill, including those relating to criteria for mandatory detention in proposed new subss189(1) and (1A) and the introduction of a discretion to detain in subs189(1C), will not achieve the changes to intended by the Government's *New Directions in Detention* policy. In particular, s4AAA provides important guidance to officers under proposed new subs189(1B), where officers must make "reasonable efforts" to ascertain a person's identity, identify whether the person is of character concern, ascertain health and security risks to the Australian community and resolve the person's immigration status. See further below under item 9.

## Resolving a non-citizen's immigration status

The LIV does not consider resolution of a person's immigration status to be the purpose of immigration detention. In the *New Directions in Detention* speech, Senator Evans indicated that the "presumption will be that persons will remain in the community while their immigration status is resolved… Once [identity, health and security] checks have been successfully completed, continued detention while immigration status is resolved is unwarranted".

We therefore query why the Bill provides that the purpose of immigration detention includes "to resolve a person's immigration status". Unlawful non-citizens will be subject to immigration detention if they are found to present an unacceptable risk to the community or they have repeatedly refused to comply with their visa conditions. Detention of the latter classes relates to management of risk and not with resolution of immigration status.

In the LIV joint Immigration detention submission, we recommended that following successful identification, health and security checks (during an initial period of immigration detention):

(a) there is community release of asylum-seekers with reasonable reporting conditions;
(b) if an asylum seeker is deemed to be a flight risk, then bail, bond or other surety options should be considered; and

[6] Human Rights and Equal Opportunity Commission, submission to the Joint Standing Committee on Migration *Inquiry into immigration detention in Australia* (4 August 2008), available at http://www.hreoc.gov.au/legal/submissions/2008/20080829_immigration_detention.html#fnB24

(c) if the asylum-seeker is destitute or having difficulty integrating into the community, then accommodation at an open Reception Centre (as defined in our submission) be made available.

We refer you to the LIV joint Immigration Detention submission for more details on these proposals.[7]

We strongly submit that it is not necessary to detain unauthorised arrivals beyond the time needed to complete identification, health and security checks and that resolution of a person's immigration status should occur whilst the person resides in the community. We suggest that proposed new s4AAA(1)(b) be deleted.

## Item 3: At the end of section 4AA

Item 3 amends s4AA to provide that if a minor is to be detained as a measure of last resort, the minor must not be detained in a detention centre established under this Act and that an officer must, for the purposes of determining where the minor is to be detained, regard the best interests of the minor as a primary consideration.

The LIV welcomes the enactment of the principle that children are not to be detained in immigration detention centres. However, we note that the effect of s4AA is unclear, for the same reasons outlined above in relation to item 1. The LIV therefore recommends that s4AA also be amended to insert an express interpretative obligation to clarify that in the interpretation of a provision of the Migration Act, and in the exercise of a discretion conferred under the Act, a construction that promotes the principles articulated in s4AA should be preferred.

We consider that guidelines should be developed about alternative forms of accommodation where children are to be detained as a matter of last resort, to assist decision-makers to determine which option is appropriate. These guidelines should also provide guidance on the best interests of the child, although we suggest that expert evidence should be sought in each individual case where a minor is to be detained as a measure of last resort.

We also seek clarification from the Government about how s4AA will be enforced and whether any remedies will be available to minors who are detained in immigration detention centres contrary to this section.

## Item 9: Subsection 189(1)

Proposed new subss189(1), (1A) and (1B) create a new scheme for mandatory immigration detention in Australia. The new scheme provides that immigration detention is mandatory only where an officer[8] knows or reasonably suspects that a person is an unlawful non-citizen[9] **and** the person meets one of the criterion listed in subs189(1)(b)(i)-(v). The criteria are:

(i) the person presents an unacceptable risk to the Australian community;
(ii) the person has bypassed immigration clearance;
(iii) the person has been refused immigration clearance;
(iv) the person's visa has been cancelled under section 109 because, when in immigration clearance, the person produced a document that was false or had been obtained falsely;
(v) the person's visa has been cancelled under section 109 because, when in immigration clearance, the person gave information that was false.

Proposed subsection 189(1)(a) retains the requirement that all non-citizens must have a visa that is in effect, or they are liable to be detained in immigration detention.[10] However, subs189(1)(b)

[7] See particularly, pp38-44, LIV joint Immigration Detention submission.
[8] As defined in s5(1) of the Migration Act.
[9] Migration Act, s14.
[10] Currently in Migration Act, s189(1).

provides additional criteria, so that a reasonable suspicion that a person is an unlawful non-citizen is no longer, by itself, a trigger for mandatory detention.

The effect of subss189(1)(b) is that all "unauthorised arrivals", where a person arrives without a valid visa and however he or she arrives in Australia, will be subject to mandatory immigration detention.

The phrase "a person is an unacceptable risk to the Australian community" in subs189(1)(b)(i) is defined in proposed new subs189(1A), which purports to limit the definition of "unacceptable risk to the Australian community," so that a person presents an unacceptable risk "if, and only if" any of the following applies:

(a) the person has been refused a visa under section 501, 501A or 501B or on grounds relating to national security;
(b) the person's visa has been cancelled under section 501, 501A or 501B or on grounds relating to national security;
(c) the person held an enforcement visa and remains in Australia when the visa ceases to be in effect;
(d) circumstances prescribed by the regulations apply in relation to the person.

The LIV supports the policy basis for subs189(1)(b)(i), recognising the responsibility of government to manage security risks to the Australian community. As outlined below, we have concerns, however, about the operation of proposed new subs189(1A) and in particular, about its reliance on the operation of other provisions of the Migration Act, such as s501.

## Subsections 189(1A)(a)-(c)

Proposed new subss189(1A)(a)-(c) do not seek to establish a decision-making framework within which Department of Immigration and Citizenship (Department) officers will determine whether a person poses an "unacceptable risk" to the Australian community. Rather, subs189(1A)(a)-(c) provides that a person will be deemed to be an unacceptable risk where the person is subject to a decision under other provisions of the Migration Act.

The LIV is concerned about how subs189(1A)(a)-(c) will interact in practice with, for example, ss501, 501A or 501B of the Migration Act. Presently, individuals receive a Notice of Intention to Cancel[11] a visa on the basis of ss501, 501A or 501B, prior to the cancellation being effected. The individual is afforded the opportunity to present evidence that the grounds for cancellation do not exist, or that there is a reason why it should not be cancelled.

We seek clarification from the Government about the impact of the new mandatory detention provisions on the visa cancellation and refusal process, including for example how the mandatory detention provisions will interact with the provision for appeal to the AAT.[12]

## Definition of unacceptable risk – subs189(1A)(d)

We understand that the Migration Regulations 1994 (Cth) (Migration Regulations) will be amended under subs189(1A)(d) in order to prescribe what constitutes an "unacceptable risk to the Australian community" for the purposes of the Department's detention or visa response under the Migration Act and that the Migration Regulations are intended to commence when the Bill commences.[13]

The LIV does not support the introduction of this important test, which will affect individual liberty, by way of regulation. We submit that the serious consequences of a finding that a person is an "unacceptable risk" to the Australian community warrants the protection and certainty afforded by primary legislation. Furthermore, introduction by regulation does not afford the same opportunity for consultation or parliamentary scrutiny as afforded by legislation.

[11] Migration Act, s119.
[12] Section 500(1)(b).
[13] Department of Immigration and Citizenship Information Session, Migration Amendment (Immigration Detention Reform) Bill 2009 and associated reforms, (23 July 2009).

We therefore consider that "unacceptable risk to the Australian community" should be defined in the Migration Act. We suggest that the provision be set out along the lines of s5C, which provides the meaning of "character concern". This definition could be elaborated in the Migration Regulations and policy guidance, in order to assist decision-makers.

We urge the Government to amend the Bill to provide a definition of "unacceptable risk to the Australian community" in the Migration Act.

In designing the legislative provision, we commend to the Committee comments by the Commonwealth Ombudsman to the JS Committee Inquiry, that an assessment of risk to the community should be based on evidence rather than just reasonable suspicion:

> *There should be some evidence on which to base a decision that somebody is a risk to the community. Evidence that will be relevant will be a person's recent pattern of behaviour — if the person has been released from prison, the offences for which a person has been convicted and the reports of parole and prison authorities on the person's behaviour. If a person has had a period outside an immigration detention centre and there have been no reports of difficult behaviour, then that is evidence of a different kind.*[14]

## Obligations of detaining officers –subs189(1B)

Proposed new subs189(1B) provides that if a person is detained under subs189(1) (other than where they present an unacceptable risk to the community), an officer must make reasonable efforts to:

(a) ascertain the person's identity; and
(b) identify whether the person is of character concern; and
(c) ascertain the health and security risks to the Australian community of the person entering or remaining in Australia; and
(d) resolve the person's immigration status.

The LIV submits that the proposed effect of subs189(1B) is unclear.

In the joint LIV Immigration Detention submission, we proposed that a maximum time limit of 30 days should be introduced for the completion of identity, health and security checks. Where these checks are not completed within this period, we suggest that the Department should be required to apply to the Federal Magistrates Court for an Immigration Detention order. We argue that this will provide increased scrutiny of immigration detention and will reverse the presumption of detention that currently exists in ss189 and 196 of the Migration Act, which (together) provide that unlawful non-citizens will remain in detention until (a) they are granted a visa, (b) they are deported, or (c) they are removed from Australia at their own request or upon the rejection of their attempts to secure a visa.

The JS Committee, in its First Report, recommended a limit of 90 days to complete security and identity checks before a detainee must be considered for release on a bridging visa.[15]

We understand that current practice within the Department is for a Senior Officer to review the lawfulness and appropriateness of continued detention once a person has been detained for a period of three months. Furthermore, we understand that cases of detention beyond six months are referred to the Commonwealth Ombudsman. Although we welcome this practice, which provides increased oversight and transparency, we do not consider that it goes far enough.

The LIV would like to see amendments to the Migration Act to codify time limits and to provide a legislative framework for review. In our view, this oversight should be judicial. However, as a minimum, we seek amendments to the Bill to define "reasonable efforts" in subs189(1B) and to

[14] Joint Standing Committee on Migration, *Immigration Detention in Australia: A new beginning – Criteria for Release from Detention (December 2008),* 47
[15] Joint Standing Committee on Migration, *Immigration Detention in Australia: A new beginning – Criteria for Release from Detention (December 2008),* recommendation 3 and 4.

include a time limit of 30 days in which checks should be completed. We consider that such an amendment will codify the Government's commitment that "the department will have to justify why a person should be detained".[16]

In addition, we note that the extent of the proposed obligation to ascertain a person's identity is unclear. We do not consider that a person should continue to be detained, for example, merely because they are unable to produce valid identity documents. We consider that additional evidence should be required in order to justify continued detention of a person whose identity in issue, to show for example that the person is considered to be a security risk because her or his identity is in issue or because there is evidence of identity fraud.

We reiterate our comments above in relation to item 1 that resolution of a person's immigration status should not be the purpose of immigration detention. We are concerned that the obligation in subs189(1B)(d), to make reasonable efforts to resolve a person's immigration status, should not be linked to the question of whether or not the person is detained. We consider that the Department should be under an obligation to make reasonable efforts to resolve a person's immigration status whilst the person is in the community, following the completion of initial identification, health and security checks as listed in subss189(1B)(a)-(c).

## Discretion to detain – subs189(1C)

Proposed new subs189(1C) provides a "catch-all" discretion, so that where a person does not meet criteria under subs189(1), an officer **may** detain a person where an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non citizen.

The LIV is concerned that the wide discretion conferred in subs189(1C) might mean limited changes in practice to decisions to detain unlawful non-citizens.

We welcome reports that the Department in 2008-9 is detaining fewer of the people it locates than in 2007-08.[17] However, we are concerned that a wide discretion could be subject to changing interpretation depending on political or other factors and that this creates uncertainty for people about whether they will be detained or not.

The LIV recommends that s189(1C) should be amended to include a list of factors that officers should take into account when exercising their discretion to detain an unlawful non-citizen. The list might include whether the officer needs to ascertain whether the person is a security risk or of character concern.

## Additional comments on judicial oversight and indefinite detention

In *Al-Kateb v Godwin*[18] (Al-Kateb), the High Court of Australia held that the "unambiguous" wording of ss189, 196 (and 198) of the Migration Act authorised the indefinite detention of an unlawful non-citizen in circumstances where there is no real prospect of removing them. The Court found that the legislative powers of detention are valid under s51(xix) of the Australian Constitution. This ruling means that indefinite immigration detention in Australia is deemed legal and constitutional.

According to s474 of the Migration Act, all decisions to detain a person under proposed new subss189(1), (1A), (1B) and (1C) will be privative clause decisions. Privative clause decisions cannot be challenged, appealed against, reviewed, quashed or called into question in any court; and are not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.[19]

---

[16] Senator Evans, Minister for Immigration and Citizenship, *New Directions in Detention* speech (29 July 2009).
[17] Department of Immigration and Citizenship Information Session, Migration Amendment (Immigration Detention Reform) Bill 2009 and associated reforms, (23 July 2009)
[18] (2004) 208 ALR 124.
[19] Migration Act, s474

In *Plaintiff S157/2002 v Commonwealth,*[20] the High Court held that s474 does not oust s 75(v) of the Constitution which provides that the High Court shall have original jurisdiction in all matters in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. A limited form of judicial review of decisions by officers is therefore available under subss189(1),(1B) and (1C). However, the LIV does **not** consider this limited judicial review to provide adequate scrutiny of Departmental decisions relating to immigration detention.

The proposed amendments in the Bill do not provide for judicial oversight of the lawfulness and merits of a person's immigration detention. The LIV strongly submits that courts should be given the power to enforce a remedy where detention is found to be inappropriate, unnecessary or unlawful. We consider that access to judicial remedies is an important step to ending provision for indefinite detention under the Migration Act.

## Item 12: After section 194

Item 12 introduces a new provision to the Migration Act which establishes temporary community access permissions. Item 5 provides that the temporary community access permission is defined as immigration detention for the purposes of the Migration Act.

The LIV generally supports mechanisms which allow flexibility for immigration detainees to make short-term community visits. This will enable detainees to attend family occasions such as weddings and funerals.

We note that temporary community access permission is subject to the discretion of an officer. We would like to see additional guidance in the Migration Act for officers, addressing in particular issues relating to eligibility for permission and the conditions which can attach to a permission. We understand however that regulations are being prepared to address this issue and we look forward to contributing to a consultation process

We note that under s194(4), an authorised officer "does not have a duty to consider whether to exercise the power to make, vary or revoke a temporary community access permission, whether he or she is requested to do so by any person, or in any other circumstances". Further, item 19 in the Bill provides that s194A is a privative clause decision. However, we consider there should be some form of internal review or appeal mechanism for persons requesting temporary community access permission. We suggest amendments to the Bill to set out grounds on which this mechanism can be sought.

The LIV appreciates the opportunity to provide comments on the Bill. If you would like to discuss any of the matters raised in the submission, please contact Laura Helm, Policy Adviser, Administrative Law & Human Rights Section on (03) 9607 9380 or by email lhelm@liv.asn.au.

[20] (2003) 211 CLR 476.