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Mr Hallahan
Committee Secretary
Senate Legal and Constitutional Committee
Joint Standing Committee on Migration Amendment
(Immigration Detention Reform Bill)
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email to: legcon.sen@aph.gov.au

Dear Mr Hallahan

Joint Standing Committee on Migration Amendment (Immigration Detention Reform Bill) 2009

In response to the Standing Committee's call for submissions on 25 June 2009, Victoria Legal Aid (VLA) provides the attached submission to the Migration Amendment (Immigration Detention Reform) Bill 2009 ("the Bill").

If you have any queries about this submission please contact Ms Linda Murdoch, Manager Policy and Planning on (03) 9246 246 or lindam@vla.vic.gov.au.

Yours faithfully

TONY MATTHEWS
Acting Managing Director

Victoria Legal Aid

Response to the Migration Amendment (Immigration Detention Reform Bill) 2009

1. Victoria Legal Aid's Migration Services

Victoria Legal Aid is funded by the Commonwealth to provide a range of migration services. One of these areas is in the provision of legal representation to test case matters in the Federal Magistrates' Court, Federal Court or High Court and proceedings which seek to challenge the lawfulness of detention.

The Department of Immigration and Citizenship (DIAC) has agreements with VLA under the Immigration Advice and application Assistance Scheme (IAAAS) to provide advice and application assistance to protection visa applicants in detention on the mainland. Under the IAAAS Scheme, the Detention Co-ordination Unit refers a detainee to the Commission for legal advice and assistance soon after such assistance is requested by the detainee. In addition to the IAAAS detention contracts some Commissions also hold IAAAS community contracts through which "disadvantaged" (defined in contracts) people can be provided with free advice and, in some cases, application assistance.

VLA provides limited legal assistance within the Community Assistance and Support (CAS) program for high need and complex cases. VLA has in the past been able to provide minor assistance to protection visa applicants and some other limited classes of visa applicants when IAAAS funding has been expended for the financial year and the case has merit, and has been able to assist clients to make requests to the Immigration Minister for discretionary intervention on humanitarian and public interest grounds under sections 417 and 351 of the *Migration Act* 1958. The funding provided under the community contracts does not meet the community need. Community funding is also subject to means and merits testing. Under this community funding program, VLA assists mainly protection visa applicants at DIAC and Refugee Review Tribunal stages and some spouse visa applicants, who have suffered domestic violence, at DIAC and Migration Review Tribunal stages. This advice service is also funded by DIAC.

VLA recommends the widening of categories for advice and representation of the matters to be funded subject to the means and merits tests, to include:

- applications to DIAC,
- applications to merit review tribunals in relation to protection visa and other visa applications, where there are strong humanitarian and/or compassionate circumstances,
- responses to DIAC criminal cancellation notices and merits review of cancellations at the relevant tribunal.

- protection visa holders for offshore applications for family reunion, including spouse and child visas, refugee and humanitarian visa classes

proceedings in the Federal Magistrates Court, Federal Court or High Court dealing with a migration matters.

VLA holds the view that it is inappropriate for DIAC, which runs the IAAAS, to administer legal assistance funding for immigration matters as there is an inherent conflict of interest in having the body which makes decisions about visas also deciding who will receive legal assistance and who will provide the assistance. Funding should be administered by the Commonwealth Attorney-General's Department as part of legal aid funding.

2. General Comments

VLA welcomes the Government's new approach to national immigration policy as outlined in its *New Directions in Detention Policy*. The Government's extensive consultation process has enabled wide stakeholder consultation and engagement Australia-wide. This inclusive stakeholder approach reflects a positive step forward to achieve the major reforms needed to re-set previous migration policy settings that shall better reflect the Government's new approach. A number of key reforms are needed to increase the clarity, fairness and consistency in the way the Minister and the Department of Immigration and Citizenship respond to people who arrive without documents and/or those people who have the status of "unlawful non citizens".

Whilst VLA welcomes the Government's new approach, VLA notes that some of the key recommendations in the report *"Immigration detention in Australia: A New Beginning - First Report of the Inquiry into Immigration Detention in Australia Joint Standing Committee on Migration December 2008* (the Immigration Detention Inquiry Committee Report) have not been fully implemented.

Whilst, the Bill proposes some reforms, however, it retains mandatory detention and the excision policy. Further, detention requires judicial oversight which is not provided for by the legislation. VLA therefore continues to have a number of key concerns in relation to the Bill itself. In addition, much of the implementation of the legislation appears to be dependant on the regulations, rather than changes having been incorporated into the legislation itself.

3. Executive summary of recommendations

Recommendation 1 - 189 1(b) (ii) and (iii): any unlawful non citizen should not be placed in immigration detention unless there is evidence that they represent a security risk.

Recommendation 2 - For those who are detained, this detention should be for the purposes of identity, security and health checks and subject to strict time limits (preferably 30 days) and external merits review and judicial review should occur after this time. Ongoing detention should be subject to regular external review.

Recommendation 3 - Section 4AAA(1) be amended to exclude subsection (b) which stipulates that a person may be detained for the purpose of resolving their immigration status.

Recommendation 4 - Section 4AA(4) be amended to state that no child should be detained under any circumstances and that the best interests of the child should be a primary consideration in the decision making about the child and their family members' well being.

Recommendation 5 - Mandatory detention not apply to persons who have had their visa cancelled under section 501.

Recommendation 6 - Regulations should introduce new bridging visa provisions to ensure that where a person is released from detention on a bridging visa, the bridging visa provides work rights. VLA further seeks access to the new regulatory framework in relation to the bridging visas regime proposed for unauthorised arrivals.

Recommendation 7 - Where a request for a temporary community access permission ("TCAP") is refused written reasons for the refusal should be provided and an internal appeal process made available.

3.1 Mandatory detention (refer to VLA recommendation number 1)

The Bill in its current form does not fully realise the Minister's Key Immigration Detention Values announced in July 2008. The current Bill appears to support the continuation of a detention regime that requires all unauthorized entrants to be detained, as opposed to detaining as a measure of last resort (see section 189(1)(b)(ii) and (iii) in particular). The Bill also provides no mechanism for external review of detention (see section 189(1B)). This is despite the fact that detention as a last resort was stated by the Minister to be one of his seven key immigration values in his July 2008 speech. In our submission, as noted above under recommendation 4 unlawful non citizens should not be placed in immigration detention unless there is evidence that they represent a security risk. Instead, the mechanism of community detention should be explored and utilised.

3.2 Detention Time Limits and External Review of Ongoing Detention (refer VLA recommendation number 2)

The ability to challenge the lawfulness of detention is an important safeguard against arbitrary detention. The International Covenant on Civil and Political Rights (ICCPR) requires that detainees be able to challenge the lawfulness of their detention before a court.

The Minister's 2008 proposals[1] suggested a number of changes namely;

- the ongoing detention of a person the onus of proof will be reversed with the Department having to justify why a person should be detained,
- that detention will be reviewed by a senior departmental officer every 3 months, and that the Ombudsman will review detention cases after 6 months instead of 2 years.[2]

The Minister's July 2008 announcement regarding changes to the use of detention was essentially based upon the principle that detention beyond initial health, identity, security and flight risk checks should be used only when shown to be necessary for security reasons or to avoid flight risks and that detention within an IDC should be a matter of last resort.[10]

As set out in recommendation 2, a time limit should be placed on the detention of a person for health, security and identity checks (preferably 30 days) . After this period, the Department must establish before an external Tribunal that there are substantial grounds for believing that the person is an unacceptable risk (and the decision of this Tribunal should be subject to judicial review). The need for a time limit on assessment of health, identity and security checks (albeit of 90 rather than 30 days) was recognised in the First Report of the Inquiry into Immigration Detention in Australia by the Joint Standing Committee on Migration December 2008.

For those who are detained, detention for the purposes of identity, security and health checks should be subject to strict time limits (we submit 30 days). If after such time no positive evidence of risk has been obtained, then the ongoing need for detention should be subject to external merits review, with attached rights to judicial review of any merits review decision. If the need for detention is upheld by the Court, then ongoing detention should be subject to regular review.

Imposition of strict time limits to ensure that people are released as soon as possible is currently the case where under s75 of the *Migration Act 1958* a decision on a bridging E visa must be made within 2 working days.

Security as opposed to Identity checks – précis of issues

It is common for asylum seekers to have great difficulties with providing concrete proof of identity. Identity difficulties persist throughout the process and are intractable. The lack of genuine identity

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[1] http://www.minister.immi.gov.au/media/speeches/2009/ce090625.htm

[2] Second Reading Speech Migration Amendments (Immigration Detention Reform) Bill 2009

documents are often inextricably linked to a person's past persecution and need for protection. The Refugee Review Tribunal regularly questions the credibility of person who has arrived on genuine documents stating that if one was a refugee, they would be unable to exit the country with their own documents. The policy on how best to balance the need for security and / or identity confirmation remains a vexed issue when processing applications made by people arriving in Australia without official documentation. Unauthorised arrivals who have been immigration cleared on fraudulent documents are eligible for a bridging visa and are therefore able to remain in the community whilst checks are undertaken.

International Legal Obligations

The Minister has stated: -

> *First, in accordance with the Government's Key Immigration Detention Values, and reflecting Australia's international human rights obligations, detention that is indefinite or otherwise arbitrary is not acceptable. Item 1 of Schedule 1 to the Bill will embed this value in the Act, by introducing a statement of principle in Part 1 of the Act that, first, a non-citizen must only be detained in an immigration detention centre as a measure of last resort and secondly, that if a non-citizen is detained in an immigration detention centre, then detention will be for the shortest practicable time*[3].

This statement does not appear to be reflected in the actual framework for detention set out in the Bill.

Article 31(1) of the Refugee Convention prohibits countries from penalising people who arrive directly from persecution, as long as they present themselves without delay and provide good reasons for entering without permission.

Providing bridging visas to those who enter on valid visas and who then apply for asylum, while detaining those arriving without permission, continues the two tiered system of refugee status determination and is clearly as distinctively different treatment of undocumented asylum seekers.

3.2 Exclusion of Excised Territories - Christmas Island

The detention values announced by the Minister on 29 July 2008 are not reflected in the practice of processing asylum seekers on Christmas Island.

The Minister has stated that the "*existing subsections 189 (2) 189 (5) including detention arrangements for offshore entry persons remain unchanged. Unlawful non-citizens, including offshore entry persons, in excised offshore places will continue to be subject to the existing detention and visa arrangements of the*

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[3] http://www.minister.immi.gov.au/media/speeches/2009/ce090625.htm

excision policy. Offshore entry persons are unable to apply for any visa in Australia while they remain an unlawful non-citizen unless the Minister acts personally to allow them to make a valid visa application".[4]

Clearly, the amendments to section 189 do not apply to excised offshore places, however, it is unclear if and how the principles of the Bill apply to excised offshore places. A number of implications arise from this; firstly, to detain non citizens on Christmas Island is incompatible with the principle of detention being used as a last resort, and for the shortest practicable time, secondly, even if the principles do apply to Christmas Island, its geographical isolation causes delays in access to legal advice and to processing generally.

3.3 Resolving a non-citizen's immigration status (refer to VLA recommendation number 3)

Currently, "*the presumption will be that persons will remain in the community while their immigration status is resolved. If a person is complying with immigration processes and is not a risk to the community then detention in a detention centre cannot be justified. The department will have to justify a decision to detain – not presume detention*".[5]

In VLA's view, resolution of a person's immigration status should occur whilst the person resides in the community.

VLA therefore proposes that the new s4AAA(1)(b) be deleted.

3.4 Children in Detention (refer to VLA recommendation number 4)

VLA does not support proposals for children to be in any type of detention environment. Further, VLA does not support placing children and/or young people under the age of majority in accommodation facilities or placements that function in a way that restricts or segregates them from the positive and guiding supports of their families or significant carers, even if such centres are not officially defined as "detention centres". Unaccompanied minors are particularly vulnerable in these settings and should not be detained.

Information is required in relation to the nature and type of facilities in which the Government plans to accommodate families caring for children and young people in the community. It would also be of assistance to receive guidelines on how assessments are to be made, and what role is played by relevant agencies such as state protective services who hold responsibility for the care, protection, assessment and support of unaccompanied minors in particular, and who may be best placed to

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[4] 2nd Reading Speech Migration Amendments (Immigration Detention Reform) Bill 2009

5 Senator Chris Evans Speech 29 July New Directions in Detention - Restoring Integrity to Australia's Immigration System – Australian National University Canberra at **http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm**

provide guidance on matters relating to the welfare of children who arrive with their families. It is imperative that children and young people already in immigration detention centre or MITA have immediate and ongoing access to free legal advice and representation. This would ensure that the best interests of the child is a primary consideration in decisions regarding the child and their family members' well being.

3.5 Unacceptable risk to the Australian Community

3.5.1 s 189(1)(b)(i) and 189(1A)(a)- (c) (refer to VLA recommendation number 5)

VLA is concerned that s189 (1A) (a)-(c) allows for no actual assessment as to whether a person is actually an "unacceptable risk". The decision as to whether someone is an unacceptable risk needs to be made in line with the principles that detention is only as a matter of last resort and therefore there should be a presumption that one is not an unacceptable risk unless there is evidence to establish otherwise. This is best decided on a case by case basis.

VLA recommends that decisions in relation to detaining an individual be made by appropriately trained and experienced staff, and that ordinary rules of procedural fairness apply, including the opportunity to comment on adverse material. As recommended above, a decision to detain should be automatically reviewed by an independent judicial officer after 30 days.

3.5.2 Section 189 (1A) (d) Prescribed circumstances that deems a person an unacceptable risk

The amendments proposed under subsection 189 (1A) (d) provide that a person will be subject to mandatory detention when they present an unacceptable risk to the Australian community as prescribed in the regulations. VLA requests the opportunity to view the regulations particularly as any regulation under section 189(1A)(d) has the potential to create a whole additional class of person subject to mandatory detention under the current provisions.

3.6 Bridging Visas (refer to VLA recommendation number 6)

VLA seeks clarification on the classes of bridging visas that are to be made available for those that have been detained under the mandatory detention provisions. At present there are very restrictive criteria for the release of people into the community, particularly in relation to those who have not been immigration cleared prior to detention.

The current bridging visa regime as set out in the *Migration Regulations* 1994 would not enable the implementation of the principle that unauthorised arrivals should be released on bridging visa once identity, health and security checking is complete. Currently such persons are only eligible for Subclass

051 bridging visa in a very limited set of circumstances. In practice this visa is rarely granted as a result of the very narrow interpretation given to the regulation. It is important that a person released into the community will have some capacity to support themselves and their families without undue burden on non-profit organisations.

The recent bridging visa regime changes have placed a clear emphasis on the cooperation of the visa applicant with DIAC as a criteria for determining whether a person can obtain work rights on their relevant bridging visa. For example, a person who has lodged a Ministerial request is able to obtain work rights on their bridging visa only if they held them on their bridging visa at the primary and review level (this is determined by whether they have remained lawful at all times). This means that a person who starts the Ministerial request without work rights on their bridging visa cannot obtain work rights even if they are now cooperating with DIAC.

VLA submits that the above philosophy should not be transferred to unauthorised arrivals as they, by the very nature of their means of arrival, have not remained lawful at all times in Australia.

VLA seeks access to the new regulatory framework in relation to bridging visas to unauthorised arrivals and requests that work rights be given to detainees upon release from detention.

3.7 Temporary Community Access Permission

Temporary Community Access Permission is a useful mechanism for detainees to access essential services and supports and is supported by VLA.

Under s194(4) of the new Bill however, 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. VLA recommends that there should be some form of internal review or appeal mechanism for persons requesting temporary community access permission and recommend amendments to the Bill to set out grounds on which this mechanism can be sought.

While this is a non-compellable power, where a request for a TCAP is refused, written reasons for the refusal should be provided and an internal appeal process should be made available. This will create a fair and transparent procedure for TCAP requests and would better ensure consistency in dealing with such requests.

VLA therefore, supports the program and recommends:

1. Greater flexibility
2. Guidelines and greater clarity on the criteria for approval

3. Mechanism for appeal
4. Reasons for refusal

3.8 Other issues

3.8.1 Discretion to detain - subs189(1C)

The proposed new subsection189(1C) appears to provide a "catch-all" discretion, so that where a person does not meet criteria under subsection189(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.

VLA cautions against the inclusion of vague or "all encompassing" provisions that may be highly discretionary or open to misapplication. A wide discretion could be subject to changing interpretation and that this creates uncertainty for people about whether they will be detained or not.

In line with the principles that a person can only be detained as a matter of last resort, before someone is detained they would have to pose an unacceptable risk to the community. If there is evidence that someone is an unacceptable risk there is provision under s 189 (1A)(d).

3.9 Closing Remarks

VLA values the significant work undertaken by the Committee to progress the reforms of the Government to create a fairer and more humane detention system under Australian immigration law. A considerable amount of work has been undertaken by a range of stakeholders across Australia to develop a mechanism that will guide the Government's *New Directions* Policy. VLA is happy to support the work of the Committee and looks forward to providing further comments on the accompanying regulations prior to their commencement in order to conclude a meaningful consultative process.