AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
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29 July 2009

Dear Inquiry Secretary

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

Please find attached a submission by Australian Lawyers for Human Rights for the consideration of the Committee.

We stand ready to give evidence at a hearing if required.

Kind regards

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

Submission to the
Senate Standing Committee on Legal and Constitutional Affairs
29 July 2009

1 Australian Lawyers for Human Rights

1.1 Australian Lawyers for Human Rights (ALHR) is a national network of Australian lawyers active in furthering awareness, understanding and recognition of human rights in Australia. It was established in 1993, and incorporated as an association in NSW in 1998.

1.2 ALHR has nearly 1,500 members nationally, most of whom are practising lawyers. Membership also includes non-practising layers, academics, policy makers and law students. ALHR is comprised of a National Committee with State and Territory committees.

1.3 ALHR promotes the practice of human rights law in Australia through training, publications and drawing attention to human rights standards. We work with Australian and international human rights organisations to achieve these aims. It is a member of the Australian Forum of Human Rights Organisations and is regularly consulted by government including through the Attorney-General and Department of Foreign Affairs and Trade NGO forums.

1.4 Australian Lawyers for Human Rights ("ALHR") thanks the Committee for the opportunity to contribute to this inquiry and comment in respect of the Migration Amendment (Immigration Detention Reform) Bill 2009.

1.5 ALHR is a national network of Australian lawyers active in furthering awareness, understanding and recognition of human rights in Australia. It was established in 1993, and incorporated as an association in NSW in 1998.

1.6 ALHR has approximately 1,200 members nationally, a majority of whom are practicing lawyers. ALHR's membership also includes judicial officers, academics, policy makers and law students. ALHR is composed of a National Committee with State and Territory committees.

1.7 ALHR main concerns with the amendments are:

1.7.1 That mandatory detention remains

1.7.2 The amendments to s 189 do not extend to those who arrive at an excise offshore place

1.7.3 The lack of independent review of detention

1.8 The ALHR welcomes the proposed s 4AAA of the *Migration Act 1958* and the inclusion of the principles that detention be used as a measure of last resort and that any detention be for the shortest period of time. However the ALHR remains concerned that the amendments do not go far enough to support these principles.

1.8.1 There are broad categories of people that must be detained and the circumstances outlining when a person can be released described in s 189(1B) are not subject to any independent review.

1.8.2 People deemed an "unacceptable risk" seem to be in limbo as s 189(1B) does not apply to them.

1.8.3 People who enter at an excised offshore place are not covered by these legislative reforms.

Unacceptable risk

1.9 An unlawful non-citizen must be detained if they represent an "unacceptable risk to the community" s 189(1)(b)(i). Unacceptable risk is defined in s 189(1A).

1.10 International human rights law accepts that in certain circumstances individuals can be detained. The removal of an individual's liberty is serious and should be constrained. Setting up broad classifications of individuals who should continue to be detained could be open to abuse. There should be an individual determination as to whether detention is necessary in *each individual case* and the courts should review that determination regularly.

1.11 Of concern are those who had their visas cancelled on character grounds pursuant to s. 501 of the *Migration Act 1958*. No consideration of the individual's circumstances is included in the Bill as they are not covered by s 189(1B). We note in this respect the comments made by the Joint Standing Committee on Migration who stated that risk assessments for s 501 detainees should be done on an individual's circumstances taking into account various evidence. They also stated:

> "The Committee notes that, should section 501 detainees be released from detention into the community on bridging visas, they may be subject to parole conditions set by state and territories bodies on their release from prison. In these instances the Committee considers that parole and correctional authorities are more expert in the assessment of 'unacceptable risk' and any decision to detain made by DIAC should only be made after consultation and reference to the relevant authorities."[1]

1.12 ALHR is concerned that the exclusion of such persons on the basis of their immigration status as opposed to their individual circumstances could lead to their detention being "arbitrary" and contrary to our obligations under Article 9 of the International Covenant on Civil and Political Rights. The Human Rights Committee has noted that the 'lawfulness' of detention under domestic law is not the measure of 'arbitrariness' of detention under our international obligations.[2]

[1] Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning,* December 2008, [3.34]. See also recommendation 7 at 54.
[2] *A v Australia* Communication No 560/1993, CCPR/C/59/D/560/1993, 3 April 1997.

Rather detention must be for a proper purpose and proportionate to that purpose to be lawful.

1.13 The Bill also states that s 189(1A) will include those specified to be an unacceptable risk in circumstances prescribed by regulation. It is ALHR's view that Parliament should not allow regulations to state who is an unacceptable risk. This does not ensure sufficient transparency or review. Particularly in light of the fact that s 189(1B) does not apply to them.

Section 189(1B)

1.14 Section 189(1B) provides that "if a detained person is someone mentioned in paragraph (1)(b) (other than subparagraph (1)(b)(i)), an officer must make reasonable efforts to:

(a) ascertain the person's identity;

(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."

1.15 ALHR welcomes the introduction of criteria to assess the ongoing detention of individuals. However more detail is required as to how each of these criteria will be assessed and what would justify the ongoing detention of an individual in respect of each of these criteria. The recent case of Dr Mohammad Haneef demonstrates problems in assessing whether there are character and/or security concerns. Cornelia Rau and Vivian Solon were very high profile cases where problems establishing identity occurred with people suffering from mental health problems.[3]

1.16 ALHR appreciates that some of these details may be left to policy or regulation however is of the view that the deprivation of a person's liberty should only be done in exceptional circumstances and is so serious a matter that it should be clearly stated in the Act.

1.17 Without the ability to seek any independent review of an individual's detention what are considered to be "reasonable" efforts will not be subject to external objective scrutiny.

Review

1.18 The Bill does not mention the ability to seek independent review of a decision to detain made pursuant to s 189(1B).

1.19 In his second reading speech the Minister for Immigration and Citizenship stated that review of detention will take place by a Senior DIAC officer and that the Ombudsman is reviewing cases of individuals in detention after 6 months. This is in line with the previous policy announced in July 2008.

1.20 This policy was the subject of submissions and consultation during the Joint Standing Committee on Migration's Inquiry into Detention in Australia. The ALHR endorses the view expressed in the dissenting report of the JSCM by Petro Georgiou, Dr Alan Eggleston and Senator Hanson-Young. ALHR agrees

[3] Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau" (the Palmer Report) and the "Inquiry into the Circumstances of the Vivian Alvarez Matter" (the Comrie Report).

that public servants should not have an unfettered power to detain without independent external scrutiny.[4] The majority of the JSCM stated that a person should have access to judicial review after 12 months. The ALHR agrees again with the dissenting report that 12 months is too long a period to allow for independent judicial review.

1.21 ALHR endorses the dissenting report's recommendations that:

- "A person who is detained should be entitled to appeal immediately to a court for an order that he or she be released because there are *no reasonable grounds* to consider that their detention is justified on the criteria specified for detention.

- "A person may not be detained for a period exceeding 30 days unless on an application by the Department of Immigration and Citizenship a court makes an order that it is necessary to detain the person on a specified ground and there are no effective alternatives to detention. This is consistent with the Minister's commitment that under the new system 'the department will have to justify a decision to detain – not presume detention'."[5]

1.22 The ALHR submits that there is a need to legislate to allow for independent review of not just the lawfulness, but also the merits of an individual's immigration detention, with the power to enforce a remedy where detention is found to be inappropriate, unnecessary or unlawful.

Exclusion of Excised Territories

1.23 The ALHR is concerned that the amendments do not apply to people who arrive at an excised offshore place. ALHR understands that there are approximately 500 detainees in the detention centre on Christmas Island with another approximately 200 persons in other forms of detention on the island. This represents a significant number. Experience has demonstrated that a very high proportion of these asylum seekers will eventually be recognised as refugees.

1.24 The Joint Standing Committee on Migration recommended that the Australian government apply the detention values announced on 29 July 2008 and the risk-based approach to detention to territories excised from the migration zone.[6]

1.25 ALHR repeats its comments to the JSCM that excision is unprincipled and irrational. It arbitrarily treats boat arrivals differently from other arrivals in respect of processing. The exclusion of such arrivals from the amendments continues their discriminatory treatment.

Conclusion

1.26 ALHR thanks the Committee for this inquiry and is ready to provide evidence if necessary.

[4] They also outlined flaws in the internal DIAC review and Ombudsman's review systems see Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning,* December 2008, 167-8.
[5] Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning,* December 2008, 171.
[6] Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning,* December 2008, 60.