

**Castan Centre for Human Rights Law
Monash University
Melbourne**

**Submission to Legal and Constitutional
Affairs Committee**

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

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The Castan Centre for Human Rights Law welcomes the opportunity to make a submission to the Committee on the Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009. The Castan Centre's mission includes the promotion and protection of human rights. It is in that context that we make this submission. We would like to congratulate the Committee on its decision to open this issue for public comment.

We would like to congratulate the Government on its attempts to articulate and to implement¹ the seven values which underpin Australia's immigration detention policy.² We note that the government has attempted to implement Immigration Detention Policy Value number 2:

Three groups will be subject to mandatory detention: first, all unauthorised arrivals will be detained for the management of health, identity and security risks to the community; secondly, unlawful non-citizens who present unacceptable risks to the community; and thirdly, unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

The Castan Centre welcomes amendments to section 194 in respect of the Temporary Community Access Permission scheme, which promotes the government's value of ensuring the inherent dignity of the human person in immigration detention.

Whilst we respect the right of the Government to formulate policy in this respect, at the outset we would like to re-iterate our concern with the overarching policy of mandatory detention, namely that affirmed by section 4AAA, and with the statutory formulation of the powers which support such detention (namely, sections 189, 196 and 198 of the *Migration Act*). In that context, we have residual concerns about the lack of legislatively sanctioned rights of review of detention and about the continued detention of asylum seekers, including children on Christmas Island. We also have concerns about the scope of the new section 189 which are articulated below.

We repeat the concerns we have previously expressed about treating asylum seekers as immigrants, and about arbitrary detention. We seek here to restate our concerns with the current legal regime only in so far as they relate to the current Bill.

Item 1: new section 4AAA

Section 4AAA affirms the principle that the purpose of detaining a non-citizen is to manage the risks to the Australian community of non-citizens entering or remaining Australia and resolve their immigration status (i.e. to provide a visa or deportation). This provision thus restates the overarching policy of mandatory detention, as affirmed by section 4AAA, read with the statutory formulation of the powers which support such detention (namely, sections 189, 196 and 198 of the *Migration Act*).

¹ Eg the formulation of new *Immigration Detention Standards* and a *Detention Health Framework*.

² See <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> accessed 30 July 2008.

It accords with Immigration Detention Policy Value number 1: Mandatory detention as an essential component of strong border control.

The meaning of ‘risks to the Australian community’ is defined in the new subsection 189(1A) – see discussion of **Item 9** below.

Although subsection (2), which refers to detention in a detention centre, provides that detention is for ‘the shortest practicable time’ we submit that section 4AAA does not improve Australia’s position in relation to detention.

We restate what we said in our Submission to the Commonwealth Joint Standing Committee on Migration dated 4 August 2008.³ Mandatory detention is often justified while **initial identity checks and immigration screening** takes place – but that continued detention would be arbitrary if it was not necessary or justified in the circumstances and not proportional to the aims pursued.’⁴

The effect of the policy contained in section 4AAA does not fit with Immigration Detention Policy Value numbers 5 and 6:

- 5 Detention in IDCs is only to be used as a last resort and for the shortest practicable time.
- 6 People in detention will be treated fairly and reasonably within the law.

We refer to the situation of asylum seekers on Christmas Island, who are effectively being subject to a penalty for their mode of arrival, in contravention of Art 31 of the Refugees Convention.

Although **Item 6** inserts Note 1A permitting the Minister to approve alternative places of detention, we note that the Government has not acted upon the second report of the Joint Standing Committee on Migration, IMMIGRATION DETENTION IN AUSTRALIA – COMMUNITY-BASED ALTERNATIVES TO DETENTION, tabled 25 May 2009 whose first two recommendation were:

- 1 The Australian Government should reform the bridging visa framework to comprehensively support those released into the community, with appropriate reporting or surety requirements.
- 2 The Government should utilise the reformed bridging visa framework in lieu of community detention until a person’s immigration status is resolved.

It is our submission that detention beyond **initial identity checks and immigration screening** goes beyond the objective of border control. Such policy discriminates unfairly against asylum seekers and those whose immigration status is difficult to resolve.

Items 2 and 3: section 4AA

³ Castan Centre for Human Rights Law, Submission to the Commonwealth Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia*, dated 4 August 2008.

⁴ Ibid at p.15.

The Castan Centre welcomes the strengthening of the values adopted by the Liberal-National coalition government in 2005 explicitly banning the detention of minors, or those reasonably suspected of being a minor, in immigration detention centres, in section 4AA. The amendments extend to specify that the best interests of the child are a primary consideration in any decision of any officer about where to detain a minor under section 189 of the Act.

This is consistent with Immigration Detention Policy Value number 3: Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.

However we are concerned that children still continue to be effectively detained with their families on Christmas Island.

Items 8, 9, 10: section 189

Previously the discretionary and contested scope of section 189 was a matter of concern.⁵

The amendments to section 189 now provide some welcome guidance to officers in the application of mandatory detention in regards to particular classes of people. Within this context, non-citizen arrivals **must** be detained if they come within one of three categories of persons who have not been ‘immigration cleared’ or whose visa has been cancelled under section 190, or who are assessed as presenting an ‘unacceptable risk’. Except in relation to the last category, the officer must then make reasonable efforts to ascertain the person’s identity, and whether the person is ‘of character concern’, ascertain health and security risk **and** then resolve the person’s immigration status.

The meaning of ‘unacceptable risk’ is defined in proposed **section 189(1A)** in terms of ‘national security’ (related to exercise of powers under the section 501, section 501A and section 501B ‘character’ provisions) plus persons who have overstayed an enforcement visa and ‘circumstances prescribed by the regulations apply in relation to the person’ (section 189(1A)(d)).

Our concerns with **section 189(1A)** are as follows:

The meaning of ‘national security’

The section 501 provisions are based on a character test (see section 501(6)) which is primarily directed to persons with criminal records. Although section 501A and section 501B refer to the ‘national interest’, these provisions are not

⁵ See Submission to the Senate Legal and Constitutional References Committee on Inquiry into the administration and operation of the Migration Act 1958, prepared by Associate Professor Susan Kneebone with the assistance of Ms Edwina Howell, for the Castan Centre for Human Rights Law (July 2005) pp 7-8; S Kneebone, ‘Before the High Court: *Ruddock and Others v Taylor*’ (2005) 27 Sydney Law Review 143 at 160-162.

primarily concerned with ‘national security’. The objects clause – section 4 also refers to the ‘national interest’. This proposal introduces a new term whose meaning is unclear.

The meaning of ‘circumstances prescribed by the regulations apply in relation to the person’

We are concerned at the use of the power to regulate in this way. The criteria which determine the length of detention should be spelt out in primary legislation. We refer to our Submission to the Commonwealth Joint Standing Committee on Migration dated 4 August 2008.⁶

Our concern with **section 189(1B)** is as follows:

The scope of ‘knows or reasonably suspects’ is unclear as there is no legislative right of review provided. Thus some of the same issues which arose in relation to the previous section 189 persist. In the absence of a legislatively based review mechanism the time-frame for the operation of the discretion is unclear. This provision thus effectively sanctions ‘arbitrary detention.’

The Castan Centre is concerned at the lack of legislation as to appropriate or specific lengths of detention and review mechanisms. In particular, new administrative policies of three-monthly senior officer reviews and new six-monthly Commonwealth Ombudsman reviews are still not entrenched in the legislative amendments. The underlying concern is that a lack of clear judicial review mechanisms for mandatory detention is potentially in breach of the prohibition of arbitrary detention contained in Article 9(1) of the ICCPR.

There is a failure to implement arguably the most important Immigration Detention Policy Value number 4: Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.

⁶ Castan Centre for Human Rights Law, Submission to the Commonwealth Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia*, dated 4 August 2008, pp 14-16.