Law Council
OF AUSTRALIA

31 July 2009

Mr Peter Hallahan
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan,

INQUIRY INTO THE MIGRATION AMENDMENT (IMMIGRATION DETENTION REFORM) BILL 2009

The Law Council is pleased to have the opportunity to comment on the provisions of the *Migration Amendment (Immigration Detention Reform) Bill 2009* (the Bill).

The Law Council welcomes the introduction of the Bill which is designed to give legislative effect to the Commonwealth Government's *New Directions in Detention Policy,* announced on 29 July 2008. In particular, the Law Council welcomes the changes to mandatory detention in the Bill, which provides that detention will be mandatory only if certain criteria are met.[1] The Council is also pleased to see the inclusion of the principle that detention should take place for the shortest practicable time and that children should not be detained in detention centres.[2]

Despite these positive features, the Law Council notes that these reforms do not completely remove the mandatory detention aspects of Australia's immigration policy, nor do they appease the full range of human rights concerns previously raised by the Law Council and highlighted by international human rights bodies. The proposed reforms also do not seek to implement the findings of the Joint Standing Committee on Migration's recent Inquiry into Immigration Detention in Australia.[3]

In particular, the Law Council is disappointed that the proposed amendments fail to prevent indefinite immigration detention and do not include the provision of judicial oversight of the lawfulness and merits of a person's immigration detention.

As a result, the Law Council is of the view that further reforms are needed to ensure Australia's immigration policy meets international human rights standards and does not continue to be characterised by mandatory, punitive and arbitrary features.

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[1] Proposed ss189(1),(1A), (1B) and (1C).
[2] Proposed ss4AA and 4AAA.
[3] Joint Standing Committee on Migration, *Immigration Detention in Australia: A new beginning - Criteria for Release from Detention* (1 December 2008).

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

For the purposes of the present Inquiry, the Law Council is pleased to endorse the submission made by the Law Institute of Victoria ('the LIV').

This submission raises a number of specific concerns with the provisions of the Bill, which are shared by the Law Council. These concerns include:

- Unclear affect of proposed section 4AAA on interpretation of *Migration Act*

  - Proposed section 4AAA affirms certain principles pertaining to immigration detention, including that a non-citizen must only be detained in an immigration detention centre as a measure of last resort and for the shortest practicable time. While the Law Council supports the inclusion of these principles in the *Migration Act*, the effect of section 4AAA on the interpretation of the other provisions of the Act is unclear. The Law Council supports the LIV's recommendation that section 4AAA be amended 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.

- Resolving immigration status as a purpose of detention

  - Proposed subsection 4AAA(1)(b) provides that as a principle, a purpose of detention is to resolve the non-citizen's immigration status. Like the LIV, the Law Council is of the view that the resolution of a person's immigration status should not be a primary purpose of immigration detention. This view is consistent with the Government's 2008 policy statement which indicated that the purpose of immigration detention should be to conduct identity, health and security checks. The Law Council supports the LIV's recommendation that proposed subsection 4AAA(1)(b) of the Bill be deleted.

- Determining 'unacceptable risk to the Australian community'

  - The proposed amendments to section 189 provide that immigration detention is only mandatory where an officer knows or reasonably suspects that a person is an unlawful non-citizen, and where the person meets one of the criterion listed in subsection 189(1)(b)(i)-(v). One of these criteria is whether the person presents an 'unacceptable risk to the Australian community', as defined in proposed subsection 189(1A).[4] The Law Council shares the LIV's concerns regarding the operation of proposed subsection 189(1)(b)(i) and its interaction with other key provisions of the *Migration Act*, such as section 501. The Law Council is also concerned that the definition 'unacceptable risk to the Australian community' can be amended or added to by Regulation. Like the LIV, the Law Council recommends that the term 'unacceptable risk to the Australian community' should be clearly defined in the *Migration Act* and not subject to change by subordinate legislation.

  - The Law Council also shares the LIV's concern that proposed subsection 189(1C) provides a broad 'catch all' discretion, allowing an officer to detain a person where he or she does not meet the criteria listed in subsection 189(1). The Law Council supports the recommendation that proposed

[4] Proposed s189(1)(b)(i).

subsection 189(1C) be amended to include a list of factors that an officer must take into account when exercising his or her discretion under this provision.

- Lack of time limits on conducting identity, health and security checks

  - The Law Council supports the LIV's recommendation that the *Migration Act* include time limits on the period required for the Department to complete identity, health and security checks under proposed subsection 189(1B). A time limit of 30 days is proposed by the LIV. Should checks not be completed within this period, it is recommended that the Department be required to apply to the Federal Magistrates Court for an Immigration Detention Order. This would provide increased scrutiny of immigration detention..

- Temporary community access permissions

  - The Law Council supports the introduction of temporary community access permissions (TCAPs) which will enable detainees to make short term community visits, for example to attend weddings, funerals, medical assessments or vocational training. However, the Law Council notes that the decision to grant a TCAP is subject to the discretion of the Departmental officer and little guidance is provided in the Bill as to the considerations relevant to exercising that discretion. Further, the Bill provides that a decision to grant a TCAP is non-compellable and non-reviewable. The Law Council supports the LIV's recommendation that the Bill include some form of review or appeal mechanism for persons requiring TCAPs and that the Bill be amended to set out the grounds on which this mechanism can be sought.

The Law Council supports these and the other observations contained in the submission prepared by the LIV.

As an additional observation, the Law Council notes that access to appropriate legal services remains a critical problem for many detainees. There continue to be large waiting lists for detainees seeking to access legal aid services. This lack of timely legal assistance has significant impacts on the ability of detainees to exercise their legal rights and also delays the timely resolution of a detainees' immigration status. The Law Council is of the view that all immigration detainees should have access to timely, publicly funded legal advice.

Yours sincerely,

Bill Grant
Secretary-General