Submission No 85a

AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

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Joint Standing Committee on Migration
Department of House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600p

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Dear Inquiry Secretary

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

Matthew Zagor and Susan Harris Rimmer are in Canberra, Eve Lester is in Melbourne and Alice Edwards is available by phone from the UK. We stand ready to give evidence at a hearing if required.

Kind regards

Susan Harris Rimmer
President, Australian Lawyers for Human Rights

Australian Lawyers for Human Rights

Supplementary Submission to the Joint Standing Committee on Migration

Inquiry into immigration detention in Australia

About ALHR

1. Australian Lawyers for Human Rights (ALHR) was established in 1993, and incorporated as an association in NSW in 1998 (ABN 76 329 114 323).

2. ALHR is a network of Australian lawyers active in practising and promoting awareness of international human rights standards in Australia. ALHR has a national membership of about 1200 lawyers, with active National, State and Territory committees.

3. Through training, information, submissions and advocacy, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

New Immigration Detention Values

4. ALHR would like to attach for the Committee's consideration an opinion editorial published in the Canberra Times on 30 July 2008, the day after the Minister's announcement at ANU (**Attachment A**). Our concern remains that mandatory detention quickly becomes arbitrary without rigorous criteria and review of decision-making. The 'values' need to be fleshed out as soon as possible to answer the currently unanswered questions about how the values will operate.

5. ALHR would like to lend its support for the submissions by UNHCR and RILC in relation to the new 'values' and echo their recommendations.

6. We would urge the Committee to revisit the Palmer recommendation relating to an independent statutory officer to act as an Immigration Health Commissioner.

7. We would urge the Committee to use the opportunity of this inquiry to explore options for the resolution of status within the community.

8. We would urge the Committee to take a broad view of detention reform. Is it time to rewrite sections of the Migration Act? Should we delink refugee status from our visa system? Should we rethink the balance and onus of proof in dentition decisions? How do we marry independent and transparent review of Department decisions with the need for the Department to 'own' these decisions? Do we still need IDAG? What resource issues are there for DIAC as a consequence of the new values? Should we allow reviews of detention decisions to go straight to a Federal Magistrate, and grant the Magistrate the power to release or order compensation? Does the contract between the private service provider and DIAC need reform? What are the roles and duties of the Immigration Ombudsman and the Australian Human Rights Commission, and can they be more strategically used? The Committee might profit from a Legal Roundtable session to creatively engage with some of the bolder law reform suggestions. What is politically possible in the short term in relation to immigration detention might profit from some long-term strategic planning.

9. ALHR stands ready to assist the Committee with the inquiry if needed.

Attachment A

Borders erected around unlimited right to detain (30 July 2008)

Fourteen years after the federal ALP introduced the current legal basis of detention, Immigration Minister Senator Chris Evans has outlined the new approach to detention agreed by the Rudd Labor Government. In essence it has committed itself to seven "values", the first being that mandatory detention remains an "essential component of strong border control".

But the second value sets out the categories of those to whom mandatory detention will apply. They are: all arrivals for health, identity and security checks, and to them only for a short time; people who present an unacceptable risk to the community; and people who refuse to comply with visa conditions. The third value takes the Coalition "rebel" reforms on children in detention further by placing an outright prohibition on the practice.

Values four to seven attempt to bring detention in line with basic human rights principles, such as the principle that indefinite detention is not acceptable (despite High Court judgments to the contrary); that detention should be a last resort; that detainees should be treated fairly and lawfully; and that conditions of detention should ensure individual dignity. All these values, apart from the first, represent important reforms to the current system.

Mountains of paper have been produced discussing the problems inherent in Australia's current system of immigration detention, in reports by federal parliamentary committees, the UN Human Rights Committee and the Human Rights and Equal Opportunity

Commission, by the Commonwealth Ombudsman, in the Palmer and Comrie reports and in psychological and medical literature not to mention civil society campaigns.

The theme of these reports is essentially that Australia's current system of detention has proved itself inherently and irredeemably problematic, and ultimately irreconcilable with basic human rights and respect for human dignity. For example, mandatory detention has a propensity to result in arbitrary detention, which has taken an unacceptable psychological toll on a vulnerable community. The use of private contractors to administer detention centres has led to problems with accountability and transparency.

Our detention practices have at times resulted in international embarrassment and condemnation on the world stage. Moreover, research has shown the availability of more effective and cheaper alternative community models, which would still ensure the integrity of the migration system.

Evans's reforms achieve the first stated aim, that of making detention a risk-based system instead of a punitive one, where the onus of proof is on the department to justify detention and the decision is constantly reviewed by the department and the Ombudsman.

The only problem will be in ensuring that the department takes a rigorous view of who really constitutes a "risk" to the Australian community (as opposed to the recent treatment of Dr Mohamed Haneef).

The minister also foreshadowed the move to a community model of detention, such as Melbourne's successful Hotham Mission project.

The more difficult reform to implement will be the idea of expedited removal. As Evans reiterated, "People who have no right to be here and those who are found not to be owed protection under Australia's international obligations will be removed." He also noted that extensive legal processes prolonged detention. This is correct in both logic and law, and this line of thought often exercised the previous minister, Philip Ruddock, in his attempts to limit judicial review of immigration decisions.
The problem is, this system works only if Australia gets the decision right the first time, and in such a manner that the applicant and the Australian community have faith in the fairness of the decision.

For Evans's plan to work, primary decision-making in immigration matters, especially complex asylum cases, must be exponentially improved. At present, more than 21 per cent of departmental determinations are overturned and the Federal Court sets aside more than one-quarter of tribunal decisions.

The one aspect at odds with the new humane and principled approach outlined in the minister's speech is maintaining the exclusion zone and the non-statutory decision making process for people who arrive by boat and are taken to Christmas Island. This is the cohort of people most likely to be asylum-seekers and to engage Australia's protection obligations.

Excision is a legal fiction, unprincipled and irrational. It was put in place to avoid Australia's international obligations and the scrutiny

of our courts. Excision arbitrarily discriminates between boat arrivals and other arrivals. Evans admits harsh detention is not necessary to deter people smugglers.

The only real improvement for asylum-seekers arriving by boat is access to independent legal aid (although there are practical impediments, considering the distances involved); access to a form of review by an "independent professional" (which requires further explanation); and access by the Immigration Ombudsman to provide further oversight of the process. It is not yet known what level of access or review powers the Government will grant the regional office of the UN refugee agency, the UNHCR.

Access and resources for the Human Rights and Equal Opportunity Commission's monitoring role (now Australian Human Rights Commission) will also be critical to perceptions of the propriety of using Christmas Island.
The UNHCR found the process used in Nauru to be questionable. There will be no independent merits review by an Australian tribunal or access to judicial review in an Australian court. There is no obligation to achieve processing of protection visa applicants within 90 days, and no obligatory tabling in Parliament of the Ombudsman's findings or recommendations.

In response to a question yesterday, the minister seemed to suggest that the new values did not necessarily apply to Christmas Island.

The reforms therefore offer a major improvement for those on the mainland. But they do not address the discriminatory treatment and processing that exist simply by reason of a person's mode of arrival.

Some hurdles remain to be to overcome, then, in Australia's quest for a fair balance between a migration system that has integrity and one that is humane. Still, this is an important first step.

Susan Harris Rimmer is president of Australian Lawyers for Human Rights.