PILCH VIC Public Interest Law Clearing House

Submission to the Joint Standing Committee on Migration Review of Immigration Detention

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1. Introduction

The Public Interest Law Clearing House (Vic) Inc (PILCH) welcomes the opportunity to comment on the Australian Parliament's Joint Standing Committee on Migration Review of Immigration Detention (***Review***).

PILCH does not intend to comment on all of the Review's Terms of Reference. As discussed below, PILCH's primary aims are to facilitate access to justice through a number of mechanisms including through co-ordinating pro bono legal service delivery amongst the legal profession. The focus of this submission is, therefore, access to justice in the context of migration matters on which PILCH is in a unique position to comment.

PILCH notes the submission of the Human Rights Law Resource Centre (***HRLRC Submission***) which focuses on the need for Australia's Immigration regime to ensure the full implementation of Australia's obligations under international Human Rights Law. PILCH strongly endorses the HRLRC Submission. PILCH is also grateful for the assistance of the HRLRC in preparing this submission.

2. About PILCH

PILCH is a leading Victorian, not-for-profit organisation which is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.

PILCH coordinates the delivery of pro bono legal services through six schemes:

- the Public Interest Law Scheme;
- the Victorian Bar Legal Assistance Scheme;
- the Law Institute of Victoria Legal Assistance Scheme;
- PILCH Connect;
- the Homeless Persons' Legal Clinic; and
- Seniors Rights Victoria.

PILCH's objectives are to:

- improve access to justice and the legal system for those who are disadvantaged or marginalised;
- identify matters of public interest requiring legal assistance;

- seek redress in matters of public interest for those who are disadvantage or marginalised;
- refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
- support community organisations to pursue the interests of the communities they seek to represent; and
- encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

In 2006-2007, PILCH assisted over 2000 individuals and organisations to access free legal and related services. Without these much needed services, many Victorians would find it impossible to navigate a complex legal system, secure representation, negotiate a fine, challenge an unlawful eviction, contest a deportation or even be aware of their rights and responsibilities.

3. Executive Summary

3.1 PILCH congratulates the Australian Government on its proposed reforms to Australia's immigration detention regime as outlined in the speech of Minister Evans on 29 July 2008.[1] In particular, PILCH applauds the closure of the offshore processing centres on Nauru and Manus Island; the abolition of temporary protection visas; and the introduction of a risk-based approach to detention.

3.2 However, PILCH submits that these proposed reforms do not go far enough.

3.3 It is clear that in order to for Australia's immigration regime to comply international human rights law, any form of immigration detention must be subject to judicial review and not subject to Ministerial discretion. Such process of review should also be recognised in legislation. Further, such judicial review needs to be readily accessible and affordable for those seeking it and be able to be completed in a timely and expeditious fashion.

PILCH makes the follow recommendations:

[1] Chris Evans, *New Directions in Detention – Restoring Integrity to Australia's Immigration System*, speech at Australia National University, Canberra, 29 July, 2008

Recommendation 1

That the protections and principles outlined in points (c) – (g) of Minster Evans' speech of 29 July 2008 be recognised in legislation and not be a matter of policy subject to discretion.

Recommendation 2

That the policy of Mandatory Detention be abolished in favour of a system of community-based supervision for asylum seekers.

Recommendation 3

That the right to have detention judicially reviewed be reinstated through legislation.

Recommendation 4

That a statutory system for publicly funded advice and assistance for review in detention matters be implemented. This system should have clearly defined powers and should be binding up on the Federal Government.

Recommendation 5

If the policy of Mandatory Detention is maintained, that a maximum allowable time spent in Immigration Detention be established by legislation, including rights of review as to the lawfulness of the detention if that time is exceeded.

"Seven Key Immigration Values" and Access to Justice

3.4 Introduction

In setting out the proposed reforms to Immigration Detention, the Minister for Immigration and Citizenship proposed "seven key immigration values". These values are as follows:[2]

(a) Mandatory detention is an essential component of strong border control.

(b) To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention:

  (i) all unauthorised arrivals, for management of health, identity and security risks to the community;

  (ii) unlawful non-citizens who present unacceptable risks to the community; and

  (iii) unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

(c) Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.

(d) 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.

(e) Detention in immigration detention centres is only to be used as a last resort for the shortest practicable time.

(f) People in detention will be treated fairly and reasonably within the law.

(g) Conditions of detention will ensure the inherent dignity of the human person.

As yet, the Government has not released details of the extent to which the "seven key immigration values" will be implemented. PILCH share the view of the HRLRC that it is vital that the protections and principles outlined in (c) – (g) be recognised in legislation and not be a matter of policy subject to discretion.

[2] Ibid.

Recommendation 1

That the protections and principles outlined in points (c) – (g) of Minster Evans' speech of 29 July 2008 be recognised in legislation and not be a matter of policy subject to discretion.

3.5 Mandatory Detention

In its submission, the HRLRC considers that that mandatory detention constitutes a violation of international human rights law. PILCH strongly supports the HRLRC in this view. We reiterate the HRLRC's position that human rights principles require that deprivation of liberty be necessary and proportionate, with the onus being on the state to justify the necessity and proportionality of such detention.[3]

In setting out the Australian Government's new approach to immigration detention, Minister Evans stated that persons will be detained only if the need is established. The presumption will be that persons will remain in the community while their immigration status is resolved. PILCH supports this approach in principle, but believes that it is inconsistent with mandatory detention.

Recommendation 2

That the policy of Mandatory Detention be abolished in favour of a system of community-based supervision for asylum seekers.

3.6 Access to Justice

PILCH considers that the principle of ensuring equitable access to justice underpins a fair and efficient civil justice system. Access to justice means that there is equitable access to the legal process and there are dispute resolution processes that are widely available, explicable and affordable.[4]

PILCH considers that no person's access to justice and the legal system should be prejudiced by reason of their incapacity to obtain adequate information about the law or the legal system, or their inability to afford the cost of independent advice or legal

[3] See, e.g., *R v Oakes* [1986] 1 SCR 103, 105, 136-7; *Minister of Transport v Noort* [1992] 3 NZLR 260, 283; *Moise v Transitional Land Council of Greater Germiston* 2001 (4) SA 491 (CC), [19].

[4] Australian Law Reform Commission, *Managing justice: A review of the federal civil justice system,* Report No 89, January 2000, 81.

representation.[5] For example, 14.53% of all matters the Victorian Bar Legal Assistance provided *pro bono* assistance to during 2007-2008 related to immigration.[6] An overwhelming majority of these claims come from people seeking Asylum. Whilst *pro bono* assistance is available to some, many other applicants remain unrepresented.

Accordingly, notwithstanding the Government's proposed Immigration Detention reforms, PILCH submits that meaningful access to justice will not be a reality for immigration detainees. PILCH submits further that the facilitation of Access to Justice for detainees should be provided by the Federal Government and not reliant upon the goodwill of the legal sector.

3.7 Judicial Review

The previous Australian Government implemented a consistent and sustained policy over a number of years to drastically scale back the remedies available to detained persons and to reduce the scope of judicial and other review available in relation to administrative decisions made under the Migration Act.

In her second reading speech before the Senate in relation to the *Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth)*, the Parliamentary Secretary to the Minister for Immigration, Senator Kay Patterson, noted that the purpose of the bill was 'to give legislative effect to the government's election commitment to reintroduce legislation that in migration matters will restrict access to judicial review in all but exceptional circumstances.'[7]

The ability to challenge the lawfulness of detention is an important safeguard against arbitrary detention and is protected at international law. For example, the International Covenant on Civil and Political Rights ("ICCPR") requires that detainees be able to challenge the lawfulness of their detention before a court.[31]

The Office of the High Commissioner for Human Rights has said that a deprivation of liberty is not arbitrary if it results from a final decision taken by a domestic judicial institution

[5] Ibid 319.

[6] The Victorian Bar Legal Assistance Scheme provided assistance in 523 matters for the 2007/08 period. Of these 76 were Immigration matters.

[7] Parliament of Australia, Parliamentary Debates, Senate, 2 December 1998, 1025 (Senator Kay Paterson).

and is in accordance with domestic law.[8] However, without access to judicial review, mandatory immigration detention does not satisfy this requirement.

Australia's detention regime has been the subject of numerous criticisms by the UN Human Rights Committee (***HRC***). For example, in *Baban v Australia*, the HRC stated that:[9]

> [j]udicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1[10].

The HRC was highly critical of the fact that, in that case,[11] judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and that the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant.

In *A v Australia*,[12] the HRC noted that 'every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed'.[13] Furthermore, the HRC considered that judicial review of the lawfulness of detention must be, in its effects, real and not merely formal.'[14] PILCH is concerned that the Government's proposed reforms, while going some way to opening 'formal' avenues for periodical review, will not be 'real' judicial review, particularly in the absence of legislative force.

The HRC and the report of the United Nations' Working Group on Arbitrary Detention ('Working Group Report') have both expressed concern about the lack of adequate judicial review of immigration detention under Australia's existing regime. The Working Group Report noted that, although avenues for judicial review exist, 'it is unlikely that these

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[8] Office of the High Commissioner for Human Rights, *Fact Sheet No 26 on the UN Working Group on Arbitrary Detention*, at part IV(B).

[9] UN Doc CCPR/C/78/D/1014/2001 (6 August 2003) at [7.2].

[10] International Covenant on Civil and Political Right, Article 9, Part 1: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

[11]. UN Doc CCPR/C/78/D/1014/2001 (6 August 2003).

[12] Ibid at [7.2]

[13] UN Doc CCPR/C/59/D/560/1993 (3 April 1997) at [9.4].

[14] Ibid at [9.5]

remedies are effective in ordinary immigration detention cases', due to the difficulty of detainees obtaining, and being able to pay for, legal representation.[15]

Persons in detention therefore do not have any practical or tangible means of challenging detention. The Rudd Government has been silent as to the restoration of judicial review for migration detention. It is PILCH's submission that until such rights are restored Australia's Immigration Detention regime will remain manifestly unjust and in breach of Australia's obligations under international law.

Recommendation 3

That the right to have detention judicially reviewed be reinstated through legislation.

3.8 Statutory System

In his speech Minister Evans' said that "Henceforward, asylum seekers will receive publicly funded advice and assistance, access to independent review of unfavourable decisions and external scrutiny by the Immigration Ombudsman".[16] Such a system would clearly improve access to justice.

However, until such rights are enshrined in legislation, they will not be a substitute for judicial review. Moreover, the Government has not provided any detail as to the proposed powers of the Ombudsman in relation to asylum seeker matters, in particular whether the Ombudsman will have adequate investigative powers and whether the findings of the Ombudsman will be binding on the Government. Doubtless the Ombudsman's powers will not be commensurate with those of the Court (or avenues of judicial review will simply have been reinstated), meaning the Government's proposed reforms will fall short of a genuine independent and fair review mechanism.

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[15] Commission on Human Rights, Economic and Social Council, United Nations, Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention, Visit to Australia, UN Doc E/CN.4/2003/8.Add 2 (24 October 2002). See also Report of Justice P N Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, Mission to Australia 24 May to 2 June 2002: Human Rights and Immigration Detention in Australia.

[16] Chris Evans, *New Directions in Detention – Restoring Integrity to Australia's Immigration System*, speech at Australia National University, Canberra, 29 July, 2008

Recommendation 4

That a statutory system for publicly funded advice and assistance for review in detention matters be implemented. This system should have clearly defined powers and should be binding up on the Federal Government.

3.9 Time Limits

The absence of a time limit for immigration detention poses a grave risk that detention will become indeterminate. Indeterminate immigration detention has been recognised as causing numerous mental health conditions in people in detention.[17]

This was recognised in the Working Group Report which recommended that 'a reasonable time limit for detention should be set, after which the person would be given a bridging visa and lodged with family or friends, or in a reception centre located in an urban area'[18].

Recommendation 5

If the policy of Mandatory Detention is maintained, that a maximum allowable time spent in Immigration Detention be established by legislation, including rights of review as to the lawfulness of the detention if that time is exceeded.

[17] See, for example, A v Australia UN Doc CCPR/C/76/D/900/1999 and A v Australia UN Doc CCPR/C/59/D/560/1993

[18] *Working Group Report*, p.19