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**Re: Migration Amendment (Immigration Detention Reform)  
Bill 2009**

Victorian Council for Civil Liberties (Liberty Victoria)

Submission prepared by Julian Burnside AO QC\*  
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31 July 2009

Peter Hallahan  
Committee Secretary  
The Senate  
Standing Committee on Legal and Constitutional Affairs  
Canberra ACT

Dear Mr Hallahan,

**Re: Migration Amendment (Immigration Detention Reform) Bill 2009**

1. Thank you for the opportunity to comment on the above Bill.
2. The Victorian Council for Civil Liberties (Liberty Victoria) is one of Australia's leading human rights and civil liberties organizations and works to defend and extend human rights and freedoms in Victoria.
3. Liberty Victoria welcomes the Bill as being, generally speaking, a sensible retreat from the worst aspects of indefinite mandatory detention.
4. We raise the following matters of concern regarding Temporary community access permission:
  - a. clause 12 (introducing 194A(4)) provides for temporary community access permission. This is a welcome initiative. It provides a mechanism by which unnecessary detention can be avoided.
  - b. clause 12 (introducing 194A(4)) provides that an authorised officer does not have a duty to consider whether to exercise the power to make, vary or revoke a temporary community access permission.
  - c. clause 19 has the effect of making a decision about temporary community access permission non-reviewable.
  - d. A non-compellable discretion which is non-reviewable is intrinsically unreasonable. It deprives the temporary community access permission of much of its efficacy. The Bill provides criteria for the grant of temporary community access permission. The provisions which make the decision to grant permission non-compellable and non-reviewable convert it into an arbitrary power. Individual liberty is too precious to be the subject of arbitrary power.
5. Accordingly, we suggest that decisions concerning temporary community access permission should be compellable and reviewable.
6. We note in passing that an alarming number of decisions under the Migration Act are privative clause decisions (see Migration Act s. 474). Privative clause decisions are almost completely immune from examination by the Courts. Section 474(1) provides:

A privative clause decision:

  - (a) is final and conclusive; and
  - (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.”

7. Although the operation of privative clauses has been read down somewhat by the Courts, they nevertheless operate in ways which can work grave injustice.
8. In an area which has the capacity to affect a person’s liberty and family life in such profound and direct ways as the Migration Act does, declaring crucial decisions to be privative clause decisions can, and does, lead to harsh and unreasonable results.
9. Liberty Victoria also contends that the detention values included in the Bill should apply to all of Australia including Christmas Island, which is excluded as “an excised offshore place”. It is time responsibility for immigration detention extends beyond mainland Australia.
10. It is commendable that the government has reiterated its commitment that ‘a minor is to be detained as a measure of last resort’ (Section 4AA) but this section still remains deficient. The Bill should state that children should not be detained in any kind of secured immigration detention facility. Currently, children are being detained in facilities that are ultimately detention centres without the label, under guarded supervision and unable to freely move.

Yours Sincerely,

Julian Burnside

Immediate Past President

Liberty Victoria

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