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Your Ref: Ms Julie Dennett

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Ms Julie Dennett
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Senate Standing Committees on Legal and Constitutional Affairs
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Dear Ms Dennett

MIGRATION AMENDMENT (DETENTION REFORM AND PROCEDURAL FAIRNESS) BILL 2010

We write on the advice of the Queensland Law Society's International Law and Relations Section and thank you for the opportunity to provide comments on this Bill.

We have reviewed the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* (the "Bill") which sets out proposed amendments to the *Migration Act 1958* (Cth) (the "Act") and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the "ADJR Act") and our comments are noted below.

1. Support for certain amendments

We welcome many of the amendments contained in the Bill, particularly those contained in the following clauses.

1.1 Schedule 1, clause 1

Schedule 1, clause 1 inserts a new section 4AAA into the Act. This provision establishes several principles that are pertinent to asylum-seekers. These principles hold that:

- indefinite or arbitrary immigration detention is not acceptable and its length and conditions must be subject to regular review;
- immigration detention must only be used as a last resort and for the shortest practicable time;
- people in immigration detention must be treated fairly and reasonably within the law; and
- immigration detention living conditions must ensure inherent human dignity.

1.2 Clauses 2-4

Clauses 2-4 replace the word 'must' in sections 42(4), 189(1) and (2) of the Act with 'may'. The removal of the word must from the mandatory detention provisions, allows for flexibility in the detention of 'unlawful non-citizens'. Hopefully this change will be used in practice to limit the number of people who are detained.

1.3 Clause 5

Clause 5 inserts two new sections into the Act which require an officer to provide written reasons for detaining a person under section 189. This allows the detained person to apply for judicial review of the detention decision and limit the period of detention to no more than 30 days. We support this amendment.

1.4 Part 3 (clauses 8-28)

Part 3 (clauses 8-28) repeals current definitions in the Act which relate to excised offshore places and asylum-seekers entering Australia at offshore locations excised from the migration zone who become unlawful non-citizens ('offshore entry persons') and provisions which employ those terms, including the following proposed amendments:

- clause 14 repeals the current section 46A of the Act which provides that visa applications are not valid if they are made by offshore entry persons;
- clause 18 repeals the current section 193(1)(c) which states that persons detained under s 189 are not entitled to be told of certain sections of the Act applicable to them, their detention and visa applications;
- clause 22 repeals the current section 198A which allows offshore entry persons to be removed to other countries to be processed; and
- clause 27 repeals the current section 494AA which prevents offshore entry persons from instituting certain legal proceedings in relation to their applications.

1.5 Part 4 (clauses 29-48)

Part 4 (clauses 29-48) amendments repeal current provisions in the Act which prevent certain migration decisions from being challenged, appealed or reviewed, or which restrict natural justice hearing rules from applying to visa applications, visa cancellations and Migration Review Tribunal or Refugee Review Tribunal reviews.

1.6 Clause 49

Clause 49 repeals current provisions dealing with continued or indefinite detention.

1.7 Schedule 2, clause 1

Schedule 2, clause 1 amends the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the ADJR Act') to remove privative clause decisions from the list of decisions to which the ADJR Act does not apply.

2 General issues

We believe that Australian law in relation to asylum-seekers should accord with international law principles and standards, especially those set out in the 1951 *Convention Relating to the Status of Refugees*, its 1967 *Protocol Relating to the Status of Refugees* (Refugee Convention) and human rights treaties to which Australia is a party.

The Australian government has an obligation to adhere to its responsibilities under the Refugee Convention and international human rights law. It follows from this that no matter where or how asylum-seekers and detained 'unlawful non-citizens' enter this country, they should enjoy rights to which they are entitled under international law, including human rights, the right to be provided with information about relevant Australian law and the same (or similar) rights in relation to visa applications which are enjoyed by other potential immigrants.

In addition, we do not consider that decisions made under the Act should be treated differently from other administrative decisions. Rather, the same (or similar) review and appeal rights should apply in relation to all such decisions.

Finally, we welcome the amendments reviving appeal and review rights in relation to migration decisions and restoring natural justice principles to procedures covered in the Act.

We note that the Law Council of Australia (LCA) has expressed similar concerns regarding the lack of a formal framework for the provision of legal advice to offshore entry persons seeking judicial review of decisions to refuse to consider protection visa applications,[1] and the need to ensure that all asylum-seekers have access to adequate legal advice at all stages of the refugee determination process.[2] The LCA has also indicated its support for procedural fairness in the refugee determination process and has urged the Australian government to abolish offshore processing of asylum-seekers.[3]

We note further that the United Nations High Commissioner for Refugees (the UNHCR) has published guidelines stating that detained asylum-seekers should be entitled to the following minimum procedural guarantees:

(i) to receive prompt and full communication of any order of detention, together with the reasons for the order, and the rights in connection with the order, in a language and in terms they understand;
(ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance;
(iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuance of detention at which the asylum-seeker or his representative would have the right to attend;
(iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain;

[1] Law Council of Australia, *Précis*, 12 April 2011, 2-3.
[2] Law Council of Australia, *Précis*, 15 February 2011, 2-3.
[3] Law Council of Australia, *Précis*, 15 February 2011, 3; also Law Council of Australia, *Précis*, 16 November 2010, 1; and Law Council of Australia, *Précis*, 14 July 2010, 2.

(v) to contact and be contacted by the local UNHCR office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.[4]

3 Concern regarding other amendments

Our concerns in relation to the following amendments proposed in the Bill are noted below.

3.1 Clause 1

Clause 1 inserts into the Act new section 4AAA establishing asylum-seeker principles:

- however, neither the amendments nor the Act contain a definition of 'asylum seeker' – although it may be assumed that an asylum-seeker is a person who matches the definition set out in the Refugee Convention, this should either be expressly stated or a definition inserted into the Act;[5]
- sub-clause 4AAA(4) states that '[a]ny person making any decision about refugees, asylum seekers, immigration detention or a related matter under this Act [...] must have regard to the asylum seeker principles' – this would mean that the principles have potentially very broad application and might have to be taken into consideration by people making decisions unrelated to asylum-seekers (this is another reason why it might be helpful to include a definition of 'asylum seeker'); and
- an additional principle should be included stating that 'all persons seeking asylum are always to be provided with information, forms and legal assistance to do so whilst in immigration detention'.

3.2 Clause 5

Clause 5 inserts into the Act two new sections.

(1) section 195B would require officers to provide written reasons for detaining a person under section 189 of the Act and would also allow detainees to apply to a magistrate to grant a release order or bridging visa if there are no reasonable grounds to justify the detention; and

(2) section 195C would limit detention under section 189 to no more than 30 days unless a court order is sought:

However, it is unclear whether the bridging visas which the magistrate could grant would be the existing bridging visas – perhaps this detail could be clarified More generally, it is unclear what would happen to 'unlawful non-citizens' if they were released under subsections 195B and 195C – would unlawful non-citizens be released without a visa? This clause would benefit from further detail either to confirm that the department would issue a visa that gives the released detainee lawful status, or otherwise to clarify a released detainee's visa status, if s/he were released under either sections 195B or 195C. Although we

[4] United Nations High Commissioner for Refugees (Regional Office), *Submission by the Office of the United Nations High Commissioner for Refugees into the Migration Amendment (Immigration Detention Reform) Bill 2009*, 5 August 2009, [50].
[5] The Migration Amendment (Complementary Protection) Bill 2011 would introduce a complementary protection system for people who do not meet the definition of 'refugee' under the Refugee Convention but who nonetheless face serious harm if returned to their country of origin.

support the principle that detention should not be indefinite or arbitrary, 30 days may not be a realistic period of time in which to expect a person's refugee or visa status assessment to be completed.

3.3 Schedule 2, clause 1

Schedule 2, clause 1 of the Bill repeals schedule 1 paragraph (da) of the ADJR Act to remove privative clause decisions within the meaning of s 474(2) of the Act from the list of decisions to which the ADJR Act does not apply, which is essentially a 'tidying up' provision alongside other clauses which repeal references to privative clause decisions – however, schedule 1 paragraph (db) of the ADJR Act, which lists purported privative clause decisions within the meaning of section 5E of the Act, is left on the list of decisions to which the ADJR Act does not apply, even though earlier clauses also repealed the references to purported privative clause decisions; in order for the 'tidying up' provisions to be consistent, the Bill should also repeal schedule 1 paragraph (db) of the ADJR Act.

We are aware that there are three other Bills amending the Act which are currently before the Parliament: the Migration Amendment (Detention of Minors) Bill 2010, the Migration Amendment (Complementary Protection) Bill 2011 and the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011. Rather than risk confusion by providing here our opinion of the amendments proposed in those Bills, we have provided a submission to LCA on the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* and we hope to comment on the other Bills at a later date.

If you have any questions regarding the issues raised in this submission, please do not hesitate to contact Ms Binny De Saram, a Policy Solicitor with our office on or

Yours faithfully

Bruce Doyle
President