Committee Secretary
Senate Legal and Constitutional Committee
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Set out below are our submissions to the Senate Legal and Constitutional Committee Inquiry into the *Migration Amendment (Immigration Detention Reform) Bill 2009* (**Detention Bill**).

1. Overview

1.1 About the Immigration Advice and Rights Centre

The Immigration Advice and Rights Centre (**IARC**) is the only community legal centre in New South Wales specialising in the provision of advice, assistance, education, training, and law and policy reform in immigration law. IARC provides free and independent advice to almost 5,000 people each year and a further 1,000 people attend our education seminars annually. IARC also produces *The Immigration Kit* (a practical guide for immigration advisers) and *The Immigration News* (a quarterly newsletter), and conducts education/information seminars for members of the public. Our clients are low or nil income earners, frequently with other disadvantages including low level English language skills.

IARC was established in 1986 and since that time has developed a high level of specialist expertise in the area of immigration law. We have also gained considerable experience of the administrative and review processes applicable to Australia's immigration law.

1.2 About the Refugee Advice and Casework Service

RACS is a community legal centre that provides free legal advice and assistance to people seeking refugee status in Australia. It is the only specialised refugee legal centre in NSW.

RACS was established in 1988 at the request of Amnesty International with funding from UNHCR in order to meet the increasing demand for legal assistance to people seeking asylum in Australia. Since that time RACS has provided advice and full casework representation to well over 5,000 asylum seekers. In the past 5 years alone, RACS has represented over 800 asylum seekers from more than 50 countries, over 90% of who were found to be owed protection obligations.

RACS aims to promote the issues asylum seekers face by raising public awareness and to advocate for a refugee determination process which both protects and promotes the rights of asylum seekers in the context of Australia's international obligations.

1.3 General overview

IARC and RACS welcome the principles and measures introduced by the Detention Bill and would like to acknowledge the important changes that have been introduced recently in an attempt to create a more humane immigration system in Australia. Nevertheless there remain some fundamental concerns about the proposed detention system, in particular the retention of mandatory detention and the excision policy.

While we set out below an outline of concerns we hold about specific issues in relation to the Detention Bill it is important to note that to date the relevant regulations and guidelines have not been released and therefore there remain many questions, the answers to which will impact on our final evaluation of the Detention Bill and its practical implementation.

Excluding the fundamental issues of the abolition of mandatory detention and the excision policy (as we understand these are not negotiable policies at the current time), in this submission we make the following recommendations, as discussed in detail below.

- ***Recommendation 1*** – Relevant draft regulations should be released for comment prior to commencement.
- ***Recommendation 2*** – Clear and publicly available guidelines must be developed in relation to the central principles and concepts of the Detention Bill.
- ***Recommendation 3*** – Section 4AAA(1) should be amended to state that a person may be detained for the purpose of resolving their immigration status, where necessary to do so.
- ***Recommendation 4*** – The Detention Bill should be amended to state that the best interests of the child should be a primary consideration in the placement of the child's immediate family as well as the placement of the child.
- ***Recommendation 5*** – Section 4AA(4) should be amended to state that the best interests of the child should be a primary consideration in the decision about where and how the child should be detained.
- ***Recommendation 6*** – A time limit should be placed on the detention of a person for health, security and identity checks (eg 90 days) unless there is evidence to suggest that the person poses an unacceptable risk to the Australian community.
- ***Recommendation 7*** – Mandatory detention should not apply to persons who have had their visa cancelled under section 501.
- ***Recommendation 8*** - The Detention Bill should be amended to include the right of judicial review for persons detained longer than a specified period of time.

- ***Recommendation 9*** – Regulations introducing new bridging visa provisions should ensure that where a person is released from detention on a bridging visa, that bridging visa provides work rights.
- ***Recommendation 10*** – Where a request for a TCAP is refused, written reasons for the refusal should be provided and an internal appeal process made available.

In his second reading speech for the Detention Bill the Minister for Immigration stated that "The Joint Standing Committee on Migration report *Immigration detention in Australia: A new beginning – Criteria for release from immigration detention* has been influential in framing the Government's Policy." Therefore, where relevant, we have referred to this report to support the recommendations outlined above.

2. Concerns regarding the Detention Bill

2.1 Extending principles to excised zones

In the second reading speech for the Detention Bill the Minister states[1]:

> Existing subsections 189(2)-189(5) including detention arrangements for offshore entry persons remain unchanged. Unlawful non-citizens, including offshore entry persons, in excised offshore places will continue to be subject to the existing detention and visa arrangements of the excision policy. Offshore entry persons are unable to apply for any visa in Australia while they remain an unlawful non-citizen unless the minister acts personally to allow them to make a valid visa application.

However, the Minister then goes on to state:

> *First*, in accordance with the Government's Key Immigration Detention Values, and reflecting Australia's international human rights obligations, detention that is indefinite or otherwise arbitrary is not acceptable. **Item 1 of Schedule 1 to the Bill** will embed this value in the Act, by introducing a statement of principle in Part 1 of the Act that, first, a non-citizen must only be detained in an immigration detention centre as a measure of last resort and secondly, that if a non-citizen is detained in an immigration detention centre, then detention will be for the shortest practicable time.

We agree with the Minister that these are important fundamental values that reflect Australia's international human rights obligations. Therefore, these principles should be applied to all persons seeking asylum from Australia, including offshore entry persons.

[1] http://www.minister.immi.gov.au/media/speeches/2009/ce090625.htm

This would be consistent with the recommendations of the report *Immigration detention in Australia: A new beginning - Criteria for release from detention*[2] which stated:

> **Recommendation 9**
>
> The Committee recommends that the Australian Government apply the immigration detention values announced on 29 July 2008 and the risk-based approach to detention to territories excised from the migration zone.

We would submit that it is impossible to reconcile the detention values announced on 29 July 2008, which are sought to be embedded in legislation through the Detention Bill, and the continued processing of asylum seekers on Christmas Island. The remote location, limited access, restricted facilities and lack of resources on Christmas Island means that it is very difficult for asylum seekers, advocates and DIAC to appropriately deal with asylum seekers' immigration matters in a manner which makes the principles of detention as a last resort and for the shortest practical time meaningful. As an example, the practical impact of lack of accommodation, Internet access and interpreters results in delays in the processing of asylum seekers' applications and limits the Australian government's ability to detain them in accommodation other than the detention centre, meaning that this is the first choice rather than last resort.

While we recognise that the Australian government will not give consideration to the abolition of the excision policy at the current time, the Detention Bill relates to the implementation of the detention values. Therefore, it would be appropriate for the Senate Legal and Constitutional Committee to consider how these values impact on territories excised from the migration zone.

2.2 Inclusion of other detention values

While we applaud the inclusion of the principles set out in section 4AAA and section 4AA, we believe it would be an important symbolic step to also embed some of the other detention values announced by the Minister on 29 July 2008 in legislation - in particular the following values:

- People in detention will be treated fairly and reasonably within the law.
- Conditions of detention will ensure the inherent dignity of the human person.

The inclusion of these values would clearly set out the expectations in relation to immigration detention. It would assist to create a culture of respect and dignity in relation to detention and therefore impact on the practical operations of detention centres and alternative forms of detention. As Australia has experienced to its detriment, the removal of such respect and dignity (as has occurred in the past) can be

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[2] available at http://www.aph.gov.au/house/committee/MIG/detention/report.htm

debilitating for vulnerable detainees and can greatly reduce their ability to later integrate with, and contribute to, Australian society.

2.3 Further consultation

The second reading speech states[3]:

> ***2.1 Regulatory reforms to come***
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> In addition to the legislative amendments, the department is currently developing significant accompanying regulatory reform to give effect to the *New Directions in Detention policy*. It is planned that the changes to the Act and the *Migration Regulations 1994* will commence on the same day.

To date no detail has been released about the "significant accompanying regulatory reform". As with most legislative amendments to Australian immigration law, critical aspects of the law are set out in the regulations. It is those provisions that will often determine the practical implementation of the principles outlined in the Detention Bill itself. For example, the regulations setting out the associated bridging visa regime will determine when detainees are able to be released and with what conditions (eg whether they will have access to work rights, Medicare, Centrelink, study conditions).

While we appreciate the opportunity to comment on the Detention Bill, we believe that this consultative process will be severely compromised if the same opportunity to comment is not afforded to relevant stakeholders in relation to the accompanying regulatory reform. Therefore, we would ask the Senate Legal and Constitutional Committee to make a recommendation that the draft regulations are released for public comment prior to their commencement. Our experience with previous amendments to Australian immigration law has shown that this consultation process is often overlooked.

Recommendation 1: The draft regulations should be released for comment prior to commencement.

2.4 Availability of guidelines

As outlined in 2.3 above, while we support the broad principles outlined in the Detention Bill, their practical implementation will be largely determined by the accompanying regulations and policy. Therefore it is crucial if the government is to achieve its aim (as outlined in the Explanatory Memorandum) of increasing "clarity, fairness and consistency" that there are publicly available, clear guidelines on all the major principles and concepts under the Detention Bill. These may be outlined in the Regulations and then expanded upon in Ministerial guidelines and/or Departmental policy.

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[3] http://www.minister.immi.gov.au/media/speeches/2009/ce090625.htm

This would include guidelines on:

- the criteria used in deciding when a person is to be detained under s189(1C) where an officer knows or reasonably suspects that a person is an unlawful non-citizen
- the criteria to be used in making the decision of whether or not to issue a TCAP
- the conditions to be attached to a TCAP
- the criteria to be used in deciding what form of detention would be the most appropriate in the circumstances of a particular detainee
- what constitutes an "unacceptable risk to the public"[4], and
- what constitutes a health risk[5].

> ***Recommendation 2:*** Clear and publicly available guidelines must be developed in relation to the central principles and concepts of the Detention Bill.

2.5 Section 4AAA(1) – Purpose of detention

Section 4AAA(1) as set out in the Detention Bill states that:

> "...as a principle that the purpose of detaining a non-citizen is to:
> (a) manage the risks to the Australian community of the non-citizen entering or remaining in Australia; and
> (b) resolve the non-citizen's immigration status."

We believe that as a principle this places the wrong emphasis on the purpose of detention as being to resolve the non-citizen's immigration status. Detention alone does not resolve a person's immigration status (especially taking into regard the note included following s4AAA which clarifies that resolution means either a visa is granted or the person is removed or deported). In addition, in most cases it is not necessary to detain a person in order to resolve their immigration status (eg a bridging visa can be granted or a person can leave Australia voluntarily).

However, we recognise that in some cases detention may be necessary to enable steps to be taken to resolve their immigration status (eg to remove the person from Australia or to allow the Minister to intervene under s195A). We assume that it is these cases that s4AAA(1)(b) is aimed at. Therefore, we recommend that the section be amended to read as follows:

> "...as a principle that the purpose of detaining a non-citizen is to:
> (a) manage the risks to the Australian community of the non-citizen entering or remaining in Australia; and
> (b) enable resolution of~~resolve~~ the non-citizen's immigration status where it cannot otherwise be resolved."

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[4] See recommendation 6 in *Immigration detention in Australia: A new beginning - Criteria for release from detention* available at http://www.aph.gov.au/house/committee/MIG/detention/report.htm

[5] See recommendation 1 in *Immigration detention in Australia: A new beginning - Criteria for release from detention* available at http://www.aph.gov.au/house/committee/MIG/detention/report.htm

Recommendation 3 – Section 4AAA(1) should be amended to state that a person may be detained for the purpose of resolving their immigration status, where necessary to do so.

2.6 Section 4AA(4) – Best interests of the child

While we support the statement that the best interests of a minor must be a primary consideration in determining where a minor is to be detained we believe that this should also apply in relation to the placement of the minor's family as it is critical that, wherever possible, the family remains united to provide the child with as stable and supportive an environment as possible.

Recommendation 4 – The Detention Bill should be amended to state that the best interests of the child should be a primary consideration in the placement of the child's immediate family as well as the placement of the child.

2.7 Section 4AA(4) – Where and how a minor is detained

While we support the statement that the best interests of the minor must be a primary consideration for the purposes of determining where the minor is to be detained, this should also apply to how the minor is detained. While their physical location is important, it is equally (if not more important) that the minor be provided with appropriate services (eg education, social activities) and support (eg counseling, health services).

Therefore we recommend that s4AA(4) be amended to read:

> "(4) If a minor is to be detained (including in accordance with a residence determination), an officer must, for the purposes of determining where and how the minor is to be detained, regard the best interests of the minor as a primary consideration."

Recommendation 5 – Section 4AA(4) should be amended to state that the best interests of the child should be a primary consideration in the decision about where and how the child should be detained.

2.8 Section 189(1) – Mandatory detention

The merits and dangers of mandatory detention have been discussed in detail elsewhere. We understand that this is not a policy open to reconsideration at this point in time. Therefore, we do not seek to make substantive submissions in relation to the fundamental principle of mandatory detention other than to note our objection to it.

In the absence of reconsideration of the principle of mandatory detention, we commend the government on the legislative recognition of the principle that detention should be as a last resort and for the shortest time possible. However, while supporting this principle

we still have concerns about its application and refer to the report *Immigration detention in Australia: A new beginning - Criteria for release from detention*[6] for a discussion of the issues surrounding detention on the grounds of identity, health or character checking and reiterate concerns raised in submissions to the Committee in relation to that report.

In particular, we have concerns about continued detention where external agency security checks are taking a protracted amount of time. In our experience DIAC's attitude in such situations is generally that it is a situation beyond their control and therefore there is little or nothing that can be done to assist the detainee. We respectfully submit that this not sufficient.

In our submission, a time limit should be placed on the length of time that a person is detained for health, security or identity checking (90 days[7]) whereby after this time they are released on a bridging visa unless there is evidence to suggest that they would pose a risk to the Australian community. Further, where there is such evidence and a consequent decision is taken to continue the detention of the relevant person that continued detention should be subject to judicial review (see section 2.10 below).

If such a time limit is not acceptable, we would at least expect that recommendation 5 of the report *Immigration detention in Australia: A new beginning - Criteria for release from detention*[8] would be adopted in either the Detention Bill or accompanying regulations. This would enable the Inspector General of Intelligence and Security to review the security assessment and evidence where security checking is taking more than 6 months. We would recommend that this should occur after 90 days rather than 6 months as 6 months is an excessively long time for a person to be deprived of their liberty without there being any evidence to suggest that they are a risk to the Australian community.

Recommendation 6 – A time limit should be placed on the detention of a person for health, security and identity checks (eg 90 days) unless there is evidence to suggest that the person poses an unacceptable risk to the Australian community.

2.9 Mandatory detention for s501 cases

Section 189(1), as amended by the Detention Bill requires that persons who have had their visas cancelled under s501 should be subject to mandatory detention. This was discussed in depth in the report *Immigration detention in Australia: A new beginning - Criteria for release from detention*[9] which concluded that such persons should not automatically be detained but should be assessed to see what risk they pose to the Australian community. Recommendation 7 stated:

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6 available at http://www.aph.gov.au/house/committee/MIG/detention/report.htm

7 this was a recommendation made in *Immigration detention in Australia: A new beginning - Criteria for release from detention* available at http://www.aph.gov.au/house/committee/MIG/detention/report.htm

8 available at http://www.aph.gov.au/house/committee/MIG/detention/report.htm

9 available at http://www.aph.gov.au/house/committee/MIG/detention/report.htm

"The Committee recommends that the Department of Immigration and Citizenship individually assess all persons in immigration detention, including those detained following a section 501 visa cancellation, for risk posed against the unacceptable risk criteria.

In the case of section 501 detainees, the Department of Immigration and Citizenship should take into account whether or not the person is subject to any parole or reporting requirements; any assessments made by state and territory parole boards and correctional authorities as to the nature, severity and number of crimes committed; the likelihood of recidivism; and the immediate risk that person poses to the Australian community."

We concur with this recommendation as it creates a much fairer detention system and stops the use of unnecessary detention is s501 cases.

Recommendation 7 – Mandatory detention should not apply to persons who have had their visa cancelled under section 501.

2.10 Right of review for detention

We endorse the recommendations of the Joint Standing Committee on Migration in relation to the need for a right of judicial review where detention continues for more than a prescribed period.

We refer to RACS' submissions to the Joint Standing Committee for the arguments supporting that recommendation (see http://www.aph.gov.au/house/committee/MIG/detention/subs.htm).

However, in our submission the prescribed period should be limited to 90 days. As stated above, a 90 day time limit should be placed on the length of time that a person is detained for health, security or identity checks after which they must be released on a bridging visa unless there is evidence to suggest that they would pose a risk to the Australian community. Where detention continues beyond a 90 day period either due to the existence of evidence suggesting the relevant person poses a risk to the Australian community or otherwise, in our submission the continued detention should be subject to judicial review.

We wish to emphasise our view that detention of individuals who have not been charged let alone convicted of any crime beyond the minimum period necessary to complete basic health, security and identity checks potentially raises serious human rights issues. Therefore, in our submission any decisions to continue such detention whether on grounds relating to the protection of the community or otherwise must be subject to checks and balances and in particular to independent review mechanisms.

Recommendation 8 - The Detention Bill should be amended to include the right of judicial review for persons detained longer than a specified period of time.

2.11 Section 189(1) – Unacceptable risk to the Australian community

Section 189(1A)(d) provides that a person will be subject to mandatory detention where they present an unacceptable risk to the Australian community as prescribed in regulations. The draft regulations in relation to this have not been released but are obviously extremely important given that they create a whole category of persons subject to mandatory detention under Australian immigration law. We reiterate our recommendation 1 that relevant stakeholders need to be consulted about the accompanying regulatory changes prior to their commencement.

2.12 Bridging visas

The current bridging visa regime as set out in the *Migration Regulations* 1994 would not enable the implementation of the principle that unauthorized arrivals should be released on a bridging visa once identity, health and security checking is complete. Currently such persons are only eligible for Subclass 051 bridging visa in a very limited set of circumstances.

It is difficult to make any substantive comments on any new bridging visa pathways but we note that it is important to ensure that person released into the community will have work rights on their bridging visa to enable them to support themselves and their families without undue burden on non-profit organisations.

The recent bridging visa regime changes have placed a clear emphasis on the cooperation of the visa applicant with DIAC as a criterion for determining whether a person can obtain work rights on their relevant bridging visa. For example, a person who has lodged a Ministerial request is able to obtain work rights on their bridging visa only if they held them on their bridging visa at the primary and review level (this is determined by whether they have remained lawful at all times). This means that a person who starts the Ministerial request without work rights on their bridging visa cannot obtain work rights even if they are now cooperating with DIAC. We are concerned that such philosophy is not transferred to unauthorized arrivals as they, by the very nature of their means of arrival, have not remained lawful at all times in Australia.

Recommendation 9 – Regulations introducing new bridging visa provisions should ensure that where a person is released from detention on a bridging visa, that bridging visa provides work rights.

2.13 Section 194A(4) – Duty to consider TCAP requests

Section 194A(4) of the Detention Bill states that an authorized officer does not have a duty to consider a request for a TCAP. While we recognise that this is a non-compellable power we would respectfully submit that where a request for a TCAP is

refused, written reasons for the refusal should be provided and an internal appeal process should be made available. This will create a fair and transparent procedure for TCAP requests and would better ensure consistency in dealing with such requests.

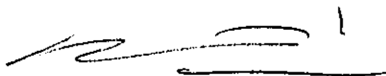
Recommendation 10 **–** Where a request for a TCAP is refused written reasons for the refusal should be provided and an internal appeal process made available.

3. Summary and conclusion

We appreciate the significance of the amendments introduced by the Detention Bill and believe that they will assist to create a fairer and more humane detention system under Australian immigration law. We also appreciate the opportunity being afforded to stakeholders to make appropriate submissions in relation to the Detention Bill.

We hope that the comments above are useful for the Senate Legal and Constitutional Committee and that the adoption of our recommendations will be given appropriate consideration. In particular we look forward to being afforded a similar opportunity to comment on the accompanying regulations prior to their commencement in order to conclude a meaningful consultative process.

Regards



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