Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
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Dear Committee Secretary,

Review of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth)

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney is pleased to provide a submission relating to the review of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) ('CIOR Act').

The Kaldor Centre is the world's first and only research centre dedicated to the study of international refugee law. The Centre was established in October 2013 to undertake rigorous research to support the development of legal, sustainable and humane solutions for displaced people, and to contribute to public policy involving the most pressing displacement issues in Australia, the Asia-Pacific region and the world.

We have had the benefit of reading the joint submission made by refugee and human rights legal organisations ('joint submission'), and we broadly endorse its findings and recommendations.

In 2014, the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) introduced some of the sections amended by the CIOR Act. In our submission on the relevant Bill, we expressed grave concerns that:

- the Bill authorised violations of Australia's *non-refoulement* obligations under international law, including the return of people to persecution or other forms of significant harm;
- not only authorised possible violations of Australia's international obligations, but might indeed require that violations be committed in certain cases, because it required removal even if Australia's *non-refoulement* obligations had not been considered;

- fundamentally misunderstood the nature of international law and the domestic implementation of treaty obligations.[1]

While on paper, it might appear that the CIOR Act addressed these concerns, it in fact created additional risks of human rights violations.

As outlined in the joint submission, the effect of the CIOR Act has been to expose certain refugees and others at risk of serious harm to:

- arbitrary and possibly indefinite detention, in clear violation of international law;[2]
- 'constructive *refoulement*' (if they 'choose' to return home, as the only alternative to such detention).

The CIOR Act has therefore realised the fear expressed by refugee law organisations that it would:

> increas[e] the risk that refugees and others in need of protection will be detained indefinitely, without adequate judicial review. This is contrary to international law and inconsistent with the practices of other democratic countries, which impose statutory time limits on immigration detention and allow judicial oversight of such detention.[3]

Similarly, concerns raised by our Kaldor Centre colleague, Dr Sangeetha Pillai, have been brought to bear (evidenced most concretely by case studies set out in the joint submission):

> Large numbers of people will mandatorily lose their visas – often on account of relatively petty crimes. Others may lose visas without committing any crime. These people will face detention. Some of them will, on application, have their visa cancellations overturned. Where this does not happen, and the person is owed protection, they will sit in detention, potentially indefinitely, waiting to see whether the Department will find a place they can be sent to, or whether the Minister will determine that they are no longer owed protection.
>
> This is not a system that clarifies Australia's international obligations. To the contrary, it directly undermines some of the most fundamental principles of international human rights law.[4]

Indeed, the retention of section 197(1) of the *Migration Act 1958* (Cth) is highly problematic. It states that:

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[1] Institute of International Law and Humanities (Melbourne Law School) and the Andrew & Renata Kaldor Centre for International Refugee Law (UNSW), Submission No 167 to the Senate Legal and Constitutional Affairs Legislation Committee: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (31 October 2014) https://www.aph.gov.au/DocumentStore.ashx?id=c1c34394-84dc-4544-8bad-e4d2e9603f5c&subId=301615?.

[2] For further details, see the submission by the Australian Human Rights Commission. That submission, and the submission by the Commonwealth Ombudsman, also detail numerous alternatives to detention.

[3] Joint Statement from Refugee Law Organisations in response to the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (Kaldor Centre, 13 May 2021) https://www.kaldorcentre.unsw.edu.au/news/joint-statement-refugee-law-organisations-response-migration-amendment-clarifying-international.

[4] Sangeetha Pillai, 'The Migration Amendment (Clarifying International Obligations for Removal) Act 2021: A Case Study in the Importance of Proper Legislative Process' (AUSPUBLAW blog, 10 June 2021) https://www.auspublaw.org/blog/2021/06/the-migration-amendment-clarifying-international-obligations-for-removal-act-2021.

> For the purposes of section 198 [removal of unlawful non-citizens], it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

This provision undermines the most fundamental principle of international refugee law, which is to protect people from being removed to a place where they have a well-founded fear of being persecuted.[5] Domestic legislation should expressly *safeguard* the principle of *non-refoulement*,[6] not dismiss it. The CIOR Act's amendments to section 197C – which were intended to clarify 'that Australia's non-refoulement obligations *do* have relevance to the removal of unlawful non-citizens under current section 198'[7] – fail to remedy this fundamental problem.

Please do not hesitate to contact us if we can be of further assistance.

Yours sincerely,

Professor Jane McAdam AO
Director

Associate Professor Daniel Ghezelbash
Deputy Director

[5] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), art 33, read in conjunction with the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[6] The principle is also reflected in the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 6, 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 37(a); Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) 999 UNTS 414.

[7] *Migration Amendment (Clarifying International Obligations for Removal) Bill 2021: Revised Explanatory Memorandum* (2021), para 16 (emphasis added).