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Committee Secretary
Senate Legal and Constitutional Committee
PO Box Parliament House
Canberra ACT 2600
Australia

SUBMISSION TO THE LEGAL AND CONSTITUTIONAL COMMITTEE INQUIRY INTO THE *MIGRATION AMENDMENT (IMMIGRATION DETENTION REFORM) BILL 2009*

The following submission is offered for consideration by the Refugee and Immigration Legal Service (RAILS).

ABOUT RAILS

The Refugee and Immigration Legal Service (RAILS) has been operating for 30 years as the only organisation in Queensland specialising in refugee and migration law.

RAILS is an independent 'not-for-profit' community legal centre that works with volunteers to provide free legal advice, representation and community education to disadvantaged people. It upholds our fundamental human rights and operates in accordance with the principles of social justice, equity and access to the law. It advocates in cases of most need before the Department of Immigration, review Tribunals and the Courts. RAILS was awarded a National Human Rights Award in December 2008 for its work as a Community Organisation.

RAILS provides advice and assistance to a wide range of people, including onshore refugees and asylum seekers, women on temporary visas suffering from domestic violence, Australian citizens and permanent residents who are former refugees seeking to sponsor family members to Australia, people facing removal or deportation, and those who have very compelling and compassionate cases that can only be resolved through the exercise of Ministerial discretion. RAILS also provides immigration advice and representation to people held in the Brisbane Immigration Transit Accommodation (BITA) under the Immigration Advice and Assistance Scheme (IAAAS).

This Bill will directly impact RAILS' client base. The submissions that we make are based upon our experience with the people this legislation will apply to.

New Direction in Detention Values

Whilst maintaining a strong view that both mandatory detention and the excision of Australian territory run contrary to our international human rights obligations and should be abolished, last July RAILS welcomed the Minister for Immigration's announcement that Cabinet had endorsed new values that would underpin immigration policy and practice into the future. We were very heartened to read that –

- children, and where possible their families, would not be held in immigration detention centres;
- indefinite or arbitrary detention is not acceptable and the length, conditions, appropriateness of accommodation and services would be subject to regular review;
- detention in immigration detention centres is to be used as a last resort for the shortest practicable time;
- people in detention are to be treated fairly and reasonably within the law and,
- conditions of detention are to ensure the inherent dignity of the human person.

RAILS fully accepts the need for detention in certain circumstances and we welcome and appreciate the government's current effort to codify certain powers and discretions in relation to detention decisions. The following comments are offered in the hope that the detention scheme that ultimately results will strike the right balance between individual rights and collective needs within the government's policy intent, and international human rights obligations.

As a preliminary yet important matter, we note that no associated regulations or guidelines/policy have been released to consider along side this Bill and so the proposed workings of the scheme cannot be considered in the detail that one might like. This is an opportunity to try and eliminate unintended consequences and properly embed policy direction. We submit that deferring passage of the Bill and releasing associated regulations and guidelines/directions for public comment would possibly result in a more considered and internally coherent decision making scheme.

1. It is recommended that the Senate further debate the Bill until the public is given the opportunity to comment on the associated regulations and guidelines/directions.

We also continue in our call for an end to excision. We submit that as a matter of principle, the conditions and rights of an asylum seeker in detention should not be connected to their place of entry or place of detention.

2. It is recommended that excision be abolished. In the interim, the Bill should apply to excised off-shore territories and to unlawful non-citizens, whether they be held on-shore or off-shore.

New Detention Value – Detention that is indefinite or otherwise arbitrary is not acceptable and the length of and conditions of detention, including

the appropriateness of both the accommodation and the services provided, would be subject to regular review.

The Bill in its current form does not provide for the review of any decision relating to the detention of a person. This is in clear contravention of Australia's obligations under the ICCPR and is an issue that is the subject of extensive, on going, public scrutiny and debate - for good reason. It will continue to be a reoccurring theme in all detention reform debate so long as there is a failure to implement any kind of statutory review mechanism by which to challenge the lawfulness and merits of detention.

The Minister said in his speech at the Australian National University on 29 July 2008 in which he announced the New Directions in Detention, "*In future, the Department will have to justify why a person should be detained. Once in detention, a detainee's case will have to be reviewed by a senior departmental official once every three months to certify that the further detention of the individual is justified* ". He further flagged Ombudsman reviews of detention every 6 months.

In the same speech the Minister strongly referred to departmental officers now having to justify their decisions; our damaged international reputation; the impact on departmental staff of implementing detention policies in the past and a loss of confidence in the immigration system.

The Minister referred to achieving a "*fundamental overturning of the current model of immigration detention*" through the new detention values. We are of the view that this truly laudable intent will be fundamentally compromised without a statutory right to a process of review of detention decisions. Ideally these decisions would be judicially reviewable.

3. It is recommended that the Bill be amended to give a statutory right of review for decisions concerning the length of and conditions of detention, including the appropriateness of both the accommodation and the services provided.

New Detention Value – People in detention will be treated fairly and reasonably within the law.

New Detention Value – Conditions of detention will ensure the inherent dignity of the human person.

We note that neither of these values, that have their basis in international human rights law, are mentioned in the Bill. Without a statutory requirement to comply with these values, or a system of review for detention decisions, it is submitted that the policy intent that underpins this Bill will be lost.

In his July 29 speech, the Minister referred to the Comrie and Palmer Reports and to the major changes in detention practice that resulted after their release. Those reports also called for an overhaul of the culture within the Department of Immigration. The Palmer

Report, delivered only 4 years ago, found a "*..culture that is overly protective and defensive, a culture largely unwilling to challenge organisational norms or to engage in genuine self-criticism or analysis.*" (para 8. p. IX of findings, Palmer Report).

The Department has made huge strides forward since 2005, however even the most senior departmental staff have referred to the overhaul of embedded cultural norms as an ongoing process that will take approximately 10 years to achieve.

If the above values are not expressly articulated in legislation as something we respect and intend to uphold, it will send a message that an individual's basic rights are of lesser importance and, should a culture of organisational expediency re-assert itself, the welfare of an individual in detention may again become the cause of individual harm and national shame.

4. It is recommended that the values regarding fair and reasonable treatment within the law, and ensuring the inherent dignity of a person in detention, be included in the Bill as statements of principle.

Temporary Community Access Permission

We welcome the legislative recognition of this initiative. In our view it goes significantly to recognising the inherent dignity of a person in detention.

RAILS has had considerable experience with current arrangements that can enable detainees to temporarily leave their place of detention, and as such has first hand experience of how beneficial that is to the mental health and well being of detainees.

However, the release of guidelines, directions or the like would have been very helpful to assess the proposed scheme beyond the point of basic principles. We refer to our first recommendation in this respect.

As a matter of principle we are of the view that a detainee's TCAP request must be able to be made verbally. Further, verbal request must then be translated into writing by a Departmental officer. A paper copy of any order must be given to the detainee and the conditions and consequences of breach must be explained fully to them by an independent person using an interpreter. These requirements could be dealt with appropriately outside of the Bill, by a Migration Series Instruction for example.

We query the wisdom of giving an officer a discretion not to consider a request for community access. In the interests of transparency and fairness, any negative decision should be in writing accompanied by reasons for that decision. If sufficiently clear guidelines are forth coming, this should not be an onerous task. Given the impact a decision like this can have on the welfare of a detainee, we regard it as a very important decision requiring accountability, and so also advocate for such decisions to be judicially reviewable.

5. It is recommended that the Bill require that negative TCAP decisions must be accompanied by reasons for decision and a right to review of that decision.

New Detention Value – Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC).

Best Interests of the Child

While 4AA(4) requires that the best interests of the child be a primary consideration, and in most circumstances this would arguably include a right to be held together with their family, the primacy of a child's right to be with their family should be specifically articulated, as it is in the New Directions in Detention policy.

It would be preferable for the Bill to be drafted so as to require a clear process by which the Department would have to discharge an onus why it would not be in the child's best interest to be held with their family.

As currently worded, with no mention of a positive obligation to hold children together with families where possible, it is submitted that the proposed subsections 4AA(3) and (4) do not give full effect to the policy intent.

6. It is recommended the Bill be amended so that it articulates a positive obligation to hold children together with families wherever possible, and an onus on the Department be inserted to show why it is in the best interests of the child, if it is proposed to separate a child from its family.

We are also concerned that Departmental staff are not professionally equipped to make decisions about what is in the best interests of a child in some situations. Many other agencies appoint independent advocates charged to act in the best interests of the child and to provide advice to decision-makers charged with some aspect of a child's welfare. This is particularly important we would suggest, in the case of unaccompanied minors and traumatised children.

If a child is unaccompanied, or it is proposed to separate a child from their family, we are of the view that there be a statutory requirement that the child be appointed an independent advocate (in differentiation to a legal guardian) to represent their interests beyond strictly migration matters. We are also of the view that there be a requirement to formally include such an advocate in any decision making process that concern the child.

In our view this would enhance compliance with our obligations under the Convention on the Rights of Child and would go a long way to ensuring consistency of decision making that is in the best interests of a child, and therefore aligned with the policy intent.

7. It is recommended that an independent advocate be appointed to all unaccompanied minors and in each case where it is proposed to separate a child from their family. It is further recommended that they be formally included in decision making processes concerning the child's best interests.

The Minister stated in his 29 July 2008 speech that "*Labor's detention values explicitly ban the detention of children in immigration detention centres. Children in the company of family members will be accommodated in residential housing or community settings*".

In Brisbane, RAILS have had first hand experience with an unaccompanied minor detained in transit accommodation (the Brisbane Immigration Transit Accommodation - BITA) and the psychological detriment that child suffered.

This 30 bed facility was by architectural design and policy intent, built for very short term stays in a 'motel style'. It is sited on a low lying flood prone site, next to an international airport, is small in area and surrounded by a high fence. Free entry or exit is not permitted. Anyone detained there will meet other detainees. A detained minor is able to mix with adults being removed/deported.

The BITA was specifically sited to, among other things, psychologically prepare people for returns to their country of origin. The Department briefed RAILS and other stakeholders that as transit accommodation, people would not be held for more than 7 days. BITA is now being used for considerably longer periods of detention - months. It is our strong view that to give full effect to the detention values, and not compromise a child's best interests, immigration transit accommodation should be removed as an option for holding children unless it is very tightly time limited by legislation.

8. It is recommended that 'immigration transit accommodation' be inserted in 4AA(3) as a place where a child cannot be held for more than three working days.

Subsection 189(1) – Assessment of Unacceptable Risk

We have had the benefit of reading the submission of the Human Rights Commission submission to the Committee on this issue and specifically endorse their submissions made under headings 9.1 and 9.2 and the recommendations:

a) **that risk be assessed on a case by case basis,** and;

b) **that 's.501' detainees in mandatory detention under 189(1)(b)(i) be subject to the 189(1B)(d) requirement to make reasonable efforts to resolve a persons immigration status**.

RAILS sends its 'Visa Cancellation Kit' to many people who find it almost impossible to advocate for themselves from prison with respect to 501 notices. We do not have the resources or funding to take on their cases.

If a s.501 assessment process is not completed by the end of a person's prison term, a risk assessment should be carried out immediately prior to the expiry of their prison term - examining their suitability for release from detention. An eligibility for parole should

operate as a presumption favourable to release. A negative decision concerning release should be reviewable by an independent arbiter.

RAILS has long been troubled by the apparent conflict between State Corrections policy and Commonwealth Immigration law/policy with respect to s.501 determinations. A person qualifies for parol on the basis of an assessment that, among other matters, they do not pose a threat of harm to the community; that there is little likelihood of recidivism etc. Yet people are routinely kept in immigration detention well past their prison sentence, waiting for assessments along not dissimilar criteria, and if they are Stateless, they run the risk of indefinite detention.

9. It is recommended that people serving prison sentences that are also subject to a s.501 Notice be fully and fairly assessed for release from detention immediately upon the expiry of their prison sentence.

Subsection 4AAA(1)(b) - Immigration status

RAILS endorses the submissions of the Refugee Council of Australia with respect to their recommendations 3 and 4 – namely the removal of 4AAA(1)(b) and clarification of the term 'visa' and/or 'resolving a persons immigration status'.

CONCLUSION

RAILS is grateful for this opportunity to engage in what is a very important debate. A well formulated Bill would give legislative credibility to the New Directions in Detention policy and encapsulate rights that apply to persons in detention that flow from international human rights instruments such as the Convention on the Rights of the Child and International Covenant on Civil and Political Rights to which Australia is a signatory.

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