Refugee Council of Australia

Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009

The Refugee Council of Australia (RCOA) welcomes the opportunity to contribute to the inquiry into the *Migration Amendment (Immigration Detention Reform) Bill* 2009.

RCOA is the national umbrella body for non-government organisations involved in supporting and representing refugees and asylum seekers, with a membership of more than 130 organisations. RCOA aims to promote the adoption of flexible, humane and constructive policies towards refugees, asylum seekers and other displaced persons by the Australian and other Governments and their communities.

RCOA has made submissions to many Government inquiries and reviews regarding immigration detention policies and legislation, most recently providing written and oral evidence to the Joint Standing Committee on Migration's Inquiry into Immigration Detention[1] and responding jointly with A Just Australia to its first report, *Immigration Detention in Australia: A new beginning – Criteria for release from detention.*[2] Though not comprehensively reiterated here, many of the comments and recommendations that we made in those submissions are relevant to this inquiry. We understand from the Second Reading speech given by Minister for Immigration and Citizenship, Senator Chris Evans, that the inquiry's first report has been influential in framing Government policy development in this area.

Twelve months following its announcement, RCOA reiterates its commendation to the Government on the extensive and laudable reforms set out within the New Directions in Detention policy framework. RCOA notes that these reforms build and expand upon those introduced under the former administration and that, over the past few years, significant changes have been introduced and alternative approaches trialled to reduce the overall rate and average duration while improving the conditions and flexibility of immigration detention.

RCOA further applauds the Government's recognition of the importance of enshrining the values and measures set out in the New Directions in Detention reform package in order to ensure its effective implementation. This is in line with the Joint Standing Committee on Migration's unanimous and priority recommendation that amendments be introduced to the

[1] RCOA's written submission to the inquiry may be viewed at http://www.refugeecouncil.org.au/docs/resources/submissions/subm-detention-aug08.pdf

[2] AJA and RCOA's joint response to the report may be viewed at http://www.ajustaustralia.com/resource.php?act=attache&id=360

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Migration Act 1958 and to the Migration Regulations 1994, and that associated guidelines be developed, in order to reflect the reforms.

RCOA welcomes the Bill and notes that it introduces a number of very significant measures to render Australia's immigration detention infrastructure more purposeful and more humane. We consider, nonetheless, that the Bill in its current form (noting that associated regulations and guidelines have not as yet been publicly released) does not clearly reflect, nor give adequate operational effect to, the full composite of values and measures set out within New Directions in Detention. We are also not convinced that it safeguards against further violations of our international human rights obligations.

Our key comments and recommendations regarding the Bill are summarised below.

While mindful that Government has indicated that its position on both is entrenched and that significant efforts are being made to mitigate their harshest effects, we wish to restate our unqualified opposition to the policies of excision and mandatory immigration detention.

Application of Bill to excised territories

The subsection 189(1) amendments explicitly exclude excised territories. While we have been given to understand that it is intended that all principles and other amendments contained within the Bill will apply to excised territories, this remains unclear within the current wording of the Bill. Subsection 189(3) of the Migration Act, pertaining to excised territories, remains unchanged (as was indicated in New Directions in Detention and the Minister's Second Reading Speech).

Recommendation 1
That the applicability to excised territories of all principles and amendments (unless excised territories are explicitly excluded) be clearly noted among the principles (or other relevant sections) of the Bill.

Affirmation of principles

Certain of the values articulated in the New Directions in Detention policy are omitted from the principles set out in Subsection 4AAA of the Bill. Specifically, there is no mention that conditions of detention must ensure "the inherent dignity of the human person" nor of detainee's treatment being required to be "fair and reasonable within the law".

There is also no mention of the fourth New Directions in Detention value: "Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review." We submit that this value is not accommodated by Subsection 4AAA(2), which specifically reflects the fifth of the New Directions in Detention values. We consider that failure to reflect the fourth New Directions in Detention value within the Principles means that Alternative Places of Detention are not subject to the standards expressly implied within New Directions in Detention. Our reading of Subsection 4AAA(2)(b) is that inclusion of the word "so" prior to "detained" implies restriction of the application of "shortest practicable time" to detention within a detention centre.

Recommendation 2
That the omitted New Directions in Detention values be incorporated within the principles of the Bill.

Subsection 4AAA(1)(b) stipulates that the resolution of a non-citizen's immigration status is a purpose of immigration detention. This is contrary to our reading of the New Directions in Detention policy, which states:

> "The presumption will be that persons will remain in the community while their immigration status is resolved. If a person is complying with immigration processes and is not a risk to the community then detention in a detention centre cannot be justified. The department will have to justify a decision to detain – not presume detention… Once [health, identity and security] checks have been successfully completed, continued detention while immigration status is resolved is unwarranted."

We take this to indicate that, under the risk-management framework, there will be an onus upon the Department of Immigration and Citizenship (DIAC) to release a person into the community once clearance has been obtained on standard checks (unless justification can be shown for not doing so), irrespective of whether the person's immigration status has been resolved.

We understand that the timely resolution of people's immigration status is a high priority for Government – regardless of whether or where a person is detained – and we welcome this as a clear priority. We further understand that, under Government policy, some people will or may be detained for periods of time in order to manage specified risks and that, during any such period of detention, reasonable measures will continue to be taken to resolve their immigration status.

The Note accompanying Subsection 4AAA(1)(b) specifies:

> "Resolving the non-citizen's immigration status would result in either a visa being granted to the non-citizen or the non-citizen being removed or deported".

It is unclear whether the term 'visa', in this instance, refers to a substantive visa (such as would generally be associated with the term status resolution) or may include a bridging visa (which would allow for the lawful release of a detainee into the community prior to a substantive resolution of immigration status). The latter interpretation would align with that which is set out in Section 5 of the Migration Act.

We are concerned that the stipulation that a purpose of immigration detention is the resolution of immigration status (presumed by us to involve grant of a substantive visa where a person is not departing or being removed from Australia) may create a basis for the prolonged detention of a person who has satisfied all requisite checks but continues to await a substantive outcome. We are also troubled by the counter interpretation – which would suggest that the issuing of a bridging visa was being viewed as an example of status resolution. We would consider this highly inappropriate for either category of bridging visa able to be issued to a person for the purpose of release from detention, namely a Bridging Visa E or a Removal Pending Bridging Visa.

We reiterate our strong support for the intention that all reasonable efforts to achieve status resolution persist during any periods of detention. We also concede that detention will at times be required for the purposes of removal, one of three possible forms of status resolution. But we do not concede that this warrants definition of status resolution as a purpose of immigration detention within the Principles of the Bill. We consider that these circumstances – namely the requirements to detain or to continue detaining in order to

manage the risk of a person absconding - are readily incorporated within the existing Subsection 4AAA(1)(a).

Recommendation 3
That Subsection 4AAA (1)(b) be removed.

Recommendation 4
That the meaning of the term 'visa' and/or 'resolving the person's immigration status' be clarified within the Note to Subsection 189(1B) paragraph (d).

Detention of children

We welcome the amendments to Section 4AA, including the prospect of Ministerial direction under Section 499 regarding interpretation of the best interests of a minor. We consider that a further priority relates to the appointment of an independent guardian for unaccompanied minors (in place of existing arrangements whereby the Minister or the Minister's delegate assumes this function).

Recommendation 5
That provisions be made for the appointment of an independent guardian for unaccompanied minors.

Definition of 'unacceptable risk'

We are concerned that a category of persons deemed to pose an unacceptable risk to the Australian community, and therefore be subject to mandatory detention, is to be prescribed by regulation. We are concerned that this provides insufficient transparency.

We consider that those subject to a Section 501 visa cancellation ought not to be automatically subject to mandatory detention but rather have the level of risk that they pose to the Australian community assessed on an individual basis, in line with the Joint Standing Committee on Migration recommendation.

Recommendation 6
That all categories of persons deemed to pose an unacceptable risk be clearly defined within the legislation, without use of regulations for this purpose.

Recommendation 7
That all those subject to a Section 501 visa cancellation have individual risk assessments, in line with the Joint Standing Committee on Migration recommendation, rather than being automatically deemed to pose an unacceptable risk to the Australian community.

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Temporary Community Access Provisions

We welcome the introduction of Temporary Community Access Provisions as a significant mechanism for introducing a more humane and dignified detention environment. It will be important to develop clear guidelines for decision-makers and we submit that requests, unless vexatious, should be required to be considered, with reasons provided for a negative decision and those unsuccessful given the opportunity to seek a review. We submit that this procedural fairness is consistent with an approach intended to support the "inherent dignity of the human person" within a detention environment.

Recommendation 8
That Temporary Community Access Provision requests be considered unless clearly vexatious and that reasons for, and an opportunity to appeal, negative decisions be provided.

Alternative Places of Detention

We welcome the amendment enabling Ministerial delegation of the capacity to make a Residence Determination. We submit that the development of clear and publicly available guidelines regarding matters to be considered when determining Alternative Places of Detention is extremely important. We submit, for example, that it is inappropriate to detain people within Immigration Transit Accommodation premises for anything beyond a very short period of time.

Recommendation 9
That guidelines regarding Alternative Places of Detention placement decisions be swiftly developed and made publicly available, in the interests of transparency in this important area.

Provisions governing release

We are concerned that, notwithstanding the clear policy set out within New Directions in Detention that the Department will have to justify decisions to detain and to continue to detain, there appears to be no requirement within Subsection 189(1)(1B) for officers to release a detainee once there is no further basis to detain. The sole onus upon officers is to make reasonable efforts to complete requisite checks and to resolve a detainee's immigration status.

Recommendation 10
That Subsection 189(1) of the Bill be amended to mandate circumstances for release from detention.

In light of the fact that health checks for asylum seekers are routinely performed within the community, without any deemed unacceptable risk, we submit that the completion of health checks ought not to be considered a function requiring detention.

Recommendation 11
That standards be changed to allow for health checks to be performed without requirement of detention.

The Bridging E Visa framework needs to be reformed, as a priority, in order to facilitate the appropriate release of detainees in line with the New Directions in Detention values. The Bridging Visa E Subclass 051 will need to be amended to be accessible to detainees other than those accommodated within its currently extremely restrictive scope (namely minors, the elderly, those married to an Australian citizen or resident, and those with health conditions that cannot be managed within a detention environment). In order to mitigate the likelihood of destitution, the Bridging Visa E Subclass 051 should also be amended to always include work entitlements and corresponding access to Medicare.

Recommendation 12
That the Bridging E Visa framework be reformed, as a priority, in order to facilitate the appropriate release of detainees in line with the New Directions in Detention values. That the reforms include expansion of the eligibility criteria for grant of a Bridging Visa E Subclass 051 and enable work rights to be granted on all detention release visas.

Further to the above, we refer the Committee to the extensive commentary and recommendations provided by Uniting Justice Australia and the Hotham Mission Asylum Seeker Project under section 8 of their joint submission. We fully endorse the comments and recommendations that they have set out in relation to support arrangements for detainees post-release.

Recommendation 13
That those released from detention be considered eligible for the full spectrum of services available within the Community Assistance Support Program (until recently the Community Care Pilot).

Review mechanisms

Contrary to the recommendation of the Joint Standing Committee on Migration report, there is no mention of judicial review of immigration detention within the Bill.

Recommendation 14
That provision be made for judicial review of immigration detention following a specified period of time.

We thank the Committee once again for the opportunity to participate in this inquiry, including the invitation to appear before it at the hearing of 7 August. We look forward to supplementing our brief written submission through oral testimony.

Yours faithfully,

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