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Joint Standing Committee on Migration
Department of House of Representatives
PO Box 6021
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Dear Sir/Madam

Re: Immigration detention reforms

As the Legal Aid duty lawyer at the Melbourne City Court in the 1980's, I acted for many detained illegal immigrants. Before the codification of migration discretions in 1989, such people who were caught by Immigration were required to be brought before a Magistrate every 7 days. During those hearings, the Immigration Department was required to justify their detention. Magistrates had a final discretion to release a detainee by refusing to make a further detention order if the Department was taking too long to deal with the case or the interests of justice otherwise required it. The system worked, because the Courts have always had the central role in defending the liberty of citizens and checking unrestrained executive power.

When I helped draft the CAIIP *Model Migration Bill* in 1989, we thought that detainees should still be brought before a Magistrate regularly for judicial oversight. The *Model Migration Bill*, reflects that idea. However, when Senator Ray was unable to get the Bill through Cabinet, this important bulwark against tyranny was scrapped in favour of piecemeal reforms and the central role of the Courts in overseeing Immigration detention was lost. Some years after codification, the Immigration Review Tribunal (now the

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Migration Review Tribunal) was given a narrow role to review detention matters through the bridging E visa system.

To show how narrow the Tribunal's role was (and still is) and why it has failed to stop the abuses that have occurred in this area, let me give the example of Mr Srey Chan Ta. I assume the Committee is familiar with *Srey affected* matters? I acted for Mr Srey in 2003 when he was first detained by Immigration officers. It seemed clear to me that he was being unlawfully detained. We applied for a Bridging visa and were refused and we sought merits review from the Tribunal. When Mr Srey was brought before the MRT on an application for a bridging E visa to allow him out of detention, the Senior Member agreed with me that, as Mr Srey had not been properly notified of the refusal of his spouse visa, he was not unlawful as this could only occur 28 days after he was properly notified. However, the MRT had no power to order his release, because bridging E visas could only be granted to unlawful non citizens and he wasn't unlawful! As the Tribunal is part of the Executive arm of Government and not a Constitutional Chapter 3 Court, the Senior Member had to *affirm* the decision to refuse a bridging E visa and Mr Srey had to remain in detention, when the MRT agreed that he was being unlawfully detained! I then had to seek an order in the nature of *Habeas Corpus* from the Federal Court to get him out of detention – a process which was expensive and time consuming and which he might well have been unable to afford (see ***Chan Ta Srey*** *v MIMIA* [2003] FCA 1292 (Gray J).

If Mr Srey had been brought before a Magistrate instead of a Tribunal, the Court would have had the power to immediately order his release. Surely the Government doesn't think that illegals should have to apply for *Habeas Corpus* to have their detention reviewed? The issues are perfectly capable of being understood by the new Federal Court Magistracy – who I think are at least as capable as the State Magistrates who provided the oversight prior to 1989 and who were given the same role in the *Model Migration Bill.* After all, it is really all about Immigration "bail" and courts have been determining that issue for centuries.

Finally, I would have provided you with the notation to the MRT decision in *Chan Ta Srey*, except that the MRT did not publish it - because no one in the MRT thought it was important enough. Indeed, the MRT has gone from publishing 100% of its decisions to a figure as low as 10% after Parliament (unwisely, in my view), gave it a discretion not to publish. When I opened the IRT premises as its first Senior Member in 1990, I described the Tribunal's public decisions as the *window* into Immigration decision making and a vital part of making the Department's decisions transparent. Minister Jerry Hand agreed with me that day. I would have thought that if the MRT is to retain jurisdiction over liberty of the subject issues (and for the practical and legal reasons above I don't think it should) then it should *at least* be required to publish 100% of its decisions again – just as the mainstream tribunals such as the AAT (and of course the Courts) are required to do. The current MRT

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situation is not conducive to handling a jurisdiction involving liberty of the subject issues, when *secret* decisions can be made about detainees, away from the public gaze. I can only again offer the *Chan Ta Srey* case as an example of why things have to change.

I thank the Committee for its time in reading this submission and I wish it the best of luck with its review.

Yours faithfully,

Michael Clothier
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