THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRightsCommittee:VK:456107

24 June 2011

Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee,

Re: Inquiry on the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010

The Law Society's Human Rights Committee (the "Committee") has responsibility to consider and monitor Australia's obligations under international law in respect of human rights; to consider reform proposals and draft legislation with respect to issues of human rights; and to advise the Law Society of NSW on any proposed changes. The Committee is a long-established committee of the Society, comprised of experienced and specialist practitioners drawn from the ranks of the Society's members who act for the various stakeholders in all areas of human rights law in this State.

The Committee welcomes the opportunity to make submissions to the Senate Standing Committee on Legal and Constitutional Affairs. The *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* (the 'Bill') proposes amendment to the *Migration Act 1958* (Cth) (the 'Act') which would see an end to Australia's current offshore processing and excision policy. The Bill would also make amendments relating to mandatory detention and the introduction of judicial review of prolonged detention. It is on these matters that the Committee seeks to comment.

Mandatory detention and offshore entry persons

While the Committee recognises that immigration detention is not prohibited by international law, its view is that Australia's current mandatory detention laws can violate the rights of asylum seekers to liberty[1] and deny the right to be treated with humanity and with respect for the inherent dignity of the human person[2].

The Committee is concerned that Australia's current immigration policy, whether or not deliberate, punishes asylum seekers based on their mode of arrival. Article 31 of the *Convention Relating to the Status of Refugees ("Refugee Convention")*, to which Australia is a signatory, explicitly prohibits the imposition of penalties on such account. Under the Act, offshore entry persons are prevented from making a valid

[1] Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR)
[2] Article 10 of the ICCPR

application for a protection visa[3]; they are detained under section 189(3) and continue to be so detained until they are granted a visa, removed or deported[4]. The law, as it currently stands, allows for indefinite detention[5] and it fails to differentiate between adults and minors.[6] This detention remains lawful despite harsh conditions[7].

This unnecessary and costly process usually sees asylum seekers detained for long periods of time in remote locations. This not only impacts on their mental health, but also places great constraints on their ability to communicate with their legal representative and adequately present their claims for protection. Those seeking asylum on the mainland are not, under policy, subject to mandatory detention, nor are they prevented from lodging a valid application for a protection visa.

The United Nations High Commissioner for Refugees (UNHCR) Guidelines on Detention provide[8]:

> Detention of asylum-seekers may exceptionally be resorted to for the reasons set out below as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law. These are contained in the main human rights instruments.
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> There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements [see Guideline 4]), these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.
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> In assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non discriminatory manner for a minimal period.

The law fails to meet these guidelines in that it allows for indefinite detention even though an asylum seeker has been found to be of no threat to the community. Currently, the only safeguard for a detainee appears within section 4AA of the Act, which affirms Parliament's intention that a minor shall only be detained as a measure of last resort. Despite this, a significant number of children continue to be held in immigration detention[9]. As such, the section has failed to fulfill its purpose. This presents a breach of Australia's obligations under Article 37(b) of the *Convention on the Rights of the Child* (the 'CRC'). While the Committee would welcome the introduction of 'Asylum Seeker Principles' under a new section 4AAA, it strongly supports amendments to the Act that would bring to force such intentions of Parliament.

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[3] See section 46A of the *Act*

[4] See section 196 of the *Act*

[5] See *Al-Kateb v Godwin* (2004) 219 CLR 562

[6] See *Re Woolley* (2004) 225 CLR 1

[7] See *Behrooz v Secretary, Department of Immigration and Multicultural and indigenous Affairs* (2004) 219 CLR 486

[8] Office of the United Nations High Commission for Refugees, " UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers" (1999, Geneva) available online: www.unhcr.org.au/pdfs/detentionguidelines.pdf (accessed 24 June 2011)

[9] 1083 children in immigration detention as at 13 May 2011 see http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/ (viewed 15 June 2011)

The Committee's view is that even if detention is required for initial identity, health and security screenings, it need not extend beyond that. The arguments against mandatory detention are compelling and can no longer be ignored. In a recent report on immigration detention the Australian Human Rights Commission provided the following insight[10]:

> The Commission has long held serious concerns about the detrimental impacts on people's mental health and wellbeing when they are held in immigration detention facilities for prolonged and indefinite periods of time. The Commission has repeatedly raised these concerns with DIAC and successive Ministers for Immigration, and in public reports regarding conditions in immigration detention facilities.
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> The Commission's concerns have escalated over the past year as thousands of people are being detained for prolonged periods, and clear evidence has become available of the poor mental health of many people in detention. This includes high rates of self-harm and five apparent suicides in immigration detention facilities – three of which occurred at Villawood IDC.

The Committee supports the proposed amendments to the Act that ensure that asylum seekers who arrive by boat are afforded the same rights and protections as those arriving on the mainland. In the same vein, the Committee welcomes amendments that see an end to mandatory detention; a policy that violates Australia's international obligations[11] and places at harm a group of the most vulnerable. Such amendments to the Act are appropriate and overdue.

Challenging detention

Under Australia's international obligations every adult or child deprived of his or her liberty is entitled to challenge the lawfulness of their detention before a court[12]. Currently Australian law does not allow for such access, nor are courts granted the power to make orders releasing a person subject to arbitrary detention. In *Re Woolley*[13], his Honour McHugh J highlighted that a number of decisions of the United Nations Human Rights Committee, the deliberation of the United Nations Working Group on Arbitrary Detention and the detention regimes in the United States, Canada, the United Kingdom and New Zealand indicate that a "regime which authorises the mandatory detention of unlawful non-citizens may be arbitrary notwithstanding that the regime may allow for the detainee to request removal at any time". His Honour postulated that "periodic judicial review of the need for detention, some kind of defined period of detention and the absence of less restrictive means of achieving the purpose served by detention of unlawful non-citizens" may serve to avoid breaches of the Refugee Convention, the ICCPR, the CRC and international law. The Committee understands this to be precisely what the present Bill aims to achieve.

While the Committee appreciates that the processing of initial identity, health and security clearances may take in excess of 30 days, it notes the proposed insertion of

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[10] Australian Human Rights Commission, "Immigration detention at Villawood: Summary of observations from visit to immigration detention facilities at Villawood" (2011) available online: http://www.hreoc.gov.au/human_rights/immigration/idc2011_villawood.html#s12 (accessed 24 June 2011)

[11] See for example *Bakhtiyari v Australia*, Human Rights Committee Communication No 1069/2002 (2003)

[12] See Article 37 of the CRC and Article 9 of the ICCPR

[13] 225 CLR 1 at [114]

sections 195B and 195C do no more than give legitimacy to detention and make prolonged detention subject to judicial scrutiny. This, in the Committee's respectful submission, not only provides a safeguard against arbitrary detention, it ensures transparency and promotes compliance with international obligations. The Committee's view is that the Bill should be supported.

Thank you once again for the opportunity to comment.

Yours sincerely,

Stuart Westgarth
President