Submission to the Joint Standing Committee on Migration's Inquiry into the *'Ending Indefinite and Arbitrary Immigration Detention Bill 2021'*

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The Progressive Law Network is a body of people passionate about social and environmental justice within the law. We facilitate university students and professionals to engage with legal challenges and bring about positive change in the law.

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Introduction

This Bill is long overdue, and we welcome its efforts to bring Australia's immigration laws in line with international human rights standards. Forty UN member states - including some of our closest allies - recently criticised Australia's policies towards refugees and people seeking asylum.[1] They recommended a time limit on immigration detention and regular judicial oversight, and an end to offshore processing.[1] These recommendations are echoed by the Australian Human Rights Commission,[2] who have also affirmed the need to ensure permanent protection, family reunification, and an adequate standard of living for refugees and people seeking asylum.[2]

We are pleased to see that this Bill incorporates many of these recommendations, and as such we broadly endorse it. However, we raise some concerns about its drafting and make the following recommendations, elaborated below:

- Section 16(1) should be amended to ensure that the reasons for detention are actively pursued, and that detention be used as a last resort, only for as long as is absolutely necessary.
- Section 16(1) should be amended to ensure detained persons have access to a fair hearing for adverse assessments made against them.
- Section 16(3) should be amended to prohibit detention in facilities which are not purpose-built for immigration detention and meeting detainees' human rights.
- Section 17 should be accepted to end indefinite detention in Australia.
- Section 19 should be amended to prescribe all the enlisted services, and ensure that services provided to non-citizens in detention and alternatives to detention are of a high standard
- Section 21 should be amended to prohibit placing children in immigration detention.

Compliance with International Law

Adherence to international human rights law is important in ensuring that the Australian Federal government is held accountable and retains its integrity in international relations. This has historically not been the case, and Australia has been accused by the United Nations for breaching multiple articles of the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights in regard to their detention policies.[3] UN Special Rapporteur François Crépeau stated that several migration policies and laws in Australia 'are regressive and fall way behind international standards',[4] and that the mandatory and prolonged on and offshore immigration detention periods carried out in Australia 'cause immense suffering'.[4] We wholly endorse the prioritisation of compliance with international human rights law in s 3(2)(b)(ii)a.

In particular, the Principle of Family Unity outlined in s 8 would bring Australia further in line with the Convention on the Rights of the Child. Article 6 of the Convention demands 'to the maximum extent possible the survival and development of the child', whilst Article 9 states that no child should be separated from their parents against their will, except where it is deemed in the best interest of the child.[5] We affirm the adoption of this principle as a 'paramount consideration' in s 8.

Reasons for Detention: s 16(1)

Section 16(1) of the Bill lists the various reasons that may justify a person's detention, however many of these are the same reasons which are currently used to justify prolonged detention. We submit that the Bill should incorporate further safeguards if it provides such a broad list of reasons to deprive

someone of their liberty. The UN Human Rights Committee has made guidelines in relation to the ICCPR's human right to liberty and security,[6] suggesting that, while an asylum seeker '***may be detained for a brief initial period*** in order to document their entry, record their claims and determine their identity if it is in doubt. ***To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual'***.[7][8]

While we welcome the efforts of s 16(1) to incorporate this principle, we are concerned that its drafting may still authorise unnecessarily prolonged detention, since it authorises a person to be 'kept' in detention so long as those reasons 'apply'– without elaborating on the meaning of 'apply'. In the case of AJL20 v Commonwealth,[9] it was argued by the plaintiff, and accepted by the Federal Court, that in order for immigration detention to be lawful, the enlisted statutory purpose of detention (including in the plaintiff's case to prepare for his removal from Australia) must be pursued– a person cannot be detained indefinitely without their detention actively serving a purpose.[9] While a slim majority of the High Court found, on appeal, that this conclusion was not supported by the existing framework of the Migration Act,[10] we submit that this Bill should endeavour to do so. Accordingly, detention of a person should only be authorised if those listed reasons 'apply' in their individualised circumstances, ***and*** that those reasons are being actively pursued as soon as reasonably practicable.

Although the presence of ss 17(1) and (2) of the proposed Bill imposes maximum time limits on immigration detention and prevents indefinite detention, such an amendment is necessary to ensure that any period of detention is only as long as is absolutely necessary. Under our current immigration system, loopholes in legislation are routinely manipulated, and so it is essential for this Bill to close the gaps and ensure that detention is, at all times, justifiable– balancing the administrative reasons for detention with the dignity and human rights of the person being detained. A presumption against detention could be listed under s 16 to support this approach, and ensure detention is a last resort only.

Furthermore, we raise our concerns about the references in subsections 16(1)(f), (g) and (h) to evidence of 'risk' of the non-citizen absconding, or destroying evidence and influencing witnesses, and the making of an adverse security assessment. We submit that non-citizens should be given a fair hearing opportunity to dispute this evidence and assessment, supported by legal representation.[24]

- **We recommend:**
    - *Section 16(1) should be amended to state that detention is only lawful if one of the listed reasons applies* ***and*** *is being actively pursued, where a person must be released into the community if the reason for detention is not being fulfilled; and*
    - *A new s 16(5) should be inserted, which mirrors s 17(3)(a), stating that when determining whether a person is to be detained or kept in detention for the enlisted reasons, the decision-maker has to take into account that detention should only occur as a last resort and that there is a general presumption against detention; and*
    - *A new s 16(6) should be inserted, which refers to subsections 16(1)(f), (g) and (h), and outlines that any 'evidence' of 'risk' that the non-citizen might abscond, destroy evidence or influence witnesses, and any adverse security assessment, must be open to dispute by the non-citizen in a fair hearing, with access to legal representation.*

Detention Facilities: s 16(3)

We caution against the wording in s 16(3) precluding non-citizens from detention only in prisons with other prisoners or in 'prison-like facilities'. The Bill does not define these terms.

Currently, 'Alternative Places of Detention (APODs)' have been used to detain non-citizens, including in hotels such as Mantra Hotel in Preston, Park Hotel in Melbourne and Kangaroo Point Hotel in Brisbane. These facilities are not purpose-built for immigration detention and often lack adequate access to basic human needs– including fresh air, sunlight, outdoor recreation, and health care. The COVID-19 pandemic exposed just how unsuitable hotel facilities are for long-term detention, with vulnerable immunocompromised detainees being negligently exposed to numerous outbreaks, such as in Park Hotel in October 2021, due to its high-density and poor ventilation.[11][12]

The use of hotel detention has been widely condemned. The AHRC has repeatedly submitted that 'hotels are not appropriate places of closed immigration detention',[13] ultimately making a formal recommendation that their use be decommissioned.[13][14] The Commonwealth Ombudsman also has consistently highlighted concerns about the use of hotel APODs, questioning their suitability 'for the long-term (greater than four weeks) accommodation of people held in immigration detention and the facilities' ability to meet basic human rights standards'.[15][16]

We fear that the words 'prison-like facilities' in s 16(3) may be open to an interpretation exclusive of hotel detention facilities, despite their widely established shortcomings. We therefore submit that, in addition to 'prisons' and 'prison-like facilities', the Bill should prohibit hotel detention and other facilities not purpose-built for meeting detainees' needs and human rights.

- **We recommend**:
    - *Section 16(3) should be amended to prohibit detention in facilities which are not purpose-built for immigration detention and meeting detainees' human rights*

Length of Detention: s 17

Currently, the average length of time people spend in Australian immigration detention is 2 years, with 120 people having been in detention for 5 years or more and several having spent over 10 years in detention as of 31 January 2021.[17] These deplorable figures fall far behind those of our global peers– with detention lasting an average of 90 days in Europe,[18] 34 days in the USA,[19] and 12.3 days in Canada–[20] indicating an urgent need to implement a time limit on detention in Australia.

There is a significant relationship between detention duration and mental health deterioration,[21] with the constant uncertainty of an indefinite sentence further contributing to detainees' psychological distress:[22]

> *"Upon my detention, if somebody had told me that they were going to detain me for five years it would have been excessive, but I would have seen an end date so that I could plan … I am sitting there, trying to speak to my family, trying to speak to my partner, and they are all asking, "When are you coming home?" Every time they ask that question…I get so angry, because I do not know what to tell them and nobody can tell me either."*
>
> – Michael, Freed Voices[23]

As such, we strongly support the time limit imposed on the length of detention in ss 17 and 21. We commend this move towards a more humane detention policy and urge the government to recognise the vital importance of prioritising the mental health of people entering immigration detention, especially given most have past experiences of trauma. However, we express concern that s 21 still allows for the possibility of children being detained for up to 6 months. Detention can compromise

child development and psychosocial health, aggravate existing trauma, and lead to the breakdown of family units, which then further exacerbates the risk of adverse mental health outcomes.[20][21]

Though the proposed limits under s 21 are certainly preferable to the current system of indefinite detention, we recommend Parliament amend the Bill to prohibit placing children in immigration detention completely.

- **We recommend:**
    - *Section 17 should be accepted to end indefinite detention in Australia*
    - *Section 21 should be amended to prohibit placing children in immigration detention*

Access to Services: s 19

Though a plethora of essential services are specifically listed in s 19, by providing only for those services which the regulations prescribe, s 19 deflects any capacity for a stringent framework to be established within the Act itself. As such, it confers wide power on the Executive to determine which services detainees can access, when we contend that the minimum standards should be secured in the legislation itself. Nonetheless, if the current approach is maintained, any regulations made under s 19(1) should ensure flexibility to accommodate detainees' needs, so that the regulations are no barrier to accessing essential services as and when they are needed in each person's unique circumstances.

The health services currently provided to detainees are below standard, with detainees themselves reporting that they are given only water and panadol to treat or manage serious illnesses, including PTSD and COVID-19. Even where action is being taken, it is of abysmal quality. For example, during the COVID-19 outbreak in October 2021 in the Park Hotel APOD, detainees reported that when they presented to the staff and health workers with symptoms, it took up to 3 days for their test results to be returned and for them to then be isolated from other detainees; some were only given panadol.[11][12] This is despite testing capabilities in the community allowing for results to be processed within 24 hours, demonstrating that health services for detainees are severely inadequate. Therefore, we submit that s 19 should also state that, not only must detainees have access to the enlisted services, but the services provided must be of a high standard, comparable to that which is available in the community.

- **We recommend:**
    - *Section 19(1) should be amended to prescribe the enlisted services, rather than deferring to regulations as to which services are prescribed and thus must be provided per subsection (2)*
    - *A new subsection 19(3) should be inserted, prescribing a high standard of services*

Our Perspectives: Why the Bill Ending Indefinite and Arbitrary Detention must become law

At its core, this is a system that is modeled on prejudice and pure economic incentive, a continuing manifestation of colonisation. The criteria for which non-citizens are granted access to the community is based on the economic value they may generate. Under the current legislative framework, one of the biggest concerns is the extremely limited availability of review by the courts and judicial oversight. I support the Bill's expansion of non citizens' access to justice in Australian courts.

- **Anika Baheti, 3rd year Laws/Arts student**

Mandatory, indefinite detention of people seeking asylum is Australia's greatest shame. These policies have stolen lives and inflicted unforgivable trauma– so an end to these policies should be mirrored by the release of all refugees and asylum seekers currently in detention and compensation paid for the harm done. Generations to come will look back on this period of our history in horror, wondering why we delayed in treating humans with dignity: I hope this Bill's enactment is the catalyst they honour.

- **Benjamin Rácz, 5th year Laws/Arts student, volunteer paralegal at ASRC**

The detention of Novak Djokovic in the Park Hotel caused an enormous uproar in Australian media, one particular reason being that whilst Djokovic was only detained for five days, detainees in the hotel have been held for up to nine years. The Australian government's treatment of asylum seekers and refugees has been, and continues to be, despicable– and the mental and physical consequences of arbitrary and indefinite detention on detainees unjustifiable. I implore Parliament to pass this very important Bill, which is integral in ensuring that our government does better by people seeking asylum, treating them with dignity, care and respect.

- **Eva Scopelliti, 5th year Laws/Arts student**

Australia's arbitrary and indefinite detention of asylum seekers is a stain on Australia's once vibrant and multicoloured cloth. Its cruel and unnecessary denial of the right to seek asylum and its torturous conditions of those simply desiring security of person is abhorrent. As a product of migrants to Australia, I feel ashamed of our collective failure of conscience that has led us to this point. So much for our boundless plains to share. This Bill is the first step to fixing our collective moral failure and, as such, I implore Parliament to pass this Bill.

- **Joseph Cercone, 4th year Laws/Arts student, volunteer paralegal at ASRC**

The moral integrity of Australia, as represented by Parliament, is at serious stake if this Bill is not passed. Indefinite detention of individuals seeking asylum is inhumane and inexplicable. Anecdotes from volunteers and legal practioners describe children who are suicidal. Mehdi is one of many, who arrived seeking protection aged 15 and has instead been detained for 9 years, currently in Melbourne's Park Hotel (brought only to light by the detention of Novak Djokovic). That this occurs under our laws is shameful. The disturbing legality of indefinite detention must be brought to an end.*

- **Mirella Wong, 3rd year Laws/Biomedical Science student**

The arbitrary and indefinite detention of people under Australian immigration law is immoral and inhumane, and I implore Parliament to pass this Bill to finally bring it to an end. People– including children– are in immigration detention being held without charge, without time limit and without any judicial oversight: an indignity not afforded to even the most heinous criminals under Australian law. This Bill is an essential addition to Australian immigration law that goes a long way towards repairing a deeply broken system, and I urge Parliament to pass it into law.

- **Piper Blake, 5th year Laws/Global Studies student**

This cruel and barbaric practice needs to end and we should be ashamed of ourselves for allowing this to continue for as long as it has. The issue of it being against international human rights law doesn't even need to be brought up, because those who promote a system of indefinite detention care for anything but people and their humanity.

- **Priya Singh-Kaushal, PLN community member**

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