THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC:CBsb130623

13 June 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: matthew.wood@lawcouncil.asn.au

Dear Dr Popple,

Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021

The Law Society appreciates the opportunity to contribute to the Law Council's submission to the Parliamentary Joint Committee on Intelligence and Security in response to its review of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) (**Act**). The Law Society's Human Rights Committee has contributed to this submission.

The Law Society supports the concerns raised by the Law Council in its submission of 7 June 2021 to the then Minister for Home Affairs. While we support the Government's commitment to the international norm of non-refoulement, in our view, the Act fails to properly address the prospect of prolonged or indefinite detention for those persons to whom Australia owes protection obligations but who have no prospect of obtaining a visa on character or security grounds. This raises serious concerns with regard to the right to liberty and freedom from arbitrary detention (Art 9 of the *International Covenant on Civil and Political Rights*), as well as Australia's obligations under the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

We make the following comments in relation to the two questions posed in the Law Council's memorandum of 23 May 2023:

Have there been greater efforts to consider the ongoing appropriateness of immigration detention for affected persons or to seek to remove affected persons to third countries?

In the experience of our members, there is no evidence of efforts to consider the ongoing appropriateness of immigration detention for affected persons who have had their visa cancelled or refused under s 501(3A) of the *Migration Act 1958* (Cth) (**Migration Act**). The Migration Act provides for revocation of such a decision under s 501(CA). While most decisions now acknowledge that a consequence of non-revocation is prolonged or indefinite detention, it is rare that there is a sophisticated, individualised assessment of the necessity, reasonableness or proportionality of such detention.

Our members are also not aware of those persons affected by the 'character and conduct' provisions in the Migration Act being sought to be removed to third countries, although we are

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aware that in the past some affected persons were resettled in Sweden. We consider that it is not appropriate for a country such as Australia to rely on the third country concept as a feasible solution for affected persons.[1]

Has there been an apparent increase in the Minister's powers to grant affected persons another visa or make a residence determination in relation to affected persons?

While we are not aware of any statistics on the exercise of the Minister's discretionary powers to allow a detainee to reside outside of an immigration detention facility at a specified address in the community, we are aware of anecdotal reports of an increase in the exercise of such powers. However, we remain concerned that non-reviewable, non-compellable discretionary powers do not provide an adequate safeguard for affected persons. As noted previously by the Law Council, the enactment of legislative protections is highly desirable, including a statutory requirement that the necessity, reasonableness and proportionality of detention on each individual person be considered initially, and then on an ongoing basis.

Thank you for the opportunity to contribute to the Law Council's submission. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at (02) 9926 0285 or sophie.bathurst@lawsociety.com.au.

Yours sincerely,

Cassandra Banks
President

[1] We note that the High Court, in finding the so-called "Malaysia solution" was invalid, held certain protections must be available in any third country with which Australia enters a resettlement arrangement: see Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship [2011] HCA 32 (31 August 2011).