

Chairperson
of the Immigration and
Refugee Board of Canada



Président
de la Commission de l'immigration
et du statut de réfugié du Canada

Ottawa, Canada K1A 0K1

June 10, 2021

Justin Mohammed
Human Rights Law and Policy Campaigner
Amnesty International Canada

Samer Muscati
Associate Director, Disability Rights Division
Human Rights Watch

Dear Messrs. Mohammed and Muscati:

Thank you for your recent letter in which you outline the key findings and recommendations arising from your study of immigration detention in Canada undertaken over the past year. I appreciate the opportunity to respond to your recommendations, as they pertain to the Immigration and Refugee Board of Canada (IRB), prior to the release of your report on June 17, 2021.

As you know, the IRB is an independent administrative tribunal composed of four divisions, one of which—the Immigration Division—is responsible for reviewing the reasons for detention for permanent residents or foreign nationals who have been detained for immigration reasons by the Canada Border Services Agency. In doing so, the Immigration Division must meet specified statutory timeframes for the holding of detention reviews and consider the grounds and factors set out in the *Immigration and Refugee Protection Act* and associated *Regulations* when making their decision to order release or continued detention.

Over the past several years, the Immigration Division has taken steps to reinforce the care and sensitivity shown to vulnerable individuals subject to a detention review. Examples include the delivery of advanced training for decision makers on active adjudication and mental health issues on multiple occasions as well as the issuance of a revised *Chairperson's Guideline on Detention* which provides specific guidance to decision makers in this area. Further, the Division has recently engaged the services of a mental health law expert who will be delivering additional follow up training on mental health-related issues later this month. This training will encompass material on how to ensure inclusive and accessible hearings for individuals who are experiencing mental illness.

IRBCISR-1385897284-2174

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With respect to your recommendations related to the role and oversight of designated representatives, I am pleased to inform you that the IRB is nearing the completion of an exhaustive review of its designated representative program. In the coming months we will be implementing a number of measures as a result of this review. These include:

- Establishing of a code of conduct for designated representatives.
- Putting into place a quality assurance framework that will include enhanced monitoring of designated representatives' performance and the implementation of a mechanism to enable the person concerned, counsel or others to make a complaint regarding the behaviour or competency of a designated representative.
- Issuing new guidance documents that clearly and comprehensively explain to designated representatives their role and responsibilities and the expectations they have to meet.
- Expanding the pool of designated representatives through targeted recruitment in an effort to ensure that the IRB is better able to match designated representatives to individuals' particular needs or profile.

It is important to recognize that each Division of the IRB is required under the *Immigration and Refugee Protection Act* to designate a representative in all cases where the person is a minor or unable to appreciate the nature of the proceedings. In doing so, the decision maker is expected to inform the person of the responsibilities of the designated representative and the decision maker may subsequently revoke the appointment if they determine that a designated representative is no longer required or if an impediment arises that prevents the designated representative from fulfilling their responsibilities. Further, designated representatives, whose core responsibility is to protect and advance the interests of the person they are representing, must inform and consult them to the extent possible when making decisions about their case.

Taken together, I believe the measures that the IRB is undertaking to strengthen its designated representative program will address a number of your recommendations, notably in relation to clarifying designated representatives' role and responsibilities and establishing an oversight mechanism (i.e. through enhanced quality assurance and the establishment of a complaints mechanism). However, I do not agree with your recommendation to prevent designated representatives from engaging in substitute decision-making. As noted above, designated representatives are required to consult and involve the person to the extent possible when making decisions, yet circumstances may arise where the individual is simply unable to make decisions in their own interest, and the designated representative provides an important safeguard in such situations. It is also important to bear in mind that one of the key responsibilities of the designated representative is to arrange for the individual to be represented by counsel, who in turn also has an obligation to ensure that the individual's needs are met and that they are being fully represented at their hearing.

I also note that you have made a number of recommendations involving amendments to the *Immigration and Refugee Protection Act* and its associated *Regulations*. As the Deputy Head of an administrative tribunal with no role in setting immigration policy, it would not be appropriate for me to comment on these recommendations.

In closing, I wish to thank you for carrying out this important research and I look forward to reading the full report following its release. In the meantime, my officials would be pleased to meet with you to further discuss your findings and recommendations.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "RWEX". The letters are stylized and connected, with a prominent "R" and "W".

Richard Wex