Australian Government
Department of Immigration and Citizenship

SECRETARY

31 July 2009

Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

Submission regarding the Migration Amendment (Immigration Detention Reform) Bill 2009

Thank you for inviting the Department of Immigration and Citizenship to make a submission to the inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009.

I am pleased to present you with the attached submission. I would welcome an opportunity for the Department to appear at the Committee's public hearing into the Bill which I understand is scheduled for 7 August 2009.

Should you wish to discuss the submission or arrangements for the hearing, the departmental contact officer is Mr Robert Illingworth, Assistant Secretary of the Compliance and Integrity Policy Branch. He can be contacted on (02) 6198 7800, or by email at robert.illingworth@immi.gov.au

Once again, thank you for the opportunity to provide input into this inquiry.

Yours sincerely

(Andrew Metcalfe)

Department of Immigration and Citizenship

Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the

Migration Amendment (Immigration Detention Reform) Bill 2009

July 2009

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Attachments

Introduction

On 29 July 2008 the Minister for Immigration and Citizenship, Senator Chris Evans, announced the Government's seven Key Immigration Detention Values (the 'values') to guide and drive new detention policy and practice into the future (see Attachment 1).

These values emphasise the Government's commitment to strong border control. Under the values unauthorised arrivals remain subject to mandatory detention. Government policy is that excision arrangements are retained with unauthorised boat arrivals continuing to be processed on Christmas Island. The values affirm that children will not be detained in an immigration detention centre.

The Government is committed to taking a risk-based approach to detention and to the prompt resolution of cases. As well as unauthorised arrivals, unlawful non-citizens who present unacceptable risks to the community and those who repeatedly refuse to comply with visa conditions will be subject to mandatory detention. Apart from these groups, under the Government's policies, people who are unlawfully in Australia will be detained only if the need to do so is established with the presumption that people remain in the community while their immigration status is resolved. Detention in a detention centre is to be a last resort. The Department is expected to justify any decision to detain and the length of any detention is subject to regular review, consistent with the values that any detention be for the shortest practicable time and that indefinite or otherwise arbitrary detention is unacceptable. Protection of the community is at the forefront of these values.

Following the Minister's announcement on 29 July 2008, the Department began to implement the values to the full extent possible within the current legislative and regulatory framework. It also developed advice to Government about options for amendments to the *Migration Act 1958* (the 'Act') and to the *Migration Regulations 1994* (the 'Regulations') to give full effect to the Government's new policies.

The amendments contained in the Migration Amendment (Immigration Detention Reform) Bill 2009 (the 'Immigration Detention Reform Bill') reflect the Government's key values on the face of the Migration legislation, support the implementation arrangements already in place and facilitate the broader application of these values by the Department.

Changes to the Regulations, planned to commence on the same day as the proposed Act amendments, are also proposed to further prescribe what constitutes an unacceptable risk to the community for the purpose of mandatory detention. Further changes are proposed to amend the Regulations in relation to Bridging E visas to reflect the Government's values relating to mandatory detention of unauthorised arrivals. The proposed Regulations will also establish the visa mechanisms for people to remain in the community while their immigration status is resolved unless there are clear risk-based reasons for their detention. Further detail in relation to the proposed changes to the Regulations is provided in Section 7 below.

Other reforms flowing from the Government's new values, not reliant on legislative change for further implementation, are also significantly advanced. These aim to promote the timely resolution of immigration status while people remain in the community and with the use of detention as a last resort and for the shortest practicable time. They include the provision of additional funding from 2009-10 onwards for the expansion of the Community Status Resolution Trial into a national service to manage clients in the community to an immigration outcome through early intervention. Section 8 provides further information.

1. An Historical Perspective

Australia is a country built on migration. Almost 7 million migrants, including almost 700 000 refugees and humanitarian entrants have come here since World War II. As a result, just under half of Australians were born overseas or have at least one parent who was born overseas. Migration has been, is, and will be in the decades ahead, a key contributor to our economic prosperity. It helps to meet skill needs and balance the ageing of the population so that the impacts of the global economic crisis are minimised. As the economy recovers, it will be a critical element in meeting demand in the expanding Australian economy. The Government views Australia's cultural diversity as a source of both social and economic wealth.

Australia's migration arrangements are based, inter alia, on the universal visa system - that all non-Australian citizens must hold a valid visa to enter and remain in Australia. Those who are in Australia and do not hold a valid visa are unlawful non-citizens and must depart Australia or be removed from Australia, unless they otherwise obtain a visa.

Over time the Australian Government has used different policy settings and approaches to manage and respond to non-citizens seeking to enter and/or remain in Australia when they have no permission to do so, or non-citizens breaching the conditions that apply to their visa.

These policies have been refined by successive Governments. Additional strategies, such as the creation of excised offshore places and limitations on the types of visas that may be applied for by some categories of person, have been introduced by Governments to manage specific immigration risks to the Australian community.

Maintaining public confidence in the integrity of Australia's migration system is a key concern for Government. Governments seek to ensure that only those with a right to enter or remain in Australia do so. Immigration risks include those risks that undermine the functioning of Australia's migration system resulting in people entering or staying in Australia when they have no legal right to do so, or in people breaching their visa conditions.

Immigration detention has been one of the tools used by Governments to manage immigration risk. It is clear, however, that immigration detention also creates significant risks of its own, particularly for those persons who are detained, such as the risk of damage to their physical and mental health and well being. The amendments to the Act that inserted section 4AA 'Detention of minors a last resort' in 2005 acknowledged this risk in relation to children.

Since that time, there has been an increasing appreciation, in Departmental processes relating to the use of immigration detention, of the full range of risks that arise when detention is used. These risks may affect those persons who are detained, but also impact on public confidence in the administration of the migration program and Australia's international standing. The need to appropriately balance those risks has become increasingly apparent.

2. Addressing Risk in Immigration Detention

The Government's values were announced in a speech by the Minister for Immigration and Citizenship on 29 July 2008 *New Directions in Detention – Restoring Integrity to Australia's Immigration System* (link to Minister's website). The speech marked a further step in the recognition of the risks inherent in the use of immigration detention. The values recognise that immigration detention is not an end in itself, but rather a risk management tool amongst a suite of measures available to the Department to manage compliance and to achieve timely resolution of the person's immigration status, either through grant of a visa, voluntary departure, removal or deportation from Australia.

Under the new values, the Department has further extended its work to eliminate unnecessary use of immigration detention. The 2009-10 Budget contained funding to continue and expand the Community Care Pilot as a national service to promote the resolution of immigration status through early intervention while clients remain in the community. There is an increased emphasis and capacity within the Department for promoting voluntary compliance with visa requirements, and for supporting and assisting clients to comply with those requirements without the use of immigration detention.

The Government has made it clear that there will continue to be an important role for immigration detention to manage particular risks. The Government's values articulate a continuing commitment to strong border control. Three groups for which the Government has specified mandatory detention are: unauthorised arrivals for the management of identity, health and security risks to the community; other unlawful non-citizens who present unacceptable risks to the community; and unlawful non-citizens who have repeatedly refused to comply with their visa conditions. In all three groups the common theme is risk management.

This risk management approach is consistent with past approaches to the use of detention but the Government has strengthened this approach by clearly stating that detention that is indefinite or otherwise arbitrary is not acceptable and by reinforcing the purpose of immigration detention as a tool to assist in the resolution of immigration status, not as an end in itself.

The Department has been working to ensure that, in its decision making, there is a proper consideration of any of the risks of harm which can arise from depriving a person of their liberty, and to give appropriate weight to the potential harm to a person's physical and mental health if detention becomes prolonged. Administrative implementation of the Government's values has been under way since July 2008 (for detail see Attachment 4). The amendments to the Act proposed by the Detention Reform Bill will reflect the Government's policy position and will create flexibility for the broader application the Government's values by the Department.

3. Current Legal Framework for Immigration Detention

In support of Australia's universal visa system, section 189 of the Act creates an obligation for the Department to detain all persons known or reasonably suspected to be an unlawful non-citizen at other than an excised offshore place. In effect, the Department can also choose, when dealing with an unlawful non-citizen, to grant

them a visa (frequently a Bridging E visa). Once the visa has been granted, there is no longer a requirement for the Department to detain them.

The interaction between the requirement to detain in the Act and the operation of the Bridging E visa in the Regulations is complex and critical to the implementation of the Government's values.

The Bridging E visa subclasses are used to keep/restore/create lawful status while a person is pursuing an immigration outcome (so that the person can be quickly released from detention or not detained when they are located). Further detail about the Bridging E visa subclasses is at Attachment 2.

Non-citizens who entered Australia lawfully, but later became unlawful non-citizens, can generally access the existing Bridging E visa subclass 050. The Bridging E visa subclass 051 is only able to be granted to people who are not immigration cleared, who apply for a Protection visa, pass health, character and security checks and are:

- under 18 or over 75;
- have a certified special need requiring care which cannot be provided effectively in detention; or
- have an Australian or New Zealand citizen or permanent resident spouse (or are the family unit member of someone who does).

4. The Characteristics of the Group of People who may be Subject to Immigration Detention

Of the millions of people who come to Australia each year under immigration programs, 99.7 percent depart when they are required to do so by their visa. Significant Departmental effort is invested in maintaining this very high level of compliance and in seeking to identify and quickly resolve (via visa grant or departure) the relatively small number of cases where people do not 'do the right thing'.

At any one time in Australia the case resolution population – that is those people who are either unlawful non-citizens or who are on a bridging visa pending resolution of their visa status - numbers approximately 56 000. In any one year there is significant turnover within this case resolution population as people leave Australia, become unlawful or are granted a visa.

Approximately 48 000 of the case resolution population will have overstayed their visas, sometimes for a very short period, and many of this group leave Australia of their own accord shortly after their permission to remain ceases and without any contact with the Department. This represents about 0. 2 percent of the total Australian population and has been stable for some years. The comparable figure in the United States of America is 3.9 percent (approximately 12 million illegal immigrants in a population of 302 million in 2008)[1].

A further 6000 people in the case resolution population will, at any one time, hold Bridging visas while they work towards resolution of their case either through grant

[1] US Department of Homeland Security

of a visa or departure. The remainder of the case resolution population will include people in detention such as:

- people who arrive without authority or have visas cancelled on arrival and need to be actively managed in detention while any health, security and identity risks are addressed;
- some high risk individuals who have had their visa cancelled or refused on the basis of character concerns;
- clients who have had their visas cancelled or refused for compliance purposes, for example working without permission or working in a manner not consistent with their visa; and
- illegal foreign fishers.

Each of the 48 000 people who have overstayed their visa is liable for detention under the current legislation. However, in practice they must first come into contact with an officer of the Department (or with a person who has relevant powers under the Act such as a member of the Australian Federal Police or of the police force of a State or an internal Territory).

The vast majority of this contact occurs when a person voluntarily approaches an office of the Department and seeks to engage with the Department to resolve their status through visa grant or departure from Australia. Tourists who have overstayed their visa by a couple of days and who 'self-resolve' are a large part of this group, as are people whose original visa has ceased but who are eligible to apply for another substantive visa or people who are pursuing review of a visa refusal.

The next largest group is referred to the Department by other agencies, primarily the police. The third group is those people located by Departmental officers as part of targeted work to locate unlawful non-citizens or those working illegally or otherwise in breach of visa conditions.

Once contact has been made, the Department must decide whether the person is eligible for grant of a visa and/or whether their detention can be justified because of the immigration risk they represent.

The percentage of people granted a Bridging E visa when located by the Department (via the various methods described above) fluctuates from year to year, but has trended upwards. It was 59 percent (11 199 out of 19 032 people) in 2004-05, 80 percent (9413 out of 11696 people) in 2006-07 and 87 percent (8609 out of 9900 people) in 2008-09. At any given time throughout the year there are approximately 6 000 Bridging visas in effect.

5. Content of the Immigration Detention Reform Bill

Relevant provisions of the Act are at Attachment 3. In summary, the Immigration Detention Reform Bill amends the Act to:

- state that the Parliament affirms as a principle that the purpose of detaining a non-citizen is to manage the risks to the Australian community of the non-

citizen entering or remaining in Australia and to resolve the non-citizen's immigration status;

- state that the Parliament affirms as a principle that a non-citizen must only be detained in a detention centre established under the Act as a last resort and if a non-citizen is to be so detained the non-citizen must be detained for the shortest practicable time;
- strengthen the existing principle in section 4AA of the Act that the detention of a minor is a measure of last resort by providing that a minor, including a person reasonably suspected of being a minor, must not be detained in a detention centre established under the Act; and if a minor is to be detained, an officer must for the purposes of determining where the minor is to be detained, regard the best interests of the minor as a primary consideration;
- expand the definition of immigration detention in subsection 5(1) of the Act to allow for a person in immigration detention to be at, or go to, a place in accordance with a temporary community access permission without being in the company of, and restrained by, an officer or another person directed by the Secretary;
- clarify in a note to the definition of immigration detention in subsection 5(1) of the Act the examples of the places of immigration detention that the Minister has the power to approve in writing include immigration transit accommodation, immigration residential housing and other places that may be used to provide accommodation;
- give an authorised officer a non-compellable, discretionary power to grant a temporary community access permission if the officer considers that it would involve a minimal risk to the Australian community to enable a person in immigration detention, who is not subject to a residence determination, to be absent from the place of the person's detention for a certain period of time for a purpose or purposes specified;
- provide that an officer must detain a person in the migration zone (other than an excised offshore place) if the officer knows or reasonably suspects that the person is an unlawful non-citizen and:
    - the person has bypassed immigration clearance;
    - the person has been refused immigration clearance;
    - the person's visa has been cancelled under section 109 because, when in immigration clearance, the person produced a document that was false or had been obtained falsely;
    - the person's visa has been cancelled under section 109 because, when in immigration clearance, the person gave information that was false;
- provide that, if a person is detained because one of the points above applies to them, an officer must make reasonable efforts to ascertain the person's identity; identify whether the person is of character concern; ascertain the health and security risks to the Australian community of the person entering or remaining in Australia; and resolve the person's immigration status;
- further provide that an officer must detain a person in the migration zone (other than an excised offshore place) if the officer knows or reasonably suspects that the person is an unlawful non-citizen and presents an unacceptable risk to the Australian community if, and only if, any of the following applies:
    - the person has been refused a visa under section 501, 501A or 501B or on grounds relating to national security;

- the person's visa has been cancelled under section 501, 501A or 501B or on grounds relating to national security;
- the person held an enforcement visa and remains in Australia when the visa ceases to be in effect;
- circumstances prescribed by the regulations apply in relation to the person;

- otherwise provide that if an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer may detain the person;
- provide that the Minister's non-compellable residence determination power may be delegated to an officer and that the Minister or the delegate must set out in a statement the reasons why the determination was made in the public interest to be tabled before each House of Parliament; and
- allow for further consequential amendments as a result of the measures above.

6. Policy Rationale behind the Immigration Detention Reform Bill

6.1. The purpose of immigration detention

The different measures in the Immigration Detention Reform Bill derive from its first principle: that the purpose of immigration detention is to manage the risks to the Australian community of the non-citizen entering or remaining in Australia and to resolve the non-citizen's immigration status. Resolving the non-citizen's status will result in either a visa being granted to the person or the person being removed or deported from Australia.

The Department's authority to detain an unlawful non-citizen, and to remove those non-citizens who do not have permission to enter and remain in Australia, derives from the Act which was made by Parliament pursuant to section 51(xix) of the Constitution (the power to make laws with respect to 'naturalization and aliens'). The High Court has held that detention of an unlawful non-citizen for these purposes is administrative in nature and not punitive.[2]

The proposed amendments reflect Australia's universal visa system which requires all non-citizens in Australia to hold a visa giving them permission to enter and remain in Australia. In the current legislative framework, in the absence of a visa and where a person becomes an unlawful non-citizen, they must be detained (unless in an excised offshore place).

Under the amendments proposed to section 189 in the Immigration Detention Reform Bill, unlawful non-citizens who are not in an excised offshore place either must be detained (because they are subject to mandatory detention), or may be detained if they are not subject to mandatory detention. In all cases, as is currently the case, an unlawful non-citizen who is granted a visa must no longer be detained.

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[2] See *Al Kateb v Godwin, Keenan & Minister for Immigration and Indigenous and Multicultural Affairs* [2004] HCA 37, *Minister for Immigration and Indigenous and Multicultural Affairs v Al Khafaji* [2004] HCA 38, and *Behrooz v Secretary, Department of Immigration and Indigenous and Multicultural Affairs* [2004] HCA 36, and *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

There is no intention to create a class of person who is not eligible for a visa and who also cannot be detained. It is intended that where an unlawful non-citizen is not to be detained they would be granted a visa to give effect to that intent. It is intended to remain the case that a non-citizen in Australia either holds a visa or is liable for immigration detention.

6.2. Retention of mandatory detention

The Immigration Detention Reform Bill clarifies those groups subject to mandatory detention. No change is proposed to the provisions of the Act relating to an unlawful non-citizen at an excised offshore place, including unauthorised arrivals at an excised offshore place. Unauthorised arrivals will continue to be subject to mandatory detention, and existing mechanisms that prevent a person whose visa has been refused or cancelled on character grounds from applying for a Bridging E visa. The groups identified in the Immigration Detention Reform Bill as subject to mandatory detention are those unlawful non-citizens who:

- present a specified unacceptable risk to the Australian community (see detail at 6.2.1 below);
- have bypassed immigration clearance;
- have been refused immigration clearance;
- have had a visa cancelled under section109 of the Act because when in immigration clearance the person produced a document that was false or had been obtained falsely when in immigration clearance; or
- the person's visa has been cancelled under section 109 because when in immigration clearance the person gave information that was false.

The risks to the Australian community arise in the latter four instances because these people have either:

- avoided the checking processes we seek to apply to all people entering Australia;
- been identified during the checking process on entry to Australia as presenting a risk to the community; or
- passed through the checking process fraudulently.

All of these groups are defined by a finding of fact relating to their immigration status in Australia.

6.2.1. An unacceptable risk to the community

The Immigration Detention Reform Bill specifies the circumstances in which a person presents an unacceptable risk to the Australian community as those where:

- the person has been refused a visa or had their visa cancelled under section 501, 501A or 501B or on grounds relating to national security;
- the person held an Enforcement visa and remains in Australia when the visa ceases to be in effect; or
- circumstances prescribed by the Regulations apply to the person.

The first category above addresses the risk presented by people whose visa has been cancelled or refused under the provisions of the Act that relate to character concerns. It also addresses people who represent a risk relating to national security as determined under the *Australian Security Intelligence Organisation Act 1979.*

The second group of former Enforcement visa holders reflects existing provisions in the *Fisheries Management Act 1991,* the *Environment Protection and Biodiversity Conservation Act 1999* and the *Torres Strait Fisheries Act 1984,* which provide for the mandatory detention of those people brought to Australia under the provisions of the above Acts. These people, for example, illegal foreign fishers, who are initially granted Enforcement visas, currently become subject to mandatory detention if their visa ceases to be in effect and they remain in Australia. These arrangements are unaffected by the proposed amendments to the Act.

The third group, who fall within prescribed circumstances in the Regulations, are discussed in more detail at Section 7.1 below. In essence the risk they present to the community comes from their damage to the effectiveness of Australia's migration and entry programs because of the risk that the person will not comply with visa conditions, will not depart Australia unless detained and/or have participated in organised identity or document fraud. This latter group can pose significant risks to public confidence in the Government's management of those migration programs.

6.2.2. Reasonable efforts in response to unlawful non-citizens mandatorily detained

If a person is detained because they are in one of the groups that must be detained (other than those who present an unacceptable risk detailed in 6.2.1 above) an officer must make reasonable efforts to ascertain the person's identity, identify whether the person is of character concern, ascertain the health and security risks to the Australian community of the person entering or remaining in Australia and resolve the person's immigration status.

This set of activities supports the integrity of Australia's migration program by managing identity, health, character and other security risks to the community and is consistent with the second value. They are also consistent with both elements of the purpose of detention, namely to manage risks to the Australian community and resolve the person's immigration status.

6.3. Discretionary detention of other unlawful non-citizens

Detention is discretionary for any other person known or reasonably suspected of being an unlawful non-citizen who does not fall into one of the groups who must be mandatorily detained. This approach allows the individual risk presented by the unlawful non-citizen to be assessed and the response (detention or grant of a visa) to be proportionate to that assessed risk, including the prospects, if any, of prompt removal of the person from Australia or other resolution of their status.

Detention arrangements for offshore entry persons (including unauthorised arrivals by boat who are taken to Christmas Island under current border protection arrangements)

remain unchanged. Unlawful non-citizens in excised offshore places, including offshore entry persons, will continue to be subject to the existing detention and visa arrangements of the Government's excision policy. Offshore entry persons are unable to apply for any visa in Australia while they remain an unlawful non-citizen unless the Minister acts personally to allow them to make a valid visa application.

This approach addresses the specific and additional risk to the Australian system relating to border control that derives from an offshore entry person's mode of arrival in Australia and the additional risk at an individual level because the person has not undergone any pre-arrival screening.

6.4. Detention in a detention centre as a measure of last resort and for the shortest practicable time

The introduction of this principle builds on existing Departmental processes of review of cases of clients in detention. The goal is to articulate a principle which will drive and support the timely resolution of the person's immigration status and the management of any risk of harm to the detained person. Detention review processes are explained at Section 8.6.

6.5. Minors

The Immigration Detention Reform Bill contains measures that extend the current principle that minors should only be detained as a last resort by also limiting the location and nature of any such detention. Minors, or those reasonably suspected of being minors, are not to be detained in an immigration detention centre established under the Act and the best interests of the child are to be a primary consideration in any decision of an officer about where to detain a minor.

This strengthened position reflects concern to ensure appropriate treatment of minors and the risk of harm to them that may accrue as a result of detention given the particular vulnerabilities of people of a young age.

The Minister intends to issue a Ministerial Direction under s499 of the Act in respect of children in detention to guide officers in the principles that apply in decisions about placement if a minor is detained as a last resort. Further information about the content of the proposed Ministerial Direction is at Section 10.1 below.

The Immigration Detention Reform Bill would also incorporate a note in the Act to make it clear that alternative places of detention approved by the Minister 'may include, for example, immigration transit accommodation, immigration residential housing and other places that may be used to provide accommodation'. These places of detention, which include some accommodation facilities on Christmas Island, are not detention centres established under section 273 of the Act. It is clear that these places of detention are not covered by the prohibition of subsection 4AA(3).

6.6. Delegation of the Residence Determination powers

Under legislation introduced in 2005 the Minister has a non-compellable and non-delegable power under section 197AB of the Act to allow a person who is an unlawful

non-citizen to reside in the community if it is in the public interest to do so. The Minister may allow individuals and/or families to reside in the community at a specified place in accordance with conditions that address their individual circumstances.

The Immigration Detention Reform Bill contains measures that will enable the Minister to delegate this non-compellable power to senior Departmental officers.

As with the creation of the Temporary Community Access Permission (TCAP) concept, delegating the Residence Determination powers increases the Department's capacity to manage the range of detention placement options without the need of the Minister for Immigration and Citizenship's intervention in individual placement decisions. It will give the Department the capacity to better integrate Residence Determination placement and management decisions with other placement and management decisions currently administered by the Department in relation to people who are liable for detention.

Further detail about the delegation of the Residence Determination power and a possible Ministerial Direction to guide its use in the public interest is at Section 10.2 below.

6.7. Temporary Community Access Permission

Currently, clients can leave detention facilities for excursions or to attend medical appointments only when accompanied and restrained by an officer, including a guard or a Directed Person. The introduction of TCAPs will maintain the legal status of immigration detention for a person while enabling the Department to permit a detainee to move outside a detention facility without the current physical restraint requirements in specific circumstances.

The grant of a TCAP by an authorised senior officer will depend on a robust risk assessment taking into account the individual circumstances of the case. Grant of a TCAP will allow a person in any detention facility to move in the community for specific periods specified in the permission and for the purpose or purposes specified in the permission.

Grant of a TCAP will allow suitably risk-assessed persons in immigration detention to be given some effective control and personal responsibility for their own circumstances, for example, while visiting a doctor unescorted or attending a funeral of a relative. These opportunities will assist in maintaining social and physical well-being of detainees while their cases are being resolved.

The TCAP will provide greater capacity to effectively minimise any adverse impacts of detention for those people for whom detention is justified. This reflects the Government's commitment and key value, that conditions of detention will ensure the inherent dignity of the human person. At the same time a TCAP will only be granted if doing so is assessed as involving minimal risk to the broader Australian community.

For further information on the intended operation of the TCAP see Section 10.3 below.

7. Other Initiatives that support Implementation of the Immigration Detention Reform Bill

7.1. Additional 'circumstances where a person presents an unacceptable risk' are proposed to be prescribed in the Regulations

It is intended that Regulations will be made to prescribe additional circumstances in which a person presents an unacceptable risk to the Australian community for the purposes of the proposed new paragraph 189(1A)(d) of the Act (see Section 6.2.1 above). This capacity to prescribe additional unacceptable risks to the community will allow flexibility to address emerging or changing immigration related risks. Risks such as the risk of an unlawful non-citizen absconding in the community or failing to depart are examples of the type of risks which may be prescribed.

The critical focus of the unacceptable risks to be prescribed will be to ensure a robust and effective management of people who clearly do not intend to comply with visa requirements or who have no basis to remain in Australia but will not depart. The Government's values identified those categories of people subject to mandatory detention and the inclusion of persons who repeatedly refuse to comply with their visa conditions will be addressed in the additional unacceptable risks it is intended to prescribe in Regulations.

The risks that the Government would be seeking to manage in the proposed Regulations are the risks that individuals, particularly those who have no entitlement to remain in Australia, will not comply with the conditions of any visa if one were granted. In such cases detention may be needed to facilitate resolution of their case.

Other risks relate to cases of organised identity or document fraud where detention pending resolution of their case is needed to protect against the risk of damage to public confidence in the management of migration programs. Examples of cases to be covered by the proposed regulation include immigration recidivist behaviour, such as a non-citizen repeatedly breaching their visa conditions by working illegally, anticipated non-compliance with visa conditions in the future or participation in organised/criminal immigration fraud against the migration program.

It is proposed that a person in the migration zone (other than an excised offshore place) who an officer knows or reasonably suspects is an unlawful non-citizen, would present an unacceptable risk to the Australian community, so as to fall within paragraph 189(1A)(d), in the following circumstances:

- where an officer knows or reasonably suspects a person will not abide by visa conditions imposed in a visa grant; and
- where an officer knows or reasonably suspects that detention will facilitate the resolution of the non-citizen's immigration status

OR

- where an officer knows or reasonably suspects an unlawful non-citizen has been a participant in (not limited to only the actual organiser of) organised

migration or identity fraud in respect of an entitlement under the Act or Regulations; and

- where an officer knows or reasonably suspects that detention will facilitate the resolution of the unlawful non-citizens immigration status.

It is proposed, consistent with the values, that the first cohort would include those unlawful non-citizens who repeatedly refuse to abide by their visa conditions and those who have no basis to remain in Australia but who will not depart, unless there are other factors which enable the officer to conclude the person would now not present an unacceptable risk to the Australian community. This proposed cohort is consistent with the Government's stated position that unlawful non-citizens who have repeatedly refused to comply with their visa conditions be subject to mandatory detention.

The second proposed cohort would include unlawful non-citizens who have participated in organised fraud against the migration program. In these circumstances there can be an unacceptable risk of harm to public confidence in the management of the migration program, in addition to risks of individuals not complying with conditions of a visa, if one were granted.

The organised nature of some non-compliance may also mean that the participant has additional incentives not to comply with any visa conditions if a visa were to be granted. For example, they may:

- owe a debt and have no way to pay it back other than by returning to working illegally;
- fear criminal prosecution and have higher incentive to abscond rather than abide by reporting conditions; or
- also have unmet obligations in their home country that are further motivation for non-compliant behaviour.

An example of such a case would be someone located working in an organised illegal work scheme who is assessed as likely to abscond if not in detention and by absconding would not be available for removal. Another example is where a person has no entitlement to remain in Australia but will not cooperate in seeking/providing travel documents so that removal may be arranged. Some countries will not provide travel documents on Departmental request unless the person is in immigration detention. Detention in this case would allow the Department to seek travel documents on the person's behalf in order to remove them and resolve their immigration status.

In addition,[3] detention in the immediate lead up to removal may be necessary and appropriate to resolve a person's immigration status if a person has been non-compliant with visa conditions and is assessed as likely to thwart removal plans through last minute absconding.

[3] Noting the legal requirement that all removals be carried out as soon as reasonably practicable and the large part that prompt removals of persons with no right to remain plays in maintaining the integrity of the immigration system.

7.2. Proposed amendments to the Bridging E visa Regulations

The Department is developing regulatory reform to Bridging E visas to support the measures in the Immigration Detention Reform Bill. It is planned that these changes to the Regulations will also commence on the same day as the Act amendments. The changes will be consistent with strong border control protections and, consistent with the values, mandatory detention for: all unauthorised arrivals for management of health, identity and security risks to the community; unlawful non-citizens who present unacceptable risks to the community; and unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

As noted above, Australia's universal visa system requires any person in Australia who is not an Australian citizen to be the holder of a visa. If such a person is not a visa holder then detention always remains either mandatory (where they fall within a specified group as detailed above) or discretionary. As most unlawful non-citizens in contact with the Department who are not detained will be eligible for the grant of only a Bridging E visa is it imperative that the two mechanisms dovetail. The proposed Regulation changes would maintain this outcome.

7.2.1. Proposed changes to both subclasses of the Bridging E visa

Key features of the proposed changes to the Regulations will be amendments that directly support the purpose of detention as a risk management and immigration status resolution tool.

In amending the Bridging E visa provisions the goal is to reflect the Government's presumption that a person would remain in the community while their immigration status was resolved unless detention is justifiable on a risk basis. It is proposed that this be done by amending the Bridging E visa grant criteria where relevant to indicate that a visa application will be granted unless the decision-maker knows or reasonably suspects that the person presents an unacceptable risk as specified in the Regulations.

Any decision to refuse a valid Bridging visa application under the proposed Regulations would continue to be subject to merits tribunal and judicial review avenues.

This approach would provide a direct link back to the purpose of detaining an unlawful non-citizen as introduced by Item 1 of the Immigration Detention Reform Bill, which is to:

(a) manage the risks to the Australian community of the non-citizen entering or remaining in Australia; and
(b) resolve the non-citizen's immigration status.

These elements also link to the prescribed class of people who present an unacceptable risk and must be detained. For further detail on unacceptable risk, see Section 6.2.1 above.

Consistent with the purpose of detention, and other departmental activities to resolve a non-citizen's status, it is also proposed to create a range of additional conditions that may be applied to grant of a Bridging E visa such as:

- the person must actively participate in the resolution of their immigration status (for example by attending an interview or attending a health check); or
- the person must provide specified documentary evidence (for example, proof of residence, custody arrangements, enrolment in study).

In considering whether detention will facilitate a timely immigration outcome the decision-maker will, under policy, have regard to the range of risks flowing from use or non-use of immigration detention including:

- the likely length of any detention, based on the prospects and timing of any likely grant of a substantive visa or removal or deportation from Australia;
- any vulnerabilities of the non-citizen and/or their affected family;
- the risk of harm to the non-citizen and/or their affected family, if any;
- any risk of self harm or threat to others;
- any history of participation in migration or identity fraud;
- any expressed desire/intent to return home or to remain in Australia without permission to do so;
- any history of active cooperation or passive non-cooperation with removal activities;
- any history of active interference with removal activities;
- any history of assisting with or delaying the speedy resolution of their case; or
- any changed circumstances such that known history is no longer considered determinative of expected future behaviour.

Non-citizens who entered Australia lawfully, but later became an unlawful non-citizens, can access the existing subclass 050 Bridging E visa. It is not proposed to change the group which has access to this subclass.

7.3. Proposed changes only to subclass 051 of the Bridging E visa

It is intended that all persons who are not immigration cleared (including unauthorised arrivals) will be subject to mandatory detention on arrival. The Government has made it clear that excision arrangements will remain and that unauthorised boat arrivals will be processed on Christmas Island in a non-statutory process. The proposed Regulations will support and reflect this strong border control policy position.

It is proposed, consistent with the values, to amend the subclass 051 to make it possible for unlawful non-citizens who have not been immigration cleared to be granted this visa in certain circumstances, once health, identity and security checks have been satisfied. Those non-citizens would also be subject to careful assessment of any risk that the person would not abide by the conditions of the visa/or not depart Australia when required.

Currently, a Bridging E visa subclass 051 is generally able to be granted to only those people who are not immigration cleared, who apply for a Protection visa, pass health, character and security checks and:

- ~~are under 18 or over 75;~~

- have a certified special need requiring care which cannot be provided effectively in detention; or
- have an Australian or New Zealand citizen or permanent resident spouse (or are the family unit member of someone who does).

Satisfaction of the decision-maker as to the identity of the individual is inherent in the decision to grant the visa. It is proposed that the existing Bridging E visa 051 arrangements would be expanded to allow grant of the visa to persons who meet the health, character and security requirements, but who do not meet the other criteria set out above.

In expanding the group of people who can access Bridging E visas it is not intended to expand the cohort of persons to include non-citizens who have had a visa refused or cancelled under the character provisions of s501 of the Act. Those persons will continue to be unable to make a valid application for a Bridging E visa. It is also not proposed to change current border control practices that use quick turnarounds and return of people who are refused immigration clearance, or have their visa cancelled in immigration clearance, where these people have no basis to remain.

7.4. Offshore Entry People

Offshore Entry People (OEPs) do not currently have access to any form of the Bridging E visa unless the Minister grants them that visa, using his non-compellable section 195A power to grant a visa, or lifts the bar under section 46A of the Act to allow a valid application to be made for a Bridging E visa 051. There is no intention to change the Act or the Regulations to allow OEPs access to the revised Bridging E visa subclasses, other than via the methods involving the Minister's personal powers as described above.

8. Strategies to Promote Immigration Status Resolution

8.1. National Community Status Resolution Service

In the 2009-10 Budget, the Government announced that it would allocate $39.2m for the Community Status Resolution Service (CSRS) over four years to boost the Department's capacity to actively engage and resolve the immigration status of Bridging E visa holders.

The principles behind the CSRS are central to the Government's values which aim to manage those people with an unresolved immigration status (including Bridging E visa holders) while they are in the community, wherever possible, unless there are clear risk based reasons to detain.

8.1.1. History of the creation of the Service

The Community Status Resolution Trial which commenced in July 2007 in Victoria and New South Wales, and was later expanded to Queensland, was an extension of the Community Care Pilot. The trial explored the impact of close and early

engagement with clients and opportunities for developing assisted voluntary return services.

Under the trial, non-case managed clients in the community were referred to the International Organization for Migration (IOM) for information, immigration counselling and voluntary return services. The trial complemented the pilot by providing the Department with the capacity to assist those clients who did not have health and welfare vulnerabilities and wished to depart Australia voluntarily.

An internal evaluation of the trial in September 2008 showed that 41 percent (111) of trial participants had departed voluntarily. Some 46 percent (51) of those did so within five weeks of engagement and 76 percent of clients (84) departed within 15 weeks. This occurred despite their average length of stay in Australia being nearly five and a half years and their having held, on average, 11 Bridging E visas each during their stay.

The trial illustrated how early intervention and close engagement can lead to timely, fair and reasonable outcomes for clients in difficult circumstances. Following the success of the trial, a limited CSRS commenced in December 2008.

The Government agreed in May 2009 to expand the service nationally.

8.2. Assisted Voluntary Return service

The 2009-10 Budget also allocated $14.23m over four years for a national expansion of the Assisted Voluntary Return (AVR) service that assists non-citizens who wish to return home but do not have the means to do so. The Department has contracted the International Organization for Migration (IOM), an independent international organisation which provides a range of services and support to assist displaced persons, to provide counselling and travel assistance to clients through the AVR. The Department expects 4000 client referrals to the IOM per year once fully operational.

Anticipated referrals to IOM were modelled using the outcomes of the Community Status Resolution Trial (see detail in Section 8.1 above) which were then applied to the BVE caseload of 18 000[4] clients per year. It is estimated these referrals will result in 1600 voluntary departures per full year of operation.

8.3. Community Assistance Support Program

The Community Care Pilot (CCP) focused on providing immigration advice, information and counselling support to the Department's vulnerable clients while addressing their health and welfare needs. It offered community assistance through the Australian Red Cross and information and counselling services through the IOM. An immigration advice and application support service is also offered to provide clients with access to expert assistance with their visa applications.

[4] Note this is the cumulative number of people who may hold a BVE during a year, not the number of people who may hold a BVE at any point time, which is 6000 and referenced elsewhere in this Submission.

As part of the 2009-10 Budget, the Government announced the funding of an extension of the CCP into a national Community Assistance Support (CAS) Program over four years from 1 July 2009. Provision of $19.85m over four years will see services extended to Western Australia, South Australia, Northern Territory, Tasmania, and the ACT in addition to existing services in NSW, Victoria and Queensland.

The CAS Program will provide a package of individually-assessed services including health, welfare and income support, together with immigration advice and application assistance, to vulnerable clients in certain circumstances, in order to facilitate resolution of their status.

The CAS Program provides assistance to these clients in order to address their basic health and welfare needs during the status resolution process. Support offered under the program to eligible clients includes:

- income support, the maximum provided being set at 89 percent of Special Benefit plus rent assistance and Family Tax Benefit (for dependent children) where applicable; and
- essential medical services (including mental health/counselling services and specialist medical/diagnostic services, as appropriate).

On being taken into the CAS Program, clients and their dependents are referred to the Australian Red Cross for intensive case work support. Through the support and assistance of the Red Cross caseworker, clients are linked into appropriate services and community supports, including, but not limited to school enrolments for children.

8.4. Community Care Assistance

An additional $3.3m over four years was provided in the 2009-10 Budget for immigration advice and application assistance. An additional $0.65m per year will boost the Immigration Advice and Application Assistance Scheme's (IAAAS) capacity to assist an additional 500 clients in the community. This supports the Department's early intervention approach towards case resolution. A further $0.1m per year will extend IAAAS help to clients receiving services under the Community Assistance Support program.

These amounts are additional to the $2.2m per year which continues to fund current IAAAS services to approximately 800 clients a year.

Under the IAAAS, selected migration agents are funded to help all asylum seekers in immigration detention and disadvantaged Protection and other visa applicants in the community with professionally qualified application assistance, including interpreters and being accompanied at visa interview. Funding is also provided for more general information sessions, brief face-to-face or telephone advice. There are 23 providers across Australia from commercial practices, legal aid agencies and non-government community bodies providing these services to people in immigration detention and in the community.

During 2008-09, unauthorised boat arrivals on Christmas Island also began receiving assistance from selected IAAAS agents to put their claims for refugee status, and those found to be refugees were further assisted to make Protection Visa applications once the Minister lifted the bar under section 46A of the Act.

8.5. Case Management

The Department's Case Management Service provides a comprehensive approach to the management of clients with complex cases or who are considered vulnerable, to achieve a timely immigration outcome. Consistent with the values, case managers ensure that detained clients are in detention as a last resort, in the least restrictive form of detention and for the shortest practicable time. Case managers also ensure that minors are given priority as they enter, transit and exit detention, and in accordance with the United Nations *Convention on the Rights of the Child 1989*, that the best interests of the child is a principal consideration in our management of minors (see also Section 10.1 below).

Case managers are present in all of the Department's offices in Australia, actively coordinating the provision of internal and external services to clients, including services under the CAS Program (see Section 8.3 above), where available, and are working closely with the CSRS and detention operations to achieve timely immigration outcomes.

8.6. Detention Review Processes

Since the inclusion in the Act in 2005 of Part 8C - Reports on Persons in Detention for more than 2 Years - the Commonwealth Ombudsman has been reviewing the case of any person who has been in immigration detention for a period of at least two years. Since May 2005, Detention Review Managers have also been in place to review the lawfulness and appropriateness of decisions to detain under the Act. They review the initial detention decision shortly after it is made and continue to review the cases of people in immigration detention on an ongoing basis to ensure their detention remains lawful and appropriate, and that their cases are being actively progressed.

On 29 July 2008 the Minister for Immigration and Citizenship announced a new detention review framework comprising a review of the reasonableness of each client's continued detention by a Departmental Senior Review Officer (SRO) every three months and by the Commonwealth Ombudsman every six months.

The Department has worked closely with the Commonwealth Ombudsman's Office on the development of the six monthly detention review process. Under this process the SRO, with the support of the Department's Detention Review Unit (DRU), undertakes a thorough review of client detention at five months. This review is provided to the Ombudsman.

As at 30 June 2009, 52 clients have been reviewed at the five month mark and a report provided to the SRO. Of those, 50 reviews have been provided to the Ombudsman (two cases were resolved prior to being forwarded to the Ombudsman). The DRU has received eight reports back from the Ombudsman and in each case the Ombudsman

has agreed with the conclusion reached by the SRO. Reviews were commenced for a further 10 clients, but were discontinued as the clients did not remain in detention.

The first priority of the DRU and the SRO has been the review and resolution of cases falling due for the new Ombudsman reviews. Three monthly SRO reviews began in July 2009.

9. Administrative Implementation of the Government's Key Immigration Detention Values

Advice about the administrative implementation of the values is at Attachment 4.

10. Related Issues

10.1. Intended Ministerial Direction on best interests of the child

While the Act was amended in 2005 to affirm the principle that children should only be detained as a last resort, the principle does not limit the location and nature of any such detention. The Government's detention values and their reflection in the Immigration Detention Reform Bill build on the 2005 principle by explicitly banning the detention of children in detention centres established under the Act.

Current policy is that while prompt placement of children and their families in community detention remains the Department's priority, there will be occasions when children will be accommodated in immigration residential housing, immigration transit accommodation or alternative places of detention within the immigration detention framework for short periods and in the least restrictive form of accommodation while their status is resolved.

A further measure in the Immigration Detention Reform Bill extends section 4AA to specify that if a minor is to be detained, the best interest of the child must be a primary consideration for the purposes of determining where the minor is accommodated.

The Minister has a power under section 499 of the Act to give written directions to a person or body having functions or powers under the Act about the performance of those functions or exercise of those powers.

The Minister intends to make a Ministerial Direction under section 499 of the Act to accompany the legislative changes. This Direction will provide binding guidance to Departmental officers as to the principles that apply if a minor is detained. The broad objective behind the Ministerial Direction will be to ensure that if a minor must be detained as a last resort for a short period while their status is being resolved, their placement, treatment, and the conditions of the detention environment are humane and have as little adverse impact on the child as possible. The policy priority is to seek the prompt resolution of the child's immigration status, along with that of their family members. The principles for managing minors will be consistent with Australia's obligations under the *Convention on the Rights of the Child 1989*.

10.2. Intended Ministerial Direction on use of section 197AB in the 'public interest'

The Immigration Detention Reform Bill provides that the section 197AB power to make a Residence Determination, currently only available to the Minister (in the public interest) in Division 7 of Part 2 of the Act, may also be delegated to a Departmental officer/s by the Minister.

The Minister has indicated his intention to delegate this power to some senior Departmental Officers who have overarching responsibility for ensuring that the immigration detention powers are used only where it is justified and, when used, are applied humanely.

As noted above, the Minister has a power under section 499 of the Act to give written directions to a person or body having functions or powers under the Act about the performance of those functions or the exercise of those powers.

The Minister has indicated his intention to use this power to issue detailed and legally binding directions to any Departmental decision-maker to whom he delegates the section 197AB power about how this power is to be used, specifically on the range and weighting of considerations which must be complied with in making, varying or revoking a section 197AB determination.

The conditions that will attach to each section 197AB determination will remain unchanged, such as to require the person to be present at a specified residence during specified hours, and to report to immigration officials at specified times.

The current requirement to table a statement in Parliament when the residence determination power is used will continue to apply to residence determinations made by a senior Departmental officer.

10.3. Procedures/guidelines for granting TCAPs

Consistent with the Government's New Directions in Detention policy the proposed legislation changes would enable authorised officers to grant a Temporary Community Access Permission (TCAP).

In situations other than where a person is subject to the particular provisions of a Residence Determination, as defined under section 197AB, the Act requires that a person in immigration detention is to be held at a place of immigration detention. When they are not at that place of immigration detention they are required at all times to be accompanied and restrained. This is required regardless of the particular characteristics of the person, such as their age, health, behaviour, or likelihood of absconding.

The TCAP will maintain the legal status of immigration detention while removing the requirement that the person be accompanied and restrained while the person is outside the place of their immigration detention. The TCAP will allow unlawful non-citizens accommodated in *any* detention facility (ie not in Residence Determination),

following suitable risk assessment and depending on individual circumstances as determined by the authorised officer, to move in the community for a specific purpose and for a specified time.

Immigration detention is an option of last resort and, in some cases the risks leading to the decision to detain will also militate against use of the TCAP. Therefore, it is likely that in practice the grant of a TCAP will be used sparingly and only where circumstances make it appropriate. However, the TCAP concept will provide additional management flexibility in responding to human need. For people in immigration detention, a TCAP may deliver a greater personal benefit than might be immediately apparent and provide a basis on which their social and physical well-being can be better supported.

Persons holding a TCAP remain unlawful non-citizens and remain in immigration detention throughout the term of the TCAP. The Department has a continuing responsibility to provide care and support to the individual.

10.3.1. Examples

Without being prescriptive, it is envisaged that the TCAP could be used for low risk detainees, for short term absences from the detention facility without a guard or person directed by the Secretary, for example:

- to attend a day excursion arranged by a community support group or charity;
    - This currently would require an accompanying person to assume legal responsibility to retain line of sight restraint of the individual. A TCAP would enable more of the responsibility to be assumed by the detainee themselves; or
- to attend a funeral, visit an ill relative in the community or attend the birth of their child in hospital.

10.3.2. Issues for consideration when granting a TCAP

The decision-maker will, when considering the possible grant of a TCAP, have close regard to the risks identified when that person was initially detained and any other risks that might present as a cause for concern in the current circumstance. In particular, the case officer will take account of the existing environment and the conditions listed below including but not limited to:

- an assessment of the reasons that led to the person being detained;
- the level of risk as established during that person's time in detention including the risk of the person not abiding by the TCAP conditions;
- the length of time that the person had been and could be expected to remain in detention based on whether there was any imminent likelihood of the grant of a substantive visa or removal or deportation from Australia;
- whether necessary health, identity, character and security checks have been resolved;
- any vulnerabilities of the non-citizen and/or their affected family;
- the risk of harm to the non-citizen and/or their affected family;
- the nature and purpose of the request for a TCAP; and

- any residual risks as determined on the basis that the person will comply with the conditions that have been set.

The grant of a TCAP will take into account the person's progress towards resolution of their immigration status. Where a TCAP is granted the expectation will be that the Department should continue its endeavour to speedily progress substantive issues necessary to achieve an immigration outcome.

Any significant breach of the conditions attached to a TCAP determination would be considered by the authorised officer in deciding whether to amend or revoke the TCAP. Any breaches of TCAP conditions would also inform future TCAP decisions by an authorised officer in relation to that individual. Decisions on TCAPs would be closely informed by assessments made in the case management of the individual.

10.3.3. Process for granting a TCAP

A person in immigration detention may have a particular need that would best be addressed by a period of absence from the facility. In such circumstances, the authorised officer would consider the circumstances of the case, the reasons a TCAP could be considered appropriate and make a risk assessment balancing all pertinent issues. TCAPs will be made in writing by an authorised officer. The TCAP would detail the conditions (including purpose and specified duration) that would apply to the TCAP.

10.3.4. Authorised Officer

Decisions made in respect to the grant of a TCAP are to take into account the risk to the Australian community and will be generally consistent with the guidelines that apply to the grant of a Residence Determination. The authorised officer will be able to grant, vary and revoke TCAPs. It is envisaged that these powers will be managed by senior officers in the Department who hold broad responsibility for oversight of case resolution and the management of immigrations detention.

The authorised officer would not have a duty to consider whether to exercise the power to make, vary or revoke a TCAP determination, whether requested to do so by any person or in any circumstance. It is to be noted that, pursuant to subsection 5(3) of the Act, the Minister personally may also exercise these powers if he wishes to do so.

11. Report recommendations

The Joint Standing Committee on Migration (JSCM) report *Immigration Detention in Australia: A new beginning - criteria for release from immigration detention* was released in December 2008. On 25 May 2009 the JSCM tabled its second report *Immigration Detention in Australia: Community-based alternatives to detention.* The Government expects to respond formally to the recommendations in the JSCM Reports in the near future. In the meantime, the Reports have been influential in framing the Government's policy.

In Recommendation 12 of the first report, the Committee unanimously recommended as a priority, that the Australian Government introduce amendments to the Act to

enshrine in legislation the reforms to immigration detention policy, and that the Regulations and guidelines also be amended to reflect these reforms. The Immigration Detention Reform Bill is consistent with that recommendation.

The Immigration Detention Reform Bill is also consistent with Recommendation 6 of the first report that the Department of Immigration and Citizenship develop and publish the criteria for assessing whether a person in immigration detention poses an unacceptable risk to the community. Item 9 of the immigration Detention Reform Bill defines 'unacceptable risk' with amendments to be made to the Regulations to prescribe those elements of unacceptable risk not listed in the Act.

Recommendation 8 of the first report is also addressed by the proposed treatment of unacceptable risk in the legislation. The Committee recommended that:

> the Department of Immigration and Citizenship clarify and publish the criteria for assessing the need for detention due to repeated visa non-compliance. The criteria should include the need to demonstrate that detention is intended to be short-term, is necessary for the purposes of removal and that prior consideration was given to:
> - reissue of the existing visa, or
> - a bridging visa, with or without conditions such as sureties or reporting requirements.

Item 1 of the Immigration Detention Reform Bill affirms as a principle that all detention (not only that related to visa non-compliance) be for the shortest practicable time. That item also states as a principle that the purpose of detention (not only that related to visa non-compliance) is to manage risk to the Australian community and resolve the non-citizen's immigration status, where that resolution may either be through grant of a visa or the non-citizen being removed or deported from Australia. In addition, the amendments to be made to the Regulations, described in Section 7.1 above, indicates the role that non-compliance with visa conditions will play in future justifications of a decision to detain a person.

Recommendation 18 of the first report, that the Government introduce legislation to repeal the liability of immigration detention costs, is addressed in the Migration Amendment (Abolishing Detention Debt) Bill 2009 introduced to Parliament in March 2009.

12. Conclusion

The initiatives in the Immigration Detention Reform Bill give legislative effect to the Government's New Directions in Detention policy. The measures in it will complement Australia's border security measures while ensuring Australia has an immigration detention system that protects the Australian community and treats people humanely.

Implementation of the Immigration Detention Reform Bill will be supported by existing administrative practice, existing and newly expanded case resolution and other support activities, and associated changes to the Regulations.

Attachment 1

Key Immigration Detention Values

1. Mandatory Detention is an essential component of strong border control.

2. To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention:
   a) all unauthorised arrivals, for management of health, identity and security risks to the community
   b) unlawful non-citizens who present unacceptable risks to the community and
   c) unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC).

4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.

5. Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.

6. People in detention will be treated fairly and reasonably within the law.

7. Conditions of detention will ensure the inherent dignity of the human person.

Attachment 2

Description of Bridging E Visa Subclasses

Bridging visas came into being on 1 September 1994 as part of the *Migration Reform Act 1992* which introduced mandatory detention of non-citizens without a valid visa. Bridging visas were the means by which an unlawful non-citizen could remain in the community while pursuing legal avenues to remain or while making arrangements to depart. Bridging visa legislation has been expanded over the years to address emerging needs and is now a complex area of migration law.

There are seven different classes and nine subclasses of Bridging visa. Bridging visa eligibility is pre-determined under the Regulations on the basis of a person's individual circumstances, such as whether they are lawful at the time of applying for a further substantive visa or coming to the attention of the Department and the stage of processing reached.

Bridging E visas (BVE) - BVEs cover people who are unlawful, or already hold a BVE, and fall within certain categories. These include people making arrangements to depart Australia, people who and have a further visa application being considered at primary or review stages, people seeking ministerial intervention after a decision to refuse or cancel a visa, non-citizens in criminal custody, and people seeking a review of a decision to cancel a visa or revoke Australian citizenship other than on character grounds. Additional categories include persons intending to apply for a substantive visa or judicial review.

Importantly, there are two BVE subclasses - Subclass 050 (General) and Subclass 051 (Protection visa). Subclass 050 (General) does not require any Public Interest Criteria (PIC) to be satisfied because those who are granted this subclass can be expected to have earlier held a substantive visa and hence met character, health and security criteria. In addition, this subclass is often used for persons detected in field operations or in other circumstances where there are time pressures to grant the visa and so avoid having to detain the person, and further, these persons are granted the BVE with the ultimate expectation that they will depart Australia or achieve another substantive immigration outcome. Conversely, subclass 051 (Protection visa) does require the meeting of the Character, Security and Foreign Policy and Weapons of Mass Destruction PIC as these persons are applicants for Protection visas and the expectation is that many will remain in Australia. Subclass 051 is only available to certain unauthorised arrivals including minor children, the elderly, spouses of Australian citizens or residents, and those with special health needs.

Attachment 3

Relevant Immigration Detention Provisions of the *Migration Act 1958*

4AA Detention of minors a last resort

(1) The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.

(2) For the purposes of subsection (1), the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a residence determination.

5 Interpretation

(1) In this Act, unless the contrary intention appears:

.....

immigration detention means:

(a) being in the company of, and restrained by:

(i) an officer; or

(ii) in relation to a particular detainee—another person directed by the Secretary to accompany and restrain the detainee; or

(b) being held by, or on behalf of, an officer:

(i) in a detention centre established under this Act; or

(ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or

(iii) in a police station or watch house; or

(iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel—on that vessel; or

(v) in another place approved by the Minister in writing;

but does not include being restrained as described in subsection 245F(8A), or being dealt with under paragraph 245F(9)(b).

Note 1: See also section 198A, which provides that being dealt with under that section does not amount to ***immigration detention***.

Note 2: This definition extends to persons covered by residence determinations (see section 197AC).

189 Detention of unlawful non-citizens

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone (other than an excised offshore place); and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person.

(3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.

(4) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter an excised offshore place; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.

(5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Note: See Subdivision B for the Minister's power to determine that people who are required or permitted by this section to be detained may reside at places not covered by the definition of ***immigration detention*** in subsection 5(1).

Subdivision B—Residence determinations

197AA Persons to whom Subdivision applies

This Subdivision applies to a person who is required or permitted by section 189 to be detained, or who is in detention under that section.

197AB Minister may determine that person is to reside at a specified place rather than being held in detention centre etc.

(1) If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a ***residence determination***) to the effect that one or more specified persons to whom this Subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of ***immigration detention*** in subsection 5(1).

(2) A residence determination must:

(a) specify the person or persons covered by the determination by name, not by description of a class of persons; and

(b) specify the conditions to be complied with by the person or persons covered by the determination.

(3) A residence determination must be made by notice in writing to the person or persons covered by the determination.

197AC Effect of residence determination

Act and regulations apply as if person were in detention in accordance with section 189

(1) While a residence determination is in force, this Act and the regulations apply (subject to subsection (3)) to a person who is covered by the determination and who is residing at the place specified in the determination as if the person were being kept in immigration detention at that place in accordance with section 189.

(2) If:

(a) a person covered by a residence determination is temporarily staying at a place other than the place specified in the determination; and

(b) the person is not breaching any condition specified in the determination by staying there;

then, for the purposes of subsection (1), the person is taken still to be residing at the place specified in the determination.

Certain provisions do not apply to people covered by residence determinations

(3) Subsection (1):

(a) does not apply for the purposes of section 197 or 197A, or any of sections 252AA to 252E; and

(b) does not apply for the purposes of any other provisions of this Act or the regulations that are specified in regulations made for the purposes of this paragraph.

What constitutes release from immigration detention?

(4) If:

(a) a residence determination is in force in relation to a person; and

(b) a provision of this Act requires the person to be released from immigration detention, or this Act no longer requires or permits the person to be detained;

then, at the time when paragraph (b) becomes satisfied, the residence determination, so far as it covers the person, is revoked by force of this subsection and the person is, by that revocation, released from immigration detention.

Note: Because the residence determination is revoked, the person is no longer subject to the conditions specified in the determination.

(5) If a person is released from immigration detention by operation of subsection (4), the Secretary must, as soon as possible, notify the person that he or she has been so released.

Secretary must ensure section 256 complied with

(6) The Secretary must ensure that a person covered by a residence determination is given forms and facilities as and when required by section 256.

197AD Revocation or variation of residence determination

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, at any time, revoke or vary a residence determination in any respect (subject to subsection (2)).

Note 1: If a person covered by a residence determination does not comply with a condition specified in the determination, the Minister may (subject to the public interest test) decide to revoke the determination, or to vary the determination by altering the conditions, whether by omitting or amending one or more existing conditions or by adding one or more additional conditions.

Note 2: If the Minister revokes a residence determination (without making a replacement determination) and a person covered by the determination is a person whom section 189 requires to be detained, the person will then have to be taken into detention at a place that is covered by the definition of ***immigration detention*** in subsection 5(1).

(2) Any variation of a residence determination must be such that the determination, as varied, will comply with subsections 197AB(1) and (2).

(3) A revocation or variation of a residence determination must be made by notice in writing to the person or persons covered by the determination.

197AE Minister not under duty to consider whether to exercise powers

The Minister does not have a duty to consider whether to exercise the power to make, vary or revoke a residence determination, whether he or she is requested to do so by any person, or in any other circumstances.

197AF Minister to exercise powers personally

The power to make, vary or revoke a residence determination may only be exercised by the Minister personally.

197AG Tabling of information relating to the making of residence determinations

(1) If the Minister makes a residence determination, he or she must cause to be laid before each House of the Parliament a statement that (subject to subsection (2)):
  (a) states that the Minister has made a determination under this section; and
  (b) sets out the Minister's reasons for making the determination, referring in particular to the Minister's reasons for thinking that the determination is in the public interest.

(2) A statement under subsection (1) in relation to a residence determination is not to include:
  (a) the name of any person covered by the determination; or
  (b) any information that may identify any person covered by the determination; or
  (c) the address, name or location of the place specified in the determination; or
  (d) any information that may identify the address, name or location of the place specified in the determination; or
  (e) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the determination—the name of that other person or any information that may identify that other person.

(3) A statement under subsection (1) is to be laid before each House of the Parliament within 15 sitting days of that House after:
  (a) if the residence determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  (b) if the residence determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

273 Detention centres

(1) The Minister may, on behalf of the Commonwealth, cause detention centres to be established and maintained.

(2) The regulations may make provision in relation to the operation and regulation of detention centres.

(3) Without limiting the generality of subsection (2), regulations under that subsection may deal with the following matters:
  (a) the conduct and supervision of detainees;
  (b) the powers of persons performing functions in connection with the supervision of detainees.

(4) In this section:

detention centre means a centre for the detention of persons whose detention is authorised under this Act.

Attachment 4

Administrative implementation of the Government's Key Immigration Detention Values

Specific initiatives

To implement the reforms announced by the Minister on 29 July 2008 the Department identified a range of initiatives grouped under the broad outcomes of:

- immigration detention being used appropriately;
- placement options being available and used appropriately;
- ongoing detention being lawful and appropriate; and
- status resolution for detained clients being fair, reasonable and timely.

Key achievements have included:

- review of the 438 people in detention, that was initiated following the Minister's speech in July 2008 now being completed;
- the new health services contract was executed on 14 January 2009, with the preferred tenderers for the Immigration Residential Housing/Immigration Transit Accommodation announced on 1 May 2009 and the preferred tenderer for the Immigration Detention Centre contract announced in March 2009 with the contract signed on 29 June 2009;
- commencement of a review of the placement model for people in detention to ensure consistency with the values which will be completed in September 2009; and
- upgrade of Villawood Immigration Detention Centre with completion of work expected in September 2009. Funding of $186.3m for further redevelopment was announced in the 2009-10 Federal Budget. Villawood will continue to be the key detention centre for Australia, containing the highest risk caseload and providing contingency capacity for other detention centres.

Detail about the new detention review initiatives and the operation of the Community Status Resolution Service and related activities is at Section 8 of the Submission.

Program Outcomes

While final figures for 2008-09 are not yet available, the rate at which people are overstaying their visas remains at less than one percent and the rate at which people are complying with the departure requirement of a Bridging E visa remains steady at around 90 percent, the same rates as in 2007-08. The percentage of Bridging E visa holders who overstay their visa for more that 14 days remains relatively constant at between 6-7 percent.

The percentage of unlawful non-citizens detained following their location via a field activity or police referral (ie. not covering persons voluntarily approaching the Department) has reduced from around 65 percent in 2007-08 to around 50 percent in 2008-09.

The time spent in detention for people being removed from Australia has reduced, with around 73 percent of people removed within two weeks of detention in 2008-09 (until March 31 2009), from 66 percent in 2007-08. The numbers of people in detention for over two years has also substantially reduced, from 95 on 6 July 2007 to 21 on 3 April 2009.

There has been a significant decline in the number of people holding Bridging E visas for more than five years from 3509 on 30 June 2006 to 2443 on 31 March 2009.

Since its inception, more than 60 percent of people referred to the Assisted Voluntary Return service have left Australia.

In the last 18 months, all children in immigration detention have been in alternative/community based detention placements, not immigration detention centres.