Australian Human Rights Commission

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Migration Amendment (Immigration Detention Reform) Bill 2009

Australian Human Rights Commission Submission to the Senate Standing Committee on Legal and Constitutional Affairs

31 July 2009

Human Rights and Equal Opportunity Commission
ABN 47 996 232 602

Level 8 Piccadilly Tower
133 Castlereagh Street
Sydney NSW 2001

GPO Box 5218
Sydney NSW 2001

General enquiries 1300 369 711
Complaints infoline 1300 656 419
TTY 1800 620 241
www.humanrights.gov.au

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1 Introduction

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to make this submission to the Senate Standing Committee on Legal and Constitutional Affairs in its Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009.

2. The Commission is established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and is Australia's national human rights institution.

2 Background

3. This submission draws on extensive work the Commission has undertaken on Australia's immigration detention system over the past decade, including:

- national inquiries, in particular *A last resort: National Inquiry into Children in Immigration Detention* (2004)[1] and *Those who've come across the seas: Detention of unauthorised arrivals* (1998)[2]
- examining proposed legislation and making submissions to parliamentary inquiries[3]
- annual inspections and reports on conditions in immigration detention facilities[4]
- investigating complaints from individuals in immigration detention[5]
- commenting on policies and procedures relating to immigration detention at the request of the Department of Immigration and Citizenship (DIAC)
- developing minimum standards for the protection of human rights in immigration detention.[6]

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[1] Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004) (A last resort). At http://www.humanrights.gov.au/human_rights/children_detention_report/report/PDF/alr_complete.pdf (viewed 27 July 2009).
[2] Human Rights and Equal Opportunity Commission, *Those who've come across the seas – Detention of unauthorised arrivals* (1998). At http://www.humanrights.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf (viewed 27 July 2009).
[3] The Commission's submissions on immigration issues are available at http://humanrights.gov.au/legal/submissions/indexsubject.html#refugees (viewed 27 July 2009).
[4] The Commission's reports on inspections of immigration detention facilities are available at http://humanrights.gov.au/human_rights/immigration/detention_rights.html#9_3 (viewed 27 July 2009).
[5] Reports are available at http://humanrights.gov.au/legal/HREOCA_reports/index.html (viewed 27 July 2009).
[6] Human Rights and Equal Opportunity Commission, *Immigration Detention Guidelines* (2000). At http://humanrights.gov.au/pdf/human_rights/asylum_seekers/idc_guidelines.pdf (viewed 27 July 2009).

4. For more than ten years the Commission has raised significant concerns about Australia's mandatory immigration detention system and the conditions in Australia's immigration detention facilities.

5. Australia's mandatory detention system has led to prolonged and, in some cases, indefinite detention in breach of Australia's obligations under article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR) and article 37(b) of the *Convention on the Rights of the Child* (CRC).

6. The Commission has consistently recommended the repeal of Australia's mandatory detention system, the codification of minimum standards for conditions and treatment of people in immigration detention, an end to the offshore processing of asylum seekers, and stronger oversight and review mechanisms for immigration detention.

7. In July 2008, the Commission welcomed the announcement by the Minister for Immigration and Citizenship, Senator Chris Evans, of 'New Directions in Detention' (the New Directions).[7]

8. The Commission particularly welcomed the intention to shift to a risk-based approach under which DIAC will need to justify a decision to detain a person rather than presuming detention.[8]

9. The New Directions are based on seven 'Key Immigration Values' (the Values):

    - Value 1: Mandatory detention is an essential component of strong border control.
    - Value 2: To support the integrity of Australia's immigration program three groups will be subject to mandatory detention:
        - 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.
    - Value 3: Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.

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[7] C Evans, *New Directions in Detention – Restoring Integrity to Australia's Immigration System* (Speech delivered at the Centre for International and Public Law Seminar, Australian National University, Canberra, 29 July 2008). At http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm (viewed 27 July 2009).
[8] C Evans, note 7, p 4.

- Value 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.

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

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

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

10. The Commission welcomed the statement of Values 3 to 7. However, the Commission also expressed the need for these Values to be translated into policy, practice and legislative change as soon as possible.

3 Summary

11. In the Commission's view, the Migration Amendment (Immigration Detention Reform) Bill 2009 (the Bill) is a positive step in the legislative implementation of the New Directions, including the Values.

12. In introducing this Bill, the government has stated that it is committed to establishing a 'fairer, more humane and effective system of immigration detention, which restores dignity and fairness to clients and rebuilds integrity and public confidence in Australia's immigration system.'[9] The Commission supports this aim.

13. The Commission welcomes some of the reforms implemented by the Bill. In particular, these include the move away from the mandatory detention of *all* 'unlawful non-citizens' to a system of more limited mandatory detention; the creation of Temporary Community Access Permissions; and changes to allow delegation of the Minister's Residence Determination power.

14. The stated purpose of the Bill is to 'give legislative effect to the Government's New Directions in Detention policy.'[10] The Commission supports this intention. However, in the Commission's view, the Bill does not go far enough towards implementing the New Directions, including some of the Values.

15. The Commission considers that the Bill does not fully implement the Values in the following areas:

- no mechanism to ensure that detention of unauthorised arrivals on the mainland will not continue beyond the period required for initial health,

[9] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2009, p 4271 (The Hon Penny Wong MP, Minister for Climate Change and Water).
[10] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2009, p 4264 (The Hon Penny Wong MP, Minister for Climate Change and Water).

security and identity checks (Value 2(a)), and failure to implement this limit for immigration detainees in excised offshore places

- insufficient protection to ensure that, where possible, children's family members will not be held in immigration detention centres (Value 3)

- insufficient mechanisms to protect against indefinite or otherwise arbitrary detention (Value 4), in particular the lack of review by a court of the initial decision to detain and the justification for ongoing detention

- lack of implementation of the Values relating to conditions of immigration detention (Values 4, 6 and 7)

- inadequate protection to ensure that detention in immigration detention centres will only be used as a last resort and for the shortest practicable time (Value 5).

16. This submission also highlights other concerns about the Bill, including:

- the definition of 'unacceptable risk' in section 189(1A), which applies a blanket policy in respect of certain groups of people, rather than requiring assessment of risk on an individual case-by-case basis

- insufficient protection to ensure that children will only be detained in immigration detention facilities (other than immigration detention centres, where they should not be held at all) as a last resort and for the shortest appropriate period.

17. While the Commission has the above concerns about the Bill, the Commission supports the intention to embed the New Directions in legislation, and to institute reforms to move towards a fairer and more humane immigration detention system.

4 Recommendations

18. The Australian Human Rights Commission makes the following recommendations in this submission:

Recommendation 1: The Bill should be amended to ensure that detention in immigration detention centres is only used as a last resort and for the shortest practicable time, as committed to in Value 5. The words 'The Parliament affirms as a principle that' in section 4AAA(2) should be deleted.

Recommendation 2: Proposed sections 4AAA(1) and (2) should be amended to apply to 'unlawful non-citizens' rather than 'non-citizens'.

Recommendation 3: The Bill should be amended to ensure that Value 3 is fully implemented, including the commitment that, where possible, children's families will not be detained in an immigration detention centre.

Recommendation 4: The Bill should be amended to strengthen section 4AA(1) of the Migration Act in order to ensure that children will only be detained if it is truly a measure of last resort:

- The words 'The Parliament affirms as a principle that' should be deleted from section 4AA(1).

- Section 4AA(1) should require that the best interests of the child be a primary consideration in the initial decision as to whether to detain the child as a measure of last resort.

Recommendation 5: The Bill should be amended to strengthen the Migration Act to ensure that, if a child is detained, they are only detained for the shortest appropriate period of time:

- Section 4AA(1) should require that, if a child is detained as a measure of last resort, the child will be detained for the shortest appropriate period of time.

- A court or independent tribunal should assess whether there is a need to detain a child for immigration purposes within 72 hours of their initial detention. There should also be prompt and periodic review by a court of the continuing detention of any child for immigration purposes.

Recommendation 6: The Bill should be amended to require that, under proposed sections 189(1) and 189(1B), unauthorised arrivals not be detained beyond the period required to conduct initial health, security and identity checks.

Recommendation 7: The Bill should be amended to require that assessments of 'unacceptable risk' under section 189(1A) are made on a case-by-case basis. The only exception to this should be persons who have been refused a visa or had their visa cancelled on grounds relating to national security.

Recommendation 8: The Bill should be amended so that section 189(1B)(d), which requires an officer to make reasonable efforts to resolve a person's immigration status, applies to a person who has been detained under section 189(1)(b)(i).

Recommendation 9: Proposed section 189(1C) should be removed from the Bill.

Recommendation 10: The provisions of the Migration Act relating to excised offshore places should be repealed. All unauthorised arrivals who make claims for asylum should have those claims assessed through the statutory refugee status determination process on the Australian mainland.

Recommendation 11: The Bill should be amended to require that unauthorised arrivals detained in excised offshore places not be detained beyond the period required to conduct initial health, security and identity checks.

Recommendation 12: The Bill should be amended to accord with international law by requiring that the decision to detain a person under the Migration Act or a decision to continue a person's detention is subject to prompt review by a court.

Recommendation 13: The Temporary Community Access Permission scheme set out in proposed section 194A is a positive reform and should be adopted.

Recommendation 14: The Bill's proposal to repeal section 197AF of the Migration Act (under which the power to make, vary or revoke a Residence Determination may

only be exercised by the Minister personally) is a positive reform and should be adopted.

Recommendation 15: Specific legislation and regulations should be enacted to set out minimum standards for conditions and treatment of detainees in all of Australia's immigration detention facilities. These minimum standards should be based on relevant international human rights standards, should be enforceable and should make provision for effective remedies.

5 The Bill should ensure that immigration detention centres are used only as a last resort and for the shortest practicable time

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

20. Proposed section 4AAA(2) reflects Value 5, stating:

> The Parliament affirms as a principle that a non-citizen:
>
> a) must only be detained in a detention centre established under this Act as a measure of last resort; and
>
> b) if a non-citizen is to be so detained – must be detained for the shortest practicable time.

21. The immigration detention centres (IDCs) are the most secure of Australia's range of immigration detention facilities, and generally represent the most harsh and inhospitable detention environment. Over the past decade, the Commission has undertaken numerous visits to all of Australia's IDCs. The Commission has raised significant concerns about both the physical conditions and the negative mental impacts of holding people in such conditions for any significant period of time.[11]

22. The Commission therefore supports Value 5 and the intention to enshrine it in legislation. However, the Commission is disappointed that the recognition of Value 5 in the Bill is limited to a statement of principle affirmed by Parliament. The Commission is concerned that, as a result, the implementation of Value 5 may be limited.

23. The Commission is concerned that the Bill does not provide adequate protection to ensure that, in practice, detention in IDCs will only be used as a last resort and for the shortest practicable time, as the government has committed to in Value 5.

Recommendation 1: The Bill should be amended to ensure that detention in immigration detention centres is only used as a last resort and for the shortest

[11] The Commission's reports of inspections of immigration detention centres are available at http://humanrights.gov.au/human_rights/immigration/detention_rights.html#9_3. See also A last resort, note 1.

practicable time, as committed to in Value 5. The words 'The Parliament affirms as a principle that' in section 4AAA(2) should be deleted.

6 The Bill should not apply to 'non-citizens'

24. Proposed sections 4AAA(1) and (2) refer to the detention of 'non-citizens' in immigration detention. In the Commission's view, these sections should apply only to 'unlawful non-citizens' in order to be consistent with section 189 of the Migration Act, under which only 'unlawful non-citizens' are subject to immigration detention.

Recommendation 2: Proposed sections 4AAA(1) and (2) should be amended to apply to 'unlawful non-citizens' rather than 'non-citizens'.

7 The Bill should increase human rights protections for children

7.1 The Bill only gives partial effect to Value 3

25. Value 3 provides that children and, where possible, their families will not be detained in an immigration detention centre.

26. Proposed section 4AA(3) gives partial effect to Value 3 in that it states that if a minor is to be detained as a measure of last resort, the minor must not be detained in an immigration detention centre.

27. The Commission has undertaken a considerable amount of work on children in Australia's immigration detention system. Most notably, the Commission conducted the National Inquiry into Children in Immigration Detention, which culminated in the 2004 report, *A last resort?*.[12] This report highlighted numerous ways in which detention in Australia's immigration detention centres had devastating impacts on the physical and mental health of hundreds of children. In the Commission's view, this must never be permitted to happen again.

28. The Commission therefore supports a legislative measure that seeks to ensure that children will never be detained in an immigration detention centre.

29. However, the Commission is concerned that the Bill only partially implements Value 3, because it omits the reference to families.

30. In conducting the National Inquiry into Children in Immigration Detention, the Commission saw and heard first-hand the negative impacts caused by the prolonged detention of families in Australia's immigration detention centres. The Commission supports the intention of Value 3 that, where possible, children's families will not be detained in a detention centre. The Commission is therefore disappointed that this aspect has not been included in the Bill.

[12] A last resort, note 1.

31. Under article 9(1) of the CRC, the Australian Government has obligations to ensure that children are not separated from their parents against their will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child. The principle of family unity is a key principle highlighted in the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, and is reaffirmed in a number of Conclusions of the UNHCR Executive Committee.[13]

32. In the Commission's view, the Bill should be amended to fully implement Value 3, including the commitment that, where possible, children's families will not be detained in an immigration detention centre.

Recommendation 3: The Bill should be amended to ensure that Value 3 is fully implemented, including the commitment that, where possible, children's families will not be detained in an immigration detention centre.

7.2 The Bill should increase safeguards to ensure that children are detained only as a last resort and for the shortest appropriate period

33. Proposed section 4AA(4) states that if a minor is to be detained, an officer must regard the best interests of the minor as a primary consideration for the purposes of deciding where the minor will be detained.

34. The Commission supports the introduction of a legislative requirement that the best interests of the child must be a primary consideration in these circumstances. The 'best interests' principle is a fundamental aspect of the CRC, and requires that the best interests of the child should be a primary consideration in all decisions affecting the child.[14]

35. While the Commission supports section 4AA(4) requiring consideration of the best interests of the child in the decision about *where* to detain that child, the Commission is of the view that consideration of the child's best interests should also be a legislative requirement when making the initial decision as to whether or not the child is detained in the first place.

36. Currently, section 4AA(1) of the Migration Act states that 'The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.' The Commission supports the intention of this provision, which was introduced in 2005.

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[13] See UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* (1951), UN Doc. A/CONF.2/108/Rev.1, at http://www.unhcr.org/refworld/docid/40a8a7394.html (viewed 28 July 2009). See also UNHCR Executive Committee Conclusions Nos. 1, 9, 24, 84, 85 and 88, available at http://www.unhcr.org/pages/49e6e6dd6.html.

[14] *Convention on the Rights of the Child* (CRC) (1989), art 3(1). At http://www.unhchr.ch/html/menu3/b/k2crc.htm (viewed 27 July 2009).

37. However, the Commission has ongoing concerns that section 4AA(1) does not provide sufficient protection to ensure that children will only be detained as a measure of last resort and for the shortest appropriate period of time, as required by the CRC.[15]

38. In practice, section 4AA(1) has not stopped DIAC from detaining children in secure immigration detention facilities. While children are no longer detained in immigration detention centres, some children are detained in facilities on the mainland and on Christmas Island. These facilities include immigration residential housing, immigration transit accommodation and various alternative places of detention. While these facilities are generally less secure and less inhospitable than the immigration detention centres, the Commission nevertheless has significant concerns about the ongoing practice of holding children in detention facilities where their liberty is restricted.[16]

39. In the Commission's view, section 4AA(1) of the Migration Act should be strengthened in order to ensure that children will only be detained if it is truly a measure of last resort. This should be done by deleting the words at the beginning of section 4AA(1): 'The Parliament affirms as a principle that'. The provision should also require that the best interests of the child be a primary consideration in the decision whether to detain the child as a measure of last resort.

40. In the Commission's view, these amendments to section 4AA(1) of the Migration Act regarding the initial decision whether to detain a child, will greatly enhance the value of proposed section 4AA(4) regarding the decision of where to detain a child if they are to be detained.

41. The Commission is also concerned that neither section 4AA(1) of the Migration Act nor this Bill provide adequate safeguards to ensure that, if a child is detained, they are only detained for the shortest appropriate period of time, as required by the CRC.[17] Section 4AA(1) does not include a reference to this requirement. Further, there is no system of review by an independent body of the initial decision to detain a child, or the decision to continue their detention.

42. In *A last resort*, the Commission recognised that, while it might be necessary to briefly detain children for identity, health and security checks, international law imposes a presumption against any detention of children even for these purposes.[18] Therefore, to comply with article 37(b) of the CRC, the

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[15] CRC, note 14, art 37(b).
[16] See further Australian Human Rights Commission, *2008 Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities* (2009), pp 79-86, at http://www.hreoc.gov.au/Human_Rights/immigration/idc2008.pdf (viewed 28 July 2009); Human Rights and Equal Opportunity Commission, *Summary of observations following the inspection of mainland immigration detention facilities* (2007), pp 20-24, at http://www.humanrights.gov.au/pdf/human_rights/asylum_seekers/summary_idc_report07.pdf (viewed 28 July 2009).
[17] CRC, note 14, art 37(b).
[18] A last resort, note 1, p 212.

Commission found that the need for, and period of, detention of a child must be closely supervised by an independent body.

43. In *A last resort*, the Commission recommended that Australia's laws should require independent assessment of the need to detain a child within 72 hours of their initial detention. Similar to bail application procedures in the juvenile justice system, if DIAC has been unable to complete its checks within 72 hours, it might ask a tribunal or court to order continuing detention of the child until those checks are completed.[19]

44. In addition to a prompt individualised assessment of the initial need to detain a child, article 37(d) of the CRC requires that there be an opportunity to seek review of any decision to detain in 'a court or other competent, independent and impartial authority'. Such review is most appropriately provided by a court.

Recommendation 4: The Bill should be amended to strengthen section 4AA(1) of the Migration Act in order to ensure that children will only be detained if it is truly a measure of last resort:

- The words 'The Parliament affirms as a principle that' should be deleted from section 4AA(1).
- Section 4AA(1) should require that the best interests of the child be a primary consideration in the initial decision as to whether to detain the child as a measure of last resort.

Recommendation 5: The Bill should be amended to strengthen the Migration Act to ensure that, if a child is detained, they are only detained for the shortest appropriate period of time:

- Section 4AA(1) should require that, if a child is detained as a measure of last resort, the child will be detained for the shortest appropriate period of time.
- A court or independent tribunal should assess whether there is a need to detain a child for immigration purposes within 72 hours of their initial detention. There should also be prompt and periodic review by a court of the continuing detention of any child for immigration purposes.

8 Detention of unauthorised arrivals under section 189(1) should not continue beyond initial health, identity and security checks

45. Proposed section 189(1)(b) outlines categories of persons who will be subject to mandatory detention under the reformed system. Proposed section 189(1B) includes a new requirement that in the case of such detainees, an officer must make reasonable efforts to ascertain their identity; identify whether the person is of character concern; ascertain their health and security risks; and resolve their immigration status.

[19] A last resort, note 1, pp 862-865.

46. The Commission understands that these provisions are intended to implement Value 2(a), which states that unauthorised arrivals will be subject to mandatory detention for the management of health, identity and security risks.

47. The Commission welcomes the move away from the mandatory detention of *all* 'unlawful non-citizens' under section 189(1), as is currently the case.

48. In the Commission's view, the Bill should go further and repeal the mandatory detention provision altogether, replacing it with a presumption that immigration detention is to be used as the exception rather than the norm. The Commission has consistently called for an end to the mandatory detention system because it places Australia in breach of its obligations under the ICCPR and the CRC to ensure that no one is arbitrarily detained.[20] The need to detain an unlawful non-citizen should be assessed on a case-by-case basis, taking into consideration the circumstances of the individual concerned, rather than mandating detention for all individuals who fall within certain broad groups.

49. While the Commission does not support the practice of holding people in immigration detention, the Commission acknowledges that use of immigration detention may be legitimate for a strictly limited period of time in order to ascertain basic information about a person's health, identity and security.

50. The United Nations High Commissioner for Refugees (UNHCR) position is that the detention of asylum seekers should normally be avoided – it should be the exception rather than the rule. Detention should only be resorted to if it is necessary to:

- verify identity
- determine the elements on which the claim to refugee status or asylum is based
- deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum
- protect national security or public order.[21]

51. While the initial detention of unauthorised arrivals might be legitimate for the above purposes, it must be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the stated purposes.[22]

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[20] CRC, note 14, art 37(b); *International Covenant on Civil and Political Rights* (ICCPR) (1966), art 9(1), at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (viewed 28 July 2009).
[21] United Nations High Commissioner for Refugees Executive Committee, *Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum Seekers* (1986), para (b), at http://www.unhcr.org/3ae68c43c0.html (viewed 28 July 2009); United Nations High Commissioner for Refugees, *Revised Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999), guideline 3, at http://www.unhcr.org.au/pdfs/detentionguidelines.pdf (viewed 29 July 2009).

52. The Commission notes that these purposes do not include detaining a person in order to conduct health checks. UNHCR has stated that the detention of asylum seekers for the purpose of conducting health or quarantine assessments may be inconsistent with international human rights standards, and that any decision to isolate, segregate or quarantine a person because of possible health risks should be separate and distinct from a decision to detain a person on the basis of a security risk.[23] UNHCR has also stated that the screening and isolation of individuals with serious communicable diseases such as active tuberculosis may be appropriate in limited circumstances, but that any isolation or segregation beyond initial screening should be in an appropriate non-detention medical facility.[24]

53. The Commission is concerned that proposed sections 189(1) and 189(1B) fail to fully implement the New Directions, in particular Value 2(a), in that they do not ensure that the detention of unauthorised arrivals will not continue beyond the period required for initial health, security and identity checks.

54. In announcing the New Directions, the Minister stated that 'once checks have been successfully completed, continued detention while immigration status is resolved is unwarranted.'[25] Further, the Minister stated that under the New Directions, 'in determining the ongoing detention of a person, the onus of proof will be reversed. A departmental decision-maker will have to justify why a person should be detained against these values that presume that that person should be in the community.'[26] The Bill fails to implement this reform.

55. Proposed section 189(1) requires the mandatory detention of certain unauthorised arrivals, and proposed section 189(1B) requires an officer to make 'reasonable efforts' to identify a detainee's health, security and identity issues and to resolve their immigration status. But the Bill fails to require that the detainee be released from detention once those initial health, security and identity checks have been completed.

Recommendation 6: The Bill should be amended to require that, under proposed sections 189(1) and 189(1B), unauthorised arrivals not be detained beyond the period required to conduct initial health, security and identity checks.

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[22] United Nations High Commissioner for Refugees, *Revised Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, note 21, guideline 3.
[23] United Nations High Commissioner for Refugees, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia* (2008), para 47. At http://www.aph.gov.au/house/committee/mig/detention/subs/sub133.pdf (viewed 25 July 2009).
[24] United Nations High Commissioner for Refugees, note 23, para 46.
[25] C Evans, note 7, p 4.
[26] C Evans, note 7, p 5.

9 The Bill's approach to people who present an 'unacceptable risk' should be revised

9.1 'Unacceptable risk' should be assessed on a case-by-case basis

56. Proposed sections 189(1)(a) and 189(1)(b)(i) require that if an officer knows or reasonably suspects that a person is an unlawful non-citizen and presents an 'unacceptable risk to the Australian community', that person must be detained.

57. Proposed section 189(1A) states that a person will be deemed to present an 'unacceptable risk to the Australian community' and thus be subject to mandatory detention if they fall within one of the following categories:

    a) a person who has been refused a visa under section 501, 501A or 501B or on grounds relating to national security
    b) a person whose visa has been cancelled under section 501, 501A or 501B or on grounds relating to national security
    c) a person who held an enforcement visa and remains in Australia when the visa ceases to be in effect
    d) circumstances prescribed by the regulations apply in relation to the person.

58. The Commission is concerned that proposed section 189(1A) applies a blanket definition of who presents an 'unacceptable risk', rather than requiring assessment of risk on an individual basis. The Commission is concerned that this approach will result in the mandatory detention of individuals who do not, in fact, pose a significant risk to the Australian community. This approach also runs counter to the government's commitment under the New Directions to only detain persons where the need has been established.

59. The Commission recommends that the approach to determining who presents an 'unacceptable risk' for the purpose of section 189(1)(b)(i) should be revised. The determination that a person falling within one of the categories in section 189(1A) presents an 'unacceptable risk' should be made on a case-by-case basis, after an assessment of the person's individual circumstances. The only warranted exception to this is people who have been refused a visa or had their visa cancelled on grounds relating to national security.

60. While some people whose visas have been refused or cancelled under sections 501, 501A or 501B of the Migration Act[27] may have been convicted of a crime, it should be remembered that in most cases they have completed their prison sentence. The expectation is that they have been punished and rehabilitated by the correctional system. The extent of any risk they might pose to the Australian community should be determined on a case-by-case basis through an assessment of their individual history and circumstances.

[27] Hereafter referred to as persons who have had a visa refused or cancelled under section 501.

61. This concern was recently raised by the Joint Standing Committee on Migration (JSCM). In the first report of its inquiry into immigration detention in Australia, the JSCM stated that 'risk assessments for section 501 detainees should focus on evidence, such as a person's recent pattern of behaviour, rather than suspicion or discrimination based on a prior criminal record.'[28]

62. Many of the section 501 detainees the Commission has spoken with during its visits to immigration detention centres have lived in Australia for a significant period of time. They often have strong ties to the Australian community, including family, friends, jobs and/or houses. Some of them have Australian partners or spouses, and some have children who are Australian citizens or were born in Australia.[29]

63. Given the serious restrictions on personal liberty inflicted by the imposition of mandatory immigration detention, the decision to detain such individuals should only be taken once a consideration of their case has been undertaken to determine whether they would, in fact, present an unacceptable risk to the Australian community.

64. Further, the Commission is concerned that a system of mandatory detention for all persons who fall under section 189(1A) may lead to breaches of children's rights. Article 3(1) of the CRC requires that the best interests of the child be a primary consideration in any decision which concerns the child. A system of mandatory detention for all persons falling under section 189(1A) does not permit consideration of the impact on a child whose parent is to be detained.

Recommendation 7: The Bill should be amended to require that assessments of 'unacceptable risk' under section 189(1A) are made on a case-by-case basis. The only exception to this should be persons who have been refused a visa or had their visa cancelled on grounds relating to national security.

9.2 The obligation in section 189(1B)(d) should apply to persons assessed as presenting an 'unacceptable risk'

65. The Commission is concerned that, in the absence of individualised assessment and independent review, a blanket policy of mandatory detention for all persons deemed an 'unacceptable risk' under section 189(1)(b)(i) increases the risk that some individuals will be held in immigration detention for prolonged periods of time. In some cases this could constitute a breach of

[28] Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning - First report of the inquiry into immigration detention in Australia* (2008), p 53. At http://www.aph.gov.au/house/committee/mig/detention/report/fullreport.pdf (viewed 28 July 2009). In making this statement, the Committee noted testimony given to the inquiry by the Commonwealth Ombudsman, Professor John McMillan.
[29] See further Australian Human Rights Commission, *Background paper: Immigration detention and visa cancellation under section 501 of the Migration Act* (2009). At http://www.hreoc.gov.au/human_rights/immigration/501_migration_2009.html (viewed 28 July 2009).

Australia's international obligations not to subject people to arbitrary detention.[30] It would also be contrary to Value 4.

66. The Commission has found on previous occasions that instances of prolonged detention as result of a visa cancellation under section 501 of the Migration Act constituted arbitrary detention in breach of Australia's obligations under article 9(1) of the ICCPR.[31]

67. Generally, a person's visa is cancelled under section 501 when they are at the end of serving a prison sentence. They are then transferred from prison to immigration detention. Some spend years in detention while they attempt to challenge the decision to cancel their visa, or while travel documents are arranged or a claim for a protection visa is assessed. The Commonwealth Ombudsman has observed that it is not uncommon for some section 501 detainees to spend more time in immigration detention than they did in prison.[32]

68. In the Commission's view, the length of time a section 501 detainee is held in immigration detention might be kept to a minimum if an officer was under an obligation to make reasonable efforts to resolve the person's immigration status. While section 198 of the Migration Act imposes a duty on an officer in a range of circumstances to remove an unlawful non-citizen from Australia 'as soon as reasonably practicable', this duty is limited to removal. It does not impose a broader duty to take reasonable steps to resolve the person's immigration status in another way, for example by granting a visa if appropriate.

69. The Commission is therefore concerned that proposed section 189(1B)(d) does not apply to people detained under section 189(1)(b)(i). Without an obligation to at least make reasonable efforts to resolve the person's immigration status, a person detained under section 189(1)(b)(i) may be subjected to prolonged or indefinite detention. In the Commission's view, this obligation should apply in respect of all persons detained under section 189(1)(b)(i).

70. The Commission also emphasises the importance of providing for the detention of any person under section 189(1)(b)(i) to be subject to review by a court. This is important to ensure that the decision to detain such a person, or the decision to continue their detention, is justified. For example, in some cases it may be that a person detained under section 189(1)(b)(i) may no longer be assessed as posing an 'unacceptable risk' after a period of time. The need for a robust system of review is discussed further in section 12 of this submission.

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[30] CRC, note 14, art 37(b); ICCPR, note 20, art 9(1).
[31] See, for example, Human Rights and Equal Opportunity Commission, *Report of an Inquiry into a Complaint of indefinite nature of detention in Prison*, Report No. 13 (2001). At http://www.hreoc.gov.au/legal/HREOCA_reports/hrc_report_13.html#intro (viewed 28 July 2009).
[32] Commonwealth and Immigration Ombudsman, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia* (2008), p 11. At http://www.aph.gov.au/house/committee/mig/detention/subs/sub126.pdf (viewed 28 July 2009).

Recommendation 8: The Bill should be amended so that section 189(1B)(d), which requires an officer to make reasonable efforts to resolve a person's immigration status, applies to a person who has been detained under section 189(1)(b)(i).

10 Proposed section 189(1C) should be removed from the Bill

71. Proposed section 189(1C) states:

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

72. It is a matter of significant concern to the Commission that the Bill proposes to create a discretionary power to detain a person solely on the basis that an officer knows or reasonably suspects that the person is an unlawful non-citizen.

73. In the Commission's view, such a power is inconsistent with the risk-based approach to detention announced under the New Directions. Under this risk-based approach, DIAC is required to justify a decision to detain a person rather than presume detention.[33] As currently drafted, section 189(1C) does not require an officer to provide any justification for detaining a person who is an unlawful non-citizen.

74. The Commission is also concerned that section 189(1B) does not apply to a person detained under section 189(1C). This means that a person detained under section 189(1C) has even fewer procedural safeguards than a person subject to mandatory detention under section 189(1), and may be at a greater risk of arbitrary detention.

Recommendation 9: Proposed section 189(1C) should be removed from the Bill.

11 Greater reforms are required in respect of immigration detention in excised offshore places

75. The New Directions maintain the excision of offshore islands and a separate non-statutory refugee status assessment system for offshore entry persons.

76. The Commission has consistently raised concerns about the practice of processing claims of asylum seekers in offshore places such as Christmas Island, and has called for the repeal of the provisions of the Migration Act relating to excised offshore places.[34] In the Commission's view, all unauthorised arrivals who make claims for asylum should have those claims

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[33] C Evans, note 7, p 4.
[34] See, for example, Australian Human Rights Commission, *2008 Immigration detention report*, note 16, pp 71-72; Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia* (2008), pp 15-16, at http://www.humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html (viewed 28 July 2009).

assessed through the statutory refugee status determination process on the Australian mainland.

77. The Commission welcomes the fact that the Minister announced some positive reforms to the offshore processing regime under the New Directions, and that these reforms are currently being implemented. This includes:

- the provision of publicly funded migration advice and assistance for asylum seekers
- access to independent merits review of unfavourable refugee status assessment decisions
- external scrutiny by the Ombudsman.[35]

78. However, the Commission notes with concern that none of these reforms has been embedded in legislation to date, nor have any of them been included in this Bill. This leaves them in a vulnerable state.

79. Further, the Commission has significant ongoing concerns about the system of offshore processing which are not addressed by this Bill. In particular:

- People who arrive unauthorised in an excised offshore place are not able to submit a valid visa application under the Migration Act, unless the Minister for Immigration exercises his or her discretion under section 46A to allow an application to be submitted. This discretion is non-compellable, so a person will have no legal recourse if the Minister decides not to exercise it.
- People who arrive unauthorised in an excised offshore place are not able to have their cases reviewed in the Refugee Review Tribunal or the Australian courts.[36]

80. The Commission has raised concerns that this system undermines Australia's international obligations under the Refugee Convention, the ICCPR and the CRC. For example, it undermines the principle of non-refoulement by failing to provide adequate legal safeguards to ensure that cases in which a person has a fear of persecution are justly decided. It can also lead to breaches of children's rights, including the right of child asylum seekers to receive appropriate protection and assistance.[37] The principle of non-discrimination in the CRC means that all children seeking asylum are entitled to the same level of protection and assistance, regardless of whether they arrive in an excised place or not.[38]

81. The offshore processing regime also fails to provide adequate protection against indefinite or otherwise arbitrary detention for people detained in excised offshore places. Value 4 states that detention that is indefinite or

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[35] C Evans, note 7, pp 5-6.
[36] *Migration Act 1958* (Cth), s 494AA.
[37] CRC, note 14, art 22(1).
[38] CRC, note 14, art 2.

otherwise arbitrary is not acceptable and the length of detention will be subject to regular review. This Bill fails to implement that Value for persons detained in excised offshore places (or for persons detained on the mainland), by failing to ensure that the initial decision to detain and decisions regarding ongoing detention are subject to judicial review. This issue is discussed further in section 12 of this submission.

82. Importantly, the Bill also fails to implement Value 2(a) in respect of people who arrive unauthorised in an excised offshore place and are subsequently detained. The Bill does nothing to ensure that such people will not be held in detention beyond the period required for their initial health, identity and security checks.

83. As discussed in section 8 above, proposed section 189(1B) requires an officer to make reasonable efforts to undertake a detainee's identity, health and security checks and to resolve their immigration status. However, this provision will not apply to people who arrive unauthorised in an excised offshore place and are subsequently detained.

84. While the Commission has concerns (as discussed in section 8) that section 189(1B) does not go far enough to limit the period of detention for detainees on the mainland, the Commission is concerned that there is no equivalent provision in the Bill seeking to apply Value 2(a) to people detained in excised offshore places.

Recommendation 10: The provisions of the Migration Act relating to excised offshore places should be repealed. All unauthorised arrivals who make claims for asylum should have those claims assessed through the statutory refugee status determination process on the Australian mainland.

Recommendation 11: The Bill should be amended to require that unauthorised arrivals detained in excised offshore places not be detained beyond the period required to conduct initial health, security and identity checks.

12 A right to review by a court is essential to ensure that indefinite or otherwise arbitrary detention does not occur

12.1 Australia has binding international obligations not to subject people to arbitrary detention

85. The Commission welcomes the government's commitment in Value 4 that indefinite or otherwise arbitrary detention is unacceptable, and that the length and conditions of detention will be subject to regular review.

86. Australia has binding international obligations not to subject people to arbitrary detention. Article 9(1) of the ICCPR states:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

87. In order for detention to avoid being arbitrary, the detention must be a proportionate means of achieving a legitimate aim, having regard to whether there are alternative means which are less restrictive of rights.[39]

88. Article 9(4) of the ICCPR provides an essential safeguard for ensuring respect for the right to liberty and security of person as provided in article 9(1). Article 9(4) sets out the requirement that any person, whether he or she has been arrested or otherwise detained,[40] is to be brought before a court without delay:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

89. The inclusion of article 9(4) in the ICCPR recognises that without a right to judicial review of the 'lawfulness' of the decision to detain, it is not possible to ensure that indefinite or otherwise arbitrary detention will not occur.

90. The 'lawfulness' of a person's detention is not limited to domestic law; it includes whether the detention is consistent with article 9(1) of the ICCPR. This means that the detention must be consistent with domestic law, and it also must not be arbitrary. In *A v Australia,* the UN Human Rights Committee stated that:

> In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release 'if the detention is not lawful', article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant.[41]

91. Accordingly, in order to guarantee the prohibition on arbitrary detention in article 9(1) of the ICCPR, it is essential that the decision to detain, or to continue detention, is subject to prompt review by a court. The court must have the power to review the lawfulness of the decision and to order the person's release if the detention does not comply with the requirements of article 9(1).

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[39] See N Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005), p 236.

[40] The UN Human Rights Committee has confirmed that articles 9(1) and 9(4) of the ICCPR apply in respect of immigration detention. See United Nations Human Rights Committee, *General Comment No. 8: Right to liberty and security of persons* (1982), para 1. At http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument (viewed 28 July 2009).

[41] United Nations Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), para 9.5. At http://www.unhchr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument (viewed 28 July 2009).

12.2 Review mechanisms under the New Directions are positive, but are not sufficient to prevent arbitrary detention

92. Value 4 recognises that in order to prevent indefinite or otherwise arbitrary detention, it is necessary to establish a system of regular reviews of detention. In his July 2008 speech announcing the New Directions, the Minister outlined two new review mechanisms:

- A detainee's case will be reviewed by a senior departmental official every three months to certify that the further detention of the individual is justified.[42]

- The Commonwealth Ombudsman will review cases after a person has been detained for six months, rather than waiting until the person has been detained for two years.[43]

93. While the Commission supports the establishment of these new review mechanisms, the Commission has significant concerns that they will not be sufficient to ensure that indefinite or otherwise arbitrary detention does not occur.

94. The Commission supports the requirement under the New Directions that each detainee should be reviewed by a senior departmental official every three months to certify that their further detention is justified. However, this review mechanism is not sufficient to meet the requirements of article 9(4) of the ICCPR, as the review is not conducted by a court. Judicial review of the decision to detain, or to continue detention, constitutes the essential safeguard for ensuring that indefinite or otherwise arbitrary detention does not occur.

95. The Commission also supports the New Directions reform that the Commonwealth Ombudsman will conduct a review of each detainee after six months, rather than waiting until a person has already been detained for two years.

96. However, it is important to emphasise that the Commonwealth Ombudsman's role is to review administrative matters related to an individual's detention, rather than to review the decision to detain or to continue a person's detention.[44] In addition, any recommendations which the Commonwealth Ombudsman makes in respect of the circumstances relating to a person's detention are not enforceable. The Commonwealth Ombudsman has noted that less than half of the recommendations made in respect of long term detainees have been accepted by the Minister for Immigration.[45]

97. Thus, while the six month Ombudsman reviews are a positive reform, without the ability to enforce recommendations or to order the release of a detainee,

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[42] C Evans, note 7, p 6.
[43] C Evans, note 7, p 6.
[44] See Joint Standing Committee on Migration, note 28, para 4.63.
[45] See Joint Standing Committee on Migration, note 28, para 4.54.

the reviews will not constitute a sufficient safeguard to ensure against indefinite or otherwise arbitrary detention.

12.3 The Bill should be strengthened to provide access to review by a court

98. In the Commission's view, the Bill does not give full effect to Value 4 (that indefinite or otherwise arbitrary detention is unacceptable), because the Bill does not put in place sufficient statutory safeguards to ensure that arbitrary detention will not occur. In particular, the Bill fails to provide immigration detainees with access to a court which is able to review the initial decision to detain them or a decision to continue their detention, and to order their release if that detention does not comply with article 9(1) of the ICCPR.

99. The UN Human Rights Committee has found Australia in breach of its obligations under article 9(4) of the ICCPR on a number of occasions, because its system of mandatory detention does not provide for judicial review of the lawfulness of detention. As noted above, 'lawfulness' in article 9(4) of the ICCPR refers to the compliance of the detention with both international and domestic law.[46] In *A v Australia*, the UN Human Rights Committee found that the Migration Act precluded the Australian courts from considering whether a person's detention was arbitrary, or from ordering the release of any person from detention.[47] In *C v Australia*,[48] *Bakhtiyari v Australia*,[49] *Baban v Australia*,[50] and *Shams et al v Australia*,[51] the UN Committee confirmed its view that an inability to challenge detention that is incompatible with article 9(1) of the ICCPR will result in a breach of article 9(4) of the ICCPR.

100. The Commission notes that the Joint Standing Committee on Migration (JSCM) has recommended that the Migration Act should be amended to provide judicial review in respect of a decision to continue detention. In December 2008, the JSCM published the first report of its inquiry into immigration detention in Australia, after receiving submissions from a diverse range of stakeholders. In the JSCM's view, it was not convinced that the necessary system of independent review could be satisfied by a series of

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[46] See, for example, *A v Australia*, note 41, para 9.5.
[47] *A v Australia*, note 41.
[48] United Nations Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc. CCPR/C/76/D/900/1999 (2002), para 8.3. At http://www.unhchr.ch/tbs/doc.nsf/0/f8755fbb0a55e15ac1256c7f002f17bd?Opendocument (viewed 28 July 2009).
[49] United Nations Human Rights Committee, *Bakhtiyari v Australia*, Communication No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003), para 9.4. At http://www.unhchr.ch/tbs/doc.nsf/0/8662db397d948638c1256de2003b3d6a?Opendocument (viewed 28 July 2009).
[50] United Nations Human Rights Committee, *Baban v Australia,* Communication No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001 (2003), para 7.2. At http://www.unhcr.org/refworld/docid/404887ee3.html (viewed 28 July 2009).
[51] United Nations Human Rights Committee, *Shams et al v Australia,* Communication No's 1255,1256,1259,1260,1266,1268,1270,1288/2004, UN Doc. CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004 (2007), para 7.3. At http://www.bayefsky.com/pdf/australia_iccpr_t5_1255-56-59-60-66-68-70-88_2004.pdf (viewed 28 July 2009).

departmental reviews. The JSCM recommended that in respect of a decision to continue detention:

> … oversight by a judicial body is warranted and appropriate as an important check on the integrity of the system.[52]

Recommendation 12: The Bill should be amended to accord with international law by requiring that the decision to detain a person under the Migration Act or a decision to continue a person's detention is subject to prompt review by a court.

13 Temporary Community Access Permissions are a positive reform

101. Proposed section 194A creates a system of Temporary Community Access Permissions, under which an officer can grant written permission for an immigration detainee to be absent from their place of detention for a specified time and for specified purposes.

102. The Commission supports this reform, as it has the potential to provide greater flexibility for immigration detainees to be able to leave the detention environment on a more regular basis. Currently, many detainees only have access to a very limited number of excursions outside the detention facility they are in, and some detainees have no access to excursions at all.

103. During its visits to immigration detention facilities over the past decade, the Commission has heard from numerous detainees about the negative physical and mental impacts caused by the severe restrictions on their liberty while in detention. The Commission has made previous recommendations about the need to increase access for detainees to regular excursions outside the detention environment.[53]

104. In the Commission's view, if a person must be held in immigration detention, it would be positive to allow them greater opportunities to leave the detention environment. The proposed Temporary Community Access Permission scheme would make this possible. At the same time, it would presumably reduce pressure on DIAC and the Detention Service Provider by providing a means through which detainees can be absent from the detention facility without the need for them to be escorted by an officer.

105. The Commission suggests that concerns that other parties might have about the proposed Temporary Community Access Permission scheme would be addressed by the fact that the Permission will only be granted if an officer determines that it would involve 'minimal risk' to the Australian community,[54]

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[52] Joint Standing Committee on Migration, note 28, para 4.110.
[53] See, for example, Australian Human Rights Commission, *2008 Immigration detention report*, note 16, pp 33-35.
[54] Migration Amendment (Immigration Detention Reform) Bill 2009, proposed section 194A(2).

and that the Permission will include conditions to be complied with by the detainee.[55]

Recommendation 13: The Temporary Community Access Permission scheme set out in proposed section 194A is a positive reform and should be adopted.

14 Changes to the exercise of the Minister's Residence Determination power are positive

106. Under the Bill, section 197AF of the Migration Act will be repealed. This will remove the requirement that the Minister must personally exercise his or her power to make, vary or revoke a Residence Determination (which allows a person to reside in 'community detention' rather than in an immigration detention facility).

107. The Commission supports the proposed repeal of section 197AF of the Migration Act. The purpose of this is to allow for the Minister's power to make, vary or revoke a Residence Determination to be delegated to an immigration officer.[56]

108. Over the past few years, the Commission has conducted annual inspections of Australia's immigration detention facilities and has also met with numerous people on community detention under a Residence Determination. Based on the Commission's observations from these activities, the Commission has concluded that, if a person must be held in immigration detention (as opposed to being granted a bridging visa, which is the preferable course of action), then community detention under a Residence Determination is the most appropriate detention arrangement. The Commission has encouraged the Minister and DIAC to make greater use of Residence Determinations, rather than holding people in immigration detention facilities.

109. During its visits to immigration detention facilities over the past few years, the Commission has heard from detainees who have been frustrated at the amount of time they have had to wait in a secure detention facility for their Residence Determination application to be considered. The Commission has also met with detainees who would have benefitted greatly from being allowed to move to community detention.

110. In the Commission's view, allowing the Minister to delegate the exercise of his or her power to an appropriate immigration officer would be a positive development that may assist both in terms of reducing the burden on the Minister to personally consider and decide on a high number of individual cases, and in speeding up decision making so that people are not unduly held in immigration detention facilities while awaiting a decision on their Residence Determination.

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[55] Migration Amendment (Immigration Detention Reform) Bill 2009, proposed section 194A(3)(c).
[56] Explanatory Memorandum, Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), p 7.

111. The Commission notes that, under the New Directions, the Minister has stated that 'once checks have been successfully completed, continued detention while immigration status is resolved is unwarranted.'[57] The presumption will be that people will remain in the community while their immigration status is resolved.[58] While the Commission's preferable option would be that people are granted a bridging visa to remain in the community, increased use of Residence Determinations could also be used to implement this aspect of the New Directions. Increased flexibility in terms of the decision making process for Residence Determinations will therefore be important.

Recommendation 14: The Bill's proposal to repeal section 197AF of the Migration Act (under which the power to make, vary or revoke a Residence Determination may only be exercised by the Minister personally) is a positive reform and should be adopted.

15 The Bill fails to implement Values 4, 6 and 7 regarding conditions in immigration detention

112. Value 4 provides that the conditions of detention, including the appropriateness of the accommodation and the services provided, will be subject to regular review. Value 6 commits to ensuring that people in detention will be treated fairly and reasonably within the law. And Value 7 states that conditions of detention will ensure the inherent dignity of the human person.

113. Having undertaken a considerable amount of work over the past decade focusing on the conditions in Australia's immigration detention facilities, the Commission fully supports the statement of these Values. The Commission is concerned, however, that these Values have not been given legislative effect in the Bill, and that the government has not indicated further reforms in this area.

114. The Commission has repeatedly called for a set of minimum standards for treatment and conditions in immigration detention to be set out in law, and for their content to be based on relevant international human rights standards.[59] In the absence of this, the Commission is of the view that there is currently no comprehensive and effective mechanism in place to ensure that all immigration detainees are treated in accordance with Australia's human rights obligations.

115. In the Commission's view, the most appropriate way of ensuring that minimum standards for conditions in detention are properly implemented, and that breaches are remedied, is to give legislative effect to those minimum

[57] C Evans, note 7, p 4.
[58] C Evans, note 7, p 4.
[59] See, for example, Australian Human Rights Commission, *2008 Immigration detention report*, note 16, p 18; Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia*, note 34, para 112.

standards. The content of the standards should be closely guided by relevant international human rights treaties and guidelines.[60]

116. In order to give effect to the commitment in Value 4 that the conditions of detention will be subject to regular review, a robust system of independent monitoring of the minimum standards should be established. One means of achieving this would be through the Australian Government ratifying the *Optional Protocol to the Convention against Torture* (OPCAT).[61]

117. As a party to OPCAT, the Australian Government would be required to establish an independent National Preventive Mechanism to conduct regular inspections of all places of detention in order to prevent torture and ill-treatment and make recommendations on improving internal conditions. The establishment of such a mechanism would facilitate a greater level of transparency and accountability with regard to conditions in immigration detention facilities.[62]

Recommendation 15: Specific legislation and regulations should be enacted to set out minimum standards for conditions and treatment of detainees in all of Australia's immigration detention facilities. These minimum standards should be based on relevant international human rights standards, should be enforceable and should make provision for effective remedies.

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[60] This should include relevant provisions of the ICCPR, the CRC, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), the *Convention Relating to the Status of Refugees* (1951) and the *Protocol Relating to the Status of Refugees* (1967). It should also include the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988), at http://www.unhchr.ch/html/menu3/b/h_comp36.htm; *Standard Minimum Rules for the Treatment of Prisoners* (1955), at http://www.unhchr.ch/html/menu3/b/h_comp34.htm; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (1990), at http://www.unhchr.ch/html/menu3/b/h_comp37.htm; and United Nations High Commissioner for Refugees, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999), at http://www.unhcr.org.au/pdfs/detentionguidelines.pdf. See further Australian Human Rights Commission, *2008 Immigration detention report*, note 16, pp 16-18.

[61] The Australian Government has signed the *Optional Protocol to the Convention against Torture*, but has not yet ratified the agreement.

[62] See further Report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan, Centre for Law and Public Policy, The University of Western Australia, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia* (2008). At http://www.hreoc.gov.au/Human_RightS/publications/opcat/index.html (viewed 28 July 2009).