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REVIEW OF THE MIGRATION AMENDMENT (IMMIGRATION DETENTION REFORM) BILL 2009

31 July 2009

Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth)

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Part A - Executive summary & recommendations

1. Executive Summary

1.1 The Public Interest Law Clearing House (Vic) Inc (PILCH) welcomes the opportunity to submit its views to the inquiry by the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) into the Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth) (the Bill).

1.2 PILCH congratulates the Australian Government on the reforms to Australia's immigration detention regime to date that will lead to the abolition of detention costs for detainees,[1] and have involved the introduction of 'alternative to detention' pilot programs that have provided successful immigration and welfare outcomes. This shift, from a 'punitive, 'one-size-fits-all' enforcement model to an individual case and risk management model, highlight[s] the benefits of community-based alternatives and case-management processes'.[2]

1.3 The current proposed detention reforms under the Migration Amendment (Immigration Detention Reform) Bill 2009 provide some additional law reform initiatives that are consistent with the government's stated aim of implementing a more humane detention policy that fulfils Australia's obligations to a greater extent under international conventions,[3] domestic law, and human rights considerations generally.

1.4 In particular, PILCH welcomes the proposal in the Bill to enshrine in legislation the immigration detention values that children, including juvenile foreign fishers, and where possible, their families, will not be detained in an immigration detention centre,4 and that detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.[5]

1.5 Furthermore, the introduction of the Temporary Community Access Permission[6] to enable a person in a detention facility to move freely in the community for a specific purpose and period is essential to minimise the negative impact that detention can have on the health and wellbeing of the individual, by providing him or her with the opportunity to feel some

[1] Migration Amendment (Abolishing Detention Debt) Bill 2009 (Cth).

[2] Grant Mitchell, *Case management as an alternative to immigration detention: The Australian Experience* (2009) International Detention Coalition [1] <http://idc.rfbf.com.au/wp-content/uploads/2009/05/a2d_australian-experience.pdf> at 22 July 2009.

[3] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 ,art 2, 9, 10 & 24, (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 2, 3, 9, 22 & 37(b) (entered into force 2 September 1990); *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, art 16, 26 & 31 (entered into force 22 April 1954).

[4] Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), sch 1(3).

[5] Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), sch 1(1).

[6] Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), sch 1(12).

sense of empowerment and decreasing feelings of isolation and alienation from the community.

1.6 The extension of Residence Determination powers available to the Minister, by making those same powers available to be exercised in the public interest by an authorised senior departmental officer,[7] also creates a more workable and practical system for community detention.

1.7 However, PILCH believes that some of these reforms are not wide enough in scope, that the retention of the policy of mandatory detention is not only unnecessary but conflicts with human rights considerations and international law as well as international guidelines for detention, and that other areas in need of reform have not been addressed by the Bill. On this basis PILCH intends to alert the Committee to those areas of reform that PILCH believes are in need of further attention.

2. Recommendations

2.1 PILCH recommends the following additional reforms:

Recommendation A

- That the following immigration detention values outlined in Minister Evan's speech of 29 July 2008[8] should be recognised in legislation and not remain as a matter of policy subject to discretion:
- 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 services provided, would be subject to regular review,
- People in detention will be treated fairly and reasonably within the law, and
- Conditions in detention will ensure the inherent dignity of the human person.

[7] Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), sch 1(13).

[8] Chris Evans, '*New Directions in Detention – Restoring Integrity to Australia's Immigration System'*, speech delivered at The Australian National University, Canberra, 29 July 2008.

Recommendation B:

Mandatory detention should be abolished in favour of a further expansion of community-based alternatives such as the Community Care Pilot.

Recommendation C:

Placing children in detention should be prohibited.

Recommendation D:

Clear and certain time limits should be introduced for detention.

Recommendation E:

The Bill should require an authorised officer to consider and determine whether or not to grant a temporary community access permission; clarify what is meant by 'risk' to the Australian community and ensure that such a clarification is in a manner that is consistent with human rights principles; and provide for a review of any decision of the authorised officer whether or not to grant a temporary community access permission.

Recommendation F

- The following reforms in relation to guidelines for detention and detainee rights are recommended:
- There should be a discretion to detain in accordance with clear guidelines incorporated in legislation.
- The onus rests on the Department of Immigration to establish that detention is both necessary and proportionate based on specific guidelines for detention.
- Only senior departmental officials or an independent board/tribunal should have the power to make a decision to detain.
- Written reasons for detention should be supplied to detainees and detainees should be informed of their rights to have the decision reviewed and the process involved.
- Stringent guidelines should apply separately for the decision to continue detention and again the onus should be placed on the Department of Immigration to establish that continued detention is both necessary and proportionate.
- Detainees should have access to government funded legal assistance from the commencement of detention and throughout the detention process.

Recommendation G

Provision be made for judicial review to occur automatically for all detainees, at the commencement of their detention and periodically throughout the time that they are detained.

Recommendation H

Bonds/Sureties for release from detention must be abolished.

Recommendation I

Detention centres should not be operated by private contractors.

Recommendation J

- All amendments in the Migration Amendment (Immigration Detention Reform)Bill should apply to persons outside the migration zone under s189.
- All excised territories should be returned to the migration zone.

Part B – About this submission

3. About PILCH

3.1 PILCH is a leading Victorian, not-for-profit organisation which is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.

3.2 PILCH coordinates the delivery of pro bono legal services through five schemes:

- the Public Interest Law Scheme (**PILS**);
- the Victorian Bar Legal Assistance Scheme (**VBLAS**);
- the Law Institute of Victoria Legal Assistance Scheme (**LIVLAS**);
- PILCH Connect (**Connect**);
- the Homeless Persons' Legal Clinic (**HPLC**); and
- the Seniors Rights Legal Clinic (**SRLC**).

3.3 PILCH's objectives are to:

a) improve access to justice and the legal system for those who are disadvantaged or marginalised;

b) identify matters of public interest requiring legal assistance;

c) seek redress in matters of public interest for those who are disadvantage or marginalised;

d) refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;

e) support community organisations to pursue the interests of the communities they seek to represent; and

f) encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

3.4 In 2006-2007, PILCH assisted over 2000 individuals and organisations to access free legal and related services. Without these much needed services, many Victorians would find it impossible to navigate a complex legal system, secure representation, negotiate a fine, challenge an unlawful eviction, contest a deportation or even be aware of their rights and responsibilities.

Part C – Values for Immigration Detention Prescribed by Law

4. Introduction

4.1 In July 2008 Senator Chris Evans, Minister for Immigration and Citizenship, gave a speech outlining the Rudd Government's commitment to reform and a more humane treatment of those seeking our protection.[9] He identified seven key immigration values upon which the government intended to base its reforms.[10] However, under the proposed Migration Amendment (Immigration Detention Reform) Bill 2009 (the 'Bill'), only four of the values in his speech will be prescribed by law. In summary these are that mandatory detention is an essential component of strong border control and the specific grounds for mandatory detention, the value that detention be an option of last resort and for the shortest practicable time, and the value that children will not be detained in a detention centre.

4.2 PILCH submits that the following values that were also outlined in Senator Evan's July 2008 speech are vitally important in ensuring that that the procedures and conditions of detention do not violate the human rights and dignity of individuals:

- 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,
- People in detention to be treated fairly and reasonably within the law, and
- Conditions of detention will ensure the inherent dignity of the human person.

4.3 Accordingly these values should be recognised by legislation rather than left as a policy matter subject to discretion. By not incorporating these values in the amendments under the Bill, the government leaves open to question its claim that it is according the need to

[9] Chris Evans, '*New Directions in Detention – Restoring Integrity to Australia's Immigration System'* , speech delivered at The Australian National University, Canberra, 29 July 2008.

[10] (a)Mandatory detention is an essential component of strong border control, (b)To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention (i)all unauthorised arrivals, for management of health, identity and security risks to the community; (ii)unlawful non-citizens who present unacceptable risks to the community; and (iii)unlawful non-citizens who have repeatedly refused to comply with their visa conditions, (c) Children, including juvenile foreign fishers, and where possible, their families, will not be detained in an immigration detention centre (IDC), (d) 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. (e) Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time (f) People in detention will be treated fairly and reasonably within the law (g) Conditions of detention will ensure the inherent dignity of the human person.

treat asylum seekers humanely equal priority with the perceived need to strengthen Australia's borders and protect the community.[11]

4.4 The omission of such values from the Bill is also contrary to international standards for immigration detention. The United Nations High Commissioner for Refugees' ('UNHCR') Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (the ***UNHCR Guidelines***) provide that conditions of detention for asylum-seekers should be humane with respect shown for the inherent dignity of the person and should be prescribed by law.[12]

4.5 The UNHCR also provides that in legislating for the detention of asylum seekers, states should have reference to 'the applicable norms and principles of international law and standards on the treatment of such persons… [such as] the 1988 UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 1955 UN Standard Minimum Rules for the Treatment of Prisoners, and the 1990 UN Rules for the Protection of Juveniles Deprived of Liberty'.[13] Based on these principles the UNHCR Guidelines suggest particular matters, such as initial screening to identify trauma or torture victims, the opportunity for regular interaction with community members and access to a complaints mechanism,[14] should be prescribed by law as a means of regulating the conditions of immigration detention. This approach may be extended to support our view of the importance of the values we have outlined being prescribed by law since these values are comparable to those outlined in the UNHCR guidelines.

5. Recommendation

Recommendation A

That the following immigration detention values outlined in Minister Evan's speech of 29th July 2008 be recognised in legislation and not remain as a matter of policy subject to discretion

- 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 services provided, would be subject to regular review
- People in detention will be treated fairly and reasonably within the law,
- Conditions in detention will ensure the inherent dignity of the human person.

[11] Chris Evans, '*New Directions in Detention – Restoring Integrity to Australia's Immigration System'* , speech delivered at The Australian National University, Canberra, 29 July 2008.

[12] UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999) [Guideline 10] <http://www.unhcr.org/refworld/docid/3c2b3f844.html> at 23 July 2009.

[13] UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999) [Guideline 10] <http://www.unhcr.org/refworld/docid/3c2b3f844.html> at 23 July 2009.

[14] UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999) [Guideline 10] <http://www.unhcr.org/refworld/docid/3c2b3f844.html> at 23 July 2009.

Part D – Mandatory Detention

6. Introduction

6.1 In 1992 Australia introduced a policy of subjecting migrants who arrived or remained in Australia without an appropriate visa to mandatory, indefinite and non-reviewable immigration detention.[15] The implementation of the policy resulted in Australia's immigration detention practice being criticised by non-government organisations, the Australian Human Rights Commission and within government commissioned reports.[16] These criticisms were largely based on medical evidence that linked the practice of mandatory detention to the serious deterioration in the mental health of some detainees and referred specifically to asylum seekers engaging in self-harm, suicide attempts or ideation, depression and traumatic stress.[17] Furthermore, in March 2009 the United Nations Human Rights Committee (HRC) recommended that Australia should abolish the remaining elements of its mandatory immigration detention policy.[18]

6.2 Unfortunately, although the Rudd government has recently taken some important steps toward reforming Australia's problematic immigration practices, it has chosen to retain mandatory detention on the grounds that 'unauthorised arrivals... must be detained for the purposes of managing identity, health and security risks to the Australian community'.[19] Accordingly, under the Bill's amendments, unlawful non-citizens will continue to be subject to mandatory detention if they:

- present an unacceptable risk to the Australian community;
- have bypassed or been refused immigration clearance; or
- have had their visa cancelled because of false documents or information.[20]

6.3 The Bill further provides for the discretionary detention of unlawful non-citizens, and places no constraint on the exercise of this discretion.[21] This may have the effect of leaving the

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[15] Grant Mitchell, *Case management as an alternative to immigration detention: The Australian Experience* (2009) International Detention Coalition [1] <http://idc.rfbf.com.au/wp-content/uploads/2009/05/a2d_australian-experience.pdf> at 22 July 2009.

[16] Grant Mitchell, *Case management as an alternative to immigration detention: The Australian Experience* (2009) International Detention Coalition [1] <http://idc.rfbf.com.au/wp-content/uploads/2009/05/a2d_australian-experience.pdf> at 22 July 2009.

[17] Derrick Silove, Patricia Austin and Zachary Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia' (2007) 44(3) Transcultural Psychiatry 359, 366

[18] Human Rights Committee, Concluding Observations: Australia [23], UN Doc CCPR/C/AUS/CO/5, 2 April 2009.

[19] Explanatory Memorandum, Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), 5.

[20] Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), sch 1(9), s189 (C).

[21] Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), sch 1(9).

practice of discretionary detention to be shaped by policymakers or individual officers, rather than enshrined in firm legal principles and provisions, a point that is discussed later in this submission.

6.4 PILCH submits that, despite the government's proposal to make the mandatory detention policy less draconian by providing that it will no longer be the default outcome for all asylum seekers,[22] mandatory immigration detention applied to broad classes of asylum seeker is still manifestly unjust and breaches international human rights law. Retaining mandatory detention as a cornerstone value of migration law and policy also undermines the government's efforts to introduce a more humane approach to the treatment of asylum seekers in particular under this Bill, and is therefore in conflict with the specific principle prescribed under the Bill in s4AAA that detention of non-citizens should only be a measure of last resort and for the shortest practicable time.

6.5 This submission will provide both an overview of some of the problems associated with the policy and grounds for mandatory detention as stipulated under the Bill, as well as why it is unnecessary under the following sub-headings:

- International law and UNHCR Guidelines for Detention
- Mandatory Detention for the Purposes of undertaking Identity, Health and Security checks.
- The Mandatory Detention of Asylum Seekers who have Bypassed Immigration Clearance.
- Mandatory Detention for Repeated Breaches of Visa Conditions.
- Mandatory Detention where a Person has their Visa Cancelled under s501 of the Migration Act.
- Alternatives to Detention
- A Cost/Benefit Analysis
- The issue of Border Security

6.6 The submission will then later examine reforms under the Bill that are not wide enough in scope and other issues concerning immigration detention that the Bill has not addressed at all.

7. International law and UNHCR Guidelines for Detention

7.1 As briefly outlined earlier in this submission, PILCH asserts that mandatory detention constitutes a violation of international human rights law, which requires that deprivation of liberty be both necessary and proportionate, with the onus on the state to establish the

[22] Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), sch 1(1).

necessity and proportionality of such detention.[23] Mandatory detention by its very nature does not allow for the assessment of the circumstances particular to any given case to determine if detention is required and if it would be proportionate.

7.2 Furthermore, Article 31 of the Refugee Convention prohibits States from imposing penalties on refugees who enter, or are present, in their territory without authorisation, merely because of their illegal entry or presence[24]. PILCH submits that the mandatory detention of asylum seekers, some of whom will later be granted refugee status, amounts to imposing a penalty upon them in breach of the Convention. In addition, any restrictions imposed on the freedom of movement of refugees must only be that which is necessary[25], a principle that conflicts with the policy of mandatory detention.

7.3 Mandatory detention is also in conflict with UNHCR Guidelines which state that asylum seekers should not be detained, on the grounds that the right to seek asylum is a fundamental human right, the exercise of which often requires asylum seekers to enter territory illegally.[26] The UNHCR Guidelines provide that states may only resort to detention of asylum seekers on exceptional grounds, after a full consideration of all of the alternative options and assessment of whether it is reasonable to detain the person and whether detention is proportional to the objectives to be achieved.[27]

7.4 The UNHCR Guidelines further suggest that there should be a presumption against immigration detention, and it has elsewhere been suggested that such a presumption should be established by law.[28] PILCH firmly supports this approach.

7.5 In PILCH's view the individual circumstances of each asylum seeker should be amongst the most important considerations in making the decision to detain him or her. Under the UNHCR Guidelines and the international human rights law framework, each case must be assessed individually to ensure that detention is proportionate and that, in addition to any possible security concerns, the particular circumstances and needs of an individual asylum seeker are met. Mandatory detention, in contrast, does not allow for an individualised approach, and is accordingly inconsistent with Australia's international human rights obligations.

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[23] See, e.g., *R v Oakes* [1986] 1 SCR 103, 105, 136-7; *Minister of Transport v Noort* [1992] 3 NZLR 260, 283; *Moise v Transitional Land Council of Greater Germiston [2001]* (4) SA 491 (CC), [19].

[24] Refugee Convention article 31.

[25] Refugee Convention article 31 (2).

[26] UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999) [Guideline 2] <http://www.unhcr.org/refworld/docid/3c2b3f844.html> at 23 July 2009.

[27] UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999) [Guideline 3] <http://www.unhcr.org/refworld/docid/3c2b3f844.html> at 23 July 2009.

[28] Amnesty International, *Irregular Migrants and Asylum Seekers: Alternatives to Immigration Detention* (April 2009).

8. Mandatory Detention for the Purposes of Health, Identity, and Security checks

8.1 PILCH is concerned that provisions of the Bill subjecting persons to identity, health and security checks[29] whilst mandatorily detained lack time limitations and other appropriate safeguards against arbitrariness and therefore violate Article 9(1) of the International Covenant of Civil and Political Rights, which expressly prohibits the arbitrary detention or arrest of individuals. Furthermore, the Government's claim that unauthorised arrivals must be detained for the purposes of managing identity, health and security risks to Australia[30] is not in keeping with international law requirements that detention must be proportionate and necessary.

8.2 In PILCH's experience and that of other service providers to asylum seekers, health checks[31] have been undertaken without any difficulties whilst asylum seekers have resided on requisite visas in the community. Other jurisdictions provide alternative and more humane mechanisms for health and identity checks by conducting those checks whilst the asylum seekers are residing in the community where possible. For example, in Sweden where there is inadequate information about the identity of a family, a sworn affidavit is usually taken.[32]

9. The Mandatory Detention of Asylum Seekers who have Bypassed Immigration Clearance

9.1 It is of particular concern to PILCH that asylum seekers may be compulsorily detained under the Bill on the grounds of bypassing immigration clearance or using false documents to obtain entry to Australia.[33] UNHCR Guidelines state that in exercising their basic human right to seek asylum, 'asylum-seekers are often forced to arrive at, or enter, a territory illegally… this element… should be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence'.[34] In our view, the Bill fails to recognise the circumstances that are particular to asylum seekers by allowing for mandatory detention on these grounds.

10. The Mandatory Detention for Repeated Breaches of Visa Conditions

10.1 Senator Penny Wong, in the Senate Second Reading speech of the Bill, states that mandatory detention will apply to persons who repeatedly refuse to comply with their visa

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[29] Migration Amendment (Immigration Detention Reform) Bill 2009 9 Subsection 189 (1) (1B)

[30] Senate second reading speech by Senator Penny Wong Thursday 25 June 2009

[31] See the Refugee and Immigration Legal Centre's submission to the Joint Standing Committee on Migration's inquiry into immigration detention (2008) available at: http://www.aph.gove.au/House/committee/mig/detention/sub/sub130.pdf

[32] Grant Mitchell, 'Asylum Seekers in Sweden: An Integrated Approach to Reception, Detention, Determination, Integration and Return' (2001), Fabian Society <http://www.fabian.org.au/940.asp> at 23 July 2009.

[33] Migration Amendment (Immigraton Detention Reform) Bill 2009 Subsection 189 (1) (b) (ii), Subsection 189 (1) (b) (iv).

[34] UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999) [Guideline 2] <http://www.unhcr.org/refworld/docid/3c2b3f844.html> at 23 July 2009.

conditions yet the Bill does not specify in sufficient detail the circumstances that must apply here. PILCH assumes that regulations as yet to be enacted will expressly deal with this ground for mandatory detention. In any event, it is our view that the mandatory detention of persons who repeatedly breach visa conditions is neither proportionate nor necessary as it fails to take into consideration the level of seriousness of the breaches and the particular circumstances of the individual involved. It is also important to be mindful that not all visa breaches can be linked to a risk to the community or a likelihood for absconding.

10.2 For example, a PILCH client was detained for breaches of his visa after being forced to seek employment because he was not able to survive solely on the assistance he received from the Australian Red Cross. His detention led to a regression in not only his language and communications skills but his general state of mental health. PILCH firmly believes that even community detention is not warranted in these circumstances.

11. Mandatory Detention of Persons who have their Visa Cancelled under s501 of the Migration Act.

11.1 PILCH submits that the mandatory detention of persons whose visas have been cancelled under s501 of the Migration Act is not proportionate nor necessary, violates the human rights and dignity of such persons, and is inconsistent with our domestic law and principles of natural justice whereby a person who has completed his or her sentence should be released into the community.

11.2 PILCH has assisted a number of individuals who have faced possible deportation after their visas have been cancelled under s501 of the Migration Act and the principle concern of these individuals has always been to access legal representation and to assist their legal representatives in putting the best case forward in order to avoid deportation. It is doubtful then that all individuals in this category would present a risk to the community or a risk of absconding given in our experience their focus is on engaging with the legal process to review decisions to cancel their visas.

11.3 Furthermore, if the Department of Immigration has concerns that particular individuals may be a risk to the community or be at risk of absconding, it can ensure that all notifications of an intention to cancel a person's permanent residence visa under s501 occur whilst these individuals are still serving their sentence in prison. A number of PILCH's clients facing possible deportation in the last few years were still serving their sentences whilst we provided them with legal assistance to deal with the initial notification of intention to cancel their permanent residence visa through to judicial review of the decision to cancel the visa.

12. Alternatives to Immigration Detention

12.1 As stated earlier in this submission, the retention of mandatory detention is neither necessary nor proportionate and is at odds with the government's policy of favouring a case-management approach to applications for asylum by expanding existing successful pilot projects such as the Community Care Pilot. Senator Evans has stated that '[t]he government's commitment in resolving the status of those in the community means there will be an increased capacity to assist people to reach a timely immigration outcome

without the need for detention'[35]. The Minister has further described the steps taken by the government to introduce alternatives to immigration detention as 'reflecting the government's determination to implement a humane and risk-based approach to detention.' However, PILCH believes that the mandatory detention of the broad classes of asylum seeker described earlier are in conflict with this policy as well as unnecessary.

12.2 This is especially the case given the success of community-based alternatives to detention that have been trialled over the past three years. The pilot programs have centred on a community-based case management model and have averaged a 94% compliance rate.[36] The Community Care Pilot, for instance, was introduced as a 'comprehensive early intervention model',[37] and has been used with great success to manage 'long-term complex cases, including refused asylum seekers, undocumented migrants, those released from detention into the care of the pilot and individuals with health and welfare concerns'.[38] The government has been positive about the success of pilot programs of this nature, stating that 'a case management approach… is critical in resolving the cases of vulnerable individuals and families swiftly. When health and welfare are stabilized, clients are better able to think clearly, exercise choice and participate in resolution of their immigration status'.[39]

12.3 PILCH submits that, in light of this success, the government should continue to pursue and expand its policy of implementing alternatives to detention, particularly programs that manage asylum seekers on a case-by-case basis according to their needs and circumstances, rather than seeking to retain mandatory detention for broad classes of asylum seekers.

13. Cost/Benefit Analysis

13.1 When mandatory detention was first introduced it was projected that the policy would 'save the cost of locating people in the community'.[40] Yet the implementation of alternative

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[35] Chris Evans, 'Budget 2009–10 – New Directions in Detention' (Press Release, 12 May 2009).

[36] Grant Mitchell, *Case management as an alternative to immigration detention: The Australian Experience* (2009) International Detention Coalition [1] <http://idc.rfbf.com.au/wp-content/uploads/2009/05/a2d_australian-experience.pdf> at 22 July 2009.

[37] Grant Mitchell, *Case management as an alternative to immigration detention: The Australian Experience* (2009) International Detention Coalition [7] <http://idc.rfbf.com.au/wp-content/uploads/2009/05/a2d_australian-experience.pdf> at 22 July 2009.

[38] Grant Mitchell, *Case management as an alternative to immigration detention: The Australian Experience* (2009) International Detention Coalition [7] <http://idc.rfbf.com.au/wp-content/uploads/2009/05/a2d_australian-experience.pdf> at 22 July 2009.

[39] Grant Mitchell, *Case management as an alternative to immigration detention: The Australian Experience* (2009) International Detention Coalition [13] <http://idc.rfbf.com.au/wp-content/uploads/2009/05/a2d_australian-experience.pdf> at 22 July 2009.

[40] Janet Phillips and Adrienne Millbank, *The detention and removal of asylum seekers* (2005) Parliament of Australia <http://www.aph.gov.au/library/intguide/SP/asylum_seekers.htm> at 22 July 2009.

community-based programs has proved cost-saving to government. The International Detention Coalition has calculated that 'decisions made not to detain have reduced the costs of detention, which average more than AU$125 per person per day, or more than $45,000 per year… For individuals requiring specialist care, the cost of providing welfare, legal and voluntary return services under the Community Care Pilot has averaged less than AU$39 a person per day, or less than $15,000 per year'.[41] It would therefore seem that mandatory detention represents a greater economic (and taxpayer) burden than community-based case management programs such as the Community Care Pilot.

14. Border Security

14.1 Mandatory detention of certain classes of asylum seeker is also unnecessary to pursue the government's aims of strengthening Australia's border security. In New Zealand, for instance, immigration officers have the discretion under the *Immigration Act 1987* (NZ) to determine on a case-by-case basis whether to detain unauthorised arrivals to the country. The Operational Instructions governing the use of this discretion set out considerations which may inform the decision to detain, and amongst these is the potential risk posed by the individual to national security or public order.[42] The Operational Instructions emphasise, however, that:

14.2 'Any decision to impose any level of restriction on the freedom of movement of the individual, and the level of restriction of movement that is to be imposed, remains a matter for careful judgement by the officer concerned after weighing up all relevant circumstances of the case… In all cases a decision to detain in a penal institution rather than any lesser form of restriction on the freedom of movement of a refugee claimant is considered only after all other alternatives have been excluded.'[43]

14.3 PILCH submits that an approach such as this, allowing for discretionary assessment of the need for detention, based on clear guidelines (preferably established by law rather than policy), strikes a more appropriate balance between security concerns and the need to ensure humane treatment of asylum seekers than the mandatory detention of certain classes of asylum seeker.

15. Recommendation

Recommendation B

[41] Grant Mitchell, *Case management as an alternative to immigration detention: The Australian Experience* (2009) International Detention Coalition [11] <http://idc.rfbf.com.au/wp-content/uploads/2009/05/a2d_australian-experience.pdf> at 22 July 2009.

[42] New Zealand Immigration Service, *A16.2 Operation Instruction: exercise of discretionary powers under the Immigration Act 1987 in response (at the time of their arrival and subsequently) to persons claiming refugee status at the border* (2004), Appendix B(2)(iv).

[43] New Zealand Immigration Service, *A16.2 Operation Instruction: exercise of discretionary powers under the Immigration Act 1987 in response (at the time of their arrival and subsequently) to persons claiming refugee status at the border* (2004), Appendix B(1).

Mandatory detention should be abolished in favour of a further expansion of community-based alternatives such as the Community Care Pilot.

Part E – Reforms in the Bill that are insufficient in scope

16. Introduction

16.1 Whilst PILCH supports the reforms in the Bill that provide that children shall not be detained in a detention centre, that detention should be a measure of last resort for the shortest practicable time, and the introduction of temporary community access permissions, we are of the view that these reforms are not wide enough in scope and further measures are required in these areas for the pursuit of a more humane immigration detention policy that fulfils Australia's domestic and international legal obligations.

17. Children in Detention

17.1 Although the Bill takes some important steps toward ensuring the welfare of children seeking asylum, including prohibiting placing children (defined as minors under the age of eighteen) in detention centres and requiring that regard is to be paid to the child's best interests in making a decision to detain, PILCH is concerned about the fact that the detention of children will remain legal under the reforms. Given that all forms of detention have problems that can undermine the mental health and physical well being of individuals to a lesser or greater degree, this is a particularly critical issue for children who are the most vulnerable group of asylum seekers.

17.2 In this section PILCH highlights both the problems associated with the detention of children generally and Australia's obligations under international law.

(1) Problems Associated with the Detention of Children

17.3 The vulnerability and susceptibility of children to adverse side effects to detention in general has been reported in numerous medical studies. One particular study demonstrated that in a sample of detainees in a remote facility, there was a tenfold increase in psychiatric morbidity in children subsequent to detention.[44] This was far greater than the threefold increase in mental illness in adults in the sample.[45] This is especially the case where children have had prior experience of trauma, which most children in immigration detention have.[46]

17.4 Problems associated with children in detention are not confined to detention centres. It has been established that the extended periods of stress and uncertainty associated with even

[44] Vanessa Johnston, 'Australian asylum policies: have they violated the right to health of asylum seekers?' (2009) 33 *Australian and New Zealand Journal of Public Health* 40, 41.

[45] Vanessa Johnston, 'Australian asylum policies: have they violated the right to health of asylum seekers?' (2009) 33 *Australian and New Zealand Journal of Public Health* 40, 41.

[46] In its 2004 inquiry into the wellbeing of children in detention, the Human Rights and Equal Opportunity Commission found that, given that 'more than 90 per cent of children in immigration detention… have been found to be refugees, it follows that many children in immigration detention are likely to have been affected by prior experiences of trauma'- See Human Rights and Equal Opportunity Commission, A Last Resort? The National Inquiry into Children in Immigration Detention (2004) 9.3.1

community detention cause mental health problems in individuals including children.[47] Furthermore, other alternative forms of detention apart from community detention such as Immigration Residential Housing have been criticised due to problems for accessing health-care, recreation and other supports available in either the community or within the detention facilities.[48] Hotham Mission also reported that based on case experience, alternative places of detention arrangements, requiring ongoing 'line of sight' detention obligations, are not suitable for individuals with serious health issues or cases involving children.[49]

(2) International law obligations

17.5 Given that children are an especially vulnerable group of individuals, they are accorded special rights and protections under international human rights law. The *Convention on the Rights of the Child*, which Australia ratified in 1990, requires that states 'take appropriate measures to ensure that a child who is seeking refugee status… shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance'.[50] In addition, the UNHCR Guidelines expressly provide that 'minors who are asylum-seekers should not be detained'.[51] Where children are unaccompanied, 'they should be released into the care of family members who already have residency within the asylum country… [or] alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision'.[52] In relation to children who arrive with their families, '[a]ll appropriate alternatives to detention should be considered' for the family.[53]

[47] Grant Mitchell, *Case management as an alternative to immigration detention: The Australian Experience* (2009) International Detention Coalition [7] <http://idc.rfbf.com.au/wp-content/uploads/2009/05/a2d_australian-experience.pdf> at 22 July 2009.

[48] Grant Mitchell, Case management as an alternative to immigration detention: The Australian Experience (2009) International Detention Coalition. p 3.

[49] Hotham Mission-Bridging Visa E Review, May 2006.

[50] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (1989), art 22(entered into force 2 September 1990).

[51] UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999) [Guideline 6] <http://www.unhcr.org/refworld/docid/3c2b3f844.html> at 23 July 2009.

[52] UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999) [Guideline 6] <http://www.unhcr.org/refworld/docid/3c2b3f844.html> at 23 July 2009.

[53] UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999) [Guideline 6] <http://www.unhcr.org/refworld/docid/3c2b3f844.html> at 23 July 2009.

18. Time Limits for Detention

18.1 Whilst the Bill prescribes in law the principle that detention should not only be a matter of last resort, but that the length of detention should be for the shortest practicable time[54], this is insufficient in giving effect to Australia's legal obligations to treat asylum seekers humanely. Given the distressed and sometimes traumatised state of asylum seekers, it is crucial that time limits for detention be introduced, rather than leaving detainees to deal with the uncertainty of indefinite confinement. An individual who is detained without knowing the projected length of the detention is subject to chronic anxiety and fear.[55] Moreover, the greater the duration of the detention, the greater the detrimental effect of detention on the individual's mental health.[56] In this respect, the position of asylum seekers detained in Australia for indefinite periods can be contrasted unfavourably even with the position of convicted criminals, who at least know the length of their prison term.[57]

18.2 In contrast, the Swedish model imposes time limits on the detention of asylum seekers. In Sweden there are three categories in the detention process: identification detention, investigation detention and detention for those likely to be deported. The first category allows for detention of non-citizens if their identity is unclear for a period of two weeks. The second category of investigation detention allows for detention of non-citizens while their right to be released into the community is investigated, particularly where there are questions of national security. Detainees in this category may be held for two months. The third category allows for the detention, for a maximum of two months, of non-citizens who will probably soon be deported or will go into hiding if released.[58]

18.3 In addition, families are released from detention quickly in Sweden. The initial health checks are generally conducted very swiftly for a family, and may be done on any day of the week. As already discussed, in instances where there is inadequate information about the identity of the family, a sworn affidavit is usually taken and the family is released into the community.[59]

18.4 The Swedish model provides a compelling example of an immigration detention system that has adopted a more humane approach to detaining asylum seekers by imposing reasonable and strictly enforced time limits on their detention. PILCH also notes that some jurisdictions use the judicial review process to limit detention periods and increase certainty about the length of detention.

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[54] Section 4AAA

[55] Grant Mitchell, 'The Swedish Approach: A Rational Alternative' (2002) 60/61 Australian Rationalist 8, 10.

[56] Human Rights and Equal Opportunity Commission, *A Last Resort? National Enquiry into Children in Immigration Detention* (2004) 370-371; Australian Human Rights Commission, *2008 Immigration Detention Report* (2008) 20-21.

[57] Grant Mitchell, 'The Swedish Approach: A Rational Alternative' (2002) 60/61 *Australian Rationalist* 8, 10.

[58] Grant Mitchell, 'Asylum Seekers in Sweden: An Integrated Approach to Reception, Detention, Determination, Integration and Return' (2001), Fabian Society <http://www.fabian.org.au/940.asp> at 23 July 2009.

[59] Grant Mitchell, 'The Swedish Approach: A Rational Alternative' (2002) 60/61 *Australian Rationalist* 8, 10.

19. Temporary Community Access Permissions

19.1 Whilst PILCH supports the introduction of the temporary community access permission, we endorse the Human Rights Law Resource Centre submission that provides that the Bill should require an authorised officer to consider and determine whether or not to grant a temporary community access permission; clarify what is meant by 'risk to the Australian community' and ensure that such a clarification is in a manner that is consistent with human rights principles; and provide for a review of any decision of the authorised officer whether or not to grant a temporary community access permission.

20. Recommendations

20.1 PILCH makes the following recommendations in relation to immigration detention:

Recommendation: C

Placing Children in detention should be prohibited.

Recommendation: D

Clear and certain time limits should be introduced for detention.

Recommendation: E

The Bill should require an authorised officer to consider and determine whether or not to grant a temporary access permission; clarify what is meant by 'risk' to the Australian community and ensure that such a clarification is in a manner that is consistent with human rights principles; and provide for a review of any decision of the authorised officer whether or not to grant a temporary community access permission.

Part F – Options for reform

21. Introduction

21.1 PILCH is of the view that the Rudd Government will fulfill its objective of having a more humane and compassionate immigration detention system that also provides international leadership in detention practices if further reforms are also addressed. The proposed reforms required which will implement Australia's human rights and international legal obligations are explained under the followings sub-headings:

- The Establishment of Guidelines for the Discretion to Detain and Detainee Rights
- The Implementation of Judicial Review of Decisions to Detain
- The Abolition of Bonds/Sureties for Release from Detention
- The Removal of Private Contractors from Managing Detention Centres
- The Application of Reforms to Australia's Immigration Detention Policy and Practice to migration exclusion zone.

22. The Establishment of Guidelines for Discretion to Detain and Detainee Rights

22.1 This section examines a number of issues for reform including the establishment of guidelines for the exercise of a discretion to detain a person, an analysis of who should be able to make the decision to detain, the need for separate guidelines for continued detention, and the rights of detainees to legal assistance.

(1) The discretion to detain and guidelines for the discretion to detain

22.2 PILCH submits that there should there be clear guidelines enacted in legislation for the exercise of the discretion to decide whether a person should be detained. The provision for the discretion to detain under s189 (C) of the Bill without any guidelines for the exercise of that discretion is in violation of Australia's human rights obligations and inconsistent with other comparable international jurisdictions as discussed below. There is also the additional anomaly that the provision seems at odds with the provision for mandatory detention. If s189 (C) is only a transitional provision, guidelines should still apply for the discretion to detain and the provision should have a sunset clause. In PILCH's view, the provision for discretion should remain with clear guidelines stipulated and the sections relating to mandatory detention should be abolished.

22.3 Overseas jurisdictions that allow discretionary detention of asylum seekers have adopted specific criteria that must be satisfied for detention to be lawful. In Canada, the law allows detention under specified conditions concerning identity, flight risk and public danger.[60] Canadian immigration officers are required by internal rules to make decisions about

[60] Jesuit Social Justice Centre, *Overview of Canada's Asylum System* (2003) [5] <http://www.uniya.org/research/asylum_canada.pdf> at 23 July 2009.

detention based on an individual, case by case risk assessment, with a view to certain specified circumstances such as safety or security concerns and identity issues.[61] The UN High Commissioner for Refugees recommends that detention should be imposed in a non-discriminatory manner, and that domestic law should clearly set out that detention may only be resorted to in certain circumstances.[62] The integrity of processing asylum seekers will be improved by an approach that enshrines in law specified criteria for the decision of whether to detain an asylum seeker. Such an approach would be commensurate with domestic laws dealing with different forms of detention.[63]

22.4 Given the seriousness of depriving an individual of his or her liberty, the onus should be on the Department of Immigration to establish that detention is both proportionate and necessary under the guidelines in accordance with international law.[64] This would also be consistent with domestic law dealing with detention such as criminal law whereby the office of public prosecutions bears the onus of proof.

(2) Who makes the decision to detain and Reasons for Decision

22.5 Only a senior departmental official or independent board or tribunal should have the authority to make the decision to detain given the seriousness of these matters. Under the Swedish model the Immigration Board, the Aliens Appeal Board or the Ministry of Foreign Affairs makes the decision to detain asylum seekers only if they meet certain specified criteria.[65]

22.6 Furthermore, decisions to detain asylum seekers should be subject to the same procedures and requirements for transparency as other administrative decisions and decisions to detain. The importance of providing individuals with reasons for decisions is emphasised in both administrative and criminal law,[66] as well as informing them of their right to review a decision to detain and the process to be followed[67]. Similarly, the various administrative decision review processes and the criminal appeals process demonstrate

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[61] UN High Commissioner for Refugees, Alternatives to Detention of Asylum Seekers and Refugees (2006) [83] <http://www.unhcr.org/4474140a2.pdf> at 22 July 2009.

[62] UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999) [Guideline 3] <http://www.unhcr.org/refworld/docid/3c2b3f844.html> at 23 July 2009. The Guidelines set out permissible exceptions, which are not the same as the criteria in the Bill.

[63] The *Mental Health Act 1986* (Vic) Part 3 Division 2 provides for admission of involuntary patients, with s 8 setting out the criteria for admission.

[64] See, e.g., *R v Oakes* [1986] 1 SCR 103, 105, 136-7; *Minister of Transport v Noort* [1992] 3 NZLR 260, 283; *Moise v Transitional Land Council of Greater Germiston* [2001] (4) SA 491 (CC), [19].

[65] UN High Commissioner for Refugees, Alternatives to Detention of Asylum Seekers and Refugees (2006) [187] <http://www.unhcr.org/4474140a2.pdf> at 22 July 2009.

[66] *Crimes Act 1914* (Cth) s 17A; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13.

[67] See Information booklet on Patient Rights which is distributed to all involuntary psychiatric inpatients detained in psychiatric units in Victoria.

the recognition in Australian society that such decisions ought to be able to be reviewed independently, an issue later discussed.

(3) Guidelines for Decisions for Continued Detention

22.7 Stringent guidelines should also apply separately for the decision to continue detention and again the onus should be placed on the Department of Immigration to establish that continued detention is both necessary and proportionate.

(4) Detainee Rights to Access Free Legal Assistance

22.8 Finally, PILCH notes that Sweden not only provides all asylum seekers with case workers to inform them of their rights and to prepare them for each stage of the process, but asylum seekers also have lawyers representing them throughout the process,[68] a situation that we advocate should happen in Australia. Providing access to government funded legal assistance for asylum seekers from the commencement of detention and over the course of detention empowers them and helps to ensure that their rights are protected.

23. The Implementation of Judicial Review of Decisions to Detain

23.1 As pointed out in PILCH's 2008 submission to the Joint Standing Committee on the Migration Review of Immigration Detention, the previous Australian government drastically reduced the scope of judicial review available in relation to administrative decisions made under the Migration Act. PILCH believes that the right to challenge the lawfulness of detention is an important safeguard against arbitrary detention. This right is protected under international human rights covenants such as the ICCPR, which requires that detainees have the ability to challenge the lawfulness of their detention in court.[69] In light of this, the current provision for three-monthly reviews of detention by a Senior Officer in the Department of Immigration and Citizenship (the ***Department***), with biannual reviews to be conducted by the Commonwealth Ombudsman, appears completely inadequate.

23.2 In addition, the UNHCR Guidelines recommend that detained asylum seekers should have the decision to detain 'subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuation of detention'.[70] The current three-monthly reviews of detention are conducted by the same department that initiated the detention, which is directly contrary to the UNHCR's Guidelines' recommendation that the reviewing authority should be independent of the detaining authority. This is of particular concern given the results of the Palmer and Comrie Reports into immigration detention, which found

[68] Grant Mitchell, 'The Swedish Approach: A Rational Alternative' (2002) 60/61 *Australian Rationalist* 8, 12.

[69] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 ,art 9(4), (entered into force 23 March 1976).

[70] UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (1999) [Guideline 5(iii)] <http://www.unhcr.org/refworld/docid/3c2b3f844.html> at 23 July 2009.

that 249 people had been wrongfully detained by the Department.[71] Independent review of administrative detention is an important means of ensuring not only the avoidance of the arbitrary detention of asylum seekers, but also of the wrongful detention of other vulnerable members of the community.

23.3 Although the Commonwealth Ombudsman is independent of the Department, biannual reviews of detention are too infrequent, and moreover will not occur until six months after the commencement of detention, meaning that a person may be wrongfully or arbitrarily detained for a long period of time before an opportunity arises for independent review of their detention. In addition, it is questionable whether the Commonwealth Ombudsman, whose role involves monitoring administrative actions across the full spectrum of government administration, will have either the specialised knowledge or resources required to undertake effective and frequent review of immigration detention. Finally, recommendations that the Ombudsman may make are not binding and therefore are inadequate to protect the rights of detainees.

23.4 In contrast to the Australian position, most overseas jurisdictions that allow the detention of asylum seekers in certain circumstances recognise the need for independent review of decisions to detain. In Sweden, for instance, appeal against detention (upon which specific time limits are placed by the Aliens Act) may be made to the local court and subsequently to the Aliens Appeal Board,[72] which is the equivalent of the Refugee Review Tribunal.[73] The UNHCR has also identified New Zealand as a country with 'relatively strong safeguards for the review of decisions to detain'.[74] The *Immigration Act 1987* (NZ) provides that, where detention is to extend beyond 48 hours, the detaining authority is obliged to apply to the registrar of the District Court for a warrant of commitment authorising detention for a period not exceeding 28 days.[75] Once 28 days of detention have passed, the decision to extend detention is usually subject to judicial review every seven days.[76] Similarly, Canadian law offers detainees an automatic right to review by a member of the Immigration Division of the Immigration and Refugee Board (described by

[71] Grant Mitchell, *Case management as an alternative to immigration detention: The Australian Experience* (2009) International Detention Coalition [11] <http://idc.rfbf.com.au/wp-content/uploads/2009/05/a2d_australian-experience.pdf> at 22 July 2009.

[72] UN High Commissioner for Refugees, *Alternatives to Detention of Asylum Seekers and Refugees* (2006) POLAS/2006/03 [187] <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4472e8b84&page=search> at 23 July 2009.

[73] Grant Mitchell, *Alternatives to Detention: The Swedish Model of Detention* (2000) Refugee Council of Australia <http://www.refugeecouncil.org.au/current/alt-swedish.html> at 23 July 2009.

[74] UN High Commissioner for Refugees, *Alternatives to Detention of Asylum Seekers and Refugees* (2006) POLAS/2006/03 [162] <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4472e8b84&page=search> at 23 July 2009.

[75] *Immigration Act 1987* (NZ) s 128(7).

[76] *Immigration Act 1987* (NZ) s 128(13B).

the UNHCR as a 'quasi-judicial refugee status determination authority')[77] after 48 hours of detention, then after seven days, and subsequently every 30 days.[78] The UNHCR has assessed Canada's procedural guarantees for immigration detainees as being 'relatively high'.[79]

23.5 The importance of the procedural protection offered by judicial review (or, at the very least, review by an independent administrative body) is recognised not only by other states that allow for detention of asylum seekers, but also by international bodies such as the Office of the High Commissioner for Human Rights, which has stated that deprivation of liberty is not arbitrary if it results from the final decision of a domestic judicial institution in accordance with domestic law and relevant international standards.[80] The arbitrariness of Australia's detention regime in this regard has led to numerous criticisms by the UN Human Rights Committee (***HRC***).

23.6 As noted in PILCH's 2008 submission, although minimal avenues for judicial review do exist under Australian law, due the scarcity and expense of competent legal representation, in most cases these remedies are not effective. It is therefore PILCH's submission that all detainees should have an automatic right to judicial review of their detention by the Federal Court, and that there should be systems in place to ensure representation or assistance for asylum seekers in preparing for and appearing at the review. Judicial review should take place within a short time frame comparable to the New Zealand and Canadian experience following the decision to detain, and there should subsequently be periodic judicial reviews to assess the suitability of the continuation of detention.

24. The Abolition of Requirements for Bonds or Sureties for Release from Detention

24.1 In PILCH's experience, the requirement that a bond be provided as a condition of release from detention is a discriminatory and unfair practice that should be abolished. Given that asylum seekers often do not have family ties or links with the community, it is extremely difficult for them to gain access to a bond or surety. In one situation with which PILCH was involved, an asylum seeker faced a lengthy time in detention awaiting his appeal to the Federal Magistrates' Court as he did not know anyone who could provide the necessary bond for his release. Eventually, a charity with links with other community groups managed to raise the money for him. This individual was not a risk to the community and eventually was granted refugee status.

24.2 The experience of bail systems overseas also reveals that financial discrimination that is inherent in making bail a condition of release from immigration detention. In several

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[77] UN High Commissioner for Refugees, *Alternatives to Detention of Asylum Seekers and Refugees* (2006) POLAS/2006/03 [83] <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4472e8b84&page=search> at 23 July 2009.

[78] *Immigration and Refugee Protection Act*, SC 2001, c 27, s 57.

[79] UN High Commissioner for Refugees, *Alternatives to Detention of Asylum Seekers and Refugees* (2006) POLAS/2006/03 [83] <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4472e8b84&page=search> at 23 July 2009.

[80] UN Office of the High Commissioner for Human Rights, *Fact Sheet No 26 on the UN Working Group on Arbitrary Detention* (2000) [IV.B] <http://www.unhcr.org/refworld/publisher,OHCHR,,,479477440,0.html> at 23 July 2009.

jurisdictions, programs have been launched by community organisations to assist asylum seekers to meet bail requirements. The need for such programs demonstrates the injustice and futility of requiring asylum seekers, who rarely have significant financial resources, to provide security for their release from immigration detention. In Canada, for instance, the financial discrimination of the bond system has given rise to the Toronto Bail Project which aims to remove the element of discrimination from the bond system. Without the support and coordination of the Toronto Bail Project, the possibility of being released on bail would be less accessible for asylum seekers.

24.3 In the United Kingdom, two non-governmental organisations, Bail for Immigration Detainees and the Bail Circle, similarly offer bail for detainees with a view to increasing the equity of the system. Likewise the provisional release system for asylum seekers in Japan, which requires evidence of financial self sufficiency, alternative accommodation and the ability to post a bond, has been noted for favouring wealthier asylum seekers. The inequity of requiring a bond or surety to secure the release of a financially disadvantaged asylum seeker is such that a bond or surety requirement for release should never form part of a humane immigration detention system.

25. The Removal of Private Contractors from Managing Detention Centres

25.1 There are strong public policy reasons against having private contractors, who are used to managing prisons, manage detention centres. Staff hired by public contractors are generally not trained to deal with asylum seekers and their (often complex) physical and mental health needs. There have been well-documented reports of detainees being re-traumatised by the prison-like conditions in detention centres[81] and the Australian Human Rights Commission cites detainee testimony of detention centre staff showing a lack of cultural respect and failing to accommodate detainees who do not speak English.[82] Whilst some of PILCH's asylum seeker clients have had extremely distressing and traumatising experiences in the centres, PILCH has also become aware of the negative impact on the mental health of staff in those centres, a few of whom have sought legal assistance on the basis that they have developed post-traumatic stress disorder from their working conditions and complete lack of training to deal with asylum seekers in detention.

25.2 In effect, allowing private contractors to run the detention centres means that the government has abandoned its role as caretaker for asylum seekers.[83] Transparency and accountability for the operation of immigration detention centres is significantly reduced where private companies manage the centres. Detention services provider GSL must meet the Immigration Detention Standards, but those standards provide inadequate guidance to operators in relation to respecting human rights. Furthermore, the standards

[81] Margaret Reynolds, Australia's Mandatory Detention of Asylum Seekers-An unlikely model for Europe, CHRI News, Winter 2002 10. See also Australian Human Rights Detention Inspection Reports 2008 and 2009.

[82] Australian Human Rights Commission, *2008 Immigration Detention Report* (2008) 21.

[83] Margaret Reynolds, 'Australia's Mandatory Detention of Asylum Seekers-an unlikely model for Europe' (2002) 10 Commonwealth Human Rights Initiative.

are not enshrined in legislation and no independent external accountability mechanism monitors whether the standards are met.[84] The Australian Human Rights Commission has noted that it has the power to investigate complaints of alleged breaches of human rights in detention facilities, but its recommendations are not legally enforceable.[85]

25.3 Government departments and agencies are more accountable due to their public nature and are therefore more appropriate for the role of operating detention centres. There are various well established mechanisms for review, reporting and independent oversight that help to ensure the transparency and accountability of government bodies. Judicial review, discussed earlier in this submission, is an important aspect of this accountability, as is the potential for review and oversight resulting from regular reporting obligations and exposure to scrutiny under freedom of information legislation and by the Auditor-General and the Commonwealth Ombudsman.[86] Furthermore, the democratic nature of Australia helps to enforce the accountability of government bodies though the electoral process and parliamentary scrutiny, for example via Senate Estimates.

25.4 In contrast to Australia, Sweden has removed the authority for operating detention centres from the police and private contractors and has given that authority to the Immigration Department. The change was due to concerns over private contractors' methods of operating the centres and over the occurrence of problems with detainees similar to those that have been seen in Australian detention centres, such as suicide attempts and hunger strikes. An inquiry into detention and deportation procedures was conducted in Sweden in 1996. As a result the Swedish Parliament transferred the responsibility for detention centres to the Immigration Department, in order to create a more civil, culturally sensitive and open detention policy.[87] PILCH submits that a similar transfer of authority is long overdue in Australia.

26. The Application of Reforms to Australia's Immigration Detention Policy and Practice to migration exclusion zone

26.1 PILCH is concerned that without explanation, the Rudd government has ensured that its proposed amendments under the Bill that appear to remove detention by default as the outcome for all asylum seekers do not apply to persons outside the migration zone under s189(2). It is difficult to imagine a reason as to why asylum seekers in these territories should be given lesser treatment and not afforded the same rights and protections as asylum seekers in mainland Australia.

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[84] Australian Human Rights Commission, *2008 Immigration Detention Report* (2008) 21.

[85] Australian Human Rights Commission, *2008 Immigration Detention Report* (2008) 18.

[86] See e.g. *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Administrative Appeals Tribunal Act 1975* (Cth); *Freedom of Information Act 1982* (Cth); *Auditor-General Act 1997* (Cth); *Financial Management and Accountability Act 1997* (Cth); *Ombudsman Act 1976* (Cth).

[87] Grant Mitchell, 'Alternatives to Detention: The Swedish Model of Detention', Refugee Council of Australia (2000) <http://www.refugeecouncil.org.au/current/alt-swedish.html> at 23 July 2009.

26.2 Furthermore, in our view, all reforms that we have recommended and any future reforms to enable Australia to fulfil its international human rights and legal obligations in relation to its immigration detention regime should also apply to excised territories. Pursuant to these aims and in order to give full effect to them, all excised territories should be returned to Australia's migration zone.

27. Recommendations

27.1 PILCH therefore makes the following recommendations for immigration detention:

Recommendation F

- The following reforms in relation to guidelines for detention and detainee rights are recommended:
- There should be a discretion to detain in accordance with clear guidelines incorporated in legislation.
- The onus rests on the Department of Immigration to establish that detention is both necessary and proportionate based on specific guidelines for detention.
- Only senior departmental officials or an independent board/tribunal should have the power to make a decision to detain.
- Written reasons for detention should be supplied to detainees and detainees should be informed of their rights to have the decision reviewed and the process involved.
- Stringent guidelines should apply separately for the decision to continue detention and again the onus should be placed on the Department of Immigration to establish that continued detention is both necessary and proportionate.
- Detainees should have access to government funded legal assistance from the commencement of detention and throughout the detention process.

Recommendation G

Provision be made for judicial review to occur automatically for all detainees, at the commencement of their detention and periodically throughout the time that they are detained.

Recommendation H

Bonds/Sureties for release from detention must be abolished.

Recommendation I

Detention centres should not be operated by private contractors.

Recommendation J

- All amendments in the Migration Amendment (Immigration Detention Reform) Bill should apply to persons outside the migration zone under s189.

- All excised territories should be returned to the migration zone.