Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

The Forum of Australian Services for Survivors of Torture and Trauma appreciates the opportunity to provide this submission to the Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009.

The Forum of Australian Services for Survivors of Torture and Trauma

The Forum of Australian Services for Survivors of Torture and Trauma (FASSTT) is a national network of agencies providing specialist torture and trauma rehabilitation services to people from refugee or refugee-like backgrounds throughout Australia. Over the last two decades our members have worked with many clients in, or who had been in, immigration detention. We are presently providing services to people in detention on Christmas Island and other locations on the mainland.

On the basis of that experience FASSTT is very aware of the significant adverse impact that immigration detention can have in particular:

- on children, young people and families
- on survivors of torture and trauma
- when it is indefinite and arbitrary i.e. when people are denied their liberty without there being explicit and reasonable grounds indicating why their detention is deemed necessary

The Migration Amendment (Immigration Detention Reform) Bill 2009

FASSTT welcomed the changes introduced in 2005 to ameliorate the harshness of the immigration detention regime which had harmed the health and wellbeing of vulnerable children and adults.

The Rudd Government's 'New Directions in Detention' policy constitutes a very significant further package of reforms, though additional measures are necessary for the immigration detention system to operate in a manner that is consistent with Australia's international human rights obligations[1].

[1] Detailed in FASSTT's Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention, August 2008.

FASSTT commends the Government's recognition that it is critical to enshrine the new policy in legislation to ensure its effective implementation, a measure unanimously recommended by the Joint Standing Committee on Migration in its report, *Immigration detention in Australia: A new beginning – criteria for release from immigration detention*.

While this is the explicit intent of the Migration Amendment (Immigration Detention Reform) Bill 2009 (the Bill), FASSTT considers that the legislation is inadequate to realise this laudable aim. In particular:

- the principle that a person should be detained only for the shortest practicable time is not given operational effect
- the Bill fails to apply the detention values to all Australian places of detention
- the Bill does not provide for the independent review of detention that is essential to ensuring rigorous compliance with the detention values

Principles are not given operational effect

Under Clause 1, Parliament will affirm as a principle that a non-citizen must only be detained in a detention centre as a measure of last resort and if detained only for the shortest practicable time. FASSTT supports this principle. However, it is not reflected in the Bill's provisions which purportedly give effect to the principle through the requirements imposed on officials.

For instance, the Bill provides that an officer must detain a person who has bypassed immigration clearance (sub-section 189 (1) (iii)) but it does not impose an obligation on officers to release people when it is no longer necessary to detain them. Officers will be obliged only to make reasonable efforts to ascertain the identity of a person who has bypassed immigration clearance, to identify whether the person is of character concern and whether the person poses health and security risks (189 (B))[2]. These are the criteria of 'necessity to detain' in the case of people who have bypassed immigration clearance, specified in detention value #2, which provides that unauthorised arrivals will be detained 'for management of health, identity and security risks to the community'[3]. It should follow that a person should be released when an officer has ascertained their identity and established that they pose no risk to the Australian community. The Bill does not achieve this.

Further, Clause 1(B)(d) requires an officer to make reasonable efforts to resolve the immigration status of a detained person who has bypassed immigration clearance. That is reasonable. However, the placement of this requirement in a list of well established criteria of necessity to detain implicitly suggests that it is appropriate to detain a person pending the resolution of their immigration status. As the history of mandatory detention in Australia starkly demonstrates, the resolution of status can be a very lengthy and uncertain process.

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[2] (1B) If a person is detained because an officer knows or reasonably suspects that the person is someone mentioned in paragraph (1)(b) (other than subparagraph (1)(b)(i)), an officer must make reasonable efforts to:
(a) ascertain the person's identity; and
(b) identify whether the person is of character concern; and
(c) ascertain the health and security risks to the Australian community of the person entering or remaining in Australia; and
(d) resolve the person's immigration status.

[3] Labor believes that the retention of mandatory detention on arrival of unauthorised arrivals for the purpose of health, identity and security checks is a sound and responsible public policy. Once checks have been successfully completed, continued detention while immigration status is resolved is unwarranted. (Minister Evans speech, 'New Directions in Detention, Restoring Integrity to Australia's Immigration System' 29 July 2008).

The Bill therefore does not ensure that detention will not be 'indefinite or otherwise arbitrary' as specified in detention value #4 and as claimed by the Minister in his Second Reading Speech on the Bill.

The Bill does not apply to all places of detention

The Bill asks Parliament to affirm new principles of detention that are expressed as applying to the whole of Australia. That is appropriate. There is no apparent reason why the principles should apply to places in detention in certain parts of Australia and not in others.

However, the Bill does not apply the principles to places of detention throughout Australia because it imposes the operational provisions only on non-excised territory: Subsection 189(1) of the *Migration Act 1958* is amended but not subsection 189(3), which applies to excised territory.

This is particularly anomalous as the majority of people who have bypassed immigration clearance are presently detained in excised territory.

The lack of independent review

The Joint Standing Committee on Migration's recommendation that the detention values be enshrined in legislation constitutes one element of an integrated package of recommendations considered essential to ensure the values are implemented in practice. Another element was the establishment of independent, judicial review of the necessity to detain individuals. The principle of independent review was endorsed by all members although there were different views about how this should be implemented.

The Committee reached the view that independent, judicial review was required in response to 'the strong evidence received that the lack of merits and judicial review for the decision to detain has in the past meant that people have been held wrongfully, unlawfully and for a period of years on the basis of a contested departmental decision'. Further, the Committee contended that 'oversight and review by independent judicial bodies will also ensure that public confidence is restored in Australia's immigration detention system'.

FASSTT believes that the Bill's failure to establish independent review of decisions to detain people is a deficiency and should be the subject of comment by the Committee on Legal and Constitutional Affairs.