3

Criteria for release – unacceptable risk and repeated non-compliance

3.1 As outlined in chapter 2, the immigration detention values announced by the Minister on 29 July 2008 identify three groups of people to whom mandatory detention will continue to apply. The second and third groups are:

- unlawful non-citizens who present unacceptable risks to the community, and
- unlawful non-citizens who have repeatedly refused to comply with their visa conditions.[1]

3.2 This chapter considers issues relating to the criteria for detaining these two groups of people and in particular:

- the risks posed by those whose visa has been cancelled under section 501 of the *Migration Act 1958* (Migration Act)
- the risks posed by those who repeatedly do not comply with visa conditions, and
- other grounds for detention considered reasonable by the Committee, namely detention immediately prior to removal.

3.3 The chapter also briefly discusses the application of these reforms to those detained in excised zones.

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1 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'New directions in detention', speech delivered at Australian National University, 29 July 2008, p 6.

Unacceptable risk to the community

3.4 It is presumed that the criterion of mandatory detention for 'unlawful non-citizens who present unacceptable risks to the community' will apply to all groups in immigration detention.

3.5 The types of risk to the community to be assessed under this criterion have not yet been made explicit. However, the Minister for Immigration and Citizenship has said that:

> The detention of those who pose unacceptable risks to the community is self-evidently sound public policy. Those with criminal or terrorist links or those whose identity is unknown may be so categorised.[2]

3.6 At a Senate Estimates hearing on 21 October 2008, Department of Immigration and Citizenship (DIAC) Secretary Andrew Metcalfe said that:

> We are still in the process of implementing the precise criteria to be applied to the calculation of those risks. But it is essentially measurements of the criteria relating to risk factors from a reasonable point of view from the community's perspective.[3]

3.7 The Committee assumes that 'unacceptable risk to the community' will focus on risks of a security and criminal nature. That is, ongoing detention could apply to anyone – an unauthorised arrival or otherwise – with an adverse security assessment and to any person in detention deemed to present a criminal risk to the Australian people and to public or private property.

3.8 The Committee has already discussed the use of detention for national security purposes, and the principles that should apply to determining whether a person should be eligible for release into the community (see chapter 2).

3.9 This section, therefore, will focus on the use of detention due to the assessment of unacceptable criminal risks to the community.

3.10 Currently there are no guidelines available outlining what may constitute unacceptable risk, what evidence may be used to

2 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'New directions in detention', speech delivered at Australian National University, 29 July 2008, p 9.

3 Metcalfe A, Department of Immigration and Citizenship, *Senate Hansard*, Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 21 October 2008, p 93.

inform this assessment, and who may be qualified to make such an assessment.

3.11 The Commonwealth Ombudsman claimed that the assessment of risk to the community should be based on evidence rather than just reasonable suspicion:

> There should be some evidence on which to base a decision that somebody is a risk to the community. Evidence that will be relevant will be a person's recent pattern of behaviour—if the person has been released from prison, the offences for which a person has been convicted and the reports of parole and prison authorities on the person's behaviour. If a person has had a period outside an immigration detention centre and there have been no reports of difficult behaviour, then that is evidence of a different kind.[4]

Risk assessment of section 501 detainees

3.12 Section 501 of the Migration Act empowers the Minister or a delegate to cancel or refuse to grant a visa to a non-citizen, including a long-term resident, who does not pass the character test stipulated in the Act. A person whose visa is cancelled under section 501 becomes an unlawful non-citizen, liable to immigration detention and ultimately subject to removal from Australia.

3.13 It has been not clarified whether those detained under section 501 will be eligible for release into the community, or whether their criminal background or other character assessments will automatically preclude them from release under the 'unacceptable risk' criterion. At a media conference following his announcements on 29 July 2008, the Minister said:

> There are a large number [of the current detention population] who are serious risks to the community. A large number of people in immigration detention are people who have had their visas cancelled, as a result of character concerns. We're talking about people who have been determined by the courts of Australia to be serious criminals and they're in immigration detention pending their removal from Australia… I have no intention of releasing those

4 McMillan J, Commonwealth Ombudsman, *Transcript of evidence*, 17 September 2008, p 7.

persons. They need to be removed from Australia and the moment I can remove them, they will be removed.[5]

3.14 There are four grounds against which a person may be found to have not passed the character test:

1. The person has a substantial criminal record. 'Substantial criminal record' is defined as having been:
   - sentenced to a term of imprisonment for 12 months or more
   - sentenced to two or more terms of imprisonment (whether on one or more occasions), where the total of those terms is two years or more
   - acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution
   - sentenced to imprisonment for life, or
   - sentenced to death.
2. The person has an association with a person or group suspected of being involved in criminal conduct.
3. The person is not of good character, having regard to the person's past and present criminal and/or general conduct.
4. There is a significant risk that the person would engage in the following types of conduct in the future, if allowed into Australia:
   - criminal conduct
   - harassing, molesting, intimidating or stalking another person in Australia
   - vilifying a segment of the Australian community
   - inciting discord in the Australian community, or a segment of that community orrepresent a danger to the Australian community, or a segment of that community.[6]

3.15 Section 501 is ultimately about the sovereign powers of a nation to deny or revoke permission for entry to those individuals it deems

5 Senator the Hon C Evans, Minister for Immigration and Citizenship, in Media Monitors, 'Senator Evans discusses a number of reforms to Australia's immigration detention system', doorstop interview transcript, 29 July 2008, pp 2-3.

6 Department of Immigration and Citizenship, Procedures Advice Manual 3 (PAM 3), Section *501 - The character test, visa refusal & visa cancellation,* para 66.

to be of 'bad character', with agendas contrary to the public interest.

3.16 In the context of immigration detention cases, section 501 is most commonly used where a non-citizen has been convicted of serious criminal conduct. According to the Commonwealth Ombudsman, the types of offences committed by such people have typically been drug-related, or have involved property and theft crimes, armed robbery or assault.[7]

3.17 Table 3.1 provides an overview of the convictions of the 25 individuals in this category in immigration detention as at 7 May 2008. The majority of individuals had multiple convictions.[8]

Table 3.1 Convictions of section 501 visa cancellations in detention as at 7 May 2008

Crime	Number of individuals
Break and enter, break enter and steal, larceny, auto theft, burglary, theft, shoplifting	23
Violent robbery, armed robbery, assault, actual bodily harm, grievous bodily harm, malicious wounding	22
Drug importation, supply, possession, attempted administration	10
Driving offences	9
Firearms offences	7
Possession stolen/prohibited goods, receiving stolen goods	6
Murder, manslaughter, kidnapping	4
Malicious property damage	3
Trespass, perjury	3
Escape from lawful custody	2
Deception	2
Child sex offences	1

Source: Senator the Hon C Evans, Minister for Immigration and Citizenship, Answers to questions on notice, Question no 423, Senate Hansard, 17 June 2008, p 2627.

3.18 Although section 501 detainees have been taken into immigration detention with the intention of removing them from the country as expeditiously as possible, in many cases removal cannot happen for an extended period. This is either because of litigation on the part of the person appealing the visa cancellation, or delays in the country of origin issuing travel documents.

7 Commonwealth Ombudsman, *Administration of s 501 of the Migration Act 1958 as it applies to long-term residents* (2006), p 9.

8 Senator the Hon C Evans, Minister for Immigration and Citizenship, Answers to questions on notice, Question no 423, *Senate Hansard*, 17 June 2008, p 2627.

3.19 The Commonwealth Ombudsman explained that:

> It is not uncommon for those subject to character cancellation under s 501 to be made aware of the decision not long before they are due to be released from correctional detention and just before they are taken into immigration detention. This means that detainees who want to remain in Australia are often pursuing litigation whilst they are in immigration detention… These processes can take a significant period of time to conclude. To date the norm has been that people remain in immigration detention during these challenges. Rarely are people released from detention pending resolution of their tribunal or court challenge.[9]

3.20 The Commonwealth Ombudsman also expressed concern that section 501 detainees make up a significant proportion of long-term detainees, and that the period of immigration detention may exceed the period of punitive detention imposed by the courts and already served by the detainee:

> We have concerns about whether the new risk assessment principles have been properly applied in some of those section 501 visa cancellation cases…It is particularly important that a proper risk assessment be undertaken of whether detention is a sensible or practical option. We have reported in the two-year detention cases on instances in which people who would otherwise have been released from a state prison because of the expiration of their criminal sentence have then spent longer in immigration detention than the period imposed by a court as punishment of the offence, and those are cases of particular concern.[10]

3.21 Professor Linda Briskman spoke about the response of section 501 detainees to the 29 July 2008 announcements. She said:

> There are other people I have spoken to in detention, particularly in the 501 category—not the asylum seeker category—who are in absolutely deep despair. It does not matter if the conditions are better around them, what they are saying is, 'Well, what's going to happen to us? Nobody is

9 Commonwealth Ombudsman, submission 126, p 6.

10 McMillan J, Commonwealth Ombudsman, *Transcript of evidence,* 17 September 2008, p 3.

> looking at our cases. Nobody really cares about us. Are we going to remain here indefinitely?'[11]

3.22 There was concern from a number of inquiry participants that a ban on the community release of section 501 detainees would not reflect a realistic assessment of the risk they posed and was contrary to a presumption against detention.

3.23 Jessie Taylor of the Law Institute of Victoria, pointed out that most section 501 detainees were people who had already been deemed appropriate candidates for parole or community release in the correctional environment:

> I have had personal contact with all of the remaining section 501 detainees… I believe I am safe in saying on behalf of the group that yes, those people are absolutely appropriate candidates to be in the community until their removal is an immediate practical possibility, if in fact that release is deemed to be the appropriate outcome.[12]

3.24 Anna Copeland of Southern Community Advocacy Legal and Education Service also said that if the criterion of 'unacceptable risk to the community' automatically precluded section 501 detainees from release:

> We would point out that they have been found eligible for release into the Australian community by state based parole boards and departments of corrections, bodies that are very experienced in determining if a person is a risk to the community.[13]

3.25 This was an argument also made by the Human Rights Law Resource Centre in Melbourne who said that:

> We note that the core competency of a parole board is the determination of whether a person poses a risk to the community. In contrast, the Department of Immigration does not have expertise in this area.[14]

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11 Briskman L, Centre for Human Rights Education, Curtin University, *Transcript of evidence*, 9 October 2008, p 24.

12 Taylor J, Law Institute of Victoria, *Transcript of evidence*, 11 September 2008, p 57.

13 Copeland A, Southern Communities Advocacy Legal and Education Services Community Legal Centre, *Transcript of evidence*, 9 October 2008, p 4.

14 Human Rights Law Resource Centre, submission 117, p 15.

3.26 The Human Rights Law Resource Centre considered that detention in such cases may constitute a violation of several of Australia's human rights obligations, including Article 14(7) of the International Covenant on Civil and Political Rights. This Article provides that a person has the right not to be tried or punished again for an offence for which one has already been finally convicted.[15]

3.27 Kate Gauthier of A Just Australia said that:

> When the section 501 was brought in, it was used retroactively for a lot of people. There are people who all of us know who had completely reformed themselves and were living very productive lives in the Australian community and then were picked up by the 501 case. In particular I know one person who was a single father of two Australian citizen children and he was picked up and put in Villawood and he has been there for a number of years and his children have had to be handed over to other family members. They are Australian citizen children, so I do not think it is in their best interest to have their father in there. He is someone whose offences had been many years before.[16]

3.28 The Detention Health Advisory Group and Legal Aid New South Wales both advanced a view that section 501 detainees 'do not by default require immigration detention'.[17] It was suggested that under basic rule of law principles, risk assessment should be based on the particular history and circumstances of the individual.[18]

Committee comment

3.29 The Committee is concerned to ensure that the new risk-based approach to determining the need for detention is applied without prejudice to all unlawful non-citizens, including those whose visa has been cancelled on character grounds under section 501 of the Act. This is in line with the stated presumption against detention except where there is demonstrated need.

3.30 The Committee notes that it is possible for a person to be detained in an immigration detention centre longer than they were

15 Human Rights Law Resource Centre, submission 117, p 15.

16 Gauthier K, A Just Australia, *Transcript of evidence*, 7 May 2008, pp 15-16.

17 Detention Health Advisory Group, submission 101, p 3.

18 Biok E, Legal Aid New South Wales, *Transcript of evidence*, 24 October 2008, p 27.

incarcerated as a result of a conviction. The Committee emphasises that immigration detention must not be punitive, and must only be for administrative purposes when risk assessment of a person determines the need for detention. The Committee also notes that those whose visa has been cancelled under section 501 have made up a large proportion of the long-term detainees.

3.31 Accordingly, the Committee recommends the development and publication of guidelines as to what is considered to constitute an unacceptable risk to the community. This will assist departmental officers in making determinations, and ensure the appropriate and measured application of this criterion for detention.

3.32 In addition, as the Commonwealth Ombudsman noted, 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.[19] If it appears likely that removal cannot occur expeditiously, then as with other unlawful non-citizens, appropriate assessments should be made to justify the need for ongoing detention pending resolution of the case.

3.33 The Committee reiterates the need for a an individualised case by case approach to again justify the need for detention, in particular in cases where litigation may be being pursued and there be a significant period before the case is resolved.

3.34 The Committee notes that, should section 501 detainees be released from detention into the community on bridging visas, they may be subject to parole conditions set by state and territories bodies on their release from prison. In these instances the Committee considers that parole and correctional authorities are more expert in the assessment of 'unacceptable risk' and any decision to detain made by DIAC should only be made after consultation and reference to the relevant authorities. Regard should also be given to the severity of crimes convicted and the history of criminal activity in order to assess based on past patterns of behaviour, the likelihood of re-offence.

19 McMillan J, Commonwealth Ombudsman, *Transcript of evidence*, 17 September 2008, p 7.

Recommendation 6

The Committee recommends that the Department of Immigration and Citizenship develop and publish the criteria for assessing whether a person in immigration detention poses an unacceptable risk to the community.

Recommendation 7

The Committee recommends that the Department of Immigration and Citizenship individually assess all persons in immigration detention, including those detained following a section 501 visa cancellation, for risk posed against the unacceptable risk criteria.

In the case of section 501 detainees, the Department of Immigration and Citizenship should take into account whether or not the person is subject to any parole or reporting requirements; any assessments made by state and territory parole boards and correctional authorities as to the nature, severity and number of crimes committed; the likelihood of recidivism; and the immediate risk that person poses to the Australian community.

Repeated visa non-compliance

3.35 The Minister has stated that those persons who have repeatedly failed to comply with their visa conditions will be subject to ongoing detention.[20]

3.36 As at 7 November 2008, there were 175 people (about 63 per cent of the total immigration detention population) who had arrived in Australia lawfully and were then taken into immigration detention, for either:

- overstaying their visa and hence not complying with its conditions, or
- breaching the restrictions imposed by the class of visa held, resulting in a visa cancellation.[21]

20 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'New directions in detention', speech delivered at Australian National University, 29 July 2008, p 6.

3.37 By definition then the majority of the immigration detention population are or have been 'non-compliant' in their immigration history. However, there are no guidelines available to determine the incidence or severity of non-compliance required to meet the criterion of 'repeated non-compliance', and so subject a person to detention.

3.38 Across different visa categories, different actions may constitute non-compliance. Commonly non-compliance with visa conditions falls into one of the following categories:

- undertaking paid work in contravention of tourist visa conditions
- failure to attend classes and or maintain grades on a student visa
- failure to leave the country before a visa has expired, or
- continued failure to make arrangements for departure from the country when a bridging visa has been granted on that condition.

3.39 Most bridging visa holders abide by the conditions placed on them. In 2006-07, for example, 8.2 per cent of bridging visa holders became unlawful or had their visas cancelled for breach of visa conditions.

3.40 Where visa breaches are detected by DIAC, bridging visas are increasingly used in preference to immigration detention as an interim measure while immigration status is resolved. In 2006-07, DIAC located 11 304 people who had either overstayed their visas or were in breach of their visa conditions. Of these, 9316 people were granted bridging visas for them to make arrangements to depart, lodge substantive visa applications or merits or judicial review of visa decisions.[22]

3.41 However it was noted by some that, even in instances of repeated visa non-compliance, there were alternatives to detention that should be considered. For example, the Law Institute of Victoria

21 Department of Immigration and Citizenship website, Immigration detention statistics summary viewed on 26 November 2008 at http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20081107.pdf.

22 Department of Immigration and Citizenship, *Annual report 2006-07* (2007), p 118. The data provided does not explain whether the remaining cohort was taken into immigration detention. Some of those located may have only received a warning about their visa conditions or have been located as overstayers on the event of their departure from Australia, in which case no further action would have been taken.

suggested the government consider instituting a bail or bond system of community release.[23]

3.42 The risk of absconding is sometimes cited as a criterion for detention. The Castan Centre for Human Rights Law in Melbourne noted that, 'It is generally agreed that detention is otherwise justified where there is a risk that a person may abscond'.[24]

3.43 However Bob Correll, Deputy Secretary of DIAC, recently told a Senate Estimates hearing that flight risk was generally low and was considered as part of a framework of 'risk criteria'.

> Our experience overall has been that that area of a flight risk, we think, can be much more effectively managed. We do not have a huge incidence of flight problems. We believe by a proper consideration and closer case management that we would be able to apply appropriate criteria to ensure that the individual is placed in the appropriate circumstances. The overall controls that can be applied can range from quite limited to more substantive, regular reporting arrangements if there be a need in the community.[25]

3.44 Data confirms that risk of absconding for those on community or residential housing detention is low. Since the introduction of community detention in July 2005, two clients out of a population of 244 have absconded. One client was located and has since departed Australia; the other client has not been located. One person, out of a population of 370, has absconded from immigration residential housing; he has not been located.[26]

Committee comment

3.45 In situations where a person is in community detention or on a bridging visa and is required to leave the country but repeatedly fails to make such arrangements, the Committee agrees that immigration detention for the purposes of removal may be an appropriate action.

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23 Law Institute of Victoria, Liberty Victoria and the Justice Project, submission 127, pp 10-11.

24 Castan Centre for Human Rights Law, submission 97, pp 22-23.

25 Correll B, Department of Immigration and Citizenship, *Senate Hansard*, Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 21 October 2008, p 108.

26 Department of Immigration and Citizenship, supplementary submission 129d, p 6.

3.46 While this may be the intention of the Minister's third criterion applying mandatory detention to all unlawful non-citizens who have repeatedly refused to comply with their visa conditions the Committee wishes to express some caution regarding this criterion as it stands.

3.47 If a person has repeatedly breached the conditions of their visa, then it is the view of the Committee that a more appropriate course of action is for that visa to be cancelled. If a person was not already on a bridging visa, then an assessment should then be made as to whether it is appropriate for a bridging visa to be issued while the person makes arrangements for their departure.

3.48 Should the assessment be that there is a significant risk of absconding, or the person has repeatedly failed to make their own arrangements for departure, then detention may be considered for a short time while removal arrangements are made. Removal should be effected within a short period of time, such as seven days.

3.49 In this sequence, repeated visa non-compliance triggers the cancellation of the current visa which may then result in a person becoming an unlawful non-citizen and so being taken into detention prior to removal from Australia taking place at the earliest opportunity. The Committee recognises that DIAC is already granting bridging visas in a large number of cases in preference to taking a person into immigration detention.

3.50 The Committee' s concern with visa non-compliance acting as a criterion for mandatory detention is it suggests immigration detention as a punitive response to visa non-compliance, rather than as an administrative function of Australia's immigration compliance system. The Committee considers the distinction is vital.

Recommendation 8

The Committee recommends that the Department of Immigration and Citizenship clarify and publish the criteria for assessing the need for detention due to repeated visa non-compliance. The criteria should include the need to demonstrate that detention is intended to be short-term, is necessary for the purposes of removal and that prior consideration was given to:

- **reissue of the existing visa, or**
- **a bridging visa, with or without conditions such as sureties or reporting requirements.**

Short-term detention prior to removal

3.51 As discussed, when a person repeatedly fails to make their own arrangements for departure, or where there is a significant risk of absconding, the Committee considers that immigration detention is reasonable. However, as stated and in line with the immigration detention values, detention should only be used where the need is established.

3.52 However, the Committee notes that there are many instances when a person arrives and is detained for a short period awaiting removal from Australia.

3.53 The Committee notes the situation of illegal foreign fishers held in the Northern Immigration Detention Centre in Darwin. Improvements to processing and repatriation of illegal foreign fishers mean that in 2007-08 the average turnaround time for removal of illegal foreign fishers back to their home countries was:

- 9.7 days for minors
- 16 days for adult fishers not facing prosecution, and
- 41.5 days for adult foreign fishers facing prosecution.[27]

3.54 Moreover, virtually all illegal foreign fishers held in immigration detention wish to return home to their families. Since 2006 only four fishers have lodged applications for a protection visa – one

27 Department of Immigration and Citizenship, supplementary submission 129a, p 1.

fisher was from the People's Republic of China, one from Indonesia and two from East Timor. One of these applications was withdrawn a week after it was lodged.[28]

3.55 Similarly there are other populations of unlawful non-citizens who are currently held in short-term detention awaiting immediate removal from Australia.

3.56 Management and the appropriateness of facilities for short-term detention of low risk populations and alternative models will be considered in later reports.

Application of release criteria to excised places

3.57 It is unclear whether the criteria for release will also apply to persons detained in an offshore place, namely on Christmas Island.[29]

3.58 The Committee has not considered the excision policy under its terms of reference for this inquiry. However it is the view of the Committee that the same risk-based framework to release from immigration detention should apply to excised territories. Consequently detention should only take place where need is demonstrated and the presumption should be that a person is able to remain in the community while their immigration status is resolved.[30]

3.59 The Committee acknowledges that DIAC appears to already be addressing this informally through the use of low-security facilities and private accommodation on Christmas Island in preference to the high-security Immigration Detention Centre which became operational last year.

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28 Department of Immigration and Citizenship, supplementary submission 129a, p 4. Of the remaining three, one was found to be owed protection.

29 Office of the United Nations High Commissioner on Refugees, submission 133, p 1.

30 The principles can be equally applied, but should the mechanism for release be a bridging visa, this will require policy development and legislative amendment by the Government, because as noted in Appendix F, offshore persons cannot apply for a bridging visa except where the Minister gives them special permission to do.

Recommendation 9

The Committee recommends that the Australian Government apply the immigration detention values announced on 29 July 2008 and the risk-based approach to detention to territories excised from the migration zone.