Dissenting Report by Mr Petro Georgiou MP

1.1 This inquiry was charged with considering alternatives to immigration detention.

1.2 The first is that the Inquiry took a considerable amount of evidence on the accommodation of children in alternatives to detention such as immigration residential housing and immigration transit accommodation.

1.3 That evidence revealed areas of significant concern that are not sufficiently reflected in the Report.

1.4 The second issue is the lack of transparency of the proposed system of release from detention via the granting of bridging visas.

Children in Immigration Residential Housing and Immigration Transit Accommodation

1.5 In 2005 the former government reformed the immigration detention regime to allow the release of children and their families from detention. The *Migration Act 1958* was amended to stipulate at section 4AA that:

> (1) The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.
>
> (2) For the purposes of subsection (1), the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a residence determination.

1.6 In July 2005, all children and their families in immigration detention were released into the community.

1.7 Under the *Migration Act*, the only exemption to the section 4AA principle of last resort is residence determinations.

1.8 It is of great concern that the new detention values announced by the Immigration Minister in July 2008 appear to envisage the detention of children in immigration residential housing and transit accommodation.

1.9 The new detention values state that "children, including juvenile foreign fishers and, where possible, their families, will not be detained in an **immigration detention centre**" [emphasis added].

1.10 This new value only prohibits the detention of children in immigration detention centres.

1.11 In unveiling the reforms, Minister Evans said that Labor's ban on the detention of children in immigration detention centres would be facilitated by their release into either community settings or immigration residential housing.[1]

1.12 The Committee took evidence from a number of organisations concerned that children were being detained for considerable periods in alternative forms of detention including residential housing and immigration transit accommodation.

1.13 In its submission, the Australian Human Rights Commission reported that it:

> …has been aware of several cases where children and families have been detained in IRH facilities for a significant period of time. … During 2007 inspections of immigration detention facilities, HREOC spoke to a family with a small child who was detained in IRH for two months before they were given a Residence Determination. The father told us that he had been concerned about the effect of the detention on his daughter, who was distressed at being surrounded by strangers. His wife was also pregnant.[2]

1.14 The Commission's report on its 2008 visits cited further incidence of this occurring:

> During the Commission's 2008 visits to the immigration residential housing facilities, there was a family of five at the Sydney IRH with a baby and a five-year-old child. The family had

1 Labor's detention values explicitly ban the detention of children in immigration detention centres. Children in the company of family members will be accommodated in immigration residential housing (IRH) or community settings. Senator the Hon C Evans, Minister for Immigration and Citizenship, 'New directions in detention', speech delivered at Australia National University, 29 July 2008.

2 Human Rights and Equal Opportunity Commission, submission 99, p 37.

> been detained for three months. The parents spoke of the five-year-old child's confusion and distress about being detained.[3]

1.15 The International Coalition on Detention of Refugees, Asylum Seekers and Migrants also raised concerns about 'long term use of immigration residential housing, including for families with children and individuals with health issues, where community-alternatives would have been more appropriate'.[4]

1.16 The Australian Human Rights Commission also expressed its 'significant concerns' about the accommodation of several children in immigration transit accommodation (ITA).[5]

1.17 It was formerly the Department of Immigration and Citizenship's (DIAC) policy that ITA's was to be used to accommodate low risk detainees for up to seven days, and was not to be used to detain children and families. But DIAC has recently informed the Commission that the policy has been amended to allow detainees to be held at ITA's for two or three weeks.[6] DIAC's response to the Commission's concerns regarding the detention of children in an ITA was that the Brisbane and Melbourne ITA's are 'suitable for families with children for short stays'.[7]

1.18 The Castan Centre for Human Rights Law described residential housing as 'less oppressive than immigration detention centres' but nonetheless 'still a method of detention':

> This is due to the excessive surveillance and restrictions within them, such as the use of cameras, security guards patrolling the site 24 hours a day; routine headcounts; body searches from children on their way and returning from school; and the requirement that detainees are not allowed to leave the grounds unless accompanied by a DIAC officer.[8]

1.19 The Australian Human Rights Commission cautions that 'The psychological effects of detention remain a significant concern for people held in immigration residential housing'.[9] The harm done to children who

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3 Australian Human Rights Commission, 2008 Immigration Detention Report, p 82.

4 International Coalition on Detention of Refugees, Asylum Seekers and Migrants, submission 109, section 3.1.

5 Australian Human Rights Commission, 2008 Immigration Detention Report, p 63.

6 Australian Human Rights Commission, 2008 Immigration Detention Report, p 63.

7 Department of Immigration and Citizenship response to the Australian Human Rights Commission's Immigration Detention Report 2008, pp 40-41.

8 Castan Centre for Human Rights Law, submission 97, p 35.

9 Australian Human Rights Commission, 2008 Immigration Detention Report, p 59.

have been detained in Australian immigration detention is well documented and needs no further reiteration here.

1.20 In the course of this inquiry a spokesperson for the Immigration Department has confirmed that children and their families would now be detained in immigration residential housing beyond the period of initial assessment.[10]

1.21 During the hearing I put on record that I considered this 'A breach of the commitments that were entered into that children and their families would be put into unsupervised community settings'.[11]

1.22 The evidence received by the Committee that children are being detained in residential housing and transit accommodation for extended periods is disturbing. I regard any policy shift in this direction as retrograde and in potential violation of the international legal principle which is enshrined in the *Migration Act* that children may be detained only as a last resort.

Transparency of the bridging visa model

1.23 The report proposes that a reformed bridging visa framework is used in lieu of community detention to effect release from detention.

1.24 In my joint dissenting report with Senators Dr Alan Eggleston and Sarah Hanson-Young, we raised grave concerns about the lack of transparency of the administration of the new risk management system. We said that we strongly disagreed that public servants should have unfettered power to detain without independent external scrutiny to ensure the release of people whose detention is assessed as being unnecessary with respect to the specified criteria.[12]

1.25 While the Committee's recommendation to shift to a model of release by bridging visa is a move in the right direction, it fails the transparency test because the crucial decision of whether to grant a bridging visa is subject to no independent external judicial scrutiny.

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10 Correll R, Department of Immigration and Citizenship, *Transcript of Evidence*, 24 September 2008, p 9.

11 Georgiou P, *Transcript of Evidence*, 24 September 2008, p 9.

12 Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning – Criteria for release from detention* (2008), Parliament of the Commonwealth of Australia, pp 165-171.

1.26 The Report records that 'consistently, the evidence reported a lack of transparency in DIAC decision-making which diminished the rigour of the immigration system'.[13]

1.27 It also states that 'the Committee notes that the shift to a risk-based approach to immigration detention decisions and the greater use of community based detention alternatives **requires that administrative processes become more accountable and transparent**'[emphasis added].[14]

1.28 Yet the report's recommendations for improving transparency are limited.

1.29 It is unclear what form of 'review' of the decision to grant a bridging visa is being proposed in the Report (Recommendation 4) and, as was said in the previous dissent, providing "reasons" for decisions to detainees does not constitute an effective mechanism of accountability.

1.30 The granting of bridging visas is a discretionary power wielded by compliance officers and bureaucrats. It is guided by a new policy of risk management which lacks the guarantee of legislative authority.

1.31 In conclusion, I reiterate the recommendation of the last dissenting report in which a model of release secured by judicial oversight was proposed.

Conclusion

1.32 I reiterate the view of the previous dissent that independent, judicial review of detention decisions is the only secure mechanism for ensuring the laudable goal of detention as a last resort is achievable. The previous dissent recommended that:

- A person who is detained should be entitled to appeal immediately to a court for an order that he or she be released because there are ***no reasonable grounds*** to consider that their detention is justified on the criteria specified for detention;
- A person may not be detained for a period exceeding 30 days unless on an application by the Department of Immigration and Citizenship a court makes an order that it is necessary to detain the person on a specified ground and there are no effective alternatives to detention. This is consistent with the Minister's commitment that under the new

13 Paragraph 4.31 in the Committee's second report of the inquiry into immigration detention.

14 Paragraph 4.37 in the Committee's second report of the inquiry into immigration detention.

system 'The department will have to justify a decision to detain – not presume detention'.[15]

1.33 In relation to the disturbing tendency to detain children, I say simply that the detention of children as anything other than a last resort is repugnant.

1.34 I commend the dissenting report of Senator Hanson-Young for offering additional ways of improving the current detention regime.

Mr Petro Georgiou MP

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