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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010

THURSDAY, 4 AUGUST 2011

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Thursday, 4 August 2011

Senators in attendance: Senators Crossin, Furner, Hanson-Young, Humphries and Pratt

Terms of reference for the inquiry:

To inquire into and report on:

Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010

WITNESSES

chTHOM, Dr Graham Stephen, National Refugee Coordinator, Amnesty International Australia

Committee met at 09:43

CHAIR (Senator Crossin): I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2011. The inquiry was referred to the committee by the Senate on 24 March 2011 for report by 16 August 2011. This bill seeks to legislate asylum seeker principles, facilitate judicial review of detention decisions, repeal excised offshore places provisions, restore fair process and procedural fairness and end indefinite detention. We have received 29 submissions for this inquiry which have been authorised for publication and are available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as contempt. It is also a contempt to give false or misleading evidence to a committee. We would prefer all evidence to be given in public but under our resolutions there is a provision to ask to give evidence in camera.

I welcome the representative from Amnesty International Australia. Thank you for your patience this morning with the delayed start. We appreciate that. We have your submission and, for our purposes on the website, it is numbered 23. I assume there are no changes or corrections to it?

Dr Thom: No.

CHAIR: I invite you to make an opening statement and then we will go to questions.

Dr Thom: Firstly, I would like to thank the committee for inviting me and Amnesty International to come and speak. Our key concerns and recommendations are set out in our submission. Amnesty has been on the record for quite some time around its concerns about mandatory detention and the way it operates in Australia and its belief that that is in breach of a number of Australia's international obligations relating to a number of different conventions.

This provides a really important opportunity to look at what is currently happening in detention centres in Australia. I have been working for Amnesty International in this capacity for approximately the last 12 years and, in terms of the way people are deteriorating in detention centres, the level of self-harm, the number of suicides, the current impact on children, this is the worst I have ever seen it. Amnesty International's role and my role are policy roles, but we also work with individuals who are seeking asylum in this country, to provide them with human rights information and to support them in their claims, if we believe those individuals are in need of protection.

At the moment we have approximately 212 active cases, of which 56 are in detention. So we regularly visit detention centres, particularly Villawood, but also in the last six months I have been to Darwin, Curtin and Christmas Island. A representative from Amnesty in the Netherlands went to Melbourne and visited Maribyrnong and the MITA.

In March I was in the Netherlands and got to see a detention centre there to compare how they detain individuals in Europe. From our perspective, we think it is very important that this committee look at mandatory detention more broadly at this time. What purpose does it achieve in the Australian context? Why are we so out of step with like-minded refugee signatory countries around the world? We are the only country which detains people in this way as a matter of first resort, as opposed to last resort. The indefinite nature of detention is also quite unique and I think our policy of excision is also quite unique. I am more than happy to also talk about the Malaysia agreement, if the committee feels that is relevant.

I visited Malaysia a number of times in the last few years and assisted Amnesty International in writing its reports on the treatment of migrant workers and refugees. We can make those reports available to the committee, if you so wish.

I also think it is important for this committee to look at character tests and ASIO checks. The number of cases that we are dealing with where people have been waiting for a considerable amount of time in detention for these clearances to come through highlights not only why mandatory detention is so problematic but also the fact that we now have approximately 30 cases of people who have been rejected in terms of their ASIO assessment and who are stuck. In about 16 of those cases most of the people have now been in detention for two years or close to two years. The damage this is doing to those individuals, without any understanding of why this assessment has been made, I think, needs to be addressed by the Australian parliament and, in particular, by this committee.

Some alternatives need to be found to de-politicise this situation, because at the moment it would be a very brave government to release anyone from detention with an adverse ASIO assessment. The previous government could not do it, and the current government seems to be having problems doing it as well. I think an alternative needs to be found. Some of the ideas that are put forward in this migration amendment bill are really important and will certainly help address some of these issues. Once again, thank you for inviting me.

CHAIR: Thank you. We do not have a brief to go into examining the Malaysia deal. I am sure there will be plenty of opportunities.

Senator HANSON-YOUNG: There is a reference directly to the issue of excise detention and the principles by which people are being transferred to Malaysia. The amendments in this bill would make that not able to happen.

CHAIR: To some extent you are right, but I think what we ought to do is focus on the legislation. This is a legislation committee and we have a particular piece of legislation before us. You would be aware of the joint select committee looking at what is happening in detention centres as well. I am sure there will be legislation coming before us to deal with the Malaysian situation. I am keen to focus on the five key areas of this piece of legislation today.

I will start with some questions. I wanted to ask you about your submission. Under 'Part Three—Repealing excised offshore places', you say:

Amnesty International considers that offshore processing of asylum seekers, such as on Christmas Island, circumvents important domestic and international legal protections for refugees.

I wonder if you can outline a little more why you believe that is the case.

Dr Thom: Partly it is because it is a non-statutory process. I think there is the fact that it still requires ministerial discretion even though we have tried to replicate a parallel process. Ultimately that does end with ministerial discretion, and at any point in time, if the minister so chooses, as we saw recently with the 500 people who arrived post May, if a decision is made that these people will not be processed then you end up with people who spend two months mandatorily detained without any access to any form of protection. That is where we think a number of our convention obligations—the Convention on the Rights of the Child, the refugee convention itself, article 31(1) and whether this is a penalty—suddenly are called into question. The ability for the executive to make those discretionary decisions around people who have come to this country to seek protection in a way that does not apply to people who would arrive by plane or who would make it to Australia by boat, we think, is clearly in breach of Australia's international obligations.

We also have serious concerns around judicial review despite the High Court decision on M61. The ability of these people to access the courts from remote detention is becoming extremely problematic, and this is something we are seeing through the casework that we do. To have that sort of judicial oversight—which, again, is addressed in this bill—is crucial. By creating a two-tiered approach, excision has a fundamental impact on the rights of those individuals and their ability to access a fair and transparent system.

CHAIR: This bill suggests that magistrates would be able to issue visas. There would be a real blurring of the separation of powers here. Have you thought about whether or not that is a wise way to go in dealing with legislation in this area?

Dr Thom: That is not how we have interpreted the bill, and a number of the submissions that have been put to this committee, we note, seek clarity around that and we would also see that as important. What we would accept is: that all asylum seekers who come to this country have the same access to the tribunal, the Refugee Review Tribunal, but the courts should have normal oversight under natural justice of that tribunal.

CHAIR: So that is your interpretation?

Dr Thom: My interpretation is that it does not create a third tier of appeal, and Amnesty International, through looking at international principles, has always said there should be an independent review and we think that is very important. I think Australia, for people who arrive onshore, has a good system—no system is perfect. A third tier of review is not necessary, but I think some complete review of how an appeal system is working needs to be made. That is where getting rid of the privative clause would be important and that is something that Amnesty certainly supports.

CHAIR: But it seems as if your interpretation is different to others so that would lead me to a conclusion that the bill is unclear about exactly the intent, the application and the role of the magistrate.

Dr Thom: It certainly was not how I interpreted the bill and how Amnesty interpreted the bill. I think a number of committees in the past have also looked at the need for the privative clause, and so we interpreted this

bill through those previous discussions around the necessity of having the privative clause there. As you have pointed out, I think a number of other submissions agree that it needs to be made clearer in terms of what that oversight would be.

CHAIR: Under the amended section 189, a person detained would be able to apply to a magistrate for an order that he or she be released from detention—

Senator HANSON-YOUNG: That is not granting a visa though.

CHAIR: because there are no reasonable grounds for justifying ongoing detention. It still involves the role of a magistrate to the extent that we have not had in the past. We used to.

Dr Thom: It certainly does, and I think this is very important because this is the sort of oversight that happens in other countries around the world where a court can order the release of somebody from detention. That is not necessarily providing a visa, and I think some work would need to be done in terms of what then happens if a magistrate does say that detention is unlawful. I think that is very serious. If you are having a magistrate saying that somebody's detention can no longer be considered lawful, that is something we would hope would then need to be addressed by the department of immigration. We certainly do not support people being released into unlawful status in the community. We think some of the supports around how people are released from detention are very important and that would also need to be addressed around this. We do not want people being released into the community without access to any sort of support; for children not to have access to schools; to not have access to health care. These things are very important and would need to be addressed, but I think for the purposes of this bill, what is crucial is: if somebody is in detention and you have a magistrate saying that is no longer lawful then that person should be released. When we are coming to situations where people have spent five years in detention and, for whatever reason, the executive will not make a decision on that person because it is deemed too political or it will not play out well in the media, that is where the judiciary becomes so important in these sorts of cases.

CHAIR: If that is the case, if a person was deemed to be held unlawfully—and there would need to be a fairly substantive reason to come to that conclusion—wouldn't it naturally follow that they would most likely then have the appropriate visa that would go with that release?

Dr Thom: You would hope that that would and I think that is something that would need to be addressed. But if this bill is passed that says magistrates are able to look—and people who are locked up should have a fundamental right to be able to go to a court and say, 'Why am I being locked up? Is this still necessary?'

This comes back to my opening statement: what is mandatory detention trying to achieve? Why do we have mandatory detention in this country? If it is getting to a point where somebody needs to go to a court and say, 'Why am I here? Is this lawful?' and a magistrate looks at it and says, 'No, this is not; this has now become arbitrary and it's not fulfilling the purposes that detention should be there for,' then systems of course need to be put in place to address what happens to that person when they are released.

CHAIR: Sure, but what I am also putting to you is that, for the magistrate to come to the conclusion, 'No, it is not lawful anymore; you should be released for these reasons,' that would then lead to the issuing of some sort of visa, I would imagine, which then takes away the right of the minister to issue those visas and causes some blurring of the separation of powers, does it not?

Dr Thom: I think no, because there should be appropriate visas when people are being released from detention. That is one of the important things that Australia does have. As I pointed out before, my colleague from the Netherlands came to look at some of the alternatives we already have. We already have community detention and bridging visas. When you look at the 2008 new directions, there is a capacity for people to be released on bridging visas. We would not see any difference between the department or the minister making a decision—we have done the checks; this person does not pose a risk to the community; they should be released; we will grant them a bridging visa—and the judiciary making a decision. If the judiciary comes to a similar decision, then, surely, a similar sort of visa can be granted. The department still has a range of visas at its disposal that can be granted, whether it be a removal pending bridging visa or a bridging visa E. That scope would still be there for the department. I think it is really just about a decision that this human being does not deserve to be locked up anymore; it is now unlawful.

So I do not believe it is a blurring of the executive and the judiciary. I think their roles are still very distinct, but in a democracy, with natural justice and the rule of law, to take away the role of the judiciary in deciding who gets detained and who does not get detained is, we think, a significant blurring. Really, what we would hope from a bill like this is for that separation to be removed again and to see an independent judiciary being able to decide whether or not it is lawful to keep somebody locked up. That is fundamental.

Senator HANSON-YOUNG: You mentioned in your opening statement that Australia was one of the only countries in the world as a signatory to the convention that has mandatory detention and also this particular element of indefinite detention. We know that there are no time limits on detention here, and I guess this goes a little to the chair's questioning around the idea of judicial review of detention as outlined in this bill—not judicial review of the visa class but judicial review of detention. Is it the case that in other countries that are signatories to the convention, where there is a form of detention, there are specific time limits or time frames by which that detention has to be performed?

Dr Thom: It varies from country to country and jurisdiction to jurisdiction. Obviously, though, in Europe there are a number of supranational bodies that also have oversight—and I think Professor Penny Mathew mentions this in her submission—around the European Court of Justice and the European Court of Human Rights. But most countries, regardless of time limits, have a presumption against detention—detention as a last resort.

Senator HANSON-YOUNG: What does that mean?

Dr Thom: A number of submissions have made reference to the International Detention Coalition's recent report on alternatives to detention, and I would certainly commend that to this committee to give a clearer overview in answer to your question. In a nutshell, what we are talking about is quick determinations around whether the person poses a risk to the community. That is the assessment that needs to be made. For the vast majority of asylum seekers the answer is no in countries in Europe and North America, and those people are released into the community. Detention only comes at the end of the process. If somebody has been rejected or if somebody is not complying with a request or an order to leave, they are detained to help effect removal. But the presumption against detention, while there are processes happening, is fundamental to most jurisdictions that have signed the convention. The problem with Australia is that we start detention from the very beginning and we keep people there throughout the entire process, and we can keep them there indefinitely. Then you end up with these situations, as I mentioned, where 30-odd people have adverse security assessments and you do not know what to do with them, and they have already spent two years in detention waiting for that. So they are already starting to suffer psychologically. Then the executive has to make a decision around that when the person who is making the decision also has not seen the evidence against these people. That is where it becomes really problematic. It is that presumption against detention which is so crucial in most other countries not only for the human rights of the individual but because detention is so impractical as a public policy.

Senator HANSON-YOUNG: As this bill outlines, people still have to have their health and security checks completed in the first instance. It might be a good idea for the committee to pull out the evidence given at the last estimates by the director of ASIO where ASIO said that those initial security checks could be done within a couple of days—of course that is not what is happening. If health and security checks were completed then people could be released on the provision that their application for asylum is still being processed and they are simply not locked up in these detention facilities. If we did go down that path, what types of support services do you think would be needed to ensure that people could sustain themselves and be supported during that process?

Dr Thom: This is where Australia, in many respects, is actually leading the world. We have a range of options available to us as far as alternatives are concerned. There will be people like unaccompanied minors for whom community detention, which we already have and which was introduced by the previous government, provides a lot of support. It provides an environment where people are being supervised, where they are able to go to school and where their health care is very well catered for. But that varies right the way down to bridging visas, some of which are problematic when they do not provide access to work rights and so people do not have access to Medicare, and we do see a number of people who are destitute, which I think needs to be addressed. But, at the same time, we have the Asylum Seeker Assistance Scheme, which should be in place to support these people. We have community care schemes, which are other ways to support people through the system.

Amnesty recommends that when a decision is made to release someone, an assessment is made on an individual basis about their need for support. As we have seen through a number of the boat arrivals, many of these people already have family in Australia. The fact that we are spending millions and millions of dollars either to keep them in remote detention or even in community detention when they have family who could support them is completely unnecessary. There is a range of supports that can be given, depending on the vulnerability of the person, and that could be achieved in this country through the mechanisms we already have. Unfortunately, with mandatory detention, we are underutilising in a lot of the systems that are already available.

Senator HANSON-YOUNG: If the indefinite nature of mandatory detention, because there is no time limit or independent oversight of those decisions to detain somebody, is a breach of the Refugee Convention, what about the detention of children? I know we have moved some way with the minister's announcement of moving some

children into community detention but there are still almost 500 children in immigration detention facilities today. Is that a breach of the Convention on the Rights of the Child?

Dr Thom: Amnesty International has always argued that mandatory detention has been a breach of the Convention on the Rights of the Child under article 3 to act in their best interests but also under, I think, article 37 around deprivation of liberty. These are crucial for children and childhood development. I think the way that we have detained children over the last three years has been absolutely deplorable. I do not know how many of the committee members went to Darwin and saw the Asti Motel but that was a horrible environment for children. The fact that those children could not get to school for many, many months has probably done significant damage to them already. The Darwin Airport Lodge is also a horrible environment for families and small children.

The Phosphate Hill facility on Christmas Island, which I have visited on a number of occasions now, is appalling. You would not want your children there for any length of time. To have mothers who had been pregnant and lost their babies being stuck in an environment like that with other families was really heartbreaking. I guess this is why all the major parties in this country have a policy not to detain children. But with mandatory detention when you get significant numbers, as we have seen recently, as we saw from 1999 to 2001, unfortunately delays occur in the system when there is a presumption that everyone must be detained and this is when the damage occurs. That is why we think that some of the recommendations that we have put around this bill are important to ensure that as a country we are meeting our obligations but that each major political party is also fulfilling its own commitment not to detain children. This is crucial.

Senator HANSON-YOUNG: I want to ask about the responsibilities of the immigration minister. In this bill the legal guardianship of unaccompanied minors would be taken away from the immigration minister. Currently at the moment that is where the power is vested. The same person who decides whether an unaccompanied child is detained is the person who is meant to be acting as their legal guardian. Do you see that as a conflict of interest?

Dr Thom: It is a huge conflict of interest and we have always argued it is a conflict of interest. We have argued it publicly and also privately with the previous government and with this government as well. As I said under article 3 of the Convention on the Rights of the Child we are supposed to be acting in the best interests of the child. How can you do that when the minister is vested with so much discretionary power particularly around the detention of children but also in terms of decision making and again excision? I know we are not going to address issues around Malaysia, but when the minister is supposed to be acting in the best interests of the child and at the same time making decisions whether to send somebody to Christmas Island, Malaysia or Nauru that is clearly not acting in the best interests of the child.

We have seen the long-term damage that mandatory detention has caused children. Where this is also coming into play is around a judicial review. When you look at an unaccompanied minor who has failed in their asylum process and wants to go to the courts they have to go up against the department of immigration in the Magistrates Court. How is the minister able to separate the conflict of interest you mentioned when he is supposed to be acting in the best interests of the child? I think that is a crucial piece of legislation that does need to be addressed in this country.

Senator HANSON-YOUNG: What about the real impacts of mandatory detention, indefinite detention, on children, and adolescents and adults as well? In the last 12 months we have seen an increase in self-harm and attempted suicide. We heard from the Commonwealth Ombudsman last week that he is concerned enough to launch his own investigation. From what you have seen on your visits, and in relation to the provisions in the current amendment bill, can you paint a bit of a picture of the current situation for us?

Dr Thom: Again, I think this is one of the reasons why most other Western democratic countries do not have a detention system like this. The evidence in terms of the psychological damage that it does not only to children but to adults as well—and the recent suicides that have been highlighted were all fairly young adult men—is a clear indication of the damage that long-term indefinite detention does to vulnerable people. Through the case work we do, the number of calls from people who are phoning us up threatening self-harm and threatening to take their own life is enormous. People then go on to self-harm in spite of our work in trying to convince them that they need to look after themselves. It is the tension that drags them down.

As I said, when I went to Christmas Island last year just before the riots, the detention in that centre was palpable. I have never seen so many people coming up to show you how they had self-harmed. They had that completely glazed look in their eyes; they were completely detached from the real world. I was talking to the Serco guards about the impact on their day-to-day work of having to cut people down and resuscitate them when they are trying to hang themselves. The impact this is having on the staff in those centres is something that I think is often forgotten. It is going to do some long-term harm to the staff as well, but that is just a fraction of what it is doing to the detainees—the children as well as the adults. When you start having children copying adults and self-

harming, the system really is in crisis. That is where we are at at the moment, unfortunately, but it was totally foreseeable. I think we now need to take a step back, through committees, and have a good look at what we are trying to achieve and how we can actually improve the system.

Senator FURNER: Could you walk me through how you foresee section 195B operating in terms of a detainee having access to the Magistrates Court for an application for release?

Dr Thom: I think it will depend upon the principles around why people are being detained and the purpose that it is supposed to serve. If an individual is given written reasons for why they have been detained—whether it be identity checks, character checks or whatever—they will have some clear indication about why they are being detained. The detainee's representative or a community member should be able to say to the department, 'We've had time to establish who the person is, so you should be able to say by now whether they pose a risk to the community.' At that point the individual should be able to ask why they are in detention? At that point it would be appropriate, as it is in most other legislation around the world, for that person to be able to lodge an application with the court and say: 'I've fulfilled these reasons for detention. Where is the proof that I pose a risk to the community? I have established my identity and this detention should no longer be considered lawful.' On that evidence a magistrate should be able to make a fairly clear decision. That gives the department the opportunity to also say: 'No. Actually we do still have some doubts about who this person is. We do still have some doubts around whether they pose a risk to the community.' I think that scrutiny is crucial in terms of public confidence in why we are detaining people and why we are keeping people in detention.

Senator FURNER: What do you believe would be the time frames in respect of getting an application heard in the Federal Magistrates Court and therefore followed by a decision of the Federal Magistrates Court?

Dr Thom: I think others are probably better placed to answer that question than me, but I think a reasonable amount of time—

Senator FURNER: Well, you need to consider these things because that is what this bill proposes to do. I have had some involvement in the Federal Magistrates Court in previous careers, and I know the time lines in respect of getting an application heard and then getting a decision from that court. I think, if you are representing detainees in your role, you should be in a position to answer that question.

Dr Thom: Yes, but I think if a decision to keep somebody in detention beyond 30 days is made and they have not been able to establish some of the reasons why they are detaining somebody in that time then an application to the Federal Magistrates Court should be able to be addressed fairly quickly, particularly if there are fairly clear guidelines around why an individual assessment has been made to detain that person. So we would hope that, as in comparable legislations around the world, the magistrate could make a decision fairly quickly that an application could be addressed fairly quickly. Getting to the heart of your question, I think it would be ridiculous if this process dragged out for six months or 12 months and no decision was made and somebody was still in detention. I think it would totally defeat the purpose of the bill.

Senator FURNER: That is what I am getting to, yes. There have been changes in industrial law which I am sure you are aware of. Previously there was probably lesser involvement by the Federal Magistrates Court in industrial law and now they have more involvement. So their workload no doubt is fairly heavy. With this additional workload put upon them, I am assuming that hearing an application and then giving a decision would be a lengthier process.

Dr Thom: Again I can only talk from experience of other countries, but I think the hope would be that there is a presumption against detention at the beginning. So we are not talking about the current situation where 6,000 people are in detention and tomorrow you have 6,000 people making applications to the Federal Magistrates Court—in which case, yes, there would be significant delays. My hope would be, if this bill actually plays out the way that it is intended to, that the vast majority of people would not be in detention, that we would only be talking about a handful of cases, as we see in comparable legislation. Therefore the delays would not be so long, because it would not create an overwhelming burden on the Federal Magistrates Court. In that sense, my hope—and I am only talking from what I have seen in other countries—is that that would not be the case.

CHAIR: We do not have any other questions for you. Thank you for your submission today, for making yourself available and for waiting this morning. We appreciate that.

Dr Thom: It was a pleasure. Thank you very much.

POWER, Mr Paul, Chief Executive Officer, Refugee Council of Australia

[10:23]

CHAIR: Welcome. We have a submission from the Refugee Council, which is much appreciated. We have numbered it 24. I invite you to make an opening statement for us and then we will go to questions.

Mr Power: Thank you very much for the opportunity to address the committee. The Refugee Council of Australia's submission supports the general thrust of this legislation. We see it as a serious attempt to take some positive legislative action in response to the appalling situation which currently exists in Australia's immigration detention system. We would like to see all parties in the parliament committed to reform of immigration detention and work together to develop more humane and effective ways of managing people who enter Australia to seek protection from persecution. We particularly welcome the attempt in this legislation to achieve a number of things: to establish principles for the treatment of asylum seekers, to end indefinite mandatory detention, to require judicial review of decisions to extend a person's detention and to end the increasingly arbitrary division between asylum seekers who enter Australia through an excised offshore territory and those who reach the mainland.

Everyone here would be only too well aware of the serious problems in Australia's immigration detention system currently. In fact, the Refugee Council welcomes the greater scrutiny being applied to the immigration detention network by parliament through the recently formed joint select committee and applauds the efforts of parliamentarians responsible for this. The current government, unfortunately, has broken all previous records for the numbers of asylum seekers held in immigration detention.

We now no longer know exactly how many people are being detained because the Department of Immigration and Citizenship has suspended the release of detention statistics since late June and has given no explanation for this nor any indication of when the detention statistics will again be available. The last figures released were for the week to 20 May when 5,600 asylum seekers were in secure detention and 564 in community detention, and of those 4,000 had been detained for six months or more. We have also seen, as Dr Thom referred to, the tragedy in the past year of several suicides of asylum seekers and also the recent suicide of a detention centre guard. Reports of the extent of the self-harm in the detention network are deeply shocking. There has also been much publicity about unrest within detention centres. What makes this even harder to accept is the senselessness of it all.

One has to ask: what has been gained by the indefinite detention of thousands of asylum seekers? Why has the government consistently ignored the advice of its own appointed advisory bodies, particularly the Detention Health Advisory Group and the Council for Immigration Services and Status Resolution, who for at least two years have warned that unrest, self-harm and suicides would increase exponentially if detention policies were not changed?

We acknowledge that immigration minister, Chris Bowen, has overseen a much-needed expansion of the community detention arrangements and is planning a further expansion. This has definitely made a difference for the hundreds of children and their family members who have benefited. But our enthusiasm for this is tempered by the continuing plight of the thousands of asylum seekers who remain needlessly in secure detention. We also note the improvements that have occurred over the past three years in the management of overstayers and others found no longer to have valid visas.

In line with the government's 2008 New Directions in Detention policy, the circumstances of many people found to be in breach of the Migration Act are being managed much more effectively by the department of immigration. Fewer of these people are finding themselves in detention, in line with the government's goal of using detention as a last resort and for the shortest practicable time. This enlightened approach to overstayers makes the government's approach to the detention of asylum seekers even more difficult to understand. People who enter Australia without visas for the purposes of seeking asylum are not in breach of the Migration Act and the refugee convention protects them from being penalised for not having prior permission to enter the country. Overstayers who have breached the Migration Act, sometimes on multiple occasions, are being released on bridging visas while people fleeing persecution who have not breached the Migration Act find themselves deprived of their liberty for indefinite periods, often for many months and even years.

Among industrialised nations and among the 148 nations that have signed the refugee convention, Australia is alone in maintaining this policy of indefinite mandatory detention of asylum seekers who arrive without visas. We have to ask ourselves why. Minister Bowen has consistently said that detention is not designed as a deterrent but is administrative detention for the purposes of identity, health and security checks. If that is the case, why isn't the detention of asylum seekers then restricted to managing risks associated with identity, health and security?

Each year more than four million non-citizens enter Australia on a temporary basis. Those people are able to enter Australia and walk the streets of our cities and towns after being identified through the visa application and passport process, after passing health checks if it is deemed necessary and after passing a security-checking process which generally involves a scan of DIAC's movement alert list database. If they apply for permanent residency while in Australia they may, if deemed necessary, require a full security clearance from ASIO.

The Refugee Council believes that the same principles should be applied to asylum seekers who enter without visas. They should be subject to the same level of scrutiny as other temporary entrants: an identification process, health screening and security check before being released into the Australian community on a temporary basis while their permanent status is determined. This security check should be of the same standard applied to other temporary entrants: generally a check against the movement alert list database. If no identity, health or security concerns are flagged, there is no case for continued detention. the full ASIO security clearance should occur, as it does with other temporary entrants, at the point just prior to granting permanent residency if indeed the person is found to have a need for refugee protection.

What we are advocating is risk management—subjecting asylum seekers who enter Australia without visas to the same risk management processes applied to people who enter the country on a temporary basis. Prudent risk management must also include releasing people from detention when those checking processes reveal no reason to continue detention, because we are all too-well aware of the serious risks associated with needlessly prolonging detention.

This legislation proposes introducing judicial scrutiny of decisions to continue to detain a person. It is essential, if people are going to have their liberty denied for any significant period of time, that the need for this continued detention be established in a court. This does not at all preclude the government from continuing to detain a person if there is a case to do so; however, it ensures that those detained have the opportunity to understand the reasons for their continued detention and to put their case to the magistrate.

For these reasons the Refugee Council supports the goals and provisions of this legislation. We believe that it would result in a much fairer and more prudent management of the circumstances of asylum seekers entering Australia. We have made in our submission some suggestions for some potential improvements to the legislation, and I note that some suggestions have been made in submissions from other organisations such as the Law Council. We appreciate this legislation because it aims to draw the parliament's attention to the critical need to work together effectively to bring about reform to the Australian immigration detention system. We are hearing day after day of so many people in detention centres in absolute despair, and when I look at the circumstances of the great majority of people currently in immigration detention facilities I cannot be convinced that current practices are sensible, effective or fair. I encourage this committee to support the passage of this legislation or, alternatively, seek to amend it so it can more effectively meet the goals outlined in the bill's explanatory memorandum.

CHAIR: Thank you. I will start by asking you a question about the same level of scrutiny as other temporary residents. Does this bill achieve that?

Mr Power: It certainly attempts to.

CHAIR: But it is a piece of legislation, so does it achieve that?

Mr Power: I would defer to people with greater legal knowledge. There are obviously people with greater legal knowledge within our network. They would understand the full implications of every aspect of the bill. But I think when someone enters the country the government's current policy, which has support from the opposition as well, is to use detention for the purpose of managing risks related to health, security and identity. What we are saying is that we accept that that is the government policy. We believe that the current policies need to ensure that detention is purely for the purpose of managing those risks and, once it is established that there are not risks associated with someone's identity, health or security, the case for continuing to detain them is no longer there. The government often says that detention of people who arrive without visas is for administrative purposes. It is a little difficult to accept that, if there are no risks associated with them being released into the community, we would detain people, in some cases for two years, for administrative purposes, just so that they are readily available to the department of immigration. When you look at how the other half of the asylum seekers who are currently in Australia are handled—these, of course, are people who enter with some form of temporary visa but then notify the Australian government that they wish to apply for protection—the department of immigration almost without exception issues these people with bridging visas and does not appear to have serious problems with the administrative aspects of processing their applications for protection.

Our belief is that, if people arrive without visas, once the risks associated with their identity, health and security have been investigated and if there are found not to be any risks, the treatment of them from that point should be similar to the treatment of asylum seekers who are living in the community who have entered the country on temporary visas.

CHAIR: But isn't that what is happening now to the extent that a person's health is actually being assessed as they enter and that because of the number the security assessment is taking longer than anticipated?

Mr Power: What we are seeing in practice is that no asylum seeker who arrives without a visa is actually being released until they are given a permanent visa. The system is not focusing on the identification of the health, security and identity risks as a path to some other form of temporary status. Certainly in relation to people being moved into community detention, those risks are being assessed and they are being assessed quite quickly. The issue that needs to be grappled with is: why is it acceptable—and the risks associated appear to be negligible—for people to enter the country on a temporary basis, without a full ASIO security clearance but a check using the Movement Alert List database? Why is that okay for four million people who enter the country on a temporary basis and why is it not okay for people who enter without a visa and who go through the same level of scrutiny while they are being detained that a temporary entrant would otherwise go through? Why must they remain in secure detention or in community detention until there is a full ASIO security clearance?

What we are saying is: we actually have good practice in relation to the management of detention issues regarding overstays; we have good practice generally in relation to the management of asylum seekers who enter the country with temporary visas; and we have good practice in relation to the management of four million people who enter the country on a temporary basis each year. We can actually apply those same principles and at the same level of scrutiny.

CHAIR: Can I just clarify: those people who come here on a temporary visa have produced some sort of paperwork in order to get that temporary visa. Isn't the problem that you get quite a number of people arriving without a form of ID, without any paperwork, and therefore that sort of puts their case back? We are actually trying to identify their correct name, their birthplace and their date of birth when they do not have any paperwork. We are trying to source that paperwork. Isn't it more the fact that they arrive with no paperwork so we have got to start from absolute scratch, and isn't it also because of the numbers that we are dealing with that it takes time here?

Mr Power: No. If you look at the practice, if the government determines, as we are suggesting, that it apply the same standards of ensuring that it knows who the person is and that they do not have contagious diseases. Then on checking their security status against the Movement Alert List database we would see people being released in some cases probably within a week and in many cases within a month.

CHAIR: But they would be released in a week, wouldn't they? If you could deal with that assessment as quick as a wink, they would be released within a week. They would be determined to be a refugee.

Mr Power: The current practice is that people who enter the country to seek asylum without a visa—so arrive without prior notification—are detained until they either get permanent residency or are expelled from the country. They are actually in detention until permanent residency. That is self-defeating on many levels because if people are actually going to become permanent residents of Australia, detaining them needlessly for two years not only costs an extraordinary amount of money but also does damage—

CHAIR: So essentially what you are saying is you could give people an identity and a health check and release them into the community on a temporary visa, pending the security check—is that right?

Mr Power: No. In discussing this with people in the department of immigration, they draw a distinction between a security check, which involves the movement alert list database, and a security clearance, which for other temporary entrants occurs prior to the granting of permanent residency. So what we are saying is—

CHAIR: You are saying do the health and identity.

Mr Power: And the security check and enable people to be released. If they pass all of those checks, enable them to be released into the community on some form of bridging visa or the like. If they are found to be in need of refugee protection and given a protection visa, then a security clearance, if it is deemed necessary. This would be conducted before permanent residency is granted. That is the procedure for other temporary residents.

CHAIR: What is your solution to those people who might pass the health and identity but not the security check that are then what the department would call on a negative pathway? What is your answer for those people?

Mr Power: There are two parts to your question. One is: if there is some reason to believe that there is a security risk associated with releasing them into the community—and that would only occur in very small

numbers—then, obviously, continued detention would have to be considered. What we are suggesting and what this legislation allows for is for that to occur if it is supervised by a court, which of course is a good discipline. It enables the person to understand why they are continuing to be detained. It enables them to put their case against whatever it is that is being put forward by the government as a reason to continue detention but it also enables, if there are genuine reasons for continuing to detain a person, a person to be continued to be detained.

In terms of the negative pathway, in general department of immigration parlance they are referring to people who are appear headed towards not getting refugee protection. Of the asylum seekers living in the community who have entered on some form of temporary visa and have applied for refugee protection, in the past financial year about 75 per cent of them ultimately are on a negative pathway. Australia has quite effective ways of managing their situation. What we also saw with the Howard government's changes in 2005 and 2006 with the development of more alternatives to detention and the development of the community care pilot was that, as more people were being moved into the community while their refugee status was being determined, there was a higher compliance with people returning to their country of origin after they were found not to need refugee status.

One of the problems in the detention system, which actually makes it more difficult to remove people when they are found not to be in need of refugee protection, is it creates this adversarial environment and it also creates psychological pressure on people, which makes it more difficult for them to accept a negative decision. What we have found with the Howard government's policy changes in 2005 and 2006 and since then is that asylum seekers living in the community are much more likely to accept a negative decision than asylum seekers in detention.

As Dr Thom was saying, Australia actually has a series of quite enlightened policies in relation to the management of asylum seekers in the community, the management of overstayers and the application of new directions in detention to people who enter Australia with a temporary visa. Unfortunately, the same lessons are not being applied to asylum seekers who arrive without a visa. We are arguing for the same level of prudent management of their situation, but the assessment of the risk of indefinite detention also needs to be considered. The department of immigration is very risk averse about absolutely everything except the risks associated with detaining people long term.

Senator HUMPHRIES: I agree with you that there is a problem with the government's rhetoric not matching its actions, particularly with respect to the changes in policy it has made recently. Can I put to you that the unstated reason for the present mandatory detention policy is that it is believed to act as a disincentive to people seeking the services of people smugglers. And I put to you that to the extent a people smuggler can persuade a potential client in Indonesia or elsewhere that, if they reach Australian waters and are intercepted by Australian authorities, they have a very good chance of receiving ultimately permanent residency in Australia, there is a very much increased opportunity for them to get that person's money and to make them a client. First of all, do you accept that that is a part of the unstated reality of why there are mandatory detention policies in Australia at the moment and, secondly, do you not accept that if you are perceived to weaken, that the present policies might be seen to act as a deterrent, that you effectively strengthen the case for people smugglers and you may therefore increase the number of people seeking their services?

Mr Power: On the first part of the question, immigration minister Chris Bowen does not accept that detention is a deterrence and has said so on a number of occasions.

Senator HUMPHRIES: I accept there is a problem with the government not saying what it means, or vice versa. I think there is a serious problem with that. Putting that to one side, what they will not say but, I put to you, they believe is that the 'hardline policies' do act as something of a deterrent, which is why they are presently moving towards a system of offshore processing of asylum seekers.

Mr Power: No, in fact yesterday, just before coming here, I asked for some assistance from one of my colleagues, just to double check that my understanding that the immigration minister has consistently said that detention is not being used in this situation as a deterrent was correct. Over the past several months the only references to whether or not detention is a deterrent which he has made public in his media interviews all say that the government does not see detention in this situation as a deterrent. I would agree with him when you look at the situation people who are entering the country to seek asylum have been in before they came here.

Two weeks ago, I had the opportunity to visit Malaysia and to talk to asylum seekers there. In fact, I found myself following in the footsteps of the opposition shadow minister, visiting some of the same people he had visited. When you look at the situation for people there, the idea that they may be detained for a period of time when they come to Australia is probably something people would accept as part of the process. If people genuinely believe they have a need for protection, once they understand what does and does not happen in Malaysia, they begin to look for a place where their need for protection will be taken seriously. If a period of time

in detention is part of that, the stoic attitude of many asylum seekers and refugees would be to accept that because ultimately they feel they need to be protected.

You only have to look at the statistics over the last few years. Looking at what has occurred and at the fact that the people who have arrived by boat have all been subjected to mandatory detention, in some cases for two years and many of them for more than six months, why is that not working as a deterrent? Why is word not getting back to those communities in South-East Asia and South Asia, 'Don't go to Australia because you'll be detained'? It is not having that deterrent effect. Unfortunately, I think a lot of the rhetoric and a lot of the action is actually designed for the Australian electorate rather than for asylum seekers. I think there is a bit of confusion in the minds of many people in Australia that, in fact, detention may be a deterrent but, in practice, I do not think you can actually make a case, because just the experience of the last two years in Australia would suggest that it is not.

Senator HUMPHRIES: If you introduce access to judicial review in the way that this bill—

Senator HANSON-YOUNG: Of detention?

Senator HUMPHRIES: Of detention, yes, in the way that this bill suggests, do you accept that virtually every unauthorised arrival, however meritorious or not their case for review of their decision may be, will seek such a review and that if appeals are available to that decision they will seek to appeal against that decision as well? It is available to them, it comes effectively without cost to them and, having taken considerable trouble to get to Australian shores, they will not lightly set aside any opportunity they may have at their disposal to stay here. Would you not accept that that would hugely increase the workload of our system and would add to the cost of our system?

Mr Power: No, I would not accept it for the reason that, if the rules are changed in the way in which this legislation suggests, that would actually focus the department of immigration's attention on the fact that detention is for the purposes of identity, health and security checking and if there is no reason to continue to detain anybody for those reasons then the majority of people would be released on some form of bridging visa or other arrangement pending the final outcome of their protection visa application. So there would be no case found to continue to detain people.

Senator HUMPHRIES: But it would not stop them from making the application for them to be released? They would still exercise all their rights. Why would they not do so? Why would a person who has been through all these processes not seek every avenue for appeal that they could possibly get?

Mr Power: If, for instance, there was a process of judicial review available after 30 days then the department of immigration would, I believe, be able to determine that, in the vast majority of cases, within 30 days the health, security and identity standards in most cases were met and that people could be released, so they would not still be in detention after 30 days. The administrative arrangements associated with the processing applications could be handled while they are living in the community. So you would be talking about the exception rather than the majority of asylum seekers. In that case, my understanding is—and I am too young to know this, but I am told by people who have been around the scene for some time—that it would actually be a return to the supervision that the Magistrates Court applied to detention in the early nineties and prior to that. It was a standard procedure whereby if the department of immigration wished to continue to detain a person, the case would need to go to a court and the Magistrates Court was quite effective in handling those situations. The numbers would be much smaller. We are also talking about the deprivation of liberty and, in all other situations, the deprivation of liberty is taken seriously and the courts have oversight.

Senator HANSON-YOUNG: People serving sentences, as opposed to indefinite sentences?

Mr Power: Yes. We have people being detained for longer periods of time than for criminals in Australia who are serving jail terms for quite serious assaults. So it is not a trifling matter. Having judicial scrutiny of continued detention, I think, would be for the benefit of everyone and we would find that the great majority of asylum seekers who arrive without visas would actually meet the identity, health and security standards fairly quickly.

Senator HUMPHRIES: DIAC argues that the amendments vest the judiciary with executive powers. Do you agree with that?

Mr Power: All it would do is that a judicial officer would be determining whether or not somebody would be detained. They would not actually be making a determination of which visa they would go on. Basically they would be saying: 'This person shouldn't remain in detention. The department of immigration needs to make a decision about what status they should have which does not include detention.' I would see it as little more than prompting the department of immigration to come up with an alternative arrangement which in many cases would be some form of bridging visa. It could even be a community detention arrangement if the government chose that

as the path. The magistrate would not be determining that someone has a right to remain in the country permanently. It is just that they would be determining that they should remain somewhere else other than a detention centre while their status is determined.

Senator HANSON-YOUNG: You have been having a discussion with the chair and Senator Humphries in relation to the length of time to do health and security checks. Aside from the evidence that this committee has already had during estimates that those things could be done within a matter of days, we have obviously seen evidence that the department believes that they can be done within a matter of days because they have signed an arrangement with Malaysia to say that those basic checks will be done within 72 hours. They have also said in relation to that arrangement that the detention of people once they arrive in Malaysia will be 45 days. Do you think that is in stark contrast to the non-existent limits that we have in Australia?

Mr Power: Yes. I think also the community detention arrangements point to the same thing.

Senator HANSON-YOUNG: In Malaysia?

Mr Power: In Australia. Community detention is officially detention but the experience for the person being detained is not very much like detention. From that point of view it is a good compromise. The department of immigration goes through a series of checks—officers of the department would be able to explain them to you no doubt—before somebody is able to walk the streets of Australian cities. They happen quite quickly from my understanding. There are existing processes. What we are talking about is really prudent management. We are not saying, when someone arrives without identification, just release them without knowing who they are. We are saying that if the government's policy is mandatory detention for identity, health and security risks then let's have it and focus this period of mandatory detention on the identification of those risks but then make a determination that we are not going to risk the damage associated with long-term detention.

Senator HANSON-YOUNG: This bill spells out a period of 30 days in which that can happen.

Mr Power: A maximum of 30 days.

Senator HANSON-YOUNG: What is your observation of the impact of mandatory detention without any time limits—the nature of indefinite detention on children and families?

Mr Power: I will start with everybody in detention. The feedback that we get from people who are currently in detention and who have been in detention is that the indefinite nature of the detention is the most damaging aspect. If someone is given a sentence for some crime they know the approximate date of when they will be appearing before the parole board or whatever. They actually know the period of time that they are going to be detained. What is most difficult for people in immigration detention to handle is that they do not know whether they are going to be released tomorrow or in three years time. They often do not know exactly why they have been detained and what the delays are. They are not given consistent information. The mental health experts who work with detainees say that often the three- to four-month period is the tipping point. Within the first few weeks, people may feel a level of relief at being in basic but relatively comfortable conditions in Australia in comparison to what they have previously been through and feel optimistic that things will work out well for them because they are in a country that respects the refugee convention and the rights of asylum seekers. It is after a period of time, when they realise that this is actually not working out as they imagined it would and that there is no definite end to their period of detention, that the psychological damage starts to occur.

In the case of children, often it is children picking up on the stress of their parents that can cause the greatest damage. Of course, it is very, very hard for adults to adjust to the whole situation, but it is even harder for children to comprehend why it is that they are being detained, why their parents are so stressed, whether there is going to be an end to it all.

Senator HANSON-YOUNG: I imagine that, as the head of the Australian Refugee Council, you would spend a considerable amount of time talking with your brother and sister organisations in other signatory countries. How do you believe the Australian system is viewed by the international community?

Mr Power: It is viewed very poorly. My counterparts in other countries have great difficulty understanding why asylum seekers who arrive without visas are treated in the way that they are. Their attitude is that many other aspects of Australian refugee policy are quite positive. Our work in refugee resettlement, certainly on a per capita basis, is the most significant in the world, and the post-arrival support is excellent. Even the management of people who breach the Migration Act—people who have entered the country on a temporary basis and then become unlawful—is quite enlightened, particularly since the New Directions in Detention policy in 2008.

The treatment of asylum seekers who arrive without visas is an entirely different category. Often I am asked to give a detailed explanation as to why: 'Why does the government see it in that form? Why does the Australian government see it as beneficial to spend hundreds of millions of dollars on detaining these people? What is gained

out of it?' Often people who are experts in the treatment of asylum seekers and refugees in other jurisdictions have great difficulty in comprehending the thinking behind the Australian policy and are just left puzzled as to why the Australian government thinks it is a reasonable way of responding to the situation.

Senator HANSON-YOUNG: Do you think reforming the system, as outlined in this amendment bill, with time limits on detention—so that it is only for the period of time needed to do health and security checks—and scrapping offshore processing, would save the Australian taxpayer money?

Mr Power: Definitely. If you look at the budget for this current financial year, the government has set aside at least $800 million for detention, much of it for the management of detention of people handled under the offshore asylum management system but also about $90 million for the onshore system. Ultimately we are talking about the detention of around 6,000 to 7,000 people at most.

Senator HANSON-YOUNG: That is a lot of money per person.

Mr Power: It can hardly be regarded as value for money. It is just extraordinary that, politically and publicly, this is not more of an issue. When you are looking at alternative systems—and we are talking about a quite conservative, prudent way of managing the situation—the amount of funds that would be freed up by releasing the Australian government from needlessly and endlessly detaining such large numbers of people would actually more than fund any alternative arrangements and make additional funds available for more constructive purposes.

CHAIR: Thank you. We have run out of time. I also thank you very much for your submission. I think there are probably a number of issues you put in your submission that the new joint select committee will also be interested in. I am sure you will make sure you have got a comprehensive submission for that committee as well.

Mr Power: Yes. We are working on a submission now. Thank you.

BUDAVARI, Ms Rosemary, Co-Director, Criminal Law and Human Rights, Law Council of Australia

[11:05]

CHAIR: I welcome the representative of the Law Council of Australia. We have received a submission from the Law Council, which we have numbered 4 for our purposes. I invite you to give a brief opening statement and then we will go to some questions.

Ms Budavari: The Law Council supports the objectives of the proposed amendments in this bill but suggests that further consideration needs to be given to some of the implications of the proposed amendments in the overall context of the Migration Act. The Law Council support the objectives of this bill because we have urged governments of both political persuasions over many years to do a number of things: firstly, abolish mandatory immigration detention; secondly, limit immigration detention to strictly defined purposes; thirdly, abolish the different treatment of asylum seekers who arrive by boat as opposed to those who arrive by other means; fourthly, restore the full rights of judicial review in relation to migration decisions; fifthly, adhere to common-law principles of natural justice and procedural fairness in relation to migration decisions; and, sixthly, implement Australia's international human rights obligations in legislation.

The proposed provisions in this bill raise a number of issues which require further consideration, including how provisions such as the proposed section 4AAA principles, applying to decisions about asylum seekers, would operate in conjunction with other provisions of the act relating to decision making. The proposed provisions also raise issues about what matters a Department of Immigration and Citizenship, or DIAC, officer should consider when deciding whether to exercise his or her discretion under the proposed amendments to detain an unlawful noncitizen. The proposed provisions also raise issues about whether detainees who would be released in the community, either through the exercise of that officer's discretion or by a magistrate, would be granted visas and, if so, exactly what type of visas. The provisions also raise issues about whether applications by the department to detain a person beyond 30 days would require a limit to be imposed on the period of further detention and how many of those applications could actually be made.

The provisions also raise issues—I was fortunate to be present during Mr Power's evidence, and the issue has been raised by Senator Humphries—about appropriate resources for legal assistance and for the courts in relation to such applications. The proposed provisions also raise issues about how a decision by a magistrate to release a detainee would operate in conjunction with ministerial powers such as the power to cancel a visa on character grounds. The proposed provisions also raise issues—and this was also alluded to during Mr Power's evidence—about the need to ensure that any delays consequential on these proposed provisions in processing asylum seekers' claims are addressed.

Our written submission makes some suggestions in relation to these issues. For example, we have suggested that DIAC officers should consider criteria under the United Nations High Commissioner for Refugees' executive committee conclusion 44 about the purposes for which asylum seekers should be detained. A number of other submissions have supported a similar suggestion.

Finally, as the chair noted in her concluding remarks to Mr Power, we also note that there are two inquiries currently being conducted which are relevant to some of the matters being considered by this committee. The first, as alluded to by the chair, is the Joint Select Committee on the Immigration Detention Network. The other inquiry which is also relevant to some of the issues before this committee is an inquiry by the Administrative Review Council into judicial review in Australia. In relation to that inquiry, the Law Council's administrative law committee, as distinct from its human rights arm, has prepared a submission to that inquiry. That submission includes an observation that special attention needs to be given to the exclusion of migration decisions from the Administrative Decisions (Judicial Review) Act, which leaves part 8 of the Migration Act to operate. The submission argues that part 8 should be repealed but that restrictions upon review should be retained for decisions of the minister's delegate where such decisions may be or have been reviewed by the Migration Review Tribunal or the Refugee Review Tribunal. The submission also argues that these restrictions could be retained via schedule 1 or section 10(2)(b) of the Administrative Decisions (Judicial Review) Act. I mention that particular submission because this bill actually seeks to repeal part 8 of the Migration Act. What the bill does not really address is some of these issues like review of decisions which have already been through a review process. So there is a technical aspect to that which probably needs to be addressed. The Law Council would be very happy to make its submission to that Administrative Review Council available to this committee if it would assist.

As the chair has mentioned, there are lengthy terms of reference for the Joint Select Committee on Australia's Immigration Detention Network. We want to highlight two of those in particular that are probably relevant to this inquiry. They are:

(g) the impact, effectiveness and cost of mandatory detention and any alternatives, including community release;

(r) processes for assessment of protection claims made by irregular maritime arrivals and other persons and the impact on the detention network;

We note that the closing date for submissions to that other inquiry is 12 August and it may be appropriate for this committee to consider those submissions in its deliberations on this bill. As the Refugee Council has indicated, the Law Council will also be making a submission to that inquiry.

Finally, we also want to note a report that is currently with the government that is also probably relevant to some of the issues that are thrown up by this bill. That report is by Professor John McMillan on issues arising from the government's response to the November 2010 decision of the High Court in the M61 and M69 case, which found that asylum seekers arriving by boat are entitled to procedural fairness and to judicial review of protection claim refusals. The Law Council met with Professor McMillan in February of this year and has also made representations to the government about the urgent need for increasing legal assistance to asylum seekers seeking judicial review as a result of this case. These calls parallel those which have been made in a number of submissions to this inquiry that any provision for matters to be heard by courts must be accompanied by appropriate forms of legal assistance to applicants. That concludes the opening statement and I am happy to answer questions.

CHAIR: Thank you very much. As always, that was very comprehensive and is much appreciated.

Senator FURNER: You, quite rightly, pick up in your submissions and also in your opening statement some issues associated with proposed section 195C of this bill. You are actually proposing an extension of time of 60 or 90 days per subsequent application. Can you cover off on that as to whether that is 60 or 90 days per subsequent application or is that the extent of the ability of any applications up to a maximum of 90 days?

Ms Budavari: That time is just a suggestion. Obviously, some sort of time limit needs to be set and that is simply a suggestion about the appropriate time.

Senator FURNER: Is that a time limit per each application, being subsequent applications?

Ms Budavari: Yes.

Senator FURNER: How many subsequent applications are you considering?

Ms Budavari: We are saying that is a matter for the legislature to decide. We are simply raising that as an issue that needs to be addressed.

Senator HANSON-YOUNG: Otherwise, it becomes indefinite—

Ms Budavari: Yes.

Senator FURNER: Your organisation more than any other organisation should be able to answer this. I asked Dr Thom about this earlier. The current workload of the Federal Magistrates Court is, as I am informed, very high in respect to activities. Would you be able to give me some feedback in terms of your experience as the Law Council on what the current workload is of the Federal Magistrates Court?

Ms Budavari: I could not give you a completely concluded view on that. I would need to consult. Suffice to say that we have received reports from lawyers around Australia, indicating that there is an increased workload arising from M61 and M69 cases and that is presently being felt within the Federal Magistrates Court. The Federal Magistrates Court is, I think, commonly known as a very busy court. It has a number of areas of jurisdiction—discrimination law, family law, immigration law and bankruptcy law. It is a very busy court. We commend the government on its decision to actually appoint two additional federal magistrates as a result of the M61 and M69 cases. Unfortunately, that process is taking a lot longer than would have been hoped, but there is recognition within the government of the court's increased workload. If these provisions were passed, there would undoubtedly be a further increased workload.

Senator FURNER: So there would possibly be a need to look at more resources for the Federal Magistrates Court?

Ms Budavari: Yes.

Senator HANSON-YOUNG: Thank you very much for your submission. I absolutely agree with the issues that you have raised in terms of the consequences of doing any type of reform like this. I appreciate the Law Council's overall support for the goal of this type of reform. I would like to go back to basics and get the Law

Council's position very clearly around the issue of mandatory detention, with no time limits and no exemptions for families, children or minors because of the mandatory nature and how that impacts on our obligations of the various conventions that we are signatories to.

Ms Budavari: I think the Law Council is on the record in a number of submissions as indicating that the nature of mandatory detention means that we may be in breach of a number of our international obligations that we have accepted under the International Covenant on Civil and Political Rights, the refugee convention, the Convention on the Rights of the Child and the convention against torture. There are certainly live issues in relation to all of those international obligations.

Senator HANSON-YOUNG: The purpose of the excise territories amendment to the migration bill back in 2001 and the provisions for offshore processing was to create even further a two-tier system. How does that impact on the principle of natural justice?

Ms Budavari: The principle of natural justice is dealt with in the legislation in a number of ways. The issue of how that principle is applied in the context of irregular maritime arrivals who are processed on Christmas Island, for example, was dealt with by the High Court. It was found that those people are entitled to natural justice and procedural fairness. As a result, the government has made some changes to the process that applies to those people. It is now called the protection obligations determination process.

Senator HANSON-YOUNG: Do you think the last month's change of policy, where all new maritime arrivals will be expelled to another country, undermines that process?

Ms Budavari: We really need to see how that agreement is going to play out in practice. There appear to be a number of safeguards that have been attempted to be built into that agreement, but from the particular perspective of the Law Council on these sorts of issues there is a concern that there is no guarantee of legal assistance for those people. There appears to be no process. Certainly the UNHCR process which will apply does have a number of stages of review, but they could probably be characterised as internal review. There is no judicial review, as we understand it, being proposed for the people who will be processed pursuant to that agreement.

Senator HANSON-YOUNG: I go to the practicalities of putting some restraints around the nature of people's detention. Under this bill the principle would be that people are simply detained for the risk management, health and identity checks; then, as you point out, there would need to be a process to determine if they go into some type of community detention or are put on a bridging visa while they wait for the process of their protection application to be completed. Aside from mandatory detention, in what other circumstances do we see people detained indefinitely under current Australian law?

Ms Budavari: I would probably need to take that on notice if we were going to answer it fully. Off the top of my head there are certainly some situations under our criminal law where serious offenders may be detained indefinitely, but normally a court would supervise that decision.

Senator HANSON-YOUNG: It is not made by a bureaucratic officer.

Ms Budavari: No.

Senator HANSON-YOUNG: Could you take that on notice? I think it would also be helpful for the subsequent broader detention inquiry. In saying that, the idea of putting a time limit and very clear parameters around what is meant to occur during that detention would of course focus people's minds—I think it was Mr Power who used that phrase—in processing the particular parts that needed to be done in that time frame. What do you see as the purpose of detention?

Ms Budavari: I am not sure that we are in a position to answer that. Presumably people from the department would be in a better position to answer that question.

Senator HANSON-YOUNG: I will ask them. One of the other parts of this amendment bill is to try and clarify the role of the immigration minister in relation to children who arrive unaccompanied, without parents or other types of guardians. Do you see a conflict of interest with the immigration minister currently being the legal guardian of these children as well as being the person who has the executive power to determine not just their detention but the type of visa that they are granted?

Ms Budavari: Yes. Certainly the Law Council is on the record as having taken that position in relation to other submissions that it has made, in fact, to this committee. We do consider that to be a conflict of interest and we do consider that the government needs to look at other arrangements for guardianship of unaccompanied children.

Senator HANSON-YOUNG: If it is not to be the minister who is the legal guardian of children who arrive unaccompanied, who would you suggest should be their legal advocate?

Ms Budavari: That is a very difficult question. We have certainly looked at some other suggestions that have been made about possibly the Minister for Families, Housing, Community Services and Indigenous Affairs or some more formal arrangements with state and territory ministers for—

Senator HANSON-YOUNG: The jurisdiction—

Ms Budavari: child welfare matters.

Senator HANSON-YOUNG: Under the Convention on the Rights of the Child, does Australia have obligations to children who are caught up in the immigration detention process to go beyond its obligations under the Refugee Convention in particular?

Ms Budavari: Yes. There are certainly much more specific obligations relating to children under that convention.

Senator HANSON-YOUNG: Obviously in this amendment bill one of the key elements is that no children would be detained in immigration detention facilities. We have heard different statements from time to time from ministers of various persuasions, but the fact still remains that we have children detained under the purpose of the Migration Act. But whenever I put this issue to the department, they say, 'They're not detained in the immigration detention centres.'

Ms Budavari: That is correct.

Senator HANSON-YOUNG: Because that is what they call it. But what is the nature of detention?

Ms Budavari: Again, Senator, I think you probably need to put the question to the department. There is a provision in the existing legislation that this parliament affirms as a principle that a minor shall only be detained as a measure of last resort. But, importantly, there is a qualification to that, which is that 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. Again, I think the department could probably help you more on that.

Senator HANSON-YOUNG: In the Law Council's view, would you place on the record that you believe children continue to be held in immigration detention?

Ms Budavari: The difficulty is how you define immigration detention, whether you define that so broadly that it also includes some of the transit accommodation and other accommodation facilities that children are currently in.

Senator HANSON-YOUNG: If detention is the restriction of a person's movement and, for the purposes of the Migration Act, they are detained while somebody has their claim for protection assessed, are children still detained?

Ms Budavari: Certainly, from some of the arrangements that we are aware of, children are subject to those restrictions that you are talking about, but there are some quite technical distinctions between detention and immigration detention centres and other forms of detention and then release into the community which make that question a little bit difficult to answer categorically yes or no.

Senator HANSON-YOUNG: Final question: in the recent group of 500 who were detained since the 7 May announcement, whom we now know are not going to be sent to Malaysia but will have their applications processed here, children were detained in the same type of facility as adults—the Bravo compound; it is the same place that this new boat that will arrive today will be detained in. Surrounded by barbed wire, it is a facility with demountable huts. Children are being detained in the same facility as adults for the same purpose. From a legal perspective under the requirements we have to treat children and minors differently, do you believe that that is appropriate?

Ms Budavari: Again, it is not really our role to say what is or is not appropriate, and I am not familiar with the particular facility that you are talking about. The Australian Human Rights Commission or the Ombudsman's office would be, but it is correct that there is a principle within that convention that children should not be detained in adult facilities in the sense of correctional facilities. Of course there are difficulties posed because there are also other principles under other conventions which say that children should not be separated from their families, so you may have a conflict of different principles operating. It would not be desirable for children to be accommodated in the same facilities as adults, unless they are with their family and depending on the nature of those facilities. Again, it is a bit difficult to give you a completely categorical answer.

Senator HANSON-YOUNG: Sure. Thank you.

Senator HUMPHRIES: Ms Budavari, does the Law Council believe that the suite of policy responses to unauthorised maritime arrivals, including both the law and the administrative arrangements built around the law, have a bearing on the volume of such arrivals on Australia's shores?

Ms Budavari: I do not think we have a view on that.

Senator HUMPHRIES: If it could be demonstrated that there was a relationship between the perception of Australia's response to such arrivals and the volume of such arrivals, would the Law Council accept that it needs to be a posture which discourages the lucrative nature of people smuggling as an appropriate policy response to that problem?

Ms Budavari: Again, I probably cannot respond conclusively to the assumption in the question but I can make a comment which may assist, and that is that the Law Council made a submission on an anti-people-smuggling bill last year. In that submission, we supported measures to be taken against people smugglers. We had some particular problems with the particular provisions of the bill in relation to safeguards that had been built into the bill but, as a general principle, we support the criminalisation of people smuggling and appropriate penalties for people smugglers.

Senator HUMPHRIES: Wouldn't you agree that criminalising people smuggling is, by itself, a very inadequate response to this problem just as criminalising dealing in drugs has very little bearing on the volume of drugs being smuggled into and sold in Australia?

Ms Budavari: Again, I probably cannot give you a concluded view on that other than to say that the criminal justice response is one response to a social problem. We probably recognise the limitations of those responses, but it is a legitimate response.

Senator HUMPHRIES: I admit to a certain logic in the argument that the Law Council and others have put to the committee about the circumstances in which judicial review is available over administrative decisions in this area compared with other areas of public policy in Australia. But the argument against that happening in this bill is that a perceived dismantling of the arrangements in place at the moment may act unintentionally at least as an encouragement to people smuggling and unauthorised arrivals into Australia. At the moment, some would say that the government is in the process of rebuilding and strengthening that arrangement with offshore processing of asylum seekers. Rather than have that debate here, would you concede that, if that is what the government is attempting to do—at least perceptually at the moment—this bill heads in precisely the opposite direction? It is perceived to be removing some of the measures which might be seen as maintaining a tough line on illegal entrants through the agency of people smugglers.

Ms Budavari: I probably cannot give you a Law Council view on that because it is not an area that we have consulted on so far. I was present for Mr Power's evidence and there would appear to be some merit in the analysis that even if you open up this pathway of judicial review one of the other effects of that will be to encourage better decision-making within the department. The Law Council is also on the record saying that in different contexts, for example, in the provision of early legal assistance to people, that that would actually encourage better first instance decisions and that it is meritorious to do that. So it may not lead to the explosion of litigation that people fear.

Senator HUMPHRIES: On that last comment, the Law Council would argue that the lack of judicial review at the level that is available in analogous situations elsewhere in the community is contributing to bad decision-making in some cases by DIAC?

Ms Budavari: We would say that there are some concerns over some of the first instance decisions by DIAC. We are very pleased that there is a process for review of those decisions both for people who apply onshore and for people who are subject to the non-statutory process offshore.

Senator HUMPHRIES: Thanks.

CHAIR: Senator Pratt.

Senator PRATT: No. I think the questions I had were clearly covered off by other questions.

CHAIR: Ms Budavari, there are no further questions. Thank you once again for the submission from the Law Council and also for your time this morning.

Ms Budavari: Thank you.

FLEMING, Mr Garry, First Assistant Secretary, Border Security, Refugee and International Policy Division, Department of Immigration and Citizenship

HARDY, Ms Jenny, Chief Lawyer, Department of Immigration and Citizenship

ILLINGWORTH, Mr Robert, Acting First Assistant Secretary, Compliance and Case Resolution, Department of Immigration and Citizenship

[11:39]

CHAIR: Welcome. I remind senators that the Senate has resolved that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of that officer to superior officers or to a minister. This prohibits questions asking for opinions on matters of policy; it does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. We have the submission that you have lodged with us, submission No. 25. Thank you very much for that. Do you want to start with an opening statement or some comments about the legislation?

Mr Illingworth: No. We are ready to answer questions. We have set out our position and given our contribution in our submission.

Senator HUMPHRIES: You have heard some of the evidence given already today by some other witnesses. I want to ask for your response to some of the things that have been raised. On the last point made the Law Council, they have suggested that the lack of judicial review of some administrative decisions of DIAC has led to inferior decision making on the part of the department. That would be a not unnatural expectation where there is less of a judicial umbrella over decision making than one might find in equivalent areas of other government administration. Do you accept that there may be some grounds for that criticism?

Mr Illingworth: I suppose that I will divide that into two areas. The first is decision making around visa granting and assessment of claims. My colleagues may want to add to my answer on this, but essentially in terms of visa applications there are established mechanisms for merits review in many cases and established mechanisms to provide access to courts for judicial review of decisions. A large number of our four million plus entry visa decisions can have either merits or judicial review or both already.

In terms of decision making around detention, I do not see that there is a particular issue at the moment. We have administrative review mechanisms in place to look at people's situations in immigration detention at around the three-month point. There are ombudsman administrative reviews at around the six-month point. There is a statutory obligation for the ombudsman to review the cases of all persons who have been in detention for more than two years at the two-year point. That is the regime that has been established by government and that is the regime that we are implementing. It does provide extensive opportunities for the examination of cases.

I would comment that in addition to that there are regular, less formal but still important reviews of cases. Each person in immigration detention has a case manager. They are responsible for the regular oversight of the case to make sure not only that detention continues to be lawful and appropriate but that placement decisions within the immigration detention environment are appropriate and that services are drawn on when needed to support to people. Case managers are also responsible for ensuring that the processing of any claims is proceeding quickly and for identifying any bottlenecks. So there is a range of administrative oversight and review points for immigration detention.

Senator HUMPHRIES: So you say that there is no foundation for the Law Council's concerns in this area.

Mr Illingworth: Those are the arrangements that we have in place. If the government of the day wishes some changes to those arrangements then obviously we would implement those.

Senator HUMPHRIES: It does not quite answer my question. Do you want to add something, Ms Hardy?

Ms Hardy: I was just to add that since the High Court decision in November last year there are now three levels of judicial review available for decisions relating to the determination of whether people are owed protection or not. So there are judicial review levels available at almost all levels that are available for all other administrative action as well.

Senator HUMPHRIES: In estimates hearings involving the department in May and June last year there was evidence given that the department expected there to be a considerable spike in the number of unauthorised maritime arrivals who would not be deemed to be genuine refugees in the 2010-11 financial year. I have been off the committee since then so I have not been able to follow this as closely as I might have liked, but has there been an increase in the number of people found not to be genuine refugees in the course of the last financial year compared to previous financial years?

Mr Fleming: Yes. I do not have the precise stats with me but we have published ones that we can refer to on notice. In summary, we did see an increase in primary decisions determining that people were not refugees.

Senator HUMPHRIES: By approximately what order of magnitude?

Mr Fleming: Depending on the nationalities over various months, some of them went down in the order of 30 to 40 per cent approval, but we were also seeing significant numbers of those being overturned on review—80 per cent plus. More recently, the primary recognition rate is running at about 70 per cent for more recent cases and the overturn rates are coming down. There are more precise figures in the published statistics that we have and will be updating them shortly.

Senator HUMPHRIES: You might just refer me to the latest set of stats rather than taking that on notice. Can you just direct me to those?

Mr Fleming: There are quarterly asylum statistics on the departmental website.

Senator HUMPHRIES: Okay, I will go there to look at them. I think it was the Refugee Council which disagreed with your assessment that these amendments vest the judiciary with executive powers. They pointed out that it is still the responsibility of the department to decide whether a person should or should not remain in detention, subject to proper process. Can you justify the statement you make in your submission that the amendments vest the judiciary with executive powers? How does that come about?

Ms Hardy: At the moment the proposed amendments provide the Federal Magistrates Court with the power to: review the merits and reasonableness of detention; order the release from detention where the magistrate finds there are no reasonable grounds to justify the officer's decision to detain or continue to detain the person; order the release from detention where a magistrate finds it is not appropriate for a person to continue to be detained; and order that a person must be granted a visa, including a bridging visa, subject to any conditions the magistrate considers appropriate. Our position is that these are at the moment all matters for the executive and that passing these powers over would have potential constitutional problems.

Senator HUMPHRIES: They are matters for the executive, but they are subject to the laws that govern them. If a magistrate has the power to determine that the law has not been complied with in an administrative decision, is that not a fair enough basis for overturning that decision?

Ms Hardy: We would suggest that at the moment these are matters for the executive and should remain so. There are potential constitutional problems. It would be a matter for argument, pointing out that there could be potential constitutional problems with the proposed amendments.

Senator HUMPHRIES: Can you just expand on that? If the law vests decisions in an officer of DIAC and the law is also amended to say that a decision made by that officer, outside of the terms of the legislation, can be overturned, how is a constitutional issue given rise to there?

Ms Hardy: We are simply suggesting that what is currently a matter for the executive would then become a matter for the judiciary. There could be a blurring of the lines in the separation of powers doctrine and we are simply pointing out that there could constitutional problems with the amendments.

Senator HUMPHRIES: But there are hundreds of executive decisions made by subordinates of ministers or delegates of ministers which are subject to judicial review. That does not make any of them constitutionally difficult. I do not understand why this is different to any of those other circumstances.

Mr Illingworth: If I might, I will make a few points about those particular provisions. They are not structured as just overturning a decision of a bureaucrat. They are essentially empowering the court to make orders and to direct the grant of a visa. I note that the terminology does not refer to any particular visa; it says 'must be granted a visa, including a bridging visa'. So essentially at the moment you have a codified statute based visa system that Australia operates where people need to meet stated criteria that make them eligible to make the application and eligible for grant. All officers of the department are operating within that framework. You do not have the discretion to grant a visa except as is provided for in the codified framework. What this proposal would do would be to empower a magistrate to just order the grant of a visa of choice. My colleague was just making the point that

that goes well beyond the powers that we would operate within as bureaucrats and would be a potentially significant issue in terms of the blurring of the separation between the executive and the judiciary.

Senator HUMPHRIES: Okay. I will have to think about that; I am not sure I am convinced. Can I go to something that the Refugee Council said in their submission. They point out:

> … the Australian Government's own key immigration detention values … stipulate that:
>
> - 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.

They argue that the present regime does not permit that to be the case. You say that every three months it is administratively reviewed internally, but they argue that is not consistent with the principles that the government itself has stated. They also said:

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

They argue that that is also not the practice of DIAC. What do you say to those charges?

Mr Illingworth: The department's implementation of government policy is a matter which is progressed closely in consultation with government to give effect to its wishes and our statutory obligations. So the manner in which those principles are applied is something that we settle with government.

Senator HUMPHRIES: I will leave it there, thank you, Chair.

CHAIR: Senator Hanson-Young.

Senator HANSON-YOUNG: Thank you. The last time the statistics from DIAC were updated on the website was 20 May. These were in terms of how many people are in detention, the average length of time people have been in detention, the longest times people have been in detention and how many children have been in detention. None of that has been updated since 20 May. Is there a reason for that?

Mr Illingworth: I am not aware of the reason but I did quite recently become aware of that issue, and it is something that I will be seeking an answer to. I could speculate that there has been quite a lot of work going on across the department on a number of detention related issues, but I would have to get back to you with that answer.

Senator HANSON-YOUNG: Okay. I raise it because it is so difficult in these types of circumstances to deal with the evidence in front of us when we do not actually have that basic information. If you could take that on notice and give to the committee the most updated information, that would be helpful.

Ms Hardy: With the other inquiry that is coming in a few weeks those statistics would be available.

Senator HANSON-YOUNG: I would hope so. Thank you. You have made comments in relation to the current government policies, which I would argue are not being adhered to, around the internal three-month reviews of people's detention, the Ombudsman's six-month review and then the statutory two-year review. Evidence has been given to this committee in estimates by the department and in the finance and admin committee by the Ombudsman himself that those reviews have not been up to date and that they are not being able to be done. Even though you may argue that government has not changed their policy and the department is still trying to work to that, the reality is that that is not what is happening. That is not my evidence. That is evidence that the department and the Ombudsman have given. I want to be very clear about that.

The purpose of this amendment bill is to try to put some framework around the length of time that people should be detained. I do not see why the department should have such a big problem with those principles as outlined in 2008 by the minister such as detention as a last resort, not wanting long-term detention, children not being detained and all of those things. If you honestly believe that they are the principles that you are working towards then surely this amendment bill would help you to implement them as opposed to creating a constitutional crisis.

Mr Illingworth: Firstly, the issues about constitutionality are there irrespective of whatever one's opinions are about the merits of the objective. I take your point precisely about the pressures that the department is under. What I described was the administrative framework that we were working towards and there are some elements of that which are under considerable pressure and have been for some time both within our department and as I understand it within the office of the Ombudsman. There are a large number of people in immigration detention, far larger than we would like to see, and that imposes a significant challenge on us to maintain controls. The question about discussing the relative merits of this arrangement versus other arrangements is not something that I feel that we can usefully or appropriately contribute to. We can talk about the implementation issues or legal issues around the bill before us but issues around government policy are probably best directed to the government.

Senator HANSON-YOUNG: Okay, my point is though that this bill has been taken from those principles. It clearly outlines those principles in the beginning of the bill. There is the idea of putting a limit on the length of time that people should be detained for the purposes of health and security assessments and not detaining them until they are given a protection visa or not. We already do this to some extent because we have moved a number of children and their families out of detention facilities into community detention. All those people had their security and health checks done before they were moved into the community, so there is no problem with doing that. They are in community detention while they await the remainder of the application process for protection. If we can do it for one group of people in one instance what is the problem in doing it as a matter of course?

Mr Illingworth: There are a range of options available to the department and some options available to the minister. We work within the statute law which means that in relation to irregular maritime arrivals as departmental officers there is very little that we can do in terms of visa grant and nothing that we can really do in terms of residence determination. These are matters for the minister to decide and the minister with the Prime Minister announced in October last year a significant initiative to increase the use of residence determination to place children and families and vulnerable people into the community. Since that time, there have been about 1,642 people placed into residence determination—as at two days ago—and we currently have 982 of those in residence determination. Looking at the detention population, that is a significant proportion of people, predominantly IMAs, for whom placement in the community, quite quickly in some cases, has been the way in which Australia has responded to their arrival and the need to process them.

Senator HANSON-YOUNG: So it is doable. You have just outlined how doable it is.

Ms Hardy: This group was prioritised because of the children involved. That is why they were done in the time. I think that has to be acknowledged.

Senator HANSON-YOUNG: And of course what this bill is doing is saying that that would simply be a matter of course. We would not have to wait until we had 1,000 children in immigration detention before we got the minister to go, 'Oh, actually I'd better do something about this,' which is currently the way. It is simply up to his discretion at the moment.

Mr Illingworth: Perhaps on a point of correction, the powers that seem to be given to the magistrate do not relate to community detention, as we would call it, or residence determination; it is 'in detention' or 'out of detention'. If it is 'out of detention', there is the question of what status do they have, either nothing or grant them a visa. That is the other power. So the response of the Australian government at the moment has been to move people, particularly starting with the vulnerable people and children, into very low-impact—if that is the right term—forms of what is legally domestically still immigration detention, where we have full duty of care responsibilities.

Senator HANSON-YOUNG: I accept that, but in order to move them into that community detention setting they have had to have their health and security checks done. No-one was moved without having their health and security checks done. That was part of the process of not just the prioritisation but then being able to move them into those new settings. We have obviously raised this before. Maybe Mr Fleming was in the room at the time. This committee during estimates received evidence from ASIO that those initial security checks could actually be done within a matter of days. We know, based on the arrangements as announced in the last couple of weeks in relation to the removal of people to Malaysia, that health and security checks are going to be completed within 72 hours. There is a newly arrived boat docking in Christmas Island as we speak. Those people will be subject to health and security checks before they are removed to Malaysia. Is that correct?

Mr Fleming: Yes. I think it becomes a question of: for what purposes are you doing the security assessment? So a security assessment for the purposes of whether somebody should go into community detention is different from one as to whether they should be granted a permanent visa and is different again from the security issues, whatever they are, that ASIO would be looking at for the purposes of transferring someone to Malaysia.

Senator HANSON-YOUNG: There is some flexibility.

CHAIR: We are not here to examine the pros and kinds of the Malaysia agreement. We are just focusing on the legislation.

Senator HANSON-YOUNG: I accept that. The reason I am asking is that we are specifically talking about the process of doing those checks. As you have outlined, Mr Fleming, there is already flexibility in the system to enable things to happen when the government wishes. Mr Fleming, when was the last time you went to a detention centre?

Mr Fleming: I have not been to a detention centre for a number of years.

Senator HANSON-YOUNG: And Mr Illingworth?

Mr Illingworth: On 27 June I was in a detention facility.

Senator HANSON-YOUNG: Which detention facility was that?

Mr Illingworth: Inverbrackie.

CHAIR: I am not sure if this is relevant, Senator.

Senator HANSON-YOUNG: It is relevant, Chair, because the underlying principle of this amendment bill is that immigration detention would not be required for the purpose of assessing people's claims for protection; it would simply be required for health and security checks. The reason is, unless there was a risk to the community of somebody being released and therefore they would continue in detention, that we know the impact that immigration detention has on vulnerable people. The reason I ask whether you have been to a detention centre recently, Mr Fleming, is that the situation is pretty bad. Detentions are pretty high. The levels of self-harm and suicide are skyrocketing, and I do not throw that around. That is not my assessment; that is the assessment of the Commonwealth Ombudsman. That is the assessment of the department's own health advisory group.

It is a fairly dire situation when there is no check on the bureaucratic arm of the government as to how long vulnerable people—anyone can be detained. We currently have a question where people are being detained indefinitely. There is no time limit by which they need to have their case resolved. They have no idea what their sentence effectively will be, and it is leading to people actually taking their own lives. Do you accept that the situation is not particularly great?

Mr Illingworth: I might make a few initial comments. I do not think there is anybody that I have spoken to within the department in recent months or indeed years who is not incredibly seized at the significance of depriving someone of their liberty. We take this very seriously and we know that detention has adverse impacts on people—it is quite variable. Sometimes people seem to be a little more resilient than others, but we know it has an impact. Our aim is to keep detention, if it is necessary, to the minimum period of time possible and to provide the services that we should be providing to people while they are in detention to try and support them. However, we are also very aware that we have a major logistical challenge. There are a lot of people in detention, not quite so many now as there were a few months ago but still there are a lot of people in detention. They are in dispersed environments around Australia. They did not tell us in advance that they were arriving, so our planning has been quite hurried to try and prepare arrangements for them on arrival. So we are very conscious of the fact that, in a perfect world, a response could have been a more receptive environment. Detention facilities and services could have been perhaps better if we had had advanced notice. We are trying to do the best, as it were, with what we have.

Senator HANSON-YOUNG: I put it to you, Mr Illingworth, that the reason that there are so many people detained for long periods of time is because there is (a) no limit and (b) there is a requirement that people have to be detained for the entire length of their application process. This amendment bill would go straight to that issue and say: conduct the health and security checks and then release people on the basis that they do not pose a risk to the community while they go through the remainder of their application process. This is not some bizarre idea that has come out of the Australian Greens policy workshop; this is how it is done in other countries around the world. It is doable and it would go right to the heart of this immense workload that you are referring to and the impact that is having directly on individuals. Can you see that?

Mr Illingworth: I do not think our comments in our submission are trying to dispute—and indeed the government policy is very clear—that mandatory detention of unauthorised arrivals is for specific purposes. It is for the management of health, identity and security risks to the Australian community. That is the policy we are doing our best to apply and we are trying to do that, understandably, within the legislation that requires us to perform in certain ways.

CHAIR: And just to clarify, Mr Illingworth, this piece of legislation is different from the current policy that is in place. I am not asking you to comment on the current policy, but it is a different policy position from what is currently in place.

Mr Illingworth: I think that is right. For example, looking at the issue about the judicial review aspects, looking at what will happen in this process, it is quite possible that a person could be released from detention in situations where the health, identity and security risks to the Australian community are not managed—or at least there could be a release in a situation where it is up to a particular magistrate with a fair degree of latitude to determine those issues about what is an appropriate management. Courts in other circumstances make decisions. It is an issue for parliament to decide whether they want courts to make decisions in this environment. But, as mentioned earlier, the range of options available to the magistrate under the bill would raise issues about whether

the magistrate would be going into areas where, constitutionally, the decisions would be ones for the executive rather than the judiciary.

Senator HANSON-YOUNG: What is the current position of the department in relation to the obligations the minister has as the legal guardian to unaccompanied minors?

Ms Hardy: I am sorry; I do not understand the question.

Senator HANSON-YOUNG: Under the way the Migration Act currently stands, the immigration minister is the legal guardian of any children who arrive unaccompanied. Does the department (a) accept that is the case?

Ms Hardy: Absolutely, yes.

Senator HANSON-YOUNG: What is the role of the legal guardian in relation to an unaccompanied minor?

Ms Hardy: To ensure that the welfare of the child is met—all of the guardianship obligations as it is understood in every context.

Senator HANSON-YOUNG: Would you see the reason why there has been criticism around the conflict of interest that exists between the requirements and obligations of the legal guardian being the immigration minister and the role and obligation he has in relation to the detention and determination of the detention of children?

Ms Hardy: I understand that there has been another inquiry looking at those issues, and the department has made separate submissions on that issue. I do not want to comment any further on that, unless either of my colleagues do.

Mr Fleming: We do not have an IGOC Act expert here.

Senator HANSON-YOUNG: Okay. You are right, Ms Hardy—there is the Commonwealth Commissioner for Children and Young People Bill, another one of my private senator's bills—and we heard evidence from the department that this was an issue that the department was looking at. I guess that is why I am asking what the current status is. Has it changed? I think that inquiry was in March.

Ms Hardy: I do not have any further information.

Mr Fleming: We are not aware of any changes since March. We are certainly aware of the evidence given by the department at that time. If there are any further developments, we can of course let you know.

Senator HANSON-YOUNG: Thank you. The McMillan report was requested as a result of the High Court decision in, I think, October—

Ms Hardy: November.

Senator HANSON-YOUNG: November last year. Where is that report currently at? Has it been completed? Is it with the department? Is it with the minister?

Ms Hardy: It is currently with the minister and it is being considered by the minister at this stage.

Senator HANSON-YOUNG: Has there been any time frame as to when that report would be made public?

Ms Hardy: No, the minister indicated at the time that he asked for the report that the report would be made public but we do not have a time frame.

Senator HANSON-YOUNG: When did he receive the report?

Ms Hardy: I do not have that information in front of me but I can certainly provide that to you if I can take it on notice.

Senator HANSON-YOUNG: Has the department seen it? Has Mr Metcalfe seen it?

Ms Hardy: Yes, the department has seen it.

Senator PRATT: I want to ask the department about their view that this bill would make the current regime unworkable. I think there are a number of things they have drawn on in their submission, one of which is the application of asylum seeker assessment principles to all decisions. Could you comment on that please? I think it is subsection(4)(i)—any person making any decision will have regard to the asylum seeker principles.

Mr Illingworth: Perhaps I can make a couple of comments firstly about the principles. Essentially, one major issue is that the translation of broadly stated policy principles into legislation which then would require the interpretation of those principles in order to apply them can lead to quite unforeseen interpretations of those principles.

Senator PRATT: Might some of those be contradictory?

Mr Illingworth: They could be contradictory internally both in terms of decision to decision until precedents are settled but also it could lead to the development of Australian interpretations at law which differ from

international interpretations and it raises the spectre of quite a degree of subjective uncertainty in applying principles to particular cases. They are principles everybody agrees with but quantifying them and weighting them in a particular case against other factors—

Senator PRATT: Would any of those contradictions impact on someone's length of time in detention?

Mr Illingworth: They would, if you are looking at issues like what is arbitrary and treating people with humanity, those sorts of principles. It is very hard to see how, without further precision of language, there would be sufficient detail in the legislation to provide a consistent response from the courts.

Senator PRATT: And that is because of the expression of broad principles as law.

Mr Illingworth: That is right.

Senator PRATT: I suppose one of those is the specific example which I think is on page 10 of your submission—responsibilities of decision makers.

Mr Illingworth: Yes, I suppose that is an unintended consequence—that the asylum seeker principles, while termed as such, would have to be taken into account by decision makers for a broad range of decisions under the Migration Act and not just in relation to asylum seekers or indeed in relation to detention.

Senator PRATT: So how can you be sure that that would be the application of it? Is that just your reading of the law? Is there any sense that, because clearly an idea like that is nonsense, therefore the law would see it as nonsense? Or is it the case that, because you are fairly confident that because of the way the law is written, there would be an obligation to read it in this way?

Mr Illingworth: The bill, as drafted, quite clearly states that that is the intention. Certainly, if one is thinking about a person who has received an adverse decision under the migration legislation then it is not unknown for such people to pursue legal avenues of redress. We have had 2,000 or 3,000 cases afoot at one time in the Federal Court doing just that, with varying degrees of strength of argument. I would have thought that, looking at the language in the bill, one could make a very strong case that that was—

Senator PRATT: Clearly, this bill is before us because of concerns about the length of detention that some people are subjected to. Can you outline for me the process that the government is currently going through to look at those concerns. I understand that there is currently an inquiry underway.

Mr Illingworth: Sorry, Senator, I missed the beginning of your question.

Senator PRATT: It was just an acknowledgement that this bill is before us because of concerns about the length of detention of some people.

Mr Illingworth: There are a range of actions underway within the department to try to minimise the duration of detention. As I mentioned earlier, some of them are around greater use of residence determination, which has been significantly expanded in recent months. Other efforts have focused on trying to deal with the significant processing challenges of claims that we have and on working with other agencies where external checks need to be resolved in order to progress a case. As to other inquiries, I am sure that these sorts of issues will come up again in the broader inquiry, which is being conducted in the parliament.

Ms Hardy: In terms of trying to move the judicial review decisions through the processes, we have been meeting with the courts and working on a range of other alternatives to try to get those matters dealt with as speedily as possible, again, to try to reduce detention times.

Senator PRATT: The Law Council refers to the review being undertaken by Professor John McMillan. Is that a review undertaken by government or someone else?

Ms Hardy: The Administrative Review Council is seeking—

Senator PRATT: Okay. We have covered that one. It was not clear in their submission that that is the review that they were referencing. Thank you. I have no further questions.

CHAIR: Thank you very much for your time this morning and this afternoon and for your submission. It is much appreciated.

Committee adjourned at 12:23