4

Review mechanisms for ongoing detention

4.1 Accountability and review mechanisms are essential for any area of government administration and particularly so when this administration may result in a decision regarding the length of detention or release from detention.

4.2 In its subsequent reports to be tabled in 2009, the Committee will consider the oversight system for immigration detention facilities, including scrutiny of conditions and service provision to people in immigration detention.

4.3 The previous two chapters of this report have addressed criteria for release from immigration detention under the Minister's announcements of 29 July 2008. Under the Committee's terms of reference for this inquiry it has also been charged with examining the criteria that should be applied in determining how long a person should be held in immigration detention.

4.1 In the context of the announced values under which immigration detention shall be a last resort and for the shortest possible time, this chapter considers length of detention and mechanisms for reviewing the need for a person's ongoing detention, including:

- the format and effectiveness of the three month review by the Department of Immigration and Citizenship (DIAC)
- the format, effectiveness and powers of the six month review by the Commonwealth Ombudsman, and
- other options such as merits and judicial review.

4.2 The chapter also examines possible improvements to the accountability and transparency of decision-making, and concludes with discussion on the value of reflecting the reforms in legislative changes.

Framework for the review of ongoing detention

4.3 As part of the 29 July 2008 announcements, the Minister of Immigration and Citizenship outlined a two-stage review framework to assess cases of ongoing detention. This framework would consist of an internal review at the three month mark conducted by DIAC and a review by the Commonwealth Ombudsman at the six month mark.[1]

4.4 Following these announcements, DIAC informed the Committee in September 2008 that its highest priority activity for implementation of the values was looking at 'greater review mechanisms in terms of the decisions to detain'.[2]

4.5 Transparency and accountability in the review of immigration detention decisions is essential. In the past the system has been undermined by maladministration, highlighted by a number of high profile cases of the unlawful detention of Australian citizens or residents, and by prolonged detention of some with no explanation or justification provided to the detainee or their advocate for the delays resulting in years of detention.

4.6 Any changes to the immigration detention framework will not be meaningful without a credible system of accountability and review of detention decisions. This is vital to ensure the full implementation of the announced values, to ensure a cultural change in the administration of Australia's detention decision-making, and to restore public confidence in the justness and humanity of Australia immigration detention policy.

1 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'New directions in detention', speech delivered at Australian National University, 29 July 2008, p 12.

2 O'Connell L, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 4.

Three month review by the Department of Immigration and Citizenship

Current internal review mechanisms

4.7 DIAC have advised the Committee that each detention case is currently reviewed as follows:

- by a Detention Review Manager to assess the lawfulness and reasonableness of the initial compliance decision to detain (within 24 hours if the identity of the client is known or 48 hours if identity is unknown), and
- every 28 days by the Detention Review Manager and a Case Manager.

4.8 The mandatory reviews every 28 days are intended to ensure that:

> …detention of each person remains lawful and reasonable, knowledge or reasonable suspicion continues to be held that the person is an unlawful non-citizen, outstanding identity issues have been followed up, and follow-up of issues relating to the client are conducted through appropriate means of referral or escalation. [3]

4.9 When considering whether there are any alternatives to immigration detention, the Detention Review Manager must review the decision of the detaining officer that the grant of a bridging visa is not appropriate. As part of their review, the Detention Review Manager must also be satisfied that alternative places of accommodation have been considered for clients, including community detention options.[4]

4.10 In 2007-08, only 74 per cent of ongoing decisions to detain were reviewed by the Detention Review Manager within 'service standards', which is taken to mean within the specified 28 days.[5] This would suggest that around one quarter of decisions to detain were not reviewed with the expected 28 days.

3 Department of Immigration and Citizenship, supplementary submission 129f, p 10.

4 Department of Immigration and Citizenship, supplementary submission 129f, p 10.

5 Department of Immigration and Citizenship, *Annual report 2007-08* (2008), p 121.

Format of the three month review

4.11 In his speech of 29 July 2008, the Minister for Immigration and Citizenship said that there would be a new internal review conducted three months after the initial detention. The Minister said that:

> In determining the ongoing detention of a person, the onus of proof will be reversed. A departmental decision maker will have to justify why a person should be detained against these values that presume that that person should be in the community.[6]

4.12 The three month internal review is 'to make sure we do not let the issues lapse for want of action'.[7] This review will be conducted by a 'senior departmental officer'.[8] It is not known at what public service level that person will be; nor has it been confirmed whether it will be a single officer or several. The Committee recommends that the review is conducted by an officer at Deputy Secretary, First Assistant Secretary or Assistant Secretary level.

4.13 DIAC has indicated that its implementation model for the review aims for a process that is:

- comprehensive, considering the totality of the client's immigration history
- investigative, and consider the validity of all departmental actions and decisions
- analytical, questioning the reasoning and evidence underpinning departmental decisions, and
- challenging, actively querying departmental actions, requiring responses to concerns identified.[9]

4.14 If approved, it is proposed this model would be fully implemented by January 2009.

Effectiveness of the review

4.15 While many inquiry participants welcomed the commitment to increased formal review, there were fears that as this review was not

6 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'New directions in detention', speech delivered at Australian National University, 29 July 2008, p 11.

7 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Senate Hansard*, Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 21 October 2008, p 93.

8 Senator the Hon C Evans, Minister for Immigration and Citizenship, in *7.30 Report*, ABC Television, transcript, 29 July 2008.

9 Department of Immigration and Citizenship, supplementary submission 129f, p 11.

independent of the detaining authority, its effectiveness would be compromised or at the very least, limited.[10] While the Minister has stated that the onus to justify detention will be placed on DIAC, in effect at the three month review DIAC is only required to justify the decision to detain internally.

4.16 While there was support for the intent of the review framework, there was some criticism of DIAC's corporate culture and their capacity to effectively self-monitor. A Just Australia stated that:

> It is unclear to what body a departmental officer must justify detention… DIAC does not have an appropriate track record of internal reviews, given that this is the same department that in recent years has unlawfully detained hundreds of people and unlawfully deported an Australian citizen. [11]

4.17 Anna Copeland, of the Southern Communities Advocacy Legal and Education Services Community Legal Centre in Western Australia, said:

> I think under the current law the Department of Immigration is given enormous power in terms of determining when a person will be released or determining that a person is an unlawful non-citizen, and we know that that has led to some problems, which were investigated by the Palmer and Comrie inquiry.[12]

4.18 Other witnesses also noted that the three month review would be undertaken by a department with a track record of risk aversion and a presumption in favour of detention, despite recent reductions in the use of detention for some groups such as visa overstayers. The Refugee and Immigration Legal Centre (RILC) in Melbourne drew on DIAC's administration of bridging visas for vulnerable people in immigration detention as evidence of this:

> The presumption of detention has been strong, and has included only limited legal exceptions… In practice these limited exceptions were systematically applied in an overly restrictive, arbitrary and, on occasion, even capricious manner… In RILC's experience, the institutional approach

10 Manne D, Refugee and Immigration Legal Centre, *Transcript of evidence*, 11 September 2008, p 23.

11 A Just Australia, submission 89, p 9.

12 Kenny M, Southern Communities Advocacy Legal and Education Services Community Legal Centre, *Transcript of evidence*, 9 October 2008, p 14.

> was characterised by a strong presumption against the use of these exceptions, to the extent that they were rarely invoked or applied. Indeed, so strong was the presumption against their use, that if the Department of Immigration was confronted with a compelling case for exercise of release powers, it would commonly seek to avoid their use altogether.[13]

4.19 This was supported by comments from the Immigration Detention Advisory Group (IDAG) claiming that in the past DIAC and successive detention services providers had been 'risk-averse':

> Although this is understandable given the nature of the work in which they are engaged, we believe that it frequently results in less than satisfactory outcomes. Underlying this appears to be the feeling that releasing people from detention into the Australian community creates significant risks for the community at large.[14]

4.20 Others noted the profound shift from DIAC (and GSL) that was required to adjust from a focus on security and detention to a risk-based approach with the onus on justifying a need for detention. As an example of a security focus of detention, psychologist Guy Coffey recounted the use of handcuffs and other restraints in taking immigration detainees outside of centres to hospitals, medical appointments and tribunal hearings.[15] He explained that:

> In the early days, people who were profoundly disturbed with very severe psychotic illnesses, for example, would arrive in handcuffs, totally disoriented, unable to give any kind of account of themselves. They would arrive in handcuffs with two or three burly officers. What was going on there was incredibly inhumane. The overriding preoccupation was one of security; the person's psychological needs were very much secondary... It still has not changed. The legacy is still there but it has been ameliorated slightly.[16]

4.21 This security focus in the administration of detention is also demonstrated in the financial penalties that were written into the detention services provider contracts for escape of detainees. These

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13 Refugee and Immigration Legal Centre, submission 130, pp 5-6.

14 Immigration Detention Advisory Group, submission 62, p 6.

15 See Lovitt P, submission 3, pp 16-18, for an example from 2008.

16 Coffey G, *Transcript of evidence*, 11 September 2008, p 81.

created an incentive for a high-security environment in detention centres irrespective of the risk posed by individual detainees. It is understood that these penalties no longer feature in detention contracts.

4.22 Others also raised arguments against reliance on internal review given DIAC's track record of inconsistent and defective administration of detention decision-making. RILC also submitted that: 'The operation of the system has often been dependent on personalities and informal relationships, and powers have often been exercised in an often *ad hoc* and inconsistent manner'.[17]

4.23 In David Manne's experience:

> Often identification of those very fundamental issues which are central to the question of the deprivation of liberty have only been resolved through a matter of chance, I would say, in our experience, and that chance is that someone actually happens to be able to get on to a competent lawyer who actually looks at the forensics of the situation and says, 'Hold on, you should not be in here'. We have personally had this experience a number of times of actually looking at the person's actual situation carefully and then contacting the Department of Immigration and arguing that the person should not be detained, that they have been unlawfully and wrongfully detained and should be released immediately. I can also assure the Committee that that has, on occasion, procured pretty much immediate release of a person. Part of our experience is that in some ways the system has relied on being able to find by chance the right person or navigate some sort of complex bureaucratic web to find someone who will stand up and say, 'Yes, okay, I will take responsibility for this' or 'I will look into this', and that to us is a completely unsatisfactory situation.[18]

4.24 In the public arena there are also enduring issues with DIAC's corporate culture and the perception that this would inhibit the full recognition of the new detention values in the three month review. As a recent article opined:

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17 Refugee and Immigration Legal Centre, submission 130, p 20.

18 Manne D, Refugee and Immigration Legal Centre, *Transcript of evidence*, 11 September 2008, p 16.

> While alternatives to detention have become more commonplace recently, [the new] approach will still be discomforting for a department not known for the quality of its decision making or for adjusting its procedures to suit individual circumstances'.[19]

4.25 UNHCR guidelines call for the right of a detained asylum seeker to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This is followed by regular periodic reviews of the necessity for the continuation of detention, which the asylum-seeker or his representative would have the right to attend.[20] At a public hearing, Richard Towle, the Regional Representative, took a practical approach to the form of this review and focussed on it having procedural integrity:

> From UNHCR's perspective, what is important is a clarity of decision making that is transparent and where reasons are recorded in writing. If there is to be a review, it has to be an effective review. Whether it is within the same department by superiors, I think, is a question of quality, but at the end of the day it needs to be an independent and arms-length review itself.[21]

4.26 Kate Gauthier of A Just Australia recommended that if DIAC was to proceed with the three month reviews, that officers should receive appropriate training:

> One of the things I would suggest to the department is that they… hire somebody who has the expertise in making those kinds of detention decisions where you have to weigh up security and compliance risks and the safety of the community versus the inherent right to liberty.[22]

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19 Nicholls G, 'Immigration's culture war', *Inside story*, 2 November 2008, viewed on 5 November 2008 at http://inside.org.au/immigration-culture-war/.

20 Office of the United Nations High Commissioner on Refugees Geneva, *Revised guidelines on applicable criteria and standards relating to the detention of asylum seekers* (1999), p 6.

21 Towle R, Office of the United Nations High Commissioner on Refugees, *Transcript of evidence*, 15 October 2008, p 3.

22 Gauthier K, A Just Australia, *Transcript of evidence*, 24 October 2008, p 12.

Committee comment

4.27 The Committee commends the resources that DIAC has invested to progress cultural change in the department. However this Committee, and many other groups, continue to have some reservations about the capacity of DIAC to effectively achieve the necessary shift from a risk-averse framework with the presumption of secure detention, to an assessed-risk framework where the onus is on establishing the need to detain.

4.28 The Committee also notes that, during 2007-08, in over one quarter of cases DIAC did not review the decision to detain within the 28 days set out in the service standards.[23]

4.29 Further, in the past administrative errors in DIAC have resulted in cases of unlawful detention, and in some instances there errors have continued for a number of years with serious consequences for those in detention. In addition, detainees and their advocates continue to express frustration that information from DIAC regarding case progress is not forthcoming and decisions to detain appear arbitrary or without clear justification.

4.30 Given this context, it is right for there to be concerns regarding the integrity of a three month detention review being conducted by and reporting to the very agency responsible for the initial decision to detain – particularly when this agency has such a chequered history.

4.31 Consequently the Committee considers it essential that the three month review report is provided to the person in immigration detention and their advocate if so authorised by the detainee. It has not been made clear if this is the intention for the three month review; however the Committee considers this to be critical to strengthening the effectiveness of the review system and restoring some level of confidence in DIAC processes.

4.32 In addition, there is as yet little detail about the format or scope of this review. To ensure the reforms are accompanied by transparency of DIAC procedures and case progress, the Committee recommends DIAC develop and publish the template that will be used to conduct the three month review.

4.33 The Committee considers that the Australian public, detainees and their advocates have the right to know the scope and

23 Department of Immigration and Citizenship, *Annual report 2007-08* (2008), p 121.

comprehensiveness of the three month review, and the publication of the DIAC template will help achieve this.

Recommendation 10

4.34 **The Committee recommends that the Department of Immigration and Citizenship develop and publish details of the scope of the three month detention review.**

The Committee also recommends that the review is provided to the person in immigration detention and any other persons they authorise to receive it, such as their legal representative or advocate.

Six month review by the Commonwealth Ombudsman

Current oversight by the Commonwealth Ombudsman

4.35 The Commonwealth Ombudsman's oversight into immigration matters was extended by amendment to the *Migration Act 1958* (the Act) in 2005.[24] The Ombudsman now has a critical role in the administrative review of persons detained under section 189 of the Act. This may include consideration of the legal, process and administrative factors that impact on the length of time a person may spend in detention.

4.36 Under the 2005 amendments, the Commonwealth Ombudsman is required to review the cases of people held in immigration detention for two years or more. Section 486O (1) of the Migration Act provides that the Ombudsman, upon receiving a report from DIAC, is to provide the Minister with an assessment of the appropriateness of the arrangements for the person's detention. Since the establishment of this function the Ombudsman has tabled reports on 480 long-term review cases. Some of these referred to the same detainees as their cases were re-reported to the Ombudsman after six months, as required by legislation.

4.37 In addition to these reviews, a person may lodge a complaint with the Commonwealth Ombudsman at any time. For example, in 2007-08,

24 Commonwealth Ombudsman website, viewed on 4 November 2008 at http://www.comb.gov.au/commonwealth/publish.nsf/Content/complaints_immigration.

the office received 1528 approaches and complaints about DIAC. Complaints commonly referred to delays in visa applications, handling of complex cases, Freedom of Information requests and conditions and alleged assaults in immigration detention centres.[25]

4.38 The Commonwealth Ombudsman can also investigate, on his own initiative or 'own motion', the administrative actions of Australian Government agencies.[26] The Ombudsman's own motion investigations into aspects of the administration of the Migration Act, regulations and procedures have provided an examination of recurring legal and process issues.[27]

4.39 In his speech of 29 July 2008 the Minister announced that, in addition to the statutory two year reviews, the Commonwealth Ombudsman would be tasked with responsibility for an additional mandated review for detention cases at the earlier interval of six months.[28]

Format of the six month review

4.40 Detail is not yet available regarding the scope and powers of the Commonwealth Ombudsman in conducting the six month review. It is understood that DIAC is currently consulting with the Commonwealth Ombudsman as to the exact nature and format of this review.[29]

4.41 When the Commonwealth Ombudsman spoke to the Committee in September 2008, he outlined his intentions for the six month review process:

> Firstly, it will be guided by the same principles as the two year review—that is, the Ombudsman's office will conduct an independent review of the circumstances that relate to a person's detention. That review will be based initially on information provided by the department in a report, much as

25 Commonwealth Ombudsman, *Annual report 2007-08* (2008), p 90.

26 *Ombudsman Act 1976*, section 5(1)(b).

27 For the financial year ending 2008, the Commonwealth Ombudsman completed 14 reports of own motion and other major investigations. Investigations into administrative process and procedures of the Department of Immigration and Citizenship included *Administration of detention debt waiver and write-off*, *The Safeguards system* and *Notification of decisions and review rights for unsuccessful visa applications*.

28 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'New directions in detention', speech delivered at Australian National University, 29 July 2008, p 12.

29 O'Connell L, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 4.

> they provide a report for the two year detention reviews. It will be based on analysis of departmental files, where that necessity arises, and we will invite every person who is subject to a six month review to meet personally with a staff member of my office so that their issues can be discussed. [30]

4.42 The Ombudsman suggested that the reports of the six month reviews would cover similar issues to the two year detention reports, but would probably be briefer in order to ensure that the reports could be prepared more quickly. The six month reports would likely focus more on the specific reasons as to why a person is in detention, and the steps taken to resolve their immigration status and any continued need for detention. They would also examine 'any other issues arising about the experience of the person in detention—mental health issues and the like'.[31]

4.43 The Ombudsman was supportive of the new review framework and the opportunity provided for earlier scrutiny of detention cases. He said:

> An objective of bringing this independent review process forward from two years to six months is to ensure that, at a much earlier stage in the detention process, somebody independently is asking hard questions about what is being done and what realistically is the prospect for resolving a person's immigration status issues; and are all options being considered and other forms of detention; grant of different visas. One of the concerns we have had in the past is that issues languished until the two year detention process cut in. That will be a strong focus.[32]

4.44 In some circumstances, such as when a person had already been released from detention, the Ombudsman did not intend to conduct a review, unless there were special issues that warranted being brought to DIAC's attention.

4.45 All six month Ombudsman reports will be required to be provided to the Secretary of DIAC, rather than directly to the Minister as is the practice with the two year reports.[33] In addition, the Ombudsman indicated that he intended to provide a regular report to the Minister

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30 McMillan J, Commonwealth Ombudsman, *Transcript of evidence,* 17 September 2008, p 4.
31 McMillan J, Commonwealth Ombudsman, *Transcript of evidence,* 17 September 2008, p 4.
32 McMillan J, Commonwealth Ombudsman, *Transcript of evidence,* 17 September 2008, p 6.
33 McMillan J, Commonwealth Ombudsman, *Transcript of evidence,* 17 September 2008, p 4.

consolidating his analysis of the cases and issues dealt with over a set period, such as one month or three months.

4.46 The Ombudsman also indicated that interviews will be conducted with detainees as part of the six month review. It has not been made clear whether the Ombudsman is able to provide a copy of the review to the detainee or their advocate.

4.47 In September when the Ombudsman spoke to the Committee he was not able to advise if the Minister would table the six month review reports in the Parliament, or if the reports would be subject to public release. The Ombudsman's two year reviews become public documents (with identifying information removed) and the Minister must table a consolidated version the reviews in Parliament within 15 sitting days of receiving it.

Effectiveness of the review

4.48 While inquiry participants were positive about the Commonwealth Ombudsman's role in the immigration detention field, a number of concerns were raised about the potential effectiveness of the six month review. Firstly, it was noted by a large number of individuals and organisations that the Ombudsman's recommendations were not enforceable and did not necessarily provide any protection against ongoing detention by DIAC.[34]

4.49 If the Ombudsman considers there has been a deficiency in the administrative actions of DIAC, he can recommend that the Department provide a solution or remedy. These recommendations might include asking them to reconsider the original decision; give further reasons for a decision; offer an apology; change a policy or procedure; or review legislation or policy.

4.50 In relation to the two year detention reports, the Ombudsman's recommendations might include:

- recommending the continued detention of the person

34 Gauthier K, A Just Australia, *Transcript of evidence*, 24 October 2008, p 12; Australian Council of Heads of Schools of Social Work, submission 119, p 7; Law Institute of Victoria, Liberty Victoria and The Justice Project, submission 127, p 30; Manne D, Refugee and Immigration Legal Centre, *Transcript of evidence*, 11 September 2008, p 23; Refugee Council of Australia, submission 120, p 10; Australian Human Rights Commission, *Transcript of evidence*, 24 October 2008, p 6.

- recommending that another form of detention is more appropriate to the person (such as residing at a place in accordance with a residence determination), or
- recommending the release of the person into the community on a visa.[35]

4.51 However, as the Uniting Church of Australia noted, recommendations from the Commonwealth Ombudsman are not enforceable:

> Current legislation does not make the Minister accountable to the public or to the Parliament for any decision not to follow the Ombudsman's recommendations, making this process ineffective in ensuring the humane treatment of asylum seekers in detention. [36]

4.52 Additionally, under the *Ombudsman Act 1976* the Commonwealth Ombudsman is not authorised to investigate action taken by a Minister, so it cannot assess visa decisions made under ministerial discretion.

4.53 DIAC was unable to provide data on the number of incidences that the Minister did not implement a recommendation of the Commonwealth Ombudsman for a person should be released into community detention or granted a visa, resulting in that person remaining in an immigration detention facility.[37]

4.54 The Ombudsman reported that less than half, approximately 45 per cent, of recommendations made in the two year reports were accepted by the Minister. Around a further 20 per cent of recommendations were partially accepted or implemented after the event. This is in contrast to the adoption of recommendations from the Ombudsman in areas other than immigration:

> The disappointing response that we received to the two year detention reports was contrary to the experience of the Ombudsman in all other areas, where the general pattern we find is that over 90 per cent of our recommendations are

35 Parliamentary Library, Migration Amendment (Detention Arrangements) Bill 2005 (2005), Bills digest no 190, 2004-05, Prince P, p 9.

36 Uniting Church of Australia, submission 69, p 6.

37 Department of Immigration and Citizenship, supplementary submission 129f, p 3.

> accepted by departments when they are in individual reports.[38]

4.55 In relation to the existing two year detention review reports, the Ombudsman also noted that in around 20 or 30 per cent of cases it was difficult for his office to assess whether the recommendation had been accepted or not. This was because the Minister's response in Parliament did not provide sufficient information to address the substance of the Ombudsman's recommendations:

> It was a great matter of concern to me that the ministerial response to the two year detention reports was not as direct and fulsome as, in my view, the system warranted and people expected.[39]

4.56 However, the Ombudsman did note that he felt there had been some positive developments in the responsiveness to recommendations. Firstly, he indicated evidence of more senior-level DIAC engagement with the long-term detention reports and explained that increasingly senior DIAC officers were participating in discussions with the Ombudsman's office about recommendations made in reports.

4.57 Secondly, the Ombudsman had met with the Minister for Immigration and Citizenship and individually considered each case of long-term detention. He explained:

> It has been apparent to me that there is a much greater ministerial focus on those two year detention reports, and I think the statistics indicate that that senior level and ministerial engagement has, with other changes, caused a major change in the detention population'.[40]

4.58 In relation to responsiveness to recommendations, the Ombudsman observed that 'the Minister's most recent tabling statement had been significantly more comprehensive than in the past.[41] However, he also noted the capacity for greater transparency to keep the Parliament and the people of Australia informed:

> We consider that the positive developments and public accountability could be further enhances by providing for future ministerial tabling statements to set out for each

38 McMillan J, Commonwealth Ombudsman, *Transcript of evidence*, 17 September 2008, p 12.
39 McMillan J, Commonwealth Ombudsman, *Transcript of evidence*, 17 September 2008, p 12.
40 McMillan J, Commonwealth Ombudsman, *Transcript of evidence*, 17 September 2008, p 12.
41 Commonwealth Ombudsman, supplementary submission 126a, p 2.

> recommendation made by the Ombudsman, whether the recommendation has been accepted, rejected or is no longer applicable. There should be accompanying commentary.[42]

4.59 In addition to the lack of enforceability for the Ombudsman's recommendations, there was some criticism regarding the timing of the proposed review. As the three month review will be internal to DIAC, the six month review represents the first mandated external review of a person's detention.

4.60 For some witnesses, although six months was an improvement on two years, this was an unacceptably long period of time for ongoing detention without external oversight and enforceable recommendations.[43] Kate Gauthier of A Just Australia said that:

> I would say that reviewing whether or not someone's detention is lawful at six months is probably a little too long to wait for that to happen. I think the Ombudsman should come in a little earlier. On the other hand, if we have enforceable remedy review, then six months would be okay, but I think that the Ombudsman should review all cases of detention at that point as a final check on how the system is going.[44]

4.61 The Ombudsman commented on the timing of the review, saying:

> The department has a responsibility from the moment a person has been detained, and on a continuing basis, to investigate or examine whether the person's detention was warranted and whether continuing detention is warranted… It is a clear legal responsibility on the department and it is always open to any person, from the moment of detention onwards, to complain to the Ombudsman and we can do an individual complaint investigation. But in terms of the Ombudsman doing an independent review that focuses on issues where the Ombudsman can usefully inform the department, the Minister, the person in detention and perhaps the general public about the issues, I think six months; it is sometimes better to wait until issues have crystallised. Many people stay in detention only for a matter

42 Commonwealth Ombudsman, supplementary submission 126a, p 2.

43 Refugee and Immigration Legal Centre, submission 130, p 16.

44 Gauthier K, *Transcript of evidence*, 24 October 2008, p 12.

> of hours or a matter of days, some weeks. My initial view is that six months is probably a good time.[45]

4.62 Views were also expressed that it was inappropriate for this review role to be delegated to the Ombudsman's office rather than to a judicial or merits review body. The Castan Centre for Human Rights Law raised concerns about the proposal to give the role of external scrutiny to the Immigration Ombudsman. The Centre argued that an Ombudsman should make recommendations on administrative matters, not adjudicate upon the status of an individual:

> This is a matter which is only appropriate for a specialised judicial or quasi-judicial body. Whilst it may be considered appropriate for the Ombudsman to have a role in relation to administration of the detention regime under the Migration Act, it is not appropriate for the Ombudsman to adjudicate upon the status of an individual.[46]

4.63 The Commonwealth Ombudsman responded to this concern, emphasising that his office was one element of a system of independent review and scrutiny that currently applies to DIAC. This system included the courts, tribunals, the Australian Human Rights Commission and the Immigration Detention Advisory Group.

> We see no need for the creation of any additional scrutiny bodies or processes… We accept that the role of the Ombudsman is to focus on administrative matters rather than the legality of decisions… That said, the Ombudsman frequently comments on legal issues… The focus of our consideration on legal issues is not statutory interpretation but broader process issues such as procedural fairness and whether relevant or irrelevant factors have been taken into account by decision-makers.[47]

Committee comment

4.64 The Committee reiterates the need for transparency in detention review systems and a culture of ongoing information about detention case progress towards resolution.

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45 McMillan J, Commonwealth Ombudsman, *Transcript of evidence*, 17 September 2008, p 5.

46 Castan Centre for Human Rights Law, submission 97, p 9.

47 Commonwealth Ombudsman, supplementary submission 126a, p 2.

4.65 The Committee also reiterates concerns about the integrity of DIAC systems and decision making processes in the past and the need for public accountability in order to restore confidence in DIAC processes.

4.66 The 29 July 2008 announcements set out a review framework with a six month review conducted by the Commonwealth Ombudsman. The Committee recommends that the Ombudsman's report should be required to be provided to the Minister for Immigration and Citizenship, rather than only to the Secretary of DIAC.

4.67 Further, in line with current procedures for the two year Ombudsman review, the Committee recommends that a consolidated version of this report be tabled in Parliament and a comprehensive response be made to each of its recommendations.

Recommendation 11

4.68 **The Committee recommends that the House of Representatives and/or the Senate resolve that the Commonwealth Ombudsman's six month detention reviews be tabled in Parliament and that the Minister for Immigration and Citizenship be required to respond within 15 sitting days.**

The Minister's response should address each of the Commonwealth Ombudsman's recommendations and provide reasons why that recommendation is accepted, rejected, or no longer applicable.

Giving effect to the reforms

4.69 The Minister for Immigration and Citizenship has said that he expects to introduce legislation in late 2009 in relation to the announced changes to immigration detention policy.[48] On 21 October 2008, he told a Senate Estimates Committee that:

> The Government's policy announcements can be implemented by administrative action, by change to regulations and by legislation. I took the view, and the

48 Senator the Hon C Evans, Minister for Immigration and Citizenship, in Media Monitors, 'Senator Evans discusses a number of reforms to Australia's immigration detention system', doorstop interview transcript, 29 July 2008, p 10.

> Government took the view, that we would not wait to implement those changes until we had all the legislative framework changed, partly because of the time delays in drafting and getting it through the Parliament and, dare I say, the Senate. So what we have sought to do is a phased program, which means I am implementing administratively or by ministerial decree some aspects. We are looking to amend regulations for others and then we will need to bring forward legislation to address a number of fairly fundamental issues. I would think that would come forward some time next year.[49]

4.70 However there has been some concern that, in the months following the Minister's announcements, there is continuing uncertainty from DIAC and amongst professionals working in the immigration detention field about what the changes will actually mean and how and when they will be implemented.

4.71 A number of cases have come to the Committee's attention that suggest the policy is currently in transition and there is little substantive implementation (figure 4.1).

4.72 At a Senate Estimates hearing on 21 October 2008, the Minister and DIAC were unable to say whether anyone had been released from detention as a result of the reforms announced on 29 July 2008. The Minister replied that the measures announced were being 'progressively implemented… I do not want to create the impression that on 29 July everything changed'. People had been released from detention since the announcements, but:

> You then have to analyse whether they would have been released under the new policy or the old policy… What I am saying to you is that I do not know that you could necessarily say,' Were they released because of the change in policy?'[50]

49 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Senate Hansard*, Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 21 October 2008, p 109.

50 Senator the Hon C Evans, Minister for Immigration and Citizenship, Senate Hansard, Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 21 October 2008, p 106.

Figure 4.1 Commonwealth Ombudsman's report on immigration detainee Mr X

Mr X is an unlawful non-citizen in detention at Villawood Immigration Detention Centre. He has been in immigration detention since August 2005, or over three years. DIAC first applied for travel documents from the Indian Consulate in January 2006, and is still waiting for these documents before Mr X can be removed from Australia. The Ombudsman's individual report from September 2008 on Mr X says that:

'In Report 399/08 of April 2008, the Ombudsman requested that "the next report to the Ombudsman under s486N address the consideration given to whether it is more suitable that Mr X be released into community detention or on a suitable visa such as a Removal Pending Bridging Visa'. The s 486N report received by the Ombudsman dated 5 August 2008 does not respond to that request.

In the Minister's recently announced immigration detention values (July 2008), it is noted that detention in an immigration detention centre (IDC) is to be for the shortest practicable time unless the person falls within one of three groups… The s 486 N report from DIAC does not explain which of these three groups Mr X falls into and it may be that DIAC's decision to leave Mr X in an IDC is at odds with the new immigration detention values.

The Ombudsman recommends that the Minister review whether the continuing detention of Mr X is consistent with the immigration detention values and if not that Mr X be allowed to live in a community detention arrangement or be granted an appropriate visa until his immigration status is resolved.'[51]

The response to this recommendation in the Minister's tabling statement was that, as part of his review of long-term detainees, he had agreed to DIAC continuing to make arrangements for the removal of Mr X from Australia.[52]

4.73 As of 21 November 2008, there have been three unauthorised boat arrivals in 2008. On 30 September 2008, a vessel carrying 14 people was intercepted near Ashmore Islands, 320 kilometres off Australia's north-west coast.[53] On 6 October 2008, a vessel carrying 17 people docked alongside a floating production offshore storage facility in the

51 Commonwealth Ombudsman, *Report for tabling in Parliament by the Commonwealth and Immigration Ombudsman under section 4860 of the Migration Act 1958, personal identifier 480/08.*

52 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Response to Ombudsman's reports received under section 4860 of the Migration Act 1958 – Statement to Parliament*, 14 October 2008.

53 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'Unauthorised boat arrivals intercepted off Ashmore', media release, 30 September 2008.

Timor Sea.[54] On Thursday 20 November, the Royal Australian Navy rescued a group of 12 people from their sinking boat 80 nautical miles south-east of Ashmore Island.[55] The passengers on these three boats have been taken to Christmas Island to be held in detention while they undergo health, security, identity and other checks to establish their identity and reasons for travelling to Australia.

4.74 The Office of the United Nations High Commissioner on Refugees commented that:

> Unfortunately, from our perspective, the work in progress has been overtaken by the arrival of two small boats to Christmas Island which will be subject to these new policy announcements and new procedures while they are still being considered and put in place. We think that there is obviously a clear and pressing need to develop guidelines and guidance for those who make detention decisions so that it is very clear as to the basis on which those decisions are being taken.[56]

4.75 Some groups have expressed concern that the values have not yet been accompanied by implementation and discernible change. Anna Saulwick of GetUp! summed up these views saying it was important 'to come out with a detailed legislative and regulatory response that ensures that the spirit of those reforms is carried through not only into practice now but well into the future'.[57]

Calls for legislative change

4.76 A great number of inquiry participants urged that the immigration values announced by the Minister be enshrined in legislation as soon as possible. It was suggested that the values, hailed as a 'fundamental shift' should not be policy matters governed by the special powers of the Minister or at the discretion of departmental decision-makers.[58]

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54 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'People smuggling vessel intercepted', media release, 7 October 2008.

55 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'Group at sea rescued by Navy', media release, 20 November 2008.

56 Towle R, Office of the United Nations High Commissioner for Refugees, *Transcript of evidence*, 15 October 2008, p 1. See also Dimasi M, 'The Christmas Island challenge', *Inside story*, 5 November 2008, viewed on 5 November at http://inside.org.au/the-christmas-island-challenge/.

57 Saulwick A, GetUp!, *Transcript of evidence*, 24 October 2008, p 48.

58 Human Rights Law Resource Centre, submission 117, p 10.

4.77 For example, Professor Linda Briskman of the Centre for Human Rights Education, said that without changes to legislation, the current announcements were 'meaningless and precarious'.[59] Kate Gauthier of A Just Australia also feared that without a legislative basis, the values could too easily be ignored or upended by a new minister, a new government, or a change in circumstances, such as an influx of unauthorised arrivals:

> All of the changes that happened under the previous government and are currently happening so far are non-enforceable, non-reviewable and relatively vague changes that rely on the goodwill of the department or the minister to behave in certain ways. I do not believe that is acceptable under our legal systems; what we need is actual legislative change or the political wind could shift at any moment and we are going to go back to the conditions that we had of children and various other vulnerable people being kept in places like Curtin and Woomera.[60]

4.78 Graeme Innes, the Human Rights Commissioner said that:

> The policy includes seven broad statements. Our concern is that we need to see the detail behind those statements. We are not doubting the direction that the minister wishes to take, but rather needing to see all of the detail and encouraging that detail to be legislative rather than policy.[61]

4.79 Commissioner Innes said that the way in which the values would be enforced or guaranteed 'will be vital to our consideration of whether the new approach protects fundamental human rights'.[62]

4.80 Witnesses also pointed out that without legislative change, decision-makers will be seriously compromised by conflict between the presumption for detention in the Migration Act and the Minister's instructions that detention shall be a last resort. The Refugee and Immigration Legal Centre argued that:

> Legislative implementation is not only required as a matter of international law, but in practice, will be crucial to ensuring

59 Briskman L, Centre for Human Rights Education, Curtin University, *Transcript of evidence*, 9 October 2008, p 19.

60 Gauthier K, A Just Australia, *Transcript of evidence*, 24 October 2008, p 11.

61 Innes G, Australian Human Rights Commission, *Transcript of evidence*, 24 October 2008, p 8.

62 Innes G, Australian Human Rights Commission, *Transcript of evidence*, 24 October 2008, p 2.

> that the worthy aspects of the reforms are properly realised. Detention processes based on discretion or which are otherwise insufficiently regulated by law - including those introduced under the post-Palmer reform process - have proved seriously deficient and highly vulnerable to unaccountable, arbitrary and fundamentally unfair decision-making.[63]

4.81 Elizabeth Biok of Legal Aid New South Wales argued that if detention was truly to be the last resort, it was important that legislation was changed to reflect the new presumption in favour of release.

> As it stands at the moment, to say that detention is a matter of last resort is very vague and very nebulous and it does not give the case officer or the person who is determining the grounds of detention a clear guideline. As with bail, we need to have a presumption in favour of release and the onus is then to be on the department to argue why a person should be kept in detention.[64]

4.82 Similarly, the Castan Centre for Human Rights Law said that:

> The Migration Act contains no guidance as to what justifies continuing detention. There is no mechanism to decide whether the detention is reasonable or proportionate, and no requirement that an individual's particular circumstances be taken into account.[65]

Committee comment

4.83 The Committee acknowledges that the Minister's announcement has been followed by extensive consultation with stakeholders and advocacy groups working in the immigration detention field. However, the lack of discernible change in DIAC decisions to detain has resulted in some concern about the practical and lasting impact of the values now and into the future.

4.84 Codification and legislative reform is important to all stakeholders in the immigration system, from DIAC to oversight bodies, lawyers and advocates. DIAC decision-makers, in particular, need clear guidance

63 Refugee Immigration and Legal Centre, submission 130, p 9.

64 Biok E, Legal Aid New South Wales, *Transcript of evidence*, 24 October 2008, p 17.

65 Castan Centre for Human Rights Law, submission 97, p 14.

and processes in recognition of the principles to underpin detention decision-making.

4.85 The Committee is highly supportive of the announced values and considers they need to be reflected in Commonwealth law. The Committee agrees that the Migration Act in its current form does not reflect the spirit nor provide any legal guidance on the implementation of the Minister's detention values.

4.86 The Committee considers that legislative change to enshrine these reforms is vital and should be introduced as a priority. Similarly, development of the accompanying regulatory changes and appropriate guidelines must be considered a priority.

Recommendation 12

4.87 **The Committee recommends that, as a priority, the Australian Government introduce amendments to the *Migration Act 1958* to enshrine in legislation the reforms to immigration detention policy announced by the Minister for Immigration and Citizenship.**

The Committee also recommends that, as a priority, the Migration Regulations and guidelines are amended to reflect these reforms.

Options for merits and judicial review for ongoing detention

4.88 A number of inquiry participants expressed the view that, while the increased review was encouraging, the proposed reviews at three and six months were insufficient to bring real integrity to the system. For example, Kate Gauthier of A Just Australia said that:

> Those internal steps are great to make the department take ownership of their own decisions to detain but, like any other form of detention we have in Australia, you need to have external review with enforceable remedies, otherwise we still have the system where we have an extraordinary extension of executive powers being conducted by immigration officers and immigration officials. As outlined in the Palmer and Comrie reports, they are being executed with inadequate training and in extraordinary ways when you compare them

> to other systems of detention in Australia. That really needs to be rectified.[66]

4.89 Similarly, Anna Saulwick of GetUp! expressed reservations that this framework would not be considered adequate to address ongoing issues in the detention processes. She said:

> The system of review that is proposed at the moment whereby on the mainland review is conducted at three months by the department itself and at six months by the ombudsman and the system of review on Christmas Island whereby it is conducted by independent professionals, I think was the term that was used, is not going to satisfy our members in their calls for what they have called adequate review. I do not think that it is going in the long term in an absolute sense rectify some of the significant problems that we are confronting today and that we have an opportunity at this time to be able to address…

4.90 She suggested that judicial review may provide a more enforceable and independent oversight mechanism:

> Perhaps a judicial review is the only way of ensuring adequate review. That is because, firstly, judicial review is independent, unlike having the decision maker review their own decision. Secondly, judicial review bodies, whether they be courts or tribunals, are empowered with sufficient powers to order people out of detention if they have been wrongfully detained. Unless you have that power it is formal review only, not substantive review.[67]

4.91 Most Commonwealth decision-making is subject to judicial review however,[68] and a decision made under section 189 of the Migration Act is no exception. This is despite the fact that successive governments have sought to restrict the availability of judicial review for migration decisions in order to reduce the migration caseloads in the courts and lengthy delays in case resolution.

4.92 An 'unlawful non-citizen' in immigration detention in Australia can challenge the lawfulness of the decision to detain him or her. The jurisdiction of the Federal Magistrates Court, the Federal Court and

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66 Gauthier K, A Just Australia, *Transcript of evidence*, 24 October 2008, pp 14-15.

67 Saulwick A, GetUp!, *Transcript of evidence*, 24 October 2008, p 49.

68 Administrative Review Council, *The scope of judicial review*, Report to the Attorney-General, April 2006, report no 47, p 8.

the High Court to examine the legality of the decision made under section 189 of the Act essentially stems from section 75(v) of the Australian Constitution which 'entrenches a minimum measure of judicial review' of Commonwealth decision-making.[69]

4.93 Section 189 of the Act has been considered by the High Court, which sets out that as long as the officer had the requisite state of mind, knowledge or reasonable suspicion that the person was an unlawful non-citizen, detention is required. That decision, similar to any other form of decision making, is subject to judicial review.[70]

4.94 However, the United Nations Human Rights Committee draws a distinction between such review and judicial review of the grounds and circumstances of detention. It asserts that Australian courts have no power to review any substantive grounds for the continued detention of an individual and to order release, in contravention of Article 9 of the International Covenant on Civil and Political Rights (ICCPR) to which Australia is a party.[71]

4.95 Merits review (available through the Migration Review Tribunal, the Refugee Review Tribunal and the Administrative Appeals Tribunal) and judicial review (through the Federal Court and High Court of Australia) generally only apply to visa decisions, rather than a review of the grounds and circumstances of a person's immigration detention.

4.96 Graham Thom of Amnesty International Australia said that:

> When it comes to detention, our real issue is that people cannot challenge the reasons for their detentions in the courts. We think that is a major failing, that somebody can be born into detention and be kept there for the rest of their life.[72]

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69 Parliamentary Library, 'Judicial review of immigration detention', client memorandum, Karlsen E, 25 October 2008, p 1. As per McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) I98 ALR 59.*

70 Parliamentary Library, 'Judicial review of immigration detention' (2008), client memorandum, Karlsen E, 25 October 2008, p 2.

71 United Nations Human Rights Committee, '*Views: Communication No. 1324/2004*', CCPR/C/88/D/1324/2004, 13 November 2006, Attorney-General website, viewed on 24 October 2008 at http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(1E76C1D5D1A37992F0B0C1C4DB87942E)~Shafiq+-+1324_2004+-+HRC+Views.pdf/$file/Shafiq+-+1324_2004+-+HRC+Views.pdf.

72 Thom G, Amnesty International Australia, *Transcript of evidence*, 7 May 2008, p 28.

4.97 Although this particular circumstance has never eventuated, and if it did it is likely that political forces and public opinion would prevail upon the Minister to use his or her discretion to grant a visa, it is theoretically possible under law.

4.98 This principle was upheld in *Al-Kateb v. Godwin* (2004).[73] In this case, the High Court found that two unsuccessful asylum seekers who could not be removed to another country could continue to be held in immigration detention indefinitely.[74]

4.99 Julian Burnside QC of Liberty Victoria told the Committee that:

> Mandatory detention of non-citizens without visas is the only exception in Australia to the general principle that innocent people cannot be locked up without a rigorous procedure beforehand and judicial oversight at all times.[75]

4.100 Mr Burnside said that in other circumstances, where society saw fit to detain a person against their will, there were rigorous systems of checks and balances. For example, although a person suffering a major mental health problem could be detained involuntarily:

> ...the procedure for detaining them is preceded by very careful checks and they are reviewed every two weeks, at least in the Victorian system, and they are always subject to judicial oversight.[76]

4.101 This observation was made by a number of inquiry participants who claimed that Australia's immigration detention laws deviated from ordinary principles that generally apply to the treatment of individuals in Australia in our legal system.[77] Kate Gauthier of A Just Australia said that so many migration issues are:

> …completely outside the normal framework of what we would consider to be a mainstream legal system in Australia, and that is something that really needs to be looked at when we are looking in a broad picture at the whole detention and legal framework.[78]

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73 *Al-Kateb v. Godwin* [2004] 219 CLR 562.

74 Parliamentary Library, 'Judicial review of immigration detention', client memorandum, Karlsen E, 25 October 2008, p 7.

75 Burnside J, Liberty Victoria, *Transcript of evidence*, 11 September 2008, pp 48-49.

76 Burnside J, Liberty Victoria, *Transcript of evidence*, 11 September 2008, p 48.

77 Manne D, Refugee and Immigration Legal Centre, *Transcript of evidence*, 11 September 2008, p 24.

78 Gauthier K, A Just Australia, *Transcript of evidence,* 7 May 2008, p 29.

> The deprivation of liberty is the most serious infringement of a person's rights… however, the immigration detention regime operates entirely outside of the normal accepted standards of our mainstream legal system.[79]

4.102 Anna Copeland, of the Southern Communities Advocacy Legal and Education Services Community Legal Centre in Western Australia, said that, 'principles of our own legal system recognise that you cannot take away a person's liberty without due process and good reason'.[80] Her colleague Mary Anne Kenny also emphasised the need for independent and enforceable review through the courts:

> Fundamentally, in order to be serious about looking more toward a model of releasing people into the community, we need to involve some independent oversight, such as in relation to the involvement of the courts, because without the courts— without those sorts of checks and balances—people can languish in detention for a long time and mistakes can occur.[81]

4.103 Kate Gauthier of A Just Australia advanced a proposal to introduce the opportunity for merits and judicial review through the use of a bridging visa mechanism for release from immigration detention. The criteria for the bridging visa would be the criteria for release. In this way, should the department refuse a bridging visa application, a person in immigration detention would have access to merits review through the Migration Review Tribunal, who would reconsider the evidence DIAC used to make its decision. Ms Gauthier suggested:

> A very simple way to have both merits review and judicial review of immigration detention is to have a bridging visa available to anybody, with the criteria for applying for that bridging visa to be that you have been in detention for longer than 30 days or whatever the time limit is that they want to set. Part of the criteria of that, of course, is that a person has passed their health and character identity checks and appears to be making a bona fide claim for asylum. By having that bridging visa in existence, which would be very simple; it is just a change to the regulations, that automatically confers

79 A Just Australia, submission 89, p 12.

80 Copeland A, Southern Communities Advocacy Legal and Education Services Community Legal Centre, *Transcript of evidence*, 9 October 2008, p 2.

81 Kenny M, Southern Communities Advocacy Legal and Education Services Community Legal Centre, *Transcript of evidence*, 9 October 2008, p 14.

merits review at the RRT stage or MRT stage, and then judicial review.[82]

Committee comment

4.104 The Committee considered at length the merits of access to judicial review of the decision to detain under the Migration Act. It is the view of the Committee that the review framework outlined in this report will bring about a much improved system of transparency, accountability and essential external oversight to detention decisions.

4.105 The 29 July 2008 announcements by the Minister indicate a significant change as, rather than assuming the need for detention, the decision to continue to detain must be justified against set criteria.

4.106 Through its recommendations the Committee has sought to strengthen this policy shift by reducing uncertainty and increasing the transparency in decision making processes. The Committee has also sought to increase the effectiveness of review mechanisms at the three and six month timeframes through greater public accountability for these review reports.

4.107 The Committee notes that the framework of criteria set out for immigration detention aims to reduce the number of persons held in immigration detention for any length of time and to ensure that periods of detention must be justified under set criteria. In addition the Committee considers that this report and other policy changes already announced combine to deliver a robust and just framework of immigration detention decision making and review that balances transparency in risk assessments to the Australian community with compassion for those detained.

4.108 The Committee has recommended the greater use of a new or amended form of bridging visa to release persons into the community, in line with the announcements made by the Minister on 29 July 2008. A bridging visa may provide opportunities for merits review or judicial review of visa decisions. The next two reports of this Committee will examine alternatives to detention and scope for the use of bridging visas and associated entitlements for those on bridging visas.

4.109 The Committee also notes that the review framework concerns the decision made at three and six months to continue to detain someone.

82 Gauthier K, A Just Australia, *Transcript of evidence*, 24 October 2008, p 15.

It is anticipated that the recommendations already set out in this report will enable a larger number of detainees to be released on a form of bridging visa while their immigration status is resolved or while awaiting removal.

4.110 However, when these earlier reviews have been completed and a decision is made to continue to detain, the Committee considers oversight by a judicial body is warranted and appropriate as an important check on the integrity of the system.

4.111 The following section considers access to merits and judicial review if detention is ongoing.

Length of time in detention

4.112 One of the Australian Government's key immigration values is that immigration detention is to be used as a mechanism of last resort and for the shortest possible time. Length of time spent in detention continues to be a concern for many detainees, oversight bodies and advocacy groups. While there has been a decrease in the average time spent in detention, there remain a proportion of cases of long-term detention.

4.113 As at 31 July 2007, the average time spent in detention was 418 days. This had decreased to 308 days by 30 June 2008, a reduction of 26 per cent over this period.[83] This includes all forms of detention.

4.114 The number of persons being held in detention longer than 12 months has also decreased over the last three years. In 2007-08, 258 persons had been in immigration detention for 12 months or more; this compares with 349 in 2006-07 and 399 in 2005-06.[84]

4.115 As at 31 October 2008, there were 95 people in detention who had been in detention for 12 months or more, comprising 34 per cent of the detention population at that time. Forty-three of those people had been in detention for longer than two years.[85]

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83 Department of Immigration and Citizenship, *Annual report 2007-08* (2008), p 33.

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

85 Department of Immigration and Citizenship website, viewed on 11 November 2008 at http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20081031.pdf.

4.116 However, prolonged detention of several years continues for some detainees. DIAC acknowledged that as at 12 September 2008 there was a person who had been detained since 5 January 2001, a period of 2807 days or more than seven years.[86] Similarly the Law Institute of Victoria, Liberty Victoria and the Justice Project referred to a recently removed client who had been in detention in Australia for nine years.[87]

4.117 Further, the Law Institute of Australia, Liberty Victoria and the Justice Project submitted that the regular review process proposed by the Minister was 'insufficient to ensure that persons have a reasonable prospect of release if legislative provision for indefinite detention remains'.[88]

4.118 Jessie Taylor, of the Immigration Detention Working Group of the Law Institute of Victoria, also argued that:

> Anything that allows the High Court of Australia to find that an innocent person can be detained for the term of his natural life in administrative detention needs to be done away with.[89]

4.119 Confirming evidence provided to a great number of other parliamentary inquiries, official reports, and clinical mental health studies[90], ex-detainees and people working closely with immigration detainees report that the indefinite nature of the detention is one of the most difficult and damaging elements of detention.

4.120 Morteza Poorvadi, who spent four years in Port Hedland, Woomera and Villawood immigration detention centres, explained:

> As an ex-detainee, one of the points that I am very concerned about is detention—just detention. Detention is necessary for this country. We understand that. We cannot let anyone in

86 Department of Immigration and Citizenship, supplementary submission 129b, p 1.

87 Law Institute of Victoria, Liberty Victoria and the Justice Project, submission 127, pp 17-18.

88 Law Institute of Victoria, Liberty Victoria and the Justice Project, submission 127, p 12.

89 Taylor J, Law Institute of Victoria, *Transcript of evidence*, 11 September 2008, p 52; see *Al-Kateb v Godwin, [2004] HCA 37;* (2004) 208 ALR 124; (2004) 78 ALJR 1099 ('*Al-Kateb*').

90 Some relevant clinical studies that have considered the longer term impact of immigration detention on mental health are Steel Z et al, 'Impact of immigration detention and temporary protection on the mental health of refugees', *The British journal of psychiatry* (2006) vol 188, pp 58-64; Steel Z et al, 'Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia', *Australian and New Zealand journal of public health* (2004) vol 28, pp 23-32; Sultan A and O'Sullivan K, 'Psychological disturbances in asylum seekers held in long-term detention: a participant-observer account', *Medical journal of Australia* (2001) vol 175, pp 593 -596.

> without knowing who they are. I understand that. But for how long? That is the point. If you tell the detainees, 'You'll be here for one year, and after one year we will decide what to do with you,' that is fine. One year is all right. But when I was in detention I spent four years in there. I saw a detainee who was in there for eight years. So there was no limit on it. That is one of the worst things: there is no limit in detention. You sit there every day thinking, 'Will I be deported tomorrow or the next day?' … Give people a time limit. Tell them they have to be there for six months, a year. That is fine. That is reasonable. But more than that is not reasonable.[91]

4.121 Similarly Ruth Prince, a regular visitor to people in immigration detention, described the deterioration caused by long-term and indefinite detention:

> The apathy that develops with long-term detention (anything over two years) is very painful to watch. A very intelligent, educated and self-assured man who had everything to look forward to has been in detention for six and a half years. He started with dreams and aspirations of what he would do here in this 'free' country. As the years passed, he progressed from wanting to get a visa to wanting to be sent back - but not to three countries where his life would be in danger. Now, years down the track, he doesn't care what happens to him. "Send me out, send me anywhere, drop me in the ocean, I don't care, as long as it's not here!" He is in a reasonable physical environment, but this prolonged loss of freedom has completely shattered his self-confidence and mental stability. When he gets depressed, he doesn't answer his mobile phone, putting it in a wardrobe. He doesn't eat (he is normally a food-conscious man - cooking and talking about food is his passion), doesn't drink, and doesn't take care of himself. Such a waste of talent, energy, creativity.[92]

4.122 The Commonwealth Ombudsman has identified a number of factors affecting the length of detention, drawing on the experience of his Office in conducting statutory two year detention reviews and a recent review of all long-term detainees for the Minister. The Ombudsman explained that there may be a number of reasons why a

91 Poorvadi M, *Transcript of evidence*, 7 May 2008, p 8.

92 Prince R, submission 113, p 7.

person has had their immigration detention prolonged or has not been removed, including:

- ongoing litigation – depending on the circumstances, an individual may be within their rights to seek review of an unsuccessful visa application, or a decision to cancel a visa or a removal decision. A person will typically remain in detention for the duration of these proceedings
- delays in outcomes for ministerial requests
- lack of cooperation on the part of detainee, where a person might refuse to sign a request for travel documents which may be required to achieve removal from Australia
- inability to obtain travel documents from the country of origin
- delays in establishing the identity of a person, and
- administrative drift or inaction by DIAC, although the Ombudsman had noted an improvement in this area with more active case management.[93]

4.123 In the Commonwealth Ombudsman's view, the measures put in place since 2005 and the Minister's announcements of 29 July 2008 have minimised the chances of long-term and indefinite detention occurring to the same extent as in the past:

> At a practical level, though improvements of that kind have met many of the objections in principle that have been raised to Australian immigration law and practice—for example, a common criticism made of the detention regime is that there is no constitutional or legal barrier to indefinite detention—in my view, many of the improvements of recent years and activities in which my own office has been engaged mean that indefinite detention is unlikely to be a practical problem. I refer here in particular to our two year detention reports, to our report on section 501 visa cancellations and to the minister's promulgation of new immigration detention values.[94]

4.124 However, the Ombudsman also suggests that an additional criterion for assessing whether a person should be released from immigration

93 Commonwealth Ombudsman, submission 126, pp 6-8.

94 McMillan J, Commonwealth Ombudsman, *Transcript of evidence,* 17 September 2008, p 2.

detention could be that no immediate solution to their immigration status is apparent.[95]

4.125 It is unclear what impact the risk-based values and announced criteria for immigration detention might have on population numbers in immigration detention and length of time spent in detention.

4.126 The Minister has commented that the values do not reflect a 'mass opening of the gates'[96] and that, 'We will continue to have a detention population featuring non-citizens who are a risk to the community or who are refusing to comply with immigration processes'.[97] However, the Minister also expressed the intention that the values would lead to less people being held in detention for less time.[98]

4.127 George Masri, Senior Assistant Ombudsman with the Office of the Commonwealth Ombudsman, noted in September 2008 that:

> In the preliminary discussions with the department at the time the Minister made the announcement, there was a view that, out of the then detention population of just under 400, a figure of around 75 may be released applying the detention principles… [But] as we take on the six month detention review process, we will have a much better understanding of the likely implications of the application of the new detention principles.[99]

4.128 It was noted by Project Safecom that the announced values to immigration detention did not preclude indefinite and long-term detention for those who cannot meet the criteria for release.[100]

Committee comment

4.129 The values outlined by the Minister and the recommendations put forward in this report will address some factors outlined by the Commonwealth Ombudsman that are currently impacting on the

95 Commonwealth Ombudsman, submission 126, p 16.

96 Senator the Hon C Evans, Minister for Immigration and Citizenship, in Media Monitors, 'Senator Evans discusses a number of reforms to Australia's immigration detention system', doorstop interview transcript, 29 July 2008, p 1.

97 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'New directions in detention', speech delivered at Australian National University, 29 July 2008, p 17.

98 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'New directions in detention', speech delivered at Australian National University, 29 July 2008, p 13.

99 Masri G, Office of the Commonwealth Ombudsman, *Transcript of evidence*, 17 September 2008, pp 6-7.

100 Smit J, Project Safecom, *Transcript of evidence*, 9 October 2008, p 34.

length of detention and potential case resolution. This may apply to ongoing litigation, requests for ministerial intervention and the inability to obtain travel documents, as these processes can potentially be pursued whilst the person is living in the community, in line with risk-based approach and the use of detention only as needed.

4.130 The Committee also acknowledges the impact of DIAC's greater emphasis in recent years on more active case management and resolution, reducing the duration of periods in detention, and the Minister's oversight of reports on the long-term (2 years and over) caseload.

4.131 Despite these measures, there remain those for whom an identity cannot be conclusively established and those awaiting the outcome of drawn-out security checks who could potentially remain in detention indefinitely, even under the announced values.

4.132 This potential group of long-term detainees may be joined by section 501 detainees should this Committee's recommendation of individualised risk assessment approach, made in the previous chapter, not be adopted by the Australian Government.

4.133 There will also continue to be a number of complex cases, such as for stateless persons, who typically have experienced long periods in some form of detention.[101] This may also apply to persons who are mentally ill or incapable for other reasons of making decisions about their case and are not able to pursue the options available to them for release into the community.

4.134 Bearing in mind the significant body of evidence citing the psychological impact of indefinite and uncertain nature of detention (whether in a secure detention environment or in community detention), the Committee considers that a period of detention beyond 12 months is unwarranted, unless a person is determined to be a significant and ongoing unacceptable risk to the Australian community.

4.135 For any period beyond 12 months for a person not considered a significant and ongoing unacceptable risk, the Committee considers that release from detention onto a bridging visa is an appropriate next measure until their immigration status is resolved.

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101 The Government has indicated the introduction of complementary protection legislation next year which may provide a framework for resolving difficult cases in which protection claims lie outside those specified by the Refugee Convention. Statelessness is one issue that will be examined within this complementary protection framework.

4.136 The Committee recognises that release in these circumstances may need to be accompanied by a set of reporting requirements. However, given the Australian Government's stated values that 'detention that is indefinite or otherwise arbitrary is not acceptable'[102] and that the onus shall be against rather than for detention, the Committee considers that stronger protection against indefinite detention is needed to give full expression to these values.

4.137 Given the current downward trend in detainee numbers and the reduction in the average length of time spent in detention as well as the projected impact of the announced values, it is not envisaged that this initiative would affect a large number of persons. However, in the context of reforming immigration detention policy in Australia, adopting a risk-based and humane approach to detention management, the impacts would be significant.

Recommendation 13

4.138 **The Committee recommends that, provided a person is not determined to be a significant and ongoing unacceptable risk to the Australian community, the Australian Government introduce a maximum time limit of twelve months for a person to remain in immigration detention.**

The Committee recommends that, for any person not determined to be a significant and ongoing unacceptable risk at the expiry of twelve months in immigration detention, a bridging visa is conferred that will enable their release into the community.

Where appropriate, release could be granted with reporting requirements or other conditions, allowing the Department of Immigration and Citizenship to work towards case resolution.

4.139 The Committee has recommended release following a maximum of 12 months spent in detention, even if the immigration case is unresolved, unless that person is determined to be a significant and ongoing unacceptable risk to the Australian community. The Committee intends that, consonant with the severity of a detention period of 12 months or more, this criterion should be more rigorous

102 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'New directions in detention', speech delivered at Australian National University, 29 July 2008, p 8.

than the 'unacceptable risk' criterion discussed earlier in the report and under which initial mandatory detention may apply.

4.140 It is expected that for the vast majority of cases, the criteria and recommendations set out here will ensure a maximum time limit for detention and so end the prolonged and indefinite detention that has characterised policy of the past. However, the Committee recognises that there may be a very small number of cases where the ongoing risk of releasing a person into the community is considered unacceptable. In these instances, a decision may be taken to continue to detain a person beyond the twelve months pending the resolution of their immigration status or a change in the material facts giving rise to that decision. A decision taken in these circumstances is a serious one and the Committee considered at length issues of justice, fairness and security.

4.141 The Committee also considered at length the value of introducing additional independent oversight and power to re-examine the decision to continue to detain a person after a period of time. The Committee noted the strong evidence received that the lack of merits and judicial review for the decision to detain has in the past meant that people have been held wrongfully, unlawfully and for a period of years on the basis of a contested departmental decision. The Committee has also noted that the only form of external independent review currently proposed in the new framework is through the Commonwealth Ombudsman and is an advisory basis only.

4.142 Given the seriousness of a decision to continue detention beyond the expected maximum of 12 months, the potential impact of lengthy detention on a person's mental health, and the legacy of maladministration in this area, the Committee concludes that there is justification for access to an independent tribunal and subsequently, if necessary, review by the courts of the tribunal's decision.

4.143 Oversight and review by independent judicial bodies will also ensure that public confidence is restored in Australia's immigration detention system.

4.144 The Committee considers that, if a decision is made to continue to detain a person after twelve months because it is determined that they are a significant and ongoing unacceptable risk to the Australian community, then that person should have access to merits and process review. Consequently the Committee recommends that the Migration Act be amended to provide that, if a person is held in detention after twelve months, then that person has the right to have

the decision reviewed by an independent tribunal and subsequently have the right to judicial review.

Recommendation 14

4.145 **The Committee recommends that, for any person who after twelve months in detention is determined to be a significant and ongoing unacceptable risk to the Australian community, the Australian Government amend the *Migration Act 1958* to give that person the right to have the decision reviewed by an independent tribunal and subsequently have the right to judicial review.**