The Parliament of the Commonwealth of Australia

Immigration detention in Australia:
A new beginning

Criteria for release from immigration detention

First report of the inquiry into immigration detention in Australia
Joint Standing Committee on Migration

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Canberra

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Contents

APPENDICES

DISSENTING REPORT

LIST OF TABLES

LIST OF FIGURES

Foreword

In April of 2008, the Joint Standing Committee on Migration inspected the Villawood Immigration Detention Centre, Australia's largest immigration detention centre. In Villawood, a variety of people are detained including people who have overstayed business or tourist visas, former international students who have breached their visa conditions, people with criminal histories whose visas have been cancelled, stowaways, stateless persons and people seeking Australia's protection from religious and political persecution. At the time of the Committee's visit, there were nationals of 97 countries in detention, the majority being from the People's Republic of China. There were 249 people in Villawood, representing just over half the nationwide detention population of 488. Between the Committee's visit and the time of writing, the number detained nationwide had fallen to 279.

With the insights gained, the Committee organised a roundtable to hear first-hand from former detainees and from regular visitors to Villawood. Members and Senators listened to evidence that detainees who posed no risk to the community were being held without just cause and to the detriment of their mental health. Concerns were expressed that the current immigration detention system is arbitrary and continues to lack transparency in its administration.

Australian policy, prior to the election of the current Government, saw too many people spending years in immigration detention, with little hope for a resolution of their case. Many in Villawood had been in detention for less than three months. However at the time of the Committee's visit there were 46 people at Villawood who had been in detention for over two years. Happily this number has declined markedly following the Minister's personal overview of long-term cases. Nevertheless, despite the changes to both policy and to administrative culture in recent times, we can and must do better.

Injustices of immigration detention prompted the Committee to develop a more humane evidence-based approach to immigration detention. This inquiry takes a wide view in examining the criteria for release from detention. We have asked how long it is reasonable to hold a person in detention. As part of the inquiry, we

will consider community alternatives to detention and how international experience can assist in innovative and more compassionate approaches. The inquiry will also examine the infrastructure needs and services that should be available to support our immigration detention policy in the future.

Our Joint Migration Committee inquiry was also committed to restoring dignity, justice and certainty to our treatment of those in immigration detention. In addition to the extensive program of hearings undertaken, the Committee has met with current and former detainees, and visited a range of community detention housing, residential housing units, transit centres and detention centres at Perth, Maribyrnong (Melbourne), the Northern Immigration Detention Centre (Darwin), and Villawood (Sydney), and at Christmas Island both the temporary facility at Phosphate Hill (still in use) and the monster $400 million 'super max' site (which is yet to be used).

Partway through this inquiry, the Australian Government made a major policy announcement outlining seven values that would underpin future immigration detention policy. On 29 July 2008 the new Minister for Immigration and Citizenship, Senator the Hon Chris Evans, announced that three groups would be subject to mandatory detention: unauthorised arrivals for the purpose of health, identity and security checks; those who pose an unacceptable risk to the community; and those who have been repeatedly non-compliant with visa conditions or immigration processes. Outside these criteria, the Minister expects that a person can reside in the community while their immigration status is resolved.

Minister Evans' announcements signalled a paradigm shift in Australian policy. The presumption of detention that defined the policy of the previous Government has shifted to an assumption of release following minimum checks. The onus will be on the Department of Immigration and Citizenship to demonstrate that detention is necessary.

This Committee welcomes the announcement of these values and the commitment of the current Australian Government to a fairer and more humane system for asylum seekers and others who are detained in immigration custody.

The first two terms of reference for the Committee's inquiry are concerned with criteria for release from detention and length of detention. In the context of the Minister's announcements the Committee agreed it was appropriate to report separately and as a priority on these terms of reference. *Immigration detention in Australia: A new beginning* is the first of three reports by this Committee on immigration detention policy in Australia.

The Committee's objective was to set open and transparent guidelines that would enable the implementation of the new values of the Australian Government. Our suggestions were prepared in the absence of advice of the Department of Immigration and Citizenship as to its benchmarks. The Committee has sought to identify what we believe to be the issues for implementation arising from the release criteria outlined in the Minister's statement of values.

A recurring concern about the current immigration detention system has been the indefinite nature of detention, with little scope or information about the reasons or rationale for detention. This report tackles those uncertainties and sets out the following clear and definite guidelines for detaining individuals:

- 5 day time frames for health checks
- up to 90 days for the completion of security and identity checks, after which consideration must be given to release onto a bridging visa,
- a maximum time limit of 12 months' detention for all except those who are demonstrated to be a significant and ongoing risk to the community, and
- the publication of clear guidelines regarding how the criteria of unacceptable risk and visa non-compliance are to be applied.

The report also recommends additional measures to increase oversight and transparency, such as:

- greater detail and scope of the three month review conducted by the Department of Immigration and Citizenship
- ensuring detainees and their legal representatives receive a copy of the review
- ensuring the six month Ombudsman's review is tabled in parliament and that the ministerial response to recommendations is comprehensive
- providing increased oversight of national security assessments that may affect individuals
- enshrining the new values in legislation
- establishing a maximum of 12 months in detention unless a person is determined to be a significant and ongoing risk to the Australian community, and

- opening the door to merits and judicial review of the grounds for detention after that person has been detained for more than 12 months. This would apply to those who remain in detention after 12 months on the basis of a 'significant and ongoing unacceptable risk' assessment.

Finally, the Committee has reported on two other issues related to the release from detention. The first issue concerns the procedures for removal from Australia of persons who are in this country unlawfully and have exhausted all avenues of appeal to stay. Many persons voluntarily depart Australia and the Department of Immigration and Citizenship facilitates arrangements for others. However there are also harrowing stories of persons forcibly removed, or losing possessions when taken into detention for the purposes of removal. The Committee lacked critical information to set out new procedures for removals but identified a number of factors to be included in the development of guidelines for removals. The Committee has also recommended the extensive involvement of external professionals and advocacy groups in deportations.

Secondly the Committee considered the practice of charging a person for their own detention. This practice was considered harsh and contrary to the stated value that immigration detention is not punitive. The Committee strongly recommends that all debts should be waived immediately.

Any discussion of immigration detention policy in Australia raises the legacy of past approaches, past failings, and past shame. As the Committee heard in evidence, there are many individuals in Australia and elsewhere around the world, as well as their families and loved ones, who continue to struggle to rebuild their lives and recover from their experience in immigration detention in Australia.

However it is the intention of the Committee for this report, and the two that follow, to look constructively to the future – to build from the new Government values statement, a rational and humane immigration detention system. This new system would align Australia with its obligations under the international laws and conventions to which we are party. Above all it would accord with the national ethos of a 'fair go'.

My colleagues on the Committee hold a range of views about immigration detention policy, but I believe I can say that all engaged with this inquiry with a genuine interest, commitment and desire to find the best outcomes both for the Australian community and those in immigration detention.

I would like to thank all who have participated in this inquiry to date, particularly those who have written submissions or given evidence at public hearings. I am also grateful to the Department of Immigration and Citizenship for facilitating the

Committee's meetings with detention clients. Thanks are especially due to the Committee secretariat for their work during the inquiry, our endless meetings and in producing the report.

Hopefully this will be not just a new beginning for people held in detention, but for Australian society in determining the detention time, nature and treatment of those who come to our shores.

Mr Michael Danby MP
Chair

Membership of the Committee

Chair	Mr Michael Danby MP
Deputy Chair	Hon Danna Vale MP
Members	Senator Andrew Bartlett *(to 30 June 2008)*
	Senator Catryna Bilyk *(from 1 July 2008)*
	Ms Yvette D'Ath MP
	Senator Alan Eggleston
	Mr Petro Georgiou MP
	Senator Sarah Hanson-Young *(from 27 August 2008)*
	Senator Anne McEwen
	Senator Helen Polley *(to 1 July 2008)*
	Hon Dr Sharman Stone MP *(from 10 November 2008)*
	Mr Don Randall MP *(to 10 November 2008)*
	Mr Tony Zappia MP

Committee secretariat

Secretary	Dr Anna Dacre
Inquiry Secretary	Ms Anna Engwerda-Smith
Senior Research Officer	Mr Steffan Tissa
Office Manager	Ms Melita Caulfield

Terms of reference

The Joint Standing Committee on Migration is inquiring into immigration detention in Australia. The Committee will examine:

- the criteria that should be applied in determining how long a person should be held in immigration detention
- the criteria that should be applied in determining when a person should be released from immigration detention following health and security checks
- options to expand the transparency and visibility of immigration detention centres
- the preferred infrastructure options for contemporary immigration detention
- options for the provision of detention services and detention health services across the range of current detention facilities, including Immigration Detention Centres, Immigration Residential Housing, Immigration Transit Accommodation and community detention
- options for additional community-based alternatives to immigration detention by
  a) inquiring into international experience
  b) considering the manner in which such alternatives may be utilised in Australia to broaden the options available within the current immigration detention framework
  c) comparing the cost effectiveness of these alternatives with current options.

(5 June 2008)

List of abbreviations

AHRC	Australian Human Rights Commission
AIDS	Acquired Immune Deficiency Syndrome
ASIO	Australian Security Intelligence Organisation
ASRC	Asylum Seeker Resource Centre
DeHAG	Detention Health Advisory Group
DIAC	Department of Immigration and Citizenship
DOHA	Department of Health and Ageing
GSL	Global Solutions Limited
FASSTT	Forum of Australian Services for Survivors of Torture and Trauma
HIV	Human Immunodeficiency Virus
IDAG	Immigration Detention Advisory Group
IGIS	Inspector-General of Intelligence and Security
IOM	International Organisation for Migration
MAL	Movement Alert List
MOC	Medical Officer of the Commonwealth

MSI	Migration Series Instructions
MRT	Migration Review Tribunal
PAM	Procedures Advice Manual
RILC	Refugee and Immigration Legal Centre
RRT	Refugee Review Tribunal
SCALES	Southern Communities Advocacy Legal and Education Service
TB	Tuberculosis
UNHCR	United Nations High Commissioner for Refugees

List of recommendations

2 Criteria for release – health, identity and security checks

Recommendation 1

The Committee recommends that, as a priority, and in line with the recommendations of the Australian National Audit Office, the Department of Immigration and Citizenship develop and publish criteria setting out what constitutes a public health risk for immigration purposes.

The criteria should draw on the treatment standards and detention provisions that otherwise apply to all visa applicants and to Australian citizens and residents who pose a potential public health risk.

The criteria should be made explicit and public as one basis on which immigration detainees are either approved for release into the community or temporarily segregated from the community.

Recommendation 2

The Committee recommends that the Department of Immigration and Citizenship establish an expected time frame such as five days for the processing of health checks for unauthorised arrivals.

This expected time frame should be established in consultation with the Immigration Detention Advisory Group, the Detention Health Advisory Group, the Department of Health and Ageing, the Commonwealth Ombudsman and the Human Rights Commission.

An optimum percentage of health checks of unauthorised arrivals should be completed within this time frame. The department should include in its annual report statistics on the proportion of health checks so

completed, and where health checks took longer than five days, specify the reasons for the delay.

Recommendation 3

The Committee recommends that, in line with a risk-based approach and where a person's identity is not conclusively established within 90 days, the Australian Government develop mechanisms (such as a particular class of bridging visa) to enable a conditional release from detention. Conditions could include reporting requirements to ensure ongoing availability for immigration and/or security processes.

Release from immigration detention should be granted:

- in the absence of a demonstrated and specific risk to the community, and
- except where there is clear evidence of lack of cooperation or refusal to comply with reasonable requests.

Recommendation 4

The Committee recommends that, in line with a risk-based approach, and where a person's security assessment is ongoing after 90 days of detention, the Australian Government develop mechanisms (such as a particular class of bridging visa) to enable a conditional release from detention. Conditions could include stringent reporting requirements to ensure ongoing availability for immigration and/or security processes.

Release from immigration detention should be granted:

- where there is little indication of a risk to the community, as advised by the Australian Security Intelligence Organisation, and
- except where there is clear evidence of lack of cooperation or refusal to comply with reasonable requests.

Recommendation 5

The Committee recommends that, where a person's security assessment is ongoing after six months of detention, the Australian Government empower the Inspector-General of Intelligence and Security to review the substance and procedure of the Australian Security Intelligence Organisation security assessment and the evidence on which it is based.

The Committee recommends that the Inspector-General provide advice to the Commonwealth Ombudsman as to whether there is a legitimate basis for the delays in security assessment. This advice should be

incorporated into the evidence considered by the Ombudsman in conducting six-month reviews.

3 Criteria for release – unacceptable risk and repeated non-compliance

Recommendation 6

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

Recommendation 7

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

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

Recommendation 8

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

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

Recommendation 9

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

4 Review mechanisms for ongoing detention

Recommendation 10

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.

Recommendation 11

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.

Recommendation 12

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.

Recommendation 13

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.

Recommendation 14

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.

5 Removals and detention charges

Recommendation 15

The Committee recommends that where enforced removal from Australia is imminent, the Department of Immigration and Citizenship provide prior notification of seven days to the person in detention and to the legal representative or advocate of that person.

Recommendation 16

The Committee recommends that the Australian Government consult with professionals and advocacy groups in the immigration detention field to improve guidelines for the process of removal of persons from Australia. The guidelines should give particular focus to:

- greater options for voluntary removal from immigration detention
- increased liaison with a detainee's legal representative or advocate
- counselling for the detainee to assist with repatriation
- a pre-removal risk assessment that includes factors such as mental health, protection needs and health requirements
- appropriate procedures for enforced removals that minimise trauma
- adequate training and counselling for officers involved in enforced removals
- appropriate independent oversight at the time of enforced removals, and
- criteria for the use of escorting officers for repatriation travel.

Recommendation 17

The Committee recommends that the Australian Government instigate mechanisms for monitoring and follow-up of persons who have claimed asylum and subsequently been removed from Australia.

Recommendation 18

The Committee recommends that, as a priority, the Australian Government introduce legislation to repeal the liability of immigration detention costs.

The Committee further recommends that the Minister for Finance and Deregulation make the determination to waive existing detention debts for all current and former detainees, effective immediately, and that all reasonable efforts be made to advise existing debtors of this decision.

1

Introduction

Referral of the inquiry

1.1 The inquiry was referred by the Minister for Immigration and Citizenship, Senator the Hon Chris Evans.

1.2 On 5 June 2008, the Committee agreed to inquire into immigration detention in Australia. The Committee undertook to examine:

- the criteria that should be applied in determining how long a person should be held in immigration detention
- the criteria that should be applied in determining when a person should be released from immigration detention following health and security checks
- options to expand the transparency and visibility of immigration detention centres
- the preferred infrastructure options for contemporary immigration detention
- options for the provision of detention services and detention health services across the range of current detention facilities, including immigration detention centres, immigration residential housing, immigration transit accommodation and community detention; and
- options for additional community-based alternatives to immigration detention by

- ⇒ inquiring into international experience
- ⇒ considering the manner in which such alternatives may be utilised in Australia to broaden the options available within the current immigration detention framework, and
- ⇒ comparing the cost effectiveness of these alternatives with current options.

1.3 The Committee sought submissions from government agencies and advisory groups, non-government organisations (such as refugee and migrant support and advocacy groups and charitable organisations) and people currently and formerly in immigration detention. A total of 139 submissions and 18 supplementary submissions have been received. The list of submissions is at Appendix A.

1.4 The Committee conducted public hearings and roundtables in Canberra, Sydney, Perth and Melbourne.

1.5 The Committee also inspected a number of immigration detention facilities including:

- the Maribyrnong Immigration Detention Centre and the Immigration Transit Accommodation facility in Melbourne
- the Villawood Immigration Detention Centre and the adjacent residential housing units in Sydney
- the Northern Immigration Detention Centre and the motel facilities temporarily used to house juvenile foreign fishers in Darwin
- the Perth Immigration Detention Centre, residential housing units and the home of a person in community detention in Perth, and
- the three detention centre facilities on Christmas Island – Phosphate Hill, the construction camp and the new immigration detention centre at North-West Point.

1.6 Public hearings and inspections are listed at Appendix B.

1.7 During the course of the inquiry the Committee spoke to a number of former detainees and individuals currently in detention centres, as well as individuals and families in immigration residential housing and in community detention.

The immigration detention context

1.8 Introduced in 1992, the policy of mandatory detention was envisaged as a temporary and exceptional measure for a particular group of unauthorised arrivals or 'designated' persons who arrived by boat between 19 November 1989 and 1 September 1994. The period of detention was limited to 273 days. In 1994 this time limit was removed and mandatory detention was extended to all unlawful non-citizens.

1.9 The number of people held in detention by the Department of Immigration and Citizenship (DIAC) was at its highest between 2000 and 2002. There has been a steady reduction in numbers since then to the current lowest numbers in over a decade (Appendix C).

1.10 Over the last decade, there has been a decrease in both the number of unauthorised arrivals to Australia in absolute terms and as a proportion of the detention population.

1.11 Between 1999 and 2001, Australia was faced with an unprecedented number of asylum seekers; around 9500 arrived unlawfully by boat from the Middle East via Indonesia.[1] This correlates historically with a global increase in demand for asylum from people from Iraq and the Middle East.

1.12 Australia receives only a small fraction of asylum claims received globally, however. For example, Australia received 5860 claims for asylum in 2002, 4300 in 2003, and 3100 in 2004. By comparison, the United Kingdom received 103 080 asylum claims in 2002, 60 050 in 2003, and 40 200 in 2004.[2] During 2007, a total of 647 200 individual applications for asylum or refugee status were submitted to governments and UNHCR offices in 154 countries, of which Australia received 3970; Canada 28 340, the United Kingdom 27 900 and the United States 49 170.[3]

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1 Department of Immigration and Citizenship website, 'Unauthorised arrivals by land and sea', fact sheets 74 & 74a, viewed on 1 November 2008 at web.archive.org/web/ 20030621215427/http://www.immi. gov.au /facts/ 74unauthorised.htm web.archive.org /web/20030621215037/ www.immi.gov.au/facts/74a_ boatarrivals.htm.

2 United Nations High Commissioner for Refugees, *Asylum levels and trends in industrialised countries, 2004* (2005), p 8.

3 United Nations High Commissioner for Refugees, *Asylum levels and trends in industrialised countries, 2007* (2008), p 12.

1.13 Recent years have seen a significant decline in unauthorised boat arrivals (see figure C.2, Appendix C). Reasons for this decline include increased resources invested in security, surveillance and interception in our northern waters and increased cooperation with Indonesia and other partners in our region in managing the numbers of people attempting to sail to Australia through transit countries and people-smuggling operations.

1.14 It is acknowledged, however, that unauthorised arrivals to Australia will likely continue to fluctuate in response to external factors, such as natural disaster and conflict, and the activities of people smugglers.[4] The international context has been of fluctuations in the number of asylum applications to industrialised countries. From 2003 to 2006 the number of people seeking asylum decreased dramatically, and across Europe new asylum claims more than halved from 477 000 to 216 000. There was, however, an increase of 40 per cent in asylum seeker applications made to non-industrialised countries.[5] Analysis by the United Nations Human Rights Commission on asylum applications in 44 industrialised countries shows that numbers have been trending up through 2007 to October 2008. The Commission predicts a total rise of 10 per cent in the number of applicants for 2008 compared with 2007.[6]

1.15 As at 7 November 2008, there were 46 unauthorised air arrivals and 34 unauthorised boat arrivals in immigration detention. This was out of a total detention population of 279.[7] The number of unauthorised boat arrivals in detention at this time was in fact higher than for the rest of 2008 as the first two boats to arrive in 2008 were intercepted in September and October.[8]

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4 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'Unauthorised boat arrivals arrive on Christmas Island', media release, 2 October 2008.

5 These trends were attributed to more restrictive asylum policies and border control measures being introduced in European industrialised nations, as well as improved security and improved living conditions in some of the major source countries of asylum-seekers. See Chapter 5 'Asylum and refugees status determination', *2006 United Nations High Commissioner for Refugees statistical yearbook*, p 45.

6 United Nations High Commissioner for Refugees, *Asylum levels and trends in industrialised countries, 2007* (2008), p 3.

7 Department of Immigration and Citizenship website, *Immigration detention statistics summary* as at 7 November 2008, viewed on 26 November 2008 at http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/index.htm.

8 As at 21 November 2008, there had been three unauthorised boat arrivals in 2008, on 30 September, 6 October and 20 November.

1.16 The majority of the detention population, approximately 80 per cent, is currently comprised of people who have entered the country legally but have overstayed or who have breached the conditions of their visa. DIAC advises that changes in policy emphasis and improved program integrity are reducing the likelihood of detention for this group.[9]

1.17 There has also been a fall in the number of illegal foreign fishers in detention from 2879 individuals across 2005-06 to 1232 in the last financial year (2007-08).[10] This decline is likely to due to increased cooperation between DIAC, Customs, the Australian Navy, the Department of Fisheries and the Indonesian Government in facilitating faster repatriation of these fishers to their home regions. As of 7 November 2008 there are 14 illegal foreign fishers currently in immigration detention.[11]

1.18 As of the same date there are a total of 279 people in immigration detention, compared with 449 people in November 2007 and a total of 3728 people in March 2000.[12]

1.19 Appendix C provides more detailed statistics on the population in immigration detention now and in the past.

Immigration detention policy framework

1.20 On 29 July 2008, the Minister for Immigration and Citizenship, Senator the Hon Chris Evans announced a series of values that would underpin Australia's immigration detention policy.[13] Those seven values are:

1. Mandatory detention is an essential component of strong border control.

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9 Department of Immigration and Citizenship, submission 129, p 9.

10 Department of Immigration and Citizenship, supplementary submission 129d, p 2.

11 Department of Immigration and Citizenship website, *Immigration detention statistics summary* as at 24 October 2008, viewed on 7 November 2008 at http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/index.htm.

12 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'Progress made in long-term immigration detention cases, media release, 24 September 2008.

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

2. To support the integrity of Australia's immigration program three groups will be subject to mandatory detention:
    - all unauthorised arrivals, for management of health, identity and security risks to the community
    - unlawful non-citizens who present unacceptable risks to the community, and
    - unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.
4. 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.
5. Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
6. People in detention will be treated fairly and reasonably within the law.
7. Conditions of detention will ensure the inherent dignity of the human person.

1.21 A historical overview of legislation and major policy initiatives relating to immigration detention is provided at Appendix D.

Scope and structure of this report

1.22 Since the ministerial announcements, consultation has been ongoing with key stakeholders and non-government organisations to develop the implementation plan for these values.

1.23 To facilitate the contribution of this inquiry to the implementation of the reforms and to developing a blueprint for Australia's immigration detention policy, the Committee has taken the decision to report in three parts.

1.24 This first report focuses on the first two of the six terms of reference, that is:

- the criteria that should be applied in determining how long a person should be held in immigration detention, and
- the criteria that should be applied in determining when a person should be released from immigration detention following health, identity and security checks.

1.25 It addresses these terms of reference in the context of the Minister's reforms and makes recommendations relating to the criteria for release and the decision to detain that are consistent with the seven values outlined.

1.26 Chapters 2 and 3 of this report consider the criteria for release for detention that are set out in the values announced on 29 July 2008. Chapter 2 considers the first group of people subject to mandatory detention: unauthorised arrivals, and the risk assessment and processes for completion of health, identity and security checks.

1.27 Chapter 3 considers the second and third groups of people subject to mandatory detention: those who either pose an unacceptable risk to the community and those who have repeatedly failed to comply with their visa conditions. It considers the criteria that should be applied in these cases.

1.28 Chapter 4 considers the future shape of our immigration detention system in terms of fairness, accountability, and review mechanisms for ongoing detention.

1.29 Chapter 5 considers processes for removal from Australia and liability for charges for the time spent in detention.

1.30 There are a number of key issues that are not considered within this report. In particular, there are concerns about where a person will go on release, what conditions will apply to release, and what services and support are available. The Committee will defer these important questions until its second and third reports, which are due to be released in 2009. These reports will consider alternatives to detention, including the use of bridging visas.

1.31 In addition, the Committee notes the commitment made by both this government and the previous government that children and their families will not be placed in immigration detention centres but will be placed in the community. The Committee views the placement of

children and families in detention facilities as an extremely important issue. Again, contemporary infrastructure and management to address the range of needs of the detention population will be addressed in detail in later reports.

2

Criteria for release – health, identity and security checks

2.1 The first two terms of reference for this Committee's inquiry refer to:

- the criteria that should be applied in determining how long a person should be held in immigration detention, and
- the criteria that should be applied in determining when a person should be released from immigration detention following health and security checks.

2.2 This chapter sets out the legislative provisions under the *Migration Act 1958* (the Migration Act) which relate to the obligation to detain and the options for release of an unlawful non-citizen.[1] It then addresses those terms of reference in relation to the first group of people identified by the Minister for whom mandatory detention is to apply – that is, all unauthorised arrivals, for the management of health, identity and security risks to the community. Issues associated with the assessment and risks posed of the second and third groups of people identified in the immigration detention values are considered in chapter 3.

2.3 The discussion of health, identity and security risk criteria is also in the context of the Minister's stated value that, 'Persons will be detained only if the need is established. The presumption will be that

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1 Detention for the purposes of the Act can include a number of forms of detention including immigration detention centres, immigration residential housing, transit accommodation and community detention arrangements. A description of these different forms of detention is provided at Appendix E.

persons will remain in the community while their immigration status is resolved'.[2]

2.4 Given the stated commitment of the Australian Government to a 'risk-based framework', this chapter seeks to objectively evaluate the nature and substance of these risks, and how these risks may be managed to best meet the presumption that a person will remain in the community, rather than in detention, while their case is resolved.

2.5 The Committee has sought to balance a humane and compassionate approach to immigration processing with an appropriate management of risk. In particular, it has sought to draw lessons from other areas of law and public policy involving assessment of risk to the community.

Current framework for release from detention

2.6 The Migration Act sets out a universal visa regime that requires all persons who are not Australian citizens to hold a visa in order to enter and remain in Australia.[3] Section 189(1) of the Act provides that if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen – that is, a person who is not a citizen and has no valid visa – the officer must detain the person. This requirement to detain under the Act is generally referred to as 'mandatory detention'.

2.7 Amongst the forms of detention currently in use in Australia are immigration detention centres, immigration residential housing and community detention arrangements through a residence determination by the Minister.[4] Internationally a number of other immigration detention models are used. The appropriateness of Australia's current forms of detention and alternative models will be addressed in the Committee's later reports.

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

3 The exception being for New Zealand citizens who hold a valid passport under section 42(2A)(a) of the *Migration Act 1958.*

4 See Appendix E for an outline of the different types of immigration detention.

2.8 Under the Migration Act, a person can only be released from detention by:

- grant of a visa (which may be a bridging or substantive visa)[5]
- removal from Australia (under section 198 or 199), or
- deportation from Australia (under sections 200 or 202).

2.9 Where a person is an unlawful non-citizen, that person cannot be released from detention other than in one of the three circumstances outlined.[6]

2.10 The only other possibility for release from immigration detention is when a citizen or a lawful non-citizen has been unlawfully detained by the Department of Immigration and Citizenship (DIAC). Following the cases of Cornelia Rau and Vivienne Alvarez, DIAC identified a further 247 cases of possible wrongful or unlawful detention for the period between 2000 and 2006, which it referred to the Commonwealth Ombudsman. The investigations by the Ombudsman's office revealed:

> … Instances of people being released from immigration detention… [that] should not have been detained. Equally people…released from detention following court decisions…which clarified that a person in detention had lawful immigration status.[7]

2.11 In relation to the 247 cases reviewed by the Commonwealth Ombudsman, DIAC has identified a risk of legal liability for unlawful detention in 191 matters. The periods of detention range from a few hours to over 500 days. Over 50 per cent of cases involve detention periods of less than 4 months. DIAC failed to disclose the number of persons unlawfully detained for longer than 4 months.[8] Since 2006, the department has referred a further 56 cases to its own Litigation Branch for investigation and has assessed two cases as involving a risk of liability for the Commonwealth of unlawful detention.[9]

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5 Under section 5 of the Migration Act, a 'substantive visa' is any type of visa other than a bridging visa, a criminal justice visa or an enforcement visa.

6 *Migration Act 1958*, section 196(3).

7 The Commonwealth Ombudsman, *Administration of detention debt waiver and write-off* (2008), p 10. With regard to court decisions, the Commonwealth Ombudsman's report refers to three cases in particular, *Srey, Uddin* and *Vean*.

8 Department of Immigration and Citizenship, correspondence, 24 November 2008.

9 Department of Immigration and Citizenship, correspondence, 27 November 2008.

2.12 Table 2.1 shows the number of persons released from immigration detention through the granting of a substantive visa, a bridging visa, or via removal in the last three years. The majority of releases from detention are for the purposes of removal.

Table 2.1 Reasons for release from immigration detention

	2005-06	2006-07	2007-08
Removal from Australia	5664	4442	3845
Substantive visa granted	395	328	505
Bridging visa granted	672	324	71

Source: Department of Immigration and Citizenship, supplementary submission 129d, p 7.

2.13 The Committee also notes that although the number of substantive visas granted to those in detention has increased slightly from 2004-05 to 2007-08 (from 10 per cent to 11.4 per cent), the number of bridging visas granted over the same period to those in detention has declined significantly from 5.9 per cent to 1.6 per cent. Appendix F outlines the bridging visas generally available to people in detention and the number of people currently holding these visas in the community.

2.14 If a person is released from detention on some form of substantive visa then it is considered that their immigration status is resolved.

2.15 A bridging visa, on the other hand, allows a person to reside in the community for a specified time or until a specified event occurs. The vast majority of those on a bridging visa are working through immigration processes, whether at the stage of primary application, merits review, judicial review or ministerial intervention. As those processes are progressed, cases will be resolved either by visa grant, voluntary departure, or the person becoming liable for removal.[10] The use of bridging visas as a mechanism for release from detention, including the appropriateness of conditions and restrictions placed on bridging visa holders will be considered in subsequent reports.

2.16 For the purposes of this report, the Committee assumes that, in the context of the Minister's values, release from detention refers to release from any type of detention under the Migration Act. Notwithstanding the differences between immigration detention centres, residential housing, transit facilities and community

10 Department of Immigration and Citizenship, supplementary submission 129f, p 15.

detention, the Committee's focus is on release from detention as a legal status under the Act.[11]

Health, identity and security checks for unauthorised arrivals

2.17 The Minister has identified that mandatory detention will continue to apply to all unauthorised arrivals for the purposes of health, identity and security checks:

> [The Government] believes that the retention of mandatory detention on arrival of unauthorised arrivals for the purpose of health, identity and security checks is a sound and responsible public policy. Once checks have been successfully completed, continued detention while immigration status is resolved is unwarranted.[12]

2.18 'Unauthorised arrivals' are those who have come by boat or air without a valid visa, as opposed to other groups in the detention population, such as visa overstayers or visa cancellations, who have already spent time lawfully in the Australian community.

2.19 In 2007-08, unauthorised boat arrivals comprised only 0.6 per cent of people entering immigration detention. Unauthorised air arrivals comprised 9.4 per cent and illegal foreign fishers 27.3 per cent.[13]

2.20 Health, identity and security checks are all routinely undertaken for those entering any Australian detention facility. However these checks have not previously operated as criteria for release, except indirectly where the grant of a visa may be conditional on, for example, a security clearance, or any of a range of public interest criteria applicable to a particular visa.

2.21 The following section examines each of the required health, identity and security checks for unauthorised arrivals, considering rationale, process and risk management.

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11 See Appendix E for further information on types of detention currently used in Australia.

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

13 Department of Immigration and Citizenship, *Annual report 2007-08* (2008), p 125. For a historical overview of detention numbers by arrival type, see Appendix C.

Detention for the purposes of health checks

2.22 All people arriving in immigration detention are given an initial health assessment that includes:

- a personal and medical history
- a physical examination including, at a minimum, blood pressure, weight, height, heart sounds, urinalysis and a brief assessment of dental hygiene
- targeted diagnostic interventions – illegal foreign fishers are compulsorily referred to state health services for public health screening of communicable diseases, and
- mental health screening, including a self-harm risk assessment.[14]

2.23 Health care is delivered to people in immigration detention centres through a combination of on-site health care professionals contracted to the DIAC and referral to external facilities and specialists.

2.24 Under Australia's universal visa system, all visa applicants must meet some form of health requirement, although for temporary visas this may be as slight as completing a health declaration in the visa application form. People in immigration detention who wish to stay in Australia and have applied for a permanent visa, such as a protection visa, must also meet the health requirement for all permanent visa applicants in Australia. This consists of:

- a medical examination
- an x-ray if 11 years of age or older, to detect tuberculosis
- a HIV/AIDS test if 15 years of age or older, and
- any additional tests requested by the Medical Officer of the Commonwealth.[15]

These additional tests might reflect screening for communicable diseases due to the prevalence of those diseases in a person's country of origin, or where risks have been clinically indicated.[16]

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14 Department of Immigration and Citizenship, *Detention health framework* (2007), pp 56-57; Department of Immigration and Citizenship, 'Changes in mental health screening for detainees', media release, 11 September 2008.

15 Department of Immigration and Citizenship website, *Fact Sheet 22 – The health requirement* (2007), viewed on 31 October at http://www.immi.gov.au/media/fact-sheets/22health.htm. HIV status does not necessarily impact upon grant of a visa.

16 Department of Immigration and Citizenship, *Detention health framework* (2007), p 43.

Assessing public health risks

2.25 People recently arrived from certain countries with poor or non-existent health care may bring with them a range of pre-existing health problems. Examples include poor dental health, lack of immunisation, untreated parasites and bacterial infections, poor diagnosis and treatment of tuberculosis, sexually transmitted infections and a range of other health conditions, including typhoid, malaria, measles and hepatitis B and C.[17]

2.26 For the purposes of establishing criteria for release from detention however, this report is only concerned with diseases that pose a public health risk to the Australian community. Other health conditions can be supervised and treated appropriately outside of a detention environment.

2.27 Figure 2.1 outlines the general public health risk profiles for different groups of unauthorised arrivals, as described in DIAC's *Detention health framework*.

2.28 The primary focus for health screening of entrants is to protect Australia from tuberculosis (TB). Australia has one of the lowest rates of TB in the world, but TB is a highly contagious disease and has a long history as a global public health threat.[18] TB is the only disease specifically identified in DIAC's public interest criteria for visa decisions.[19]

2.29 As DIAC Secretary Andrew Metcalfe told the Committee:

> By definition, people coming in boats from countries to our north will have been living in areas where there is a high incidence of TB, and therefore proper checking is critical… That has been borne out by the fact that we have seen people who have tested positive for TB.[20]

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17 Department of Immigration and Citizenship, *Detention health framework* (2007), p 45; King K and Vodick P, 'Screening for conditions of public health importance in people arriving in Australia by boat without authority', *Medical journal of Australia* (2001), vol 175, pp 600-02; Department of Immigration and Multicultural Affairs, 'Health concerns over boat arrivals', media release, 21 August 2001.

18 World Health Organization, *Global tuberculosis control 2008: Surveillance, planning, financing* (2008), p 278.

19 Department of Immigration and Citizenship, Migration Regulations 1.03, Public interest criteria 4005.

20 Metcalfe A, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 24.

Figure 2.1 Public health risk profiles for unauthorised arrivals

Illegal foreign fishers
This group of people has a high risk of public health issues but requires less intensive care due to the shortness of their stay and their age and fitness level. To protect the Australian community from communicable diseases such as tuberculosis, blood screening is a high priority for this group and ensures that health conditions are identified and treated appropriately.

Unauthorised boat arrivals
Unauthorised boat arrivals are a more diverse group than illegal foreign fishers and may have conditions that need specific health responses. There is a potentially increased prevalence of communicable diseases, giving rise to a need for blood screening similar to that provided for illegal foreign fishers.

Unauthorised air and sea arrivals
This group includes stowaways, ship deserters and air arrivals travelling on false documents. A detailed health assessment may not always be required or cost-effective in view of the quick turnaround by many people in this group. However, a brief screening assessment is always conducted to determine whether a more detailed health assessment is warranted. Stowaways or ship deserters may require further tests depending on their background and the circumstances of their arrival in Australia.

Source: Department of Immigration and Citizenship (compiled with the advice of the Detention Health Advisory Group), Detention health framework (2007), pp 46-47.

2.30 Regarding other communicable diseases that would qualify for detention on the basis of public health risk, the Committee defers to existing public health and quarantine laws applying to all Australian citizens and residents. Under the *Quarantine Act 1908*, for example, a person infected with a quarantinable disease may be ordered into human quarantine.[21] Those diseases which are currently subject to quarantine controls are cholera, plague, rabies, severe acute respiratory syndrome, highly pathogenic avian influenza in humans, yellow fever, smallpox and viral haemorrhagic fevers.[22]

21 *Quarantine Act 1908*, section 18. 'Quarantine' may not necessarily mean detention but powers of detention are covered by the Quarantine Act. As outlined in section 4, quarantine measures might include detention, examination, exclusion, observation, segregation, isolation, protection, treatment and regulation of vessels, installations, human beings, animals, plants or other goods or things.

22 *Quarantine Proclamation 1998* (as amended), section 21.

2.31 The Committee also notes that all states and territories have their own public health legislation, some with up to 100 prescribed diseases that may be the subject of involuntary detention. The provisions for detention, and rights to appeal detention, vary significantly between the states and territories. [23]

2.32 For Australian citizens subject to human quarantine and public health detention orders, detention is used as a last resort where patients have not complied with their treatment plan. Only ten public health detention orders for TB carriers were issued in Australia between 1999 and 2004.[24]

2.33 Within Australia's migration program the risk of TB is assessed and managed so that evidence of TB does not, in itself, adversely impact on the outcome of a visa application. Across the entire migration program, DIAC granted over 101 000 health undertakings between 2000-01 and 2005-06 for individuals with a history of treatment for diagnosed or suspected TB that was currently inactive.

2.34 This means that the person was granted a visa on condition that they report to a medical professional for follow-up on these conditions. A number of undertakings were also granted for leprosy, hepatitis B and C, and other diseases.[25]

2.35 However, in 2007 the Australian National Audit Office identified some issues with DIAC's administration of the health requirement under the Migration Act. According to the audit findings, DIAC had not developed clear criteria to identify what constituted a public health risk in an immigration client, even though decision-makers were required to assess public health risk under the public interest criteria .

> While DIAC included some infectious diseases of global significance within this criterion, the reasons or a firm basis for doing so was often unresolved and undocumented. DIAC did not follow a systematic process for incorporating new or

23 Senanayake S and Ferson M, 'Detention for tuberculosis: public health and the law', *Medical Journal of Australia* (2004), vol 180, no 11, p 575.

24 Senanayake S and Ferson M, 'Detention for tuberculosis: public health and the law', *Medical Journal of Australia* (2004), vol 180, no 11, p 573.

25 Australian National Audit Office, *Audit Report No 37 2006–07: Administration of the Health Requirement of the Migration Act 1958* (2007), p 111.

> emerging health risks into its guidelines and risk management framework.[26]

2.36 In response to the audit, DIAC agreed to work with the Department of Health and Ageing (DOHA) to develop clear and current guidelines for assessing and managing public health risks in immigration clients.[27] DIAC did not provide details of specific progress made against this recommendation. However, the department advised that they are working with DOHA to review the framework for managing public health risks.[28]

2.37 The development of guidelines for assessing what constitutes a public health risk, as recommended by the Audit Office in 2007, should inform the development of criteria for immigration detention. This will also ensure that DIAC's administration of the health requirement under the Act is more accountable and transparent.

2.38 The Detention Health Advisory Group (DeHAG) also noted the importance of continuing to collect health-related detention data to ensure risk assessment criteria have a demonstrable evidentiary basis.[29]

Validity of detention for the purposes of health checks

2.39 A number of inquiry participants suggested that detention for the purposes of health checks was not legitimate. It was argued that health checks could appropriately be conducted in the community, as they were for the majority of immigration clients.[30]

2.40 David Manne, of the Refugee and Immigration Legal Centre in Melbourne, said that:

> In the normal course of processing, most people undergo health checks in the community. If there were some demonstrable risk to the community, our view would be that that would not be occurring. In fact, it is quite clear to us that

26 Australian National Audit Office, *Audit report 2006–07: Administration of the Health Requirement of the Migration Act 1958* (2007), pp 19, 30.

27 Australian National Audit Office, *Audit Report No 37 2006–07: Administration of the Health Requirement of the Migration Act 1958* (2007), p 59.

28 Department of Immigration and Citizenship, correspondence, 28 November 2008.

29 Minas H, Detention Health Advisory Group, *Transcript of evidence*, 11 September 2008, p 40.

30 Human Rights Law Resource Centre, submission 117, p 4; Refugee and Immigration Legal Centre, submission 115, p 3; Asylum Seeker Resource Centre, *Transcript of evidence*, 24 October 2008, p 66.

> someone undergoing health checks and having possible medical problems would not fit an unacceptable risk to the community which would justify detention. It may justify proper treatment and exploration of appropriate options for someone who had, for example, an infectious disease, but our understanding is that, under normal public policy and in fact in practice in this area, detention is not one of those options usually used...
>
> Our organisation assists many people each year who arrive on a valid visa and then apply for a protection visa, and at all times they remain in the community… As part of the application process, these people are required to undergo a medical examination by law and cannot be granted a protection visa if they do not. So, it is mandatory. At no point is there any consideration of detaining that person while they undergo the checks; far from it. Normally the concerns, if they do have medical problems, are about ensuring they are provided with proper care and are not placed in a situation where medical conditions could be exacerbated. All the evidence is that detention has a real capacity to do that. So it is just unclear to us.[31]

2.41 Similarly, the Human Rights Law Resource Centre argued that:

> Other new arrivals to Australia are not detained for this reason. Where health checks are required for authorised arrivals they are regularly performed after people have been living in the community for months. In this context it is manifestly unnecessary and disproportionate for unauthorised arrivals to be detained while health checks are completed.[32]

2.42 The Office of the United Nations High Commissioner for Refugees (UNHCR) also expressed concern that:

> The detention of asylum-seekers and/or refugees, for the purposes of conducting health or quarantine assessments, may be inconsistent with international human rights standards.[33]

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31 Manne D, Refugee and Immigration Legal Centre, *Transcript of evidence*, 11 September 2008, p 20.

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

33 Office of the United Nations High Commissioner for Refugees, submission 133, p 10.

2.43 However, it also noted a recent UNHCR commissioned study which suggests that isolation may be necessary for a small number of serious cases. The study found that, in limited circumstances, there may be an argument for:

> …the screening and isolation of individuals with serious communicable diseases such as active tuberculosis, which may be transmitted via casual contacts and close proximity over a certain period for example, in a communal reception centre for asylum. [34]

2.44 At a public hearing Richard Towle of UNHCR elaborated on the distinction between mandatory detention for health checks and temporary segregation due to health risks. Mr Towle told the Committee that beyond initial screening:

> We think that there may be a qualitative difference between detention on the basis of identity and security and separation or segregation on the basis of health risk. We are not convinced that you need to detain on the basis of health assessments but, rather, some form of health or medical related segregation.[35]

2.45 Dermot Casey, Acting First Assistant Secretary of DIAC, said that people arriving in Australia as unlawful non-citizens were not considered to be 'more unhealthy' than others who might enter on a valid visa and then apply to stay in Australia permanently. However, conducting the health assessment while a person is in detention helped the department to satisfy their duty of care and ensure that health conditions did go undetected.[36]

Time frames for health checks

2.46 As noted earlier, health checks generally comprise: a medical history; a physical examination (such as blood pressure, weight, height, heart sounds, urinalysis and dental hygiene); screening for communicable diseases from identified risk groups; and mental health screening.[37]

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34 Office of the United Nations High Commissioner for Refugees, submission 133, p 10.

35 Towle R, Office of the United Nations High Commissioner on Refugees, *Transcript of evidence*, 15 October 2008, p 2.

36 Casey D, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 23.

37 Department of Immigration and Citizenship, *Detention health framework* (2007), pp 56-57; Department of Immigration and Citizenship, 'Changes in mental health screening for detainees', media release, 11 September 2008.

2.47 The Committee was not provided with data on the average and range of time taken to complete health checks by DIAC. The Committee considers this data is important to ensure an effective process of health checks that does not unnecessarily prolong the detention period for an unauthorised arrival.

2.48 However, from inspections at various detention centres and discussions with medical, DIAC and GSL officials, the Committee understands that health checks are usually conducted expeditiously.[38] Even for those detainee populations who have a high risk of carrying communicable diseases, x-rays for TB and other testing is undertaken at local hospitals within a few days of arrival in the country.

2.49 Nevertheless DIAC told the Committee that, although checks for TB and other communicable diseases could generally be conducted quickly, it might not be appropriate to apply specific time frames for the completion of health checks as there were always exceptions to the rule. For example, where a group of people arrived at a very remote part of Australia there could be issues about their ability to fly and duty of care issues in relation to detainees as well as for the staff accompanying them.[39]

Committee comment

2.50 There is some evidentiary basis for greater potential public health risks from unlawful non-citizens who arrive in Australia, particularly for tuberculosis. This is supported by DIAC's *Detention health framework*, which was compiled on advice from the DeHAG and characterises unauthorised arrivals as having a higher public health risk profile than other unlawful non-citizens who may have breached their visa conditions or have been subject to visa cancellation.[40]

2.51 Provided that evidence-based guidelines are developed, the Committee believes that the health check criterion is justified, in terms of DIAC's duty of care to immigration detainees, protection of the Australian community, and given that health checks can be done expeditiously and are only likely to delay a person's release from immigration detention in highly unusual circumstances.

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38 GSL refers to staff of Global Solutions Limited, the contracted detention services provider for Australian immigration detention centres.

39 Metcalfe A, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, pp 23-24.

40 Department of Immigration and Citizenship, *Detention health framework* (2007), p 47.

2.52 The Committee anticipates that the development of DIAC guidelines setting out what constitutes a public health risk, as recommended by the Audit Office in 2007, will provide a more transparent approach to detention on the basis of public health risk.

2.53 The Committee urges DIAC to complete these guidelines as a priority and ensure that they are publicly available to detainees and advocacy groups.

2.54 As part of this transparency and evidence-based approach to risk assessment for health checks, the Committee notes the importance of continuing to collect health-related data on unlawful non-citizens. This will assist in determining the ongoing appropriateness of certain screening and health checks for different arrival populations.

Recommendation 1

2.55 **The Committee recommends that, as a priority, and in line with the recommendations of the Australian National Audit Office, the Department of Immigration and Citizenship develop and publish criteria setting out what constitutes a public health risk for immigration purposes.**

The criteria should draw on the treatment standards and detention provisions that otherwise apply to all visa applicants and to Australian citizens and residents who pose a potential public health risk.

The criteria should be made explicit and public as one basis on which immigration detainees are either approved for release into the community or temporarily segregated from the community.

2.56 The Committee also notes that, unless an arrival poses a risk due to active pulmonary TB or a quarantinable disease, or is non-compliant with a treatment plan for a communicable disease, detention is for the purposes of health screening and checks only. As with the general migrant population, any medical treatment plans can be appropriately provided outside of a detention facility.

2.57 In this manner, assessments of unlawful non-citizens should reflect the risk management practices that apply to communicable diseases for other visa applicants and citizens of Australia.

2.58 The Committee also agrees with the proposal of UNHCR that any isolation or segregation on the basis of health risks posed by individual detainees should be in an appropriate medical facility and that all actions to isolate them should be proportional to the health risk posed.[41] This can be achieved through use of the existing temporary alternative detention framework, which is already used for transfer of immigration detainees to places of specialist medical and psychiatric care.

2.59 The Committee recognises that there will be cases in which it is not possible to complete health checks within a specified time frame. This might be for practical reasons, such as because of the remoteness of the location in which people come into contact with immigration or navy officers, or because of difficulties in finding translators for a particular language group.

2.60 There will also be traumatised or vulnerable people arriving in detention who may be further distressed by being asked to undergo potentially invasive health checks. In these circumstances the immediate priority should be stabilising the mental state of the person and reassuring them of their safety.

2.61 However, balancing DIAC's concern that there will be 'exceptions' to any time frames developed for health checks, the Committee argues the need for public accountability, the need to ensure detainees are informed of required processes and expected time frames, and the importance of minimising any chances that health checks will unnecessarily hold a person in detention who poses no risk to the community.

2.62 The Committee considers that a framework of indicative time frames for the completion of health checks is a means of balancing flexibility and efficiency within the system. The Committee recognises that time frames should not be binding. However it is reasonable to expect that, for the majority of detainees, health checks will be completed within a defined number of days – such as five days.

2.63 For cases beyond this time, the Committee considers that there should be an established set of criteria which are permissible to justify the extended time taken to complete health checks. These criteria may cover conditions such as: remoteness of arrival location; availability of translators; or the traumatised state of the person arriving in detention.

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

2.64 A framework such as this would establish benchmark expectations for health checks, and require DIAC to report against these time frames. Given that the completion of health checks will function as a criterion for detention under the new values, it is reasonable that a degree of accountability is placed on DIAC to monitor and report on the times taken to complete health checks.

Recommendation 2

2.65 **The Committee recommends that the Department of Immigration and Citizenship establish an expected time frame such as five days for the processing of health checks for unauthorised arrivals.**

This expected time frame should be established in consultation with the Immigration Detention Advisory Group, the Detention Health Advisory Group, the Department of Health and Ageing, the Commonwealth Ombudsman and the Human Rights Commission.

An optimum percentage of health checks of unauthorised arrivals should be completed within this time frame. The department should include in its annual report statistics on the proportion of health checks so completed, and where health checks took longer than five days, specify the reasons for the delay.

Detention for the purposes of identity checks

2.66 The values announced by the Minister for Immigration and Citizenship state that, as part of the new 'risk-based' approach detention policy, mandatory detention will apply to all unauthorised arrivals for the management of health, identity and security risks to the community.[42]

2.67 In the Minister's speech it was implied that a person whose identity remains unknown will not be eligible for release from detention into the community.[43] Consequently issues of managing identity

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

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

verification processes, defining identity, and assessing potential identity risks are critical to determining release from immigration detention.

2.68 DIAC aims to manage identity verification and prevent identity fraud by:

- establishing the identity of persons applying for entry to Australia or for other immigration related services or citizenship
- verifying identity at the border, and
- establishing a consistent foundation identity for non–citizens to use in the Australian community, from initial contact through to when and if they become Australian citizens.[44]

2.69 Unauthorised arrivals present a risk as they sidestep this system of verification. The identity tracking of those persons coming and going from Australia is controlled by our universal visa system, and unauthorised arrivals do not, by definition, have visas.

2.70 Successive Australian governments have maintained that one of the fundamental principles of the movement of people is that nations have the sovereign right to determine who enters their borders. DIAC's strategic plan for identity management notes that, 'By extension, nations also have the sovereign right to grant entry only to those they have approved for entry, and not to any substitute or false identities. Identity does matter'.[45] DIAC also cites terrorism and the growth in identity crime as two factors giving impetus to the need to know who enters Australia.[46]

2.71 Australia has experienced a number of unlawful detention cases for which the Commonwealth has been liable for compensation, including cases such as those of Cornelia Rau and Vivian Solon, in which a person was not identified or wrongfully identified.[47]

Minister's speech this reference to unresolved identity is linked with 'unacceptable risk' to the community.

44 Department of Immigration and Citizenship, *Identity matters: Strategic plan for identity management in DIAC 2007-2010* (2007), p 4.

45 Department of Immigration and Citizenship, *Identity matters: Strategic plan for identity management in DIAC 2007-2010* (2007), pp 7-8.

46 Department of Immigration and Citizenship, *Identity matters: Strategic plan for identity management in DIAC 2007-2010* (2007), p 8.

47 Under the terms of settlement, Ms Rau received $2.6 million in compensation. In addition, the Commonwealth also paid Ms Rau's legal costs. Ms Alvarez (Solon) received $4.5 million in compensation.

2.72 At a Senate Estimates hearing on 21 October 2008, DIAC Chief Lawyer Robyn Bicket said that of the 247 referred cases of wrongful or unlawful detention; there are currently 191 cases in which DIAC considered there to be a risk of legal liability for compensation. DIAC has advised the Committee that in relation to these 247 cases referred by the Commonwealth Ombudsman, at 20 August 2008, compensation had been offered in 31 instances. Thirteen matters were resolved through confidential negotiated settlements with compensation payable.[48]

2.73 Apart from the 247 Ombudsman review case load, compensation has been paid in five cases involving unlawful detention since 1 January 2001.[49] This includes the cases of Cornelia Rau and Vivian Solon. The total payout in compensation for the financial year ending 2007-08 was in the order of $4.1 million. The most significant individual compensation payment for the period was made to Cornelia Rau which accounted for $2.6 million.[50]

2.74 At the Senate Estimates hearings on 21 October 2008, the Minister of Immigration and Citizenship conceded that DIAC is 'facing a lot of compensation claims relating to unlawful detention or prolonged detention'.[51]

2.75 In the wake of these cases, DIAC has invested considerable resources in improving the way it manages identity and cases where identity is unknown. This includes a national identity verification and advice service, established in 2005, which helps staff in state and territory offices to identity people of compliance interest and conducts identity investigations of particularly complex cases. [52]

2.76 There has also been a large-scale roll-out of biometrics and identity management technology. In 2004, the Migration Act was amended to provide a legislative basis for collecting personal identifiers including photographs, signatures and fingerprints. The Committee inspected some of the biometric testing facilities during its visits to detention facilities around the country.

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48 Department of Immigration and Citizenship, supplementary submission 129c, p 3.

49 Department of Immigration and Citizenship, correspondence, 27 November 2008.

50 Bicket R, Department of Immigration and Citizenship, *Senate Hansard*, Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 21 October 2008, p 24.

51 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Senate Hansard*, Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 21 October 2008, p 42.

52 Department of Immigration and Citizenship, *Annual report 2006-07* (2007), p 111.

2.77 Despite these investments in identity tracking and verification, there are times when it can be extremely difficult to satisfactorily determine a person's identity. In particular this occurs when the person:

- actively seeks to withhold details
- has fraudulent documentation or documentation that is not theirs
- is unable to provide details, or
- provides conflicting details.[53]

2.78 The Commonwealth Ombudsman explained that problems with clarifying a person's identity and citizenship were often among those factors that meant there was no practical likelihood of their immigration status issue being resolved in the short term.[54] Accordingly, people with identity issues feature regularly amongst the long-term detention cases under his review.

2.79 With this in mind, a number of inquiry participants expressed concern that the mandatory detention for identity checks criterion would consign vulnerable asylum seekers to continued detention.

2.80 Anna Copeland, of the Southern Communities Advocacy Legal and Education Services Community Legal Centre in Perth, said that:

> Many asylum seekers obviously arrive without identity documents, due to the fact that they are fleeing their country because of persecution. They may come from countries that have fallible systems for recording the identity of citizens and residents and it may take years to pursue inquiries into identity with their country of origin, and that might only produce a very limited possibility of success. [55]

2.81 Similarly, clinical psychologist Guy Coffey said that unless the values were implemented in a way that was able to accommodate residual doubts about identity, 'We are still going to see people detained for extended periods of time'. He expressed concern that the criterion could potentially discriminate against the most vulnerable people in detention, 'people who have had to flee their countries precipitously

53 Department of Immigration and Citizenship, Procedures Advice Manual (PAM) 3, *Establishing identity in the field and in detention*, para 4.0.

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

55 Copeland A, Southern Communities Advocacy Legal and Education Services (SCALES) Community Legal Centre, *Transcript of evidence*, 9 October 2008, pp 2-3.

and have not been able to gather the means to establish their identity'.[56]

Defining identity

2.82 If identity risk is a criterion for mandatory detention, then there must be a clear recognition of what can constitute defining an identity for detention release purposes.

2.83 Issues relating to determining identity were a significant concern to many inquiry participants. It was noted that, for the purposes of developing a framework policy for release, a definition of identity and what it took to establish identity would be critical.

2.84 David Manne, of the Refugee and Immigration Legal Centre in Melbourne, was concerned that clear direction be given:

> …as to what we even mean by identity, because identity can mean different things in different contexts. Just as an example, it might appear on the face of it obvious what an identity check means and that people just think that it normally would mean name, date of birth and country of origin, for example, but identity can mean very different things in the context of someone arriving in Australia. For example, it could bleed into questions that are related to their substantive claims for protection.[57]

2.85 Julian Burnside QC of Liberty Victoria felt that, in protection visa cases at least a narrow definition of identity was generally 'not the crucial thing':

> The person either has a claim for a visa to Australia or not, typically it will be a protection visa claim. If you remove it from current politics and assume it was a person arriving from Germany in 1938, and let us suppose it is plain that they are Jewish and they tell a story which is internally coherent, it probably does not matter which German Jew they are; you would still probably say that they are entitled to protection rather than being sent back to Nazi Germany. The mere fact

56 Coffey G, *Transcript of evidence*, 11 September 2008, p 83.

57 Manne D, Refugee and Immigration Legal Centre, *Transcript of evidence*, 11 September 2008, p 20.

> that a person adopts a different persona may be of very little concern, except in marginal cases.[58]

2.86 Mr Burnside added that the convention relating to the status of refugees says nothing about identity, and identity in its narrow sense would become relevant only insofar as it was suggested that a person had been involved in crimes against humanity, which would preclude them from being granted protection.[59]

2.87 There was also criticism of DIAC and the Refugee Review Tribunal (RRT) which in the past, it was claimed, have applied the need for establishment of identity in a very restrictive fashion. Jessie Taylor, of the Law Institute of Victoria, said:

> I have sat in on a number of Refugee Review Tribunal hearings where the member has been interrogating the applicant. Afghanistan is a classic example, 'Ms Hazara from Oruzgan, where is your birth certificate, what date were you born, where was your mother born, where is her birth certificate?'
>
> That is just extraordinarily inappropriate and impossible for that person to provide. However, still nine or ten years after the first waves of people in that particular category have arrived, the RRT is still grappling with why Afghanis do not have birth certificates.[60]

2.88 At the time of this report there was no detail released on the policy and procedures DIAC would apply to determine what would constitute identity and hence eligibility for release from detention.

Assessing identity risks

2.89 DIAC's *Strategic plan for identity management* states its aim is to combat 'one of the fastest growing crimes of the twenty-first century—identity fraud'. However there is scant data available on the incidence of identity fraud in Australia's migration program and in particular, amongst unauthorised arrivals, who are the target of this criterion. In January 2003, DIAC prepared a paper which reported that, 'There is no evidence to suggest widespread identity fraud problems within

58 Burnside J, Liberty Victoria, *Transcript of evidence*, 11 September 2008, p 53.

59 Burnside J, Liberty Victoria, *Transcript of evidence*, 11 September 2008, p 55.

60 Taylor J, Law Institute of Victoria, *Transcript of evidence*, 11 September 2008, p 54.

any [department] programs,' although there were 'identified risks in some of our procedures'.[61]

2.90 Without information on these 'procedural risks' it is difficult to assess where the balance should lie between the nation's sovereign right to control its borders and empathy for the real and practical difficulties some unauthorised arrivals will face in establishing their identities.

2.91 The Commonwealth Ombudsman provided some insights with his comments on the approach he would take when, in his six month reviews, he encountered cases where a person's identity had still not been established:

> The hard question we will be asking is whether, for the purposes of section 189 of the Migration Act, there can be a reasonable suspicion that the person is an unlawful non-citizen. The Committee may be aware [of earlier Ombudsman's reports dealing with] cases in which somebody's identity was not known. A view that I put very strongly in those reports was that the person may simply have been exercising their common law right to remain silent when dealing with authorities and because you do not know anything about a person does not provide reasonable grounds for a suspicion that they are unlawfully in the country. In one of those cases, the person was released from detention soon after. In the other case, the person's identity was established.[62]

2.92 The UNHCR's guidelines for the detention of asylum seekers advise that detention may be resorted to, where necessary, in cases where asylum-seekers have destroyed their travel and identity documents or have used fraudulent documents in order to mislead the authorities of the state in which they intend to claim asylum.[63]

2.93 However, the guidelines also note that the absence of travel and identity documents should not be used to punish asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin.

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61 Department of Immigration and Citizenship, *Identity matters: Strategic plan for identity management in DIAC 2007-2010* (2007), pp 7, 12.

62 McMillan J, Commonwealth Ombudsman, *Transcript of evidence*, 17 September 2008, pp 5-6. Further background on this issue is provided in *Report into referred immigration cases: Detention process issues* (2007), pp 8-10.

63 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 4.

2.94 The guidelines go on to state that:

> What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process… detention is only permissible when there is an intention to mislead, or a refusal to co-operate with the authorities.[64]

2.95 Richard Towle of UNHCR further expanded on this attempt to find a reasonable balance between the rights of the state to determine identity risks and the human rights of asylum seekers:

> The problem with identity is that, if you do not know who they are, there may be questions in this day and age about releasing them completely and freely into the community. That is why I think you need to have a nuanced approach.
>
> Just because someone does not have a document to prove their name and their date of birth does not mean they pose a threat to security and it does not mean that they cannot be let out. It might be very apparent, even if they do not have a document to say they are from Sudan, that they may be from Sudan—the language they speak, the way they look, their understanding of cultural values will show you that is where they are from without that document.
>
> I think that is the value of an individualised risk assessment process, which the government has now announced in policy terms, because it allows you to look at cases, one by one, rather than these broad, brushstroke assessments and assumptions that because you come from region X or country Y you therefore pose a threat to national security or to the community. Having the onus now shifting to the department to make those assessments is positive. We hope we will see less and less, but you will always see cases like that: stateless people unable to prove who they are. That is where the balance comes in between allowing someone to keep going on with their lives freely and the threat to the nation and community. Finding that balance is very important.[65]

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64 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 4.

65 Towle R, Office of the United Nations High Commissioner on Refugees, *Transcript of evidence*, 15 October 2008, pp 6-7.

Committee comment

2.96 The Committee recognises that the integrity of the migration system relies on establishing the identity of unauthorised arrivals. There may also be potential issues of national security when the identity of unauthorised arrivals cannot be determined. The assessment and management of security risks are considered in the following section.

2.97 On balance, however, in the absence of a demonstrated and specific risk, the Committee recommends that consideration is given to dispensation for release from immigration detention for people whose identity checks are ongoing. This acknowledges that:

- some people, including those most in need of Australia's protection, may not always be able to provide identity documents or such documents may not in fact exist in their home countries
- where identity checking involves seeking information from the country of origin there may be significant delays that neither the person in immigration detention nor DIAC will be able to control, and that
- in the past, failure to establish identity has resulted in prolonged periods of detention and uncertainty, and this has adversely impacted on the mental health of clients, in particular those seeking asylum in Australia.

Recommendation 3

2.98 **The Committee recommends that, in line with a risk-based approach and where a person's identity is not conclusively established within 90 days, the Australian Government develop mechanisms (such as a particular class of bridging visa) to enable a conditional release from detention. Conditions could include reporting requirements to ensure ongoing availability for immigration and/or security processes.**

Release from immigration detention should be granted:

- **in the absence of a demonstrated and specific risk to the community, and**
- **except where there is clear evidence of lack of cooperation or refusal to comply with reasonable requests.**

2.99 The Committee also considers that this 90 day time frame should be reviewed after a period of time with a view to further reducing it if possible and practicable to do so.

Detention for the purposes of security checks

2.100 The new immigration detention values state that unauthorised arrivals will be detained for management of health, identity and lastly security risks to the community.

2.101 As the Justice Project observes, identity and security are often linked issues as it is difficult to conduct a security check on someone whose identity is unclear. Even more so than identity however, the proposed security criterion for release raised the most concern amongst inquiry participants due to its potential adverse impact on the duration of detention for unauthorised arrivals.

2.102 Any person applying for a visa to travel to, or remain in, Australia may have their application referred by DIAC to the Australian Security Intelligence Organisation (ASIO) for an assessment of whether that person's presence in Australia would pose a risk to security. Under the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), security means protecting Australia from espionage, sabotage, politically motivated violence, the promotion of communal violence, attacks on our defence system and acts of foreign interference.[66]

2.103 In conducting security assessments, ASIO draws on classified and unclassified information to evaluate the subject's activities, associates, attitudes, background and character, taking into account the credibility and reliability of available information. Where there are inconsistencies or doubts, the person may be interviewed. Where ASIO determines that a person's presence in Australia would pose a direct or indirect risk to security, ASIO may recommend against the issue of a visa.[67]

2.104 The Director-General of ASIO, Paul O'Sullivan, told the Committee that DIAC does not refer all persons in immigration detention to ASIO for security checking. The existing arrangements are based upon a risk management model, which means that DIAC performs an

66 Australian Security Intelligence Organisation Act 1979, section 4.

67 Australian Security Intelligence Organisation, *Report to the Parliament 2007-08* (2008), p 18.

initial assessment. DIAC only refers those cases to ASIO that match agreed criteria:

> With regard to security assessments of persons held in mandatory immigration detention, in most cases this involves individuals who have arrived here without a valid visa (whether by boat or aircraft). While DIAC also refers cases of individuals detained for overstaying or breaching the conditions of their visa, this occurs less frequently.[68]

2.105 The criteria on which DIAC makes this assessment and referral to ASIO are classified.[69]

2.106 With regards to the reforms announced by the Minister, Mr O'Sullivan said his organisation was working with DIAC but did not foresee any fundamental change to ASIO's processes and responsibilities for visa security assessments:

> We are working closely with DIAC at senior levels in relation to how any changes associated with the Department's implementation of the Government's policy might affect ASIO. Given the Minister's directive for the department to implement a risk-based immigration detention framework, ASIO and DIAC will continue to prioritise detention cases. And ASIO will continue to assess cases of individuals held in immigration detention as quickly as possible.
>
> Looking at the matter purely in terms of fulfilling our responsibility to carry out security assessment of cases referred to us by DIAC, we do not foresee any significant new challenges arising from the risk-based detention policy framework.[70]

Time frames for security assessments

2.107 ASIO prioritises security assessments for protection visa application and detention cases.[71] In 2007-08, ASIO completed 62 per cent of protection visa applications within the 90 day time frame for processing of those applications, which was up from 52 per cent in 2006-07. Mr O'Sullivan explained that those cases outside the 90 days

68 Australian Security Intelligence Organisation, submission 139, p 5.
69 Australian Security Intelligence Organisation, submission 139, p 4.
70 Australian Security Intelligence Organisation, submission 139, p 10.
71 Australian Security Intelligence Organisation, submission 139, p 10.

tended to be complex and time frames varied based on the complexity of the case.[72]

2.108 Specific data on time frames for assessment of immigration detainees, rather than for protection visa applicants who may or may not be in immigration detention, is not available.

2.109 Section 37(2) of the ASIO Act says that an adverse or qualified security assessment shall be accompanied by a statement of the grounds for the assessment and:

> …that statement shall contain all information that has been relied on by the Organisation in making the assessment, other than information the inclusion of which would, in the opinion of the Director-General, be contrary to the requirements of security.

2.110 However disclosure of the reasons for an adverse assessment cannot usually be made where the evidence is classified. For persons in immigration detention whose security checks are ongoing, that person may not know what the issue of concern is for ASIO and where the delays arise.

2.111 The Hon John Hodges, Chair of the Immigration Detention Advisory Group, indicated that time frames for security assessment were a challenge to expediting detention cases, not least because ASIO commonly consulted with international agencies:

> In the assessment of people for health, security, criminal activity or prior criminal activity, you have got other agencies involved… When you get to police reports and security reports it is much more difficult because you are dealing with perhaps dozens or hundreds of countries around the world. It is very difficult to get information and to get it quickly. The objective of turning these people around in terms of those vital checks is not easy.[73]

2.112 The Refugee Council of Australia also raised the issue of delays for security checking:

> While the Council accepts the need to safeguard the security of the broader Australian community, the agencies responsible for security vetting often take many months,

72 Australian Security Intelligence Organisation, submission 139, p 7.

73 Hodges J, Immigration Detention Advisory Group, *Transcript of evidence*, 3 September 2008, p 9.

> sometimes years, to conduct security checks. … It would be a shame if such persistent delays on the part of security agencies operated in such a way as to undermine the operation of the general principles of a presumption against detention and detention for the shortest possible time.[74]

2.113 Jo Knight, of the Refugee Law Reform Committee of the Law Institute of Victoria, said that security could be:

> …a never-ending concept… A case can stay open for years while the external agency such as ASIO, which the Department of Immigration and Citizenship cannot control, has checks taking place. That is an area that creates great delay, and at times, great injustice.[75]

2.114 This was confirmed by clinical psychologist Guy Coffey who said he had a client who had just received their protection visa after six or seven years of identity checking.[76]

2.115 Inquiry participants who were legal representatives or advocates for unauthorised arrivals in detention expressed frustration with the opacity of the security assessment process. Elizabeth Biok, a solicitor with Legal Aid New South Wales, said that:

> As a lawyer it is really difficult because you talk to the case officer and all the case officer can say to you is, 'It has gone to the other agency.' We all know what that means. It has gone to ASIO. We have no idea of what checks are being made and who they are being made with, so it is very hard to advise the clients… I have some clients who are really very seriously mentally ill. They are sweating on this ASIO check, but there is no way of finding out what is happening.
>
> …We do not know where the security checks are being made. We do not know if they are going back to Iraq to try to find out if they know anything about this person. We do not know if they are going to countries that they have passed through. A similar issue is people who have lived for some time in other countries. For example, a lot of Iraqis have lived in Iran or have lived in Greece and then they make their way to Australia and end up in detention. They have to get a penal clearance from the countries where they have spent some

74 Refugee Council of Australia, submission 120, p 8.

75 Knight J, Law Institute of Victoria, *Transcript of evidence*, 11 September 2008, p 53.

76 Coffey G, *Transcript of evidence*, 11 September 2008, p 79.

> time. The Greek bureaucracy is, let me say, slightly worse than the Australian bureaucracy. I have had a young Christian Iraqi waiting in detention for a couple of months until we managed to get something from the Greek authorities. That does not seem to be just to me.[77]

2.116 In recognition of the delays in completing some security checks, and that during this time people continue to be held in detention with no indication of a potential release date, Ms Biok proposed that:

> If the person has been accepted as a refugee, the Australian authorities have no problem, and the person says, 'I have not got any problems', and they appear to be credible, then we should be able to release them into the community on an undertaking that they do not get their permanent residence visa until they actually get that penal clearance. There are certain countries where we know the penal clearance is going to take a long time and there should be account made of that. People should not be kept there waiting and getting more stressed as they see everybody else leave the detention centre.[78]

2.117 In addition to concerns raised about the inherently time-consuming nature of security checks, evidence was also provided about the prevalence of DIAC administrative and data errors where the department had failed to action assessments received from ASIO. Ms Biok said that:

> I had a client last year where we waited on a security check and I kept going back to the department saying, 'What is happening?' I complained to the Inspector-General of Intelligence and he eventually found out that the security check had been sent back to the department four months before, but there was a computer error and it was not put onto the record. This man waited unnecessarily for five months to get his visa. He was in the community, but the fact that he was waiting and was not a permanent resident had a major impact on the health services that were provided to his children, one of whom was very ill. These sorts of things are happening with security checks. It has got to be a more transparent system.[79]

77 Biok E, Legal Aid New South Wales, *Transcript of evidence*, 24 October 2008, pp 18-19.

78 Biok E, Legal Aid New South Wales, *Transcript of evidence*, 24 October 2008, p 19.

79 Biok E, Legal Aid New South Wales, *Transcript of evidence*, 24 October 2008, pp 18-19.

2.118 The Committee notes the current collaboration of DIAC and ASIO in developing a 'next generation border security initiative'. This initiative will enable direct electronic connectivity for the transmission of visa applications between DIAC and ASIO, and is expected to minimise the potential for errors of this type to occur in the future.

2.119 Over the last three years there has been an increase in the number of complaints regarding delays in ASIO's security assessment process of visa purposes. The Inspector-General of Intelligence and Security (IGIS) has an important role in overseeing ASIO's security operations. However, IGIS is only empowered to inquiry into the 'propriety' of ASIO's activities and whether it has followed procedural guidelines effectively and appropriately.[80]

2.120 The 2007-08 IGIS annual report notes that the number of complaints received by IGIS had increased markedly. This was primarily driven by complaints about delays in ASIO's security assessment process for visa purposes. A total of 193 new complaints of this type were received and administratively actioned in the reporting period. This compares to 71 new complaints of this type received and actioned in 2006–07 and 26 in 2005–06.[81]

Assessments of security risk

2.121 Assessment of security risk is a specialised task and one which falls under ASIO's area of expertise. Most external scrutiny bodies, including this Committee, do not have access to the evidence on which ASIO is making its security assessments or determining that an investigation should be ongoing.

2.122 Other than a policy commitment to prioritise detention cases, ASIO's directions under its Act do not allow it to consider the circumstances of detention for a person they are assessing, or that person's state of mental health.

2.123 Some inquiry participants felt that in the past the security risk posed by the detention population, particularly unauthorised boat arrivals, had been exaggerated.[82] For example, Professor Linda Briskman of the Centre for Humans Rights Education, Curtin University, told the Committee that for unauthorised boat arrivals:

80 *Inspector-General of Intelligence and Security Act 1986*, section 8.

81 Inspector-General of Intelligence and Security, *Annual report 2007-08* (2008), p 8.

82 Castan Centre for Human Rights Law, submission 97, p 7; see further references below.

> Security has not been an issue at all. With people fleeing their countries and coming from Indonesia on dreadful boats, where some people have died and put themselves and their children in danger, it is really hard to say that they are a security problem or that they are terrorists. That is not how terrorists do their work.[83]

2.124 The historical evidence available suggests that the security risk posed by unauthorised arrivals has been minimal. For example:

- Of 72 688 visa security assessments conducted by ASIO in 2007-08 across the whole migration program, two applicants (or 0.00003 per cent) were assessed to pose a direct or indirect risk to security and received adverse assessments.[84]
- In 2004–05 ASIO provided adverse security assessments for two unauthorised arrivals from a total of 4223 assessments. This represents approximately 0.05 per cent of the total number of assessments for unauthorised arrivals.[85]
- On an earlier occasion, the Director-General revealed that, out of the 5986 security checks that ASIO had performed on boat people between 2000 and 2002, no individuals had been assessed as a security risk.[86]

2.125 Only two adverse assessments against immigration detainees have come to public attention in recent years. In August 2005, two unauthorised arrivals, Mohammed Sagar and Muhammad Faisal, both Iraqi nationals detained on Nauru for some years, received adverse security assessments. They were given no reason for these assessments.

2.126 Although assessed as genuine refugees, they were considered to be a security threat for reasons ASIO would not disclose and were denied Australian visas. They launched civil action against the Director-General of Security in the Federal Court of Australia, seeking orders

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83 Briskman L, Centre for Human Rights Education, Curtin University, *Transcript of evidence*, 9 October 2008, p 23.

84 Australian Security Intelligence Organisation, *Report to the Parliament 2007-08* (2008), p 19.

85 Australian Security Intelligence Organisation (ASIO), Answers to questions taken on notice at an Estimates hearing on 25 May 2006, Senate Legal and Constitutional Legislation Committee, question no 120.

86 Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights Subcommittee, Inquiry into aspects of HREOC's annual report 2000-01 concerning immigration detention centres; *Committee Hansard*, 22 August 2002, pp 36, 39.

to quash the adverse security assessments.[87] Mr Faisal's case was later reviewed by ASIO. The adverse assessment was removed and he was granted a permanent visa in 2007. Mr Sagar was resettled by UNHCR in Sweden. [88]

2.127 A number of strong submissions were received addressing the damaging effects on detainees of long waits for security checks, and the frustration resulting from delays. Questions were also raised regarding the validity and basis for suspicion that a detainee may pose a security risk to the Australian community.

2.128 Kate Gauthier of A Just Australia asked:

> How long do you need to be keeping someone in there anyway, and how deep is the level of security that you need for those people? I would say that as we have not had any asylum seekers who have ever been a security problem for Australia, who have never been found to have an adverse security assessment, shouldn't we be using that experience within Australia to say, 'If we have never had a problem, are we being a little heavy handed in requiring that they remain in a high security facility in order to do these health, character and identity checks?'[89]

2.129 The Forum of Australian Survivors of Torture and Trauma also queried:

> Does the ongoing policy of mandatory detention of unauthorised arrivals mean that they will be detained indefinitely until there is evidence that they are *not* a security risk? ASIO sometimes takes many months to provide security clearances. Such an approach would seem to be contrary to the principle of the new policy that the onus is on DIAC to establish the necessity for detention and not to presume that detention is necessary.[90]

2.130 Bill Georgiannis of Legal Aid New South Wales commented that:

> Regarding people in detention, once everything else is cleared and the only thing that they are waiting on is the security check, I do think in those cases if a security check cannot be

87 *Parkin v O'Sullivan* [2007] FCA 1647 (2 November 2007).

88 Hoffman S, supplementary submission 59a, p 2.

89 Gauthier K, A Just Australia, *Transcript of evidence*, 24 October 2008, p 13.

90 Forum of Australian Survivors of Torture and Trauma, submission 115, p 9.

> done within a reasonable period of time then that person should be released into the community pending the finalisation of the security check.[91]

2.131 Mr Georgiannis further suggested that:

> If the security check cannot be done within a reasonable period of time then to keep them detained does not stand. There are ways that people can be released pending the outcome of the security review, if that is necessary.[92]

2.132 Kon Karapanagiotidis, Chief Executive Officer of the Asylum Seeker Resource Centre in Melbourne, told the Committee:

> It will be those who are the most vulnerable and who have suffered the worst who will not be able to establish their identity for the purpose of a security check, like those two Afghan men in Maribyrnong. They are into their fifth month and likely to be there for a year, possibly longer. We know that identity checks regarding their country of origin are a nightmare. Most Afghans do not even know their date of birth. So we sit there and say, 'Well, once they have done their security check, we'll let them out.' What if they cannot demonstrate their identity? Who are we protecting here? This idea that undocumented arrivals are a threat to our national security or a threat to our country is a lie. There are no facts to support this.[93]

Committee comment

2.133 The Committee acknowledges the importance of conducting security checks for unauthorised arrivals. However there will be instances where, due to the complexity of the case or difficulties in liaison with other countries, there are lengthy delays in the completion of security assessments.

2.134 The Committee notes that only two adverse security assessments were given in 2004-05 for unauthorised arrivals. In 2007-08 only two adverse assessments were made across the whole of Australia's migration program.

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91 Georgiannis B, Legal Aid New South Wales, *Transcript of evidence*, 24 October 2008, p 19.

92 Georgiannis B, Legal Aid New South Wales, *Transcript of evidence*, 24 October 2008, p 19.

93 Karapanagiotidis K, Asylum Seeker Resource Centre, *Transcript of evidence*, 24 October 2008, p 67.

2.135 In keeping with a risk management approach to security checks, the Committee recommends that non-completion of a security assessment should not, in itself, be grounds for ongoing detention. If a security assessment has not been finalised within the 90 day time frame, the Committee considers it necessary that a valid explanation be given as to the basis for delays and the justification for ongoing detention while security checks continue.

2.136 As with health and identity checks, the Committee is of the view that there must be some indication of an immediate and specific security risk in order to establish any need for ongoing detention. Otherwise, consistent with the values outlined by the Minister on 29 July 2008, there should be provision for a person to remain in the community while checks are competed and their immigration status is resolved.

2.137 The Committee acknowledges that it may be appropriate to impose more stringent reporting requirements in these situations.

Recommendation 4

2.138 **The Committee recommends that, in line with a risk-based approach, and where a person's security assessment is ongoing after 90 days of detention, the Australian Government develop mechanisms (such as a particular class of bridging visa) to enable a conditional release from detention. Conditions could include stringent reporting requirements to ensure ongoing availability for immigration and/or security processes.**

Release from immigration detention should be granted:

- **where there is little indication of a risk to the community, as advised by the Australian Security Intelligence Organisation, and**
- **except where there is clear evidence of lack of cooperation or refusal to comply with reasonable requests.**

Recommendation 5

2.139 **The Committee recommends that, where a person's security assessment is ongoing after six months of detention, the Australian Government empower the Inspector-General of Intelligence and Security to review the substance and procedure of the Australian Security Intelligence Organisation security assessment and the evidence on which it is based.**

The Committee recommends that the Inspector-General provide advice to the Commonwealth Ombudsman as to whether there is a legitimate basis for the delays in security assessment. This advice should be incorporated into the evidence considered by the Ombudsman in conducting six-month reviews.

3

Criteria for release – unacceptable risk and repeated non-compliance

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

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

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

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

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

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

Unacceptable risk to the community

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Risk assessment of section 501 detainees

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.19 The Commonwealth Ombudsman explained that:

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

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

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

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

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

9 Commonwealth Ombudsman, submission 126, p 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.27 Kate Gauthier of A Just Australia said that:

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

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

Committee comment

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

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

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

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

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

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

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

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

3.32 In addition, as the Commonwealth Ombudsman noted, risk assessments for section 501 detainees should focus on evidence, such as a person's recent pattern of behaviour, rather than suspicion or discrimination based on a prior criminal record.[19] If it appears likely that removal cannot occur expeditiously, then as with other unlawful non-citizens, appropriate assessments should be made to justify the need for ongoing detention pending resolution of the case.

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

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

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

Recommendation 6

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

Recommendation 7

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

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

Repeated visa non-compliance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee comment

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

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

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

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

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

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

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

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

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

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

Recommendation 8

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

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

Short-term detention prior to removal

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

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

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

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

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

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

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

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

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

Application of release criteria to excised places

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

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

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

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

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

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

Recommendation 9

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

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

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.**

5

Removals and detention charges

5.1 As outlined in chapter 2, under the *Migration Act 1958* (the Act) there is an obligation to detain any unlawful non-citizen. Currently the Act only provides three mechanisms for subsequent release from detention:

- grant of a visa (either a substantive or bridging visa)
- removal from Australia, or
- deportation from Australia.

5.2 Due to the small number and specialised nature of deportations, as opposed to removals, deportation is not addressed in this report.

5.3 This chapter considers the provision under the Migration Act for release from detention for the purpose of removing a person from Australia. Issues regarding the management of voluntary and enforced removals are discussed, with an emphasis on raising transparency and oversight.

5.4 The report concludes with a consideration of the practice of charging a person for the costs of the period spent in detention.

5.5 The Committee understands that the Minister for Immigration and Citizenship is currently reviewing this policy. In June 2008 the Minister acknowledged that, 'There is a need for a review of the

detention debt regime'.[1] More recently, the Minister has advised that he is currently waiting on advice to move forward with options.[2]

Removal of unlawful non-citizens from Australia

5.6 In 2007-08, a total of 8404 people were removed from Australia. This included 4055 monitored departures (in which the Department of Immigration and Citizenship (DIAC) monitored, but did not enforce removal), 722 voluntary returns and two criminal-related deportations.[3]

5.7 Of the total number of persons removed in 2007-08, 3625 people were enforced removals. Approximately 65 per cent of this group were removed within two weeks of their detention, a further 30 per cent were removed within two months and the remaining 5 per cent were detained for more than 60 days. Overall, approximately 85 per cent were removed within 28 days of being detained.[4]

5.8 The removal of a person, for the purposes of this report, refers to a person leaving Australia as an unlawful non-citizen or as a deportee set out under sections 198 and 200 of the Act.[5] The Act defines a deportee as a person who is facing a deportation order.[6]

5.9 The Act also sets out the terms for when mandatory removal must occur. The three main criteria are:

- at the request of an unlawful non-citizen to the Minister (section 198(1))
- a detained unlawful non-citizen who fails to apply for a substantive visa in the allotted time frame (section 198(5))
- a detained unlawful non-citizen whose application for a substantive visa has been refused and finally determined, and

1 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Senate Hansard*, 19 June 2008, p 2885.

2 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Senate Hansard*, Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 21 October 2008, p 114.

3 Department of Immigration and Citizenship, *Annual report 2007-08* (2008), p 123.

4 Department of Immigration and Citizenship, supplementary submission 129f, p 25.

5 *Migration Act 1958*, ss 198, 200.

6 *Migration Act 1958*, s 5(1).

another visa application for a substantive visa has not been made (section 198(6)).[7]

5.10 Lyn O'Connell, First Assistant Secretary of the Department of Immigration and Citizenship, explained the removal requirement to the Committee:

> In terms of removal, it is an obligation under the Act to remove someone who has no lawful right to remain in Australia. So, rather than a positive decision to remove, it is in fact an obligation of the act that somebody who is unlawful must be removed effectively. The judgement around that happening is of course as to somebody who does not have a visa, so they have unlawful status; they are not pursuing any form of merit review or processing or judicial review or any other form of activity with the department.[8]

Removal practice by the Department of Immigration and Citizenship

5.11 The majority of people that have been released from immigration detention have done so as a result of removal from Australia (see table 2.1).

5.12 DIAC manages the process of removal in a number of ways. People can be detained within an immigration detention facility and DIAC facilitates removal, or alternatively people are granted bridging visas which enables them to voluntarily arrange their own departure.[9]

5.13 DIAC informed the Committee that it is committed to ensuring that visa overstayers and bridging visa holders who are required to depart the country are able to do so from the community rather than being taken into detention for the purposes of removal:

> We use every opportunity for the client—be it a family or an individual—to return from the community. We have provisions to provide them with bridging visas so that, provided someone is making genuine departure arrangements, they can remain lawfully in the community and make those arrangements to depart. We are also now

7 Migration Series Instruction 376 (MSI 376), *Implementation of enforced departure*, para 2.1.1.

8 O'Connell L, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 7.

9 Department of Immigration and Citizenship, *Annual report 2006-07* (2007), p 121.

> piloting the assisted voluntary return. If someone does not actually have the means to depart, or there are some other factors in relation to their return, they may use the assisted voluntary return service under the Community Care pilot. As a last resort, where someone will not depart, having been given opportunities to, we may use detention in order to remove someone.[10]

5.14 At the October 2008 Senate Estimates hearing, Ms O'Connell stated that removals from the community were not a new policy for DIAC. She explained that DIAC would typically monitor a person's arrangements and actual departure rather than undertake an enforced removal.[11]

5.15 However, amongst those required under the Act to be removed from Australia, there will be a proportion that are reluctant and unwilling to comply with DIAC's requests.[12]

5.16 Ms O'Connell outlined the process and procedures leading up to enforced removal:

> All necessary checks are made to make sure that they have no ongoing processes and there is no prospect of any non-refoulement that will take place, in terms of meeting our international obligations, and that they have the necessary fitness to travel, having been so certified. Arrangements are put in place for that person to be removed if they have the necessary travel documentation to be returned. Then the person is booked on a flight and removed. They may or may not be escorted. That depends on the air transport requirements in terms of removing somebody involuntarily. Sometimes the air transport requirements require that we do provide escorts for some removals.[13]

5.17 DIAC's Procedures Advice Manual also sets out the criteria that must be satisfied prior to the decision being taken for an enforced removal.

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10 O'Connell L, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 18.

11 O'Connell L, Department of Immigration and Citizenship, *Senate Hansard*, Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 21 October 2008, p 22.

12 O'Connell L, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 7.

13 O'Connell L, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 7.

These criteria include confirmation of the person's identity, ensuring that the client has no outstanding litigation, court orders or other legal matters in tow and ensuring that the Commonwealth Ombudsman's Office or the United Nations High Commissioner for Refugees has not made any substantial claims against the intended removal.[14]

Accounts of enforced removal

5.18 The inquiry received several accounts of enforced removal practices in the past, in particular regarding detention facilities at Woomera and Baxter (closed in 2003 and August 2007 respectively). There was also evidence of a continuing culture of anxiety amongst detainees with regards to removals and suggestions of some continuing poor practices.

5.19 Guy Coffey, a clinical psychologist, reported it had been the practice at Woomera and Baxter detention centres that, as part of removal procedures, a detained person would be called to a medical appointment as a pretext for their removal. This had debilitating impacts on detainees' willingness to trust medical service providers in detention centres.[15]

5.20 This practice appears to be ongoing. Sister Lorraine Phelan, a regular visitor to Villawood Immigration Detention Centre and Onshore Programs Manager for Mercy Refugee Service, explained that detainees at Villawood were 'reluctant to go to medicals because someone was picked up from a medical, and they are reluctant to go to any interview rooms for the same reason'.[16]

5.21 As recently as May 2008, there are also accounts of removals taking place in the early hours of the morning, when the detainees were disoriented and given only a few minutes notice:

> We had another removal—and this is something else we have tried to fight about—at five o'clock in the morning. They get someone out of bed, with all the officers there. The person is distressed. They have been asleep; they do not know what is going on. They are told they have got 10 minutes and then they are being deported. That is distressing for that person but it is also distressing for the other detainees. And we have

14 Department of Immigration and Citizenship, Procedures Advice Manual 3 (PAM 3), *Compliance - Removal - Removal from Australia,* para 10.

15 Coffey G, *Transcript of evidence*, 11 September 2008, p 82.

16 Phelan L, Mercy Refugee Service, *Transcript of evidence*, 7 May 2008, p 32.

> had that again this week in stage 2... There was, yesterday, an Indian who had been here nearly three years and, at five o'clock, was told, 'You're being deported in 10 minutes.' [17]

5.22 Sister Phelan related this account of a planned removal:

> We had 4.30 removals. It was quite often the pattern. We asked that it not be 4.30 in the morning because psychologically the person is in a state of stupor. That is part of the reason why, because they do not have their wits about them to do anything, but they always scream out to others, 'I'm being deported,' so then it impacts on the other people around in the stages and they think the same thing is going to happen. Maybe it will happen to them; we do not know… When we have challenged that before, GSL come back to us and say, 'Those are the only flights we could get for them.' [18]

5.23 Other concerns presented include ensuring that DIAC met its obligations of notification of legal representatives and/or advocates who should receive timely advice of departmental or ministerial decisions.[19] The Asylum Seeker Resource Centre gave this account:

> On 17 August, last year [2007], the Department of Immigration attempted to remove an asylum seeker. At about four o'clock on a Friday afternoon, I received a telephone call from a distressed fiancé. She said to me, 'My fiancé is on the way to the airport.' I was completely shocked at this for a few reasons. Firstly, this man had just come out of a psychiatric hospital in the preceding days and, in the credible assessment of every doctor who had seen him, was unfit to travel. Secondly, he had a ministerial request pending; we had not received a decision about that, and there were compelling grounds for him to be considered for a humanitarian intervention.
>
> I immediately rang his case officer. I made phone calls back and forth for about the next hour, trying to ascertain where my client was and whether the removal was actually

17 Phelan L, Mercy Refugee Service, *Transcript of evidence*, 7 May 2008, pp 11, 32.

18 Phelan L, Mercy Refugee Service, *Transcript of evidence*, 7 May 2008, pp 11, 32.

19 The obligation for notification by the Department of Immigration and Citizenship is set out under s 66(1) of the *Migration Act 1958* which sets out the terms of notification of a decision and s 494B, 'Methods by which the Minister is to provide documents to a person'. Further instructions for DIAC delegates can be found in Procedures Advice Manual 3 (PAM 3) - *Notification - Notification requirements*, paras 33-36.

> happening—'Let's get down to the facts.' His case officer informed me, 'Yes, he's on his way to the airport; he's being removed.' At 4.15 that Friday afternoon, we received a fax that was, indeed, notification of the decision refusing this man ministerial intervention. This decision was dated 15 August 2007, two days before we finally received it. We received it on the Friday afternoon, when our client was on the way to the airport.[20]

Fitness to travel

5.24 Under DIAC's Procedures Advice Manual, persons being removed from immigration detention to an overseas destination are required to undergo a physical health discharge assessment to ensure that they are fit to travel by aircraft.[21]

5.25 Concerns were raised regarding the fitness assessments process, and in particular the assessment management of the psychological state of those being removed.

5.26 Dermot Casey, Acting First Assistant Secretary at DIAC, outlined the process for the removal of persons that may have presented a risk of self-harm:

> All medical records are checked before a person is declared as medically fit for removal. If a person has had previous mental health issues, then they would be referred for a report, from a psychiatrist and a psychologist, to determine whether in fact that person's removal would impact negatively in any clinical sense.
>
> For all people who are being removed we do require that the medical provider provide us with 'fitness to travel' documentation. If there have been any issues in relation to the person's previous health, whether it be physical or psychological, then we ask that they also consult with somebody of the appropriate professional standing who has known the person and is able to give a clinical assessment of their fitness.[22]

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20 Psihogios-Billington M, Asylum Seeker Resource Centre, *Transcript of evidence*, 24 October 2008, pp 62-63.

21 Department of Immigration and Citizenship, Procedures Advice Manual (PAM) 3, *Compliance – Removal - Removal from Australia*, para 35.

22 Casey D, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 7.

5.27 However, Mr Coffey suggested that judgements made on fitness to travel needed to be re-examined:

> [Detainees] who have been suicidal have been removed I think possibly with very deleterious consequences to their wellbeing. As with any mental health or psychological problem, the origins of the self-harm or suicidality need to be corrected, identified and treated.[23]

Use of chemical restraints

5.28 Some anecdotal evidence was received citing the use of sedation to facilitate the removal of challenging and recalcitrant individuals. In response to questions from the Committee, an assurance was given by DIAC that this is not current policy.[24]

5.29 Regarding the use of restraints and medications in order to facilitate removal Mr Casey stated:

> Our health provider[s] have within their own company rules that medication would not be administered to somebody in order to facilitate their removal…There is no lawful capacity to administer medication to somebody without their consent in any circumstance.[25]

5.30 Mr Metcalfe advised that in the last three years he has had no knowledge of it being 'departmental or government policy that it be feasible for medication to be administered to render a person compliant for removal'.[26]

5.31 DIAC also advised that it was unable to identify any instances where a person who was subject to an enforced removal had been medicated to prevent resistance.[27] Further, DIAC policy clearly states that sedatives are not to be used to facilitate removal:

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23 Coffey G, *Transcript of evidence,* 11 September 2008, pp 86-87.

24 Metcalfe A, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 8.

25 Casey D, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 7.

26 Metcalfe A, Department of Immigration and Citizenship, *Transcript of evidence*, 24 September 2008, p 8.

27 Department of Immigration and Citizenship, supplementary submission 129f, p 35.

> Neither the department nor security escorts are to request the prescription and/or administration of sedatives to a removee for restraint purposes.[28]

5.32 However, several independent accounts of the use of chemically induced restraints were brought to the attention of the Committee. While this Committee accepts that it is not policy and there are no verifiable instances of DIAC authorising the administration of medication for restraint and removal, there remains cause for concern.

5.33 Maria Psihogios-Billington, Principal Solicitor of the Asylum Seeker Resource Centre advised that she remained concerned about the use of chemical restraint for the purpose of removal.

> I am aware that the committee has heard evidence to the contrary, regarding the sedation of immigration detainees at the point of removal. This is not our experience, and I invite you to investigate these matters further.[29]

5.34 Linda Jaivin recounted events told to her by Morteza Poorvadi, an ex-detainee, who was detained for four years at Woomera, Port Hedland and Villawood detention centres. Ms Jaivin said that:

> Morteza has told me many things about those early-morning deportations, when they come in. There was one fellow who slashed himself with a razor to avoid deportation, and they sprayed him with coagulant rather than treat him so that they could take him and drag him off to the plane. There was another fellow, a Sudanese. They tried to keep forcing tranquillisers into him and a needle broke off in his knee. With this sort of thing you would think, under Australian law, there would be some limits—they tend to operate in some special place that should not be there really.[30]

5.35 Ms Psihogios-Billington also provided an account of an asylum seeker being sedated prior to removal to his country of origin. This removal occurred on 16 October 2007:

> He had been tortured in his country of origin, and this had been proven by a medical report. In detention, where he spent almost two years, he was diagnosed with major

28 Department of Immigration and Citizenship, Procedures Advice Manual 3 (PAM 3), *Compliance- Removal - Removal from Australia*, para 32.2.

29 Psihogios-Billington M, Asylum Seeker Resource Centre, *Transcript of evidence*, 24 October 2008, p 64.

30 Jaivin L, *Transcript of evidence*, 7 May 2008, p 29.

> depression and post-traumatic stress disorder. In detention, on several occasions he attempted to take his own life in the most heinous of ways. On the day prior to his removal, he was taken to an isolation cell. He was given suicide prevention clothing, he was handcuffed, he was helmeted and he was left alone… At 3 am that morning, he was injected with sedation. He awoke on the aeroplane.[31]

5.36 DIAC has advised that it is aware allegations are periodically made that a person has been medicated in order to facilitate removal. It assured the Committee that it takes complaints of this nature seriously and a recent complaint had been commissioned for an independent audit by an external auditor. The audit was unable to establish that medication had been used to facilitate removal. This case has now been referred to the Commonwealth Ombudsman's Office for further investigation.[32]

Preferred removal options

5.37 There were a number of suggestions as to how the present removals process could be improved.

5.38 Kate Gauthier of A Just Australia, outlined a holistic approach currently used by the Canadian Government called a pre-removal risk assessment. The model takes into account a range of factors such as mental health, protection needs, health requirements and the situation in the country that the person is being removed to.[33]

5.39 Noel Clement of the Australian Red Cross added that, similar to the Canadian approach, it would be appropriate for Australia to offer some form of return counselling.[34]

5.40 In addition, in expansion of the voluntary departure options, Mr Clement, explained that:

> There are some people who are actually ready to return, who want to return and who it is safe to return. But their only option previously has been removal by government. So people have avoided removal

31 Psihogios-Billington M, Asylum Seeker Resource Centre, *Transcript of evidence*, 24 October 2008, p 63.

32 Department of Immigration and Citizenship, supplementary submission, 129f, p 35.

33 Gauthier K, A Just Australia, *Transcript of evidence*, 7 May 2008, p 32.

34 Clement N, Australian Red Cross, *Transcript of evidence*, 7 May 2008, pp 32-33.

because when they are removed their government is notified that they are coming. It impacts on their travel arrangements in the future.

There are a whole range of impacts of removal by government. We have found through the community care pilot that by offering people in the community the alternative of working with IOM [the International Organization for Migration] if they want to consider return, talking about what that might mean and actually letting them leave with dignity, a fair number of people have taken that course of action and have decided to do that. That option is not currently available to a lot of people in detention. The only choice for people is removal by government.[35]

Committee comment

5.41 In relation to the accounts it has received of individual removals, the Committee considers that it is not in a position to make comprehensive recommendations on the detail of removal practices. However, the reports it has heard are disturbing.

5.42 The Committee is concerned that, in some instances at least, it would appear that inadequate notification regarding removal is being provided to a detainee's legal representative and/or advocate. This is contrary to DIAC's obligations.[36]

5.43 The Committee accepts that the use of medications to facilitate removals is in clear contravention of DIAC policy, and DIAC has provided assurances that this is not current practice. However, there are accounts from detainees and advocates that undue force is being used. The circulation of these accounts is concerning as it not only generates fear amongst people in detention but raises questions regarding current procedures and appropriate independent oversight for enforced removals.

5.44 The Committee also acknowledges that many policies and procedures have changed since the closure of the Woomera, Baxter and Port Hedland detention facilities. However, enforced removals are potentially one of most challenging and emotionally distressing

35 Clement N, Australian Red Cross, *Transcript of evidence*, 7 May 2008, p 9.

36 The obligation for notification by the Department of Immigration and Citizenship is set out under s 66(1) of the *Migration Act 1958* which sets out the terms of Notification of decision and section 494B, Methods by which the Minister is to provide documents to a person. Further instructions for DIAC delegates can be found in Procedures Advice Manual 3 (PAM 3) *Notification - Notification requirements*, paras 33-36.

aspects of immigration detention management. They are also an area of high public sensitivity. For example, ABC Television's *Four Corners* program recently screened alarming footage of a naked Cornelia Rau being physically restrained and medicated against her will during her removal from Baxter Immigration Detention Centre.[37]

5.45 It is essential that the removals process meets the highest standards of accountability, and can stand up to the most rigorous level of scrutiny.

5.46 The Committee has not received sufficient information to recommend a best practice model. Accordingly, it recommends wider consultation with professionals and advocacy groups working in the detention field with an aim to improving current practices and procedures and introducing greater compassion and oversight into the system.

Recommendation 15

5.47 **The Committee recommends that where enforced removal from Australia is imminent, the Department of Immigration and Citizenship provide prior notification of seven days to the person in detention and to the legal representative or advocate of that person.**

37 Australian Broadcasting Corporation, *Four Corners*, 'The guards' story', viewed on 15 September 2008.

Recommendation 16

5.48 **The Committee recommends that the Australian Government consult with professionals and advocacy groups in the immigration detention field to improve guidelines for the process of removal of persons from Australia. The guidelines should give particular focus to:**

- **greater options for voluntary removal from immigration detention**
- **increased liaison with a detainee's legal representative or advocate**
- **counselling for the detainee to assist with repatriation**
- **a pre-removal risk assessment that includes factors such as mental health, protection needs and health requirements**
- **appropriate procedures for enforced removals that minimise trauma**
- **adequate training and counselling for officers involved in enforced removals**
- **appropriate independent oversight at the time of enforced removals, and**
- **criteria for the use of escorting officers for repatriation travel.**

5.49 The Committee also considers that the Australian Government could improve monitoring and follow-up of persons who have been returned to their countries of origin. Improved information would provide feedback on removal practices from the persons they have most impact on and strengthen the integrity of our immigration processes by providing evidence on what proportion of clients may or may not be returned to danger and persecution. Where ex-detainees are experiencing danger or persecution for reasons outside of those Australia recognises through the Refugee Convention, this information may also inform the development of a complementary protection framework, which has been raised by the Minister for Immigration and Citizenship.

Recommendation 17

The Committee recommends that the Australian Government instigate mechanisms for monitoring and follow-up of persons who have claimed asylum and subsequently been removed from Australia.

Detention charges

5.50 Under the Act a non-citizen who is detained is liable to pay the Commonwealth the costs of his or her immigration detention.[38] An individual begins to accumulate a debt with the Commonwealth as soon as they are placed in detention.[39]

5.51 At the time of its introduction in 1992, the intent of the amendment was to ensure that all unlawful non-citizens would bear the primary responsibility for the expenditure associated with their detention. Specifically, section 209 of the Act was introduced to 'minimise the costs to the Australian community of the detention, maintenance and removal or deportations of unlawful non-citizens'.[40]

5.52 As at June 2008, the charge for an individual to be held in immigration detention was $125.40 per day. This daily charge applies to immigration detention centres, residential centres and community detention.[41] Spouses and dependent children are also liable for charges, with the parent or guardian being liable for the costs of a dependent child.[42]

5.53 Under current policy, costs of detention are only recovered once the period of detention has ended and total costs are calculable. The exceptions are if a person in detention chooses to pay these costs (partly or in full) before release or, valuables have been seized and applied towards the payment of the incurred costs.[43]

38 *Migration Act 1958*, s 209.

39 Dastyari, A, *The liability of immigration detainees for the cost of their detention* (2007), Castan Centre for Human Rights Law, p 6.

40 Migration Reform Bill 1992, Explanatory Memorandum, 59, p 11.

41 Kamand S et al, *The immigration kit* (2008), 8th ed, Federation Press, p 166.

42 *Migration Act* 1958, s 211.

43 Department of Immigration and Citizenship, Procedures Advice Manual 3 (PAM 3), *Liability to pay detention and removal costs*, para 16.

5.54 Table 5.1 sets out the approximate detention debt a person could accumulate based on the length of time held in detention.

Table 5.1 Projected costs accumulated by person in immigration detention

Time in immigration detention	Approximate charge
1 day	$125.40
1 month	$3762
3 months	$11 286
6 months	$22 572
1 year	$45 144
5 years	$225 720

Note: Projected costs are indicative only and based on a daily charge of $125.40 per day billed per the criteria set out in paragraph 6.6.

5.55 As an example, the Refugee Action Committee reported the case of an accumulated debt for a family held in detention:

> After six years in a detention centre and another three years living as a refugee in Melbourne, Hossein (family name withheld), an Iranian refugee, has been advised by the Department of Immigration and Citizenship that he owes an amount of $200 000 which represents the cost of keeping his wife, daughter and son locked up in the Curtin Detention Centre in Western Australia for three years.[44]

5.56 The Forum of Australian Services for Survivors of Torture and Trauma (FASST) also advised that:

> Detention debts can be very considerable. In the year ended 30 June 2007, one family was advised that their debt was more than $340 000.[45]

5.57 Appendix G provides an example of a 2008 debt notification letter and invoice sent by DIAC to a former detainee.

5.58 The Act provides the Commonwealth with specific powers to recover any outstanding debt.[46] These powers include restraining dealings with property, preventing a bank or financial institution from processing any transactions in any account held by the debtor, attaching the debt to specific forms of income of the debtor and

44 Refugee Action Committee website, viewed on 6 November 2008 at http://www.refugeeaction.org/rac/newsletter.html.

45 The Forum of Australian Services for Survivors of Torture and Trauma, submission 115, p 22.

46 *Migration Act 1958*, s 215.

entering a premise in order to seize and sell valuables belonging to the debtor.[47]

5.59 Where debt recovery is pursued, a payment plan is commonly negotiated with the ex-detainee. FASST gave the example of one ex-detainee with a detention debt and repayment arrangement to the Commonwealth that would take him over 80 years to repay.[48]

Debt waiver and write-off

5.60 In practice, recovery of many detention debts is not pursued but is waived or written-off. When a debt is written off, this means that a decision is made not to pursue recovery of the debt. At some time in the future, the Commonwealth may choose to execute debt recovery. When a detention debt is waived, the debt is extinguished.

5.61 Table 5.2 sets out the numbers of persons whose debts were waived or written off between 2004-05 and 2007-08.

Table 5.2 Waiver and write-off of detention debts

	2004–05	2005–06	2006–07	2007–08
Debt waived	$332 786	$1 668 901	$616 111	$3 417 007
(no of persons whose debt was waived)	(19)	(324)	(10)	(142)
Debt written off	$38 071 639	$46 714 236	$28 910 699	$19 253 883
(no of persons whose debt was written off)	(738)	(4528)	(3571)	(1743)

Source: Department of Immigration and Citizenship, supplementary submission 129c, p 2.

5.62 In the financial year ending 2008, nearly $3.5 million of detention debt was waived for 142 former detainees. Write-offs were much more commonly employed, however. For the same period just over $19.2 million was written off for 1743 individuals formerly in detention (see table 5.2). In the last four financial years, 495 individual debts amounting to over $6 million were waived. For the same period 10 580 individual debts were written off, amounting to just under $133 million.[49]

47 Mitchell K & Dastyari A, 'Paying their debt to society: Billing asylum seekers for their time in detention', *Castan Centre for Human Rights Law Newsletter*, April 2007, p 13.

48 The Forum of Australian Services for Survivors of Torture and Trauma, submission 115, p 22.

49 Department of Immigration and Citizenship, supplementary submission 129c, p 2.

5.63 DIAC have advised that detention debt liability is written off for ex-detainees that have been granted humanitarian and refugee visas or from those persons detained unlawfully.

> [DIAC] recognises the Refugee Convention of 1951 not to penalise asylum seekers, including those holding visas such as Temporary Protection, Protection or Special Global Humanitarian. In these instances, the department records the debt but does not issue an invoice or pursue the debt. These debts are written off. [50]

5.64 Detention debts may be written-off under sections 47(1)(b) and (c) of the *Financial Management and Accountability Act 1997* (FMA Act) which allows the approval of non-recovery of debts where DIAC is satisfied that the debts are not legally recoverable, or are uneconomical to pursue.

5.65 The Minister of Finance is the only person authorised to waive a debt under section 34 of the FMA Act. The Minister has an unfettered discretion to consider each request for a waiver on a case by case basis.[51]

5.66 Waivers are generally approved in circumstances where the Commonwealth considers it has a moral rather than legal obligation to extinguish a debt.[52] They are generally applied when it is considered that repayment of the debt 'would cause or exacerbate ongoing financial hardship'.[53]

5.67 Concerns were raised regarding a lack of transparency in the debt waiver and write-off process. The authors of Law Institute of Victoria, Liberty Victoria and The Justice Project stated:

> Currently, persons eventually granted visas must either accept the liability, or rely on debt write-off or debt waiver procedures to escape liability. The joint authors consider that these procedures operate in an arbitrary manner, without the

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50 Department of Immigration and Citizenship, Questions taken on notice, Budget Estimates Hearing, *Senate Hansard*, 21-22 May 2007.

51 Migration Series Instructions 377: *Visa applicants with debts to the Commonwealth*, para 4.0.7.

52 Migration Series Instructions 377: *Visa applicants with debts to the Commonwealth*, para 4.0.7.

53 Department of Finance and Deregulation website, viewed 3 November 2008 at http://www.finance.gov.au/financial-framework/discretionary-compensation/debt-waiver.html.

> procedural safeguards ordinarily afforded to persons by way of the rule of law.[54]

5.68 The example of a debt notification letter in Appendix G provides no reference to a person's options for applying for debt waiver or write-off.

Accumulation and management of detention debt

5.69 In the last four financial years, a total of 17 355 detainees have been invoiced with detention debts amounting to a sum of $170 143 787 or over $170 million (see table 5.3). In that time period, there has been a significant negative trend in the number of persons detained since 2004 (see figure C1, Appendix C). Consequently, the total debt being invoiced each year has also reduced.

5.70 The total amount of debt recovered since 2004 has remained disproportionately low, between one and four per cent of the total debts incurred. The increase over time in the percentage recovered is potentially due to the accumulating numbers of ex-detainees attempting to repay their detention debt.

Table 5.3 Comparisons of debt invoiced and breakdown of debt collected

	2004–05	2005–06	2006–07	2007–08
Detainees subjected to charges for time in detention	5542	5306	4101	2386
Debt invoiced for the year	$65 346 414	$50 509 909	$30 999 374	$23 288 090
Debt recovered onshore	$1 197 785	$928 368	$776 921	$736 616
Debt recovered offshore	$56 210	$160 437	$126 078	$134 214
Percentage recovered	1.9%	1.8%	2.5%	3.2%

Source: Department of Immigration and Citizenship, supplementary submission 129c, pp 1–2.

54 Law Institute of Victoria, Liberty Victoria and The Justice Project, submission 127, p 20.

5.71 Since 2004-05, less than 2.5 per cent of the detention debt invoiced has been recovered. In 2007-08, as outlined in table 5.3, only $870 000 of $23 million of incurred debt was recovered. Figures are not available for the annual administrative cost of assessing which debts will be written-off or waived or for the costs of debt recovery for DIAC and the Department of Finance and Administration.

5.72 The Minister for Immigration and Citizenship has said that:

> It seems that the cost of administering the scheme to raise the debt either outweighs or is close to a break-even point in terms of the money brought in. It does seem to be a crazy situation to run a system to raise debt when it costs us as much to raise the debt as it does to generate income from it.[55]

5.73 The Commonwealth Ombudsman has also called for the application of detention debts to be reviewed, recommending that 'consideration should be given to the fact that most debts are either written off or are waived'.[56]

Criticisms of detention charges

5.74 The Committee heard a range of criticisms about the practice of applying charges to persons in detention. There was consensus of opinion condemning the policy as punitive and discriminatory. Labor for Refugees (NSW) described it as 'intentionally punitive, unjust and inhumane'.[57]

5.75 The concerns raised related not only to compounded trauma for the person in detention, but also to the flow-on effect for families and dependants and the ability of people to progress their lives following detention.

5.76 For example, the Office of Multicultural Interests Western Australia called for the abolition of the requirement for detainees to repay the costs of their detention. The Office called for all existing debt to be waived and highlighted concerns about the lack of precedent for such a policy and questioned its validity in regards to Australia's international obligations.[58]

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55 Senator the Hon C Evans Minister for Immigration and Citizenship *Senate Hansard,* 19 June 2008, p 2885.

56 Commonwealth Ombudsman, submission 126, p 16.

57 Labor for Refugees (NSW), submission 55, p 6.

58 Office of Multicultural Interests Western Australia, submission 106, p 22.

5.77 Similar concerns were also raised in a joint submission from the Law Institute of Victoria, Liberty Victoria and The Justice Project. They questioned the position of Australia in regards to the United Nations Convention on the Status of Refugees stating that:

> Under [article] 14 of the Universal Declaration of Human Rights, 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. To this end, Australia has signed and ratified the 1951 UN Convention on the Status of Refugees (the Convention) and its protocol, signifying its intention to provide protection to those seeking asylum in Australia.[59]

5.78 Paul Power, Chief Executive Officer of the Refugee Council of Australia (RCOA), also questioned the principle of applying charges for immigration detention:

> It's really akin to [the] United Nations High Commissioner for Refugees charging refugees for the time they spend in refugee camps. There is a real question of natural justice involved.

5.79 The detention debt policy was described by David Manne of the Refugee and Immigration Legal Centre in Melbourne, as being 'manifestly harsh and unjust', with no peer worldwide.[60] Similar views were expressed by Amnesty International Australia.[61]

5.80 In his appearance before the Committee, Julian Burnside QC stated:

> We charge [people in detention] by the day for the cost of their own detention. In connection with a case which challenged the validity of that section [of the Act], the Department and I against them, carried out some research which showed that we are the only country in the world which charges innocent people the cost of incarcerating them. It is not a distinction that is deserving of much merit.[62]

59 Law Institute of Victoria, Liberty Victoria and The Justice Project, submission 127, p 21.

60 Manne D, Refugee and Immigration Legal Centre, *Transcript of evidence*, 11 September 2008, p 14.

61 Thom G, Amnesty International Australia, *Transcript of evidence*, 7 May 2008, p 41.

62 Burnside J, Liberty Victoria, *Transcript of evidence*, 11 September 2008, p 49.

Comparison with other forms of detention in Australia

5.81 Azadeh Dastyari of the Castan Centre for Human Rights Law has argued that charging for immigration detention is a punishment that cannot be justified and finds no corollary in other forms of detention in Australia:

> Citizens and non-citizens who are detained as punishment for crimes are not made liable for the cost of their detention… Other detainees subjected to 'administrative detention' such as individuals suffering from mental health issues who are detained pursuant to the *Mental Health Act 1983* are not required to reimburse the Commonwealth for the cost of the deprivation to their liberty. Nor are detainees detained for quarantine reasons pursuant to the *Quarantine Act 1908* (Cth), required to pay for their segregation from the Australian community. Detention of non-citizens pursuant to the *Migration Act 1958* remains the only form of detention in Australia that requires the detained to pay for their own detention.[63]

5.82 The Office of Multicultural Interests Western Australia confirmed this analysis, explaining that immigration detainees are the only group in the Australian community who were charged for their detention; by comparison, detainees in prisons, psychiatric hospitals and quarantine are not.[64]

The impact of detention debt on ex-detainees

5.83 Concerns were raised regarding the impact of detention debt on ex-detainees, in particular the burden on mental wellbeing, the ability to repay the debt, and the restrictions a debt could place on options for returning to Australia on a substantive visa. The Refugee Action Committee in Canberra note that :

> Policy [relating to detention charges] stands as a barrier towards refugees fully integrating into the community, and continues to put significant pressure – both emotionally and

63 Dastyari, A, *The liability of immigration detainees for the cost of their detention* (2007), Castan Centre for Human Rights Law, p 15.

64 Office of Multicultural Interests Western Australia, submission 106, p 22.

> financially - on those people who have already experienced so much trauma and uncertainty in their lives.[65]

5.84 A 2008 Commonwealth Ombudsman report into detention debt administration indicated that the added burden of having a large debt caused high levels of stress to people that had formerly spent a period of time in detention. The report stated:

> Complaints to the Ombudsman's office indicate that the size of some debts causes stress, anxiety and financial hardship to many individuals who are now living lawfully in the Australian community as well as those who have left Australia.[66]

Mental health

5.85 The Forum of Australian Services for Survivors of Torture and Trauma (FASSTT) saw that detention debts further strained a person's ability to put both their past and experience in immigration detention behind them:

> The consequences for people who have not paid or not arranged to repay the debt may be very profound… FASSTT agencies often see the serious impact of detention debt on their clients. The policy reinforces and prolongs emotions such as shame and guilt which are common effects of torture and trauma, and impedes the recovery of survivors.
>
> FASSTT believes that the detention debt policy should be abolished. At the very least, detention debts should not be raised against people who have been granted visas on humanitarian grounds.[67]

5.86 Studies have indicated that the stress imposed by a significant debt, particularly as a charge for a detention experience that may have been traumatic, frightening or isolating, impedes recovery for people trying to start new lives in Australia:

> The deterioration in the mental health of detainees continues to affect individuals after they have been released from

65 Refugee Action Committee website, viewed on 6 November 2008 at http://www.refugeeaction.org/rac/newsletter.html.

66 The Commonwealth Ombudsman, *Administration of detention debt waiver and write-off* (2008), p 2.

67 The Forum of Australian Services for Survivors of Torture and Trauma, submission 115, p 22.

> immigration detention facilities. Trauma from time spent in immigration detention contributes to ongoing risks of depression, post traumatic stress disorder and mental-health related disability. Liability for the cost of immigration detention may exacerbate already existing mental health issues which can be attributed to immigration detention.[68]

5.87 The Office of Multicultural Interests Western Australia also strongly asserted that a detention debt exacerbated mental health problems related to immigration detention:

> Mandatory detention has been strongly linked with a rapid deterioration in mental health, including depression and posttraumatic stress disorder, and significantly increased suicide rates. The burden of a large detention debt, such as one WA case where a former detainee has a $345,000 debt, places individuals under extreme financial and emotional pressure and has the potential to exacerbate mental health issues developed in detention. The imposition of this debt could therefore be considered to be inconsistent with the right to health under the Covenant on Economic, Social and Cultural Rights.[69]

5.88 Many of those former detainees with histories of torture and trauma may well be found to be owed protection under Australia's international obligations and therefore, according to Australian Government policy, may not be pursued for detention costs. Nevertheless, debts can still have detrimental impacts on people who are found to be refugees. The Minister for Immigration and Citizenship has commented:

> I had to deal recently with an instance of a man who had been found to be a refugee but had been prevented from sponsoring and being reunited with his family because of the debt.[70]

5.89 While it is policy for those granted refugee and humanitarian visas to have their debts written off, it is understood that an invoice is sent following release from detention and a waiver or write-off is then considered. This may contribute to the stress of ex-detainees and their

68 Dastyari, A, *The liability of immigration detainees for the cost of their detention* (2007), Castan Centre for Human Rights Law, p 17.

69 Office of Multicultural Interests Western Australia, submission 106, p 22.

70 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Senate Hansard,* 19 June 2008, p 2885.

families who do not know if they will be liable for their detention debt.

Financial hardship

5.90 While DIAC policy is not to pursue recovery of debt where this would leave a person 'destitute', the Committee also heard evidence that financial hardship is experienced by many ex-detainees due to detention debts.

5.91 Labor for Refugees (NSW) made the observation that people coming out of immigration detention will usually have a limited earning capacity due to the time they have spent in detention, the need to acquire Australian qualifications or meet skills recognition requirements, and for many the debilitating impact of mental health problems. [71] As National Legal Aid pointed out, many of those released on bridging visas will have no earning capacity at all due to the restrictions on work rights as part of their visa conditions. Bill Georgiannis, a solicitor for Legal Aid NSW, told the Committee how a client was released from detention on a bridging visa without work rights and subsequently notified of his accumulated detention debt:

> [Our client] received a letter from the department's debt recovery area seeking repayment in the vicinity of $50,000 or to make appropriate arrangements to repay by instalments. I wrote a letter to [the Department] saying he has been released with no permission to work, so obviously he has no capacity to repay. The letter that came back said, 'We understand that you need to make arrangements as soon as you are able.' The impact on my client was that I got a telephone call saying, 'What do they want from me? They have released me with no permission to work. I am not allowed to work. I am slowly going crazy because I have nothing to do and then they send me this bill.'[72]

5.92 It is apparent from the concerns raised formally and informally with the Committee that detention debts are a source of substantial anxiety to ex-detainees, and may impede the capacity of the ex-detainee to establish a productive life, either in Australia or elsewhere, following a period of detention. The financial hardship imposed by a detention

71 Labor for Refugees (NSW), submission 55, p 6.

72 Georgiannis B, Legal Aid NSW, *Transcript of evidence*, 24 October 2008, p 23.

debt also extends beyond the ex-detainee to the spouse and children in the family.

Ability to return to Australia

5.93 One argument advanced is that for the most part detention charges are incidental, given that most people released from immigration detention are removed from the country and are under no obligation to pay debts to the Australian Commonwealth once they are residing offshore.

5.94 However, the Committee received evidence that detention charges could have impacts on persons removed from Australia where they had connections to this country. As the Commonwealth Ombudsman identified in his submission to the inquiry, accumulated debt may impede a person's legitimate entry into Australia in the future.[73] This is because DIAC can refuse to grant a visa to a person who holds a debt against the Commonwealth.[74]

5.95 National Legal Aid advised the Committee that debts could prejudice offshore applications for visas:

> With [ex-detainees] who are not found to be refugees but can make an offshore application or even an onshore application after ministerial intervention, the department will insist on that person making appropriate repayment or arrangements to make the repayments, which adds another level of difficulty to the visa application process, whether it be offshore or onshore.[75]

5.96 Similarly, the Edmund Rice Centre also expressed concern about records held on the Movement Alert List (MAL)[76] and said that:

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73 Commonwealth Ombudsman, submission 126, p 15.

74 Under the public interest criteria (PIC 4004) set out in schedule 4 to the Migration Regulations, a person with a debt to the Commonwealth cannot be granted many types of visas. In order to satisfy this criterion the person must pay the debt in full, make arrangements for repayments or have the debt waived by the Australian Government.

75 Georgiannis B, Legal Aid New South Wales, *Transcript of evidence*, 24 October 2008, p 23.

76 The Movement Alert List, administered by the Department of Immigration and Citizenship, is a computer database that stores details about people and travel documents of immigration concern to Australia. In addition, MAL is automatically checked when applications for visas are made on behalf of travellers by travel agents/airlines using the Department's Electronic Travel Authority System. Information obtained from Department of Immigration and Citizenship website, viewed on 26 November 2008 at http://www.immi.gov.au/media/fact-sheets/77mal.htm.

> Those who are deported also have the debt registered against their names, and it becomes sufficient reason to refuse them any other type of visa to Australia.[77]

5.97 The Castan Centre for Human Rights Law views detention debts as punitive, adding an insurmountable barrier on the individual or family ever legitimately returning to Australia:

> The debt may prevent an individual from being able to re-enter Australia should they leave and then wish to return. In the case of individuals wishing to obtain another form of immigration visa such as a permanent spouse visa, the debt may be used to prevent the visa being granted to them.[78]

5.98 The Forum of Australian Services for Survivors of Torture and Trauma (FASSTT) stated:

> They can be refused a visa and/or be prevented from entering Australia. Families may be split if a person who has left owing a detention debt is refused permission to re-enter.[79]

5.99 Jessie Taylor of the Law Institute of Victoria told the Committee of a man removed to the United Kingdom in September 2008 after nine years in detention:

> He was handed a bill for $512 000 which will bar him from returning to Australia to see his wife, her ailing parents and his children and grandchildren. He is in an abject state in the United Kingdom at the moment, having lived in Australia since 1982.[80]

Committee comment

5.100 The Committee is aware that the Commonwealth Ombudsman has also called for a review of DIAC detention debt administration and specifically the use of a debt waiver for unlawful detention.[81]

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77 Edmund Rice Centre, submission 53, p 3.

78 Mitchell K and Dastyari A, 'Paying their debt to society: Billing asylum seekers for their time in detention.' *Castan Centre for Human Rights Law Newsletter*, April 2007, p 13.

79 The Forum of Australian Services for Survivors of Torture and Trauma, submission 115, p 22.

80 Taylor J, Law Institute of Victoria, *Transcript of evidence*, 11 September 2008, p 60.

81 Commonwealth Ombudsman, submission 126, p 16.

5.101 The Committee further notes that the Minister has indicated that there is 'a need for a review of the detention debt regime'[82] and he is currently waiting on advice to move forward with options.[83]

5.102 The Committee anticipates that the findings and recommendations of this report will assist in reviewing and reforming detention debt practices. In particular, the Committee urges any review to question the policy rationale, appropriateness and impact of current detention debt practices.

5.103 Australia appears to be the only country to apply costs for immigration detention. The practice of applying detention charges would not appear to provide any substantial revenue or contribute in any way to offsetting the costs of the detention policy. Further, it is likely that the administrative costs outweigh or are approximately equal to debts recovered.

5.104 The Committee notes the conclusions reached by the Senate Legal and Constitutional References Committee in its 2006 report on the administration and operation of the *Migration Act 1958*:

> The evidence clearly indicates that the imposition of detention costs is an extremely harsh policy and one that is likely to cause significant hardship to a large number of people. The imposition of a blanket policy without regard to individual circumstances is inherently unreasonable and may be so punitive in some cases as to effectively amount to a fine. The Committee agrees that it is a serious injustice to charge people for the cost of detention. This is particularly so in the case of unauthorised arrivals, many of whom have spent months and years in detention … the committee therefore recommends that it be abolished and all existing debts be waived.[84]

5.105 Similarly the Committee questions the justification for this policy, and finds the impact of this policy to be punitive and without effective purpose. It is the Committee's conclusion that:

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82 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Senate Hansard*, 19 June 2008, p 2885.

83 Senator the Hon C Evans, Minister for Immigration and Citizenship, *Senate Hansard*, Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 21 October 2008, p 114.

84 Senate Legal and Constitutional Affairs Committee, *Administration and operation of the Migration Act 1958* (2006), Parliament of the Commonwealth of Australia, p 207.

- the practice of charging for periods of immigration detention should be abolished
- all existing debts (including those who have entered into arrangements to repay debts) and all write-offs should be extinguished, effective immediately
- the movements alert list should be amended to reflect these changes
- legislation to this effect should be introduced as a priority, and
- every attempt should be made to notify all existing and ex-detainees with debts of the changes.

Recommendation 18

The Committee recommends that, as a priority, the Australian Government introduce legislation to repeal the liability of immigration detention costs.

The Committee further recommends that the Minister for Finance and Deregulation make the determination to waive existing detention debts for all current and former detainees, effective immediately, and that all reasonable efforts be made to advise existing debtors of this decision.

Michael Danby MP
December 2008

A

Appendix A: List of submissions to the inquiry

1	Blue Mountains Refugee Support Group
2	Mrs Nancy Eggins
3	Ms Pauline Lovitt
4	Ms Robin Gibson
5	Ms Virginia Walker
6	Mr Leith Maddock
7	Mrs Daphne Lascaris
8	Rev Isobel Bishop
9	North Belconnen Congregation, Uniting Church in Australia
10	Ms Diana Greentree
10a	Ms Diana Greentree — SUPPLEMENTARY
11	Mr Nick Armitage
12	Dr Juliet Flesch
13	Ms Amalina Wallace
14	Ms Marilyn Penneck
15	Mrs Jean Jordan
16	Mr Rex Rouse

17	Ms Cynthia Pilli
18	Mr and Mrs Peter and Jan McInerney
19	Labor for Refugees (Victoria)
20	Little Company of Mary Refugee Project
21	Australian Catholic Migrant and Refugee Office
22	Ms Susanne Gannon
23	Montmorency Asylum Seekers Support Group
24	Professor Mary Crock
25	Refugee Advice and Casework Service (Australia) Inc
26	Dr Anne Pedersen and Ms Mary Anne Kenny
27	NetAct
28	Professor Elliott Forsyth
29	The Social Justice Board of The Uniting Church In Australia, WA Synod Social Responsibilities Commission, Anglican Province of Western Australia Catholic Social Justice Council, Archdiocese of Perth Council of Churches of Western Australia (WA) Inc Religious Society of Friends, Perth Meeting Coalition Assisting Refugees and Detainees (WA) Inc Centre For Advocacy, Support & Education (CASE) For Refugees Inc Edmund Rice Institute for Social Justice, Fremantle
29a	The Social Justice Board of The Uniting Church In Australia, WA Synod Social Responsibilities Commission, Anglican Province of Western Australia Catholic Social Justice Council, Archdiocese of Perth Council of Churches of Western Australia (WA) Inc Religious Society of Friends, Perth Meeting Coalition Assisting Refugees and Detainees (WA) Inc Centre For Advocacy, Support & Education (CASE) For Refugees Inc Edmund Rice Institute for Social Justice, Fremantle — SUPPLEMENTARY
30	Name Withheld
31	Mercy Refugee Service
32	Circle of Friends 42
33	The Migrant Health Service
34	Ecumenical Social Justice Group/Western Suburbs Inc (Brisbane)

35	Australian Catholic Social Justice Council
36	Sr Claudette Cusack
37	Ms Bette Devine
38	Ms Linda Jaivin
39	Geoffrey, Donald and Gillian Allshorn
40	Children Out of Detention (ChilOut)
41	Buddies Refugee Support Group
42	Queensland Council for Civil Liberties
43	Ms Mary de Merindol
44	ALP Goldstein Federal Electoral Assembly
45	Ms Halinka Rubin
46	Women's Electoral Lobby Australia
47	Sr Anne Higgins
48	Mr Fred Johnson
49	NSW Council for Civil Liberties
50	Mrs Willis Ripper
51	Mr Arthur Maxwell Ripper
52	Ms Michelle Dimasi
53	Edmund Rice Centre
54	The Royal Australasian College of Physicians
55	Labor For Refugees (New South Wales)
56	Human Rights Committee, NSW Young Lawyers
57	Researchers for Asylum Seekers
58	Dr Sev Ozdowski OAM
59	Ms Sue Hoffman
59a	Ms Sue Hoffman — SUPPLEMENTARY
60	Mr Paul Falzon
61	Attorney-General's Department

62 Immigration Detention Advisory Group

63 Ms Margaret Bryant

64 Ms Janet Castle

65 Mrs Amina Daligand

66 Ms Lesley Walker

67 Ms Marilyn Shepherd

67a Ms Marilyn Shepherd — SUPPLEMENTARY

68 Balmain for Refugees

69 Uniting Church in Australia

70 Ms Anna Harding

71 Federation of Ethnic Communities Councils of Australia

72 CONFIDENTIAL

73 Jesuit Refugee Service Australia

74 Dr Michelle Foster

75 Ms Doreen Roache

76 Assoc Prof Simon Rice, Dr Hitoshi Nasu &
Mr Matthew Zagor

77 Ms Jenny Denton

78 Ms Meryl McLeod

79 National Ethnic Disability Alliance

80 Mr Andrew Naylor

81 Sr Jane Keogh

82 Ms Linda Leung

83 ACT Government

84 Public Interest Advocacy Centre Ltd

85 Australian Lawyers for Human Rights

85a Australian Lawyers for Human Rights — SUPPLEMENTARY

86 Ms Trish Highfield

87	Ms Helen Lewers
88	Dr Helen McCue
89	A Just Australia
90	Joint Advocacy Statement
91	Rural Australians for Refugees - Daylesford and District
92	Brotherhood of St Laurence
93	Hotham Mission Asylum Seeker Project
94	Australian Federation of AIDS Organisations and HIV/AIDS Legal Centre
95	Ms Emily Ackland
96	CONFIDENTIAL
97	Castan Centre for Human Rights Law
98	Centre for Human Rights Education, Curtin University of Technology
99	Human Rights and Equal Opportunity Commission
100	Ms Kath Morton
101	Detention Health Advisory Group
102	Romero Centre
103	SCALES Community Legal Centre with the assistance of students from the Murdoch University School of Law
103a	SCALES Community Legal Centre with the assistance of students from the Murdoch University School of Law – SUPPLEMENTARY CONFIDENTIAL
104	Ms Margaret O'Donnell
105	The Australian Psychological Society Ltd
106	Department of Premier and Cabinet, Western Australia and other Agencies
107	Ms Carmel Kavanagh
108	Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS)
109	International Detention Coalition

110	Ms Cecilia Quinn
111	National Council of Women in Australia
112	Mr Michael Clothier
113	Ms Ruth Prince
114	Queensland Government
115	Mr Paris Aristotle AM
116	Ms Chris Rau
117	Human Rights Law Resource Centre Ltd
118	Sr Stancea Vichie
119	Australian Council of Heads of Schools of Social Work (ACHSSW)
120	Refugee Council of Australia
121	Asylum Seeker Resource Centre
121a	Asylum Seeker Resource Centre — SUPPLEMENTARY
122	Mr Habib Khan
123	Public Interest Law Clearing House
124	Get Up!
125	Law Council of Australia
126	The Commonwealth Ombudsman
126a	The Commonwealth Ombudsman — SUPPLEMENTARY
127	Law Institute of Victoria, Liberty Victoria and The Justice Project
127a	Law Institute of Victoria, Liberty Victoria and The Justice Project — SUPPLEMENTARY
128	Mr Guy Coffey and Mr Steven Thompson
129	Department of Immigration and Citizenship
129a	Department of Immigration and Citizenship — SUPPLEMENTARY
129b	Department of Immigration and Citizenship — SUPPLEMENTARY
129c	Department of Immigration and Citizenship — SUPPLEMENTARY

129d	Department of Immigration and Citizenship – SUPPLEMENTARY
129e	Department of Immigration and Citizenship – SUPPLEMENTARY
129f	Department of Immigration and Citizenship – SUPPLEMENTARY
129g	Department of Immigration and Citizenship – SUPPLEMENTARY CONFIDENTIAL
129h	Department of Immigration and Citizenship – SUPPLEMENTARY
129i	Department of Immigration and Citizenship – SUPPLEMENTARY CONFIDENTIAL
129j	Department of Immigration and Citizenship – SUPPLEMENTARY
129k	Department of Immigration and Citizenship – SUPPLEMENTARY CONFIDENTIAL
129l	Department of Immigration and Citizenship – SUPPLEMENTARY
130	Refugee and Immigration Legal Centre Inc
131	Ms Frederika Steen
132	Amnesty International Australia
133	United Nations High Commissioner for Refugees
134	Ms Ngareta Rossell
135	CONFIDENTIAL
136	CONFIDENTIAL
137	National Legal Aid
138	Ms Mairi Petersen and Ms Natalie Gould
139	Australian Security Intelligence Organisation

B

Appendix B: List of public hearings and inspections

Tuesday, 22 April 2008 — Sydney

Site inspection of Villawood Immigration Detention Facility and immigration residential housing

Wednesday, 7 May 2008 — Sydney

Individuals

Ms Linda Jaivin

Mr Morteza Poorvadi

A Just Australia

Ms Kate Gauthier, National Coordinator

Amnesty International Australia

Dr Graham Thom

Asylum Seekers Centre

Ms Tamara Domicelj, Director

Australian Red Cross

Mr Noel Clement, General Manager, Domestic Operations

Ms Annie Harvey, Manager, ITRASS

Balmain for Refugees

Mrs Deborah Nicholls

House of Welcome

Father James Carty, Coordinator

Mercy Refugee Service

Sister Lorraine Phelan, On-Shore Programmes Manager, Mercy Works Inc

Monday, 7 July 2008 — Darwin

Visit to Headquarters Northern Command, Larrakeyah Barracks

Site inspection of Hotel facilities

Site inspection of the Northern Immigration Detention Centre, Defence Establishment Berrimah

Tuesday, 8 July 2008 — Christmas Island

Site inspection of the Phosphate Hill immigration detention facility and adjacent construction camp

Site inspection of the Christmas Island Immigration Detention and Reception Centre, North-West Point

Wednesday, 3 September 2008 — Canberra

Immigration Detention Advisory Group

Air Marshal Ray Funnell AC (Rtd), Member

Hon John Hodges, Chair

Wednesday, 10 September 2008 — Melbourne

Site inspection of Maribyrnong Immigration Detention Centre

Site inspection of Melbourne Immigration Transit Accommodation

Visit to the Asylum Seekers Resource Centre, West Melbourne

Thursday, 11 September 2008 — Melbourne

Individuals

Mr Guy Coffey

Australian Red Cross

Mr Noel Clement, General Manager, Domestic Operations

Brotherhood of St Laurence

Ms Serena Lillywhite, Manager, Sustainable Business

Castan Centre for Human Rights Law

Dr Susan Kneebone, Deputy Director

Detention Health Advisory Group

Assoc Professor Harry Minas, Chair

Dr Tim Lightfoot, Member

Dr Gillian Singleton, Member

Hotham Mission Asylum Seeker Project

Ms Caz Coleman, Project Director

Ms Stephanie Mendis, Casework Team Leader

Law Institute of Victoria

Ms Joanne Knight, Chairperson, Refugee Law Reform Committee

Ms Jessie Taylor, Convenor - Immigration Detention Working Group, The Justice Project and Liberty Victoria

Liberty Victoria

Mr Julian Burnside QC, President

Refugee and Immigration Legal Centre Inc

Mr David Manne, Coordinator/Principal Solicitor

The Justice Project Inc

Mr Kurt Esser, Chair

Wednesday, 17 September 2008 — Canberra

Office of the Commonwealth Ombudsman

Prof John McMillan, Commonwealth Ombudsman

Mrs Helen Fleming, Senior Assistant Ombudsman

Mr George Masri, Senior Assistant Ombudsman

Dr Vivienne Thom, Deputy Ombudsman

Wednesday, 24 September 2008 — Canberra

Department of Immigration and Citizenship

Mr Dermot Casey, Ag First Assistant Secretary

Mr Bob Correll, Deputy Secretary

Ms Arja Keski-Nummi, First Assistant Secretary, Refugee Humanitarian and International Division

Mr Andrew Metcalfe, Secretary

Ms Lyn O'Connell, First Assistant Secretary

Wednesday, 8 October 2008 - Perth

Site inspection of Perth Immigration Detention Centre and immigration residential housing

Meeting with Ms G, community detention client

Thursday, 9 October 2008 — Perth

Individuals

Mr Stephen Khan

Dr Anne Pedersen

Centre for Human Rights Education, Curtin University of Technology

Professor Linda Briskman

Centrecare Inc

Mr Nigel Calver, Executive Manager

Mr Anthony Pietropiccolo, Director

Project SafeCom Inc

Mr Jack Smit, Executive Director / Project Coordinator

Southern Community Advocacy Legal and Educational Services Community Legal Centre

Ms Anna Copeland, Acting Director (Southern Community Advocacy Legal and Educational Services)

Ms Mary Anne Kenny, Solicitor/ Migration agent

Mrs Vanessa Moss, Solicitor/ Migration agent

The Uniting Church in Australia

Ms Rosemary Hudson Miller, Associate General Secretary, Justice and Mission

Uniting Church in Australia - Western Australia

Mr Mark Cox, Solicitor

Wednesday, 15 October 2008 — Canberra

Australian Security Intelligence Organisation

Mr Paul O'Sullivan, Director-General

United Nations High Commissioner for Refugees

Mr Richard Towle, Regional Representative

Friday, 24 October 2008 — Sydney

Individuals

Dr Sev Ozdowski OAM

A Just Australia

Ms Kate Gauthier, National Coordinator

Asylum Seeker Resource Centre

Mr Kon Karapanagiotidis, Chief Executive Officer

Ms Pamela Curr, Campaign Coordinator

Ms Maria Psihogios-Billington, Principal Solicitor

Asylum Seekers Centre

Ms Tamara Domicelj, Director

Australian Human Rights Commission

Mr Graeme Innes, Human Rights Commissioner and Disability Discrimination Commissioner

Ms Catherine Maywald, Policy Officer, Human Rights Unit

Balmain for Refugees

Ms Frances Milne

Mr Shane Prince, Counsel

Get Up!

Mr Edward Coper, Campaigns Director

Ms Anna Saulwick, Rights, Justice and Democracy Campaigner

Human Rights and Equal Opportunity Commission

Ms Susan Newell, Acting Director, Human Rights Unit

Legal Aid NSW

Ms Elizabeth Biok, Solicitor

Mr Bill Georgiannis, Solicitor

Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS)

Ms Deborah Gould, Clinical Psychologist

Ms Gordana Hol-Radicic, Clinical Psychologist, Acting Clinical Services and Research Coordinator

Participants in roundtable of community detention clients

Ms K

Mr U

Mrs Z

Mr W

Ms L

Mr K

Miss Z

C

Appendix C: Overview of immigration detention population

1.1 This appendix provides a context to the body of the report by outlining the major characteristics of the immigration detention population and trends in recent years. It acknowledges that the current detention population is different in size and composition to that of 2000-01, when the immigration detention system was put under intense pressure by large numbers of unauthorised boat arrivals. In summary, the trends outlined are of:

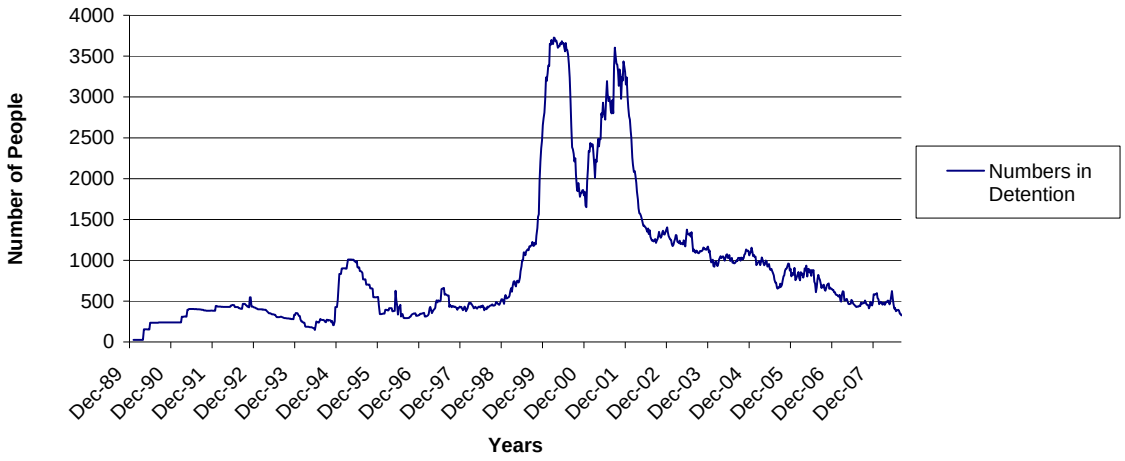
- decreasing absolute numbers of people in immigration detention in Australia
- a detention population of changing composition; that is, a population now dominated by visa overstayers and visa cancellation cases, and
- a general decrease in the length of immigration detention.

Numbers of people in immigration detention

1.2 Figure C.1 illustrates the rise and fall of numbers of people in immigration detention since 1989, when the *Migration Legislation Amendment Act 1989* was passed. The number of people in immigration detention in Australia was at its highest between 2000 and 2002, but dropped dramatically in 2003, and had halved again by 2007. In late 2008, the Minister for Immigration and Citizenship

announced that the number of people in immigration detention was at its lowest level since 1994.[1]

Figure C.1 Trends in immigration detention in Australia from 1989 to 2007



Source: Department of Immigration and Citizenship, submission 129d, p 2.

Immigration detention population by mode of arrival

1.3 Two groups of people are liable to be taken into immigration detention in Australia: those who arrive unlawfully without a valid visa; and those who enter Australia on a valid visa and then become unlawful, either because their visa expires or they breach the conditions of that visa, resulting in a cancellation.

1.4 A common assumption is that Australia's detention policy mainly captures unauthorised boat arrivals claiming asylum under Australia's international obligations. This has been true in the past. Between 1999 and 2002 more than half of those in immigration detention in Australia were unauthorized boat arrivals. It is not, however, the case at the present time. Since 2003, overstayers and those with visa cancellations have been the majority.[2]

1.5 Figure C.2 maps the broad trends in the detention population by arrival type since 1989-90. Of particular note are:

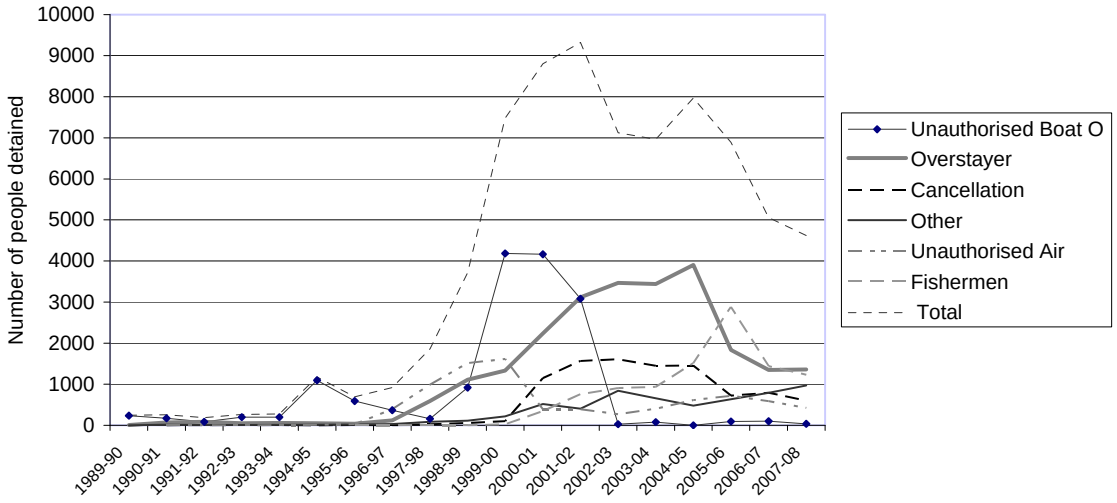
- peaks in unauthorised boat arrivals in 1994-95 and 2001-02

1 Senator the Hon C Evans, Minster for Immigration and Citizenship, 'Progress made in long-term immigration detention cases, media release, 24 September 2008.

2 See also Department of Immigration and Citizenship, supplementary submission 129, p 12.

- a peak in illegal foreign fishers in 2006, and
- a steady increase in the number of visa overstayers in detention, peaking in 2005 and now declining.

Figure C.2 Trends in immigration detention by arrival type and/or reason for detention



Source: Department of Immigration and Citizenship, supplementary submission 129d, p 2.

1.6 As the Committee heard when they visited Headquarters Northern Command in Darwin, recent years have seen a significant decline in the number of unauthorised boat arrivals intercepted. Reasons for this decline include increased resources invested in security, surveillance and interception in our northern waters and increased cooperation with Indonesia and other partners in our region in managing the numbers of people attempting to sail to Australia through transit countries and people-smuggling operations. It is acknowledged, however, that unauthorised arrivals to Australia will likely continue to fluctuate in response to external factors, such as natural disaster and conflict, and the activities of people smugglers.[3]

1.7 As at 7 November 2008, there were 46 unauthorised air arrivals and 34 unauthorised boat arrivals in immigration detention. This was out of a total detention population of 279.[4] The number of unauthorised boat arrivals in detention at this time was in fact higher than for the

3 Senator the Hon C Evans, Minister for Immigration and Citizenship, 'Unauthorised boat arrivals arrive on Christmas Island', media release, 2 October 2008.

4 Department of Immigration and Citizenship, submission 129, p 9.

rest of 2008 as the first two boats to arrive in 2008 were intercepted in September and October.[5]

1.8 The majority of the detention population, approximately 80 per cent, is currently comprised of people who have entered the country legally but have overstayed or who have breached the conditions of their visa. DIAC advises that changes in policy emphasis and improved program integrity are reducing the likelihood of detention for this group.[6]

1.9 There has also been a fall in the number of illegal foreign fishers in detention from 2879 individuals across 2005-06 to 1232 in the last financial year (2007-08).[7] This decline is likely to due to increased cooperation between DIAC, Customs, the Australian Navy, the Department of Fisheries and the Indonesian Government in facilitating faster repatriation of these fishers to their home regions. As of 7 November 2008 there are eight illegal foreign fishers currently in immigration detention.[8]

1.10 Figure C.3 illustrates the breakdown, by mode of arrival, of the 4514 people taken into immigration detention during 2007–08.

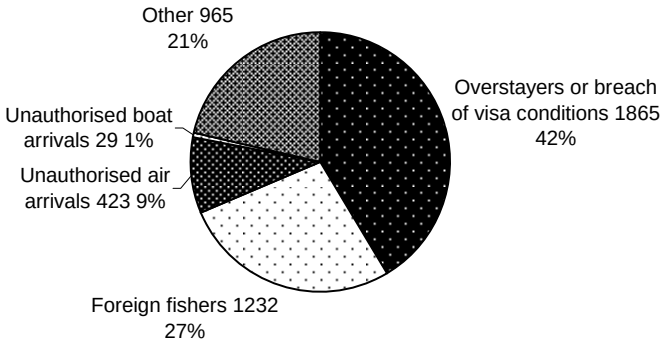
5 As at 21 November 2008, there had been three unauthorised boat arrivals in 2008, on 30 September, 6 October and 20 November.

6 Department of Immigration and Citizenship, submission 129, p 9.

7 Department of Immigration and Citizenship, supplementary submission 129d, p 2.

8 Department of Immigration and Citizenship, *Immigration detention statistics summary*, as at 7 November 2008, viewed on 26 November 2008 at http://www.immi.gov.au/managing- australias-borders/detention/_pdf/immigration-detention-statistics-20081031.pdf.

Figure C.3 People in immigration detention during 2007-08, by arrival type/reason for detention



Source: Department of Immigration and Citizenship, Annual report 2007-08 (2008), p 125.

Source countries of people in detention

1.11 The source countries of the immigration detention population is largely determined by international developments such as natural disaster, regional or national conflicts, as well as the source countries for holders of various visa types who may then become unlawful by overstaying or breaching the conditions of their visa.

1.12 Between 1998-99 and 2001-02 people fleeing conflict in the Middle East from Afghanistan, Iraq and Iran contributed to the significant increase in the number of unauthorised arrivals by boat, and these nationalities were the most represented in immigration detention.[9]

1.13 Table C.1 shows that since 2002-03, however, the most common nationality amongst the detention population was Indonesian. As these figures include illegal foreign fishers, this likely reflects increased numbers and interceptions of illegal fishing vessels entering Australian waters from Indonesia's southern regions.[10]

9 Parliamentary Library, Part 1, 'Australia and Refugees, 1901–2002: Annotated Chronology Based on Official Sources: Summary', *Chronology No. 2 2002*–03, 16 June 2003.

10 Hon P Costello MP, Treasurer, Budget Speech 2006 -07, delivered 9 May 2006; Department of Immigration and Citizenship, supplementary submission 129d, p 2.

Table C.1 Nationalities of people detained 2000-01 to 2007–08 (ranked by majority)

2000-01 to 2007-08				
Year	1st rank	2nd rank	3rd rank	4th rank
1996-97	Iraq	Sri Lanka	China, Peoples Republic Of	Somalia
1997-98	Indonesia	China, Peoples Republic Of	Iraq	Sri Lanka
1998-99	Iraq	China, Peoples Republic Of	Afghanistan	Turkey
1999-00	Iraq	Afghanistan	Iran	China, Peoples Republic Of
2000-01	Afghanistan	Iraq	Iran	Indonesia
2001-02	Iraq	Afghanistan	China, Peoples Republic Of	Indonesia
2002-03	Indonesia	China, Peoples Republic Of	Papua New Guinea	Malaysia
2003-04	Indonesia	China, Peoples Republic Of	Malaysia	Korea, South
2004-05	Indonesia	China, Peoples Republic Of	Malaysia	Korea, South
2005-06	Indonesia	Malaysia	China, Peoples Republic Of	Korea, South
2006-07	Indonesia	Malaysia	China, Peoples Republic Of	Philippines
2007-08	Indonesia	Malaysia	China, Peoples Republic Of	India

Source: Department of Immigration and Citizenship, supplementary submission 129f, p 2. Data for years prior to 2002-03 has excluded those for whom no nationality is reported.

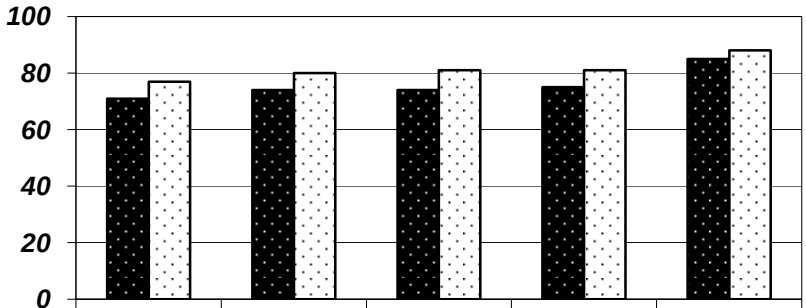
Length of immigration detention

1.14 The length of time individuals spend in immigration detention has been a persistent concern, as highlighted elsewhere in this report. For the majority of individuals, however, detention is for a period less than one month, and this percentage has been improving gradually since 2003-04 (figure C.4).

1.15 Since the introduction of mandatory reporting to the Commonwealth Ombudsman there has been a significant decline in the number in people in detention for two years or more particularly from 367 in 2007 to 42 as at 7 November 2008.[11]

11 Department of Immigration and Citizenship, *Immigration detention statistics summary*, as at 7 November 2008, viewed on 26 November 2008 at http://www.immi.gov.au/managing- australias-borders/detention/_pdf/immigration-detention-statistics-20081031.pdf.

Figure C.4 Percentage of detention population with a length of stay less than three months

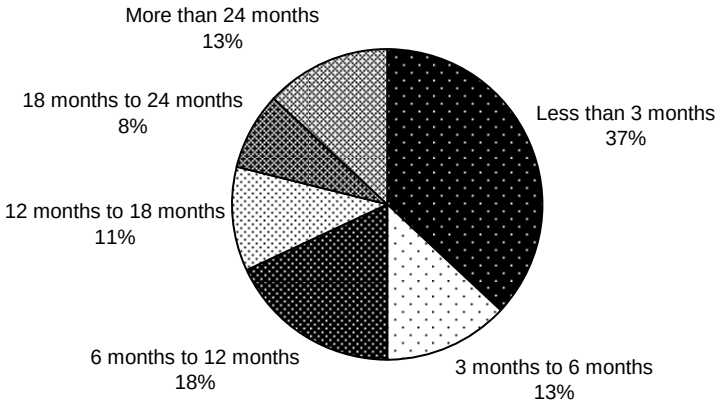


	2003-04	2004-05	2005-06	2006-07	2007-08
Less than one month	71	74	74	75	85
Less than three months	77	80	81	81	88

Source: Department of Immigration and Citizenship, correspondence, 19 November and 27 November 2008.

1.16 Figure C.5 provides a breakdown of the immigration detention population at 30 June 2008 by the period of time spent in detention.

Figure C.5 People in immigration detention by period detained at 30 June 2008



Source: Department of Immigration and Citizenship, Annual report 2007-08 (2008), p 128.

D

Appendix D: Time line for immigration detention policy 1989–2008

Legislation/event	Policy implications
Migration Legislation Amendment Act 1989	In the context of an increasing number of unauthorised boat arrivals from Indochina, the Act introduced significant changes to the system of processing boat people. It provided that an officer had discretion to arrest and detain a person suspected of being an 'illegal entrant', although detention was not mandatory.
Migration Amendment Act 1992	Introduced by the Keating Government with bipartisan support, the policy of mandatory detention was envisaged as a temporary and exceptional measure for a particular group of unauthorised arrivals or 'designated' persons who arrived by boat between 19 November 1989 and 1 September 1994. The period of detention was limited to 273 days. The Act also aimed to codify discretionary detention as it existed under the Migration Act so as to facilitate the processing of refugee claims, prevent de-facto migration and reduce costs of accommodation in the community.
Migration Reform Act 1992	Extended mandatory detention from a specified group to all who did not hold a valid visa. The Act established a new visa system making a simple distinction between a 'lawful' and 'unlawful' non-citizen. Under Section 13 of the Act, a migration officer had an obligation to detain any person suspected of being unlawful. The Act removed the 273 day detention limit which had applied under the *Migration Amendment Act 1992*. Overstayers could apply for a bridging visa which allowed them to stay in the community while their claims were assessed. The Act had bipartisan support.

Migration Amendment Regulations (no. 12), 20 October 1999	Introduced the Temporary Protection Visa (TPV) scheme which reduced the number of people detained. Temporary refugee status was granted for three years but without the level of access to government services provided under Permanent Protection visas.
Migration Legislation Amendment (Immigration Detainees) Act 2001	Expanded the powers of detention centres, providing that certain offences on the part of detainees are punishable under the Criminal Code, and that detainees must comply with screening and entry requirements. The amendment had qualified bipartisan support.
Migration Legislation Amendment (Judicial Review) Act 2001	Introduced a privative clause to exempt most decisions made under the Migration Act from judicial review. The amendment was not supported by the opposition.
Migration Amendment (Excision from Migration Zone) Act 2001 *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*	The legislation amended the *Migration Act 1958* to excise the Christmas, Ashmore, Cartier and Cocos (Keeling) islands from Australia's migration zone, giving effect to the policy of offshore processing known as the 'Pacific Solution'. The new arrangements provided that unlawful arrivals were to be processed at offshore centres on Nauru and Manus Islands, and some on Christmas Island, circumventing their entitlement to Australia's migration visa and review processes. The legislation also provided for indefinite detention or, if refugee status was determined, for removal to a third country. There was bipartisan support for both Acts.
Woomera Detention Centre closed, April 2003	The Baxter immigration detention centre and the Port Augusta residential housing project in South Australia were opened to replace facilities in Woomera.
Palmer Inquiry commenced, February 2005	The Palmer Inquiry was opened to investigate the wrongful 11-month detention of Cornelia Rau, a German citizen holding Australian permanent residency, who was released from Baxter IDC into a psychiatric care facility. By May, it was revealed that 33 people had been wrongfully detained under the Migration Act, including one case of a woman forcibly deported and subsequently missing, Vivian Solon. By the end of the month over 200 cases of possible unlawful detention were referred to the Palmer inquiry.
Migration Amendment (Detention Arrangements) (MADA) Act 2005	Introduced in June 2005 with bipartisan support, the Act held that families with children would no longer be held in immigration detention centres (IDCs) unless as a 'last resort'. Instead they would be placed in immigration residential housing (IRH). Under the legislation the Minister could specify alternative arrangements for a person's detention; impose conditions of

	detention of that person; and grant a visa to a person who is in immigration detention. Ministerial reporting on, and six monthly review by the Commonwealth Ombudsman of the cases of detainees held over two years was also mandated. The MADA Act also introduced the Removal Pending Bridging Visa (RPBV), which allowed certain long-term detainees to live in the community, subject to agreeing to return home when the government determined.
Migration and Ombudsman Legislation Amendment Act 2005 (Cth)	This Act empowered the Ombudsman to review the cases of people who had been in detention for two years or more, and set a 90-day time limit on decisions by the Minister on applications for protection visas and review by the Refugee Review Tribunal (RRT) of protection visa decisions. There was bipartisan support for the Act.
Pacific Solution policy formally concluded February 2008	In February 2008, the Pacific Solution formally concluded when the last 21 asylum seekers at Nauru were resettled on the mainland and Nauru and Manus Island centres closed. Future unauthorised arrivals would, however, continue to be processed on Christmas Island, excised from Australia's migration zone.
Risk-based detention values announced, July 2008	The Minister for Immigration and Citizenship announced seven immigration detention values on which reforms would be based, as outlined on 29 July 2008.
Abolition of the Temporary Protection Visa, August 2008	Temporary Protection Visa holders/applicants gained the right to apply for Permanent Protection Visas with immediate access to Newstart and Youth allowances, the Adult Migrant English Program (AMEP), age and disability pensions, family tax benefit, childcare benefit and the right to travel.

E

Appendix E: Types of immigration detention

1.1 Since 2003, immigration detention accommodation in Australia has expanded beyond the immigration detention centre to include a range of lower security options, designed particularly to cater for the needs of families, children and vulnerable people. This report has been focussed on mechanisms for release from immigration detention, and has not therefore differentiated between types of detention in any detail. Nevertheless, these are outlined below for the benefit of readers.

1.2 These include:

- immigration detention centres (more secure detention);
- immigration residential housing (family style detention accommodation for lower risk detention);
- transit accommodation (hostel type accommodation for quick processing)
- community detention (supported community living arrangements for those assessed as a low flight risk and for families with children), or
- alternative temporary detention in the community, which may include foster care or alternative temporary detention in hotels or hospitals).[1]

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1 Department of Immigration and Citizenship, submission 129, pp 18-26.

Immigration detention centres

1.3 People in immigration detention determined by Department of Immigration and Citizenship (DIAC) to pose a higher flight or security risk are generally held within an immigration detention centre environment. The range of accommodation provided is varied, and includes dorms and single rooms, some of which have ensuites. Persons in detention centres share dining areas, laundries and multipurpose rooms. The perimeters of IDCs are securely fenced.[2]

Immigration residential housing

1.4 The range of facilities provided by DIAC as immigration residential housing (IRH) have been purpose-built and provide persons in immigration detention with a less institutional domestic environment. The predominant groups of people that are eligible to stay at an IRH are families with children, those awaiting a decision for release into community detention and other persons determined to be low risk.[3]

1.5 Accommodation in an IRH allows some degree of privacy for families to cook and eat together. Facilities are located in a residential style setting either in the community or on IDC grounds. Residents may visit local recreational facilities and attend community based educational and development programs when accompanied by an officer or other appropriately authorised person. Health and medical services are delivered through community-based health services, under the supervision of health staff employed by a Health Service Manager.[4]

Immigration transit accommodation

1.6 Immigration transit accommodation (ITA) is set up to offer semi-independent living in a hostel-style environment to those people expected to achieve an immigration outcome quickly.

1.7 The aim of this type of facility is to provide short stay accommodation for people who represent a low security risk, a low flight risk and have no known health concerns that cannot be managed at the accommodation.

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2 Department of Immigration and Citizenship, *Detention health framework- a policy framework for health care for people in immigration detention* (2007), p 19.

3 Department of Immigration and Citizenship, *Detention health framework- a policy framework for health care for people in immigration detention* (2007), p 19.

4 Department of Immigration and Citizenship, submission 129, p 30.

Community detention

1.8 Community detention can only be authorised by the Minister personally under section 197AB of the Migration Act 1958, the 'residence determination' arrangement.

1.9 The legislation allows people in immigration detention to be detained in the community with the support of non-government organisations (NGOs) and some state welfare agencies. Currently community care is provided by the Australia Red Cross, which is funded to source housing and provide allowances to people in community detention to help meet living expenses.[5]

1.10 People in community detention reside in houses and home units without other indications that they are being detained; there is no requirement for official accompaniment during daily activities. Family groups, women and children, unaccompanied minors and people with special needs are considered for this form of immigration detention.[6]

Alternative immigration detention arrangements

1.11 Subsection 5(1) of Migration Act 1958 provides for establishment of places of alternative temporary detention in the community. DIAC applies this provision as a temporary solution to meet a critical need, such as for medical treatment, pending community detention grant, or where no other immigration detention facilities are available.

1.12 Alternative temporary placements in the community can include:

- motels, hotels and private apartments
- hospitals, psychiatric facilities and other places where medical treatment is provided
- home-based care using private accommodation owned or leased by relatives or people with established close relationships with the person in detention, and
- foster care for unaccompanied minors.[7]

5 Department of Immigration and Citizenship, submission 129, pp 19-20.

6 Department of Immigration and Citizenship, submission 129, p 19.

7 Department of Immigration and Citizenship, submission 129, p 25.

1.13 While use of alternatives has been increasing, immigration detention centres remain the most commonly used type of accommodation, as illustrated in table E.1.

Table E.1 Total number of days spent in immigration detention- July 2005 to June 2008

Immigration detention centre	506 187
Community detention	68 446
Immigration residential housing	16 286
Immigration transit accommodation	648

Source: *Department of Immigration and Citizenship, supplementary submission 129h, p 4. The low figures for immigration transit accommodation reflect the fact that the first ITA facility was only opened in Brisbane in November 2007, followed by the Melbourne facility in June 2008. Department of Immigration and Citizenship, submission 129, p 23.*

1.14 As at 7 November 2008, of a total of 279 people in detention:

- 189 were in immigration detention centres
- 44 were in community detention
- 25 were in alternative temporary detention in the community
- 16 were in immigration residential housing, and
- 3 were in immigration transit accommodation.
- 2 were restricted on board vessels in port.[8]

8 Department of Immigration and Citizenship, *Immigration detention statistics summary*, as at 7 November 2008, viewed on 26 November 2008 at http://www.immi.gov.au/managing- australias-borders/detention/_pdf/immigration-detention-statistics-20081031.pdf.

F

Appendix F: Bridging visas

1.1 There are currently some 56 000 people lawfully in the community on bridging visas. While on a bridging visa, a person may remain in the community for a specified time or until a specified event occurs. The vast majority of those on a bridging visa are working through immigration processes, whether at the stage of primary application, merits review, judicial review or ministerial intervention. As those processes are progressed, cases will be resolved either by visa grant, voluntary departure, or the person becoming liable for removal.[1]

1.2 The use of detention during the process of resolving these clients' immigration status has declined significantly. In the last three years, the percentage of unlawful non-citizens located and then taken into detention by the Department of Immigration and Citizenship (DIAC) has halved to 15 per cent.[2] While the Act requires the detainment of an unlawful non-citizen, DIAC's policy is that, where it is appropriate and safe to do so, the granting of a bridging visa should be considered prior to detaining a person.

1.3 Bridging visas may be granted with conditions attached such as:

- a requirement to report to DIAC at regular intervals
- to live at a specified address and notify DIAC of a change in address
- to pay the costs of detention or make arrangements to do so (see chapter 5), or

1 Department of Immigration and Citizenship, supplementary submission 129f, p 15.

2 Department of Immigration and Citizenship, *Annual report 2007-08* (2008), p 8.

- to lodge a security bond, generally between $5000 and $50 000.[3]

1.4 Bridging visas may also be granted with restrictions on the following:

- work rights
- study rights, and
- access to Medicare.

1.5 However for those persons who taken into detention at arrival or at some later point, bridging visas are only granted in a limited range of circumstances.[4] Table F.1 outlines the criteria for these visas.

1.6 Offshore entry persons are prevented by subsection 46A(1) of the Act from lodging a valid visa application, including an application for a bridging visa. This includes 'boat people' who enter Australian waters, are intercepted in the excised zone and taken to Christmas Island for processing.[5]

1.7 Under section 72(1)(c) of the Migration Act, the Minister can determine that an otherwise ineligible person is eligible to apply for a bridging visa if:

- that person has been in immigration detention for more than six months since lodging a protection visa application without a primary decision having been made, and
- the Minister considers a determination to be in the public interest.

1.8 The power is personal to the Minister and its exercise is non-compellable. Since the conferral of this power in 1994, only four persons have been released from detention under the exercise of this power.[6]

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3 Kamand S et al, *The immigration kit* (2008), 8th ed, The Federation Press, p 197; Phelan L, Mercy Refugee Service, *Transcript of evidence*, 7 May 2008, p 20.

4 Department of Immigration and Citizenship, supplementary submission 129d, p 9.

5 The only venue for the grant of a bridging visa for offshore entry people is under subsection 46A(2) of the Migration Act, whereby the Minister may exercise the power to allow a valid application to be made if he/she considers it to be in the public interest.

6 Taylor S, 'Immigration detention reforms: A small gain in human rights', *Agenda* (2006), vol 13, no 1, pp 56.

Table F.1 Bridging visa categories available to people in immigration detention

Category	Criteria	Number of people in community holding this visa as at 30 June 2008
Bridging visa E (BVE) - subclass 050	Available to certain unlawful non-citizens in three general circumstances. They are: - to provide lawful status to an unlawful non-citizen arranging to depart Australia; or - to provide a lawful status to a non-citizen who is pursuing a claim of one kind or another to remain in Australia; or - to provide lawful status to an unlawful non-citizen in criminal detention, including a person in remand or a person serving a custodial sentence, so that immigration detention is unnecessary for the duration of the criminal detention.	5923
Bridging visa E (BVE) - subclass 051	Available to unauthorised arrivals applying for a protection visa who have either been refused immigration clearance or who have bypassed immigration clearance and come to notice within 45 days of entering Australia and satisfy at least one of the following criteria: - are less than 18 years of age or more than 75 years of age - have a special need based on health or torture or trauma, in respect of which a medical specialist appointed by immigration has certified that the non-citizen cannot be properly cared for in a detention environment - are the spouse of an Australian citizen, permanent resident or eligible New Zealand citizen. Applicants must meet health criteria.	2
Bridging Visa R - Removal Pending (RPBV)	Enables the release, pending removal, of people in immigration detention who have been cooperating with efforts to remove them from Australia, but whose removal is not reasonably practicable at that time. This visa can only be applied for on written invitation of the Minister. Applicants must pass the character test and be assessed by ASIO as not being a risk to security.	16

Sources: *Department of Immigration and Citizenship, supplementary submission 129f, pp 27-28; supplementary submission 129d, p 9; Migration Regulations 2.20A; Kamand S et al, Immigration Advice and Rights Centre, The immigration kit (2008), 8th ed, The Federation Press, p 177. Certain persons in immigration detention may also be eligible for a Bridging Visa F, available to a person who is of interest to the police in relation to offences involving people trafficking or sex slavery. While people in detention can be eligible for Bridging Visa E (general), most of the people holding this visa will not, in fact have come from immigration detention, as this visa is usually granted as an alternative to detaining someone who is making arrangements to depart the country or pursuing visa applications or appeal processes.*

G

Appendix G: Notice of detention debt and invoice

Figure G.1 Notice of detention debt

Australian Government
Department of Immigration and Citizenship

Dear Sir/Madam

Detention, Maintenance and/or Passage Costs
Customer No.: 0000

Attached please find a tax invoice for $161684.60 for the detention and/or other costs you incurred.

Sections 209 - 214 of the Australian Migration Act 1994 provide that a detainee/deportee is liable to pay the Commonwealth of Australia for passage, custody and other costs in respect of conveyance from Australia.

This means that you are liable to pay the costs in full within the payment term of **30 days** as stated on the tax invoice. Please quote the Account and Invoice Numbers when contacting DIAC or making a payment. Payment can be made by bank cheque, bank draft, money order or credit card, and should be made payable to "**CPM DIAC**" and post to our postal address below:

DIAC
Accounts Receivable Section
GPO Box 241
Melbourne VIC 3001
AUSTRALIA

If payment or correspondence is not received from you within the payment term, the Commonwealth of Australia reserves the right to impose penalty interest* and/or commence a legal action to recover in full the remaining debt.

Please note that a debt owed to the Commonwealth affects adversely your ability to meet visa criteria for the visa you applied for and your ability to re-enter Australia, until the debt is repaid or satisfactory arrangements have been made for its repayment.

Should you have any queries regarding the above matter, please do not hesitate to contact the Accounts Receivable Section on (03) 9235 3639.

*Interest rate to be imposed on debts owing to the Commonwealth will be the weighted average yield of 13-week Treasury Notes allotted in the latest tender (available from the Reserve Bank of Australia).

Yours sincerely

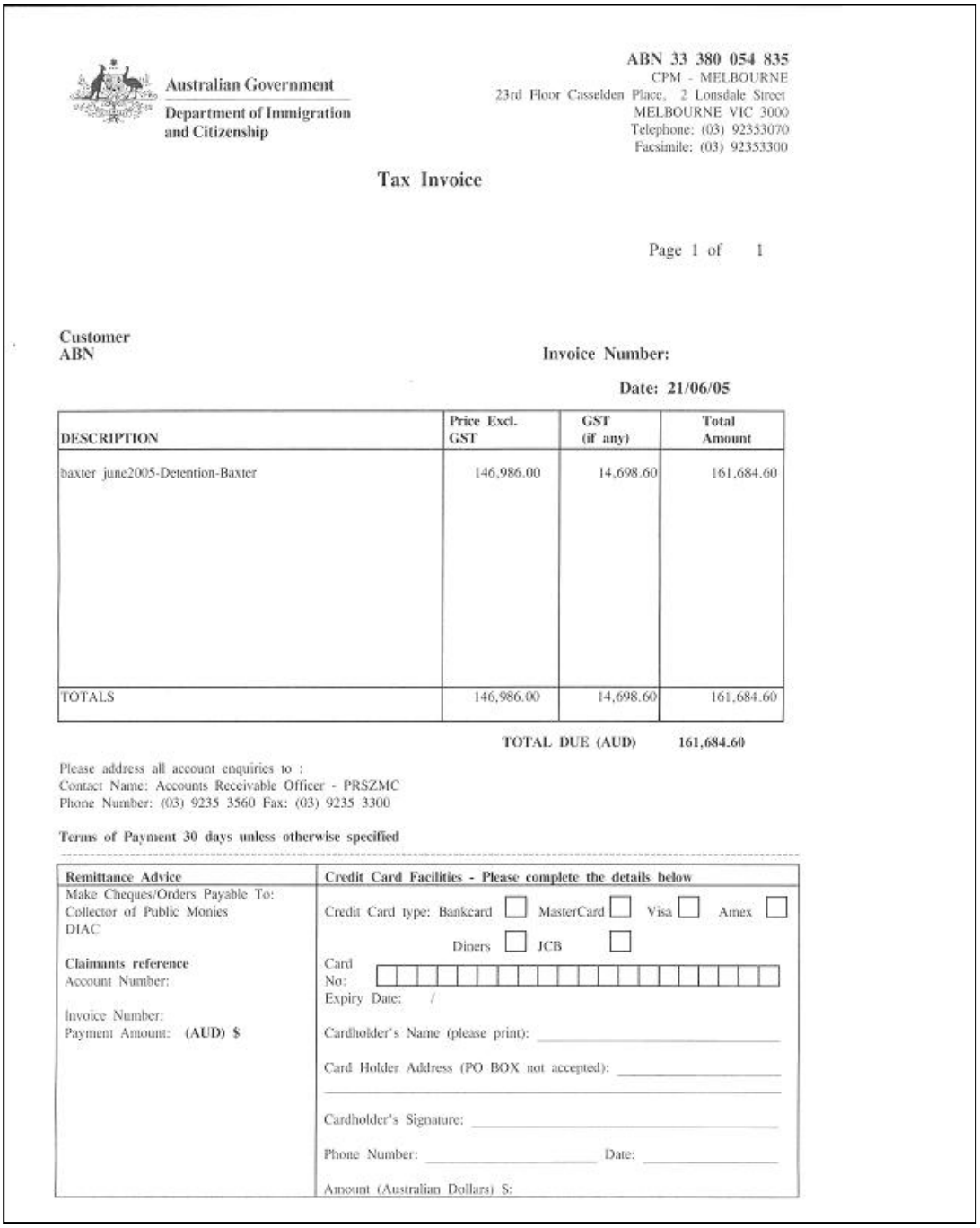
Recovery Officer
Accounts Receivable Section
17 May 2008

people our business

Casselden Place, 2 Lonsdale Street Melbourne VIC 3000

GPO Box 241 MELBOURNE VIC 3001 • Telephone 131 881 • Facsimile (03) 9235 3300 • Website: www.immi.gov.au

Figure G.2 Tax invoice for detention debt



Australian Government
Department of Immigration and Citizenship

ABN 33 380 054 835
CPM - MELBOURNE
23rd Floor Casselden Place, 2 Lonsdale Street
MELBOURNE VIC 3000
Telephone: (03) 92353070
Facsimile: (03) 92353300

Tax Invoice

Page 1 of 1

Customer
ABN

Invoice Number:

Date: 21/06/05

DESCRIPTION	Price Excl. GST	GST (if any)	Total Amount
baxter june2005-Detention-Baxter	146,986.00	14,698.60	161,684.60
TOTALS	146,986.00	14,698.60	161,684.60

TOTAL DUE (AUD) 161,684.60

Please address all account enquiries to :
Contact Name: Accounts Receivable Officer - PRSZMC
Phone Number: (03) 9235 3560 Fax: (03) 9235 3300

Terms of Payment 30 days unless otherwise specified

Remittance Advice	Credit Card Facilities - Please complete the details below
Make Cheques/Orders Payable To: Collector of Public Monies DIAC **Claimants reference** Account Number: Invoice Number: Payment Amount: **(AUD) $**	Credit Card type: Bankcard ☐ MasterCard ☐ Visa ☐ Amex ☐ Diners ☐ JCB ☐ Card No: ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐ Expiry Date: / Cardholder's Name (please print): _____ Card Holder Address (PO BOX not accepted): _____ _____ Cardholder's Signature: _____ Phone Number: _____ Date: _____ Amount (Australian Dollars) $:

Dissenting report by Mr Petro Georgiou MP, Senator Dr Alan Eggleston and Senator Sarah Hanson-Young

1.1 As the report indicates, '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'.[1] It is also the case that the lack of merits and judicial review has meant that many men, women and children have been held not unlawfully but unnecessarily and unreasonably.

1.2 The Committee majority believe that given factors such as 'the potential impact of lengthy detention on a person's mental health and the legacy of maladministration… there is justification for access to an independent tribunal and subsequently, if necessary, review by the courts of the tribunal's decision' after a person has been detained for 12 months.[2]

1.3 Under this framework, Department of Immigration and Citizenship officials will continue to have power to decide whether it is necessary and reasonable to detain people for 6 months without any external scrutiny of their decision whatsoever.

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1 Paragraph 4.141.

2 Paragraph 4.142.

1.4 After 6 months, the Ombudsman will review the detention decision but can offer only advice which is non-binding.

1.5 We strongly disagree that public servants should have such unfettered power to detain for 12 months without independent external scrutiny which can ensure the release of people whose detention is assessed as being unnecessary with respect to the specified criteria.

1.6 If the detention criteria are enshrined in law as the Committee recommends (Recommendation 12), a detained person should not be denied the right for 12 months to have a court examine whether the executive's decision to detain him or her is in accordance with the law.

1.7 This is a grossly excessive period.

1.8 Evidence presented to the inquiry was that detention can be a very damaging experience for certain people well before 12 months has elapsed. For example, psychologists Guy Coffey and Steven Thompson who have had clinical contact with several hundred detained or formerly detained people advised as follows:

> For some vulnerable asylum seekers, particularly but not exclusively with histories of torture and trauma or imprisonment, psychological deterioration has occurred almost immediately. We have observed individuals who have developed severe levels of depression, anxiety and the activation of pre-migration related post traumatic reactions very soon after being detained. Although the number of asylum seekers detained is now much lower than previously, and they are generally detained for shorter periods, we are still observing very adverse reactions across the course of the first several months of detention. The authors and our colleagues have assessed a series of asylum seekers in the past 6 months who have histories of trauma and loss and who have deteriorated significantly within a month or two of being detained.[3]

1.9 Clearly it is important that the decision to detain is subject to 'a credible system of accountability and review'[4] from an early stage.

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3 Coffey G and Thompson S, submission 128, pp 4-5.

4 Paragraph 4.6.

1.10 The Committee's recommendations relating to reviews by DIAC and the Commonwealth Ombudsman will improve the current framework. However, they fall well short of ensuring rigorous and timely assessment of whether detention is necessary in accordance with the new policy.

1.11 Significant weaknesses remain in both the DIAC and Ombudsman's review processes, as outlined below.

Internal review by DIAC

1.12 One of the prominent features of the new detention policy announced by the Minister for Immigration and Citizenship in July is that a senior DIAC officer is required to review the necessity for detention after people have been detained for 3 months.

1.13 The majority of the Committee acknowledges that in view of the 'chequered history' of DIAC '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…'[5]

1.14 The Committee seeks to address these concerns by recommending that:

- DIAC publish the 'template' that will be used to conduct the review; and
- the review report be provided to detainees and their advocates.

1.15 These changes will not alleviate concerns about the integrity of reviews that are conducted internally.

1.16 The template may be excellent but that will not provide assurance of the quality of reviews. Providing reports to detainees does not constitute an effective mechanism of accountability.

1.17 Detainees – who may have little or no English fluency - may not have qualified and experienced advisors who can assess whether the reviews were conducted properly and advise on possible courses of action if they are concerned about the conduct and conclusions of reviews.

5 Paragraph 4.30.

1.18 There is no mechanism to ensure that reviews are conducted in a timely manner, so people do not remain in detention simply because their cases have not been examined as required by departmental standards. This is not a fanciful concern: as the report notes, each detention case is currently required to be reviewed every 28 days by the Detention Review Manager and a Case Manager. However, in 2007-08 around one quarter of instances of detention were not reviewed within that period.

Review by the Ombudsman

1.19 The review of cases of people detained for longer than 2 years by the Ombudsman was instituted in 2005. It has been valuable and undoubtedly led to the release of people who should not have been detained for extended periods or perhaps at all.

1.20 Under the new system the Ombudsman has agreed to conduct six month reviews. This may not ensure expeditious consideration of the situations of people detained for that length of time. The Ombudsman's reviews of people detained for longer than 2 years have commonly taken months to be finalized.

1.21 We support the recommendations that six month review reports should be tabled and that the Minister should explain why Ombudsman's recommendations were accepted or rejected. The impact of these changes may be limited. The recommendations will still be unenforceable and their influence may be weak: fewer than half of the recommendations relating to long-term detainees have been accepted. It remains to be seen whether requiring the Minister to explain rejections makes acceptance more likely.

Compliance with international human rights obligations

1.22 The Department of Immigration and Citizenship acknowledges that immigration detention is subject to obligations under international law and conventions to which Australia is a party, including the International Covenant on Civil and Political Rights (ICCPR).[6]

6 Department of Immigration and Citizenship website, http://www.immi.gov.au/managing-australias-borders/detention/regulations/legislation-conventions.htm.

1.23 The issue of whether Australia's immigration detention system complies with these obligations has been the subject of considerable contention for over a decade.

1.24 When the Minister for Immigration and Citizenship announced the new immigration detention policy on 29 July 2008, he stated that the values 'honour our international treaty obligations'. According to the Minister:

> Enormous damage has been done to our international reputation. On 14 occasions over the last decade, the United Nations Human Rights Committee made adverse findings against Australia in immigration detention cases, finding that the detention in those cases violated the prohibition on arbitrary detention in article 9(1) of the International Covenant on Civil and Political Rights.[7]

1.25 The specific concern of the UN Human Rights Committee to which the Minister was referring is that the Migration Act permits non-citizens to be detained simply if they do not have a valid visa, without reference to whether it is reasonable to do so because they pose a risk to the community.

1.26 Article 9(4) of the ICCPR also provides that detained people should be entitled to appeal to the courts to decide whether their detention is 'lawful.' This right is available to detainees but the lawfulness of detention is determined by their citizenship or visa status not whether the detention is reasonable.[8]

1.27 The consequence is that Australian law does not provide the protection from arbitrary detention which is an obligation under the ICCPR. As the Human Rights and Equal Opportunity Commission explained in its submission:

> Judicial oversight of all forms of detention is a fundamental guarantee of freedom and liberty from arbitrariness (ICCPR article 9(4)). However this right is not guaranteed under the Migration Act in respect of the right to judicial review of

7 Article 9(1) provides that, 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.

8 Article 9(4) of the ICCPR provides that, 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.

> decisions to detain unlawful non-citizens under s.189. The courts are precluded from authorising the release from detention of unlawful non-citizens detained under ss 189 and 196 of the Migration Act, unless their detention under these provisions contravenes domestic law. The courts have no authority to order that a person be released from immigration detention on the grounds that the person's continued detention is arbitrary, in breach of Article 9(1) of the ICCPR. This is because under Australian law it is not unlawful to detain a person (or refuse to release a person) in breach of article 9(1) of the ICCPR.[9]

1.28 We are very doubtful whether denying someone the right to ask a court to review the merits of their detention for as long as 12 months will honour our international treaty obligation not to arbitrarily detain people.[10]

Conclusion

1.29 Many submissions strongly argued that the merit of detention decisions should be subject to independent oversight without indicating a view as to when that should be available as a right or should occur as a matter of course.

1.30 Their tenor did not suggest that they would have considered it reasonable to preclude merits and judicial review for 12 months. We do not agree that such a system will 'ensure that public confidence is restored in Australia's immigration detention system' as the majority of the Committee contend.[11]

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9 Human Rights and Equal Opportunity Commission, submission 99, p 13.

10 Note that Article 9(4) of the ICCPR provides that a detained person must be entitled to take proceedings before a court in order that the court may decide ***without delay*** on the lawfulness of detention and order release if the detention is not lawful. While the jurisprudence of the UN Human Rights Committee (HRC) concerning the time before detention must be reviewed relates primarily to Article 9(3), which requires that the lawfulness of arrest on a criminal charge be ***promptly*** reviewed by a court or tribunal, it may offer a good indication of the Committee's approach to the issue. In a General Comment on Article 9(3) the HRC has stated that 'delays must not exceed a few days.' (*General Comment No.8: Right to liberty and security of persons (Art.9)*, 30/6/82, [2]). The European Court of Human Rights has considered there to be a breach of the analogous right to personal freedom under Article 5 of the *European Convention on Human Rights* in cases where the length of detention before a person was brought before a judge was as short as 4 days and 6 hours: *Brogan v United Kingdom*, (1988) 11 EHRR 117.

11 Paragraph 4.143.

1.31 We believe that the government should consider a less draconian approach that would be far more in accord with the evidence the Committee received and Australia's human rights obligations. In particular, we recommend that:

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

Mr Petro Georgiou MP

Senator Dr Alan Eggleston

Senator Sarah Hanson-Young