

## 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.<sup>1</sup> 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'.<sup>2</sup>

- 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.<sup>3</sup> 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.<sup>4</sup> 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.

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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)<sup>5</sup>
  - 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.<sup>6</sup>
- 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.<sup>7</sup>
- 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.<sup>8</sup> 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.<sup>9</sup>

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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.<sup>10</sup> 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

<sup>10</sup> 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.<sup>11</sup>

## 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.<sup>12</sup>

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.<sup>13</sup>

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.<sup>14</sup>
- 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.<sup>15</sup>

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.<sup>16</sup>

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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.<sup>17</sup>
- 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.<sup>18</sup> TB is the only disease specifically identified in DIAC's public interest criteria for visa decisions.<sup>19</sup>
- 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.<sup>20</sup>

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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.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup>
- 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.<sup>24</sup>
- 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.<sup>25</sup>
- 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

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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.<sup>26</sup>

- 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.<sup>27</sup> 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.<sup>28</sup>
- 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.<sup>29</sup>

### 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.<sup>30</sup>
- 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

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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.<sup>31</sup>

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.<sup>32</sup>

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.<sup>33</sup>

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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.<sup>34</sup>

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.<sup>35</sup>

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.<sup>36</sup>

### 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.<sup>37</sup>

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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.<sup>38</sup> 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.<sup>39</sup>

## 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.<sup>40</sup>
- 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.<sup>41</sup> 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.

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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.<sup>42</sup>
- 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.<sup>43</sup> Consequently issues of managing identity

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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.<sup>44</sup>
- 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'.<sup>45</sup> DIAC also cites terrorism and the growth in identity crime as two factors giving impetus to the need to know who enters Australia.<sup>46</sup>
- 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.<sup>47</sup>

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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.<sup>48</sup>
- 2.73 Apart from the 247 Ombudsman review case load, compensation has been paid in five cases involving unlawful detention since 1 January 2001.<sup>49</sup> 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.<sup>50</sup>
- 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'.<sup>51</sup>
- 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 identify people of compliance interest and conducts identity investigations of particularly complex cases.<sup>52</sup>
- 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.<sup>53</sup>
- 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.<sup>54</sup> 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.<sup>55</sup>
- 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

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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'.<sup>56</sup>

## 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.<sup>57</sup>
- 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

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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.<sup>58</sup>

- 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.<sup>59</sup>
- 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.<sup>60</sup>

- 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

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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'.<sup>61</sup>

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.<sup>62</sup>

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.<sup>63</sup>

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.<sup>64</sup>

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.<sup>65</sup>

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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.<sup>66</sup>
- 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.<sup>67</sup>
- 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

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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.<sup>68</sup>

2.105 The criteria on which DIAC makes this assessment and referral to ASIO are classified.<sup>69</sup>

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.<sup>70</sup>

## Time frames for security assessments

2.107 ASIO prioritises security assessments for protection visa application and detention cases.<sup>71</sup> 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

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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.<sup>72</sup>

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.<sup>73</sup>

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,

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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.<sup>74</sup>

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.<sup>75</sup>

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.<sup>76</sup>

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

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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.<sup>77</sup>

- 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.<sup>78</sup>

- 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.<sup>79</sup>

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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 inquire into the 'propriety' of ASIO's activities and whether it has followed procedural guidelines effectively and appropriately.<sup>80</sup>
- 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.<sup>81</sup>

## 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.<sup>82</sup> For example, Professor Linda Briskman of the Centre for Humans Rights Education, Curtin University, told the Committee that for unauthorised boat arrivals:

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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.<sup>83</sup>

- 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.<sup>84</sup>
  - 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.<sup>85</sup>
  - 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.<sup>86</sup>
- 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.<sup>87</sup> 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.<sup>88</sup>

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?'<sup>89</sup>

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.<sup>90</sup>

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

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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.<sup>91</sup>

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.<sup>92</sup>

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.<sup>93</sup>

## 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 completed 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.**



