

# CHAPTER 1

## INTRODUCTION

1.1 On 25 June 2009, the Senate referred the Migration Amendment (Immigration Detention Reform) Bill 2009 to the Senate Legislation Committee on Legal and Constitutional Affairs, for inquiry and report by 7 August 2009.

1.2 The committee presented a short interim report to the Senate out of session on 7 August, indicating that it intended to present its final report on 17 August. On 13 August the Senate granted a further extension of the reporting date until 20 August 2009.

1.3 The Bill was introduced in the Senate on the same date by the Minister for Climate Change and Water, Senator the Hon. Penny Wong, representing the Minister for Immigration and Citizenship, Senator the Hon. Chris Evans. The Bill seeks to amend the *Migration Act 1958* (the Act) to support the implementation of the Government's *New Directions in Detention* policy (the policy), announced by the Government on 29 July 2008.

1.4 The policy included the introduction of seven key Immigration 'Detention Values' to guide and drive new detention policy and practice into the future. According to the Explanatory Memorandum, the amendments in the Bill aim to increase clarity, fairness and consistency in the way the Minister and the Department of Immigration and Citizenship responds to unlawful non-citizens.

1.5 These values are reproduced at Appendix 3.

1.6 From the perspective of the committee, the Bill has two noteworthy features. These are the insertion of a discretion on the part of immigration officials whether or not to detain a known or suspected unlawful non-citizen in prescribed circumstances, replacing provisions which required officials to detain the person regardless of their criminal history and other personal circumstances.

1.7 The other significant feature of the Bill is its provision for temporary community access permissions to be issued by officers to detainees considered of low flight and other risk to the community. These amendments and others contained in the Bill are discussed in more detail below.

### **Summary of key amendments**

1.8 Items 1 and 2 of the Bill affirm as a principle that the purpose of detaining an unlawful non-citizen is to manage the risks to the Australian community of the non-citizen entering or remaining in Australia and to resolve the non-citizen's immigration status. It also sets out the principle that an unlawful non-citizen must only be detained in a detention centre as a last resort, and that if detention occurs it must be for the shortest practicable time.

1.9 Item 3 strengthens the existing principle in section 4AA of the Act that the detention of a minor is a measure of last resort by providing that a minor, including a person reasonably suspected of being a minor, must not be detained in a detention

centre; and if a minor is to be detained, an officer must for the purposes of determining where the minor is to be detained, regard the best interests of the minor as a primary consideration.

1.10 The Bill, in Items 4 to 5, would expand the definition of immigration detention in subsection 5(1) of the Act to allow for a person in immigration detention to be at, or go to, a place in accordance with a Temporary Community Access Permission (TCAP) (see next paragraph) without being in the company of, and restrained by, an officer or another person directed by the Secretary. The amendments also clarify (in a note to the definition of 'immigration detention' in subsection 5(1) of the Act) the examples of the places of immigration detention that the Minister has the power in writing to approve include immigration transit accommodation, immigration residential housing and other places that may be used to provide accommodation.

1.11 Items 7 and 12 would give an authorised officer a non-compellable discretionary power to grant a TCAP if the officer considers that it would involve a minimal risk to the Australian community to enable a person in immigration detention, who is not subject to a residence determination, to be absent from the place of the person's detention for a certain period of time for a purpose or purposes specified.

1.12 Item 9 would provide that an officer must detain a person in the migration zone (other than an excised offshore place) if the officer knows or reasonably suspects that the person is an unlawful non-citizen and certain circumstances exist. These are:

- the person has bypassed immigration clearance;
- the person has been refused immigration clearance;
- the person's visa has been cancelled under section 109<sup>1</sup> because, when in immigration clearance, the person produced a document that was false or had been obtained falsely;
- the person's visa has been cancelled under section 109 because, when in immigration clearance, the person gave information that was false; or
- the person presents an unacceptable risk to the Australian community.

1.13 Where an officer knows or reasonably suspects that a person fits in the final category (that is, they present an unacceptable risk to the Australian community), they must form that view if, and only if:

- the person has been refused a visa under section 501<sup>2</sup>, 501A or 501B or on grounds relating to national security;

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1 Sections 100 through 114 deal with visa applications containing false information or which are falsified.

- the person's visa has been cancelled under section 501, 501A or 501B or on grounds relating to national security;
- the person held an enforcement visa and remains in Australia when the visa ceases to be in effect; or
- circumstances prescribed by the regulations apply in relation to the person.

1.14 Proposed subsection 189 (1B) would provide, except where a person is held because they are deemed an 'unacceptable risk', that an officer must make reasonable efforts to ascertain the person's identity; identify whether the person is of character concern<sup>3</sup>; ascertain the health and security risks to the Australian community of the person entering or remaining in Australia; and resolve the person's immigration status.

1.15 However, the Bill would retain, in proposed subsection 189(1C), an overriding discretion, absent any character or other concerns, to provide that if an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, for the officer to detain the person;

1.16 The changes contained in Item 9 are noteworthy in that they convey a discretion on immigration officials *not* to detain known or suspected unlawful non-citizens unless those persons are considered to be a substantial risk to the community, where they didn't enter Australia through the usual channels, or where they provided inaccurate visa applications.

1.17 Items 13 and 14 provide that the Minister's currently non-delegable residence determination power may be delegated to an officer. A statement of reasons why the determination was made in the public interest must still be tabled before each House of Parliament.

1.18 Other amendments, contained at Items 15 to 18, deal with the definitions of 'immigration legal assistance' and 'immigration representations' and are consequential to the provision of temporary community access permissions in Items 7 and 12.

### **Conduct of the inquiry**

1.19 The committee advertised the inquiry in *The Australian* newspaper on 1 July 2009, and invited submissions by 31 July 2009. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to over 100 organisations and individuals inviting submissions.

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2 Refusal or cancellation of visas under Sections 501, 501A and 501B relate to character concerns. They cover persons who have a substantial criminal record, consorted with criminals, or engaged in conduct which suggests they are not of good character. Character concern also applies where there is a 'significant risk' the person would engage in criminal conduct, harass or vilify others, incite discord, or in some other way represent a danger to the Australian community.

3 As defined in Section 5C, which largely mirrors the character assessment model in sections 501, 501A and 501B (see previous).

1.20 The committee received 51 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.21 The committee held public hearings in Sydney on 7 August 2009. A list of witnesses who appeared at the hearings is at Appendix 2 and copies of the Hansard transcript are available through the Internet at <http://aph.gov.au/hansard>.

### **Acknowledgement**

1.22 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

### **Note on references**

1.23 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.