CHAPTER 2

ISSUES

2.1 As outlined in the previous chapter, this Bill has been drafted to reflect the Government's 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 (the Department) responds to unlawful non-citizens.[1]

2.2 The direction taken by reforms contained in the Bill attracted general support from most submitters. Many submitters commended the Government on its adoption of a risk assessment-based policy, from which the Bill is derived, and supported the passing of the Bill on the basis that it signalled a further improvement on the status quo.[2] The Law Council of Australia expressed a common view:

> The Law Council welcomes the introduction of the Bill which is designed to give legislative effect to the Commonwealth Government's New Directions in Detention Policy, announced on 29 July 2008. In particular, the Law Council welcomes the changes to mandatory detention in the Bill, which provides that detention will be mandatory only if certain criteria are met. The Council is also pleased to see the inclusion of the principle that detention should take place for the shortest practicable time and that children should not be detained in detention centres.[3]

2.3 In particular, the inclusion in proposed section 4AAA that detention be a measure of last resort, and should be as short as possible, was commended, as was the introduction of the Temporary Community Access Permission[4] and delegation by the Minister of residence determination power.[5] The Commonwealth Ombudsman considered that the measures could be expected to improve the administration of immigration policy.[6]

2.4 In addition to the key initiatives taken in the Bill, which were summarised in the previous chapter, submissions to the inquiry disclosed a number of other areas of

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1 These values are reproduced at Appendix 3.

2 See, for example, Uniting Justice, *submission 14*, p. 5. Other submitters in general support of the measures contained in the Bill included, for example, Immigration Advice and Rights Centre (IARC) & Refugee Advice and Casework Service (RACS), *submission 20*, p. 2; Coalition for Asylum Seekers, Refugees and Detainees, *submission 22*, p. 1; Australian Human Rights Commission, *submission 26*, p. 5; Community Legal Centres NSW, *submission 29*, p. 1; Refugee Council of Australia, *submission 37*, pp1–2.

3 Law Council of Australia, *submission 30*, p. 1.

4 See, for example, Australian Lawyers for Human Rights, *submission 12*, p. 2.

5 See, for example, A Just Australia, *submission 19*, p.10.

6 Commonwealth Ombudsman, *submission 33*, p. 1.

interest and concern to submitters. While discussion in this chapter focuses primarily on the two new initiatives, other matters of concern and interest are also dealt with in turn as raised in submissions and at the committee's public hearing.

Immigration Detention Values

2.5 Notwithstanding support for what it did contain, proposed section 4AAA, and the Bill in general, attracted a degree of criticism, broadly on the basis that it failed to adequately reflect the entirety of the detention values adopted by the Government.[7] This view was put by Ms Rowena Irish, representing the Immigration Advice and Rights Centre (IARC):

> …we would prefer to see the principles clearly enunciated within the legislation itself. We think that provides very clear guidance and very sound guidance for departmental officers in terms of developing a particular culture within the department.[8]

2.6 The committee considers that it would be desirable for 4AAA to more closely reflect the detention values adopted by the Government, perhaps even to the extent of them being directly replicated in the Bill as a statement of principle.

Recommendation 1

2.7 That the Government consider amending proposed section 4AAA of the Bill to more closely reflect its adoption of the Immigration Detention Values.

2.8 Furthermore, the committee agrees with concerns raised by submitters and witnesses over the 'purpose' of immigration detention in proposed paragraph 4AAA(1)(b) being to 'resolve the non-citizen's immigration status' as being inaccurate, and accepts the Department's advice that this could be addressed by making it clearer that detention is solely for the purpose of managing risk while immigration status is being resolved. This could be effected by deleting existing subsection 4AAA (1)(b) and amending existing subsection 4AAA (1)(a) to more accurately reflect the purpose of detention.

Recommendation 2

2.9 The committee recommends that existing subsection 4AAA (1)(b) be deleted and that proposed paragraph 4AAA (1)(a) be amended to read: (a) Manage the risks to the Australian community of the non-citizen entering or remaining in Australia, pending the resolution of the non-citizen's immigration status.

Discretion to detain

2.10 As it stands, the *Migration Act 1958* (the Act) requires the detention of all persons known or reasonably suspected to be unlawful non-citizens inside the migration zone. Proposed section 189 would require the detention of a person in

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7 See, for example, Australian Human Rights Commission, *submission 25*, p. 26; Uniting Justice, *submission 14*, p. 5; Public Interest Law Clearing House, *submission 38*, p. 5.

8 *Proof Committee Hansard*, 7 August 2009, p. 20.

certain circumstances and convey on an officer of the Department a discretion to detain in all other circumstances, as described in chapter 1. While the provision of such a discretion attracted support, or at least recognition that it was an improvement on the current arrangements[9], the requirement to detain persons deemed of 'unacceptable risk' to the Australian community was criticised.

Unacceptable risk

2.11 A person must be detained if they are suspected or known to be an unlawful non-citizen and are deemed to represent an 'unacceptable risk' to the community under proposed subsection 189(1). Subsection 189(1A) of the Bill sets out the circumstances where a person 'presents an unacceptable risk to the Australian community'. These include where a person has been refused a visa or had it cancelled on character grounds or on grounds relating to national security, has held an enforcement visa or in prescribed circumstances.

2.12 The response of the Australian Human Rights Commission to this measure was a common one:

> The Commission is concerned that proposed section 189(1A) applies a blanket definition of who presents an 'unacceptable risk', rather than requiring assessment of risk on an individual basis. The Commission is concerned that this approach will result in the mandatory detention of individuals who do not, in fact, pose a significant risk to the Australian community.[10]

2.13 Australian Lawyers for Human Rights (ALHR), in particular, made some compelling observations in relation to possible problems with the interpretation and implementation of the provision, and their submission is worth quoting at length:

> The removal of an individual's liberty is serious and should be constrained. Setting up broad classifications of individuals who should continue to be detained could be open to abuse. There should be an individual determination as to whether detention is necessary in each individual case and the courts should review that determination regularly.
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> …
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> ALHR is concerned that the exclusion of such persons on the basis of their immigration status as opposed to their individual circumstances could lead to their detention being "arbitrary" and contrary to our obligations under Article 9 of the International Covenant on Civil and Political Rights. The Human Rights Committee has noted that the 'lawfulness' of detention under domestic law is not the measure of 'arbitrariness' of detention under our international obligations. Rather detention must be for a proper purpose and proportionate to that purpose to be lawful. [11]

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9 See, for example, Refugee and Immigrant Legal Centre, *submission 43*, p. 6; Law Institute of Victoria, *submission 18*, p. 6.

10 Australian Human Rights Commission, *submission 25*, p. 15.

11 Australian Lawyers for Human Rights, *submission 12*, p. 2.

2.14 Nonetheless, the committee is mindful of the countervailing need to provide a degree of certainty, both to the officers administering the immigration system and to the public, about the classes of people who will not be released into the community. The committee believes, subject to its recommendation below regarding the application of the provisions in proposed section 189(1B) to all detainees, that the 'unacceptable risk' provisions strike a fair balance between competing interests.

Regulation of definition of unacceptable risk

2.15 Proposed paragraph 189(1A)(d), which provides for regulations to cover other circumstances in which a person represents an 'unacceptable risk', also attracted criticism. The Law Institute of Victoria submitted that it:

> …does not support the introduction of this important test, which will affect individual liberty, by way of regulation. We submit that the serious consequences of a finding that a person is an "unacceptable risk" to the Australian community warrants the protection and certainty afforded by primary legislation. Furthermore, introduction by regulation does not afford the same opportunity for consultation or parliamentary scrutiny as afforded by legislation.[12]

2.16 The Refugee and Immigrant Legal Centre submitted that any such regulated requirement:

> …must be framed to require an individual assessment of the person's circumstances, based on evidence relevant to the questions of whether it is necessary and proportionate to require detention, and with the onus on this Department to show this. An assessment must not be based on vague or trivial matters. It is crucial that in assessing whether a person is an unacceptable risk to the Australian community that a person be presumed not to be an 'unacceptable risk' unless there are substantial grounds for believing otherwise; that any assessment be evidence-based; and that the ordinary rules of procedural fairness apply, including that a person be afforded an opportunity to comment on adverse information.[13]

2.17 ALHR also expresses concern at the prospect of circumstances constituting 'unacceptable risk' being prescribed by regulation, as did a number of other submitters.[14]

2.18 The Department went to considerable effort in its submission to anticipate the circumstances regulations are most likely to address. The following situations were identified in particular:

- Where an officer knows or reasonably suspects a person will not abide by visa conditions imposed in the grant of a visa; or an officer knows or reasonably

12 Law Institute of Victoria, *submission 18*, p. 6.

13 Refugee and Immigrant Legal Centre, *submission 43*, pp 8–9.

14 See, for example, Refugee Council of Australia, *submission 37*, p. 4; Castan Centre for Human Rights, *submission 47*, p. 5.

suspects a person has been a participant in organised migration or identity fraud; and

- the officer knows or reasonably suspects that detention would facilitate the resolution of the person's visa status.[15]

2.19 The legislation of broad regulation-making powers is very familiar to the committee, which has criticised numerous bills in the past on the basis that they seek the creation of regulation-making power where it is best left in primary legislation. The committee agrees with submitters who observe that regulations do not attract the same level of scrutiny as primary legislation, and in many cases, attempts to create broad regulation-making powers should be rebuffed.

2.20 Nonetheless, the committee notes the detailed explanation of the likely regulations provided by the Department, as well as the undeniable need for rapid flexibility of rule-making in the immigration portfolio. On this basis, while the committee restates its in-principle opposition to the widespread use of broad regulation-making powers, on this occasion it declines to recommend an amendment to the Bill before it.

Detention for checking identity, health and character

2.21 Proposed subsection 189(1B) of the Bill requires that the Department make reasonable efforts to ascertain a detainee's identity and what level of health and security risk they may be to the Australian community, and to resolve the detainee's immigration status, except where they are detained because they are deemed an 'unacceptable risk' under proposed subparagraph 189(1)(b)(i).

2.22 The Human Rights Law Resource Centre submitted that people subject to a visa cancellation under section 501, which concerns the character of a detainee, have:

> …generally served their sentence for the crime they committed and have been found eligible for release by a state-based parole board. 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'[16]

2.23 A number of other submitters agreed, arguing that visa cancellation under section 501 should not be grounds for detention.[17] Many also objected to detention for the purpose of health checking, pointing out that when arrivals are authorised, health checks are regularly performed after people have been living in the community for some time.[18]

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15 Department of Immigration and Citizenship, *submission 15*, p. 17. These two cohorts of persons are comprehensively addressed in the submission on pages 16 and 17.

16 Human Rights Law Resource Centre, *submission 34*, p. 15. See also, for example, Refugee and Immigrant Legal Centre, *submission 43*, p. 8.

17 IARC/RACS, *submission 20*, p. 9, Australian Human Rights Commission, *submission 26*, p. 15.

18 See, for example, Human Rights Law Resource Centre, *submission* 34, p. 14.

2.24 Other submitters queried the absence of a provision to guarantee the release of a person once all health, character and any other tests have been satisfied. The Australian Human Rights Commission was especially critical of this, and recommended amendment of the Act to require that unauthorised arrivals not be detained beyond the period required to conduct initial health, security and identity checks.[19]

2.25 The codification of the obligations of the Department under proposed section 189(1B) was generally welcomed, insofar as it facilitated the resolution of issues that stand in the way of a person's release. However, concerns were raised that the requirement that an officer make 'reasonable efforts' is vague and indefinite.[20]

Exclusion of people assessed as 'unacceptable risk' from section 189(1B) and 189(1C)

2.26 Subsection 189(1B) would not apply to persons detained on the basis that they present an 'unacceptable risk'. This was a concern to a number of submitters.[21] The Australian Human Rights Commission was:

> …concerned that, in the absence of individualised assessment and independent review, a blanket policy of mandatory detention for all persons deemed an 'unacceptable risk' under section 189(1)(b)(i) increases the risk that some individuals will be held in immigration detention for prolonged periods of time. In some cases this could constitute a breach of Australia's international obligations not to subject people to arbitrary detention.[22]

2.27 The Commission was also concerned that section 189(1B) does not apply to a person detained under section 189(1C). This means that a person detained under section 189(1C), would be left with even fewer procedural safeguards than a person subject to mandatory detention under section 189(1), and may render them at a greater risk of arbitrary detention.[23]

2.28 The committee further notes that proposed Section 189 would cover only detainees in the migration zone and not those in excised offshore places. This would entail detainees on Christmas Island, for example, not being subject to the benefit of the duty under proposed subsection 189(1B). The committee can see no justification for this and recommends that a duty be imposed on the Department to make reasonable efforts to identify any person detained within the migration zone or in an excised offshore place, to conduct character, health and security assessments, and resolve the person's immigration status in a timely fashion.

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19 Australian Human Rights Commission, *submission 26*, pp 12–14. See also, for example, Refugee Council of Australia, *submission 37*, p. 5.

20 See, for example, Refugee and Immigrant Legal Centre, *submission 43*, p. 12.

21 See, for example, Australian Lawyers for Human Rights, *submission 12*, p. 3.

22 Australian Human Rights Commission, *submission 26*, pp 16–17.

23 Australian Human Rights Commission, *submission 26*, pp 16–17.

Recommendation 3

2.29 That the Bill be amended to broaden the application of proposed subsection 189(1B) to impose a duty on the Department of Immigration and Citizenship to make reasonable efforts to identify any person detained within the migration zone or in an excised offshore place, to conduct character, health and security assessments, and resolve the person's immigration status in a timely fashion.

Overriding discretion to detain

2.30 The presence of proposed subsection 189(1C) grants an overriding discretion for Departmental officers to detain a person suspected of being an unlawful non-citizen, regardless of any other factors that might have mitigated against detention under foregoing proposed subsections (1A) and (1B). The Law Institute of Victoria submitted that:

> The LIV is concerned that the wide discretion conferred in subs189(1C) might mean limited changes in practice to decisions to detain unlawful non-citizens. [W]e are concerned that a wide discretion could be subject to changing interpretation depending on political or other factors and that this creates uncertainty for people about whether they will be detained or not. The LIV recommends that s189(1C) should be amended to include a list of factors that officers should take into account when exercising their discretion to detain an unlawful non-citizen. The list might include whether the officer needs to ascertain whether the person is a security risk or of character concern.[24]

2.31 In a similar vein, the Australian Human Rights Commission observed that in its view:

> …such a power is inconsistent with the risk-based approach to detention announced under the New Directions. Under this risk-based approach, DIAC is required to justify a decision to detain a person rather than presume detention. As currently drafted, section 189(1C) does not require an officer to provide any justification for detaining a person who is an unlawful non-citizen.[25]

2.32 The committee considers that, while subsections 189(1), (1A) and (1B) provide broad detention powers for the Department and an argument could be put that the inclusion of subsection 189(1C) is excessive, it must be remembered that provisions (1), (1A) and (1B) provide only for circumstances in which a person *must* be detained, and not for a person who *may* be. It remains important to provide an ability to detain a person suspected of being an unlawful non-citizen, even when they do not fit easily within one of the categories set out in proposed subsection 189(1).

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24 Law Institute of Victoria, *submission 18*, p. 8.

25 Australian Human Rights Commission, *submission 26*, p. 18.

Temporary Community Access Permissions (TCAP)

2.33 The provision of a new alternative through which detention might be more flexibly managed was welcomed by many submitters.[26]

2.34 However, concerns were raised that the procedures governing the request by a detainee for a TCAP and the decision whether or not to grant a TCAP are not adequately codified in the Bill or in regulation. Proposed subsection 194A(4) expressly prevents an officer from being compelled to consider the granting of a TCAP.

2.35 Liberty Victoria considered that:

> A non-compellable discretion which is non-reviewable is intrinsically unreasonable. It deprives the temporary community access permission of much of its efficacy. The Bill provides criteria for the grant of temporary community access permission. The provisions which make the decision to grant permission non-compellable and non-reviewable convert it into an arbitrary power. Individual liberty is too precious to be the subject of arbitrary power.[27]

2.36 The Human Rights Law Resource Centre agreed, submitting that:

> If the government believes, in principle, that detention in the community is appropriate in circumstances where it would pose a minimal risk to the Australian community, then the legislation should require authorised officers to consider whether to exercise their power under proposed new section 194A. This would also be consistent with the government's policy of ensuring that detention is a measure of last resort.[28]

2.37 Some submitters called for a statement of reasons for a refusal to be provided, and for an internal appeal process.[29]

2.38 In the process of questioning the Department about this apparent anomaly in the drafting of proposed section 194A, the committee learned that:

> It was not the government's intent to create a right to apply for permission to leave a detention environment temporarily without a guard. It was to allow additional flexibility, particularly in long-term cases where the risk to the community was low, to facilitate a more humane detention environment.[30]

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26 See, for example, Refugee and Immigrant Legal Centre, *submission 43*, p. 20; Law Institute of Victoria, *submission 18*, p. 9; Australian Human Rights Commission, *submission 26*, p. 24.

27 Liberty Victoria, *submission 31*, p. 1.

28 Human Rights Law Resource Centre, *submission 34*, p. 19.

29 See, for example, IARC/RACS, *submission 20*, p. 11; Law Council of Australia, *submission 30*, p. 3; Human Rights Law Resource Centre, *submission 34*, p. 3; Refugee Council of Australia, *submission 37*, p. 5.

30 Ms Alison Larkins, Department of Immigration and Citizenship, *Proof Committee Hansard*, 7 August 2009, p. 57.

2.39 The committee interprets this statement to mean that the TCAP is intended to be used by the Department, primarily for its own purposes and at its own initiative. Detainees may request the Department issue a permission, but the measure is not, for the most part, designed to be initiated by detainees. This comes as some surprise to the committee, and it suspects the same would be said of many submitters and witnesses to the inquiry. The wording of the Bill is, at best, ambiguous.

2.40 While this information goes some way to explaining the absence in the Bill of a duty to consider requests, it does not entirely negate the need for one to be inserted. The committee was reminded of the possible implications of such a duty for merits review, and that considering, deciding on and responding to requests for permission from detainees could be onerous. While the timeframe of this inquiry does not allow for definitive assessment to be made of possible solutions, the committee takes the view that solutions to most practical problems, such as vexatious, repetitive or inappropriate requests, could be solved without undue difficulty. The placement of a cap on the number of requests able to be made in a given period might be one measure worthy of consideration.

Recommendation 4

2.41 That proposed section 194A be amended to require an officer to consider a request by a detainee for a Temporary Community Access Permission.

Time-limited detention and consequential review mechanisms

2.42 The Bill does not seek to impose time limits on the detention nor amend arrangements for seeking a review to a decision to detain a person. The existing policy in respect of independent review, announced in 2008, is for the Ombudsman to review the cases of people in detention after six months. This is in addition to case review by the Department on a three-monthly basis.

2.43 Most submissions received by the committee raised the inadequacy of mechanisms to review the decision to detain as being of concern.[31] A number included reference to the inquiry of the Joint Standing Committee on Migration into detention in Australia.[32]

2.44 Among these was ALHR, which made particular reference to the dissenting report of that inquiry, the recommendations of which included provision of immediate appeal rights on the grounds of there being no reasonable grounds to continue detention, and that a court order be required to detain a person for longer than 30 days.[33] In support of these recommendations, ALHR concluded that:

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31 In addition to those quoted below, see for example Australian Human Rights Commission, *submission 26*, pp 20–24; Human Rights Law Resource Centre, *submission 34*, pp 3–4; Amnesty International, *submission 39*, p. 5.

32 Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning*, 2008.

33 Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning*, 2008, p. 171.

> …there is a need to legislate to allow for independent review of not just the lawfulness, but also the merits of an individual's immigration detention, with the power to enforce a remedy where detention is found to be inappropriate, unnecessary or unlawful.[34]

2.45 The Refugee and Immigrant Legal Centre echoed these sentiments:

> RILC is extremely concerned that the Bill does not provide any legislative or regulatory clarification of the procedures under which the decision to detain is made. For example, there is currently no basis by which a legally regulated procedure can assess whether detention really is the last resort in each case, nor whether detention is or has been for the shortest practicable time. Nor are there currently any legislated or regulatory mechanisms that provide procedural fairness in relation to the decision to detain.
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> …
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> We note the new detention policy refers to "regular review" of detention and states this will be undertaken by a senior departmental officer at three month intervals yet there is no provision made for this in the Bill. Once again, we submit that without legislative enforceability, the conduct of a review of detention can become superficial, perfunctory and arbitrary. In our experience, legislative requirements validate the importance of prompt, fair and transparent decision making and strengthen the readiness of decision makers to comply with principles of natural justice.[35]

2.46 The Australian Human Rights Commission considered that:

> While the Commission supports the establishment of these new review mechanisms, the Commission has significant concerns that they will not be sufficient to ensure that indefinite or otherwise arbitrary detention does not occur.[36]

2.47 The Commission was also at pains to clarify the role of review by the Ombudsman, as distinct from reviewing the decision to detain *per se*:

> …it is important to emphasise that the Commonwealth Ombudsman's role is to review administrative matters related to an individual's detention, rather than to review the decision to detain or to continue a person's detention. In addition, any recommendations which the Commonwealth Ombudsman makes in respect of the circumstances relating to a person's detention are not enforceable. The Commonwealth Ombudsman has noted that less than half of the recommendations made in respect of long term detainees have been accepted by the Minister for Immigration. Thus, while the six month Ombudsman reviews are a positive reform, without the ability to enforce recommendations or to order the release of a detainee, the

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34 Australian Lawyers for Human Rights, *submission 12*, p. 4.

35 Refugee and Immigrant Legal Centre, *submission 43*, pp 16, 18.

36 Australian Human Rights Commission, *submission 26*, p. 22.

> reviews will not constitute a sufficient safeguard to ensure against indefinite or otherwise arbitrary detention.[37]

2.48 A significant number of submitters also argued for a time limit on detention. These included, for example, IARC and RACS[38], the Coalition for Asylum Seekers, Refugees and Detainees (CARAD)[39], Public Interest Law Clearing House[40], and the Human Rights Law Resource Centre.[41]

2.49 The committee was also interested to note the findings of the majority of the Joint Committee on Migration in its 2008 review of detention in Australia, when it found in part, that being born into detention and staying there for life was 'theoretically possible under law'[42] and that once '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.'[43] The Joint Committee went on to recommend, in part, 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.
- 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.[44]
- 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 Act to give that person the right to have the decision reviewed by an independent tribunal and subsequently have the right to judicial review.[45]

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37 Australian Human Rights Commission, *submission 26*, p. 22.

38 *Submission 20*, p. 8.

39 *Submission 22*, p. 4.

40 *Submission 38*, p. 23.

41 *Submission 34*, p. 4.

42 Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning*, 2008, p. 87.

43 Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning*, 2008, p. 90.

44 Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning*, 2008, Recommendation 13.

45 Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning*, 2008, Recommendation 14.

2.50 The Government has yet to respond to the Joint Committee's report. This committee agrees that current arrangements for case review are arguably insufficient, and would likely be improved with provision for judicial review of a person's detention, perhaps triggered upon the expiration of a time limit. However, detailed examination of this question fell outside the remit of this committee's inquiry, and of the time allocated for it. The committee recommends that the Government further consider the findings of the Joint Committee, and in particular to the need for enhanced review mechanisms, with a view to implementing that committee's recommendations.

Recommendation 5

2.51 That the Government give further consideration to implementing recommendations 13 and 14 of the Parliamentary Joint Committee on Migration's report Immigration Detention in Australia: A New Beginning.

Detention of children

2.52 The Bill would extend the current principle that children should only be detained as a last resort by also limiting the location and nature of any such detention. Minors would not, under the Bill, be detained in an immigration detention centre and the best interests of the child would be the primary consideration in an officer's decision about where to detain a minor. In place of detention centres, immigration transit accommodation, immigration residential housing or some other place could be used.[46] The measure attracted general support, insofar as it 'brings Australia closer into line with principles enshrined in international law'[47], but like other aspects of the Bill, was considered to fall short of what was required.

2.53 The Australian Human Rights Commission argued for the Bill to be amended to reflect a commitment not to detain children's families in a detention centre, where possible, so that the family unit can be maintained.[48] The Commission argued that such a commitment would be consistent with Australia's responsibilities under the United Nations Convention on the Rights of the Child, which requires that children not be separated from their parents against their will, except where competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child.[49]

2.54 A number of other submitters took a similar view, observing that the separation of children from parents would be an unacceptable result. For example, IARC and RACS argued that it was 'critical' that the family remains united to provide

46 Department of Immigration and Citizenship, *submission 15*, p. 14.

47 Amnesty International, *submission 39*, p. 6. Support was also received from the New South Wales Commission for Children and Young People, *submission 48*, p. 1.

48 Australian Human Rights Commission, *submission 26*, p. 10.

49 Australian Human Rights Commission, *submission 26*, p. 10, citing Article 9(1).

the child with as stable and supportive an environment as possible, wherever that is possible.[50]

2.55 The committee concurs with these arguments, and while it is arguable that the proposed provisions about detention of minors would in many cases see families kept together, the connection between a child's best interests and co-location with their family is worth making explicit in the legislation, and the committee recommends accordingly.

Recommendation 6

2.56 That proposed subsection 4AA(4) be amended to require that the best interests of the child should be a primary consideration in the placement of the child's immediate family as well as the placement of the child.

2.57 The committee also sees merit in the suggested recommendation of IARC and RACS in explicitly requiring an officer to consider the child's best interests in determining *how* they are detained. The joint IARC/RACS submission pointed out that:

> While their physical location is important, it is equally (if not more important) that the minor be provided with appropriate services (eg education, social activities) and support (eg counselling, health services).[51]

2.58 Such a recommendation would go some way to addressing ongoing concerns expressed by some submitters about the conditions in transit accommodation and residential housing being unacceptable.[52] Indeed, at least one submitter, Liberty Victoria, opined that such facilities are 'ultimately detention centres without the label'.[53]

Recommendation 7

2.59 That proposed section 4AA(4) be amended so that the best interests of the child be regarded by an officer as a primary consideration in where and how a child is detained (including in accordance with a residence determination).

2.60 As the Department pointed out at the committee's hearing, separation can sometimes be in the child's best interests, although rarely.[54] A number of submitters also called for the appointment of an independent guardian for children who are

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50 *Submission 20*, p. 7. See also, for example, Federation of Ethnic Communities' Council of Australia (FECCA), *submission 10*, p. 3; Coalition for Asylum Seekers, Refugees and Detainees (CARAD), *submission 22*, p. 4; Community Legal Centres NSW, *submission 29*, p. 2.

51 IARC/RACS, *submission 20*, p. 7.

52 See, for example, A Just Australia, *submission 19*, p. 10; Australian Human Rights Commission, *submission 26*, p. 11; Human Rights Law Resource Centre, *submission 34*, p. 17.

53 *Submission 31*, p. 3.

54 Ms Alison Larkins, *Proof Committee Hansard*, 7 August 2009, p. 53.

detained apart from their families or are unaccompanied minors. These included Uniting Justice[55], A Just Australia[56], and the Refugee Council of Australia.[57]

2.61 IARC submitted that:

> an independent advocate should be assigned to all unaccompanied minors or children separated from their parent or parents to ensure that the best interests of the child are a primary consideration in all decisions affecting the child. Our understanding is that currently this role in practice often falls on the child's migration legal adviser, who is not trained in the broad range of areas that the child's interest needs to be protected.[58]

2.62 A Just Australia added that:

> At the moment you have a situation where the minister or a delegated officer for the minister is the final arbiter of whether or not that person gets a visa, is the detainer of that person and decides whether or not that person gets out of detention and is supposed to be the guardian. They are completely conflicting responsibilities towards the unaccompanied minor.[59]

2.63 The committee was heartened to learn from the Department at its hearing that:

> It is recognised that there are issues with guardianship of children, particularly the operation of the Immigration (Guardianship of Children) Act, which has been the basis for guardianship for a long time. The minister has asked the department to look at those in a policy sense, to see if we need a new regime in relation to children and guardianship, but that work has not been completed and no decisions have yet been made.[60]

2.64 Where a child is unable to be housed with their parents the committee considers the provision of an independent guardian, able to act in the child's best interest and to make day-to-day decisions concerning the care of the child, to be an important safeguard and one which the Government should consider implementing as soon as possible.

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55 Uniting Justice, *submission 14*, p. 9.

56 A Just Australia, *submission 19*, pp 9–10.

57 Refugee Council of Australia, *submission 37*, p. 4.

58 Ms Rowena Irish, *Proof Committee Hansard*, 7 August 2009, p. 16.

59 Ms Kate Gauthier, *Proof Committee Hansard*, 7 August 2009, p. 46.

60 Mr Peter Hughes, *Proof Committee Hansard*, 7 August 2009, p. 53.

Recommendation 8

2.65 That the Government consider amending the Bill to provide for the appointment of an independent guardian for unaccompanied minors and children housed apart from their immediate families.

Recommendation 9

2.66 That subject to the foregoing recommendations, the Bill be supported.

Senator Trish Crossin

Chair