Additional comments by Senator Sarah Hanson-Young

Introduction

1.2 On 29 July 2008, Immigration Minister, Senator Chris Evans announced seven key immigration detention values to "drive new detention policy and practice into the future."[1]

1.3 The Migration Amendment (Immigration Detention Reform) Bill 2009 essentially legislates for these principles, although it should be noted that not all of the values articulated in the New Directions in Detention policy are contained within this legislation.

1.4 While the Greens recognise that the legislation introduces a number of very significant measures that go some way in ensuring Australia's immigration detention system is more humane and purposeful, we remain concerned that the Bill, in its current form, does not explicitly enshrine safeguards against further human rights violations, as per our commitment under International Law.

Regulatory reforms

1.5 One of the key concerns raised during the course of the inquiry, was the frustration that the supporting regulations, detailing the practical impacts of what this piece of legislation sets out to achieve, have yet to be drafted – heightening concern over how much consultation will be involved when framing these essential legislative instruments.

1.6 To date, and following on from the evidence provide by the Department of Immigration, no further detail has been released as to when these significant regulatory reforms will be drafted, let alone circulated.

1.7 During evidence presented to the Committee, the Immigration Advice and Rights Centre argued in response to questioning about the impending regulations that

> " that there needs to be sufficient consultation in relation to the regulations and the guidelines and policies. My understanding is that at the moment the proposal is that a lot of that will be set out in the regulations or just within departmental policy, which we consider would be of concern because it is subject to change and not subject to review in the same way as legislative change is."[2]

Recommendation 1

1.8 Given the associated regulations and guidelines have not as yet been publicly released, the Greens recommend that as a priority the draft regulations

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[1] *Migration Amendment (Immigration Detention Reform) Bill 2009* – Minister Evans' second reading speech

[2] Committee Hansard 07/08/09 p.16 http://www.aph.gov.au/hansard/senate/commttee/S12355.pdf

be released for public comment and consultation, before the Bill formally proceeds.

Mandatory detention vs detention as a last resort

1.9 The Committee also heard evidence suggesting that the Government's strong commitment to maintain mandatory detention was in direct conflict with their commitment to ensure that "detention is only to be used as a last resort and for the shortest practicable time."

1.10 The Human Rights Law Resource Centre highlighted this concern arguing

> "Part of the problem is that the values set out by the government in its policy are internally inconsistent. On the one hand the government supports the maintenance of mandatory detention, whilst on the other hand the government supports the policy which says that detention should be used as a last resort and for the shortest practicable time. We say that mandatory detention of all unauthorised arrivals—the management of health, identity and security risks—is not consistent with a policy of detention truly being a last resort and for shortest period of time."[3]

1.11 Given unauthorised arrivals, particularly asylum seekers, will be detained in an IDC as a matter of first resort, not last resort, it is clear that the principle to detain as a last resort will be breached as soon as it is legislated.

1.12 The Greens have long held the view that mandatory detention should not be part of any effective and humane immigration policy, but acknowledge that where detention is necessary, it must be subject to proper judicial oversight with specific timeframes explicitly outlined within the legislation to ensure that those people are not held indefinitely.[4]

1.13 Article 9(4) of the ICCPR also provides that detained people should be entitled to appeal to the courts to decide whether their detention is 'lawful.' This right is available to detainees but the lawfulness of detention is determined by their citizenship or visa status not whether the detention is reasonable.[5]

Recommendation 2

1.14 Given the retention of mandatory detention is inconsistent with our international obligations to avoid arbitrary detention, the Greens recommend that the policy of mandatory detention should be abolished.

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[3] Human Rights Law Resource Centre, Committee Hansard 07/08/09 p.19 http://www.aph.gov.au/hansard/senate/commttee/S12355.pdf

[4] see dissenting report by Mr Petro Georgiou, Senator Eggleston and Senator Hanson-Young "*Immigration detention in Australia: A new beginning – criteria for release from detention*"

[5] Article 9(4) of the ICCPR provides that, "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

Recommendation 3

1.15 If mandatory detention is to remain, the Greens recommend, that this Bill should be amended to ensure the following:

- **a) A person who is detained should be entitled to appeal immediately to a court for an order that he or she be released because there are *no reasonable grounds* to consider that their detention is justified on the criteria specified for detention;**
- **b) A person may not be detained for a period exceeding 30 days unless on an application by the Department of Immigration and Citizenship a court makes an order that it is necessary to detain the person on a specified ground and there are no effective alternatives to detention. This is consistent with the Minister's commitment that under the new system "the department will have to justify a decision to detain – not presume detention."[6]**

Children in detention

1.16 Greens remain committed to the principle that no minor or their family will be held in a detention centre or secure facility.

1.17 We believe that this must be codified within the *Migration Act 1958,* and extended to include all detention facilities, to prevent the return to prevent the return of detaining children in remote desert camps in appalling conditions.

1.18 Immigration residential housing and transit accommodation are still detention facilities. They are closed, secure environments where detainees are closely monitored by guards and are not allowed to freely come and go.

1.19 Many submissions to the inquiry highlighted continued concerns that while children were generally no longer held in Immigration Detention Centres, the fact that no independent guardian is appointed for unaccompanied children must be rectified within this Bill, if the welfare of children is to be paramount.

Recommendation 4

1.20 Section 4AA of the Migration Act 1958 must be amended to explicitly state "... a minor must not be detained in any detention centres or facilities with similar conditions to detention centres under any circumstances".

Recommendation 5

1.21 An independent child guardian is appointed for unaccompanied children (as per the Committee recommendation).

Recommendation 6

1.22 To ensure that the welfare of children is paramount, to any immigration detention policy, the Greens further recommend that a Commonwealth Commissioner for Children be established to among other things; specifically

[6] "New Directions in Detention – Restoring Integrity to Australia's Immigration System," 29 July 2008.

oversee the treatment of children in immigration detention. In establishing such a commissioner, the rights of children will be appropriately protected, and the treatment of children adequately scrutinised.

Excision policy

1.23 The remoteness and isolation of the Christmas Island detention facilities from mainland Australia, has heightened the limit in access to sufficient health facilities, the lack of resources for both island residents and detainees, and provided minimal access to torture and trauma counselling.

1.24 A Just Australia's submission argues that the continued committed to the excision policy means that "the most vulnerable people within the detention regime (boat asylum seekers) are the ones will be detained the longest under the worst conditions."[7]

1.25 As David Manne rightly articulated during the Inquiry process

> "we are stuck with the position in this bill where the new directions policy would be part implemented in law for people, if you like, who are not subject to the excision laws but not for those subject to the excision laws. Really for those people, for example, subject to excision laws held on Christmas Island, the best that one could hope for and it is clearly inadequate is that the policy is applied to their situation as a matter of discretion. The distinction is whether the new detention policy is implemented or enforceable by law or is merely applied as a matter of policy."[8]

1.26 The Greens share the concerns of many witnesses who presented to the Committee, that the proposed amendments contained within this Bill in relation to detention, do not actually apply to persons outside the migration zone under 189(2) – 189(5).

1.27 Given 'unlawful non-citizens', including offshore entry persons, in excised territories will continue to be subjected to the existing detention and visa arrangements of the current excision policy, the Greens do not think that those asylum seekers who are held in these territories are not afforded the same rights and protections as those on the mainland.

Recommendation 7

1.28 Given Australia's commitment to continuing with the excised territories of Christmas Island, Cocos Islands and Ashmore Reef, the Greens recommend that the Migration Amendment (Excision from Migration Zone) Act 2001 be repealed in its entirety.

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[7] A Just Australia Submission No.19 p.11

[8] Committee Hansard 07/08/09 p.17 http://www.aph.gov.au/hansard/senate/commttee/S12355.pdf

Recommendation 8

1.29 The Government must ensure that all asylum seekers on both mainland detention centres and those outside the migration zone are afforded the same rights as those identified under s189 of this Bill.

Recommendation 9

1.30 The Greens further recommend that all Immigration Detention Centre's be located in urban areas to allow for proper service delivery and oversight and transparency.

Concern with section 4AAA(1)

1.31 One of the major concerns that came out of the Committee process was in relation to the proposed new section 4AAA of the Bill. The Greens agree that the way in which the principles have been inserted into section 4AAA is not the same as inserting them as objects or purposes of the act. As the Human Rights Law Centre stated during their presentation to the inquiry

> "if we are serious about those values being inserted into the legislation then they should be inserted as objects or purposes of the act, but they should also be reflected in the substantive operational provisions of the bill."[9]

1.32 As per evidence provided by the Refugee Council of Australia, we remain concerned that there seems to be no mention

> "that conditions of detention must ensure the inherent dignity of the human person, nor that detainees' treatment must be fair and reasonable within the law, nor that detention that is indefinite or otherwise arbitrary is not acceptable."[10]

1.33 While we acknowledge that the use of detention may be used for removal purposes (one of the three forms of status resolution), the Greens do not believe that the definition of status resolution as a purpose of immigration detention, be included as a principle under the Bill.

1.34 Our concern is that this definition seems to suggest that immigration detention might be imposed for the duration of time that it takes for a person to have their status resolved.

Recommendation 10

1.35 Given the requirements to detain or to continue detaining in order to manage the risk of a person absconding, are readily incorporated within the existing subsection 4AAA(1)(a), the Greens recommend that subsection 4AAA(1)(b) be removed.

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[9] Committee Hansard, 07/08/09 p.21http://www.aph.gov.au/hansard/senate/commttee/S12355.pdf

[10] Committee Hansard 07/08/09 p.26 http://www.aph.gov.au/hansard/senate/commttee/S12355.pdf

Determining 'unacceptable risk' to the Australian community

1.36 Many witnesses to the inquiry, including the Law Council of Australia, and the Law Institute of Victoria outlined their concerns with sub-paragraph (d) of section 189 which relates to circumstances prescribed by the regulations. Given the Committee has yet to see these regulations; the Greens remain concerned that the definition 'unacceptable risk to the Australian community' can be amended or added to by regulation.

1.37 The Law Institute of Victoria argued, within their submission, that they do not support the introduction of the unacceptable risk test, which will "*affect individual liberty, by way of regulation.*"[11]

Recommendation 11

1.38 The Greens recommend that the term 'unacceptable risk' be clearly defined and inserted into the Migration Act, and not subjected to change by subordinate legislation.

Recommendation 12

1.39 The Greens further recommend that each person's detention must be subjected to a proper individualised assessment of risk, where the characteristics of the person and their particular situation is taken into account, rather than a broad discretionary approach that is currently proposed.

Temporary Community Access Permission:

1.40 While the Greens applaud the Committee's recommendation around the new alternative of the Temporary Community Access Permission, we believe it needs to be expanded and the purpose explicitly clarified.

1.41 The Human Rights Law Council (HRLC), like many witnesses, highlighted that while the proposed new section 194 is a welcome inclusion, there remains some ambiguity around the way in which it will operate in practice. Specifically the HRLC stated that given an "authorised officer is not bound to consider whether to grant a temporary community access permission…this means that even where it would only involve a minimal risk to the Australian community for a detainee to be living in the community, that detainee can be held in detention simply because an authorised officer fails to consider that person's circumstances."[12]

Recommendation 13

1.42 The Greens therefore recommend that the Bill should be amended to require an authorised officer to consider and determine whether or not to grant a temporary community access permission.

[11] Law Institute of Victoria Submission No.18 p.6

[12] Human Rights Law Council Submission No.34 p.19

Recommendation 14

1.43 We further recommend that the Bill include scope for a review of any decision of the authorised officer on whether or not to grant the temporary community access permission.

Privatisation of detention services:

1.44 The Public Interest Law Clearing House (PILCH), highlighted concerns over having private contactors operate detention centres. Their submission specifically outlined that

> "In contrast to Australia, Sweden has removed the authority for operating detention centres from police and private contractors and has given that authority to the Immigration Department….the Swedish Parliament transferred the responsibility for detention centres to the Immigration Department, in order to create a more civil, culturally sensitive and open detention policy."[13]

1.45 As identified in the Greens dissenting report to the Joint Standing Committee's final report into Immigration Detention, we remain concerned that the new five-year contract for immigration detention services with GSL, and Serco is strikingly at odds with the Government's pre-election promises.

1.46 Outsourcing is not an appropriate way of handling the claims and care of these vulnerable people seeking our assistance and protection, particularly when some of the detention facilities are so remote from the Australian mainland.

Recommendation 15

1.47 The Greens recommend that the Government return all immigration detention services to public control, opening up a direct line of responsibility between the Department, the Minister and the immigration processes and services available, that occur in these detention facilities.

Recommendation 16

1.48 If private management of immigration detention centres continues, the contracts must emphasise the need to put welfare outcomes ahead of security and compliance to ensure that no private operator with only a prison services background is awarded the contract.

Conclusion

1.49 While the Greens welcome the Minister's commitment to enshrining many of the detention values into legislation, we remain concerned that in failing to provide the Committee with the supporting regulations, where much of the detail is to be inserted, any public consultation on the impact that these will have on the legislation, will be limited, if any.

1.50 Given the importance of this legislation, in reforming Australia's immigration detention system, the Greens remain committed to ensuring that any legislation that

[13] Public Interest Law Clearing House (PILCH) Submission No.39 p.28

seeks to reform the way in which we treat asylum seekers is treated with the highest importance.

1.51 We will therefore proposing changes to the legislation to remedy our concerns contained within this report, and as such, reserve the right to our final position on the Bill when it is brought before the Senate.

Sarah Hanson-Young
Senator for South Australia