The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Immigration Detention Reform) Bill 2009

August 2009

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1.29 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.

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1.65 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

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

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[1] 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[2], 501A or 501B or on grounds relating to national security;

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[3]; 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.

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.
>
> …
>
> 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.
>
> …
>
> 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

Liberal senators' minority report

1.1 Liberal senators disagree with several of the fundamental tenets of the Bill. They are concerned at the proposed delegation of the power of the Minister for Immigration and Citizenship in respect of housing determinations and the proposal to give additional power to the Minister to regulate. Liberal senators are also concerned about the insertion of a discretion (as distinct from an obligation) to detain suspected unlawful non-citizens, and the proposal to allow unlawful non-citizens free and unescorted access to the community. Taken together, the proposals contained in the Bill would significantly weaken Australia's border security and lead to an increase in unauthorised arrivals.

Discretion to detain

1.2 The Bill would allow immigration officials a discretion to release a known or suspected unlawful non-citizen into the community. While the Bill prescribes certain circumstances in which such a person must not be released, Liberal senators worry that too many potentially problematic non-citizens would not be caught by the proposed provisions.

1.3 Furthermore, Liberal senators note that proposed provisions 189(1)(b)(i) and 189(1A)(d) provide for the Minister to prescribe circumstances constituting 'unacceptable risk' a finding of which will preclude a person being released from detention. This could be interpreted as an acknowledgement that the provisions in proposed subsections 189(1) and 189(1A) fail to capture the kinds of unlawful non-citizens for whom detention is the only safe solution.

Temporary Community Access Permissions

1.4 The Bill would allow for an officer to permit a person in detention to go into the community for a specified period and for a specified purpose where they consider the risk to the community would be minimal.

1.5 Liberal senators consider that any power to allow unlawful non-citizens unescorted access to the community should only be exercised with great care. It is often the case that little health, identity and security information is known about unlawful non-citizens while they are in detention, and it is often the absence of such intelligence that delays resolution of a detainee's immigration status.

1.6 It is the view of Liberal senators that this initiative, if agreed to, could well lead to many more unlawful non-citizens 'disappearing' into the community.

Delegation of power to make housing determinations

1.7 The Bill would allow the Minister to delegate to senior departmental officers the power, under section 197AB of the Migration Act, to allow an unlawful non-citizen to reside in the community if it is in the public interest to do so. Liberal

senators consider that such an important power should be exercised only by the Minister, on the grounds that the provision would diminish accountability and transparency to the Australian people and lead to a considerable increase in refugee litigation.

Overuse of regulations

1.8 At the time of writing relevant regulations had yet to be drafted by the Department, much less released for public examination and comment. Liberal senators oppose the extensive use of regulations in respect of such important matters as those covered by the Bill, which in the case of 189(1) and 189(1A) directly impact on a person's liberty.

1.9 While Liberal senators note the provision of some detail of the proposed regulations by the Department in its submission, anything short of a draft of the proposed regulations is inadequate. Liberal senators concur with the view of several submitters that the devolution from primary legislation to regulation is to be discouraged on grounds of diminished transparency and accountability[1], and place on record their intention to consider moving to disallow the regulations when they come before the Senate.

Trends in unauthorised arrivals and detention

1.10 It is clear that the number of people in detention has increased dramatically in recent months, from about 400 to nearly 1000. Indeed numbers in detention have not been this high since May 2005.[2] This trend is not encouraging. The committee learned that:

- Only 2 per cent of detainees have been held for less than a week;
- Nearly 70 per cent of detainees have been held for between one week and six months;
- About 4 per cent, or 21 people, have been held for more than 2 years;
- One person has been held for over 3000 days, nearly 9 years.[3]

1.11 The Government clearly anticipates a rise in numbers, in light of the testimony by departmental officials at the committee's hearing and answers to questions on notice concerning strategies to grow capacity in detention centres and other detention facilities. A departmental officer informed the committee that moves are afoot to increase capacity and that if fruitful, 'several hundred additional beds'

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1 See, for example, Law Institute of Victoria, *submission 18*, p. 6; Refugee and Immigrant Legal Centre, *submission 43*, pp 89; Refugee Council of Australia, *submission 37*, p. 4.

2 Immigration Detention Statistics Summary, Community and Detention Services Division, Department of Immigration and Citizenship, as at 17 July 2009.

3 Messrs Correll and Hughes, and Ms Larkins Department of Immigration and Citizenship, *Proof Committee Hansard*, 7 August 2009, p. 7.

would become available on Christmas Island over 'something like a three to six month horizon'.[4]

1.12 Liberal senators assume that such dramatic and expensive expansion would not be authorised were the Government not expecting the increased capacity to be utilised in the future.

Conclusion

1.13 Liberal senators are concerned that some of the measures proposed in this Bill may well send a signal to people considering travelling to Australia and arriving unauthorised, and at the number of would-be travellers who would be sufficiently encouraged by them to proceed, making an already dramatically deteriorating situation even worse.

1.14 Liberal senators take the view that many of the measures contained in the Bill are likely to serve to undermine the integrity of Australia's border security regime. In light of this danger, Liberal senators are not persuaded that a compelling case for reform has been made.

Recommendation

1.15 Liberal Senators recommend that the Bill be amended to address the above concerns, or failing that, rejected.

Senator Guy Barnett **Senator Mary Jo Fisher** **Senator Russell Trood**

Deputy Chair

4 Mr Correll, Department of Immigration and Citizenship, *Proof Committee Hansard*, 7 August 2009, p. 9. Mr Correll later referred to a figure of '300 to 400' beds.

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

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	David Sykes
2	Allan Nield
3	Jean John
4	Marie Gordon
5	Marilyn Shepherd
6	Colleen Bartolomei
7	Jon Cook
8	Merilyn Bertram
9	Rosie Wong
10	Federation of Ethnic Communities' Councils of Australia (FECCA)
11	Veronica Waugh
12	Australian Lawyers for Human Rights
13	Deryck Thomas
14	UnitingJustice Australia
15	Department of Immigration and Citizenship (DIAC)
16	Association for the Wellbing of Children in Healthcare
17	Amber Evangelista
18	Law Institute of Victoria
19	A Just Australia
20	Immigration Advice and Rights Centre
21	Australian Christian Lobby
22	Coalition for Asylum Seekers, Refugees and Detainees (CARAD)
23	Diane Gosden
24	Jo Lee
25	Bronwyn Bell
26	Australian Human Rights Commission
27	Jill Greenwell

28	Margaret Landbeck
29	Community Legal Centres NSW
30	Law Council of Australia
31	Liberty Victoria
32	Audrey Raymond
33	Commonwealth Ombudsman
34	Human Rights Law Resource Centre
35	Robin Gibson
36	Philip Kidner
37	Refugee Council of Australia
38	Public Interest Law Clearing House (PILCH)
39	Amnesty International Australia
40	New South Wales Council for Civil Liberties
41	Rosemary Nairn
42	Refugee and Immigration Legal Service
43	Refugee and Immigration Legal Centre (RILC)
44	Forum of Australian Services for Survivors of Torture and Trauma (FASST)
45	Rufus Coffield-Feith
46	United Nations High Commissioner for Refugees (UNHCR)
47	Castan Centre for Human Rights Law
48	The Commission for Children and Young People
49	Victoria Legal Aid
50	Jenny Haines
51	National Legal Aid
52	Migration Institute of Australia
53	Aileen Cryle

ADDITIONAL INFORMATION RECEIVED

1 Tabled document - Immigration Detention Statistics Summary - *provided by the Department of Immigration and Citizenship Friday 7 August*

2 Submission of Assoc. Prof. Jane McAdam and Mr Tristan Garcia to the National Human Rights Consultation, June 2009 - *provided by the Refugee and Immigration Legal Service & Refugee Council of Australia Friday 7 August 2009*

3 Answers to Questions on Notice – *provided by the Department of Immigration and Citizenship Wednesday 19 August 2009*

4 Answers to Questions on Notice – *provided by the Department of Immigration and Citizenship Wednesday 19 August 2009*

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Friday 7 August 2009

BALL, Ms Rachel, Lawyer
Human Rights Law Resource Centre

BUDAVARI, Ms Rosemary, Director, Human Rights and Criminal Law Unit
Law Council of Australia

CATON, Ms Sonia, Board Member
Refugee Council of Australia

COLEMAN, Ms Caz, Project Director
Hotham Mission Asylum Seeker Project

CORRELL, Mr Bob, Deputy Secretary
Department of Immigration and Citizenship

DOMICELJ, Ms Tamara, National Policy Director
Refugee Council of Australia

GAUTHIER, Ms Kate, National Coordinator
A Just Australia

HOWIE, Ms Emily, Senior Lawyer
Human Rights Law Resource Centre

HUGHES, Mr Peter, Deputy Secretary
Department of Immigration and Citizenship

ILLINGWORTH, Mr Robert, Assistant Secretary, Compliance and Integrity Policy Branch
Department of Immigration and Citizenship

IRISH, Ms Rowena, Acting Director and Principal Solicitor
Immigration Advice and Rights Centre

LARKINS, Ms Alison, First Assistant Secretary, Compliance and Case Resolution Division
Department of Immigration and Citizenship

MANNE, Mr David Thomas, Coordinator and Principal Solicitor
Refugee and Immigration Legal Centre

METCALFE, Mr Andrew, Secretary
Department of Immigration and Citizenship

MOULDS, Ms Sarah, Senior Policy Lawyer
Law Council of Australia

POULOS, Reverend Elenie, National Director
UnitingJustice Australia, Uniting Church in Australia National Assembly

POWLES, Mr Charlie, Senior Policy Officer and Solicitor
Refugee and Immigration Legal Centre

RODAN, Mr Erskine, Honorary Member
Law Institute of Victoria

WILSON, Ms Jackie, First Assistant Secretary, Community and Detention Services Division
Department of Immigration and Citizenship

YAN, Ms Zhi, Acting National Coordinator
A Just Australia

APPENDIX 3

Key Immigration Detention Values

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

2. To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention:

   a) all unauthorised arrivals, for management of health, identity and security risks to the community

   b) unlawful non-citizens who present unacceptable risks to the community and

   c) unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC).

4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.

5. Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.

6. People in detention will be treated fairly and reasonably within the law.

7. Conditions of detention will ensure the inherent dignity of the human person.