Law Council
OF AUSTRALIA

Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010

Senate Committee on Legal and Constitutional Affairs

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Introduction

1. The Law Council of Australia is pleased to provide the following comments on the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* ('the Bill') to the Senate Committee on Legal and Constitutional Affairs.

2. The Law Council has a long standing interest in ensuring Australia's immigration detention laws and policies adhere to rule of law principles and comply with Australia's international human rights obligations. The Council regularly raises concerns with the Commonwealth Government regarding the existing immigration detention laws and policies, and supports legislative efforts to ensure that the *Migration Act 1958* (Cth) (the Migration Act) more fully complies with Australia's international human rights obligations, including those obligations that relate to the protection of asylum seekers and refugees.

3. The Bill is a Private Members Bill introduced by Australian Greens Senator Sarah Hanson-Young. It aims to significantly amend the way in which the Migration Act currently operates in respect of asylum seekers, by ending offshore processing; ensuring that detention is only used as a last resort; ending indefinite and long-term detention; and introducing a system of judicial oversight of detention beyond 30 days.

4. In line with its past advocacy in this area, the Law Council strongly supports the objects of the Bill and the measures that aim to:

   (a) codify a set of principles that are to apply to the treatment of asylum seekers under the Migration Act, based on Australia's obligations under the relevant human rights Conventions to which it is a party, including the Convention Relating to the Status of Refugees;

   (b) introduce a system of judicial oversight of detention decisions by ;

      (i) providing a detainee with the right to apply to a magistrate[1] for an order for release because there are no reasonable grounds to justify his or her initial detention, or continued detention;

      (ii) limiting detention under section 189 of the Migration Act to a maximum period of 30 days, unless continued detention is authorised by a magistrate;

   (c) remove those features of the Migration Act that relate to excised offshore places provisions; and

   (d) remove the privative clause provisions and enable judicial review of certain decisions currently excluded from review.

5. While the Law Council generally supports the amendments in this Bill, it submits that further clarity could be provided regarding how the proposed amendments would operate in practice, and what impact they would have on the existing immigration detention regime. This could be achieved by:

[1] The Law Council notes that the *Migration Act 1958* (Cth) refers to the Federal Magistrates Court's jurisdiction in migration matters. Although the term 'magistrate' is not defined in the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*, it is presumed that any reference to 'magistrate' relates only to federal magistrates, and does not intend to give jurisdiction to State and Territory magistrates.

(a) outlining in further detail within Part 2 of the Bill the criteria for detention under the amended section 189 (which is also relevant to the determinations to be made by federal magistrates pursuant to proposed sections 195B and 195C); and

(b) providing further information in the Explanatory Memorandum about the nature of the proposed amendments, their impact on the existing laws and policies and what further steps would need to be taken to ensure that they operate to remove those features of the existing regime that have been identified as being of concern.

6. The Law Council notes that since the introduction of this Bill, there have been a number of opportunities for both Houses of Parliament to inquire in detail into a range of matters relevant to Australia's immigration detention regime and the processing of persons seeking asylum in Australia.[2] The Council suggests that this Bill should be considered in the context of those inquires, and in particular, that this Committee consider recommending that the Bill be referred to the recently established Joint Parliamentary Committee on Australia's Immigration Detention Network for consideration.

7. The Law Council further notes that since 2008, the Government has made legislative and policy attempts to address some of the most concerning aspects of Australia's immigration detention regime. It has, for example, introduced the *Migration Amendment (Immigration Detention Reform) Bill 2009* and the *Migration Amendment (Complementary Protection) Bill 2011*, as well as announcing New Directions in Immigration Detention Values and committing to removing children from detention. While the Council welcomed each of these developments, it has been disappointed that they have not yet resulted in substantive legislative or policy change. It is hoped that the current Bill will provide the Government and the Parliament with a further opportunity to consider and debate these issues and provide a further incentive to implement meaningful change in this area.

Asylum Seeker Principles

1. Part 1 of the Bill seeks to include within the Migration Act a new section 4AAA which would contain a set of principles that are to apply to the treatment of asylum seekers under the Act, based on Australia's obligations under the relevant human rights Conventions to which it is a party, including the Convention Relating to the Status of Refugees.

2. The asylum seeker principles proposed in the Bill are:

- *immigration detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of such detention, including the appropriateness of both the accommodation and the services provided, must be subject to regular review;*

[2] For example, on 7 January 2011 Professor McMillan was appointed by the Commonwealth Government to report on options for enhancing the efficiency and minimising the duration of the judicial review process for offshore entry persons seeking refugee status determinations. In December 2008 the Joint Committee on Migration issued the first of three reports into Immigration Detention in Australia and made a number of recommendations that are relevant to the amendments proposed in this Bill. These reports are available at http://www.aph.gov.au/house/committee/mig/index.htm

- *detention in immigration detention facilities must only be used as a last resort and for the shortest practicable time;*
- *people in immigration detention must be treated fairly and reasonably within the law;*
- *living conditions in immigration detention must ensure the inherent dignity of the human person.*

3. Part 1 of the Bill provides that any person making any decision about refugees, asylum seekers, immigration detention or a related matter under the Migration Act or a regulation or instrument made under the Act must have regard to these principles.[3]

Law Council's Support for the Proposed Amendments

4. The Law Council supports the inclusion of a provision of this nature. Codifying the principles under which Australia will respond to and process persons seeking asylum will help solidify Australia's commitment to ensuring its laws and policies comply with international human rights standards. Codifying principles of his nature would also begin to address a number of long standing concerns and recommendations for change previously made by the Law Council[4] and by domestic and international human rights bodies, including the Australian Human Rights Commission,[5] the United Nations Human Rights Committee[6] and the United Nations High Commissioner for Refugees.[7]

5. The Law Council notes that a similar approach to codifying the principles under which Australia will determine the immigration status of asylum seekers was contemplated by the Rudd Government, in the form of the *Migration Amendment (Immigration Detention Reform) Bill 2009* (the IDR Bill).[8] The IDR Bill was introduced following the announcement of the Government's New Immigration Detention Values on 29 July 2008.[9] The principles to be included in this IDR Bill were not as expansive as those proposed in Part 1 of the current Bill and were limited to the principle that a non-citizen must only be detained as a measure of last resort; and only for the shortest practicable time. The IDR Bill also strengthened 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 must not be detained in a detention centre,

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[3] See Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010 s4AAA(4).
[4] For a summary of the Law Council's past advocacy in this area, and to access relevant submissions and media releases, see http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/detention.cfm.
[5] See for example, Human Rights and Equal Opportunity Commission's Submission to the Joint Committee on Migration's Inquiry into Immigration Detention in Australia (4 August 2008) available at http://www.hreoc.gov.au/legal/submissions/2008/20080829_immigration_detention.html; for more recent reports and recommendations see for example, Australian Human Rights Commission, *Immigration Detention at Villawood*, (May 2011) available at http://www.humanrights.gov.au/human_rights/immigration/idc2011_villawood.html
[6] See, for example UN Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).
[7] See for example UNHCR Revised Guidelines On Applicable Criteria And Standards Relating To The Detention Of Asylum Seekers, (February 1999) available at http://Www.Unhcr.Org.Au/Pdfs/Detentionguidelines.Pdf.
[8] The text of this Bill can be found at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs720%22
[9] For further details on the New Immigration Detention Values see http://www.immi.gov.au/managing-australias-borders/detention/about/key-values.htm..

and if a minor is to be detained, regard for the best interests of the minor must be a primary consideration.

6. When the IDR Bill was considered by the Senate Committee on Legal and Constitutional Affairs,[10] the Law Council supported the inclusion of these principles in the Migration Act,[11] but noted that there was a lack of clarity about how the principles would be applied when interpreting and applying the provisions of the Migration Act. The Law Institute of Victoria, one of the Law Council's constituent bodies, recommended that the proposed section 4AAA be amended to insert an express interpretative obligation to clarify that in the interpretation of a provision of the Migration Act, and in the exercise of a discretion conferred under the Act, a construction that promotes the principles articulated in s4AAA should be preferred.[12]

7. This issue has been substantially addressed in the context of the current bill by proposed subparagraph 4AAA(4) which specifically provides that:

   Any person making any decision about refugees, asylum seekers, immigration detention or a related matter under this Act, or a under a regulation or other instrument made under this Act, must have regard to the asylum seeker principles set out in subsection (3).

8. If enacted, this provision would go some way to ensuring that the principles proposed to be included in section 4AAA would be observed by the Minister and his delegate when making key decisions about the immigration status of asylum seekers, and whether, where and for how long they are detained.

9. However, like the IDR Bill, the effectiveness of this provision at ensuring these principles are adhered to by decision makers depends largely on the other relevant provisions of the Migration Act, which currently authorise and guide decision makers and determine the criteria on which immigration status will be determined and the basis upon which these decisions can be reviewed.

10. The Law Council notes that this Bill seeks to make substantive changes to these provisions that if enacted would help facilitate compliance with the proposed principles and deliver a degree of consistency within the Migration Act. The Council warns that without such significant changes, the ability of the principles proposed to be included in section 4AAA of the Act to significantly change the existing laws and policies relating to the treatment and processing of asylum seekers would appear to be severely limited.

Judicial Oversight of Detention Decisions

11. Part 2 of the Bill contains amendments that seek to facilitate judicial oversight of all detention decisions made under the Migration Act.

[10] 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 ('Senate Committee Report'). Further details on the inquiry, including the Committee's Report are available at http://www.aph.gov.au/Senate/committee/legcon_ctte/migration_2009/report/c01.htm.

[11] See Law Council of Australia submission to Senate Legal and Constitutional Affairs inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009 (31 July 2009) available at http://www.aph.gov.au/Senate/committee/legcon_ctte/migration_2009/submissions.htm.

[12] Law Institute of Victoria submission to Senate Legal and Constitutional Affairs inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009 (31 July 2009) available at http://www.aph.gov.au/Senate/committee/legcon_ctte/migration_2009/submissions.htm.

12. Subsections 189(1), 189(2) and 196(1) of the Migration Act currently provide for a system of mandatory detention for any person who is in Australia who does not hold a valid visa. These provisions mean that such persons must be detained until they are either granted a visa or removed from Australia. Subsection 196(3) further provides that a court may not order the release of a person detained under these provisions unless he or she has obtained a valid visa.

13. The Bill seeks to deprive these provisions of their mandatory character and amends subsections 189(1) and (2) of the Migration Act by replacing the word "must" with "may", resulting in the following provisions:

> *(1) 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, the officer **may** detain the person.*
>
> *(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:*
>
> *(a) is seeking to enter the migration zone (other than an excised offshore place); and*
>
> *(b) would, if in the migration zone, be an unlawful non-citizen;*
>
> *the officer **may** detain the person.*

14. Item 5 of the Bill also inserts a new section 195B into the Migration Act. This section would provide for a system of judicial oversight of decisions to detain non-citizens made under section 189. It would allow for a person detained under section 189 to apply to a federal magistrate for an order for release. Proposed section 195B provides:

> *(1) An officer who has detained a person under section 189 must, as soon as practicable after detaining the person, set out in writing:*
>
> *(a) the circumstances of the detention;*
>
> *(b) the reasons for the decision to detain the person; and*
>
> *(c) the grounds for the decision to continue to detain the person.*
>
> *(2) As soon as reasonably practicable after an officer detains a person under section 189, the officer must ensure that the person is given a copy of the information required to be set out under subsection (1) in relation to the detention of the person.*
>
> *(3) A person detained under section 189 may apply to a magistrate for an order that he or she be released from detention because there are no reasonable grounds to justify:*
>
> *(a) the officer's decision to detain the person; or*
>
> *(b) the officer's decision to continue to detain the person.*
>
> *(4) If the magistrate is not satisfied that, in all the circumstances, it is appropriate that the person continue to be detained, the magistrate may make any order the magistrate sees fit, including:*

(a) an order that the person must be released; or

(b) an order that the person must be granted a visa, including a bridging visa, subject to any conditions the magistrate considers appropriate.

(5) A decision to detain a person under section 189 or to continue to detain a person detained under section 189 is not a privative clause decision.

15. Item 5 of the Bill also inserts a new section 195C into the Migration Act which would provide that detention under section 189 must not exceed 30 days and would require the Secretary of the Department of Immigration and Citizenship (DIAC) to apply to a magistrate if continued detention is required beyond 30 days. Proposed section 195C would provide:

(1) A person detained under section 189 must not be detained for more than 30 days except in accordance with an order made under this section.

(2) The Secretary may apply to a magistrate for an order that a person detained under section 189 is to continue to be detained for more than 30 days.

(3) An application under subsection (2) must specify why it is necessary to continue to detain the person.

(4) If the magistrate is satisfied that, in all the circumstances, it is appropriate that the person is to continue to be detained, the magistrate may make an order for the continued detention of the person, subject to any conditions the magistrate considers appropriate, until:

(a) the person is released from detention pursuant to paragraph 196(1)(c); or

(b) a specified date.

(5) If the magistrate is not satisfied that, in all the circumstances, it is appropriate that the person is to continue to be detained, the magistrate may make any order the magistrate sees fit, including:

(a) an order that the person must be released from detention; or

(b) an order that the person must be granted a visa, including a bridging visa, subject to any conditions the magistrate considers appropriate.

16. Item 6 of the Bill would repeal subsection 196(3) of the Migration Act, which currently prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa. Item 6 of the Bill would replace this subsection with a subsection that does not categorically prevent the release of a person from detention by a court. Proposed subsection 196(3) would provide:

(3) To avoid doubt, subsection (1) does not prevent the release of a person from detention in accordance with a court order under section 195B or 195C.

17. Item 7 of the Detention Reform Bill describes when Part 2 of the Bill will come into operation. It explains that the amendments made in this Part would apply to a person who was detained under section 189 as it was in force immediately prior to

the commencement of the Bill and who continues to be detained on the commencement day.

Law Council's General Support for the Proposed Amendments

18. The Law Council generally supports the changes proposed by Part 2 of the Bill.

19. For many years, the Law Council has strongly opposed the policy of mandatory detention of unlawful non-citizens prescribed in the Migration Act and called for a system that relies upon detention only as a matter of last resort, and only for specified purposes such as health and security checks. The Law Council has also advocated for any detention of asylum seekers and other non-citizens to be subject to effective judicial oversight and regular review.[13]

20. If enacted, the amendments proposed in Part 2 of the Bill would constitute an important step towards removing the mandatory components of the current immigration detention policy and inject a level of judicial oversight into the process that the Law Council considers is urgently needed. It would achieve this by authorising a person who is subject to immigration detention to apply to a magistrate to review that detention, and by requiring that any detention beyond a period of 30 days is subject to approval by a magistrate. The amendments also make it clear that a decision to detain a person under the amended section 189 is not a privative clause decision and therefore is not excluded from the *Administrative Decisions Judicial Review Act 1977* (Cth) (the ADJR Act).

Areas in Need of Further Consideration

21. While the Law Council strongly supports the objects of these amendments, it suggests that further detail could be provided either in the Bill itself or the Explanatory Memorandum to help clarify how these provisions might operate in practice.

22. For example, the amended section 189 provides the relevant DIAC officer with a discretion to detain an unlawful citizen, but does not provide any direction as to the criteria to be applied when exercising that discretion. It may be that the principles to be contained in proposed section 4AAA would offer some guidance, but even these principles fail to set out any precise criteria to be applied. In its submission to the Joint Committee of Migration's 2008 inquiry into Immigration Detention, the Australian Human Rights Commission recommended that the requirement to detain all unlawful citizens be replaced with a presumption that detention is the exception not the norm, and that the decision to detain should be made on a case by case basis, taking into account the unique circumstances of the case and certain exceptional criteria.[14] The criteria suggested was based on the United Nations High Commissioner for Refugees (ExComm) Conclusion 44 which states that where detention of asylum seekers is deemed necessary it should only be used:

    (a) to verify identity;

[13] For example see Law Council of Australia submission to the Joint Parliamentary Committee on Migration Review into Immigration Detention (August 2008) available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=1B2BF9EA-F430-AE50-DD02-2DBDEC1C83A4&siteName=lca.

[14] Human Rights and Equal Opportunity Commission's Submission to the Joint Committee on Migration's Inquiry into Immigration Detention in Australia (4 August 2008) paras [22]-[29] available at http://www.hreoc.gov.au/legal/submissions/2008/20080829_immigration_detention.html

(b) to determine the elements on which the claim to refugee status or asylum is based;

(c) to deal with cases where refugees or asylum seeker do not have travel and/or identification documents; or

(d) to protect national security or public order.[15]

23. The Law Council suggests that consideration be given to including criteria of this nature in the Bill to assist decision makers exercising power under the amended section 189.

24. This would also provide guidance as to the contents of the notice required to be given to the person being detained by the DIAC officer as proposed by section 195B(1) of the Bill.

25. Similar or identical criteria should also be developed to provide guidance to magistrates seeking to determine whether there are reasonable grounds to justify a person's detention pursuant to proposed section 195(3), and to magistrates determining whether continued detention is appropriate pursuant to proposed section 195C. At the very least, the Law Council suggests that the Bill should specifically provide that when making these determinations, the magistrate should take into account Australia's international human rights obligations under the Conventions to which it is a party, including the Refugee Convention, the International Covenant on Civil and Political Rights, the Convention Against Torture and the Convention on the Rights of the Child.

26. The Law Council further notes that although proposed section 195C of the Bill would require judicial authorisation for detention beyond 30 days, it does not place any limits on the length of detention authorised by a magistrate under this section, nor does it provide any limits on the number of times a continued detention order could be sought. As a result, while this provision inserts a much needed level of judicial oversight in respect of immigration detention that continues beyond 30 days, it does not prescribe any ultimate limits on the period a person can be detained under section 189. This could be addressed by amending proposed section 195C by prescribing a maximum period for a continued detention order (such as 60 or 90 days) and requiring a new application to be made at the expiry of this period.

27. The Law Council also suggests that if this Part of the Bill is to be enacted, it would need to be accompanied by appropriate resources to ensure, for example, that persons seeking to utilise these provisions have access to appropriate legal advice and that the federal magistrates court is appropriately resourced to cope with the significant increase in workload this change may generate. Consideration should also be given to the implications of persons seeking to appeal decisions made by magistrates under proposed section 195B and 195C and the increased demand this would place on appellate courts and legal counsel.

28. Consideration should also be given as to whether persons released from detention under these provisions would be provided with existing bridging visas whilst their protection claim or immigration status is being resolved – or whether it would be more appropriate to develop additional or alternative temporary visa arrangements for such persons.

[15] UNHCR ExCom Conclusion 44 (XXXVII) "Detention of Refugees and Asylum-Seekers," United Nations High Commissioner for Refugees, 37th Session, 1986, paragraph (b).

29. Consideration should also be given to what types of accommodation and support, including access to appropriate Centrelink benefits and/or work rights, would need to be provided to persons seeking protection in Australia who have been released from immigration detention under these proposed provisions. The Law Council notes that a range of support programs are currently in place to assist persons who have obtained a protection visa – such programs would need to be expanded and adapted to effectively respond to the needs of new arrivals, particularly those who may be suffering from experiences of persecution or trauma.

30. The Law Council further notes that this Bill does not seek to amend a range of discretionary powers available to the Minister under the Migration Act which may impact on the ability of a person to obtain a valid visa and currently operate to expose a person to the risk of immigration detention. For example, the character test in section 501 of the Migration Act enables the Minister or his or her delegate to refuse to grant a visa or cancel a visa in respect of a person who fails the test outlined in subsection 501(6). Currently, if a person has had their visa refused or cancelled on this ground, they are likely to be detained in immigration detention, sometimes for considerable periods. It is unclear how this provision will operate in the context of the amendments proposed in this Bill, and in particular how a decision by the Minister that a person has failed the character test will interact with a decision by a magistrate to release a person from immigration detention.

Excised Offshore Places Provisions

31. Part 3 of the Bill seeks to put an end to the policy of processing some unlawful non-citizens "onshore" and some "offshore", depending on their mode of arrival. The Bill seeks to do this by removing all provisions in the Migration Act that relate to excised offshore places. This includes:

    (a) repealing the definitions of 'excised offshore place', 'excision time' and 'offshore entry person' in subsection 5(1), as well as note 1 to the definition of 'immigration detention' and paragraph (a) of the definition of 'transitory person';[16]

    (b) repealing section 46A which currently provides that an offshore entry person who is in Australia without a valid visa cannot make a valid application for a visa without the exercise of discretion by the Minister to exempt him or her from this provision;

    (c) removing the terms "other than an excised offshore place" from subsections 189(1) and 189(2)(a), which current distinguish between onshore unlawful citizens and those in excised offshore places;

    (d) repealing subsections 189(3),(4) and (5), which currently authorise certain DIAC officers to detain a person in an excised offshore place if he or she knows or reasonably suspects that the person is an unlawful non-citizen.

    (e) repealing paragraph 193(1)(c), which currently provides that offshore entry persons detained in immigration detention under subsection 189(2), (3) or (4) cannot apply for a visa under sections 194 and 195;

[16] *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* (Cth) Items 8-13.

(f) repealing section 198A, which currently authorises certain DIAC officers to take an offshore entry person from Australia to a declared country;[17] and

(g) repealing section 494AA, which currently prevents certain legal proceedings being taken against the Commonwealth in relation to offshore entry persons.

32. Part 3 of the Bill also provides that the amendments made by this Part apply to visa applications that have not been finally determined prior to the commencement of the Bill.

Law Council's General Support for the Proposed Amendments

33. The Law Council strong supports the amendments in Part 3 of the Bill and the abolition of offshore processing of asylum seekers. The Law Council has repeatedly called for an end to the current system, whereby asylum seekers are processed differently according to their mode of arrival.

34. The Law Council has also previously expressed grave concerns regarding the policy of excision of offshore islands, which provides that visa applications are not valid where they are made by a person who entered Australia at an "excised offshore place".[18] The Council has urged the Government to respect its international obligations[19] by allowing persons to apply for asylum wherever they are on Australian sovereign territory.

35. The Law Council has further submitted that given the costs and logistical difficulties involved with processing in excised offshore places, the Government should move towards its abolition and people should brought safely to the mainland to be assessed through the onshore protection system.

36. If enacted, Part 3 of this Bill would signal a very significant policy change. It would see all visa applicants having access to the onshore processing system, that currently incorporates stronger protections for procedural fairness and greater access to external review of certain decisions affecting immigration status including merits review by the Refugee Review Tribunal. Visa applicants may also have greater access to other external review mechanisms, such as the Commonwealth Ombudsman and the Australian Human Rights Commission if processed onshore.

37. It would also assist asylum seekers and other visa applicants to obtain appropriate legal advice and to overcome some of the practical and financial barriers to pursuing legal matters in the context of the offshore processing system. This is because onshore visa applicants generally have better access to professional migration advice and application assistance under the Government's Immigration Advice and Application Assistance Scheme (IAAAS). Further, practical access to federal courts

[17] The Law Council notes that clauses 10,12,22 and 24 of the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* (Cth) relate to the 'declared countries' provisions of the Act and in particular s198A which currently allows third countries to be declared in writing by the Minister, and then allows a DIAC officer to transfer an offshore entry person to that country. This can be contrasted with *Migration Amendment (Declared Countries)Bill 2011* recently introduced by Hanson-Young, which assumes that s198A of the Act remains in force and seeks to add a paragraph to that section to provide that the declaration by the Minister in writing is a legislative instrument which has to be tabled before both Houses (and is disallowable under the *Legislative Instruments Act 2003* (Cth).

[18] *Migration Act 1958* (Cth), s 46A.

[19] *Convention Relating to the Status of Refugees,* adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, entry into force 22 April 1954.

and tribunals, including the lodgement of forms and ability to attend hearings, is considerably improved if the person is residing within mainland Australia.

38. However, it should be noted that there remain a number of concerns relating to the current onshore processing system that could be exacerbated if the numbers of persons utilising this system is increased without additional reforms. For example, persons processed onshore can still be subject to immigration detention and experience considerable delays in the determination of their immigration status. They are also subject to a range of discretionary powers that can be exercised by the Minister or his or her delegate which can have the effect of refusing or cancelling a person's visa, such as section 501 of the Migration Act.

39. Consideration would also need to be given to the impact of this significant policy shift on existing policies and practices that currently assume a dual processing approach. For example, most asylum seekers who arrive in Australia by plane and are processed onshore arrive with a valid visa (such as a tourist visa) and are seeking to have their visa status changed to reflect their right to protection. They are often provided with a form of bridging visa that allows them to lawfully reside in the community while their protection claim is being determined. Persons who arrive in Australia by boat (such as those currently being processed offshore) typically do not arrive with a valid visa – triggering the operation of section 189, which currently requires them to be detained in immigration detention. If section 189 is amended as proposed by the current Bill and such persons are released into the community while their protection claims are being determined, consideration would need to be given to what form of temporary or bridging visa would be appropriate to enable the person to lawfully reside in the community while his or her immigration status is being determined.

Fair Process and Procedural Fairness

40. Part 4 of the Bill seeks to restore asylum seekers rights to procedural fairness under the Migration Act. It does so by repealing or amending provisions of the Migration Act and the ADJR Act , to remove the privative clause provisions and enable judicial review of certain decisions currently excluded from review.

41. Part 4 of the Bill:

    (a) replaces the definition of "migration decision" in subsection 5(1), which currently provides that a migration decision includes a privative clause decision, a purported privative clause decision or a non-privative clause decision, with the definition that a migration decision is "a decision under this Act";

    (b) repeals the definitions of "non-privative clause decision", "privative clause decision" in subsection 5(1) and the definition of "purported privative clause decision" in section 5E;

    (c) removes the terms "the Minister is satisfied" from paragraph 36(2)(a), which currently sets out criteria for the granting of protection visas to non-citizens to whom Australia has protection obligations under the Refugees Convention;

    (d) repeals section 51A which currently provides that Part 2, Division 3, Subdivision AB, which deals with the code of procedure for dealing fairly, efficiently and quickly with visa applications, is an exhaustive statement of the

requirements of the natural justice hearing rule in relation to the matters it deals with;

(e) repeals section 97A which currently provides that Part 2, Division 3, Subdivision C, which deals with visas based on incorrect information, is an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with;

(f) repeals section 118A which currently provides that Part 2, Division 3, Subdivision D, which deals with procedure for cancelling visas in or outside Australia, is an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with;

(g) repeals section 127A which currently provides that Part 2, Division 3, Subdivision F, which deals with other procedures for cancelling visas outside Australia, is an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with;

(h) repeals section 357A which currently provides that Part 5, Division 5 which deals with the conduct of review of certain migration decisions, is an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with; and

(i) repeals section 422B which currently provides that Part 7, Division 4, which deals with the conduct of review of protection visa decisions, is an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.

42. Part 4 of the Bill also repeals the entirety of Part 8 of the Migration Act, which deals with judicial review of decisions under the Act. Part 8 currently provides that certain decisions under the Migration Act are "privative clause decisions" and that these decisions are final and conclusive, must not be challenged, appealed against, reviewed, quashed or called in question in any court; and are not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account. Part 8 also sets out the jurisdiction of the Federal Magistrates Court and the Federal Court to deal with judicial review of decisions under the Act, and the procedures to be followed when conducting such review.

43. Part 4 of the Bill also makes changes to the time limitations on applications to the High Court for judicial review currently contained in section 486A.

44. Schedule 2 of the Bill ensures that these amendments are also reflected in the the ADJR Act by removing Paragraph (da) of Schedule 1 of that Act, which currently excludes a privative clause decision within the meaning of subsection 474(2) of the Migration Act from the operation of the ADJR Act.

Law Council's General Support for the Proposed Amendments

45. The Law Council supports those amendments proposed in Part 4 of the Bill which seek to remove those features of the Migration Act that currently exclude key decisions relating to a person's immigration status from administrative review, and which limit the operation of principles of natural justice or procedural fairness in respect of certain decisions made under the Act.

46. These amendments would require decisions makers exercising certain authority under the Migration Act, including the Minister, to take into account general

principles of administrative law – such as the right to procedural fairness and the right to know the reasons for a decision. The amendments would also subject such decisions to external oversight, such as review under the ADJR Act or judicial review in the Federal Court. This would insert a degree of administrative accountability and transparency into the Migration Act, which is currently characterised by the provision of broad discretionary powers that are subject to only limited forms of external review.

47. In order for the practical impact of these amendments to be maximised, consideration would need to be given to providing appropriate training and guidance to primary decision makers, in particular DIAC officers, to ensure that they are aware of the types of matters they are required to take into account to ensure that a decision is made in accordance to the principles of natural justice and procedural fairness. Consideration would also need to be given to ensuring that these amendments do not result in further delays in the resolution of a person's immigration status, particularly if the person is being held in immigration detention.

48. If enacted, these provisions would also have the potential to significantly impact the workload of administrative review tribunals and the federal courts, as well as significantly increasing the demand for appropriate legal advice. As described above in relation to Part 2 of the Bill, consideration would need to be given to ensuring appropriate resources are applied in response to this increase in workload.

49. The Law Council also notes that Professor John McMillan has recently been tasked with reviewing options for enhancing the efficiency and minimising the duration of the judicial review process for offshore entry persons seeking refugee status determinations. The recommendations flowing from this review may be relevant to the Committee's consideration of Part 4 of this Bill.

50. The current inquiry being undertaken by the Administrative Review Council into judicial review in Australia may also have relevance to the Committee's consideration of this aspect of the Bill.

Duration of Detention

51. Part 5 of the Bill seeks to remove those provisions in the Migration Act that authorise or permit indefinite detention. This involves repealing subsections 196(4), (4A), (5), (5A), (6) and (7) of the Migration Act.

52. Section 196 of the Migration Act currently provides that an unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is removed or deported from Australia or granted a visa. Subsection 196 (4) provides that if the person is detained as a result of the cancellation of his or her visa under section 501, the detention is to continue unless a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen. Subsection 196(4A) provides that if the person is detained pending his or her deportation under section 200, the detention is to continue unless a court finally determines that the detention is unlawful. Subsection 196(6) provides that section 196 has effect despite any other law.

Law Council's General Support for the Proposed Amendments

53. As noted above in respect to Part 2 of the Bill, the Law Council strongly supports the introduction of measures designed to impose limits on the period a person is detained in immigration detention. The amendments in Part 5 of the Bill would have the effect of removing those aspects of the Migration Act that currently provide legislative authority for prolonged or even indefinite detention and the amendments are therefore supported by the Law Council.

54. However, as noted above, while the Bill takes important steps towards establishing a system of judicial oversight of immigration detention, it stops short of imposing an absolute limit on the period for which a person can be detained. If one of the objects of the Bill is to remove any aspect of the Migration Act that permits indefinite detention, further consideration should be given to proposed sections 195B and 195C, which potentially allow for a continued detention order to be made by a magistrate for a prolonged or even indefinite period.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.