Australian Government

Department of Immigration and Citizenship

Submission to the Inquiry into the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*

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The Department of Immigration and Citizenship (the Department) welcomes the opportunity to provide comment to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* (the Bill), following the introduction of this Bill into the House of Representatives on 18 November 2010.

1. SUMMARY OF CONCERNS

The Bill, introduced to Parliament on 18 November 2010 by Senator Hanson-Young, seeks to amend the *Migration Act 1958* (the Act) to:

- end offshore processing and excision policy;
- remove the mandatory detention provisions by making detention decisions discretionary, merit based and judicially reviewable on the merits;
- end long-term detention;
- repeal the privative clause provisions; and
- introduce a system of judicial review after 30 days of detention.

As drafted, it appears that the Bill would remove the structural integrity of the Act and undermine the procedural efficiencies and certainty in relation to decision making and the review of migration decisions.

In effect, the proposed amendments:

- render Australia's immigration detention regime unworkable through the introduction of asylum seeker principles that are expressed in broad terms and open to interpretation by the courts;

- extend the judicial review of detention to broad concepts that are open to subjective interpretation;

- allow a person in immigration detention to be released into the Australian community for an indefinite period of time without a visa (including persons detained under the character provisions), undoing the fundamental philosophy of the Act of a universal visa system, requiring all non-citizens to hold a valid visa to enter and remain in Australia;

- vest the judiciary with executive powers;

- increase demand on the judiciary, legal aid commissions and the community legal sector;

- strain existing judicial and court administration resources;

- enable any person who enters the migration zone, even at an excised offshore place, to apply for a Protection Visa; and

- apply to all migration decisions and do not contain measures to manage the costs, delays and inefficiencies created by the amendments.

Although some of the principles in the Bill are consistent with current Government policy, the apparent application of the proposed legislation is very broad.

2. BACKGROUND

Under Australia's universal visa system, non-citizens must generally hold a valid visa to enter into and remain in Australia. The benefits of this system, at a macro policy level, are its clarity, consistency and support for managed migration to Australia. The Act regulates who arrives in Australia through the visa process, and that process allows the Government to know who is visiting Australia, how long they are staying and when they are leaving.

Our visa application system is a risk-based system. The traveller's risk profile, reason for travel and individual characteristics are all taken into account, and will determine what kind of visa application process is undertaken. As part of the visa application process, all applicants are checked against a number of security and law enforcement agencies as well as other Commonwealth agencies. After visa grant, a traveller passes through a number of other checking layers, culminating in their final check at the Australian border. This means that Australia's visa system provides a screening mechanism to prevent the entry of people who are identified as posing a security, character or health risk and facilitating the travel of genuine travellers.

Applications for visas are usually made at the time travel plans are made in a person's home country. In most cases, a visa must be obtained prior to travel to Australia. Exceptions to this include Special Purpose Visas, New Zealand passport holders and Norfolk Island permanent residents who will normally be issued a visa on arrival in Australia unless there are character or health concerns. The excision legislation bars offshore entry persons who arrive unauthorised by ship or plane at an excised offshore place from making valid visa applications and, as a result, they will need to be dealt with accordingly by the Department.

The excised offshore places are under Australian jurisdiction and sovereignty. The Act applies to these places in all respects, other than extending the visa application process to unauthorised arrivals.

Immigration detention

The universal application of mandatory detention commenced on 1 September 1994 and continued until it was modified by the amendment made to the Act in 2001. Historically, mandatory detention has, and continues to receive, bipartisan political support.

People who arrive in Australia without the appropriate authority do not provide the Government with an opportunity to assess any risks they might pose to the Australian community prior to presenting at the border. These unauthorised arrivals are detained for the purposes of managing health, identity and security risks. In contrast, people who arrive lawfully have been assessed including in relation to character, health, identity and bona fides.

The application of the detention regime is brought about by section 189 and section 196 of the Act. Relevant to below discussion of the proposed Bill are the following provisions in the Act:

- subsection 189(1) of the Act provides 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, the officer must detain the person;
- subsection 189(2) of the Act provides that if an officer reasonably suspects that a person in Australia but outside the migration zone is seeking to enter the migration zone (other than an excised offshore place) and would, if in the migration zone, be an unlawful non-citizen, the officer must detain the person;
- subsection 189(3) of the Act provides that if an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person;
- subsection 189(4) of the Act provides that if an officer reasonably suspects that a person in Australia but outside the migration zone is seeking to enter an excised offshore place and would, if in the migration zone, be an unlawful non-citizen, the officer may detain the person; and
- subsection 196(1) provides that an unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is removed from Australia, deported or granted a visa.

A person becomes an unlawful non-citizen when he or she is in the migration zone and does not hold a valid visa whether through:

- arriving in Australia without a visa;
- having a visa cancelled after arrival;
- having a visa cease to be in effect; or
- having a visa application refused and becoming an unlawful non-citizen as a result of that refusal.

The legal framework of the mandatory detention regime that applies to people arriving irregularly by boat varies depending on whether a person is classified as an Irregular Maritime Arrival – Offshore Entry Person, or an Irregular Maritime Arrival – Non-Offshore Entry Person.

Irregular Maritime Arrivals – Offshore Entry Person

An Irregular Maritime Arrival - Offshore Entry Person (IMA-OEP) is defined in subsection 5(1) of the Act as a person who entered Australia at an excised offshore place after the excision time for that offshore place, and who became an unlawful non-citizen because of that entry.

A person who arrives by boat in the migration zone but at an excised offshore place and who is, or is reasonably suspected to be, an unlawful non-citizen may be detained under subsection 189(3) of the Act.

A person who arrived as an IMA-OEP on or before 7 May 2011 and who makes a protection claim, has their claim administratively assessed through a Protection Obligation Determination process.

Section 46A of the Act bars an IMA-OEP from making a valid application if the person is in Australia and is an unlawful non-citizen. However, the Minister personally may lift the bar if the Minister thinks that it is in the public interest to do so.

If an IMA-OEP is in immigration detention under section 189 of the Act, the Minister has a personal and non-compellable power to grant a visa without an application for a visa being made pursuant to section 195A of the Act.

The bar on IMA-OEPs being able to apply for visas under the Act does not breach Australia's international obligations. A key obligation under the *United Nations Convention relating to the Status of Refugees 1951* as amended by the *Protocol relating to the Status of Refugees 1967* (Refugee Convention) is not to '*refoule*', or return, a person directly, or indirectly, to a place where they would face serious harm for a Refugee Convention reason.

The Government will not remove persons during the Protection Obligation Determination process. The obligation not to *refoule* an IMA-OEP, however, does not give a person a right to a visa or residence in Australia.

Any IMA-OEP who is found not to raise claims which, prima facie, may engage Australia's protection obligations or has not made a valid visa application is subject to removal from Australia under the provisions of the Act and will be removed as soon as reasonably practicable. The removal process will take into account Australia's *non-refoulement* obligations under the various international human rights instruments to which Australia is a signatory, that is the *Convention on the Rights of the Child*, the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

Irregular Maritime Arrivals – Non-Offshore Entry Person

An Irregular Maritime Arrival - Non-Offshore Entry Person (IMA-NOECP) is a person who is an unlawful non-citizen on arrival in the migration zone and whose first point of entry in the migration zone is not at an excised offshore place.

A person who has arrived by boat in the migration zone at other than an excised offshore place, and who is, or is reasonably suspected to be, an unlawful non-citizen must be detained under subsection 189(1) of the Act.

A person in immigration detention as an IMA-NOEP has an automatic right to apply for a protection visa which may be granted by the Minister. The bar set by section 46A of the Act does not apply to an IMA-NOEP. A refusal of a grant of a protection visa can be the subject of merits review or judicial review.

If an IMA-NOEP is in immigration detention under section 189 of the Act, the Minister has a personal and non-compellable power to grant a visa without an application for a visa being made pursuant to section 195A of the Act.

3. CONTENT AND DISCUSSION OF THE MIGRATION AMENDMENT (DETENTION REFORM AND PROCEDURAL FAIRNESS) BILL 2010

Schedule 1 - Amendment of the Migration Act 1958
3.1 Part 1 – Amendment establishing asylum seeker principles

Proposed amendments
Part 1 of the Bill establishes the following four principles that apply to persons seeking asylum (the asylum seeker principles):

- 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;
- 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; and
- living conditions in immigration detention must ensure the inherent dignity of the human person.

Subsection (4) of Part 1 requires any person making any decision about refugees, asylum seekers, immigration detention or a related matter to have regard to the asylum seeker principles.

Problems with the proposed asylum seeker principles
Although the Bill proposes to enact existing principles related to the treatment of asylum seekers in immigration detention, it is unclear how statutory principles expressed in such broad terms would interact with or curtail the immigration detention provisions under the Act. Further, the wording of some of the principles is very general and open to a number of interpretations, some of which would, if adopted by courts, render Australia's immigration detention regime unworkable.

There is also confusion in the Bill between the mandatory immigration detention of unlawful non-citizens and those unlawful non-citizens in immigration detention who have applied for asylum protection. The nature of the changes proposed in the Bill would impact on the Government's ability to effectively mitigate risks as they have a very broad application. The proposed amendments would not apply only to asylum seekers. The proposals may

also create an incentive for any unlawful non-citizen who is placed in immigration detention, to claim asylum if still possible. This would have a significant impact on departmental resources and on genuine asylum seekers, particularly relating to the length of time to process applications.

First asylum seeker principle

The first principle states that immigration detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of that detention, including the appropriateness of both the accommodation and the services provided, must be subject to regular review.

The Government's position is that immigration detention (including of individuals claiming protection) is neither unlawful nor arbitrary per se under international law. Article 9(1) of the ICCPR provides that *"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law*".

Clearly, the Government accepts that arbitrary detention is unacceptable. Whilst continuing immigration detention may become arbitrary after a certain period of time without proper justification, the determining factor is not the length of detention, but whether the grounds for the detention are justifiable. A principle that prohibits detention without an end date would effectively end the policy of mandatory detention, unless visas were granted to all detainees after a set period of time.

Current Government policy stresses the role of detention as an essential component of strong border control and sets out the three groups subject to mandatory detention. The proposed asylum seeker principles do not consider this context, and in stating simply that immigration detention that is 'indefinite or otherwise arbitrary' is unacceptable creates interpretative issues. Taken out of context, the wording implies wrongly that detention with no fixed cessation date is necessarily arbitrary detention.

Immigration detention is not 'indefinite' because subsection 196(1) of the Act sets out the events that bring detention to an end. However, a court may interpret this provision in a way that means that where there is no clear timeframe in which the ceasing events will occur, the detention falls foul of this principle. Should the courts interpret the principle in this way, it would impose a responsibility beyond Australia's international obligations.

The Department's policy and procedures are consistent with the principle that the appropriateness of immigration detention and of the services available and conditions are subject to regular review. Further, the current policy is also consistent with the principles relating to the fair and reasonable treatment of detainees, and ensuring the inherent dignity of detainees. However, the impact of enshrining such general principles in legislation is of concern. For example, it is unclear how broadly a court would interpret the words, "last resort" in the asylum principle relating to detention in an immigration detention

facility rather than in immigration detention centre as it is currently phrased in the Act.

Enshrining such unspecific principles in legislation exposes them to having their meaning determined by the courts creating scope for unintended consequences.

Second asylum seeker principle
The second proposed principle states that detention in immigration detention facilities should be a last resort, which is a policy that already in place in terms of immigration detention centres.

Currently, children are not placed in immigration detention centres. While placement of minors and their accompanying families in community-based detention remains the Department's priority, there will be occasions where minors will be accommodated in low-security facilities, such as immigration transit accommodation and immigration residential housing. This could be when appropriate community accommodation is not immediately available or where it is in the best interests of the child to remain with family members who must be detained.

The term 'detention facilities' is not defined in the Bill, so it is not clear if it includes the concept of residence determination as specified in section 197AB of the Act and which is included in the definition of immigration detention as defined in subsection 5(1) of the Act. If it is interpreted widely and does cover residence determination, then community detention is not being acknowledged as a substantially different form of detention and its arrangements may become unworkable under the proposed principle, particularly when taken in combination with other proposed amendments.

Third asylum seeker principle
The third asylum seeker principle states that people in immigration detention must be treated fairly and reasonably within the law.

Immigration detention is an administrative arrangement. Government policy requires that people in immigration detention be treated fairly and reasonably within the law. This policy already applies not only to Commonwealth officers, but also people providing services to people in immigration detention on behalf of the Commonwealth.

The fair and reasonable treatment of people in immigration detention is subject to a range of Commonwealth legislation and other obligations including:

- *Age Discrimination Act 2004;*
- *Disability Discrimination Act 1992;*
- *Human Rights and Equal Opportunity Commission Act 1986;*
- *Immigration (Guardianship of Children) Act 1946;*
- *Occupational Health & Safety (Commonwealth Employment) Act 1991;*

- *Racial Discrimination Act 1976;*
- *Sex Discrimination Act 1984; and*
- *Convention on the Rights of the Child.*

It is unclear how a court would interpret an additional over-arching requirement to treat people in immigration detention "fairly and reasonably" as proposed in this principle. This potentially creates an additional role for courts to oversee immigration detention that goes beyond the existing requirements and duty of care that would be created by the implementation of this principle.

Fourth asylum seeker principle
It is Government policy that the living conditions in immigration detention must ensure the inherent dignity of the human person, which is also the fourth proposed principle in the Bill.

Conditions in detention include people being provided access:

- to visitors, as well as phones, computers, internet, fax machines and mail services;
- to culturally appropriate programs and activities including religious activities and the provision of culturally appropriate food; and
- under the individual allowance program, to points that can be exchanged for small personal items at the facility shop or for special purchases.

Children also have access to school to meet their educational needs.

To ensure that living conditions in immigration detention ensure the dignity of detainees, the operations of immigration detention are continually subject to scrutiny from external agencies such as:

- the Australian Human Rights Commission;
- the Commonwealth Ombudsman;
- the United Nations High Commissioner for Refugees;
- the Council for Immigration Services and Status Resolution; and
- the Detention Health Advisory Group.

The specification in legislation that immigration detention must ensure the "inherent dignity" of persons in immigration detention, without providing a definition of the term, creates a broad imperative to courts and the Department which is open to varying interpretations. By not establishing a threshold or definition, it also means that the legislation could create a much higher standard relating to the care of persons in immigration detention than our international obligations currently require.

Responsibilities of decision makers
Subsection (4) in Part 1 of the amendments requires *any* person making *any* decision to have regard to the asylum seeker principles. This would mean, effectively, that an unsuccessful General Skilled Migration visa applicant may seek to challenge the decision on the grounds that the decision maker failed to take into account the asylum seeker principles as a relevant consideration

as to whether or not the applicant met the refugee definition under the Refugee Convention even though the decisions are unrelated.

In addition, the proposed legislation refers to refugees and asylum seekers as if the terms are inter-changeable. A distinction should be made between those who claim asylum and those who are found to be refugees under the Refugee Convention. Refugees are those who meet the definition of Article 1 of the Refugee Convention:

> *"A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."*

3.2 Part 2 – Amendments facilitating judicial review of detention decisions

Proposed amendments
In summary, Part 2 of the Bill ends Australia's mandatory immigration detention policy and introduces judicial review of detention decisions.

There are potential constitutional issues with the proposed amendments facilitating judicial review of detention decisions, as these provisions seem to give executive powers to the judiciary.

The Bill proposes to amend the mandatory provisions to detain unlawful non-citizens under subsections 189(1) and (2) of the Act. Section 195B in Part 2 of the Bill proposes that an officer (who detains a person detained under section 189) must, as soon as practicable after detaining the person, set out in writing (and provide a copy of the information to the detainee) the circumstances of the detention; the reasons for the decision to detain the person; and the grounds for the decision to continue to detain the person. A person detained under section 189 may then apply to a magistrate for an order for release from detention because there are no reasonable grounds to justify the officer's decision to detain the person; or the officer's decision to continue to detain the person.

Subsection 195B(4) in Part 2 proposes that 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:

- an order that the person must be released; or
- an order that the person must be granted a visa, including a bridging visa, subject to any conditions the magistrate considers appropriate.

Subsection 195B(5) of the Bill would amend the Act so that 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.

Section 195C of the Bill proposes for an order for continued detention where the detention of a person exceeds 30 days. If the magistrate is satisfied that further detention is justified, the magistrate may make an order to release the person from detention pursuant to subsection 196(1)[1] of the Act or a specified date. If the magistrate is not satisfied that further detention is justified, the magistrate may make any order the magistrate sees fit pursuant to paragraph 195B(4)(a) and (b) in Part 2.[2]

Subsection 195C(5) of the Bill provides that a decision to detain a person under section 189, or to continue to detain a person under section 189, is not a privative clause decision. In that regard, this provision is inconsistent with the Bill's proposed repeal of the privative clause provision in the Act (see section 3.4 below).

Problems with the proposed amendments facilitating judicial review of detention decisions

An important clarification that should be made in reference to the proposed Bill is that the Australian Government does not subject people to mandatory detention because they seek asylum. An asylum seeker is only placed in immigration detention if they fall within one of the three groups subject to mandatory detention under Government policy. There are also detainees who are not asylum seekers.

The proposed changes to section 189 to make immigration detention optional, and the proposed provisions under section 195B that provide a more involved notification process for detaining people and a judicial mechanism to enable the client to seek release, may impact on current arrangements for the removal of persons who arrive at air and seaports and who do not meet Australia's immigration clearance requirements.

The provision for mandatory detention as part of the removal process assists to ensure that persons who do not have an entitlement to enter Australia, including for reasons such as the provision of fraudulent documents and where there are significant character concerns, are managed in a manner that enables timely removal from Australia whilst mitigating the risk to the community that may be posed through the person's immediate release. The summary removal arrangements already contain administrative steps to identify possible instances where international protection obligations may arise. They are a key component of a range of initiatives designed to maintain

[1] Subsection 196(1) of the Act provides that *an unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is: (a) removed from Australia under section 198 or 199; or (b) deported under section 200; or (c) granted a visa.*

[2] Subsection 195B (4) of the Bill provides that *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.*

Australia's border integrity and serve as a deterrent for persons intending to circumvent Australia's immigration requirements.

The proposed amendments would restrict the Government's ability to manage the range of clients and any health, identity and security risks to the community. Of significance in the proposed amendments, a court order to release an unlawful non-citizen does not appear to be time limited, and there is no provision enabling the Department to revisit the matter if the client's circumstances change later, such as if they present an unacceptable risk to the Australian community.

Judicial review

Under the discretionary detention framework proposed by the Bill, a decision to detain and a decision to *continue* to detain a person beyond 30 days will become subject to judicial review. The scope of review would extend to concepts of reasonableness, appropriateness and necessity of detention or continued detention. This means that under the proposed Bill, judicial review of detention would no longer be based on lawful status alone but on much broader concepts that are open to subjective interpretation.

A discretionary detention framework and corresponding judicial review as envisaged by the Bill would have the following impact:

- fundamental changes to the structure of Australia's migration system by vesting the Federal Magistrates Court with the power to order that the person must be released from detention *or* an order that the person must be granted a visa (including a bridging visa, subject to any conditions the magistrate considers appropriate). This would effectively allow unlawful non-citizens to be released into the community without a visa. This would undermine the current visa system, where applicants must meet eligibility criteria for grant of a visa, with the only exemption being that the Minister may intervene to grant any visa. This change would arguably give executive power to the judiciary, and would have far reaching unintended consequences;

- cost implications of higher volume of litigation and associated costs of arranging for detainees to attend hearings;

- release of detainees into the community before completion of the processing of their protection claims, security and character checks, and protection visa claims. This would include the release of persons of character concern (as occurred in 2003 when a loophole allowing visa cancellees to be released by courts was discovered). These outcomes would be particularly likely, if average processing times increase due to a large caseload;

- flow on effects on relevant service delivery agencies, such as Department of Families, Housing, Community Services and Indigenous Affairs, Centrelink, Department of Education, Employment and Workplace Relations; and

- increase in demand on the Federal Magistrates Court and the Federal Court of Australia, and, concurrently, an increase in demand for legal aid. This would require the allocation of additional resources that is likely to be proportionate to the resources currently sought to overcome the logistical and procedural challenges presented by an increased caseload of judicial review applications since the High Court's decision in *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia [2010]* HCA 41 (Plaintiff M61).

The proposed amendments provide the Federal Magistrates Court with the power to:

- review the merits and the reasonableness of detention;
- order the release from detention where the magistrate finds that there are no reasonable grounds to justify the officer's decision to detain or to continue to detain the person;
- order the release from detention where the magistrate finds that it is not appropriate for a person to continue to be detained; and
- order that a person must be granted a visa, including a bridging visa, subject to any conditions the magistrate considers appropriate.

It is unclear what rights of review or appeal may flow from an adverse determination by a magistrate in the applications entertained under the Bill. It is further noted that the scope of orders a magistrate may make upon application is very broad and likely to involve complex consideration and time necessary to determine an application.

These amendments also change the current regulatory system for imposing visa conditions as prescribed by the *Migration Regulations 1994*. The Bill would in effect vest the courts with the power to create new conditions on a case by case basis. Where a magistrate finds that there are no reasonable grounds to detain a person or there are no reasonable grounds and it is not appropriate to continue to detain a person, the magistrate may order the release of a detainee into the community without a visa or the magistrate may order that the person be granted a visa. These proposed amendments may infringe the constitutional separation of powers doctrine by purporting to empower the court to exercise an administrative power.

Furthermore, if detention were to be characterised as a punitive measure, Australia could be in breach of Article 31 of the Refugee Convention which prohibits the imposition of penalties on account of the illegal entry or presence of asylum seekers.

The provisions under Part 2 of the Bill relating to release from detention are broad and ill-defined with respect to the information an officer is required to provide to a person as soon as practicable after exercising their discretion. To expect an officer to provide reasons for the decision to detain the person and the grounds for the decision to continue to detain the person whilst also progressing a visa application and undertaking all the requisite health and

security checks within a 30 day period is in conflict with the processing times and resources available to the operations of the Department.

Also, the provisions in Part 2 of the Bill would result in potentially all detainees bringing an application to the courts for an order for release, in addition to challenging the basis for their detention on the grounds of the proposed section 4AAA.

It is not clear whether detainees would continue to remain in detention pending the outcome of their judicial review/litigation procedures. However, the additional layer of judicial review proposed in Part 2 of the Bill would increase the burden on the judiciary.

3.3 Part 3 – Amendments repealing excised offshore places provisions

Proposed amendments
The Bill proposes repealing all references to excision in the Act, including references to an 'offshore entry person', and the proposal is not compatible with the Government's current policy in relation to IMAs.

Problems with repealing excision provisions
The package of excision legislation, comprising the *Migration Amendment (Excision from the Migration Zone) Act 2001*, the *Migration Amendment (Excision from the Migration Zone) (Consequential Provisions) Act 2001* and the *Border Protection (Validation and Enforcement Powers) Act 2001*, was introduced to establish excision and deal with people who arrive unlawfully at one of the territories defined as an excised offshore place. The amendments were intended to create disincentives to unauthorised arrival in Australia and to ensure that the integrity of Australia's maritime borders and refugee program was maintained. The then Minister made it clear that Australia would continue to honour international protection obligations, but that the Refugee Convention does not confer a right on asylum seekers to choose their country of asylum and to abandon or bypass protection opportunities.

In 2008 the Government decided to maintain current arrangements in line with its policy commitments to excise certain places from the migration zone for border security purposes.

A repeal of Australia's offshore excision policy would re-create the situation previously, where anyone landing unlawfully in Australia, including at one of Australia's remote territories, would be able to apply for a Protection visa.

3.4 Part 4 – Amendments restoring fair process and procedural fairness

Proposed amendments
The proposed changes will permit procedural requirements for decision makers to be supplemented by common law requirements developed through judicial review, and remove the judicial review scheme for migration litigation found in Parts 8 and 8A of the Act.

The Explanatory Memorandum claims that repealing the Codes of Procedure and the judicial review provisions of the Act will 'restore' asylum seekers' rights to procedural fairness. To that end, Part 4 of the Bill seeks to repeal a number of provisions that were enacted with bipartisan support in 2001 and 2005.

Problems with the proposed amendments relating to fair process and procedural fairness
The proposed amendments would affect all migration decisions; whether asylum seeker or the general migration or family programs.

The Bill removes efficiencies and certainty in relation to the processes for decision making and for the review of migration decisions, and does not contain measures to manage the costs, delays and inefficiencies that will result.

Repeal of the exclusion of common law procedural fairness
The Codes of Procedure were intended to enable decision-makers and tribunals to deal with visa applications, visa cancellations and applications for merits review fairly, efficiently and quickly, by forming an exhaustive statement of the procedures that decision makers must follow. It was also intended that these codes would eliminate the legal uncertainties that flow from the non-codified common law principles of natural justice while retaining fair, efficient and legally certain decision-making procedures.

The Codes of Procedure incorporate the natural justice hearing rule, requiring delegates to afford an applicant the opportunity to comment on any adverse information (other than non-disclosable information) before the delegate, prior to a decision being made.

The Codes of Procedure govern processes for a very large number of administrative decisions, providing certainty to clients about the processes that decision makers will follow. It is unclear how removing this certainty, and incurring the necessary costs and delays associated with introducing uncertainty, will quantifiably enhance procedural fairness.

Judicial review provisions

Part 8 of the Act provides, amongst other things, exclusive jurisdiction to the federal courts to deal with migration matters who are also provided with the same jurisdiction as the High Court under paragraph 75(v) of the Constitution. The provisions do not in effect restrict the ability of individuals to seek judicial review of decisions about themselves.

The proposed amendments would create inefficiencies and jurisdictional issues that are contrary to the Government's policy to improve the overall efficiency of migration litigation.

Further, the Bill does not provide any alternative to the inefficiencies that it creates, and is therefore not sufficiently developed to justify consideration by Parliament. Some of the efficiencies this Bill would remove include:

- incentives for applicants refused a visa by a delegate to utilise merits review mechanisms prior to seeking judicial review; applicants could seek judicial review of that decision in the Federal Court without first needing to seek merits review;

- the harmonisation of the jurisdiction of the Federal Magistrates Court and the Federal Court with the jurisdiction available under section 39B of the *Judiciary Act* and paragraph 75(v) of the Constitution (subsection 476(1) and subsection 476A(2) of the Act). This prevents individuals from appealing the same decision under both the common law and a statutory regime.

- channelling first instance judicial review applications to the Federal Magistrates Court by harmonising the jurisdiction of the Federal Magistrates Court with that of the High Court under paragraph 75(v) of the Constitution, and limiting the jurisdiction of the Federal Court to appeals from the Federal Magistrates Court;

- single judge hearings of appeals from the Federal Magistrates Court in the Federal Court;

- the use of time limits (which are extendable in the interests of justice) to encourage litigation to be lodged in a timely way and also discourage repeat litigation. We note that current time limits under the AD(JR) Act are more flexible than those under the Act;

- the limitation on standing to a person who is the applicant or sponsor who is the subject of the relevant decision (section 479 of the Act). These amendments were a result of allegations from clients in the past that agents have lodged applications on their behalf without authorisation; and

- provisions that facilitate the streamlining of processes or allow summary dismissal of unmeritorious claims.

Repeal of privative clause

The changes seem to be based on a mistaken belief that the privative clause actually operates to restrict review, which the High Court made clear was not the case in its decision in *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA2. In practice there is little (if any) difference between the grounds of review under paragraph 75(v) of the Constitution, section 39B of the *Judiciary Act*, and judicial review under Part 8 and Part 8A of the Act. It is unclear, therefore, what the rationale for removing the privative clause is, and unlikely that this will achieve the stated objective of the proposed Part 4. Further, it is unclear that it is an appropriate time to move to a new judicial review scheme without due regard to all the implications of doing so, given that changes to migration review schemes tend to be accompanied by an increase in litigation applications.

Finally, the Department notes that the Administrative Review Council is currently conducting an inquiry into the federal system for judicial review of administrative action and preparing advice on possible future directions and models for judicial review. This encompasses an examination of judicial review in the migration litigation context. It may be premature to pursue these amendments prior to the Government's independent expert Council on administrative law completing its examination.

3.5 Part 5 – Amendments relating to the duration of detention

Proposed amendments

Part 5 of the Bill repeals subsections 196(4), (4A), (5), (5A), (6) and (7) of the Act. Currently, section 196 provides that unlawful non-citizens must be kept in immigration detention until they are:

- removed from Australia under section 198 or section 199 of the Act (paragraph 196(1)(a));
- deported under section 200 (paragraph 196(1)(a)); or
- are granted a visa (paragraph 196(1)(c)).

The Explanatory Memorandum does not provide any rationale for this amendment and only states that *"this part repeals the subsections relating to indefinite detention*".

Problems with the proposed amendments to the duration of detention

The provisions sought to be removed were passed by Parliament in 2003 to overcome a loophole in the mandatory detention regime that allowed a person whose visa was to be cancelled for character reasons to be released from detention. In the absence of any rationale for the repeal of these provisions, the proposed amendments present an unacceptable risk to the Australian community.

Schedule 2 - Amendment of the *Administrative Decisions (Judicial Review) Act 1977*

Proposed amendments
The Bill proposes repealing paragraph (da) of Schedule 1 of the AD(JR) Act. Schedule 1 of the AD(JR) Act specifies classes of decisions that are not decisions to which the AD(JR) Act applies, and paragraph (da) specifies a privative clause decision within the meaning of subsection 474(2) of the Act.

Problems with amending the AD(JR) Act
This amendment would result in the bifurcation of the judicial review process allowing applicants to seek review both at common law (pursuant to paragraph 75(v) of the Constitution), and on the grounds set out in the AD(JR) Act.

The ARC is currently exploring in a considered way the desirability or utility of reforms in relation to judicial review of administrative decisions. In particular, one of the questions raised by the ARC in its current inquiry into federal judicial review, relates to when, and for what categories of decisions, exclusion from general statutory review schemes can be justified. It cannot be excluded that the procedural fairness rules at common law and under the Code of Procedure could in the future be brought together under a single system of judicial review under the AD(JR) Act.

4. SUMMARY

The reach of the proposed amendments is much wider than the current policy framework and removes the structural integrity of the Act. Further, the Bill undermines the procedural efficiencies and certainty in relation to decision making and the review of migration decisions. For the reasons discussed above, the Department is of the view that the proposed amendments would, in effect:

- render Australia's immigration detention regime unworkable through the introduction of asylum seeker principles that are expressed in broad terms and open to interpretation by the courts;

- extend the judicial review of detention to broad concepts that are open to subjective interpretation;

- allow a person in immigration detention to be released into the Australian community for an indefinite period of time without a visa (including persons detained under the character provisions), undoing the fundamental philosophy of the Act of a universal visa system, requiring all non-citizens to hold a valid visa to enter and remain in Australia;

- vest the judiciary with executive powers;

- increase demand on the judiciary, legal aid commissions and the community legal sector;

- strain existing judicial and court administration resources;

- enable any person who enters the migration zone, even at an excised offshore place, to apply for a Protection Visa; and

- apply to all migration decisions and do not contain measures to manage the costs, delays and inefficiencies created by the amendments.

The Department strongly recommends that the proposed amendments are not accepted in their present state.