Dissenting report by Mr Petro Georgiou MP, Senator Dr Alan Eggleston and Senator Sarah Hanson-Young

1.1 As the report indicates, 'The Committee noted the strong evidence received that the lack of merits and judicial review for the decision to detain has in the past meant that people have been held wrongfully, unlawfully and for a period of years on the basis of a contested departmental decision'.[1] It is also the case that the lack of merits and judicial review has meant that many men, women and children have been held not unlawfully but unnecessarily and unreasonably.

1.2 The Committee majority believe that given factors such as 'the potential impact of lengthy detention on a person's mental health and the legacy of maladministration… there is justification for access to an independent tribunal and subsequently, if necessary, review by the courts of the tribunal's decision' after a person has been detained for 12 months.[2]

1.3 Under this framework, Department of Immigration and Citizenship officials will continue to have power to decide whether it is necessary and reasonable to detain people for 6 months without any external scrutiny of their decision whatsoever.

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1 Paragraph 4.141.

2 Paragraph 4.142.

1.4 After 6 months, the Ombudsman will review the detention decision but can offer only advice which is non-binding.

1.5 We strongly disagree that public servants should have such unfettered power to detain for 12 months without independent external scrutiny which can ensure the release of people whose detention is assessed as being unnecessary with respect to the specified criteria.

1.6 If the detention criteria are enshrined in law as the Committee recommends (Recommendation 12), a detained person should not be denied the right for 12 months to have a court examine whether the executive's decision to detain him or her is in accordance with the law.

1.7 This is a grossly excessive period.

1.8 Evidence presented to the inquiry was that detention can be a very damaging experience for certain people well before 12 months has elapsed. For example, psychologists Guy Coffey and Steven Thompson who have had clinical contact with several hundred detained or formerly detained people advised as follows:

> For some vulnerable asylum seekers, particularly but not exclusively with histories of torture and trauma or imprisonment, psychological deterioration has occurred almost immediately. We have observed individuals who have developed severe levels of depression, anxiety and the activation of pre-migration related post traumatic reactions very soon after being detained. Although the number of asylum seekers detained is now much lower than previously, and they are generally detained for shorter periods, we are still observing very adverse reactions across the course of the first several months of detention. The authors and our colleagues have assessed a series of asylum seekers in the past 6 months who have histories of trauma and loss and who have deteriorated significantly within a month or two of being detained.[3]

1.9 Clearly it is important that the decision to detain is subject to 'a credible system of accountability and review'[4] from an early stage.

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3 Coffey G and Thompson S, submission 128, pp 4-5.

4 Paragraph 4.6.

1.10 The Committee's recommendations relating to reviews by DIAC and the Commonwealth Ombudsman will improve the current framework. However, they fall well short of ensuring rigorous and timely assessment of whether detention is necessary in accordance with the new policy.

1.11 Significant weaknesses remain in both the DIAC and Ombudsman's review processes, as outlined below.

Internal review by DIAC

1.12 One of the prominent features of the new detention policy announced by the Minister for Immigration and Citizenship in July is that a senior DIAC officer is required to review the necessity for detention after people have been detained for 3 months.

1.13 The majority of the Committee acknowledges that in view of the 'chequered history' of DIAC 'it is right for there to be concerns regarding the integrity of a three-month detention review being conducted by and reporting to the very agency responsible for the initial decision to detain…'[5]

1.14 The Committee seeks to address these concerns by recommending that:

- DIAC publish the 'template' that will be used to conduct the review; and
- the review report be provided to detainees and their advocates.

1.15 These changes will not alleviate concerns about the integrity of reviews that are conducted internally.

1.16 The template may be excellent but that will not provide assurance of the quality of reviews. Providing reports to detainees does not constitute an effective mechanism of accountability.

1.17 Detainees – who may have little or no English fluency - may not have qualified and experienced advisors who can assess whether the reviews were conducted properly and advise on possible courses of action if they are concerned about the conduct and conclusions of reviews.

5 Paragraph 4.30.

1.18 There is no mechanism to ensure that reviews are conducted in a timely manner, so people do not remain in detention simply because their cases have not been examined as required by departmental standards. This is not a fanciful concern: as the report notes, each detention case is currently required to be reviewed every 28 days by the Detention Review Manager and a Case Manager. However, in 2007-08 around one quarter of instances of detention were not reviewed within that period.

Review by the Ombudsman

1.19 The review of cases of people detained for longer than 2 years by the Ombudsman was instituted in 2005. It has been valuable and undoubtedly led to the release of people who should not have been detained for extended periods or perhaps at all.

1.20 Under the new system the Ombudsman has agreed to conduct six month reviews. This may not ensure expeditious consideration of the situations of people detained for that length of time. The Ombudsman's reviews of people detained for longer than 2 years have commonly taken months to be finalized.

1.21 We support the recommendations that six month review reports should be tabled and that the Minister should explain why Ombudsman's recommendations were accepted or rejected. The impact of these changes may be limited. The recommendations will still be unenforceable and their influence may be weak: fewer than half of the recommendations relating to long-term detainees have been accepted. It remains to be seen whether requiring the Minister to explain rejections makes acceptance more likely.

Compliance with international human rights obligations

1.22 The Department of Immigration and Citizenship acknowledges that immigration detention is subject to obligations under international law and conventions to which Australia is a party, including the International Covenant on Civil and Political Rights (ICCPR).[6]

6 Department of Immigration and Citizenship website, http://www.immi.gov.au/managing-australias-borders/detention/regulations/legislation-conventions.htm.

1.23 The issue of whether Australia's immigration detention system complies with these obligations has been the subject of considerable contention for over a decade.

1.24 When the Minister for Immigration and Citizenship announced the new immigration detention policy on 29 July 2008, he stated that the values 'honour our international treaty obligations'. According to the Minister:

> Enormous damage has been done to our international reputation. On 14 occasions over the last decade, the United Nations Human Rights Committee made adverse findings against Australia in immigration detention cases, finding that the detention in those cases violated the prohibition on arbitrary detention in article 9(1) of the International Covenant on Civil and Political Rights.[7]

1.25 The specific concern of the UN Human Rights Committee to which the Minister was referring is that the Migration Act permits non-citizens to be detained simply if they do not have a valid visa, without reference to whether it is reasonable to do so because they pose a risk to the community.

1.26 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.[8]

1.27 The consequence is that Australian law does not provide the protection from arbitrary detention which is an obligation under the ICCPR. As the Human Rights and Equal Opportunity Commission explained in its submission:

> Judicial oversight of all forms of detention is a fundamental guarantee of freedom and liberty from arbitrariness (ICCPR article 9(4)). However this right is not guaranteed under the Migration Act in respect of the right to judicial review of

7 Article 9(1) provides that, 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.

8 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'.

> decisions to detain unlawful non-citizens under s.189. The courts are precluded from authorising the release from detention of unlawful non-citizens detained under ss 189 and 196 of the Migration Act, unless their detention under these provisions contravenes domestic law. The courts have no authority to order that a person be released from immigration detention on the grounds that the person's continued detention is arbitrary, in breach of Article 9(1) of the ICCPR. This is because under Australian law it is not unlawful to detain a person (or refuse to release a person) in breach of article 9(1) of the ICCPR.[9]

1.28 We are very doubtful whether denying someone the right to ask a court to review the merits of their detention for as long as 12 months will honour our international treaty obligation not to arbitrarily detain people.[10]

Conclusion

1.29 Many submissions strongly argued that the merit of detention decisions should be subject to independent oversight without indicating a view as to when that should be available as a right or should occur as a matter of course.

1.30 Their tenor did not suggest that they would have considered it reasonable to preclude merits and judicial review for 12 months. We do not agree that such a system will 'ensure that public confidence is restored in Australia's immigration detention system' as the majority of the Committee contend.[11]

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9 Human Rights and Equal Opportunity Commission, submission 99, p 13.

10 Note that Article 9(4) of the ICCPR provides that a detained person must be entitled to take proceedings before a court in order that the court may decide ***without delay*** on the lawfulness of detention and order release if the detention is not lawful. While the jurisprudence of the UN Human Rights Committee (HRC) concerning the time before detention must be reviewed relates primarily to Article 9(3), which requires that the lawfulness of arrest on a criminal charge be ***promptly*** reviewed by a court or tribunal, it may offer a good indication of the Committee's approach to the issue. In a General Comment on Article 9(3) the HRC has stated that 'delays must not exceed a few days.' (*General Comment No.8: Right to liberty and security of persons (Art.9)*, 30/6/82, [2]). The European Court of Human Rights has considered there to be a breach of the analogous right to personal freedom under Article 5 of the *European Convention on Human Rights* in cases where the length of detention before a person was brought before a judge was as short as 4 days and 6 hours: *Brogan v United Kingdom*, (1988) 11 EHRR 117.

11 Paragraph 4.143.

1.31 We believe that the government should consider a less draconian approach that would be far more in accord with the evidence the Committee received and Australia's human rights obligations. In particular, we recommend that:

- 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.
- 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'.

Mr Petro Georgiou MP

Senator Dr Alan Eggleston

Senator Sarah Hanson-Young