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Migration Amendment (Immigration Detention Reform) Bill 2009

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Law and Bills Digest Section

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Migration Amendment (Immigration Detention Reform) Bill 2009

Date introduced: 25 June 2009

House: Senate

Portfolio: Immigration and Citizenship

Commencement: Sections 1 to 3 of Schedule 1 commence on the day of Royal Assent. All other provisions commence on a day to be fixed by Proclamation or six months after the day of Royal Assent which ever is the sooner.

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

The purpose of the Migration Amendment (Immigration Detention Reform) Bill 2009 (this Bill) is to amend the *Migration Act 1958* (the Act) to create more flexibility in managing the detention of 'unlawful non-citizens'. Explicitly, it restricts mandatory detention to a specific category of people, introduces express discretionary detention for other 'unlawful non-citizens', creates temporary community access permissions (TCAPs) and removes the requirement that only the Minister for Immigration and Citizenship (the Minister) can personally grant residency determinations.

Background

Basis of policy commitment

In the lead up to the 2007 federal election the Australian Labor Party (ALP) set out its national policy platform. In relation to the detention of asylum seekers, the platform relevantly stated:

> Detention of asylum seekers should only be used for health, identity and security checks. Children and family groups should initially be placed under supervision within the community. In other circumstances, detention would remain mandatory for the duration of these initial check [*sic*].
>
> Conditions of detention must be humane and appropriate to the needs of asylum seekers, with appropriate alternatives to detention centres made to meet the needs of unaccompanied children and family groups.

> The length and conditions of detention must be subject to review and detention centres managed by the public sector.[1]

The ALP also 'went to the last election with a commitment to maintain a system of mandatory detention and the excision of certain places from the migration zone', a policy which it has consistently asserted, especially in the debate surrounding this Bill.[2]

However, since forming Government, the ALP has sought to significantly reform immigration detention to ensure a fairer, more humane and effective system.[3] To this end, the Government has (amongst other things):

- introduced its 'New Directions in Detention' policy (discussed in further detail below),
- introduced legislation to remove the requirement that certain persons held in immigration detention be liable for the costs of their detention;
- allocated $186.3 million in the 2009-10 budget to redevelop Sydney's Villawood Immigration Detention Centre;
- allocated $77.4 million in the 2009-10 budget to implement initiatives to manage people in the community to an immigration outcome through early intervention, e.g. Community Care Pilot and Community Status Resolution Trial;
- removed the 45-day rule for certain bridging visa holders which prevented some bridging visa holders, including asylum-seekers from being given permission to work; and
- introduced this Bill which it asserts will implement or give legislative effect to the New Directions in Detention policy'.[4]

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1. Australian Labor Party, *2007 Policy Platform and Constitution*, Chapter 13: Respecting Human Rights and a Fair Go for All, paragraph 153, viewed 27 July 2009, http://pandora.nla.gov.au/pan/22093/20071124-0102/www.alp.org.au/download/now/2007_national_platform.pdf
2. C Evans, 'New Directions in Detention, Restoring Integrity to Australia's Immigration System', 29 July 2009, p. 2, viewed 12 August 2009 http://www.chrisevans.alp.org.au/news/0708/immispeeches29-01.php
3. P Wong, 'Second reading speech: Migration Amendment (Immigration Detention Reform) Bill 2009', Senate, *Debates*, 25 June 2009, p. 17.
4. P Wong, 'Second reading speech, p.1; Explanatory Memorandum, Migration Amendment (Immigration Detention Reform) Bill 2009, p. 1. Proposed changes to the Migration Regulations 1994 are also envisaged to give effect to the New Directions in Detention policy though details of these are yet to be made available: P Wong, Second reading speech, p. 17.

New Directions in Detention policy

Key immigration detention values

On 29 July 2008 the Minister gave a speech at the Australian National University (ANU) entitled '*New Directions in Detention, Restoring Integrity to Australia's Immigration System*'. In this speech, the Minister listed seven 'key immigration detention values' (detention values) which would 'inform all aspects of the Department's immigration detention services'. They included:

> 1. Mandatory detention is an essential component of strong border control.
>
> 2. To support the integrity of Australia's immigration program three groups will be subject to mandatory detention:
>
> > a. all unauthorised arrivals, for management of health, identity and security risks to the community;
> >
> > b. unlawful non-citizens who present unacceptable risks to the community; and
> >
> > c. unlawful non-citizens who have repeatedly refused to comply with their visa conditions;
>
> 3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC);
>
> 4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, will be subject to regular review;
>
> 5. Detention in IDCs is only to be used as a last resort and for the shortest practicable time;
>
> 6. People in detention will be treated fairly and reasonably within the law; and
>
> 7. Conditions of detention will ensure the inherent dignity of the human person.[5]

According to the Minister:

> The values commit us to detention as a last resort; to detention for the shortest practicable period; to the rejection of indefinite or otherwise arbitrary detention. In

5. C Evans, 'Fact sheet: Immigration Detention Values', undated, viewed 12 August 2009 http://www.chrisevans.alp.org.au/download/now/fact_sheets__immigration_detention_values.pdf

> other words, the current model of immigration detention is *fundamentally overturned* (emphasis added)'.[6]

Administrative implementation of the Government's detention values has reportedly been progressing since July 2008.[7]

Risk-based approach to detention

The Minister was of the view that taken cumulatively, the detention values 'embrace' a risk-based approach to the management of 'the immigration population'.[8] However, unlike the detention values which were clearly articulated and expressly endorsed by Cabinet, this risk-based approach is a little more ambiguous. Some key features were identified in the Minister's speech:

- people will be detained only if the need is established
- the key determinant of the need to detain a person in an immigration detention centre will be risk to the community
- the presumption will be that persons will remain in the community while their immigration status is resolved
- the Department will have to justify a decision to detain – not presume detention
- once [health, identity and security] checks have been successfully completed, continued detention while immigration status is resolved is unwarranted.[9]

The second reading speech of this Bill clarifies that the Government's approach is based on a 'risk management matrix' whereby the level of a person's restriction of liberty is directly commensurate with their assessed risk to the Australian community. Accordingly, only people considered to pose a *high* risk to the Australian community will be detained in an immigration detention centre. People generally assessed as posing an unacceptable risk to the Australian community (such as unauthorised arrivals) will similarly be assessed for the risk they pose and located within the 'detention network'[10] which could include being

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6. C Evans, 'New Directions in Detention, Restoring Integrity to Australia's Immigration System', pp. 3-4.
7. Department of Immigration and Citizenship (DIAC), Submission to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009*, 31 July 2009, p. 7. Specific details at Appendix 4 of the Committee's Report.
8. C Evans, 'New Directions in Detention, Restoring Integrity to Australia's Immigration System', p. 3.
9. C Evans, 'New Directions in Detention, Restoring Integrity to Australia's Immigration System', p. 3.
10. P Wong, Second reading speech, pp. 4–5.

detained in the community (community detention). This is significant because under this Bill, the categories of people to be subject to mandatory detention will either expressly be deemed to 'present an unacceptable risk to the Australian community' or will be considered to be a risk by virtue of failing to comply with immigration laws (which is considered to entail a risk to the Australian community).[11]

Significantly, the Department of Immigration and Citizenship (DIAC or the Department) notes that the Government's 'risk management approach is consistent with past approaches to the use of detention'.[12] However, this Bill does not embed the risk-based approach to detention in the Act. Nor does this Bill articulate what 'risk to the Australian community' might encapsulate, other than listing categories of people deemed to be so.[13] To this end, the Department appears to be adopting a broad interpretation ranging from risk to Australia's migration and entry programs to risk to public confidence in the Government's management of those migration programs.[14]

Excised offshore place

Though sometimes overlooked, in his speech outlining the Government's New Directions in Detention policy, the Minister also addressed how the new policy would affect people to be processed at an excised offshore place.[15] In brief:

- excision of offshore islands and non-statutory processing of persons who arrive unauthorised at an excised place will remain;
- such unauthorised arrivals will be processed on Christmas Island; and

11. P Wong, Second reading speech, p. 3.
12. DIAC, Submission to Senate Legal and Constitutional Affairs Legislation Committee, p. 7.
13. **Proposed paragraph 189(1A)(a)-(d)** provides that (amongst others) people who have had their visa cancelled or refused on 'character grounds' or on grounds relating to national security, or people who have overstayed their enforcement visa will 'present an unacceptable risk to the Australian community' for the purposes of subparagraph (1)(b)(i).
14. DIAC, Submission to Senate Legal and Constitutional Affairs Legislation Committee, p. 13.
15. 'Excised offshore place' is defined in existing section 5 of the Act to include the Territory of Christmas Island, Ashmore and Cartier Islands, the Territory of Cocos Islands and more. Section 7 provides that the Migration Act applies to prescribed territories, namely the Coral Sea Islands Territory, the Territory of Cocos (Keeling) Islands, the Territory of Christmas Island and the Territory of Ashmore and Cartier Islands. Subject to the Act, these territories are deemed to be part of Australia for the purposes of the Act and not to be a place outside Australia.

- asylum seekers will receive publicly funded advice and assistance, access to independent review of unfavourable decisions and external scrutiny by the Immigration Ombudsman.[16]

In this regard, this Bill does not propose to amend the Migration Act to create a statutory scheme for processing at excised offshore places or an independent merits review mechanism.

The second reading speech confirms that 'unlawful non-citizens, including offshore entry persons, in excised offshore places will continue to be subject to the existing detention and visa arrangements of the excision policy'.[17]

It remains unclear whether the detention *values* will apply to excised offshore places but it appears the amendments in this Bill that do not expressly exclude 'excised offshore places' will apply:

> The excised offshore places are under Australian jurisdiction and sovereignty and the Act applies to these places in all respects, other than extending the visa application process to unauthorised arrivals.[18]

Committee consideration

Committees that have inquired into this Bill

Senate Legal and Constitutional Affairs Legislation Committee

This Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 7 August 2009.[19] The timeframe in which to report was ultimately extended to 20 August 2009.[20] Details of the inquiry are available at the inquiry webpage. The Committee was chaired by Senator Patricia Crossin (Australian Labor Party) and the Deputy Chair was Senator Guy Barnett (Liberal Party).

The Committee received 53 submissions and held a public hearing in Sydney on 7 August 2009. The Committee report was subsequently completed on 20 August 2009 wherein it

16. C Evans, 'New Directions in Detention, Restoring Integrity to Australia's Immigration System'.
17. P Wong, Second reading speech, p. 12.
18. DIAC, 'Australia's Excised Offshore Places', Fact Sheet 81, 13 July 2009, viewed 23 July 2009, http://www.immi.gov.au/media/fact-sheets/81excised-offshore.htm
19. Senate Selection of Bills Committee, *Report no. 10 of 2009*, Commonwealth of Australia, Canberra, 25 June 2009, p.3.
20. K O'Brien, 'Committees: Legal and Constitutional Affairs Legislation Committee – Extension of time', Senate, Debates, 13 August 2009.

made eight recommendations to change this Bill (to be discussed in further detail below). Significantly, the Committee ultimately recommended this Bill be supported, subject to these recommendations. Of significance, particularly to people being processed at an excised offshore place, the Committee considered that 'it would be desirable for 4AAA to more closely reflect the detention values adopted by the Government, perhaps even to the extent of them being *directly replicated in the Bill as a statement of principle*'(emphasis added).[21] To this end it recommended that:

- '**the Government consider amending proposed section 4AAA of the Bill to more closely reflect its adoption of the Immigration Detention Values**'(recommendation 1) (emphasis added).[22]

Only two 'noteworthy features' of this Bill were identified by the Committee namely, the insertion of discretionary detention and provision for temporary community access permissions.[23] These features and other issues raised in the Committee report (including the Liberal Senators minority report) will be discussed in further detail throughout this Digest.

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills raised concerns about **proposed new section 194A (item 12)** which enables an authorised officer to grant a temporary community access permission. The Committee sought 'the Minister's advice on the level, position or qualifications of authorised officers who are expected to make decisions pursuant to proposed new section 194A'.[24] The Minister subsequently responded to the Committee's comments in a letter dated 18 August 2009 in which he stated:

> I would like to clarify that it is envisaged that the power to grant, vary or revoke a temporary community access permission will be used by senior officers within my

21. Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Immigration Detention Reform) Bill 2009*, p. 6.
22. Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Immigration Detention Reform) Bill 2009*, p. 6.
23. Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Immigration Detention Reform) Bill 2009*, Commonwealth of Australia, Canberra, August 2009, p.1.
24. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 9 of 2009*, p.54, viewed 14 August 2009 http://www.aph.gov.au/senate/committee/scrutiny/alerts/2009/d09.pdf

> Department who hold broad responsibility for oversight of case resolution and the management of immigration detention.[25]

Committees that have inquired into mandatory detention

Joint Standing Committee on Migration (2008/09)

On 5 June 2008 the Joint Standing Committee on Migration (JSCM) commenced a comprehensive inquiry into immigration detention in Australia.[26] The Committee received a total of 142 submissions and 29 supplementary submissions, held 12 public hearings across the country and conducted site inspections of detention facilities, including on Christmas Island. The first report of the JSCM entitled *criteria for release from detention* was tabled in Parliament on 1 December 2008 with bipartisan support. The Committee was chaired by Michael Danby MP (Australian Labor Party) and the Deputy Chair was the Hon Danna Vale MP (Liberal Party).

In its first report, the JSCM made 18 recommendations. In the context of this Bill it is worth noting that the JSCM commented that:

> Codification and legislative reform is important to all stakeholders in the immigration system, from DIAC to oversight bodies, lawyers and advocates. DIAC decision-makers, in particular, need clear guidance and processes in recognition of the principles to underpin detention decision-making.
>
> **The Committee is highly supportive of the announced values and considers they need to be reflected in Commonwealth law**. The Committee agrees that the Migration Act in its current form does not reflect the spirit nor provide any legal

25. Senate Standing Committee for the Scrutiny of Bills, *Report No. 9 of 2009*, 19 August 2009, pp.323-324, viewed 4 September 2009, http://www.aph.gov.au/senate/committee/scrutiny/bills/2009/b09.pdf

26. Terms of reference available at p. xv of the Committee Report, in Joint Standing Committee on Migration (JCSM), *Immigration detention in Australia – A new beginning: Criteria for release from detention*, first report of the inquiry, Commonwealth of Australia, Canberra, December 2008. The JSCM also conducted an inquiry into immigration detention practices in Australia commencing on 27 May 1993 taking into account detention arrangements that were to come into force on 1 September 1994 by virtue of the *Migration Reform Act 1992*. The Committee made a number of recommendations including that 'unauthorised border arrivals who claim refugee status be held in detention during the determination of their status, including during administrative processing, administrative review and any legal appeals, but that there be a capacity to consider release where the period of detention exceeds six months: JSCM, *Asylum, border control and detention*, Commonwealth of Australia, Canberra, February 1994, pp. 156-157.

> guidance on the implementation of the Minister's detention values (emphasis added).[27]

The JSCM subsequently recommended that:

- **the Migration Act be amended to enshrine in legislation the reforms to immigration detention policy** announced by the Minister; and also that the Migration Regulations and guidelines be amended to reflect these reforms (recommendation 12) (emphasis added); and
- **the immigration detention values and the risk-based approach to detention should apply to territories excised from the migration zone** (recommendation 9) (emphasis added).[28]

Other relevant recommendations of the Committee are discussed later in this Digest.

Though the Minister for Immigration and Citizenship instigated the inquiry into immigration detention,[29] the Government released its New Directions in Detention policy some five months prior to the release of the Committee's first report. Nonetheless, the second reading speech states that the Committee's first report was influential in the framing of the Government's policy.[30]

The second report of the JSCM entitled '*Immigration detention in Australia: Community-based alternatives to detention'* was tabled in Parliament on 25 May 2009. In brief, some of the more significant recommendations relevant to this Bill were that:

- the Australian Government reform the bridging visa framework to comprehensively support those released into the community, with appropriate reporting or surety requirements (recommendation 1);
- the Australian Government utilise the reformed bridging visa framework in lieu of community detention until a person's immigration status is resolved (recommendation 2);
- any case where a person held in some form of immigration detention is refused a bridging visa, the Australian Government require that:

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27. Joint Standing Committee on Migration (JSCM*), Immigration Detention in Australia - A new beginning: Criteria for release from detention*, first report of the inquiry, Commonwealth of Australia, Canberra, December 2008, pp.83–84.

28. Joint Standing Committee on Migration (JSCM), Immigration Detention in Australia - A new beginning: Criteria for release from detention, p. 60.

29. JSCM, Immigration Detention in Australia - A new beginning: Criteria for release from detention, p. 1.

30. P Wong, Second reading speech, p.18.

- clear and detailed reasons in writing are provided to the person being detained, and that
- the person has a reasonable time limit, up to 21 days, in which to seek merits review of that refusal, commensurate with those that apply to visa applicants in the community (recommendation 4).

The third and final report of the JSCM entitled '*Immigration detention in Australia: Facilities, services and transparency'* was tabled in Parliament on 18 August 2009. Of particular relevance to this Bill, the Committee recommended that:

- **detention in immigration residential housing should be used in lieu of detention in immigration detention centres provided that it is feasible** (emphasis added) (recommendation 4).

At time of writing the Government had not issued a formal response to these reports.[31]

Senate Legal and Constitutional References Committee (2006)

On 21 June 2005 the Legal and Constitutional References Committee commenced an inquiry into the administration and operation of the Migration Act. The inquiry primarily arose from the wrongful detention of Australian resident, Ms Cornelia Rau and the improper deportation of Ms Vivian Solon.[32] In the process of conducting its inquiry, the Committee considered recent changes to the mandatory detention policy such as the Migration Amendment Regulations 2005 (No.2) (SLI No. 76 of 2005) which created a new type of bridging visa known as the Removal Pending Bridging Visa, and the Migration Amendment (Detention Arrangements) Bill 2005 which sought to 'soften' the policy through a number of amendments that provided for:

> - Parliament's affirmation as a matter of principle that a minor shall only be detained as a measure of last resort;
>
> - an additional non-compellable power for the minister to specify alternative arrangements for a person's detention and conditions to apply to that person…
>
> - extending the ministers non-compellable discretionary powers to allow release from immigration detention, through the grant of a visa where the Minister believes this is appropriate, including a removal pending bridging visa; and
>
> - require DIMIA to report to the Commonwealth Ombudsman when a person has been detained for 2 years, and every 6 months thereafter that the person is in

31. The JSCM third report entitled '*Immigration detention in Australia: Facilities, services and transparency'* was tabled after this Bill was introduced.

32. Senate Legal and Constitutional References Committee, *Administration and Operation of the Migration Act 1958,* Commonwealth of Australia, Canberra, March 2006, p. 1.

> detention. The Ombudsman's assessment and recommendation are to be tabled in Parliament.[33]

These amendments are directly relevant to this Bill because the amendments proposed in this Bill 'build on these reforms'.[34]

The committee identified three key criticisms of mandatory detention, namely, its effectiveness, legality, and its indeterminate nature.[35] In acknowledging that there was 'persuasive argument that the deterrent effect is not as efficacious as once thought' and that 'Parliament did not intend to pass a law for the indefinite detention on non-nationals' it concluded that it was time to reconsider Australia's policy of mandatory detention for the duration of status determination.[36]

It subsequently made 3 recommendations of relevance to the present Bill:

- that the Migration Act be amended to permit the mandatory detention of unlawful non-citizens **for the purpose of** initial screening, identity, security and health checks and that the **initial period of detention be limited to up to ninety days** (emphasis added) (recommendation 45).
- the continuation of detention for a specified limited period should be subject to a formal process, such as the approval of a Federal Magistrate, on specified grounds and limited to situations where there is suspicion that an individual is likely to disappear into the community to avoid immigration processes; or otherwise poses a danger to the community (recommendation 46).
- release into the community on a bridging visa with a level of dignity that allows access to basic services, such as health, welfare, housing and income support or work rights (recommendation 47).[37]

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33. Senate Legal and Constitutional References Committee, *Administration and Operation of the Migration Act 1958*, p. 157.
34. P Wong, Second reading speech, p.4.
35. Note that this inquiry took place after the High Court ruled that unsuccessful asylum seekers who could not be removed to another country, despite their wish to leave Australia, could continue to be held in immigration detention indefinitely: *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664 and *Al-Kateb v Godwin* (2004) 219 CLR 562 (heard together).
36. Senate Legal and Constitutional References Committee, *Administration and Operation of the Migration Act 1958*, p. 173. See contrary view expressed in dissenting report by the then Government Senators at p. 349.
37. Senate Legal and Constitutional References Committee, *Administration and Operation of the Migration Act 1958*, p. 211.

The then Coalition-led Government did *not* accept recommendations 45 and 46 and noted recommendation 47. Most relevantly, in relation to recommendation 45 it stated that 'it is not appropriate to have an arbitrary time limit of up to ninety days established regardless of the circumstances of the case' and 'immigration detention centres are managed in accordance with the principles (amongst others) that "people are detained for the shortest practicable time, especially in facility-based detention…"'.[38] The former Government also noted that the policy of mandatory detention 'ensures that essential health, identity, and security checks have been conducted in each case'.[39]

Position of significant interest groups

The Senate Committee inquiry into this Bill observed that most submitters supported its passage:

> The direction taken by reforms contained in the Bill attracted general support from most submitters. Many submitters commended the Government on its adoption of a risk assessment-based policy, from which the Bill is derived, and supported the passing of the Bill on the basis that it signalled a further improvement on the status quo.[40]

However, it is important to distinguish support for the detention values and/or the New Directions in Detention policy, from support for this Bill as the two are arguably distinguishable. As the Commonwealth Ombudsman noted 'the detention values announced by the minister are reflected in but not wholly subsumed in the proposed amendments'.[41] The response to the New Directions in Detention policy (incorporating the seven detention values) was generally well-received by academics and interest groups, as noted by the NSW Parliamentary Library:

> The Chairman of the Refugee Advisory Council, Bruce Baird stated that the changes were 'long-overdue' and that moving to a risk based model 'will ensure a more realistic approach to immigration processing, as well as the humane treatment of vulnerable immigrants, not least refugees and asylum seekers.'…Academic commentator George Williams also stated that the new risk based approach is 'more

38. Government response to Senate Legal and Constitutional References Committee Report '*Administration and Operation of the Migration Act'*, May 2007, p.23, viewed 22 August 2009 http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/migration/reponse/gov_response_migration.pdf

39. Government response to Senate Legal and Constitutional References Committee Report '*Administration and Operation of the Migration Act'*, p.23.

40. Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Immigration Detention Reform) Bill 2009*, p. 5.

41. Commonwealth Ombudsman, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into Migration Amendment (Immigration Detention Reform) Bill 2009*, July 2009, p. 1.

> compassionate and more consistent with human rights'. Further, the Refugee Council of Australia stated that the policy changes were a 'very positive' and 'fundamental shift in policy' (footnotes omitted).[42]

In comparison, support for this Bill has not been so unequivocally positive and strong. Submitters to the Senate Committee inquiry into this Bill generally extended in-principle support for some of the reforms but expressed concerns about some of the provisions (to be discussed in further detail below) and disappointment that it did not go far enough:

- to adequately give legislative effect to the New Directions in Detention policy including the detention values; and
- to adequately implement the recommendations of the Joint Standing Committee on Migration inquiry into immigration detention in Australia.[43]

Many submitters also expressed strong opposition to the retention of mandatory detention and excision policy.[44]

For a more detailed examination of the issues raised by significant interest groups, see chapter two (pages 5—19) of the Senate Committee inquiry report into this Bill.

Coalition/Greens/Family First/Independents policy positions

Liberal Party

A 2004 Liberal Party policy document specifically addressing the issue of immigration detention states:

- Mandatory detention plays a significant role in maintaining the integrity of the migration program by ensuring that:
  - Unauthorised arrivals do not enter the Australian community until their identity and status have been properly assessed and they have been granted a visa;

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42. K Simon, *Asylum Seekers*, NSW Parliamentary Library Research Service, Briefing Paper No. 13/08, November 2008, pp. 29-31, viewed 25 August 2009 http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/AsylumSeekers

43. See for example, Australian Human Rights Commission (AHRC), Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into Migration Amendment (Immigration Detention Reform) Bill 2009*, 31 July 2009; Law Council of Australia submission, 31 July 2009; Refugee Council of Australia submission, 3 August 2009.

44. See for example, Australian Human Rights Commission (AHRC), Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into Migration Amendment (Immigration Detention Reform) Bill 2009*, 31 July 2009; Law Council of Australia submission, 31 July 2009; Refugee Council of Australia submission, 3 August 2009.

  - People are immediately available for health and security checks which are a requirement for the grant of a visa; and
  - People are readily available for removal from Australia if their visa applications are unsuccessful.
- A re-elected Coalition Government will maintain mandatory immigration detention for all unlawful non-citizens;
- A re-elected Coalition Government will retain the policies of excision, offshore processing (the "Pacific Solution") and mandatory detention that have acted as a powerful deterrent to illegal migration;
- Genuine refugees are immediately released from immigration detention upon the completion of their health and security checks; and
- The Coalition Government believes that unlawful non-citizens should be detained for the shortest possible time while their visa is being processed or their removal from Australia is arranged.[45]

However, it is significant to note that the membership of the JSCM which unanimously[46] recommended (in its first report) that the Migration Act be amended to legislatively enshrine the Government's New Directions in Detention policy included several Coalition MPs including the Shadow Minister for Immigration and Citizenship, the Hon. Dr Sharman Stone.[47] The membership also included Liberal Party 'moderate', Petro Georgiou MP who subsequently consistently expressed deep concern about review rights of the decision to detain and continue detention and about the continued detention of children in closed secure environments.[48]

The three Liberal Senators on the Senate Committee inquiry into this Bill 'disagree[d] with several of the fundamental tenets of the Bill' which they considered would

45. Liberal Party of Australia and the Nationals, *A stronger economy, a stronger Australia: The Howard Government Election 2004 Policy – Stronger Border Protection*, Coalition Policy document, Election 2004, 27 September 2004.

46. Though Mr Petro Georgiou MP, Senator Dr Alan Eggleston and Senator Hanson-Young issued a dissenting report, they did not disagree with the Committee's recommendation that the Act be amended to enshrine in legislation the reforms to immigration detention policy (recommendation 12).

47. The Hon Dr Sharman Stone became a member of the JSCM only one month prior to the release of its first report. She subsequently made minority reports to the Committee's second and third reports and has since issued numerous press-releases expressing opposition to the Government's 'softer policies on border protection' – For a complete list, see the Liberal Party website, http://www.liberal.org.au/Shadow%20Ministry/Sharman%20Stone/index.php

48. P Georgiou, Dissenting Report, in Immigration Detention in Australia - A new beginning: Criteria for release from detention, p. 165; P Georgiou, Dissenting Report, Immigration Detention in Australia - Facilities, services and transparency, p. 155.

'significantly weaken Australia's border security and lead to an increase in unauthorised arrivals'.[49] More explicitly, they were of the opinion that:

- the power to make residence determinations should remain with the Minister to ensure accountability and transparency;
- the introduction of discretionary detention may see 'many potentially problematic non-citizens' being released;
- TCAPs might lead to many more unlawful non-citizens 'disappearing' into the community;
- the proposed new mandatory detention provisions 'fail to capture the kinds of unlawful non-citizens for whom detention is the only safe solution'; and
- the use of regulations (instead of primary legislation) on important matters that directly impact on a person's liberty was inadvisable.

Australian Greens

The Australian Greens (AG) policy on immigration and refugees states (amongst other things) that the Party will:

> 17 abolish mandatory and indefinite detention of asylum seekers…
>
> 24 house asylum seekers who arrive without a valid visa in publicly owned and managed open reception centres, where entry and exit to these centres are unrestricted except where prohibited for medical or security reasons specified in clause 28.
>
> 25 ensure that initial assessment of refugee status is completed within 90 days.
>
> 26 grant asylum seekers an asylum application visa (AAV) and assist without delay their move into the community provided medical and security checks are satisfied or after 14 days has passed, whichever occurs first.
>
> 27 ensure asylum seekers living in the community while their claim is assessed will be granted an AAV which will entitle them to travel, work, income support and access to ongoing educational and medical services anywhere within Australia while their claims for asylum are assessed.
>
> 28 deny an AAV if security checks demonstrate the person poses a serious criminal threat to the Australian community or if the person has not remained housed in the reception centre while the medical and security checks were completed.[50]

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49. G Barnett, MJ Fisher, R Trood, Minority Report, in Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Immigration Detention Reform) Bill 2009*, Commonwealth of Australia, Canberra, August 2009, p. 21.

50. Australian Greens, *Australian Greens Policy: Immigration and Refugees*, issued 1 March 2007, accessed 26 August 2009 using Parlinfo Political Party Documents database.

Senator Sarah Hanson-Young was a member of the Senate Committee inquiry into this Bill and issued additional comments wherein she stated that the AG will be proposing changes to the Bill. She made 16 recommendations including (in summary):

- the policy of mandatory detention be abolished;
- Appeal rights should be strengthened and detention should not exceed 30 days unless a court considers it necessary and there are no effective alternatives;
- Section 4AA of the Act should be amended to state that a minor must not be detained in any facilities that have similar conditions to detention centres and that a Commonwealth Commissioner for Children be established to oversee any detention;
- that **proposed paragraph 4AAA(1)(b)** be removed from the Bill;
- the term 'unacceptable risk' be clearly defined and inserted into the Migration Act and that individualised assessment of risk occur; and
- that an authorised officer be required to consider and determine whether to grant a TCAP.[51]

Family First

The Family First Party policy on immigration and refugees states (amongst other things) that the party:

> believes all unauthorized arrivals and asylum seekers should be detained in secure centres to assess health, identity and security issues;
>
> …
>
> supports providing additional resources to ensure detention time is kept to an absolute minimum. Asylum seekers should then be transferred to low security facilities that are more like a home than a prison until their claims can be fully processed.[52]

Independent Senators

Independent Senator Nick Xenophon has not publicly announced his position on mandatory detention or this Bill. However he is reported to have expressed the view that the Government's New Direction in Detention policy 'seemed to be more a humane and

51. Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Immigration Detention Reform) Bill 2009, 'additional comments by Senator Sarah Hanson-Young', p. 25.
52. Family First, *Immigration and Refugees*, 1 October 2007, accessed 26 August 2009 using Parlinfo Political Party Documents database.

cost effective alternative to mandatory detention as long as there were adequate safeguards for the community'.[53]

Financial implications

The Explanatory Memorandum to this Bill simply notes that 'the financial impact of these amendments is low. Any consequential costs will be met from within existing resources'.[54]

Key issues

This Bill is contentious for a number of reasons. Firstly, because of what it proposes to do, secondly, because of what it does *not* seek to change and thirdly, because of what it does not seek to insert, repeal, or amend in the Act:

Overview of what this Bill proposes to do

- confine mandatory immigration detention to only a specific category of 'unlawful non-citizens' in the migration zone (other than an excised offshore place) (**proposed subparagraphs 189(1)(b)(i)-(v)**)
- embed in law discretionary detention for all other 'unlawful non-citizens' in the migration zone (other than an excised offshore place) ((**proposed subsection 189(1C)**)
- affirm *in principle* that immigration detention *centres* are only to be used as a measure of last resort (**proposed paragraph 4AAA(2)(a)**)
- affirm *in principle* that 'unlawful non-citizens' are only to be detained in immigration detention *centres* for the shortest practicable time (**proposed paragraph 4AAA(2)(b)**)
- embed in law that a minor (and a person reasonably suspected of being a minor) is not to be detained in an immigration detention *centre* (**proposed subsection 4AA(3)**)
- embed in law that an officer 'must make reasonable efforts' to resolve the immigration status of some detainees **(proposed paragraph 189(1B)(d)**)
- introduce a discretionary temporary community access permission (TCAP) to enable certain detainees to be absent from 'immigration detention' for a specific purpose and for a specified duration (**proposed section 194A and B**)
- enable Departmental officers to make, vary or revoke 'residence determinations' which are non-compellable determinations currently made by the Minister that a

53. Nicola Berkovic, 'Clash looms over asylum-seeker detention policy', *The Australian*, 30 July 2008.

54. Explanatory Memorandum, p. 3.

person/s reside at a specified place rather than being detained in a detention centre if it's in the public interest (**item 13**)

Overview of what this Bill does not propose to do

- give legislative effect to all seven key detention values
- abolish administrative immigration detention
- completely abolish mandatory detention
- prohibit the detention of children
- impose a maximum time limit for detention
- prescribe that detention is 'for the purpose' of managing health, identity and security risks to the community or require release once such initial checks are completed
- require that immigration detention should only be 'for the shortest practicable time'
- require that immigration detention should only be used as 'a measure of last resort' or when *necessary* (as per international standards)[55]
- permit the reasonableness and appropriateness of detaining an individual to be determined by the Courts, (as recommended by the Australian Human Rights Commission and the United Nations Human Rights Committee)[56]
- introduce periodic independent review by a tribunal or court of the ongoing need for detention
- amend the Migration Act to require six monthly reporting by the Commonwealth Ombudsman on detention arrangements[57]
- prescribe that 'unlawful non-citizens who have repeatedly refused to comply with their visa conditions' must be detained (as per immigration detention value 2(c))
- incorporate the 'best interests of the child' principle (contained in article 3(1) of the Convention on the Rights of the Child) into the Migration Act. Rather, this Bill seeks

55. See United Nations High Commissioner for Refugees (UNHCR), Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into Migration Amendment (Immigration Detention Reform) Bill 2009*, 5 August 2009.

56. The position of the previous Coalition government on this issue was that article 9.4 of the ICCPR only requires a review of the legality of the detention and the present system provides sufficient review in this respect: Government response to the Human Rights and Equal Opportunity Commission 1998 report into 'those who've come across the seas, the detention of unauthorised arrivals', undated, p.10.

57. Existing Part 8C of the Migration Act governs current arrangements for the reporting on persons in detention for more than 2 years. Six monthly reviews by the Commonwealth Ombudsman occur administratively: P Wong, Second reading speech, p. 8.

to incorporate article 3(1) only for the purposes of determining *where* a child is to be detained

- prescribe that, where possible, children will be detained with their families (as per immigration detention value 3)
- introduce statutory processing of people on Christmas Island (including provision of independent merits review)

Overview of what this Bill does not insert, repeal or amend in the Act

- expressly embed the risk-based approach to detention placement in the Act
- prescribe the criteria that requires detention in an immigration detention centre
- prescribe *all* the circumstances in which a person must be detained for presenting an 'unacceptable risk to the Australian community'
- define 'risk to the Australian community'
- provide for the mandatory detention of unauthorised arrivals at an excised offshore place
- prescribe minimum standards for conditions and treatment of persons in immigration detention, as per immigration detention value 6: 'people in detention will be treated fairly and reasonably within the law' and 7 'conditions of detention will ensure the inherent dignity of the human person'
- prescribe that 'the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, will be subject to regular review', as per immigration detention value 4

However, it is important to distinguish measures that are to be legislatively embedded in the Act from measures which are to be more suitably implemented through policy and guidelines. As previously noted, administrative implementation of the Government's detention values has reportedly been progressing since July 2008.[58] However, it is not clear why some detention values are to be inserted into the Act while others (of arguably equal importance) are not. As the Australian Human Rights Commission (AHRC) noted in its submission to the Senate Committee inquiring into this Bill:

> The Bill fails to implement Values 4, 6 and 7 regarding conditions in immigration detention…The Commission is concerned, however, that these values have not been

58. DIAC, Submission to Senate Legal and Constitutional Affairs Legislation Committee, p. 7, Specific details at appendix 4 of the Committee Report.

> given legislative effect in the Bill, and that the government has not indicated further reforms in this area.[59]

As Petro Georgiou MP recently opined:

> Improvements of any sort are to be welcomed, but the lack of legislative mandate means the reforms are especially vulnerable to the vagaries of the political winds, which, as we know, can shift abruptly.[60]

Main provisions

Detention 'principles'

Item 1 inserts **proposed section 4AAA** which articulates two principles that will apply to the detention of 'non-citizens'. If passed, the first principle that Parliament will affirm is that:

- the *purpose* of detention is to 'manage the risks to the Australian community of the non-citizen entering or remaining in Australia'; and to 'resolve the non-citizen's immigration status'.

A distinction needs to be drawn between broadly articulating the purpose of immigration detention, and specifically articulating the purpose of *mandatory* detention. The former relates simply to the purpose of administrative detention while the latter more controversially relates to the purpose of imposing an express duty on officers to detain a certain category of people. The former is what this Bill seeks to do while the latter is what the detention values does. In effect the detention values articulated that the purpose of mandatory detention is two-fold: 'to support the integrity of Australia's immigration program' and maintain 'strong border control' (as per immigration detention value 1 and 2).

However, in practice this distinction appears to be rather immaterial as reflected in the Department's submission to the JSCM which stated that the 'overall purpose of immigration detention is to support the integrity of Australia's immigration program'[61]

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59. AHRC, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into Migration Amendment (Immigration Detention Reform) Bill 2009*, 31 July 2009, p. 26.
60. P Georgiou, 'Protection should be paramount', *The Age*, 31 July 2008.
61. Department of Immigration and Citizenship (DIAC), Submission to the Joint Standing Committee on Migration, *Inquiry into immigration detention*, September 2008, viewed 9 July 2009, http://www.aph.gov.au/house/committee/mig/detention/subs/sub129.pdf

while according to the second reading speech, the purpose of retaining the policy of mandatory detention is to 'manage health, identity and security risks to the community'.[62]

Moreover, the Minister has emphasised that 'once checks have been successfully completed, continued detention while immigration status is resolved is unwarranted'.[63] However, such an assertion appears to contradict the proposed legislated purpose of detention, which is instead to *resolve* the non-citizen's immigration status (resulting in a visa being granted, removal or deportation).

In response to concerns raised by submitters that it was inaccurate to assert that the purpose of immigration detention is to resolve a non-citizen's immigration status, the Senate Committee inquiry into this Bill recommended that 'proposed subsection 4AAA(1)(b) be deleted and that proposed paragraph 4AAA (1)(a) be amended to read: (a)

Manage the risks to the Australian community of the non-citizen entering or remaining in Australia, pending the resolution of the non-citizen's immigration status'.[64]

The second principle that Parliament will be asked to affirm is that:

- a non-citizen must only be detained in a detention centre as a measure of last resort and for the shortest practicable time.

This principle will only apply to persons detained in a detention *centre* as opposed to other facilities that nonetheless constitute 'immigration detention'. Therefore, the 'detention' of unlawful non-citizens (including minors) at other detention facilities will *not* be governed by this principle. Existing section 273 of the Migration Act gives the Minister the power to establish detention centres. For this purpose it defines 'detention centres' as 'a centre for the detention of persons whose detention is authorised under this Act'.[65] There are currently five operational immigration detention centres:

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62. P Wong, Second reading speech, p. 10

63. C Evans, 'New Directions in Detention, Restoring Integrity to Australia's Immigration System'.

64. Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Immigration Detention Reform) Bill 2009*, p. 6.

65. Official departmental policy clarifies that 'immigration detention centres are established under section 273 of the Act. Immigration transit accommodation (ITA), immigration residential housing (IRH) and alternative places of detention (APOD) are all established under item (b)(v) of the Act definition of immigration detention as other places 'approved by the Minister in writing'. Residence determination (community detention) is defined under section 197AB of the Act: Department of Immigration and Citizenship (DIAC), PAM3: Act - DSM - Chapter 2 - Client placement - Placement options within the immigration detention network, registered as an official departmental policy instruction on 15 February 2009, viewed 12 August 2009 using Legend database.

- Villawood Immigration Detention Centre (NSW)
- Northern Immigration Detention Centre (NT)
- Maribyrnong Immigration Detention Centre (Vic)
- Perth Immigration Detention Centre (WA)
- Christmas Island Immigration Detention Centre.[66]

Significantly, in the absence of any clear judicial authority on the issue, it remains unclear whether these 'principles' are in fact judiciable. The Australian Human Rights Commission (AHRC) has argued that the affirmation of the principle that children should only be detained as a measure of last resort (in existing section 4AA of the Migration Act) 'is a statement of principle only and does not create legally enforceable rights'.[67]

The drafters of this Bill have chosen to retain the phrase 'measure of last resort' which was inserted into existing section 4AA ('detention of minors a last resort') by the *Migration Amendment (Detention Arrangements) Act 2005*. The phrase has been used in various international instruments, though most notably in article 37(b) of the Convention on the Rights of the Child (CRC) which states:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a *measure of last resort* and for the shortest appropriate period of time (emphasis added).

However, in a domestic statutory context it is not clear what the expression 'measure of last resort' means in real terms for a prospective detainee. Does it mean that they will only be detained in a detention centre if it is absolutely necessary, if there are no other viable options, or only in the most exceptional circumstances? Importantly, this Bill does *not* clarify what those circumstances or criteria are.

Though not expressed as a principle in legislation it is interesting to note that the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC) emphasised the need to reduce the disproportionate levels of Aboriginal people in custody (14% of the total prison population) and to use incarceration 'as a measure of last resort'. However, this did not translate into fewer Indigenous people being incarcerated. Rather HREOC found the

66. Department of Immigration and Citizenship, PAM3: Act – DSM – Chapter 2 – client placement – immigration detention centres, registered as an official departmental policy instruction on 26 April 2008, viewed 7 July 2009 using Legend database.

67. The (former) Human Rights and Equal Opportunity Commission (HREOC), 2008 Immigration detention report, December 2008, p.80. See also 'A last resort? National Inquiry into Children in Immigration Detention, 2004, http://www.hreoc.gov.au/human_rights/children_detention_report/

number of Indigenous prisoners to have *increased* over the last decade (22% of the total prisoner population as at 30 June 2005).[68]

Children in immigration detention

Item 2 clarifies that for the purposes of existing section 4AA reference to a 'minor' includes 'a person whom an officer reasonably suspects of being a minor'. This is in keeping with existing subsection 189(1) which states that not only unlawful citizens must be detained but also those reasonably suspected of being so.

Item 3 inserts **proposed subsections 4AA(3)** and **(4)** which together elaborate upon the principle asserted in existing subsection 4AA(1) that a 'minor shall only be detained as a measure of last resort'. **Proposed subsection 4AA(3)** provides that *if* a minor is detained, the minor must not be detained in a detention centre. Though detention value 3 stated that where possible, their families would similarly not be detained in an immigration detention centre; this Bill is silent on the issue.[69]

Proposed subsection 4AA(4) provides that if a minor is to be detained, an officer must, for the purposes of determining *where* the minor is to be detained, regard the best interests of the minor as a primary consideration. The requirement to regard the best interests of the child as a primary consideration stems from article 3(1) of the CRC but significantly it does not only apply to determining *where* a minor is to be detained, rather it applies in *all actions* concerning children. It relevantly states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

To properly incorporate Australia's international obligations in this respect, it is arguable that this Bill should instead be requiring that the best interests of the minor be a primary consideration in all actions taken under the Migration Act.

Moreover, this Bill does not propose to remove the qualification in existing subsection 4AA(2) that permits minors to be detained in accordance with a residence determination. As AHRC observed in its most recent report into immigration detention, even though children are only to be detained as a measure of last resort, children continued to be 'held in other closed immigration detention facilities, both on the mainland and on Christmas

68. Human Rights Commission, 'A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia: Indigenous peoples and criminal justice systems', August 2006, viewed 14 July 2009, http://www.hreoc.gov.au/Social_Justice/statistics/index.html#toc9

69. Article 23 of the International Covenant of Civil and Political Rights (ICCPR) states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Island'.[70] The AHRC has also asserted that though 'most children and families are no longer in facility-based detention'[71], residence determinations do not offer alternatives *to* detention, but rather alternative forms *of* detention and so though people may reside in the community they must still abide by certain conditions which might include residence at a specified place.[72] Further, the AHRC continues to recommend, as it has done since 2004 when it conducted its national inquiry into children in immigration detention, that 'Australia's laws should require independent assessment of the need to detain children within 72 hours of any initial detention, similar to bail application procedures in the juvenile justice system'.[73]

In response to concerns expressed by submitters about the qualified expression of this principle in the Bill, the Senate Committee inquiring into this Bill made three recommendations:

- that proposed subsection 4AA(4) be amended to require that the best interests of the child should be a primary consideration in the placement of the child's immediate family as well as the placement of the child;
- that proposed section 4AA(4) be amended so that the best interests of the child be regarded by an officer as a primary consideration in where and how a child is detained (including in accordance with a residence determination); and
- that the Government consider amending the Bill to provide for the appointment of an independent guardian for unaccompanied minors and children housed apart from their immediate families.[74]

Definition of 'immigration detention'

Presently, there are a variety of placement or accommodation options for 'unlawful non-citizens' with varying degrees of security/confinement. They broadly fit within five categories (ranging from the most secure to the least secure):

- **Immigration detention centres**
  - Secure detention

70. HREOC 2008 report, Summary Fact-sheet: overview, p.3, viewed 18 August 2009 http://www.hreoc.gov.au/human_rights/children_detention_report/index.html
71. AHRC, Submission to JSCM, *Inquiry into Immigration Detention in Australia*, 4 August 2008, p. 16.
72. AHRC, Submission to JSCM, Inquiry into Immigration Detention in Australia, p. 17.
73. AHRC Submission to JSCM, Inquiry into Immigration Detention in Australia, pp. 17-18.
74. Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Immigration Detention Reform) Bill 2009*, Recommendations 6-8, pp. 17-19.

- **Immigration residential housing**
  - Purpose-built housing complexes in the community or on detention centre grounds
  - Secure and closed environment with restricted (accompanied) outside access
- **Immigration transit accommodation**
  - Temporary semi-independent hostel style (secure) accommodation
- **Alternative places of detention**
  - May include a motel, apartment, private house, hospital, remand and/or correctional facility etc
  - Person will normally remain in the presence of an officer
- **Community detention**
  - Residential house in the community
  - Does not require the person to be in the company of, or restrained by an officer or other designated person
  - Other specified conditions (monitoring, reporting conditions) may apply.[75]

Notwithstanding all these different accommodation options (with their varying levels of confinement) they are all a form of immigration detention and all come within the single definition of 'immigration detention' contained in existing section 5.[76] Though it may be administratively convenient to maintain such a broad definition of immigration detention it is also potentially misleading and confusing. For instance, when the Minister says 'the presumption will be that persons will remain in the community while their immigration status is resolved'[77] it is important to recognise that such people will still be in what is commonly referred to as 'community detention' rather than residing freely in the community because their immigration status has not yet been 'resolved'. As the Department notes 'it is intended to remain the case that a non-citizen in Australia either holds a visa or is liable for immigration detention'.[78]

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75. DIAC, PAM3: Act – DSM – Chapter 2 – client placement – immigration detention centres; JSCM, *Immigration detention in Australia – Community-based alternatives to detention*, pp. 18-24.

76. Note 2 of the definition of 'immigration detention' in existing section 5 of the Migration Act states that the definition extends to persons covered by residence determinations (see section 197AC).

77. C Evans, 'New Directions in Detention, Restoring Integrity to Australia's Immigration System'.

78. DIAC, Submission to Senate Legal and Constitutional Affairs Legislation Committee, p. 12.

Not surprisingly, such an all-encompassing definition of 'immigration detention' has resulted in it becoming a contested issue, particularly with respect to the 'detention' of minors.[79] The Minister has acknowledged that confusion arises as a result of existing definitions under the Migration Act:

> We have the definitions in the Act which do need changing. People still say to me, 'You've still got that child detained.' That is legally true but I would argue they are not really detained if they are in community detention.[80]

The Secretary of the Department, Andrew Metcalfe has similarly acknowledged that the existing definition may require revision:

> We are already seeing a significant move away from detention centres into other forms of detention and community detention. Indeed, the phrase 'community detention' is the wrong phrase to use. It is really a form of bail or a reporting arrangement. Part of our work here is to get our definitions straightened out a bit.[81]

This Bill retains the existing definition of 'immigration detention' and broadens it even further by inserting **proposed subsection 5(1)(c)** (**item 5**) to the definition of immigration detention to clarify that 'being at, or going to, a place in accordance with a temporary community access permission without being in the company of, and restrained by, an officer or another person directed by the Secretary' will come within the definition of 'immigration detention' under the Act.

Proposed Note 1A to the definition of 'immigration detention' in existing section 5 clarifies that places approved by the Minister for the purposes of existing subparagraph (b)(v) 'may include, for example, immigration transit accommodation, immigration residential housing and other places that may be used to provide accommodation'.

Item 13 repeals existing section 197AF which provides that the power to make, vary or revoke a residence determination may only be exercised by the Minister personally. **Item 14** makes a consequential amendment to existing paragraphs 197AG(1)(a) and (b) which means though officers will have the power to make, vary or revoke a residence determination, the Minister will still be obligated to table a statement in Parliament when a residence determination is made and the reasons why it was made, with particular reference as to why it was thought to be in the public interest.

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79. JSCM, Immigration detention in Australia – Community-based alternatives to detention, p. 24.

80. C Evans, Senate Legal and Constitutional Affairs Committee, Immigration and Citizenship Portfolio, Supplementary Budget Estimates, 21 October 2008, p.163 http://www.aph.gov.au/hansard/senate/commttee/S11352.pdf

81. A Metcalfe, Joint Standing Committee on Migration, *Immigration detention in Australia*, 18 March 2009, p.10 http://www.aph.gov.au/hansard/joint/commttee/J11724.pdf

Mandatory detention

The policy of mandatory detention is given legislative effect through existing subsection 189(1) which states 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'.

Proposed new subsection 189(1)(b) restricts the power and obligation to detain all 'unlawful non-citizens'. Under this new provision the category of 'unlawful non-citizens' that *must* be detained is limited to:

- present an unacceptable risk to the Australian community;
- have bypassed immigration clearance;
- have been refused immigration clearance;
- have had their visa cancelled under section 109 because when in immigration clearance they produced a document that was false or had been obtained falsely;
- have had their visa cancelled under section 109 because when in immigration clearance they gave information that was false.

Significantly, this new mandatory detention provision appears to simply list categories of people that are already subject to mandatory detention under existing subsection 189(1). Of greater significance are the categories of people who will *not* be subject to mandatory detention including which include:

- asylum seekers (protection visa applicants);
- people that overstay their visa; and
- people who have had their visa cancelled for non-compliance of a minor nature.[82]

Presumably 'unlawful non-citizens' awaiting the outcome of merits or judicial review proceedings or a request for ministerial intervention (who do not fall within **proposed 189 (1)(b)** could also be added to this list.

These four categories of people are discussed in further detail under 'discretionary detention' at p.40.

82. This group of people 'will generally be managed in the community': P Wong, Second reading speech, p.5

Mandatory detention of people who present an unacceptable risk to the Australian community

Under **proposed subparagraph 189(1)(b)(i)** a person who is, or is reasonably suspected of being an unlawful non-citizen in the migration zone (other than an excised offshore place) who presents an unacceptable risk to the Australian community *must* be detained. 'Unacceptable risk to the Australian community' is not expressly defined rather, **proposed subsection 189(1A)** provides that people in the following circumstances will be deemed to 'present an unacceptable risk to the Australian community', and will thereby be subject to mandatory detention:

- those who have been refused a visa or had their visa cancelled under sections 501, 501A or 501B (refusal or cancellation of visa on character grounds);
- those who have been refused a visa or had their visa cancelled 'on grounds relating to national security';
- those who remain in Australia following the cessation of their enforcement visa; and
- those who come within other circumstances to be prescribed by the regulations.

Two preliminary observations need to be made about this proposed amendment. Firstly, the statutory classification of people who will be deemed to 'present an unacceptable risk to the Australian community' may in effect predetermine or at least influence any subsequent 'risk assessment' for the purposes of placement within the detention network which in turn may run counter to the recommendation of the JSCM which was that section 501 detainees should be *individually* assessed taking into account various factors such as the nature, severity and number of crimes committed, the likelihood of recidivism, and the immediate risk that person poses to the Australian community.[83]

Secondly, it is not clear why the proposed statutory obligation to make reasonable efforts to resolve a person's immigration status (in **proposed paragraph 189(1B)(d)** resulting in either a visa being granted to the person or the person being removed or deported), expressly excludes people who are deemed to present an unacceptable risk to the Australian community (in **proposed subparagraph 189(1)(b)(i)**). This proposed amendment is discussed in further detail below under 'statutory obligation to resolve a detainee's immigration status'. This Bill has not adopted the recommendation of the JSCM in this regard which was that for any person who after twelve months in detention is determined to be a significant and ongoing unacceptable risk to the Australian community,

83. JSCM, Immigration Detention in Australia - A new beginning: Criteria for release from detention, p. 54.

the Migration Act should be amended to give the person the right to have the decision reviewed by an independent tribunal and subsequently have the right of judicial review.[84]

Visas cancelled or refused on 'character grounds'

Proposed paragraphs 189(1A)(a) and (b) provide that a person who has been refused a visa or had a visa cancelled 'under section 501, 501A or 501B' will be deemed to present an unacceptable risk to the Australian community for the purposes of **proposed subparagraph 189(1)(b)(i)**.[85] Under existing section 501, a person's visa may be refused or cancelled on 'character grounds'. The grounds on which a person may be found not to pass the character test can broadly be grouped into four categories:

- substantial criminal record
- association with criminal conduct
- not of good character on account of past and present criminal or general conduct
- significant risk of future conduct grounds[86]

The administration of section 501 of the Migration Act has been the subject of a number of inquiries, most recently:

- Australian Human Rights Commission, *Background Paper: Immigration detention and visa cancellation under section 501 of the Migration Act* (January 2009)
- Joint Standing Committee on Migration, *Criteria for release from detention* (December 2008)
- *Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008)
- Senate Legal and Constitutional References Committee, *Administration and operation of the Migration Act 1958* (March 2006)
- Commonwealth Ombudsman, *Administration of s501 of the Migration Act 1958 as it Applies to Long-Term Residents* (February 2006)

The main criticisms surrounding the administration of the section can be broadly summarised as follows:

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84. JSCM, Immigration Detention in Australia - A new beginning: Criteria for release from detention, recommendation 14, p. 98.

85. Sections 501A and B enable the Minister to personally refuse or cancel a visa under subsection 501(1) or (2) if the Minister reasonably suspects that a person does not pass the character test and if the Minister is satisfied that cancellation is in the national interest. Such decisions are not merits reviewable.

86. Australian Human Rights Commission, Immigration detention and visa cancellation under section 501 of the Migration Act, Background paper, January 2009, p. 3.

- The prolonged period of time spent in immigration detention following cancellation of a visa under section 501 (sometimes following release from correctional detention);
- The increasing use of section 501 to cancel the visas of long-term permanent residents (those who have lived in Australia for more than ten years) is beyond the intended scope of the provision;
- The broad and subjective nature of the 'character test';
- The extent and reliability of information upon which decisions are made;
- The standard of procedural fairness available to those affected by the provision;
- The broad and non-transparent discretion available to the Minister to substitute a decision of the Department or the Administrative Appeals Tribunal which is expressly not governed by ordinary rules of natural justice;
- The Department's lack of expertise to adequately assess a person's potential 'risk to the community';
- Increasing reliance on the wider power to cancel visas on character grounds under section 501 where a person has been convicted of a criminal offence rather than criminal deportation provisions (section 201);
- The length of time a person has spent in Australia is not considered to be a primary consideration for the Department when deciding whether to cancel a visa under section 501;
- Decision-makers are failing to adequately consider Australia's international obligations when deciding whether to cancel a visa under section 501;
- Absolute international obligations including that of *non-refoulement* is considered subordinate to considerations of national interest;
- The standard of immigration detention facilities used to accommodate people who have had their visa cancelled under section 501;
- The provision unfairly impacts upon people with a mental illness, especially those acquitted on grounds of unsoundness of mind or insanity;

Though some of these observations or criticisms have arguably been made redundant following the commencement on 15 June 2009 of the Minister's new Direction No. 41 entitled '*visa refusal and cancellation under section 501'* which is binding on all decision-makers, and measures such as the redevelopment of Villawood Immigration Detention Centre to provide a range of accommodation options to account for the different requirements of people in detention, other more substantive criticisms arguably remain and can only be addressed by legislative change.

Visas cancelled or refused on grounds relating to 'national security'

Proposed paragraphs 189(1A)(a) and (b) provide that a person who has been refused a visa or had a visa cancelled 'on *grounds relating to* national security' will be deemed to present an unacceptable risk to the Australian community for the purposes of **proposed subparagraph 189(1)(b)(i)**. Under the Migration Act and Migration Regulations, a person may be refused a visa or have their visa cancelled if they have been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security as defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).[87]

Section 4 relevantly defines 'security' as:

> (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
>
> (i) espionage;
>
> (ii) sabotage;
>
> (iii) politically motivated violence;
>
> (iv) promotion of communal violence;
>
> (v) attacks on Australia's defence system; or
>
> (vi) acts of foreign interference;
>
> whether directed from, or committed within, Australia or not; and
>
> (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).

People who remain in Australia following the cessation of their enforcement visa

An enforcement visa is a temporary visa which comes into force 'by operation of law to non-citizens who are detained by fisheries officers or who are aboard a vessel directed or brought to Australia by fisheries officers'.[88] The Department's submission to the Senate

87. See for example subsection 116 of the Migration Act and Regulation 2.43(1)(b) of the Migration Regulations 1994. See also public interest criterion 4002, Schedule 4 Migration Regulations 1994.

88. Department of Immigration and Citizenship, PAM3: Act-based visas - Enforcement visas, registered as official departmental policy instruction on 15/03/09, viewed 21 July 2009 using Legend database.

Committee inquiry into this Bill states that existing arrangements under the Act are unaffected by this proposed amendment:

> The second group of former Enforcement visa holders reflects existing provisions in the *Fisheries Management Act 1991*, the *Environment Protection and Biodiversity Conservation Act 1999* and the *Torres Strait Fisheries Act 1984*, which provide for the mandatory detention of those people brought to Australia under the provisions of the above Acts. These people, for example, illegal foreign fishers, who are initially granted Enforcement visas, currently become subject to mandatory detention if their visa ceases to be in effect and they remain in Australia. These arrangements are unaffected by the proposed amendments to the Act.[89]

People who come within circumstances to be prescribed by the regulations

Though no draft regulations have yet been made publicly available, the Department envisages that a person in the following two circumstances might come within the ambit of **proposed paragraph 189(1A)(d)**:

> • where an officer knows or reasonably suspects a person will not abide by visa conditions imposed in a visa grant; and where an officer knows or reasonably suspects that detention will facilitate the resolution of the non-citizen's immigration status; OR
>
> • where an officer knows or reasonably suspects an unlawful non-citizen has been a participant in (not limited to only the actual organiser of) organised migration or identity fraud in respect of an entitlement under the Act or Regulations; and where an officer knows or reasonably suspects that detention will facilitate the resolution of the unlawful non-citizen's immigration status.[90]

People who have repeatedly refused to comply with their visa conditions

It is not clear what changed between the drafting of the immigration detention values (which listed this category of people as being subject to mandatory detention) and this Bill but this category of people will not be *expressly* subject to mandatory detention under this Bill. Rather, it appears they will be mandatorily detained pursuant to **proposed paragraph 189(1A)(d)** which states the regulations may prescribe additional circumstances that apply in relation to the person.[91] Though interest groups and the Senate Committee inquiring into this Bill expressed concern that it proposed to leave such a significant matter to the regulations (which it conceded are not as closely scrutinised as Bills before Parliament), it is worth noting that such circumstances to be prescribed by the regulations are *in addition to* the person being an 'unlawful non-citizen' and therefore this

89. DIAC, Submission to Senate Legal and Constitutional Affairs Legislation Committee, p. 13.

90. For further information see: DIAC, Submission to Senate Legal and Constitutional Affairs Legislation Committee, pp.16–17.

91. Explanatory Memorandum, p.6, paragraph 36.

provision does not permit the detention of people who would not already be classified as 'unlawful non-citizens' and therefore subject to mandatory detention under existing subsection 189(1).

It is interesting to note that the former category of people identified by the Department (those who have repeatedly refused to abide by their visa conditions or are *anticipated* to not comply) will not only be detained, they will come within the definition of people who *by law* present an 'unacceptable risk to the Australian community' along side people of character or national security concern. In comparison, people who have actually had their visa cancelled for non-compliance with visa conditions will only be subject to discretionary detention.

The Senate Committee inquiring into this Bill declined to make a recommendation in this regard[92] but the JSCM expressed concern with visa non-compliance acting as a criterion for mandatory detention because it implied that detention had a punitive as opposed to administrative function:

> The Committee's concern with visa non-compliance acting as a criterion for mandatory detention is it suggests immigration detention as a punitive response to visa non-compliance, rather than as an administrative function of Australia's immigration compliance system. The Committee considers the distinction is vital.[93]

It subsequently recommended that:

> the Department of Immigration and Citizenship clarify and publish the criteria for assessing the need for detention due to repeated visa non-compliance. The criteria should include the need to demonstrate that detention is intended to be short-term, is necessary for the purposes of removal and that prior consideration was given to: reissue of the existing visa, or a bridging visa, with or without conditions such as sureties or reporting requirements.[94]

Mandatory detention of 'unauthorised arrivals'

Proposed subparagraphs 189(1)(b)(ii)-(iii) provide that unlawful non-citizens (other than those at an excised offshore place) who have bypassed or been refused immigration clearance will be mandatorily detained. **Proposed subparagraphs 189(1)(b)(iv)-(v)** provide that unlawful non-citizens (other than those at an excised offshore place) who

92. Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Immigration Detention Reform) Bill 2009*, p. 9.

93. JSCM, Immigration Detention in Australia - A new beginning: Criteria for release from detention, p. 57.

94. JSCM, Immigration Detention in Australia - A new beginning: Criteria for release from detention, p. 58.

have produced a false document or given false information in immigration clearance must similarly be detained. Each of these categories will be briefly discussed below.

Immigration clearance is a process (defined in existing section 172) which regulates the entry of persons to Australia to ensure that those who enter have authority to do so, that they are who they claim to be and that they provide other information if required to do so.[95]

People who have bypassed immigration clearance

In broad terms, a person seeking to enter Australia bypasses immigration clearance under existing subsection 172(4) if they leave the place where they entered Australia without complying with section 166 ('persons entering to present certain evidence of identity etc.'). Current official departmental policy further clarifies that:

- A non-citizen who enters at a port holding a visa and leaves the port without complying with section 166 bypasses immigration clearance and becomes an unlawful non-citizen (as s174 deems their visa to have ceased);
- A non-citizen who enters Australia without holding a visa and who bypasses immigration clearance is an unlawful non-citizen because they do not hold a visa;
- A non-citizen who bypasses immigration clearance is an unlawful non-citizen and is subject to detention under section 189.[96]

People who have been refused immigration clearance

A person seeking to enter Australia is refused immigration clearance under existing subsection 172(3) if whilst in immigration clearance one of the following applies:

- They have refused to, or are unable to, produce evidence of their identity and a visa; [97] or
- They have refused to, or are unable to, give the information required on a passenger card;[98] or
- They have had their visa cancelled in immigration clearance and have not been granted another visa; or

95. DIAC, PAM3 Migration Act – Arrival, immigration clearance and entry: Immigration Clearance at Airports & Seaports, registered as an official departmental policy instruction on 15 February 2009, viewed 4 August using Legend database.

96. DIAC, PAM3 Migration Act – Arrival, immigration clearance and entry: Immigration Clearance at Airports & Seaports.

97. See paragraph 166(1)(a)of the Migration Act.

98. See paragraph 166(1)(b)of the Migration Act.

- They have refused to, or cannot, comply with any requirements referred to in existing paragraph 166(1)(c) to provide one or more personal identifiers.[99]

Existing subsection 190(1) of the Migration Act relevantly provides that for the purposes of existing section 189 ('detention of unlawful non-citizens'), an officer suspects on reasonable grounds that a person in Australia is an unlawful non-citizen if they know or suspect on reasonable grounds that the person was required to comply with section 166 and:

- bypassed, attempted to bypass, or appeared to attempt to bypass, immigration clearance;
- was not able to provide, or otherwise did not provide information required by section 166;
- was not able to comply with, or did not otherwise comply with any requirement referred to in section 166 to provide one or more personal identifiers.

People who have had their visa cancelled for giving false information or producing false documents when in immigration clearance

In broad terms, existing section 109 currently provides a discretionary power to cancel visas where a non-citizen:

- provides incorrect information in a visa application or on a passenger card; or
- gives an officer a bogus document;[100] or
- fails to notify the department of a change of circumstances; or
- fails to correct incorrect answers; or
- makes any incorrect statement in response to a visa cancellation notice.[101]

Significantly, official departmental policy states that 'section 109 applies only to visas held by non-citizens who are in Australia *after* being immigration cleared'.[102] **Proposed**

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99. Subsection 166(5) of the Migration Act lists 'personal identifiers' for the purposes of paragraph 166(1)(c) to potentially include a photograph, signature, fingerprint or iris scan etc.

100. Section 97 defines 'bogus document' to mean, a document that the delegate reasonably suspects is a document that purports to have been, but was not, issued in respect of the person; or is counterfeit or has been altered by a person without authority to alter it; or was obtained because of a false or misleading statement, whether or not made knowingly. For example, a counterfeit passport or a genuine passport that belongs to someone else.

101. See sections 101, 102, 103, 104, 105 and 107(2) of the Migration Act; DIAC, PAM3: Act - Visa cancellation instructions - General cancellation powers, registered as an official departmental policy instruction on 1 July 2009, viewed on Legend database.

paragraphs 189(1)(b)(iv)-(v) appear to place a further limitation on the cancellation power by providing that detention is only mandatory if the false information or a false (or falsely obtained) document was given when the person was 'in immigration clearance', as opposed to after they had been immigration cleared.

Further, cancellation under existing section 109 requires certain procedural fairness requirements to be satisfied and an officer must have regard to the following matters (prescribed in regulation 2.41) when deciding whether to cancel a visa:

- the correct information
- the content of the genuine document (if any)
- the likely effect of the correct information or the genuine document on a decision to grant a visa or immigration clear the visa holder
- the circumstances in which the non-compliance occurred
- the visa holder's current circumstances
- the visa holder's subsequent behaviour in regards to their obligations under Subdivision C of Division 3 of Part 2 of the Act
- any other instances known to the delegate of non-compliance by the visa holder
- the time that has elapsed since the non-compliance
- any breaches of law since the non-compliance and the seriousness of those breaches and
- any contribution to the community made by the visa holder.[103]

Statutory obligation to resolve a detainee's immigration status

Proposed subsection 189(1B) provides that if a person is detained because they have bypassed or been refused immigration clearance or produced a false document (or falsely obtained document) or given false information in immigration clearance, then 'an officer must make reasonable efforts to:'

- ascertain the person's identity; and
- identify whether the person is of character concern; and
- ascertain the health and security risks to the Australian community of the person entering and remaining in Australia; and
- resolve the person's immigration status.

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102. DIAC, PAM3: Act - Visa cancellation instructions - General cancellation powers.

103. DIAC, PAM3: Act - Visa cancellation instructions - General cancellation powers.

Significantly, this Bill does *not* introduce a time frame in which health, identity and security checks must be completed. Nor does it impose a maximum time limit for a person to remain in immigration detention. It simply requires officers to 'make reasonable efforts' to conduct the requisite checks and resolve a person's immigration status, and as previously noted, this obligation does *not* extend to:

- people who are deemed to present an unacceptable risk to the Australian community (in **proposed subparagraph 189(1)(b)(i)**); and
- people who are detained following the exercise of an officer's discretion under **proposed subsection 189(1C)**; and
- people detained at an 'excised offshore place' under existing subsections 189(3) or (4).

This is despite detention value 4 stating (in part) that 'detention that is indefinite is not acceptable' and two parliamentary inquiries recommending that a maximum time limit be imposed. Most recently, the JSCM which recommended that:

- DIAC establish an expected time frame such as **five days** for the processing of health checks for unauthorised arrivals (recommendation 2);
- where a person's identity is not conclusively established within **90 days**, mechanisms be developed to enable conditional release from detention (recommendation 3);
- where a person's security assessment is ongoing after **90 days** of detention, mechanisms be developed to enable conditional release from detention (recommendation 4. See also recommendation 5);
- provided a person is not determined to be a significant and ongoing unacceptable risk to the Australian community, a maximum time limit of **twelve months** be set for a person to remain in immigration detention (recommendation 13. See also recommendation 14).[104]

With regard to the second category of people (people who are detained following the exercise of an officer's discretion), it is interesting to note that the AHRC has recommended to the Senate Committee inquiring into this Bill that **proposed subsection 189(1C)** creating an express discretion whether to detain be *removed*. The principal reason for its concern stems from the apparent lack of procedural safeguards (as mentioned above) and the absence of any requirement for an officer to provide justification for deciding to detain a person which together may create a greater risk of arbitrary detention.[105]

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104. JSCM, *Immigration Detention in Australia - A new beginning: Criteria for release from detention*, pp. i- xxiv.

105. AHRC, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into Migration Amendment (Immigration Detention Reform) Bill 2009*, p. 18.

Significantly, the Senate Committee inquiry into this Bill recommended that it be:

> 'amended to broaden the application of proposed subsection 189(1B) to impose a duty on the Department of Immigration and Citizenship to make reasonable efforts to identify *any* person detained within the migration zone or in an excised offshore place, to conduct character, health and security assessments, and resolve the person's immigration status *in a timely fashion*' (emphasis added).

This is arguably the Senate Committee's most significant recommendation.

In addition, though perhaps of less significance (due to the way it was expressed) was the Senate Committee's recommendation that the Government give only *further consideration* to implementing recommendations 13 and 14 of the JSCM which recommended the imposition of a maximum time limit of 12 months for a person to remain in immigration detention if they were *not* determined to be a significant and ongoing unacceptable risk to the Australian community and merits and judicial review rights for detainees who were considered to be so.[106]

Discretionary detention

Proposed subsection 189(1C) creates an express statutory discretion *whether to detain* a person reasonably suspected of being an 'unlawful non-citizen' (other than at an excised offshore place). According to the Department, this approach allows the individual risk presented by the unlawful non-citizen to be assessed and the response (detention or grant of a visa) to be proportionate to that assessed risk'.[107] The discretion does not apply to people being processed at an excised offshore place and no other qualification or limitation is placed on the exercise of this discretion. The granting of a visa would necessarily follow the exercise of the discretion in order to conform to Australia's universal visa regime that requires all non-citizens to hold a valid visa in order to enter and remain in Australia.[108]

However, even within the statutory confines of existing subsection 189(1) there is already an inherent or implied discretion whether to detain an 'unlawful non-citizen'. This discretion derives from the definition of 'unlawful non-citizen' as simply someone who

106. Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Immigration Detention Reform) Bill 2009*, recommendation 5, p.16. Recommendations 13 and 14 of the JSCM, see also dissenting report by Mr Petro Georgiou MP, Senator Dr Alan Eggleston and Senator Hanson-Young which considered 12 months to be a 'grossly excessive period': JSCM, *Immigration Detention in Australia - A new beginning: Criteria for release from detention*, p. 166.

107. DIAC, Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009, p. 13.

108. Though note the exceptions contained in section 42 of the Migration Act and regulation 2.06 of the Migration Regulations 1994.

does not hold a visa that is in effect.[109] If an otherwise 'unlawful non-citizen' is granted a visa (including a non-substantive visa), then the obligation to detain under existing subsection 189 (1) is rendered redundant. As explained by the Department in its recent submission to the JSCM:

> The exercise of the power to detain under s189(1) is mandatory as indicated by the term 'must detain' but the department's policy is that the grant of a Bridging E visa should be considered prior to detaining a person, where it is appropriate and safe to do so. Where a compliance officer grants a BVE, the person becomes a lawful non-citizen and there is no obligation to detain the person under s189.[110]

The second reading speech similarly acknowledges that 'the Department has significantly reduced the use of detention by using *flexibilities* currently available in migration legislation, and in particular in Bridging E provisions (emphasis added).'[111] Accordingly, it is difficult to see how inserting an express discretionary power to detain into the Migration Act will make any real practical difference to existing arrangements.

If discretionary detention is exercised, interest groups have expressed concern that there may not be adequate arrangements for the care of asylum seekers in the community. For instance, according to Uniting Justice Australia:

> 'carefully planned community care arrangements, based on the circumstances and vulnerabilities of individuals being released from detention on bridging visas, are clearly required' in order to avoid the risk of homelessness and the potential negative impact on health and overall wellbeing, particularly for child asylum seekers.[112]

It is envisaged that the following groups of people *may* be subject to discretionary detention:

- asylum seekers (protection visa applicants);
- people that overstay their visa; and

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109. Existing subsection 13(1) defines 'lawful non-citizens' while existing subsection 14(1) defines 'unlawful non-citizens.

110. DIAC, Submission to the JSCM Inquiry into Immigration Detention in Australia, supplementary submission 129f, 15 October 2008, viewed 20 August 2009, http://www.aph.gov.au/house/committee/mig/detention/subs/sub129f.pdf

111. P Wong, Second reading speech, p. 8.

112. Uniting Justice Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the *Migration Amendment (Immigration Detention Reform) Bill 2009*, July 2009, p. 10. See also the Asylum Seeker Resource Centre 'Position paper on homelessness among asylum seekers', 2009, viewed 28 August 2009, http://www.asrc.org.au/uploads/File/Locked%20Out.pdf

- people who have had their visa cancelled for non-compliance of a minor nature.[113]
- 'unlawful non-citizens' awaiting the outcome of merits or judicial review proceedings or a request for ministerial intervention (if they do not come within **proposed subsection 189(1)(b)**.

Protection visa applicants

When a person applies for a protection visa then they automatically apply for a bridging visa to give them 'lawful' status while their application is being processed. The application form for a protection visa (Application for a Protection (Class XA) visa) also serves as an application form for a bridging visa which means that provided the criteria for the bridging visa are satisfied, such people will *not* be detained as they will be 'lawful' non-citizens.

If a protection visa applicant did *not* satisfy the criteria for a bridging visa under current arrangements it is difficult to see how they would benefit from the introduction of an express discretionary detention provision which would still require them to satisfy the criteria for a bridging visa. The only way protection visa applicants would benefit from the introduction of an express discretionary detention provision is if the bridging visa criteria were changed to ensure they will be able to satisfy the criteria for grant. Accordingly, the Department is planning to make amendments to the Bridging E visa regulations 'to indicate that a visa application will be granted unless the decision-maker knows or reasonably suspects that the person presents an unacceptable risk as specified in the Regulations'.[114]

People that overstay their visa

All unlawful non-citizens who remain in Australia following the expiration of their visa (otherwise known as 'visa overstayers') are subject to mandatory detention under existing subsection 189(1) because they no longer hold a visa that is in effect. However, under **proposed new subsection 189(1A) and (1)(b)** only former holders of enforcement visas that have expired will be subject to mandatory detention.

According to the Department, there are currently approximately 48 000 visa overstayers in Australia.[115]

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113. This group of people 'will generally be managed in the community': P Wong, Second reading speech, p. 5.

114. DIAC, Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009, p. 18.

115. DIAC, Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009, p. 8.

Visa cancellation for non-compliance with visa conditions

People who have had their visa cancelled are subject to mandatory detention under existing subsection 189(1). However, under **proposed new subsection 189(1)(b)** only people whose visas are cancelled on prescribed grounds will be subject to mandatory detention i.e. 'on grounds relating to national security'; under sections 501, 501A or 501B (character); and under section 109 for producing a false (or falsely obtained) document or giving information that was false when in immigration clearance. All other visa cancellations would presumably come within the newly created discretionary detention provision or proposed 189(1A)(d).

Detention statistics on the DIAC website indicate that,

> as at 24 July 2009 there were **175 people (about 18 per cent of the total immigration detention population) who had arrived in Australia lawfully and were then taken into immigration detention for either overstaying their visa or breaching their visa conditions, resulting in a visa cancellation.** The number of people in immigration detention who had arrived unlawfully by air or boat as at 24 July 2009 was 796, representing about 81 per cent of the total immigration detention population (emphasis added).[116]

Of these 175 people (or 18 per cent of the total detention population), 105 were visa overstayers, and 70 were visa cancellations.[117]

People awaiting outcome of merits/judicial review proceedings

It is not clear whether 'unlawful non-citizens' awaiting the outcome of merits or judicial review proceedings or a request for ministerial intervention will similarly be detained on a discretionary rather than mandatory basis, though it appears they would on the basis that they are not expressly included in the list of people to be subject to mandatory detention. This group of people are likely to remain in immigration detention for prolonged periods of time due to the delays caused by legal processes.

Discretionary detention at an 'excised offshore place'

The Migration Act does *not* require or obligate officers to detain all unauthorised arrivals at excised offshore places. Rather, existing subsection 189(3) creates a discretionary power (reflected in the use of the term 'may') to detain 'unlawful non-citizens' and those reasonably suspected of being so in an 'excised offshore place' such as Christmas

116. DIAC website, Immigration Detention Statistics Summary as at 24 July 2009, viewed 24 August 2009, http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20090724.pdf

117. DIAC website, Immigration Detention Statistics Summary as at 24 July 2009.

Island.[118] This Bill does *not* propose to amend the Act to introduce mandatory detention of all unauthorised arrivals at excised offshore places.

However, under the New Directions in Detention policy three categories of persons will be subject to *mandatory* immigration detention:

- all unauthorised arrivals, for management of health, identity and security risks to the community
- unlawful non-citizens who present unacceptable risks to the community and
- unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

Significantly, official Departmental Policy Instruction confirms that this policy applies to persons being processed on Christmas Island:

> As a matter of policy, it is intended, as a general rule, that all unauthorised air and sea arrivals at Christmas Island will initially be taken into immigration detention to enable processing, initial interviews and health checks to take place.[119]

Accordingly, it appears that unlawful non-citizens, (or those reasonably suspected of being so) on Christmas Island will now be subject to *mandatory* rather than discretionary detention, albeit in policy only.

Temporary community access permission

Item 12 inserts **proposed section 194A** into the Migration Act which will create what is to be known as 'temporary community access permission' (TCAP), which the Minister equates to an *unaccompanied* 'day release' for detainees to e.g. undertake an educational course, visit a doctor, attend a wedding or funeral of a close friend or relative etc.[120] The main features of this proposed scheme are as follows:

- it enables a person/s to 'be absent' from the person's place of detention for a specific purpose and for a specified duration;
- it is available to those in 'immigration detention' but *not* those covered by a residence determination;
- it is only available if it would involve a minimal risk to the Australian community;

118. Subsection 189(4) of the Migration Act also extends the discretion to those at sea, in Australia, where the person is seeking to enter an excised offshore place.

119. DIAC, PAM3 Migration Act, Detention Services Manual, Chapter 2 Client Placement: Discretion to Detain Unauthorised Arrivals at Christmas Island.

120. P Wong, Second reading speech, p. 15.

- an authorised officer is not under any obligation to consider a request for a TCAP;
- a TCAP can be varied or revoked;
- being at, or going to, a place in accordance with a TCAP is still considered to be 'immigration detention' for the purposes of the Migration Act;
- being at, or going to, a place in accordance with a TCAP may involve the person not being in the company of, and restrained by an officer or another person; and
- a TCAP must be in writing and specify the conditions that must be complied with.

Though immigration detention value 7 (conditions of detention will ensure the inherent dignity of the human person) will not be embedded in the Act, the Minister claims that the TCAP will *support* the value, in the same way the Residence Determination system introduced by the former Coalition Government did.[121]

In response to concerns that an authorised officer is not under any obligation to consider a request for a TCAP, and the Department's statement which the Senate Committee inquiry into this Bill interpreted as meaning that 'the TCAP is intended to be used by the Department, primarily for its own purposes and at its own initiative', the Committee recommended that 'proposed section 194A be amended to require an officer to consider a request by a detainee for a Temporary Community Access Permission'.[122]

The more technical aspects of a TCAP may be summarised as follows:

- a TCAP is not a legislative instrument (and thus not disallowable) (**proposed subsection 194(5)**);
- preparing or helping to prepare a request for a TCAP or advising someone about making a request is considered to be 'immigration assistance' (**items 15 and 16**);[123]
- a lawyer does not give 'immigration legal assistance' in giving advice regarding a request for a TCAP (**item 17**);[124]
- a person makes 'immigration representations' if they make representations to, or otherwise communicates with, the Minister, a member of the Minister's staff or the

121. P Wong, Second reading speech, p. 16.

122. Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Immigration Detention Reform) Bill 2009*, Recommendation 4, p. 13.

123. Section 280 of the Migration Act places restrictions and imposes penalties for the giving of immigration assistance by unqualified persons.

124. Section 277 of the Migration Act defines 'immigration legal assistance'.

Department on behalf of a person who has made, or is proposing to make a request for a TCAP (**item 18**);[125] and

- a decision not to exercise, or not to consider the exercise the power to grant a TCAP is a 'privative clause decision' for the purposes of existing section 474 (**item 19**) therefore judicial review is limited.[126]

Transitional arrangements for existing detainees

Subitem 20(1) provides that a detainee in immigration detention under existing subsection 189(1) will be taken to be detained under **proposed new subsection 189(1)** as inserted by item 9 if at the time this item commences, if an officer knows or reasonably suspects that the person is someone mentioned in paragraph 189(1)(b).

Subitem (2) provides that if a detainee is not someone covered by subitem (1), then the person is simply taken to be detained under proposed new subsection 189(1C) upon commencement.

Item 21 confirms that the amendments made by Schedule 1 apply 'in relation to a person who is in immigration detention on or after the day on which this item commences'.

Concluding comments

When introducing the Government's 'New Directions in Detention policy', the Minister claimed that the former Coalition Government's reforms to immigration detention in 2005 were 'largely superficial and never fundamentally reformed the system'. In contrast, he asserted that the Government's new detention policy would address serious concerns about the immigration detention system and fundamentally change the premise underlying detention policy so that people would be treated humanely and compassionately. Moreover, its new detention policy would reduce the duration of detention; create greater transparency, oversight and accountability around the decision to detain and the decision to continue detention. It is against this backdrop that this Bill must be assessed because it is this new detention policy (incorporating the detention values) that this Bill will give legislative (as opposed to regulatory and administrative) effect. In this respect this Bill simply proposes to make rather minor and qualified amendments to the Act to give legislative effect to largely existing policy and practice. Accordingly, parts of this Bill could be described as symbolic. As conceded in the second reading speech, the amendments proposed largely represent a continuation of the reforms introduced by the

125. Section 282 of the Migration Act places restrictions and imposes penalties on charging fees for immigration representations.

126. Subsection 474(2) defines 'privative clause decision as 'a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5)'.

former Government. In doing so, this Bill, as it currently stands, does not adequately embed in legislation the Government's new detention policy and more importantly, the considered recommendations of consecutive parliamentary inquiries.