RILC **Refugee & Immigration Legal Centre Inc**

Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Migration Amendment (Detention Reform) Bill 2009

1. Introduction – Refugee & Immigration Legal Centre Inc.

1.1 The Refugee and Immigration Legal Centre ("RILC") is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia.[1] Since its inception over 20 years ago, RILC and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2 RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration's Immigration Advice and Application Assistance Scheme ("IAAAS") and we visit the Maribyrnong immigration detention centre often. RILC has been assisting clients in detention for over 12 years and has substantial casework experience. We have often been contacted for advice by detainees from remote centres and have visited Port Hedland, Curtin, Perth, Baxter, Christmas Island and Nauru immigration detention centres/'facilities' on numerous occasions. We are also a regular contributor to the public policy debate on refugee and general migration matters.

1.3 In the 2007-2008 financial year, RILC gave assistance to 3,227 people. Our clientele largely consists of people from a wide variety of nationalities and backgrounds who cannot afford to pay for legal assistance and are often disadvantaged in other ways. Much of this work involved advice and/or full legal representation to review applicants at the Migration and Refugee Review Tribunals. Due to funding and resource constraints, in recent years we have generally provided advice and assistance at the administrative level only.

2. Outline of submission

2.1 RILC welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Migration Amendment (Detention Reform) Bill 2009.

[1] RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service ("RACS") and the Victorian Immigration Advice and Rights Centre ("VIARC") which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

2.2 The Migration Amendment (Detention Reform) Bill 2009 ("the Bill") amends the *Migration Act 1958* (Cth) ("the Act") purportedly to implement the Government's new Directions in Detention Policy ("new detention policy").[2] The Bill amends the Act by affirming certain principles in relation to the purpose of detention, strengthening the presumption that the detention of minors is a last resort, changing the basis on which unlawful non-citizens must or may be detained, allowing the delegation of the Minister's residence determination power and allowing the grant of temporary community access permits to detainees.

2.5 RILC has welcomed the new detention policy as an important development broadly consistent with international human rights principles concerning detention.[3] However, while RILC welcomes the amendments to the Bill as having the potential to improve the quality of decision making in relation to the decision to detain, we hold serious concerns that the Bill does not adequately translate the new detention policy into law.

2.6 We are extremely concerned that the Bill fails to properly implement the new detention policy in a number of fundamental respects. First, in continuing to allow for a discretion to detain any unlawful non-citizen,[4] the Bill provides only limited and potentially inadequate enforceability of the principles set out in the new detention policy. Secondly, one of the core principles of the new detention policy is that the onus should be on the Department to establish the need for a person to be detained and must justify the decision to detain[5], yet there is no provision on the Bill that requires the Department or the Minister to justify, based on a thorough assessment of each person's individual circumstances, the need to detain each person. Thirdly, the Bill fails to implement in any form the regular review of detention, or the review of the decision to detain, in the form proposed in the new detention policy.[6] Finally, by not repealing the continuing discretion to detain persons in excised offshore places, the Bill fails to adequately ensure that the elements of the new detention policy which it *does* implement apply to people detained on Christmas Island or other excised territory.

2.7 Related to these concerns are the continuing deficiencies, in light of Australia's international human rights obligations, of the new detention policy itself made

[2] As set out in the speech by Senator Chris Evans, Minister for Immigration and Citizenship, 'New Directions in Detention, Restoring Integrity to Australia's Immigration System', 29 July 2008
[3] See for example our submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia, Refugee and Immigration Legal Centre, September 2008, at paragraph 3.15, accessible via http://www.aph.gov.au/house/committee/mig/detention/subs/sub130.pdf
[4] See s 189(1C) of the Bill and paragraphs 5.1 – 5.4 below.
[5] See fn 2 above, at page 8.
[6] Ibid at page 12.

manifest in the Bill. We have addressed our concerns in relation to these issues previously[7] and we are seriously concerned that the Bill perpetuates these deficiencies. In particular, the Bill continues to require the mandatory detention of unlawful non-citizens in many cases, does not set out any process by which the decision to detain will be made and does not provide independent merits review of the decision to detain or continue to detain. The requirements set out in the Bill that purportedly clarify the bases on which an unlawful non-citizen must be detained continue to broadly categorise individuals without requiring a proper assessment of their individual circumstances as to whether they, individually, represent a serious risk to the Australian community if they are not detained.

2.8 Further, we submit that the provisions in the Bill relating to minors in detention seriously fail to address the principle at the heart of the new detention policy on this issue: that is, that children should not be incarcerated in any way as a result of Australia's immigration laws. Implicit in this principle is that children must not be held in conditions that deprive them of their liberty or are otherwise prison- or detention-like. The relevant provisions of the Bill remain mired in an artificial semantic distinction between "detention" and "detention centre" that does not afford children the protection to which they are entitled. While it is possible that some forms of alternative detention may allow children to live in conditions that are not "detention-like" there is no requirement in the Bill that the Department ensure this in determining the form of detention, that is not a "detention centre", in which a child will be detained.

2.9 We submit it is crucial that the Bill provide clear and comprehensive legislative guidance for immigration officers in relation to their duties and obligations to detainees and unlawful non-citizens facing the prospect of detention. Otherwise, there is a real risk that the new detention policy will not be properly implemented in practice. RILC has recently had direct experience of the failure of the Department to adequately implement the new detention policy. For example in one instance there was clear evidence that our clients had satisfied the necessary checks and yet were still detained in the North West Point Detention Centre on Christmas Island, representing a manifest failure of the new detention policy. In addition, we note a number of recent reports of the Commonwealth Ombudsman in relation to detainees held for more than six months, which find that the detainee's continued detention is inconsistent with the new detention policy and recommend the detainee's release into the community.[8] Given that the Commonwealth Ombudsman's recommendations are not binding on the Department, we submit these reports and RILC's clients' experience raise grave

[7] See fn 3 above.

[8] See Commonwealth Ombudsman, Reports for the Tabling in Parliament under s 486O of the Migration Act 1958, Personal identifiers 512/09, 513/09, 534/09 & 535/09.

concerns as to whether the Department will adequately implement the new detention policy without enforceable oversight of its activities.

2.10 In light of the above, we submit it is crucial to the fair and reasonable treatment of non-citizens in Australia that the new detention be properly and thoroughly implemented in a way that allows individuals to enforce their rights in relation to decisions that they be detained in immigration detention. Establishing a clear and comprehensive legislative operational framework is central to this. The amendments proposed in the Bill are only a small, first step in the direction of a proper, transparent system regulating the detention of unlawful non-citizens in Australia.

3. Recommendations

3.1 Accordingly, we submit the Bill requires serious and fundamental revision and make the following recommendations.

Recommendation 1.
That sections 189(1)(b)(ii) – (v) of the Bill be removed.

Recommendation 2.
Subsections 189(1A)(a) - (b) of the Bill should be removed. Mandatory detention should not apply to persons who fail the "character" test.

Recommendation 3.
Draft regulations prescribing the circumstances set out in s 189(1A)(d) of the Bill should be made available for public comment.

Recommendation 4.
The Bill should be amended to include a provision that places the onus on the Department to establish and provide evidence to support the claim that a person is an unacceptable risk to the Australian community.

Recommendation 5.
The Bill be amended to require that an officer undertake reasonable efforts to complete the activities set out in s 189(1B)(a) – (c) within a particular time period that coincides with the timing of a decision to continue to detain (such as 30 days), at which time a risk assessment must be made on the evidence available at that time, and that s 189(1B)(d) be removed.

Recommendation 6.
That s 189(1C) be removed from the Bill or, in the alternative, its status as a transitional provision be clarified by the operation of a "sunset clause" after a

limited specified period or a stipulation that it only applies to persons detained at the time the Bill comes into force.

Recommendation 7.
That s 189(3) of the Act be repealed so that the amendments made to s 189 by the Bill apply to persons detained at excised offshore places.

Recommendation 8.
That s 4AAA(2) of the Bill be amended to remove the words "in a detention centre established under this Act" so that the principle is clearly that detention in any form is a measure of last resort.

Recommendation 9.
That s4AA(3) of the Bill be amended to remove the words "in a detention centre established under this Act" to ensure that children are not detained.

Recommendation 10.
That the Bill be amended to incorporate a provision that requires that designated, properly trained, officers make a decision to detain or not to detain.

Recommendation 11.
That the Bill be amended to include a requirement that the decision to detain be:

- made by properly qualified, designated officers of the Department; and
- in writing, with full reasons, provided immediately to the detainee and include information about the right of review and right to legal assistance.

Recommendation 12.
That the Bill be amended to provide for a statutory right to have the decision to detain be review by an independent, merits review body within a time limit of 30 days.

Recommendation 13.
That the Bill and the Act be amended to allow for judicial review of the decision to detain, either made by a designated officer or an independent merits review body.

Recommendation 14.
That the Bill be amended to set out a clear procedural framework setting out a detainee's right to seek a TCAP and allowing for independent merits review of a decision to refuse to grant a TCAP.

4. Amendment to detention provisions

Mandatory detention

4.1 The Bill amends s 189(1) of the Act so as to require that the decision to detain will now involve more than an assessment of whether a person is an unlawful non-citizen. It requires that the decision to detain also involve an assessment of whether the person "presents an unacceptable risk to the Australian community", has bypassed or been refused immigration clearance or has had their visa cancelled because they used a false visa or other document when in immigration clearance. This amendment is clearly an improvement on the default obligation to detain required under s 189 in its current form. Consistent with the new detention policy, however, it continues to implement a policy of mandatory detention in relation to people who fall under one of the categories set out in s 189(1).

4.2 While we acknowledge that continuing mandatory detention for certain categories of people is part of the new detention policy, we reiterate our previously made objections to the policy of mandatory detention.[9] In particular, we submit the Bill is in danger of failing to address the inherent contradiction at the heart of the new detention policy which states that detention that is "arbitrary is not acceptable"[10] and yet still requires mandatory detention of certain categories of people. As we submitted to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia ("JSCM"),[11] under applicable international standards, detention which is mandatory is unlawful precisely because it does not contain appropriate regard for substantive questions about the necessary and proportionate nature of detention itself. Put simply, detention which is mandatory necessarily fails to adequately consider the individual circumstances of the individual or alternatives to incarceration and so renders the person's detention arbitrary.

4.3 In RILC's experience there may often be circumstances where a person may come under one of the categories set out in subsection 189(1)(b)(ii) – (v) of the Bill yet a fair assessment of their individual circumstances would show it is neither necessary nor proportionate for that person to be detained. For example, almost all unauthorised boat arrivals will, by the nature of their arrival in Australia, be refused immigration clearance and so will continue to be mandatorily detained under s 189(1)(b)(iii). Yet a very high proportion of unauthorised boat arrivals are consistently found to be refugees and pose no risk

[9] See fn 3 above.
[10] See fn 2 above at page 8, Key Immigration Value Number 4.
[11] Ibid at paragraph 3.17.

to the Australian community either before or after their claims to refugee status are assessed.

4.4 To limit the decision to detain to only requiring an assessment that a person falls under one of the broad categories set out in s 189 is to fail to require a substantive assessment of the person's individual circumstances. Thus the requirement that persons coming under those categories must be detained continues to be inherently arbitrary and so in breach of Australia's obligations under International law and with the new detention policy.

4.5 In order to resolve the contradiction between the policy that detention is not arbitrary but that certain categories of people are subject to mandatory detention, we submit that s 189(1) of the Bill should be amended to require an assessment of the individual circumstances of the person subject to the decision to detain that determines whether it is necessary or proportionate to detain that particular person. A straightforward way to do this would be to remove subsections 189(1)(b)(ii) – (iv) so that subsection 189(1)(b)(i) – that a person presents an unacceptable risk to the Australian community – remains the one test as to whether an unlawful non-citizen must be detained. Subject to other amendments to the Bill in relation to what amounts to an unacceptable risk[12] and further legislative requirements setting out fair and transparent procedures governing the process by which the decision to detain is made, this would provide clarity to decision makers as to what assessment must be made to ensure that a decision to detain is not arbitrary and so inconsistent with the new detention policy.

Recommendation 1.

That sections 189(1)(b)(ii) – (v) of the Bill be removed.

Unacceptable risk

4.6 Subsection 189(1A) of the Bill sets out the circumstances where a person "presents an unacceptable risk to the Australian community". These include where a person has been refused or cancelled a visa on "character" grounds or on grounds relating to national security, has held an enforcement visa or in prescribed circumstances.

4.7 RILC has been concerned that the new detention policy has appeared to contemplate 'mandatory' detention of people who have a criminal past, and in particular, those who have their visas cancelled on 'character' grounds under section 501 of the *Migration Act* on the basis that such people pose an

[12] See paragraphs 4.6 – 4.19 below.

'unacceptable risk' to the community. RILC has acted for numerous people detained on the basis of character cancellation. In most cases, these people have served a criminal sentence and have otherwise been determined by a parole board under the criminal justice system to be fit for release into the community. They generally have long-established and close relationships with Australian residents or citizens, including family.

4.8 RILC reiterates our submission to the JSCM[13] that any default determination of risk for such individuals runs counter to the core policy presumption which requires justification of necessity based on individualised, evidence-based assessment of risk, rather than a non-rebuttable presumption of risk for a class of persons. It is unclear why a person found not to pose a serious risk to the community and to thus be found fit for release from prison into community, would be found to constitute such a risk as to justify incarceration under immigration law. This represents an unjustified departure from ordinary approaches to release from incarceration under the Australian legal system and can operate as a double punishment, contrary to domestic and international human rights law principles.[14]

4.9 We also note that the Joint Standing Committee has recommended in its first report that the Department *individually assess* those detained as a result of the operation of the "Character" provisions of the Act against unacceptable risk criteria and that factors relating to the person's parole, convictions and other matters be taken into account in that assessment.[15] Section 189(1A) of the Bill fails to require any individual assessment of this sort.

4.10 In light of the above, we submit the assumption that a person whose visa has been refused or cancelled on "character" grounds is an "unacceptable risk" should be removed from the Bill and that any regulations made under s 189(1A)(d) should not further prescribe such an assumption.

Recommendation 2.

Subsections 189(1A)(a) - (b) of the Bill should be removed. Mandatory detention should not apply to persons who fail the "character" test.

4.11 Further, we submit that any circumstances prescribed under s 189(1A)(d) as presenting an unacceptable risk to the Australian community must be framed to require an individual assessment of the person's circumstances, based on

[13] See fn 5 at paragraphs 4.23 – 4.25.
[14] See for example, ICCPR art 14(7).
[15] See Recommendation 7, *Immigration detention in Australia: A new beginning - Criteria for release from detention,* First report of the inquiry into immigration detention in Australia Joint Standing Committee on Migration, December 2008, at page xxi.

evidence relevant to the questions of whether it is necessary and proportionate to require detention, and with the onus on this Department to show this. An assessment must not be based on vague or trivial matters. It is crucial that in assessing whether a person is an unacceptable risk to the Australian community that

- a person be presumed not to be an 'unacceptable risk' unless there are substantial grounds for believing otherwise;
- that any assessment be evidence-based; and
- that the ordinary rules of procedural fairness apply, including that a person be afforded an opportunity to comment on adverse information

This would bring the policy within general conformity with relevant guidelines developed by United Nations bodies.[16]

4.12 We are concerned that without such clear safeguards, there is a real risk that routine practices of the past could be adopted. For example, the approach regarding security clearance has commonly proceeded on the assumption that a person may be a risk until established otherwise. This approach prevailed despite the relevant regulation requiring only that a person *not* be assessed as a security risk.[17] Contrary to its clear meaning, for asylum seekers, this provision has been interpreted as requiring a formal security clearance from the Australian Security and Intelligence Agency. In our experience, this has routinely resulted in inordinate delays of many months, and on occasion, over one year.

4.13 Further, it is crucial that the prescribed regulations provide clear guidance as to the definitional scope of key terms such as 'security risk', 'identity' and 'health'. For example, it will be important to clearly define what is meant by 'identity' to avoid the danger of the inquiry expanding unnecessarily into credibility assessments related to a person's substantive claims for asylum. We address these issues further below.

Identity

4.14 We hold concerns in relation to the application under the new detention policy of identity verification as a key condition of release. The Minister's speech referred to an "unacceptable risk" including "those whose identity is unknown". However, in RILC's experience, it is common for asylum seekers to have great difficulties with providing concrete proof of identity. Many people are unable to obtain genuine identity documentation. These difficulties often persist throughout the determination process and are intractable. In fact, the lack of

[16] See: Guideline 3: 'Exceptional Grounds for Detention' in United Nations High Commissioner for Refugees Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999).
[17] *Migration Regulations 1994* (Cth), Schedule 4, Item 4002.

genuine identity documents or the means to otherwise verify identity are often inextricably connected to the person's past persecution and need for protection.

Visa non-compliance

4.15 RILC further considers that there is a distinct lack of clarity as to the basis of repeated non-compliance mandating detention under the government's new policy. For example, it is unclear how visa breaches could generally be considered to be at the same level of seriousness as security concerns in relation to the key question of risk. In our view, it is doubtful that an 'unacceptable risk' to the community could be identified – let alone established - in most cases of non-compliance.

4.16 It is paramount that in any consideration of detention on the basis of breaches of visa conditions, there be a fundamental connection established between the nature, frequency and seriousness of the breaches, and necessity and proportionality based on the key determinant of risk. In other words, a clear connection must be established between the breaches and this risk of depriving the government of achieving timely status resolution through absconding. The decision must not just be assumption-based and unduly risk averse, as has been the trend in past decision-making. In RILC's experience, many breaches of conditions have no obvious connection with risk to the community, whether by way of absconding or otherwise. Further, few people abscond. RILC's experience is that most people fully co-operate and comply with conditions, in part due to the commonsense view that such conduct is consistent with their desire to achieve a positive outcome. Our experience mirrors conclusions regarding international studies into this issue.[18]

Health

4.17 RILC notes the new policy mandates detention for completion of health checks[19] and the Bill refers to health risk as an issue at s 189(1B)(c). However, we find it difficult to envisage circumstances under which heath checks would provide a sound basis for detention grounded on reasons of necessity, proportionality and unacceptable risk. The fact that such requirement is unnecessary seems clear from our experience that many people we have assisted have undertaken medical checks while living in the community rather than detention, purely by reason of having initially arrived in Australia on a valid visa before applying for protection. Further, in the small amount of cases in which we have assisted people with serious health problems, there has been no necessary connection

[18] See: O Field, 'Alternatives to Detention of Asylum Seekers and Refugees, Legal and Protection Policy Research Series', UNHCR, POLAS/2006/03, April 2006.
[19] See fn 2 above.

between their medical condition and detention. They have been required to undergo treatment and agree to undertakings related to this treatment, but not with detention as a prerequisite. To the contrary, serious illness has often triggered quicker consideration of release from detention, given the difficulties of providing appropriate health care in detention.

4.18 We submit that the above issues must be taken into account in drafting regulations prescribing the circumstances where a person is an unacceptable risk. Further, as these prescribed circumstances will be crucial to implementation of the Bill, we submit that the regulations prescribing these circumstances should be made available for public comment before being finalised.

Recommendation 3.

Draft regulations prescribing the circumstances set out in s 189(1A)(d) of the Bill should be made available for public comment.

4.19 Finally, we are gravely concerned that the Bill does not require that the onus be on the government to establish grounds amounting to 'unacceptable risk' or to otherwise justify the decision to detain a person. A requirement of this sort is consistent with international law[20] and, as noted above, is part of the new detention policy.[21] Principles of natural justice require that the Department should only take the step of depriving a person of their liberty if there is logically relevant and substantial evidence that supports a finding that the person themselves would be a risk to the Australian community. It is neither fair nor just for the person to have to provide evidence that they are *not* a risk to the Australian community and so should not be detained. Accordingly, we submit that, in order for the new detention policy to be properly implemented, a provision placing this onus on the Department must be incorporated in the Bill.

Recommendation 4.

The Bill should be amended to include a provision that places the onus on the Department to establish and provide evidence to support the claim that a person is an unacceptable risk to the Australian community.

"Reasonable efforts" while in detention

[20] See Guideline 3: 'Exceptional Grounds for Detention' in United Nations High Commissioner for Refugees Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999).
[21] See fn 2 at page 8.

4.20 Section 189(1B) of the Bill requires that the Department make reasonable efforts to ascertain a detainee's identity and what level of health and security risk they may be to the Australian community, and to resolve the detainee's immigration status.

4.21 RILC welcomes some codification of the obligations of the Department in relation to resolving issues that may lead to the release of a person from detention. However, we are concerned that the requirement that an officer make "reasonable efforts" is vague and indefinite. For this provision to accord with the principle that detention should be for the shortest period possible and as a matter of last resort, we submit there must be a requirement that the reasonable efforts be concluded within a particular time period. We submit that the appropriate period of time would be aligned with the time at which review of the decision to detain is made. At that time, a detainee should then be released into the community at that time unless an individual assessment establishes that continued detention is necessary and proportionate for that individual *based on the evidence available at that time*.

4.22 Further, the purpose of s 189(1B) would appear to be to clarify the maters that an officer must resolve in order to determine whether a person is an unacceptable risk to the Australian community. We are concerned that the reference to resolution of a person's immigration status in s 189(1B)(d) implies that the resolution of a person's immigration status is directly relevant to the risk they may pose to the Australian community and so a condition of release from detention. We submit this is not and should not be the case. In this context, we note that the new detention policy states that: "…continued detention while immigration status is resolved is unwarranted."[22]

4.23 In relation to the assessment of health, identity and security issues, we refer to our submissions above at paragraph 4.12 – 4.17.

4.24 In light of the above, we are concerned that s 189(1B) has the potential to create significant confusion for immigration officers in relation to their responsibilities and obligations to detainees. We submit that such confusion and uncertainty has in the past led to serious instances of failures to investigate and resolve outstanding issues determinative of whether a person is detained[23] and, accordingly, a proper implementation of the new detention policy requires that an officer be compelled to expedite inquiries into health, character, security and

[22] Minister Evans' speech, supra n 17.

[23] See for example *Department of Immigration and Citizenship, Report into Referred Immigration Cases: Other Legal Issues*, June 2007, Report by the Commonwealth and Immigration Ombudsman, Prof. John McMillan under the *Ombudsman Act 1976* accessible at http://ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2007_10/$FILE/report_2007_10.pdf.

identity issues. Consistent with the policy that the onus is on the Department to establish reasons for detention, the inquiry process should not be unduly prolonged and the detainee should be given the benefit of the doubt in assessments of these matters.

Recommendation 5.

The Bill be amended to require that an officer undertake reasonable efforts to complete the activities set out in s 189(1B)(a) – (c) within a particular time period that coincides with the timing of a decision to continue to detain (such as 30 days), at which time a risk assessment must be made on the evidence available at that time, and that s 189(1B)(d) be removed.

5. Detention as a matter of discretion

Residual discretion

5.1 Subsection 189(1C) retains a residual discretion for the Department to detain unlawful non-citizens in the migration zone. Further, the Bill does not amend subsection 189(3) and so the same discretion continues to apply in relation to unlawful non-citizens in excised offshore places. Given that that the vast majority of unauthorized arrivals are currently detained on Christmas Island, an excised offshore place, the proposed changes to the criteria for the decision to detain do not affect the decision to detain them, nor influence the decision to continue to detain them, nor is the Department legislatively required to make the reasonable efforts set out in s 189(1B) in relation to them.

5.2 As noted above, allowing the Department a continuing discretion to detain undermines as a matter of law the legislative restrictions on the mandatory detention requirements in s 189(1). By allowing the Department to still have the power to detain a person simply because they are an unlawful non-citizen, any rights a person may have to dispute the decision to detain them by arguing that s 189(1) does not apply to them are rendered unenforceable. Yet an enforceable right to challenge the decision to detain a person is fundamental to the proper regulation of immigration detention. Without it, the tendency for decisions to be made without rigour or arbitrarily greatly increases. Where the decision is in relation to the manifestly significant question of whether a person should be deprived of their liberty, enforceability of the right to challenge the decision is essential.

5.3 We note that the explanatory Memorandum for the Bill states that s 189(1C) has a role to play as a transitional provision so that all detainees detained at the time the Bill comes into law to whom s 189(1) does not apply will be detained under s

189(1C). The Bill does not set out what will happen to detainees detained under s 189(1C) after the Bill comes into law, nor does it specify that s 189(1C) only applies to people detained at that time.

5.4 It is unclear what legitimate purpose s 189(1C) serves other than as a transitional provision. Given the intention of the Bill is to implement the new detention policy, and in light of the fact that s 189(1C) undermines the enforceability of the restrictions on mandatory detention set out in s 189(1), we submit there is no place for a blanket residual discretion to detain in the Act. Accordingly, we submit s 189(1C) of the Bill should be amended to clearly reflect its role as a transitional provision, so it only applies in relation to detainees in detention at the time the Bill comes into law and/or with a "sun set" clause that brings the residual discretion to detain to an end after a certain period, such as three months after the Bill comes into law.

Recommendation 6.

That s 189(1C) be removed from the Bill or, in the alternative, its status as a transitional provision be clarified by the operation of a "sunset clause" after a limited period or a stipulation that it only applies to persons detained at the time the Bill comes into force.

Offshore excised territory

5.6 In relation to the continuing residual discretion to detain persons at offshore excised territory under s 189(3), while it may be that, as matter of policy, the Department will endeavour to implement the new detention policy in relation to detention at excised offshore places, we submit that continuing the complete lack of legislative or regulatory oversight of the decision to detain at offshore excised places perpetrates the high risk that the rights of detainee and unlawful non-citizens at excised offshore places fail to be adequately protected. This is particularly so given the notorious resource constraints in relation to the Department's ability to implement the new detention policy on Christmas Island. We also note that the JSCM recommended that the new detention policy should apply to excised offshore places.[24]

5.7 We submit it is inexplicable that the new detention policy as implemented in the Bill does not apply to persons held on Christmas Island. If it is intended that the new detention policy does not apply on Christmas Island, it is unclear what justification there is of the denial of the basic scrutiny and regulation of the executive and its officers. Essentially, we are left to conclude that it is solely the

[24] See fn 15 above, Recommendation 9.

mode and place of a person's arrival that discriminatorily dictates whether they are afforded the proper protection of fundamental human rights.

5.8 For this reason, we submit that s 189(3) should be repealed and s 189(1) in the terms we set out at paragraph 4.5 above should apply to unlawful non-citizens at excised offshore places.

Recommendation 7.

That s 189(3) of the Act be repealed so that the amendments made to s 189 by the Bill apply to persons detained at excised offshore places.

6. Statements of principle and minors

6.1 RILC welcomes the statements of principle in the Bill at section 4AAA in relation to the purpose of detention and the use of detention in a detention centre and the legislative implementation of the new detention policy in relation to minors in s 4AA of the Bill as useful first step in codifying fair and just principles underlying immigration detention in Australia.

6.2 In relation to the amendments to s 4AAA, however, we submit that it is insufficient to address these issues only as matters of principle. In order to properly implement the new detention policy, it is crucial that these principles be implemented in legislation in a way that is enforceable. Through its lack of mechanisms addressing the decision as to the form of detention or the decision to continue to detain, the Bill fails to do this. Further, we submit that the principle at s4AAA(1)(a) affirming a purpose of detention to be to "manage the risks" of non-citizens entering or remaining in Australia is broad and uncertain. Such uncertainty can lead to ambiguity of policy and practice.

6.3 Further, we submit it is inappropriate to draw a distinction in principle between detention in a detention centre and detention otherwise. We note there is no definition of what a "detention centre" is in the Act or Regulations, yet it is a crucial definitional element of the Bill and lies at the heart of an issue fundamental to the new detention policy: the form of deprivation of liberty a person should suffer. Without clarification of this issue, it is not possible to be clear about the conditions that apply to the deprivation of liberty of individual detainees, which can allow, as has been seen in the past, the "goal posts" being moved with serious consequences for the conditions under which liberty is deprived.

6.4 We submit that, while this fundamental definitional issue remains unresolved, given that it is crucial to ensure that any detention is only in a form that is

necessary and proportionate in the circumstances, as a matter of principle, all forms of detention should be a measure of last resort.

Recommendation 8.

That s 4AAA(2) of the Bill be amended to remove the words "in a detention centre established under this Act" so that the principle is clearly that detention in any form is a measure of last resort.

6.5 In relation to the amendments to s 4AA, we submit that it is not possible to reconcile Australia's obligations to children under international human rights law with a requirement that children be detained in any form. Nor is it apparent how the application of necessity and risk-based criteria in relation to a minor could justify their detention in any form. Further, RILC is aware of many circumstances in which children have been detained in circumstances that, while not being detention "in a detention centre", have amounted to detention-like conditions, including the intimidating presence of security guards and the compulsory searching of all belongings.

6.6 As noted above, the core of any policy that is consistent with international law in relation to the detention of children must be the principle that children are not incarcerated in prison- or detention-like conditions. In continuing to create a distinction based solely on undefined terms such as "detention centre", the Bill does not address what should be the fundamental substantive assessment in relation to unlawful non-citizen minors: are they being held in conditions that are overly restrictive, intimidatory and prison-like? Accordingly, we submit that this section be amended to state that children must not be detained under any circumstances.

Recommendation 9.

That s4AA(3) of the Bill be amended to remove the words "in a detention centre established under this Act" to ensure that children are not detained.

7. Decision to detain and review

7.1 RILC is extremely concerned that the Bill does not provide any legislative or regulatory clarification of the procedures under which the decision to detain is made. For example, there is currently no basis by which a legally regulated procedure can assess whether detention really is the last resort in each case, nor whether detention is or has been for the shortest practicable time. Nor are there currently any legislated or regulatory mechanisms that provide procedural fairness in relation to the decision to detain.

7.2 Principles of natural justice make it imperative that persons detained under the Act be given the proper opportunity to respond to and challenge a decision to detain or continue to detain them. Accordingly, we submit that it is crucial to the proper implementation of the new detention policy, and of the stated principles that detention in a detention centre be a matter of last resort and for the shortest practicable time, that the above matters be articulated legislatively.

7.3 We submit that central to establishing a clear, transparent and fair process governing the decision to detain is a legislative structure that stipulates that a decision whether to detain is to be made, and should only be made after an evidence-based, individual risk-assessment is completed. We note that a similar stipulation is implemented in s 65 of the Act in relation to visa applications. In fact, a large part of immigration law in Australia sets out the detailed procedures governing the assessment of visa applications, or what could more broadly be termed permission to stay, including a framework ensuring a level of procedural fairness. We submit that there is no reason why a similar framework can be set out legislatively in relation to the decision to detain. In fact, to do so would be consistent with the new detention policy that states that "people in detention will be treated fairly and reasonably within the law".[25]

Recommendation 10.

That the Bill be amended to incorporate a provision that requires that a designated officer is to make a decision to detain or not to detain.

7.4 In our submission to the JSCM, we set out key areas of concern in relation to the procedures governing the decision to detain or continue to detain, including who makes the decision, the form of the decision, time limits by which further decisions to detain must be made and the proper review and oversight of those decisions. We briefly reiterate those submissions here.

7.5 In relation to the questions of who decides whether to detain, we submit such decisions be made by officers who are:

- sufficiently experienced;
- appropriately trained;
- readily identifiable, known and contactable; and
- in relation to review, independent of government.

7.6 We submit the decision to detain or continue to detain should:

- be in writing;
- set out the full reasons for the decision, including criteria and specific evidence applied;

[25] See fn 2 at page 8, point 7.

- be clear and comprehensible to the detainee, including ready and free availability of interpreting or translating services where necessary;
- be conveyed promptly to the person and/or any persons providing support;
- provide clear information about availability of review; and contain explicit reference to the right to legal assistance and the provision of meaningful access to free legal assistance.[26]

Recommendation 11.

That the Bill be amended to include a requirement that the decision to detain be:

- **made by properly qualified, designated officers of the Department; and**
- **in writing, with full reasons, provided immediately to the detainee and include information about the right of review and right to legal assistance.**

7.7 We note the new detention policy refers to "regular review" of detention and states this will be undertaken by a senior departmental officer at three month intervals yet there is no provision made for this in the Bill. Once again, we submit that without legislative enforceability, the conduct of a review of detention can become superficial, perfunctory and arbitrary. In our experience, legislative requirements validate the importance of prompt, fair and transparent decision making and strengthen the readiness of decision makers to comply with principles of natural justice. Without specific legislative oversight, there is no guard under these provisions against individuals being detained in circumstances similar to those of Mr Al Masri[27] or Mr Qasim.[28]

7.8 In relation to time limits for review of the decision to detain, we again reiterate our submission to the JSCM that in order to comply with applicable international[29] and domestic standards the right to review of the initial decision to detain should be allowed within a very short period and that thereafter there should be an automatic right to review of the decision on a regular and periodic basis, with timeframes for review for the shortest possible period (e.g. every 30 days)

Recommendation 12.

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[26] *Migration Act* s 256 has been applied by the Immigration Department in a restrictive manner in which access legal assistance is only facilitated if detainee specifically requests such assistance. This provision will require amendment to ensure that access to legal assistance is actively initiated and facilitated by the Department as a matter of course.

[27] See http://www.theage.com.au/articles/2003/08/14/1060588510876.html.

[28] See http://www.theage.com.au/articles/2004/08/09/1092022404082.html.

[29] See: Guideline 5: 'Procedural Safeguards', in United Nations High Commissioner for Refugees Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999).

That the Bill be amended to provide for a statutory right to have the decision to detain be review by an independent, merits review body within a time limit of 30 days.

Judicial review

7.9 Further to the issue of review, we have concerns that internal review of the decision to detain or continue to detain lacks necessary independence and is only administrative rather than judicial. We believe that beyond the initial decision to detain made by an immigration official, any review of such matters is best decided within a short period by an independent judicial officer, such as a Magistrate of the Federal Court. In the past, lack of clarity about those responsible for such decisions in the bureaucratic chain has been unclear, and has resulted in confusion about the basis of the decision and who is responsible for the decision and possible review of it. RILC's experience is that arrangements for detention and assessment of clients' claims which are largely discretionary and non-statutory are far more likely to be arbitrary, unreasonable and unjust in relation to both process and outcome.

7.10 For these reasons, we contend that all forms of immigration detention must include access to independent judicial review. The scope of questions for consideration of any review should include the proposed criteria set out in the Bill, the new detention policy and, more broadly, conformity with Australia's international human rights obligations. We note that the JSCM recommends a right of judicial review for detainees held for twelve months or more.[30] We submit that, in the context of the deprivation of liberty and incarceration, a detainee should be entitle to obtain judicial review in relation to the initial decision to detain or, at the very least, after a much shorter period, such as thirty days.

Recommendation 13.

That the Bill and the Act be amended to allow for judicial review of the decision to detain, either made by a designated officer or an independent merits review body.

8. Temporary Community Access Permit

8.1 Section 194A of the Bill proposes that an authorized officer may grant a temporary community access permit ("TCAP") to a person in immigration detention to allow then to be absent from their place of detention for specific purposes. Subsection 194A(2) requires that an authorized officer may only grant a TCAP where they consider "that it would involve minimal risk to the Australian community do so".

[30] See fn 15 above, Recommendation 14, page xxiii.

8.2 RILC welcomes the introduction of the TCAP as another means by which alternatives to detention can be managed flexibly and responsively to the needs of detainees.

8.3 However, we remain concerned that the procedures governing the request by a detainee for a TCAP and the decision whether or not to grant a TCAP are not codified in the Bill or in regulation. Further, s 194A(4) expressly prevents an officer from being compelled to grant a TCAP. This raises the same concerns as those we hold in relation to the decision to detain generally[31]: there is no procedural mechanism that ensures that a detainee who otherwise meets the requirements of a TCAP will be granted one, and no ability to seek review of a decision to refuse a TCAP.

8.4 In light of the above, we submit the Bill should be amended to set out a clear procedural framework setting out a detainee's right to seek a TCAP and allowing for independent merits review of a decision to refuse to grant a TCAP.

Recommendation 14.

That the Bill be amended to set out a clear procedural framework setting out a detainee's right to seek a TCAP and allowing for independent merits review of a decision to refuse to grant a TCAP.

9. Conclusion

9.1 RILC acknowledges the government's commitment to address deficiencies in Australia's immigration detention system, in particular in the introduction of the new detention policy. The Bill, however, does not adequately implement the new detention policy nor further address the continuing deficiencies in Australian immigration law and policy. While the Bill contains statements of principle, it does not allow for operational enforcement of those principles. In particular, the Bill continues to allow for children to be detained in detention-like conditions. The criteria for detention remain broad and category-based, rather than requiring a proper assessment of an individual's circumstances. Further, the amendments to the decision to detain proposed in the Bill are not legislatively enforceable on Christmas Island or other excised offshore places and continue to allow for the Department to detain people in other circumstances. Finally, the Bill does not provide for any legislative- or regulatory-governed process under which the decisions to detain is made, nor does it provide for adequate judicial

[31] See paragraphs 7.1 – 7.10 above.

independent oversight of those decisions, processes which a crucial to the fair and transparent operation of Australia's immigration detention system.

9.2 As a result, we remain concerned that the Bill does not effectively translate into regulation clear guidance for immigration officers on how to act in relation to detainees. Given the notorious evidence in the past – in the Palmer report and beyond – clear legal guidance for how immigration officials are to act and independent scrutiny of their actions is crucial to a fair and just detention regime.

9.3 Without these outstanding matters being addressed, the Bill remains a flawed first step towards a fair and humane immigration detention system.

Refugee and Immigration Legal Centre (RILC)
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