RILC **Refugee & Immigration Legal Centre Inc**

Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention

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 2006-2007 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 key recommendations

2.1 Our submission will primarily address issues which fall under the following terms of reference of the Joint Standing Committee:

- the criteria that should be applied in determining how long a person should be held in immigration detention;
- the criteria that should be applied in determining when a person should be released from immigration detention following health and security checks; and
- options for additional community-based alternatives to immigration detention.

2.2 We address the issues under three broad headings:

- the decision to detain; and

[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.

- the form of detention; and
- other matters, which relate to issues of adequate community-based alternatives to detention, and detention debts.

2.3 RILC submits that the Joint Standing Committee should adopt the following recommendations:

A. General

Recommendation 1: All forms of 'mandatory' immigration detention should be abolished.

Recommendation 2: The government's new detention policy should be fully enshrined in legislation.

Recommendation 3: There should be the formulation of a clear and comprehensive operational framework for implementation of the new detention policy.

B. Decisions to detain

Recommendation 4: Decisions to detain should only be made by sufficiently experienced and appropriately trained decision makers.

Recommendation 5: All decision-makers on detention should be readily identifiable, known and contactable.

Recommendation 6: All decisions to detain should be made within a regulated timeframe, and within the shortest practicable period.

Recommendation 7: All decisions to detain should be:

- made in writing,
- set out full reasons,
- conveyed promptly to the person subject to the decision; and
- explicitly refer to the right to legal assistance in relation to the decision.

Recommendation 8: All decisions to detain should be reviewable by a decision-maker independent of government, and ideally by a judicial officer, within a short period.

Recommendation 9: Oversight by the Commonwealth Ombudsman should extend to the making of recommendations which must be fully and promptly responded to by government. Any such reviews, including responses by government, should be fully reported upon publicly.

C. Criteria for detention decisions

Recommendation 10: There should be detailed, clear guidance for decision-makers on the criteria for deciding when to detain, which is consistent with the government's new 'detention values'. The criteria should be publicly available.

Recommendation 11: There should clear and detailed guidance as to what constitutes an “unacceptable risk”, including in relation to issues of ‘security’, ‘health’ and ‘identity’.

Recommendation 12: A person should be assumed to not to be an “unacceptable risk” unless there are substantial grounds for believing otherwise.

Recommendation 13: The onus should be on the Department of Immigration and Citizenship to establish, based on evidence, that a person is an “unacceptable risk”.

Recommendation 14: The ordinary, well-established rules of procedural fairness should apply in relation to decisions to detain. This should include affording an opportunity to comment before a decision is made.

Recommendation 15: A person should be given the benefit of the doubt in relation to issues of identity verification, unless there is clear evidence of lack of cooperation or refusal to comply with reasonable requests.

Recommendation 16: Repeated non-compliance with visa conditions should only be considered as resulting in an “unacceptable risk” where there is a clear, evidence-based connection between the non-compliance and a substantial, significant risk of absconding that would prevent the resolution of immigration status.

Recommendation 17: The power to impose sureties or bonds as condition of release from detention should be abolished. If sureties or bonds as to used as condition of release, legislation should be introduced to ensure that the imposition of sureties for release from detention is not unduly onerous.

Recommendation 18: Detention should not be imposed for the completion of health checks.

Recommendation 19: Detention should not be automatically imposed on persons who have had a visa refused or cancelled on ‘character’ grounds. Decisions to detain in such cases should only be made after an appropriate assessment of ‘unacceptable risk’ taking into account the individual circumstances of each case.

D. Form of detention

We reiterate Recommendations 4-10 inclusive and 14 above, which should also be applicable to the form of detention.

Recommendation 20: All forms of detention for children should be abolished.

Recommendation 21: Detention should be of the least restrictive form appropriate to an individual’s circumstances**.** The conditions of detention should not be prison-like, unless exceptional grounds of necessity exist for reasons of security.

Recommendation 22: Any person subject to consideration of a decision to detain or the form of their detention should be given adequate access to legal advice and assistance.

Recommendation 23: The use of remote detention locations, such as Christmas Island, should be abolished.

Recommendation 24: If remote detention locations are retained, additional measures should be implemented to mitigate obstacles to timely and adequate service delivery and that, where this is not possible, people should be transferred to mainland Australia to access these services. Survivors of torture and trauma should be transferred to mainland Australia for access to appropriate services.

E. Adequate alternatives to immigration detention

Recommendation 25: A broad range options of community-based alternatives should be developed and implemented to ensure that there are appropriate and readily available options.

Recommendation 26: Measures should be implemented as a matter of priority to ensure that community-based alternatives to detention properly resourced.

Recommendation 27: Consideration should be given to adopting key components of the Community Care Pilot as part of a permanent program to provide community-based alternatives to detention.

Recommendation 28: People released into community-based alternatives should have immediate access to adequate material support, health care, education, and the right to work.

F. Detention costs

Recommendation 29: The policy of imposing costs of detention on a person should be abolished.

3. Background and key principles and practices

A. Background

3.1 Since 1992, immigration detention policy has involved the core presumption that all people in Australia without a valid visa - 'unlawful non-citizens'[2] - must be detained. Detention has been the default under policy, law and practice for those refused immigration clearance because of arrival without a valid visa (or visa cancellation), as well as for those who initially arrived on valid visas but subsequently become 'unlawful'. It has also applied not only to asylum seekers, but also to overstayers and those whose visas are cancelled on 'character' or other grounds. The hallmarks of detention have been that it is mandatory, indefinite, and non-reviewable.

3.2 In practice, this detention policy has resulted in asylum seekers who arrive without a valid visa ('unauthorised') being detained on the blanket ground that

[2] *Migration Act* ss 13 and 14.

they were unlawful non-citizens, and for an indefinite duration until granted a visa or removed or deported from Australia.[3] Visa processing has determined duration of detention. Generally, no further inquiry into the rationale or necessity for detention of a particular individual has been permitted. Further, there has been no right to seek independent substantive review of the grounds or conditions of detention. (Courts are only empowered to consider challenges to detention on the question of whether a determination that a person is an 'unlawful non-citizen' was correctly made.)[4]

3.3 Since its introduction, the detention policy has been responsible for subjecting thousands of people, many of them asylum seekers, to detention in prison-like centres. For many, detention has been prolonged. It has been very harmful to the physical and mental health of many of these people. It has also been very prejudicial to the rights of many people to seek and obtain adequate legal and other independent supports. It has created significant obstacles to people detained being able to present their case for protection (or other basis for stay) in a timely, comprehensive and effective manner. At times, it has hindered and harmed the prospects of due recognition of refugee status, and, in turn, has often contributed significantly to whether and when release from detention could be procured.

3.4 Factors which have resulted in such harmfulness have included:

- punitive and prison-like conditions;
- the uncertain and indeterminate nature of the detention;
- the often prolonged length of detention;
- lack of adequate medical, welfare and legal supports; and
- the remoteness and inaccessibility of location.[5]

3.5 The presumption of detention has been strong, and has included only limited legal exceptions. Limited exceptions to the detention policy contemplated release from detention of asylum seekers in the following circumstances:

- be under 18, release is in the best interests, and satisfactory care arrangements have been made and there will be no prejudice to custody or access to the child;[6]
- be at least 75 and satisfactory care arrangements have been made;[7]
- have a special need based on health or previous experience of torture or trauma, and cannot be properly cared for in a detention environment (and satisfactory care arrangements have been made);[8] or
- a primary decision on the protection visa application has not been made within six months and release is in the public interest.[9]

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[3] *Migration Act*, ss 189 and 196.
[4] *Migration Act* ss 196(3).
[5] See for example: Silove D, Austin P, Steel Z: 'No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia', *Transcultural Psychiatry* 2007, 44(3):359-393.
[6] Migration Regulations, reg 2.20(7).
[7] Migration Regulations, reg 2.20(8).
[8] Migration Regulations, reg 2.20(9).
[9] *Migration Act*, ss 72(2).

3.6 Arguably, the legislative enshrinement of these exceptions was informed by a recognition - albeit inadequate - that detention, particularly of especially vulnerable people, is undesirable, and should be used only as a measure of last resort.

3.7 However, in practice these limited exceptions were systematically applied in an overly restrictive, arbitrary and, on occasion, even capricious manner. In RILC's experience, the institutional approach was characterised by a strong presumption against the use of these exceptions, to the extent that they were rarely invoked or applied. Indeed, so strong was the presumption against their use, that if the Department of Immigration was confronted with a compelling case for exercise of release powers, it would commonly seek to avoid their use altogether, or otherwise would favour alternative forms of detention outside of an immigration detention centre. Such arrangements often involved more intrusive conditions than would usually attach to a release on a Bridging Visa under the above-mentioned exceptions.

3.8 Other strategies, including the following systemic failures, also characterized the institutional approach:

- Failure to identify, acknowledge or appropriately respond to serious medical conditions of people detained. This included the not infrequent sidelining of independent treating health specialists who had assessed the person's medical condition as not being conducive to care within a detention environment, and appointment of alternative specialists by the Department to assess the person to be fit for detention.
- The failure to initiate or respond to requests for release of children, including unaccompanied minors, into the community despite the existence of clear alternatives.[10]
- Failure to release asylum seekers held in detention who had not received primary decisions on their protection visa applications for periods well in excess of six months, through no fault of the applicants. There is no evidence that the provisions of section 72(2) of the *Migration Act* or submissions asking for this power to be exercised were ever seriously considered by the Immigration Minister or his Department. RILC's experience is that the government offered no substantive response or meaningful dialogue, let alone substantive reasons for refusal of the requests for release. (It is noteworthy that some of the people subjected to this treatment were asylum seekers who had fled from Taliban brutality and were survivors of past torture and trauma.)
- Obfuscation, and inexplicable and unjustified delays in responses and decisions by officials.

3.9 The result of this institutional, systematic and undue restrictiveness was that many particularly vulnerable people - including children, asylum seekers and others suffering from serious physical or psychological conditions - were

[10] See *The Australian*, 'Philip Ruddock's detention regret: kids', 13 August 2008, in which it was reported that former Immigration Minister Philip Ruddock, recently sought to defend the porlonged detention on the lack of funding for alternative detention arrangements meant children were not able to be released "sooner and earlier". RILC was directly aware of and involved in presentation of available and appropriate alternatives to detention of children which were brought to the attention of the government but not adopted.

subjected to prolonged detention in prison-like conditions and were unable to access release from detention under the legal exceptions referred to at paragraph 3.5 above before their immigration status had been resolved. This has been well-documented by numerous independent domestic and international reporting bodies.[11] So too has the serious harm which this often caused. The history of the fundamental failure to appropriately apply these laws is not only of profound concern, but provides some important guidance as to the desired shape of future reform so as to ensure that the principles are properly effected.

3.10 How was this situation able to happen? And what lessons can be drawn from this for future reform? One of the key problems is that the laws and the guidelines governing the exceptions have been too restrictive, unclear and 'discretionary' in nature, to the extent that their effect has been rendered largely nugatory. It is far from clear that their introduction by Parliament was intended to be nugatory. And yet that is essentially what occurred. This underscores the fundamental importance of ensuring that there is a clear and detailed operational framework of laws and guidelines to be applied by decision-makers on the questions of whether, and if so, under what conditions a person should be detained. The situation also underscores the crucial nature of clearly enshrining the principles of the new detention policy in law, as is more fully argued below.

B. Key principles and practices

3.11 Australia's detention policy has also involved serious violations international law, as well as a radical departure from ordinary principles governing incarceration under Australian domestic law.

3.12 Australia's non-compliance with applicable international standards and obligations has been well documented by numerous independent domestic and international bodies and commentators.[12] Key violations have been found in relation to the arbitrary, indefinite nature of detention, and the failure to provide a meaningful or effective right to seek independent judicial review of a person's detention which includes consideration of necessity, proportionality and reasonableness in light of proper consideration of alternatives.[13] In summary, our submissions proceed on the basis that core principles which ought to inform Australia's detention policy - including the decision to detain, and duration and form of detention – are rooted in international human rights principles and law. Principal amongst these are:

- The International Covenant on Civil and Political Rights ("ICCPR"), which prohibits arbitrary detention, and limits deprivation of liberty of all persons to that which is not arbitrary, but rather, that which is necessary, proportionate, reasonable, reviewable, for the shortest period practicable and the least restrictive.[14]

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[11] See for example, Commission on Human Rights, Economic and Social Council, United Nations, Civil and Political Rights, *Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention, Visit to Australia*, 24 October 2002; *A v Australia*, UN Human Rights Committee ("HRC") (560/1993); Human Rights and Equal Opportuniy Commission, *A last resort?: National Inquiry into Children in Immigration Detention,* 2004.
[12] Ibid.
[13] See for example, *Shafiq v Australia* (1324/2004) HRC.
[14] ICCPR art 9(1).

- The Refugees Convention, which prohibits unnecessary restrictions on freedom of movement or the imposition of "penalties" for arrival in a State's territory "without authority.[15]
- United Nations High Commissioner for Refugees ("UNHCR") Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999), which states that in general, asylum seekers should not be detained, and detention should only be used in exceptional circumstances where necessary,[16] under strict conditions, and only after due consideration of possible, prescribed alternatives.
- UNHCR Executive Committee Conclusions, Detention of Refugees and Asylum Seekers No. 44 (XXXVII) – 1986.

3.13 Further, a matter rarely acknowledged is that detention policy has also constituted a radical departure from ordinary principles governing incarceration under Australian domestic law. Under Australian law, other (non-immigration related) forms of detention are generally characterised by being:

- justified on 'protective' grounds;
- time-limited;
- governed by the rule of law, rather than executive discretion; and
- open to independent administrative and/or judicial review.

3.14 In our submission, there is no justification for such a departure from these principles in relation to the rights of non-citizens in Australia. It is not only an unwarranted form of discrimination, but a betrayal of standards otherwise considered essential safeguards to protect the liberty of the individual in Australia.

3.15 The detention reforms recently announced by the Immigration Minister are an important and most welcome development.[17] The following elements, in particular, are broadly consistent with international human rights principles concerning detention:

- detention will only be used as a last resort and only if necessary on the basis of unacceptable risk;
- the government will bear the onus of demonstrating necessity to detain;
- duration of detention will be for the shortest period practicable;
- arbitrary, including indefinite, detention is unacceptable, and detention will be subject to regular and periodic review;
- detention will take the least restrictive form possible; and
- children will not be detained in immigration detention centres.[18]

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[15] Refugees Convention arts 31 and 31(2).

[16] Under these Guidelines, detention is permitted only if it is necessary: to verify an asylum seeker's identity; to determine elements of an asylum seeker's claim (meaning a preliminary assessment of the essential facts of the claim, not a determination of the merits of the claim); or to deal with cases where required documents have been destroyed; to protect national security or public order.

[17] See speech by Senator Chris Evans, Minister for Immigration and Citizenship, 'New Directions in Detention, Restoring Integrity to Australia's Immigration System', 29 July 2008 ("Speech by Minister Evans").

[18] Ibid.

3.16 However, there are significant gaps and concerns, which if not adequately addressed could render the reforms a case of 'so near, and yet so far'. These gaps broadly relate to two key areas: (a) substantive matters; and (b) procedural matters.

3.17 In relation to substantive matters, RILC's principal concern relates to the retention of 'mandatory' detention under the new policy. We submit that mandatory detention is inherently arbitrary, and thus objectionable on legal grounds. While we acknowledge that the new policy also refers to 'arbitrary' detention being unacceptable and that detention will be based on necessity – and in particular, risk – it appears to contain an inherent contradiction and tension which lies at its heart. 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. Justifications of detention by previous Australian governments on grounds of necessity based on immigration status or compliance with standard immigration laws have been found, on numerous occasions, to violate international law by United Nations Committee bodies.[19]

3.18.1 We submit that mandatory detention is incompatible with detention based on accepted international and domestic standards of necessity. We welcome the fundamental shift to a needs-based approach, but are concerned that its meaning and scope remain unclear. This leaves a potentially serious tension unresolved within the system proposed under new policy. In our experience, such unresolved contradictions have the real potential to undermine effective and consistent implementation, particularly when they relate to matters as crucial as the guiding presumption of the policy. For example, they create a mixed message which may send the wrong signal to decision-makers as to how apply the new criteria. There is a real risk that the importation of what is essentially a political concept into the decision-making process could result in arbitrary decisions being made. This is particularly so given mandatory detention's specific historical meaning and the highly political nature of the term.

3.19 In relation to procedural matters, RILC's key concern relates to the lack of a clear commitment to the full enshrinement of the new policy – including the acceptable detention values – in legislation. This will require a fundamental reform of both the *Migration Act* and Regulations. Amendments that merely create new regulations which expand grounds for release while preserving the existing mandatory detention framework in the Act would be wholly inadequate and contrary to the spirit and intent of the new policy.

3.20 Such legislative implementation is not only required as a matter of international law,[20] but in practice, will be crucial to ensuring that the worthy aspects of the reforms are properly realised. Detention processes based on discretion or which are otherwise insufficiently regulated by law - including those introduced under the post-Palmer reform process - have proved seriously deficient and highly vulnerable to unaccountable, arbitrary and fundamentally unfair decision-making.

[19] See for example, supra n 13 and 14.
[20] See for example, ICCPR art 2.

They have also remained largely immune from the types of proper scrutiny and challenge which have the capacity to effectively remedy injustice.[21]

3.21 In addition, key aspects of the new policy remain very broad and ill-defined. In RILC's view, in order to meet the expectations of the enunciated principles, it will be critical to formulate a clear and comprehensive operational framework in policy which must also faithfully reflect and implement clearly-defined legislative rules.

3.22 Issues concerning operational frameworks under law and policy will be dealt with further below. These matters are addressed under two broad headings:

- the decision to detain; and
- the form of detention.

3.23 We also briefly address a number of other matters related to issues of adequate community-based alternatives to detention, and detention debts.

Recommendation 1: All forms of 'mandatory' immigration detention should be abolished.

Recommendation 2: The government's new detention policy should be fully enshrined in legislation.

Recommendation 3: There should be the formulation of a clear and comprehensive operational framework for implementation of the new detention policy.

4. Decision to detain

4.1 One of the key questions for consideration by the Joint Standing Committee under its terms of reference is whether to detain, and if so, the duration of such detention.[22] As mentioned above, the Government's new detention policy represents substantial and welcome progress, particularly insofar as it marks a fundamental change from detention as a default to detention based on necessity and risk. In particular, we submit that the decision to detain should principally be governed by applicable international human rights law and domestic standards regarding the deprivation of liberty of individuals. In this regard, the new policy is in general conformity with such principles, subject to the key exceptions referred to above in paragraphs 3.16 to 3.21.

4.2 However, in relation to the grounds for, and duration of detention, the parameters of the policy remain very broad and ill-defined. In our submission, it is of fundamental importance that a clear, comprehensive operational framework is formulated to fully realise the core principles of the policy. This framework must be sufficiently clear, detailed and transparent to ensure that the policy is properly understood, interpreted and implemented consistently with the announced principles.

[21] For example, the Ministerial discretion under s 195A of the *Migration Act* to grant a visa to person detained.
[22] This arises under the first two terms of references.

4.3 Such guidance will also be crucial in avoiding overly onerous or restrictive application of the principles, which could produce outcomes that are ultimately at odds with the core aims of the principles, such as use of detention only as a last resort and, where necessary, to protect the public from a real risk to safety. As mentioned above, in the absence of clear guidance, experience tells that rules designed to operate in favour of release have often been applied in practice in a manner contrary to this beneficial intent.

4.4 We set out below a number of key areas of concern.

(a) Who will decide

In RILC's submission it will be important to ensure that decisions about whether to detain are made by officers who are:

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

4.5 RILC believes that beyond the initial decision to detain made by an immigration official, any review of such matters would be 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. This has contributed to decisions being inconsistent and arbitrary.

(b) Criteria to be applied

4.6 We note that under the new policy, it is proposed to detain both 'unauthorised arrivals' and those who have repeatedly breached visa conditions.[23] The core determinant of detention will be whether a person represents an 'unacceptable risk to the community'. The policy makes clear connections between risk to the community and security concerns. One key question which arises is the basis of deciding whether a person poses a security risk.

4.7 In our submission, it will be crucial for the criteria adopted to be informed by the fundamental presumptions of the policy. In other words, the risk assessment must be conducted in the context of detention being a measure of last resort and only if necessary, with the government bearing the onus of demonstrating necessity. Avoidance of prolonged detention and harm must also feature prominently in the considerations.

4.8 We further submit that the new policy presumptions dictate that the following elements be applied to the decision to detain:

- that a person be presumed not to be an 'unacceptable risk' unless there are substantial grounds for believing otherwise;

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

- that the onus be on the government to establish grounds amounting to 'unacceptable risk';
- that the decisions be made in accordance with established criteria for what amounts to 'unacceptable risk';
- 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.

4.9 This would bring the policy within general conformity with relevant guidelines developed by United Nations bodies.[24]

4.10 We are concerned that without such clear safeguards, there is a real risk that routine practices of the past could be adopted, in which 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.[25] 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.

4.11 Further, it will be necessary to develop clear guidelines 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. In this context, we note that the new detention policy states that: "…continued detention while immigration status is resolved is unwarranted."[26]

4.12 We hold associated concerns in relation to the application under the new 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 genuine identity documents or the means to otherwise verify identity are often inextricably connected to the person's past persecution and need for protection.

4.13 RILC is concerned that if the policy fails to have proper regard for this context, unwarranted inquiry and consequent delay may unduly prolong the process of verification and release from detention. We contend that the benefit of the doubt should generally guide the assessment. Exceptions to this approach should only arise where there is a refusal to comply or co-operate with reasonable attempts to verify identity. Such an approach would be consistent with existing Australia migration law[27] and well-recognised international principles.[28]

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[24] 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).
[25] Migration Regulations 1994, sch 4 item 4002.
[26] Minister Evans' speech, supra n 17.
[27] See: *Migration Act* s 91W.

4.14 We further note that, in our experience, access to independent legal and other support is often an important factor in facilitating such processes. Many people who RILC has assisted have a strong fear and mistrust of authority, which is often based on flagrant denials of human rights and infliction of state-sponsored brutality. Independent legal advice can often play a significant part in a person understanding the importance of candour and co-operation with authorities in relation to their treatment, including their detention. This will be particularly important under the policy given the likely centrality of identity verification in determining whether and when release from detention will occur.

4.15 RILC also 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. What 'risk' refers to in this context is also ill-defined, though we assume it refers in part to the risk of absconding. 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.[29]

4.17 Further, we submit that the practice of imposing sureties or bonds as a condition of detention should be abolished. If a person is found not to be a risk to the community, it would be inconsistent and unnecessary to impose such an additional condition on release. Alternatively, if sureties are used, there must safeguards implemented to ensure that the imposition of sureties is not used in a way which for all intents and purposes renders release impossible. Past practice of Departmental and Migration Review Tribunal decision-makers has often involved the imposition of bonds as a condition of release which are in excess of $10,000 and manifestly unattainable for the detainee. Such practice would appear to be inconsistent with the underlying aims of the new policy.

4.18 RILC submits that it is also fundamental that the criteria used to justify detention are publicly known so that appropriate clarity, transparency and scrutiny concerning the basis of decisions is facilitated. As mentioned, too often under

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[28] See: O Field, 'Alternatives to Detention of Asylum Seekers and Refugees, Legal and Protection Policy Research Series', UNHCR, POLAS/2006/03, April 2006.
[29] Ibid.

past detention practice the rules have been unclear and decisions have been unduly subjective and assumption-based.

4.19 In addition, RILC is concerned that the new policy appears to contemplate the necessity to detain in certain circumstances which appear inconsistent with the underlying principles. These include the following:

(i) Children

4.20 While RILC strongly welcomes the government's new prohibition on detention of children in detention centres, we are most concerned about the government's apparent failure to abolish all forms of detention for children. The new policy appears to contemplate less restrictive yet nonetheless intrusive forms of detention for children with families in 'Immigration Residential Housing'.[30] Further, there is an absence of any clear commitment to ensure that unaccompanied minors are not detained and that appropriate measures are implemented to provide for proper care of such children. RILC has acted for numerous unaccompanied minors whose ongoing detention was said to be justified in part on the basis of inadequate alternatives. In order to guarantee the avoidance of these practices in the future, it will be necessary to make community-based alternatives mandatory.

4.21 RILC submits that the retention of certain forms of detention for children is irreconcilable with necessity and risk-based criteria under the policy. In this regard, such detention also appears to violate relevant international human rights principles in general, and those which relate specifically to children.

(ii) Health

4.22 RILC notes the new policy mandates detention for completion of health checks.[31] 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 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.

(iii) Character

4.23 RILC is concerned that the new detention policy appears 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*. The basis would appear to be that such people pose an

[30] Minister Evans' speech, supra n 17.
[31] Ibid.

'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.

4.24 RILC submits 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. Further, it is quite 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 would appear to represent an unjustified departure from ordinary approaches to release from incarceration under the Australian legal system. It would also tend to operate as a double punishment, contrary to domestic and international human rights law principles.[32]

4.25 The circumstances of Dr Haneef's detention in 2007 under the 'character' provisions after the decision by a magistrate to release him on bail provides a compelling case in point of the potential dangers and injustice of such a policy which prescribes mandatory detention for character cancellation cases.

(c) Form of decisions

4.26 RILC submits that decisions to detain – whether initially or on an ongoing basis upon review- should comprise the following core elements. Decisions should:

- be in writing;
- set out the full reasons for the decision, including criteria and specific evidence applied;
- 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.[33]

4.27 This would generally conform with UNHCR guidelines for asylum seekers.[34] We see no reason why such elements should not apply more generally to any person detained, whether or not they are seeking asylum.

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[32] See for example, ICCPR art 14(7).

[33] *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.

[34] 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).

4.28 Past practice of detention in Australia has frequently failed to apply these elements either at all, or consistently. This has had deleterious affects on individuals' understanding of the basis of their detention and their associated rights. In some cases, it has also resulted in unnecessarily prolonged detention.

(d) Time limits

4.29 RILC considers that it is essential for the proper realisation of the detention reform principles that there are clear timeframes applicable to review of the decision to detain.

4.30 We submit that the inclusion of regular review of detention under the new policy is a positive development, but that the proposed form of the review is wholly inadequate. Three months is far too long to wait for review of the decision to detain. (We reiterate our position that any review should be conducted by an independent body – ideally a judicial officer – and not by a person from the same body which made the decision to detain, regardless of seniority.) Further, six months is far too long for a review by the Ombudsman. The new policy has rightly accorded priority to the government's need to justify any detention, to ensure it is for the shortest period practicable, and to avoid the harmful affects of prolonged and indeterminate detention where possible.[35] These timeframes would tend to frustrate those aims.

4.31 RILC considers that the following elements would bring the practice into general conformity with applicable international[36] and domestic standards:

- the right to automatic review of the initial decision within a very short period;
- thereafter, the automatic right to review of the decision on a regular and periodic basis;
- timeframes for review should be for the shortest possible period (e.g. every 30 days) which is fixed in law rather than 'aspirational'.

(e) Review and oversight

4.32 RILC acknowledges the government's commitment to improve measures regarding the review and oversight of immigration detention, but believes that the proposed measures fall well short of what is required. In short:

- internal review of decisions lacks necessary independence;
- there is no apparent provision for procedural fairness mechanisms to comment on the decision to detain;
- review is only administrative, rather than judicial; and
- the Ombudman's mere advisory role lacks necessary 'teeth' and transparency.

4.33 RILC considers that it is fundamental for a person to be able to access independent administrative and judicial review of the basis and conditions of their

[35] Minister Evans' speech, supra n 17.
[36] 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).

detention. For many years, the rights to challenge detention have been restricted to a mere formal determination of whether the domestic laws of mandatory detention have been complied with. Australia's detention policy has been found to violate numerous international laws by, inter alia, failing to provide a meaningful or effective right to seek independent judicial review of a person's detention which includes consideration of international law requirements such as necessity, proportionality and reasonableness in light of proper consideration of alternatives.[37]

4.34 We also note that this is at radical odds with ordinary principles of domestic law under which the ancient right of 'habeaus corpus' is firmly entrenched in law and constitutes one of the golden threads of our legal system and the protection of individual liberty.

4.35 RILC contends 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 detention values under the new policy and, more broadly, conformity with Australia's international human rights obligations. We also submit that there should be procedural fairness mechanisms in place to provide an opportunity for comment on a decision to detain which is the subject of review.

4.36 In relation to oversight by the Commonwealth Ombudsman, we submit that the powers should extend to the making of recommendations which must each be promptly responded to by government. Further, any such reviews, including responses by government, should be fully reported upon publicly. In addition, we note that the Ombudsman is currently experiencing difficulties in meeting detention review timeframes, and are concerned any further functions be properly resourced.

4.37 Finally, it is RILC's direct experience that processes which have fallen short of these minimum standards have routinely resulted in administrative decision-making which is arbitrary, inconsistent, unaccountable and unfair. Decisions have often been at odds with the substantive principles relevant to the decision. This has particularly been the case in relation to the treatment of refugees we have acted for under the offshore processing arrangements caught by the excision and 'Pacific Solution' policies on Christmas Island and Nauru. 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.

Recommendation 4: Decisions to detain should only be made by sufficiently experienced and appropriately trained decision makers.

Recommendation 5: All decision-makers on detention should be readily identifiable, known and contactable.

Recommendation 6: All decisions to detain should be made within a regulated timeframe, and within the shortest practicable period.

[37] See for example, *Baban v Australia*, HRC (1014/2001).

Recommendation 7: All decisions to detain should be:

- made in writing,
- set out full reasons,
- conveyed promptly to the person subject to the decision; and
- explicitly refer to the right to legal assistance in relation to the decision.

Recommendation 8: All decisions to detain should be reviewable by a decision-maker independent of government, and ideally by a judicial officer, within a short period.

Recommendation 9: Oversight by the Commonwealth Ombudsman should extend to the making of recommendations which must be fully and promptly responded to by government. Any such reviews, including responses by government, should be fully reported upon publicly.

Recommendation 10: There should be detailed, clear guidance for decision-makers on the criteria for deciding when to detain, which is consistent with the government's new 'detention values'. The criteria should be publicly available.

Recommendation 11: There should clear and detailed guidance as to what constitutes an "unacceptable risk", including in relation to issues of 'security', 'health' and 'identity'.

Recommendation 12: A person should be assumed to not to be an "unacceptable risk" unless there are substantial grounds for believing otherwise.

Recommendation 13: The onus should be on the Department of Immigration and Citizenship to establish, based on evidence, that a person is an "unacceptable risk".

Recommendation 14: The ordinary, well-established rules of procedural fairness should apply in relation to decisions to detain. This should include affording an opportunity to comment before a decision is made.

Recommendation 15: A person should be given the benefit of the doubt in relation to issues of identity verification, unless there is clear evidence of lack of cooperation or refusal to comply with reasonable requests.

Recommendation 16: Repeated non-compliance with visa conditions should only be considered as resulting in an "unacceptable risk" where there is a clear, evidence-based connection between the non-compliance and a substantial, significant risk of absconding that would prevent the resolution of immigration status.

Recommendation 17: The power to impose sureties or bonds as condition of release from detention should be abolished. If sureties or bonds as to used as condition of release, legislation should be introduced to ensure that the imposition of sureties for release from detention is not unduly onerous.

Recommendation 18: Detention should not be imposed for the completion of health checks.

Recommendation 19: Detention should not be automatically imposed on persons who have had a visa refused or cancelled on 'character' grounds. Decisions to detain in such cases should only be made after an appropriate assessment of 'unacceptable risk' taking into account the individual circumstances of each case.

5. The form of detention

5.1 A concomitant issue is the form, including conditions, of detention. This applies to both initial, and if found necessary, ongoing detention. In this regard, we note that the government's new policy refers to the values which will underpin this issue, including most importantly that detention in immigration detention centres is only to be used as 'a last resort' and for the 'shortest practicable period'. Other values include:

- that conditions, including accommodation and services provided, will be subject to regular review;
- treatment of those detained will be fair, reasonable, within the law, and 'humane'; and
- children, and where possible, families, will not be held in detention centres.

5.2 Under the new policy, the form of detention should thus be the "least restrictive form appropriate to an individual's circumstances"[38] in recognition of these values.

5.3 In our submission, these values correctly recognise the inherently harmful nature of detention to the physical and psychological well-being of people, particularly in detention centres. The especially damaging affects on health of such confinement - or even lesser but nonetheless intrusive forms of detention – is well-documented. So too, is the inability to provide proper medical treatment in these circumstances.

5.4 These new detention values also broadly conform with relevant international human rights and domestic standards regarding deprivation of liberty.

5.5 However, we hold similar concerns to those raised above regarding the grounds for detention about the need for a clear, comprehensive framework to inform the proper application of these principles. At present, RILC is concerned by the lack of any clear commitment to the development of such a framework through legislative and policy guidelines**.**

5.6 Too frequently under the former policy, options for less restrictive forms of detention have been ignored or bypassed due to purported 'operational issues', including resourcing. Less restrictive detention has also been denied through assumption-based decision-making which is largely speculative and lacks any sound evidentiary basis.

5.7 Further, under the previous policy, administration of the mode of detention has often been characterised by a distinct lack of clear or transparent rules governing

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

decision-making. The operation of the system has often been dependent on personalities and informal relationships, and powers have often been exercised in an often *ad hoc* and inconsistent manner.

5.8 In addition, under the old system, it has routinely been dependent on mere chance as to whether a detainee will know:

- about their rights regarding detention;
- who is responsible for making decisions regarding these rights;
- about their rights to access legal assistance and how to effect them; and
- how to effect their rights regarding mode of detention.

In RILC's experience, it is commonly only after accessing such knowledge and legal assistance that problems are able to be identified and resolved, and better outcomes achieved. This has included alerting the Immigration Department to the wrongful or unlawful nature of a person's detention which they had not previously detected.

5.9 In RILC's submission, denial of access to adequate legal assistance can cause serious harm. It not only constitutes a denial of fundamental human rights,[39] but can result in prolonged detention as people remain in ignorance of their basic rights and unable to properly or promptly present any case they have for release from detention or the grant of any type of visa which would also enable such release.

5.10 We submit that if the principles under the new policy are properly applied, detention under prison-like conditions will only be justified on grounds of manifest security risk. It is difficult to envisage how an individual's circumstances would otherwise warrant such detention. However, without sufficient safeguards, there remains a real danger that detention in prison-like conditions could arise in cases which extend beyond such security grounds. For example, it currently remains unclear whether people who have repeatedly breached visa conditions could be placed in a detention centre. If so, it is also unclear whether the nature, frequency and gravity of the breaches would be taken into account in such determination. For instance, would it be considered justifiable to place an asylum seeker who is a survivor of torture and trauma in a detention centre due to serial breaches of regular reporting requirements or a 'no work' condition on a Bridging Visa? If yes, it is unclear on what basis such a determination would be made.

5.11 If the principle of least restrictive detention is to be properly realised, it will require clear, comprehensive criteria. Ideally, like the grounds necessitating detention, these should be enshrined in law under the *Migration Act*. Determinations of the appropriate form of detention should also involve development of a clear and detailed framework which incorporates the broad elements set out above in relation to the decision to detain.

5.12 RILC is particularly concerned about the use of remote detention, including the government's policies to detain unauthorised arrivals on Christmas Island. RILC has extensive experience and expertise in relation to provision of legal

[39] See for example, UN HRC, Draft General Comment No 32: Article 14 Concerning the Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32/CRP.1Rev.2 (2006).

assistance to people detained in remote locations. For example, in recent years, we have played a leading role in relation to legal representation of those held on Christmas Island and Nauru.

5.13 In our experience, access to adequate legal assistance can often prove critical to a refugee's ability to properly present their case, including understanding the requirements of the legal process. Conversely, obstacles to such access can deprive a person of the capacity to make well-informed decisions quickly.

5.13 In our submission, remote detention in places like Christmas Island inherently imposes serious obstacles to a person's ability to access adequate independent health, welfare and legal support. In relation to legal assistance, barriers are in-built by circumstances of distance, and include for those detained:

- serious difficulties with knowing about or accessing legal assistance, which has routinely resulted in a constructive denial of legal assistance;
- substantial difficulties and delays in being able to access adequate ongoing advice and updates when necessary, including limited face-to-face contact with lawyers due to resource constraints; and
- increased difficulties with being able to have confidential communications with legal advisers.

5.14 While we welcome the government's commitment to expand the provision of free legal assistance to people held on Christmas Island, we do not believe that this will properly address the fundamental limitations of the policy. RILC believes that such remote detention is fundamentally inconsistent with core goals of the new policy, such as expedition of processing in relation to: (a) necessity to detain; and (b) refugee status. It is likely to result in unnecessary delays in processing and thus, unnecessarily prolonged and restrictive detention.

5.15 Further, our recent visit to the Christmas Island detention centre confirmed our view about the totally inappropriate nature in general of this environment as a place of immigration detention. In essence, it is high-security prison-like environment, the conditions of which run the real risk of being inherently cruel, inhuman and degrading for asylum seekers. It is difficult to reconcile core principles of the new policy – including the aims of 'least restrictive' and 'humane' detention – with use of this centre. The government has indicated that it may only be used if there is a so-called surge of arrivals, though it is unclear what less restrictive alternatives will be available in such circumstances.

5.16 Clients also commonly describe their situation when released into alternative forms of less restrictive community-based detention in remote locations as still feeling imprisoned; as if they are living in a form of constructive incarceration.

5.17 In our submission, remote detention locations such as Christmas Island are inherently inconsistent with core aspects of the new detention policy. It is common for access to health, welfare and legal services to be inadequate. This is particularly so in cases where a person is a survivor of torture or trauma. RILC submits that detention in remote locations such as Christmas Island is inappropriate and its use should be minimised. If the government continues to use this form of detention, additional measures should be implemented to:

- mitigate the obstacles to accessing adequate services and timely decisions; and
- ensure that where there are no adequate specialist services available for particularly vulnerable people, such as survivors of torture, they be transferred to mainland Australia to access such treatment.

5.18 Further, we refer to and repeat our comments above in relation to our objection to any form of detention for children.

5.19 To give full effect to the new policy, it will be necessary to expand options for less restrictive, community-based alternatives. History tells that arguments of inadequate provision for such options can dictate justification of more restrictive measures, including prolonged detention of children.[40] Alternatives will need to ensure that the following two key issues are addressed:

(i) the mode of the detention, including accommodation; and
(ii) the conditions of detention, including the ability to access basic necessities such as food, clothing, transport and shelter, and the right to work.

5.20 Further, it will be important that additional measures are implemented to ensure prompt resolution of cases, including in relation to visa processing issues.

We reiterate Recommendations 4-10 inclusive and 14 above, which should also be applicable to the form of detention.

Recommendation 20: All forms of detention for children should be abolished.

Recommendation 21: Detention should be of the least restrictive form appropriate to an individual's circumstances**.** The conditions of detention should not be prison-like, unless exceptional grounds of necessity exist for reasons of security.

Recommendation 22: Any person subject to consideration of a decision to detain or the form of their detention should be given adequate access to legal advice and assistance.

Recommendation 23: The use of remote detention locations, such as Christmas Island, should be abolished.

Recommendation 24: If remote detention locations are retained, additional measures should be implemented to mitigate obstacles to timely and adequate service delivery and that, where this is not possible, people should be transferred to mainland Australia to access these services. Survivors of torture and trauma should be transferred to mainland Australia for access to appropriate services.

6. Other matters

(a) Adequate alternatives to immigration detention

[40] See supra n 10.

6.1 We do not intend to address in detail the issue of community-based alternatives, but note that many other submissions provided to this Inquiry by agencies with expertise in these matters demonstrate that there is a wide range of options available to the government. In this regard, we wish to make the following broad observations in relation to matters which should guide the government policy in this area:

- The fundamental tenets of the government's new detention policy dictate that formulation and introduction of comprehensive alternatives to detention be given utmost priority. Minister Evans has recently expressed concern about the "limited and inadequate" options currently available beyond detention centres. We welcome the government's commitment to prioritise "expansion of community housing options."[41] Faithful implementation of the policy is in part dependent on this occurring.
- Alternatives to immigration detention need to be properly resourced.
- The Community Care Pilot (CCP) provides a useful precedent for options other than immigration detention. The CCP, which was commenced by the Immigration Department in 2006, provides support to address the health, welfare and legal needs of clients with exceptional circumstances while their immigration outcome is being managed. Key objectives include managing a client's in a timely, fair and reasonable manner while their immigration outcomes are being determined, to provide wellbeing support to clients with exceptional circumstances and to support individuals to make informed choices about their immigration status and thereby achieve more timely immigration outcomes. RILC has been directly involved through participation on the CCP Reference Group, and believes that the Pilot continues to clearly demonstrate the greatly improved outcomes of such an approach in relation to humane treatment of people, timely and just resolution of status, and reduced financial costs. We commend this model to the Committee for further consideration.
- People released into community-based alternatives should have immediate access to adequate material support, health care and education, as well as the right to work.
- In Australia, and internationally, evidence indicates that immigration compliance and effective status resolution are not so much dependent on mandatory detention, but that critical factors include provision of adequate material support and legal assistance.[42]
- The UNHCR has formulated useful guidelines for alternatives to detention, some of which are already employed in Australia.[43]

Recommendation 25: A broad range options of community-based alternatives should be developed and implemented to ensure that there are appropriate and readily available options.

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[41] Minister Evans' speech, supra n 17.
[42] See O Field, supra n 27.
[43] See 'Guideline 4: Alternatives to Detention', in United Nations High Commissioner for Refugees Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999).

Recommendation 26: Measures should be implemented as a matter of priority to ensure that community-based alternatives to detention properly resourced.

Recommendation 27: Consideration should be given to adopting key components of the Community Care Pilot as part of a permanent program to provide community-based alternatives to detention.

Recommendation 28: People released into community-based alternatives should have immediate access to adequate material support, health care, education, and the right to work.

(b) Detention debts

6.2 While the imposition of detention costs and subsequent debts on detainees by the government under the *Migration Act* is not formally incorporated into the Committee's terms of reference, we are of the view that is a fundamental component of immigration detention policy. In RILC's experience, debts can amount to tens of thousands of dollars, and in some cases have exceeded $250,000. It also tends to be the case that the higher the debt, the more harmful the experience of detention has been. Debts can be incurred even when the detention was unlawful. In our submission, this policy should be abolished, on the grounds that:

- It is manifestly unjust, discriminatory, and incompatible with international and domestic standards.
- The policy finds few precedents internationally, with the possible exception of the application of this practice in Nazi Germany with respect to detention in a concentration camp.
- It has caused retraumatisation.
- It has been used in legally dubious ways by the Immigration Department to seek to delay or refuse applications for Citizenship.

Recommendation 29: The policy of imposing costs of detention on a person should be abolished.

Refugee & Immigration Legal Centre Inc
(September 2008)