

This factsheet explains [immigration detention](#). The factsheet explains [whether Australia's policy on immigration detention is consistent with international law](#), [the rationale for detention](#), and the [alternatives to detention](#). The factsheet also includes a list of [further reading](#).

What is Australia's policy on immigration detention?

Australia has a policy of [mandatory detention](#).¹ This requires the detention of all 'unlawful non-citizens' (that is, non-citizens in Australia without a valid visa) unless they are granted a [bridging visa](#), which temporarily gives them a lawful status in Australia while they arrange either to leave the country or apply for another visa.² Most unlawful non-citizens in Australia are people who have entered Australia with a visa (that is, by plane), but either have overstayed their visa or have had their visa cancelled.³ Under Australia's policy, these unlawful non-citizens are generally eligible for the grant of a bridging visa and are therefore not detained.⁴ On the other hand, unlawful non-citizens who have entered Australia without a visa (usually by boat) cannot apply for a bridging visa.⁵ Instead, they are detained.

Since November 2011, the Australian Government implemented a policy of issuing bridging visas ([class E](#)) to some unlawful non-citizens who entered Australia by boat.⁶ Although unlawful non-citizens who have arrived by boat are not allowed to apply for a bridging visa, they may be identified and referred to the Minister of Immigration, who has a personal and non-compellable power to grant them one.⁷ If so granted, they are allowed to live in the community while their claim for a visa is being processed. If not, then they are detained.

Australia is the only country in the world where mandatory detention is enshrined in legislation.⁸ It was introduced in 1992 by the Keating Labor Government in response to the arrival of Indochinese asylum seekers by boat.⁹ As the [Second Reading Speech](#) for the [Migration Amendment Act 1992 \(Cth\)](#) made clear, the policy was designed only to be an 'interim measure' which was introduced with the aim of sending 'a clear signal ... that migration to Australia may not be achieved by simply arriving in this country ...'.¹⁰ Initially, the policy applied only to 'designated persons' (those who had arrived in Australia by boat between 19 November 1989 and 1 September 1994) and limited the period of their detention to 273 days.¹¹ However, in 1994, mandatory detention was extended to all unlawful non-citizens and the limitation on the period of detention was removed.¹² Under this policy, and as is currently the case, unlawful non-citizens who satisfied certain criteria could apply for a bridging visa and therefore avoid being detained, but this did not include those who had arrived in Australia without a visa.¹³

In 2004, the High Court of Australia held by a majority that mandatory detention was not unconstitutional. This finding was based on a technical question of statutory interpretation and a consideration of whether the Parliament had the power to make such a law. The court did not evaluate whether mandatory detention breached Australia's human rights obligations because it had no power to do so. As Justice McHugh explained: 'As long as the detention is for the purpose of deportation or preventing aliens

from entering Australia or the Australian community, the justice or wisdom of the course taken by Parliament is not examinable in this Court or in any other domestic court.¹⁴

In July 2008, the Rudd Labor Government announced seven '[key immigration detention values](#)' that would 'guide and drive new detention policy and practice into the future'.¹⁵ Among other things, these values provided that detention in immigration detention centres (IDCs) was only to be used 'as a last resort and for the shortest practicable time', that the length and conditions of detention would be subject to regular review, and that children would not be detained in IDCs.¹⁶ These values, however, are yet to be reflected in law and practice in Australia.¹⁷

Is Australia's mandatory detention regime consistent with international law?

Australia's policy of mandatory detention breaches the right not to be arbitrarily detained under article 9(1) of the International Covenant on Civil and Political Rights ([ICCPR](#)).¹⁸ Mandatory detention is arbitrary because individuals are detained on an automatic and indiscriminate basis (because they have arrived in Australia by boat), without any individual assessment of whether detention is necessary (for example, because an individual poses a security threat or a risk of absconding). Moreover, individuals cannot challenge the legality of their detention. Rather, their detention is commonly protracted and possibly indefinite.

Under international law, detention is only lawful if it is reasonable, necessary and proportionate in all the circumstances, and can be periodically reviewed. While it might be permissible to detain an asylum seeker for a brief initial period to document their entry to the country, record their claims, and verify their identity, it is arbitrary – that is, unlawful – to continue to detain them while their refugee status is being determined. The only circumstances in which detention could lawfully continue would be if there were a demonstrable risk of a particular individual absconding, committing a crime against others, or engaging in acts contrary to national security. This would have to be shown in a case-by-case basis, and the Government would have to show that there was no other, less invasive means of achieving the same objective (such as through mandatory reporting requirements).

A number of studies have shown that detention has adverse psychological consequences for asylum seekers who are detained.¹⁹ This has also been a consistent finding of inquiries into the impacts of immigration detention.²⁰ Detention contributes to mental health issues among asylum seekers because of the prolonged nature of detention, the physical conditions under which detainees are held (in prison-like environments in remote locations, where there is limited access to physical and mental health services, and exposure to incidents of unrest and self-harm), and the fact that asylum seekers may be vulnerable to mental health problems due to trauma experienced in their countries of origin. In August 2013, the UN Human Rights Committee found that the arbitrary and protracted nature of detention, combined with the difficult conditions of detention, were 'cumulatively inflicting serious, irreversible psychological harm' upon detainees.²¹ As a result, Australia was found to be in breach of article 7 (prohibition on cruel, inhuman or degrading treatment) and article 10 (requirement that persons deprived of their liberty be treated with humanity and respect for their inherent dignity) of the ICCPR.²²

Australia also has obligations under article 31 of the [Refugee Convention](#) not to penalize asylum seekers for illegal entry.²³ Mandatory detention may constitute a penalty for illegal

entry, given that detention is not justified in the circumstances of each individual detained, and is directed at asylum seekers who arrive without a visa.²⁴

Mandatory detention also breaches children's rights under international law. In addition to the general ICCPR violations noted above, it also breaches the rights of children not to be arbitrarily deprived of their liberty, contrary to article 37(b) of the [Convention on the Rights of the Child](#).²⁵ An [inquiry in 2004](#) by the Australian Human Rights Commission (AHRC) found that children in immigration detention suffered from anxiety, distress, bed-wetting, suicidal ideation and self-destructive behaviour, including attempted and actual self-harm.²⁶ Some children were also diagnosed with psychological illnesses, such as depression and post-traumatic stress disorder.²⁷ A [report in 2008](#) by the AHRC highlighted the adverse psychological effects on children of detention in immigration residential housing and immigration transit accommodation.²⁸

What is the rationale for detention?

According to the Australian Government, mandatory detention is 'an essential component of strong border control' and 'support[s] the integrity of Australia's immigration program'.²⁹ However, detention is unlikely to achieve these objectives. Indeed, as then Immigration Minister, [Chris Bowen](#), acknowledged in 2010: 'We already have the toughest mandatory detention regime in the Western developed world, yet people still come to Australia ... So I don't think mandatory detention should be seen as a deterrent.'³⁰

Research shows that asylum seekers tend to have a limited awareness of the asylum policies of prospective destination countries before arrival.³¹ Further,

no empirical evidence is available to give credence to the assumption that the threat of being detained deters irregular migration, or more specifically, discourages persons from seeking asylum ... Critically, threats to life or freedom in an individual's country of origin are likely to be a greater push factor for a refugee than any disincentive created by detention policies in countries of transit or destination.³²

What are the alternatives to detention?

According to [UNHCR's Detention Guidelines](#), detention is an exceptional measure that should be applied only where it is necessary, reasonable and proportionate in the individual case.³³ Whether it is necessary, reasonable and proportionate to detain an individual will require consideration of whether there are alternatives to detention, since it must be shown in the individual case that there are not less invasive or coercive means of achieving the same ends.³⁴

Alternatives to detention may take different forms, which vary in the extent to which they restrict freedom of movement or liberty.³⁵ In determining which alternatives may be appropriate in the individual case, the principle of minimum intervention should be observed.³⁶ Alternatives to detention may include:

- Community release and supervision;
- Reporting requirements;
- Release with bail, bond, surety or guarantee;
- Surrender of travel documents;
- Residence at a designated location; and
- Electronic monitoring.³⁷

Further reading

- Australian Human Rights Commission, *Immigration Detention Report: Summary of Observations following the Inspection of Mainland Immigration Detention Facilities* (2008)
- Australian Human Rights Commission, *Immigration Detention and Offshore Processing on Christmas Island* (2009)
- Australian Human Rights Commission, *Immigration Detention at Villawood: Summary of Observations from Visit to Immigration Detention Facilities at Villawood* (2011)
- Australian Human Rights Commission, *Immigration Detention at Curtin: Observations from Visit to Curtin Immigration Detention Centre and Key Concerns across the Detention Network* (2011)
- Asher, Allan, '*Immigration Detention Values: Milestones or Motherhood Statements?*', *The Drum*, 29 July 2011
- Coffey, G J, I Kaplan, R C Sampson and M M Tucci, 'The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum' (2010) *70 Social Science & Medicine* 2070
- Commonwealth of Australia, *Immigration Detention in Australia: A New Beginning* (December 2008)
- Department of Immigration and Border Protection, *Fact Sheet 65 – Onshore Processing Arrangements: Bridging Visas for Irregular Maritime Arrivals*, May 2013
- Department of Immigration and Border Protection, *Fact Sheet 82 – Immigration Detention*, May 2012
- Department of Immigration and Border Protection, *Fact Sheet 86 – Overstayers and Other Unlawful Non-Citizens*, March 2012
- Edwards, Alice, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants* (UNHCR, Legal and Protection Policy Research Series, April 2011)
- Flood, Philip, *Report of Inquiry into Immigration Detention Procedures* (Commonwealth of Australia, February 2001)
- Green, Janette P and Kathy Eagar, 'The Health of People in Australian Immigration Detention Centres' (2010) *192 Medical Journal of Australia* 65
- Human Rights and Equal Opportunity Commission, *A Last Resort? The Report of a National Inquiry into Children in Immigration Detention* (2004)
- International Detention Coalition, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (2011)
- International Detention Coalition, *Ten Things IDC Research Found about Immigration Detention*
- McAdam, Jane, '*UN Slams Australia's Treatment of Refugees*', *The Lowy Interpreter*, 27 August 2013

- McAdam, Jane, Greg Weeks, Fiona Chong and Alice Noda, [Submission to Joint Select Committee on Australia's Immigration Detention Network](#), *Inquiry into Australia's Immigration Detention Network*, 10 August 2011
- Menadue, John, Arja Keski-Nummi and Kate Gauthier, [A New Approach: Breaking the Stalemate on Refugees and Asylum Seekers](#) (Centre for Policy Development, August 2011)
- Newman, Louise K, Michael Dudley and Zachary Steel, 'Asylum, Detention, and Mental Health in Australia' (2008) 27 *Refugee Survey Quarterly* 110
- Phillips, Janet and Harriet Spinks, [Immigration Detention in Australia](#) (Background Note, Parliamentary Library, 20 March 2013)
- Silove, D, P Austin and Z Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-Affected Refugees Seeking Asylum in Australia' (2007) 44 *Transcultural Psychiatry* 359
- Steel, Z and D M Silove, 'The Mental Health Implications of Detaining Asylum Seekers' (2001) 175 *The Medical Journal of Australia* 596
- United Nations High Commissioner for Refugees, [Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention](#) (2012)
- United Nations High Commissioner for Refugees, [Submission to Joint Select Committee on Australia's Immigration Detention Network](#), *Inquiry into Australia's Immigration Detention Network*, 19 August 2011
- United Nations Working Group on Arbitrary Detention, [Report: Visit to Australia](#), UN Doc E/CN.4/2003/8/Add.2 (24 October 2002)

Endnotes

¹ Department of Immigration and Border Protection, *Fact Sheet 82 – Immigration Detention*, May 2012 <<http://www.immi.gov.au/media/fact-sheets/82detention.htm>>. People may be detained in immigration detention centres, immigration residential housing, immigration transit accommodation, community detention, or alternative temporary detention in the community: *ibid*; Department of Immigration and Border Protection, *Alternative Detention Arrangements* <<http://www.immi.gov.au/managing-australias-borders/detention/services/alternative-arrangements.htm>>.

² Janet Phillips and Harriet Spinks, *Immigration Detention in Australia* (Background Note, Parliamentary Library, 20 March 2013) 1 <http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1311498/upload_binary/1311498.pdf;fileType=application/pdf>.

³ Department of Immigration and Border Protection, *Fact Sheet 86 – Overstayers and Other Unlawful Non-Citizens*, March 2012 <<http://www.immi.gov.au/media/fact-sheets/86overstayers-and-other-unlawful-non-citizens.htm>>.

⁴ *Ibid*.

⁵ Department of Immigration and Border Protection, *Fact Sheet 65 – Onshore Processing Arrangements: Bridging Visas for Irregular Maritime Arrivals*, May 2013 <<http://www.immi.gov.au/media/fact-sheets/65onshore-processing-irregular-maritime-arrivals.htm>>.

⁶ Chris Bowen (Minister for Immigration and Citizenship), 'Bridging Visas to Be Issued for Boat Arrivals' (Media Release, 25 November 2011) <<http://www.chrisbowen.net/media-centre/media-releases.do?newsId=5240>>; Department of Immigration and Border Protection, above n 5.

⁷ Department of Immigration and Border Protection, above n 5.

⁸ In Malta, if a person is refused admission then he or she is automatically detained. It is the practice of the immigration authorities to systematically issue removal orders to all boat arrivals from Libya, which results in detention. Vulnerable people (including children) are usually released following an age or vulnerability assessment. People who arrive in an irregular way but escape immediate detection may avoid detention if they lodge an intention to apply for refugee status. While Maltese law does not set a maximum limit on the duration of detention, in practice it is capped at one year, and if a protection claim is unsuccessful, then the maximum is 18 months. Although it is theoretically possible to challenge detention in court, the European Court of Human Rights has held that in reality this is ineffective. See generally UNHCR, 'UNHCR's Position on the Detention of Asylum-Seekers in Malta (18 September 2013) <<http://www.unhcr.org/mt/news-and-views/news/698>>.

⁹ Philips and Spinks, above n 2, 1.

¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 5 May 1992, 2370 (Mr Gerry Hand, Minister for Immigration, Local Government and Ethnic Affairs).

¹¹ Commonwealth of Australia, *Immigration Detention in Australia: A New Beginning* (December 2008) 151 <<http://www.aph.gov.au/binaries/house/committee/mig/detention/report/fullreport.pdf>>.

¹² *Ibid.*

¹³ Philips and Spinks above n 2, 7.

¹⁴ *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562, 595, para 74. Note that this is currently being challenged in the High Court with respect to the indefinite detention of refugees.

¹⁵ Department of Immigration and Border Protection, *Key Immigration Detention Values* <<http://www.immi.gov.au/managing-australias-borders/detention/about/key-values.htm>>.

¹⁶ *Ibid.*

¹⁷ See Allan Asher, 'Immigration Detention Values: Milestones or Motherhood Statements?', *The Drum*, 29 July 2011 <<http://www.abc.net.au/unleashed/2815388.html>>; UNHCR, Submission to Joint Select Committee on Australia's Immigration Detention Network, *Inquiry into Australia's Immigration Detention Network*, 19 August 2011, 3–4 <<http://unhcr.org.au/unhcr/images/2011-08-19%20UNHCR%20Submission%20to%20JSC%20on%20AIDN.pdf>>; Philips and Spinks, above n 2, 12.

¹⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9(1). See the views of the Human Rights Committee in the following cases: *Communication No 2094/2011*, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) ('*FKAG v Australia*'); *Communication No 2136/2012*, 108th sess, UN Doc CCPR/C/108/D/2136/2012 (20 August 2013) ('*MMM v Australia*'); *Communication No 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004 (11 September 2007) ('*Shams et al v Australia*'); *Communication No 1324/2004*, 88th sess, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006) ('*Shafiq v Australia*'); *Communication No 1050/2002*, 87th sess, UN Doc CCPR/C/87/D/1050/2002 (9 August 2006) ('*D and E v Australia*'); *Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) ('*Bakhtiyari v Australia*'); *Communication No 1014/2001*, 78th sess, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) ('*Baban v Australia*'); *Communication No 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) ('*C v Australia*'); *Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) ('*A v Australia*'). See also UN Working Group on Arbitrary Detention, *Report: Visit to Australia*, UN Doc E/CN.4/2003/8/Add.2 (24 October 2002).

¹⁹ See Janette P Green and Kathy Eagar, 'The Health of People in Australian Immigration Detention Centres' (2010) 192 *Medical Journal of Australia* 65; G J Coffey, I Kaplan, R C Sampson and M M Tucci, 'The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum' (2010) 70 *Social Science & Medicine* 2070; Louise K Newman, Michael Dudley and Zachary Steel, 'Asylum, Detention, and Mental Health in Australia' (2008) 27 *Refugee Survey Quarterly* 110; D Silove, P Austin and Z Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-Affected Refugees Seeking Asylum in Australia' (2007) 44 *Transcultural Psychiatry* 359; Z Steel and D M Silove, 'The Mental Health Implications of Detaining Asylum Seekers' (2001) 175 *The Medical Journal of Australia* 596.

²⁰ See Philip Flood, *Report of Inquiry into Immigration Detention Procedures* (Commonwealth of Australia, February 2001); UN Working Group on Arbitrary Detention, above n 18; Human Rights and Equal Opportunity Commission, *A Last Resort? The Report of a National Inquiry into Children in Immigration Detention* (2004) <<https://www.humanrights.gov.au/last-resort-report-national-inquiry-children-immigration-detention-2004>>; Australian Human Rights Commission (AHRC), *Immigration Detention Report: Summary of Observations following the Inspection of Mainland Immigration Detention Facilities* (2008) <<https://www.humanrights.gov.au/publications/2008-immigration-detention-report-summary-observations-following-inspection-mainland>>; AHRC, *Immigration Detention and Offshore Processing on Christmas Island*

(2009) <<https://www.humanrights.gov.au/publications/2009-immigration-detention-and-offshore-processing-christmas-island>>; AHRC, *Immigration Detention at Villawood: Summary of Observations from Visit to Immigration Detention Facilities at Villawood* (2011) <<https://www.humanrights.gov.au/publications/2011-immigration-detention-villawood>>; AHRC, *Immigration Detention at Curtin: Observations from Visit to Curtin Immigration Detention Centre and Key Concerns across the Detention Network* (2011) <<https://www.humanrights.gov.au/publications/2011-immigration-detention-curtin>>.

²¹ *FKAG v Australia*, UN Doc CCPR/C/108/D/2094/2011, 6 [3.12]; *MMM v Australia*, UN Doc CCPR/C/108/D/2136/2012, 6 [3.14]. See also Jane McAdam, 'UN Slams Australia's Treatment of Refugees', *The Lowy Interpreter*, 27 August 2013 <<http://www.loyyinterpreter.org/post/2013/08/27/UN-Human-Rights-Committee-slams-Australias-treatment-of-refugees.aspx>>.

²² *Ibid.*

²³ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), read in conjunction with the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (collectively, the 'Refugee Convention').

²⁴ Jane McAdam et al, Submission to Joint Select Committee on Australia's Immigration Detention Network, *Inquiry into Australia's Immigration Detention Network*, 10 August 2011, 4 <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/GT_Detention_Submission.pdf>.

²⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1755 UNTS 3 (entered into force 2 September 1990).

²⁶ HREOC, *A Last Resort?*, above n 20.

²⁷ *Ibid.*

²⁸ AHRC, *Immigration Detention Report*, above n 20, 82.

²⁹ Department of Immigration and Border Protection, *Key Immigration Detention Values*, above n 15.

³⁰ Michael Owen and Tony Barrass, 'Getting Tougher "Won't Stop Boats" Says Chris Bowen', *The Australian* (2 November 2010) <<http://www.theaustralian.com.au/news/nation/getting-tougher-wont-stop-boats-says-chris-bowen/story-e6frg6nf-1225946353586#sthash.G8D3caad.dpuf>>.

³¹ See International Detention Coalition, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (2011), 11 and references cited there <<http://idcoalition.org/cap/handbook/>>.

³² Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants* (UNHCR, Legal and Protection Policy Research Series, April 2011) iii <<http://www.unhcr.org/4dc949c49.html>>. See also International Detention Coalition, *Ten Things IDC Research Found about Immigration Detention* <<http://idcoalition.org/cap/handbook/capfindings/>>.

³³ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) 21 <<http://www.unhcr.org/505b10ee9.html>>.

³⁴ *Ibid.* 22.

³⁵ *Ibid.* 24.

³⁶ *Ibid.* 23.

³⁷ *Ibid.* Annex A. See also International Detention Coalition, above n 31.