



4 February 2022

Committee Secretary  
Joint Standing Committee on Migration

By email: [migration@aph.gov.au](mailto:migration@aph.gov.au)

Dear Committee Secretary

### **Ending Indefinite and Arbitrary Immigration Detention Bill 2021**

The Andrew & Renata Kaldor Centre for International Refugee Law welcomes the opportunity to provide a submission on the Ending Indefinite and Arbitrary Immigration Detention Bill 2021 ('the Bill'). The Bill provides an important opportunity for Parliament, together with relevant individuals and organisations, to consider and debate the nature of the current immigration detention regime, its role in Australia's border management functions, and viable alternatives.

The purpose of this submission is to provide a broad overview of key aspects of international law relevant to the Committee's consideration of the Bill. It is vital that Australian law and practice comply with the obligations Australia has assumed under international law, including international human rights law. These obligations reflect minimum standards of treatment and State conduct which are widely (if not universally) recognised by States, and are consistent with the values of a liberal democracy based on the rule of law. If Australia is to uphold these values, and maintain its standing as a responsible international citizen, it must act in accordance with the legal rules and accepted norms to which it has committed itself.

In a 2019 communication to the UN Human Rights Committee, the Australian government affirmed its position that 'indefinite or arbitrary immigration detention is not acceptable'.<sup>i</sup> Despite this public statement, current Australian law and practice with respect to the administrative detention of non-citizens ('immigration detention') is indefinite, arbitrary and contrary to several other key provisions of international law. This situation requires urgent redress. Legislative amendments are essential, but will be insufficient on their own to effect the institutional and practical changes necessary to achieve a policy which meets Australia's border management and security objectives in a way which is humane, sustainable, economically sound, and consistent with international law.

#### **Immigration detention under international law**

The imposition of restrictions on non-citizens, including asylum seekers, is not prohibited by international law *per se*. However, any deprivation of liberty is subject to certain limits and safeguards. For example, detention must not:

- be unlawful or arbitrary;<sup>ii</sup>
- amount to torture or cruel, inhuman or degrading treatment or punishment;<sup>iii</sup>
- threaten a person's right to life;<sup>iv</sup>
- interfere with the right of all people deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person;<sup>v</sup>
- interfere with the universal right to seek and enjoy asylum;<sup>vi</sup> or
- violate the rights of people who are entitled to special protections, including women, children and people with disabilities.<sup>vii</sup>

The Bill proposes a new legislative regime which would render the current immigration detention system less unlawful and arbitrary and ensure better protection of children. As such, this submission focuses on these aspects of international law. However, other matters – such as the conditions of immigration detention, the visa system, and the need to expand and develop alternatives to detention – are related issues that warrant consideration by Parliament.

## Arbitrary detention

### *Position under international law*

The prohibition on arbitrary detention is absolute, meaning that States can never justify deprivation of liberty which is unreasonable or unnecessary in the circumstances, even in times of public emergency.<sup>viii</sup> The reasonableness, necessity and proportionality of detention must be considered both at the time of the initial decision to detain, and on an ongoing basis as the State decides how long a person should remain detained.

For thirty years, the UN Working Group on Arbitrary Detention has been the independent body of international experts tasked with investigating cases involving the arbitrary deprivation of liberty. To assist States and others identify such situations, the Working Group developed five categories of arbitrary detention.<sup>ix</sup> Categories II and IV are the most relevant to the current inquiry. Deprivation of liberty will be arbitrary:

- under Category II, when it results from the exercise of the right to seek and to enjoy in other countries asylum from persecution; and
- under Category IV, when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy.

To avoid being characterised as arbitrary, the administrative detention of non-citizens would need to meet *all* of the following conditions:<sup>x</sup>

1. It would need to be used as an **exceptional measure of last resort**, only after all reasonable and less coercive or intrusive alternatives to detention had been considered. Alternatives to detention could include allowing people to live in the community subject to certain conditions, or requiring them to remain at a designated residence or facility in less restrictive conditions than a closed detention centre.
2. It would need to be justified by a **legitimate purpose**. The UN High Commissioner for Refugees (UNHCR) recognizes the following legitimate purposes for the detention of asylum seekers and refugees:
  - i. to prevent absconding and/or in cases of likelihood of non-cooperation;
  - ii. to facilitate accelerated procedures for manifestly unfounded or clearly abusive claims;
  - iii. for initial identity and/or security verification;
  - iv. for the purpose of recording, within the context of a preliminary interview, the elements of an asylum claim, but only where that information could not be obtained in the absence of detention;
  - v. to carry out health checks to protect public health;
  - vi. to protect national security; and
  - vii. for the purposes of expulsion after an asylum claim has been finally determined and rejected.<sup>xi</sup>

Detention which is imposed as a penalty for illegal entry, to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them, is not permitted under international law.<sup>xii</sup>

3. It is determined, in the individual case, to be **necessary, reasonable in all the circumstances and proportionate to one of the legitimate purposes** set out above. The Working Group on Arbitrary Detention states that this determination should be made or approved by a judge or judicial authority.<sup>xiii</sup>

4. It is applied for the ***shortest necessary period of time***, with the necessity, reasonableness and proportionality of ongoing detention subject to automatic and regular periodic reviews.
5. It is subject to ***effective and independent review*** by a court of law empowered to order immediate release in the event that detention is found to be unlawful or arbitrary.

### ***Australian law and practice***

Australia's immigration detention regime is arbitrary under both Category II and IV, and does not meet any of the five criteria set out above. All 'unlawful non-citizens' (that is, all non-citizens who do not hold a valid visa) *must* be detained automatically as a matter of first resort, without any consideration of their individual circumstances, and can only be released from detention in limited circumstances.<sup>xiv</sup> The necessity, reasonableness and proportionality of decisions to detain are neither made by nor reviewable by a judge or court empowered to order release. Non-citizens are routinely detained for purposes other than those identified as legitimate grounds for detention.

### ***The effect of the Bill on the arbitrariness of immigration detention***

The Bill proposes a model of immigration detention that would bring Australian law and practice more into line with international law. However, it would still contain certain risks of arbitrariness.

The positive features of the Bill include that it specifically enumerates the legitimate purposes justifying immigration detention (section 16), and provides that, if no such purpose applies in an individual case, alternatives to detention must be found (section 12). This aspect of the Bill could be strengthened by incorporating the elements of necessity, reasonableness and proportionality into the decision to detain. That is, not only must there be a legitimate purpose for detention, it must also be determined (preferably by a court) that that purpose could not be achieved in the absence of detention. If, for example, the elements of a person's asylum claim could be recorded while they resided with family members in the community, or at some other designated location subject to less restrictive measures than held detention, it might not be reasonable or necessary to detain them at all.

With regard to the length of detention, both the UN Working Group on Arbitrary Detention and the UNHCR affirm that strict time limits for immigration detention must be set out in national legislation.<sup>xv</sup> While international law does not mandate a specific maximum period of time for immigration detention, the Bill's proposal of three months for an initial period of detention would appear to be reasonable, provided that: a) the initial decision to detain was made only as an exceptional measure of last resort; and b) detained people retain at all times guaranteed access to a court of law empowered to order immediate release should detention cease to be reasonable, necessary and proportionate to a legitimate purpose.

The Bill's proposed model for review and extension of immigration detention by a court, with a maximum total extension period of 12 months, appears reasonable in the context of Australia's political and judicial systems. It would strike a good balance between the rights to liberty, security and freedom of movement of the non-citizen and the objectives of immigration detention.

### **Protection of children**

#### ***Position under international law***

Under international law, Australia has additional obligations with respect to children, including to ensure that:

- the best interests of the child are a primary consideration in all actions concerning children;<sup>xvi</sup>
- no child is deprived of liberty unlawfully or arbitrarily, and the detention of children is used only as a measure of last resort and for the shortest appropriate period of time;<sup>xvii</sup>
- every child deprived of liberty is treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age;<sup>xviii</sup> and

- appropriate measures are taken to ensure that asylum seeker and refugee children, whether accompanied or unaccompanied, receive appropriate protection and humanitarian assistance in the enjoyment of their rights;<sup>xix</sup>

In light of these obligations, and the very high risks of serious harm that children face in detention due to their age and development, it is generally accepted that children should not be subject to administrative immigration detention at all, or at least only in the most exceptional of cases until a suitable alternative can be found as a matter of urgency.

For example, the UN Working Group on Arbitrary Detention has repeatedly affirmed that the deprivation of liberty of asylum-seeking, refugee, stateless or migrant children, including unaccompanied or separated children, is prohibited under international law, and that detaining children because of their parents' migration status will always violate the principle of the best interests of the child and constitute a violation of the rights of the child.<sup>xx</sup>

In similar terms, UNHCR has stated that children 'should in principle not be detained at all',<sup>xxi</sup> that detention of children cannot be justified on the basis of their migration status alone,<sup>xxii</sup> that 'all efforts, including prioritisation of asylum processing, should be made to allow for the *immediate* release of children from detention and their placement in other forms of appropriate accommodation',<sup>xxiii</sup> and that:

Overall an *ethic of care* – and not enforcement – needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration. The extreme vulnerability of a child takes precedence over the status of an 'illegal alien'.<sup>xxiv</sup>

### **Australian law and practice**

In 2005, Parliament affirmed the 'principle' that children should only be detained as a measure of last resort, and codified this principle in section 4AA of the *Migration Act 1958* (Cth). However, this provision has proven insufficient to prevent the detention of asylum seeker and refugee children as a measure of first resort, in some cases for lengthy periods of time, and despite the availability of more appropriate alternatives to detention.

Section 189 of the *Migration Act* provides that all unlawful non-citizens must be detained as a matter of first recourse, regardless of their age and any other vulnerabilities which might render them at risk of harm in a closed detention environment. Children can only be released from detention if they are removed from Australia, or if the relevant Minister chooses to make a residence determination (moving them into 'community detention') or grant them a visa (allowing them to live in the community). Since these powers are non-compellable and discretionary, there is no legal duty for the Minister even to consider whether a detained child should be released. Children cannot effectively challenge their deprivation of liberty, since neither the courts nor any other independent authority are empowered to release a child from immigration detention on the basis that they are detained contrary to their rights under international law. There is no limit to the time a child can be detained, nor any law requiring that they be held in a facility suitable for their needs and vulnerabilities as children.

While currently no children are reported to be in immigration detention in Australia, significant numbers have historically been detained, with peaks of 1,923 in 2000-01 and 1,992 in July 2013.<sup>xxv</sup> More recently, the extended detention of the two Murugappan children from the 'Biloela family', despite significant public and political pressure for their release, demonstrated the government's ongoing willingness and ability to detain even very young children, rather than allow them to live in safer residential arrangements while their visa issues were resolved. Additionally, some adults currently in detention have been detained since they were children.<sup>xxvi</sup>

### **The effect of the Bill on the detention of children**

There are various ways in which Australia could implement its obligations with respect to asylum seeking and refugee children and families. The approach proposed in section 21 of the Bill ('Children in detention') has some good features, but could be strengthened even further.

Specifically, it would be preferable for Australian law to provide explicitly that alternatives to detention which are family-friendly and safe and appropriate for children *must* be sought for all asylum seeker and refugee children prior to any deprivation of liberty. Only if no such alternatives are available or suitable should a child be held in a closed detention facility. Such a legislative change would need to be accompanied by practical action to identify or establish such facilities.

Further, the period of initial detention might warrant reduction from 7 days down to 72 hours. In this regard, we note that in the United Kingdom (UK) children may only be detained as a last resort for up to 72 hours (with the possibility of an extension to an absolute maximum of one week in exceptional circumstances subject to Ministerial authorisation).<sup>xxvii</sup>

Similar provisions may also be warranted for other vulnerable groups. For example, UK law limits the detention of pregnant women to 72 hours (again, with the possibility of an extension to an absolute maximum of one week in exceptional circumstances subject to Ministerial authorisation).<sup>xxviii</sup>

If I can be of further assistance to the Committee, please do not hesitate to contact me at

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Kind regards

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<sup>i</sup> UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia: Information received from Australia on follow-up to the concluding observations* (UN Doc CCPR/C/AUS/CO/6/Add.1, 2 December 2019) ('*Information received from Australia*') [31].

<sup>ii</sup> International Covenant on Civil and Political Rights (ICCPR), art 9(1).

<sup>iii</sup> ICCPR, art 7. See also the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>iv</sup> ICCPR, art 6.

<sup>v</sup> ICCPR, art 10(1).

<sup>vi</sup> Universal Declaration of Human Rights, art 14(1). See also the 1951 Convention and 1967 Protocol relating to the Status of Refugees.

<sup>vii</sup> See for example the Convention on the Rights of the Child (CRC) and the Convention on the Rights of People with Disabilities.

<sup>viii</sup> UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of the Person)* (UN Doc CCPR/C/GC/35, 16 December 2014) [66]; UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants* (7 February 2018) ('*Revised Deliberation No. 5*') [8].

<sup>ix</sup> UN Working Group on Arbitrary Detention, *Revised Fact Sheet No. 26* (8 February 2019) 5-6.

<sup>x</sup> UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5*; UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) ('*Detention Guidelines*').

<sup>xi</sup> *Detention Guidelines*, 16-20.

<sup>xii</sup> *Ibid.*, 19.

<sup>xiii</sup> *Revised Deliberation No. 5*, [13].

<sup>xiv</sup> *Migration Act 1958* (Cth), s 189.

<sup>xv</sup> *Revised Deliberation No. 5*, [25]; *Detention Guidelines*, 26.

<sup>xvi</sup> CRC, art 3(1).

<sup>xvii</sup> CRC, art 37(b).

<sup>xviii</sup> CRC, art 37(c).

<sup>xix</sup> CRC, art 22(1).

<sup>xx</sup> See e.g. UN General Assembly, *Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court* (A/HRC/30/37, 6 July 2015) [46]; *Revised Deliberation No. 5*, [11].

<sup>xxi</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [51].

<sup>xxii</sup> *Ibid.*, [54].

<sup>xxiii</sup> *Ibid.*, [57] (emphasis added).

<sup>xxiv</sup> *Ibid.*, [52] (emphasis in original).

<sup>xxv</sup> Refugee Council of Australia, 'Australia's detention policies: Alternatives to detention' (20 May 2020)

<<https://www.refugeecouncil.org.au/detention-policies/4>>.

<sup>xxvi</sup> Ben Doherty, "Everyone asks about Novak" but Mehdi has languished for nine years in Australian immigration detention' (*Guardian*, 7 January 2022) <<https://www.theguardian.com/world/2022/jan/07/everyone-asks-about-novak-but-mehdi-has-languished-for-nine-years-in-australian-immigration-detention>>.

<sup>xxvii</sup> UK Home Office, *Detention: General Instructions* (version 2.0, 14 January 2022)

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<sup>xxviii</sup> *Immigration Act 2016* (UK), s 60.