

Factsheet

IMMIGRATION DETENTION IN AUSTRALIA

Last update: April 2019

Australia has a policy of mandatory detention that requires all 'unlawful non-citizens' to be held in immigration detention, potentially indefinitely.

Who must be held in 'immigration detention'?

A policy of mandatory detention—first adopted in 1992—applies to all 'unlawful non-citizens' in Australia. Unlawful non-citizens are defined as anyone who:

- (a) arrives in Australia without a valid visa (eg, asylum seekers arriving by plane);
- (b) has had their visa cancelled; or
- (c) has overstayed their visa.

An unlawful non-citizen must be held in detention until they have been granted a valid visa or they leave the country.

According to [statistics from the Department of Home Affairs](#), as at 31 January 2019, 1269 people were being held in immigration detention. While the statistics are not broken down by reference to whether or not a person is seeking asylum, we know that 427 (or approximately one third) were people who arrived without a valid visa.

Since 19 July 2013, any asylum seeker who arrives by boat without a valid visa is sent to Nauru or Manus Island in Papua New Guinea for processing and is barred from entering Australia on a permanent basis (see our factsheet [Offshore processing: an overview](#)). Asylum seekers and refugees held in Nauru and Manus Island are not counted in the detention statistics reported by the Department of Home Affairs.

The Refugee Council of Australia also provides regular updates on statistics on immigration detention [in Australia](#) and [offshore](#).

Why are people detained?

The [Australian Border Force website](#) states that 'immigration detention is part of strong border control and supports the integrity of Australia's migration program'. Generally speaking, immigration detention is an administrative process that is meant to allow for health, identity and security checks. In Australia, it is also intended to have a deterrent

effect – but arguably it does not. As then Immigration Minister Chris Bowen said 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’.

How long can people be detained?

Under Australian law, a person is held in immigration detention until they are granted a valid visa or they leave the country, whichever comes first. This means that a person can be held in detention indefinitely, unless they are given a visa, they choose to leave the country, or Australia finds another country to which they can go.

In response to a question during Senate Estimates, the Department of Home Affairs provided the following breakdown of the average time spent in detention by asylum seekers, refugees and stateless persons:

Detention Group	Average Days
Air Arrival (without a valid visa)	422
Arrival by boat without a valid visa	826
Overstayer	188
Visa cancellation on character grounds	360
Seaport arrival	846
Other visa cancellation	217

According to a [report by the Commonwealth Ombudsman](#), in 2016–17, 9% of people had been in detention for 4 years or more, and 24 people were in detention who had been detained for 6 years or more. The Ombudsman found that these 24 people faced significant barriers to release from detention.

What oversight is there of Australia’s immigration detention system?

The key domestic sources of oversight of immigration detention are the Commonwealth Ombudsman and the Australian Human Rights Commission. They can review detention arrangements but their views are not binding on the government.

If a person has been in immigration detention for over two years, the Secretary of the Department of Home Affairs must, at the two-year mark, and every 6 months thereafter until the person is released, give the Commonwealth Ombudsman a report about the circumstances of the person’s detention. The Ombudsman then provides an assessment of the appropriateness of the detention. The Ombudsman also conducts regular inspections of detention centres.

The Australian Human Rights Commission also plays a key oversight role. It investigates complaints relating to alleged breaches of human rights in immigration detention centres, conducts visits to detention centres and reports on conditions in them, and has [developed minimum human rights standards for immigration detention](#).

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](#)'). 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, record their claims, and verify their identity, it is arbitrary – and thus, unlawful – to continue to detain them while their refugee status is being determined, unless there are reasons to consider that the individual poses a risk to the community.

A number of studies have shown that detention has adverse psychological consequences for asylum seekers who are detained. This has also been a consistent finding of inquiries into the impacts of immigration detention in Australia. 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. 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*.

Mandatory detention also breaches children's rights under international law. In addition to the general *ICCPR* violations noted above, it violates 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](#).

Finally, Australia has obligations under article 31 of the [Refugee Convention](#) not to penalize asylum seekers for illegal entry. 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.