



Australian Government
Department of Home Affairs

Department of Home Affairs submission to the Inquiry into the Ending Indefinite and Arbitrary Detention Bill 2022

Joint Standing Committee on Migration
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Background

The Australian Government is committed to an immigration detention network that is humane, risk-based and guided by principles, including that:

- Held detention should be a matter of last resort, for the shortest practicable time, and alternatives to held detention should be used where it is appropriate to do so.
- Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, will be subject to regular review.
- People in detention will be treated fairly and reasonably within the law.
- People in detention will be provided with appropriate care and services.
- Conditions of detention will ensure the inherent dignity and safety of the human person.

Immigration detention forms part of Australia's strong border control arrangements and supports the integrity of Australia's migration programs. The detention of an unlawful non-citizen is for the purpose of resolving their immigration status.

Introduction

The Department of Home Affairs (the Department) welcomes the opportunity to provide this submission to the Joint Standing Committee on Migration inquiry into the Ending Indefinite and Arbitrary Detention Bill 2022 (the Bill).

Legislation

The Department administers the immigration detention network in Australia in accordance with the *Migration Act 1958* (the Act) and the *Migration Regulations 1994* (the Regulations). Under the Act, an officer must detain a person who the officer knows or reasonably suspects is an unlawful non-citizen. This detention must continue until the person's immigration status is resolved either through the granting of a visa or the person's departure from Australia.

Review of Detention

The Department conducts monthly reviews of persons held in detention. The purpose of these reviews is to ensure that:

- where a person is managed in a held detention environment, that the detention remains lawful and is reasonable and necessary for a legitimate purpose;
- the location of detention remains appropriate to their individual circumstances and conducive to status resolution and departmental activity is underway to reach a status resolution outcome;
- if it is identified through these reviews that detention is no longer appropriate to an individual's circumstances, or if there are vulnerabilities identified, their case is considered for assessment against the Minister's intervention guidelines.

Under Australian law, immigration detainees have the capacity to take proceedings before a court to determine the legality of their detention.

The Department regularly engages with external scrutiny bodies, including the Australian Human Rights Commission, and considers all the communications and reports it receives in good faith.

Conditions of Detention

The Department is committed to ensuring that everyone who lives in, visits or works at a detention facility is treated with dignity and respect and with regard to their safety, security and health. The Australian Border Force (ABF) has a range of processes and practices in place to ensure that detained individuals have appropriate mechanisms to engage with officers on the conditions of their detention, including to make complaints.

The Department, including the ABF, work closely with its service providers to manage the wellbeing of detainees through care, welfare and support arrangements that provide for their needs. These services are delivered by appropriately trained and experienced service providers to ensure detainees' needs are adequately met, including provision of health and welfare services broadly commensurate with health care available to the Australian community through the public health system. Detainees have access to appropriate food (accommodating dietary and cultural requirements), educational programs, cultural, recreational, educational and sporting activities, internet and computer facilities, televisions, and clean, comfortable sleeping quarters.

The Department's response to the Bill

Risk to the Australian Community

The Department believes that the Bill, if passed, would erode the Government's ability to protect the Australian community by:

- overriding provisions in the the Act (section 189) and preventing the Department's ability to detain persons whose visas are cancelled or refused on character grounds, prior to their departure from Australia.
- limiting the detention of persons with an adverse security assessment to a maximum of 12 months.

The Department takes a risk-based approach when reviewing the status of individual detainees, including the appropriateness of granting a visa and releasing them into the community. The proposed Bill would severely restrict the Department's ability to make informed and considered decisions in the best interests of the Australian community.

The Department is concerned that as a direct result of the changes contemplated by the Bill, individuals who are awaiting the resolution of their immigration status and who pose a threat to the safety of the Australian community would be required to be released from detention into the community until the matter is resolved. This would include persons with histories of serious criminal offending and people with adverse security assessments.

Impact on Operation Sovereign Borders

The Bill's explanatory memorandum expresses an intent to dismantle offshore immigration detention by stating that immigration detention must occur in Australia. Regional processing of Unauthorised Maritime Arrivals (UMAs) remains a key aspect of Operation Sovereign Borders and an important disincentive to people smuggling. Dismantling regional processing in favour of a mainland processing approach would likely be marketed by some people smugglers as a weakening of Australia's border protection policies.

The Department notes that regional processing occurs in accordance with the laws of the regional processing country, and individuals taken to regional processing countries are not detained under the Migration Act. Under regional processing arrangements with Nauru, transitory persons are not detained, and reside freely in the Nauruan community.

Independent monitoring of immigration detention

The Bill proposes to enshrine monitoring processes including a biannual inspection of detention facilities by an independent organisation determined by the President of the Australian Human Rights Commission (AHRC).

The Department notes that a rigorous review framework including internal review and external scrutiny currently exists in relation to immigration detention. For example:

- The Act requires the Secretary to report to the Ombudsman on individuals who have completed a cumulative period of two years in detention and then for every six months that they remain in detention. Based on these reports, the Ombudsman provides an assessment to the Minister that may include recommendations on appropriateness of these individuals' detention arrangements.
- The AHRC provides independent investigation and oversight of detention cases, investigates human rights and unlawful discrimination complaints and undertakes monitoring of detention facilities.
- The Department also has a MOU with the Australian Red Cross to provide independent reports and recommendations on the immigration detention network.

The Department notes the importance of regular and thorough scrutiny of administrative immigration detention and believes that the existing arrangements provide a robust oversight of detainees and detention facilities.

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) (ratified in December 2017) requires states parties to establish a system of regular preventive visits to places of detention under their jurisdiction and control detention by independent bodies, known as National Preventive Mechanisms Mechanism (NPM). The Commonwealth Ombudsman has been named as the NPM for Commonwealth places of detention, including immigration detention. OPCAT also requires signatories to allow visits from the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNSPT). The Department cooperated with the UNSPT during its inspections of immigration detention facilities in Australia in October 2022 prior to the suspension of its visit.

The Department has in place systems to ensure that detainee cases are reviewed regularly with a view to resolving their status and consequently their release from detention. This submission notes that these ongoing processes are an important factor in the Government's commitment to ensuring that detention is a last resort and for the shortest duration necessary.

The purpose of these reviews is to ensure that:

- where a person is managed in a held detention environment, that the detention remains lawful and is reasonable and necessary for a legitimate purpose;
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- if it is identified through these reviews that detention is no longer appropriate to an individual's circumstances, or if there are vulnerabilities identified, their case is considered for assessment against the Minister's intervention guidelines.

Under Australian law, immigration detainees have the capacity to take proceedings before a court to determine the legality of their detention.

Principles of family unity and rights and best interests of the child

Australia's obligations under the Convention on the Rights of the Child require that the best interests of the child be a primary consideration in all actions concerning children. In addition, the International Covenant on Civil and Political Rights recognises the importance of the family unit and its entitlement to protection by the State.

Section 4AA of the Act affirms the principle that minors should only be detained as a measure of last resort. The principles of family unity and the best interests of the child are referenced in relevant departmental policy and guidelines including for the use of the Minister's Residence Determination and Ministerial Intervention powers under section 197AB and section 195A.