

## Factsheet

## IMMIGRATION DETENTION IN AUSTRALIA

Last update: October 2021

*Australia has in place a policy of mandatory detention that requires all 'unlawful non-citizens' to be held in immigration detention, which can be for an indefinite period.*

### Who must be held in 'immigration detention'?

A policy of mandatory detention—first adopted in 1992—applies to all 'unlawful non-citizens' in Australia. Under the *Migration Act 1958* (Cth), officers must detain any person they know or suspect to be in Australia unlawfully. Once a person has been moved to immigration detention, they must remain in detention until they have been granted a valid visa or leave the country.

Any non-citizen who does not have a visa authorising them to be in Australia is an 'unlawful non-citizen', and is vulnerable to detention. This includes anyone that:

- (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.

According to statistics reported by the Department of Home Affairs, as at 31 August 2021, 1440 people were being held in immigration detention. While the statistics are not broken down by reference to whether a person is seeking asylum, we know that 302 (or approximately one fifth) were people who arrived without a valid visa.

Since July 2013, any person who arrives without a valid visa is subject to the policy of offshore processing on the Republic of Nauru or to Manus Island in Papua New Guinea and is barred from entering Australia on a permanent basis. Those asylum seekers who are subject to offshore processing 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.

### 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'. Former

immigration ministers have acknowledged this doesn't necessarily work. Chris Bowen said in 2010, that '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'.

While deterrence is a policy goal of immigration detention, the Australian Border Force says that detention in an immigration facility is not intended to punish unlawful non-citizens, but rather is a tool to manage Australia's migration programs. It is also a mechanism to segregate unlawful non-citizens without visa prospects from the Australian community while awaiting their departure.

**How long can people be detained?**

Under Australian law, a person is held in immigration detention until they are granted a valid visa or 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 they can go to. The Minister also has the discretion to release a person into community detention, grant them a bridging visa, or grant any other kind of visa, where the Minister thinks that this is in the public interest.

In its monthly report on Immigration Detention, the Department of Home Affairs provides statistics on the length of time of people in Held Immigration Facilities. At 31 August 2021, the Department provided the following breakdown:

Length of Time	Total	% of Total
31 days or less	78	5.4%
32 days – 91 days	154	10.7%
92 days – 182 days	176	12.2%
183 days – 365 days	234	16.3%
366 days – 730 days	293	20.3%
731 days – 1095 days	189	13.1%
1096 days – 1460 days	127	8.8%
1461 days – 1825 days	72	5.1%
1825 days or greater	117	8.1%
<b>Total</b>	<b>1440</b>	<b>100%</b>

At the time of the report, the average period of time for people to be held in detention facilities was 696 days (or 1.9 years).

**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.

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 afterward 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](#).

A person may also seek judicial review if they believe they have unlawfully held in immigration detention. If they are found to have been unlawfully detained, they will be released from detention. However, the prospects for challenging Australia's immigration detention system as a whole through domestic courts are slim: the High Court has held that mandatorily detaining unlawful non-citizens until they obtain a visa or can be removed from Australia is [constitutionally valid](#).

### **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 with a visa), 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. 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 causes psychological damage for asylum seekers who are detained. This has also been a consistent finding of inquiries into 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 ICCPR article 7 (prohibition on cruel, inhuman or degrading treatment) and article 10 (requirement that persons deprived of liberty be treated with humanity and respect for their inherent dignity).

Mandatory detention also breaches children's rights under international law, particularly the right not to be arbitrarily deprived of their liberty, contrary to article 37(b) of the Convention on the Rights of the Child.

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.