

Committee Secretary  
Senate Legal and Constitutional Affairs  
Parliament House Canberra ACT 2600  
*Submitted via email*

Dear Committee Secretary,

We urge the Committee to accept *the Ending Indefinite and Arbitrary Immigration Detention Bill 2021* in its entirety, and immediately end the indefinite and arbitrary detention of people seeking asylum and refugees.

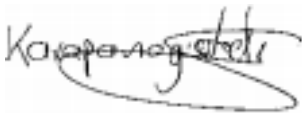
The Asylum Seeker Resource Centre works closely with people seeking asylum and refugees currently held in Australia's network of detention centres. The mental and physical health issues people have sustained during their time in these conditions is deeply concerning and necessitates immediate release into the community where they can receive urgent care.

Our submission highlights a myriad of issues with Australia's immigration detention regime, in particular how it affects those who tried to seek protection in Australia by sea, separates families and denies basic human rights to thousands.

We welcome the opportunity to support a Bill that corrects many of the issues lawyers, caseworkers and people seeking asylum have faced over previous decades.

We would welcome the opportunity to appear before the Committee.

Yours faithfully,



Kon Karapanagiotidis OAM  
CEO Asylum Seeker Resource Centre

# 1. Introduction

## 1.1 The Asylum Seeker Resource Centre

- 1.1.1 Founded in 2001, the Asylum Seeker Resource Centre (**ASRC**) is Australia's largest independent aid and advocacy organisation for people seeking asylum and refugees, supporting and empowering people at the most critical junctures of their journey.
- 1.1.2 The ASRC welcomes the opportunity to submit to the Joint Standing Committee on Migration concerning the Ending Indefinite and Arbitrary Immigration Detention Bill 2021 (**the Bill**).

## 1.2 Overview of submission

- 1.2.1 The ASRC strongly supports the Bill which provides clear guidance on the parameters for immigration detention, including that detention should only be used as a last resort and maximum timeframes for detention. In addition, the Bill provides for minimum conditions of immigration detention and independent oversight of all detention. Currently, Australia is an outlier amongst comparable countries in relation to both the length of time people spend in immigration detention and their treatment within detention, which is also incompatible with international human rights law and practices. Our submission will outline some of the persistent issues with Australia's immigration detention regime and explain how these can be rectified by this Bill.

## 1.3 Summary of recommendations

- 1.3.1 We provide the following recommendations to the Australian Government.

**Recommendation 1:** This Bill is accepted in its entirety.

**Recommendation 2:** Immediately release all refugees and people seeking asylum currently held in detention.

**Recommendation 3:** Prohibit arbitrary detention of refugees and people seeking asylum and require that all decisions to detain refugees and people seeking asylum must be exceptional and subject to independent review.

**Recommendation 4:** Implement clear and strict timeframes for the length of time a person can be held in immigration detention.

**Recommendation 5:** Respect and maintain family unity and avoid all actions that disrupt or separate family units.

**Recommendation 6:** Provide free legal assistance and adequate medical and mental health care to people held in immigration detention.

## 2. Explanation for ASRC's support of this Bill

### 2.1 This Bill is accepted in its entirety.

- 2.1.1 The ASRC recommends that the Committee urgently adopt this Bill in its entirety.
- 2.1.2 Since offshore processing was restarted in 2001, people seeking asylum have been subjected to arbitrary and indefinite detention. Australia's detention regime has received sustained international condemnation, which has undermined Australia's international standing and brought into dispute Australia's commitment to international law. Subjecting people seeking asylum to brutal conditions in detention has cost the lives of at least 14 people seeking asylum and refugees. This was highlighted in Australia's recent participation in the third cycle of the Universal Periodic Review process in January 2021, where 47 nations criticised Australia's policies towards refugees and people seeking asylum, including Australia's persistent use of prolonged detention.
- 2.1.3 Australia's immigration detention system, including permitting indefinite detention, is in opposition to numerous international treaties, including but not limited to: the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**), International Covenant on Civil and Political Rights (**ICCPR**), United Nations Convention on the Rights of the Child (**CRC**), and Convention Relating to the Status of Refugees. Codifying Australia's international obligations to refugees and people seeking asylum in domestic law is an integral step to rectifying and addressing Australia's failures to adhere to international law. This will include abolishing indefinite, arbitrary detention of refugees.
- 2.1.4 Mandatory detention is the status quo in Australia. Section 189 of the *Migration Act 1958* (Cth) (**Migration Act**) provides that any person who is reasonably suspected of being an unlawful non-citizen (i.e. who does not have a visa), must be detained. There are no time limits provided for any person's detention and people are detained indefinitely for several years.
- 2.1.5 Also, mandatory detention has led to monumental policy failure, which costs the Australian taxpayer billions of dollars. According to the [2021-22 Federal Budget](#), the Government will spend \$1.3 billion on onshore detention this year and will spend a total of \$4.3 billion over the next four years. A further \$464.7 million will be spent on expanding the detention centre on Christmas Island; this is despite the Government claiming it would cost \$55.6 million to reopen the detention centre in 2019. Two families held in the Northern APOD in Darwin were held in abysmal conditions until their release in August 2021, which cost an estimated [\\$891,000 per month](#) (from February 2020 to December 2020); this amount does not include health service provider costs. The average administered cost per annum of holding a person in immigration detention in 2019–20 was \$361,835, and \$458,506 for those held in Alternative Places of Detention (**APOD**) accommodation in Brisbane and Melbourne. By comparison, the average administered cost per annum of holding a person in Residence Determination (community detention) in 2019–20 was \$46,490.
- 2.1.6 In addition, there is no adequate oversight of the detention regime, including decisions made to detain a person and monitoring of detention facilities. Under section 486O of the Migration Act, the Commonwealth Ombudsman can make recommendations to the Minister regarding a person's detention, where they have been detained for at least 2 years. However, these recommendations are not binding and there is no process to seek review of a person's

detention.

2.1.7 The Bill addresses our concerns with the current immigration regime by providing clear guidance on the duration and conditions of immigration detention, including:

- providing that immigration detention is a last resort, in particular for children;
- prohibiting arbitrary or mandatory detention;
- prescribing a maximum period of detention of 3 months, which may be extended by application to the Federal Circuit Court of up to no more than 12 months;
- requiring that all detention is in Australia, thereby precluding offshore detention;
- prescribing an exhaustive list of reasons for detention and prohibiting discriminatory practices to detain a person based on their mode of arrival;
- establishing independent review mechanisms for decisions to detain people and independent monitoring of detention facilities; and
- ensuring minimum conditions of detention, including legal assistance and health care, to ensure all detainees can live in safety and with dignity.

#### Case study - Maghames family

The Maghames family was the last remaining family held in the Darwin Northern APOD and were released into the community in August 2021. The family, members of a persecuted minority group from Iran, sought asylum in Australia by sea and instead of being offered protection, they were detained on Nauru and Christmas Island for over six years. In 2020, due in part to the brutal conditions of Nauru's offshore detention centre, they were medically transferred to Darwin. Here the family lived in a tiny cramped cabin for over 2 years. In the sweltering heat, the elderly parents were forced to sleep in bunk beds and were watched day and night by dozens of guards.

Hajar Maghames, who suffers from sciatic nerve damage as well as extreme back, neck and leg pain, [said](#) of the conditions, "This feels like a relentless form of punishment ... [my mother is] constantly in tears." She also noted how the Government was spending "massive amounts of money" to detain a sick family who only wanted to build a better life.

## 2.2 Immediately release all refugees and people seeking asylum currently held in detention

- 2.2.1 Refugees and people seeking asylum currently held in detention must immediately be released. The mental and physical health injuries that are caused by protracted detention are catastrophic and often permanent. There is no legitimate reason why refugees and people seeking asylum in detention cannot be released into the community while the government processes their visa applications.
- 2.2.2 There is no timely and clear information available to the public about the number of refugees and people seeking asylum held in immigration detention. However, there is a large cohort of refugees and people seeking asylum who were moved to Australia's onshore detention network from offshore detention for medical reasons, mostly under the former Medevac law. ASRC estimates there are currently 70 people seeking asylum and refugees who meet this description currently held in APODs such as Park Hotel. These men must be urgently released. Since December 2020, nearly 200 people previously held in detention under the same circumstances have been released into the community. The Morrison Government has provided no clear reason as to why the 70 remaining people are arbitrarily held in detention.

- 2.2.3 We are also concerned about other people in detention who are currently seeking protection or have been granted humanitarian visas. As of March 2021, [there were](#) 736 people who held a humanitarian or protection visa prior to being detained or have applied for a protection visa in Australia. This [includes](#) 240 people in held immigration detention who are seeking protection, merits review of their protection visa refusal or have a request before the Minister to lift a statutory bar. It is inhumane and in breach of our international obligations to indefinitely detain refugees and people seeking asylum.
- 2.2.4 During the COVID-19 pandemic there has been a substantial increase in the risk of people held in detention contracting COVID-19, which in turn increases the spread of the virus to the community at large. Medical and legal bodies, including the [Human Rights Commission](#), the [Commonwealth Ombudsman](#), [the Australasian Society for Infectious Diseases](#) and the Australasian College for Infection Prevention and Control, have been warning the Government of the COVID-19 health risks, harmful conditions and lack of oversight into the care and treatment of refugees inside detention centres. Detention centres and APODs have been noted to have poor air circulation; they are often cramped and overcrowded. With a series of COVID-19 outbreaks over the previous 18 months, in particular the outbreak at Park Hotel that saw nearly half of the population contract COVID-19, it is clear that immigration detention of people seeking asylum and refugees, particularly during a pandemic, is dangerous and must end.
- 2.2.5 In addition, we are gravely concerned for the remaining people on Nauru and PNG that were subjected to Australia's offshore detention processing regime. There are around 200 refugees and people seeking asylum currently in PNG and Nauru who have been found to be owed protection and are awaiting permanent resettlement. It is unacceptable that people have been subjected to immigration detention for over 7 years and still do not have any pathway to permanent protection in Australia.
- 2.2.6 It is imperative that the release of people seeking asylum from detention must be accompanied with a support system that allows them to be active members of the community, which includes healthcare, welfare and work rights comparable to other residents of Australia. From our experience of working with people in detention, we have observed that many people struggle to re-integrate into the community after being isolated from their former support networks and not having employment for several years. However, the process of people re-integrating into the community will be much less burdensome if they have only been held in detention for a short period of time as provided for in the Bill.

## 2.3 Prohibit arbitrary detention of refugees and people seeking asylum and require that all decisions to detain refugees and people seeking asylum must be exceptional and subject to independent review

- 2.3.1 The decision to detain refugees and people seeking asylum must be subject to rigorous independent review, including decisions made under ministerial powers.
- 2.3.2 As stated above, Australian law mandates the detention of all unlawful non-citizens and there are no mechanisms for review and oversight of detention. This is inhumane and contrary to international human rights. People seeking asylum who do not pose any security threat should be permitted to reside in the community while their visa applications are processed. While persons are living in the community waiting for their visa applications to be processed, the Government must also provide support, work rights and healthcare in line with other residents to ensure people seeking asylum can live in safety and with dignity.

- 2.3.3 Arbitrary and indefinite detention is dangerous and has cost the lives of 14 refugees and people seeking asylum since 2013. The worrying evidence regarding self-harm and assault within detention centres (see below section 2.6 for more information), as well as the known detrimental effects detention, has on the mental and physical health of detainees demonstrates that such facilities should be used as a last resort.

Case Study: Thanush Selvarasa

Thanush Selvarasa is a human rights activist for people seeking asylum and sought asylum in Australia by sea in 2013. Instead of being provided protection, he was detained on Manus Island then transferred to Melbourne Immigration Transit Authority and the Mantra Hotel Melbourne. When reflecting on his over 8 years in detention, he stated:

"How do I explain the detention life, the cage life? People seeking asylum are put in detention, within a year they will be destroyed mentally and physically. Every day our life is denied, it is not a good place, it destroys dreams and hope.

We don't know how long we are there for, everything is out of our control, we cannot choose our food, we cannot choose our clothes, we have no privacy, we are always watched, even when sleeping. When you use the bathroom a guard is outside, it made me feel crazy."

- 2.3.4 Currently the majority of people held in immigration detention are as a result of visa cancellations and refusals under section 501 of the Migration Act (known as the Character Provisions) (see below in section 2.4.4 for more information). These Character Provisions are part of [47 personal powers](#) available to the Minister of Immigration, more than any other portfolio. These powers enable the Minister 'God-like' powers over the lives of people seeking asylum and refugees without an independent merits review system. The rapid increase in ministerial powers from 2014 onwards has made it almost impossible for people in immigration detention to be treated fairly.
- 2.3.5 The Character Provisions do not relate strictly to issues of national security or security-related offences but are shockingly broad. They give the Minister of Immigration visa cancellation power on the basis of a person's "past and present general conduct" or "suspicion of their association with a group involved in criminal conduct", or based on a "risk the person would in the future "engage in criminal conduct" or even something so tentative as, they might in the future become "disruptive" to the community in some way. These powers are antithetical to democracy and judicial fairness. Due to the broad nature of these provisions, many people who have not been convicted of offences and have not spent a day in prison, have had their visas refused or cancelled and remain in protracted detention. Further, due to amendments to section 197C of the Migration Act under the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth), persons who have been found to be owed protection are not subject to mandatory removal under s 198 of the Migration Act. In practice, this means that refugees who have had their visa cancelled or refused will be subjected to indefinite detention, in breach of our international obligations under the ICCPR and CAT.
- 2.3.6 The Bill addresses our concerns regarding arbitrary and indefinite detention by providing clear maximum time limits on detention and prohibiting arbitrary and mandatory detention.

## 2.4 Implement clear and strict timeframes for the length of time a person can be held in immigration detention

- 2.4.1 The ASRC urges the Committee to endorse the Bill's stipulation that non-citizens should not be kept in immigration detention for more than 3 months, with the provision that the Federal Circuit Court may extend the period of detention as a last resort for not more than 12 months.
- 2.4.2 Since 2014, there has been an expansion of people held in immigration detention and a rapid increase in the time spent in immigration detention. Since 2013, the average amount of days spent in detention has drastically increased from under 100 days to 689 days as of [30 September 2021](#). This is far beyond the average time spent in detention in countries such as [Canada](#), [United States](#) and the [United Kingdom](#) which are 14, 55 and 29 days respectively. Other countries such as Germany and France have legal maximum lengths of detention, neither of which exceed 32 days. Organisations such as the Australian Human Rights Commission have routinely [urged](#) the Government to rectify this situation and reduce the average time in detention to an acceptable level. Establishing time frames is necessary as the current situation has become untenable.
- 2.4.3 There has also been a similarly rapid increase in the number of people held in immigration detention due to visa cancellations, leading to serious concerns of overcrowding. The issue of overcrowding in immigration detention has been noted by organisations such as the [Australian Human Rights Commission](#), which has become heightened due to COVID-19 as the reduction of flights leaving Australia has resulted in fewer removals and a larger detention population, thereby increasing the health risk to those in detention centres. The Morrison Government's response to such overcrowding has been in part to reopen the North West Point detention facility at Christmas Island as well as rely on Alternative Places of Detention such as Park Hotel in Melbourne and Kangaroo Point Hotel in Brisbane. Both responses have been unmitigated failures, with outbreaks of COVID-19 in detention facilities, inadequate health care and support and deteriorating mental health of detainees.
- 2.4.4 By contrast, the nearly 200 refugees and people seeking asylum transferred from Nauru and PNG to Australia for medical treatment were eventually released from closed detention into the community and have integrated into the community. This demonstrates that reducing overcrowding could easily be achieved and more people should be released from detention into the community, including the remaining 70 refugees at Park Hotel.
- 2.4.5 Furthermore, the increase in the Minister of Home Affairs and Immigration powers to cancel visas without merits review has seen a corresponding rise in the number of people in immigration detention because of visa cancellations. Currently, [nearly 60%](#) of the people held in immigration detention have had their visa cancelled under Character Provisions (more information in section 2.3.2). Clearly establishing time frames that people can be kept in detention, even when visas have been cancelled, is integral in guaranteeing the rights of people seeking asylum, refugees and non-citizens in line with our international legal obligations.

## 2.5 Respect and maintain family unity and avoid all actions that disrupt or separate family units

- 2.5.1 We wish to draw to the Committee's attention the deep and lasting effects of immigration detention on family separation. Indefinite and arbitrary detention invariably separates hundreds of people from their families as many spend years in immigration detention centres,

including in remote locations such as Christmas Island. This practice has been repeatedly found to be in breach of the prohibition under international law on arbitrary detention. This unjustifiable detention often also results in protracted, even permanent, separation of families.

- 5.1.2 Furthermore, family separation has a significant impact on children. There have been glaring examples where a single parent, who is the sole carer of dependent children, has been taken into detention without regard for their children's rights to be cared for by their parents, resulting in the children being placed in State care, contrary to their best interests. Numerous [studies](#) have found that separating children from their parents is harmful to children's development and health. This is particularly relevant in the context of refugees and people seeking asylum as the children themselves are often fleeing violent circumstances.

#### Case Study - Mohammad

Mohammad arrived in Australia by boat in 2013 with his wife. They were detained on Christmas Island and transferred to Nauru where they were held in offshore detention. While in Nauru, Mohammed and his wife had a child who required urgent medical care that the child could not receive in Nauru.

While the Australian Government agreed to transfer Mohammad's wife and child to Australia, Mohammad was not permitted to travel with them and remained in Nauru. Mohammad's mental health declined significantly due to the separation from his family, and he was eventually transferred to Australia for medical treatment in 2019.

In Australia, Mohammad was detained in an APOD. Mohammed was not released into the community and was unable to see his wife and child, who were living in the same city as him. Mohammed's mental health worsened due to ongoing family separation and he attempted to take his own life on two occasions.

It was only after his second suicide attempt that Mohammed was released from detention and able to be reunited with his wife and child, whom he had not seen for 3.5 years. Although all three family members were living in Australia, they had not been allowed to see each other during this time due to the Australian Government's policy of mandatory detention.

- 2.5.3 The rights to family life and family unity are contained in numerous international treaties of which Australia is a signatory. These include but are not limited to: the Universal Declaration of Human Rights, Article 16(3); the 1966 International Covenant on Civil and Political Rights (ICCPR), Article 23(1); the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 10(1); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW); the 1989 Convention on the Rights of the Child (CRC); and the 2006 Convention on the Rights of Persons with Disabilities (CRPD). Furthermore, protection of family life is also anchored in the right not to be subject to arbitrary or unlawful interference with privacy, family, home or correspondence as per Article 17(1) of the ICCPR, and the right to "the protection of the law against such interference or attacks" as per Article 17(2) of the ICCPR. Importantly, these rights to family life and family unity apply irrespective of a person's migration status.
- 2.5.4 The Bill addresses the importance of family unity by making the principle of family unity and the rights and best interests of the child (which includes the principle of family unity) as paramount considerations for any decision relating to immigration detention (sections 8 and 9). In addition, the Bill's provisions regarding maximum time limits for detention and that



children should only be detained as a last resort will further ensure family unity.

## 2.6 Provide free legal assistance and adequate medical and mental healthcare to people held in immigration detention

- 2.6.1 We would like to draw the Committee's attention to the fact that Australia does not have any human rights protection or any minimum standards of immigration detention which are enshrined in Australian law. By comparison, similar standards exist for our prison system. Due to this gap, there has been a gross failure to provide basic access to legal assistance and health services.
- 2.6.2 Immigration detention facilities are inhospitable and dangerous environments. Between 2016-2021 the Australian Border Force [recorded](#) 42 complaints of sexual assault complaints against facility workers; there [have been](#) 172 complaints of assault, and [over](#) 2,650 actual and threatened instances of self-harm.
- 2.6.3 COVID-19 also poses a unique threat to people in detention especially those in APODs (more information in section 2.2.4). During an outbreak of COVID-19 in Park Hotel, people reported to ASRC caseworkers that they not only struggled to get basic medication such as Panadol and often had to monitor their own oxygen levels, but also waited up to 5 hours to see a nurse.

### Case Study - Anonymous

A refugee who sought asylum in Australia by sea, was later moved to offshore detention and then to onshore detention due to medical reasons, noted his experience during the COVID-19 outbreak at the Melbourne Immigration Transit Accommodation:

"We are not being given any information and our questions are not being answered. We are worried about our health and the guards will not tell us what is going on. There are not really any COVID-safe precautions being taken with new guards coming and going all the time to cover other staff members; many guards are not wearing masks; we are not being told to wear masks and there is no way that we can social distance. We cannot protect ourselves."

- 2.6.4 The inadequate medical care received by people in detention centres during COVID-19 is consistent with the reports of poor medical care in general. Lack of access to adequate mental health care is of urgent concern, highlighted by the 2,650 reported actual and threatened instances of self-harm over the previous five years. For people seeking asylum transferred to Australia for medical treatment, the situation is critical, after they have been in detention for 9 years, some since they were children. Further the medical treatment, which this cohort was meant to receive in Australia, is in many cases yet to be provided.
- 2.6.5 It is also critical that people in detention are provided with free legal assistance. Many people in detention are isolated from their support networks in the community and face other practical difficulties such as language barriers. Also, given the remote location of many detention centres, particularly on Christmas Island, many detainees do not know how to access legal assistance. Legal advice regarding their migration status, length of detention and treatment in detention are essential to ensure that people are making informed decisions and know their rights. We often are contacted by people in detention who have missed relevant deadlines for their migration cases which have serious consequences on their ability to seek asylum in Australia and live in safety from persecution.

- 2.6.6 The Bill addresses our concerns by providing that all persons in detention must have access to health and mental health services, including counselling and trauma services, and free and independent legal services.

### **3. Conclusion**

- 3.1 We reiterate our support for the Bill in addressing the systemic issues in Australia's immigration detention regime. Notably, mandating that detention is a last resort (especially for children), imposing maximum time limits on detention, ensuring oversight for all detention and minimum conditions in detention will ensure that all people in detention, including people seeking asylum and refugees, can be treated humanely and with dignity in accordance with international human rights law.