

# Refugees, Asylum Seekers and Migrants



Australian  
Human Rights  
Commission

Australia's third UPR | 2021

## Key Issue – Immigration detention and the conditions of detention

Immigration detention remains mandatory for all unlawful non-citizens, which can result in prolonged and/or indefinite detention that may be arbitrary and risks mental ill-health. [In May 2020](#), the average period spent in immigration detention increased to 553 days, the highest level ever recorded.

The length of time spent in immigration detention is far higher in Australia than in comparable jurisdictions. For example, [Canada reported](#) that the average length of detention was 12.3 days between January and March 2019.

The detention of an unlawful non-citizen is not based on an individual assessment of the need for detention. All unlawful non-citizens must be detained, regardless of whether they individually pose an unacceptable risk to the community.

However, the Migration Act does not require that unlawful non-citizens be detained in purpose-built, closed immigration detention facilities. In some circumstances, people in detention can be released from closed facilities into alternative, community-based arrangements. The Commission

has long recommended that the Migration Act be amended to ensure that closed immigration detention is only used in circumstances where it is strictly necessary to manage unacceptable risks to the community.

In recent years, [the Commission's periodic inspections of immigration detention facilities have raised concerns](#) about the mental health impacts of long-term detention and the physical conditions of detention, following its periodic inspections of immigration detention facilities. The [Commission has recently raised significant concerns](#) about a Bill that would enable a blanket ban on the possession of mobile phones in immigration detention facilities, not only for specific high-risk individuals but for all people in such facilities. As at September 2020, the Bill has not been passed.

## Recommendation

**Government ensure immigration detention is justified, time limited, and subject to prompt and regular judicial oversight**

## Key Issue - the COVID-19 Pandemic and immigration detention

It has been widely acknowledged around the world that COVID-19 poses heightened risks to people in all forms of detention, including immigration detention facilities and prisons, where adequate physical distancing may be difficult or impossible. [The Australian Department of Health has recognised](#) that people in correctional and detention facilities are among those most at risk of contracting the virus in Australia.

The Commission is concerned that given the number of people in immigration detention has increased, some immigration detention facilities are operating at close to or over their operational capacity and may be at risk of overcrowding. There are also concerns about the use of shared accommodation and shared hygiene facilities. In line with [public health advice](#), the Commission has [called](#) on the Australian Government to release people who do not pose a security risk

to the community to be released to community detention.

[The Commission](#) does not support the recent re-opening of the immigration detention facility on Christmas Island as a solution to overcrowding in immigration detention. The considers that the remote location of Christmas Island, with limited access to facilities and services, is an inappropriate place for a detention facility and does not support this as a solution to overcrowding in immigration detention.

## Recommendation

**Government reduces numbers of people held in immigration detention to maintain safety during COVID-19 pandemic**

### Key Issue – Children in Immigration Detention

The Commission welcomes efforts over the last 8 years that have resulted in a dramatic reduction in the number of children in closed immigration detention.

However, the Commission remains deeply concerned about the situations of the few children who remain in closed detention. At the time of writing



two very young children, aged two and four years old remain detained at an immigration detention facility on Christmas Island with their parents.

At the time of the Commission's last immigration detention inspections in the second half of 2019, there were five children in closed detention in Australia, including four very young children. The UN Working Group on Arbitrary Detention considered the circumstances of one of these young children and found that the child and their mother were arbitrarily detained. The Commission agrees with this assessment, and welcomes [reports](#) that they were both recently released from closed immigration detention .

In the Commission's view, the detention of children, especially very young children, in closed immigration detention facilities is never appropriate and cannot be justified. Community-based alternatives to closed detention are readily available and already most commonly used for children and their families in Australia. The Commission considers that all parents with children, including unaccompanied children, should be able to reside in community-based alternatives to closed immigration detention.

## Recommendation

**Government amends the Migration Act 1958 (Cth) to prohibit placing children in immigration detention**

## Key Issue - the Legacy Caseload

A group of approximately 30,000 asylum seekers who arrived in Australia by boat prior to 1 January 2014 were permitted to remain in Australia in order to lodge applications for protection visas. This group has come to be known as the 'Legacy Caseload'. Due to a number of changes to legal and policy settings since 2012, including the introduction of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), asylum seekers and refugees in the Legacy Caseload are treated differently from other groups of asylum seekers and refugees, and they have also faced lengthy delays in the processing of their claims. [Most recent statistics](#) indicate that around 5,000 are still in the process of having their claims assessed, and over 17,000 have been granted temporary protection visas.



Some key findings of the Commission's [Lives on Hold report](#), which examined the human rights situation for refugees and asylum seekers in the Legacy Caseload include:

- the refugee status determination process does not provide adequate safeguards against *refoulement*
- *asylum seekers* do not receive sufficient support to ensure an adequate standard of living
- temporary protection discriminates unjustifiably based on mode of arrival and is likely to have a negative impact on mental health and settlement outcomes
- restrictions on family reunion result in indefinite separation from family members living overseas (including in some cases minor children) and creates a risk of constructive *refoulement*.

The Commission's recommendations included reinstating a more thorough and fair process for assessing refugee claims, providing permanent protection to those found to be refugees, allowing family reunion and ensuring that asylum seekers, including children and families, receive adequate and appropriate support to provide for their basic needs, maintain secure housing and access health care.

## Recommendations

**Government repeal the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)***

**Government conduct refugee status determination consistently with international obligations and provide permanent protection for refugees and family sponsorship**

**Government provide sufficient support to asylum seekers to ensure an adequate standard of living**



## Key Issue – Visa cancellations

Mandatory visa cancellation provisions were [introduced](#) in December 2014, and significantly broadened the scope of visa cancellations under s 501 of the Migration Act. Under the mandatory cancellation provisions the Minister must cancel a person's visa where they have 'substantial criminal record' (sentenced to death, life imprisonment or a term of imprisonment of 12 months or more, including multiple terms totalling 12 months or more) or have committed a sexually based offence involving a child, and are serving a full-time term of imprisonment for an offence against Australian law.

The consequences of mandatory visa cancellation are serious — a person becomes unlawful, and as a result is subject to mandatory immigration detention and may be removed from Australia. Since the mandatory visa cancellation provisions were introduced there have been increasing numbers of people being detained for long periods. People subject to s501 visa cancellations are the largest group of people in immigration detention, currently comprising [nearly half of the total population](#).

There is a risk that people in this situation may be subject to arbitrary and indefinite immigration detention and they may be separated from their family for prolonged periods resulting from detention or removal.

Under section 116 of the Migration Act, a non-citizen may have their visa cancelled on a prescribed ground, and a criminal charge is one of the prescribed grounds for cancelling a

Bridging Visa E. The Commission has [previously raised concerns](#) that the detention of people as a result of visa cancellations on this basis may not be reasonable or necessary in all cases, creating a risk of arbitrary detention, and has recommended that a criminal charge should be removed as a prescribed ground for visa cancellation under s 116.

## Recommendations

**Government repeals mandatory visa cancellation provisions in sections 501(3A) and 501CA and removes a criminal charge as a prescribed ground for cancellation of a Bridging Visa E under section 116(1)(g) of the *Migration Act***

