



Refugee Council  
of Australia

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

## **INDEFINITE DETENTION OF PEOPLE WITH COGNITIVE AND PSYCHIATRIC IMPAIRMENT IN AUSTRALIA**

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 200 organisations and around 1,000 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback to the Senate Community Affairs References Committee's inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia. RCOA's submission highlights the indefinite detention of people with mental illness in Australia's immigration detention facilities, including offshore processing centres located in Nauru and Manus Island in Papua New Guinea. There are primarily three ways in which a person with a cognitive and psychiatric impairment may be indefinitely detained in an immigration detention facility. Firstly, people who enter Australia without a visa are subject to mandatory detention without time limits; this includes those with mental illnesses. Second, as various studies have shown, people who experience prolonged detention in an immigration detention facility can develop mental health issues. Thirdly, people with mental illness living in Australian communities could be more vulnerable to becoming involved in actions which are in breach of their visa conditions resulting in detention or redetention. Due to the significant ways in which people with a mental illness can be indefinitely detained in immigration detention centres, we believe these issues fall within the Committee's Terms of Reference.

It is clear to RCOA that indefinite detention in immigration detention facilities causes significant mental health issues. Further, the mandatory detention requirement under the *Migration Act 1958* makes it extremely likely that people with a mental illness are being indefinitely detained upon arrival in Australia, or after having their visa cancelled under character grounds. Indefinite detention is a significant breach of Australia's human rights obligations. RCOA believes no person should be held in indefinite detention, especially those who are suffering from a mental illness. As such, RCOA recommends that the Australian Government end its practice of mandatory detention of people it considers unlawful non-citizens.

### **1. Overview of Australia's policy of mandatory indefinite detention (Terms of Reference 1(d))**

1.1. Australia's policy of indefinite mandatory immigration detention, as enshrined in the *Migration Act 1958*, has for over two decades resulted in the indefinite detention of tens of thousands of people. Under this policy, "unlawful non-citizens" (people who are not citizens of Australia and do not hold a valid visa) must be detained until they are granted a visa or leave the country. Detention is mandatory regardless of circumstances (including for children) and can lawfully continue even if a person presents no identifiable risk to the community. There are no time limits on detention under Australian law (meaning that an "unlawful non-citizen" can theoretically be detained for the course of their natural life), no onus on the Australian Government to demonstrate why the continued detention of a particular individual is necessary and very few grounds on which people detained can challenge the lawfulness of their detention.

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- 1.2. In addition, current mechanisms for monitoring and review of detention have proved inadequate. At present, the only formal, independent review mechanism available to people who have been detained for extended periods is oversight by the Commonwealth Ombudsman. For years, the Ombudsman has prepared detailed reports taking into account the mental and physical health and wellbeing of individuals detained. Many such reports have recommended the individual be released from immigration detention; however, there is nothing to compel the Minister for Immigration to act on these recommendations and in practice they have been often ignored. In addition, the Ombudsman has no authority to interview and report on a person's detention until they have been detained for a period of more than six months.

## **2. The number of people indefinitely detained in immigration detention (Terms of Reference 1(a))**

- 2.1. RCOA believes that a high number of people with mental illness may be detained under Australia's policy of mandatory indefinite immigration detention. Refugees, as a population, have significantly higher mental health issues, often developed as the result of persecution, violence, war and the trauma arising out of their experiences. There is a significant body of research which highlights the mental health impacts of the refugee experience. As such, the policy of mandatory detention of these people if they seek Australia's protection without a visa is likely to affect a high number of people with mental health issues. Further, as discussed below, even if people are detained while healthy, the prolonged effects of indefinite detention often cause or significantly contribute to mental health problems. As such, a significant number of people may develop a mental illness while in detention.
- 2.2. As of 29 February 2016, there were 1,753 people in Australian onshore detention facilities. 798 people have been detained in closed immigration detention facilities for more than one year, including 454 people who had been in detention for over two years. The average length of detention was 464 days.<sup>1</sup> In addition, there are 1,379 people in offshore detention centres on Nauru and Manus, which Australia has responsibility and effective control over.<sup>2</sup>
- 2.3. It is unclear exactly how many people in immigration detention have a mental illness. Data from the The Commonwealth Ombudsman's 2013 review on asylum seekers in long-term detention highlights the negative impact of long-term detention on mental health. In 2013, the Ombudsman reviewed 754 asylum seekers who had been detain for over two years (pursuant to section 4860 of the *Migration Act*). Of those reviewed, 546 (73.64%) suffered from a mental health issue and 516 (69.38%) were found to have had their mental health issue(s) either induced or exacerbated by immigration detention.<sup>3</sup> Comparatively, asylum seekers in long-term detention report mental health issues nearly four times the rate of the general population (20%) and 1.5 times the rate of the prison population (46%).<sup>4</sup>

## **3. The impacts of immigration detention on mental health (Terms of Reference 1(b), 1(n))**

- 3.1. There is now a large body of research which substantiates the proposition that immigration detention causes severe psychological harm to people in detention.<sup>5</sup> Research also shows that detained asylum seekers have much higher rates of depression and anxiety.<sup>6</sup> Men's and women's

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<sup>1</sup> See the Immigration Department's detention statistics for 29 February 2016 at

<https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-29-feb-2016.pdf>

<sup>2</sup> Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru. (2015). *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru*, 31 August, ¶5.16.

<sup>3</sup> 'Who Will Be For Me?' Humanitarian Research Partners Open Source Project on Asylum, May 2014, Annex A, available at <https://www.humanrights.gov.au/sites/default/files/Attachment%20A%20to%20Submission%20No%20239%20-%20Humanitarian%20Research%20Partners.pdf>

<sup>4</sup> 'Who Will Be For Me?', 26.

<sup>5</sup> Guy J. Coffey et al., "The meaning and mental health consequences of long-term immigration detention for people seeking asylum," *Social Science & Medicine*, 70 no. 12 (2010).

<sup>6</sup> Katy Robjant, Rita Hassan and Cornelius Katona, "'Mental health implications of detaining asylum seekers: systematic review,'" *The British journal of psychiatry : the journal of mental science*, 194 no. 4 (2009).

rates of suicidal tendencies in Australian immigration detention centres are respectively 41 and 26 times that of the nation average.<sup>7</sup>

- 3.2. Deterioration of mental health has been positively correlated with length of detention in immigration centres. This is extremely troubling considering that over the past two decades detention of two years or more has been a prevalent phenomenon in Australian immigration.<sup>8</sup>
- 3.3. The high prevalence of mental health issues in immigration detention is a result of the very specific set of stressors that asylum seekers face in detention.<sup>9</sup> The deprivation of liberty, uncertainty regarding return to country of origin, social isolation, riots, excessive use of force, application of mechanical restraints (including when travelling outside detention for torture and trauma counselling), forceful removal, hunger strikes and self-harm are all factors which contribute to the mental deterioration experienced by immigration detainees.<sup>10</sup>
- 3.4. A study conducted on 17 adult refugees who had been held in Australian immigration detention facilities for an average of three years and two months showed much insight into the psychological state of those experiencing prolonged detention.<sup>11</sup> Participants put great emphasis on various disturbing experiences they both witnessed and experienced in detention. Mass riots, the use of excessive force on people by detention officers, fights between detainees, acts of self-harm, suicide attempts, hunger strikes and a lack of privacy were all relevant stressors common to the participants' experiences.<sup>12</sup>
- 3.5. A prominent stressor in immigration detention, which is not present in most other forms of detention, is the arbitrariness of confinement.<sup>13</sup> Because most detainees have not committed a crime, there is a sense of confusion and injustice relating to their detainment. This in turn can intensify emotions. One participant commented:  
  

*It is like you are a big criminal. You are there even though you never did any crime, or you never did anything wrong... but they are watching you... every step you take from outside your room, where ever you go they are watching.... That started a negative effect on my mind.*
- 3.6. For many, detention can stir up previous experiences of torture and trauma in their countries of origin, particularly where they have had previous experiences of undue imprisonment in the past.<sup>14</sup> Mental health professionals have raised concerns that prolonged detention can re-traumatise people fleeing persecution and abuse.<sup>15</sup>
- 3.7. Equally troubling is the psychological effects immigration detention has on children seeking asylum. Although the number of children in detention has recently decreased, the average length of time children spend in detention is increasing.<sup>16</sup> Children in detention, like adults, are continually exposed to multiple risk factors. However, due to their age, they are particularly vulnerable to these experiences. The stress related to confinement and the experiences that

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<sup>7</sup> Michael Dudley, "Contradictory Australian national policies on self-harm and suicide: the case of asylum seekers in mandatory detention," *Australasian Psychiatry*, 11 (2003): 102.

<sup>8</sup> Coffey et al., "The meaning and mental health consequences of long-term immigration detention for people seeking asylum," 2070.

<sup>9</sup> Robjant, Hassan and Katona, "Mental health implications of detaining asylum seekers: systematic review."

<sup>10</sup> Robjant, Hassan and Katona, "Mental health implications of detaining asylum seekers: systematic review," 307.

<sup>11</sup> Coffey et al., "The meaning and mental health consequences of long-term immigration detention for people seeking asylum."

<sup>12</sup> Coffey et al., "The meaning and mental health consequences of long-term immigration detention for people seeking asylum," 2073.

<sup>13</sup> Khatidja Chantler, "Gender, Asylum Seekers and Mental Distress: Challenges for Mental Health Social Work," *British Journal of Social Work*, 42 no. 2 (2012): 325.

<sup>14</sup> Chantler, "Gender, Asylum Seekers and Mental Distress: Challenges for Mental Health Social Work," 325.

<sup>15</sup> Zachary Steel et al., "A comparison of the mental health of refugees with temporary versus permanent protection visas," *The Medical Journal of Australia*, 185 no. 7 (2006)

<sup>16</sup> Georgja Paxton et al., "The forgotten children: National inquiry into children in immigration detention (2014)," *Journal of Paediatrics and Child Health*, 52 no.4 (2015): 366.

accompany it can be highly disruptive to normal psychological development.<sup>17</sup> Detention interferes with peer and family relationships, normal schooling environments and exposes developing minds to high levels of distress, despair and self-harm.<sup>18</sup> Most infants living in such conditions showed developmental delays and disturbed emotional states. Although research regarding the psychological effects of detention on children is somewhat limited; research suggests that the majority of the school-age children and adolescents in detention suffer from Post-Traumatic Stress Disorder, depression, self-destructive behaviour or oppositional defiant disorder.<sup>19</sup> Oftentimes, these disorders escalated to daily self-harm and cutting, suicide attempts or provocation of conflict with authority figures.<sup>20</sup> Emotional abnormalities, withdrawal, extreme boredom, guilt, and anxiety were also common symptoms presented by children in detention.<sup>21</sup> The Australian Human Rights Commission (AHRC) conducted an inquiry in 2014, which concluded that mandatory and prolonged immigration detention of children is not only extremely harmful to their psychological development, but also contrary to Australia's international obligations and thus constitutes a violation of international law.<sup>22</sup>

- 3.8. These conditions and their effects are exacerbated by the lack of available treatment planning and intervention in immigration detention. Beyond a limited access to clinicians, there is a clear inability to implement tangible recommendations aimed at improving the psychological and social circumstances of people in detention. Restricted access to medication and an inability to change living conditions means that effective treatment is unable to be implemented.<sup>23</sup>

#### **4. The detention of people who have had their visas cancelled (Terms of Reference 1(d))**

- 4.1. The *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) (Character Act) introduced new powers to refuse or cancel visas on 'character' grounds (that is, on grounds related to a person's character or criminal record). The Character Act has the effect of automatically cancelling a visa if, among other things, the person was imprisoned for a sentence of 12 months or more, or was convicted of a sexually based offence involving a child (s 501(3A) of the *Migration Act 1958* (Cth)). The Character Act also creates new personal Ministerial powers to reverse decisions made by the Administrative Appeals Tribunal or an officer of the Department (see ss 133A, 133C, 501BA). In addition, the Act significantly decreases the threshold under which a person would fail the 'character test' and increases the Minister's powers to cancel visas on the basis of incorrect information.
- 4.2. Significant concerns about the Character Act have been raised before by the Refugee Council of Australia,<sup>24</sup> and others, including the Australian Human Rights Commission.<sup>25</sup> These concerns include:
- The considerable risk of prolonged indefinite detention, especially in relation to refugees who cannot be removed to their country of origin due to the risk that they may face persecution or other forms of serious harm, and stateless people who have no country which is obliged to accept them.

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<sup>17</sup> Matthew Hodes, "The mental health of detained asylum seeking children," *European Child & Adolescent Psychiatry*, 19 no.7 (2010): 621.

<sup>18</sup> Hodes, "The mental health of detained asylum seeking children," 622.

<sup>19</sup> Hodes, "The mental health of detained asylum seeking children," 622.

<sup>20</sup> Sarah Mares and Jon Jureidini, "Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical issues," *Australian and New Zealand Journal of Public Health*, 28 no.6 (2004): 523.

<sup>21</sup> Mares and Jureidini, "Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical issues," 523.

<sup>22</sup> Paxton et al., "Perspective: 'The forgotten children: National inquiry into children in immigration detention (2014)," 365.

<sup>23</sup> Mares and Jureidini, "Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical issues," 525.

<sup>24</sup> See [http://www.refugeecouncil.org.au/wp-content/uploads/2016/03/Submission\\_Migration-Amendment\\_Character-Cancellation-Consequential\\_Mar\\_2016-1.pdf](http://www.refugeecouncil.org.au/wp-content/uploads/2016/03/Submission_Migration-Amendment_Character-Cancellation-Consequential_Mar_2016-1.pdf)

<sup>25</sup> Australian Human Rights Commission, *Submission into the Inquiry on the Migration Amendment (Character and General Visa Cancellation) Bill 2014*, Submission No 8, 28 October 2014.

- The mandatory nature of the visa cancellation powers, which significantly decreases the capacity of the system to consider the individual circumstances of a case before a person is detained.
- The very low thresholds for visa cancellation, which trigger visa cancellations even in the absence of a real risk to the community, and
- The continued trend towards increasing the personal discretionary powers of the Minister, including to reverse carefully made decisions by merits review tribunals.

4.3. While there are a number of grounds based on which people can have their visas cancelled under section 501 of the *Migration Act*, importantly for this inquiry, a person can have their visa cancelled because they fail the character test. A person can fail the character test if there is a risk they would, in the future:

- engage in criminal conduct,
- harass, molest, intimidate or stalk another person,
- vilify a segment of the community, incite discord, or represent a danger through involvement in disruptive and/or violent activities.

4.4. There is a strong likelihood, and possibly instances of, a person with a mental illness engaging in such conduct and subsequently having their visa cancelled under character grounds. Such a provision is extremely severe, especially if the conduct complained of was a result of the person's mental illness. There are no safeguards in place for instances where a person fails the character test because of their mental illness. Having a mental illness is not a defence under the act.

4.5. If a person who has their visa cancelled is a refugee, they are unable to be sent back to their country of origin, and they cannot be released unless they are given a visa, and they cannot be given a visa because they fail the character test. As such, this policy is likely to result in many people with a mental illness in indefinite detention.

## **5. Compliance with Australia's human rights obligations (Terms of Reference 1(e))**

5.1. While detention itself is not illegal under international law, there are many restrictions on the use of detention. One important issue is the right against arbitrary detention. Article 9 of the *Universal Declaration of Human Rights* states that "no one shall be subjected to arbitrary arrest, detention or exile."<sup>26</sup> Furthermore, Article 9(1) of the *International Covenant on Civil and Political Rights* states that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention".<sup>27</sup> In addition, Article 9(4) states that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court".<sup>28</sup>

5.2. While the ICCPR itself does not define the term arbitrary, the UN Human Rights Committee has provided subsequent definitions of arbitrary detention in its decisions of individual complaints against Australia in relation to individuals claiming asylum. The Human Rights Committee emphasises two key points: first, that justification for detention must be advanced on grounds specific to the individual; and second, that this individual justification for detention should be subject to periodic review.<sup>29</sup>

5.3. The Human Rights Committee has also recently released its *General Comment No. 35 on Article 9: Liberty and security of person*. It has reaffirmed that:

*The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of*

<sup>26</sup> UN General Assembly, *Universal Declaration of Human Rights* ('Universal Declaration'), 10 December 1948, 217 A (III) art 9 ('UDHR').

<sup>27</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>28</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>29</sup> M. T. Stubbs, 'Arbitrary Detention in Australia: Detention of Unlawful Non-Citizens under the Migration Act 1958 (Cth)' (2006) 25 *Australian Year Book of International Law* 273, 294.

*predictability, and due process of law,<sup>30</sup> as well as elements of reasonableness, necessity, and proportionality.<sup>31</sup>*

5.4. The Australian Human Rights Commission has argued that:

*Detention may be found to be arbitrary where it is prolonged or indefinite in circumstances which are inappropriate, are unjust or lack predictability or proportionality. The United Nations Human Rights Committee has found that prolonged detention for immigration purposes was not justifiable and amounted to arbitrary detention in breach of Australia's international human rights obligations.<sup>32</sup>*

5.5. Under international law, Australia has the obligation to ensure the humane treatment of all people under its jurisdiction, as defined in Articles 7 and 10 of the ICCPR. Article 7 of the ICCPR states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>33</sup> Furthermore, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also contains provisions against inhumane treatment in Article 16: “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”<sup>34</sup>

5.6. Detention can be contrary to these rights when it compromises health and wellbeing or when it is unnecessary or unjust. The AHRC points out that:

*Prolonged and indefinite detention may also amount to cruel, inhuman or degrading treatment, in breach of Australia's obligations under Articles 7 and 10(1) of the ICCPR ... because it can cause serious psychological harm.*

5.7. The United Nations has recognised the well-established link between prolonged indefinite detention and significant mental health issues. In *C v Australia*, the United Nations Human Rights Committee held that mandatory immigration detention amounted to cruel, inhuman or degrading treatment in circumstances where it was prolonged, arbitrary and contributed to a person's mental ill health, when the authorities were aware of this but they delayed releasing the person from immigration detention.

5.8. In addition, individuals may be also subject to inhumane treatment due to lack of adequate facilities in the place of detention. This has been documented, for instance, in relation to offshore immigration detention centres where there is a lack of adequate facilities to provide safe and humane conditions.<sup>35</sup>

5.9. RCOA submits that there is overwhelming evidence that Australia's policy of mandatory, indefinite detention breaches these international human rights obligations outlined above.

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<sup>30</sup> 1134/2002, *Gorji-Dinka v. Cameroon*, para. 5.1; 305/1988, *Van Alphen v. The Netherlands*, para. 5.8.

<sup>31</sup> Human Rights Committee, General comment No. 35 Article 9: Liberty and security of person, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fGC%2f35&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fGC%2f35&Lang=en).

<sup>32</sup> Australian Human Rights Commission, Submission to the Joint Select Committee on Australia's Immigration Detention Network, August 2011, 19, [http://www.humanrights.gov.au/legal/submissions/2011/201108\\_immigration.pdf](http://www.humanrights.gov.au/legal/submissions/2011/201108_immigration.pdf).

<sup>33</sup> International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>34</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>35</sup> Australian Human Rights Commission, Immigration detention reports and photos, <https://www.humanrights.gov.au/immigration-detention-reports-and-photos>; Amnesty International, This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea (2013), [http://www.amnesty.org.au/images/uploads/about/Amnesty\\_International\\_Manus\\_Island\\_report.pdf](http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf); Amnesty International, This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea (2013), [http://www.amnesty.org.au/images/uploads/about/Amnesty\\_International\\_Manus\\_Island\\_report.pdf](http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf).

## **6. Conclusion**

- 6.1. No one should be held in immigration detention, especially not those suffering from a mental illness. International law makes it clear that such policies are a gross violation of human rights. Despite this, Australia continues to be the only country to mandatorily detain those who arrive in Australia without a visa. This policy results in people with a mental illness being detained as a first resort, without any legal avenues for recourse. If people don't have a mental illness when they are detained, there is a high chance they may develop one during their prolonged detention. Studies cited above make it clear that indefinite detention cause mental health problems for those detained, especially for those detained for a significant amount of time. Further, there is a likelihood that people with a mental illness may be detained following a cancellation of their visa, especially as the *Migration Act 1958* requires the visa cancellation of people who fail the character test.

## **7. Recommendations**

### ***Recommendation 1***

*The Australian Government should introduce legislation to:*

- a) Abolish mandatory immigration detention in favour of a discretionary system under which detention is applied as a last resort and only when strictly necessary;*
- b) Restrict immigration detention to a maximum of 30 days without judicial review and six months overall;*
- c) Establish a system of judicial review of immigration detention longer than 30 days, with subsequent reviews carried out at regular intervals if continued detention is deemed appropriate; and*
- d) Codify clear criteria for lawful detention and minimum standards of treatment for people subject to immigration detention, in line with UNHCR's Detention Guidelines.*

### ***Recommendation 2***

*RCOA recommends that the Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth) (Character Act) be repealed.*