Universal Periodic Review Stakeholder Submissions

Human Rights For All (HR4A)

Australia

Submission to the United Nations Universal Periodic Review

Thirty Second Session of the Working Group on the UPR

Human Rights Council

16 March 2020

1. Executive Summary

Australia has a long tradition of supporting human rights internationally. However, whilst Australia continues to make progress in protecting human rights internationally, significant action and change is required to uphold and maintain international human rights standards in the treatment of refugees and the stateless within Australia.

This submission focuses on current data reporting on the treatment of refugees and stateless onshore, which illustrates Australia's failure to meet its human rights obligations with respect to the detention of these people within Australia.

To improve the protection of human rights and minimise the detrimental consequences refugees and the stateless experience in onshore detention, Australia must reform its legislation, policies and practices. Specifically, we recommend a number of key changes so that Australia can uphold its international human rights obligations and commitments, including:

1. the abolishment of mandatory and indefinite detention;
2. legislative enshrinement of non-refoulement (and removing the current legislative provision allowing refoulement);
3. the abolishment of detention for children (and all families to be released with the children they care for);
4. the establishment of an appropriately-empowered body to review and enforce proper compliance with the revised legislation, policies and practices;
5. if detention is to be maintained under law or policy, that people in detention are detained with others of similar levels of security issues (ie none, medium or high);
6. if detention is to be maintained under law or policy, that people claiming refugee status, refugees and the stateless are not detained with other people awaiting deportation; and
7. implementing a legislative and policy framework for stateless people.

2. Background of HR4A

Human Rights for All (**HR4A**) is a charitable law firm which focuses on the legal rights of refugees and the stateless. In particular, it aims to bring arbitrary and administrative detention onshore to an end. Since 2017, HR4A has made various submissions to the United Nations Human Rights Council's Working Group on Arbitrary Detention (**WGAD**) to obtain opinions on the legality of detention in Australia under international law.

HR4A regularly appears in the Federal Court, Federal Circuit Court and Administrative Appeals Tribunal and has appeared on numerous occasions in the High Court of Australia. It has also successfully applied to the United Nations Committee Against Torture (**UNCAT**) and the United Nations Human Rights Committee (**UNHRC**) for interim measures against the Australian Government. HR4A has successfully secured the release from detention of 37 individuals since 2017.

3. Adoption of Human Rights Mechanisms

Australia has ratified the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights, as well as other key human rights treaties, including:

- Convention on the Rights of the Child (**CRC**);
- Convention on the Elimination of All Forms of Discrimination against Women;
- Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**);
- Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (**CAT**);
- Convention on the Reduction of Statelessness;
- Convention relating to the Status of Stateless Persons; and
- Convention relating to the Status of Refugees (**Refugee Convention**).

As a party to the Refugee Convention, Australia has agreed to ensure that people who meet the United Nations definition of a 'refugee' are not sent back to a country where their life or freedom would be threatened. Australia also has obligations not to return people to their country of origin or another third country where they face a real risk of violation of certain human rights under the ICCPR, the CAT, and the CRC, including those who have not been found to be refugees.

Whilst Australia has ratified these major international human rights treaties, the rules and obligations contained in these treaties do not form part of Australia's domestic law unless, and only to the extent that, the treaties have been specifically incorporated into Australian law through legislation. Generally, the system governing human rights in Australia is made up of the Australian Constitution, the constitutions of each State and Territory, common law, the judiciary, democratically-elected governments, a free and questioning media, and bodies created to advance the promotion and protection of human rights.

There are also a number of Australian federal laws that exist to protect people from discrimination and breaches of human rights. They include:

- *Racial Discrimination Act 1975* (Cth) (reflecting Australia's ratification of ICERD);
- *Australian Human Rights Commission Act 1986* (Cth) (**Act**); and
- *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

At a State and Territory level, only the Australian Capital Territory, Victoria and Queensland have enacted human rights legislation (in 2004, 2006 and 2019 respectively). The other five States and Territories have not. Various human rights organisations and bodies have expressed their support for introducing such legislation into these States and Territories.[1]

[1] These include Human Rights for NSW, Tasmanian Law Reform Institute, Human Rights Law Centre, and the Human Rights and Equal Opportunity Commission.

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The Act restates the obligations Commonwealth authorities have under key human rights instruments and establishes the Australian Human Rights Commission (**AHRC**) as an independent statutory organisation which has a range of powers to oversee how the Australian Government is meeting its human rights obligations. These powers include:

- resolving complaints of discrimination or breaches of human rights under federal laws;
- holding public inquiries into human rights issues of national importance;
- developing human rights education programs and resources for schools, workplaces, the community and the Federal public service;
- providing independent legal advice to assist courts in cases that involve human rights principles;
- providing advice and submissions to parliaments and governments to develop laws, policies and programs;
- undertaking and coordinating research into human rights and discrimination issues;
- looking at whether federal laws comply with international human rights law; and
- developing a new National Action Plan on Human Rights to outline future action for the promotion and protection of human rights.

4. Implementation of International Human Rights Obligations

The Australian Department of Immigration and Multicultural and Indigenous Affairs (currently the Department of Home Affairs (**Department**)) has acknowledged that 'Australia has a duty to respect and apply its international human rights obligations to all individuals within its jurisdiction'.[2] However, Australia's system of mandatory immigration detention leads to multiple breaches of its human rights obligations, particularly breaches of its obligations under the ICCPR and the CRC. For many years various human rights bodies have called for Australia to put an end to its arbitrary immigration detention regime.

Under international human rights law, detention must be necessary and reasonable as it extends in time and given all the circumstances of a case and a proportionate means of achieving a legitimate aim to avoid being considered arbitrary. Detention will be considered arbitrary if a legitimate aim could be achieved through less invasive measures. The AHRC also considers that for detention to be valid, there must be an individual assessment of the necessity of detention for each person, taking into account their individual circumstances.[3] If a person is individually assessed as posing an unacceptable risk to the Australian community, they may be held in detention if that risk cannot be met or mitigated in a less restrictive way. Individuals should otherwise be permitted to reside in the Australian community while their immigration status is resolved.

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[2] Australian Human Rights Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (Report, April 2004) ch 4 <https://www.humanrights.gov.au/our-work/4-australias-human-rights-obligations>.

[3] 'Immigration Detention and Human Rights', *Australian Human Rights Commission* (Web Page, 6 January 2016) <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/immigration-detention-and-human-rights>.

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Australia has had a policy of mandatory immigration detention since 1992, requiring all non-citizens without a valid visa to be detained until they are granted a visa, leave the country voluntarily or are involuntarily removed. Consequently, people are being held for lengthy periods of time and are unable to judicially challenge their detention, as Australian courts have no authority to order that a person be released from detention on the grounds that the person's continued detention is arbitrary. As this policy of mandatory detention is arbitrary, it is in breach of various human rights obligations, including Article 9 of the ICCPR which states that 'no one shall be subjected to arbitrary arrest or detention' and 'anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court'.

According to the Department, there were 1,450 people in immigration detention facilities at 31 December 2019. Of the people held in immigration detention at December 2019, 492 of these were illegal maritime arrivals (**IMAs**) and 596 had had their visa cancelled due to character concerns. There were also 293 people listed in the detention group 'other,' which may include overstaying a visa, having a visa cancelled, arriving by air without immigration clearance, or arriving at a seaport.

The amount of time people spend in detention has increased significantly since the 2013-14 financial year. The Refugee Council of Australia reported that, as at 9 December 2019, the average length of time spent in detention was 496 days (compared to 81 days in July 2013).[4] Furthermore, a report published by the Commonwealth Ombudsman in August 2017 reported that there were 42 people in detention who had been detained for 5 years or more, who were unlikely to be released.[5] Based on anecdotal evidence, this number has increased significant since 2017.

Despite the introduction of Operation Sovereign Borders in September 2013 to combat maritime people smuggling,[6] the Australian Government's strong messaging has not been effective to disrupt people smuggling. In 2018-2019 there were 24,566 applications for protection visas lodged by people who arrived by plane, which is approximately a 200% increase compared to 2014.[7] Such applications draw out tribunal and court processes for years and the turning back of displaced individuals leads them to continue to seek asylum elsewhere.

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[4] 'Statistics on People in Detention in Australia', *Refugee Council of Australia* (Web Page, 19 January 2020) <https://www.refugeecouncil.org.au/detention-australia-statistics/5/>.

[5] Commonwealth Ombudsman, *An Analysis of Assessments by the Ombudsman under s 486O of the Migration Act 1958 Sent to the Minister for Immigration and Border Protection in 2016-17* (Report, August 2017) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0012/50250/486O-analysis-2016-17-final-for-website.pdf>.

[6] Andrew and Renata Kaldor Centre for International Refugee Law, *Australia's Refugee Policy: An Overview* (Factsheet, April 2019) <https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Australian%20Refugee%20Policy_Apr2019.pdf>.

[7] Department of Home Affairs, *Onshore Humanitarian Program 2018–19: Delivery and Outcomes for Non–Irregular Maritime Arrival (Non–IMA) as at 30 June 2019* (Report, 30 June 2019) <https://www.homeaffairs.gov.au/research-and-stats/files/ohp-june-19.pdf>.

In terms of the health of detainees, International Health and Medical Services (**IHMS**) data identified that 14.9% of immigration detainees held in onshore facilities were in 'severe mental distress'.[8] Again, based on anecdotal evidence, this percentage has increased significant since 2016. With average detention times at a record level, IHMS has warned the Australian Government that detainees' mental health deteriorates dramatically the longer they are incarcerated. A 2011 study indicated that the cost of mental health care over the course of one person's lifetime can increase considerably – by up to 50% more than the average person, or $25,000 if that person has been held for a lengthy period in immigration detention.[9] Moreover, the cost of keeping refugees in detention is extremely significant, with the average annual cost for one person in immigration detention in Australia being $346,178 for the period 1 July to 30 September 2017, as compared to $10,221 for refugee to live in the community on a bridging visa while their claim is processed.[10]

5. Achievements, Challenges and Constraints

The Department implemented the *Child Safeguarding Framework* on 24 July 2019 (**Framework**) which compels departmental officers to safeguard children in onshore immigration detention facilities from abuse and exploitation.[11] The Framework undergoes regular review and supports Australia's international obligations under the CRC.

Whilst Australia has the Framework in place and has ratified the CRC such that it applies to all children within Australia's jurisdiction, the rights of children in detention have not been adequately upheld. While the CRC prescribes that detention must be a measure of last resort and for the shortest appropriate period of time, there are currently at least three children in detention, who have been detained for an average of approximately two years. There are no indications that these children are to be released.[12]

[8] Ben Doherty and Nick Evershed, 'Immigration Detainees Four Times More Likely to Suffer Severe Mental Distress', *The Guardian* (online, 19 January 2016) <https://www.theguardian.com/australia-news/2016/jan/19/immigration-detainees-400-percent-more-likely-to-suffer-severe-mental-distress>.

[9] Andrew and Renata Kaldor Centre for International Refugee Law, *The Cost of Australia's Asylum and Refugee Policies: A Source Guide* (Factsheet, 12 December 2019) <https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Cost%20of%20Australias%20asylum%20and%20refugee%20policy_Dec2019.pdf>.

[10] 'Onshore Detention Statistics', *Refugee Council of Australia* (Web Page) <https://refugeecouncilms.sharepoint.com/:x:/s/Public/EbFRXNczQZxCqWSRMDPvik4BN6Xpn0eBuF6zN-CcyALMng?e=EW4INw> ('*Onshore Detention Statistics*').

[11] Department of Home Affairs, *Child Safeguarding Framework* (Policy Statement, 24 July 2019) <https://www.homeaffairs.gov.au/reports-and-pubs/files/child-safeguarding-framework.pdf>.

[12] See, e.g. Human Rights Council, *Opinion No. 2/2019 concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong (Australia)*, 84th sess, UN Doc A/HRC/WGAD/2019/2 (6 June 2019) <https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGAD_2019_2.pdf> ('*Opinion No. 2/2019*').

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6. Shortcomings of Australia's system

The *Migration Act 1958* (Cth) (**Migration Act**) and the judgment of *Al-Kateb v Goodwin* renders the indefinite detention of an unlawful non-citizen lawful.[13] As a dualist nation, it is within Australia's power to implement this oppressive law, irrespective of its international obligations. In November 2016, a UN Special Rapporteur urged Australia to respect the limitations imposed by international conventions when regulating onshore immigration detention. Australia will only achieve this objective through radical policy and legislative reform that ensures the interpretation and application of section 196 of the Migration Act does not encroach on the protections imposed by the ICCPR and other relevant conventions to which Australia is a signatory.

Notwithstanding Australia's attempts to uphold the protection of human rights, Australia experiences ongoing challenges to implementing an effective case management system for people in detention.[14] Furthermore, rules regarding visitor policies have been tightened and are inconsistently applied.[15] Obstacles in accessing justice and the imposition of oppressive rules that inhibit the ability to interact with the broader community cause immense suffering to persons in onshore detention facilities.[16]

The UN WGAD has, in the opinions that it has issued over the past three years, flagged key steps to be undertaken to bring Australia's treatment of its onshore detainees in line with its human rights obligations. At its core, it recommends reform to migration law and policy as it relates to refugees and asylum seekers.

7. Recommendations

HR4A identifies a number of key measures that should be undertaken by Australia to comply with its international human rights obligations and commitments.

Abolishment of mandatory, indefinite detention

Following the second cycle Universal Periodic Review in late 2015 (**2nd Cycle UPR**), Australia refused to further consider recommendations to 'repeal provisions which establish compulsory detention for those who enter the country in an irregular manner; [and] end the policy of mandatory detention for all unauthorised arrivals, ensure that detention is only applied as a last resort, establish statutory time limits for detention and ensure access to an effective judicial remedy to review the necessity of

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[13] *Migration Act 1958* (Cth) s 196; *Al-Kateb v Goodwin* (2004) 219 CLR 562.

[14] Australian Human Rights Commission, *Inspection of Brisbane Immigration Transit Accommodation* (Report, 19-20 September 2017) <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/australian-human-rights-commission-inspection-2>.

[15] Refugee Council of Australia, *Unwelcome Visitors: Challenges Faced by People Visiting Immigration Detention* (Report No 02/17, August 2017) <https://www.refugeecouncil.org.au/detention-visitors-report/2/>.

[16] François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Australia and the Regional Processing Centres in Nauru*, UN Doc A/HRC/35/25/Add.3 (24 April 2017) <https://reliefweb.int/sites/reliefweb.int/files/resources/G1709891.pdf>.

detention'.[17] The refusal to further consider these recommendations perpetuates Australia's status quo of a mandatory immigration detention policy, which breaches Article 9 of the ICCPR as the reasonableness, necessity, and proportionality of detention is not considered, and it is therefore arbitrary.

HR4A re-emphasises the recommendations put forward by numerous state parties during the 2nd Cycle UPR. It further recommends that the legislature repeal section 189 of the Migration Act which provides for mandatory, indefinite detention and replace it with a system of individualised assessments based on due process and international human rights law. As repeatedly recommended by the UN WGAD, a maximum period of detention that is reasonable and capped should be specified in law.[18]

Legislative enshrinement of non-refoulement

Section 197C of the Migration Act currently allows the Australian Government to circumvent its obligations of non-refoulement by stating that Australia's non-refoulement obligations are irrelevant to the removal of unlawful non-citizens. It is recommended that section 197C of the Migration Act be repealed and appropriate references to international laws (including *inter alia* the Refugee Convention, ICCPR and CAT) be inserted into the Migration Act to enshrine Australia's commitment to the

[17] Human Rights Council, *Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review*, 31st sess, UN Doc A/HRC/31/14/Add.1 (29 February 2016) <https://undocs.org/A/HRC/31/14/Add.1>.

[18] See *Opinion No. 2/2019,* UN Doc A/HRC/WGAD/2019/2 (n 15) 15 [114-115]; Human Rights Council, *Opinion No. 1/2019 concerning Premakumar Subramaniyam (Australia)*, 84th sess, UN Doc A/HRC/WGAD/2019/1 (12 June 2019) 14 [94-95] <https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGAD_2019_1.pdf> ('*Opinion No. 1/2019*'); Human Rights Council, *Opinion No. 74/2018 concerning Ahmad Shalikhan (Australia)*, 83rd sess, UN Doc A/HRC/WGAD/2018/74 (10 January 2018) 12-13 [101-102] <https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session83/A_HRC_WGAD_2018_74.pdf> ('*Opinion No. 74/2018*'); Human Rights Council, *Opinion No. 50/2018 concerning Edris Cheraghi (Australia)*, 82nd sess, UN Doc A/HRC/WGAD/2018/50 (1 October 2018) 12 [87-88] <https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session82/A_HRC_WGAD%20_2018_50_AEV.pdf > ('*Opinion No. 50/2018*').

fundamental duty of non-refoulement.[19] Further, sections 5H-5M of the Migration Act, which allow Australia's own interpretation of its international protection obligations, should be repealed.

Abolishment of detention for children

The ongoing presence of children in detention, including those not officially reported in detention statistics,[20] necessitates the reiteration of the recommendations made during the 2nd Cycle UPR to 'ensure that no child is detained on the basis of his/her immigration status', 'ensure that all migrant children, irrespective of their migration status, have access to education and healthcare services in the exact same terms as Australian children do' and 'remove children and their families from immigration detention centres'. Practically, it is recommended that section 4AA of the Migration Act be amended to state that children must never be detained and to prioritise unification of families/care givers with children.

Establish an appropriately-empowered body to enforce proper process

As repeatedly identified by the UN WGAD, section 196(3) of the Migration Act, which prevents non-citizens from challenging the lawfulness of their detention in court absent a visa, should be repealed.[21] In its stead, a procedure whereby every person seeking asylum should have access to timely and periodic merit review by an independent body (with the recognition that the average 496 days spent in immigration detention awaiting conclusive review is unreasonable and unacceptable), and judicial review of merit reviews and/or government decisions affecting them, including visa grants, should be established. In particular, individuals with adverse Australian Security Intelligence Organisation security assessments should have an avenue to challenge the assessment and have it independently reviewed, and alternate monitoring methods such as parole-like conditions and tracking devices be employed in cases where the risk and danger is assessed to be not significant.

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[19] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 33(1) ('*Refugee Convention*'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6–7('*ICCPR*'); *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) art 3(1) ('*CAT*'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 6, 37('*CRC*'); *Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty*, opened for signature 15 December 1989, 999 UNTS 414 (entered into force 11 July 1991); See Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, UN Doc HRI/GEN/1/Rev.7 (10 March 1992) para 9; Human Rights Committee, *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, 80th sess, UN doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 12 ('*General Comment No. 31*'); Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 39th sess, UN doc CRC/GC/2005/6 (1 September 2005) para 27.

[20] *Opinion No. 2/2019,* UN Doc A/HRC/WGAD/2019/2 (n 15).

[21] See ibid paras 95, 115, 123; *Opinion No. 1/2019,* UN Doc A/HRC/WGAD/2019/1 (n 21) paras 80, 95, 103; *Opinion No. 74/2018,* UN Doc A/HRC/WGAD/2018/74 (n 21) paras 112-113, 118, 127; *Opinion No. 50/2018,* UN Doc A/HRC/WGAD/2018/50 (n 21) paras 76-78, 88, 96.

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Appropriate housing of detainees

If Australia continues to maintain a system of detaining refugees and the stateless, such people should not be detained with other people awaiting deportation. Further, each person should be subject to a security assessment by an independent body, and housed appropriately. There is increasing evidence the mixing of detention centre populations results in increased violence against refugees and the stateless.[22]

Legislative provisions dealing with stateless people

The Australian Government has only recently collated data on the number of stateless people in detention. It is likely these numbers will increase as the cases of detainees are reviewed. Many of the longest term detained in Australia are stateless.[23]

Australia should examine the legislation and policies of countries who provide for specific pathways for the stateless (such as the United Kingdom), and then implement appropriate measures as a matter of urgency.

Alison Battisson

Director Principal

Human Rights for All

16 March 2020

[22] https://www.theguardian.com/australia-news/2019/mar/25/secret-recordings-allege-excessive-force-by-guards-in-australias-detention-centres; https://www.smh.com.au/politics/federal/asylum-seekers-ousted-criminals-raise-level-of-violence-in-detention-centres-20160116-gm782s.html.

[23] *Opinion No. 42/2017,* UN Doc A/HRC/WGAD/2017/42; Human Rights Council, *Opinion No. 42/2017 concerning Mohammad Naim Amiri (Australia)*, 79th sess, UN Doc A/HRC/WGAD/2017/42 (22 September 2017) and *Opinion No. 71/2017,* UN Doc A/HRC/WGAD/2017/71; Human Rights Council, *Opinion No. 71/2017 concerning Said Imasi (Australia)*, 80th sess, UN Doc A/HRC/WGAD/2017/71 (21 December 2017).