



Australia's Human Rights Score Card

Australia's 2015 UPR—NGO Coalition Fact Sheet 11

Refugees and Asylum Seekers

Mandatory Detention and Transfer offshore

Under Australia's *Migration Act*, any asylum seeker arriving by boat is subject to mandatory, indefinite and non-reviewable immigration detention. Australian law requires that they remain in detention until they are either granted a visa or removed from the country.¹ The possibility of release by a court is expressly excluded.² The average time currently spent in immigration detention is 394 days.

Those arriving before 19 July 2013 are detained in Australia whilst those arriving after that date are subject to mandatory removal to detention centres on Nauru or Manus Island, Papua New Guinea.³ Apart from the personal, non-compellable and non-reviewable discretion of the Immigration Minister (which the Minister has made clear they do not intend to exercise⁴), there are no exceptions to these mandatory detention and removal provisions. Gay men have been removed to Papua New Guinea which criminalises consensual sex between men.⁵ Unaccompanied children have been sent to detention on Nauru.⁶

As at 31 May 2015, there were 634 asylum seekers detained on Nauru (including 81 children), 943 asylum seekers detained on Manus

and 138 children in Australia's onshore and offshore detention centres.⁷

The UNHCR has described the conditions in the centres as unsafe, falling short of international standards and as producing a "return-orientated environment".⁸ One asylum seeker has been murdered inside the Manus centre and 77 others have received serious injuries due to attacks by staff and guards employed there.⁹ One man has also died from untreated septicaemia.¹⁰

Proposed Recommendations

Australia should:

1. immediately close the Manus and Nauru detention centres and process asylum seekers' claims in Australia;
2. repeal the mandatory detention provisions in the *Migration Act* and codify that asylum seekers only be detained as a last resort and for the shortest possible time; and
3. codify maximum time limits on immigration detention and a system of periodic judicial review of all decisions to detain.

¹ *Migration Act 1958* (Cth) s 196.

² *Ibid* s 196(3).

³ *Ibid* s 198AD.

⁴ See Scott Morrison, 'Operation Sovereign Borders update 8 November 2013', (Press Conference, Sydney) <www.minister.immi.gov.au/media/sm/2013/sm209431.htm>.

⁵ Olivia Laughland, 'Gay asylum seekers on Manus Island write of fear of persecution in PNG', *The Guardian* (online), 24 September 2014

<<http://www.theguardian.com/world/2014/sep/24/gay-asylum-seekers-manus-island-fear-persecution-png>>.

⁶ Ben Doherty, 'Unaccompanied child refugees on Nauru report beatings, death threats', *The Guardian* (online), 28 October 2014 <<http://www.theguardian.com/australia-news/2014/oct/28/child-refugees-australia-sent-to-nauru-report-beatings-and-death-threats>>.

⁷ Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary* (2013).

⁸ See, eg, UNHCR, Report of Monitoring Visit to the Republic of Nauru on 7-9 October 2013, <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>.

⁹ Australian Associated Press, 'Reza Barati was 'knocked down stairs and then beaten to death'', *The Guardian* (online), 21 March 2014

<<http://www.theguardian.com/world/2014/mar/21/reza-barati-was-knocked-down-stairs-and-then-beaten-to-death>>.

¹⁰ Sarah Whyte, 'Asylum seeker Hamid Kehzaei dies in Brisbane hospital', *The Sydney Morning Herald* (online), 5 September 2014 <<http://www.smh.com.au/federal-politics/political-news/asylum-seeker-hamid-kehzaei-dies-in-brisbane-hospital-20140905-10d8qk.html>>.

Refoulement

Australia is placing asylum seekers at risk of harm by intercepting them at sea and returning them without any fair or thorough assessment of their protection claims.

In July 2014, 41 Sri Lankan asylum seekers were intercepted by Australia and handed over to the Sri Lankan Navy after reportedly being asked only four questions over skype and without being given the opportunity to speak with a lawyer.¹¹ Some of these asylum seekers subsequently fled to Nepal where they were found to be refugees by UNCHR.¹²

Others have also been intercepted, forced to board single-use lifeboats and towed back to just outside Indonesian territorial waters.¹³ In total, 15 asylum seeker boats carrying 429 asylum seekers have been intercepted at sea and returned since December 2013.¹⁴ 1248 Sri Lankan asylum seekers who made it to Australia have also been returned to Sri Lanka after being subjected to a non-statutory 'enhanced screening process' – an administrative shortcut bypassing more appropriate refugee assessment processes under Australian law.

Recent changes to Australian law have given the Australian Government the express power to disregard international human rights law and the rules of natural justice when conducting boat turn-backs and detaining asylum seekers at sea.¹⁵

The common thread in each of these actions is the return of asylum seekers without any fair, thorough or reviewable assessment of their protection claims and without them having the opportunity to speak with a lawyer. Returning

¹¹ Jane Wardell, 'All at sea: Is Australia's fast-tracked asylum screening policy fair?' on *Reuters* (8 July 2014) <www.reuters.com/article/2014/07/08/us-sri-lanka-australia-screening-idUSKBN0FD0TK20140708>.

¹² David Corlett, 'Sinhalese asylum seekers' on-water claims accepted by UN', *The Saturday Paper* (online), 31 January 2015 <<http://www.thesaturdaypaper.com.au/news/politics/2015/01/31/sinhalese-asylum-seekers-water-claims-accepted-un/14226228001441>>.

¹³ Paul Farrell and Nick Evershed, 'Operation Sovereign Borders timeline: every encounter', *The Guardian* (online), 2 July 2014 <www.theguardian.com/news/datablog/interactive/2014/jul/01/operation-sovereign-borders-timeline>.

¹⁴ Minister for Immigration and Border Protection, 'Operation Sovereign Borders delivers six months without a successful people smuggling venture' (Media Release, 28 January 2015) <<http://www.minister.immi.gov.au/peterdutton/2015/Pages/Operation-Sovereign-Borders-delivers-six-months-without-a-successful-people-smuggling-venture.aspx>>.

¹⁵ *Maritime Powers Act 2013* (Cth) s 75A.

large numbers of asylum seekers without due process creates an absolutely unambiguous risk of refoulement.

Proposed Recommendations

Australia should:

1. cease the interception and return of asylum seekers to the countries from which they are fleeing or countries of asylum which do not offer effectively protection to refugees; and
2. cease using practices such as 'enhanced screening' and ensure all asylum seekers have their protection claims fairly and thoroughly assessed under Australia's standard refugee determination process.

Indefinite Detention of Refugees with Negative Security Assessments

Under current Australian law, non-citizens issued with an 'adverse security assessment' by the Australian Security Intelligence Organisation (ASIO) are ineligible to obtain a visa and are, as a matter of policy, indefinitely detained.

Unlike citizens, non-citizens have no right to seek independent merits review of their adverse security assessment and have no legal entitlement to the reasoning and information on which it is based.¹⁶ Consequently, non-citizens can be indefinitely detained on the basis of decisions which they cannot challenge and which are never explained to them.¹⁷

A non-statutory, non-compellable system for reviewing adverse security assessments for those in immigration detention was established in late 2012.¹⁸ However, it cannot lead to binding decisions to release a person or to revoke a negative assessment. Further, the process does not guarantee non-citizens any access to the reasons for their initial negative assessment or the information on which it was based.

¹⁶ *Australian Security Intelligence Organisation Act 1979* (Cth) s 36(b).

¹⁷ For a detailed discussion of the relevant Australian domestic laws, see Ben Saul, 'Dark Justice: Australia's indefinite detention of refugees on grounds under international human rights law' (2012) 13 *Melbourne Journal of International Law* 1.

¹⁸ Attorney-General's Department, *Independent Reviewer of Adverse Security Assessments*, Commonwealth of Australia <www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Page/s/IndependentReviewofAdverseSecurityAssessments.aspx>.

In August 2013, the UN Human Rights Committee found that Australia's indefinite detention of 46 refugees on the basis of secretive ASIO assessments amounted to cruel, inhuman or degrading treatment.¹⁹ One year on, Australia has not implemented the Committee's recommendations.

The proposed change is inconsistent with international law, including the Committee Against Torture's own interpretation of article 3 of CAT.

Proposed Recommendation

Australia should ensure asylum seekers issued with adverse security assessments are given the same legal right to merits review and a statement of reasons as others in Australia. Where the adverse assessment remains in place, consideration should always be given to whether any risk can be managed in a manner less restrictive than indefinite detention.

Proposed Recommendation

Australia should retain existing complementary protection laws.

Complementary Protection

Since 24 March 2012, complementary protection claims have been assessed as part of the existing primary protection assessment framework, rectifying the previous situation where Australia relied solely on non-compellable, non-reviewable Ministerial discretion to meet its non-refoulement obligations.

However, there are two Bills currently before the Australian parliament which would either repeal or amend the existing complementary protection legislation. On 4 December 2013, the Australian Government introduced the *Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013* (Cth) which seeks to repeal the complementary protection provisions in the *Migration Act*. The Bill is currently before the Senate, where a Senate Committee has recommended that it be passed.

On 25 June 2014, the Australian Government also introduced the *Migration Amendment (Protection and Other Measures) Bill 2014* (Cth), which would only come into effect should the federal parliament fail to pass the 2013 Bill. Under the Bill, the threshold for determining whether a person satisfies the complementary protection test would increase. The Minister would have to consider that it be 'more likely than not that the non-citizen will suffer significant harm' if the person is removed from Australia to another country before that person would be eligible for Australia's protection.

¹⁹ *FKAG et al v Australia*, UN Doc CCPR/R/108/D/2094/2011 (23 August 2013).