

## ACTION ALERT AA 23-6: IMMIGRATION DETENTION

***As Quakers we seek a world without war. We seek a sustainable and just community. We have a vision of an Australia that upholds human rights and builds peace internationally, with particular focus on our region. In our approach to government, we will promote the importance of dialogue, of listening and of seeking that of God in every person. We aim to work for justice and to take away the occasion for war.***

December 2023

*The High Court has rejected the use of indefinite detention by successive governments because it involves the exercise of a legal power by the executive, contrary to the federal constitution. This has led to a rapid move in Parliament to create a new framework that imposes severe restrictions on those detainees released as a result of the High Court decision. The outcome of all this is still to be seen, as there may well be further legal cases. The ongoing issues relating to the poor treatment of asylum seekers and refugees continue, along with strong advocacy to achieve more humane policies.*

### What Has Happened

1. Under the ongoing regime applied to asylum seekers and refugees, there are over 1000 people in immigration detention, with an average time of 709 days being held. Of these, 127 have been held for over 5 years. Before 1994 those suspected of migration offences could be detained for 72 hours and then brought before a magistrate every 7 days until a clear decision was made on their migration status. By a series of executive decisions by governments and ministers since then, confirmed by High Court decisions in 1992 and 2004, people have been held for longer periods pending finalization of their status. Despite regular protests by human rights groups, this situation has deteriorated at the expense of refugees.
2. Some of those detained as not satisfying immigration rules have been guilty of serious charges of violence or sexual abuse, and been imprisoned under state/territory law – most have now served their time for these offences, but have been transferred to immigration detention awaiting decisions on whether they can be deported to a home or third country. Returning them to a dangerous situation in their home country has not been justifiable under international law, and efforts to find another country to accept them have been unsuccessful.

3. A Rohingya detainee who has served time in gaol for a child sexual offence appealed to the High Court on continued detention, and the Court ruled that, under the federal constitution, such punishment could not be given without a legal process. In its full statement, the Court explained that section 189(1) and `96(1) of the *Migration Act* did not authorize continued detention. The Court did nevertheless allow continued or re-detention under section 198 if the person was seen as a threat to the community as a child sex offender. For details of the High Court judgment, see *NZYQ v. Minister for Immigration Citizenship and Multicultural Affairs* at <http://www.austlii.edu.au/cgi-bin/viewdocs/au/cases/cth/HCA/2023/37.html>

4. Some 148 detainees held under ‘character grounds or unable to return home were eligible for immediate release, including some who are stateless. Most of these have been released on bridging visas with strict conditions. Another 300 long term detainees are expecting re-examination of their cases. Constitutional lawyer Professor Anne Twomey (Sydney University) emphasized that the government had no choice but to release all those whose circumstances of detention were similar to the Rohingya man featured in the High Court case. The High Court decision was welcomed by the agencies working with refugees.

### Political Moves

The reaction of the major political groups was rapid. Shocked at the High Court outcome, the Minister for Home Affairs, Clare O’Neil MP, said she would like to “re-detain every one of those people” to ensure a “safe country”. The Leader of the Opposition, Peter Dutton MP, took an even stronger position, demanding immediate action to reverse the impact of the High Court decision. Both parties were caught up in a panic of fear and hysteria that claimed the detainees were mainly guilty of serious crimes and posed a threat to Australian citizens. As a result, legislation – the *Migration Amendment (Bridging Visa Conditions) Act* - was hastily drafted and passed on 18 November to impose very punitive restrictions on the released detainees – mandatory curfews, electronic monitoring, and restrictions on work and association.

On 27 November, following further public debate, the government introduced a second Bill to strengthen the first one. The *Migration Amendment (Bridging Visa Conditions and Other Measures) Bill* provided for a further series of prohibitions on work and movement options. Of greater significance, however, was the inclusion of **preventative detention** provisions whereby those released from immigration detention may be subject to an application by the Minister for Immigration to a court to permit re-detention if the court is satisfied the person has been convicted of a crime with a possible sentence of at least 7 years’ imprisonment, and poses an unacceptable risk of committing a serious offence (e.g. violence, sexual assault). This was passed on 7 December 2023.

On 27 November Kylea Tink MP (Independent) introduced another bill called the *Migration Amendment (Limits on Immigration Detention) Bill* which amends the *Migration Act 1958* to improve Australia’s compliance with human rights obligations related to its immigration detention regime. Firstly, it will introduce a 90-day limit on immigration detention, which can only be extended if the Minister decides that, having regard to principles of international law, an extended period of detention is necessary as a last

resort, reasonable, and proportionate. This bill provides that any extension of detention by the Minister is reviewable by the Administrative Appeals Tribunal (AAT). Secondly, this bill includes a prohibition of the detention of minors, in accordance with human rights obligations.

The Parliament website gives details of all the legislation – put the name of the Bill into [www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results?](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results?)

## Responses

Opponents of the new legislation claimed that the major parties had colluded in a panic reaction. They also said the new legislation was likely to be challenged in the High Court, because it creates a new set of punishments, contrary to the constitution. Human rights advocates see the legislation as excessive and as undermining democratic principles.

The United Nations High Commissioner for Refugees (UNHCR) said in a statement on 9 November 2023 that the High Court ruling should “begin to align Australia’s immigration detention practices with international law”. Noting that some detainees had been held for up to 10 years, the UNHCR pledged to continue its mandate to advocate for those in detention.

The Refugee Council of Australia made representations to the government in a letter of 16 November recommending modifications to the first Bill to ensure any visa conditions are regularly reviewed by a court or other independent body.

The Australian Human Rights Commission on 9 November welcomed the High Court decision as historic, reminding Australians that over the last 20 years the detention system has affected tens of thousands of lives, separated families and friends, deprived people of hope, and taken away their fundamental right to liberty. The Commission was very pleased to have been involved as a ‘friend of the court’ in the High Court deliberations.

The former Independent National Security Legislation Monitor Grant Donaldson was quoted (*The Canberra Times* 4 December) as saying he could not see how the legislation could apply to people who had finished their sentences, and that the push was a disgrace and shame to both sides of politics.

There is already a challenge to the new legislation, led by David Manne of Refugee Legal, claiming its provisions amount to punishment and are therefore illegal. An Afghan refugee who has been living in the community for some years on a temporary visa has objected to being subjected to new electronic restraints and curfews.

There is also a campaign for a Royal Commission into Immigration Detention, led by the following organisations:

Justice and Peace Office, Catholic Archdiocese of Sydney  
 Josephite Action Network  
 House of Welcome  
 Brigidine Asylum Seekers Project  
 Rural Australians for Refugees  
 Asylum Seeker Resource Centre  
 Challenging Racism Project  
 Refugee Action Coalition

Our Lady of Dolours  
Blue Mountains Refugee Support Group  
Academics for Refugees  
Grandmothers for Refugees  
Teachers for Refugees

The campaign was launched in Parliament House Canberra by Behrouz Bouchani (\*former refugee) on 27 November 2023. See [c. www.asrc.org.au](http://www.asrc.org.au)

For a full analysis of the legal implications, see Professor Anne Twomey's article in *The Conversation* (13 December 2023) at [www.theconversation.com/new-laws-to-deal-with-immigration-were-rushed-leading-to-legal-risks-219384](http://www.theconversation.com/new-laws-to-deal-with-immigration-were-rushed-leading-to-legal-risks-219384)?

## Issues Raised

1. **The Ongoing Dilemma of Immigration Detention.** Those kept in immigration detention are held by administrative order, not for punishment but for health, security and identity checks and to enable visa processing or removal from the country. The length of detention has grown over the years. Since this system was introduced 30 years ago, thousands of people (including children) have been subject to this policy, in conditions that are often punitive and subject to international criticism by UN bodies etc. Governments of all stripes have sought to prolong the policy as they attempt to maintain a hard line to reinforce mantras like 'no one who arrives by boat will ever be able to stay in Australia'. As a result, detainees are subject to severe limitations on their capacity to work or earn income, get legal or other support. Despite many efforts by concerned citizens to challenge the prevailing approach, it seems that public opinion reflects general anxiety about attracting more refugees.

2. **Human Rights.** The High Court decision has shown the extent to which the policy has become oppressive, and has highlighted the 'abuse' of many people whose only 'crime' has been to seek asylum under recognised refugee law. The decision has also drawn attention to the gulf between what Australians citizens can expect from the law and what non-citizens can expect. Crimes committed by citizens are judged by the legal system, with punishments applied and detention ordered, followed by parole and freedom without the likelihood of further sanctions or restraints. Preventive detention is seen as abnormal and contrary to accepted human rights standards as described in international conventions and domestic human rights legislation. There is a good deal of support for the creation of a Bill of Rights or equivalent for Australia to clarify the powers of the state to interfere with the lives of individuals.

3. **Campaigns for Change.** Numerous agencies have worked with asylum seekers and refugees and sought to support them through difficult times under our immigration policies. Some of the campaigns that Friends might wish to encourage are listed below:

- The [Refugee Council of Australia](http://www.refugeecouncil.org.au) (RCOA) has a platform for long-term change to end offshore processing, and creating a fairer way for asylum seekers to have claims heard. See [www.refugeecouncil.org.au](http://www.refugeecouncil.org.au)

- Refugee Legal offers legal support to refugees, and gives advice and information via its website and in person. See [www.refugeelegal.org.au](http://www.refugeelegal.org.au)
- Kaldor Centre (UNSW) undertakes research on displacement issues in our region, to promote humane solutions to forced migration. It supports the bill introduced by Kylea Tink MP (see above). See [www.unsw.edu.au/kaldor-centre](http://www.unsw.edu.au/kaldor-centre)
- The Human Rights Law Centre works to make the law apply to everyone, regardless of where they come from. See [www.hrlc.org.au](http://www.hrlc.org.au)
- The Asylum Seeker Resource Centre offers ongoing practical support for asylum seekers and refugees. It has a particular campaign to get refugees out of Papua New Guinea. See [www.asrc.org.au](http://www.asrc.org.au)
- Amnesty International has a particular focus on opposing legislation that imposes restraints, and seeks to make governments accountable for breaches of human rights. See [www.amnesty.org.au](http://www.amnesty.org.au)
- The Australian Churches Refugee Taskforce (part of NCCA) provides spiritual and practical assistance to refugees, and has a fund to support those not eligible for government payments. See [www.commongrace.org.au](http://www.commongrace.org.au)

**4. Australia's Responsibility.** The events on recent days have exposed more starkly than ever the problems of structural violence and racism that influence policies and decisions on people who come from outside the country seeking help. The use of official secrecy to cover up breaches of international law, the ease with which fears and anxieties about foreigners can be tapped by political representatives and media, and the expansion of executive power at the expense of legal order and proper scrutiny by Parliament – all these trends bode ill for our much-vaunted affirmation of freedom and democracy. The review processes available need to be strengthened to place checks and balances on the exercise of power over the lives of all who live in this country, citizens or not.

### **What Action Can be Taken**

Friends are encouraged to seek opportunities to work with others to

- build campaigns for re-creating an environment based on justice and peace;
- remind political candidates of the importance of ethical standards and integrity in public life,;
- support those journalists, whistleblowers and commentators who are willing to investigate and report on what is happening, and
- make contact with asylum seekers and refugees in our own neighbourhoods to listen to their stories and advocate on their behalf where possible and appropriate.

Canberra

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