

NJP POSITION STATEMENT: Immigration Detention

EXECUTIVE SUMMARY

National Justice Project position on Immigration Detention

The National Justice Project (NJP) believes that everyone has the right to seek asylum, without distinction or discrimination. Refugees and people seeking asylum are equal in rights and dignity and must be treated with compassion. The Australian Government owes a duty of care to those fleeing violence, persecution and other injustices and has a positive duty to prevent harm from occurring to those we detain.

Australia is the only country to perpetuate mandatory detention.¹ The protracted and indefinite nature of immigration detention is inhumane and has a significant long-term, and often irreparable, psychological and physical toll on those detained. The systemic injustices experienced by refugees and people seeking asylum detained in Australia's onshore and offshore immigration detention systems have resulted in tragic and avoidable outcomes; not only for those who have made the life-threatening journey to our shores seeking safety, but also their families.

Immigration policy in Australia, particularly as it relates to refugees and people seeking asylum, has historically been, and continues to be, prejudicial, punitive and politically motivated. The discriminatory treatment of people based on their country of origin and manner of arrival in Australia is in direct violation of Australian and international laws. Rather than aiding humane and rights-based solutions, and despite its international obligations, the Australian Government continues to indefinitely detain refugees, deny asylum and turn back boats, leaving refugees and people seeking asylum facing harsh and at times fatal consequences.

PRIORITIES & RECOMMENDATIONS

Overarching Recommendations

1. The Australian Government must be held accountable for breaches of its obligations under international law, including redress for those who have been harmed by its policies and actions.
2. All indefinite immigration detention policies should be repealed.
3. All offshore processing facilities should remain closed. Onshore immigration detention should only be applied or considered as a last resort² with strict temporal limits in place where applied.

1

https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/Childrendetention#:~:text=for%20the%20future,-,Immigration%20Detention,introduced%20in%20Australia%20in%201992

² Committee against Torture, Concluding observations on the combined fourth and fifth periodic reports of Australia, UN Doc CAT/C/AUS/CO/4-5 (23 December 2014) 6 [16].

4. The harsh, highly restrictive and prison-like conditions of immigration detention facilities are not fit for purpose and comprehensive modifications to the infrastructure and management of these facilities are urgently needed.
5. Temporary Protection and Safe Haven Enterprise visas should be abolished.
6. All people seeking asylum in Australia who are found to be refugees, or found to be owed complementary protection, should be issued with Permanent Protection visas regardless of their mode of arrival and should have their cases reviewed and processed in a timely manner.
7. All bridging visas should include access to income support, Medicare, PBS and NDIS and the automatic right to work and study while their applications are being processed.
8. All asylum seekers, regardless of their mode of arrival, should have access to fair and efficient refugee status determination procedures and non-refoulement determinations.
9. Arrangements should be made to transfer and resettle all refugees currently in Papua New Guinea and on Nauru in Australia to live in the community – including for those awaiting United States, Canada and New Zealand resettlements determinations.
10. It is incumbent on Federal, State and Territory governments to ensure that safe and adequate health care is made available to all without discrimination, including on the grounds of their citizenship and residency status.
11. Pathways for judicial review of immigration decisions, including right of review on grounds of natural justice (or procedural fairness) and unreasonableness, should be reinstated.
12. Australia's OPCAT³ obligations should be extended to include to all places where people are or may be deprived of their liberty, including all Immigration Transit Accommodations⁴ and Alternative Places of Detention.⁵
13. Legislation should be introduced to ensure Australia's OPCAT obligations are enforceable, procedurally clear and both adequately funded and resourced.

Amendments to the Migration Act

14. The *Migration Act 1958* (Cth) ('**Migration Act**') and related policies should be revised to replace terms such as 'unauthorised' and 'illegal' with 'irregular' when referring to people seeking asylum who arrive by air or by sea without a valid visa.
15. All maritime interdiction policies and practices should cease as they are unsafe, are unlikely to afford adequate and fair protection assessments and potentially return people to face persecution or significant harms.
16. Expansion of asylum-seeking options beyond 'durable solutions' given that many refugees lack access to UNHCR's resettlement processes altogether and do not have resettlement available to them as an option.
17. All eligibility restrictions based on health and disability should be abolished.
18. The Migration Act should be amended to increase the threshold for refusing or cancelling visas on 'character' or 'security' grounds; transfer the burden of proof requirement from refugees and

³ Australia ratified the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) on 21 December 2017. For further information, see:

<https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Implementation_of_OPDAT_in_Australia.pdf>

⁴ Australian Border Force, *Immigration Detention in Australia* <<https://www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention/detention-facilities>>

⁵ Refugee Council of Australia, *Australia's detention policies* (20 May 2020) <[https://www.refugeecouncil.org.au/detention-policies/6/#:~:text=Alternative%20Places%20of%20Detention%20\(APOD,people%20who%20need%20medical%20treatment](https://www.refugeecouncil.org.au/detention-policies/6/#:~:text=Alternative%20Places%20of%20Detention%20(APOD,people%20who%20need%20medical%20treatment)>

people seeking asylum to the Government; introduce strict assessment protocols and ensuring that Ministerial determinations are subject to judicial review; and provide alternatives to indefinite detention that are in line with our non-refoulement and other human rights obligations, particularly those relating to arbitrary, mandatory and indefinite detention.

19. The Migration Act should be amended to extend the operation of s 4AA to include persons with disabilities⁶ and the ten-year residency minimum for the Disability Support Pension should be abolished, or at least substantially reduced.

Health care for refugees and people seeking asylum

20. Health care should be delivered in a manner that is culturally appropriate and trauma-informed, with special consideration to physical and mental health needs proportionate to the harmful conditions created and exacerbated by detention.
21. All refugees and people seeking asylum have the right to receive appropriate health care without delay and at a standard equivalent to that which is enjoyed by the rest of the Australian community regardless of their citizenship and residency status – including full access to the Medicare Benefits Scheme (Medicare), the Pharmaceutical Benefits Scheme (PBS) and the National Disability and Insurance Scheme (NDIS).
22. Enhanced resourcing and supports are needed for improved access to health care services for all adults and children regardless of their residency status – including health, mental health and disability services, with a focus on community-based, holistic, compassionate and responsive health and support services.

Transparency, accountability and oversight

23. Dismantle and re-establish the Administrative Appeals Tribunal (AAT) to ensure it is structured in a way that operates in accordance with its legislated aims of providing fair, informal, unbiased and expeditious merits review.⁷
24. Significantly increase resources to the AAT Migration and Refugee Division (MRD) to address the backlog of protection visa cases.⁸
25. Establish an independent body to make AAT appointments to strengthen the independence of the AAT appointment process and ensure that only relevantly experienced and qualified people are appointed.⁹
26. Publish yearly statistics which set out the decision-making patterns of individual tribunal members in refugee cases.¹⁰
27. Abandon the Immigration Assessment Authority (IAA) and ensure all people seeking asylum have access to merits review through the AAT.¹¹

⁶ Section 4AA of the Migration Act provides that ‘a minor shall only be detained as a measure of last resort’.

⁸ Refugee Council of Australia, *Submission on the performance and integrity of Australia’s administrative review system* (7 May 2022) <<https://www.refugeecouncil.org.au/performance-and-integrity-of-the-aat/>>.

⁹ Refugee Council of Australia, *Submission on the performance and integrity of Australia’s administrative review system* (7 May 2022) <<https://www.refugeecouncil.org.au/performance-and-integrity-of-the-aat/>>.

¹⁰ Refugee Council of Australia, *Submission on the performance and integrity of Australia’s administrative review system* (7 May 2022) <<https://www.refugeecouncil.org.au/performance-and-integrity-of-the-aat/>>.

¹¹ Refugee Council of Australia, *Submission on the performance and integrity of Australia’s administrative review system* (7 May 2022) <<https://www.refugeecouncil.org.au/performance-and-integrity-of-the-aat/>>.

28. Ensure access to adequate legal representation by reinstating access to the Immigration Advice and Application Assistance Scheme at all stages of the refugee status determination process, regardless of how a person arrives in Australia.¹²
29. Establish and fund a statutory framework to ensure the independent judicial investigation of the deaths of ALL refugees and people seeking asylum transferred by the Australian Government to onshore and offshore detention facilities.

¹² Refugee Council of Australia, *Submission on the performance and integrity of Australia's administrative review system* (7 May 2022) <<https://www.refugeecouncil.org.au/performance-and-integrity-of-the-aat/>>.