

# Inquiry into the Ending Indefinite and Arbitrary Immigration Detention Bill 2021

## Joint Standing Committee on Migration

### Submission by the Office of the United Nations High Commissioner for Refugees

28 January 2022

#### I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide this submission to the Joint Standing Committee on Migration, in respect of its inquiry into the Ending Indefinite and Arbitrary Immigration Detention Bill 2021 (the Bill).
2. Indefinite and arbitrary detention are both features of Australia's immigration system which have previously attracted the scrutiny of UNHCR and other UN human rights mechanisms.<sup>1</sup> As indicated by its title, the Bill intends to 'end' such practices.
3. UNHCR welcomes the initiative of the Bill's drafters and supports the foundational principles on which the Bill rests. As will be discussed below, the Bill closely aligns with UNHCR's views relating to immigration detention, as contained in its *Detention Guidelines*,<sup>2</sup> as well as international refugee and human rights law standards.<sup>3</sup>

#### II. UNHCR'S AUTHORITY

4. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking

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<sup>1</sup> See for instance, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, Concluding observations on the combined fourth and fifth periodic reports of Australia, 23 December 2014, CAT/C/AUS/CO/4-5, available at:

[docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsoQ6oVJgGLf6YX4ROs1VbzHbjPhQXE%2B0WWmIrYFRkrdSVDi646tTx7wQu2ScGTgf%2BJVP%2Bu4P9Ry9gl0FCCLcBVuKEcWc%2Fk%2FXTL4sM%2BWHda%2Fd](https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsoQ6oVJgGLf6YX4ROs1VbzHbjPhQXE%2B0WWmIrYFRkrdSVDi646tTx7wQu2ScGTgf%2BJVP%2Bu4P9Ry9gl0FCCLcBVuKEcWc%2Fk%2FXTL4sM%2BWHda%2Fd;);

International Covenant on Civil and Political Rights, Human Rights Committee Concluding observations on the sixth periodic report of Australia, 1 December 2017, CCPR/C/AUS/CO/6, available at:

<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsoAl3%2fSniSQx2VAmWrPA0uA3KW0KkpmSGOue15UG42EodNm2j%2fnCTyghc1kM8Y%2fLQ4n6KZBdggHt5qPmUYCI8e6X%2btTU%2b%2bv5XeCnE5Q7qgg>. Other organisations such as the UN Working Group on Arbitrary Detention have regularly expressed concern regarding immigration detention in Australia. As an example, see Working Group on Arbitrary Detention, Opinion 1/2019, paras. 96-97, available at: [https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A\\_HRC\\_WGAD\\_2019\\_1.pdf](https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGAD_2019_1.pdf).

<sup>2</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, available at: <https://www.unhcr.org/en-au/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

<sup>3</sup> See, in particular, 1951 Convention relating to the Status of Refugees, Article 31, available at: <https://www.unhcr.org/en-au/1951-refugee-convention.html>; International Covenant on Civil and Political Rights, articles 9 and 12(1), available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; and Convention on the Rights of the Child, articles 9(4) and 37(b), available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

permanent solutions for refugees.<sup>4</sup> As set forth in the *Statute of the Office of the United Nations High Commissioner for Refugees*, UNHCR fulfils its international protection mandate by, *inter alia*, '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto'.<sup>5</sup> UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the *1951 Convention relating to the Status of Refugees*,<sup>6</sup> according to which State Parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention." The same commitment is included in Article II of the *1967 Protocol relating to the Status of Refugees* (1967 Protocol).<sup>7</sup>

5. In accordance with UN General Assembly resolutions 3274 XXIX<sup>8</sup> and 31/36,<sup>9</sup> UNHCR has been designated, pursuant to Articles 11 and 20 of the *1961 Convention on the Reduction of Statelessness* (the 1961 Statelessness Convention),<sup>10</sup> as the body to which a person claiming the benefits of this Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authorities. In resolutions adopted in 1994 and 1995, the UN General Assembly entrusted UNHCR with a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons.<sup>11</sup> UNHCR's statelessness mandate has continued to evolve as the UN General Assembly has endorsed the Conclusions of UNHCR's Executive Committee.<sup>12</sup>
6. Australia is a Contracting Party to the *1951 Convention relating to the Status of Refugees* and its 1967 Protocol (together, the Refugee Convention), as well as the *1954 Convention relating to the Status of Stateless Persons* (the 1954 Statelessness Convention),

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<sup>4</sup> See *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1 (Statute).

<sup>5</sup> Statute, para. 8(a).

<sup>6</sup> UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>7</sup> UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

<sup>8</sup> UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 10 December 1974, A/RES/3274 (XXIX).

<sup>9</sup> UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 30 November 1976, A/RES/31/36.

<sup>10</sup> UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

<sup>11</sup> UN General Assembly resolutions A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI), *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, 20 October 1995.

<sup>12</sup> Executive Committee Conclusion No. 90 (LII), Conclusion on International Protection, 5 October 2001, para. (q); Executive Committee Conclusion No. 95 (LIV), General Conclusion on International Protection, 10 October 2003, para. (y); Executive Committee Conclusion No. 99 (LV), General Conclusion on International Protection, 8 October 2004, para. (aa); Executive Committee Conclusion No. 102 (LVI), General Conclusion on International Protection, 7 October 2005, para. (y); Executive Committee Conclusion No. 106 (LVII), Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, 6 October 2006, paras. (f), (h), (i), (j) and (t); all of which are available in: [Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 \(Conclusion No. 1 – 114\)](#), October 2017.

and the 1961 Statelessness Convention. Through accession to these instruments, Australia has assumed international legal obligations in relation to refugees, asylum-seekers and stateless persons in accordance with their provisions.

7. Although the amendments in the Bill are capable of affecting any non-citizen, UNHCR's submission focuses on their effect on refugees, asylum-seekers and stateless persons in Australia, in light of relevant international legal obligations.

### III. SUMMARY OF THE PROPOSED LEGISLATION

8. The Bill seeks to establish a new framework to govern immigration detention in Australia,<sup>13</sup> precluding the use of mandatory detention and giving precedence to international refugee and human rights law.<sup>14</sup>
9. From the outset, it affirms two key principles; firstly, the principle of family unity and attendant obligations to protect the family and respect family life and secondly, the principle of the rights and best interests of the child.<sup>15</sup> The Bill requires that these dual principles be a "paramount consideration" when considering the detention of an individual.<sup>16</sup>
10. The Bill states that immigration detention should "always be" lawful, necessary, proportionate and for the shortest time possible.<sup>17</sup> It provides an exhaustive list of reasons for which a person *may* be taken into or kept in immigration detention, stating that they must apply "on a particularised and individualised basis" but does not mandate detention.<sup>18</sup> Moreover, the Bill guarantees the necessity of independent oversight and prompt review for all detention decisions.<sup>19</sup> Importantly, the Bill also expressly articulates Parliament's intention that any immigration detention be in Australian territory and that alternatives to detention (ATDs) are the preferred option to immigration detention.<sup>20</sup>
11. If none of the stipulated reasons for an individual's detention apply, the Bill requires a determination on the use of ATDs.<sup>21</sup> It also provides that, if a determination is made that ATDs should be used in an individual's case, that individual is to be granted a bridging visa such that they are no longer an unlawful non-citizen.<sup>22</sup>
12. If an ATD is determined in an individual case, the Bill allows it to last for a period of 12 months.<sup>23</sup> For an ATD to occur for a longer period, an application must be made to

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<sup>13</sup> Ending Indefinite and Arbitrary Immigration Detention Bill 2021, subclause 3(1).

<sup>14</sup> *Ibid*, subclause 3(2).

<sup>15</sup> *Ibid*, clauses 8, 9.

<sup>16</sup> *Ibid*, subclause 8(2), clause 9.

<sup>17</sup> *Ibid*, subclause 11(1).

<sup>18</sup> *Ibid*, clause 16.

<sup>19</sup> *Ibid*, clause 17.

<sup>20</sup> *Ibid*, clause 11.

<sup>21</sup> *Ibid*, subclause 12(1); see also clause 11(2).

<sup>22</sup> *Ibid*, subclause 12(5).

<sup>23</sup> *Ibid*, clause 14.

the Federal Circuit Court of Australia.<sup>24</sup> The Bill has a similar effect in imposing time constraints on the use of detention itself; ordinarily, it states that a person can only be held in immigration detention for up to three months.<sup>25</sup> However, it permits an extension if an application is granted by the Federal Circuit Court, up to a maximum of 12 months.<sup>26</sup>

#### IV. ARBITRARY AND INDEFINITE DETENTION

13. The fundamental rights to liberty and security of person and freedom of movement are expressed in all the major international and regional human rights instruments.<sup>27</sup> Moreover, Article 31 of the Refugee Convention specifically provides for the non-penalisation of refugees (and asylum-seekers) having entered or stayed irregularly if they present themselves without delay and show good cause for their illegal entry or stay. It further provides that restrictions on movement shall not be applied to such refugees (or asylum-seekers) other than those which are necessary and such restrictions shall only be applied until their status is regularised or they gain admission into another country. Article 26 of the Refugee Convention further provides for the freedom of movement and choice of residence for refugees lawfully in the territory. These rights taken together – the right to seek asylum, the non-penalisation for irregular entry or stay and the rights to liberty and security of person and freedom of movement – mean that the detention should be a measure of last resort, with liberty being the default position.<sup>28</sup>
14. While detention in the context of migration or asylum procedures is not prohibited, international law provides substantive safeguards that are designed to prevent unlawful as well as arbitrary detention. Arbitrary detention is described in UNHCR’s *Detention Guidelines* as including not only detention that displays elements of unlawfulness, but also detention characterised by elements of inappropriateness, injustice and lack of predictability.<sup>29</sup> The UN Working Group on Arbitrary Detention has repeatedly expressed alarm at the rising number of Australian cases that are brought before it. In some, it has made findings that Australia has detained an individual arbitrarily, because Australia was not able to articulate a legitimate justification for the detention, or because the detainee was prevented from challenging the lawfulness of their continued detention.<sup>30</sup>
15. Indefinite detention for immigration purposes is arbitrary as a matter of international human rights law.<sup>31</sup> Indefinite detention is detention that continues for a protracted

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid, clause 17.

<sup>26</sup> Ibid.

<sup>27</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, p. 13.

<sup>28</sup> Ibid.

<sup>29</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, p. 15.

<sup>30</sup> Working Group on Arbitrary Detention, Opinion 1/2019, paras. 96-97, available at:

[https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A\\_HRC\\_WGAD\\_2019\\_1.pdf](https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGAD_2019_1.pdf).

<sup>31</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, p. 26.

and unconstrained period. This is a feature of Australia's detention framework, as reflected by the fact that the average period a person spends in immigration detention is currently close to 700 days. For stateless persons, of whom there are presently 39 in detention, an average period in detention is over 1,200 days – which equates to more than 3 years.<sup>32</sup>

## V. AUSTRALIA'S DETENTION FRAMEWORK AND INTERNATIONAL STANDARDS IN THE CONTEXT OF THE PROPOSED LEGISLATION

16. As explained below, Australia's current framework of immigration detention is inconsistent with international refugee and human rights law standards. Necessary substantive safeguards are often not incorporated into relevant legislation, leading to a real likelihood that detention is or becomes arbitrary and, in particular, lasts for a prolonged or indefinite period of time. UNHCR thus welcomes the Bill's attempts to correct a number of aspects of the Australian immigration detention system by bringing it in closer alignment with international law and standards enshrined in many agreements which Australia is party to.

### *Australia's policy of mandatory detention*

17. Australia has maintained a policy of mandatorily detaining "unlawful non-citizens" since 1992, which continues to negatively impact on refugees, asylum-seekers and stateless persons.<sup>33</sup> The policy of mandatory detention finds its legislative expression in the *Migration Act 1958 (Cth)* (the Migration Act), which states that if an immigration officer suspects that a person is an unlawful non-citizen, they "must" detain them on the basis of their legal status.<sup>34</sup>
18. Decisions to detain, which bear upon asylum-seekers' exercise of a fundamental right, should only be applied when necessary, be temporary and be based on a detailed and an individualised assessment of a person's particular circumstances. Factors that may be relevant include family and/or community ties, past behaviour relating to compliance and character or the risk of absconding.<sup>35</sup> This reflects the fact that detention is a tool of last resort and should be applied cautiously and only be exceptionally resorted to.<sup>36</sup>
19. A detention framework that is "mandatory, automatic and indiscriminate", as the UN Working Group on Arbitrary Detention has described Australia's framework, is

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<sup>32</sup> Department of Home Affairs, Senate Legal and Constitutional Affairs Committee, Supplementary Budget Estimates, 25 October 2021, Answer to Questions SE21-340, available at [https://www.aph.gov.au/Parliamentary\\_Business/Senate\\_estimates/legcon/2021-22\\_Supplementary\\_budget\\_estimates](https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/legcon/2021-22_Supplementary_budget_estimates).

<sup>33</sup> See, for instance, UNHCR, 'Submission for the Universal Periodic Review: Australia (3rd Cycle, 37th Session)', p. 4, available at: <https://www.unhcr.org/en-au/publications/legal/6032fb044/submission-for-the-universal-periodic-review-australia-3rd-cycle-37th-session.html>

<sup>34</sup> *Migration Act 1958 (Cth)* s 189(1)(b).

<sup>35</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, p. 15, [19], available at: <https://www.unhcr.org/en-au/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

<sup>36</sup> *Ibid*, p. 16, [21].

contrary to international standards.<sup>37</sup> It does not facilitate the individualised assessment of a person's circumstances on which detention is conditioned. The Bill subject to this inquiry aims to address this aspect of Australian detention practice, stating from its outset that it "does not allow mandatory detention".<sup>38</sup> Instead, it requires that the use of detention be justified "on a particularised and individualised basis".<sup>39</sup>

*Detention can only be justified for a legitimate purpose*

20. Rather than occurring mandatorily or automatically, detention should occur only in connection with a legitimate purpose. Without such a purpose, detention will be considered arbitrary, even if an individual's entry was illegal.<sup>40</sup> To guarantee the overall predictability and fairness of an immigration detention system, the grounds on which detention can occur should be clearly defined in legislation and/or regulations.<sup>41</sup>
21. There are a number of examples of 'legitimate purposes' in UNHCR's *Detention Guidelines*. For instance, detention may be justified to protect public order where there are strong grounds for believing that an asylum-seeker is likely to abscond or will refuse to cooperate with the authorities. Detention may likewise be used to protect public health whilst health checks are conducted in respect of an asylum-seeker.<sup>42</sup>
22. As Australia's legislation requires mandatory detention of all unlawful non-citizens, it does not prescribe other reasons for detention. The Bill aims to alter this, by outlining an exhaustive list of purposes which may justify detention.<sup>43</sup> This list closely mirrors UNHCR's *Detention Guidelines* in allowing detention to only occur to protect public order, public health or national security.
23. Detention for the sole reason that the person is seeking asylum is not lawful under international law. As previously mentioned, illegal entry or stay of asylum-seekers does not give the State an automatic power to detain or to otherwise restrict freedom of movement. Detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms. Furthermore, detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction for irregular entry or presence in the country.<sup>44</sup>

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<sup>37</sup> UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: Addendum: Visit to Australia (24 May-6 June 2002)*, 24 October 2002, E/CN.4/2003/8/Add.2, p. 7 available at: <https://www.refworld.org/docid/3e2e7ca54.html>.

<sup>38</sup> Ending Indefinite and Arbitrary Immigration Detention Bill 2021, subclause 3(1).

<sup>39</sup> *Ibid*, subclause 16(1).

<sup>40</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, p. 16.

<sup>41</sup> *Ibid*.

<sup>42</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, pp. 16-18.

<sup>43</sup> Ending Indefinite and Arbitrary Immigration Detention Bill 2021, clause 16.

<sup>44</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, p. 19.



*Detention can only be resorted to when it is determined to be necessary, reasonable and proportionate*

24. The individualised assessment that must occur prior to detention should establish the necessity, reasonableness and proportionality of the detention in the given circumstances. This means that detention cannot be used or prolonged if it would exceed what is necessary to achieve the purpose that the authorities have identified.<sup>45</sup> Again, the Bill broadly reflects UNHCR's *Detention Guidelines*, providing that detention should always be "necessary and proportionate".<sup>46</sup>

*Alternatives to detention*

25. To properly establish the necessity and proportionality of detention, the availability of less restrictive or coercive measures restricting freedom of movement must be explored. Consideration of ATDs, as less invasive or coercive measures of movement restrictions as means of achieving the same ends in circumstances where these are necessary to pursue a legitimate purpose to restrict a person's liberty of free movement, ensures that the detention of asylum-seekers is actually operating as a measure of last resort.
26. Once an individual has been detained in Australia, the avenues for release are extremely limited and entirely discretionary. While the Minister has the power to release an individual under s 195A of the Migration Act,<sup>47</sup> this power is personal, discretionary and non-compellable. As a reflection of this, the annual number of refugees in detention following visa cancellation who were subsequently granted a visa under s 195A has not exceeded five since the 2016-17 reporting period.<sup>48</sup>
27. Likewise, s 197AB of the Migration Act permits the release of someone from held detention into what is commonly known as community detention on what is known as a 'residence determination'.<sup>49</sup> Again, though, this is a power that the Minister exercises based on their own personal assessment of whether it is "in the public interest" to do so.
28. Alternatives to detention may take various forms, depending on the particular circumstances of the individual, including registration and/or deposit/surrender of documents; bond/bail/sureties; reporting conditions; community release and supervision; designated residence; electronic monitoring; or home curfew. Australia could bring its immigration detention framework into closer alignment with international human rights law standards if it were to consider the adoption of such alternatives.

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<sup>45</sup> Ibid, p. 21.

<sup>46</sup> Ending Indefinite and Arbitrary Immigration Detention Bill 2021, subclause 11(1)(b).

<sup>47</sup> *Migration Act 1958* (Cth), s 195A.

<sup>48</sup> Department of Home Affairs, Senate Legal and Constitutional Affairs Committee, Supplementary Budget Estimates, 25 October 2021, Answer to Questions SE21-346, available at

[https://www.aph.gov.au/Parliamentary\\_Business/Senate\\_estimates/legcon/2021-22\\_Supplementary\\_budget\\_estimates](https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/legcon/2021-22_Supplementary_budget_estimates).

<sup>49</sup> *Migration Act 1958* (Cth), s 197AB.

29. The Bill goes some way to ensuring that Australia relies on ATDs more frequently. It states that, if there is no applicable reason for detention, then available ATDs must be determined.<sup>50</sup> It also articulates a list of ATDs broader than those currently in use in Australia, including a requirement to deposit documentation, reporting conditions and a requirement to provide a guarantor.

### *Time limits on detention*

30. Detention and ATDs must both be governed by laws and regulations to ensure that restrictions are not arbitrarily imposed on an individual's liberty or freedom of movement.<sup>51</sup> Indeed, the length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary. To ensure that the length of detention is tightly circumscribed, it is vital that maximum periods be set in national legislation and that there be a periodic review of the detention. Indeed, without such time constraints, detention often becomes prolonged, and in some cases indefinite. The risk of indefinite detention is particularly high for refugees who cannot return to their home countries.
31. No such safeguards exist in the Migration Act and detention is not confined temporally, but rather ends only when an individual is removed or deported from Australia, taken offshore to a regional processing country, or is granted a visa.<sup>52</sup> The inevitable result is situations of protracted or indefinite detention, and risk that individuals may feel compelled out of desperation to return to a country that they have fled despite their fear of persecution and where they may be in danger, or to 'voluntarily' return to a regional processing country, situations that may be at variance with the principle of *non-refoulement*.
32. The Bill imposes strict time limits on immigration detention in Australia which, in combination with its acknowledgment of the requirements of necessity and proportionality outlined above, is consistent with international standards outlined in UNHCR's *Detention Guidelines*.<sup>53</sup> It specifically states that persons must not be kept in

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<sup>50</sup> Ending Indefinite and Arbitrary Immigration Detention Bill 2021, subclause 12(1).

<sup>51</sup> *International Covenant on Civil and Political Rights*, articles 12(3) provides freedom of movement can be subject to restrictions when they are "provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

<sup>52</sup> *Migration Act 1958* (Cth), s 196(1). See also, Human Rights Committee, *F.J. et al v. Australia*, Communication No. 2233/2013, 22 March 2016, para. 10.3 "[A]sylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case by case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic reevaluation and judicial review. The decision must also take into account the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion. The inability of a State party to carry out the expulsion of an individual does not justify indefinite detention."

<sup>53</sup> See also UN Human Rights Committee (HRC), *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, available at: <https://www.refworld.org/docid/553e0f984.html>,



immigration detention for more than three months.<sup>54</sup> This period may be extended by up to six months,<sup>55</sup> but cannot exceed a total of 12 months.<sup>56</sup>

33. ATDs that restrict the liberty of asylum-seekers may impact on their human rights and should therefore be subject to human rights standards. Like with detention in held facilities, the Bill brings Australia's framework of ATDs in closer alignment with international standards by subjecting it to a number of restrictions. Primarily, the Bill suggests that an ATD used in an individual case will be limited in its applicability to a period of 12 months.<sup>57</sup> Moreover, the Bill ensures access to services in detention to ensure the humane and dignified treatment of all detainees.<sup>58</sup>
34. Other safeguards are built into the ATD framework under the Bill. For instance, it requires that a copy of a determination concerning the use of ATDs in their case be given to an individual. This ensures that a person subject to ATDs clearly understands the rights and duties associated with the ATD that has been adopted. Additionally, those subject to ATDs are guaranteed a right to work, which reflects the *Detention Guidelines'* emphasis to use ATDs in a way that promotes dignity, humanity and respect. Moreover, the Bill provides that the Administrative Appeals Tribunal can provide merits review of decisions to specify or vary restrictions, or to revoke a determination made with respect to ATDs.<sup>59</sup>

#### *Periodic review of detention*

35. As outlined in the UNHCR *Detention Guidelines*, asylum-seekers should be given an opportunity to challenge an initial detention decision.<sup>60</sup> Thereafter, detainees should be provided with an opportunity to periodically challenge the ongoing necessity, proportionality and reasonableness of a detention decision. Good practice indicates that following an initial judicial confirmation of the power to detain, review would take place every seven days until the one-month mark and thereafter every month until the maximum period set by law is reached.
36. Australia's mandatory detention framework discussed above, does not provide for periodic or systematic review of an individual's detention by the Minister or the Department, even when the decision is first made. For this reason, UNHCR welcomes the Bill's initiative in requiring that, for detention to exceed a period of three months, an application must be made to the Federal Circuit Court. This has the effect of reversing the presumption in favour of detention that presently characterizes the Australia's immigration detention system, instead requiring the detaining authority

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At para. 15: "States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases."

<sup>54</sup> Ending Indefinite and Arbitrary Immigration Detention Bill 2021, subclause 17(1).

<sup>55</sup> *Ibid*, subclause 17(2).

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid*, clause 14.

<sup>58</sup> *Ibid*, clause 19. See also *International Covenant on Civil and Political Rights*, article 7 which provides "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

<sup>59</sup> *Ibid*, clause 23.

<sup>60</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, p. 27.

to establish why continued detention is necessary, proportionate and reasonable to a legitimate aim.

37. As mentioned above, ATDs must also be subject to constraints, meaning they too should be periodically reviewed in individual cases by an independent body.<sup>61</sup> Whilst the Bill provides for a maximum limit of 12 months for ATDs, again it permits the use of ATDs for longer periods if an application is successfully made to the Federal Circuit Court. UNHCR supports mechanisms by which potential restrictions on the liberty of asylum-seekers, refugees and stateless persons can be scrutinized prior to being authorized.

## **VI. CONCLUSION**

38. For some time, Australia has sustained an immigration detention framework which allows for both arbitrary and indefinite detention. This Bill reflects international law and standards expressly designed to prevent such practice, including UNHCR's *Detention Guidelines*. UNHCR supports the principles upon which the Bill has been drawn and commends its drafters for their commitment to international human rights and refugee law.

**UNHCR**  
**28 January 2022**

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<sup>61</sup> Ibid, p. 22.