

**POLICY STATEMENT ON
PRINCIPLES
APPLYING TO
THE DETENTION
OF ASYLUM
SEEKERS**

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Law Council
OF AUSTRALIA

INTRODUCTION

A key objective of the Law Council is the maintenance and promotion of the rule of law. For this reason, the Law Council often provides analysis of federal legislation and federal executive action based on the Law Council's Policy Statement on Rule of Law Principles.¹

This document seeks to apply those principles and other relevant principles to the detention² of asylum seekers by the Australian Government. It is not, however, intended to be a comprehensive analysis of legislation and executive action applying in this context.

Australia is a party to the seven key international human rights treaties and has also signed or ratified a number of optional protocols to those treaties. These international instruments set out in clear terms Australia's international human rights obligations. These incorporate a number of obligations which focus on the deprivation of liberty, including the power to detain, the process under which a person is detained and the conditions of detention.

The instruments which are most relevant to the detention of asylum seekers include:

- The Convention Relating to the Status of Refugees (as amended by its 1967 Protocol) (the Refugee Convention);
- The International Covenant on Civil and Political Rights (the ICCPR);
- The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) and its Optional Protocol; and
- The Convention on the Rights of the Child (CROC).

Where appropriate, this document draws on Australia's relevant international obligations and surrounding commentary, in particular, guidelines issued by the United Nations High Commissioner for Refugees (UNHCR) regarding the detention of asylum seekers.

¹ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011

² Detention is defined in the United Nations High Commissioner for Refugees Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention (2012) (UNHCR Guidelines) as 'the deprivation of liberty or confinement in a closed place which an asylum seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.'

KEY PRINCIPLES

1. THE RIGHT TO SEEK ASYLUM SHOULD BE RESPECTED.

- a. Every person has the right to seek and enjoy asylum from persecution, serious human rights violations and other serious harm. Seeking asylum is not an unlawful act.
- b. Asylum seekers shall not be penalised for their “illegal” entry or stay in a country provided they present themselves to the authorities without delay and show good cause for their “illegal” entry or presence.³
- c. The State shall not expel a refugee who is lawfully in its territory, except on grounds of national security or public order.
- d. The State shall not expel or return a refugee to a situation where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.

2. THE RIGHTS TO LIBERTY AND SECURITY OF PERSON AND TO FREEDOM OF MOVEMENT APPLY TO ASYLUM SEEKERS.

- a. The State shall respect rights to liberty and security of person and freedom of movement in principle for all people.
- b. The State shall only detain asylum seekers as a measure of last resort.

3. DETENTION MUST BE IN ACCORDANCE WITH AND AUTHORISED BY LAW.

- a. The State shall only detain asylum seekers as authorised by law. Detention provided for by domestic law may nevertheless be considered arbitrary and unlawful under international law.
- b. Executive discretion relating to the detention of asylum seekers shall be subject to prescribed limits and to judicial review.
- c. Anyone who has been the victim of unlawful detention shall have an enforceable right to compensation, in addition to any other effective remedy to which he or she is entitled.

4. NO ASYLUM SEEKER SHOULD BE SUBJECTED TO ARBITRARY OR MANDATORY DETENTION.

- a. The State should only detain an asylum seeker:
 - i. When it is necessary, reasonable in all the circumstances and proportionate to a legitimate purpose; and
 - ii. Based on a detailed assessment of an individual's particular circumstances and clear, objective criteria.
- b. In all other circumstances, detention is likely to be considered arbitrary and unlawful, particularly when:
 - i. The State does not consider less coercive or intrusive alternatives to detention; and
 - ii. Detention is inappropriate, unjust, unpredictable or indefinite.
- c. Mandatory or automatic detention is arbitrary and unlawful.

³ “Illegal entry” is the expression used in the Refugee Convention. The use of this expression in these principles is not intended to imply that it is not lawful to seek asylum.

5. THERE SHOULD BE A GENERAL PRESUMPTION AGAINST THE DETENTION OF ASYLUM SEEKERS.

- a. The State should not use detention for the primary purpose of resolving an asylum seeker's immigration status.
- b. The State may use a minimal period of detention to conduct initial health, identity and security checks.
- c. After initial checks, the State should only detain an asylum seeker where he or she is individually assessed as posing an unacceptable risk to the community which cannot be met in any less restrictive way.
- d. Detention should only take place after full consideration of all possible alternatives, such as reporting requirements or structured community supervision. However, alternatives that restrict individual liberty should themselves be subject to human rights standards.
- e. Immigration detention should not be used or threatened as a deterrent to asylum seekers seeking refuge in Australia.

6. INDEFINITE DETENTION IS ARBITRARY AND MAXIMUM LIMITS ON DETENTION SHOULD BE ESTABLISHED IN LAW.

- a. The State should establish maximum periods of detention in legislation. Otherwise, detention can become prolonged, and in some cases indefinite. Indefinite detention is arbitrary as a matter of international human rights law.

7. DETENTION MUST NOT BE DISCRIMINATORY

- a. The State shall not detain or discriminate in its treatment of asylum seekers on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status. For example, there should be no discrimination or difference in treatment based on the country of origin, or the mode or manner of a person's arrival into Australia.

8. DECISIONS TO DETAIN OR EXTEND DETENTION MUST BE SUBJECT TO PROCEDURAL SAFEGUARDS.

8.1 *Detained asylum seekers should be fully and promptly informed of the reasons for, and their rights in relation to, their detention.*

- a. The State should fully and promptly inform a detained asylum seeker of the reasons for detention, in a language and in terms he or she understands.
- b. If necessary, the State shall provide a detained asylum seeker with the assistance of an interpreter, free of charge.
- c. The State shall provide a detained asylum seeker promptly with an explanation of his or her rights and how to avail him or herself of such rights.

8.2 *An asylum seeker has the right to challenge the lawfulness of his or her detention before a court.*

- a. The State should provide review by judicial process of the necessity of the detention in a simple, effective and fair manner.
- b. An asylum seeker should also have the right to challenge the lawfulness of his or her detention before a court of law at any time.

8.3 All detained asylum seekers, including those who are detained or are facing the prospect of being detained, should have full, confidential access to a competent and independent legal adviser of their choice to establish and defend their rights.

- a. Such asylum seekers should have access to legal advisers at all stages of the resolution of their immigration status, including judicial review.
- b. The State should provide publicly funded legal advice to asylum seekers without independent means.

8.4 An asylum seeker must have the right to confidential contact with international and/or non-governmental organisations as well as relatives and friends.

- a. The State shall allow regular access by detained asylum seekers to the United Nations High Commissioner for Refugees (UNHCR), the Commonwealth Ombudsman, the Australian Human Rights Commission and relevant Non-Governmental Organisations. It shall allow regular visits by such bodies to places where asylum seekers are detained.

8.5 Decisions taken which affect the rights and interests of asylum seekers who are or may be detained must be procedurally fair.

- a. Asylum seekers must be granted a fair hearing before a decision is taken which negatively affects their rights or interests.
- b. Decisions regarding an asylum seeker's detention must be and appear to be impartial, must be supported by evidence and must follow a proper inquiry into the matters in dispute.

8.6 Asylum seekers who are subject to adverse security assessments must be given the opportunity to be informed of the case against them, the opportunity to be heard and the right to seek a review of the adverse security assessment and any decision based on the assessment.

- a. Meaningful review requires that such a person must be given sufficient information to know the basis for their assessment.
- b. Where national security concerns preclude full disclosure of the reasons for the assessment, mechanisms must be available to allow for partial disclosure.
- c. Adverse security assessments should be subject to periodic internal review.
- d. The State should determine alternatives to detention that are appropriate in the light of the specific security risk posed if an adverse security assessment is upheld. Special consideration should be given to the wellbeing of the children of any asylum seekers against whom an adverse security assessment is made.

9. CONDITIONS OF DETENTION MUST BE HUMANE AND DIGNIFIED.

- a. No asylum seeker should be held in conditions of detention which amount to torture or cruel, inhuman or degrading treatment. This includes being held in incommunicado or lengthy solitary detention.
- b. Asylum seekers should not be held with prisoners or in prison-like facilities.
- c. Asylum seekers should be detained in a manner appropriate to their status – for example, unless they are family members, men and women should be segregated, and children should be separated from adults.
- d. Detained asylum seekers should have appropriate access to key services such as education and health services, including appropriate mental health services.
- e. The State should identify and minimise the risk of suicide and self-harm by detained asylum seekers.

10. IN ALL ACTIONS CONCERNING CHILDREN, THE BEST INTERESTS OF THE CHILD SHALL BE A PRIMARY CONSIDERATION.

- a. Children should be detained only as a measure of last resort and for the shortest appropriate period of time. If necessary as a last resort, community-based detention should be used for children and families, provided that it includes appropriate access to services and facilities.
- b. Children have the right to family unity and the right not to be separated from their parents against their will, unless competent authorities, subject to judicial review, determine that separation is necessary for the best interests of the child.
- c. Other guiding principles regarding the detention of children include the rights to:
 - i. life, survival and development to the maximum extent possible;
 - ii. enjoy the highest attainable standard of health;
 - iii. non-discriminatory treatment;
 - iv. express their views freely and for their views to be given “due weight” in accordance with the child’s age and level of maturity; and
 - v. education, recreation and play.
- d. An independent legal guardian or adviser should be appointed for unaccompanied minors, who as a general rule, should not be detained.
 - i. Such children are entitled to special protection and assistance, noting their inherent vulnerability, lack of support and high rates of mental illness.
 - ii. Their needs require special emphasis and care in the provision of appropriate legal assistance, counselling, and other services including education, health and recreation.

11. THE SPECIAL CIRCUMSTANCES AND NEEDS OF OTHER VULNERABLE ASYLUM SEEKERS SHOULD BE TAKEN INTO ACCOUNT.

- a. Alternatives to detention should be actively considered for any people with special needs, including victims of trauma and torture and the elderly.
- b. Where detention of people with special needs occurs, they should be provided with appropriate services – for example, reasonable adjustments to services and accommodation shall be made to meet the needs of persons with disabilities.
- c. Asylum seekers who are vulnerable to prolonged or indefinite detention, such as stateless persons should be able to access durable solutions to resolve their situation.
- d. The existence of a disability shall in no case justify a deprivation of liberty.

12. POLICY AND PRACTICE IN THE DETENTION OF ASYLUM SEEKERS SHOULD BE ACCOUNTABLE, TRANSPARENT, AND SUBJECT TO INDEPENDENT MONITORING.

- a. The State should legislate for appropriate standards regarding the detention of asylum seekers, including the length and conditions of detention, to be met by public and private authorities, and for penalties for non-compliance.
- b. The State should make public all policies and practices concerning the detention of asylum seekers. Such policies and practices should be subject to systematic independent review and monitoring. Where reports highlight deficiencies in detention policy and practice, the State should promptly redress them.
- c. Immigration detention facilities should be open to scrutiny and monitoring by independent national and international bodies as provided for in the Optional Protocol to the Convention Against Torture (OPCAT).
- d. Whenever the death or disappearance of a person occurs during his or her detention, an inquiry into the cause of death or disappearance should be held by an independent authority, with the findings to be made available upon request, unless doing so would jeopardize an ongoing criminal investigation. Similar inquiries should be conducted into credible allegations of acts of torture and other cruel, inhuman treatment or punishment committed in detention. When such inquiries are conducted, the State should fund legal representation of interested persons if they are unable to do so.

Authorised by LCA Directors
Law Council of Australia
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