Working Group on Arbitrary Detention

Human Rights For All

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Executive summary

Australia's immigration laws require the mandatory detention of any individual who arrives in Australia without a valid visa. These people are detained until they are removed or granted a visa. As a result, a significant number of asylum seekers are held in closed detention facilities, with people who arrive by boat accounting for the vast majority of those detained long-term. Some people (i.e. those who are stateless) can never be removed, but may also be ineligible to enter Australia. They are unable to challenge their detention in the Australian courts because their detention is lawful under Australia's immigration laws.

Seeking asylum is not a crime, even if a person arrives by irregular means without a visa. On the contrary, the right to seek asylum is a universal human right set out in article 14 of the Universal Declaration of Human Rights (**UDHR**), a declaration which Australia supported as one of the original members of the United Nations in 1948.

This places Australian law at odds with international law and leaves vulnerable people at risk of prolonged, potentially permanent detention in facilities that are widely described as punitive and prison-like.

> *"…seeking asylum is not a criminal act; on the contrary, seeking asylum is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights, and in the 1951 Convention relating to the Status of Refugees, and its 1967 Protocol. … [T]hose instruments constitute international legal obligations undertaken by Australia."*
>
> WGAD opinion 50/2018, para [68]

International agencies have repeatedly reviewed Australia's indefinite detention laws and practices against its compliance with international law obligations. In case after case, Australia has been held to have breached its international legal obligations, in particular the right of each person to liberty and security of person without being subject to arbitrary arrest or detention.[1]

This report summarises the findings of one international agency which has repeatedly reviewed Australia's mandatory detention laws and practices. The United Nations' Working Group on Arbitrary Detention (**WGAD**) has the power to review potential breaches by United Nation member states of their human rights obligations as they relate to deprivation of liberty. Its mandate is to investigate cases of deprivation of liberty imposed arbitrarily or inconsistently with the international standards set forth in the Universal Declaration of Human Rights (**UDHR**), or the international legal instruments accepted by the States concerned.

> *"The [WGAD] has the mandate to investigate cases of deprivation of liberty imposed arbitrarily or inconsistently with the international standards set forth in the [UDHR], or the international legal instruments accepted by the States concerned."*[2]

[1] International Covenant of Civil and Political Rights (**ICCPR**), article 9.

[2] United Nations Human Rights Office of the High Commissioner website, 'Working Group on Arbitrary Detention' https://www.ohchr.org/en/special-procedures/wg-arbitrary-detention.

One of the ways the WGAD fulfils its mandate is by investigating individual complaints under its regular communications procedure. Each year, the WGAD reviews between 70 and 90 matters, and provides opinions as to whether the deprivation of liberty is arbitrary as well as recommendations to the relevant State.

In the last five years, the WGAD has delivered 21 opinions on Australia (**Australian Opinions**), all relating to the human impact of Australia's policy of mandatory, indefinite immigration detention. To date, all have been instigated by a submission made to the WGAD by Human Rights for All (**HR4A**) on behalf of a detained person (**Complainant**). The number and frequency of Australian Opinions is astounding for a liberal democratic country with an independent judicial system. In contrast, in the 2017-22 period, Canada, New Zealand and the United Kingdom have never been the subject of a WGAD opinion, and the United States has been a subject twice. Australia is in the invidious position of being on par with regular respondents including China, Russia and Venezuela.

The Australian Opinions repeatedly find that Australia's mandatory immigration detention laws result in arbitrary detention and highlight a continual and systematic denial by Australia of its international human rights obligations.

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1 PURPOSE AND CONTENTS

1 Purpose and contents

The purpose of this report is to provide an overview of the WGAD's Australian Opinions. These Australian Opinions repeatedly find that Australia's mandatory immigration detention laws result in arbitrary detention and highlight a repeated, systematic denial by Australia of its international human rights obligations.

This report is divided into the following sections:

1 Definition of 'arbitrary detention' as adopted by the WGAD.

2 Key findings in the Australian Opinions.

3 Recurring legal issues raised by the WGAD in the Australian Opinions.

4 Recommendations of the WGAD to Australia to address the common issues identified in the Australian Opinions.

5 Concluding remarks from the WGAD and potential solutions to address the underlying issues presented in the Australian Opinions.

6 Appendix: Detailed summaries of each Australian Opinion.

2
ARBITRARY DETENTION

2 Arbitrary detention

HR4A's submissions are based on the five categories the WGAD uses to determine whether deprivation of liberty is arbitrary:

- **Category I:** When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of their sentence or despite an amnesty law applicable to them).
- **Category II:** When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the UDHR[3] and, in so far as State parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant of Civil and Political Rights (**ICCPR**).[4]
- **Category III:** When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the UDHR and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.
- **Category IV:** When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy.
- **Category V:** When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings.

In the Australian Opinions, Category IV is the most common basis for a finding of arbitrary detention, however, other categories are also regularly held to be relevant, particularly Categories I and II.

[3] These rights from the UDHR include the right to be equal before the law and protected from discrimination (article 7), the right to freedom of movement and residence within the borders of each state (article 13), the right to seek and enjoy asylum from persecution in other countries (article 14), the right to freedom of thought, conscience, and religion (article 18), the right to freedom of opinion and expression (article 19), the right to freedom of peaceful assembly and association (article 20) and the right to take part in the government and have equal access to public service in one's own country (article 21).

[4] These rights from the ICCPR include the right to liberty of movement and freedom to choose one's residence (article 12), the right to freedom of thought, conscience and religion (article 18), the right to hold opinions without interference and freedom of expression (article 19), the right of peaceful assembly (article 21), the right to freedom of association with others (article 22), the right to take part in the conduct of public affairs, vote, be elected and access public service within one's country (article 25), the right to equality before the law and freedom from discrimination (article 26) and the right for minorities to enjoy their own culture, profess and practise their own religion or use their own language (article 27).

3
KEY FINDINGS

3 The Australian Opinions – Key Findings

This section summarises the most common themes in the Australian Opinions. Individual summaries of each Australian Opinion are set out in Appendix B of this report.

3.1 Australia's immigration detention practices constitute arbitrary detention

In every Australian Opinion, the WGAD has concluded that the deprivation of liberty amounts to arbitrary detention and recommends that the Complainant be released immediately, with appropriate compensation and other reparations afforded to them.

3.2 Detrimental impact of detention on mental health

After arriving in immigration detention facilities, 15 out of the 21 Complainants in the Australian Opinions were identified as having mental health concerns.[5]

Some of the Complainants had already faced significant trauma, violence and/or abuse in their country of origin. Placing people with significant trauma backgrounds in closed detention centres is inappropriate and exacerbates related mental health issues. The Complainant in opinion 33/2022, for example, had already suffered significant trauma as a result of being imprisoned for 18 months as a five-year-old in Iraq following Saddam Hussein's Decree No. 666, which labelled Faili Kurds as 'enemies of the state'.

Several medico-legal opinions have described the debilitating impact of detention on this Complainant "*especially when confronted with handcuffs and aggressive behaviour by guards*".[6] Within a year of being detained, this Complainant was diagnosed as suffering from complex post-traumatic stress disorder, chronic grief, detention fatigue, depression and anxiety,[7] but this appears to have had no impact on detention placement decisions. He had several bridging visa referrals rejected and requests by his Australian citizen partner for transfer to Melbourne, and later for release under section 195A or 197AB of the *Migration Act* 1958 (Cth) (**Migration Act**), were consistently rejected from 2017-22, causing profound mental health impacts for them both.

[5] Opinion 28/2017, opinion 20/2018, opinion 21/2018, opinion 50/2018, opinion 74/2018, opinion 1/2019, opinion 2/2019, opinion 70/2020, opinion 71/2020, opinion 17/2021, opinion 68/2021, opinion 69/2021.

[6] Opinion 33/2022, para [23].

[7] Opinion 33/2022, paras [5], [22]-[24].

The detrimental impact of prolonged detention on mental and physical health is also apparent in people who had no history of health concerns prior to being detained. The Complainant in opinion 68/2021, for example, was reported as having *"no obvious signs of mental or physical illness*",[8] when he was first detained at the Nauru Regional Processing Centre in October 2013. By the time the WGAD opinion was published, this Complainant was reported to have significant physical and mental health problems, including schizophrenia, post-traumatic stress disorder, internal bleeding from a duodenal ulcer and a bacterial gastrointestinal infection. He was reported to be "*non-verbal, talking in an infantile voice and shaking*".[9]

The Australian Opinions' repeated findings of the detrimental impact of detention on mental health is extremely concerning but unsurprising. Numerous Australian and international studies have identified the close link between detention and deteriorating mental health, with many medical and mental health organisations speaking out against closed detention due to the destructive effects on mental health, even after a few months.[10]

The Australian Human Rights Commission has found that long-term detention without a known prospect of release correlates closely with deteriorating mental health.[11] Long-term detention is readily apparent in the Australian Opinions, with most Complainants experiencing prolonged and indefinite periods of detention. The Complainant in opinion 69/2021, for example, had spent almost 12 years in detention at the time of submission of his case to the WGAD. This Complainant has a history of mental health issues that developed as a result of his continued detention. Treating counsellors and psychiatrists had expressed consistent, repeated concern about the impact of his ongoing detention on his mental health and recommended that he be released into the community. However, this Complainant was only released in late 2021 following the significant deterioration of his 2018 leukaemia diagnosis.

The COVID-19 pandemic exacerbated the isolation and uncertainty of indefinite detention and continues to do so. The compound in which the Complainant in opinion 69/2021 was detained was locked down for extended periods due to COVID-19, which further restricted his access to medical facilities and visitors, negatively impacting his already fragile mental health.[12]

COVID-19 also led to the cancellation of court and tribunal hearings, creating further delay and uncertainty for individuals in detention. For example, opinion 71/2001 describes the circumstances of a young Afghan refugee who arrived in Australia on a child migrant visa. This Complainant had challenged the refusal of his protection visa on character grounds, but his court and tribunal dates were cancelled due to COVID-19 resulting in long delays and uncertainty. This was further complicated by deterioration in his mental health due to allegedly not receiving required close monitoring for severe post-traumatic stress disorder and schizophrenia.[13]

The Complainant in opinion 33/2022 faced a 16-month wait for a hearing at the Federal Court of Australia (**FCA**), during which time two ministerial intervention requests for relief from detention on mental health grounds were refused without referral.

[8] Opinion 68/2021, para [17].

[9] Opinion 68/2021, paras [5], [10], [17].

[10] Department of Immigration and Citizenship, Submission 32, Supplementary, p. 62.

[11] Australian Human Rights Commission Submission to the Joint Select Committee on Australia's Immigration Detention Network (2011), p. 28.

[12] Opinion 69/2021, paras [27-30], [105].

[13] Opinion 71/2020, para [18].

Significant delays in hearings and visa processing, plus bureaucratic complexity and avoidable bureaucratic mistakes impact the length of detention and mental health. Mistakes, delays, misinformation and a lack of clear procedures are repeatedly reported in the Australian Opinions. For example, in opinion 68/2021, HR4A submitted that officials failed to officially notify us of our client's imminent removal from Australia. In addition, the Department of Immigration claimed that our client had consented to his removal. However, HR4A advised the WGAD that '*the consent forms have someone else's name on them, are in English (which the Complainant cannot read or understand) and there is no evidence a translator was used, and two different people appeared to have signed the forms*".[14]

3.3 Lack of alternative compassionate or flexible options for the most vulnerable detainees

The Australian Opinions document repeated failures by the Australian Government (**Government**) to provide alternative and more compassionate or flexible options to address known vulnerabilities and circumstances of the Complainants. The Migration Act's mandatory detention provisions (which require a person to be detained until they are removed or a visa is granted) have resulted in people remaining in closed detention for up to 12 years when a bridging visa or residence determination would provide a compassionate alternative, especially where there are no significant character or criminal concerns.

The Complainant in opinion 71/2020, for example, suffers from schizophrenia, post-traumatic stress disorder and associated substance use. He had been convicted of several firearm offences and served a custodial sentence, triggering cancellation of his visa on character grounds. This Complainant has a history of trauma including reportedly being kidnapped and held captive for three years. His parents had believed him dead and were informed he had been found alive after they were granted refugee status and settled in Australia in 2002. The Complainant was reunited with his parents in 2005, when he arrived in Australia on a child migrant visa, aged 14. However, after the Complainant was convicted of several offences and served a period of imprisonment, the Minister cancelled his child visa on character grounds and the Complainant was detained. In its submission, the Government claimed that the Complainant was being held in an alternative place of detention owing to concerns for his safety.[15] However, the WGAD found that this 'alternative place of detention' was, in fact, a maximum-security prison and that, as at the date of the WGAD's findings, the Complainant had remained in solitary confinement for 23 hours a day since 20 December 2019.[16] The WGAD recognised that the Complainant has a substantial criminal record and could be considered a potential danger to the Australian community, however, it held that continual solitary confinement cannot be considered an *"alternative place of detention"*.[17]

[14] Opinion 68/2021, para [20].

[15] Opinion 71/2020, para [62].

[16] Opinion 71/2020, para [103].

[17] Opinion 71/2020, para [100].

In opinion 2/2019, the Complainant gave birth to a baby girl while in detention. The Complainant was given the option to sign a consent form for her baby to remain in detention as her guest or give her baby to her husband (the baby's father). HR4A contends this to be an "*impossible choice of being separated from her newborn or bringing her [newborn] into the detention environment*".[18] The Government refused to consider alternative or flexible arrangements. Instead, it submitted that it would be practical for the husband to take care of the baby, stating that "*[the] husband may have arrangements for leave without pay approved by his sponsoring employer, including paternity or parental leave. This would not be a breach of his visa conditions. In addition, he may place [the child] in childcare while he is at work*".[19] HR4A claimed that in suggesting this option, the Government did not consider or assess the ability of the husband to pay for childcare, take leave without pay or otherwise comply with his visa conditions. The child was detained for approximately two and a half years before HR4A helped secure her release and that of her mother in 2021.

Opinion 28/2022 highlights the barriers faced by LGBTQI asylum seekers who fear harassment and abuse in closed detention facilities and keep their status secret through fear of violence and continuing persecution. While in detention, the Complainant in this opinion was held in male-only shared accommodation in Nauru and Australia and feared that he may be harmed by other detainees and guards if he revealed his LGBTQI status. HR4A's submission supports the Complainant's fears, noting that "*LGBTQI asylum seekers experience more and worse harassment and abuse than other detainees in detention centres*".[20] The submission also notes that detention staff can fail to protect LGBTQI asylum seekers from abuse as they often lack insight into LGBTQI issues and can display discriminatory and biased behaviour towards them.[21] The Complainant only disclosed his LGBTQI status seven years after being initially detained in Australia. His case exemplifies the invidious position of LGBTQI detainees: "*LGBTQI asylum seekers are too afraid to initially disclose their LGBQTI status in their protection visa applications, and then are found not credible when they subsequently disclose such status*".[22]

[18] Opinion 2/2019, para [73].

[19] Opinion 2/2019, para [55].

[20] Opinion 28/2022, para [13].

[21] Opinion 28/2022, para [13].

[22] Opinion 28/2022, para [14].

4
RECURRING LEGAL ISSUES

4 The Australian Opinions – Recurring Legal Issues

4.1 Illegitimate reliance on the Migration Act to justify breaches of international human rights obligations

In all the Australian Opinions, the Government justified mandatory immigration detention as lawful because it is a legal requirement under the Migration Act.[23] In response, the WGAD has repeatedly reiterated its "*alarm at the rising number of cases from Australia concerning the implementation of the [Migration Act]*".[24] The WGAD has consistently declared that the Government's argument cannot be accepted as legitimate under international human rights law and that no State can legitimately avoid its international human rights obligations by relying on domestic laws and regulations. The WGAD has consistently declared that it is the duty of the Government to ensure the Migration Act complies with Australia's obligations under international human rights law and called on the Government to review this legislation without delay.

> *"No State can legitimately avoid its obligations arising from international law by hiding behind its domestic laws and regulations."*
>
> WGAD opinion 2/2019, para [116]

The right to seek asylum is a universal human right enshrined in the 1951 Refugee Convention relating to the Status of Refugees (**Refugee Convention**) and in article 14 of the UDHR. Australia is a signatory to the Refugee Convention and was one of the original 48 countries who adopted the UDHR.

The WGAD shares the Government's position that the deprivation of liberty in the immigration context must be a measure of last resort and alternatives must be sought to meet the requirement of proportionality. However, the interpretation of 'last resort' and 'proportionality' diverges widely between the two parties. While an initial period of detention may be lawful to determine a person's identity and record their claim, submitting people to extended periods of indefinite detention without specific, evidenced justification is arbitrary. Additionally, decision-making processes such as the Department of Home Affairs' Community Protection Assessment Tool were not designed by experts and have proven to be flawed and opaque.

The WGAD has found that several sections of the Migration Act are at odds with the requirements of international law, specifically sections 189(1) and 189(3) which provide for *de facto* mandatory detention of all unlawful non-citizens unless they are being removed from Australia or have been granted a visa. Furthermore, while stated by Australian politicians and bureaucrats as a principle, the Migration Act does not reflect that detention should only be used in exceptional circumstances in the context of migration and it does not provide for alternatives to detention to meet the requirement of proportionality.

[23] Opinion 68/2021, para [95].

[24] Opinion 68/2021, para [95].

The Government is obliged to comply with its international human rights obligations, but the Australian Opinions consistently find its mandatory detention laws do not comply. Instead, the Government has repeatedly used the Migration Act, a domestic law that is inconsistent with international obligations, to defend systematic and ongoing breaches of its international human rights signatory obligations.

4.2 No effective remedy to challenge the legality of continued administrative detention

In the *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, the right to challenge the lawfulness of administrative detention is stated to be a human right which is foundational to the preservation of legality in a democratic society.[25] Australia's Migration Act does not reflect this foundational requirement of a democratic society.

In the Australian Opinions, the WGAD has expressed concern over detainees' inability to challenge the legality of continued administrative detention under Australian law. Article 9(4) of the ICCPR provides that individuals who are deprived of their liberty by detention are entitled to bring proceedings before a court, to determine the lawfulness of their detention. The court must also have the means to order for their release should the detention be deemed unlawful. However, section 196(3) of the Migration Act provides that "*even a court*" cannot release an unlawful non-citizen from detention unless the person has been granted a visa. The WGAD is therefore perplexed by the Government's argument that the Complainant may bring an action like *habeas corpus*, since this action, "*which is aimed at challenging illegal detention, does not therefore provide a realistic avenue of redress*".[26] This is further reiterated by the United Nation's Human Rights Committee (**HRC**), which notes that as the domestic law currently stands, there is no effective legal remedy for individuals who are subject to administrative detention in Australia because such detention is permitted under Australian law.[27]

> ***What is Habeas Corpus?***
> *Habeas corpus* is a legal order that requires a detainee to be brought before a court for the court to determine whether their detention is lawful. If the court finds the detention unlawful, they can order the prisoner's release. It is important to note that *habeas corpus* is a protection against *illegal* detention. It is not a potential avenue for persons who are legally detained under the Migration Act.

The Government has stated in numerous submissions to the WGAD that an individual in detention may seek judicial review regarding the lawfulness of their detention before the Federal Court of Australia (**FCA**) or the High Court of Australia (**HCA**).[28] However, this position is in direct conflict with the decision of the HCA in *Al-Kateb v Godwi*n [2004] 219 CLR 562[29] (***Al-Kateb v Godwin***), which held that non-citizens cannot challenge the legality of their detention before a court.

The HRC examined the implications of *Al-Kateb v Godwin* and concluded that the effect of that judgment is that there is no effective legal remedy to challenge the legality of continued administrative detention under Australian law. The lack of effective remedies to detention was recently considered in *Commonwealth of Australia v AJL20* [2021] HCA 21 with the HCA confirming that a person can be detained for no purpose or an incorrect purpose without that impacting the legality of their detention.

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[25] A/HRC/30/37, paras [2]-[3].

[26] Opinion 74/2018, para [114].

[27] *Mr. C. v. Australia* (CCPR/C/76/D/900/1999).

[28] Under the Judiciary Act 1903 (Cth) s 39B(1) for the FCA and under the Australian Constitution s 75(v) for the HCA.

[29] *Al-Kateb v Godwin* [2004] 219 CLR 562 (***Al-Kateb v Godwin***).

> ***Al-Kateb v Godwin* [2004] 219 CLR 562**
> Ahmed Ali Al-Kateb, a Palestinian citizen born in Kuwait, travelled to Australia in 2000 without a passport or visa. His application for a temporary protection visa was rejected, a decision upheld by the Refugee Review Tribunal, and his appeal to the FCA was unsuccessful.
> After two years in immigration detention in Australia he expressed a desire to return to Kuwait or Gaza, however, no country would accept him, and his statelessness prevented him from being able to exercise any right to return to these places. He remained in detention as an unlawful non-citizen with no real prospect of removal in the reasonably foreseeable future. The HCA found that Mr Al-Kateb's indefinite detention was permitted under the Migration Act. It also found that the Migration Act was not unconstitutional.[30]

Additionally, the Government has frequently referenced the Commonwealth Ombudsman (**Ombudsman**) and an internal Case Management and Detention Review Committee (**Committee**) as a means to seek review of immigration detention decisions. This is a specious argument as neither of these bodies are judicial bodies, nor do either have the power to order a detainee's release as required by article 9(4) of the ICCPR. As the law currently stands, there is no independent review body that can order the Government to release individuals from detention.

4.3 Citizens and non-citizens not equal before the law

Another repeated concern of the WGAD is Australia's differential treatment of citizens and non-citizens, and of asylum seekers who arrive by boat and those who arrive by other means. Article 26 of the ICCPR prohibits discrimination on any ground and provides that all persons are equal before the law. However, the WGAD considers the HCA's interpretation of the Migration Act in *Al-Kateb v Godwin* has resulted in discrimination because while Australian citizens may challenge administrative detention before a court, non-citizens cannot.

The Government has challenged this interpretation of *Al-Kateb v Godwin*. Instead, it argues that the HCA affirmed the validity of the provisions of the Migration Act that require the detention of non-citizens until they are removed or granted a visa, even if removal is not reasonably practicable in the foreseeable future. Moreover, the Government rejected that a breach of its international obligations has occurred, instead arguing that the Migration Act regulates the arrival of non-citizens to Australia and thus, by definition, does not apply to citizens. It argues that this distinction is 'permissible legitimate differential treatment' given it is aimed at achieving a legitimate purpose that is based on reasonable and objective criteria and is proportionate to the aim to be achieved.

The WGAD has not accepted the Government's position and the discriminatory treatment under the Migration Act and as a result the *Al-Kateb v Godwin* decision has frequently been considered by the WGAD as a breach by Australia of its international obligations. The impact of *Al-Kateb v Godwin* is that there is no effective remedy to challenge the legality of continued administrative detention. The WGAD has held that this is discriminatory and contrary to article 16 and article 26 of the ICCPR.

[30] Cameron Boyle, Executive Detention: A Law unto Itself? A Case Study of Al-Kateb v Godwin, http://www5.austlii.edu.au/au/journals/UNDAULawRw/2005/8.pdf.

5 RECOMMENDATIONS

5 Recommendations

5.1 Urgent review and amendment of the Migration Act

In every Australian Opinion, the WGAD expressed its dissatisfaction with Australia's Migration Act, observing that in multiple instances, the functioning of the Migration Act contradicts the international law framework. It repeatedly recommends that the Migration Act be amended to align with Australia's obligations under international law.[31]

By aligning the Migration Act with the ICCPR, other international obligations and basic tenets of the rule of law, the risk of arbitrary detention in Australia would be reduced, as would the risks of inhumane treatment and mental and physical suffering that result from the current inflexible and mandatory approach. In particular, by allowing independent judicial bodies to assess the legitimacy, necessity and proportionality of a detention decision, for example by examining *habeas corpus* applications, there would be a legal check on executive decisions as there are for Australian citizens in similar circumstances. Similarly, removing mandatory detention as the sole option for certain asylum seekers and migrants, and instead allowing officials to consider the circumstances and needs of individual people, would reduce the number of arbitrary detentions and allow considered and humane treatment of vulnerable persons and groups.

5.2 Alternatives to closed detention

We support the WGAD's strong encouragement of the Government to consider alternative placement options instead of its current practice of using closed immigration detention centres, which have been designed, staffed and structured to closely resemble prisons. In several of the Australian Opinions, the WGAD observes that there was no evidence of viable alternatives to closed detention being considered by the Government.

The benefits of community placement have been widely promoted in the Australian Opinions and by various human rights groups.[32] In opinion 2/2019, HR4A contends that the Complainant's presence in a detention centre environment is the cause of many of her medical issues and if she were released into the community (including on a type of supervised residential placement), these issues would likely improve or be resolved.[33] In this opinion, which documents the continued detention of the Complainant and her daughter, the benefits of community placement, and the detrimental impacts of continued detention, are clear. Further, the child's interests should be prioritised in accordance with commentary from the Committee on the Rights of the Child.[34] The WGAD also reiterates that alternatives to detention in such cases must be considered and applied to the entire family unit.[35]

[31] Opinion 74/2018, para [114].

[32] Opinion 17/2021, para [32]; opinion 69/2021, paras [28]–[30].

[33] Opinion 2/2019, para [75].

[34] Committee on the Rights of the Child, General Comment No. 14 (2013), para [39].

[35] Opinion 2/2019, para [109].

In opinion 33/2022, the WGAD emphasised *"that the Government has made no indication as to when [the Complainant's] detention would cease"*[36] but it has made it clear that this would be "protracted" due to challenges associated with securing travel documents. In this regard the WGAD noted with concern HR4A's submission that the Complainant is in fact a stateless person, which the Government had chosen not to address. This led the WGAD to conclude that "protracted" may be equated with "indefinite" in this case as it would clearly be impossible to obtain travel documents for the Complainant from Iraq, which does not recognise him as its citizen. Despite the Government's stated position, the Complainant was released into community detention within weeks of the opinion being communicated. Revised Deliberation No. 5 is relevant here:

> *"There may be instances when the obstacle for identifying or removal of persons in an irregular situation from the territory is not attributable to them, including non-cooperation of the consular representation of the country of origin; the principle of non-refoulement;*[37] *or the unavailability of means of transportation, which render expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary."*[38]

The WGAD recognises that there are circumstances in which community placement is not appropriate. In the Australian Opinions, such circumstances arise when the individual has significant criminal convictions and poses a danger to the community.[39] However, closed detention should not be the automatic choice simply because community placement is not appropriate in the circumstances.

> *"The choice between community placement and detention does not satisfy the requirement to duly consider alternatives to detention."*
>
> WGAD opinion 74/2018, para [113]

Other alternatives should be considered in these circumstances, factoring in health and risk considerations and using a trauma-informed approach. This could include reporting at agreed intervals, sureties, or transitional accommodation.[40] These options should be properly resourced and regularly reviewed as an alternative form of residence determination (also known as "community detention"). Given the significant cost of closed detention in Australia – currently conservatively calculated at AUD$364,000 per year per detainee - this would offer a solution that respects human rights and is much less resource-intensive. This should be actively pursued, for example, through the regular Ombudsman reviews, rather than waiting for detrimental effects of detention to provide a trigger.

[36] Opinion 33/2022, para [98].

[37] A/HRC/13/30, para. [63]; opinion 45/2006; A/HRC/7/4, para [48]; A/HRC/10/21, para [82].

[38] See *C. v. Australia; Baban et al. v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004); *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia*.

[39] Opinion 42/2017, opinion 71/2017, opinion 20/2018, opinion 50/2018, opinion 74/2018, opinion 1/2019, opinion 74/2019, opinion 35/2020, opinion 71/2020, opinion 69/2020.

[40] WGAD 2021 annual report (A/HRC/48/55).

6
CONCLUSION

6 Conclusion

Every Australian Opinion to date has held that the circumstances of a Complainant's deprivation of liberty amount to arbitrary detention in breach of Australia's international obligations. Taken as a group, the Australian Opinions demonstrate the systemic failures of Australia's immigration detention laws, policies and practices, including:

- failures to comply with international human rights obligations;
- failures to address the severely detrimental, widely documented mental and physical health impacts of indefinite detention; and
- failures to meet basic tenets of a democratic society and of a legal system, such as equality before the law and the ability to seek review of executive decision-making by independent judicial bodies.

6.1 Solutions

We call on the Government to acknowledge these breaches and address the recommendations made by the WGAD, namely by immediately releasing the Complainants in all the Australian Opinions, by urgently reviewing and amending the Migration Act to align with international law, and by introducing humane, proportionate and reasonable alternatives to mandatory detention. More specifically, we call on the Government to consider the following long-term solutions:

- **Amending the Migration Act**: These amendments could include repealing mandatory detention and introducing minimum standards for the conditions and treatment of people in detention. In addition, a mandatory maximum period of detention should be legislated. The current average length of 726 days in detention is the highest recorded and far exceeds the averages in the United States (55 days) and Canada (14 days).[41] An attempt to introduce these changes under the *Ending Indefinite and Arbitrary Immigration Detention Bill 2021* was unsuccessful under the past Government.
- **Introducing a Human Rights Act for Australia**: A Human Rights Act would enshrine the right to liberty and ensure that the human rights of asylum seekers and refugees are front of mind for politicians, public servants and other relevant decision makers when making legislative or executive decisions. Additionally, this act could introduce enforceable remedies in circumstances where human rights are not respected.
- **Introducing a visa for stateless people**: This visa would specifically account for the stateless people in immigration detention and provide an option other than indefinite detention for those who are stateless and unable to travel to a country other than Australia.
- **Introducing independent bodies:** Regular, independent monitoring of detention facilities would help ensure that they are compliant with international human rights and an independent regulatory body with enforcement powers to release detainees would help to balance the Government's power.

[41] Human Rights Watch, Submission by Human Rights Watch on the Inquiry into the Ending Indefinite and Arbitrary Immigration Detention Bill 2021, https://www.hrw.org/news/2022/02/15/submission-human-rights-watch-inquiry-ending-indefinite-and-arbitrary-immigration.

- **Increasing appropriate use of ministerial intervention powers:** Increasing appropriate use of ministerial intervention powers for visa grant, residence determination and lifting the bar to allow people to reapply for protection visas would increase the efficiency of the current system and award more options for freedom to detainees.

- **Improving processing speeds:** Addressing current delays within the Department in reviewing and processing visa applications and appeals is vital. Introducing time limits for processing applications when someone is in detention and improving the speed of security and identification checks, as well as requests for information relevant to applications and appeals such as Freedom of Information requests, would help to limit detention length, have positive impacts on the mental health of detainees and decrease personal and family trauma. Additionally, addressing opaque processes that prolong detention, such as the Department's Community Protection Assessment Tool, which was designed by a bureaucrat rather than a qualified criminologist and is being routinely withheld when requested, would minimise unnecessary and harmful delays.

- **Separate immigration detention accommodation (violent and non-violent detainees):** Providing separate immigration detention accommodation for the three different cohorts of detainees (asylum seekers, refugees with visa cancellations, migrants with visa cancellations), based on whether they have criminal records or character concerns, would help to protect those in detention and ensure that the risk of physical injuries in detention are minimised.

- **Providing human rights training for staff**: This training would ensure that Government and detention service staff engaging with asylum seekers and refugees in detention facilities are aware of the importance of protecting human rights and are equipped to deal with vulnerable, traumatised or unwell people.

- **Implementing a trauma-informed approach:** Implementing a trauma-informed approach to assessing criminal records and character concerns would minimise the detrimental impact of the current system on already traumatised individuals. Additionally, providing half-way house style accommodation would assist people who cannot be returned to their country of origin to reintegrate into the Australian community.

- **Increasing community detention**: This would allow people to live in the community instead of in closed detention while their immigration status is being resolved. Under the Migration Act, the Minister for Home Affairs can make residence determinations, which determine where someone must live but do not generally require that they are under physical supervision. While they may have regular check-ins and are unable to work, this option provides people with more freedom.

- **Increasing the number of bridging visas**: These temporary visas allow people to move freely in the community while their immigration status is being resolved. Depending on the restrictions specific to a person's bridging visa, people may undertake employment.

APPENDIX A: DEFINITIONS

Appendix A Definitions

AAT	Administrative Appeals Tribunal
ASIO	Australian Security Intelligence Organisation
Migration Act	Migration Act 1958 (Cth)
Al-Kateb v Godwin	*Al-Kateb v Godwin* (2004) 219 CLR 562
Australian Opinions	The 21 opinions adopted by the WGAD relating to immigration detention in Australia since 2017, namely opinions 28/2017, 42/2017, 71/2017, 20/2018, 21/2018, 50/2018,74/2018, 1/2019, 2/2019, 74/2019, 35/2020, 70/2020, 71/2020, 72/2020, 17/2021, 68/2021, 69/2021, 28/2022 and 33/2022
Category I	Detention is arbitrary when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her)
Category II	Detention is arbitrary when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the UDHR and, insofar as State parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR
Category III	Detention is arbitrary when the total or partial non-observance of the international norms relating to the right to a fair trial, established in the UDHR and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character
Category IV	Detention is arbitrary when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy
Category V	Detention is arbitrary when the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings
Complainant	The individual whose circumstances are being discussed
Committee	Case Management and Detention Review Committee
Department	Department of Home Affairs
FCA	Federal Court of Australia
FCFCA	Federal Circuit and Family Court of Australia (previously the Federal Circuit Court of Australia or FCC)
Government	Australian Federal Government

HCA	High Court of Australia
HR4A	Human Rights for All
HRC	United Nation's Human Rights Committee
IAA	Immigration Assessment Authority
ICCPR	The International Covenant of Civil and Political Rights
IHMS	International Health and Medical Services
Minister	Minister for Home Affairs or Minister for Immigration
Ombudsman	Commonwealth Ombudsman
UDHR	Universal Declaration of Human Rights
WGAD	United Nation's Working Group on Arbitrary Detention

APPENDIX B: SUMMARIES OF THE AUSTRALIAN OPINIONS

Appendix B Summaries of the Australian Opinions

1. Opinion 2/2019

1.1 Summary of key facts

The Complainant is a young Vietnamese woman who arrived in Australia by boat in 2011 and sought asylum on the basis of her religious beliefs. As the Complainant arrived in Australia via boat, under the Migration Act she was required to be personally invited by a relevant minister to apply for a protection visa. The Government has never invited the Complainant to apply for such a visa. As such, the Complainant's protection claims have never been properly assessed by the Government.

The Complainant was detained until 2012 when she was placed in community detention. The Complainant left the community detention placement without permission after witnessing other young Vietnamese asylum seekers being forcibly removed from Australia to Vietnam. The Complainant was detained for a second time in 2017 after submitting an invalid protection visa application which alerted the Department to her location (this application was invalid because she had not been invited to apply for a protection visa by a relevant Minister). The Complainant was pregnant to her Mauritian husband when she was detained for a second time.

In January 2018, the Department attempted to forcibly remove the Complainant. This removal attempt was stopped on the plane as the Complainant was approximately seven months pregnant and unfit to travel due to complications with the pregnancy. In March 2018, the Complainant gave birth to her daughter. Shortly before the Complainant's daughter's birth, the Complainant was presented with the consent form by the Department, which provided that she waive all claims against the Department for the Complainant's daughter being raised as a 'guest' in immigration detention with the Complainant. The Complainant was informed that if she did not sign the consent, the Complainant's daughter would not be permitted to reside with her in detention and would be removed from her when she left the hospital following the birth. The Complainant signed the form.

The Complainant's daughter spent the first two and a half years of her life in immigration detention, until she was freed with her mother in mid-2020.

1.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant and the Complainant's daughter:

- the Complainant's decision to sign a consent form for her baby to live with her in detention as a 'guest' was made under duress because she had to choose between being separated from her baby immediately after birth or consenting for her daughter to be held in detention with her. The Complainant desired to bond with her daughter, including by breastfeeding, which meant it was practically impossible for the Complainant's daughter to reside with her father in the community. This would have also been incompatible with the father's work commitments, visa conditions and visitation rights. As such, while the Complainant's daughter was not officially detained under the Migration Act, she was, as a newborn, *de facto* the subject of open-ended administrative detention;

- the Complainant's daughter is stateless. She does not hold citizenship in either Vietnam or Mauritius. As such, the Complainant's daughter cannot be removed to any country from Australia. This increased her risk of open-ended administrative detention;

- the health of both the Complainant and the Complainant's daughter deteriorated in detention. While the Complainant was diagnosed with severe depression, the Complainant's daughter exhibited signs of attachment-related anxiety and was at risk of developmental problems due to her mother's depression and prolonged detention. The Complainant did not receive appropriate postnatal care and the situation of her infant daughter was urgent due to the ongoing harm that detention was causing her at a vital stage in her development;

- the Complainant has been deprived of liberty because she exercised her right to seek and enjoy asylum under article 14 of the UDHR. The Complainant's treatment by the Government was also in contravention of her right to be equal before the law under article 26 of the ICCPR (when compared to others in the Australian community not subject to indefinite detention, and particularly asylum seekers who had not arrived via boat). The Complainant's daughter was also deprived of liberty because her mother sought asylum and was discriminated against as she is stateless (again, when compared to others in the Australian community, particularly children born to Australian parents);

- the Complainant was not guaranteed the possibility of meaningful administrative or judicial review or remedy and the limited avenues for judicial review were exhausted;

- given Australia's legislation and case law,[42] the Complainant had no right to challenge her administrative detention;

- HR4A disputed the Government's claim that the cause of the Complainant's daughter's ongoing detention lay with the Complainant and her partner. The Complainant was faced with the impossible choice of being separated from her newborn baby or bringing her into detention. It was also unreasonable to expect her partner, who is also financially responsible for his mother, to request leave without pay to care for his daughter. Further, there is no evidence that the employer would have been able to grant this request. Finally, the Complainant's daughter's father could not remain in Australia long term (i.e. for his daughter's childhood) unless he met the conditions of his work visa, which required him to work;

- the Government did not acknowledge that the Complainant's personal circumstances had changed since she absconded in 2012, given her relationship with her partner and the birth of her daughter. HR4A criticised the Government's failure to acknowledge that the Complainant feared she and her infant daughter would be harmed if she were to return to Vietnam, and the Complainant's daughter would be separated from her father; and

- HR4A reiterated that (at the time of the complaint to the WGAD) the Complainant's daughter was 10 months old and had spent her entire life in detention. HR4A continued to dispute the quality of the medical care provided to the Complainant and her daughter.

[42] See summary of *Al-Kateb v Godwin* on page 10.

1.3 The opinion of the WGAD

The Complainant

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant was arbitrary, discriminatory and contrary to international law. The WGAD:

- criticised the Government for apportioning blame to the Complainant;
- observed the repeated failure by the Government to explain how the reviews carried out by the Committee, which is a non-judicial body, satisfy the guarantees encapsulated in the right to challenge the legality of detention enshrined in article 9 of the ICCPR;
- found that the Government did not explain how non-citizens can effectively challenge their continued detention as required by articles 9 and 26 of the ICCPR; and
- agreed with the HRC that the impact of Al-*Kateb v Godwin*[43] is that there is no effective remedy to challenge the legality of continued administrative detention.

The Complainant's daughter

The WGAD found that the detention of the Complainant's daughter was arbitrary and contrary to international law. The WGAD:

- rejected the Government's argument that the Complainant's daughter was not detained because the Complainant requested that her child be allowed to stay in the detention facility, given that the Complainant had little choice if she was to raise her newborn baby;
- claimed that the signed consent form was an attempt by the authorities to circumvent the prohibition of detention of children in the context of migration;
- observed that no judicial body has ever examined the detention of the Complainant's daughter while taking into account the best interests of the child as the primary consideration; and
- noted that since remaining with her mother and being free is in the Complainant's daughter's best interests, her mother's detention status should not have been allowed to dictate her detention.

1.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant and the Complainant's daughter;
- accord the Complainant and the Complainant's daughter an enforceable right to compensation and other reparations; and
- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

[43] See summary of case on page 10.

1.5 Significance

This case is significant as it concerns the detention of a heavily pregnant woman (with pregnancy complications), the birth of a stateless child in an Australian detention centre and the Government forcing a mother to make an impossible decision to raise her daughter in detention or be separated from her daughter from birth.

There is also the question of the rights of the child under the Convention on the Rights of the Child, given both mother and father were available and committed to active parenting. For example, during extended COVID-19 lockdowns, the Complainant's daughter was unable to have daily visits with her father and no alternative was provided.

1.6 Current status

In mid 2020, the Complainant and the Complainant's daughter were granted temporary visas and freed from detention. Their status in Australia remains insecure.

2. Opinion 74/2018

2.1 Summary of key facts

The Complainant arrived in Australia in 2013 with his mother when he was 16 years old. He and his mother were immediately detained by the Department, because they arrived via boat seeking asylum. The Complainant and his mother are stateless people from Iran. In 2014, the Complainant and his mother were referred for consideration by the Minister for a possible placement in community detention. This referral reportedly indicated that the offshore processing centres did not currently have the services available to manage the Complainant's significant mental health needs, and there was no evidence that they posed a risk to the Australian community.

In June 2014, the Minister indicated that he would allow the Complainant and his mother to reside in community detention. The Minister, however, decided not to permit the Complainant and his mother to reside in the community after the Complainant received a caution by a Court for behaviour in detention. The Complainant was still a child at this time and struggled to manage his mental and intellectual needs in closed detention.

In September 2015, the Minister intervened to allow the Complainant and his mother to lodge an application for a protection visa. While their protection visa application was initially rejected by the Department, a review body (the IAA) sent their application back to the Department with a direction that they were refugees within the meaning of the Migration Act. In 2016, the Complainant's mother was granted a five-year protection visa and released from detention. The Complainant was not released. In 2017, the Complainant was issued with a notice of intention to consider refusal of the grant of a protection visa. A response was submitted by his legal representatives and, at the time of the opinion, the Complainant was awaiting the Department's decision to grant him a protection visa, or leave him in detention.

2.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- the Complainant has been deprived of his liberty because he exercised his right to seek and enjoy asylum under article 14 of the UDHR. The Complainant's treatment by the Government was also in contravention of his right to be equal before the law under article 26 of the ICCPR (when compared to others in the Australian community not subject to indefinite detention, and particularly asylum seekers who had not arrived via boat);
- the Complainant had been held in administrative detention for more than four and a half years since he arrived in Australia at the age of 16;
- the Government and Department found the Complainant to be a refugee and through the grant of his mother's visa, have recognised him as a person who deserves Australia's protection;
- any return of the Complainant to Iran would constitute refoulement;
- the Complainant lacks any chance of his detention being the subject of a real administrative or judicial review remedy;

- given Australia's legislation and case law,[44] the Complainant has no right to challenge his administrative detention; and

- the Complainant's right to a fair trial has not been afforded as guaranteed under articles 9 and 10 of the UDHR and article 9 of the ICCPR.

2.3 The opinion of the WGAD

Following submissions of the Government to the WGAD, the WGAD found that the detention of the Complainant was arbitrary, discriminatory and contrary to international law. The WGAD:

- concluded that the Complainant was detained due to the exercise of his legitimate rights under article 14 of the UDHR;

- noted that alternatives to detention must be sought and while community placement was considered, the choice between community placement and detention does not satisfy the requirement to duly consider alternatives to detention;

- observed that the Government had not responded to the submission made by HR4A concerning the assessment reports about the Complainant, which made it clear that the confined environment is exacerbating his mental health concerns;

- observed the repeated failure by the Government to explain how the reviews carried out by the Committee, which is a non-judicial body, satisfy the guarantees encapsulated in the right to challenge the legality of detention enshrined in article 9 of the ICCPR;

- found that the Government did not explain how non-citizens can effectively challenge their continued detention as required by articles 9 and 26 of the ICCPR;

- agreed with the HRC that the impact of *Al-Kateb v Godwin*[45] is that there is no effective remedy to challenge the legality of continued administrative detention; and

- expressed their concern that when the Complainant arrived in Australia, he was 16 years old and noted that this engaged the Government's obligations under articles 2, 22, 24, 28 and 37 of the Convention on the Rights of the Child.

2.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;
- accord the Complainant an enforceable right to compensation and other reparations; and
- investigate the violations in this matter.

[44] See summary of *Al-Kateb v Godwin* on page 10.

[45] Ibid.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

2.5 Significance

This case involves a stateless child with significant mental health concerns arriving in Australia seeking asylum, only to be separated from his mother and indefinitely detained. The combination of the Complainant's mental health issues and mild intellectual disability means he struggles to cope in indefinite detention and is often identified by the Department as having behavioural concerns.

2.6 Current status

The Complainant remains separated from his mother and in detention. He has not been granted a protection visa. He is at significant risk of serious self harm and suicide. HR4A continues to act for the Complainant and fight for his liberty.

3. Opinion 28/2022

3.1 Key facts

The Complainant is an Iraqi citizen who arrived in Australia by boat in December 2012 to seek asylum. The Complainant was immediately detained on arrival. In January 2013, the Complainant was transferred for offshore processing to a detention centre in Nauru and then, in August 2013, he was transferred back to detention in Australia to commence his status resolution process in Australia. The Complainant was not invited to apply for a protection visa until 2016, more than four years after he arrived in Australia. In April 2017, the Complainant's protection visa application was rejected, a decision that was later upheld by the IAA. A ministerial intervention request to permit the Complainant to reside in the community was rejected in August 2019.

While in detention, the Complainant has suffered severe mental health issues, including self-harm (including sewing his lips together). In November 2019, the Complainant disclosed to the Department his attraction to people of the same sex and his relationship with a member of the same sex. Thus far, the Department has refused to examine this information as part of the Complainant's protection claim.

3.2 HR4A's submissions

HR4A submitted that the Complainant's protection claim based on being attracted to the same sex must be examined by the Department to ensure the Complainant is not returned to a place of harm. HR4A submitted that the Complainant, quite reasonably, did not disclose his sexual orientation in his initial protection visa application as he was uncomfortable making this disclosure while in detention in male-only shared accommodation and as he feared being harmed by other detainees and guards. HR4A stressed that LGBTQI asylum seekers experience more frequent and severe harassment than other detainees in detention centres, particularly as detention staff often lack understanding of LGBTQI issues and can display discriminatory behaviour towards them.

HR4A identified the following issues in the Government's treatment of the Complainant:

- despite the Complainant filing an appeal before the FCC almost three years ago, no court date had been set for a final hearing;
- the Complainant had no external visitors in almost two years and only spoke to his legal counsel over the phone due to border closures and restriction on visitors to the detention centre as a result of COVID-19 protection protocols. Instead of releasing detainees with no criminal records, like the Complainant, in accordance with World Health Organisation recommendations, the number of detainees increased during COVID-19;
- the Department's denial that Australia is responsible for individuals detained in Nauru is misleading as the Government built, administers and funds the Nauru detention centre;
- detention was not used as a last resort for the Complainant, who was immediately detained upon arrival in Australia;
- there is no mechanism under Australian law for the Complainant to challenge his detention, since the detention is authorised under the Migration Act; and
- citizens and non-citizens are not equal before the law, as while citizens can challenge administrative detention, non-citizens cannot.

3.3 The opinion of the WGAD

The Government made its submissions late, despite being granted an extension of time to lodge their submissions. As such, the WGAD did not consider them. The WGAD found that the detention of the Complainant was arbitrary, discriminatory and contrary to international law. The WGAD:

- clarified that no State can legitimately avoid its obligations arising from international human rights law by hiding behind its domestic laws and regulations;
- observed that during the Complainant's detention for over ten years, there was no evidence that the Government engaged in assessing the need for detention or whether a less restrictive measure would be suitable, as required by international law;
- did not accept that detention for nearly ten years could be described as a brief initial period and noted that the Government has not presented any reason specific to the Complainant that would justify his detention;
- noted that the Complainant was subject to *de facto* detention due to his immigration status, which the WGAD determines is a clear breach of articles 2 and 9 of the ICCPR;
- concluded that during his ten years of detention, no judicial body assessed the legality of the Complainant's detention or the proportionality of such detention to his individual circumstances;
- agreed with the HRC that the impact of *Al-Kateb v Godwin*[46] is that there is no effective remedy to challenge the legality of continued administrative detention. It found this situation discriminatory and contrary to article 26 of the ICCPR;
- expressed its serious concern over the state of the Complainant's mental and physical health, which severely deteriorated following nearly ten years of detention; and
- noted that it is disturbed by HR4A's allegations regarding the interviews that the Complainant and other LGBTQI asylum seekers are subjected to, which appear to discourage asylum seekers from disclosing their status and as such, the WGAD referred this case to the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity for further consideration.

3.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;
- accord the Complainant an enforceable right to compensation and other reparations; and
- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

[46] See summary of case on page 10.

3.5 Significance

This case is significant because it demonstrates the difficulties faced by LGBTQI detainees in immigration detention centres, who may be afraid to initially disclose their LGBTQI status in their protection visa applications and then can be found not credible when they subsequently disclose this information.

3.6 Current status

The Complainant was released in early August 2022, after almost a decade in detention.

4. Opinion 33/2022

4.1 Key facts

The Complainant is a Faili Kurdish man born in Iraq. The Complainant and his family were affected by Decree 666 (1980-2004), passed by Saddam Hussein's regime, which identified Faili Kurds as 'enemies of the state' and led to the confiscation of their property and many Faili Kurds being detained or deported (with at least 200,000 deported). As a five-year-old, the Complainant was jailed with his family for over a year, where they suffered severe abuse and torture. The Complainant and his family were then deported to Iran in 1984, where they lived in a closed detention camp until an amnesty enabled them to leave in 1995.

The Complainant arrived in Australia by boat in August 2013 seeking asylum as a stateless person. Upon his arrival in Australia, the Complainant was detained in Christmas Island's North-West Point Immigration Detention Centre.

The Complainant was invited to apply for a protection visa in September 2015. In March 2017, the Department rejected the Complainant's protection visa application. In December 2019 the HCA found his case had been impacted by apprehended bias and the matter was remitted back to the Department. In February 2020, the IAA again affirmed the Department's decision to deny the Complainant a protection visa. Since the HR4A submission was made, the Complainant's lawyers made further appeals in light of the Department again sharing irrelevant, prejudicial information with the IAA reviewer. In January 2022, the Complainant withdrew from further appeals.

Before and during his detention, the Complainant has suffered extensive mental health issues, including complex post-traumatic stress disorder, detention fatigue, anxiety, depression and chronic grief. He has also reported experiencing visual and auditory hallucinations.

The Complainant has a long-term Australian citizen partner, who has made numerous requests for ministerial intervention and supported litigation to address his health rights, including the practice of handcuffing immigration detainees for medical treatment.

4.2 HR4A's submissions

HR4A submitted that the Complainant is stateless and unable to voluntarily or involuntarily return to Iraq or Iran. As such, unless the Complainant is released in the Australian community, he faces indefinite detention. If, somehow, the Complainant were to return to Iraq or Iran (despite there being no realistic possibility of this), the Complainant would be vulnerable to persecution and discrimination. HR4A identified the following issues in the Government's treatment of the Complainant:

- the Complainant remained in detention despite raising evidence regarding the damage of closed detention on his mental and physical health;
- there was no reasonable explanation as to why the Complainant could not reside in the community with his partner, who is an Australian citizen;
- immigration detention was not used as a last resort (which is a requirement under international human rights law), given that the Complainant was mandatorily detained on arrival in accordance with the Migration Act;

- despite the Complainant's trauma history and mental issues being recorded within weeks of arriving in Australia, Departmental case reviews considered the Complainant's involvement in various incidents while in detention as a barrier to the Complainant being released from detention. While in detention, the Complainant was involved in a number of incidents relating to protecting vulnerable asylum seekers and protesting against indefinite detention;

- the Complainant was not afforded procedural fairness in his protection claim. For example, the Complainant never saw or had a chance to respond to what was found to be 48 pages of irrelevant, prejudicial information provided by the Department to the IAA on 23 March 2017;

- there is no evidence that an independent assessment of the appropriateness of the Complainant's detention was ever undertaken; and

- given Australia's legislation and case law,[47] the Complainant had no right to challenge his administrative detention.

4.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant is arbitrary, discriminatory and contrary to international law. The WGAD:

- was again alarmed at the rising number of cases emanating from Australia and wished to make it absolutely clear that detention cannot be considered lawful purely because it is allowed under the Migration Act;

- noted the Government gave no indication as to when the Complainant's detention would end but instead made it clear that the Complainant's detention would be protracted;

- concluded that the Complainant's detention is indefinite as it would be impossible to obtain travel documents for him from Iraq, which does not recognise him as its citizen;

- did not accept that detention for nearly ten years could be considered as a brief initial period as required under international human rights law;

- criticised the Government's failure to justify the necessity or proportionality of detaining the Complainant;

- found that reviews completed by the Ombudsman did not satisfy article 9(4) of the ICCPR;

- agreed with the HRC that the impact of *Al-Kateb v Godwin*[48] is that there is no effective remedy to challenge the legality of continued administrative detention; and

- expressed its very serious concern over the state of the Complainant's mental and physical health which had severely deteriorated in detention and reminded the Government that persons deprived of their liberty are to be treated with respect for their human dignity, as per article 10 of the ICCPR.

[47] See summary of *Al-Kateb v Godwin* on page 10.

[48] Ibid.

4.4 Conclusion/Next Steps

The WGAD requested the Government to, without delay:

- release the Complainant;
- accord the Complainant an enforceable right to compensation and other reparations; and
- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

4.5 Significance

This case demonstrates the difficulties experienced by stateless individuals to obtain necessary identification documents to support a protection visa application. Such difficulties often result in prolonged or indefinite detention. It also highlights the severe mental health consequences associated with prolonged detention, particularly for individuals who have already suffered abuse and torture in the country they are fleeing.

4.6 Status

The Complainant was released in May 2022 on a residence determination. His Australian citizen partner has relocated to Perth from Melbourne to be with him, but they cannot live together (or spend the night together without permission) because of the strict rules governing community detention.

5. Opinion 71/2017

5.1 Key facts

The Complainant is a stateless man who arrived by plane in 2010 to seek asylum in Australia. The Complainant was detained upon arrival by the Department.

The Complainant has no documents to prove his identity or nationality. He believes he was born in the Canary Islands in March 1989, and spent approximately six years living in, or close to, the Western Sahara region. At six years old, he believes he was taken to Las Palmas and then to Madrid to reside in an orphanage. From 1998 to 2004, he lived in Paris as a street child, in Belgium as a domestic servant (likely as a victim of human trafficking and slavery), and in the Netherlands in an open refugee camp and on the streets. In 2002, the Complainant was picked up by a criminal gang, and in 2004 he relocated to Norway. After reportedly trying to leave the gang on multiple occasions, the Complainant was assaulted and threatened by a gang member. The Complainant arrived by plane in Australia in 2010 and claimed asylum on the basis of the harm he feared from criminal gangs in Norway and the inability of the Norwegian government to protect him. While the Complainant had a temporary Norwegian visa, this expired while he was in detention in Australia. The Norwegian Government has since refused to grant him another visa.

The Complainant has applied for protection visas on three occasions. All applications were denied. In 2018, the Complainant challenged his detention in the HCA, which found that it did not have sufficient facts to determine the case because the Complainant's identity might be discovered at some point in the future.

5.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- the Complainant has been deprived of his liberty because he exercised his right to seek asylum under article 14 of the UDHR;
- the Complainant's continued detention is the result of the inability of the Complainant or the Minister to prove his identity. Given the Complainant's history, the Complainant does not have any formal identification documents. As such, the Complainant is being detained while the Minister pursues an impossible goal; and
- given Australia's legislation and case law,[49] the Complainant has no right to challenge his administrative decision.

5.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant is arbitrary, discriminatory and contrary to international law. The WGAD:

- highlighted that deprivation of liberty should be a matter of last resort and that detaining asylum seekers should only occur for a brief initial period to document their entry, record their claims and determine their identity if it is in doubt. Nearly eight years of detention cannot be justified against the requirements of reasonableness, necessity and proportionality required by article 9 of the ICCPR;

[49] See summary of *Al-Kateb v Godwin* on page 10.

- acknowledged the challenges associated with confirming the Complainant's identity and that such an extreme example of statelessness may render the Complainant's identity impossible to determine;
- highlighted that since the date of his detention, the Complainant has not been able to challenge the legality of his continued detention before a judicial authority; and
- confirmed that the effect of *Al-Kateb v Godwin*[50] is that Australian citizens can challenge administrative detention while non-citizens cannot. This leaves non-citizens with no effective remedy against their continued detention.

5.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;
- accord the Complainant an enforceable right to compensation and other reparations; and
- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

5.5 Significance

This case is significant as it demonstrates how statelessness and a lack of formal identification documents can result in a denial of human rights, including indefinite detention.

5.6 Current status

The Complainant remains in detention. He has been detained for 13 years. HR4A continues to fight for his liberty.

[50] Ibid.

6. Opinion 71/2020

6.1 Summary of key facts

The Complainant is from Afghanistan. The Complainant was kidnapped as a child in Afghanistan, and his family presumed he had been murdered. The Complainant's family, believing him dead, travelled to Australia in 2002. Three years later, the Complainant was found alive but having suffered terrible abuse. The Complainant arrived in Australia in 2005 on a child visa to join his family. The Complainant has been diagnosed with chronic post-traumatic stress disorder and schizophrenia.

From 2008-2017 the Complainant was convicted of several offences, for some of which he was found unfit to be tried due to his mental health issues.

In 2015, the Minister cancelled the Complainant's child visa on character grounds for having been sentenced to a period of imprisonment for more than 12 months. In March 2017, the Complainant lodged an application for a protection visa, which was refused due to his criminal record. In June 2017, after being released from criminal custody, the Complainant was immediately transferred to immigration detention under the Migration Act.

The Complainant appealed the rejected visa application to the AAT. In February 2019, the AAT found that he was a refugee under the Migration Act and his matter was sent back to the Department for reconsideration. The Complainant had also appealed the cancellation of his child visa to the FCA. Just before the hearing, the Department instructed its legal representative to concede, resulting in the Complainant's visa being reissued. However, his visa was again cancelled later that same day based on character grounds and the Complainant was transferred to a prison, despite not being subject to criminal detention. The Complainant's child visa had also been reinstated and cancelled on the one day in December 2019. In January 2020, the Department again refused the Complainant's protection visa. While this decision was appealed, the hearing date was delayed due to COVID-19.

6.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- despite the known danger to the Complainant and his poor mental health, the relevant ministers have not considered his case for ministerial intervention with any sense of urgency;
- the two occasions on which the Government immediately cancelled the Complainant's visa after it was reinstated imply the Government was seeking to avoid FCA proceedings and the scrutiny of the court;
- the Complainant's mental health has deteriorated because of his detention. The Department, however, had informed the Complainant that he cannot be transferred to an administrative detention centre due to threats to his life. The Complainant's requests to be transferred from prison to the detention centre have all been denied. There is no correspondence or feedback outlining the reasons for keeping the Complainant in prison against the advice of medical and legal professionals;
- administrative detention in a prison is punitive and the Government is effectively punishing the Complainant for being the victim of threats and mentally ill, given the Government has recognised the link between his serious mental health issues and offending;
- detention of unlawful non-citizens is not treated as a last resort as it is mandatory under the Migration Act;

- the Ombudsman has no power to change the Complainant's conditions and thus this review mechanism is insufficient. The Migration Act allows arbitrary, open-ended detention and if he were not an unlawful non-citizen, he would not be liable for detention;

- any removal of the Complainant from Australia to Afghanistan would constitute refoulement since he has been recognised as being owed protection obligations;

- the Complainant lacks any chance of his detention (as opposed to his visa applications) being subject to a real judicial review;

- given Australia's legislation and case law,[51] the Complainant has no right to challenge his administrative detention; and

- the Complainant has been deprived of his liberty because he exercised his right to seek asylum under article 14 of the UDHR, which contravenes his right to be equal before the law under article 26 of the ICCPR.

6.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant is arbitrary, discriminatory and contrary to international law. The WGAD:

- criticised the Government's failure to explain the two occasions when the Complainant's visa was cancelled on the same day it was reinstated;

- criticised the decision to place the Complainant in a maximum-security prison, especially as the Government failed to respond to the claim that he was in solitary confinement for 23 hours a day;

- found that his detention was punitive and indefinite, and that the Complainant did not have the option of challenging the legality of his detention before a judicial body in breach of articles 2 and 9 of the ICCPR;

- found that the Government did not explain how non-citizens can effectively challenge their continued detention as required by articles 9 and 26 of the ICCPR; and

- agreed with the HRC that the impact of *Al-Kateb v Godwin*[52] is that there is no effective remedy to challenge the legality of continued administrative detention. It found this situation discriminatory and contrary to article 26 of the ICCPR.

6.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;
- accord the Complainant an enforceable right to compensation and other reparations; and
- investigate the violations in this matter.

[51] See summary of *Al-Kateb v Godwin* on page 10.

[52] Ibid.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

6.5 Significance

This case demonstrates the lack of a trauma-informed approach to refugees who have suffered significant abuse, and the use of prisons as places of administrative detention.

6.6 Current status

HR4A is unaware of the Complainant's whereabouts, but has been provided with no evidence that he has been released into the Australian community.

7. Opinion 68/2021

7.1 Summary of key facts

The Complainant is Bangladeshi and arrived on Christmas Island, Australia in 2013 by boat to seek asylum. The Complainant was detained on arrival.

A week after arriving in Australia, the Complainant was transferred to the Nauru Regional Processing Centre. This Centre is an Australian funded and run detention centre on Nauru. While in detention, the Complainant suffered a significant brain injury and repeatedly self-harmed. While on Nauru, the Complainant's refugee status was recognised by the Nauruan Government.

In February 2015, the Complainant was brought to Australia for psychiatric treatment and then returned to Nauru in June 2015. In December 2018, the Complainant was again brought to Australia for urgent medical care. In 2019, the Complainant was released into the community on a residence determination placement where, due to his significant health needs, he was placed in assisted care.

In late May 2019, the Complainant became lost after a walk and was unable to find his way back to the assisted care accommodation. He was missing for three days and was eventually found confused and hungry wandering the streets. As a result, the Minister cancelled the Complainant's residence determination and he was returned to closed detention.

The Complainant has significant physical and mental health issues, including schizophrenia, post-traumatic stress disorder and internal bleeding from a duodenal ulcer and a bacterial gastrointestinal infection.

7.2 HR4A's submissions

HR4A expressed concern at the revocation of the Complainant's residence determination and the refusal to allow the Complainant to reside in more suitable accommodation with a carer. HR4A also identified the following issues in the Government's treatment of the Complainant:

- since returning to closed detention, the Complainant's health deteriorated significantly. The Department and IHMS have delayed or not provided the Complainant's records, which raises serious concerns regarding how he obtained the brain injury and whether he has received and is receiving proper treatment. This has also meant that the Complainant cannot pursue legal action in relation to his treatment;

- the Complainant's legal representatives had not been officially informed of his imminent removal planned for May 2021. While the Department stated that the Complainant had consented to his removal via two removal consent forms, HR4A noted that the consent forms have someone else's name on them, appear to be signed by two different people and are in English, which the Complainant cannot read or understand. There is no evidence that a translator was used;

- the Complainant has been deprived of his liberty because he exercised his right to seek and enjoy asylum under article 14 of the UDHR, which contravenes his right to be equal before the law under article 26 of the ICCPR;

- given Australia's legislation and case law,[53] the Complainant had no right to challenge his administrative detention;

- it is likely that the Complainant will never be capable of caring for himself if removed, and therefore HR4A questioned the purpose of his detention, if it was not for removal (which would constitute refoulement); and

- the Complainant had been in detention for eight years, has medical issues and no criminal record. His detention was not reasonable, necessary or proportionate. There was also no evidence that the detention would cease as there was no evidence that he was being assessed for residence detention placement, a visa or removal.

7.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant was arbitrary, discriminatory and contrary to international law. The WGAD:

- observed that during the Complainant's detention for over eight years, there was no evidence that the Government engaged in assessing the need for detention or whether a less restrictive measure would be suitable, as required by international law;
- rejected the argument by the Government that in instances of continuing detention, the determining factor is not the length of the detention, but whether the grounds for the detention are lawful and justifiable;

- confirmed that the Complainant was transferred to Nauru Regional Processing Centre on Australia's instructions and therefore, Australia is responsible for any violation of his rights there;

- criticised the Government's failure to justify the necessity or proportionality of detaining the Complainant;

- found that reviews completed by the Ombudsman did not satisfy article 9(4) of the ICCPR;

- found that the detention was punitive and indefinite, and that the Complainant did not have the option of challenging the legality of his detention before a judicial body in breach of articles 2 and 9 of the ICCPR;

- agreed with the HRC that the impact of *Al-Kateb v Godwin*[54] is that there is no effective remedy to challenge the legality of continued administrative detention; and

- expressed its very serious concern over the state of the Complainant's mental and physical health which has deteriorated in detention and reminded the Government that persons deprived of their liberty must be treated with respect for their human dignity, as per article 10 of the ICCPR.

7.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;

[53] See summary of *Al-Kateb v Godwin* on page 10.

[54] Ibid.

- accord the Complainant an enforceable right to compensation and other reparations; and
- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

7.5 Significance

This case demonstrates the poor treatment of people with significant mental health and brain injuries in detention.

7.6 Current status

In early 2022, the Complainant was released into the community on a residence determination placement. He was placed with the same care organisation that had previously lost him when he wandered away from their facility in 2019.

8. Opinion 17/2021

8.1 Summary of key facts

The Complainant is Albanian and arrived in Australia by boat in 2013 seeking asylum. He was detained on arrival. The Complainant has been detained in various immigration detention facilities, with significant periods of hospitalisation for his deteriorating and serious mental and physical health.

After three years in immigration, in May 2016, the Complainant was invited to apply for a protection visa. This application was rejected. The IAA, FCFCA and FCA reviewed this application and affirmed this initial decision. Applications for a temporary visa, special leave to apply to the HCA and ministerial intervention to allow the Complainant to reside in the community were also rejected. The Complainant was repeatedly told by the Department that the existence of an Interpol Red Notice was a significant factor contributing to his unsuccessful applications. In fact, HR4A was able to confirm with Interpol that no such Interpol Red Notice existed.

In November 2019, the authorities attempted to remove the Complainant. The Complainant was seriously ill after spending months in a specialist hospital. The Complainant's legal representative was only notified of the removal when the Complainant was being transported to the airport. This attempt was aborted when the Complainant stood up on the plane and repeatedly said he was unfit to fly, after reporting chest pains and severe anxiety.

Since the attempted removal, the Complainant's health seriously deteriorated. In January 2020 he was diagnosed with infected kidney stones, severe major depressive illness and mild neurocognitive disorder. He was later diagnosed with a rare type of endocrine disorder. In October 2020, the Complainant was appointed a public guardian as it was deemed that he did not have sufficient decision-making capacity to act in his own best interests. In February 2020, the Complainant's case manager confirmed that the Department was no longer considering his release from detention as he was referred for removal.

8.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- in November 2019, Interpol confirmed there was no Red Notice in the Complainant's name. This should have removed previous concerns that the Complainant was ineligible for a temporary visa or community-based detention;
- the Complainant was deprived of his liberty because he exercised his right to seek asylum under article 14 of the UDHR, which contravenes his right to be equal before the law under article 26 of the ICCPR. The Complainant only fled to Australia after providing information to the police about an organised criminal gang;
- the Complainant was not invited to apply for a protection visa until after he was already in closed detention for almost two and a half years. At this time, he was also not put forward for a temporary visa or community detention, despite his exemplary behaviour and consistent assignments to low security facilities;
- the Government failed to implement a psychiatrist's recommendation that the Complainant be placed in a less restrictive place for his mental health. The Government disregarded this recommendation and instead returned him to the Melbourne Immigration Transit Accommodation and tried to remove him one week later, causing renewed mental health issues;

- the uncertainty of removal caused the Complainant distress. As he was not given notice during the first removal attempt, the Complainant feared that his removal could occur at any time;

- it is unclear how the IHMS can determine if someone is fit to travel, as often their assessments are made without examining or talking to the person concerned;

- HR4A rejected the idea that detention of unlawful non-citizens is a last resort given it is legislated as the first resort under the Migration Act;

- HR4A submitted that no independent review body, including the Ombudsman, has the power to change the Complainant's conditions or release him. Therefore, it submitted that this detention was arbitrary and open-ended; and

- given Australia's legislation and case law,[55] the Complainant had no right to challenge his administrative detention.

8.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant was arbitrary, discriminatory and contrary to international law. The WGAD:

- confirmed that the Complainant's detention was not an exceptional measure of last resort, given that there was no attempt to ascertain if a less restrictive measure would be suitable and as the Government did not present a specific reason that would justify his detention;

- concluded that the Complainant was detained for the sole reason that he was seeking asylum and arrived without a visa;

- concluded that in the eight years of detention, no judicial body has been involved in the assessment of the legitimacy, necessity and proportionality of the Complainant's detention;

- found that the Government did not explain how non-citizens can effectively challenge their continued detention as required by articles 9 and 26 of the ICCPR;

- agreed with the HRC that the impact of *Al-Kateb v Godwin*[56] is that there is no effective remedy to challenge the legality of continued administrative detention; and

- expressed serious concern over the Complainant's mental and physical health and reminded the Government that it must treat detainees humanely and with respect for their human dignity under article 10 of the ICCPR.

8.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;

[55] See summary of *Al-Kateb v Godwin* on page 10.

[56] Ibid.

- accord the Complainant an enforceable right to compensation and other reparations; and
- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

8.5 Significance

This case demonstrates the deterioration of physical and mental health for many in immigration detention, in this instance resulting in long periods of hospitalisation. Additionally, it deals with the Government's rejection of a visa application and community-based placement options based partially on a false understanding, in this instance that there was an Interpol Red Notice in the Complainant's name (when none existed).

8.6 Current status

The Complainant was removed from Australia in late 2021, during the COVID-19 pandemic and while still under the care of a public guardian.

9. Opinion 35/2020

9.1 Summary of key facts

In May 2009, the Complainant and one of his children were assaulted and kidnapped in Iraq. He fled to Turkey with his five children, where they were found to be refugees by the Office of the United Nations High Commissioner for Refugees. On 14 December 2012, the Complainant travelled to Australia under an alias with his two youngest children (the Complainant's older children were able to join their mother in Australia on valid visas, the younger children have a different mother). On 15 December 2012, the Complainant and his children were detained on Christmas Island. In July 2015, the Complainant's children were transferred to community detention while the Complainant remained in closed detention.

In June 2016, the Minister invited the family to apply for protection visas – approximately three and a half years after they arrived in Australia. The Complainant submitted his protection visa application on 13 October 2016 and listed his children as dependants. In March 2017, the Department refused the application, however, the IAA found that they were owed protection obligations and remitted the decision back to the Department. In December 2017, the Complainant's children were granted protection visas. In August 2018, the Department rejected the Complainant's application because he had a criminal record. In November 2018, the AAT found in favour of the Complainant and remitted the case back to the Department. In March 2019, the Department issued the Complainant a notice of intention to refuse his visa, and submissions were made in response. The Minister then set aside the AAT's decision, stating that granting a visa was not in the national interest. In June 2019, the Complainant filed a claim in the FCA for unreasonable delay by the Department in making a decision on his application.

While the Complainant was detained, his young children were placed in group home care (as their mother was not in Australia). They were also at risk of being placed in the foster care system, despite having a father who was ready and capable of caring for them if released.

9.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- the Complainant had been found to be owed protection obligations and to be a refugee four times. Three of these decisions were made by Australian institutions, with the other made by the UNHCR;
- given Australia's legislation and case law,[57] the Complainant had no right to challenge his administrative detention;
- the Complainant was deprived of his liberty because he exercised his right to seek asylum under article 14 of the UDHR;
- the Minister was given direction by the AAT and the IAA that the Complainant meets the criteria for the granting of a visa and still he had not been granted one;
- the Complainant had not been guaranteed the possibility of administrative or judicial review or remedy;

[57] See summary of *Al-Kateb v Godwin* on page 10.

- the Minister has issued instructions to the Department that all controversial cases, like this case, be referred to him for a decision. These cases are unlikely to be referred to him for release, raising questions about bias and procedural fairness;

- the Government's review mechanisms operate under the legal framework of Australia, which permits arbitrary detention. The Ombudsman has no power to compel the Department to release a person from immigration detention. The review mechanisms available to the Complainant relate to the decision-making process concerning granting of a visa, rather than to his detention; and

- while the Complainant had not exhausted all domestic remedies, even if he was successful in the FCA, the decision to grant him a visa would be remitted back to the Department. Given the Department and Minister have refused the visa application three times, it is unlikely that they would accept the visa application. This means the Complainant was in detention indefinitely.

9.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant is arbitrary, discriminatory and contrary to international law. The WGAD:

- did not find that the Complainant's initial detention was purely because of his exercise of the right to seek asylum given that the Complainant had outstanding prison sentences, however this only accounts for the year that he served a prison sentence and not the remainder of the time he spent detained due to his migratory status;

- criticised the Government's review process for not meeting the obligations under article 9(4) of the ICCPR, given that the Committee and the Ombudsman are not judicial bodies;

- found that the Government did not explain how non-citizens can effectively challenge their continued detention as required by articles 9 and 26 of the ICCPR; and

- agreed with the HRC that the impact of *Al-Kateb v Godwin*[58] is that there is no effective remedy to challenge the legality of continued administrative detention. It found this situation discriminatory and contrary to article 26 of the ICCPR.

9.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;

- accord the Complainant an enforceable right to compensation and other reparations; and

- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

[58] See summary of case on page 10.

9.5 Significance

This case demonstrates the impact of detention on families. The Complainant's children were detained with him for approximately four years, and then placed in a group home and threatened with foster care.

9.6 Current status

In early 2020, the Complainant was granted a protection visa. He resides in the community with his children.

10. Opinion 28/2017

10.1 Key facts

The Complainant is a recognised refugee from Syria. He fled Syria following the start of the civil war, which has resulted in more than half a million people killed and nearly 13 million displaced.

The Complainant arrived in Australia by boat in 2013 and sought asylum. The Government recognised his refugee claim but detained him since the beginning of 2014.

On arrival in Australia, the Complainant was released in the Australian community on a temporary visa. On 12 January 2014, the Complainant was in a public area in Sydney when he received news that his mother had been killed in a suicide attack in Syria. The Complainant became agitated and called the police over a misunderstanding with payment in a shop. The Complainant struggled to explain to the police why he was so upset as he did not speak English very well and the police did not understand Arabic. Consequently, the police did not understand that the Complainant was trying to explain that his mother had died in a suicide blast in Syria and instead believed that he was going to kill himself with a suicide vest (which he did not have). The police, however, recognised that something was not quite right with the Complainant and had him admitted to a hospital for mental health reasons. The Complainant was released later that night but was admitted again a few days later to a different hospital. The Complainant was diagnosed with bipolar disorder, emotional distress and psychotic episodes. The Complainant's mother had, in fact, survived the suicide bomb attack.

On or about 3 February 2014, the Complainant was detained by officials from the Department as his temporary visa had expired. The Complainant had previously approached the Department regarding the impending expiry of his visa and was told it would be renewed and not to worry.

10.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- despite the Department stating that they had security concerns regarding the Complainant, he was detained for nearly two years before being interviewed about these concerns. Ultimately, it was concluded that the Complainant had suffered from a serious psychotic episode, which had been treated;

- as a person who arrived by boat, the Complainant had to wait to be invited to apply for a protection visa (which took approximately two years). When he was invited to apply for a temporary protection visa, he was not initially provided with legal assistance to complete the visa application and attempted to complete the application form himself in detention. More than eight months later, limited government-funded legal assistance was provided to amend his application or file a new application. A visa application was eventually lodged on 27 June 2016, more than two years after he was re-detained;

- no decision had been made at the time of the WGAD complaint and no timeframes were given by the Department for the making of its decision; and

- given Australia's legislation and case law,[59] the Complainant had no right to challenge his detention.

[59] See summary of *Al-Kateb v Godwin* on page 10.

In 2016, the Complainant signed various documents relating to the provision of social security in Australia, which he took as an indication of his impending release into the community. The hope generated by the social security documents, turned to despair when he not only remained in detention but was moved to a remote detention centre on Christmas Island.

10.3 The opinion of the WGAD

The Government did not make submissions in response to HR4A's complaint. The WGAD found that the detention of the Complainant was arbitrary, discriminatory and contrary to international law. The WGAD:

- reiterated that seeking asylum is not a criminal act. On the contrary, seeking asylum is a universal human right enshrined in article 14 of the UDHR;
- expressed its concerned that more than three years had passed since the Complainant's initial detention and the Government had not provided an explanation as to why his visa had not been renewed;
- noted that the Complainant had no indication from the authorities about the progress of his case over the past three years, which is a clear breach of article 9(4) of the ICCPR; and
- noted that the effect of *Al-Kateb v Godwin*[60] is such that non-citizens have no effective remedy against their continued administrative detention and cannot challenge the legality of their continued detention.

10.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;
- accord the Complainant an enforceable right to compensation and other reparations; and
- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

10.5 Significance

This case demonstrates the vulnerability of refugees who are distressed or have mental health issues and are unable to explain their distress in English. The Complainant was detained partly due to his arrest because of a language barrier between him and police. He was trying to communicate that his mother had been killed by a suicide blast, but the police mistakenly assumed that the Complainant was going to detonate a bomb vest.

10.6 Current status

The Complainant was released into the community in June 2022, after more than eight years in detention.

[60] See summary of case on page 10.

11. Opinion 69/2021

11.1 Summary of key facts

The Complainant is Sri Lankan and arrived by boat on Christmas Island in 2009. He was detained as an offshore entry person under the Migration Act. Since his arrival he has lived in various immigration detention centres.

In 1990, the Complainant was forcibly conscripted by the Liberation Tigers of Tamil Eelam (**LTTE**) as a child. The Complainant could not leave the LTTE due to threats from the LTTE to his family. When the Complainant arrived in Australia, the Government was concerned regarding his involvement with the LTTE.

In March 2010, the Government Refugee State Assessment found that the Complainant was not owed protection obligations. However, later that year, an independent merits review overturned that decision. In 2011, ASIO issued the Complainant with an adverse security assessment, due to his involvement with the LTTE, which was reaffirmed in October 2015. In July 2017, after receiving a qualified security assessment from ASIO, a delegate of the Minister found that the Complainant was a refugee but determined that he was ineligible for a visa due to his involvement with the LTTE. In April 2018, the Complainant unsuccessfully sought merits review and judicial review of the decision. In February 2020, the Ombudsman recommended that the Department refer the Complainant's case to the Minister for consideration of a community placement, noting medical advice and the Complainant's vulnerability to COVID-19. In August 2020, the Minister advised that the Complainant's case met the guidelines for referral and a submission would be prepared for the assistant minister. In May 2021, the Tribunal reaffirmed the decision not to grant the Complainant a protection visa and in July 2021, the Complainant again sought judicial review in the FCA.

The Complainant has received ongoing medical and psychological treatment for major depression. He was also diagnosed with Chronic Lymphocytic Leukaemia in 2018 and has received ongoing chemotherapy since.

11.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- the Complainant has been deprived of his liberty because he exercised his right to seek asylum under article 14 of the UDHR, which contravenes his right to be equal before the law under article 26 of the ICCPR;
- given Australia's legislation and case law,[61] the Complainant had no right to challenge his administrative detention;
- the Government failed to implement recommendations from the counsellor and psychiatrist that the Complainant be placed in a less restrictive location for his mental health; and
- the fact that the Complainant was been held in administrative detention for over 12 years, had no behavioural issues and no criminal record illustrates that his detention was not reasonable, necessary or proportionate and was not properly or independently assessed over time. This goes against the HRC's comments on article 9 of the ICCPR, where it noted that detention must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed over time.

[61] See summary of *Al-Kateb v Godwin* on page 10.

11.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant was arbitrary, discriminatory and contrary to international law. The WGAD:

- noted that when the Complainant was initially detained, the Government did not engage in the assessment of the need to detain him, nor has there since been an attempt on behalf of the authorities to do so;
- concluded that the Complainant was detained for 12 years due to the exercise of his legitimate rights under article 14 of the UDHR and rights under articles 2 and 9 of the ICCPR;
- concluded that the Complainant's detention was *de facto* indefinite, given that he was detained for over 12 years and although his case was being periodically reviewed by the Ombudsman, it has no power to compel the Department to release a person from immigration detention;
- found that the Government did not explain how non-citizens can effectively challenge their continued detention as required by articles 9 and 26 of the ICCPR;
- agreed with the HRC that the impact of *Al-Kateb v Godwin*[62] is that there is no effective remedy to challenge the legality of continued administrative detention; and
- expressed serious concern over the Complainant's mental and physical health and reminded the Government that it must treat detainees humanely and with respect for their human dignity under article 10 of the ICCPR.

11.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;
- accord the Complainant an enforceable right to compensation and other reparations; and
- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

11.5 Significance

This case demonstrates the extensive mental and physical health issues that many in immigration detention have, in this instance major depression and chronic lymphocytic leukaemia. Further, it demonstrates the use of immigration detention to punish those the Government believes have committed crimes overseas, without an actual criminal trial. This is impermissible under Australia's constitutional separation of powers.

11.6 Current status

The Complaint was released on a community detention placement in 2021. He continues to receive treatment for cancer.

[62] See summary of case on page 10.

12. Opinion 1/2019

12.1 Summary of key facts

The Complainant is a Sri Lankan and Tamil man who arrived on Christmas Island by boat in 2010. The Complainant sought asylum from persecuting forces in Sri Lanka. He was captured by the Sri Lankan army in 2002 and 2003 and subsequently developed psychotic symptoms. In June 2010, he applied for a protection visa but, while he was found to be a refugee for the purposes of the Migration Act, he was denied the visa on the grounds of an adverse security assessment by ASIO.

A second security assessment was undertaken in 2013, which resulted in another adverse security assessment. An independent reviewer confirmed this assessment in February 2014. Around August 2015, the Minister lifted the bar and allowed the Complainant to apply for a protection visa, which he did in late 2015 – five years after he arrived in Australia. In December 2016, ASIO revised the Complainant's assessment and issued him with a qualified security assessment.

The Complainant is legally blind and has significant mental and physical health issues.

12.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- the Complainant has been deprived of his liberty because he exercised his right to seek asylum under article 14 of the UDHR, which contravenes his right to be equal before the law under article 26 of the ICCPR;
- the failure to provide reasons for the adverse security assessments by ASIO breaches the right to be given reasons for an arrest (being administrative detention in Australia), and the unreviewable nature of these assessments is inconsistent with the right to have the lawfulness of one's detention reviewed before a court under article 9 of the ICCPR;
- due to his ongoing mental health issues the Complainant was unable to understand the reasons for his detention or the pathways available to him;
- review mechanisms operate within the Government's legal framework, which permits arbitrary detention, and within a set of referral guidelines, which the Complainant was extremely unlikely to meet due to his mental health, qualified security assessment and previous adverse security assessments;
- the Government has consistently failed to act on recommendations from the Ombudsman to release individuals from detention and the options to challenge detention were not available to the Complainant; and
- given Australia's legislation and case law,[63] his arbitrary open-ended detention was authorised and the Complainant had no right to challenge his administrative detention.

12.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant was arbitrary, discriminatory and contrary to international law. The WGAD:

[63] See summary of *Al-Kateb v Godwin* on page 10.

- concluded that there was no reason for detaining the Complainant other than the fact he is an asylum seeker and subject to automatic immigration detention under Australian law;
- criticised the Government's repeated failure to explain how reviews carried out by the Committee satisfy the guarantees encapsulated in the right to challenge the legality of detention enshrined in article 9 of the ICCPR;
- found that the detention was punitive and indefinite, and that the Complainant did not have the option of challenging the legality of his detention before a judicial body in breach of article 9 of the ICCPR;
- found that the Government did not explain how non-citizens can effectively challenge their continued detention as required by articles 9 and 26 of the ICCPR; and
- agreed with the HRC that the impact of *Al-Kateb v Godwin*[64] is that there is no effective remedy to challenge the legality of continued administrative detention.

12.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;
- accord the Complainant an enforceable right to compensation and other reparations; and
- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

12.5 Significance

This case demonstrates disability issues and the serious mental health issues that many in immigration detention experience and the impact this can have on Complainants understanding the pathways available and their circumstances.

12.6 Current status

In early 2020, the Complainant was released into the Australian community on a protection visa, after nine years in detention.

[64] See summary of case on page 10.

13. Opinion 70/2020

13.1 Summary of key facts

The Complainant is Bangladeshi and arrived in Australia by boat in 2012. Prior to arriving in Australia, the Complainant witnessed a killing between two local political party members. The members of one of the local political parties threatened to kill the Complainant if he gave evidence in relation to the incident. Fearing for his safety, the Complainant fled to Malaysia and then Australia to seek asylum where he was detained as a non-citizen.

In January 2016, the Complainant submitted a protection visa application, which was denied by the Department. This decision was also upheld by the IAA and the FCFCA. In August 2018, the FCA issued a decision allowing the Complainant to appeal. The FCA also held that the IAA did not have jurisdiction to hear the matter and the Complainant should have been referred to the AAT. However, the Department and the AAT again denied the protection visa application. While in detention, the Complainant has become increasingly mentally unwell and has been diagnosed with depression and insomnia.

13.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- there are no options for the Complainant to challenge his detention, given the ministerial powers under the Migration Act that could be used to release him from detention are non-compellable and non-renewable. Previous challenges to the constitutionality of the Department's power have also been unsuccessful;
- the Complainant has been deprived of liberty because he exercised his right to seek asylum under article 14 of the UDHR, which contravenes his right to be equal before the law under article 26 of the ICCPR;
- the Complainant was initially determined to be an unauthorised maritime arrival and was therefore subject to a fast-track review process, which meant the options for reviewing the Department's decision were extremely limited. It was later found that the Complainant was not an unauthorised maritime arrival, but this error by the Department significantly extended the Complainant's time in detention;
- detention is not being used as a last resort, given the Complainant was detained immediately upon arrival. Despite his exemplary behaviour and his consistent assignments to low-security facilities, the Complainant was not put forward for a temporary visa or community detention;
- given Australia's legislation and case law,[65] the Complainant has no right to challenge his administrative detention;
- it is misleading to suggest that the Complainant's protection visa application is being actively processed given that his application is not before the Ministers;

[65] See summary of *Al-Kateb v Godwin* on page 10.

- it is misleading to suggest that the Complainant could be found to meet the ministerial referral guidelines and that he could then be granted a visa given his visa applications have been refused several times. Decisions relating to long-term detainees should be reviewed by a committee which includes legal, health and policy experts. This would provide an independent and timely review mechanism for cases such as this one;

- providing a report to the Ombudsman is not a sufficient review mechanism as the Ombudsman has no power to change the Complainant's conditions and it is not an independent body; and

- there are no effective review mechanisms available, since the options listed by the Government only relate to the granting of a visa, rather than the Complainant's detention.

13.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant is arbitrary, discriminatory and contrary to international law. The WGAD:

- observed that during the Complainant's detention for over eight years, there was no evidence that the Government engaged in assessing the need for detention or whether a less restrictive measure would be suitable, as required by international law;

- noted that the Complainant is subject to *de facto* detention due to his immigration status, which the WGAD determines is a clear breach of articles 2 and 9 of the ICCPR;

- noted that reviews on the Complainant's detention completed by the Committee, the Ombudsman and the relevant minister do not satisfy article 9(4) of the ICCPR, since these groups are not judicial bodies;

- concluded that during his eight years of detention, no judicial body assessed the legality of the Complainant's detention;

- found that the Government did not explain how non-citizens can effectively challenge their continued detention as required by articles 9 and 26 of the ICCPR; and

- agreed with the HRC that the impact of *Al-Kateb v Godwin*[66] is that there is no effective remedy to challenge the legality of continued administrative detention. It found this situation discriminatory and contrary to article 26 of the ICCPR.

13.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;

- accord the Complainant an enforceable right to compensation and other reparations; and

- investigate the violations in this matter.

[66] See summary of case on page 10.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

13.5 Significance

This case demonstrates the deterioration of mental health experienced by many in immigration detention, in this instance relating to a diagnosis of mild recurring depression and the need to take insomnia medication.

This case also demonstrates the significant barriers that asylum seekers from Bangladesh face, given the Government's reliance on inaccurate country information.

13.6 Current status

The Complainant was released in October 2022 after spending more than a decade in detention. HR4A was thrilled to greet him from detention and welcome him properly to Australia, although a decade too late.

14. Opinion 21/2018

14.1 Key facts

The Complainant is a former intelligence officer, who fled Iran after reportedly suffering significant torture and trauma because he refused to support the regime of Bashar al-Assad in Syria. He arrived in Australia by boat in 2013 to seek asylum. He was immediately detained by the Department and transferred to Manus Island, Papua New Guinea, where he was placed in administrative detention. He has been recognised as a refugee by the Government of Papua New Guinea since March 2015. In 2016, he was transferred to a detention centre in Australia for medical treatment for a range of mental health disorders, including post-traumatic stress disorder.

14.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- the Complainant was deprived of his liberty because he exercised his right to seek asylum under article 14 of the UDHR;
- as a refugee, he has not been guaranteed the possibility of administrative or judicial review or remedy;
- under international law, Australia was responsible for the Complainant's transfer to and detention on Manus Island. As the Complainant was included in the regional processing arrangements with Papua New Guinea, there were extremely limited domestic remedies available to him. The only domestic remedy was for him to appeal to the Minister to be granted a community detention placement under the Migration Act. The Department made an application for this residence determination for the Complainant, but several months later no response had been received and no explanation was given as to the delay;
- Australian citizens and non-citizens are not equal before the courts and tribunals and, as pointed out by the HRC, there is no effective remedy for people subject to mandatory detention in Australia;
- HR4A underlined that, by the Government's own admission in its response to the WGAD, the purpose of its border protection policies, including administrative detention, is not tailored to the requirements of individual asylum seekers or refugees, but instead, is for the purpose of deterring others from seeking asylum. If administrative detention is not for the purpose of visa processing or removal, then it becomes punitive;
- HR4A rejected that a *habeas corpus* challenge is a possible option for the Complainant. Since his detention was legal under Australian law, a *habeas corpus* challenge was not applicable as it relates to alleged unlawful detention; and
- according to legislation and case law, it also rejected the idea that detention of unlawful non-citizens is a last resort given it is legislated as the first resort.

14.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the Complainant's detention was arbitrary, discriminatory and contrary to international law. The WGAD:

- did not accept the Government's submissions that it was not responsible for the Complainant's time on Manus Island. It noted that when a State maintains migration detention facilities in the territory of another State, both States remain jointly responsible for the detention;

- confirmed that the Government failed to explain the individualised, specific reasons that would have justified the need to deprive the Complainant of his liberty while his asylum claim was being considered. On the contrary, the Government itself clearly states that the purpose of its border protection policies is to deter others;

- noted that the Complainant had been waiting for the Minister's discretionary decision since May 2017 and the Government has not disputed any of these submissions in its reply;

- found that there was never any consideration of alternatives to detention in the case of the Complainant; and

- found that the Government failed to explain how non-citizens can challenge their continued detention after the findings by the HCA in *Al-Kateb v Godwin*.[67]

14.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;

- accord the Complainant an enforceable right to compensation and other reparations; and

- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

14.5 Significance

This case highlights the cruelty of the offshore processing system which has resulted in significant numbers of asylum seekers being transferred to Australia for the treatment of serious medical conditions. These people are then detained in Australia and receive limited health care.

14.6 Current status

The Complaintant has been released into the Australian community on a temporary basis. The Government refuses to provide a permanent resettlement option for him.

[67] See summary of case on page 10.

15. Opinion 74/2019

15.1 Summary of key facts

The Complainant is an Afghan man, who entered Australia in 2008 on a spousal visa sponsored by his wife. In June 2013, ASIO issued him with an adverse security assessment based on allegations that he was involved in smuggling people to Australia. However, the Australian Federal Police had stated in a report that it had insufficient evidence to charge the Complainant with a criminal offence. The Complainant has never been charged with people smuggling.

On 19 June 2013, the Department cancelled the Complainant's spousal visa and he was detained. On 25 June 2013, the Complainant's application for a partner (migrant) visa was refused since he no longer held a partner (provisional) visa at the time of the decision. In August 2013, the Migration Review Tribunal affirmed the refusal. The Complainant's temporary visa was also refused later that year.

In October 2013, the Complainant sought judicial review by the HCA of the adverse security assessment. While the HCA remitted part of this matter to the FCA, the FCA dismissed the matter and his request to appeal to the HCA was also dismissed. In early 2015, while in detention, the Complainant applied for a permanent protection visa on the basis of being a Hazara Shia man. However, the adverse security assessment issued by ASIO meant that the Complainant was excluded from being granted this visa. While the Complainant applied for merits review and judicial review, these applications were dismissed.

The Complainant has been the victim of significant physical abuse while in detention.

15.2 HR4A submission

HR4A identified the following issues in the Government's treatment of the Complainant:

- since the Complainant cannot be granted a permanent protection visa and he did not seek the reinstatement of his spousal visa, he has exhausted all domestic remedies to secure his release into the Australian community;
- the Complainant suffered physical and psychological damage because of his detention;
- the Complainant's detention is arbitrary and he lacks any chance of his detention being subject to a real judicial review;
- given Australia's legislation and case law,[68] the Complainant has no right to challenge his administrative decision;
- the Complainant has been deprived of his liberty because he exercised his right to seek asylum under article 14 of the UDHR, which contravenes his right to be equal before the law under article 26 of the ICCPR. The Complainant would have been removed to Afghanistan, except as he is an asylum seeker this would constitute refoulement;

[68] See summary of *Al-Kateb v Godwin* on page 10.

- the Complainant has not been guaranteed the possibility of administrative or judicial review or remedy. He has applied for several temporary visas, which have been rejected by the Department. While the Minister has non-reviewable and non-compellable powers to grant a visa, it is extremely unlikely that the Minister will exercise its powers given that the Complainant has an adverse security assessment;

- HR4A criticised the Government's inflexible application of policies and guidelines relating to persons subject to an adverse security assessment. According to HR4A, no person with such an assessment has been referred for or released because of a ministerial intervention granting them a visa or community detention placement; and

- HR4A rejected the idea that detention of unlawful non-citizens is a last resort given it is legislated as the first resort. The options to challenge detention are not applicable to the Complainant, and HR4A contested the Government's discussion on the detention review mechanisms as these mechanisms operate within Australia's legal framework, which permits arbitrary detention.

15.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant is arbitrary, discriminatory and contrary to international law. The WGAD:

- criticised the Government's repeated failure to explain how reviews carried out by the Committee satisfy the guarantees encapsulated in the right to challenge the legality of detention enshrined in article 9 of the ICCPR;

- found that the detention was punitive and indefinite, and that the Complainant did not have the option of challenging the legality of his detention before a judicial body in breach of articles 2 and 9 of the ICCPR;

- found that the Government has failed to explain how non-citizens can effectively challenge their continued detention as required by articles 9 and 26 of the ICCPR; and

- agreed with the HRC that the impact of *Al-Kateb v Godwin*[69] is that there is no effective remedy to challenge the legality of continued administrative detention.

15.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;

- accord the Complainant an enforceable right to compensation and other reparations; and

- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

[69] See summary of case on page 10.

15.5 Significance

This case demonstrates the use of administrative detention as a punitive tool by the Government to detain people who the Government deems a risk, but who have not been afforded a judicial process to determine guilt.

15.6 Current status

In 2021, the Government recognised that it has non-refoulement obligations in respect of the Complainant. At the beginning of 2023, the Government refused the Complainant a visa. The Complainant remains detained after approximately eight years.

16. Opinion 72/2020

16.1 Summary of the key facts

The Complainant is Egyptian and arrived in Australia in October 2014 on a cargo ship on which he was working. He sought asylum in Australia and was detained.

In December 2014, the Complainant lodged an application for a protection visa, which was found to be invalid. As of the date of the complaint to the WGAD, the Complainant had not been invited to apply for a visa. Instead, he was detained with no resolution process at all.

16.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- the Complainant has been deprived of his liberty because he exercised his right to seek asylum under article 14 of the UDHR following repeated threats from his family due to his 'dishonourable' marriage. Additionally, the Complainant converted from Islam to Christianity and feared that his life would be in danger if he returned to Egypt, due to the persecution of individuals who convert to Christianity;
- in 2014, the Department inadvertently made public the identity of almost 10,000 asylum seekers, including the Complainant's details;
- during the six-year period of the Complainant's prolonged detention, the Complainant suffered mental health and physical complications, including a wrist fracture, chest pain and an abdominal lipoma. His mental health also deteriorated while being in the detention centre;
- the Department did not present any reason to justify the Complainant's initial or continued detention, such as an individualised likelihood of absconding, committing a crime or committing an act against national security;
- no judicial body was involved in the assessment of the lawfulness of his detention;
- HR4A criticised the Government's assertion that the ongoing HCA litigation posed a 'practical impediment' to transferring the Complainant to a regional processing country and assessing his protection claims because it implied that the Department could not release the Complainant from detention;
- HR4A also disputed that immigration detention is a last resort since it is a requirement under the Migration Act;
- the Ombudsman does not have the power to compel the Department to release a detained person and the Department has failed to act on the recommendations of the Ombudsman. The Minister had numerous opportunities to release the Complainant and did not do so; and
- HR4A explained that the Government's attempts to assert that the regime of immigration detention is compliant with international law are misleading.

16.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant was arbitrary, discriminatory and contrary to international law. The WGAD:

- observed that during the Complainant's detention for over six years, there was no evidence that the Government engaged in an assessment of whether detention was necessary or whether a less restrictive measure would be suitable, as required by international law;

- asserted that no judicial body was involved in the assessment of the lawfulness, which involves considerations of legitimacy, necessity and proportionality, of his detention;

- rejected the Government's submission that the length of detention is not a determining factor and that as long as reasons justifying detention are present, the detention may legally continue; and

- agreed with the HRC that the impact of *Al-Kateb v Godwin*[70] is that there is no effective remedy to challenge the legality of continued administrative detention.

16.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;

- accord the Complainant an enforceable right to compensation and other reparations; and

- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

16.5 Significance

This case highlights the problems with a system in which people who arrive via boat have to be "invited" to apply for a protection visa. In the Complainant's case, this took approximately six years.

16.6 Current status

In mid-2020, the Complainant was released into the community on a temporary visa. The Government has not yet allocated a case officer to review his protection claim, after almost nine years of being in Australia.

[70] See summary of case on page 10.

17. Opinion 20/2018

17.1 Key facts

The Complainant is a Dinka man from South Sudan. The Complainant was forced to flee Sudan when his older brother turned 18 years old and he was in danger of being conscripted by the Sudanese military. The Complainant spent three years living in a refugee camp in Egypt with limited humanitarian assistance, before relocating to Australia on a humanitarian visa as a dependent on his mother's visa. On arrival in Australia in 2003, the Complainant attended intensive English classes and completed Year 12, however, he did not receive any counselling or other support to deal with his traumatic past and began self-medicating with drugs and alcohol. He has been convicted of numerous offences relating to property damage, drink-driving, dangerous driving and violence and has served prison sentences.

The Complainant's visa was cancelled in 2012, and he was placed in administrative detention upon being released from prison in 2014.

17.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- the Complainant has been deprived of his liberty because he exercised his right to seek asylum under article 14 of the UDHR;
- the international norms relating to the right to a fair trial have not been observed in relation to his detention;
- South Sudan was experiencing a humanitarian emergency at the time of the opinion, meaning that any return of the Complainant to South Sudan would constitute refoulement. It was also unclear whether South Sudan would accept the Complainant if he were returned. Therefore, unless the Complainant is released from administrative detention, he will be held in detention indefinitely;
- the Complainant's protection visa applications were refused on two occasions due to character concerns. Given that his humanitarian visa was also cancelled, the Complainant is not eligible to apply for any other type of visa. This is significant because Australian law provides that a non-citizen can be released from administrative detention only if they are removed from Australia or granted a visa;
- the Complainant no longer represents a threat to the Australian community as he has participated in rehabilitation and counselling programs;
- there is no possibility of a *habeas corpus* application in this case because the Complainant's detention complies with the Australian legislation, and a *habeas corpus* application would be useless in such circumstances as it only applies to alleged instances of unlawful detention;
- while the Complainant could have sought merits and judicial review of the decisions to cancel his visa and refuse his protection visa application, the reviews pertain to visa processes and not his detention; and
- HR4A emphasised that his detention is considered legal in Australia, but it is nevertheless arbitrary, especially given the length of his detention.

17.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant is arbitrary, discriminatory and contrary to international law. The WGAD:

- asserted that detention in the immigration context should have been periodically reviewed in order to ascertain its continued necessity and proportionality;
- concluded that during his detention, no judicial body assessed the legality of the Complainant's detention;
- found that the Government did not explain how non-citizens can effectively challenge their continued detention as required by articles 9 and 26 of the ICCPR;
- agreed with the HRC that the impact of *Al-Kateb v Godwin*[71] is that there is no effective remedy to challenge the legality of continued administrative detention; and
- expressed its concern that the Complainant faces the real prospect of indefinite detention given that the only other possibility for him currently is removal, which would likely breach the principle of non-refoulement.

17.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;
- accord the Complainant an enforceable right to compensation and other reparations; and
- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

17.5 Significance

This case demonstrates the circumstances that can lead to the detention of individuals with significant trauma backgrounds. In this instance, the Complainant did not receive the necessary psychological help on arrival in Australia to deal with his traumatic past and he began self-medicating with drugs and alcohol. This contributed to his offending behaviour, which then impacted his chances of being released from detention.

17.6 Current status

The Complainant remains detained and has been in detention for a period of approximately eight years. He faces indefinite detention.

[71] See summary of case on page 10.

18. Opinion 50/2018

18.1 Summary of key facts

The Complainant is Iranian and arrived in Australia in December 2012 seeking asylum from persecuting forces in Iran. The Complainant was detained on arrival, before being released into the community in May 2013 on a series of temporary visas. Around July 2015, the Complainant was charged with three offences and arrested. On 11 September 2015, the Complainant's temporary visa was cancelled, and he was transferred from criminal detention to immigration detention.

The Minister intervened in December 2015 to allow the Complainant to apply for a protection visa. This application was rejected.

The Complainant has significant mental health issues, including suicidal ideation and self-harm.

18.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- although the Complainant has been charged with three offences, he has not been convicted. He has been in administrative detention for three years while waiting for the criminal justice process to be finalised. This ongoing detention, and the cancellation of his visa before conviction, is representative of the Department pre-judging his guilt;
- the Complainant's mental health has deteriorated during his detention and counsellors provided by the Department have recommended the Complainant be released into the community to better manage his health;
- even if the Complainant is found to be owed protection obligations, his criminal charges make it extremely unlikely that he would be granted a visa or community placement;
- the Complainant lacks any chance of his detention being subject to a real judicial review. Given Australia's legislation and case law,[72] he has no right to challenge his administrative detention;
- the Complainant has been deprived of his liberty because he exercised his right to seek asylum under article 14 of the UDHR;
- this administrative detention is not appropriate in the circumstances;
- the Complainant's detention is arbitrary and open-ended, despite the Government's view that it is lawful under domestic law. The Complainant has been issued with a criminal justice stay certificate, which prevents his removal from detention while his criminal matter is ongoing. The jury was unable to render a verdict and as such, the Complainant faces a second trial. However, the length of time that the Complainant has spent waiting for an outcome exceeds the maximum custodial sentence that could be imposed should he be found guilty. The Complainant has not been convicted of a criminal offence and there is no other legitimate reason for his continued detention;

[72] See summary of *Al-Kateb v Godwin* on page 10.

- despite significant health issues and urgent requests made to the Department, the Complainant's case has not yet passed through the series of guideline checks needed for referral to the Minister. As far as HR4A is aware, no progress has been made in this regard;

- people in detention centres can wait upwards of five years for a primary assessment to be completed. In this case, the Complainant's identity is not in question, nor have any health or security matters been raised by the Department;

- detention is the first resort for unlawful non-citizens, as opposed to a last resort as presented by the Government; and

- the detention review mechanisms referred to in the Government response operate within a legal framework that permits arbitrary detention, and within a set of referral guidelines.

18.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant is arbitrary, discriminatory and contrary to international law. The WGAD:

- observed that the Government has not provided an explanation for the continued detention of the Complainant;

- noted that any form of administrative detention should be for the shortest period of time and the Government has failed to explain how this requirement was met in this instance;

- concluded that during his detention, no judicial body assessed the legality of the Complainant's detention;

- agreed with the HRC that the impact of *Al-Kateb v Godwin*[73] is that there is no effective remedy to challenge the legality of continued administrative detention; and

- rejected that *habeas corpus* is a realistic legal avenue for redress as a *habeas corpus* challenge is aimed at challenging illegal detention, not detention which is legal under the current domestic law.

18.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;

- accord the Complainant an enforceable right to compensation and other reparations; and

- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

[73] See summary of case on page 10.

18.5 Significance

This case demonstrates the deterioration of mental health experienced by many in immigration detention, in this instance relating to a history of mental health or psychosocial disability which deteriorated further throughout detention.

This case also demonstrates the issues faced by Iranians who have legitimate protection claims, which are often not accepted by the Government.

18.6 Current status

The Complainant remains detained and faces indefinite detention.

19. Opinion 42/2017

19.1 Key facts

The Complainant is Afghan and arrived in Australia by boat in 2009 to seek recognition of his refugee status after he received threats from the Taliban against him and his family. Since then, he has been transferred between several offshore and onshore immigration detention facilities. In 2013, the Complainant was convicted of rioting and sentenced to one year and ten months' imprisonment.

19.2 HR4A's submissions

HR4A explained that the Complainant had exhausted all domestic remedies to secure his release into the Australian community. Between 2009 and 2015, the Complainant's visa application was rejected, and an independent merits review upheld this earlier decision. HR4A identified the following issues in the Government's treatment of the Complainant:

- the Department did not believe the Complainant's reasons as to why he fled Afghanistan despite him continually asserting that he faces a real risk of harm from the Taliban if he is returned to Afghanistan. This is demonstrated in the Complainant's willingness to remain in indefinite administrative detention in Australia for almost seven years rather than voluntarily returning to Afghanistan;

- in 2014, while in detention, the Complainant married an Australian citizen, however, he is unable to apply for a spousal visa while he is onshore;

- regarding his conviction, the riot was a result of his emotional distress after a prolonged period of detention and the slow progress of his refugee status determination process. It is unconscionable to use his conviction in those circumstances as a reason to prevent his release into the community on a temporary or permanent visa, or alternatively, via a community detention placement; and

- the Complainant was subject to prolonged administrative custody and had not been guaranteed the possibility of administrative or judicial review or remedy.

19.3 The opinion of the WGAD

The Government submitted a response out of time and as such, it was not considered by the WGAD. The WGAD found that the detention of the Complainant is arbitrary, discriminatory and contrary to international law. The WGAD:

- concluded that there was no other reason for detaining the Complainant other than the fact that he is an asylum seeker and subject to automatic immigration detention under Australian law;

- concluded that during his detention, no judicial body assessed the legality of the Complainant's detention;

- found that the Government did not explain how non-citizens can effectively challenge their continued detention as required by articles 9 and 26 of the ICCPR; and

- agreed with the HRC that the impact of *Al-Kateb v Godwin*[74] is that there is no effective remedy to challenge the legality of continued administrative detention.

19.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;
- accord the Complainant an enforceable right to compensation and other reparations; and
- investigate the violations in this matter.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

19.5 Significance

This case demonstrates that minor protests against detention can result in refugees being punished by not being considered for release due to 'character concerns' and long-term detention.

19.6 Current status

The Complainant was released from detention in 2020 and finally joined his wife in the community.

[74] See summary of case on page 10.

20. Opinion 32/2022

20.1 Summary of key facts

The Complainant is an Ahwazi Arab from Iran, who arrived in Australia in mid-2012, seeking asylum from persecution. He sought recognition of his refugee status due both to his ethnicity (his culture having been suppressed by the Iranian regime), and to his anti-government activities as a satellite-installer (providing unauthorised access to media channels).

Originally released into the community on a series of bridging visas, the Complainant was charged with an offence and imprisoned in mid-2014. As a result, his visa was cancelled due to character concerns. The Complainant's case was dismissed just over two years later (and as such, the Complainant does not have a criminal record), when he was transferred to immigration detention. He has been in ongoing detention since August 2016.

20.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- the Government has determined that the Complainant has "criminal behaviour", using this as a significant part of the justification to detain him, even though he does not have a criminal record;
- Despite recognising that the Complainant cannot be returned to Iran, and the fact that he has a good behavioural record in detention, the Government has not considered placing him in community detention;
- the Complainant's mental and physical health have severely deteriorated during his over six years of detention;
- the Complainant has been deprived of his liberty because he peacefully exercised his right to seek and enjoy asylum under article 14 of the UDHR. The Complainant's treatment by the Government was also in contravention of his right to be treated as equal before the law under article 26 of the ICCPR;
- given Australia's legislation and case law,[75] the Complainant has no right to challenge his administrative detention.

20.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant is arbitrary, discriminatory, and contrary to international law. The WGAD:

- restated its alarm at the rising number of cases from Australia concerning mandatory immigration detention and repeated that detention cannot be considered lawful purely because it is allowed under the Migration Act;
- accepted that despite the fact that a decision was made not to prosecute the Complainant for an alleged criminal offence in 2016 and all charges were withdrawn, the Complainant's detention has continued following that initial adverse character assessment in the context of his immigration status;

[75] See summary of *Al-Kateb v Godwin* on page 10.

- agreed with HR4A's submissions that the Complainant was detained because of the peaceful exercise of his right to seek asylum under article 14 of the UDHR, stating that "if it was not for [his] migratory status, he would not have been detained";

- expressed serious concern over the severe deterioration in the Complainant's mental and physical health due to his prolonged detention;

- maintained that the Government has not assessed whether the Complainant needs to be detained or whether "a less restrictive measure" might suit his individual circumstances; and

- opined that the Complainant's detention without charge or trial is in fact punitive in breach of article 9 of the ICCPR.

20.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant;

- accord the Complainant an enforceable right to compensation and other reparations; and

- investigate the violations of his rights.

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

20.5 Significance

This case highlights the Government's use of administrative detention as a form of punishment for people it believes should not be in the community. Governmental records evidence that the Complainant is viewed by the Government as being a criminal. This is despite the Complainant not having a criminal record and having a good behavioural record in detention. The Government's use of administrative detention to punish people offends Australia's Constitutionally enshrined separation of powers between the executive, administrative and judicial branches of the Government.

This case is also significant as it concerns the indefinite detention of a member of a persecuted ethnicity in Iran. It demonstrates the issues faced by Iranians with legitimate protection claims, which are often not accepted by the Government.

20.6 Current status

The Complainant remains detained and faces indefinite detention. HR4A continues to fight for his release.

21. Opinion 42/2022

21.1 Summary of key facts

The Complainant is a Sudanese woman of Dinka ethnicity, who arrived in Australia on a Refugee visa in 1999. The Complainant suffers a range of severe mental health issues and is also a survivor of repeated sexual abuse, perpetrated in both Sudan and Australia. The Complainant also has substance abuse issues as a result of her traumatic background. These issues have, in turn, lead to offending. In March 2016, after serving a period of imprisonment of more than 12 months, the Complainant was released from prison, only for her visa to be mandatorily cancelled on character grounds. The Complainant was immediately transferred to immigration detention for approximately two months, after which her visa was reinstated. Shortly thereafter she was again jailed and then detained in immigration detention for a similar period. The Complainant was jailed and detained for a third time in April 2018 and has remained in immigration detention ever since.

In October 2018, the Complainant lodged an application for a protection visa, which was refused in September 2020. A delegate for the Minister concluded that although the Complainant was owed protection obligations with respect to South Sudan, she posed a danger to the Australian community, having been convicted of a "particularly serious crime". This decision was upheld by the Tribunal in June 2021.

21.2 HR4A's submissions

HR4A identified the following issues in the Government's treatment of the Complainant:

- the Complainant's mental and physical health have severely deteriorated during her more than four years of detention;
- ongoing immigration detention, where drugs are readily available, is detrimental to the Complainant's recovery from sexual abuse and her mental health issues. Indeed, it has been documented that she received narcotic substances in exchange for sexual acts; has been hospitalised several times for drug induced psychosis; and has been identified by hospital staff as being at high risk of death due to drug use;
- the Complainant has been deprived of her liberty because she exercised her right to seek asylum under article 14 of the UDHR, which contravenes her right to be equal before the law under article 26 of the ICCPR;
- while the Complainant is not owed protection obligations under the Refugee Convention, she is nevertheless owed non-refoulement obligations under other international instruments ratified by Australia;
- under Australian law, the Complainant is still liable to be removed to South Sudan where she continues to fear harm;
- the Complainant will continue to endure indefinite immigration detention as the Australian Government has not indicated that it is actively pursuing her removal; and

- given Australia's legislation and case law,[76] the Complainant has no right to challenge her administrative detention.

21.3 The opinion of the WGAD

Following submissions of the Government to the WGAD and a written response from HR4A, the WGAD found that the detention of the Complainant is arbitrary, discriminatory, and contrary to international law. The WGAD:

- reiterated its alarm at the ongoing number of cases from Australia concerning mandatory immigration detention and repeated that detention cannot be considered lawful simply because it is allowed under the Migration Act;
- expressed its concern that the Complainant faces the real prospect of indefinite detention given that the only other possibility for her currently is removal, which would likely breach the principle of non-refoulement;
- criticised the Australian Government for not presenting any specific reason for the Complainant's continued detention, pointing out that it is purely due to the assessment that she is a "danger to Australian society": "This assessment is based solely on her three criminal convictions for which she has served imprisonment terms … no individual assessment of [her] circumstances has taken place to ascertain whether a less restrictive measure might be possible nor is there an indication when this detention might come to an end";
- recorded "its very serious concern over the state of [the Complainant's] mental and physical health", noting "the trauma she has suffered as a result of the years of detention she has already been subjected to";
- agreed with HR4A's submissions that the Complainant "was detained due to the exercise of her legitimate rights under article 14" of the UDHR;
- opined that the Complainant's detention without charge or trial is in fact punitive in breach of article 9 of the ICCPR; and
- maintained that "there has never been an assessment of the necessity to detain" the Complainant or whether her detention is proportional to her individual circumstances, nor have any alternatives to her detention ever been considered.

21.4 Conclusion/Next steps

The WGAD requested the Government to, without delay:

- release the Complainant unconditionally with appropriate compensation and reparations in accordance with international law;
- ensure the circumstances surrounding her arbitrary detention are fully and independently investigated;
- "take appropriate measures against those responsible for the violation of her rights".

The WGAD reiterated its ongoing dissatisfaction with Australia's domestic law regarding the detention of refugees and reiterated that domestic law cannot legitimise acts in contravention of international law.

[76] See summary of *Al-Kateb v Godwin* on page 10.

21.5 Significance

This case is significant as it concerns the indefinite detention of a traumatised female refugee, who is a victim of sexual assault and has severe mental health issues. It illustrates that ongoing detention is detrimental to refugees, asylum seekers and stateless people in such circumstances.

21.6 Current status

The Complainant remains detained and faces indefinite detention. HR4A continues to fight for her release.

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