



OFFICIAL

Alternatives to Held Detention Program

Briefing Note – 3 August 2022

The immigration detention landscape has changed in recent years and the composition of people in held detention has evolved. As at 31 May 2022, there are 1395 people in held detention of which approximately 89 per cent have a criminal record.

The timeframes for status resolution and removal pathways have also increased, meaning detainees are spending longer in held immigration detention. The average length of time in detention is 843 days and there are 570 detainees that have been detained for two years or more (as at 31 May 2022). This issue has been exacerbated by the emergence of an ‘intractable’ caseload of individuals who fail the character test and face significant external removal barriers or complex circumstances, including *non-refoulement* obligations.

Held immigration detention will remain a key feature of the status resolution continuum in circumstances where no alternative options are viable and unlawful non-citizens (UNCs) are assessed as posing an unacceptably high risk to the Australian community.

The Department of Home Affairs (the Department) is currently considering a range of short, medium and long term options as part of the Alternatives to Held Detention (ATHD) program, with a focus on those individuals who pose a low to medium risk to the community. While there is an immediate focus on the current detention population, in the future the ATHD program could be applied to UNCs who become liable for detention. The ATHD program would also need to be supported by a strengthened compliance and monitoring framework to deliver status resolution outcomes.

The Department has commenced Phase 2 of the ATHD program. Key initiatives being further explored are:

Risk assessment tools

- The purpose of this stream of work is to review current risk tools and develop a revised risk assessment framework and tools that enable a dynamic and nuanced assessment of risk across the status resolution continuum.

Residence Determination and Bridging visa conditions, compliance and electronic monitoring

- Increasing community based placements and managing residual risk for an individual may require, or be better supported by, enhanced Residence Determination and visa conditions. Conditions could seek to mitigate risk to the individual and the community, with consideration of the individual’s circumstances and a post-release transition plan.
- Ensuring compliance with these conditions, progress through a step-down model and managing post-release support (detainee welfare and access to transition services) may require the implementation of a strengthened support, compliance and monitoring framework.

An ‘independent panel’

- A qualified independent panel may be well placed to conduct a more nuanced assessment of a detainee’s risk, including risks related to their physical and mental health. The appointment of suitable experts, in a similar model to that employed by state and territory parole boards, would allow a range of information to be considered.
- Community based placement for detainees with complex circumstances and residual risk could be informed by the advice of an independent panel, including the type of visa or Residence Determination conditions that could be imposed on an individual released from held detention.

A 'step-down' model

- A step-down model is being considered whereby an individual might initially transition from a held immigration detention environment to Residence Determination for a period of time, particularly for those people who have been in detention for a long period and may need greater support to transition to living in the community. The Status Resolution Support Service (SRSS) program currently supports individuals in Residence Determination, but further consideration would need to be given to whether it is fit for purpose. Subject to the initiative on Residence Determination and Bridging Visas, conditions would be tailored to the individual and the support to be provided would need further consideration as part of a 'step-down' model.

Background

In March 2020, Robert Cornall AO delivered the Independent Detention Case Review (IDCR) to the Secretary and the Commissioner of the Australian Border Force (ABF). The IDCRC reviewed the Department's management of unlawful non-citizens held in immigration detention facilities (IDFs). The review sought to determine whether those held in IDFs should remain so, whether they have appropriate access to services, and, whether appropriate steps are being taken to resolve their immigration status. The IDCRC recommended the Department explore the development of an individual dynamic risk assessment capability to consider the release of detainees into the community.

The Australian Human Rights Commission (AHRC) delivered a separate report titled *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth) (2021)* in February 2021 into arbitrary detention and arbitrary interference with families.¹ The basis of this report relates to 11 individual complaints made by unlawful non-citizens held in immigration detention whose visas were either refused or cancelled under section 501 (s 501) of the *Migration Act 1958* (the Migration Act). The report examined steps taken by the Department to resolve each complainant's immigration status.

In response to the IDCRC, the Department established the ATHD Program. In Phase 1 of the ATHD program, the Department conducted consultation, research and analysis. This included international detention models, the use of parole and bail in domestic jurisdictions, dynamic risk assessment models, and how electronic monitoring could be utilised in an immigration context.

(Note – this Briefing Note has been prepared for consultation purposes only and should not be disseminated further without the permission of Status Resolution and Visa Cancellation Division, Department of Home Affairs).

¹Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141 <https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>



Australian Government
Department of Home Affairs

Alternatives to Held Detention

Stakeholder briefing – 8 August 2022

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The current state

The immigration detention landscape has changed in recent years and the population composition of detainees has evolved.

As at 31 May 2022:

- There were 1395 people in held detention.
 - approximately 89 per cent have a criminal record.
- The average length of time in detention was 843 days.
 - 570 detainees that have been detained for two years or more.

This issue has been exacerbated by the emergence of an ‘intractable’ caseload of individuals who fail the character test and face significant external removal barriers or complex circumstances.

Objectives

- Held immigration detention will remain a key feature of the status resolution continuum in circumstances where no alternative options are viable and unlawful non-citizens (UNCs) are assessed as posing an unacceptably high risk to the Australian community.
- Considering a range of short, medium and long term options as part of the Alternatives to Held Detention (ATHD) program, with a focus on those individuals who pose a low to medium risk to the community.
- While there is an immediate focus on the current detention population, in the future the ATHD program could be applied to UNCs who become liable for detention.
- The ATHD program would also need to be supported by a strengthened compliance and monitoring framework to deliver status resolution outcomes

Alternatives to Held Detention

The ATHD Program was established as a response to the Independent Case Review (IDCR).

- The review sought to determine whether those held in IDFs should remain so, whether they have appropriate access to services, and, whether appropriate steps are being taken to resolve their immigration status.
- The IDCR recommended the Department explore the development of an individual dynamic risk assessment capability to consider the release of detainees into the community.

The Australian Human Rights Commission (AHRC) delivered a separate report titled *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth) (2021)* in February 2021 into arbitrary detention and arbitrary interference with families.

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Alternatives to Held Detention

In Phase 1 of the ATHD program, research and analysis was conducted into:

- international detention models
- the use of parole and bail in domestic jurisdictions, dynamic risk assessment models
- how electronic monitoring could be utilised in an immigration context.

Phase 2 will focus on the development and design of options to better enable the management of detainees within a community setting, including comprehensively assessing community protection risk and mitigating against residual risk.

- This will include the consideration of a step-down model, whereby an individual might transition from a held detention environment to Residence Determination in the first instance.

ATHD Program key initiatives

Risk assessment tools

- The purpose of this stream of work is to review current risk tools and develop a revised risk assessment framework and tools that enable a dynamic and nuanced assessment of risk across the status resolution continuum.

Residence Determination and Bridging visa conditions, compliance and electronic monitoring

- Increasing community based placements and managing residual risk for an individual may require, or be better supported by, enhanced Residence Determination and visa conditions.
 - Conditions could seek to mitigate risk to the individual and the community, with consideration of the individual's circumstances and a post-release transition plan.
- Ensuring compliance with these conditions, progress through a step-down model and managing post-release support (detainee welfare and access to transition services) may require the implementation of a strengthened support, compliance and monitoring framework.

ATHD Program key initiatives

An 'independent panel'

- A qualified independent panel may be well placed to conduct a more nuanced assessment of a detainee's risk, including risks related to their physical and mental health. The appointment of suitable experts, in a similar model to that employed by state and territory parole boards, would allow a range of information to be considered.
- Community based placement for detainees with complex circumstances and residual risk could be informed by the advice of an independent panel, including the type of visa or Residence Determination conditions that could be imposed on an individual released from held detention.

A 'step-down' model

- A step-down model is being considered whereby an individual might initially transition from a held immigration detention environment to Residence Determination for a period of time, particularly for those people who have been in detention for a long period and may need greater support to transition to living in the community.
- The Status Resolution Support Service (SRSS) program currently supports individuals in Residence Determination, but further consideration would need to be given to whether it is fit for purpose. Subject to the initiative on Residence Determination and Bridging Visas, conditions would be tailored to the individual and the support to be provided would need further consideration as part of a 'step-down' model.

Potential cohorts

It is likely that individuals who are released into the community may have complex and varied backgrounds and histories.

Examples of complex circumstances may involve combinations of the following factors:

- Moderate to serious histories of criminal offending.
- Mental and physical health concerns.
- Exposure to torture and trauma.
- Limited recent access to rehabilitation programs.
- Low levels of education/restricted access to employment opportunities.
- Limited time spent living in the Australian community.
- Restricted access to accommodation.
- Age specific concerns (eg. youth and geriatric cohorts).

Discussion

Considering these factors and based on the experience of stakeholders:

- What are the considerations we need to be mindful of to ensure individuals successfully transition from held detention into the community?
- What types of support will individuals need if they are released into the community?
- What expertise could the Department benefit from to:
 - i) develop an enhanced risk assessment framework; and
 - ii) implement appropriate support mechanisms for a 'step-down' model?

Next steps

- Development into designs and proposals.
- Briefings back to this group at appropriate intervals.
- Potential changes may be subject to Government approval.