



Australian Government  
Department of Home Affairs

Submission

For information  
PDMS Ref. Number: MS22-001225  
Date of Clearance: 08/07/2022

To Minister for Immigration, Citizenship and Multicultural Affairs

Subject Long term detention overview

Timing At your convenience.

Recommendations

That you:

1. note the information regarding the long-term detention cohort and the current challenges to resolving this caseload; noted / please discuss
2. note the Department will brief you further on particular detention cohorts and options for management, including:
  - detainees who have been in held detention for greater than ten years;
  - detainees who have been found to engage Australia's protection obligations who are unable to be removed at this time, where the Department must investigate third country removal options;
  - other detainee cohorts with complex barriers to status resolution contributing to protracted detention including statelessness and where removal is not reasonably practicable at this time; andnoted / please discuss
3. note the Department will brief you on the outcomes of the *Independent Detention Case Review* (discussed from paragraph 38) and the proposed program of work to implement the findings from this review regarding alternatives to held detention. noted / please discuss

Minister for Immigration, Citizenship and Multicultural Affairs

Signature

Date 25/7/2022

Minister's Comments				
<b>Rejected</b> Yes/No	<b>Timely</b> Yes/No	<b>Relevance</b> <input type="checkbox"/> Highly relevant <input type="checkbox"/> Significantly relevant <input type="checkbox"/> Not relevant	<b>Length</b> <input type="checkbox"/> Too long <input type="checkbox"/> Right length <input type="checkbox"/> Too brief	<b>Quality</b> Poor 1.....2.....3.....4.....5 Excellent <b>Comments:</b>

### Key Issues

1. The purpose of this submission is to provide you with an overview of the long-term detention cohort, some of the key challenges associated with resolving this caseload and the Department of Home Affairs' (the Department) short and longer-term efforts to address these challenges. This submission also provides further context to the issues associated with long-term detention following a briefing you attended with the Commonwealth Solicitor-General on 21 June 2022 in relation to s. 47F(1) and risks associated with long-term detention.
2. In recent years, the immigration detention landscape and composition of the people within held detention has changed. As government policy and departmental decision-making has shifted to focus on community risk, the proportion of high-risk detainees within immigration detention has increased. As the detention population has evolved increasingly to a cohort with criminal history, the complexity of these cases has increased, leading to more protracted timeframes for status resolution including removal, resulting in detainees spending longer in immigration detention.
3. s. 42(1)
4. In *Al-Kateb v Godwin* (2004) 219 CLR 562 (*Al-Kateb*), a bare majority of the High Court found that immigration detention may be properly characterised as detention for the purpose of removal even if removal is not reasonably practicable in the foreseeable future. s. 47C(1)



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5. Recent amendments made to section 197C of the Migration Act clarify that section 198 does not require or authorise the involuntary removal of an unlawful non-citizen who has been found to engage protection obligations in assessment of a valid Protection visa application, to the country in reference to which protection obligations have been found to be engaged. As a result, should the person be refused a Protection visa on character or security grounds, or have a visa cancelled, they will be required to be detained until the person is granted a visa, or can be removed to a safe third country (discussed below).
6. The Department has identified opportunities for reform and enhanced strategic capability across the status resolution continuum, however significant challenges remain in the Department's ability to resolve a number of long-term detention cases.

### Effect of character settings

7. Strengthening of character settings and the introduction of mandatory visa cancellation in 2014 advanced the former Government's community protection agenda. However, this has increased the number of visa cancellation and refusal decisions, and consequently increased related litigation. It has also altered the immigration detention footprint, with 64 per cent of the current immigration detention population comprising persons whose previous visas were cancelled under section 501 of the Migration Act.
8. This has led to the emergence of an intractable caseload of individuals who do not hold visas for character reasons, but cannot be removed from Australia due to barriers to removal, including *non-refoulement* obligations. These individuals frequently also experience prolonged stays in immigration detention prior to becoming available for removal, as they pursue merits and judicial review outcomes, often in relation to their visa cancellation or refusal decision.

### Ministerial intervention powers under sections 195A and 197AB of the Migration Act

9. The Migration Act provides Home Affairs Portfolio Ministers personal, non-delegable and non-compellable Ministerial Intervention (MI) powers. Under the Migration Act, Portfolio Ministers can exercise these powers if they believe it is in the public interest to do so.
10. There are limited options for an unlawful non-citizen who is detained due to the cancellation or refusal of a visa under section 501 of the Migration Act to be released from immigration detention. Due to the operation of statutory bars on valid visa applications, MI under section 195A of the Migration Act is usually required in order for a detainee whose visa has been cancelled or refused under section 501 to be granted a visa. MI under section 197AB of the Act is required to place a detainee in a residence determination (community detention).
11. Portfolio Ministers may set guidelines for the use of their MI powers that describe the types of cases that they wish and do not wish to be referred for their consideration under their MI powers.
12. You have indicated that you wish to review the current MI guidelines, and the Department will brief you further on this matter.

13. The existing section 195A MI guidelines were established in November 2016 and state that a person whose visas have been refused or cancelled under section 501 of the Migration Act should generally not be referred to the Minister. The MI guidelines for the residence determination power under section 197AB of the Migration Act also state that cases where a person may fail the character test under section 501 of the Migration Act should generally not be referred to the Minister. Persons residing in the community pursuant to a residence determination through the exercise of the section 197AB power continue to be detained under section 189 of the Migration Act, however such placements provide an alternative to held detention.
14. On 16 April 2021, the *Migration Regulations 1994* (the Migration Regulations) were amended making available additional visa conditions for a Portfolio Minister to impose on Bridging E (subclass 050) visas (BVE) or Bridging (Removal Pending) (Subclass 070) visas (BVR) granted through MI under section 195A of the Migration Act. These additional conditions mostly related to restricting what types of activities or employment a visa holder could undertake, mostly relating to industries which could be of a national security concern. The reasons provided by the Government at the time for introducing such amendments, was to provide greater confidence in the management of risk to the community, noting that all submissions inform the Minister on a person's circumstances including character and health. These amendments were made to enhance and extend visa conditions to instil greater confidence that risk to the community would be managed effectively.
15. Further, the amendments resulted in the ability for greater alignment between the conditions that could be imposed on a BVE and a BVR. These additional conditions are only available for the Minister to apply on a case by case basis at their discretion or recommendation. As most of these conditions relate to national security concerns, they would likely not be considered as appropriate if considering the grant of these bridging visa types for the majority of people currently in immigration detention.
16. The Department will provide you with a further submission in relation to your MI powers and their application.

Impacts on immigration detention

17. With the reduction of people entering Australia as unauthorised maritime arrivals (UMA) and the expansion of the character cancellation provisions of the Migration Act in 2014 (including the introduction of mandatory cancellation provisions), the composition of the held immigration detention population has changed significantly from a predominately lower risk UMA cohort to a higher risk criminal cohort, with many having served prison sentences.
18. As at 31 May 2022, of the held immigration detention population:
- 89 per cent had a criminal history
  - 78 per cent were rated high to extreme security placement risk
  - 64 per cent were section 501 visa cancellations
  - the average period of time spent in detention was 843 days. <sup>1</sup>

<sup>1</sup> Calculated on cumulative time in detention.



19. The current composition of the immigration detention population has not come with commensurate changes to legislation for managing the increased risks associated with the population. s. 47C(1)
- [REDACTED] without the legislative tools in place to manage this type of behaviour. Individuals are being released from a corrective services environment and entering immigration detention with limited education and/or cognitive or behavioural remediation services in place to prevent deterioration in behaviour. The increased volume of high-risk detainees also adversely impacts the proportion assessed as lower risk, which underlies the Department's focus on exploring alternative options in these cases.
20. s. 47C(1)
- [REDACTED] They engage in adverse behaviours with little consequences for their actions without the support of legislation to lawfully manage these behaviours (such as greater search and seizure powers). This includes detainees damaging property, abusing staff, invoking confrontation, engaging in food and fluid refusal and challenging procedures and authority, which poses a significant risk to the safety of other detainees, visitors and staff.
21. s. 47C(1)
- [REDACTED]
- As a result, there has been a number of additional services requested to support increasingly high needs of care within the long-term detained cohort. Examples include Opiate Substitute Treatment Programs, torture and trauma counselling and other specialised care programs for the support of acute high needs detainees, such as those with chronic disease or functional limitations in their ability to care for themselves.
22. The long-term detention cohort is also an increasingly aging population. s. 47C(1)
- [REDACTED] Placement of detainees in aged care facilities is often difficult to achieve and costly. Health, welfare and security services are often over-subscribed, or do not wish to carry the extra risk associated with this type of arrangement.
23. s. 47C(1)
- [REDACTED]
24. The Department engages contracted service providers for the delivery of held detention services, including garrison, facility management, security, welfare and engagement, and health services. These contracts are due to expire in December 2023, and the Department has commenced briefing you separately on the progress of procurement activities for detention services, noting the issues outlined in this submission.

Scrutiny of long-term detention


25. The Department continues to face ongoing scrutiny with regard to people in detention. Findings from the Australian Red Cross, Australian Human Rights Commission, the Commonwealth Ombudsman and various international scrutiny bodies have been consistent, recommending the Department continue to reduce the number of people in detention. The Department has also continued to receive scrutiny regarding the long-term detention cohort, with arbitrary detention being a prevalent theme in findings where the length of detention is not considered proportionate to the purpose for an individual being detained.
26. The Commonwealth Ombudsman also reviews all detention cases at six monthly intervals once a person has spent two or more years in detention. The Department acknowledges the impacts of prolonged immigration detention and continues to maintain transparency with scrutiny bodies on its management of the long-term detention cohort.

Removal challenges

27. There are ongoing challenges associated with effecting removal for a significant proportion of the detainee population. There are a broad range of barriers that consistently impact the Department's ability to achieve departure and removal outcomes for the detainee population including:
- *Non-refoulement* obligations. It has been long-standing Government policy not to remove individuals who engage Australia's protection obligations to the country in relation to which those protections obligations are engaged, and this is now reflected in the Migration Act through the passage of the *Migration Amendment (Clarifying International Obligations for Removals) Act 2021*.
  - Individuals who refuse to cooperate with removals processes. s. 33(a)(iii)
  - Delays in obtaining foreign travel documents due to bureaucratic processes that are not efficient or well-established. It can take years to obtain appropriate documents from some countries.
  - Challenges engaging with foreign governments who will not issue travel documents for detainees who are involuntary to their removal, or will not accept detainees with a significant criminal background.
  - Individuals with significant identity concerns, such that Australia or a foreign country cannot be sure of who they are.
  - Individuals who are stateless or claimed stateless and for whom there is no country which they have the right of entry and long-term stay.
  - Individuals with significant medical needs that would render them unfit to depart or significantly hinder the Department's ability to remove them.
  - Individuals who have been found not to be owed protection, however are found to engage Australia's international obligations for reasons that are not protection related.
28. The Department recognises these ongoing challenges and is currently exploring a number of strategies. This includes working with other countries, s. 33(a)(iii) to learn about how they manage intractable cohorts.




29. s. 47C(1)



Third country options


30. The Commonwealth's successful High Court appeal in *The Commonwealth v AJL20* [2021] HCA 21 only reduced some of the legal risk associated with a failure to comply with the duty in section 198 of the Migration Act to remove unlawful non-citizens as soon as reasonably practicable. The High Court's decision clarified that a failure to comply with the duty under section 198 of the Migration Act does not make continued immigration detention unlawful, but does provide a basis for a court order (likely a writ of mandamus) compelling officers to comply with the duty. s. 42(1)




31. One such risk crystallised in the recent matter of *BHL19 v Commonwealth*. BHL19 is a Syrian citizen who arrived in Australia as an unauthorised maritime arrival in November 2012. Following the cessation of his bridging visa in July 2013, he was taken into immigration detention in February 2014. Although he has been found to be owed protection by Australia in respect of Syria, his application for a Protection visa application was refused on the basis that he failed to meet the character test under section 501 of the Migration Act.

32. On 31 March 2022, the Federal Court declared that from at least 22 February 2021, officers of the Commonwealth failed to discharge their statutory duty to remove BHL19 from Australia as soon as reasonably practicable, and issued an order compelling the Commonwealth to do so. The order was directed to an ABF Assistant Commissioner, who was required to depose to whether the steps taken to remove BHL19 and why removal had not become reasonably practicable.

33. s. 42(1)



34. s. 42(1)



35. Nevertheless, in order to comply with its obligations under the Migration Act and mitigate the associated risks, the Department must be in a position to evidence that concrete and robust steps to remove the individual as soon as reasonably practicable have been and are being taken in any given case.
36. In response to the outcome of the BHL19 judgment, and increased risks associated with cases where the Department is obliged to pursue third country options, the Department has established a s. 47E(d) [REDACTED] is currently identifying and reviewing all cases that currently fall, or may fall, within scope of section 197C of the Migration Act to explore third country options.
37. Unless a person has an existing right of residency or long-term stay, or at least significant ties to a particular third country, in the Department's experience it is highly unlikely that a third country will accept them. A person's criminal history remains one of the most significant barriers to successful third country removals, as many countries have visa requirements relating to character and/or criminal convictions that those with serious criminal histories cannot satisfy.
38. The Department has indicated in the recommendations of this submission that it will brief you separately on detainees who have been found to engage Australia's protection obligations who are unable be removed at this time, where the Department is obligated to investigate third country removal options.
39. s. 42(1) [REDACTED]

Measures to address barriers to alleviate long-term detention

40. The Department is currently exploring a range of measures aimed at addressing barriers to status resolution and associated risks of long-term detention.
41. The Department uses the Community Protection Assessment Tool (CPAT), a decision support tool to assist in assessing the most appropriate placement of a non-citizen while status resolution is pursued. In this context, placement refers to whether the non-citizen should reside in the community or in held immigration detention. The CPAT provides a placement recommendation based on a point in time assessment of the level of risk a person poses to the community, through a set of defined parameters. The CPAT also enables Status Resolution Officers to recommend an alternative placement for a non-citizen on consideration of additional information outside the CPAT parameters.
42. The Department is reviewing risk assessment processes and tools across the status resolution continuum. Current work in relation to reviewing risk processes and tools includes:
- Undertaking a 'Single Front Door' pilot to enable a single referral point for all community protection-related visa cancellations. This will allow more coordinated engagement with Field Operations and Detention to align capacity and resources. It will help direct focus to higher risk cancellations.



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- Exploring how the CPAT could give greater consideration to the nature of a detainee's criminal history when assessing community risk including an individual's strengths and vulnerabilities and how these factors may affect placement recommendations.
43. Recognising the complexity of the changes impacting detention and status resolution practices since 2014, the Secretary of the Department and the Australian Border Force Commissioner requested an independent case review of individuals in held immigration detention. The review, known as the *Independent Detention Case Review* (IDCR), was undertaken by Mr Robert Cornall AO and completed in March 2020.
44. The Department is continuing to explore options recommended by the IDCR to identify alternatives to held immigration detention and the management of individuals where community risk could potentially be mitigated through the implementation of additional controls.
45. As part of this work, the Department is engaging with international partners to discuss detention models and share information and experience across jurisdictions. Any potential changes must be balanced against the Government's community protection policies and will be subject to Government approval. Your office will be briefed separately on the IDCR and the proposed program of work to implement the findings from this review.
46. The Department also intends to explore the potential for an expanded role for residence determination as a tool to manage non-citizens in a community detention setting rather than held immigration detention. The current residence determination population consists almost entirely of transitory persons and the Department considers there is capability to utilise residence determination to manage certain lower risk unlawful non-citizens with character or security concerns who would otherwise be accommodated in held immigration detention. The Department will brief you further in relation to alternatives to held detention.

### Background

47. As at 31 May 2022, there were 1,395 people in held immigration detention. The average time spent in detention was 843 days, compared to 726 days as at 28 February 2022.
48. Of the 1,395 detainees, 570 detainees had been in detention for a cumulative period of two years or more, approximately 41 per cent of the held detention population. The longest period in detention is just under 15 years.
- 386 (68 per cent) have been in held detention between two and five years
  - 184 (32 per cent) have been in held detention in excess of five years.
49. The number and proportion of people in long-term detention has been steadily increasing. As at 1 June 2020 there were 443 people in held detention for two years or more (30 per cent of the total population at the time).
50. Detainees who have been in held detention for more than two years generally have complex case histories and significant barriers to the timely resolution of their immigration status.

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51. Internal factors that contribute to these barriers include visa cancellation revocation processes and ongoing visa applications. External factors that contribute to these barriers include merits and judicial review processes, ongoing criminal proceedings, *non-refoulement* obligations and challenges associated with acquiring travel documents for both voluntary and involuntary removals. As at 31 May 2022:

- 363 of the 570 long-term detainees have external barriers to resolving their status.
- 207 of the 570 long-term detainees have internal barriers to resolving their status.

52. A breakdown of the long-term detainee cohort is provided at Attachment A.

### Consultation – internal/external

53. This submission was prepared in consultation with Immigration Integrity Assurance and Policy Division, Health Services Division, Legal Group and North and Immigration Detention.

### Consultation – Secretary

54. The Secretary was not consulted on the approach in the submission.

### Client service implications

55. Not applicable.

### Sensitivities

56. s. 47C(1)

57. The information contained in this submission should not be publicly released without the authority of the Department. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – [media@homeaffairs.gov.au](mailto:media@homeaffairs.gov.au).

### Financial/systems/legislation/deregulation/media implications

58. The Department is unable to provide specific details regarding the financial implications of managing an individual, either in the community or in detention. The Department notes that the costs will be highly dependent on the individual circumstances, including the level of support required, however in 2020-21, the estimated annual cost for managing a person:

- in held detention was approximately \$428,541;
- in residence determination was approximately \$54,798; and
- on a Bridging visa was approximately \$3,962.



**Attachments**

**Attachment A** Long-term detainee cohort overview – As at 31 May 2022.

<b>Authorising Officer</b>
Cleared by:
Belinda Gill A/g First Assistant Secretary Status Resolution and Visa Cancellation Division
Date: 08/07/2022 Mob <b>s. 22(1)(a)(ii)</b>

**Contact Officer:** Belinda Gill, A/g First Assistant Secretary, Status Resolution Branch, Ph: **s. 22(1)(a)(ii)**  
Mob **s. 22(1)(a)(ii)**

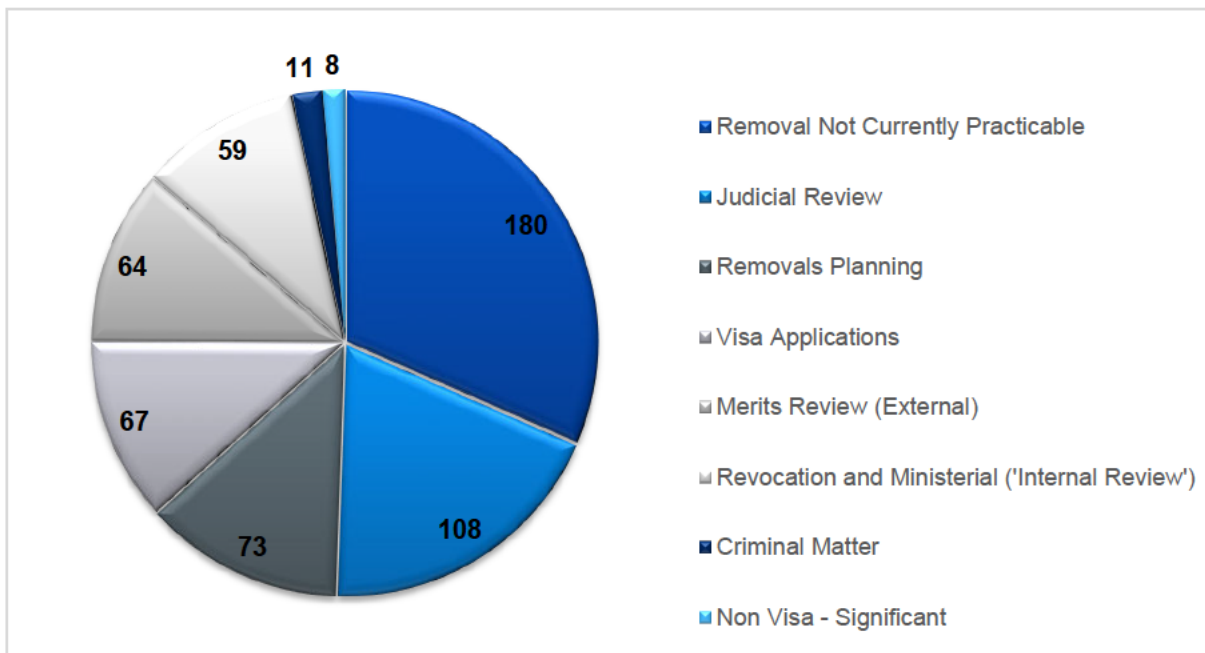
CC Minister for Home Affairs, Minister for Cyber Security  
Secretary  
ABF Commissioner  
Deputy Secretary, Immigration and Settlement Services Group  
Deputy Commissioner, North, West and Detention  
A/g Deputy Commissioner, South, West and Workforce  
Group Manager Legal  
First Assistant Secretary, Immigration Integrity, Assurance and Policy  
Assistant Commissioner, North and Immigration Detention  
A/g Assistant Secretary, Status Resolution  
Assistant Secretary, Character and Cancellation  
Commander, National Detention Operations  
A/g Assistant Secretary, Compliance and Community Protection Policy



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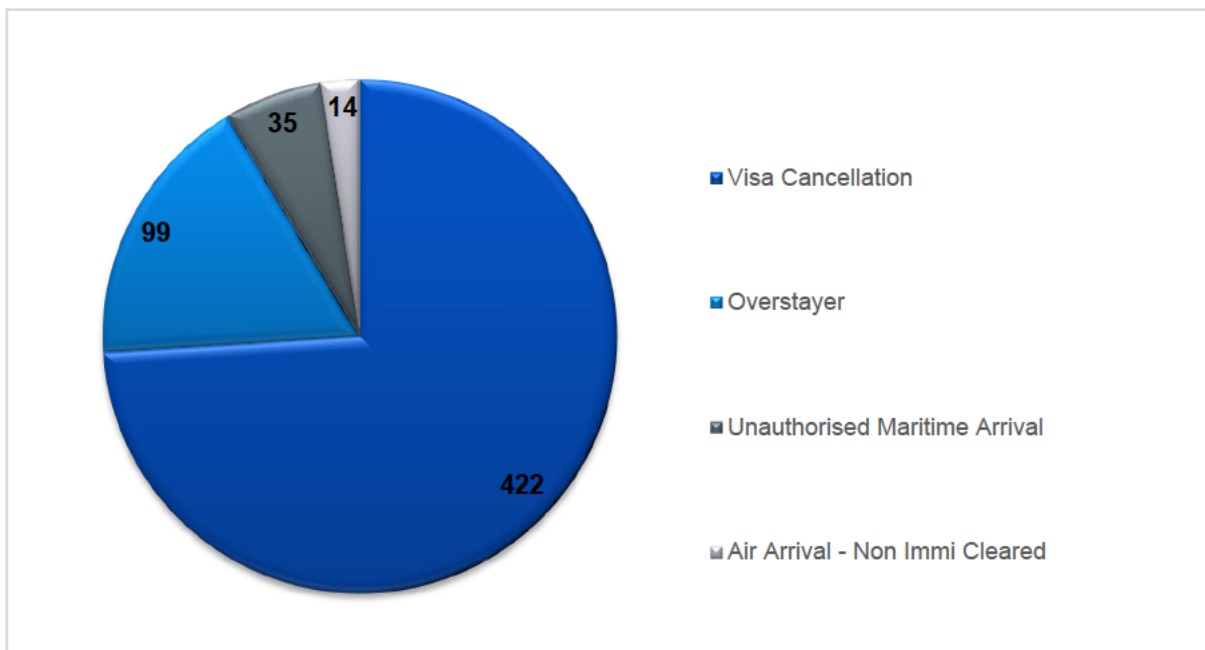
**Attachment A – Long term detention overview – As at 31 May 2022**

**Table 1: Current status resolution barrier\***



\*Non Visa – Significant includes individuals subject to regional processing and other ongoing complex assessments.

**Table 2: Most recent detention reason\***

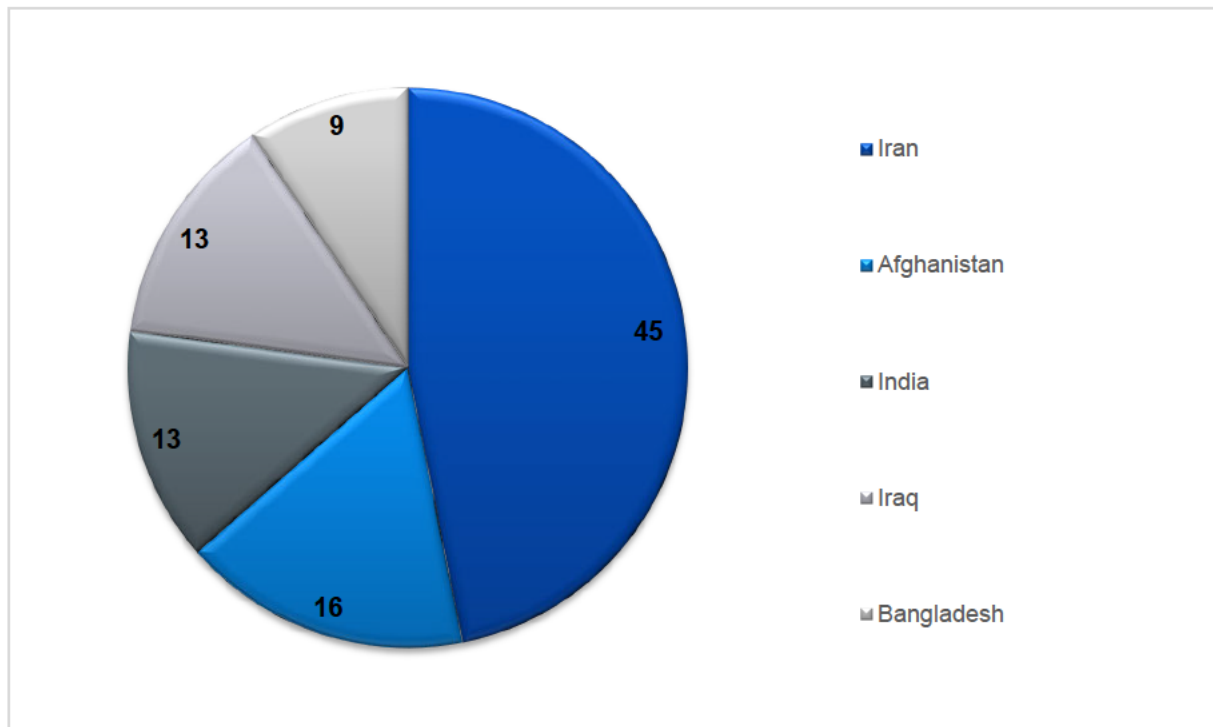


\*UMAs includes individuals in held detention since arrival, those accommodated in Tier 4 detention placements and Alternative Places of Detention and individuals transferred to a residence determination whose residence determination was subsequently revoked under section 197AD of the *Migration Act 1958*.

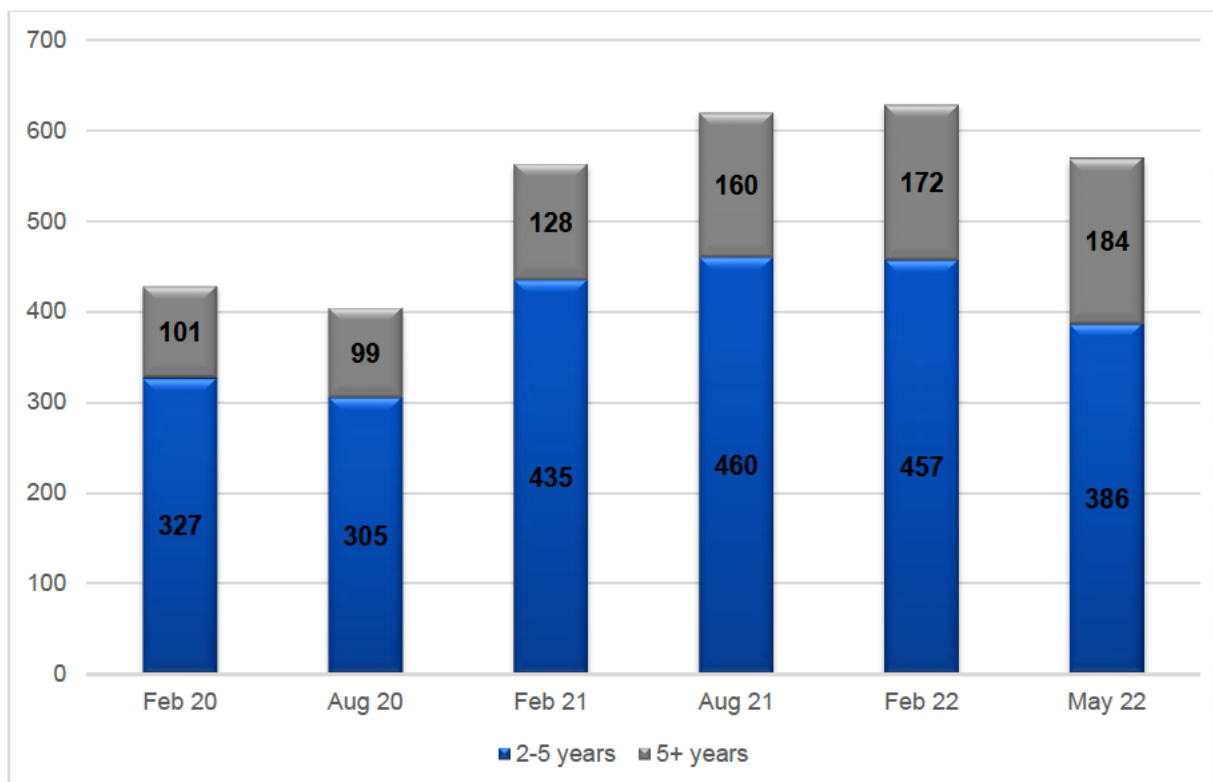
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**Table 3:** Top five citizenships for detainees where removal is not currently practicable



**Table 4:** Long-term detention cohort – Since February 2020



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