PLEASE TAKE ME TO A SAFE PLACE

THE IMPRISONMENT OF ASYLUM SEEKERS IN AOTEAROA NEW ZEALAND
Amnesty International is a movement of 10 million people which mobilises the humanity in everyone and campaigns for change so we can all enjoy our human rights. Our vision is of a world where those in power keep their promises, respect international law and are held to account. We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and individual donations. We believe that acting in solidarity and compassion with people everywhere can change our societies for the better.
**EXECUTIVE SUMMARY & RECOMMENDATIONS**

**PLEASE TAKE ME TO A SAFE PLACE**

The imprisonment of asylum seekers in criminal justice facilities in Aotearoa New Zealand

“Please take me to a safe place” are the desperate words of a 20-year-old African asylum seeker pleading to be released from prison in Auckland. After fleeing danger in his home country, he thought he would finally be safe in Aotearoa New Zealand. However, he was instead arrested and detained in a criminal prison solely on immigration grounds. He was only released after his refugee status was recognised, seven months later.

In 2014, the United Nations Working Group on Arbitrary Detention made a 15-day visit to Aotearoa New Zealand. In their report presented to the Human Rights Council in 2015, they highlighted their concern that Aotearoa New Zealand “is using the prison system to detain irregular migrants and asylum seekers, including Waikeria Prison, Arohata Prison for Women and Mt. Eden Corrections Facility.” These prisons, and police stations, do not provide separate facilities for immigrants in an irregular situation or asylum seekers. They recommended the abolishment of this practice.

In the subsequent years after the visit from the working group, the Government of Aotearoa New Zealand has continued to detain asylum seekers and irregular migrants in police stations and prisons.

The number of asylum claimants detained in prison per year, shown by first year of detention only.

<table>
<thead>
<tr>
<th>Corrections Facility Name</th>
<th>2019</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
<th>2019</th>
<th>2020</th>
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<td>10</td>
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<td>1</td>
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<td>2</td>
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<td>0</td>
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<tr>
<td><strong>Totals</strong></td>
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<td><strong>20</strong></td>
<td><strong>14</strong></td>
<td><strong>21</strong></td>
<td><strong>41</strong></td>
<td><strong>86</strong></td>
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Between the years 2015 to 2020, Immigration New Zealand imprisoned approximately 86 people seeking asylum. Whilst the majority of people who apply for asylum in Aotearoa New Zealand are not detained at any stage, legislation and practice still allow for the detention of some asylum seekers solely on immigration grounds. Immigration New Zealand can imprison an asylum seeker to hold them for future deportation pending the determination of their claim if they are considered at risk of absconding within Aotearoa New Zealand, pending satisfactory establishment of their identity, or on broad “threat to security” grounds. In some cases, the Immigration Act 2009 effectively reverses the presumption of liberty, contrary to international human rights standards.

These 86 people had to pass through a complex hybrid of civil and criminal detention processes. This usually began by being arrested at the airport or in the community, detained in a police cell for several nights, brought before a judge in the District Court, and taken to a prison managed by the Department of Corrections or a private prison provider contracted by the Government. Their detention in a police cell or prison ranged from several days to several years. Despite not being charged with a criminal offence in Aotearoa New Zealand, asylum seekers detained in a prison are subject to essentially the same regime as remand accused prisoners.

Our findings from research conducted into the continuation of these policies in the last six-year period demonstrate that they have put refugees and asylum seekers at risk, and in some cases, constitute human rights violations. Their stories and the policies and practices that have contributed to the findings of this report are a stark picture of the human rights failures and harms of this policy for the people who are subject to it.

Our investigations have documented a case where a reported survivor of torture, later recognised as a refugee, was allegedly raped whilst being double bunked in prison. Immigration New Zealand admitted to imprisoning several other people, later also recognised as refugees, who were past survivors of torture, mistreatment or sexual or gender-based violence. We also interviewed a case where a man reported being caught up in the notorious “fight clubs” at Mt Eden Corrections Facility, resulting in him being forced to regularly fight other remand prisoners. Three men spoke of how their treatment led them to want to end their life. All spoke of the negative impacts on their well-being and harms of the use of police stations and prisons to detain asylum seekers and other immigration detainees and that it should not take place. Amnesty International is calling for immediate and urgent reform to end these practices.

1. Report of the Working Group on Arbitrary Detention on its visit to New Zealand (22 March – 2 April 2015), UN Doc. CHRD/NGW/ NZL/2, 8 July 2015, para. 11.
2. Report of the Working Group on Arbitrary Detention on its visit to New Zealand (22 March – 2 April 2015), UN Doc. CHRD/NGW/ NZL/2, 8 July 2015, para. 11.
3. UN HRC, 40th session, PARAGRAPHS 119-122 (In the case of Mr. R.); 41st session, PARAGRAPHS 57-60 (In the case of Mr. L.);
5. Immigration Act 2009, Regulation 184 of the Corrections Regulations 2005. There is one narrow exception that an immigration detainees may be released temporarily to their next of kin.
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EXECUTIVE SUMMARY & RECOMMENDATIONS

OUR RECOMMENDATIONS

Amnesty International urges the Government of Aotearoa New Zealand to:

RECOMMENDATION 1:
End the use of criminal justice facilities such as police stations and prisons to detain asylum seekers or irregular migrants, since these are designed for those within the realm of the criminal justice system.

RECOMMENDATION 2:
Reform the Immigration Act 2009 to ensure that it is consistent with international human rights standards, including the following amendments:

a) Explicitly protect in law the presumption against immigration detention in all circumstances.

b) Introduce international human rights standards on the use of immigration detention in Part 9 of the Immigration Act, including a statutory obligation to adhere to the requirements of detention only as a last resort and to comply with the requirements of legality, necessity, proportionality and non-discrimination.

c) Any decision to detain is based on an individualised assessment and not the circumstances of arrival or asylum claim.

d) Introduce a prohibition in law on the immigration detention of people at increased risk of human rights violations who have sought asylum, including: torture survivors, children under 18 and their families or guardians, pregnant or lactating women, those with serious medical conditions, people with disabilities and older persons.

e) Introduce a total maximum duration for detention provided by law which should be reasonable in its length. Once this period has expired the individual concerned should automatically be released.

f) For cases where restrictions to the rights to liberty or freedom of movement are necessary, introduce an obligation in law to consider non-custodial measures before resorting to detention.

RECOMMENDATION 3:
Ensure that community alternatives to detention are available, funded adequately and accessible to asylum seekers and irregular migrants in policy and practice, without discrimination.

RECOMMENDATION 4:
Immediately review cross-agency failures to ensure due process rights at all stages of the immigration detention process, in co-operation with rights holders, lawyers, the UNHCR and civil society organisations. This should include, but not be limited to:

a) Access to and funding of civil legal aid representation at all stages of detention that meaningfully ensures the right to challenge immigration detention and pursue asylum claims.

b) Access to interpreters at all stages of detention and provision of relevant documentation in their own language. The interpretation or translation provided should be of a standard which enables the detainee to fully understand the proceedings around their case.

c) Immigration detainees are handed information as soon as possible about the reasons for a detention decision and details on their rights in a language they understand, preferably at the airport.

d) Immigration detainees are given access to a qualified immigration lawyer before their court appearance and ideally at the first interview stage.

e) Judicial review of immigration detention is not only of a procedural nature but must also allow for substantive consideration of the case at each hearing.

f) Search practices, including strip searches for immigration detainees are reviewed.

g) Adequate time for proper health checks and screening prior to transfer to any detention facility, including appropriate assessment, diagnoses, and treatment of any illnesses, injuries or disabilities and that immigration detainees are not transferred to a facility where these health needs cannot be addressed or under circumstances in which their health would be adversely affected.

h) Human rights and asylum-specific training of Immigration New Zealand officers and legal counsel, police officers and the judiciary.

RECOMMENDATION 5:
If immigration detention is used as a last resort and is legal, necessary and proportionate, ensure that any restrictions on movement or detention conditions comply with relevant international human rights standards, including:

a) Ensure that all immigration detainees can communicate freely and in full confidentiality with visitors and that they have adequate opportunity to communicate with the outside world.

b) Ensure that all immigration detainees can exercise their right to access legal counsel, interpreters, doctors, refugee and migrant assisting organisations, members of their families, friends, religious and social assistance and the UNHCR, and that this right is not impeded in practice.

c) Ensure that all immigration detainees are afforded regular and sufficient periods to make telephone calls at times that are appropriate for the part of the world they are calling.

d) Ensure that all immigration detainees are given regular and sufficient periods of time to send and receive email and to receive information.

e) Ensure that there are no limits on the number of letters that can be sent and received by immigration detainees. Legal mail should not be opened or otherwise read by prison or detention centre staff.

f) Allow any immigration detainee to have reasonable access to a radio, television and/or internet.

g) Take steps to ensure that immigration detainees have access to a library that is adequately stocked with recreational and instructional books.

h) Ensure that immigration detainees have appropriate food in line with their culture and religious beliefs whilst detained.

i) Ensure that detention centre/prison rules are provided in a language detainees understand, in particular that information on accessing a medical professional, a lawyer, making a complaint and access to phone calls/outside world should all be provided in a language that is understood.
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RECOMMENDATION 6:

Individuals who have been subjected to human rights violations in custody must have accessible and effective remedies. In particular, the Government of Aotearoa New Zealand must ensure that allegations are promptly, impartially, independently and thoroughly investigated, that victims have access to an effective remedy and receive reparation, and that those responsible are brought to justice in accordance with international human rights law and fair trial standards.

METHODOLOGY

Our research, analysis and findings are based on a variety of primary and secondary sources relating to the imprisonment of people who have sought asylum in Aotearoa New Zealand between the years of 2015 to 2020. These include interviews with 20 people, including refugees and asylum seekers and those working closely with them, such as support workers or lawyers. Our sources also include court documents, legislation and operational policies, official documents obtained under the Official Information Act, such as statistics, documents and emails, immigration, prison and legal files of individuals, and credible or independent inspections of prisons.

The first-hand testimonies come from the direct experiences and words of 12 people who have sought asylum in Aotearoa New Zealand and were detained in prison at some point between 2015 and 2020 on immigration grounds. Not all 12 testimonies have been featured in this report as individual case studies, but all were included in our overall analysis and inform the recommendations made. We carried out semi-structured interviews in September and November of 2020. All interviews with asylum seekers were carried out in person, primarily on site at the Asylum Seekers Support Trust Hostel, which is the primary organisation in Aotearoa New Zealand dedicated to supporting or hosting asylum seekers in the community.

Of the 12 testimonies included, 11 interviews were carried out after the interviewees had been released from prison and one was interviewed whilst still detained in prison. Ten had been detained on arrival at the airport and two had been detained after living as an irregular migrant in the community and claiming asylum after being served with a deportation order.

Eleven asylum seekers were men and one was a woman, which is generally representative of the profile of asylum seeker detainees in Aotearoa New Zealand. They were from a number of different countries, including Somalia, Sri Lanka, Iran, Turkey and China. Some shared their story through an accredited interpreter sourced through a trusted partner organisation or with a support worker who spoke their language. For reasons of privacy and security, the sources have not been identified and false names have been used. The information included in the case studies featured in this report has been independently verified unless otherwise indicated.

The people we interviewed dedicated significant time to telling their experiences, and shared personal and difficult stories. We are indebted to them for trusting us with their experiences.

We also carried out interviews with two support staff from the Asylum Seekers Support Trust and interviews with six lawyers, who between them, have decades of experience representing asylum seekers who have been detained and imprisoned in Aotearoa New Zealand. These were carried out in person or using videoconference. Parts of their comments, quotes and analysis are also included in the report.

We engaged with relevant government departments to request official information and statistics, clarify relevant operational policies and respond to some allegations. This included a final opportunity for the Ministers of Immigration, Justice, Corrections and Police to respond prior to publishing.

At time of publishing, the Minister of Immigration and Justice and the Minister of Corrections had responded to Amnesty International’s right to reply letter. The Minister of Immigration advised that he was not able to provide a comprehensive response prior to the deadline but welcomed an opportunity to meet with Amnesty International following the release of the full report.

The Minister of Corrections provided a brief response to Amnesty International prior to publishing with clarifications and comments. These primarily related to Correction’s role in that it does not decide who is placed in a prison, the privacy of legal mail, and interpretation services in prison. This included that people in prison should have access to a translation service on phone calls or in meetings with their legal advisor, or meeting with Corrections staff, and that the Department is currently working on a pilot for the development of translated information into different languages.

j) Ensure the right to the highest attainable standard of health, including access to adequate mental health care is met.
k) Ensure free and full access for independent agencies such as faith and community interest groups, local, national, and international governmental organisations and non-governmental organisations, and permit them to monitor detention conditions.
l) Ensure that community organisations are provided adequate funding and resources to house and support refugees and asylum seekers.

6. “Alleges”, “claims” or “reported” has been used if independent verification has not been possible at a particular incident or claim.
For many decades, Aotearoa New Zealand has been party to a number of core treaties that relate directly to its international human rights obligations relating to the rights of asylum seekers in detention. These include, among others, the 1951 Convention Relating to the Status of Refugees, the International Covenant on Civil and Political Rights (the ICCPR), The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture) and the International Covenant on Economic, Social and Cultural Rights (the ICESCR). Some domestic laws in Aotearoa New Zealand incorporate some of these human rights standards indirectly or directly.

To honour obligations under these human rights treaties domestically, Aotearoa New Zealand is required to both refrain from actions that interfere with human rights, protect people against human rights abuses and take positive steps to facilitate the enjoyment of human rights for all.

(a) The right to seek asylum

Seeking asylum is a universal human right and has been enshrined as such since 1948 in the Universal Declaration of Human Rights following the atrocities of World War Two. The 1951 Refugee Convention (the Refugee Convention) and its 1967 Protocol are the key legal documents that protect the rights of refugees. Aotearoa New Zealand acceded to the Refugee Convention in 1960 and the 1967 Protocol in 1973 and the Immigration Act incorporates the Refugee Convention into its schedule. Article 1 of the Refugee Convention defines a refugee as “any person who is outside his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/her race, religion, nationality, membership to a particular social group or political opinion; and is unable or unwilling to avail himself/herself of the protection of that country, or to return there, for fear of persecution”.

(b) The right to liberty and security of the person

International and domestic law establishes that everyone, regardless of nationality, citizenship or migration status, has the right to liberty, including protection from arbitrary arrest and detention and the enjoyment of their personal security. The right to liberty should always be the default condition for all people and can only be restricted in specific and the most exceptional of circumstances. In order not to be arbitrary, any form of detention, including immigration detention, must strictly adhere to the requirements of legality, necessity, proportionality, and non-discrimination.

Domestic and international human rights standards pertaining to the absolute prohibition of arbitrary detention are also applicable to asylum seekers and other individuals in immigration detention. Forms of administrative detention, (ie. detention without a trial) can be at times prolonged, and may also be used by states to circumvent fair trial proceedings in the criminal justice system.

Whilst immigration detention (detention for the only purpose of migration management) is not completely prohibited under international law, it is only permissible as a last resort for the shortest possible time. If immigration detention is used, people seeking asylum like anyone else, must still benefit from the legal presumption of liberty. Liberty “is a substantive guarantee against unlawful and arbitrary detention.”

UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention, para. 11.

“The position of asylum seekers may differ fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry. They may, for example, be unable to obtain the necessary documentation in advance of their flight because of their fear of persecution and/or the urgency of their departure. These factors, as well as the fact that asylum seekers have often experienced traumatic experiences, need to be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence.”

UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention, para. 11.

Asylum seekers are also entitled to certain protections under the Refugee Convention. All refugees declared as such, were once an asylum seeker. The Refugee Convention recognises that by virtue of fleeing persecution, often in urgent circumstances, people seeking a safe haven may be forced to enter a country without the required documentation or without prior legal authorisation. Accordingly, asylum seekers should not be penalised for doing so, provided they present themselves without delay to the authorities and show good cause for their irregular entry or presence.

10. See also the UNHCR Detention Guidelines.
11. Article 9(2) of the ICCPR. The right to liberty is enshrined in section 20 of the New Zealand Bill of Rights Act 1990.
14. Article 9(1) of the ICCPR. The International Covenant on Civil and Political Rights (the ICCPR) is a human rights treaty that was adopted and opened for signature, ratification and accession on 16 December 1966, and entered into force on 23 March 1976.
17. The New Zealand Bill of Rights Act 1990 sets out the legal rights and freedoms of New Zealanders and it’s citizens and it’s permanent residents. It also incorporates some of the human rights standards outlined in the Universal Declaration of Human Rights. Article 9(2) of the ICCPR that enshrines the right to liberty is enshrined in section 15 of the Bill of Rights Act 1990. Article 9(2) of the ICCPR also incorporates the extent of the right to liberty in the Bill of Rights Act 1990.
18. Article 9(2) of the Universal Declaration of Human Rights (UDHR), Article 9(2) of the ICCPR, The right to liberty is also protected by fundamental rights contained in the European Convention on Human Rights. Article 5 of the European Convention on Human Rights (the ECHR).
19. Article 9(1) of the ICCPR. The International Covenant on Civil and Political Rights (the ICCPR) is a human rights treaty that was adopted and opened for signature, ratification and accession on 16 December 1966, and entered into force on 23 March 1976.
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35. Article 9(2) of the ICCPR. The right to liberty is enshrined in section 20 of the New Zealand Bill of Rights Act 1990.
Detaining asylum seekers specifically in criminal justice facilities is contrary to the standards set by international human rights bodies, including the United Nations Working Group on Arbitrary Detention in 2018. These bodies have repeatedly noted the inappropriateness of and harm from the use of police stations and prisons to detain asylum seekers and other immigration detainees. People detained under immigration grounds have not been charged with a criminal offence in Aotearoa New Zealand.

“Immigration Act 2009: detainees subject to same regime as accused prisoners

Prisoners who are detained under the Immigration Act 2009 are subject to the same regime and have the same entitlements as accused prisoners except as provided under regulation 70 and regulation 188.”

Regulation 184 of the Corrections Regulations 2005.

Whilst the majority of asylum seekers are not detained, Aotearoa New Zealand legislation and practice still allow for the detention of some asylum seekers in criminal justice facilities, and they are subject to essentially the same regime as remand accused prisoners. As such there is no distinct policy for immigration detainees, including asylum seekers, in prison.

“It is of concern to the Working Group that New Zealand is using the prison system to detain irregular migrants and asylum seekers. They are being held in Waikeria Prison, Avondale Prison for Women and Mt. Eden Corrections Facility. These prisons, and police stations, do not provide separate facilities for immigrants in an irregular situation or asylum seekers.”


References


18. Section 121 of the Bill of Rights Act 1990; Article 10 of the ICCPR; UN Standard Minimum Rules for the Treatment of Prisoners; Article 10 of the ICCPR.

19. Article 7 of the ICCPR.

20. Article 10 of the ICCPR.


22. Immigration Act 2009; Principles of the General Assembly


24. Regulation 184 of the Corrections Regulations 2005. There is one narrow exception to this, which is that an immigration detainee may keep their own hairstyle.

The imprisonment of asylum seekers in Aotearoa New Zealand

Under current law and practice in Aotearoa New Zealand, some asylum seekers may be arrested and detained under two primary routes. They may arrive at the airport border in Aotearoa New Zealand and be refused entry, for example if they don’t have a valid visa or have false identity documents and are considered liable for “turnaround” or deportation. Alternatively, a person may be arrested and detained when they are living in the community without a valid visa, are arrested for deportation, and apply for asylum at this point in time. The Immigration Act 2009 stipulates that the purpose for which arrest and detention powers may be exercised generally relate to questions of detaining due to the immediate inability to carry out a deportation order or “turnaround”, on “threat to security” grounds, or pending satisfactory establishment of the person’s identity.26

When an asylum seeker is considered liable to arrest and detention, they may then be:27

1) Detained by an immigration officer for four hours (often where an interview takes place to establish next steps).
2) Arrested and detained without warrant in a police station for a period not exceeding 96 hours.
3) Released into the community on conditions, or to a specific place of residence with reporting requirements (such as the Asylum Seeker Support Trust Hostel in Auckland).
4) Detained under a “warrant of commitment” by a District Court Judge to prison, or to Aotearoa New Zealand’s Refugee Resettlement Centre.

Both domestic law and international human rights standards require that a detainee, including an immigration detainee, is entitled to basic procedural standards to protect against arbitrary detention and if treatment.

This includes the right to be informed, in writing and in a language which they understand, of the nature of and grounds for the decision to detain, the duration of detention, as well as of the possibility to challenge the legality and arbitrariness of such decision (habeas corpus).28 They must be informed of their right to contact a lawyer and for authorities to take reasonable steps to enable a legal visit in private.29 International human rights standards makes clear that people seeking asylum who are detained must also retain the the ability to communicate with the outside world, including by telephone or email, to file an asylum application, and to not be detained in criminal justice facilities such as police stations or prisons.30

For those who were arrested and detained, at every stage, Amnesty International found failures such as police stations or prisons.

Section 23 of the New Zealand Bill of Rights Act 1990:

Rights of persons arrested or detained

(1) Everyone who is arrested or who is detained under any enactment—

(a) shall be informed at the time of the arrest or detention of the reason for it; and

(b) shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is—

(a) arrested; or

(b) detained under any enactment—

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

Sections 310 and 316 of the Immigration Act 2009.

Sections 23 of the New Zealand Bill of Rights Act 1990.
At this stage in the process asylum seekers can legally be detained by Immigration New Zealand for up to four hours, which is usually when the initial interview with an immigration officer from Border Operations takes place in a separate room at the airport. Interpretation services are available over the phone or in person. Immigration New Zealand does not consider the initial interview with asylum seekers at the airport as an official form of “detention” and therefore does not consider that it has an obligation to ensure access to legal representation.

However, under international human rights standards, this could still be considered a form of immigration detention. A brief period of immigration detention (such as for several hours) can be legitimate if it is considered necessary for legitimate purposes, such as for determining a person’s identity, but must be for the shortest possible time and still comply with human rights standards.

A refugee and human rights lawyer described the process at the airport as the “Wild West,” which is usually when the initial interview with an immigration officer from Border Operations takes place in a separate room at the airport. Interpretation services are available over the phone or in person. Immigration New Zealand does not consider the initial interview with asylum seekers at the airport as an official form of “detention” and therefore does not consider that it has an obligation to ensure access to legal representation.

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For example, asylum seekers are asked “whether they would leave New Zealand voluntarily if their asylum claim is declined” as standard practice in airport interviews. When they respond in the negative (with a “no”), this may be used against them as one of the cumulative reasons justifying detention in prison under future warrant of commitment applications by Immigration New Zealand.35

“Risk of absconding” is a prevalent ground used under the Immigration Act 2009 to detain asylum seekers in prison.36 A “just in case” approach, of ensuring compliance with a “potential” deportation order is increasingly not recognised as a legitimate standalone ground for detaining asylum seekers under international law.37 Amnesty International believes that the “risk of absconding” must be assessed in relation to a deportation procedure that has been initiated, is in progress, and has a reasonable prospect of being executed. International law prohibits deportation before a person’s asylum claim has been finally determined. States are therefore prohibited from detaining asylum seekers for the purpose of expelling them before the final decision on their asylum application has been made.38

Whilst asylum seekers are told they will not be removed from Aotearoa New Zealand until their claim is decided, some were also given a “message” at the outset of the interview:

“If you are not granted entry permission you will not be removed from New Zealand until your claim for refugee or protection status has been decided. This process can take many months or even years. Depending on the information gained during this interview you may be granted a visa or held in a form of detention whilst your claim is being processed.”39

Telling asylum seekers how long their claim could take, combined with the reference to detention could be interpreted or construed (particularly for someone in a state of post-traumatic stress) as seeking to deter or dissuade them in their right to pursue their asylum claim. This initial interview is also not carried out by a Refugee Status Determination Officer or someone with expertise in refugee law. This was particularly evident in the experiences of some asylum seekers interviewed by Amnesty International who referred to immigration officials in this interview having no rudimentary knowledge of the large-scale conflicts in the country they were fleeing, or knowledge that countries they had passed through in their journey were not signatories to the Refugee Convention so could not offer protection.

Li is an asylum seeker from China who, after being in limbo in a country that is known for the forced return of refugees, claimed asylum on arrival to Aotearoa New Zealand at Auckland Airport. He spent several months, at times double bunked with remand prisoners, at Mt Eden Corrections Facility.

Li arrived with a regular passport and travel documents and was initially admitted access through the border. Li spoke no English so as soon as he was admitted through the border, he looked around for an official who could speak his language. As soon as he did, he told them he wanted to seek asylum. Li was interviewed, had his visa cancelled, detained at the airport and had his belongings taken off him, including his passport.

“The immigration officer didn’t really give me any accurate reason why I needed to go to the police station, although they have a translator there, they only ask the few questions. I already explained I have the passport, it’s all valid, it’s true and the visa is also valid too, but [it felt like they] just ignored this information….. I think that’s what they thought actually, like they think I would be like a risk.”

35. In the 30 warrants of commitments from 2019 reviewed by Amnesty International, it was noted that the reasons for inadmissibility included a submission of natural legal home in the full New Zealand evidence was disclosed about the cumulative reasons underlying the finding a “risk of absconding” in order to detain the asylum seeker.
36. This relates to the legal ground for detention under a warrant of commitment, which primarily relates to prevention of absconding in order to prevent a person from disappearing or evading return or removal. “Cumulative” means “substantial evidence” and in the absence of concrete evidence of a need “to prevent a person from disappearing or evading removal”, the risk of absconding must be “substantial”.
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38. WGAD 2018 noted two possible “legitimate aims” to detain migrants: (a) for the purpose of documenting entry and recording claims or (b) where there is a risk of absconding. A detention may be necessary in order to prevent a person from disappearing or evading return or removal. “Cumulative” means “substantial evidence” and in the absence of concrete evidence of a need “to prevent a person from disappearing or evading removal”, the risk of absconding must be “substantial”.
39. See R v. Wilson (2018) 365 NJR 8. The immigration officer didn’t really give me any accurate reason why I needed to go to the police station, although they have a translator there, they only ask the few questions. I already explained I have the passport, it’s all valid, it’s true and the visa is also valid too, but [it felt like they] just ignored this information….. I think that’s what they thought actually, like they think I would be like a risk.”

After being interviewed at the airport, Li was taken by a police officer to a local police station where he spent three nights, reportedly without access to a lawyer.

“At the beginning I was really scared, I had no idea whether here in NZ if the police is kind of working with Chinese Government, so I was worried about maybe being harmed again, yeah... No offer of information that I can contact a lawyer in the police station, because also everything was taken away, like the cell phone, the wallet, so I cannot make a call to the family members too. Until I got to prison, I don’t know how long, so then I was offered to have a [refugee] lawyer there.”

At court for his warrant of commitment appearance, Immigration applied for Li to be detained in prison but he only had a minute to speak with a duty lawyer:

“The lawyer just come to tell me what’s going on, and that the result is you’re going to prison and the next minute I want to see the Judge and I stand there for one or two minutes, the Judge read the results to me and then the lawyer told me [I was indeed going to prison].”

At Mt Eden Corrections Facility Li was double bunked with a remand prisoner and allegedly threatened by his cellmate. His mental health deteriorated in prison but he didn’t know who he could talk to. Li was released on conditions to a specified address, after he was appointed a legal aid refugee lawyer who advocated for his release. Li described his shock that Aotearoa New Zealand used prisons to detain asylum seekers and his hopes that the Government will consider changing its practice:

“If I had the chance to talk to the government, I would like to suggest if they are going to have to put them in prison at least put them in somewhere like with only asylum seekers there, not with others, like the real criminals because it’s really not safe. Also it’s bad for the country too... when I was in prison there was lots of people who want to sell drugs or ask me to join the group to sell drugs with them. So I would like the government to set up somewhere to keep the asylum seekers, if they really consider it’s a risk for the country. Also I hope they can get the chance to use the cell phone; this is really, really hard for them not to be able to communicate with family when they arrive to a new country; someone disappeared, the family they are very worried about if they are safe.”

Amnesty International believes that

Refugee lawyer J [name withheld], interviewed by Amnesty International via video conference, 8 March 2021.

Li (real name withheld) interviewed by Amnesty International, Auckland, 23 November 2020.
The imprisonment of asylum seekers in Aotearoa New Zealand

The Conveyer Belt to Prison

DETENTION AT A POLICE STATION

After an asylum seeker has had their initial interview at the airport, and the immigration officer considers they should be detained further under the Immigration Act, they are then able to be arrested without warrant and detained in police custody for up to 96 hours.40 This usually involves being taken from the airport by police to the nearest police station and detained in a police cell for three to four nights.

“I was locked in a very small cell, which there was no privacy for the toilet and shower, and everyone was looking, and the camera was there. I was very emotional I was crying. I told them I wanted to go to my family ... They waited until about 11 o’clock. They didn’t let me call, but then I gave them a card of one of my friends overseas... and they contacted them and said they could call back, and she did call back and I spoke with her, and I told her what’s happened to me, “I am actually in a very small cell, and I will die here, I am not feeling well.” She arranged the lawyer for me, for the next morning. She arranged Islam food for me, and the Police Station didn’t let me eat it, they refused, and they gave me a burger, which I’m Muslim, and I don’t eat pork. The burger was a hamburger. I told them, “I don’t eat this” And I was advised to take the slice off, and you can eat the rest of it, and they said, “Our supervisor doesn’t allow it, we can’t give you any food from outside.”

Peter [real name withheld], interviewed by Amnesty International, Auckland, 18 September 2020.

Police operational policy instructs police to “apply the same standard of care to any person detained by police under any enactment, whether they have been arrested or not; this includes immigration detainees in police custody. Police duty of care exists alongside other obligations police have to people in their custody. This includes provisions that protect basic human rights and freedoms contained in the New Zealand Bill of Rights Act 1990.”

Police are also required to ensure that all detainees understand their rights in custody. Police have stated that “the notice of detainee’s rights is available in a number of different languages, and if necessary, an interpreter can be engaged. Police utilise the government service, Ezispeak, which delivers telephone and video interpreting.”

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Official Information Act request response from the New Zealand Police to Amnesty International, 8 March 2021.

Arresting police officers are usually given a letter from Immigration New Zealand notifying them of their obligations with regards to informing the detained asylum seeker in their custody of the right to contact and have a visit from a lawyer in private, the maximum period of detention at this stage (96 hours), and the reason for arrest including that it is not a criminal matter, unless it is “in all the circumstances impracticable to do so.”41

Legal advice

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It is deeply concerning to Amnesty International that most asylum seekers interviewed reported not having access to a lawyer or an interpreter for their nights at the police station, not knowing why they were detained or who to ask for help from. This would amount to a breach of Aotearoa New Zealand’s obligations to ensure due process rights in arrest and detention proceedings. Asylum seekers also described feeling terrified, exhausted, overwhelmed and not knowing that they had a right to challenge their detention.

“It was really difficult. It was my first time in custody, or in prison. My first time ever. I didn’t know. I didn’t want to do it. It was really difficult. I was thinking like I will die inside there. At that time I was 20 years [old]. It was my first time in a police cell and I didn’t know what was going on. I came here for the safety; not to be in a difficult situation or to be punished... The first time I told them to bring the interpreter, but they told me they could not find a [an appropriate] interpreter at that time; so they decided to talk to me directly.”

Aaden [real name withheld], interviewed by Amnesty International, Auckland, 3 November 2020.
The imprisonment of asylum seekers in Aotearoa New Zealand

"RUBBER STAMPING"

The District Court

Time with a duty lawyer and an interpreter prior to their court appearance is by its nature, very short. If a refugee lawyer can represent asylum seekers at a warrant of commitment hearing, the civil legal aid hours available to prepare for this are extremely limited. This makes it very difficult to obtain documentary evidence, affidavits and other materials needed to meaningfully oppose a warrant of Commitment for detention and propose alternatives to detention. There are also a very small number of lawyers in Aotearoa New Zealand who have the appropriate expertise in refugee and immigration law. Several refugee lawyers who have been involved in representing asylum seekers detained under a warrant of commitment have sought to make human rights arguments challenging the detention in the District Court with very mixed results. One lawyer made submissions that if a judge is ‘seeking to maximise compliance with the Immigration Act’, then this should also include the Refugee Convention and other international human rights obligations, given that the Refugee Convention is incorporated into the Act as a Schedule. The District Court Judge’s response to him in court was allegedly, ‘This is the District Court, we don’t do human rights here.’

Another lawyer, in describing his experiences with Ministry of Business, Innovation and Employment (MBIE) lawyers (representing Immigration New Zealand) said: ‘They don’t understand the need to have judicial oversight of their decision making to detain and are resistant to this. I’ve been mocked for presenting arguments challenging detention based on the Refugee Convention and had MBIE counsel yell at me for bringing these arguments’.

This continues to the court appearance itself, which, depending on the size of the court list that day and pressures on judges and duty lawyers, may take only minutes. Asylum seekers recounting their experience of court to Amnesty International were overwhelmed by the speed and unfamiliarity of the process and did not feel that they could meaningfully defend or even understand the claims made against them by Immigration New Zealand to justify their imprisonment.

"There is no meaningful access to justice in warrant of commitment hearings for refugee claimants in New Zealand.

The Judiciary has a role to speak up. We have tried to engage with them without success. I’m sorry, but I see it as akin to Family Court judges signing off the uplift of children in New Zealand as a matter of routine. [District Court judges] shouldn’t be allowed to be a fig leaf in a process which is denying refugee claimants basic access to justice.”

Refugee lawyer 6 [name withheld], interviewed by Amnesty International, via videoconference, 8 March 2021.

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“We [as refugee lawyers] generally don’t receive that first call during that first 96 hours of detention as no-one has usually spoken to the asylum seeker about having a lawyer. The person who is detained doesn’t know how to access lawyers who specialise in this area so they turn up to the first warrant of commitment hearing at court not knowing what is going on. The Duty lawyers are saying ‘we don’t know anything about this because we are criminal lawyers. I don’t know how to best assist this person who has an asylum claim’ but the Judge is roping them into it because this person needs representation...

It’s window dressing. They meet [a lawyer] two minutes before the court appearance. It’s not until they are detained, sent off to Mt Eden and are in prison for a couple of weeks and start talking to others in the same position as them that they start to find out names of the very few specialist refugee lawyers who are around...

One District Judge we talked to about the problems with this process [the warrant of commitment hearings] described it as a “rubber-stamping exercise”.”

Refugee lawyer 4 [name withheld], interviewed by Amnesty International, via videoconference, 3 February 2021.

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Warrant of commitment hearings in the District Court were described by lawyers as a strange “hybrid” of a refugee immigration matter and a criminal bail hearing. Despite not being charged with any criminal offence, it is not uncommon for asylum seekers to be represented by a “duty lawyer” at their court appearance for their warrant of commitment. The object of the duty lawyer service is “to ensure that a sufficient number of lawyers are available at each District Court for the purpose of assisting, advising, and representing unrepresented defendants charged with a criminal offence.” Duty lawyers are therefore by background generally criminal lawyers as opposed to civil lawyers, and generally won’t have the specialised knowledge of immigration or refugee law.

"[Court] happens very fast, and I only had a few seconds to appear before I’m taken back again, and walked out of the door. After a few times coming to court [every 28 days], I raised my hand to ask the Judge this question actually, and the reason why I am being kept there, and why I can’t be put in a better environment where there are no people like the folks in prison, and the Judge said, ‘This is an Immigration matter, and that can only happen once your case is finalised by Immigration, but until then you are going to be in prison’.”


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The imprisonment of asylum seekers in Aotearoa New Zealand


Refugee lawyer 3 [name withheld], interviewed by Amnesty International, Auckland, 8 March 2021.
International human rights standards have made clear that excessive or indefinite detention in immigration proceedings is arbitrary. Some asylum seekers are spending excessive periods of time in prison. Article 5 of the Universal Declaration of Human Rights states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This right clearly applies to persons detained for immigration purposes, and the requirement for “exceptional circumstances” justifying continued detention in the context of immigration proceedings is arbitrary.

There are international human rights standards that requireinite detention in immigration proceedings is arbitrary. Some asylum seekers are spending excessive periods of time in prison. Article 5 of the Universal Declaration of Human Rights states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This right clearly applies to persons detained for immigration purposes, and the requirement for “exceptional circumstances” justifying continued detention in the context of immigration proceedings is arbitrary.

The combination of the above has resulted in periods of indefinite, excessive or prolonged detention in the last five years which could therefore be considered arbitrary, including four cases of asylum seekers who were held in prison over 18 months, and one asylum seeker who was held in prison for over three years.

Carlos (real name withheld), interviewed by Amnesty International, Auckland, 17 September 2020

Carlos is a man from South Africa who now has successfully claimed protected person status in Aotearoa New Zealand. He fled here in 2006 after escaping lethal gang violence. He was arrested at home for irregular migration status in 2017 and applied for asylum after being served with a deportation order. Carlos says that he was taken to a police station by several police officers and that was where “the nightmare started”. Carlos described the several nights that he was detained at a local police station before appearing in court and being transferred handcuffed in a van to Waikeria prison.

“Okay, I speak English, not that good, but at that time it was worse. I was so freaking with all the situation because my first night there was so noisy, and people screaming. That environment was not normal for me, and I saw lots of blood on the floor. It was a nightmare, it was like a horror movie; listening to noise all night, and then you see in the days, in the morning, like blood everywhere in some cells. It was terrible.”

Carlos was detained in prison for over three years. In Waikeria prison he was double bunked with remand prisoners and describes an altercation which resulted in a hand fracture. He described becoming suicidal and the poor conditions at the prison including the small and unsafe exercise yard:

“The situation in prison was bad for my mental health, the things that happened to me; the violence and everything that happened to me there. I thank God I didn’t get raped, but I got threats...”

“In [exercise yard] space they used to put maybe 12 people to 20 people, and sometimes more. They would leave us there for two or three hours, and then we have a shower where I see lots of fights and lots of blood. There was just so much wrong stuff you know?”

Carlos alleged that in prison he also received verbal abuse from some prison guards during his time in detention.

“They provoke you and say - sorry about the words but that’s what they say - ‘Oh you’re a f**n refugee, what the fuck are you doing here. ‘ ‘You’re a f**n criminal you deserve to be here.’ I even had my complaint ripped up in front of me, and some documents that I was going to send to Immigration...”

Carlos appeared in court every 28 days where Immigration New Zealand continued to apply for his continued imprisonment under the Immigration Act. Carlos spoke of how difficult he found it to gather evidence for his case in prison as he was unable to access the internet or properly access international phone calls.

Carlos was represented by a lawyer who fought repeatedly to secure his release in court but was unsuccessful. Carlos was finally released from prison during the COVID-19 pandemic in 2020 and when his lawyer contacted Amnesty International about his detention. Out of prison Carlos found it much easier to gather evidence for his claim, and in September 2020, on his third appeal, he was recognised with protected person status in Aotearoa New Zealand. He fled here in 2006 after escaping lethal gang violence. He was arrested at home for irregular migration status in 2017 and applied for asylum after being served with a deportation order. Carlos says that he was taken to a police station by several police officers and that was where “the nightmare started”. Carlos described the several nights that he was detained at a local police station before appearing in court and being transferred handcuffed in a van to Waikeria prison.

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The New Zealand Government, under its international human rights obligations, has a duty to ensure the fair assessment of refugee claims to ensure that people seeking asylum get the safety and protection they need and are not returned to places where they are in danger. A refugee lawyer with over 20 years of experience representing detained asylum seekers explained how imprisoned asylum seekers are particularly “high stakes” cases, as they can be caught in the “tumult of the immigration system.” The lawyer also emphasized the importance of the “right to be heard” and the challenges that come with representing these clients. The lawyer further highlighted the “Orwellian” nature of the detention system, which penalizes those who are seeking asylum and attempts to expedite the process at the expense of fairness and due process. The lawyer noted that the process of obtaining legal representation for asylum seekers in detention can be particularly difficult, as many asylum seekers lack the resources to hire private counsel. The lawyer also discussed the impact of detention on the mental health of asylum seekers, noting that the experience of detention can be “unintended consequences of trying to pursue claims at speed for someone at risk of deportation.” The lawyer concluded that the New Zealand immigration system is in need of comprehensive reform to ensure that the rights of asylum seekers are protected and respected.

If they are detained in a prison, asylum seekers in Aotearoa New Zealand are entitled, at a minimum, to the rights for all persons deprived of their liberty, including freedom from torture or cruel, inhuman or degrading treatment or punishment. They have the right to be treated with humanity and with respect for the inherent dignity of the person. Asylum seekers in detention are also entitled to appropriate medical treatment, including psychological counselling, the ability to have regular contact with relatives, friends, and other non-governmental organisations, and access to the UNHCR. Asylum seekers in detention are entitled to physical exercise and natural light, access to reading materials and timely information, vocational/educational training, non-discriminatory complaints mechanisms, and to staff that have received training in relation to asylum and sexual based violence.

When asked about the mental and physical impacts she has seen on the asylum seekers she has supported who have been detained in prison, a social worker said the following:

“I think it doesn’t really go away, that experience. ’’ - Hostel Manager and Social Worker at the Asylum Seekers Support Trust.

She described how clients have told her that they came close to suicide in prison, that was the worst experience of their lives, and that it’s something they deal with to this day. She also noted that asylum seekers who have been detained in prison often have difficulties with the social worker’s empathy, as it is a difficult experience for them.

The Impact of Immigration Detention on Mental Health


When asked about the mental and physical impacts she has seen on the asylum seekers she has supported who have been detained in prison, a social worker said the following:

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“I think it doesn’t really go away, that experience.” - Hostel Manager and Social Worker at the Asylum Seekers Support Trust.
UNHCR notes that because of the nature of the asylum experience, and the often highly traumatic events people have survived in the process of being forced to leave, people seeking asylum in a host country may arrive with significant mental health challenges and specific needs. This necessitates the factoring of this context into the decision regarding the necessity and proportionality of detention, especially detention in a criminal justice facility. This is especially cogent when there is knowledge that a criminal detention facility will not be able to provide the specialist support required. For example, in 2018, a Prison Inspectorate report of Mt Eden Corrections Facility, the main prison used to detain asylum seekers in the 2015–2020 period, made several findings of concern relating to the inadequate provision of mental health support to the general prison population, which would include immigration detainees. This included a lack of specific training for staff in the At-Risk Unit and a high demand for forensic in-patient beds, which resulted in delays in a patient being admitted.

Immigration detention of people in situations of vulnerability or at risk, such as children, pregnant women, breastfeeding mothers, elderly people, people with disabilities, LGBTQIA+ people, and survivors of trafficking, torture and other serious physical, psychological or sexual violence is prohibited under international human rights standards. Immigration detention of people in situations of vulnerability or at risk, such as children, pregnant women, breastfeeding mothers, elderly people, people with disabilities, and survivors of trafficking, torture and other serious physical, psychological or sexual violence is prohibited under international human rights standards. Any form of detention of these particular individuals in a criminal justice facility is strictly prohibited under international human rights standards.

Immigration New Zealand has stated that they have imprisoned several people in the last five years (later recognised as refugees) “who had credible claims of past experiences of torture and/or physical, psychological mistreatment or sexual or gender-based violence”. Any form of detention of these particular individuals in a criminal justice facility is strictly prohibited under international human rights standards. Once immigration detainees are detained under a warrant of commitment to a prison, including asylum seekers, they are subject to the same regime as criminal remand prisoners, and as such there is no distinct policy for asylum seekers in prison. As Aotearoa New Zealand law also strictly limits when it can be disclosed that someone is an asylum claimant, refugee, or a protected person. Whilst this is not without good intentions (including for safety and confidentiality reasons) in practice this has meant that prison authorities will generally not know if a detainee is an asylum seeker, and there can be limited information sharing between Immigration New Zealand and the Department of Corrections. The combination of the above culminates in a variety of situations that put asylum seekers at risk and result in a deferral of responsibility from both departments. Immigration New Zealand has stated that it “can’t direct Corrections (i.e. prescribe accommodation arrangements, food, leisure activities, clothing) on how to manage an individual who is detained under an immigration warrant at a Corrections facility, and that “ Corrections sets the rules”.

Whenever INZ is advised by a claimant or their lawyer regarding any issues relating to their detention in a Corrections Facility, INZ would advise them to contact Corrections and to follow the complaints procedure. INZ continuously reviews all relevant information regarding the personal circumstances of migrants who are being detained under immigration Warrants of Commitment in order to adjust levels of detention if required.”

The adequate provision of appropriate and specialist asylum facilities and services in prison, whether mental health or otherwise, is therefore made very difficult in practice. In 2020, Immigration New Zealand appointed a Senior Civil Detention and Welfare Advisor “to provide welfare support for asylum seekers in detention and in the community” with the role primarily focused on Mt Eden Corrections Facility. They provide an option to visit an asylum seeker in prison within two weeks of their asylum claim being submitted. Whilst this focus on the welfare of asylum seekers is very welcome, the advisor is working within the context of an administrative detention process sitting within a criminal detention regime. The advisor is unable to discuss reasons as to why they are being held in detention with an asylum seeker. Activity to support the welfare of asylum seekers in prison is also highly limited if the form of detention itself is inherently harmful.

This deflected agency responsibility is also disturbingly present in government agencies’ recording and tracking of crucial data in relation to preventing and tracking ill-treatment or harm experienced by asylum seekers in prison. Following allegations of incidents, including hospitalisations and suicide attempts, Amnesty International made an Official Information Request to Immigration New Zealand regarding the number of instances of self-harm, transfers to hospital, use of mechanical restraints and use of segregation for asylum seekers in prison. Immigration New Zealand responded by providing limited information sharing between Immigration New Zealand and the Department of Corrections, as it was considered to “relate more closely to the functions of Corrections”. The Department of Corrections then refused the request because they did not have the data on asylum seekers or any immigration detainees as a specific category of detainees.

Immigration detention screening (such as for physical or mental health needs, a history of torture and/ or physical, psychological mistreatment or sexual or gender-based violence) prior to determining whether or not an asylum seeker should be detained. Immigration New Zealand places the burden on the asylum seeker or their lawyer, stating that “all persons have the opportunity at any stage of their detention to inform the immigration officer of any personal circumstances or reasons as to why they should not be detained”.

Immigration New Zealand vs the Department of Corrections

PASSING THE BUCK

Immigration New Zealand

Amnesty International Aotearoa New Zealand, 17 July 2020.


Amnesty International Aotearoa New Zealand, 17 July 2020.
BEHIND BARS: THE PRISON EXPERIENCE

“The Committee has consistently recommended that States parties provide data disaggregated by age, gender and other key factors in their reports to enable the Committee to adequately evaluate the implementation of the Convention. Disaggregated data permits the States parties and the Committee to identify, compare and take steps to remedy discriminatory treatment that may otherwise go unnoticed and unaddressed. States parties are requested to describe, as far as possible, factors affecting the incidence and prevention of torture or ill-treatment, as well as the difficulties experienced in preventing torture or ill-treatment against specific relevant sectors of the population, such as minorities, victims of torture, children and women, taking into account the general and particular forms that such torture and ill-treatment may take.”

UN Committee Against Torture General Comment 2, UN Doc. CAT/C/GC/4, 24 January 2008, para. 23.

The protection of certain minority or marginalised individuals or populations especially at risk is a part of the obligation to present torture or ill-treatment.68 The shared responsibility between Immigration New Zealand and the Department of Corrections leaves refugees and asylum seekers exposed to prison conditions that cannot cater for their particular needs and also puts them at risk of punitive measures and practices.69

Double bunking, the practice of placing two people in a cell designed for one, is especially common in criminal justice facilities. It has significant human rights implications, including on the right to privacy, dignity, safety and security. This is especially profound for asylum seekers who may have significant language barriers amongst other challenges, which can impact on their ability to understand the systems in an Aotearoa New Zealand prison including their rights in detention, complaint processes and knowing how, or who, to ask for help.

68 UN Committee Against Torture General Comment 2, UN Doc. CAT/C/GC/4, 24 January 2008.

69 For example, in criminal justice facilities have different guidelines on use of cells and cells at medium level. In an asylum seeker to be detained under a warrant of commitment to the new green list Whakatāne Detention Centre, for instance, that appear to be available to detainees and residents of a particular group of asylum seekers. Asylum seekers are often referred to as criminal justice prisoners. This means that they could be used for detention for programmes in prison focused on criminal offending.

“Double bunking is also a widespread practice in several of Aotearoa New Zealand’s prisons. In 2019, as a response to significant increases to the prison population over a number of years, particularly the remand population, the Corrections Amendment Bill removed the reference in the regulations that individual cells were preferred, and prisoners assessed as unsuited must be accommodated in an individual cell.70

As of June 2020, 69% of prisoners experienced cell-sharing in Mt Eden Corrections Facility,71 which is the prison most commonly used to detain asylum seekers given its proximity to Auckland International Airport and to the majority of Aotearoa New Zealand’s small bar of refugee lawyers.

Appendix Two - breakdown by prison of the number of double-bunked cells and the number of prisoners, as at June 30 2020

Table Source: Department of Corrections

<table>
<thead>
<tr>
<th>Site</th>
<th>Number of double-bunked cells</th>
<th>Number of prisoners sharing</th>
<th>Total prisoners</th>
<th>Percent sharing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ahirata Prison</td>
<td>6</td>
<td>12</td>
<td>113</td>
<td>11%</td>
</tr>
<tr>
<td>Auckland Region Women’s Corrections Facility</td>
<td>123</td>
<td>246</td>
<td>393</td>
<td>63%</td>
</tr>
<tr>
<td>Auckland South Corrections Facility</td>
<td>202</td>
<td>404</td>
<td>894</td>
<td>45%</td>
</tr>
<tr>
<td>Auckland Prison</td>
<td>0</td>
<td>0</td>
<td>486</td>
<td>0%</td>
</tr>
<tr>
<td>Christchurch Men’s Prison</td>
<td>144</td>
<td>288</td>
<td>839</td>
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<td>0</td>
<td>0</td>
<td>100</td>
<td>0%</td>
</tr>
<tr>
<td>Hawkes Bay Regional Prison</td>
<td>76</td>
<td>152</td>
<td>605</td>
<td>25%</td>
</tr>
<tr>
<td>Invercargill Prison</td>
<td>18</td>
<td>36</td>
<td>165</td>
<td>22%</td>
</tr>
<tr>
<td>Manawatu Prison</td>
<td>24</td>
<td>48</td>
<td>226</td>
<td>21%</td>
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<td>1,019</td>
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<td>123</td>
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<td>431</td>
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<td>Rimutaka Prison</td>
<td>81</td>
<td>162</td>
<td>867</td>
<td>19%</td>
</tr>
<tr>
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<td>0</td>
<td>0</td>
<td>253</td>
<td>0%</td>
</tr>
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<td>Spring Hill Corrections Facility</td>
<td>220</td>
<td>440</td>
<td>792</td>
<td>56%</td>
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<tr>
<td>Tongariro Prison</td>
<td>0</td>
<td>0</td>
<td>283</td>
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</tr>
<tr>
<td>Waikura Prison</td>
<td>111</td>
<td>222</td>
<td>752</td>
<td>30%</td>
</tr>
<tr>
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<td>28</td>
<td>56</td>
<td>529</td>
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68 UN Committee Against Torture General Comment 2, UN Doc. CAT/C/GC/4, 24 January 2008.


71 Department of Corrections, “It’s time to act on“ Whakatāne Detention Centre, Auckland, 23 November 2020.

“I couldn’t sleep at times. I would just be awake the entire night, because you have somebody that is just doing whatever they want, and you can’t tell them, “Hey, don’t do that, I’m just gonna sleep.” Or whatever! Otherwise, that’s going to create a situation where you might have a confrontation, and I was just avoiding that, but at the same time because I was worried, I would just be awake all night.”


DOUBLE BUNKING

“If you make any noise again, I will beat you up and somehow I have to keep still again for a long time, and then when I want to move, just [the same] again.”

Li [real name withheld], interviewed by Amnesty International, Auckland, 23 November 2020.

The imprisonment of asylum seekers in Aotearoa New Zealand

All of asylum seekers and refugees interviewed by Amnesty International reported being double bunked with remand prisoners at some point during their time in prison. This is not unexpected, given that there is no distinct policy for asylum seekers in prison and they are classified and treated as “accused remand” prisoners by the Department of Corrections. Double bunking is also a widespread practice in several of Aotearoa New Zealand’s prisons. In 2019, as a response to significant increases to the prison population over a number of years, particularly the remand population, the Corrections Amendment Bill removed the reference in the regulations that individual cells were preferred, and prisoners assessed as unsuited must be accommodated in an individual cell.71

As of June 2020, 69% of prisoners experienced cell-sharing in Mt Eden Corrections Facility,71 which is the prison most commonly used to detain asylum seekers given its proximity to Auckland International Airport and to the majority of Aotearoa New Zealand’s small bar of refugee lawyers.

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71 Department of Corrections, “It’s time to act on“ Whakatāne Detention Centre, Auckland, 23 November 2020.
BEHIND BARS:
THE PRISON EXPERIENCE

The Department of Corrections has an assessment tool called Shared Accommodation Cell Risk Assessment (SACRA) to establish prisoner compatibility when double bunking is used, including specific vulnerabilities. However, given asylum seekers are under the same regime as remand prisoners, the Department of Corrections does not always know when a detainee is an asylum seeker, the ability to make an informed assessment is highly limited.

Because asylum seekers are subject to the same regime as remand prisoners, they are also subject to the same “unlock” regimes in Aotearoa New Zealand prisons. Under Aotearoa New Zealand law, this can mean exposure to being locked in a cell, including a double bunked cell, for up to 23 hours a day depending on the particular unlock regime of the prison and prison unit.72 For example, findings from a Mount Eden Corrections Facility inspection in 2018 by the Office of the Inspectorate found that the restricted unlock times in some of the units (including an unlock regime of between only one and three hours in six different units), meant “prisoners had limited opportunities to engage in constructive out-of-cell activities. Prisoners had limited access to rehabilitation or treatment programmes, work experience, education programmes or the gym”.73

When you’re in prison, unless you’re doing something obviously, you’re spending 23 hours in your cell, and you only have one hour for recreational activities, and for somebody who hasn’t committed any criminal act... and their only “crime” is seeking a safe haven, to be kept in detention for 23 hours of the day; I think it’s a bit harsh.”


Exposing asylum seekers to prison standards and double bunking with remand prisoners is contrary to international human rights standards and guidelines.74 In instances which have resulted in abuse or violence from a cellmate, these could constitute a failure to prevent ill-treatment under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Vinay is a refugee and reportedly a torture survivor from a country in South Asia. He applied for asylum when he arrived at Auckland Airport after a broker brought him to Aotearoa New Zealand on false documents.

Vinay was detained under a warrant of commitment at Mt Eden Corrections Facility for approximately three months and was double bunched with a remand prisoner. In Mt Eden, he was allegedly raped, beaten and threatened by his cellmate. He was taken to hospital but a forensic examination was not carried out because a translator was not available. He was returned to Mt Eden to a single cell and a police investigation began into the alleged rape. This investigation is still ongoing.

Immigration New Zealand were informed by police a day after the assault took place, but continued to maintain his detention in prison. Vinay’s lawyer only found out that her client had been allegedly raped in prison 19 days later, when she received a letter in the post from Vinay that a fellow prisoner had written for him in English. The letter told her about the assault, that he didn’t feel safe and asked her to “please come see me”.

Vinay’s lawyer urgently advocated to Immigration for his immediate release to the Māngere Refugee Resettlement Centre and asked why she hadn’t been informed earlier. A string of emails between Vinay’s lawyer and Immigration show that Immigration defended not disclosing the assault to Vinay’s lawyer as “they were not at liberty to disclose the information as it risked breaching his privacy” and Vinay had been “advised” to tell her, and that they hadn’t been given enough information by police or the Department of Corrections relating to the assault to make a decision about his detention. Vinay described not being able to access phone calls at the prison and not knowing who to ask for help.

“I didn’t complain or didn’t ask for help because I didn’t know that I could ask. I was so scared because I was beaten up by my cell mate and therefore I was very scared. I didn’t know where to go or whom to ask; whom to trust; and so, I didn’t ask specifically for any help. I didn’t know anything.”

Eighteen days after the assault, Immigration confirmed to Vinay’s lawyer they were “reviewing” Vinay’s detention status but needed to wait until he had a prison interview with a Refugee Status Officer, “in order to determine if a change in detention is warranted”. This interview had been meant to take place a month earlier but had been delayed due to staff sickness.

Vinay’s distress and fear in prison grew and he disclosed to his lawyer at his legal visit that he had attempted suicide. He was transferred to an “at risk” cell. He said he didn’t want to eat due to his mental state.

Vinay’s detention was downgraded to Māngere Refugee Resettlement Centre nearly a month after he was assaulted when he was able to receive appropriate and specialist psychiatric care. He was recognised as a refugee on appeal several months later. When asked what he would say to the Government if he could, Vinay said:

“No to put asylum seekers in the prison, and to put them in the Māngere camp with other refugees.”
Amnesty International considers that Vinay’s case constitutes a failure by the state to prevent further ill-treatment and provide adequate remedies. The Department of Corrections failed to prevent inter-prisoner violence including by placing him in a double-bunked cell with a person detained for a criminal matter. Once the allegation was made, both the Department of Corrections and Immigration New Zealand had an obligation to provide adequate remedies, including access to adequate medical care, immediate transfer to a more appropriate facility and compensation.

“Yeah, I can’t forget it, and I was taken to the Mount Eden Correction facility. They open my clothes, and make me naked, and the three officers told me to bend over, and they did a strip search, and when I turned around to face them they were smiling. I feel I have no dignity anymore.”

Peter [real name withheld] interviewed by Amnesty International, Auckland, 18 September 2020

The Corrections Amendment Act 2013 authorised mandatory strip-searching of prisoners in a broader range of circumstances, in a more invasive manner and with fewer safeguards than previously provided for. It is currently mandated that every prisoner “must” be required to undergo a strip search on first being admitted to a prison, on transfer to another prison, and also each time the prisoner enters an at-risk cell, until an at-risk management plan is established.

Bani is a human rights activist from a South Asian country. He sought asylum in Aotearoa New Zealand and on arrival at Auckland Airport was allegedly strip searched, transferred to a police cell and ultimately to prison for several months.

“They stripped me naked, and that’s a very embarrassing thing. I am feeling very bad about it. They checked all my baggage, and checked the body. When coming from [home country] my arms were hurting because I was beaten, and I couldn’t even put on my shirt. I was suffering from pain in my shoulders.”

“I was not treated like a human, and that’s hurting me very much. They never looked at me like a human. I have worked in [home country], and worked with people who have disappeared, and the same for the families of employees disappearing, and those who are tortured in the prisons. There are lots of human rights activities here undertaken in [home country]. The treatment here has hurt me a lot.”

The indignity of the strip searches continued on arrival to the prison and reportedly every 28 days when he had to go to back and forth from court.

“I was stripped naked in the prison. And there were two or three officers witnessing it. Although it happened in the room there would be two of the officers witnessing it, and I’m no longer young. I felt really humiliated by that, and even before going to court and coming back from court, they stripped me naked, and that’s a very humiliating thing.”

Bani’s experience of imprisonment profoundly impacted him. It also completely changed his view of Aotearoa New Zealand as a place of safe refuge.

“I always had the impression that New Zealand was a very good country. Its human rights record is very good, excellent, and they’re helping refugees who have been arriving in Australia, as boat refugees from Indonesia. And that is not so.”

The subjection of asylum seekers to the same regime as remand prisoners means that they must be strip searched on admission to the prison, which may in some cases be in addition to already being searched at the airport. This can also expose some asylum seekers to strip searching every month, given that under the Corrections Act, prison officers “may” also conduct strip searches before a prisoner appears before a court, which occurs every 28 days for Immigration’s warrant of commitments. This will also happen again if they enter an At-Risk cell.

Several asylum seekers interviewed by Amnesty International spoke of the deep indignity and distress they felt in being strip searched, and the cumulative impacts of it happening repeatedly when they were transferred to and from court.

Amnesty International considers that the cumulative factors exposing detained asylum seekers to repeated strip searches in the criminal justice system could not be considered a legitimate limit on the right to be treated with humanity and with respect for the inherent dignity of the human person in detention and may well result in degrading treatment in breach the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

77. Section 98 of the Corrections Act 2004. Article 10 of the ICCPR.
BEHIND BARS: THE PRISON EXPERIENCE

ACCESS TO FAMILY, FRIENDS OR OUTSIDE SUPPORT

“In asylums seekers in detention should be able to make regular contact (including through telephone or internet, where possible) and receive visits from relatives, friends, as well as religious, international and/or non-governmental organisations, if they so desire. Access to and by UNHCR must be assured. Facilities should be made available to enable such visits. Such visits should normally take place in private unless there are compelling reasons relevant to safety and security to warrant otherwise.”

UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, p. 50.

In prison, various tools for accessing the outside world are prohibited, such as cell phones being considered “contraband” items, and prisons in Aotearoa New Zealand do not have computers that have access to the internet. 78 To make phone calls, prisoners have to buy a topped-up phone card at the prison canteen, or have one sent to them from the outside. 79 They then are required to know who to call, their contact details and must apply to have the number “approved” by staff.

Many asylum seekers, by virtue of their status and being new to the country will not necessarily have any family or established community connections in Aotearoa New Zealand. The above barriers, combined with often not being able to speak English or having inconsistent access to interpreters in prison, can make it very difficult for some to have contact with, or ask for help and support from the outside world, apart from through their legal representative, or rare visits from Immigration.

CLOTHING AND BEDDING

“That was really awful because I still don’t know the system how it works. My friends from outside they were trying to see me. But, they can’t because I have declare first that these people will see me. I don’t have their information to see me. Some of them even I don’t know their surnames, because I’ve never met them face-to-face. So, we couldn’t. I couldn’t use a phone or anything. That whole system takes too long. I bought phone cards to use. They let me have my family’s phone numbers, but not my friends. I don’t know. You have to confirm the phone number first. They check it. I was never able to do that. I told them I want to call these people and they said, “Okay, we’ll check that.” [But] that was it.”

Yusef [real name withheld], interviewed by Amnesty International, Auckland, 18 September 2020.

“The imprisonment of asylum seekers in Aotearoa New Zealand

The UNHCR is notified of detained asylum seekers if the person applied for asylum at the airport, however they are not informed if the person applies for asylum after living in the community. The UNHCR does not currently have an office in Aotearoa New Zealand. Due to the strict privacy restrictions, it is also very difficult for support agencies, religious, international, and non-governmental organisations to know when and where an asylum seeker is in prison and may require support.

“It is haphazard at best... There’s no system for us to know who is there, so we can only advocate for people to be released to us if we know they are in there... Our advocacy is limited in who we can help.”

In Aotearoa New Zealand, “remand accused” prisoners, which asylum seekers are categorised as once they are detained in prison, “may” be permitted to wear their own clothes but must be issued “standard remand prisoner clothing” if it is insufficient or unfit.81 This means that asylum seekers are faced with wearing prison uniforms or their own clothes, potentially the ones they have arrived in off the plane that are often entirely unsuitable for the climate. Several asylum seekers detained at Mt Eden Corrections Facility whom Amnesty International spoke to referenced how cold they got in the police cells and prison, especially if they were in an “At Risk” cell.82 One asylum seeker was put in an At-Risk cell under observation after being considered “at risk” due to his inability to speak English.83

One lawyer described having to give their client their coat at the refugee status unit interview at the prison because he was shivering from the cold,84 and another lawyer in an email to Immigration New Zealand, described her horror that her client allegedly had only one pair of pants and one t-shirt. He said he had no family to bring him additional clothing. We interviewed one foreign national prisoner in Charlie Unit who told us he had only one pair of pants and one t-shirt. He said he had no family to bring him additional clothing because of a uniform shortage.85 An inspection carried out at Mt Eden Corrections Facility in 2018 by the Office of the Inspectorate, noted that staff advised of a “prison-wide clothing shortage” and how this particularly impacted “foreign national prisoners”.86

“Prisoners were expected to wear prison clothing until they received approved clothing from their family. However, foreign national prisoners lacked outside support to provide additional clothing. We interviewed one foreign national prisoner in Charlie Unit who told us he had only one pair of pants and one t-shirt. He said he had no family to bring him additional clothing as his lack of English meant he could not complete the family visits application.”87

“Everyone has the right to freedom of thought, conscience and religion and persons belonging to ethnic, religious or linguistic minorities have the right to their own culture, religion and language.”

Article 18 of the Universal Declaration of Human Rights; Articles 18 and 27 of the International Covenant on Civil and Political Rights.

Several Muslim asylum seekers spoke of their distress at not being able to practice their Muslim religion properly, particularly in police cells or at mealtimes with inconsistent access to halal food, or being given pork to eat which is forbidden in Islam. Whilst the Corrections Act 2004 in Aotearoa New Zealand stipulates that allowance “must be made for the various religious, spiritual and cultural needs of prisoners” when providing food and drink to prisoners, it is only required as far “as practicable in the circumstances”.88 This opens the door to inconsistent practice and does not sufficiently give effect to the obligation of non-discrimination by taking account of the individual needs of prisoners,89 nor does it sufficiently uphold their right to manifest their religion or beliefs.90

“At Mt Eden prison I didn’t know what to do. I was crying for the past three days. I didn’t know anyone. Even my language at that time was not good. So, I was really suffering in silence. I cannot really express my problem. Even people are taking my food. There’s days that they give chicken, so there would be big, big people, criminals and they say, “Give us your chicken.” He was doing what he wanted. I cannot sleep during the night. He was listening to the TV and the volume was very high inside the cell. I could not sleep. He’s sleeping day time, but I cannot sleep there at night when I want to sleep. So, I will report to the immigration officers. He is even in my case. I put it in the confirmation of claim form. I told them I am not safe here in the prison. I am not getting my food, or praying and worshipping daily. I asked if they could please put me in a safe place that I can pray and I can sleep in peace. They never do that, because I stayed in that prison cell a month.”91


83. “We’re not safe. They’re not safe.”: A Review of the New Zealand Prison System in the Lead-up to the 2020 General Election, https://www.amnesty.org.nz/seclusion_and_restraint_in_new_zealand_findings_from_the_data_and_visits/.
84. Amendments to the Corrections Act 2004 in Aotearoa New Zealand stipulates that allowance “must be made for the various religious, spiritual and cultural needs of prisoners” when providing food and drink to prisoners, it is only required as far “as practicable in the circumstances”.88
85. “At Mt Eden prison I didn’t know what to do. I was crying for the past three days. I didn’t know anyone. Even my language at that time was not good. So, I was really suffering in silence. I cannot really express my problem. Even people are taking my food. There’s days that they give chicken, so there would be big, big people, criminals and they say, “Give us your chicken.” He was doing what he wanted. I cannot sleep during the night. He was listening to the TV and the volume was very high inside the cell. I could not sleep. He’s sleeping day time, but I cannot sleep there at night when I want to sleep. So, I will report to the immigration officers. He is even in my case. I put it in the confirmation of claim form. I told them I am not safe here in the prison. I am not getting my food, or praying and worshipping daily. I asked if they could please put me in a safe place that I can pray and I can sleep in peace. They never do that, because I stayed in that prison cell a month.”91
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BEHIND BARS: THE PRISON EXPERIENCE

Language barriers were significant for asylum seekers with no or limited English in prison. Whilst asylum seekers have access to a professional interpreter for meetings with their lawyer or an official in prison, limited access on a day-to-day basis meant that some asylum seekers would often have no idea what was going on, how to complain or who to ask for help.\(^{39}\) Prison authorities would at times resort to finding a prison officer or other prisoner who spoke a “similar” language. This language barrier was particularly devastating for asylum seekers who were subject to harassment, violence or various forms of seclusion and restraint, such as in the case of Adam, below.

Adam (real name withheld)
interviewed by Amnesty International, Auckland, 3 November 2020

Adam is an asylum seeker from an African country and claimed asylum at Auckland Airport after arriving on a false passport. He spent six months in Mt Eden Corrections Facility where he faced double bunking and harassment from remand prisoners, seclusion and restraint and significant language barriers. Adam was interviewed by Immigration New Zealand at Auckland Airport after being refused entry for a false passport. During this interview he disclosed his real identity and said that he had faced torture in his home country. He was arrested by a policeman and told that he would be detained for three or four days and then taken to a refugee centre. After several nights in the police station he was transferred to the District Court cells when he thought his detention would end.

“In my mind I said to myself, ‘because it’s the third day maybe they are going to take me to the refugee centre.’”

Instead, he was told by a lawyer that he was going to be detained in prison rather than the refugee centre.

“They said the centre is far, it’s not close to here, and we don’t have a big number of police, to stay, to check the safety of that centre, and the family who stay in that centre, it’s safe for families, with no problems at all, and we don’t know who you are. If we send you there something can happen, and because we don’t know who you are we have to be careful. That’s why we can’t send you to that refugee centre.”

The warrant of commitment court documents outlining the reasons for his detention were not in his language, and he reports that his lawyer told him he didn’t have enough time to explain them with the interpreter before appearing before a judge in court. It wasn’t until he was reunited with his small translation dictionary weeks later in prison that he started to decipher the accusations that had been made against him. On arrival at Mt Eden Corrections Facility, to his shock, he was taken without explanation to the At-Risk Unit and was allegedly placed in a restraint jacket:

“Adam was kept in a segregation cell in an At-Risk Unit for four days due to being considered “at risk” because of his language barriers. He was then transferred to another unit where he was double bunked with remand prisoners and harassed. Adam described how making complaints was extremely difficult for him due to his language barriers:

“[He asked me] ‘So what are your accusations?’ I said to her, ‘I don’t know.’ She said, ‘What did you do?’ I said, ‘I don’t know, the only thing I know I did is I asked for asylum here.’ She said, ‘That is not a crime.’ So, I didn’t do any crime; and so, [she told the other officers] to release this person and take the restraints off. And they gave me a prison uniform. I didn’t understand English, but I think the way they were talking it’s like they were apologising to me.”

Adam was kept in a segregation cell in an At-Risk Unit for four days due to being considered “at risk” because of his language barriers. He was then transferred to another unit where he was double bunked with remand prisoners and harassed. Adam described how making complaints was extremely difficult for him due to his language barriers:

“He [the cellmate] was in charge of everything, and I couldn’t say a word. To talk to someone I had to wait for [the Spanish officer] to come, and to see her, who was working in another department, it was very hard. It could be two weeks to a month without her coming to where I was. It was very hard to raise all the issues I had.”

After six months in prison Adam was released to the Asylum Seekers Support Trust hostel. He reported to Amnesty International facing ongoing migraines and being on medication from his time at Mt Eden Corrections Facility. The unnecessary use of a restraint jacket in a case such as this is likely to amount to ill-treatment under international law and is prohibited by the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

\(^{39}\) “GiliSpeak” is an interpreted video-interpreting service that can be used by the interpreter for the hearing impaired when visiting police and Corrections. However, this is not always possible if devices are not available and some languages require advance booking.See also the Office of the Ombudsman, “Final report on unannounced inspection into Waikeria Prison – documentation,” 3 November 2020, p. 19, and “Submissions received in relation to the 3rd periodic report of New Zealand on the Universal Periodic Review of New Zealand,” UPR/36/NZL, 5 August 2020, p. 39.

The imprisonment of asylum seekers in Aotearoa New Zealand

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The imprisonment of asylum seekers in Aotearoa New Zealand

PLEASE TAKE ME TO A SAFE PLACE

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The imprisonment of asylum seekers in Aotearoa New Zealand

BEHIND BARS: THE PRISON EXPERIENCE

EXPERIENCES OF VIOLENCE IN DETENTION

Most asylum seekers who are imprisoned are detained at Mt Eden Corrections Facility. Between 2015 and 2020, Mt Eden had the highest rates of prisoner “non serious assaults” (physical injuries that may require medical treatment and overnight hospitalisation) in the country, and some of the highest numbers of “serious assaults” (bodily harm requiring extended periods of ongoing medical intervention or sexual assault where police charges are laid). In places of detention, states have a heightened duty of protection when they significantly restrict a person’s freedom of movement and capacity for self-defence. The Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment has stated that inter-prisoner violence may amount to torture or other ill-treatment if a state fails to act with due diligence to prevent it.

Appendix One – Assaults in Prison 2015/16 to 2018/19, as at May 2020

Table source: Department of Corrections

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Amnesty International has documented three cases of asylum seekers being seriously physically and sexually assaulted (by other prisoners) whilst in prison in the last five years. These include instances of a hand fracture, alleged rape and being forced to take part in notorious prison “fight clubs” on a regular basis. These cases constitute violations of their rights to security of the person and a failure to prevent ill-treatment under the Convention Against Torture and other Cruel, Inhuman or Degrading treatment.

John (real name withheld) interviewed by Amnesty International, Auckland, 18 November 2020

John is an asylum seeker from an African country and sought asylum in Aotearoa New Zealand on arrival at Auckland Airport. He was detained for two months at Mt Eden Corrections Facility, which was at that point in time run by private prison company Serco. Already traumatised on arrival, in Mt Eden he reports being double bunked with remand prisoners and being forced to participate in the now notorious “fight clubs” where he experienced and witnessed grave violence. The “fight clubs” at Mt Eden has since been subject to an official inquiry which found failures on a large scale and led to the Department of Corrections taking over control of the prison from private prison company Serco.

John’s nightmare began at Auckland airport, where he describes his fear when being approached by officials when he declared he was seeking asylum.

“I heard them saying, ‘He’s from this plane.’ When they were questioning me one of the lady’s really threatened me; coming up to me very closely and shouting, ‘Hey, where do you come from, who are you?’ Stuff like that, ‘We know who you are; we get people like you here.’ It was harsh.”

After his interview with Immigration at the airport, John reported being taken handcuffed to a police station in Manukau.

“The police handcuffed me, and the police was sitting beside me like I was a criminal, or something. They were there on my back; they make sure that they look after me, and I see another criminal they’re bringing, with the police, when I was arriving. So I knew, ‘this is like a criminal now’. Now they take me to Manukau, and the counter police takes my name, ‘Where are you from?’ (home country). ‘Why are you here?’ I say, ‘I’m an asylum seeker; the policeman didn’t know what an asylum seeker is.’”

John describes his three days at the police station as some of the worst days of his life.

He alleged he was verbally abused by a guard about his Muslim faith, given a pork sandwich (which is forbidden in Islam) and felt freezing cold without proper clothes or blankets. He became so desperate that he said tried to take his life and drown himself in the cell toilet.

“So me knowing where I come from, and who I am, and the hardships I’ve been through, and where they’re putting me now I have no idea, if two three days if I’m there. I’m begging and no-one is listening to me, no-one cares about me; no-one has an answer, no-one even knows. So now I think, ‘okay, fine, it’s not worth living’. You’re just like a dog, and now they’ve taken my clothes. Maybe after seven or eight hours, in the afternoon, they give me my clothes back. I begged them, “Give me my clothes now.” I was dying with the cold; I’m very cold, I am cold, but they don’t care.”

John’s nightmarish continuation when he was detained under a warrant of commitment at Mt Eden Corrections Facility and double bunked with remand prisoners. He was reportedly forced to regularly participate in the “fight clubs” at the prison. John describes being shown knives by his cellmate to protect himself and realising the extent of what was going to happen to him.
BEHIND BARS: THE PRISON EXPERIENCE

“There was a lot of things happening at that time in Mount Eden, and now this guy he shows me, and I think, ‘wow, I’m in danger’, and new in there... This is a country I came to for safety but they’re harming me, and I come from trauma. I come from being a refugee living in camps...”

In the fight clubs, John said he witnessed and experienced significant violence:

“So, in the prison this is what I was having, and the moment of my last days; I have injuries, head injuries. One guy, the last fight I had two days before I came out and got really get smashed in the head. He was a big guy, he just would fight, and he overpowered me. So I was down, and he was just smacking me. I had to defend myself. I got injured; I’m on medicine now.”

After being released, a lawyer helped him take a case against the Department of Corrections and Immigration under the Bill of Rights Act about his time at Mt Eden. John accepted legal settlement as he desperately needed the money including to support his family who are resettled refugees in other countries.

“What’s horrible is they compensate me, and they compensate me a very small thing, and at that time I have to take it, because my mum was sick, and because my mum sick I sent all the money to my mum.”

John continues to struggle to make ends meet due to being not being able to work or access the full benefit whilst he awaits determination of his claim. He still suffers from PTSD from the violence he experienced and witnessed in Mt Eden Corrections Facility.

NON CUSTODIAL MEASURES

As the detaining agency, Immigration New Zealand has the knowledge that if they decide to progress a warrant to detain an asylum seeker in prison (as opposed to non-custodial measures) they will be subject to essentially the same regime as remand accused prisoners in Aotearoa New Zealand, and all this encompasses. Amnesty International believes this is likely to fail the proportionality test required by international law for any restrictions on the right to liberty for immigration detainees.

The enjoyment of personal liberty should be any individual’s default condition. If restrictions to the rights to liberty or freedom of movement are necessary, non-custodial measures should be the preferred solution and should always be considered before resorting to detention.54

Under international law, “considering” or “exploring” non-custodial measures is not a matter of goodwill on the part of a government.55,56 They must be available not only in law, but also in practice. Whilst Aotearoa New Zealand law and operational policy does stipulate “bans” of less restrictive to more restrictive options,57 in practice, Amnesty International found a reluctance to use or provide alternatives in the cases it examined, as explored below.

Māngere Refugee Resettlement Centre is primarily used for Aotearoa New Zealand’s refugee quota resettlement programme.58 It is an “open air” center with specialist refugee mental and medical/physical health support, a school and other facilities to integrate “Quota” refugees for their first six weeks in Aotearoa New Zealand.

“In my view they don’t use [prison] as a last resort”

General Manager of the Asylum Seekers Support Trust.

Māngere Refugee Resettlement Centre is can also accommodate up to 28 asylum seekers detained under a warrant of commitment, and they are accommodated separately from refugees under the Quota programme. They are detained under a form of administrative detention, where they must reside at the facility and are subject to conditions including needing to be granted permission to leave and return at stipulated times. If they break their conditions, their warrant of commitment can be varied, including to detention in a prison.

Lawyers, support workers and asylum seekers themselves spoke of instances where they had been told that Immigration didn’t want to detain some asylum seekers at Māngere Refugee Resettlement Centre rather than in prison, because they were considered “too risky” and the centre was for “legitimate” refugee families, including “women and children” and there were not enough police officers to be present. Whilst there may be limited circumstances where Māngere Refugee Resettlement Centre is not considered suitable or appropriate detention, cases examined by Amnesty International did not always demonstrate why prison was the necessary or proportionate form of detention, as opposed to less restrictive or punitive alternatives.
The imprisonment of asylum seekers in Aotearoa New Zealand

Please take me to a safe place

98. Since 2013, the New Zealand Government has not consistently funded the only community-based Asylum Seeker Support Hostel in Aotearoa New Zealand, where asylum seekers can be released to on reporting conditions. “Lack of family or community ties” is also used consistently by Immigration New Zealand as one of the cumulative reasons justifying “absconding risk” in Warrants of Commitments seeking detention in prison. This inherently disadvantages asylum seekers who will not necessarily have family ties or financial means in Aotearoa New Zealand. Even in some cases where a lawyer has provided extensive evidence of that person’s identity or a community that wants to offer them a place of residence and be the legal guarantor for their movements, Immigration New Zealand has still progressed a warrant of commitment for prison or detention.99

The failure of the New Zealand Government to both provide and utilize adequate non-custodial measures in practice is a significant contribution to the use of prison as a form of immigration detention for asylum seekers. All of the above, combined with the presumption of liberty being reversed by the legislation in many cases, due process issues, and the challenges of the prison environment, makes it highly difficult in practice for asylum seekers and their lawyers to displace the burden of proof and challenge detention, once a decision has been made to detain by Immigration New Zealand.

99. In at least five cases investigated by Amnesty International, police has detained a person who had been recently proposed by their lawyer or support lawyer, such as founders to Māngere Refugee Resettlement Centre, release an asylum seeker to a strict residence, cultural or diaspora community inside or to a support hostel.

LIVING IN THE SHADOW OF PRISON

The cases of asylum seekers in prison which Amnesty International examined tended to only be released from prison when their asylum claim was approved or when their lawyer or an external agency successfully fought for their transfer to Māngere Refugee Resettlement Centre or their release on conditions to a specified address. Several asylum seekers were also released in early 2020 when Aotearoa New Zealand entered a nationwide “lockdown” due to the COVID-19 global pandemic. When asylum seekers are released, they are not prepared with specific post-release support by the Government. They may be found and supported or housed by the Asylum Seekers Support Trust, which primarily relies on philanthropic support.

Asylum seekers in Aotearoa New Zealand can also face significant barriers to their economic, social and cultural rights after detention. This is especially cogent for asylum seekers who do not have refugee status determinations finalised and face legal and bureaucratic barriers due to their precarious migration status. Implications of this include not being allowed to work or not being entitled to mainstream social security benefits. 100 These challenges combined with some of the other lasting impacts and harms of the prison experience have made life extremely difficult for asylum seekers who have experienced detention.

Zahi is from Somalia and has been recognised as a refugee in Aotearoa New Zealand. He claimed asylum on arrival at Auckland Airport. He was detained at Mt Eden Corrections Facility for six months until his asylum claim was accepted.

“When I first arrived here; I arrived at the Auckland International airport, and the Immigration officials detained me there. I just told them my story; that I am somebody who is seeking refuge, and fleeing from persecution and violence. I just told them my story.”

Zahi was shocked when he was told by an immigration officer after his interview at Auckland Airport that he was going into police custody because he arrived on false travel and identification documents and they could not ascertain his identity to their satisfaction:

“To be honest I wasn’t expecting I would end up in a prison. The reason for that is again, the main reason why I came to this country is because I’m looking to better my life, and I’m just seeking refuge, and just a better future, and a prison is for criminals; people who have done wrong, and I’m not a criminal.”

Zahi was taken to the police station where he was detained for three nights, where he said he did not know that he had any rights, including to speak to a lawyer. Despite telling police officers that he was Muslim, he was allegedly given sandwiches with pork and he was told to avoid it and “eat the rest”. Zahi had a short appearance at court with a duty lawyer, and reported being taken in handcuffs in a police van to Mt Eden. There he alleged being harassed and double bunked several times with remand prisoners, including a cell-mate on a murder charge.

“When you’re in prison, unless you’re doing something obviously; you’re spending 23 hours in your cell, and you only have one hour for recreational activities, and for somebody who hasn’t committed any criminal act... and their only “crime” is seeking a safe haven, to be kept in detention for 23 hours of the day; I think it’s a bit harsh.”


RELEASE ON CONDITIONS IN THE COMMUNITY

Despite some asylum seekers having to face some of the severest aspects of the criminal justice system (police cells, a District Court, criminal prison) on immigration grounds, they are not necessarily afforded all the same protections, such as liberty as a presumption, or utilizing non-custodial measures, such as an electronic monitoring bracelet. Whilst asylum seekers can be released into the community on conditions, or to a specific place of residence with reporting requirements, this is very difficult in practice.

Since 2013, the New Zealand Government has not consistently funded the only community-based Asylum Seeker Support Hostel in Aotearoa New Zealand, where asylum seekers can be released to on reporting conditions. “Lack of family or community ties” is also used consistently by Immigration New Zealand as one of the cumulative reasons justifying “absconding risk” in Warrants of Commitments seeking detention in prison. This inherently disadvantages asylum seekers who will not necessarily have family ties or financial means in Aotearoa New Zealand. Even in some cases where a lawyer has provided extensive evidence of that person’s identity or a community that wants to offer them a place of residence and be the legal guarantor for their movements, Immigration New Zealand has still progressed a warrant of commitment for prison or detention.

The failure of the New Zealand Government to both provide and utilize adequate non-custodial measures in practice is a significant contribution to the use of prison as a form of immigration detention for asylum seekers. All of the above, combined with the presumption of liberty being reversed by the legislation in many cases, due process issues, and the challenges of the prison environment, makes it highly difficult in practice for asylum seekers and their lawyers to displace the burden of proof and challenge detention, once a decision has been made to detain by Immigration New Zealand.
Zahi was eventually transferred to a unit where he worked in the laundry and then the kitchen from 6am to 4pm. He also sought to keep busy in prison by using his skills as a barber and offering haircuts to other prisoners. This helped him make a small amount of money to buy items from the canteen that he couldn’t otherwise access, because he knew no-one in Aotearoa New Zealand who could support him from the outside.

After six months in prison, Zahi was finally released with very little notice, but wasn’t prepared for a release or given any support by the Department of Corrections or Immigration.

“I picked up my stuff, and they opened the gate for me, and they said ‘You’re free, see you later.’ I told them, ‘I have nobody here. I don’t know anyone. I have no idea where I’m going.’ Like zero knowledge. I mean, where am I going to go.”

With very limited English, Zahi tried to explain to the office outside the prison that he didn’t know what to do, he had no phone and nowhere to go. Eventually they gave him the small amount of money that he had earned working at the prison, Googled local Islamic Centres, and put him in a taxi which he paid for out of his earnings. The local Mosque helped him find the Asylum Seekers Support Trust, who picked him up and took him to their hostel.

Zahi is now studying and has big hopes for his future to use his barber skills and open his own business. He said he saw a lot of people suffering and crying in the prison, and hopes that the New Zealand Government will stop the practice of putting some asylum seekers in prison, but if detention is used, to instead use a “safer place.”

Amnesty International asked those that they interviewed what they wanted to say to the Aotearoa New Zealand Government if they had the chance, and how they viewed Aotearoa New Zealand after their experience. These are some of their responses:

“To be honest I wasn’t expecting I would end up in a prison. The reason for that is again, the main reason why I came to this country is because I’m looking to better my life, and I’m just seeking refuge, and just a better future, and a prison is for criminals; people who have done wrong, and I’m not a criminal.”

“When I saw the Christchurch attack, and all the sympathy for people and Jacinda Ardern, I thought that seems to be a good country; if there is a terrorist attack with the politicians and the people of the country they support. So, that was my only knowledge about New Zealand. It was quite shocking when they told me I was going to prison.”

“I always had the impression that New Zealand was a very good country. It’s human rights record is very good, excellent, and they’re helping refugees who have been arriving in Australia, as boat refugees from Indonesia; and that is not so.”

“You see we have arrived here as refugees, and we want to be treated well; to be treated as human beings, and we want to be recognised as human beings. We have thrown away everything we had, and have run here to New Zealand because we were persecuted in [home country]; and the world sees the protection you are offering immigrants. We want to be treated well, and as refugees, when we arrive here; to treat them well, and not to put them in prison. New Zealand is well recognised around the globe as a country that observes and respects human rights; and so, they should treat us well.”

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“People here [at the hostel] are all [have] mental health issues. The person with me is leaving, and seven years of continual fighting, and he knows when he goes back he will be killed straightaway.... They refused him yesterday after seven years. All refugee people here are on medicine. You see them happy sometimes, and suddenly they’re crying. They all are finished. We are treated like the enemy, but we don’t deserve what they’re doing, because we know that the United Nations has given us the right here to claim asylum.... I know there’s some countries will not help you, because they do not have an agreement with the United Nations. New Zealand have an agreement with them, but they breaching this one, and no-ones speaking against them.”
The imprisonment of asylum seekers in Aotearoa New Zealand

CONCLUSION AND RECOMMENDATIONS

AMNESTY INTERNATIONAL URGES THE GOVERNMENT OF AOTEAROA NEW ZEALAND TO:

RECOMMENDATION 1:

End the use of criminal justice facilities such as police stations and prisons to detain asylum seekers or irregular migrants, since these are designed for those within the realm of the criminal justice system.

Reform the Immigration Act 2009 to ensure that it is consistent with international human rights standards, including the following amendments:

a) Explicitly protect in law the presumption against immigration detention in all circumstances.

b) Introduce international human rights standards on the use of immigration detention in Part 9 of the Immigration Act, including a statutory obligation to adhere to the requirements of detention only as a last resort and comply with legality, necessity, proportionality and non-discrimination.

c) Any decision to detain is based on an individualised assessment and not the circumstances of arrival or asylum claim.

d) Introduce a prohibition in law on the immigration detention of people at increased risk of human rights violations who have sought asylum, including: torture survivors, children under 18 and their families or guardians, pregnant or lactating women, those with serious medical conditions, people with disabilities and older persons.

e) Introduce a total maximum duration for detention provided by law which should be reasonable in its length. Once this period has expired the individual concerned should automatically be released.

f) For cases where restrictions to the rights to liberty or freedom of movement are necessary, introduce an obligation in law to consider non-custodial measures before resorting to detention.

RECOMMENDATION 2:

Ensure that community alternatives to detention are available, funded adequately and accessible to asylum seekers and irregular migrants in policy and practice, without discrimination.

RECOMMENDATION 3:

The Government of Aotearoa New Zealand has committed to actively protecting the human rights of people seeking safety here and to prevent and refrain from actions that violate their rights. As one asylum seeker noted, "New Zealand is well recognised around the globe as a country that observes and respects human rights; and so, they should treat us well". Our findings demonstrate there have been failures to do so, resulting in significant harm to the people subjected to these policies and practices. The people at the centre of these policies and practices just want to be "recognised as human beings". In the words of another asylum seeker, they are just seeking "a better future" and "a better life." To bring about the institutional change required to end the harmful use of the criminal justice system to detain people in these situations, urgent concrete steps, including legislative reform, are required.

RECOMMENDATION 4:

Immediately review cross-agency failures to ensure due process rights at all stages of the immigration detention process, in co-operation with rights holders, lawyers, the UNHCR and civil society organisations. This should include, but not be limited to:

a) Access to and funding of civil legal aid representation at all stages of detention that meaningfully ensures the right to challenge immigration detention and pursue asylum claims.

b) Access to interpreters at all stages of detention and provision of relevant documentation in their own language. The interpretation or translation provided should be of a standard which enables the detainee to understand fully the proceedings around their case;

c) Immigration detainees are handed information as soon as possible about the reasons for a detention decision and details on their rights in a language they understand, preferably at the airport.

d) Immigration detainees are given access to a qualified immigration lawyer before their court appearance and ideally at the first interview stage.

e) Judicial review of immigration detention is not only of a procedural nature, but must also allow for substantive consideration of the case at each hearing.

f) Search practices, including strip searches for immigration detainees are reviewed.

g) Adequate time for proper health checks and screening prior to transfer to any detention facility, including appropriate assessment, diagnoses, and treatment of any illnesses, injuries or disabilities and that immigration detainees are not transferred to a facility where these health needs cannot be addressed or under circumstances in which their health would be adversely affected.

h) Human rights and asylum-specific training of Immigration New Zealand Officers and legal counsel, Police Officers and the Judiciary.

RECOMMENDATION 5:

If immigration detention is used as a last resort and is legal, necessary and proportionate, ensure that any restrictions on movement or detention conditions comply with relevant international human rights standards, including:

a) Ensure that all immigration detainees can communicate freely and in full confidentiality with visitors and that they have adequate opportunity to communicate with the outside world.

b) Ensure that all immigration detainees can exercise their right to access to legal counsel, interpreters, doctors, refugee and migrant assisting organizations, members of their families, friends, religious and social assistance and the UNHCR, and that this right is not impeded in practice.

c) Ensure that all immigration detainees are afforded regular and sufficient periods to make telephone calls at times that are appropriate for the part of the world they are calling.

d) Ensure that all immigration detainees are given regular and sufficient periods of time to send and receive email and to receive information.
CONCLUSION AND RECOMMENDATIONS

e) Ensure that there are no limits on the number of letters that can be sent and received by immigration detainees. Legal mail should not be opened or otherwise read by prison or detention centre staff.

f) Allow any immigration detainee to have reasonable access to radio, television and or internet.

g) Take steps to ensure that immigration detainees have access to a library that is adequately stocked with recreational and instructional books.

h) Ensure that immigration detainees have appropriate food in line with their culture and religious beliefs whilst detained.

i) Ensure that detention centre/prison rules are provided in a language detainees understand, in particular that information on accessing a medical professional, a lawyer, making a complaint and access to phone calls/outside world should all be provided in a language that is understood.

j) Ensure the right to the highest attainable standard of health, including access to adequate mental health care.

k) Ensure free and full access for independent agencies such as faith and community interest groups; local, national, and international governmental organisations; and non governmental organisations, and permit them to monitor detention conditions.

Individuals who have been subjected to human rights violations in custody must have accessible and effective remedies. In particular, the Government of Aotearoa New Zealand must ensure that allegations are promptly, impartially, independently and thoroughly investigated, that victims have access to an effective remedy and receive reparation, and that those responsible are brought to justice in accordance with international human rights law and fair trial standards.

GLOSSARY OF TERMS

ASYLUM SEEKER

A person outside their country of origin (or, for stateless people, outside their country of habitual residence), who is seeking protection from persecution but has not yet been formally recognized as a refugee.

REFUGEE

Refugees are defined in the Convention Relating to the Status of Refugees as people who cannot return to their own country because they have a well-founded fear of human rights abuses or persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion. Their own government cannot or will not protect them and so they are forced to seek international protection.

IRREGULAR MIGRANT

Migrants are people who move from one country to another, either temporarily or permanently, usually to find work, although there may be other reasons, such as to study or to join family. Many move for a combination of reasons. People can migrate “regularly,” with legal permission to work and live in a country, or “irregularly,” without permission from the country they wish to live and work in. They may also arrive in a country with legal permission, but this expires or is cancelled. They may be referred to as “irregular migrants”.

DETENTION

Detention refers to any form of deprivation of liberty or confinement of the physical body ordered by public authorities. Article 9(1) of the ICCPR applies to all deprivations of liberty (not just in the context of criminal law), including confinement to a restricted area in an airport, being involuntarily transported, and other forms of administrative detention of migrants and asylum-seekers. Whether a person is “detained” depends on the fact of whether he/she has been deprived of liberty by the state, not on the place or circumstances of the confinement. E.g., Individuals held in Australia’s refugee “processing centres” on Nauru or Manus Island, or certain “reception centres” in Europe are in detention, regardless of the name the facility is given by the government.

IMMIGRATION DETENTION

Immigration detention or migration-related detention refers to “the deprivation of an individual’s liberty, usually of an administrative character, for an alleged breach of the conditions of entry, stay, or residence in the receiving country.” detention for migration-related purposes can take many forms, including detaining people in penal institutions, specialized detention centres, restricted movement arrangements, as well as in closed camp settings.

101. UN Human Rights Committee General Comment 35, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 3.
102. UN Human Rights Committee General Comment 35, UN Doc. CCPR/C/GC/35, 16 December 2014, paras 3 and 5.
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**Non-custodial measures**

Sometimes called alternatives to detention, these are non-custodial measures restricting the rights of migrants and asylum-seekers (often the rights to freedom of movement or the right to privacy). They vary in levels of intrusiveness and can range from registration requirements, to bond/bail, designated residence, community release/supervision, reporting conditions, electronic tagging, or home curfew.

**Remand prisoner**

The Department of Corrections defines a remand prisoner as “someone is held in custody while they wait for their trial or sentencing... A remand prisoner could be held in police cells, court cells, psychiatric facilities or in prison.” A “remand accused” prisoner refers specifically to someone held in pre-trial detention where they have been charged with but not convicted of a criminal offence.

**Double bunking**

“Double bunking” means that there are two prisoners who share the same cell. The Department of Corrections refers to this arrangement as “cell-sharing” or a “shared accommodation cell.”

**Strip searching**

Section 3 of the Search and Surveillance Act 2012 defines strip search as “a search where the person conducting the search may require the person being searched to undress, or to remove, raise, lower, or open any item or items of clothing so that the genitals, buttocks, or (in the case of a female) breasts are— (a) uncovered; or (b) covered only by underclothing.”

**Warrant of commitment**

A warrant of commitment is a court order issued under the Immigration Act 2009 to detain an individual or group. As section 316(1) explains “An immigration officer may apply to a District Court Judge for a warrant of commitment (or a further warrant of commitment) authorising a person’s detention for up to 28 days in any case where it becomes apparent, in the case of a person detained in custody under this Part, that before the expiry of the period for which detention is authorised.”

**Amnesty International is a global movement for human rights. When injustice happens to one person, it matters to us all**

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**Glossary of terms**

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