

Legal challenge to Australian government's new laws to impose inhuman conditions on released refugees

Mike Head

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New legislation imposing police-state restrictions on 93 people released from indefinite immigration detention has been already challenged in the Australian High Court. This is less than a week after the Labor government combined with the Liberal-National Coalition opposition to ram the regressive laws through parliament in just 12 hours.

A released detainee, a Chinese refugee identified only as S151, is seeking a declaration that a curfew to stay indefinitely at his home address from 10 p.m. to 6 a.m. and “wear an ankle bracelet for electronic tracking at all times” amount to punishment without trial, in violation of the Australian Constitution.

The very fact that S151's lawyers filed his application in the High Court on Wednesday, so soon after the legislation was passed the previous Thursday, points to the strong legal opinion that the laws are unconstitutional. Similar challenges are expected from other released refugees.

In essence, the bipartisan legislation imposed a new form of mandatory indefinite detention on the people whom the Labor government was forced to release. The High Court ruled on November 8 that indefinite detention of non-citizens—a regime first introduced by the Keating Labor government in 1992—constituted “punishment” without judicial process.

The immediate legal challenge underscores the readiness of the ruling political establishment to override even the extremely limited protections of legal and democratic rights in the 1901 Constitution.

The colonial-era constitution contains no bill of rights that formally guarantees basic democratic rights. Its only partial protection against arbitrary detention lies in the separation of powers between the executive government and the judiciary, which is allocated the sole power to inflict punishment, except in times of war.

On November 16, Prime Minister Anthony Albanese's Labor government joined hands with the Peter Dutton-led Coalition to rush laws through both houses of parliament blatantly aimed at evading the November 8 High Court verdict, despite warnings from lawyers that a challenge to the legislation was inevitable.

In court documents lodged on Wednesday, S151's lawyers

say that the new legislation allows the imposition of “conditions that are inherently punitive in nature,” exceeding parliament's authority and breaching the separation of powers.

The same argument was used for the High Court's November 8 ruling that indefinite detention is unlawful where there is no real prospect of deporting detainees because they are either stateless or officially-recognised refugees and no other country will take them.

The legislation imposed curfews, ankle bracelet-wearing and 10 other restrictions—amounting to house arrest, electronic tracking and constant surveillance—via conditions attached by the government to the released detainees' visas.

S151's legal submission argues that curfews are “typical of criminal sentences and house arrest conditions, not of administrative visa regulations imposed by the executive.” These “severely restricted” his personal liberty “without a judicial order.”

The application further states that electronic tracking “is similarly punitive” and restricts personal privacy and autonomy. Such devices are commonly associated with the “monitoring of convicted offenders under sentence.”

Among the lawyers who had warned that such challenges were inevitable was David Manne, the executive director of Refugee Legal. He said the new laws created “extraordinary extrajudicial powers akin to anti-terrorism control orders to, in effect, further deprive people of their liberty when the High Court have just ruled against deprivation of their liberty... What we're seeing here is serious government overreach—powers that would ordinarily only be determined by a court.”

S151's plight typifies that of the many of the detained refugees. He arrived in Australia in September 2001 on a student visa, progressing on to other visas, including one nominated by an employer. After serving a sentence for an undisclosed offence, he was put into indefinite immigration detention, despite being determined to be a refugee in danger of persecution, preventing removal to China.

After the High Court's November 8 ruling, S151 was released on November 11, but he was informed of the new inhuman conditions on his visa on November 19, two days after

the government-Coalition legislation came into effect.

This week it was also revealed that at least 21 of the 93 detainees—all demonised as hardened or “disgusting” criminals by the Labor government, the Coalition and corporate media outlets—had previously been released from detention facilities.

High Court briefing papers showed that 21 people were subject to “residence determination” and permitted to live at specific addresses in the community. This occurred under both the Labor government and the previous Morrison Coalition government, exposing the claims that the detainees were too dangerous to release.

Manne, from Refugee Legal, told the Australian Broadcasting Corporation’s “Afternoon Briefing” program they were “largely free to live in the community, generally with reporting requirements, sometimes with a number of other conditions.” But the new restrictions were “severe deprivations of liberty, when the High Court has just ruled that it is unlawful and unconstitutional to deprive people indefinitely of their liberty.”

Another person subjected to the new regime had been in immigration detention for 13 years despite having no convictions in Australia. He was said to be of interest to the domestic political spy agency, the Australian Security Intelligence Organisation (ASIO).

The detainees included others with no convictions. There were some convicted murderers, sex offenders and drug smugglers, alongside traffic offenders. All of these had already served their sentences. Had they been citizens, they would have been released, either on parole or unconditionally.

The High Court has yet to release its reasons for its November 8 ruling, but the government is already considering further legislation to re-imprison detainees. One possibility is the expansion of Continuing Detention Orders (CDOs), which were legislated by the Coalition government in 2016, with Labor’s backing.

CDOs allow prisoners to be incarcerated indefinitely, using renewable detention orders, regardless of the original terms of their imprisonment. They also violate the core legal principle of habeas corpus—no detention without a criminal trial.

Such orders require no proof of any intent to commit a further offence—just a “high degree of probability” that a crime could occur. This involves speculative allegations by police and ASIO of an “unacceptable” risk that a prisoner might commit a violent act.

Like the more than 120 “counterterrorism” laws since US President George W. Bush declared the “war on terror” in 2001, this legislation already extends beyond terrorism-related offences. It also covers prisoners convicted of treason or “foreign incursions.” Treason includes “assisting countries or forces engaged in armed hostilities against the Australian Defence Force.” That could mean opposing US-instigated wars and other military interventions.

Moreover, “terrorism” is defined so broadly that it can cover many forms of political dissent, including “providing support”

to a government-decreed “terrorist organisation,” such as Hamas. That can be a means of outlawing opposition to government-backed genocidal wars like the one underway in Gaza.

Under laws rushed through parliament in previous record time by the Howard Coalition government in 2005, with Labor and Greens support, people also can be convicted for allegedly discussing “a” potential “terrorist act,” even where there is no mooted location, time or method of attack.

Another government possibility is expanded use of Control Orders, introduced in 2005 as well. These can be imposed currently on the basis of ASIO or police assertions that they would “substantially assist in preventing a terrorist act.” Such orders can include house arrest, ankle monitoring devices and restrictions on social media activity, internet use, communications, movements and associates.

For now, these developments are mainly confined to non-citizens. But they set precedents. They are a warning of a broader threat to democratic rights as opposition grows to the ruling-class agenda of war and austerity, fuelled by the cost-of-living crisis, the multi-billion-dollar AUKUS military pact and full support for the Israeli genocide in Gaza.

In 1992, the High Court’s *Chu Kheng Lim* decision rubberstamped the mandatory imprisonment of all asylum seekers introduced by the Keating Labor government, on the basis that it was “reasonably necessary” for visa processing or deportation. The judges said citizens could not be deprived of their liberty in the same fashion, except in wartime.

This is an ominous exception, particularly under conditions in which the Albanese government and the ruling class as a whole has aligned itself behind the US-backed onslaught in Gaza and Washington’s preparations for wider wars against Russia, Iran and China.



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