Australian government tries to thwart High Court challenges to new detention laws

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Without any public announcement, the Australian Labor government has lifted electronic ankle bracelet and curfew conditions from two of the three people recently released from indefinite immigration detention who are challenging the new police-state type restrictions in the High Court.

This is a calculated behind-the-scenes move to thwart legal challenges, by now arguing that the two plaintiffs have no standing to conduct their cases.

The government clearly knows that such challenges are likely to succeed. That is because these restrictions essentially amount to a new form of indefinite detention. They thus flout the High Court's November 8 ruling that such endless punishment violates the country's constitution.

The Albanese government's latest manoeuvre is another demonstration of how far it is prepared to go, hand-in-hand with the Liberal-National Coalition, to override the limited protections in the country's 1901 Constitution against arbitrary detention by executive decree.

Over the past few weeks, Labor and the Coalition have jointly rammed through parliament, without any semblance of debate, sweeping bills to either shackle or re-detain people released as a result of the High Court's verdict.

This has been accompanied by a bipartisan and media witch hunt demonising the released detainees as murderers and rapists. In reality, many are traumatised refugees, and all have served any prison sentences they received for earlier convictions.

The frenzied passage of these bills, pushed through both houses of parliament in a matter of hours, showed the real repressive face of parliamentary democracy. It also expressed contempt for the court's order, which partially struck down the notorious decades-long regime of indefinitely incarcerating asylum seekers and other non-citizens who cannot be deported.

Lawyers for one of the ex-detainees, a Chinese refugee identified only as S151, are still seeking a High Court declaration that the shackling and curfew laws amount to further unlawful punishment. That case may not be heard for months, however, now that the government has sought to short-circuit it.

Like S151, an Afghan Hazara refugee, labelled AUK15, has had his bracelet monitoring and curfew lifted by order of Immigration Minister Andrew Giles. Lawyers for the third plaintiff, a Sudanese Dinka refugee known as RVJB, declined to tell reporters if he is still subject to the restrictions.

Currently, RVJB's challenge is expected to be heard in March. It could become the first legal test of the bipartisan barrage of re-detention bills rushed through parliament this month.

In the meantime, because of the Labor government's bid to evade the challenges, 138 of the 149 detainees released after the High Court ruling will remain subject to constant ankle bracelets and curfews. The process of re-detaining many of them will proceed.

On November 27, Giles declared that "the curfew and electronic monitoring conditions generally would apply across the board." That amounts to a blanket imposition, by ministerial edict, of a form of indefinite house arrest.

Giles and Home Affairs Minister Clare O'Neil also have instigated re-detentions by rapidly setting up a so-called Community Safety Board. Reportedly comprised of police, Border Force and ex-law enforcement officers, this body will refer released detainees to courts for the imposition of "preventative detention."

In addition, at least six ex-detainees have been arrested for allegedly breaching restrictions or committing other offences. Media outlets and O'Neil herself have effectively declared them guilty of the unsubstantiated allegations against them, trashing the presumption of innocence and prejudicing any prospect of fair trials.

Last week, O'Neil went further. She publicly denounced the High Court, accusing the seven judges of deliberately putting criminal "perpetrators" on the streets. In effect, O'Neil, speaking on behalf of the Albanese government, condemned the judges for unanimously upholding even the narrow protection of basic democratic rights in the 1901 Constitution.

Reflecting its British colonial origins, that constitution has no bill of rights, but it does contain a formal separation of executive and judicial powers. That bars governments from arbitrarily imprisoning or otherwise punishing people without a judicial process, except during wartime.

Labor's Coalition-backed moves represent a definite pitch toward authoritarian forms of rule, under conditions in which the same two ruling parties are continuing to support the US-backed Israeli genocide in Palestine, in flagrant violation of international law.

Under Labor's new legislation, the government can apply to a state or territory Supreme Court to impose a detention order if a judge is "satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of seriously harming the community by committing a serious violent or sexual offence."

Such orders can last up to three years and can be renewed endlessly. This amounts to potential life-long incarceration on the basis of an alleged "thought crime"—a police assertion of what a person might do in the future, not what they have actually done.

As the WSWS has previously reported, the three plaintiffs, S151, AUK15 and RVJB, whose challenges the government has tried to block or delay, each typify the barbarity of the indefinite detention regime. Like the six arrested, they are highly vulnerable members of society, brutalised and traumatised by years in unlawful indefinite detention, often after fleeing brutal wars, starvation or persecution.

The Labor government is proceeding down this re-detention path despite public statements by constitutional experts, professors George Williams and Anne Twomey, that its legislation is likely to be ruled unlawful.

Twomey wrote that this regime is based on one that already exists for terrorism offenders, yet extends to non-citizens who have completed their prison sentences and been released into the community, possibly for many years. That could constitute illegitimate punishment, she stated, beyond the "aliens" power in the 1901 Constitution.

The High Court rubberstamped preventative detention orders in the infamous 2007 case of *Thomas v Mowbray*. That was done in the name of "counter-terrorism," as an exercise of the Constitution's wartime defence power.

This was part of the bogus "war on terrorism" declared in 2001 to justify the US-led invasions of Afghanistan and Iraq and, as the WSWS warned, to set precedents for wider domestic use of such arbitrary imprisonment.

But the judges may not be prepared to extend that chilling logic to the incarceration of immigrants, except in wartime, as happened in World Wars I and II when "aliens" were subjected to mass detention.

The government's efforts to stymie the legal challenges shows how consciously the political and media establishment is seeking to override basic legal and democratic rights. At the same time, there must be no illusions that the High Court will protect the rights of the detainees or anyone else.

For three decades, the court sanctioned the indefinite incarceration of asylum seekers and other non-citizens denied visas. That flowed from the brutal system of mandatory detention of all asylum seekers arriving by boat, which was pioneered by the Keating Labor government in 1992, setting a global precedent for anti-refugee measures internationally.

In its November 8 ruling, the High Court maintained the underlying 1992 regime of mandatory refugee detention. Under that system, almost 1,000 people are still in indefinite detention, despite domestic protests and condemnations by UN human rights bodies.

The judges also said their ruling did not prevent the re-detention of people if it became "practicable in the reasonably foreseeable future" to remove them from Australia. In addition, detention could be re-imposed via a preventive detention law.

There is a mounting danger of far-reaching precedents being set. Similar detention laws could be introduced against anyone accused of conduct or views deemed an unacceptable threat to "community safety" or "national security." Governments internationally are seeking to outlaw protests against the Gaza genocide, falsely accusing participants of antisemitism, "hate speech," or aiding terrorism.

As the WSWS has warned, this is part of a broader offensive against basic democratic rights. Repressive mechanisms are being put in place to preserve capitalist rule against the growing development of mass opposition to war, widening social inequality and deteriorating living conditions.