Refugee Legal:

Submission to Parliamentary Joint Committee on Intelligence and Security's review into amendments made by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth)

Refugee Legal:
Defending the rights of refugees.

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Executive summary

The amendments made by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) have failed to achieve their stated policy purpose of preventing removals in breach of Australia's non-refoulement obligations. The amendments fail to protect all people who engage Australia's international non-refoulement obligations from being directly, indirectly or constructively refouled. The amendments also operate with other provisions of the Migration Act to further entrench the indefinite nature of immigration detention for many people. In doing so, they cause irreparable and severe psychological harm and lead to Australia breaching a range of international human rights obligations.

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About Refugee Legal

1. Refugee Legal (formerly the Refugee and Immigration Legal Centre[1]) is a specialist community legal centre providing free legal assistance to people seeking asylum and disadvantaged migrants in Australia.[1] Since its inception over 35 years ago, Refugee Legal and its predecessors have assisted many thousands of people seeking asylum and migrants in the community and in detention. Refugee Legal is the largest provider of free legal assistance to such people in Australia. In the 2021-22 financial year, its total client assistance was over 14,000.

2. Refugee Legal specialises in all aspects of refugee and immigration law, policy and practice and is a regular contributor to the parliamentary and other policy reform processes on refugee and general migration matters. We also play an active role in professional training and community education. We are a longstanding member of the peak Department of Home Affairs/Immigration and Border Protection-NGO Dialogue and other consultative fora.

3. We welcome the opportunity to contribute to the Parliamentary Joint Committee on Intelligence and Security's review into amendments made to the *Migration Act 1958* (Cth) (**the Migration Act**) by Schedule 1 to the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) (**CIOR Act**) pursuant to s 29(1)(cf) of the *Intelligence Services Act 2001* (Cth) (**IS Act**). The focus of our submissions and recommendations reflect our experience and expertise as briefly outlined above.

Introduction

4. Section 197C was inserted in the Migration Act in December 2014[2] to address judicial interpretations of the removal power in section 198 to the effect that it did not mandate removal of an unlawful non-citizen where the removal would breach Australia's non-refoulement obligations.[3] At the time, Refugee Legal submitted that the proposed section 197C was of profound concern as it not only authorised potentially unlawful removals resulting in individuals being exposed to serious human rights abuses, but it imposed a strict legal duty on public servants to do so.[4] Subsequent judicial authority confirmed this

[1] RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.
[2] Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth), Schedule 5—Clarifying Australia's international law obligations, Part 1—Removal of unlawful non-citizens, Division 1—Amendments commencing on the day after Royal Assent, Item 2; section 2, item 12.
[3] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144; *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33; (2013) 210 FCR 505. See Australia, House of Representatives, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Explanatory Memorandum at 165-166 [1135]-[1140].
[4] Senate, Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Submission 165 (Refugee and Immigration Legal Centre), at [6.2.3], available at: https://www.aph.gov.au/DocumentStore.ashx?id=6358cdae-eb7e-48ca-8db4-

to be the case.[5] At the time, the Parliamentary Joint Committee on Human Rights also raised similar concerns with respect to the implications of section 197C for Australia's non-refoulement obligations[6], as did many others including the United Nations Human Rights Committee (**HRC**).[7]

5. On 25 May 2021, the CIOR Act amended the Migration Act with intent to "clarify that the duty to remove under the Migration Act should not be enlivened where to do so would breach non-refoulement obligations, as identified in a protection visa assessment process, including Australia's obligations under the *1951 Convention relating to the Status of Refugees* and its 1967 Protocol (Refugees Convention), the *International Covenant on Civil and Political Rights* (ICCPR), and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)".[8]

6. Our principal contentions in response to the Committee's review pursuant to s 29(1)(cf) of the IS Act, are summarised as follows:

   (i) **Failure to consistently comply with non-refoulement obligations** –the amendments made by the CIOR Act do not prevent the refoulement of all people who engage Australia's non-refoulement obligations.

   (ii) **Violation of other international obligations and infliction of severe harm** –the amendments operate, in conjunction with other statutory provisions,[9] to inflict severe harm on people contrary to Australia's other obligations under international law, not including the prohibitions on arbitrary detention and torture, cruel, inhuman and degrading treatment and punishment.

International obligations

7. A proper understanding of the domestic and international frameworks governing non-refoulement is essential for the Committee to undertake its review.

8. The obligation of non-refoulement is the cornerstone of the international legal framework governing protection, and stems from refugee, human rights, humanitarian and customary law. It prohibits states from removing an individual to another country where that person faces a real risk of persecution, torture, or cruel and inhuman or degrading treatment or punishment.[10] Non-refoulement obligations under the human rights treaties are absolute

55f8c1bf2ab1&subId=301613 [accessed 8 June 2023].

[5] *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 96 ALJR 497, per Gleeson J at [107]; *AJL20 v The Commonwealth* [2020] FCA 1305 at [95]- [99], [123] (and this point was not disturbed by the High Court on appeal: *The Commonwealth v AJL20* [2021] HCA 21); *DMH16 v Minister for Immigration and Border Protection* [2017] FCA 448; (2017) 253 FCR 576 at 581 [26].

[6] See the Committee's analysis of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 in Parliamentary Joint Committee on Human Rights, Fourteenth Report of the 44th Parliament (October 2014) pp. 77–78.

[7] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/6 (2017) [33]–[34].

[8] Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, Revised Explanatory Memorandum, p3.

[9] Including ss 189, 196, 197C(1) and 198 and the various statutory bars on making visa applications.

[10] This obligation is express in the Refugee Convention and the Convention against Torture. It is implied

and may not be subject to any limitations.[11]

9. Australia is bound by instruments imposing this obligation, including the:

   (i) *1951 Convention relating to the Status of Refugees*[12], as amended by the *1967 Protocol relating to the Status of Refugees*[13] (**Refugees Convention**);

   (ii) *International Covenant on Civil and Political Rights*[14] (**ICCPR**);

   (iii) *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*[15] (**Second Optional Protocol**); and

   (iv) *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[16] (**CAT**).

10. In domestic law, the term "non-refoulement obligations" is non-exhaustively defined in the Migration Act for the purposes of s 197C as follows:

> ***non-refoulement obligations*** *includes, but is not limited to:*
>
> *(a) non–refoulement obligations that may arise because Australia is a party to:*
>
> *(i) the Refugees Convention; or*

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from the rights to life and freedom from torture and cruel treatment in the ICCPR and the CROC: Office of the United Nations High Commissioner for Human Rights, *The principle of non-refoulement under international human rights law*, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf [accessed 9 June 2023].

[11] UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018) [9].

[12] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

[13] *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). Reservations by Australia to Art 28(1) and Art 32 were withdrawn in 1971 and 1967 respectively: UNTS, Convention Relating to the Status of Refugees, Geneva, 28 July 1951, note 14. See *NAGV v Minister for Immigration, Multicultural and Indigenous Affairs* (2003) 130 FCR 46, Addendum. On 13 December 2001 the *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees* was adopted in Geneva at the Ministerial Meeting of the States Parties to the Convention and/or its 1967 Protocol Relating to the Status of Refugees. The Declaration was signed by all the member States to the Convention, including Australia, and reaffirms their 'commitment to implement [their] obligations under 1951 Convention and/or its 1967 Protocol fully and effectively in accordance with the object and purpose of these instruments': HCR/MMSP/2001/09, 16 January 2002.

[14] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). The Covenant was signed for Australia on 18 December 1972, and ratified on 13 August 1980, subject to a number of reservations in relation to arts 2 and 50, 10, 14, 17, 19, 20, and 25: Australian Treaty Series 1980, No 23.

[15] *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991). Ratified 2 October 1990.

[16] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). Signed for Australia on 10 December 1985 and ratified on 8 August 1989: Australian Treaty Series 1989, No 21.

(ii) the Covenant; or

(iii) the Convention Against Torture; and

(b) any obligations accorded by customary international law that are of a similar kind to those mentioned in paragraph (a).

11. Importantly, judicial authority provides that this non-exhaustive statutory definition:

    (i) encompasses obligations undertaken by Australia pursuant to certain international treaties, and not just the Refugee Convention[17]; and

    (ii) is *not* just confined to the protection obligations to which s 36(2) of the Migration Act refers.[18]

12. That is, although the protection visa regime under the Migration Act is the primary mechanism by which Australia purports to comply with its non-refoulement obligations, the relevant provisions purporting to address Australia's protection obligations do not incorporate concepts from the above international instruments in full.[19]

Operation

Potential breaches of non-refoulement obligations

13. The amendments made by the CIOR Act fail to achieve their stated policy purpose of preventing removals in breach of non-refoulement obligations because the amended provisions do not operate, in practice, to prevent all people engaging these obligations from refoulement.

14. The provisions are limited in scope and people in a range of categories, discussed below, do not benefit from their protection. As a result, noting the strict legal duty in section 197C(1) to remove a person from Australia's territory, there is a real likelihood that Australia has, and will continue to, breach its international non-refoulement obligations. Breaching international law is a 'significant matter' in and of itself[20] and has grave consequences for the people subject to refoulement, including serious human rights abuses and death.

15. The categories of people who may engage Australia's international refoulement obligations but who do not enjoy the protection from refoulement afforded by the CIOR Act amendments are set out below.

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[17] *Ibrahim v Minister for Home Affairs* [2019] FCAFC 89; 270 FCR 12 at [103].
[18] Ibid.
[19] See: Migration Amendment (Complementary Protection) Bill 2011 (Cth), Explanatory Memorandum, at 1.
[20] *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195 [5], per Allsop CJ.

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People who have not applied for a protection visa

16. The protections afforded by the CIOR Act only apply to people in immigration detention who have lodged a protection visa application in Australia and been found through that process to meet the specific statutory refugee and complementary protection criteria for that application process. These protections do not apply to other people who may engage Australia's protection obligations, including:

(i) Those found to be a refugee as defined in the Refugees Convention and resettled in Australia on a Subclass 200 (Refugee) or Subclass 204 (Woman at risk) visa.

(ii) People found to engage Australia's non-refoulement obligations through a different statutory process under the Migration Act such as a visa cancellation related process (ss 109, 116 or 501 etc).[21]

(iii) People found to engage Australia's non-refoulement obligations through a non-statutory process initiated by the Department of Home Affairs (**Department**) such as an International Treaties Obligation Assessment (**ITOA**).[22]

(iv) Those statutorily barred from applying for a protection visa including because they arrived in Australia by boat without a visa.[23]

(v) Those statutorily barred from making a second or subsequent protection visa application under s 48A(1) of the Migration Act.

> For example, an Afghan national of Hazara ethnicity previously had a protection visa refused in 2015 on the basis that it was safe for Hazaras to return to Afghanistan. However, due to a significant deterioration in country conditions since that time it is not safe for that person to be returned. However, they are legally prohibited from applying for re-applying for a protection visa. Sections ss 198(1) and 197C(1) compel the removal of that person to Afghanistan as soon as reasonably practicable.

(vi) People facing significant barriers preventing them from lodging a protection visa application not limited to: lack of English language skills, mental health conditions, intellectual impairments; and/or an inability to access free legal support.

> For example, a national of South Sudan who lives with an acquired brain injury, is illiterate in English, and whose Subclass 200 (Refugee) visa was cancelled on

[21] See: *Ministerial Direction 99 - Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (made pursuant to s 499) at [9.1.2.]; Department of Home Affairs, Visa cancellation instructions > General visa cancellation powers (s109, s116, s128, s134B and s140), Non-refoulement obligations.
[22] See: *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29; 259 CLR 180 per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ at [9].
[23] Pursuant to s 46A(1) of the Act.

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> character grounds. Sections ss 198(1) and 197C(1) compel the removal of that person to South Sudan as soon as reasonably practicable.

(vii) People liable to being removed to a third country in relation to which the person's claims for protection were not considered in the context of a protection visa application.

> For example, a Syrian national of Christian religion who applies for a protection visa, and is found to meet the relevant s 36(2) criteria engaging the s 197C(3) protection from non-refoulement. The protection visa application is refused on character grounds under s 501 of the Migration Act. While in detention it is established that the person has a temporary work visa in Yemen, where country information confirms Christians face a high risk of human rights abuses. Sections ss 198(1) and 197C(1) compel the removal of that person to Yemen as soon as reasonably practicable.

(viii) People who arrived in Australia by boat, were transferred to a regional processing country (**RPC**), and subsequently transferred back to Australia for medical treatment ('transitory persons').[24] The CIOR amendments do not operate to prevent the removal of any people in this category back to the RPC where there is a real risk of prohibited treatment in the receiving RPC for reasons including (but not limited to) because of their gender, sexual orientation or gender identity.

17. Section 198(1) with s 197C(1), and section 198AD in the case of transitory persons, compel the Australian government to remove people in these categories as soon as reasonably practicable,[25] despite their need for protection from refoulement.

People engaging Australia's non-refoulement obligations under international law but not meeting the protection obligations criteria for a protection visa

18. Protection from refoulement afforded by s 197C(3) extends only to those who apply for a protection visa and are found to meet the refugee or complementary protection criteria in ss 36(2)(a) or (aa) of the Migration Act. As previously stated, these criteria are narrower than those afforded at international law,[26] meaning there will be circumstances in which people meet the international tests in relation to non-refoulement obligations but not those legislated in the Migration Act governing protection visas. These people will be subject to the duty of removal in s198(1) (and 197C(1)) and exposed to a real risk of human rights abuses in breach of Australia's non-refoulement obligations.

19. As we have previously submitted to Parliamentary committees, the narrow scope of the

[24] As defined in s 5(1). See also: ss 198(11), 198B, 198AD and 198AH. Section 197C only applies to people liable to removal pursuant to s 198, which expressly excludes transitory persons.
[25] Provided one or more of the grounds for removal in s 198(2)-(9) are engaged.
[26] Namely those that apply to s 197C(1) in the Migration Act in accordance with the definition of non-refoulement obligations in s 5(1).

refugee and complementary protection criteria in the Migration Act has implications for Australia's ability to comply with its international obligations.[27] For example, Australia's statutory definition of a refugee departs from the internationally recognised test by modifying its internal relocation component. It is well-established that under the Refugee Convention a person is not eligible for refugee protection if she can safely access another location within her home country where there is no well-founded fear of being persecuted, and it is reasonable for her to move to and settle there.[28] By contrast, Australia's definition omits the reasonableness element and imposes a requirement on the applicant to demonstrate a well-founded fear in *all* locations within the home country, which has been called an 'impossible burden'.[29]

> For example, a single mother with three young children from Quetta, Pakistan, of Hazara ethnicity and Shia religion applies for a protection visa and is found to face a real chance of persecution in Quetta from Sunni extremist groups. Under Australian law, she would not meet the refugee criteria if she could not demonstrate that she faced the same risk in all other areas in Pakistan, irrespective of whether in practice she would be able to safely access and subsist in those other areas.

20. Although these additional requirements do not apply to the complementary protection criteria in s 36(2)(aa),[30] due to the different scopes of the refugee and complementary protection tests in the Migration Act, not all people who meet the international definition of refugee but not the Migration Act definition in s 36(2)(a) will meet the complementary protection criteria in s 36(2)(aa). In this way, the addition of the complementary protection criteria for protection visas does not always act as a safeguard for people in these circumstances despite it not requiring the person to demonstrate a real risk in all parts of the country.[31] For example, the principle regarding impermissible behaviour modification,

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[27] Senate, Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Submission 165 (Refugee and Immigration Legal Centre), at [4.1]-[4.5], available at: https://www.aph.gov.au/DocumentStore.ashx?id=6358cdae-eb7e-48ca-8db4-55f8c1bf2ab1&subId=301613 [accessed 8 June 2023].

[28] UN High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, GUIDELINES ON INTERNATIONAL PROTECTION NO. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, available at: https://www.refworld.org/docid/5cb474b27.html [accessed 16 June 2023]

[29] s 5J(1)(c). See UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) at [1], cited in Hathaway and Foster, *The Law of Refugee Status*, 2nd ed, (Cambridge, CUP, 2014) at 338. Although this additional test does not apply to the qualifying criteria for complementary protection, it is not the case that everyone who would qualify as a refugee under international law, but who cannot meet the Migration Act refugee criteria will qualify for complementary protection. This leaves a gap in the statutory scheme which could result in breaches of Australia's international non-refoulement obligations.

[30] See: s 36(2A)(a).

[31] See: ss 36(2)(aa) and 36(2B)(a).

expressed by the High Court in Appellant *S395/2002*[32] in relation to the refugee criterion, does not apply to the complementary protection criterion in s 36(2)(aa).[33]

> For example, a transgender woman of Turkish nationality who faces a real chance of persecution in their home area in southern Türkiye but not in Istanbul would therefore not meet the refugee criteria in s 36(2)(a). However, they would also not meet the complementary protection criteria in s 36(2)(aa) if the decision-maker found they would not face a risk of harm in their home area (or elsewhere in the country) if they could modify their appearance and behaviour in public through hiding their true gender identity.

21. Additionally, the complementary protection criterion, as it applies to protection visas, does not accurately reflect Australia's international non-refoulement obligations in all respects. The High Court of Australia has confirmed that the Migration Act does not purport to incorporate the non-refoulement obligations arising under those instruments; nor generally speaking do the terms of s 36 directly replicate the tests used in those instruments or the associated jurisprudence.[34]

People liable to indirect refoulement

22. The protection afforded by the amendments made by the CIOR Act do not operate in practice to protect people from indirect refoulement, which is prohibited under international law.[35]

23. Indirect refoulement may arise where a person found to engage Australia's non-refoulement obligations in respect of their country of nationality has a right to enter a third country, meaning they cannot meet the refugee or complementary protection criteria in the Migration Act.[36] If that person is either returned to their home country by the third state, or is forced to return to their home country because of their circumstances in the third country,[37] Australia may be responsible for the breach of non-refoulement obligations.

Constructive refoulement

24. The CIOR Act amendments operate in practice in a way that may lead to 'constructive

[32] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.
[33] *DQU16 v Minister for Home Affairs* (2021) 273 CLR 1.
[34] See: *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211 at [20].
[35] *T.I. v. the United Kingdom*, 7 March 2000, Appl. No. 43844/98, in which the European Court of Human Rights stated that "the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention." See also *K.R.S. v. United Kingdom* Appl. No. 32733/08, 2 December 2008, as well as in *Abdolkhani and Karimnia v. Turkey*, 22 September 2009, Appl. No. 30471/08, paras. 88-89.
[36] s 36(3).
[37] For example, where the right to enter and reside in the third country is not permanent, where an individual is subject to other human rights breaches, including where the third country is affected by civil conflict or where the individual is unable to subsist.

refoulment' of people who feel compelled to consent to their removal under duress because they face indefinite or protracted immigration detention. As elaborated in recent decisions of the European Court of Human Rights, 'constructive refoulement' refers to practices adopted by a state that compel an asylum seeker to accept repatriation.[38]

25. The CIOR Act amendments provide for people otherwise protected from refoulement to consent to their removal to the country in relation to which they have been found to face a real risk of serious human rights abuses.[39] Given that, as discussed in more detail below, people whose refoulement is prevented by the CIOR amendments are likely subject to protracted and indefinite detention, there is a risk that these conditions will compel individuals to sign paperwork consenting to removal to their home countries. Such circumstances may amount to 'constructive refoulement',[40] given that the alternative to return is to remain in detention in breach of fundamental human rights, including the rights to be protected from arbitrary detention and torture or inhuman treatment.

Violations of other international obligations and severe harm

26. The amendments made by the CIOR Act operate with other provisions of the Migration Act, as well as the absence of any mechanism to challenge or seek review of a person's detention, to entrench the indefinite nature of immigration detention, and in doing so cause irreparable harm to those affected and breach a range of Australia's international human rights obligations. This operation and effect has been expressly acknowledged by the Minister before Parliament.[41]

27. High Court authority provides that the Migration Act validly authorises and requires the ongoing detention of an unlawful non-citizen until they are removed from Australia or granted a visa.[42] Where an individual cannot be returned to their home country pursuant to the CIOR Act amendments, cannot be granted a visa,[43] and has no right of entry to a third country, the legal consequence is that the person will be detained indefinitely subject only to the relevant Minister exercising a personal non-compellable power to grant them a

[38] Sanmarti Verma, 'Refoulement by another means—'constructive refoulement' and character-based decisions under the Migration Act 1958 (Cth)' (2022) 28(2) *Australian Journal of Human Rights* 347. In the European Court of Human Rights, see *M.S. v Belgium* (2012) App No 50012/08 (ECHR, 31 January 2012); *N.A. v Finland* (2019) App No 25244/18 (14 November 2019, ECHR).
[39] Section 197C(3)(c)(iii) of the Migration Act.
[40] Sanmarti Verma, 'Refoulement by another means—'constructive refoulement' and character-based decisions under the Migration Act 1958 (Cth)' (2022) 28(2) *Australian Journal of Human Rights* 347
[41] See: Parliament of Australia, Parliamentary Business, Tabled Documents, *Migration Act 1958 - Section 486O: Assessment of detention arrangements - Commonwealth Ombudsman's report no. 1 of 2023 - government response*, Ombudsman ID 1002937-O3 (page 7); Ombudsman ID 1003033-O3 (page 12), Ombudsman ID 1003123-O2 (page 18), available at: https://www.aph.gov.au/Parliamentary_Business/Tabled_Documents/1071 [accessed 22 June 2023].
[42] *The Commonwealth v AJL20* [2021] HCA 21; 273 CLR 43. The only legal remedy available to challenge the lawfulness of a detainee's detention is to seek an order from a court in the nature of mandamus compelling the Executive to compel the performance of either of those two duties.
[43] For example, people who have been found to engage Australia's non-protection findings but who cannot meet other criteria for a protection visa due to being of character concern

visa.[44] For reasons set out below, the likelihood of the Minister exercising this non-compellable public interest power is fanciful.

28. As of 30 April 2023, 12% of the 1128 people detained in immigration detention facilities have been held in detention for more than 5 years.[45] A proportion of these people include those who are indefinitely detained due to them being unable to be removed for reason of s 197C(3) and there being no safe third country available.[46] There is a substantial body of research which substantiates the proposition that immigration detention causes severe psychological harm.[47] Studies also confirm that refugees and people seeking asylum held in immigration detention have much higher rates of depression and anxiety.[48] Research also demonstrates that suicidal tendencies for immigration detainees in Australia are, respectively, 41 (men) and 26 (women) times the nation average.[49] A common and powerful mental health stressor in the immigration detention environment that is not present in most other forms of detention, is the arbitrariness of confinement.[50]

29. Australia's mandatory detention regime, which routinely leads to protracted and/or indefinite detention, has been repeatedly found by the HRC to violate the right not to be arbitrarily detained,[51] cause extreme hardship and deterioration of mental health,[52] and facilitate the denial or violation of other rights including the right to be free from torture,[53]

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[44] Under s 195A of the Act.
[45] Department of Home Affairs, Visa statistics, Immigration detention, Immigration Detention Statistics for 2023 available at: https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-april-2023.pdf [accessed 9 June 2023]. The Department does not publish statistics on the number of people held in immigration detention who have been found to engage Australia's non-refoulement obligations (i.e. the people to whom the CIOR Act amendments apply).
[46] See: Parliament of Australia, Parliamentary Business, Tabled Documents, *Migration Act 1958 - Section 486O: Assessment of detention arrangements - Commonwealth Ombudsman's report no. 1 of 2023 - government response*, Ombudsman ID 1002937-O3 (page 7); Ombudsman ID 1003033-O3 (page 12), Ombudsman ID 1003123-O2 (page 18), available at: https://www.aph.gov.au/Parliamentary_Business/Tabled_Documents/1071 [accessed 22 June 2023].
[47] Guy J. Coffey et al., "The meaning and mental health consequences of long-term immigration detention for people seeking asylum," Social Science & Medicine, 70 no. 12 (2010); Michelle Peterie, Visiting Immigration Detention: Care and Cruelty in Australia's Asylum Seeker Prisons (2023), Bristol University Press.
[48] Katy Robjant, Rita Hassan and Cornelius Katona, ""Mental health implications of detaining asylum seekers: systematic review," The British journal of psychiatry: the journal of mental science, 194 no. 4 (2009).
[49] Michael Dudley, "Contradictory Australian national policies on self-harm and suicide: the case of asylum seekers in mandatory detention," Australasian Psychiatry, 11 (2003): 102.
[50] Khatidja Chantler, "Gender, Asylum Seekers and Mental Distress: Challenges for Mental Health Social Work," British Journal of Social Work, 42 no. 2 (2012): 325.
[51] See eg *A v Australia* CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC); C v Australia CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC); *Omar Sharif Baban v. Australia*, CCPR/C/78/D/1014/2001, UN Human Rights Committee (HRC); *Bakhtiyari v. Australia*, CCPR/C/79/D/1069/2002, UN Human Rights Committee (HRC); *D and E, and their two children v. Australia*, CCPR/C/87/D/1050/2002, UN Human Rights Committee (HRC); *Shafiq v. Australia*, CCPR/C/88/D/1324/2004, UN Human Rights Committee (HRC); Shams & Ors v Australia, HRC, UN Doc CCPR/C/90/D/1255; *MGC v Australia,* UN Human Rights Committee Communication No. 1875/2009; *F.K.A.G. et al. v Australia* (UN Doc CCPR/C/108/D/2094/2011)
[52] C v Australia CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC)
[53] C v Australia CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC); *F.K.A.G. et al. v Australia* (UN Doc CCPR/C/108/D/2094/2011).

the right to humane treatment,[54] and protection of the family. The HRC has also made clear that "[t]he inability of a state to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention".[55]

Arbitrary detention and the ICCPR

30. As a signatory to the ICCPR, Australia is required to ensure that "[n]o one shall be subjected to arbitrary arrest or detention".[56] The HRC has held that detention under the Australian framework – a mandatory regime without any provision for an individualized assessment of the necessity of detention – has an arbitrary character[57] and is in violation of article 9 of the ICCPR.

31. There is no effective remedy to indefinite detention in Australia. Domestic courts have found that in the circumstances of a person who has had a visa refused or cancelled on character grounds (i.e., a person to whom the CIOR Act amendments may apply), the prospect of the Minister intervening to exercise their personal public interest power would be 'fanciful'[58]; and in those circumstances it would "be extremely incongruous, if not bizarre, that the Minister would again do an about-face and find that it was somehow in the public interest for the appellant to be granted a visa so he could be released from detention".[59] Indeed, the Minister's own guidelines governing which cases are referred to them for consideration of whether to exercise the discretion in s 195A states that the Minister would 'generally' not expect referrals where the person has had an adverse character related decision. [60] Moreover, this power is non-compellable, meaning there is no duty to consider whether to exercise the power in response to a request from a detainee, or in any other circumstances.[61]

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[54] *Madafferi v. Australia*, CCPR/C/81/D/1011/2001, UN Human Rights Committee (HRC).
[55] UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [18]. See, also, *C v Australia*, UN Human Rights Committee Communication No.900/1999 (2002) [8.2]; *Bakhtiyari et al. v. Australia*, UN Human Rights Committee Communication No.1069/2002 (2003) [9.3]; *D and E v. Australia*, UN Human Rights Committee Communication No. 1050/2002 (2006) [7.2]; *Shafiq v. Australia*, UN Human Rights Committee Communication No. 1324/2004 (2006) [7.3]; *Shams et al. v. Australia*, UN Human Rights Committee Communication No. 1255/2004 (2007) [7.2]; *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.3]; *F.J. et al. v. Australia*, UN Human Rights Committee Communication No. 2233/2013 (2016) [10.4].
[56] ICCPR, Article 9(1).
[57] See n 45 above. See also Australian Human Rights Commission, Right to security of the person and freedom from arbitrary detention, International Scrutiny Human Rights Committee views on communications and Government responses, available at: https://humanrights.gov.au/our-work/rights-and-freedoms/right-security-person-and-freedom-arbitrary-detention [accessed 16 June 2023]; Australian Human Rights Commission, Submission to the Joint Select Committee on Australia's Immigration Detention Network (2011), at [7].
[58] *AEM20 v Minister for Home Affairs* [2020] FCA 623; 277 FCR 299 at per Katzmann J at [113].
[59] *MNLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 35; 283 FCR 525 per Wigney J at [56]
[60] Department of Home Affairs, *PAM3: Act - Compliance and Case Resolution - Case resolution - Minister's powers - Minister's detention intervention power* (reissued on 18 August 2017 to update revised guidelines as signed by the Minister in November 2016), at [4].
[61] Liberty Victoria, Rights Advocacy Project, 'Playing God: The Immigration Minister's Unrestrained Power', 4 May 2017. In our experience, the process for engaging these public interest powers is

32. Departmental statistics substantiate the low prospects of ministerial intervention occurring as a form of relief to indefinite detention in these circumstances. For example, in the six years between 2015-2021, the Minister granted only six visas under s 195A where the recipient had a visa refused or cancelled on character grounds and had been found to be owed non-refoulement obligations (i.e. where the CIOR Act amendments would have applied).[62]

33. The Parliamentary Joint Committee on Human Rights previously observed, in relation to the CIOR Act amendments, that because these discretionary powers of the Minister "appear to be exercised infrequently in practice…are non-reviewable and non-compellable, and do not attract the requirements of procedural fairness, they do not appear to be a sufficient safeguard for the purpose of a permissible limitation under international human rights law"[63] and are "unlikely to be an effective safeguard in practice or offer an accessible alternative to detention".[64]

Torture, Cruel and Inhuman or Degrading Treatment or Punishment

34. In 2021, the Parliamentary Joint Committee on Human Rights found in relation to the CIOR Act amendments that "there is a significant risk that the measure is incompatible with the right to liberty and the prohibition against torture or ill-treatment, and were children to be detained under these circumstances, with the rights of the child".[65] That committee also found "[n]oting the possibility of indefinite or protracted detention, the absence of effective review and other procedural safeguards as well as the uncertainty as to whether the services outlined by the minister are sufficient to ensure detention conditions are humane, there appears to remain a risk that the measure may have implications for Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[66]

35. The UN Special Rapporteur on Torture, noting most comparable countries provide for a maximum limit of 6 months, recently stated in relation to Australia that where individuals are spending more than three months in open-ended or limitless detention, their treatment could begin to amount to degrading or inhumane treatment, or psychological torture.[67] The

routinely protracted, highly complex, arbitrary –and lacking in due process and transparency. Outcomes of requests are often characterised by arbitrary, inconsistent and unpredictable and determined by the Minister's personal or political whim.

[62] Statistics released by the Department pursuant to a request for access to documents under the *Freedom of Information Act 1982* (Cth), cited in *EPU19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 1536 per Perry J at [128].

[63] Parliamentary Joint Committee on Human Rights, 32. Human rights scrutiny report, Report 7 of 2021 (16 June 2021), at [2.72], [2.76].

[64] Ibid, at [2.87].

[65] Ibid, at [2.87].

[66] Ibid, at [2.84].

[67] The Sydney Morning Herald, *Limitless detention of refugees is inhumane and must end, says UN torture watchdog*, 18 May 2023, available at: https://www.smh.com.au/national/limitless-detention-of-refugees-is-inhumane-and-must-end-says-un-torture-watchdog-20230414-p5d0et.html [accessed 9 June 2023].

Special Rapporteur further commented that '[i]t is inhumane to allow never-ending, unreviewable detention.'

36. The HRC has similarly found in individual cases that immigration detention in Australia violates the right to be free from torture or cruel and inhuman or degrading treatment or punishment.[68] The arbitrariness of the regime, combined with its 'protracted and/or indefinite nature', and the difficult conditions within detention facilities, have been found to have caused 'serious, irreversible psychological harm' to people detained.[69] Research demonstrates that immigration detention causes severe psychological harm,[70] particularly when it is protracted[71] and applied to people who have already experienced torture and trauma in their countries of origin.[72]

Family unity

37. The amendments made by the CIOR Act operate indirectly to separate family members contrary to Australia's international obligations not to interfere with the family and to protect the family unit.[73] Respecting these rights requires that States refrain from actions which would separate family members.

38. It is not uncommon for people to be held in remote detention centres and separated from immediate family, including dependent children, residing in the Australian community. It is also not uncommon for such detainees to have dependent immediate family residing overseas, including in countries where their safety is are risk. In these circumstances, detainees are ineligible to sponsor or propose visas for to reunite with these family members in Australia.

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[68] Article 7 ICCPR; *F.K.A.G. et al. v Australia* (UN Doc CCPR/C/108/D/2094/2011) [9.8]; C v Australia CCPR/C/76/D/900/1999, UN Human Rights Committee.
[69] *F.K.A.G. et al. v Australia* (UN Doc CCPR/C/108/D/2094/2011).
[70] See eg Guy J. Coffey et al., "The meaning and mental health consequences of long-term immigration detention for people seeking asylum," Social Science & Medicine, 70 no. 12 (2010); Michelle Peterie, Visiting Immigration Detention: Care and Cruelty in Australia's Asylum Seeker Prisons (Bristol University Press, 2023); Katy Robjant, Rita Hassan and Cornelius Katona, ""Mental health implications of detaining asylum seekers: systematic review," The British journal of psychiatry: the journal of mental science, 194 no. 4 (2009); Michael Dudley, "Contradictory Australian national policies on self-harm and suicide: the case of asylum seekers in mandatory detention," Australasian Psychiatry, 11 (2003): 102.
[71] Coffey et al., "The meaning and mental health consequences of long-term immigration detention for people seeking asylum," 2070.
[72] Chantler, "Gender, Asylum Seekers and Mental Distress: Challenges for Mental Health Social Work," 325; Zachary Steel et al., "A comparison of the mental health of refugees with temporary versus permanent protection visas," The Medical Journal of Australia, 185 no. 7 (2006). Research also highlights types of stressors specific to immigration detention contributing further to mental deterioration, including: uncertainty regarding return to country of origin and/or release, social isolation, riots; excessive use of force; application of mechanical restraints (including when travelling outside detention for torture and trauma counselling); forceful removal; hunger strikes; and self-harm: Coffey et al., "The meaning and mental health consequences of long-term immigration detention for people seeking asylum," 2070; Robjant, Hassan and Katona, "Mental health implications of detaining asylum seekers: systematic review.", at 307.
[73] ICCPR, Articles 17 and 23; *International Covenant on Economic, Social and Cultural Rights*, Article 10; and *Convention on the Rights of the Child*, Articles 9 and 10.

Effectiveness

39. The effectiveness of the CIOR Act amendments must be assessed against their stated policy purpose at the time of enactment, being to "clarify that the duty to remove under the Migration Act should not be enlivened where to do so would breach non-refoulement obligations, as identified in a protection visa assessment process, including Australia's obligations under the *1951 Convention relating to the Status of Refugees* and its 1967 Protocol (Refugees Convention), the *International Covenant on Civil and Political Rights* (ICCPR), and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)".[74]

40. In our experience, the amendments made by the CIOR Act have been effective in the following respects:

    (i) in preventing direct refoulement of people who engage s 197C(3), being people who have lodged a protection visa and been found to meet the core components of the Australian statutory definition of refugee and the complementary protection criteria; and

    (ii) in resolving judicial and practical uncertainty regarding the operation of s 197C(1) that existed previously following its insertion in the Migration Act in 2014[75], in respect of persons to whom section 197C(3) now applies.

41. However, as detailed in this submission, the CIOR Act amendments have been ineffective in prohibiting and otherwise preventing the direct, indirect and constructive refoulement of other people who engage Australia's international non-refoulement obligations. The amendments can also be said to be ineffective in preventing Australia from breaching its international obligations in other respects outlined above.

Implications

42. The implications of the CIOR Act amendments are that, although the risk of Australia breaching its non-refoulement obligations is mitigated in respect of the class of persons to whom section 197C(3) applies, the real risk of Australia failing to comply with these obligations in respect of other people and breaching other international obligations remains unaffected.

43. The amendments do not mitigate the risk of Australia breaching its international non-refoulement obligations in respect of all people who engage them, as set out above. The CIOR Act amendments also implicate Australia's other international human rights obligations including by:

[74] Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, Revised Explanatory Memorandum, p3.
[75] By the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

(i) subjecting people to arbitrary detention contrary to Article 9 of the ICCPR.

(ii) subjecting people to torture or cruel or inhuman or degrading treatment contrary to the ICCPR and the CROC.

(iii) failing to protect the family unit pursuant to its obligations under the ICCPR, *International Covenant on Economic, Social and Cultural Rights* and *Convention on the Rights of the Child*.

44. As a result, people in need of Australia's protection are at risk of serious human rights abuses in Australia. The amendments made by the CIOR Act do not protect these people from this harm or mitigate the risk of Australia's non-compliance with other obligations under international law. In operation with other provisions, the CIOR Act amendments are responsible for Australia continuing to breach its international human rights obligations in respect of people held in immigration detention.

Recommendations

45. Following the above, we make the following recommendations.

Recommendation 1

Repeal the amendments made by Schedule 5 ('Clarifying Australia's international law obligations') to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), which:

1. inserted section 197C to impose a strict legal duty on public servants to remove people from Australia irrespective of Australia's non-refoulement obligations;

2. repealed the definition of refugee that imported the Refugees Convention definition; and

3. inserted a statutory definition of refugee in the Migration Act that is inconsistent with international law (in contravention of Article 42 of the Refugees Convention which expressly prohibits States from varying the definition of refugee in Article 1).

Recommendation 2

Repeal the amendments made by the CIOR Act.

Recommendation 3

A review of the Migration Act be conducted directed at recommending a new statutory framework facilitating alternatives to immigration detention for people not limited to those affected by s 197C, and which includes:

1. a statutory mechanism to seek review of a person's detention; and

2. new visa pathways with access to merits review for people in immigration detention,

and which are not dependent on the exercise of non-compellable discretionary powers of the Minister.

Recommendation 4

Ministerial directions made pursuant to s 499(1) of the Migration Act, the Migration Regulations 1994 and Department policy guidelines be amended or replaced to require decision-makers to have regard to, as a primary consideration, the legal and practical consequences of their decision in terms of Australia's compliance with its international human rights obligations.

Recommendation 5

The guidelines governing the circumstances in which a request may be referred to the Minister for the purposes of consideration of their non-compellable powers (including but not limited to those in ss 46A, 46B, 48B, 195A and 195A of the Migration Act), be revised to prioritise for referral all people in immigration detention who otherwise engage the removal power in s 198(1) of the Migration Act but who:

1. engage Australia's international non-refoulement obligations; or

2. otherwise cannot be removed from Australia as soon as reasonably practicable.

Conclusion

46. The amendments made by the CIOR Act have not only failed to achieve their stated policy purpose of preventing removals in breach of Australia's non-refoulement obligations, but also operate with other provisions of the Migration Act to further entrench the indefinite nature of immigration detention for many people. In doing so, the CIOR Act causes irreparable harm to those affected and leads to breaches of a range of Australia's international human rights obligations.

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