Submission by the Commonwealth Ombudsman

Parliamentary Joint Committee on Intelligence & Security Review of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*

Submission by the Commonwealth Ombudsman, Iain Anderson

June 2023

Contents

INTRODUCTION AND SUMMARY **1**

RECOMMENDATIONS 1

THE ROLES OF THE COMMONWEALTH OMBUDSMAN **1**

UNDER THE MIGRATION ACT 1
UNDER THE OMBUDSMAN ACT 2
UNDER OPCAT 2

BACKGROUND **3**

OPERATION OF THE AMENDMENTS **3**

PROLONGED OR INDEFINITE DETENTION 3
OUR OBSERVATIONS 4
ALTERNATIVES TO HELD DETENTION 4
International models *5*
INDEPENDENT OVERSIGHT 6

CONCLUSION **6**

REFERENCES **7**

Introduction and summary

Thank you for the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence & Security's Review of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (CIOR Act).

My Office welcomes the opportunity to contribute to the review. This submission outlines:

- the roles of the Commonwealth Ombudsman under domestic legislation including the *Ombudsman Act 1976* and Regulations and the *Migration Act 1958* (Migration Act);
- the role of the Commonwealth Ombudsman in the context of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT);
- our observations from almost two decades of oversight of the Migration Act and system; and
- recommendations the Committee may wish to consider.

Recommendations

1. The Government considers an additional amendment to the Migration Act to ensure that people facing indefinite detention must be considered for an alternative to held detention within 12 months of their visa cancellation or refusal of a visa on character or security grounds.
2. The National Preventive Mechanism must be appropriately resourced and legislated to ensure independent preventive oversight of detention settings in Australia.

The roles of the Commonwealth Ombudsman

The Office of the Commonwealth Ombudsman (the Office) safeguards the community in its dealings with Australian Government agencies by:

- providing assurance that the Australian Government entities and prescribed private sector organisations the Commonwealth Ombudsman oversights act with integrity and treat people fairly**;** and
- influencing enduring systemic improvement in public administration in Australia and the region**.**

Under the Migration Act

The Commonwealth Ombudsman has a role under s 486O of the Migration Act to review the appropriateness of the detention arrangements for people who have been in immigration detention for 2 years, and then every 6 months thereafter for as long as they remain in detention. In making the assessment, the Ombudsman considers the Department of Home Affairs' report(s) as well as information obtained from the person detained and their advocates, and any complaints received by the Office. The Ombudsman reviews the person's immigration or removal pathway, including any established delay points or complexities, such as delays in obtaining travel documents, administrative or judicial review action, and subsequent outcomes. The Ombudsman also reviews the person's incident and other relevant behaviour history, as well as information relating to their mental and physical health and welfare.

The Migration Act also empowers the Ombudsman to make any type of recommendation the Ombudsman considers appropriate to the Minister responsible for Immigration in relation to individual cases.

The Ombudsman provides these assessments to the Minister. The Minister must table a de-identified version of the Ombudsman's assessments within 15 sitting days after the Minister receives the Department of Home Affairs' prepared response.

Under the Ombudsman Act

Amongst other responsibilities, the Office investigates complaints about the administrative actions taken by the Department of Home Affairs and the Australian Border Force. These include:

- visa and citizenship processing delays;
- detention issues, including removal; and
- customs-related issues.

The Office commenced an Own Motion Investigation (OMI) into people who are detained in immigration detention and later released as not unlawful non-citizens in 2007 following 2 high profile cases – Cornelia Rau (an Australian citizen who was unlawfully detained for 10 months in 2004/2005) and Vivian Alvarez (an Australian citizen who was unlawfully removed from Australia in 2001). Under this ongoing investigation, we receive reports every six months from the Department of Home Affairs about individuals detained on suspicion of being an unlawful non-citizen and who were subsequently found to be not unlawful and released. The Office publishes a regular report in relation to this OMI.

Since 2004, the Office has also been visiting immigration detention facilities as part of its duties as the Immigration Ombudsman.

Under OPCAT

As the Commonwealth National Preventive Mechanism under the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* **(**OPCAT**)**, the Office continues to oversee immigration detention.

Australia ratified the OPCAT**,** an international treaty that aims to enhance protections for individuals deprived of their liberty and vulnerable to mistreatment or abuse, in December 2017. OPCAT requires signatory states to establish a system of regular preventive visits to detention facilities by independent bodies called National Preventive Mechanisms (NPMs). It also mandates that signatories accept visits from the United Nations Subcommittee on Prevention of Torture (SPT).

In July 2018, the Commonwealth Government designated the Commonwealth Ombudsman as the NPM with the responsibility of overseeing detention facilities under the control of the Commonwealth. Additionally, the Commonwealth Ombudsman serves as the Coordinator for the network of NPMs across Australia.

The Commonwealth NPM focuses on systemic issues to reduce the risk of ill-treatment in detention and does not respond to individual complaints, which are handled by a separate part of the Office of the Commonwealth Ombudsman. The Commonwealth NPM visits places of immigration detention, including Alternative Places of Detention (APODs). Our role is to monitor the treatment of people and the conditions of their detention and make recommendations for improvement. We have full and free access to detention facilities, which means we can choose which places we want to visit and when, and the people we want to interview.

Through these combined responsibilities, my Office not only observes and comments on specific areas of concern but also identifies and raises systemic issues across the detention network to the Department of Home Affairs and the Australian Border Force. These functions provide independent assurance and transparency regarding immigration matters for the public.

Background

Section 197C, inserted into the Migration Act in 2014, provided that, for the purposes of s 198 (removal from Australia of unlawful non-citizens), it was irrelevant if *non-refoulement* obligations exist in respect of the unlawful non-citizen, and that person must be removed as soon as reasonably practicable.[1]

Section 197C was amended in response to two Federal Court decisions which found that the provisions in the Migration Act effectively overrode Australia's international *non-refoulement* obligations:

- DMH16 v Minister for Immigration and Border Protection (2017) 253 FCR 576 (DMH16), where the Federal Court found that, where it is reasonably practicable to remove an unlawful non-citizen, s 197C obliges the department to remove the unlawful non-citizen, even where the person had been found to engage Australia's non-refoulement obligations.
- AJL20 v Commonwealth of Australia [2020] FCA 1305 (AJL20), where the Federal Court ordered the release from immigration detention of an individual (who was also the applicant in DMH16) who it found had no ongoing matters before the department, Minister, or the Courts and had not been removed from Australia as soon as reasonably practicable (in circumstances where removal may have been inconsistent with *non-refoulement* obligations).

In response to these rulings, the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (CIOR Act) was enacted.

The CIOR Act modified the effect of s 197C to make clear that the duty to remove a person under s 198 should not be enlivened where the person's removal to their country of origin would breach Australia's *non-refoulement* obligations. This includes Australia's obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the 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).

Operation of the amendments

Prolonged or indefinite detention

The CIOR Act amended the Migration Act to clarify that it does not authorise the removal of a person found to attract Australia's protection obligations under international law; and to require that Australia's protection obligations be considered before a decision is made to grant or refuse a protection visa.

I agree that where a person is found to be owed protection they should not be removed to a country where they would face persecution or risk of significant harm and by doing so would breach Australia's *non-refoulement* obligations.

While the intent of the CIOR Act was to prevent a person being returned to a country where they were at risk of significant harm, under the current circumstances, operation of the legislation results in the potential for indefinite and potentially arbitrary detention, particularly for unlawful non-citizens who:

- qualify for protection and cannot be involuntarily removed but are considered a risk to the community for various reasons;
- may not be eligible for protection but cannot be removed due to the lack of cooperation from their countries of origin, the security situation in those countries, or their statelessness; or

- have chosen to pursue legal action in tribunals and courts, which often entails a prolonged period for resolution, and are kept in detention for the duration of that process.

In these situations, individuals find themselves in a state of limbo, where their detention becomes lengthy and without a clear resolution. This raises concerns regarding the fairness and purpose of their continued detention.

I note that the Parliamentary Joint Committee on Human Rights consideration of the CIOR Bill noted that in the absence of any legislative maximum period of detention or effective safeguards to protect against arbitrary detention, there is a real risk that detention may become indefinite[2]. This is particularly so where the circumstances in the relevant country are unlikely to improve in the reasonably foreseeable future. The Committee considered that where this would result in the indefinite detention of certain persons, it does not appear to be proportionate to the stated aims.

Our observations

My Office has identified a total of 63 individuals in the s 486O long-term detention reporting caseload who were affected by the CIOR Act. Five of these people are no longer in detention, leaving 58 individuals still detained.

Of this group of 58 people, 37 have been in immigration detention for more than 5 years, and 4 individuals have spent more than 10 years in immigration detention. Only 6 of these 58 people have been released into community detention (permitted to live at a specified residence in the community, while legally remaining in immigration detention), while the other 52 remain in held immigration detention, either in a detention centre or an alternative place of detention.

Our data (from the entire s 486O cohort) shows that people in long-term detention face deteriorating mental and physical health, and institutionalisation.

Alternatives to Held Detention

The term "alternatives to held detention" (ATHD) does not have an established legal definition. The International Detention Coalition has defined ATHD as a “range of laws, policies and practices by which people at risk of immigration detention are able to live in the community, without being detained for migration-related reasons.”[3] ATHD offer a practical and proactive strategy centred around resolving individual cases. This approach acknowledges asylum seekers, refugees, and migrants as individuals with inherent rights, and aims to empower them to engage with immigration procedures without resorting to restrictions or the loss of personal freedom.

International human rights standards provide clear guidance that immigration detention should only be used as a last resort, regardless of the person’s immigration status. Instead, States are required to provide non-custodial ATHD that fully protect the human rights of migrants. In the case of children, international human rights mechanisms make it clear that children should never be detained for reasons related to their or their parents’ migration status and that immigration detention is never in the best interest of the child.[4]

My Office's evaluation of the suitability of continued detention for many long-term detained persons reveals that, in many instances, individuals could be released on a bridging visa, placed in community detention rather than held detention, or transferred to facilities where the specific needs of people in detention can be better addressed. When reviewing individual cases, I frequently find myself questioning why certain individuals are still held in detention and why the processes involved in resolving their cases take an excessive amount of time. I understand that some individuals in held detention present complex characteristics and circumstances, and their cases may involve legal or operational complexities that make it challenging to find a long-term immigration solution.

In 2018, the then-Ombudsman recommended that the Minister prioritise finding a solution for this group of very long-term detained persons that meets Australia's *non-refoulement* obligations without detaining individuals indefinitely, noting that the Department of Home Affairs (and its predecessor departments) has been engaged in finding a solution for such cases since 2011.

Indefinite immigration detention is strongly correlated with poor mental and physical health outcomes.[5] In contrast, myriad reviews have found that alternatives to held detention are less damaging to the mental and physical health of migrants.[6,7,8] International experience also demonstrates that alternative programs are both cost effective and achieve immigration enforcement objectives.

I am aware that, as a result of a number of internal and independent reviews, the Department of Home Affairs is currently looking into Alternatives to Held Detention including options such as reviewing current risk assessment tools and frameworks, Residence Determination and Bridging visa conditions and compliance, an independent panel for nuanced assessment of individual circumstances, and a 'step-down' model whereby an individual might initially transition from a held immigration detention environment to Residence Determination for a period of time, before transitioning to living in the community.

International models

If screening and assessment processes reveal no valid justifications for held detention, the primary and preferred option should be liberty. Opting for placement in the community, free from any conditions or limitations, upholds an individual's fundamental rights to freedom of movement and personal liberty.

In cases where individuals have a history of non-compliance or when other serious concerns are identified through the screening and assessment process, various conditions or restrictions can be implemented to encourage compliance without imposing unnecessary limitations on their liberty or freedom of movement.

In addition to those options already being considered by Government, there are a number of models internationally that are worthy of consideration.

For example:

Country	**Alternative programs**
Uganda, Zambia and Kenya[9]	Registration with authorities (central database)
Canada[10]	Providing a nominated/registered address
Austria[7], Canada[8], Hungary[11], Poland[12], Croatia[13,] and New Zealand[14]	Handover of travel documents until migration matters are resolved
Turkey[15], Hong Kong[16], Canada[7,8], Slovenia[17], and the United Kingdom[18]	Regular reporting requirements to authorities
Poland[10], Croatia[11], Spain[19], Turkey[13] and Belgium[20]	Directed residence – living in a certain location
United States[21]	Intensive supervision by migration authorities
Canada[8]	Delegated supervision
Hong Kong[14], the United States[19] and Canada[7,8]	Bail, bond, surety, or guarantee
Hong Kong[14] and Sweden[22]	Consequences for non-compliance

Alternatives to held detention are not without their critics. Some alternatives such as electronic monitoring, home curfew, and other tougher restrictions have been challenged in the courts, and disparaged due to their potential impact on human rights. Like any form of coercive power, ATHDs

need to be subject to stringent oversight and monitoring. So, too, those subject to them need to have a clear pathway for lodging complaints, seeking redress, and challenging their treatment in the courts.

Recommendation 1: *The Government considers an additional amendment to the Migration Act to ensure that people facing indefinite detention must be considered for an alternative to held detention within 12 months of their visa cancellation or refusal of a visa on character or security grounds.*

Independent oversight

Given the likelihood that long term detention will continue to be a feature of Australia's immigration settings for the foreseeable future, it is imperative that effective independent oversight occurs to ensure that while people are being detained their health, safety, and physical and mental wellbeing is being cared for as best as possible.

One of the provisions of the OPCAT is that member states who have ratified OPCAT must provide appropriate resourcing to the National Preventive Mechanism for them to carry out their important mandate under the Protocol. As the Commonwealth NPM, my Office received a degree of funding, but it is not sufficient for our needs with respect to our role as Commonwealth NPM. Additional resourcing and capability must be developed in relation to independent monitoring of immigration (and other) detention facilities, to ensure that Australia upholds the intent of OPCAT.

My Office is already building our capability in this area and changing some of our practices within the limits of current resourcing, but more resourcing will be needed if the Commonwealth is to meet its obligations under OPCAT, and if Commonwealth places of detention are to receive appropriate oversight to assist them to ensure that people are not subjected to cruel and inhuman treatment in detention.

Recommendation 2: *The National Preventive Mechanism must be appropriately resourced and legislated to ensure independent preventive oversight of detention settings in Australia.*

Conclusion

I support the intent of the CIOR Act, that individuals who qualify for protection should not be deported to a country where they would face persecution or significant harm. This would violate Australia's commitment to *non-refoulement* obligations, and international human rights responsibilities.

However, Australia should be implementing the least restrictive means necessary to accomplish legitimate border protection objectives, should not be allowing instances of arbitrary indefinite detention to result from the provisions in the CIOR Act, and any conditions imposed on a person's release should be grounded in an individualised assessment of that person's circumstances.

Identifying alternatives to indefinite detention has been a consistent area of focus for my Office and the Department of Home Affairs, and should be expedited. Appropriate funding to ensure the National Prevention Mechanism is able to comprehensively oversee the immigration detention system in accordance with our international obligations is also imperative.

References

[1] Explanatory Memorandum to the amending bill, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Available at: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

[2] Parliamentary Joint Committee on Human Rights (2021). *Human rights scrutiny report*. Report 5 of 2021. Available at: Report 5 of 2021 – Parliament of Australia (aph.gov.au)

[3] Sampson, R, Chew, V, Mitchell, G, and Bowring, L. (2015). *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (Revised)*, Melbourne: International Detention Coalition. Available at: There Are Alternatives: A Handbook for Preventing Immigration Detention – International Detention Coalition (idcoalition.org)

[4] Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return, para 7.

[5] Bosworth, M. (2016). '*The Impact of Immigration Detention on Mental Health: Literature Review*'. In Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office by Stephen Shaw. London: HMSO, CM 9186.

[6] Bloomfield, A, Tsourdi, E, and Pétin, J. (2015*). Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation*. Brussels: Odysseus Network. http://odysseus-network.eu/wp-content/uploads/2015/02/FINAL-REPORT-Alternatives-to-detention-in-the-EU.pdf

[7] Detention Action. (2016). *Without Detention: Opportunities for Alternatives*. London: Detention Action. Available at: http://detentionaction.org.uk/wordpress/wp-content/uploads/2016/09/Without-Detention.pdf

[8] Katz, I., Doney, G., and Mitchell, E. (2013). *Evaluation of the Expansion of the Community Detention Program: Client and Service Provider Perspectives*. Sydney: UNSW Social Policy Research Centre. Available at: https://www.sprc.unsw.edu.au/media/SPRCFile/evaluationexpansioncommunitydetentionp rogramFinal.pdf

[9] Field, O. and Edwards, A. (2006). *Alternatives to Detention of Asylum Seekers and Refugees*, Geneva: UNHCR.

[10] Edwards, A (2011) *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Asylum-Seekers, Stateless Persons, and Other Migrants*. Geneva: UNHCR.

[11] Pursuant to section 48(2) of Hungary's *Act II of 2007 on the Admission and Rights of Residence of Third-Country Nationals*.

[12] Article 398 of the *New Act on Foreigners 2014*, Poland

[13] European Union Agency for Fundamental Rights (2012). *Fundamental Rights: Challenges and Achievements in 2012.* Vienna: EU FRA

[14] Section 315 of the *Immigration Act 2009.* New Zealand

[15] *Law on Foreigners and International Protection (LFIP) 2014*. Turkey

[16] *A, F, AS and YA v Director of Immigration* [2008] HKCU 1109 (CACV 314-317 of 2007, 18 July 2008) and *Hashimi Habib Halim v Director of Immigration* [2008] HKCU 1576 (HCAL 139 of 2007, 15 October 2008).

[17] De Bruycker, P (Ed), Bloomfield, A, Tsourdi, E, & Pétin, J (2015). *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation.* Odysseus Network and the European Union.

[18] UK Home Office Guidance "*Reporting – Standards of Operational Practice*".

[19] UNHCR (2009). Submission by the UNHCR for the *OHCHR's Compilation Report Universal Periodic Review Spain*. Geneva: UNHCR.

[20] UNHCR (2011). *Alternatives to the Detention of Asylum Seekers in Belgium.* Brussels: UNHCR.

[21] Sullivan, E, Mottino, F, Khashu, A and O'Neil M (2000). *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program Volume 1*" New York: Vera Institute for Justice.

[22] Mitchell, G (2001). *Asylum Seekers in Sweden.* http://www.fabian.org.au/940.asp