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NSWCCL SUBMISSION

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

INQUIRY INTO THE MIGRATION AMENDMENT (CLARIFYING INTERNATIONAL OBLIGATIONS FOR REMOVAL) ACT 2021 (CTH) ('CLARIFYING ACT')

23 July 2023

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The NSW Council for Civil Liberties ('NSWCCL') welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security regarding its review of the operation, effectiveness and implications of the amendments made to the Migration Act 1958 (Cth) ('Migration Act') by Schedule 1 of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (Cth) ('Clarifying Act').

1 Introduction

1.1 The *Clarifying Act* was introduced on 25 May 2021, following two Federal Court decisions.[1] In those decisions, the Court found that section 197C of the *Migration Act* required a person who is owed Australia's non-refoulement obligations, but is refused a protection visa, to either be removed from Australia or released from immigration detention. As a consequence of the jurisprudence, the Government acted quickly to amend the existing provisions. No public inquiry or formal consultation process was undertaken prior to enactment. Despite concerns that the (then) proposed laws would result in fewer checks on prolonged and indefinite detention, the laws were rushed through Parliament.[2]

1.2 The *Clarifying Act* claims to support Australia's international non-refoulement obligations by amending the *Migration Act* to clarify that the *Migration Act* does not require or authorise the removal of a person who is deemed an unlawful non-citizen and for whom a protection finding has been made through the protection visa process. Notionally, the *Clarifying Act* does uphold Australia's non-refoulement obligations. However, NSWCCL is deeply concerned that by operation and effect, the *Clarifying Act* subjects a person captured by the laws to ongoing mandatory immigration detention, without any time limit or safeguards to prevent prolonged or indefinite detention.[3] NSWCCL is equally concerned that the new laws have implications for Australia's other extant international obligations, i.e. not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment, and not to limit a person's right to liberty, particularly in respect of children.

1.3 NSWCCL firmly supports the abolition of prolonged and indefinite detention. For the purpose of the Committee's review, NSWCCL submits that:

(1) **no Australian law should allow for the prospect of prolonged or indefinite detention. The *Clarifying Act* must be urgently addressed to remove this consequence;**

(2) **absent any safeguards that ensure persons captured by the laws are not exposed to mandatory prolonged or indefinite detention, the *Clarifying Act* is entirely disproportionate;**

(3) **the *Clarifying Act* does not 'clarify' Australia's international obligations and instead further threatens fundamental principles of international human rights law to which Australia is bound;**

(4) **the migration laws must ensure that those affected by the *Clarifying Act* are not at risk of ill-treatment, and the length of detention imposed is compatible with the right to liberty, the rights of children, and the prohibition against torture or other forms of cruel, inhuman or degrading treatment or punishment; and**

[1] See *DMH16 v Minister for Immigration and Border Protection* [2017] FCA 448 ('*DMH16*') and *ALJ20 v Commonwealth* [2020] FCA 1305 ('*ALJ20'*).
[2] 'Morrison Government Rushes Through New Laws That Allow Lifetime Detention of Refugees', *Human Rights Law Centre* (Web Page, 13 May 2021), <https://www.hrlc.org.au/news/2021/5/13/morrison-government-rushes-through-new-laws-that-allow-lifetime-detention-of-refugees>.
[3] *Migration Act 1958* (Cth) ss 189, 196, 198 ('*Migration Act'*). Section 196 provides that an unlawful non-citizen detained under section 189 can be kept in immigration detention until (a) they are removed from Australia under sections 198 or 199; (aa) an officer begins to deal with them under subsection 198AD(3); (b) they are deported under section 200; or (c) they are granted a visa.

(5) **it is entirely inadequate to rely on ministerial intervention, through discretionary, non-compellable and non-reviewable powers, to safeguard fundamental human rights principles.**

1.4 This submission focuses on:

(1) **identifying serious concerns in respect of the practical operation of the *Clarifying Act*; and**

(2) **establishing the need for domestic migration laws that are:**

(a) **consistent with Australia's international obligations; and**

(b) **consistent with its international non-refoulement obligations including under:**

(i) **the *International Covenant on Civil and Political Rights* ('*ICCPR*') ratified on 13 August 1980[4];**

(ii) **the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ('*CAT*') ratified on 8 August 1989; and[5]**

(iii) **the *Convention on the Rights of the Child* ('*CRC*') ratified on 17 December 1990.[6]**

1.5 This submission is not intended to propose specific amendments to the *Clarifying Act* or the *Migration Act*. Its focus is to identify the serious issues with the current legal framework by reference to Australia's international obligations, the alarming impact of indefinite and prolonged detention on detainees, and case studies from comparable nation states.

1.6 It is noted that the proper construction and constitutional validity of the scheme for detention for the purposes of removal under s 198 of the *Migration Act*, as qualified by s 197C(3), remains in doubt and subject to potential challenge.[7]

2 The road to the *Clarifying Act*

2.1 The road to the *Clarifying Act*, and in particular the introduction of section 197C of the *Migration Act* in 2014, has been the subject of immense criticism by the Courts, legal groups and commentators[8]. Despite this, the *Clarifying Act* retains section 197C, and instead seeks to carve out exceptions in the form of subsections 197C(3) to (9) that prevent removal of persons who have been assessed as engaging Australia's protection obligations but denied a protection visa. For the reasons we identify below, the exceptions provide no comfort or solution for such persons.

2.2 The principle of 'non-refoulement' is set out in Article 33(1) of the *Convention Relating to the Status of Refugees* ('*Refugee Convention*') which Australia ratified on 22 January 1954[9] along with six key international human rights treaties,[10] and provides:

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[4] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').
[5] *Convention against Torture and Other Cruel, Inhumane or Degrading treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT').
[6] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC').
[7] *ENT19 v Minister for Home Affairs [2023] HCA 18* per Gordon, Edelman, Steward and Gleeson JJ at [54].
[8] Samuel Whittaker, *Any time for any reason? The expanded powers of immigration detention: Commonwealth v AJL20 (2021) 391 ALR 56* (2022) 43(1) Adelaide Law Review
[9] *Convention Relating to the Status of Refugees,* opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).
[10] The seven main international human rights treaties are the *ICCPR*, *CRC*, *CAT*, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*'),

> **No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or particular opinion.**

2.3 The principle of non-refoulement applies both to recognised refugees, and individuals whose claims for protection have not been finally determined.[11] Australia also has non-refoulement obligations under the ICCPR, CAT and CRC. The consequence of these obligations is that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[12]

2.4 In 2014, the *Migration Act* was amended by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). This had the effect of removing references to the Refugee Convention and replacing these with statutory definitions for most terms. Section 197C was introduced into the *Migration Act* and required that Australia's non-refoulement obligations be treated as irrelevant for the purpose of removal from Australia of an unlawful non-citizen who asks to be removed, as soon as reasonably practicable, in accordance with section 198 of the *Migration Act*. In December 2017, the United Nations Human Rights Committee ('UNCHRC') expressed views that Australia's domestic legal framework "*does not afford full protection against non-refoulement*", and recommended that the provision be repealed and the Government introduce *"a legal obligation to ensure that the removal of an individual must always be consistent with [Australia's] non-refoulement obligations".*[13]

2.5 The scope and application of section 197C was also considered by the Federal Court in two judgments: *DMH16 v Minister for Immigration and Border Protection ('DMH16')*[14] and *ALJ20 v Commonwealth of Australia ('ALJ20')*[15]. These decisions led to the unavoidable conclusion that section 197C effectively overrode Australia's international non-refoulement obligations, and that must have been its legislative intention. In ALJ20 the Court stated, *"[A]ny suggestion that the Commonwealth is itself ignorant of the power given and the obligation imposed by the Act on its officers to remove an unlawful non-citizen despite the fact that Australia has non-refoulement obligations in respect of that person is untenable"*.[16]

2.6 Rather than seeking to repeal section 197C, Parliament introduced the *Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (Cth) ('Clarifying Bill')*. In his Second Reading Speech introducing the Clarifying Bill, the Hon Alex Hawke MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ('Minister') (as it then was) announced, *"[T]his is an important change which will further improve our ability to ensure that we uphold Australia's non-refoulement obligations. It is essential that Australia sends a strong message that we are committed to upholding human rights, and that we remain steadfast in our commitment to these treaties and their underlying principles".*[17]

Convention of the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*'), *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*'), and *Convention of the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*').

[11] United Nations High Commissioner for Refugees ('UNHCR'), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, (26 January 2006), 2-3.

[12] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 6 of 2021, 21 April 2021) 23-24. See also United Nations ('UN') Committee against Torture, *General Comment No.4 (2017) on the Implementation of Article 3 in the Context of Article 22,* UN Doc CAT/C/GC/4 (4 September 2018) and UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture),* 44th sess (10 March 1992) para 9.

[13] UN Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia,* CCPR/C/AUS/CP6 (1 December 2017) paras 33-34.

[14] *DMH16* (n [1]).

[15] *ALJ20* (n [1]).

[16] Ibid [122].

[17] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 March 2021, 1 (Alex Hawke, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs).

2.7 Both the Scrutiny on Bills Committee and the Parliamentary Joint Committee on Human Rights raised concerns the Clarifying Bill contained insufficient legal safeguards to ensure that immigration detention is reasonable, necessary and proportionate. The Scrutiny on Bills Committee was particularly concerned that the new laws would unduly interfere with personal rights and liberties, and empowered the Minister with a 'highly discretionary and non-compellable' personal power to grant a visa or make a 'residence determination' to ensure that immigration detention would be 'reasonable, necessary and proportionate' in the individual circumstances.[18] Despite these significant concerns, Parliament passed the Clarifying Bill and introduced the *Clarifying Act*. By operation and implication, the *Clarifying Act* now crystallises the proposed laws that gave rise to these serious concerns.

3 The operation, effectiveness and implications of the *Clarifying Act*

3.1 The Migration Amendment Act included two key amendments:

(1) **assessment of protection obligations: new section 35A imposes an obligation on decision-makers to consider whether a person engages Australia's non-refoulement obligations before considering any exclusionary factors (such as character or security grounds); and**

(2) **removal from Australia: new subsections 197C(3) to (9) clarify the scope and application of section 197C, to confirm that the removal power under section 198 does not authorise removal of a person for whom a protection finding has been made, even if their protection visa application is unsuccessful.**

3.2 NSWCCL accepts the *Clarifying Act* accommodated for a legitimate objective of supporting Australia's ability to uphold its non-refoulement obligations, and provides a statutory protection to ensure that a person cannot be removed to the country in relation to which their protection claims have been accepted unless: (1) the non-refoulement obligations no longer apply; or (2) the person requests in writing to be removed. However, by corollary, persons affected by the new laws may be subject to ongoing immigration detention under section 189 of the *Migration Act*.

3.3 NSWCCL submits that no law in Australia should allow for the prospect of prolonged or indefinite detention and the *Clarifying Act* must be urgently amended to remove this consequence. NSWCCL further submits Australia's domestic migration laws must be consistent with Australia's international obligations.

3.4 The exceptions under 197C(3) to (9) *Clarifying Act* maintains section 197C, and instead seeks to carve out exceptions in the form of subsections that prevent removal of persons, like AJL20, who have been assessed as engaging Australia's protection obligations but denied a protection visa. The exceptions provide no comfort or solution for such persons. Instead, persons like AJL20 will remain in extended, potentially indefinite, detention, for as long as the Minister determines that protection obligations exist, and the Department of Home Affairs ('Department') determines that removal to a safe country is impossible.[19]

3.5 The Statement of Compatibility with Human Rights included in the Explanatory Memorandum to the *Clarifying Act* acknowledged that persons affected by the *Clarifying Act* 'may be subject to ongoing immigration detention' and 'may be detained until their removal is reasonably practicable'.[20] The Explanatory Memorandum then identifies the Minister's discretionary powers as helping 'to ensure that an immigration detention placement is reasonable, necessary and proportionate to their individual circumstances and therefore not arbitrary and contrary to Article 9 [ICCPR]'. The Government ultimately concluded that the Clarifying Bill was compatible with human rights because it was consistent with Australia's human rights obligations, and to the

[18] Senate Standing Committee for the Scrutiny of Bills (above n [10]) 19-24.
[19] Sangeetha Pillai, 'AJL20 v Commonwealth: Non-refoulement, indefinite detention and the 'totally screwed'', *Australian Public Law* (Web Page, 8 August 2021) <https://www.auspublaw.org/blog/2021/09/ajl20-v-commonwealth-non-refoulement-indefinite-detention-and-the-totally-screwed>.
[20] Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill (Cth) 2021, 13.

extent that it may have the consequence of limiting human rights in some circumstances, those limitations are reasonable, necessary and proportionate.[21]

3.6 NSWCCL submits it is entirely inadequate to rely on ministerial intervention, through discretionary, non-compellable and non-reviewable powers, to safeguard fundamental human rights principles in circumstances where the *Clarifying Act* (and the *Migration Act*) are absent of any legislative maximum period of detention. Stronger legislative safeguards are needed. NSWCCL submits that absent safeguards that ensure persons captured by the laws are not exposed to mandatory prolonged or indefinite detention, the laws are entirely disproportionate.

3.7 There is simply no requirement for the Minister or Department to change their behaviour and consider the circumstances of those persons left in mandatory detention as a consequence of the *Clarifying Act*. Indeed, in the recent case of *BHL19 v Commonwealth of Australia (No 2)* ('*BHL19*') involving a Syrian refugee that engaged Australia's non-refoulement obligations and had been in detention since February 2014, the Federal Court remarked: [22]

> **After the commencement of the *Clarifying Act*, the only way the applicant could be removed from Australia was removal to a third country. There was, however, no evidence to suggest that the change resulting from the *Clarifying Act* spurred the officers responsible for removing the applicant into action, or even caused them to adopt a different approach or strategy in relation to their duty to remove the applicant. The Commonwealth did not adduce any evidence of what its intentions were in respect of the applicant's removal following the important change to the operation of s 197C of the *Migration Act*.**

3.8 Adjacent to these concerns is the reality that the departmental administrative processes create significant administrative burdens which are likely to decrease efficiency and increase the amount of time individuals spend in detention.

4 The punitive consequences of the *Clarifying Act*

4.1 Article 31 of the *Refugee Convention* expressly prohibits nations from penalising refugees as a result of their illegal entry where they are *"coming directly from a territory where their life or freedom was threatened*", Article 31 mandates that the detention of asylum seekers should not be punitive in nature.

4.2 In *ENT19 v Minister for Home Affairs & Anor ('ENT19'),*[23] the High Court left open questions as to the proper construction and constitutional validity of the scheme for detention for the purposes of removal under s 198 of the *Migration Act*, as qualified by s 197C(3), and whether the Minister's decision to refuse an Iranian national a protection visa was made 'for a punitive purpose or to inflict punishment' where the Minister should have known their decision would lead to indefinite detention as ENT 19: (1) was, and is, owed Australia's non-refoulement obligations, (2) was found to pose no risk to the community, and (3) had served his judicially imposed prison sentence following a guilty plea.

4.3 ENT19 entered Australia by sea from Indonesia without a valid visa. He was later convicted of people smuggling and was sentenced to 8 years imprisonment, following which he was transferred to immigration detention. As a result of the offence, the Minister was not satisfied granting a protection visa was in the national interest and denied ENT19 a visa to deter people smugglers. At the time of sentencing his Honour Judge Scotting observed:[24]

[21] Ibid, 14.
[22] [2022] FCA 313 [160].
[23] [2023] HCA 18.
[24] *ENT19*, 'Plaintiff's Submissions', Submission in *ENT19 v. Minister for Home Affairs & Anor,* S102/2022, 7 October 2022, [10].

> The extent of the offender's mental condition is now significant. It is hard to judge his mental state at the time of the offences, except to say that I am satisfied that he acted out of desperation for his circumstances, particularly the desire to re-join his family. He knew what he was doing was wrong. The community does not require protection from the offender by reason of his mental condition.

4.4 ENT19 is not the only person in this situation. There are several other cases where indefinite detention as a result of the operation of the *Clarifying* Act, is a potential outcome.[25] The number of recent cases suggest that there is a significant number of immigration detainees affected by the operation of the *Clarifying Act*.

4.5 As a result of the Minister's decision and as a consequence of the *Clarifying Act,* ENT19 and others will potentially be subjected to indefinite detention. This detention, in the case of ENT19 as advanced by his solicitors, would essentially amount to double punishment, a consequence long prohibited by the common law.[26] A law that allows asylum seekers who committed crimes out of fear and desperation to avoid persecution and served their sentence, or who have never been convicted or accused of any crime,[27] to be subjected to prolonged or indefinite detention clearly violates Australia's international legal obligations and undermines the protection from punitive detention provided by the *Refugee Convention*.

5 The impact of indefinite and prolonged detention

5.1 It is well accepted that prolonged or indefinite detention often inflicts mental harm on refugees, manifesting in depression, post-traumatic stress disorder and self-harm.[28] NSWCCL is deeply concerned about the individuals who remain in prolonged or indefinite immigration detention facilities, both onshore and offshore, as a consequence of the *Clarifying Act.*. Detainees are subjected to prison-like conditions with very little opportunity to communicate with the outside world.

5.2 The High Court held in *Al-Kateb v Godwin* ('*Al-Kateb*') that there are no time limits on the power to detain a person pending removal.[29] This ruling was unsuccessfully challenged more recently in *M472018 v Minister for Home Affairs,* a case issued on behalf of a person held in immigration detention for nine years with little possibility of release.[30] This is in stark contrast to the position taken by the European Union, where the 'Return Directive', the EU legislation governing procedures for Member States to apply when returning third-country nationals, provides that the maximum period of detention set by EU Member States may not exceed six months, or up to a maximum of 18 months in exceptional circumstances.[31]

5.3 Whilst there is no standard definition of 'long term detention', the United Nations High Commissioner for Refugees (UNHCR) detention guidelines state: *'[T]o guard against arbitrariness, maximum periods of detention should be set in national legislation. Without maximum periods, detention can become prolonged, and in some cases indefinite, including particularly for stateless asylum-seekers. Maximum periods in detention cannot be circumvented by ordering the release of an asylum-seeker only to re-detain them on the same grounds shortly afterwards.'*[32]

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[25] Three appellate decisions in the last 3 months concern immigration detainees known as ECE21, DMQ20, and CCU21 (see *ECE21 v Minister for Home Affairs [2023] FCAFC 52, DMQ20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] FCAFC 84, CCU21 v Minister for Home Affairs [2023] FCAFC 87*).
[26] Ibid [35].
[27] For example, CCU21 has never been convicted of, or even accused of, any crime.
[28] Ben Saul, 'Dark Justice: Australia's Indefinite Detention Of Refugees On Security Grounds Under International Human Rights Law' (2008) 13(2) *Melbourne Journal of International Law* 13.

[29] (2004) 219 CLR 562.
[30] [2019] HCA 17.
[31] *Parliament and Council Directive 2008/115/EC of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals* [2008] OL J 348/98, art 15.
[32] UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) guideline 6.

5.4 According to the Department of Home Affairs, at 30 April 2023, there were 1128 people in onshore immigration detention facilities. Of these 1128 people, 26.5 per cent had been detained for 91 days or less and 48.8 per cent had been detained for 365 days or less:[33]

Table 9 – Length of Time of People in Held Immigration Detention Facilities at 30 April 2023

Period Detained	Total	% of Total
7 days or less	30	2.7%
8 days - 31 days	69	6.1%
32 days - 91 days	200	17.7%
92 days - 182 days	93	8.2%
183 days - 365 days	158	14.0%
366 days - 547 days	93	8.2%
548 days - 730 days	67	5.9%
731 days - 1095 days	133	11.8%
1096 days - 1460 days	80	7.1%
1461 days - 1825 days	70	6.2%
Greater than 1825 days	135	12.0%
Total	**1,128**	**100%**

5.5 Further, at 30 April 2023, the average period of time for people held in onshore detention facilities was 735 days, being more than 2 years,[34] compared with 55 days in the United States and 14 days in Canada.[35]

5.6 In terms of the number of people in offshore detention, a study from the Refugee Council of Australia dated 12 May 2023 shows the number of people sent offshore since 13 August 2012 was 4,183.[36]

5.7 In Sweden, in 2022 the average period of detention was 52 days.[37] Sweden has generally been applauded for its detention practices, where the legal limits on the length of detention vary according to the grounds for detention.[38] Those detained while awaiting deportation may be detained for two months, although this can be also be extended on the basis of exceptional grounds. Even in instances of exceptional circumstances, an individual may not be detained for longer than three months (unless there is a lack of cooperation or delay and then detention can last up to 12 months or the non-citizen is expelled by the Swedish courts because of crimes).[39] Sweden has also implemented alternatives to detention, such as supervision, which entails regular reporting to the police or to its national migration agency and surrendering passports and identity documents. Authorities are obliged to consider supervision before deciding on detention.[40]

5.8 In the United Kingdom ('UK'), the Home Office has the administrative power to detain a non-citizen at any point in their immigration process including upon arrival in the United Kingdom, upon presentation to an immigration office within the country, during a check-in with immigration officials, once a decision to remove has been issued, following arrest by a police officer or,

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33 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (30 May 2023).

34 'Risk management in immigration detention' *Australian Human Rights Commission* (Web Page, 18 June 2019) <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019> ('Risk Management')

35 'What's happening to Australia's refugees?' *NSW Council for Civil Liberties* (Web Page, 8 March 2022) <https://www.nswccl.org.au/whats_happening_to_refugees>.

36 This figure is also supported by the Australian Border Force: Australian Border Force, 'Operational Performance Monitoring' (FOI Request FA 19/07/00487, 14 July 2019) https://www.homeaffairs.gov.au/foi/files/2019/fa-190700487-document-released.PDF>.

37 Asylum Information Database, 'Country Report: Sweden' (December 2022) 98 <https://asylumineurope.org/wp-content/uploads/2023/04/AIDA-SE_2022update.pdf>.

38 Global Detention Project, 'Country Report Immigration Detention In Sweden: Increasing Restrictions And Deportations, Growing Civil Society Resistance' (July 2018) <https://www.globaldetentionproject.org/immigration-detention-in-sweden-increasing-restrictions-and-deportations-growing-civil-society-resistance> 5.

39 Ibid 10.

40 *Aliens Act* (Sweden) No 2005:716 ch 10 s 6 [tr Government Offices of Sweden 'Aliens Act (2005:716)', *Government Offices of Sweden* (Web Document, 2005) <https://www.government.se/government-policy/migration-and-asylum/aliens-act/>.

sometimes, after completing a prison sentence.[41] Home Office policy states that *'[D]etention must be used sparingly, and for the shortest period necessary.*'[42] Of all people leaving detention in 2021, 87% had been detained for less than 29 days, 6% for 29 days to under 2 months, 6% for 2 months to under 6 months, 1% for 6 months to under 1 year, and 0.4% had been detained for 1 year or longer.

5.9 In Canada, on average, detention in the 2019/2020 financial year was for 13.9 days. In 2019-2020, 241 people (3% of detainees) were confined for more than 99 days, compared to 527 (6.5%) in 2015-2016, and 629 (8.8%) in 2014-2015.[43]

5.10 In 2019, the Australian Human Rights Commission ('Commission') reported that conditions in immigration detention were becoming more difficult to manage due to greater use of force, the use of restraints and high-security accommodation.[44] According to a report produced by the World Health Organisation:

> **Findings show that the environment in immigration detention can cause a decline in the mental health of migrants. The longer migrants are detained, the worse the effects on their mental health. These negative impacts can be long-lasting, continuing even after release. Although the mental health needs of migrants in immigration detention are well documented, psychological care and support are often missing.[45]**

5.11 Studies show that indefinite detention causes psychological harm to asylum seekers who have been detained. This is caused by uncertainty about their future, lack of independence, concerns about family members, impact of being detained in prison-like conditions, and impacts of past torture or trauma.[46] There are reported cases of both suicide and attempted suicide within immigration detention facilities within Australia and limited medical and psychiatric support provided to the detainees.

5.12 Doctors without Borders ('MSF') have provided free, independent mental healthcare to people held under Australia's immigration policy on both Nauru and Papua New Guinea and have reported 'devastating mental health impacts'.[47] In particular the mental health suffering on Nauru was described as the worst MSF has ever seen, namely due to 'the lengthy and indefinite time period of the "processing'': people simply had no idea how long they would be held offshore'.[48]

5.13 In their 2018 Report titled *Indefinite Despair*, MSF reported: 'In total, 135 (65%) refugee and asylum seeker patients seen by MSF had suicidal ideation and/or engaged in self-harm or suicidal acts. Among MSF's refugee and asylum seeker patients, 124 (60%) had suicidal ideation, 63 (30%) had attempted suicide, and 34 (16%) had engaged in acts of self-harm.'[49] Further 'children as young as nine were found to have suicidal ideation, had committed acts of self-harm or

[41] The Migration Observatory at the University of Oxford, 'Immigration Detention in the UK' (Web Page, 2 November 2022) <https://migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/>.
[42] UK Home Office, 'Detention: General Instructions' (14 January 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1114683/Detention_General_instructions.pdf> 7.
[43] Canada Border Services Agency, 'Annual Detention, Fiscal Year 2019 to 2020' (Web Page, 25 October 2022) <https://www.cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2022-eng.html>.
[44] Risk Management (above n [30]).
[45] World Health Organisation, 'Immigration detention is harmful to health – alternatives to detention should be used' (Media Release, Copenhagen, 4 May 2022) <https://www.who.int/europe/news/item/04-05-2022-immigration-detention-is-harmful-to-health---alternatives-to-detention-should-be-used>.
[46] 'Australia's detention policies' *Refugee Council of Australia* (Web Page, 20 May 2020) <https://www.refugeecouncil.org.au/detention-policies/3/>.
[47] Doctors without Borders, 'Project News: Seven Years Of Offshore Processing. Enough Is Enough' (9 July 2020) <https://msf.org.au/article/project-news/seven-years-offshore-processing-enough-enough>.
[48] Ibid.
[49] Medecins Sans Frontieres, 'Indefinite Despair: The tragic mental health consequences of offshore processing on Nauru' (December 2018) 5.

attempted suicide.'[50] Family separation due to medical evacuation has also increased suicidal ideation.

5.14 Children in detention also have "*prolonged exposure to multiple developmental risk factors including direct experience of personal and interpersonal violence, parental mental illness, inadequate parental protection and comfort in a context described as developmentally impoverished*."[51]

5.15 The statistics are alarming both because of the average duration that detainees are subjected to in Australia (compared to comparable Nation States) and the detrimental, in some cases irreversible, mental and physical health issues detainees experience. These reports cannot be ignored and further support NSWCCL's submission that Australia's domestic laws should not allow for the prospect of prolonged or indefinite detention.

6 Australia's international obligations engaged by the *Clarifying Act*

6.1 NSWCCL firmly supports the abolition of prolonged and indefinite detention. The UNHRC has found that mandatory detention and its continuous and indefinite character, the absence of procedural safeguards to challenge that detention, and the difficult detention conditions, cumulatively inflicts serious psychological harm on such individuals that amounts to cruel, inhuman or degrading treatment.[52]

6.2 As the *Clarifying Act* subjects persons to whom protection obligations are owed, but who are ineligible for a protection visa, to ongoing mandatory immigration detention, without any time limit, the laws allow for the prospect of indefinite detention. Domestic laws should never impermissibly limit the right to liberty, the rights of a child, or fall foul of the prohibition against torture or ill-treatment under the ICCPR.

6.3 Article 9 of the ICCPR provides that everyone has the right to liberty and security of person, and that *'[n]o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'*.[53] Article 10(1) of the ICCPR provides that persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

6.4 Article 1 of the CAT defines 'torture' to mean *'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or which the consent or acquiescence of public official or other person acing in an official capacity.'*

6.5 Children have special rights under international human rights law taking into account their particular vulnerabilities. The CRC and Australia's domestic law[54] specifies that children can be detained as a last resort. Specifically, Article 37(b) states that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The Commission has explained that in order to guarantee the prohibition on arbitrary detention of a child in Article 37(b) of the CRC, judicial review of the decision to detain, or to continue to detain, is essential and the national Court must also have the authority to order the child's release if the detention is found to be arbitrary. Currently, Australia does not provide access to such review.[55]

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[50] Ibid.
[51] Sarah Mares, Jon Jureidini, 'Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical' (2004) 28(6) *Australian and New Zealand Journal of Public Health* 521.
[52] Senate Standing Committee for the Scrutiny of Bills, (above n [10]) 33-34.
[53] ICCPR (above n [4]) article 9.
[54] *Migration Act* (above n [3]) s 4AA,
[55] 'What Does the Law Say About Detaining Children?' *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/our-work/5-what-does-law-say-about-detaining-children#a5-3>.

7 Recommendations

7.1 NSWCCL submits there needs to be effective safeguards in the *Migration Act* to ensure:

(1) **that those affected by the *Clarifying Act* are not at risk of ill-treatment, and the length of detention imposed is compatible with the right to liberty, the rights of children and the prohibition against torture or other forms of cruel, inhuman or degrading treatment or punishment; and**

(2) **there are effective limits for detention to ensure that detention is only authorised where reasonable, necessary and proportionate and in accordance with Australia's international obligations.**

We trust that this submission assists the Committee in its work and would be pleased to offer further assistance if it would be of use.

Yours sincerely,

[redacted]

Sarah Baker
Secretary
NSW Council for Civil Liberties

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