

# Torture and cruel treatment in Australia's refugee protection and immigration detention regimes

Submission to the UN Committee Against Torture's sixth  
periodic review of Australia, 75<sup>th</sup> Session, 2022

**3 October 2022 | NGO response to State party report**

**Contributors:** Madeline Gleeson, Associate Professor Daniel Ghezelbash and Dr Sangeetha Pillai (Andrew & Renata Kaldor Centre for International Refugee Law), Sahar Okhovat and Asher Hirsch (Refugee Council of Australia), Rachel Saravanamuthu, Scott Cosgriff and Josephine Langbien (Human Rights Law Centre)

**Contact:**

Josephine Langbien  
Senior Lawyer  
Human Rights Law Centre  
Level 17, 461 Bourke Street  
Melbourne VIC 3000  
**T:** + 61 3 8636 4450  
**E:** josephine.langbien@hrlc.org.au

**About:**

### Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre has also contributed to a submission addressing Australia's compliance with the Convention with respect to places of detention including prisons and police custody, in collaboration with the National Aboriginal and Torres Strait Islander Legal Services and Change the Record, which is separately provided to the Committee.

### Andrew & Renata Kaldor Centre for International Refugee Law

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney is the world's leading research centre dedicated to the study of international refugee law. Founded in October 2013, the Kaldor Centre undertakes rigorous research on the most pressing displacement issues in Australia, the Asia-Pacific region and around the world, and contributes to public policy by promoting legal, sustainable and humane solutions to forced migration. Through outstanding research and engagement, the Kaldor Centre has become recognised as an intellectual powerhouse with global impact.

### Refugee Council of Australia

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, people seeking asylum, and the organisations and individuals who work with them. RCOA promotes the adoption of humane, lawful, and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum, and humanitarian entrants.

**Acknowledgement:** The Human Rights Law Centre, the Andrew & Renata Kaldor Centre for International Refugee Law and the Refugee Council of Australia acknowledge the Wurundjeri people of the Kulin Nation, the Gadigal people of the Eora nation and the Larrakia people, the Traditional Owners of the lands on which we work and live. This land always was and always will be Aboriginal and Torres Strait Islander land as sovereignty was never ceded. We acknowledge the role of the legal system in establishing, entrenching, and continuing the oppression and injustice experienced by First Nations peoples.

# A. Introduction & recommendations

1. The Human Rights Law Centre, the Andrew & Renata Kaldor Centre for International Refugee Law and the Refugee Council of Australia welcome this opportunity to highlight aspects of Australia's asylum and immigration detention policies and practices which fall short of the obligations assumed by Australia under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>1</sup> and respond to issues raised in the sixth periodic report submitted by Australia to the Committee against Torture (CAT/C/AUS/6). Our submission addresses systemic issues relating to immigration detention (Part B), offshore processing (Part C), Australia's *non-refoulement* obligations (Part D) and the separation of refugee families (Part E).
2. The current sixth periodic review of Australia's compliance with the Convention commenced in 2016. The Human Rights Law Centre and other Non-Government Organisations provided input to the Committee to inform the List of Issues Prior to Reporting (**LOIPR**). Additional issues of concern have emerged in the years since. Following a federal election in May 2022, the governing political party in Australia changed. Responsibility now lies with the new Australian Government to openly and comprehensively interrogate Australia's ongoing non-compliance with the Convention and to remedy it.
3. Our recommendations for urgent reform in Australia include:
  - (a) ending the mandatory detention of any person without a visa and making the use of closed detention a genuine measure of last resort;
  - (b) establishing statutory time limits to immigration detention and judicial oversight of decisions pertaining to immigration detention;
  - (c) the immediate review of all persons currently detained and the reasons for their detention, particularly those who have been detained for long periods, and considering their release;
  - (d) restricting the circumstances in which children may be detained and preventing the transfer of children to offshore processing countries;
  - (e) developing an enforceable legal framework to govern conditions in immigration detention and protect the human rights of people detained, including to ensure access to appropriate medical care and accountability for incidents of excessive use of force by detention personnel;
  - (f) reforming the laws and policies relating to visa cancellations, which presently create the risk of arbitrary detention and *refoulement*;
  - (g) ending the offshore processing regime and providing permanent resettlement in Australia or safe third countries for all persons subjected to it;
  - (h) repealing the 'Fast Track' asylum process and reinstating a full, fair and independent refugee determination process that complies with international standards;
  - (i) ensuring that all people seeking asylum who are subject to maritime interceptions are provided with a full, fair and independent refugee determination process that complies with international standards;
  - (j) restoring government-funded legal assistance to people seeking asylum, especially those in detention; and
  - (k) reforming the laws, policies and practices which intentionally seek to separate refugees from their family members as a method of deterrence – practices which may contravene Article 2.

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<sup>1</sup> *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).

## B. Immigration detention in Australia

### ***(a) Mandatory and indefinite detention***

4. Australia's claim that its policy since 2008 'has required that held detention be a last resort for the management of unlawful non-citizens who have not yet been granted permission to stay in Australia'<sup>2</sup> is inconsistent with Australian law and practice during the reporting period. By law, immigration detention continues to be automatic and mandatory for all people without a visa.<sup>3</sup> The *Migration Act 1958* (Cth) (**Migration Act**) does not provide for individual assessments of the need to detain prior to detention, nor do immigration officers have the discretion to exempt individuals from detention in appropriate cases. There are no procedures established under Australian law for people who may be particularly vulnerable to harm in detention environments, including survivors of torture or people with disability, to be screened prior to detention.
5. Release from detention is only possible upon grant of a visa (which is a matter of ministerial or departmental discretion) or removal from Australia.<sup>4</sup> Judicial, automatic and regular reviews to ensure detention remains necessary, proportional, lawful and non-arbitrary are neither enshrined in Australian law nor provided in practice. There are few options open to people seeking to challenge their detention before Australian courts, and the High Court of Australia has repeatedly affirmed the lawfulness (under Australian law) of the Executive exercising its power to detain non-citizens.<sup>5</sup> Relevantly, Australia has no binding federal human rights framework, meaning Australian courts are unable to rule detention unlawful on the basis of it being arbitrary or amounting to ill-treatment.
6. The number of people in immigration detention has increased over the reporting period, despite urgent calls from health professionals and other groups to reduce the detention population in light of the COVID-19 pandemic.<sup>6</sup> In June 2021, the Australian Human Rights Commission reported that while many countries responded to the COVID-19 pandemic by reducing the number of people held in closed immigration detention, 'the immigration detention population in Australia increased by nearly 12% in the six months since the COVID-19 pandemic was declared in March 2020—resulting in significant strain across the immigration detention network as facilities operate close to or at their regular capacity'.<sup>7</sup> The average number of people detained in immigration detention facilities rose to 1,487 in 2020, and remained above 1,500 people between June 2020 and June 2021.
7. As at 31 May 2022, there were 1,402 people held in immigration detention facilities in Australia.<sup>8</sup> Of those, 226 (16.1%) were people who had arrived in Australia without a valid visa by air (25 people) or boat (201 people); while the remaining 1,176 (83.9%) were people who had arrived in Australia lawfully and were subsequently taken into immigration detention for either overstaying or having their visas cancelled for breaching visa conditions (see Part B, subsection (c)).<sup>9</sup>

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<sup>2</sup> Committee Against Torture, *Sixth periodic report submitted by Australia under Article 19 of the Convention pursuant to the optional reporting procedure, due in 2018*, UN Doc CAT/C/AUS/6 (16 January 2019) ('CAT Sixth Periodic Report'),[81].

<sup>3</sup> *Migration Act 1958* (Cth), s 189(1) ('Migration Act').

<sup>4</sup> *Ibid*, ss 189(1) and 196(1).

<sup>5</sup> The Australia OPCAT Network, Submission to the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the United Nations Working Group on Arbitrary Detention, *The Implementation of OPCAT in Australia* (13 January 2020) 37-38 ('OPCAT Submission'), 37-38; Sangeetha Pillai, 'AJL20 v Commonwealth: Non-refoulement, indefinite detention and the "totally screwed"', *Australian Public Law* (Blog, 8 August 2021) <<https://www.auspublaw.org/blog/2021/09/ajl20-v-commonwealth-non-refoulement-indefinite-detention-and-the-totally-screwed/>>.

<sup>6</sup> Refugee Council of Australia, *Immigration Detention in Australia: Main Issues of Concern since January 2020* (Report, August 2022) 4-5 ('Refugee Council Report').

<sup>7</sup> Australian Human Rights Commission, *Management of COVID-19 risks in immigration detention* (Review, 16 June 2021) 5.

<sup>8</sup> Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, 31 May 2022) 4.

<sup>9</sup> *Ibid* 7-8.

8. The length of immigration detention continues to be a matter of grave concern, as does the serious toll that lengthy and indefinite detention takes on the physical and mental health of people who are detained. Overall, the average length of time in immigration detention is increasing.<sup>10</sup> As at 31 May 2022, the average period of time people had been held in detention facilities was **736 days** (more than 2 years).<sup>11</sup> 761 people (54.3%) had been detained for more than one year, and 138 people (9.8%) had been detained for more than 5 years. In December 2021, the Department of Home Affairs (**Department**) advised that a small number of people had been detained for 14 to 15 years.<sup>12</sup> There are no statutory time limits on immigration detention, and very few (if any) grounds for courts to review the necessity or proportionality of lengthy and indefinite detention.
9. Recent developments in Australian law have confirmed the right of the Executive to subject people to indefinite immigration detention. In 2020, the Federal Court interpreted ss 197C and 198 of the *Migration Act* as requiring detained individuals who had exhausted all visa avenues to be removed from Australia as soon as reasonably practicable, even if this would breach Australia's *non-refoulement* obligations.<sup>13</sup> In response, the Australian Parliament passed the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth), which modified s 197C of the *Migration Act* to provide that, unless certain conditions are satisfied, the duty to remove an unlawful non-citizen under s 198 will not be enlivened if the person is owed *non-refoulement obligations*.<sup>14</sup> We have raised concerns with the UN Human Rights Committee about how this amendment does not afford full protection against *refoulement*.<sup>15</sup> Additionally, this amendment affirmed that a person who is owed protection obligations and cannot be removed from Australia due to its *non-refoulement* obligations can lawfully be detained indefinitely.
10. Finally, the increasing lack of transparency and resistance to scrutiny of immigration detention is highly alarming. The Committee raised concerns about the *Australian Border Force Act 2015* (Cth) in the LOIPR compiled in 2017, which remain pertinent. In addition, during the reporting period, Australia increasingly resorted to designating hotels as 'Alternative Places of Detention' (**APODs**) and holding people seeking asylum and refugees there (see paragraph 49). The location of all places designated as APODs was never fully disclosed to the public, and people detained there were restricted in their contact with lawyers and visitors, creating a risk of secret detention in inadequate facilities. People and organisations attempting to visit and monitor these and other places of immigration detention reported hostility to oversight, and a lack of effective accountability mechanisms.<sup>16</sup> There have also been concerns about the lack of transparency and delays in the Department providing detention statistics.<sup>17</sup> On the issue of the Australian Government's response to scrutiny, we particularly commend to the Committee the summary of issues set out in the Refugee Council of Australia's recent report to the Subcommittee on the Prevention of Torture.<sup>18</sup>

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<sup>10</sup> *Refugee Council Report* (n 6) 1-2.

<sup>11</sup> *Ibid* 12.

<sup>12</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Additional Budget Estimates* (Question 256 and Answers on Notice AE22-256, 14 February 2022). Where statistics relate to a number of people that is less than five, the Department does not provide exact figures.

<sup>13</sup> *AJL20 v Commonwealth of Australia* [2020] FCA 1305, [123]-[126].

<sup>14</sup> *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth). For further explanation, see: Sangeetha Pillai, 'The Migration Amendment (Clarifying International Obligations for Removal) Act 2021: A case study in the importance of proper legislative process', *Andrew & Renata Kaldor Centre for International Refugee Law* (Online Article, 10 June 2021) <<https://www.kaldorcentre.unsw.edu.au/publication/migration-amendment-clarifying-international-obligations-removal-act-2021-case-study>>.

<sup>15</sup> Andrew & Renata Kaldor Centre for International Refugee Law et al., *Follow-up Civil Society Report on United Nations Human Rights Committee Concluding Observations 2017-2019: Australia* (Report, 31 January 2022).

<sup>16</sup> *OPCAT Submission* (n 5)73-74.

<sup>17</sup> *Ibid* 49-50.

<sup>18</sup> *Refugee Council Report* (n 6) 9-12.

## **(b) Detention of children**

11. The number of children in closed immigration detention facilities dropped from the peak of 2,000 detained children in July 2013 to zero in June 2021.<sup>19</sup> This is a welcome development. However, the legal framework providing for the detention of children (including unaccompanied minors) remains in place. Australia's policy of mandatory detention (see paragraph 4) is inconsistent with the principle of detaining children as a measure of last resort.<sup>20</sup> Further, under the *Immigration (Guardianship of Children) Act 1946* (Cth), the Minister for Immigration is the legal guardian of unaccompanied child migrants. Considering the Minister is responsible for administering immigration detention and granting visas, there is a conflict of interest in making decisions that are in the best interests of the child.
12. While the Australian Government released almost all children and their families from closed detention, it chose to keep one Tamil family with two young Australian-born children detained for several years. For one year, the family were the only occupants of a remote detention facility on Christmas Island where the Australian Government spent seven million dollars to detain them.<sup>21</sup> While in detention, the youngest child (then 2 years old) had four teeth surgically removed and another four treated after they began to rot, reportedly due to a lack of access to fresh food and sunlight.<sup>22</sup> It was only in June 2021, after the youngest child developed a serious health condition requiring hospitalisation - and after sustained public pressure - that the Government released the family from closed detention.<sup>23</sup> As well as the harm that closed detention inflicts on children, the case shows how the lack of legislation preventing detention of children allows the fate of children to be determined by the politics of the day.
13. The Australian Government sent hundreds of children and their families, as well as tens of unaccompanied minors, to Nauru for offshore processing. Children were also born in Nauru to parents who were detained there. The highest number of children held in Nauru was 222 in August 2014.<sup>24</sup> In 2014, the Australian Human Rights Commission also reported that it was aware of "at least 27 unaccompanied children who have been transferred to Nauru and remain in detention".<sup>25</sup> We are also aware of a number of unaccompanied children who were taken to Manus Island and never transferred to Nauru.<sup>26</sup> Many children left Nauru only as a result of legal action compelling their transfer to Australia for medical treatment. In February 2019, the final remaining children in Nauru were resettled in the United States of America.<sup>27</sup> Many children who were transferred to Australia are yet to access a durable solution, and the Australian Government maintains that their stay in Australia is temporary.
14. There is still no legislation preventing the future transfer of children to Nauru or Papua New Guinea, where essential services remain unavailable. This is particularly relevant as Australia recently signed a new offshore processing agreement with the Government of Nauru (see paragraph 35).

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<sup>19</sup> Department of Home Affairs, 'Immigration Detention Statistics for 2021', *Visa Statistics* (Web Page) <<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/immigration-detention>>.

<sup>20</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Migration Act* (n 3) s 4AA.

<sup>21</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Budget Estimates* (Question 461 and Answers on Notice BE21-461, 24-25 May 2021).

<sup>22</sup> Maani Truu, 'Two-year-old in immigration detention forced to have rotting teeth surgically removed', *SBS News* (online, 26 July 2019) <<https://www.sbs.com.au/news/article/two-year-old-in-immigration-detention-forced-to-have-rotting-teeth-surgically-removed/ed21vjmn>>.

<sup>23</sup> Al Jazeera Staff, 'Three Murugappan family members given temporary Australia visas', *Refugees News* (Online Article, 23 June 2021) <<https://www.aljazeera.com/news/2021/6/23/three-of-murugappan-family-given-temporary-australia-visas>>.

<sup>24</sup> Elibritt Karlsen, Parliament of Australia, *Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources* (Laws and Bills Digest, Research Paper Series 2016/17, 19 December 2016).

<sup>25</sup> Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Report, November 2014) 186.

<sup>26</sup> See, for example, the case of Loghman Sawari as reported here: Ben Doherty, 'Three countries, eight years: one refugee's nightmare odyssey through Australia's detention system' *The Guardian* (Online Article, 17 July 2021) <<https://www.theguardian.com/australia-news/2021/jul/17/three-countries-eight-years-one-refugees-nightmare-odyssey-through-australias-detention-system>>.

<sup>27</sup> 'Final four children held on Nauru to be resettled with their families in US', *The Guardian* (Online Article, 3 February 2019) <<https://www.theguardian.com/australia-news/2019/feb/03/final-four-children-held-on-nauru-to-resettled-with-families-in-us>>.

15. Finally, we note that some adults who are currently, or were recently, in immigration detention, have been held there (and/or in detention offshore) since they were children, including people who arrived as asylum seeker children and have been recognised as refugees.<sup>28</sup>

**(c) Visa cancellations – risk of arbitrary detention and refoulement**

16. The vast expansion of the visa cancellation powers under the Migration Act has resulted in thousands of people in Australia having their visas refused or cancelled since 2014.<sup>29</sup> Due to Australia’s universal visa requirement and mandatory detention laws, the ordinary consequence of visa cancellation is detention. The visa cancellation system is opaque and prone to create unjust outcomes. Visa cancellations have life-changing consequences for visa holders, their families and communities – including permanent separation, indefinite detention and return to countries where a person might face death or serious harm.

*(i) Visa cancellation on ‘character’ grounds*

17. There is no minimum standard of conduct for visa cancellation or refusal on ‘character’ grounds under s 501 of the Migration Act. A Minister or their delegates (i.e. employees of the Department) *may* cancel or refuse a visa on the basis of any criminal or general conduct,<sup>30</sup> including on the basis of charges alone or where there have been no charges at all.<sup>31</sup> However, if a person has been sentenced to imprisonment for 12 months or more, and they are currently serving a sentence of imprisonment, their visa *must* be cancelled.<sup>32</sup> They are entitled to seek revocation of the cancellation, which on average takes over a year to process,<sup>33</sup> during which time the person must remain in immigration detention if their sentence of imprisonment is concluded.
18. If a Department delegate cancels or refuses a visa on character grounds, the former visa holder can seek merits review. However, the significant barriers to legal representation (see paragraph 64) impact on people’s ability to seek review. Of people whose visas were mandatorily cancelled between 2015 and 2021, at least 1,300 did not seek review,<sup>34</sup> and it is likely that thousands of people did not seek review of discretionary visa cancellation decisions on character grounds. By contrast, if the Minister makes a personal decision to cancel or refuse a visa, the former visa holder loses access to merits review and can only seek judicial review before the Federal Court of Australia. Concerningly, Ministers have made over 1,000 such decisions since 2014.
19. People who have had their visa refused or cancelled are at high risk of refoulement. Since 2010, over 500 people holding refugee or humanitarian visas have had their visas cancelled on character grounds.<sup>35</sup> Australian law explicitly states that the duty under the Migration Act to deport a person applies even if removal is in breach of non-refoulement obligations.<sup>36</sup> There is also evidence that Australia deports people to refugee-producing countries with poor human rights records. Between 2014 and May 2021,

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<sup>28</sup> See for example the cases of Mehdi Ali and Adnan Choopani as reported here: Ben Doherty, ‘Iranian refugee Mehdi Ali released after nine years in Australian immigration detention’, *The Guardian* (Online article, 4 March 2022) <<https://www.theguardian.com/australia-news/2022/mar/04/iranian-refugee-mehdi-ali-released-after-nine-years-in-australian-immigration-detention>>; and of Mustafa Salah, as reported here: Hannah Ryan, ‘Refugees in Aust told to return to Nauru’, *Canberra Times* (Online article, 10 June 2021) <<https://www.canberratimes.com.au/story/7291815/refugees-in-aust-told-to-return-to-nauru/>>.

<sup>29</sup> Since 2014, over 6,500 people have had their visas cancelled under s 501, see: Department of Home Affairs, Freedom of Information Request, ‘FA21/06/00757’ (14 July 2021) (‘FOI 757’); Since 2015, over 2,600 people have had their visas refused under s 501, see: Department of Home Affairs, Freedom of Information Request, ‘FA21/02/00558’ (7 May 2021) (‘FOI 558’).

<sup>30</sup> *Migration Act* (n 3) s 501(1) or (2) in concert with (6)(b), (ab), (c) or (d).

<sup>31</sup> *Ibid* s 501(1) or (2) in concert with ss 501(6)(b),(ba), (c) or (d).

<sup>32</sup> *Migration Act* (n 3) ss 501(3A) and 501(6)(a)-(c) and (e).

<sup>33</sup> Department of Home Affairs, Parliament of Australia, Freedom of Information Request, ‘FA21/06/00235’ (16 July 2021).

<sup>34</sup> *FOI 558* (n 29).

<sup>35</sup> Department of Home Affairs, Parliament of Australia, Freedom of Information Request, ‘FA21/10/00396’ (30 December 2021);

<sup>36</sup> *Migration Act* (n 3) ss 198 and 197C.

Australia removed people to South Sudan, Sudan, Iraq, Liberia, Eritrea, Sri Lanka and Somalia, amongst others, and removed 7 stateless persons, all following visa cancellation.<sup>37</sup>

20. There is also a high risk of indefinite detention following visa cancellation. As at 27 April 2021, 198 people who previously held a permanent refugee or humanitarian visa were held in immigration detention.<sup>38</sup> Following the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth), people are at risk of arbitrary detention unless they ‘voluntarily’ chose to be refouled (see above at paragraph 9). Although the Minister has the power to intervene to grant someone a visa to release them from detention, this very rarely occurs, even if the person is owed non-refoulement obligations.<sup>39</sup>
21. In March 2021, the Australian Government issued an updated Direction (**Direction 90**) governing how decision-makers should exercise the discretion to refuse or cancel visas on character grounds.<sup>40</sup> The Direction makes clear that all persons who have engaged in broadly-defined family violence should be refused visas or have their visas cancelled, even where there are ‘strong countervailing circumstances’. Direction 90 increases the risk of people facing indefinite detention and refoulement. Although the Direction purports to reduce the risk of family violence and protect survivors, neither objective is achieved, including because it may discourage reporting of family violence, can lead to the permanent separation of families regardless of survivors’ wishes, and can trigger the consequential cancellation of survivors’ and children’s visas. The government issued Direction 90 without consultation with family violence survivors or organisations with family violence expertise.

(ii) s 116 ‘general’ cancellations

22. The recent visa cancellation of Novak Djokovic drew the world’s attention to Australia’s opaque visa cancellation process at its airports, which creates a risk of refoulement.<sup>41</sup> A person whose visa is cancelled under s 116 while in ‘immigration clearance’ is not eligible to apply for merits review of that decision. The only way to challenge such decisions is in the Federal Circuit and Family Court of Australia on technical legal grounds. Such proceedings must be commenced urgently, while the visa holder is in detention or at the airport, before they are removed from the country. Djokovic was able to obtain legal advice, commence court proceedings, and temporarily prevent his removal from Australia; but few people in need of international protection have access to the same resources. At airports, people are given as little as 10 minutes to respond if their visa is being considered for cancellation. They are not given access to legal advice or advised that they have a right to seek asylum. As a result, visa cancellations made under a veil of secrecy remain unchallenged, and visa holders at risk of refoulement are deported.<sup>42</sup>

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<sup>37</sup> FOI 757 (n 29).

<sup>38</sup> Ibid; Department of Home Affairs, Parliament of Australia, Freedom of Information Request, ‘FA21/04/01002’ (9 June 2021).

<sup>39</sup> Freedom of Information materials reveal that since 2015, the Minister has intervened less than five times per year under s 195A and s 197AB of the *Migration Act* (n 3) (to grant a visa or transfer them into community detention) where a person’s visa had been refused or cancelled under s 501 of the *Migration Act* (n 3) (Department of Home Affairs, Parliament of Australia, Freedom of Information Request, ‘FA21/03/01281’ (23 June 2021)); the Minister’s intervention under s195A for persons who did not satisfy s 501 remained at less than five times per year regardless of whether they were owed non-refoulement obligations (Department of Home Affairs, Parliament of Australia, Freedom of Information Request, ‘FA21/05/00505’ (26 May 2021)); not a single person whose visa had been cancelled pursuant to s 501(3A) of the *Migration Act* (n 3) and where that cancellation remained unrevoked has been granted a Protection (subclass 866) visa since 1 July 2015, but at least 215 people have applied (Department of Home Affairs, Parliament of Australia, Freedom of Information Request, ‘FA21/04/01042’ (17 May 2021) and Department of Home Affairs, Parliament of Australia, Freedom of Information Request, ‘FA21/05/00993’ (17 May 2021)).

<sup>40</sup> Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Cth), *Direction No 90: Visa Refusal and Cancellation under section 501 and Revocation of a Mandatory Cancellation of a Visa under section 501CA* (8 March 2021).

<sup>41</sup> Amy Bainbridge and Kate Ashton, ‘Federal Court releases reasons for Novak Djokovic visa decision’, *ABC News* (online, 20 January 2022) <<https://www.abc.net.au/news/2022-01-20/novak-djokovic-visa-decision-reasons-released-federal-court/100760588>>.

<sup>42</sup> For more information, see: Regina Jefferies, Daniel Ghezalbash and Asher Hirsch, ‘Assessing Protection Claims at Airports: Developing procedures to meet international and domestic obligations’ (Policy Brief 9, Andrew & Renata Kaldor Centre for International Refugee Law, 15 September 2020).

#### **(d) Denial of medical treatment**

23. Contrary to Australia's assertion,<sup>43</sup> healthcare for people in immigration detention is not comparable to standards in the Australian community. Longstanding and systemic failures to provide access to vital healthcare have been consistently documented, as have cases of people being arbitrarily denied medical treatment.<sup>44</sup> The Department has contracted International Health and Medical Services (**IHMS**) to provide primary healthcare at clinics inside detention facilities. In 2022, the Commonwealth Ombudsman identified that IHMS did not effectively engage people in detention and there was inadequate information sharing between IHMS and Serco, the government-contracted organisation managing detention centres, to support people in detention.<sup>45</sup>
24. People often experience significant delays to receive medical treatment. For example, a man detained at Yongah Hill Immigration Detention Centre (**IDC**) has been waiting for over two years for dentures.<sup>46</sup> Causes for delay include insufficient IHMS staffing, particularly after hours; Australian Border Force's (**ABF**) rigid policy for external visitors and offsite medical appointments; COVID-19 outbreaks in detention facilities which prevent people attending the IHMS clinic; and the remote location of detention facilities, such as on Christmas Island where certain medical treatment requires transfer to the mainland or appointments with visiting specialists. Delays can exacerbate existing conditions, in some cases causing irreparable damage, and contribute to mental health issues.
25. People with disabilities are not exempt from mandatory immigration detention. Despite approximately 130 people in immigration detention having a disability,<sup>47</sup> there are inadequate services for people with physical, cognitive or psychiatric impairment. Due to the Department's hasty decision to reopen North West Point IDC on Christmas Island in 2020, essential services such as torture and trauma counselling were not available there for several months. Prohibitive detention conditions are not conducive to rehabilitation from torture and trauma, or other mental health conditions; instead, detention exacerbates mental illness. There are no drug and alcohol rehabilitation services available in immigration detention facilities. These services are critical, especially for people seeking to challenge a visa cancellation or refusal on character grounds where their offending is linked to substance use.

#### **(e) Use of force by detention personnel**

26. Excessive and arbitrary use of force by detention centre personnel remains an ongoing issue.<sup>48</sup> The Commonwealth Ombudsman's report published in 2022 raised significant concerns, including instances where detention personnel did not de-escalate situations and resorted to excessive force rather than alternative measures.<sup>49</sup> In 2019 the Australian Human Rights Commission (**AHRC**) investigated a number of complaints regarding excessive use of force and recommended that the Australian Government pay compensation to eight complainants.<sup>50</sup>

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<sup>43</sup> Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia: Information received from Australia: Addendum*, UN Doc CCPR/C/AUS/CO/6/Add.1 (2 December 2019) [57].

<sup>44</sup> Public Interest Advocacy Centre, *In Poor Health: Health care in Australian Immigration Detention* (Report, 13 June 2018); Public Interest Advocacy Centre, *In Poor Health: Healthcare Denied: Medevac and the long wait for Essential Medical Treatment in Australian Immigration Detention* (Report, 3 December 2021) ('*PIAC 2021 Report: Healthcare Denied*').

<sup>45</sup> *OPCAT Submission* (n 5), 2.431-2.438.

<sup>46</sup> Millie Roberts, 'Asylum Seeker Detained in WA says he's been waiting two years for a Dental Appointment', *JUNKEE* (Online Article, 26 July 2022) <[https://junkee.com/asylum-seeker-dentures-dental-care/337176?mc\\_cid=488f93f2b2&mc\\_eid=96b2fd7c1d](https://junkee.com/asylum-seeker-dentures-dental-care/337176?mc_cid=488f93f2b2&mc_eid=96b2fd7c1d)>.

<sup>47</sup> Department of Home Affairs, Freedom of Information Request, 'FA21/06/00239' (9 June 2021).

<sup>48</sup> For further context, see: *OPCAT Submission* (n 5); Commonwealth Ombudsman, *Monitoring Immigration Detention: The Ombudsman's Oversight of Immigration Detention, 1 July 2020 to 30 June 2021* (Report No 01, 2022) ('*Commonwealth Ombudsman Report 2022*'); Australian Human Rights Commission, *Use of Force in Immigration Detention* (Report, 2019) ('*AHRC Immigration Detention Report 2019*').

<sup>49</sup> *Commonwealth Ombudsman Report 2022*, 2.326-2.336

<sup>50</sup> *AHRC Immigration Detention Report 2019*, 17.

27. The Ombudsman also observed an overreliance on pat searches and mechanical restraints which was not consistent with respecting the rights or dignity of people who were detained.<sup>51</sup> The Ombudsman observed that Serco's use of force requests in relation to mechanical restraints were often approved contrary to medical advice for people with a history of torture and/or trauma or with mental health conditions.<sup>52</sup> Further, the use of mechanical restraints during offsite medical appointments continued to discourage people from receiving medical treatment,<sup>53</sup> and is contrary to the 'last resort' principles developed by the Australian Government for security management.<sup>54</sup> The AHRC reported that mechanical restraints had been used on children and people with restricted mobility.<sup>55</sup>
28. In addition, there continues to be a disproportionate reliance on solitary confinement (referred to as High Care Accommodation) as a punishment tool; for example, in one month, there were 74 reported uses across the detention system.<sup>56</sup> The Ombudsman raised concerns regarding the inappropriate use of High Care Accommodation to manage risks of self-harm, including for several days where IHMS was not available to undertake a mental health review.<sup>57</sup> There is an urgent need for regulation to prevent such practices, as well as training and cultural change within detention centres.
29. Accountability mechanisms for detention personnel (including ABF, Serco, IHMS and RPC staff) are inadequate. The Department's complaint mechanism (an online form) is opaque and inadequate for urgent matters, including where a person in detention is facing imminent serious harm. The investigation of complaints takes several weeks or months, and the response is fragmented with each service provider responding separately to aspects of a complaint, rather than a complete response from the Department or ABF. Responses never include details regarding whether disciplinary action has been taken against detention personnel.
30. A 2017 Senate inquiry into reports of abuse, self-harm and neglect in Regional Processing Centres (**RPCs**) found that the Department failed to provide safe living conditions for those subject to offshore processing. The inquiry found that the 'culture of secrecy' around the management of the RPCs created an unacceptable lack of accountability and transparency (see Part C regarding offshore processing).<sup>58</sup> Despite these findings, and the subsequent settlement of a negligence class action amounting to \$70 million, no measures were taken to establish an independent complaints mechanism or monitoring of RPCs. Further, there has been no accountability for those responsible for the majority of the serious misconduct reported. For example, the Senate inquiry into the death of Reza Berati found the violence was 'eminently foreseeable' and that the Australian Government had failed in its duty to protect Mr Berati from harm, yet no one within the Australian Government has been held accountable or paid compensation to Mr Berati's family, as recommended by the inquiry.<sup>59</sup> Consequently, in 2021 Mr Berati's family commenced legal proceedings to seek accountability and redress.<sup>60</sup>
31. External complaint mechanisms, in the form the Commonwealth Ombudsman (the current National Preventative Mechanism in respect of immigration detention) and the AHRC, are also ineffective in

<sup>51</sup> *Commonwealth Ombudsman Report 2022*, 2.304-2.305.

<sup>52</sup> *Commonwealth Ombudsman Report 2022*, 2.314.

<sup>53</sup> *Commonwealth Ombudsman Report 2022*, 2.318-2.325.

<sup>54</sup> Department of Home Affairs, *Detention Services Manual – Safety and security management – Use of force* (Procedural Instruction, 10 October 2018) ('*Procedural Instruction 2018*').

<sup>55</sup> *AHRC Immigration Detention Report 2019*, 135.

<sup>56</sup> *Commonwealth Ombudsman Report 2022*, 2.345

<sup>57</sup> *Commonwealth Ombudsman Report 2022*, 2.354-2.355

<sup>58</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Serious Allegations of Abuse, Self-harm and Neglect of Asylum Seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre* (Report Inquiry, 21 April 2017); Refugee Council of Australia, 'Abuse, Self-harm and Neglect on Manus and Nauru: Senate Inquiry Report 2017', *Refugee Council of Australia Interesting Publications* (Online Article, 2 February 2019) < <https://www.refugeecouncil.org.au/manus-nauru-senate-2017/> >.

<sup>59</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (Report Inquiry, 11 December 2014).

<sup>60</sup> Human Rights Law Centre, 'Family seeks justice for the murder of Reza Berati on Manus Island', *Human Rights Law Centre News and Commentary* (Media release, 26 July 2021) <<https://www.hrlc.org.au/news/2021/7/26/family-seeks-justice-for-the-murder-of-reza-berati-on-manus-island>>.

achieving redress – it takes several months for a complaint to be investigated and enforceable measures, such as disciplinary action against detention staff, are not available. These external bodies can only make recommendations, which are often not followed by the Department.<sup>61</sup>

32. It remains a criminal offence, punishable by imprisonment, for detention personnel (including onshore and offshore Commonwealth contracted service providers) to disclose information about detention centre operations.<sup>62</sup> Whilst exemptions exist,<sup>63</sup> the onus is on the person making the disclosure to ensure the exemption applies. Given the serious consequences, these laws discourage detention personnel from acting as whistleblowers regarding negligent, dangerous or harmful practices in detention.

#### **(f) Security assessments causing arbitrary detention**

33. As at 30 September 2021, 11 people were held in detention because they had been assessed by the Australian Security and Intelligence Organisation (ASIO) to be a security risk.<sup>64</sup> The average length of time that these 11 people have been detained is more than 7 years, and one individual has been detained for more than 13 years. They cannot appeal their security assessment or receive detailed evidence or reasons for the decision.<sup>65</sup> Even where a security assessment is rescinded, people remain at risk of protracted detention. A refugee was detained for 12 years despite his adverse security assessment being overturned, and being diagnosed with leukemia and commencing chemotherapy.<sup>66</sup> In November 2021, the UN Human Rights Council Working Group on Arbitrary Detention concluded that he was arbitrarily detained in breach of his human rights.<sup>67</sup>
34. Security assessments are concerned solely with considerations relating to the grant of visas. People subject to these assessments are detained in closed facilities due to government policy – not because ASIO assesses that detention is necessary to manage any risk the individuals might pose.<sup>68</sup> Similarly, this policy applies to people who have had their visa cancelled or refused on character grounds; they are held in immigration detention indefinitely without any risk-based justification while they seek review of their visa cancellation or pursue other migration pathways.

## C. Offshore processing

### **(a) Overview of the current policy**

35. Australia continues to operate a policy of offshore processing of asylum claims for people who arrive by boat without a visa. No person seeking asylum has been transferred to Nauru or Papua New Guinea

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<sup>61</sup> In 2019, the AHRC recommended that the Commonwealth pay compensation to individuals who had suffered harm in immigration detention, however this recommendation was not accepted by the Commonwealth. See: *AHRC Immigration Detention Report 2019* (n 48). In 2020 and 2022, the Commonwealth Ombudsman made a range of recommendations regarding detention conditions, many of which the Department did not agree to implement, see: Commonwealth Ombudsman, *Monitoring Immigration Detention: Review of the Ombudsman's Activities in Overseeing Immigration Detention, July-December 2019* (Report No 06, 2020) and *Commonwealth Ombudsman Report 2022* (n 48).

<sup>62</sup> *Australian Border Force Act 2015* (Cth), s 42.

<sup>63</sup> *Ibid* ss 44-48.

<sup>64</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Supporting Budget Estimates* (Answers on Notice SE21-234 and SE21-235, 25 October 2021).

<sup>65</sup> Refugee Council of Australia, 'Statistics on people in detention in Australia', *Refugee Council of Australia Statistics on People in Detention in Australia* (Online Article, 3 September 2022) <<https://www.refugeecouncil.org.au/detention-australia-statistics/6/>>.

<sup>66</sup> Redflag, 'Tamil man diagnosed with cancer after almost a decade in detention', *Publications* (Online Article, 24 March 2019) <<https://redflag.org.au/node/6732>>; AAP, 'Sick Tamil refugee detained for 11 years', *Canberra Weekly* (Online Article, 11 July 2021) <<https://canberraweekly.com.au/sick-tamil-refugee-detained-for-11-years/>>.

<sup>67</sup> Human Rights Council Working Group on Arbitrary Detention, *Opinion No 69/2021 concerning Navanitharasa Sivaguru (Australia)*, UN Doc A/HRC/WGAD/2021/69 (22 February 2022) [141].

<sup>68</sup> *OPCAT Submissions* (n 5), 40.

(PNG) for processing since 2014, as Australia now intercepts and returns all new arrivals wherever possible (see the concerns regarding maritime interception operations at paragraphs 58 to 63 below). However, the policy remains formally in place. The former (Liberal-National Coalition) Australian Government maintained that ‘anyone who attempts to enter Australia illegally by boat will be returned, or sent to Nauru’.<sup>69</sup> To formalise this commitment, Australia and Nauru signed a new ‘memorandum of understanding to establish an enduring regional processing capability in Nauru’ in September 2021.<sup>70</sup> The new (Labor) Australian Government has also indicated an intention to continue offshore processing in Nauru.<sup>71</sup> Australia’s agreement with PNG formally ended on 31 December 2021, meaning no new arrivals can be transferred there, but the impact of the previous regime continues as many people transferred to PNG for processing remain there without a durable solution. Australia purports to take no further responsibility for the people remaining in PNG, despite forcibly sending them there and funding their detention for many years.

36. Approximately 1,394 people who arrived in Australia in 2013 and 2014 are still subject to the offshore processing regime<sup>72</sup> and have now endured more than nine years of serious and well documented human rights violations without remedy or redress.<sup>73</sup> The vast majority of these people are currently in Australia, having been transferred back on a ‘temporary’ basis for medical reasons (see Part C, subsection (e) below), but are liable to be returned offshore at the discretion of the Australian Government. As of May 2022, 112 people remained in Nauru.<sup>74</sup> As of 31 December 2021 (after which the Australian Government ceased publishing relevant data), 105 people remained in PNG.<sup>75</sup>
37. Where a newly arrived asylum seeker is not subject to immediate return to their country of origin or place of departure, and is instead identified for transfer to Nauru, the legal framework for offshore processing provides no statutory process or administrative mechanism for the person to challenge the transfer decision on the basis that they would face a real risk of torture or ill-treatment in Nauru. The Migration Act continues to provide that Australian officers ‘must’ detain unlawful non-citizens in the migration zone (s 189) and then ‘must, as soon as reasonably practicable’ take that person to a regional processing country (s 198AD). Despite examples of legal challenges resisting transfer, Australian courts are yet to determine the circumstances, if any, in which non-refoulement obligations may limit this duty as a matter of domestic law. Further, while the relevant Minister has a personal, non-compellable and non-reviewable discretion to exempt a person from transfer offshore, if he or she ‘thinks that it is in the public interest to do so’ (s 198AE), there is no domestic legal obligation for the Minister to consider making an exemption in any case. This discretionary power is not an appropriate safeguard against transfer to a place where there is a real risk of torture or ill-treatment.

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<sup>69</sup> Karen Andrews, ‘Joint media release with the Hon. Westly Nukundj MP – Finalisation of the Regional Resettlement Arrangement’ (Media Release, 6 October 2021) (*Andrews and Nukundi*).

<sup>70</sup> Karen Andrews MP, ‘Joint media release with the Hon. Lionel Rouwen Aingimea - New agreement to secure our region from maritime people smuggling’ (Media Release, 24 September 2021).

<sup>71</sup> Ben Packham, ‘Albanese appoints US prison operator to run Nauru Detention Centre’, *The Australian* (Online Article, 15 August 2022) <[https://www.theaustralian.com.au/nation/politics/albanese-appoints-us-prison-operator-to-run-nauru-detention-centre/news-story/982ebef90ee6175e2c76209786541df8?mc\\_cid=26d6010526&mc\\_eid=96b2fd7c1d](https://www.theaustralian.com.au/nation/politics/albanese-appoints-us-prison-operator-to-run-nauru-detention-centre/news-story/982ebef90ee6175e2c76209786541df8?mc_cid=26d6010526&mc_eid=96b2fd7c1d)> (*Packham*); Ben Doherty and Christopher Knaus, ‘Canstruct loses lucrative Nauru offshore processing contract to US prisons operator with controversial record’, *The Guardian* (Online Article, 16 August 2022) (*Doherty and Knaus*) <[https://www.theguardian.com/australia-news/2022/aug/16/canstruct-loses-lucrative-nauru-offshore-processing-contract-to-us-prisons-operator-with-controversial-record?mc\\_cid=26d6010526&mc\\_eid=96b2fd7c1d](https://www.theguardian.com/australia-news/2022/aug/16/canstruct-loses-lucrative-nauru-offshore-processing-contract-to-us-prisons-operator-with-controversial-record?mc_cid=26d6010526&mc_eid=96b2fd7c1d)>.

<sup>72</sup> Refugee Council of Australia, ‘Offshore Processing Statistics’, *Refugee Council of Australia Statistics* (Online Article, 6 August 2022) <<https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/>> (*RCOA Offshore Processing Statistics 2022*).

<sup>73</sup> See: United Nations High Commissioner for Refugees, ‘United Nations Observations: Australia’s transfer arrangements with Nauru and Papua New Guinea (2012-present)’, *UNHCR Monitoring the Forcible Transfer of Asylum Seekers by Australia* (Web Page, 2022) < [UNHCR - United Nations Observations](#)>, specifically: Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/37/51/Add.3 (26 February 2018); Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68/Add.1 (5 March 2015); Committee Against Torture, *Convention against Torture and Other Cruel, Unhuman or Degrading Treatment or Punishment: Concluding observations on the combined fourth and fifth reports of Australia*, UN Doc CAT/C/AUS/Co/4-5 (23 December 2014).

<sup>74</sup> *RCOA Offshore Processing Statistics 2022* (n 72), 1.

<sup>75</sup> *Ibid.*

38. Australia continues to deny that its international obligations extend to ensuring the health and well-being of people forcibly transferred to Nauru and PNG, instead claiming that responsibility for offshore processing rests solely with the host States and that Australia's role is merely to provide 'support'.<sup>76</sup> Numerous UN treaty bodies have made findings to the contrary.<sup>77</sup> Australia also refuses to acknowledge that it may bear responsibility for internationally wrongful acts arising in the context of the offshore processing regime, either on the basis of wrongdoing by Australian officers and contractors and/or by aiding and assisting another State in the commission of wrongful acts.<sup>78</sup>

**(b) Current conditions offshore**

39. The 112 people remaining in Nauru live in the community, and no one has lived in the Nauru Regional Processing Centre (RPC) since March 2019.<sup>79</sup> Australia recently entered into a contract with a new company, Management and Training Corporation (MTC) Australia, to provide 'facilities, garrison, transferee arrivals and reception services' in Nauru.<sup>80</sup> MTC operates prisons in the United States (US) and has a controversial record.<sup>81</sup> It appears that the services in Nauru may be provided by a joint venture between MTC and Broadspectrum, an Australian company which previously provided similar services in Nauru and PNG and was implicated in human rights abuses there.<sup>82</sup> There are grave concerns about the well-being of the people who remain in Nauru, particularly in light of this new contract and the lack of effective protections against human rights abuses.
40. Refugees and people seeking asylum who were forcibly transferred to PNG were previously detained in the RPC on Manus Island, which closed in October 2017 due to the PNG Supreme Court's ruling that the detention of refugees in the RPC was illegal.<sup>83</sup> Following the closure of the RPC, the 690 men who were detained there were progressively (and at times forcibly) relocated to other locations, and those who currently remain in PNG are now accommodated in Port Moresby. Living conditions for the men transferred to Port Moresby have remained very difficult.<sup>84</sup> Of particular concern was the unexplained detention of 53 men in Bomana Immigration Centre in July and August 2019.<sup>85</sup> These men were held incommunicado, without access to their lawyers or visitors, and in conditions that constituted inhuman and degrading treatment or punishment. They reported that they were pressured to 'voluntarily' return to their home countries. While these men were detained in and by PNG, they remained the subjects of Australia's offshore processing policy and could have been transferred to safety in Australia at any time. Instead, Australia chose to leave the men in that condition in PNG, and we are not aware of any steps taken by Australia to ensure that they were not arbitrarily detained or subjected to torture or ill-treatment. In January 2020, the last 18 men held in that facility were released.<sup>86</sup>

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<sup>76</sup> CAT Sixth Periodic Report, [166], [170] and [171].

<sup>77</sup> See: Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5 (11 July 2017) [18]; Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [35]; Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) [30]; Committee on the Elimination of Discrimination Against Women, *Concluding observations on the eighth periodic report of Australia*, UN Doc CEDAW/C/AUS/CO/8 (20 July 2018). See also: Madeline Gleeson and Natasha Yacoub, 'Cruel, costly and ineffective: The failure of offshore processing in Australia (Policy Brief 11, Andrew & Renata Kaldor Centre for International Refugee Law, August 2021) 12.

<sup>78</sup> *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) arts 4, 8 and 16.

<sup>79</sup> RCOA *Offshore Processing Statistics 2022* (n 72), 2.

<sup>80</sup> Packham (n 69); Doherty and Knaus (n 71).

<sup>81</sup> Ibid.

<sup>82</sup> Amnesty International, *Trea\$ure Island: How Companies are Profiting from Australia's Abuse of Refugees on Nauru* (Report, 5 April 2017).

<sup>83</sup> Aljazeera, 'Why is the Manus detention centre being closed?', *Refugees News* (Online Article, 29 October 2017) <<https://www.aljazeera.com/news/2017/10/29/why-is-the-manus-detention-centre-being-closed>>.

<sup>84</sup> Ian Rintoul, 'More threats to relocate refugees in Port Moresby into poverty', *Refugee Action Coalition* (Online Article, 2 October 2019) <<http://www.refugeeaction.org.au/?p=8028>>; Amnesty International, 'Relocation to Port Moresby not a 'fix-all' for Refugees', *Chasing Asylum* (Online Post, 20 August 2019) <<https://www.amnesty.org.au/relocation-to-port-moresby-not-a-fix-all-for-refugees/>>.

<sup>85</sup> RCOA *Offshore Processing Statistics 2022* (n 72), 2.

<sup>86</sup> Ibid.

41. In October 2021, Australia and PNG announced that ‘regional processing contracts in PNG will cease on 31 December 2021 and will not be renewed’.<sup>87</sup> Anyone subject to offshore processing and still in PNG could volunteer to be transferred to Nauru before 31 December 2021, and from 1 January 2022 ‘the PNG Government will assume full management of regional processing services in PNG and full responsibility for those who remain’.<sup>88</sup> However, Australia retains the power to bring people who were sent to PNG back to Australia at any time, indicating its continuing control over the lives of the men remaining in PNG. Australia and PNG announced that PNG would provide a permanent migration pathway for those wishing to remain in PNG.<sup>89</sup> However, Australia sought, and PNG made to Australia, no commitments regarding permanent residence or citizenship for the men remaining in PNG, nor any commitment regarding their treatment, safety, access to healthcare and livelihood opportunities.<sup>90</sup> As such, we maintain our longstanding concerns, supported by UNHCR, that PNG is not a suitable settlement country for most refugees.<sup>91</sup> In 2022, refugees and people seeking asylum in PNG have expressed confusion and anxiety after the withdrawal of Australian service providers.<sup>92</sup>
42. Many of the people still offshore face difficult living conditions and safety concerns in Nauru and PNG.<sup>93</sup> In Nauru, in May 2022, leaked emails from the Nauruan Police demonstrated their disregard for the safety and well-being of refugees and people seeking asylum who were at risk of suicide and self-harm.<sup>94</sup> Gay men have reported being harassed and subjected to violence by other refugees and the local population in Nauru. While same-sex sexual activity has been legal since May 2016, there is no legal recognition of same-sex unions or protections against discrimination in employment or the provision of goods and services on the basis of sexual orientation.<sup>95</sup> Same sex relationships remain illegal in PNG, and security issues have also long affected the men transferred to PNG. Most recently, in August 2022, two Iranian refugees in PNG were robbed at gunpoint after armed attackers broke into their unit.<sup>96</sup>
43. During the COVID-19 pandemic, Australia did not take adequate steps to ensure the health and safety of people subject to offshore processing in Nauru and PNG. In July 2022, almost half the population in Nauru had COVID-19 and lockdown restrictions made it nearly impossible for refugees to access food

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> *Andrews and Nukundi* (n 69).

<sup>90</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Estimates* (25201, 25 October 2011) 111.

<sup>91</sup> These concerns have been raised consistently by the UN High Commissioner for Refugees (UNHCR) since the reintroduction of offshore processing in 2012. See: UNHCR, *UNHCR monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013* (Summary Report, 26 November 2013) [120]-[128]; UNHCR, ‘Australia must secure solutions for refugees abandoned on Manus Island’, *UNHCR Briefing Notes* (Online Article, 22 December 2017) <<https://www.unhcr.org/en-au/news/briefing/2017/12/5a3cce224/australia-must-secure-solutions-refugees-abandoned-manus-island.html>>.

<sup>92</sup> Eden Gillespie, ‘“Confusion, no answers” as Australia ends offshore asylum seeker processing deal with PNG’, *SBS News* (Online Article, 31 December 2021) <<https://www.sbs.com.au/news/confusion-no-answers-as-australia-ends-offshore-asylum-seeker-processing-deal-with-png/d5a65553-f611-4c1e-b121-967b19a97393>>.

<sup>93</sup> Evan Young, ‘Asylum seekers in PNG scared and devastated after reportedly being held at gunpoint’, *SBS News* (Online Article, 22 April 2021) <<https://www.sbs.com.au/news/article/asylum-seekers-in-png-scared-and-devastated-after-reportedly-being-held-at-gunpoint/i7rgzed39>>; Human Rights Watch, ‘Australia/PNG: Refugees Face Unchecked Violence’, *Human Rights Watch News* (Online Article, 25 October 2017) <<https://www.hrw.org/news/2017/10/25/australia/png-refugees-face-unchecked-violence>>; Helen Davidson, ‘Refugees attacked on a daily basis on Nauru, human rights groups say’, *The Guardian* (Online Article, 3 August 2016) <<https://www.theguardian.com/australia-news/2016/aug/03/refugees-attacked-on-a-daily-basis-on-nauru-says-amnesty-report>>; Zoe Osborne, ‘Beyond the Park Hotel: Australia’s immigration detention network’, *Al Jazeera* (Online Article, 13 January 2022) <<https://www.aljazeera.com/news/2022/1/13/beyond-the-park-hotel-australias-immigration-detention-network>>.

<sup>94</sup> Cam Wilson, ‘Appalling disregard: Australia’s offshore processing slammed after leaked emails show Nauru people mocking suicide, self-harm threats’, *Crikey* (Online Article, 5 May 2022) <<https://www.crikey.com.au/2022/05/05/nauru-police-force-emails-refugees-asylum-seeker-self-harm-suicide/>>.

<sup>95</sup> Equaldex, ‘LGBT Rights in Nauru’, *Equaldex Regions, Oceania, Nauru* (Web Page, 2022) <<https://www.equaldex.com/region/nauru>>.

<sup>96</sup> RNZ, ‘Refugees robbed at gunpoint in Papua New Guinea’s Capital’, *RNZ Pacific News* (Online Post, 15 August 2022) <[https://www.rnz.co.nz/international/pacific-news/472893/refugees-robbed-at-gunpoint-in-papua-new-guinea-s-capital?mc\\_cid=26d6010526&mc\\_eid=96b2fd7c1d](https://www.rnz.co.nz/international/pacific-news/472893/refugees-robbed-at-gunpoint-in-papua-new-guinea-s-capital?mc_cid=26d6010526&mc_eid=96b2fd7c1d)>.

and medicine.<sup>97</sup> Similarly, the spike in COVID-19 cases in PNG in 2021 created a dire health crisis for refugees and people seeking asylum.<sup>98</sup>

### **(c) Refugee Status Determination (RSD) in Nauru and PNG**

44. Australia's claim that it 'does not have any involvement in the RSD process' in Nauru and PNG<sup>99</sup> is misleading. When Australia first began forcibly transferring people offshore in August 2012, neither Nauru nor PNG had an RSD system in place to process the new arrivals. Australia was instrumental in developing these processes and building RSD capacity in both countries. The extent of this involvement has been well-documented, and includes Australian officials being seconded to Nauru and PNG.<sup>100</sup> Australia also contracted lawyers to act as Claims Assistance Providers (CAPs) to help people make their asylum claims. Thus, while the level and nature of Australian involvement in these RSD processes may have decreased over time, their creation and implementation were entirely dependent on Australian involvement and funding. The Committee's questions about timeframes involved in these processes and the availability of judicial review with suspensive effect on deportation are crucial to understanding the serious mental impact of delayed processing and the risks of *refoulement*,<sup>101</sup> and it is regrettable that Australia has chosen not to provide this information.
45. As at June 2022, there were 12 people seeking asylum in Nauru still going through the RSD process.<sup>102</sup>

### **(d) Inadequate healthcare**

46. The Australian Government owes a duty of care to ensure refugees and people seeking asylum who were transferred to Nauru and PNG receive appropriate medical treatment.<sup>103</sup> In many cases, this treatment cannot be provided in Nauru or PNG, due to the complexity of the medical needs and/or the limitations of the health services in those countries. However, the Australian Government has maintained a long-standing resistance to bringing people back to Australia for medical care, even in critical and urgent cases where doctors have indicated an immediate threat to life. In some cases, this resistance has resulted in death.<sup>104</sup> Twelve people have died while subject to offshore detention,<sup>105</sup> most of whom were suffering from untreated physical or mental health conditions which had been caused or exacerbated by Australian Government policies. There is no indication that these policies were ever reviewed or changed after any of these deaths. At least six additional people who were previously subject to offshore detention have also died.
47. Because the Australian Government consistently refused to follow the advice of doctors about critically unwell people in its care, many people were forced to take court action to secure urgent medical transfers to Australia. Between December 2017 and February 2019, more than 50 cases involving

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<sup>97</sup> Asylum Seeker Resource Centre, 'Refugees held offshore at critical risk as COVID-19 cases rise in Nauru' (Media Release, 7 July 2022).

<sup>98</sup> Marian Faa, 'Australian government urged to act as PNG's COVID-19 outbreak spreads among refugees', *ABC News* (Online Article, 21 October 2021) <<https://www.abc.net.au/news/2021-10-21/png-refugee-family-covid-calls-for-evacuation/100548240>>.

<sup>99</sup> *CAT Sixth Periodic Report*, [170].

<sup>100</sup> Madeline Gleeson, 'Protection Deficit: The Failure of Australia's Offshore Processing Arrangements to Guarantee "Protection Elsewhere" in the Pacific' (2019) 31(4) *International Journal of Refugee Law* 415.

<sup>101</sup> *CAT Sixth Periodic Report*, [9(c)].

<sup>102</sup> *RCOA Offshore Processing Statistics 2022* (n 72), 7.

<sup>103</sup> *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483 established that the Australian Government owed a duty of care to a refugee to procure a safe and legal termination of her unwanted pregnancy after she was raped in Nauru. The Federal Court of Australia has also repeatedly found, and the Australian Government has accepted, that there is a *prima facie* case that a duty to provide appropriate medical care exists. See, for example: *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63; *DJA18 as litigation representative for DIZ18 v Minister for Home Affairs* [2018] FCA 1050; *DRB18 v Minister for Home Affairs* [2018] FCA 1163; *EHW18 v Minister for Home Affairs* [2018] FCA 1350.

<sup>104</sup> *Findings of the Inquest into the death of Hamid Khazaei*, Coroner's Court of Queensland, 30 July 2018.

<sup>105</sup> Human Rights Law Centre, '#9YearsTooLong', *Human Rights Law Centre News and Commentary* (Web Page, 2022) <<https://www.hrlc.org.au/timeline-offshore-detention>>.

critically ill people offshore were brought before the Federal Court of Australia.<sup>106</sup> These people had serious medical conditions, including sepsis, encephalitis, psychosis, resignation syndrome and pregnancy complications in which the life of the unborn child and mother were at risk. Every single court case was successful in securing a transfer to Australia for medical care. Many more people were transferred to Australia for medical treatment only after lawyers intervened and threatened court proceedings. In total, more than 340 people were transferred to Australia as a result of this legal action, highlighting the serious unmet medical needs of people held offshore.

48. For a brief period in 2019, a better system for meeting the critical health needs of people offshore was introduced through an amendment to the Migration Act by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019*, known as the ‘Medevac law’. This law, which was passed by Parliament against the then-Government’s wishes and came into effect in March 2019, established an efficient pathway for independent doctors to refer people offshore for urgent medical transfer to Australia.<sup>107</sup> The Medical Evacuation Response Group, a partnership of lawyers, doctors, caseworkers and counsellors, worked together to ensure the safe and effective submission of applications under the Medevac law. However, the former Coalition Government repealed the Medevac law in December 2019.<sup>108</sup> In the eight months of its operation, approximately 192 refugees and people seeking asylum were transferred to Australia.<sup>109</sup> The repeal of the Medevac law undermined the safety of people who required medical treatment.

### ***(e) Treatment of people transferred to Australia***

49. Almost 1,200 people currently remain in Australia after being transferred back from offshore processing countries, predominantly for medical reasons.<sup>110</sup> They were all subject to mandatory detention upon return to Australia; many were detained in closed immigration detention facilities, including hotels designated as APODs, for prolonged periods. The use of these facilities has been widely condemned. The AHRC recommended that hotels only be used as places of detention in exceptional circumstances and for very short periods of time, not least because of their lack of dedicated facilities and restrictions on access to open space.<sup>111</sup> However, the Australian Government detained people in APODs for years, including during COVID-19 (see paragraph 10). Out of desperation, some people requested return to Nauru or PNG, regardless of their ongoing medical needs, and at least 130 people commenced court proceedings seeking to compel their removal from Australia as an alternative to arbitrary detention (though these cases were largely unsuccessful).<sup>112</sup> During 2021 and 2022, at least 5 people did in fact return from Australia to Nauru. Due to mounting public pressure, the former Coalition Government finally released most of the remaining people who had been transferred from offshore processing from closed detention in April 2022.<sup>113</sup> At the time of writing it is believed that six people are still detained. Throughout this entire time period, the Government’s decision-making regarding who was held in closed detention and who was released, has been arbitrary and opaque.
50. Most people experienced or continue to experience significant delays in accessing the healthcare for which they were brought back to Australia. This delay in accessing treatment has had severe impacts,

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<sup>106</sup> Although interlocutory injunctive relief was granted for people to be transferred to Australia for medical treatment, many of their Federal Court proceedings remain on foot because the Australian Government is contesting that it owed a duty of care to provide medical treatment to people transferred to Nauru.

<sup>107</sup> Civicus, *State of Civil Society Report: The Year in review* (Report, March 2019), [81]-[87].

<sup>108</sup> PIAC 2021 Report: *Healthcare Denied* (n 44) 5.

<sup>109</sup> Ibid.

<sup>110</sup> RCOA *Offshore Processing Statistics 2022* (n 72), 1.

<sup>111</sup> AHRC *Immigration Detention Report 2019* (n 48).

<sup>112</sup> Sowaibah Hanifie, ‘Medevac refugees return to Nauru after more than a year in Australian hotel detention’, *ABC News* (Online Article, 18 March 2021) <<https://www.abc.net.au/news/2021-03-18/tamil-medevac-refugees-return-to-nauru-from-darwin-detention/13248378>>; Nino Bucci, ‘Court ruling on detention of Iranian man in Australia may clear path for release of 130 refugees’, *The Guardian* (Online Article, 3 February 2021) <<https://www.theguardian.com/australia-news/2021/feb/03/court-ruling-on-detention-of-iranian-man-in-australia-may-clear-path-for-release-of-130-refugees>>.

<sup>113</sup> Ashleigh Barraclough, ‘Final eight asylum seekers released from Park Hotel in Melbourne’, *ABC News* (Online Article, 7 April 2022) <<https://www.abc.net.au/news/2022-04-07/final-eight-asylum-seekers-released-park-hotel-melbourne/100973950>>.

including for people awaiting treatment for painful and debilitating conditions such as chest pain, heart palpitations and gum disease. Poor detention conditions – including the use of hotels for long and indefinite periods, and a lack of access to adequate fresh air, sunlight, activities and visitors – have also exacerbated physical and mental health conditions.

51. Most people transferred to Australia from the RPCs now live in the community, either in ‘community detention’<sup>114</sup> or on short-term bridging visas.<sup>115</sup> People in community detention are required to live at a specific location and are prevented from working, but are provided with accommodation and income support. In August and September 2020, the Minister moved a significant number of people who had previously been in community detention (including families with children) onto bridging visas, effectively stripping them of much of the support they had previously received and leaving many without housing or income in the middle of the COVID-19 pandemic.<sup>116</sup> Other people who remain in community detention but wish to obtain a bridging visa in order to work, are unable to do so, with no apparent explanation.
52. People in this cohort have no right to apply for a protection visa (or any other visa) while in Australia, unless specifically permitted to do so by the Minister. In March 2022, nine years after the re-introduction of offshore processing, the Australian Government finally accepted an offer from the New Zealand Government to resettle 450 people who have been, or are still, subject to offshore processing.<sup>117</sup> People in PNG are not eligible for resettlement in New Zealand under this agreement, but may be referred by UNHCR for resettlement in New Zealand under a separate process.<sup>118</sup> As of 31 October 2021, 1,026 refugees subject to offshore processing have been resettled from Nauru and PNG to other countries (predominantly the US), and at least another 230 refugees had been approved to resettle in the US. In February 2019, it was reported that 265 people had been rejected for resettlement by the US; this number is believed to have increased, but more recent official data is not available.<sup>119</sup> The Australian Government has not identified permanent solutions for people who are ineligible for resettlement in the US and New Zealand, or people who will miss out on the limited resettlement places available under these arrangements, who continue to be at risk of detention and refoulement.

## D. Australia’s non-refoulement obligations

### (a) *Unfair RSD process*

53. In December 2014, Australia introduced a “Fast Track” RSD process for asylum seekers who arrived by boat after 12 August 2012 and were not taken to Nauru or PNG for offshore processing. This group faces a very limited and inadequate review process, presenting serious concerns that people with credible fears of harm may be refouled. Those who have been refused a protection visa are no longer allowed to appeal to the regular merits review system, but can only seek review at the Immigration Assessment Authority (IAA) – a system set up specifically for people who arrived by boat to provide a ‘fast’ review. Despite its name, the Fast Track process has taken over nine years to assess approximately 30,000

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<sup>114</sup> ‘Community detention’ is created through the Minister’s power, in s 197AB of the *Migration Act*, to determine that a person must reside at a specified place instead of being detained in immigration detention.

<sup>115</sup> *RCOA Offshore Processing Statistics 2022* (n 72), 5.

<sup>116</sup> *Ibid.*

<sup>117</sup> Josh Butler and Daniel Hurst, ‘Australia agrees 450 refugees can be resettled in New Zealand, nine years after deal first offered’, *The Guardian* (Online Article, 24 March 2022) <<https://www.theguardian.com/australia-news/2022/mar/24/australia-agrees-450-refugees-can-be-resettled-in-new-zealand-nine-years-after-deal-first-offered>>.

<sup>118</sup> UN High Commissioner for Refugees, ‘Resettlement to New Zealand for persons subject to Australia’s offshore transfer policy’, *UNHCR Help Australia* (Web Page, 2022) <<https://help.unhcr.org/australia/resettlement-to-new-zealand-for-persons-subject-australias-offshore-transfer-policy/>>.

<sup>119</sup> *RCOA Offshore Processing Statistics 2022* (n 72), 4.

people.<sup>120</sup> As of July 2022, 1,043 people are still waiting on the outcome of their refugee claim, while 9,798 have been refused, and 19,491 have been found to be refugees.

54. Under the Fast Track process, people seeking asylum are not provided with a review hearing, but rather their review is considered only ‘on the papers’.<sup>121</sup> The IAA can only consider new information not provided in the initial application in ‘exceptional circumstances’, *and* if either the new information could not have been provided at the time of the initial decision, or it is ‘credible personal information’ which, had it been known, may have affected the initial consideration of the claim.<sup>122</sup>
55. The limited review rights under the IAA have resulted in more refusals being upheld. In 2019-20, the IAA affirmed the original decision to refuse a visa in 94% of cases.<sup>123</sup> In 2020-21, this figure was 91%.<sup>124</sup> By contrast, the previous review system overturned the original refusal in 60-90% of asylum cases.<sup>125</sup>
56. The Fast Track process also excludes some people, known as ‘excluded fast track applicants’, from any form of merits review.<sup>126</sup> There is a significant risk that people who are excluded from review may be returned in violation of *non-refoulement* obligations.
57. Those who have been refused a protection visa are not able to apply for refugee protection again unless the Minister makes a personal decision to allow them to resubmit an application.<sup>127</sup> This presents serious concerns for people where circumstances in their country of origin have changed since they first applied for refugee protection.

#### ***(b) Lack of access to a fair RSD process during maritime interception operations***

58. Asylum seekers returned to Indonesia as a result of maritime ‘turn-back’ operations, are not afforded any opportunity to make protection claims. They are denied access to RSD entirely, putting Australia at risk of violating its *non-refoulement* obligations under international law.
59. By contrast, asylum seekers involved in ‘take-back’ operations to Sri Lanka and Vietnam have been subject to basic screening procedures at sea, referred to as ‘enhanced screening’ by the Australian Government. The stated purpose of enhanced screening is to determine whether an asylum seeker has claims that may engage Australia’s *non-refoulement* obligations and whether those claims warrant further assessment through a full RSD process.<sup>128</sup> In practice, this enhanced screening does not meet the requirements for a fair RSD process.
60. The process is carried out by officers from the Refugee and Humanitarian Visa Management Division of the Department of Home Affairs, who are seconded to the Joint Agency Task Force for Operation

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<sup>120</sup> Human Rights Commissioner Edward Santow, ‘Lives on hold: Refugees and asylum seekers in the Legacy caseload (2019)’, *Australian Human Rights Commission Publications* (Commissioner’s Foreword, July 2019) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.

<sup>121</sup> *Migration Act* (n 3) s 473DB.

<sup>122</sup> *Migration Act* (n 3) s 473DD.

<sup>123</sup> Administrative Appeals Tribunal, *Annual Report 2019-20* (Report, 2020), 68.

<sup>124</sup> Administrative Appeals Tribunal, *Annual Report 2020-21* (Report, 2021), 88.

<sup>125</sup> Refugee Council of Australia, ‘Fast tracking and ‘Legacy Caseload’ statistics’, *Refugee Council of Australia Statistics* (Online Article, 21 October 2021) <<https://www.refugeecouncil.org.au/fast-tracking-statistics/>>.

<sup>126</sup> *Migration Act* (n 3) s 5. Excluded Fast Track applicants include those who have come from ‘safe third countries’ or have ‘effective protection’ in another country; previously entered Australia and made a protection visa application which was refused or withdrawn; made an unsuccessful claim for protection in another country; made an unsuccessful claim for protection to the UN High Commissioner for Refugees (UNHCR); provided ‘without reasonable explanation’ a ‘bogus document’ in support of the application; or made, in the opinion of the Minister, a ‘manifestly unfounded’ claim.

<sup>127</sup> *Ibid* s 48B.

<sup>128</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Budget Estimates* (Transcript, 25 May 2015), Michael Manthorpe at 109 (*‘Senate Budget Estimates May 2015’*); *Procedural Instruction 2018* (n 51), 1.1.

Sovereign Borders.<sup>129</sup> Asylum seekers are asked a series of questions, based on internal guidelines.<sup>130</sup> The exact content of the questions remains unknown, as the relevant sections were redacted from the procedural instructions before public release. Interviews take between 40 minutes and two hours per person.<sup>131</sup> There have been instances where the interviews have been carried out via video-link, but the Government asserts that general practice is to conduct them in person.<sup>132</sup> To enable this, officers from the Refugee and Humanitarian Visa Management Division are forward deployed onto vessels operating in Operation Sovereign Borders.<sup>133</sup>

61. The Australian Government has also stated that interpreters are provided,<sup>134</sup> but it is unclear if interpreters are always physically present on the vessel or are engaged via telephone. Australia also claims that interview subjects are provided with an opportunity to respond to adverse information, but it is not clear what this looks like in practice.<sup>135</sup> The interview is carried out by an interview officer, with relevant background and training in *non-refoulement*.<sup>136</sup> The team leader from the Department, who is physically present on the vessel, reviews the transcripts and decisions.<sup>137</sup> These are then forwarded to a senior executive officer at the Department for final decision.<sup>138</sup>
62. People whose asylum claims are processed at sea by the Australian Government do not appear to have any access to appeal or review rights, or access to legal representation.
63. The extremely low number of people who are ‘screened in’ as having protection claims warranting further assessment raises serious concerns about the effectiveness of the process in upholding Australia’s non-refoulement obligations. Historical statistics indicate that, prior to the introduction of Operation Sovereign Borders in 2013, between 70 and 100% of people arriving in Australia by boat since the 1970s were found to be refugees and granted protection either in Australia or in another country.<sup>139</sup> By contrast, between September 2013 and October 2017, only two out of more than 216 Sri Lankan and Vietnamese asylum seekers subjected to enhanced screening procedures were screened in.<sup>140</sup> That is a success rate of under 1%.

### **(c) Lack of access to legal representation**

64. Access to legal representation is crucial to prevent refoulement. The Australian Government previously provided limited government-funded legal assistance for people seeking asylum.<sup>141</sup> Concerningly, this ceased altogether in August 2022, and there is now no government-funded legal assistance available.<sup>142</sup> People seeking asylum in detention face additional barriers to accessing legal representation. The remote location of detention centres makes it difficult to communicate with lawyers, especially in facilities like North West Point IDC on Christmas Island where there are persistent problems with internet and phone reception.

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<sup>129</sup> Ibid, Michael Pezzullo at 110.

<sup>130</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Budget Estimates* (Transcript, 23 February 2015), Kruno Kukoc at 138 (*‘Senate Budget Estimates February 2015’*).

<sup>131</sup> *Senate Budget Estimates May 2015* (n 127), Michael Manthorpe at 117.

<sup>132</sup> Ibid, Michael Manthorpe at 110; *The Procedural Instructions 2018* state that the interview ‘is usually face to face’ (n 51), 4.1.

<sup>133</sup> Ibid, Michael Pezzullo at 110.

<sup>134</sup> Ibid, Michael Manthorpe at 118; *Procedural Instructions 2018* (n 51), 4.1 and 4.4.

<sup>135</sup> Ibid; The relevant sections are redacted from the *Procedural Instructions 2018*.

<sup>136</sup> *Procedural Instructions 2018* (n 51), 4.1.

<sup>137</sup> *Senate Budget Estimates February 2015* (n 129), Kruno Kukoc at 139.

<sup>138</sup> Ibid; This person is referred to as the Assessing officer in the *Procedural Instructions 2018*.

<sup>139</sup> Janet Phillips, ‘Asylum seekers and refugees: what are the facts?’ (Research Paper, Parliamentary Library, Parliament of Australia, 2 March 2015) 9.

<sup>140</sup> Azadeh Dastyari and Daniel Ghezelbash, ‘Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures’ 32(1) *International Journal of Refugee Law* 1.

<sup>141</sup> *OPCAT Submission* (n 5), 2.2.5.

<sup>142</sup> Settlement Services International, ‘Immigration Advice and Application Assistance Scheme (IAAAS)’, *SSI Services* (Web Page, 2022) <<https://www.ssi.org.au/services/newcomers-refugees-and-migrants/iaaas>>.

## E. Separation of refugee families

65. The right to family unity and family reunification is recognised in many international human rights instruments to which Australia is a party. Despite this, a number of Australian laws, policies and practices have or continue to separate refugees from their family members or prevent them from reuniting.<sup>143</sup> For example, refugees who are granted temporary, rather than permanent, protection visas are not entitled to sponsor family members for Australian visas. Refugees holding permanent visas are entitled to apply for family reunification, but there is an express policy<sup>144</sup> which renders family visa applications sponsored by people who arrived in Australia by boat as the lowest processing priority – commonly leading to delays of 5 to 10 years in visa processing. The Australian Government has openly acknowledged that limitations on family reunification for refugees are intended to deter people from travelling to Australia by boat to seek protection.
66. Families have also been separated between Australia and the RPCs in Nauru and Papua New Guinea, particularly where one family member required medical transfer to Australia and other family members were forced to stay behind. This included pregnant women who were flown to Australia to give birth, whose partners and other children were prevented from accompanying them. Government whistleblowers have confirmed that refusing to allow family members to travel was part of an ‘unofficial policy’ to use family separation as a coercive measure to encourage refugees who were separated from their family members to agree to return to Nauru or Papua New Guinea despite their health and safety concerns, or even to abandon their protection claims.<sup>145</sup>
67. These policies and practices have led to the widespread separation of refugee families, including children from their parents. A detailed legal opinion provided to the Human Rights Law Centre in February 2020<sup>146</sup> indicates that the Australian Government’s intentional separation of families may, in certain circumstances, violate the absolute prohibition on torture under the Convention and the *jus cogens* norm of international law, or the prohibition of acts of cruel, inhuman or degrading treatment or punishment under the Convention, as:
  - (a) the immediate and long-term impacts of family separation, including serious adverse psychological, physical, and family life impacts, surpass the gravity threshold of severe physical or mental pain and suffering, particularly when concerning children;
  - (b) there is evidence that family separation is used to deter asylum seekers from asserting their rights of protection once physically in Australia and to deter others from seeking to come to Australia. Separated children are also suffering for the movements of their parents or in order to deter and/or coerce people who may seek asylum in future. Punishing the victim for an act the victim or a third person has committed, or intimidating or coercing the victim or a third person, is a specific purpose listed in the definition of torture in Article 1; and

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<sup>143</sup> The intentional separation of refugee families is further detailed in the Human Rights Law Centre’s multi-disciplinary report *Together in Safety* (April 2021), <<https://www.hrlc.org.au/together-in-safety>>.

<sup>144</sup> David Coleman, Minister for Immigration, Citizenship and Multicultural Affairs, *Ministerial Direction 80 – Order for Considering and Disposing of Family Visa Applications*, issued 21 December 2018. Before Direction 80 was issued, similar policies were in place – see *Ministerial Direction 62 – Order for considering and disposing of Family Stream visa applications*, issued 19 December 2013, and *Ministerial Direction 72 - order for considering and disposing of Family visa applications*, issued 13 September 2016.

<sup>145</sup> Ben Doherty, ‘Border Force tells Nauru refugees to separate from family if they want to settle in the US’, *The Guardian* (Online article, 6 December 2017) <<https://www.theguardian.com/world/2017/dec/06/border-force-tells-nauru-refugees-to-separate-from-family-if-they-want-to-settle-in-us>>.

<sup>146</sup> Caoilfhionn Gallagher QC and Jennifer Robinson, Doughty Street Chambers, ‘Opinion: Family separation in Australia and International law’ (February 2020), <<https://www.hrlc.org.au/family-separation-international-law>>.

- (c) while Australian laws and policies do not expressly state a policy of family separation, the practical impact has the effect of separating families and is acknowledged as such. This meets the requirement of consent or acquiescence by the State.
68. Following a group communication to the UN Human Rights Committee, domestic legal action, and the (brief) implementation of the Medevac laws, all families who were separated between Australia and regional processing countries have now been reunited. However, a number of those families remain at risk of future separation, either through detention, returns to RPCs or inflexible resettlement policies, and there have been no legal or practical changes to prevent other families being similarly separated in future. At the time of writing, family separation on account of temporary protection visas and the deprioritisation of people who arrived by boat continues.