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Submission to the Parliamentary Joint Committee on Human Rights

Inquiry into Australia's Human Rights Framework

Acknowledgment of Country

We acknowledge the Traditional Owners, Custodians and Elders of the Gadigal People of the Eora Nation, past, present, and future, on whose traditional land we work.

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Introduction

The Refugee Advice and Casework Service (**RACS**) provides critical free legal advice, assistance and representation to financially disadvantaged and vulnerable people seeking asylum in Australia. We advocate for systemic law reform and policy that treats refugees with justice, dignity and respect, and we make complaints about serious human rights violations to Australian and United Nations bodies.

RACS acts for and assists refugees, people seeking asylum, people that are stateless or displaced, in the community, in immigration detention centres, alternative places of detention and community detention. Our services include supporting people to apply for protection visas, re-apply for temporary visas, apply for work rights and permission to travel, apply for family reunion, lodge appeals and complaints, assist with access to citizenship and challenging government decisions to detain a person.

RACS welcomes this opportunity to contribute to Parliamentary Joint Committee on Human Rights' Inquiry into Australia's Human Rights Framework**.** Australia is a party to several key human rights treaties and international agreements including the:

- 1951 Convention Relating to the Status of Refugees (**Refugee Convention**) and its 1967 Protocol;
- 1961 Convention on the Reduction of Statelessness (**Stateless Convention**);
- International Covenant on Civil and Political Rights (**ICCPR**);
- International Covenant on Economic, Social and Cultural Rights (**ICESCR**);
- International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**);
- Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**);
- Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**);
- Convention on the Rights of the Child (**CRC**); and
- Convention on the Rights of Persons with Disabilities (**CRPD**).

However, the rights protected in these agreements do not have any force in Australia until they are incorporated into domestic legislation. Australia is one of the only liberal democracies without a piece of federal human rights legislation. This has garnered repeated criticism from the international community, particularly for the human rights violations that have been able to occur in Australia with no recourse in the absence of

such protections. This inquiry represents an opportunity to shift this legacy, and meaningfully act on the obligations we have voluntarily assumed under international law.

RACS' submission speaks specifically to our experience of gaps in human rights protection in the Australian as it relates to refugees and people seeking asylum. In addition to this submission, we rely on several previous submissions and reports we have made advocating for policy change that would align Australian policies with international standards of human rights protection. These submissions have been enumerated in the Annexure of this document.

We aim to highlight the ways in which current Australian laws and practice breach the obligations we have assumed under international law. RACS seek to draw attention to the impact of this gap on the communities we serve in order to emphasise the benefits that formal and federal rights protection may have for refugees, people seeking asylum and the stateless in Australia.

We would also like to extend our gratitude to the following contributors to this submission: Trevin AndersonSoria, Lydia Ganci, Josephine Haseman, Mursal Rahimi, Joy Zhang and Arif Hussein.

Nature and scope of human rights

Human rights are indivisible, inalienable and universal. Article 1 of the Universal Declaration on Human Rights affirms that 'all human beings are born free and equal in dignity and rights'.[1] All humans should be entitled to access these rights, and one person's rights should not be valued more than another's. It is also important to note that one set of a person's rights cannot be fully enjoyed without the protection of others.[2] As these rights are inherent to each individual, their visa status should not act as a barrier to realising their human rights. Any federal piece of human rights legislation must protect the rights of **all persons** in Australian jurisdiction.

In this context, jurisdiction should be interpreted to include wherever the Australian government exercises *de facto* or *de jure* control over people or places, even if this is not situated within Australian territory. This broader interpretation of jurisdiction is permitted by the language of the treaties to which Australia is party to, and guidance from the treaty bodies that oversee their implementation.[3] In a General Comment *on the Nature of the General Legal Obligation Imposed on States Parties to the [ICCPR]*, the Human Rights Committee stated that under Article 2(1) of the ICCPR the treaty applies to all those under a State's jurisdiction. Jurisdiction was defined to include "anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".[4] The Committee Against Torture has also stated that the CAT is applicable to State activities in their sovereign territory as well as extraterritorially where, "by whichever military or civil authorities such control is exercised".[5] Another example includes an International Court of Justice's Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* which reasoned for the extraterritorial application of the ICCPR. They stated in the opinion that, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory." [6] The United Nations High Commissioner for Refugees (**UNHCR**) relied on these examples to issue a comprehensive report on a State's *non-refoulement* obligations under the Refugee Convention. The UNHCR urged that "the decisive criterion

[1] United Nations General Assembly. The Universal Declaration of Human Rights (UDHR). New York: United Nations General Assembly, 1948.
[2] OHCHR, "What are Human Rights?" United Nations Human Rights Office of the High Commissioner https://www.ohchr.org/en/what-are-human-rights (July 2023)
[3] Philipp Janig, 'Extraterritorial Application of Human Rights' in Christina Binder, Manfred Nowak, Jane A Hofbauer and Philipp Jang (eds), Elgar Encyclopedia of Human Rights, vol II (Edward Elgar Publishing 2022) 180-191.
[3] Ibid.
[4] UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html
[5] Committee Against Torture, Conclusions and recommendations of the Committee against Torture concerning the second report of the United States of America, supra footnote 47
[6] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, 9 July 2004, para. 111.

is not whether such persons are on the State's territory, but rather, whether they come within the effective control and authority of that State".[7]

It is important that any Australian human rights legislation provides for this broad interpretation of jurisdiction. In the context of increasing globalisation and the rise of significant non-State actors it is vital that human rights protections extend to circumstances where violations may be occurring outside of the sovereign territory of Australia, but through the actions of the Australian government no less. We submit that where jurisdiction is not clearly defined or limited in its application, there is an increased risk for human rights violations. We urge that Australia adopt a broad definition of jurisdiction in a future human rights act where the rights enshrined apply wherever Australia is enforcing *de facto* or *de jure* control.

[7] UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <https://www.unhcr.org/media/advisory-opinion-extraterritorial-application-non-refoulement-obligations-under-1951-0>

Detention

Mandatory

Under Australia's current immigration policy, any person who arrives or resides in Australia unlawfully *must* be detained by authorities and remain in immigration detention until they have been granted a valid visa or leave the country (which must happen as soon as reasonably practicable if visa channels are exhausted).[8] This includes anyone that arrives in Australia without a valid visa, a person who has had their visa cancelled, or a person who has overstayed their visa. Once someone is deemed to be an 'unlawful non-citizen' under the *Migration Act 1958* (Cth) and placed in detention, there is very limited opportunity to seek judicial review of the decision to detain them, or to ascertain whether detention is in fact necessary.

This policy of mandatory detention was first adopted in Australia in 1992.[9] The Australian Border Force maintains that immigration detention forms part of Australia's strong border control and is used to "support the integrity of Australia's migration program".[10] However, there is no evidence that detention has any deterrent effect on irregular migration.[11]

People subject to this policy have been detained on mainland Australia in immigration detention centres (**IDCs**), immigration transit accommodation (**ITAs**), immigration residential housing and alternative places of detention. They have also been detained on Christmas Island (since 2001)[12] and in regional processing centres (**RPCs**) offshore in the Republic of Nauru and Papua New Guinea (**PNG**).[13]

Over 50% of all people in immigration detention have either previously held or applied for a protection or humanitarian visa.[14] As of 30 April 2023, there are 1128 people in immigration detention facilities, including 1079 men and 50 women.[15] Of this figure, 168

[8] *Migration Act 1958* (Cth), s 189.
[9] *Migration Reform Act 1992* (Cth).
[10] Australian Border Force, 24 January 2019, *Immigration Detention in Australia,* <https://www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention>.
[11] United Nations High Commissioner for Refugees, 2012, *Detention Guidelines* 7 [3], <https://www.unhcr.org/sites/default/files/legacy-pdf/505b10ee9.pdf>.
[12] Everyone was taken out of Christmas Island in early October 2018, although in August 2020 the Government announced they were to reopen the North West Point Immigration Detention Centre in Christmas Island. As of 30 April 2023, 53 people were detained there. Refugee Council of Australia, 13 May 2023, *Statistics on people in detention in Australia*, <https://www.refugeecouncil.org.au/detention-australia-statistics/3/>.
[13] Refugee Council of Australia, 20 May 2020, *Australia's offshore processing regime: The facts*, <refugeecouncil.org.au/offshore-processing-facts/>; Kaldor Centre for International Refugee Law, 10 August 2021, *Offshore processing: an overview*, <https://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-overview>.
[14] Department of Home Affairs, *SE23-442 - Visa Cancellation and Detention - Asylum Seekers, Humanitarian Entrants and Refugees in Immigration Detention Facility* (answer to question on notice), Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, February 2023, <https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/legcon/2022-23_Supplementary_budget_estimates>; Department of Home Affairs,10 February 2023, *Immigration Detention and Community Statistics Summary December 2022* 4, <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-december-2022.pdf>.
[15] Department of Home Affairs, 30 May 2023, *Immigration Detention and Community Statistics Summary April 2023* 4, <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-april-2023.pdf>.

individuals are currently detained as they are Unauthorised Maritime Arrivals (**UMAs**).[16] At its peak in July 2013, there were 10, 201 people in closed detention consisting of 6670 men,1539 women and 1992 children.[17] It is important to note that these statistics published by the Department of Home Affairs (**the Department**) exclude data pertaining to persons sent offshore to RPCs in Nauru and PNG. Since the second iteration of offshore processing began in August 2012 the Australian government has sent 4,138 people to Nauru or PNG.[18] This figure excludes the 49 children that were born in Nauru or PNG to people transferred offshore on or after 19 July 2013.[19]

Australia's legislated framework of mandatory detention violates established common law principles and fundamental international human rights norms – most notably, the right not to be arbitrarily detained under article 9(1) of the *International Covenant on Civil and Political Rights* (**ICCPR**). The UNHCR's Detention Guidelines direct that detention is only lawful where it is reasonable, necessary, proportionate and as a measure of last resort.[20] The blanket rule in our legislation requiring the detention of unlawful non-citizens is arbitrary as it applies on an automatic and indiscriminate basis with little consideration of whether detention is justified in an individual's specific circumstances.

Seeking asylum is a lawful act. Any subsequent restrictions on the liberty of a person exercising the right to asylum should be prescribed in law and subject to prompt review.[21] The lack of judicial oversight of Australia's detention regime on human rights grounds, and inability of detainees to challenge the legality of their detention challenges the legality of our detention framework under international law and breaches the right to an effective remedy for human rights violations under the ICCPR.[22] This unfortunate reality appears to have resulted, in part, from the troubling practice of executive governments in Australia legislating their way around court decisions.[23]

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[16] Refugee Council of Australia, 13 May 2023, *Statistics on people in detention in Australia*, <https://www.refugeecouncil.org.au/detention-australia-statistics/7/>.
[17] Refugee Council of Australia, 13 May 2023, *Statistics on people in detention in Australia*, <https://www.refugeecouncil.org.au/detention-australia-statistics/2/>.
[18] Australian Border Force,14 July 2019, *Operational Performance Monitoring,* <https://www.homeaffairs.gov.au/foi/files/2019/fa-190700487-document-released.PDF>.
[19] Refugee Council of Australia, 30 June 2023, *Offshore processing statistics*, <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/2/>.

[20] United Nations High Commissioner for Refugees, 2012, *Detention Guidelines* 13 [14], 21, <https://www.unhcr.org/sites/default/files/legacy-pdf/505b10ee9.pdf>.
[21] Ibid at 6[2].
[22] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 172 UNTS 1976 (entered into force 23 March 1976) art 2.3; *Human Rights Council Working Group on Arbitrary Detention*, *Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20 – 24 November 2017,* 80th sess, UN Doc A/HRC/WGAD/2017/71 (21 December 2017) [53]–[55].

[23] Ben Doherty, The Guardian, 13 May 2021, *New law allows Australian government to indefinitely detain refugees,* <https://www.theguardian.com/australia-news/2021/may/13/new-law-allows-australian-government-to-indefinitely-detain-refugees-with-criminal-convictions>; See also E Karlsen, J Phillips and H Spinks, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Bills Digest 40, 2014–15, Parliamentary Library, 23 October 2014, 21: "Removal

Our current system of mandatory detention may also constitute a breach of our obligations per article 31(1) of the Refugee Convention. This provision stipulates that States Parties should not penalise people seeking asylum who arrive in a receiving country without a valid visa.[24]

We refer to and rely on the submission made by RACS to the inquiry on the Ending Indefinite and Arbitrary Immigration Detention Bill 2022, which provides further details of the issues with Australia's immigration detention framework.[25]

Indefinite

Under Australian law a person is held in immigration detention until they are granted a valid visa, or they leave the country. This poses the risk of people being held in prolonged or potentially indefinite detention. This is particularly so for stateless persons who are unable to return to another country.

The Department provides monthly statistics concerning the length of time people have been held in immigration detention. Most recently, the Department provided the following information in its report for April 2023:[26]

Period Detained	Total	% of Total
7 days or less	30	2.7
8 days – 31 days	69	6.1
32 days – 91 days	200	17.7
92 days – 182 days	93	8.2
183 days – 365 days	158	14.0
366 days – 547 days	93	8.2
548 days – 730 days	67	59
731 days – 1095 days	133	11.8
1096 days – 1460 days	80	7.1
1461 days – 1825 days	70	6.2
Greater than 1825 days	135	12.0
Total	**1, 128**	**100**

of references to the 1951 Refugee Convention appears to be an attempt at the very least to limit Australia's obligations under the Convention and curtail the way in which such obligations are interpreted by the judiciary."

[24] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189UNTS 150 (entered into force 22 April 1954) Art 31(1).

[25] RACS, submission no. 351 to the Joint Standing Committee on Migration, Parliament of Australia, 'Ending Definite and Arbitrary Immigration Detention Bill 2021', 2022 < https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/ImmigrationDetentionBill/Submissions>.

[26] Department of Home Affairs, 30 May 2023, *Immigration Detention and Community Statistics Summary 12*, <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-april-2023.pdf>.

The average time a person was held in detention facilities was 735 days, or slightly over 2 years.[27] Where a person has been held in immigration detention for more than two years the Secretary of the Department of Home Affairs is obliged to notify and report to the Office of the Commonwealth Ombudsman (the **Ombudsman**) regarding the circumstances of their detention.[28] The Ombudsman is then able to give an assessment of detention arrangements, and make recommendations as to the appropriateness of detention or alternative arrangements.[29] Most recently the Ombudsman made 35 s 486O assessments tabled in Parliament in early 2023.[30]

While the Ombudsman provides a level of oversight for immigration detention, this is considerably limited given that their recommendations and conclusions are not legally binding on the Department. In one instance the Ombudsman recommended that a person who was found to be owed protection and had been held in detention for over a decade be referred to the Minister for consideration of a visa or community placement as a matter of priority.[31] Mr X, as he was dubbed in the assessment, had previously been referred by the Department for consideration of a visa or community detention three times.[32] Each time the Department found that he did not meet the guidelines for consideration of a visa under s 195A of the *Migration Act 1958* (Cth).[33]

Of the 35 people assessed by the Ombudsman, 70% of those who remained in immigration detention had been found to be owed protection or were previously granted a humanitarian visa.[34] Such individuals who engage Australia's *non-refoulement* obligations are at risk of being detained indefinitely due to recent legislative changes to the *Migration Act 1958* (Cth). In 2021, the Federal Government passed the *Migration Amendment (Clarifying International Obligations for Removal)* Bill 2021. The effect of that Bill was to introduce changes to section 197C of the *Migration Act* 1958 (Cth) to clarify that the Act does not authorise or require the removal of an unlawful non-citizen who has been found to engage Australia's protection obligations under international law –

[27] Ibid.
[28] *Migration Act 1958* (Cth) s 486N.
[29] *Migration Act 1958* (Cth) s 486O.
[30] Department of Home Affairs, 7 March 2023, *Assessments by the Commonwealth Ombudsman, under section 486O of the Migration Act 1958, for Tabling in Parliament* reports 1-3, <https://www.ombudsman.gov.au/publications-and-news-pages/publication-pages/detention-review-assessments/2022/immigration-assessments-tabled-in-parliament-on-7-march-2023>.
[31] Department of Home Affairs, 7 March 2023, *Assessments by the Commonwealth Ombudsman, under section 486O of the Migration Act 1958, for Tabling in Parliament No. 2* p. 8, <https://www.aph.gov.au/Parliamentary_Business/Tabled_Documents/1217>.
[32] Ibid.
[33] Ibid at 7-8.
[34] Department of Home Affairs, 7 March 2023, *Assessments by the Commonwealth Ombudsman, under section 486O of the Migration Act 1958, for Tabling in Parliament* reports 1-2, <https://www.ombudsman.gov.au/publications-and-news-pages/publication-pages/detention-review-assessments/2022/immigration-assessments-tabled-in-parliament-on-7-march-2023>.

specifically, the obligation of *non-refoulement*, which requires Australia not to return a person to a place where he or she may be persecuted or suffer serious harm. [35]

RACS recently made a joint submission to the Parliamentary Joint Committee on Intelligence and Security's review of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (**CIO Act**).[36] We once again endorse the contents of that submission, but would like to draw specific attention to the following extracts:

- "Rather than clarifying Australia's obligations under international law, the CIO Act has increased the risk that people's rights will be violated - either through indefinite arbitrary detention or constructive refoulement";
- "When a person faces the choice between detention for life, or returning to a risk of serious harm, it cannot be said that a choice to return is made freely and voluntarily. There is a real risk that the prospect of arbitrary and potentially indefinite detention may coerce the person into making that choice. This is known as constructive refoulement";
- "The practical effect of the CIO Act has been to authorise the prolonged and indefinite detention of people who are owed protection obligations. Yet the explanatory materials to the amending legislation specifically contemplated that indefinite detention will be brought to an end by a person's 'voluntary' repatriation. The intention and likely effect of the legislation is to generate constructive refoulement. This is evidenced by both the number of 'voluntary' returns of people who previously held protection or humanitarian visas, and the further unknown number of people who have elected to return to harm rather than pursuing a formal protection finding that would condemn them to indefinite detention"; and
- "The amendments to s 197C were said to be necessary to avoid the human rights violation of refoulement. Yet detention involves the deprivation of a person's liberty – one of the most serious curtailing of rights. The harms of immigration detention in Australia are well documented. In the past five years, 21 people died in onshore Australian immigration detention centres, and over 800 instances of self-harm were recorded… avoiding one human rights violation (refoulement) is not a justification for the imposition of another, potentially equally harmful violation – arbitrary detention."

As mentioned above, RACS also holds particular concern about the prospects of indefinite detention for stateless persons. The indefinite detention of stateless persons

[35] Section 197 C of the Migration Act provides that Australia's non-refoulement obligations are irrelevant to the duty in section 198 of the Migration Act to remove unlawful non-citizens from Australia as soon as practicable. The amendment made by the *Migration Amendment (Clarifying International Obligations for Removal)* Bill 2021, however, created exceptions to this rule including where a 'protection finding' has been made in relation to the relevant individual.

[36] RACS et al, Submission no. 7 to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, 2023 < https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CIORAct2021/Submissions>.

has been deemed lawful by the High Court of Australia.[37] As stateless persons are not considered nationals of any state, if they are not granted a valid visa then there are no arrangements that can be made to return the person to another country. The UNHCR also warns that "[f]or stateless persons, the absence of status determination procedures to verify identity or nationality can lead to prolonged or indefinite detention".[38] There are approximately 35 stateless persons currently held in immigration detention.[39] Around 60% of these people have been detained for longer than two years. Indeed, the average period of time in detention for stateless persons is 1.5 times the amount for non-stateless persons at 1,105 days.[40]

Our current laws concerning immigration detention breach our voluntarily assumed obligations under international agreements. Among others, they breach the freedom from arbitrary detention protected in Article 9(1) of the ICCPR and can amount to a breach of the principle of *non-refoulement* found in Article 33 of the Refugee Convention and in customary law. The physical and mental health impacts of protracted, indefinite detention arguably also constitute a breach on the prohibition of cruel, inhuman or degrading treatment per the CAT. Our detention system has garnered significant criticisms from UN bodies, including the Working Group on Arbitrary Detention who previously stated that:

> "102. The Working Group is concerned about the number of cases from Australia regarding the implication of this Act. The Working Group is equally concerned that, in all these cases, the Government has argued that the detention is lawful because it follows the stipulations of the Migration Act 1958. The Working Group wishes to clarify that such argument cannot be accepted as legitimate under international law. The fact that a State is following its own domestic legislation does not in itself approve that legislation as conforming with the obligations that the State has undertaken under international law. In the Working Group's view, no State can legitimately avoid its obligations arising from international law by evoking its domestic laws and regulations.
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> 103. The Working Group therefore wishes to emphasize that it is the duty of the Government to bring its national legislation, including the *Migration Act 1958*, into line with its obligations under international law. Since 2017, the Government has

[37] *Al-Kateb v Godwin* (2004) 219 CLR 562; *M47/2018 v Minister for Home Affairs* [2019] HCA 17.
[38] UNHCR, 2014, *Handbook on Protection of Stateless Persons* 41[115], <https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf>.
[39] Department of Home Affairs, SE23-410 - Stateless persons in detention (answer to question on notice), Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, February 2023, <https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/legcon/2022-23_Supplementary_budget_estimates>.
[40] Department of Home Affairs, SE23-432 - Visa Cancellation and Detention - Stateless Person (answer to question on notice), Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, February 2023, <https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/legcon/2022-23_Supplementary_budget_estimates>.

been consistently reminded of these obligations by numerous international human rights bodies, including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against and the Committee on the Elimination of Racial Discrimination, as well as by the Special Rapporteur on the human rights of migrants33 and by the Working Group. The Working Group therefore calls upon the Government to review this legislation in the light of its obligations under international law, without delay".[41]

Children and Unaccompanied Minors

Children and unaccompanied minors are also subject to Australia's scheme of mandatory detention per the *Migration Act 1958* (Cth). Section 4AA(1) 'affirms' that 'a minor shall only be detained as a measure of last resort'. Significantly, however, the text of section 4AA(1) indicates that this affirmation only has the status of a general 'principle' rather than a justiciable statutory rule. The Victorian Court of Appeal has unanimously held that section 4AA(1) does not create an independent and actionable statutory duty against the Commonwealth of Australia.[42]

Although the general principle may inform the exercise of discretionary powers conferred by the Migration Act concerning minors, it remains vulnerable to abrogation by other provisions of the Migration Act containing express language[43] or necessary implications[44] to the contrary. Courts also have held that the principle offers little utility in interpreting statutory provisions of general application that draw no distinction between minors and non-minors.[45] Provisions belonging to these two categories include those:

- requiring the detention of persons known to be, or reasonably suspected of being, non-citizens unlawfully present in Australia;[46]
- requiring all detained unauthorised maritime arrivals to be taken to a regional processing country,[47] subject to the possibility of being granted a Ministerial exemption if the Minister thinks it is in the public interest to do so;[48] and
- mandating that all detained unlawful non-citizens remain in immigration detention indefinitely unless they are removed from Australia by their own request, deported,

[41] Working Group on Arbitrary Detention, Human Rights Council, 6 October 2020, *Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April-1 May 2020* 14 [102-103], A/HRC/WGAD/2020/35, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/254/89/PDF/G2025489.pdf?OpenElement>.
[42] *AS v Minister for Immigration and Border Protection* (2016) 312 FLR 67, 76 [37] (Warren CJ, Osborn and Beach JJA) ('*AS*').
[43] *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ).
[44] *Coco v R* (1994) 179 CLR 427, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ).
[45] E.g. *SGS v Minister for Immigration and Border Protection* (2015) 34 NTLR 224, 233 [23] (Hiley J).
[46] *Migration Act 1958* (Cth) s 189.
[47] *Migration Act 1958* (Cth) s 198AD.
[48] *Migration Act 1958* (Cth) s 198AE.

or granted a visa.[49] In practice, substantial delays in processing protection claims, and harsh detention conditions, encourage detainees to return "voluntarily" to their home States.[50] Further, an unauthorised maritime arrival generally is barred from making a valid visa application[51] unless the Minister determines that this bar should be lifted.[52]

An additional source of restrictions that, on their face, appear to limit the use of immigration detention of unaccompanied children is located in the *Immigration (Guardianship of Children) Act 1946* (Cth) (**the Guardianship Act**). Section 6(1) assigns to the Minister for Immigration, or an authorised delegate, guardianship of all unaccompanied non-citizen children who arrive unlawfully in Australia. As guardian, the Minister assumes the 'same rights, powers, duties, obligations and liabilities as a natural guardian of the child'.[53] Consistently with Article 3(1) of the *Convention on the Rights of the Child* (**CRC**),[54] to which Australia is a party, the Minister has a fiduciary duty to act in the child's best interests.[55]

The same Minister, however, also exercises the powers to determine the refugee status of asylum-seeker children applying for protection in Australia[56] and to detain, transfer, and remove such children from Australia.[57] This conflict of interest produces outcomes where, for instance, the Minister determines that a child should be placed in immigration detention but where such detention is not in the child's best interests. The conflict also arises in the context of decisions regarding whether a child should be exempt from regional transfer. Departmental policy regarding pre-transfer assessments acknowledges that the best interests of an unaccompanied child are 'a' primary consideration but explicitly states these interests may be outweighed by other factors.[58]

Sub-sections 6(1) and (2)(b) of the Guardianship Act provide that the Minister's guardianship ceases when a child 'leaves Australia permanently' and is transferred from Australia to an RPC such as Nauru. The Nauruan Minister for Justice and Border Control is then appointed the legal guardian of every unaccompanied minor arriving in Nauru.[59] One legislative safeguard that ostensibly protects the interests of a child under the

[49] *Migration Act 1958* (Cth) s 196(1).
[50] Jo Chandler, Guardian, 11 November 2019, *"Designed to torture": asylum seeker chooses Iranian prison over PNG detention centre*, <https://www.theguardian.com/world/2019/nov/10/designed-to-torture-asylum-seeker-chooses-iranian-prison-over-png-detention-centre>.
[51] *Migration Act 1958* (Cth) s 46A(1).
[52] *Migration Act 1958* (Cth) s 46A(2).
[53] *Immigration (Guardianship of Children) Act 1946* (Cth) s 6(1).
[54] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[55] *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497, 511 (Kirby P, Priestley JA agreeing at 515-516); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 141 (Dawson J); *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 426-427 (McHugh J).
[56] *Migration Act 1958* (Cth) ss 29, 30, 35A, 36.
[57] *Migration Act 1958* (Cth) ss 189, 198AD, 200.
[58] Department of Home Affairs (Cth), *Procedures Advice Manual 3*: Regional processing – Pre-transfer assessment.
[59] *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) s 15.

Australian Minister's guardianship is the requirement for the Minister to give written consent prior to the child being removed from Australia.[60]

However, this safeguard is drafted as a presumption against refusal of Ministerial consent. The Minister 'shall not refuse' to grant consent unless satisfied that it 'would be prejudicial to the interests of the non-citizen child'.[61] This negative formulation imposes no positive duty on the Minister to determine that removal from Australia is in the child's best interests.

According to the Department of Home Affairs, as of 31 March 2023, there are no children in closed detention.[62] However, Australia has had a long history of detaining children in closed detention both onshore and offshore in regional processing countries.

In March 2014, there were 584 children in detention on mainland Australia, 305 at Christmas Island and 179 at Nauru.[63] At this time, most children in detention were of primary school age, followed by pre-schoolers aged 2-4.[64] As of 30 April 2023, there are 95 children in community under residence determinations and 1367 on bridging visas.[65] While RACS welcomes the Department's reporting that there are no children held in closed immigration detention, ours laws maintain that should a child arrive in Australia without a visa, they would be subject to mandatory detention under section 189 of the *Migration Act*. Should they come to Australia as an unlawful maritime arrival, they would also be liable to removal to Nauru for processing under the legislative package of Operation Sovereign Borders.

We refer to our submissions made to the Committee on the Migrant Workers and Committee on the Rights of Child, Office of the United Nations High Commissioner for Human Rights.[66] We continue to support those submissions and consider them to be useful for the context of this submission. Specifically, RACS puts forward that Australia has not taken adequate steps to safeguard the human rights of children and unaccompanied minors seeking asylum. Some of the key rights relevant to children and unaccompanied minors seeking asylum in Australia under the CRC include:

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[60] *Immigration (Guardianship of Children) Act 1946* (Cth) s 6A(1).
[61] *Immigration (Guardianship of Children) Act 1946* (Cth) s 6A(2).
[62] Department of Home Affairs, 30 May 2023, *Immigration Detention and Community Statistics Summary April 2023* 10, <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-april-2023.pdf>.
[63] Australian Human Rights Commission, 2014, *The Forgotten Children: national Inquiry into Children in Immigration Detention 2014* 51, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/national-inquiry-children-immigration-detention-0>.
[64] Ibid at 53-4.
[65] Department of Home Affairs, 30 May 2023, *Immigration Detention and Community Statistics Summary April 2023* 4, <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-april-2023.pdf>.
[66] RACS, 16 November 2017, Submission to the *Joint General Comment – No. 4 of the CMW and No. 23 of the CRC (2017) – on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return,* <https://www.ohchr.org/en/documents/general-comments-and-recommendations/joint-general-comment-no-4-cmw-and-no-23-crc-2017>.

- legal guardian(s) of a child must have as the primary consideration the best interests of the child (Art 3);
- children should not be detained unlawfully or arbitrarily (Art 37(b));
- children must only be detained as a measure of last resort and for the shortest appropriate period of time (Art 37(b));
- children in detention should be treated with respect and humanity, and in a manner that takes into account their age and developmental needs (Art 37(c));
- and children in detention should have the right to challenge the legality of their detention (Art 37(d)).
- children seeking asylum have a right to protection and assistance – because they are an especially vulnerable group of children (Art 22);
- children have a right to family reunification (Art 10); and
- children who have suffered trauma have a right to rehabilitative care to promote physical and psychological recovery and social reintegration (Art 39).

The Australian Human Rights Commission's (the **AHRC**) findings in the *National Inquiry into Children in Immigration Detention* (2014) provide a startling image of the impact which mandatory detention has on children. The inquiry found that "prolonged, mandatory detention of asylum seeker children causes them significant mental and physical illness and developmental delays, in breach of Australia's international obligations."[67] We refer to the 'snapshot' of findings made by the AHRC:

- "Children in immigration detention have significantly higher rates of mental health disorders compared with children in the Australian community.
- Both the former and current Ministers for Immigration agreed that holding children for prolonged periods in remote detention centres, does not deter people smugglers or asylum seekers. There appears to be no rational explanation for the prolonged detention of children.
- The right of all children to education was denied for over a year to those held on Christmas Island.
- The Minister for Immigration and Border Protection, as the guardian of unaccompanied children, has failed in his responsibility to act in their best interests.
- The Commonwealth's decision to use force to transfer children on Christmas Island to a different centre breached their human rights.

[67] Australian Human Rights Commission, 2014, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014* 13, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/national-inquiry-children-immigration-detention-0>.

- The numerous reported incidents of assaults, sexual assaults and self-harm involving children indicate the danger of the detention environment.
- At least 12 children born in immigration detention are stateless, and may be denied their right to nationality and protection.
- Dozens of children with physical and mental disabilities are detained for prolonged periods.
- Some children of parents assessed as security risks have been detained for over two years without hope of release.
- Children detained indefinitely on Nauru are suffering from extreme levels of physical, emotional, psychological and developmental distress."[68]

Since the above findings by AHRC in its *National Inquiry into Children in Immigration Detention report* in 2014, the Australian government has continued the practice of mandatory detention of children including offshore in Nauru, with no options for resettlement in Australia. In 2016 the Guardian published more than 2,000 leaked reports from the RPC on Nauru.[69] Dubbed 'the Nauru files', these documents set out the assaults, sexual abuse, abuse, attempts of self-harm and poor living conditions experienced by children seeking asylum. Children were disproportionately represented in the reports; 51.3% of incident reports involved children though they only constituted 18% of the population in detention during the period for which the files related to (May 2013 to October 2015).[70] This included seven reports of sexual assault of children, 59 reports of assault on children, 30 of self-harm involving children and 159 reports of threatened self-harm involving children.[71] Detention of children offshore continued until February 2019 here the last child was transferred out of Nauru.[72] Still, the Minister continued to detain two young children from a Tamil family (widely referred to as the Biloela family) in closed detention for a number of years. For an entire year, the family were detained as the only occupants of the detention facility on Christmas Island at the cost of seven million dollars to Australian taxpayers.[73] At only two years old, one of the children received medical attention to remove four teeth and treat another four due to rotting, believed to be caused by a lack of access to fresh food.[74] The family were not released from closed detention

[68] Ibid page 13.
[69] Paul Farrell et al., 'The Nauru files: cache of 2,000 leaked reports reveal scale of abuse of children in Australian offshore detention', The Guardian (online, 10 August 2016) <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>.
[70] Nick Evershed et al. 'The lives of asylum seekers in detention detailed in a unique database', The Guardian (online, 10 August 2016) <https://www.theguardian.com/australia-news/ng-interactive/2016/aug/10/the-nauru-files-the-lives-of-asylum-seekers-in-detention-detailed-in-a-unique-database-interactive>.
[71] Ibid.
[72] 'Last remaining asylum seeker children on Nauru to leave the island for the US, Scott Morrison confirms' (online, 3 February 2019) <https://www.abc.net.au/news/2019-02-03/nauru-last-asylum-seeker-children-to-leave-detention-pm-says/10774910>
[73] 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).
[74] 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-teethsurgically-removed/ed21vjmnu>

until June 2021 after the youngest child's health deteriorated to the point of requiring urgent hospitalisation. [75]

Without a fundamental change to our legislative framework to protect the rights of children seeking asylum and their families, the risk of these human rights violations recurring is ever present.

Conditions of detention

The poor conditions across Australia's immigration detention facilities have been well documented. From as early as 2012 various UN bodies have maintained that the standards at RPCs used for offshore processing fell markedly short of humane conditions. The UNHCR noted that the transfer of people seeking asylum to PNG and Nauru did not extinguish Australia's legal responsibility for the protection of those impacted by the policy.[76] Reporting following the UNHCR missions to Nauru and PNG voiced disapproval of the "deplorable" conditions for refugees and people seeking asylum held at the RPCs. Such conditions have also been recorded by the Committee Against Torture,[77] the Human Rights Council,[78] the Committee on the Rights of the Child,[79] the Committee on the Elimination of Discrimination against Women,[80] the Phillip Moss review,[81] Robert Cornall

[75] Al Jazeera Staff, 'Three Murugappan family members given temporary Australia visas', Refugees News (Online Article, 23 June 2021) .
[76] UNHCR, 12 July 2013, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11-13 June 2013* 5, <https://www.refworld.org/pdfid/51f61ed54.pdf?_gl=1*m9523e*_rup_ga*MTY0NjgyNDYwMy4xNjgzNTg5NTY4*_rup_ga_EVDQTJ4LMY*MTY4ODg5Mzc5OS4xNC4xLjE2ODg4OTM5MjUuMC4wLjA>.
[77] Committee against Torture, 23 December 2014, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, CAT/C/AUS/CO/4-5, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsoQ6oVJgGLf6YX4ROs1VbzHbjPhQXE%2B0WWmIrYFRkrdSVDi646tTx7wQu2ScGTgf%2BJVP%2Bu4P9Ry9gI0FCCIcBVuKEcWc%2Fk%2FXTL4sM%2BWHda%2Fd>.
[78] Human Rights Council, 13 November 2020, *Compilation on Australia* 10[92], A/HRC/WG.6/37/AUS/2, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsoQ6oVJgGLf6YX4ROs1VbzHbjPhQXE%2B0WWmIrYFRkrdSVDi646tTx7wQu2ScGTgf%2BJVP%2Bu4P9Ry9gI0FCCIcBVuKEcWc%2Fk%2FXTL4sM%2BWHda%2Fd>.
[79] Committee on the Rights of the Child, 28 October 2016, *Concluding observations on the initial report of Nauru*, CRC/C/NRU/CO/1, <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsttsBjyX%2FwSGIMoHUf7j8vAqB2RlzeskJ9RkdSj7%2FtqBwpgLIFLLzbAx3w8wNlhTSypD0vqh5A8L6kBphroDj38khdk4YJblicnbRkVASmvt>.
[80] Committee on the Elimination of the Discrimination against Women, 25 July 2018, *Concluding observations on the eighth periodic report of Australia* [53], CEDAW/C/AUS/CO/8, <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsgcjdm0xgERNaIXh22nhTUm5OpQrNrl4Ci8qYwlOTk4TfVt3axFLnaCi4v3wbkWktgQK5ZQHB5uXt9bKJxBel0RV%2B9U29%2BoamoXUKoKJguOH>.
[81] Philip Moss, 6 February 2015, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru*, <https://www.homeaffairs.gov.au/reports-and-pubs/files/review-conditions-circumstances-nauru.pdf>.

reviews,[82] in senate reports following parliamentary inquiries,[83] and the reports of civil society organisations including Amnesty International[84] and Save the Children.[85] These conditions include, but are not limited to:

- Overcrowded living arrangements;
- Acute isolation and restrictions on movement;
- Inadequate provisions to manage the heat;
- A lack of privacy;
- Limited access to key services including legal support, education and health services;
- Acts of intimidation;
- Exposure to the risk of physical violence and self-harm; and
- Sexual exploitation in exchange for access to amenities.

The Ombudsman[86] and AHRC[87] have also reported on the conditions in onshore immigration detention facilities as part of their oversight function. Most recently, the AHRC released a damning report on the use of hotels as Alternative Places of Detention (**APOD**). Though the use of hotels as APODs may be appropriate on a temporary basis, the AHRC found that they had been regularised as part of Australia's detention network.

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[82] Robert Cornall AO, September 2013, *Report To The Secretary Department Of Immigration And Border Protection: Review into Allegations Of Sexual And Other Serious Assaults At The Manus Regional Processing Centre*, <https://www.homeaffairs.gov.au/reports-and-pubs/files/review-manus-offshore-processing-centre-publication-sep2013.pdf>; Robert Cornall AO, 23 May 2014, *Report To The Secretary Department Of Immigration And Border Protection: Review Into The Events OF 16-18 February 2014 At The Manus Regional Processing Centre*, <https://www.homeaffairs.gov.au/reports-and-pubs/files/review-robert-cornall.pdf>.

[83] The Senate Legal and Constitutional Affairs References Committee, December 2014, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report> ; The Senate Legal and Constitutional Affairs References Committee, May 2016, *Conditions and treatment of asylum seekers and refugees at the regional processing centres in the republic of Nauru and Papua New Guinea Interim report*, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Offshore_RPCs/Interim_Report>; The Senate Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, August 2015, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru*, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report>; The Senate Legal and Constitutional Affairs References Committee, April 2017, *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*, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report>.

[84] Amnesty International, 11 December, 2013, *Australia: This is breaking people: Human rights violations at Australia's asylum seeker processing centre on Manus Island, Papua New Guinea*, <https://www.amnesty.org/en/documents/ASA12/002/2013/en/>; Amnesty International, 12 May 2014, *Australia: This is still breaking people: Update on human rights violation at Australia's asylum seeker processing centre on Manus Island, Papua New Guinea*, <https://www.amnesty.org/en/documents/asa12/002/2014/en/>; Amnesty International, 17 October 2016, *Australia: Island of Despair: Australia's "processing" of refugees on Nauru*, <https://www.amnesty.org/en/documents/asa12/4934/2016/en/>.

[85] Save the Children Australia, September 2016, *At What Cost? The Human, Economic and Strategic Cost of Australia's Asylum Seeker Policies and the Alternatives*, <https://resourcecentre.savethechildren.net/pdf/at-what-cost-report-final.pdf/>.

[86] Commonwealth Ombudsman, *Monitoring places of detention – OPCAT*, <https://www.ombudsman.gov.au/industry-and-agency-oversight/monitoring-places-of-detention-opcat>.

[87] Australian Human Rights Commission, *Immigration detention reports*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/immigration-detention-reports-and-photos?_ga=2.22292091.1743920799.1688897036-788739480.1685505915>.

Hotels are typically (though not exclusively) used as APODs for refugees and people seeking asylum subject to offshore processing who were then transferred to Australia (known as **transitory persons**). While in Australia, they are also subject to mandatory immigration detention, and are required to return to a regional processing country once the temporary purpose for which they were transferred is completed. The AHRC reported on conditions in these APODs including a lack of fresh air, minimal to no access to outdoor space, a lack of privacy, limited opportunities to participate in religious activities, significant restrictions on movement, the use of restraints, the provision of contaminated food and inadequate health care.[88]

The AHRC quoted an employee of the organisations supporting current and former detainees who stated that many of their clients:

> 'have primary traumatic experiences of refugee torture and trauma prior to arrival in Australia, which may be the initial cause of symptoms, it is the secondary trauma caused by the detention environment and related systemic issues that has further exacerbated, perpetuated and prolonged clients' psychiatric presentations and lack of treatment responsiveness'.[89]

One of the individuals subject to this detention arrangement challenged the legality of hotel detention in the case *Azimitabar v Commonwealth of Australia.*[90] While Murphy J concluded that the policy was ultimately lawful, he remarked:

> 'That should not, however, be understood as my approving the immigration detention the applicant was required to endure. I can only wonder at the lack of thought, indeed lack of care and humanity, in detaining a person with serious psychiatric and psychological problems in the Hotels for 14-months, primarily in a hotel room with a window that would only open 10cm, and for most of the time without access to an outdoor area to breathe fresh air or feel the sun on his face. For most of the time he was held in the Mantra Hotel he was restricted to his room, to the third floor of the hotel, and to the basement area when having meals. Anyone who endured even two weeks of hotel quarantine during the COVID-19 pandemic would surely understand how difficult that must have been. As a matter of ordinary human decency, the applicant should not have been detained for such a period in those conditions, particularly when he was suffering from PTSD and a major depressive episode. But the decision in this case does not turn on the humanity of the applicant's detention; it is about whether the Minister had power under the Act

[88] Australian Human Rights Commission, June 2023, *The Use of Hotels as Alternative Places of Detention (APODs)*, <https://humanrights.gov.au/sites/default/files/document/publication/final_version_-_the_use_of_hotels_as_alternative_places_of_detention_apods_2023_0.pdf>.

[89] Ibid at 19.

[90] *Azimitabar v Commonwealth of Australia* [2023] FCA 760.

> to approve the Hotels as places of immigration detention, and therefore to detain the applicant as he was. I consider the Minister had (and has) power to do so'.[91]

Poor conditions in immigration detention are exacerbated by the protracted lengths of time in which people are detained, which together can have disastrous impacts on an individual's physical and mental health. This can amount to cruel and inhuman treatment that breaches Australia's obligations per the CAT and is inconsistent with international best practice for detention. In the absence of formal rights protections in this space, our justice system has deemed this cruelty to be lawful.

[91] *Azimitabar v Commonwealth of Australia* [2023] FCA 760, [5] (Murphy J).

Operation Sovereign Borders

In September of 2013, the Australian government implemented Operation Sovereign Borders (OSB).[92] A "military-led" operation situated in the Department of Home Affairs [93], its original mission statement was to 'stop the entry of detected [Suspected Illegal Entry Vessels] into Australian territory."[94] Currently, OSB states that "combatting people smuggling", "preventing people from risking their lives at sea", and "protecting Australia's borders" are its primary purposes.[95]

OSB utilises a joint agency taskforce.[96] To achieve OSB's purposes, the 'Detection, Interception, and Transfer Task Group' interdicts migrants arriving by boat with the goal of turning them away from Australia and returning them to their country of departure or country of origin.[97] This is achieved by turn backs (removing a vessel from Australian waters to return it just outside the territorial seas of the country of departure), take backs (collaboration with the country of departure to return passengers and crew, either by plane or an at-sea transfer) and assisted returns (where a vessel is in distress).[98]Anyone who is not turned or taken back to their country of departure would be sent to a regional processing country, and barred from ever settling in Australia.

Australia's boat interception policies lack "adequate consideration of an individual's need for protection", and therefore divert from the intention of the 1951 Refugee Convention and risk a breach of the principle of *non-refoulement*. [99] Should a person seeking asylum be returned to a place where they fear persecution, this can also constitute a breach of Australia's obligations per the *International Covenant on Civil and Political Rights*, and the *Convention Against Torture*, both of which Australia is a party to.[100] In addition to the known and unknown harms endured out at sea, Australia, through its turnback policy, knowingly puts refugees and people seeking asylum at risk of potential serious harm upon return to their country of origin. This results not only in violations of *non-refoulement*, but could also constitute an "excessive use of force by proxy", according to Special

[92] Refugee Council, 1 March 2021, *Australia's asylum policies,* <https://www.refugeecouncil.org.au/asylum-policies/4/>.
[93] Australian Government, Operation Sovereign Borders (Joint Agency Taskforce), <https://www.directory.gov.au/portfolios/home-affairs/department-home-affairs/operation-sovereign-borders-joint-agency-task-force>.
[94] The Coalition's Operation Sovereign Borders Policy, July 2013, <https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2616180/upload_binary/2616180.pdf;fileType=application%2Fpdf#search=%22library/partypol/2616180">.
[95] Australian Government, Operation Sovereign Borders, <https://osb.homeaffairs.gov.au/home>.
[96] Australian Government, Operation Sovereign Borders, <https://osb.homeaffairs.gov.au/home/Files/OSB-organisational-chart.pdf>.
[97] Kaldor Centre for International Refugee Law, April 2019, *Factsheet: Turning Back Boats*, <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Factsheet_Turning%20back%20boats_Apr2019.pdf>.
[98] Refugee Council of Australia, 30 June 2023, *Statistics on boat arrivals and boat turnbacks*, <https://www.refugeecouncil.org.au/asylum-boats-statistics/2/>.
[99] UNHCR, 23 July 2015, *UNHCR Position: Interception and turn back of boats carrying asylum-seekers*, <https://www.unhcr.org/au/media/interception-and-turn-back-boats-carrying-asylum-seekers>; see also, *Convention And Protocol Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 33.
[100] *International Covenant on Civil and Political Right*, opened for signature 16 December 1966, 72 UNTS 1976 (entered into force 23 March 1976) art 7; *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) art 3.

Rapporteur of the Human Rights Council Agnes Callamard.[101] For example, at least one person returned to Sri Lanka has claimed being tortured, and multiple individuals returned to Vietnam have been imprisoned for fleeing the country.[102]

The government has concealed much of its actions surrounding OSB by heavily restricting access to information regarding its "on-water operations".[103] At its inception, weekly updates were provided as to the implementation of OSB. However, these updates fell from weekly to monthly. [104] The quantity of information and its meaningfulness also diminished.[105] The current Minister for Home Affairs, Clare O'Neil MP, decried the lack of access to information of OSB actions back in 2014. In an address to Parliament, she referred to the provision of information as "fundamental to democracy" and warned that a government working under the shadow of secrecy risks blatantly running afoul of human rights.[106] In 2015, the government enacted the *Australian Border Force Act,* which further clamped down on OSB secrecy by implementing a penalty of two years imprisonment for any unauthorised disclosure of information.[107]

The 'militant secrecy' shrouding OSB limits an understanding of the true nature and severity of this policy.[108] Still, the few accessible accounts of its implementation have highlighted the dangers it poses to the lives of refugees and people seeking asylum. Some reports have contended that people seeking asylum have been transferred to "lifeboats or 'wooden fishing' boats"[109] before being turned back, or that boats have run out of petrol on the return trip[110], subjecting people to more dangerous conditions out at sea. These lifeboats and wooden boats have been purchased by the Australian government for the purpose of boat turn backs.[111] In 2014, the Australian Navy intercepted 157 people from Sri Lanka who were seeking asylum and attempted to

[101] Agnes Callamard, 15 August 2017, *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions* [33], UN Doc A/72/335,<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/258/06/PDF/N1725806.pdf?OpenElement>.
[102] Kaldor Centre for International Refugee Law, April 2019, *Factsheet: Turning Back Boats*,<https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Factsheet_Turning%20back%20boats_Apr2019.pdf>.
[103] Ibid.
[104] Clare O'Neil MP, 25 February 2014, Adjournment Asylum Seekers and Truth, Timestamp 1:24, <https://www.youtube.com/watch?v=ym61tp8AAmc>.
[105] Ibid.
[106] Ibid.
[107] *Australian Border Force Act* (2015) [42] <https://www.legislation.gov.au/Details/C2020C00202>.
[108] Madeline Gleeson, virtual panel discussion transcription 7 July 2021, *What is occurring in the seas north and west of Australia? We have no way of knowing*, <https://www.kaldorcentre.unsw.edu.au/news/ what-occurring-seas-north-and-west-australia-we-have-no-way-knowing#:~:text=It%20is%20thus%20implausible%20that%20not%20a%20single,flee%20again%20and%20be%20recognised%20as%20refugees%20elsewhere>.
[109] Felipe Gonzalez Morales, 12 May 2021, *Report on means to address the human rights impact of pushbacks of migrants on land and at sea* [72], UN Doc A/HRC/47/30, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/106/33/PDF/G2110633.pdf?OpenElement>.
[110] Ben Doherty, Guardian, 30 October 2017, *Australia's asylum boat turnbacks are illegal and risk lives, UN told*, <https://www.theguardian.com/australia-news/2017/oct/30/australias-asylum-boat-turnbacks-are-illegal-and-risk-lives-un-told>.
[111] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, 20 October 2014, *Official Committee Hansard: Budget Estimates*, Michael Pezzullo at 166, <https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/e0ac4873-6e45-47ec-b82f-7eb06a2dd45f/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2014_10_20_2981_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/e0ac4873-6e45-47ec-b82f-7eb06a2dd45f/0000%22>.

transfer them to India. Ultimately, they were taken to the Nauruan RPC, but not before being held out at sea for 29 days with no knowledge of what was to befall them. In another instance it was alleged that Australian officials paid around $40, 000 in cash to the crew of a vessel intercepted in Australian water on route to New Zealand to return to Indonesia.[112]

Updated totals of those turned or taken back are difficult to come by. Data gathered from Senate estimates and monthly reporting by the ABF indicate that since December 2013 there have been a total of 1,123 people recorded to have been returned to their country of departure.[113] The opacity of the operation makes it difficult to scrutinise how compliant Australia is with our international obligations when conducting what they refer to as "safe" returns.[114] What is clear is that per international refugee and human rights law, Australia must afford people seeking asylum with an opportunity to raise their protection claims as part of a full, fair and individualised refugee status determination (**RSD**) process. It is difficult to imagine how such processes can be conducted at sea. Indeed, while those "taken back" to their country of departure are subject to some kind of basic procedures to determine whether they engage *non-refoulement* obligations (referred to as enhanced screening)[115] it is not clear whether similar procedures, if any, are in place for those intercepted and "turned back".

OSB also exacerbates Australia's externalisation and securitisation of protection obligations.[116] Externalisation occurs when a State evades its international obligations by denying asylum-seekers and refugees entry into the State, "and/or [denying them] from being able to claim or enjoy protection there."[117] The policies of boat turn backs and of offshore processing have attempted to shirk the international obligations owed by Australia to people seeking asylum by externalising them outside our territory.[118] This movement towards analysing and framing government policy regarding the issue of forced migration through lenses of national security and militarisation has reinforced a politic of fear around refugees and people seeking asylum. The salience of framing people seeking asylum as a threat to national security has "opened avenues for the de facto

[112] Amnesty International, 28 October 2015, *Australia: By hook or by crook – Australia's abuse of asylum-seekers at sea* 17, <https://www.amnesty.org/en/documents/ASA12/2576/2015/en/>.
[113] Refugee Council of Australia, 30 June 2023, *Statistics on boat arrivals and boat turnbacks*, <https://www.refugeecouncil.org.au/asylum-boats-statistics/2/>.
[114] Australian Border Force, 30 June 2023, *Operation Sovereign Borders Monthly Update: May 2023*, <https://www.abf.gov.au/newsroom-subsite/Pages/Operation-Sovereign-Borders-Monthly-Update-May-2023-30-06-2023.aspx>.
[115] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Transcript, 25 May 2015, *Budget Estimates: Official Committee Hansard*, Michael Manthrope at 109, <https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/0c5973fa-5b41-457f-af39-57df2971a205/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2015_05_25_3493_Official.pdf;fileType=application%2Fpdf#search=%222010s%20legal%20and%20constitutional%20affairs%20legislation%20committee%202015%2005%2025">.
[116] UNHCR, 24 January 2022, *Legal Publications: Externalisation*, <https://www.unhcr.org/au/publications/externalisation>.
[117] Ibid.
[118] Ibid.

resurgence of racially charged xenophobic debate."[119] Securitising asylum allows governments to justify the inadequate treatment of refugees and people seeking asylum on the basis of defence or border protection. The use of this narrative undermines the humanitarian effort to resettle refugees and people seeking asylum in safety, and negatively impacts their unalienable right to life with dignity.[120]

[119] K.J. Matthews, 2018, *The securitization of asylum in Australia: Delineating endogenous and exogenous causes* 110 <https://api.research-repository.uwa.edu.au/ws/portalfiles/portal/32928009/THESIS_DOCTOR_OF_PHILOSOPHY_MATTHEWS_Kane_Jamen_2018.pdf>.
[120] Ibid at 257.

Temporary Protection Scheme

The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Legacy Caseload Act) reintroduced a temporary protection scheme through the return of Temporary Protection Visas (**TPVs**) and introduction of Safe Have Enterprise Visas (**SHEVs**). Despite being announced on 5 December 2014, the new temporary protection scheme retroactively applied to people who arrived by boat from 13 August 2012 to 1 January 2014.[121] It specifically targeted a group of approximately 30,000 people seeking asylum in this period, referred to as the 'Legacy Caseload'. The maintenance of a temporary protection system for those who arrived unauthorised, subsequently created a two-tiered system of protection in Australian society, where some refugees will have fewer rights and comparatively less access to crucial services than those who entered Australia regularly.

RACS would like to reiterate that discrimination on the basis of an applicant's mode of arrival is inconsistent with the rights enshrined in the *Refugee Convention 1951.*[122] Article 31(1) specifically stipulates that States Parties shall not penalise refugees who enter their territory without authorisation.[123] However, this cohort was treated distinctively, and arguably more punitively, from those who sought asylum in Australia after arriving on a valid visa. Members of the legacy caseload were trapped in protracted uncertainty, being granted protection for only a period of 3 or 5 years. The temporariness of the protection offered kept refugees in a state of insecurity with a looming fear of repatriation to their country of origin.

This has led to higher levels of anxiety, depression, and cases of post-traumatic stress disorder (**PTSD**) when compared with people seeking asylum that have been granted permanent protection visas (**PPVs**).[124] In research conducted by the University of New South Wales there were findings that showed refugees holding TPVs have a 700% increase in risk for developing depression and PTSD than refugees who are granted PPVs.[125] The process of reassessment can also detrimentally hinder a person's ability to integrate into their community and rebuild their life after forced displacement. This is further exacerbated by the bars the conditions of these temporary visas that prevent them from reuniting with family members. Protracted family separation has been normalised under the for those in the Legacy Caseload, even for immediate family members such as

[121] UNSW Sydney, The 'Legacy Caseload', *UNSW Sydney* (16 November 2020) https://www.kaldorcentre.unsw.edu.au/publication/legacy-caseload
[122] *Convention relating to the Status of Refugees,* opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).
[123] *Convention relating to the Status of Refugees,* opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 31(1).
[124] "Temporary Protection Visas and Safe Haven Enterprise Visas', *UNSW Sydney* (2 November 2020) https://www.kaldorcentre.unsw.edu.au/publication/temporary-protection-visas
[125] Senate Legal and Constitutional References Committee, Parliament of Australia, *Administration and operation of the Migration Act 1958* (2006), para 8.33.

partners and minor children.[126] Prolonged family separation also increases the risk of constructive refoulment, which is not in line with Australia's international legal obligations to refugees. By deliberately denying a person the chance to reunite with their family, some may feel they have no choice but to return to a territory where they would be at risk of persecution rather than remain separated.[127]

As such, this scheme infringes on the rights of the family protected in the ICCPR.[128] The ICCPR specifically advocates for the 'widest possible protection and assistance' for the family group.[129] It further violates Australia's commitments found in article 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[130] with respect to the mental health impacts of temporary protection. The following section specifically details how the flawed system of RSD applied to the Legacy Caseload risks breaching *non-refoulement* obligations.

"Fast-tracking" refugee status determination

In late 2014, the Coalition government established a fast-track process for assessing the claims for protection made by people seeking asylum in the Legacy Caseload.[131] Members of this caseload were subject to a RSD process characterised by a lack of funding for legal assistance, translation services and interpreters for all, strict deadlines with severe time pressures, withdrawn income support, and restrictions on their appeal rights. If an applicant received a negative Departmental decision, their case would be referred to the Immigration Assessment Authority (**IAA**) for an "on the papers" review on the existing material available to the Department. Applicants would only be able to provide new information to the IAA in exceptional and limited circumstances. New information must be substantiated by an explanation of no longer than 5 A4 pages which explains why the information could not have been given to the Department before the decision, why it is personal credible information and why it is relevant to the review.[132] In comparison, non-fast-tracked applicants would be able to apply for a review of the decision by the Administrative Appeals Tribunal. Here, they can provide new information

[126] Australian Human Rights Commission, 'Lives on hold: Refugee and asylum seekers in the 'Legacy Caseload' (2019) < https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy#:~:text=This%20report%20identifies%20a%20range,a%20prolonged%20period%20of%20time> p. 13.
[127] UNHCR, the UN Refugee Agency, 'Glossary' https://www.unhcr.org/glossary/#refoulement
[128] "Temporary Protection Visas and Safe Haven Enterprise Visas', *UNSW Sydney* (2 November 2020) https://www.kaldorcentre.unsw.edu.au/publication/temporary-protection-visas
[129] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 8, available at: https://www.refworld.org/docid/3ae6b36c0.html
[130] Australian Human Rights Commission, 'What are the Commissions concerns about TPVs?' https://humanrights.gov.au/our-work/4-what-are-commissions-concerns-about-tpvs [26 June 2023]
[131] The term 'legacy caseload' refers to approximately 30,000 people seeking asylum who arrived in Australia by boat between 13 August 2012 and 1 January 2014. This cohort were barred from making an application for protection for up to four years after arriving in Australia.
[132] Immigration Assessment Authority, Updated 31 March 2023, *The Review Process,* <https://www.iaa.gov.au/the-review-process/faqs/new-information>.

to a decision-maker that stands in the shoes of the Department and can also access important procedural fairness safeguards.

Case study: no 'exceptional circumstances' to provide new information

Balan arrived by boat from Sri Lanka in 2013. He lodged a substantive visa application in 2017. Later that year, the Department notified Balan that his visa application had been refused. The application was referred to the IAA for review.

Balan submitted documents to the IAA with new information about his fears of persecution. This information related to his involvement in the Sri Lankan civil war and his experiences of physical abuse.

Balan explained that he had not initially disclosed this information due to fears that he may be detained or deported.

The IAA did not consider Balan's new claims, as the decision-maker was not satisfied that there were exceptional circumstances to justify considering the new information.

In 2018, the IAA affirmed the Department's decision to refuse Balan's visa application.

* Names and other personal identifiers have been changed in case studies in order to protect confidentiality.

The model of the IAA's "on the papers" assessment, and strict conditions when accepting new information relies on the assumption that evidence provided before the Department's decision was made represents the full extent of an applicant's claims. RACS' Legal Help for Refugees Clinic has supported people impacted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* since its passage. In our experience and the overwhelming experience of our clients, this assumption is deeply flawed for a number of reasons including:

- The time restraints and strict deadlines that this cohort was subject to limited their ability to provide application that canvassed the full extent of their protection claims. Many applicants were issued a notice requiring them to apply within 60 or 30 days. Another example of this is the 1 October 2017 deadline where the then Minister for Immigration, Peter Dutton announced that if people did not apply for a protection visa by 1 October 2017, they would be deemed to have forfeited any claim for protection, be barred from any other visa in Australia and returned to their countries of origin.[133] The process of applying for protection in Australia is complex

[133] Ibid

and detailed and requires that an applicant accurately recall extensive details concerning their life history. Such a significant process necessitates that an applicant has sufficient time to receive legal advice, gather their evidence and thoroughly communicate claims for protection;

- The calculated withdrawal of funded legal assistance which coincided with these strict deadlines. This resulted in lengthy waiting periods for applicants and increased pressure on legal services to respond to this demand in light of looming deadlines;
- That applications are completed in English, which can act as a barrier for people seeking asylum who may not speak the language. Limited publicly funded interpreting and translation services also significantly undermine an applicant's ability to understand and articulate their claims for protection;
- The trauma typically experienced by people seeking asylum and the impact this has on their memory. It is well established that people seeking asylum globally experience multiple traumas before and during their arrival in the country where they are seeking protection.[134] Studies have revealed that trauma, particularly of the kind experienced by people seeking asylum, often leads to memory loss or gaps, loss of concentration, impairment in cognitive function and the deterioration of mental health.[135] For some people seeking asylum, the need to cope with past traumas may lead to avoidance, suppressing memories, or dissociation when prompted to recount their experience of these traumatic events.[136] This can explain why there may be a lack of detail, incoherence or gaps in an applicant's retelling of an event; and
- Stigma and shame, which can inhibit the disclosure of sensitive information that may form the basis of a protection claim. Stigma attached to the experience of sexual or gender-based violence may leave persons seeking asylum afraid or unwilling to share their experience for fear of lack of trust in authorities, fear of rejection, fear of serious harm as a reprisal or concerns about the confidentiality of information shared. People seeking asylum because of their diverse sexual orientation, gender identity, gender expression or sex characteristics (**SOGIESC**) may have been raised in cultures where their SOGIESC is considered shameful or taboo. This could foster a hesitance to express their SOGIESC verbally or

[134] Sanjida Khan, Sara Kuhn and Shamsul Haque, 'A Systematic Review of Autobiographical Memory and Mental Health Research on Refugees and Asylum Seekers' (2021) 12(1) *Frontiers in Psychiatry* 1, 2.
[135] Ibid 5; Philippe Charlier et al, 'Memory Recall of Traumatic Events in Refugees' (2018) 392(1) *The Lancet* 2170; Altaf Saadi et al, 'Associations Between Memory Loss and Trauma in US Asylum Seekers: A Retrospective Review of Medico-legal Affidavits' (2021) 16(3) *PLoS ONE* 1, 5.
[136] United Nations High Commissioner for Refugees (UNHCR) and the European Refugee Fund of the European Commission (2013) *Beyond Proof: Credibility Assessment in EU Asylum Systems,* p. 65 < https://www.unhcr.org/sites/default/files/legacy-pdf/51a8a08a9.pdf>.

physically, and even limit how readily they identify themselves as being someone with diverse SOGIESC.

Case study: challenges faced by Legacy Caseload applicants

Hamza arrived in Australia by boat in 2013, fleeing persecution based on his religion. In 2016, the Minister 'lifted the bar' to allow Hamza to apply for a substantive visa. Hamza prepared his application with the help of a friend, but did not have an opportunity to receive legal advice. His application included a series of photographs as evidence of his activities with a religious organisation.

After undergoing an interview with the Department, Hamza was notified that his application had been refused. The statement of reasons accompanying the refusal notification explained that the decision-maker did not believe that Hamza in fact held his claimed role within the religious organisation. His application was referred to the IAA for review.

Due to his limited English language skills, Hamza was unable to fully understand the statement of reasons. When the decision was eventually explained to him by a lawyer, Hamza approached the religious organisation in his country of origin, whose leaders wrote a letter corroborating his stated role. Hamza planned to provide the original copy of the letter to the IAA.

However, the IAA — without having interviewed Hamza — affirmed the primary decision before he was able to submit the letter as evidence. Even if Hamza had submitted the letter in time, it is unclear whether it would have been considered due to restrictions on the IAA's ability to consider new information.

Hamza's visa application is now considered 'finally determined' and he has no further options to remain in Australia, despite his ongoing fear of persecution.

* Names and other personal identifiers have been changed in case studies in order to protect confidentiality.

Merits review through the IAA has resulted in a greater proportion of refusals being upheld. In 2019-20 the IAA affirmed the Department's decision to refuse a protection visa in 94% of cases.[137] In 2020-21 91% of refusals were affirmed.[138] Comparatively, previous

[137] Administrative Appeals Tribunal, Annual Report 2019-20 (Report, 2020), 68 < https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2019-20-annual-report>.
[138] Administrative Appeals Tribunal, Annual Report 2020-21 (Report, 2021), 88 < https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2020-21-annual-report>.

systems of merits review overturned a refusal in 60-90% of protection visa matters.[139] It is crucial that applicants have access to a robust system of merits review, as subsequent options for appeal are limited to aspects of the decision infected by jurisdictional error. RACS holds concern for the 7, 268 people[140] still engaged in this process and are at risk of *refoulement* having had their protection claims assessed through a procedurally fraught system of RSD. There is also the risk that applicants who have made a Ministerial Intervention Request per s 48B of the *Migration Act 1958* would be subject to the fast-track process and potentially excluded from protection.

The 2023 announcement of the Resolution of Status (RoS) visa signals a much welcome pathway to permanent protection for many of the people who were impacted by the temporary protection scheme. People who held a Temporary Protections Visa (TPV) or Safe Haven Enterprise Visa (SHEV) before 14 February 2023 are eligible for a RoS visa. However, this announcement does not resolve but does not resolve the harms imbued in the scheme itself. Data presented by the Refugee Council Australia shows there are at least 6,756 people who *cannot* be granted a permanent visa under the new RoS conversion approach whom were assessed under this arbitrary and deeply flawed system, including:

- 2,425 people "whose TPV/SHEV visas have been refused without ongoing matters";
- 2,367 people "whose status has been resolved who cannot be granted a permanent visa" or "are unlikely to require a RoS visa"; and
- 1,964 people who have already departed Australia.[141]

Excluding fast-tracked applicants from accessing protection because of an ineffective system of claims assessment and discrimination on mode of arrival is inconsistent with the principles underpinning the Refugee Convention. The temporary protection scheme must be abolished and replaced with a fair and robust RSD process which grants permanent protection to those found to be refugees.

[139] Refugee Council of Australia, 'Fast tracking and 'Legacy Caseload' statistics', Refugee Council of Australia Statistics (Online Article)< https://www.refugeecouncil.org.au/fast-tracking-statistics/>.
[140] Refugee Council of Australia, 'Fast tracking and 'Legacy Caseload' statistics', Refugee Council of Australia Statistics (Online Article)< https://www.refugeecouncil.org.au/fast-tracking-statistics/>.
[141] 'Fast tracking and "Legacy Caseload" statistics', *Refugee Council of Australia* (Web Page, 22 May 2023) <https://www.refugeecouncil.org.au/fast-tracking-statistics/>.

Offshore Processing

Offshore processing is the transfer of persons seeking asylum in Australia to Regional Processing Centres not located on the Australian mainland.[142] The Australian Government has enforced the practice of offshore processing since 2001.[143] The practice fell out of favour with the government and temporarily concluded in 2008.[144] At the time, most of the remaining people detained in the Nauru processing centre were relocated to Australia.[145]

However, in 2012 the practice gained new popularity and political traction. [146] The Australian Government reopened the RPCs on Nauru and Manus Island in PNG to reinstated the transfer of people seeking asylum who arrived by boat.[147] What was envisaged as just a short-term 'circuit breaker to a current surge' in force has devolved into an enduring component of Australian asylum policy.[148]

From 13 August 2012 – 18 July 2013, about 1000 people were transferred to and detained in Nauru and PNG.[149] They were subject to a 'no advantage' policy, meaning that in order to be granted protection, they had to wait for the equivalent of the regional average wait-time in the region according to the UNHCR, a standard considered 'non-existent'.[150] While in Nauru and PNG, these individuals did not complete a refugee status determination and were eventually transferred back to Australia, where they had to wait until 2015 to claim asylum and begin the RSD process again.[151]

After 19 July 2013, people seeking asylum who arrived by boat were not only processed offshore but also banned from ever settling in Australia.[152] As discussed, the newly

[142] Madeline Gleeson and Natasha Yacoub, 2021, *Policy Brief - Cruel, costly and ineffective: The failure of offshore processing in Australia* 1, <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf>.
[143] Ibid.
[144] Madeline Gleeson and Natasha Yacoub, 2021, *Policy Brief - Cruel, costly and ineffective: The failure of offshore processing in Australia* 1, <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf>.
[145] Ben Doherty, Guardian, 10 August 2016, *a short history of Nauru, Australia's dumping ground for refugees*, <https://www.theguardian.com/world/2016/aug/10/a-short-history-of-nauru-australias-dumping-ground-for-refugees>
[146] Madeline Gleeson and Natasha Yacoub, 2021, *Policy Brief - Cruel, costly and ineffective: The failure of offshore processing in Australia* 1, <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf>.
[147] Legal and Constitutional Affairs References Committee, May 2016, *Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea – Interim report* 2.
[148] Australian Government, August 2012, *Report of the Expert Panel on Asylum Seekers* [3.45], <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/expert-panel-report.pdf>
[149] Kaldor Centre for International Refugee Law, 10 August, 2021, *Offshore processing: an overview*, < https://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-overview>.
[150] Madeline Gleeson and Natasha Yacoub, 'Policy Brief - Cruel, costly and ineffective: The failure of offshore processing in Australia' (2021) 2 <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf>
[151] Kaldor Centre for International Refugee Law, 10 August, 2021, *Offshore processing: an overview*, < https://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-overview>.
[152] Ibid

elected Abbott government implemented Operation Sovereign Borders in 2013.[153] While OSB focused on the turn back of people seeking asylum arriving by boat, those who could not be turned or taken back were sent to RPCs.[154] Between 19 July 2013 and the end of 2014, the Australian government detained over 2,650 people in Nauru and PNG.[155] In total, Australia removed about 4,180 refugees and people seeking asylum to Nauru and PNG from 2012 to 2014.[156]

This policy has resulted in what Special Rapporteur of the UN Human Rights Council François Crépeau described as "systemic human rights violations".[157] Reports of the conditions inside the RPCs are grim, and the grievances are numerous and varied. According to reports, the regional processing centres at Nauru and Manus Island exposed individuals detained there to many dangers, mistreatment, and health concerns, including:

- threats to life;
- torture or cruel, inhuman or degrading treatment or punishment;
- prolonged, indefinite and arbitrary detention;
- unlawful interference[s] in family and private life;
- gender-based violence and discrimination;
- violations of "many obligations owed to children"; and
- violation[s] of the principle of non-refoulment.[158]

This policy has claimed the lives and souls of those subject to it. At least 14 people have tragically lost their life, including through medical neglect and suicide.[159] This includes Omid Masoumali, who self-immolated before UNHCR officials during their official visit to Nauru in April 2016. In an inquest into his death, the Queensland Coroner concluded that Omid's death could have been avoided with the right medical care and that the mental

[153] Madeline Gleeson and Natasha Yacoub, 2021, *Policy Brief - Cruel, costly and ineffective: The failure of offshore processing in Australia* 3, <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf>.
[154] Ibid.
[155] Ibid.
[156] Human Rights Watch, 15 July 2021, *Australia: 8 Years of Abusive Offshore Asylum Processing*, <https://www.hrw.org/news/2021/07/15/australia-8-years-abusive-offshore-asylum-processing>.
[157] UN Human Rights Council, 24 April 2017, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru* [82], UN Doc A/HRC/35/25/Add.3, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/098/91/PDF/G1709891.pdf?OpenElement>.
[158] Madeline Gleeson and Natasha Yacoub, 2021, *Policy Brief - Cruel, costly and ineffective: The failure of offshore processing in Australia* 11, <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf>; For more accounts and statistics, see: Legal and Constitutional Affairs References Committee, 'Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea – Interim report' (May 2016) [1.31], and Madeline Gleeson and Natasha Yacoub, 2021, *Policy Brief - Cruel, costly and ineffective: The failure of offshore processing in Australia* 15-16, <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf.
[159] Ben Doherty et al. 'Deaths in offshore detention: the faces of the people who have died in Australia's care', The Guardian (online, 20 June 2018) <https://www.theguardian.com/australia-news/ng-interactive/2018/jun/20/deaths-in-offshore-detention-the-faces-of-the-people-who-have-died-in-australias-care>; Human Rights Law Centre, '#TenYearsTooLong' (online, 30 June 2023) <https://www.hrlc.org.au/timeline-offshore-detention>.

anguish caused by the delays and uncertainty around his settlement (despite being found to be a refugee) led him to despair.[160]

In late 2022 the Committee against Torture urged for the end of offshore processing, and that human rights violations in the RPCs be investigated with perpetrators prosecuted.[161] They expressed alarm at:

> 'the State party's continuing policy of transferring migrants and asylum-seekers arriving by boat and without visas to the regional processing centres located in Nauru for the processing of their claims despite the high number of corroborated reports on the harsh and dangerous conditions prevailing in those centres, in which persons, including children, experience severe human rights violations and in which many of those violations are treated with impunity… The combination of the harsh conditions, the protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental pain and suffering and has allegedly compelled some asylum-seekers to return to their country of origin, despite the risks that they face there… Moreover, it is deeply concerned about information that years after having been recognized as refugees, children and adults are still not resettled and some remain detained, with no certainty about their future… The Committee reiterates its view that all persons who are under the effective control of the State party, because, inter alia, they were transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice, enjoy the same protection from torture and ill-treatment under the Convention'.[162]

Transitory persons in the Australian community

From March to December of 2019, Australia implemented legislation known as the 'Medevac law' which allowed for the transfer of refugees and people seeking asylum to Australia if deemed necessary by two independent doctors.[163] During this period 192 people were transferred to Australia.[164] When the government repealed the legislation, the rate of transfers fell by more than 75%, with only 117 people transferred to Australia between the law's repeal in December of 2019 and 31 December 2022.[165] There were

[160] *Inquest into the Death of Omid Masoumali* (Coroners Court of Queensland, State Coroner, 1 November 2021) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0008/699119/cif-masoumali-o-20211101.pdf>.
[161] Committee against Torture, *Concluding observations on the sixth periodic report of Australia*, UN Doc CAT/C/AUS/CO/6 (5 December 2022).
[162] Ibid.
[163] Kaldor Centre for international Refugee Law, 10 August 2021, *Medical transfers from offshore processing to Australia*, < https://www.kaldorcentre.unsw.edu.au/publication/medevac-law-medical-transfers-offshore-detention-australia>
[164] Ibid.
[165] Refugee Council of Australia, 30 June 2023, *Offshore processing statistics*, <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/5/>.

1,152 transitory persons in Australia by the end of May 2023, at least 836 of whom were not in detention but rather in the community on short term visas.[166]

These 836 transitory persons in the community are left with no long-term options for settlement and are only eligible to apply for bridging visas on a rolling (typically) 6 month basis. RACS has a dedicated clinic supporting approximately 200 clients every year to reapply for their bridging visas. Under our legislation, a transitory person must be returned to a regional processing country once the temporary reason for which they were transferred is fulfilled. While RACS has been successfully assisting these clients to reapply for these short-term visas, there is no guarantee that they will not be returned to the RPC in Nauru. While they reside in the community, they are stuck in a state of permanent temporariness.

These short-term visas pose a number of issues in terms of the rights afforded to people seeking asylum and refugees while in Australia. Once they turn 18 years old, transitory persons have a no study condition applied to their visa. Many clients emphasise how important education is to their mental health and journey in building a new life for themselves after mistreatment experienced in their country of origin, and after seeking protection in Australia both onshore and offshore. For high school aged transitory clients, going to school offers a sense of normalcy. For transitory clients over 18, education can be a critical tool to access meaningful and gainful employment. However, they face perpetual disappointment when repeatedly issued Bridging Visa Es subject to a no study condition. In our experience, applying for the removal of this condition is a fruitless endeavour with no responsiveness from the Department.

Case study: no study condition and limited work opportunities

Sahar was medically evacuated to Australia in December 2018 after spending 6 years in Nauru. Following a period time in immigration and community detention she was released into the community on a Bridging Visa E in around September 2020. The fortnightly payments of $200 she received while in community detention ceased when she was granted her Bridging Visa E. She was asked to vacate the apartment she was living in, and to start working to support herself.

Sahar's visa did not allow her to study. She wanted to study English so she could find work. Sahar was employed but said that she lost her job as her English was not very good. RACS has been assisting Sahar with applying for consecutive bridging visas

[166] Ibid.

since 2021. Each time, she has asked whether she can be granted study rights on her visa. Each time, she has been issued a visa subject to a no study condition.

Most recently, in March 2023 Sahar advised that her mental and physical health had been deteriorating and that she had a heart attack. She is not sure how she is going to be able to continue paying for rent, bills and food in her current condition. On top of not being able to study English, she said that employers do not want to hire her when they see her visa is only valid for 6 months. RACS provided a letter of support outlining Sahar's legal status to prospective employers, but we cannot be certain of whether that will assuage their concerns.

* Names and other personal identifiers have been changed in case studies in order to protect confidentiality.

While transitory persons technically have the right to work on their visas, the fact that their visa is only valid for 6 months significantly reduces their employment opportunities. Often, clients are limited to manual labour and/ or entry level positions, regardless of their level of qualifications or experience. Their tenuous visa status can also make these clients vulnerable to labour exploitation.[167]

Transitory clients also experience issues with renewing their access to Medicare every 6 months. The availability of Medicare for these clients is tied to their bridging visa. Given the conditions of offshore detention, experiences of persecution in their country of origin, and the nature of their medical evacuation to Australia, it follows that transitory persons have significant mental and physical health needs that necessitate ongoing and reliable access to health services. Many of these health issues were either exacerbated by or borne from their time in detention and ongoing transitory status. In addition to anxieties around whether clients will continue to be granted a bridging visa, many clients fear that their access to Medicare will cease. There are consistent problems with renewing Medicare for these clients. While 6 month bridging visas are generally considered valid for the purposes of obtaining Medicare, if a client is only given a 3 or 4 month visa (which can happen without explanation) it may mean that they are refused Medicare on application, as the duration of the visa is too short.

Withholding permanent protection and settlement for this cohort, especially for those who have been granted refugee status, also contravenes one of the main goals of the international protection system: finding durable solutions.[168] The Australian government has resettled over 1000 people abroad in countries such as the United States, New

[167] Migrant Workers Centre, *Lives in Limbo: the Experiences of Migrant Workers Navigating Australia's Unsettling Migration System* (Report, 2021).
[168] United Nations Human Rights Office, *Fact Sheet No.20, Human Rights and Refugees*, <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet20en.pdf>

Zealand, and Cambodia – not including 115 provisional approvals of resettlements by the United States of America (**US**) as of 22 May 2023 and New Zealand's agreement on 24 March 2022 to resettle 150 transitory people a year for three years.[169] However, individuals who are not resettled in a safe third country remain bound by these harsh restrictions in Australia.[170] Some clients understandably do not pursue resettlement because they have built lives, families, businesses and relationships here in Australia; some still hold out hope that the Government will change their mind. Some do get accepted for re-settlement only to have other members of their family refuse to go. Some have children or family members with Australian permanent residency or citizenship and wish to avoid separation. Others *do* pursue resettlement only to be turned down - as is the case for many Iranians and Iraqis applying for resettlement in the US.

One of the lawyers who assists these clients as part of our dedicated clinic reflects that:

> "This cohort of [people seeking asylum] are the most disadvantaged of all. They spend years hoping that the Government will come round and allow them to stay. They are in many cases broken and desperate, I often deal with crying inconsolable clients on the phone. Especially just after the Feb 14 [Resolution of Status visa] announcement, which gave many transitory clients false hope that they would be included in the announcement. For the average Australian 19 July 2013 was just another day in recent history, to transitory [people seeking asylum] in Australia it is the most hated and despised day of their lives, knowing that their present situation, being so hopeless and cruel is because of the decision made on that day."

Enduring capacities and international reach

As of 24 June 2023, the government transferred the last refugee remaining in Nauru to the Australian mainland.[171] Still, 80 refugees and people seeking asylum remain in PNG.[172] These individuals reside in the islands' communities and rather than in detention centres. [173] Australia's offshore detention centre on Manus Island in PNG shut down after the PNG supreme court ruled it unconstitutional in 2016.[174]

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[169] Refugee Council of Australia, 30 June 2023, *Offshore processing statistics*, <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/4/>.
[170] Department of Home Affairs, 31 May 2023, *Statistics of transitory persons*, <https://www.homeaffairs.gov.au/about-us-subsite/files/population-number-resettled-31-may-2023.pdf>.
[171] Ben Doherty and Eden Gillespie, 24 June 2023, *Australia to move last refugee from offshore processing on Nauru – but its cruelty and cost are not over*, <https://www.theguardian.com/australia-news/2023/jun/24/australia-to-move-last-refugee-from-offshore-processing-on-nauru-but-its-cruelty-and-cost-is-not-over>.
[172] Ibid.
[173] Ben Doherty, 7 March 2023, *Refugees held offshore plead with Australia to be moved, saying 'every day is suffering'*, <https://www.theguardian.com/australia-news/2023/mar/06/refugees-held-offshore-plead-with-australia-to-be-moved-saying-every-day-is-suffering>.
[174] Eric Tlozek and Stephanie Anderson, 27 April 2016, *PNG's Supreme Court rules detention of asylum seekers on Manus Island is illegal*, <https://www.abc.net.au/news/2016-04-26/png-court-rules-asylum-seeker-detention-manus-island-illegal/7360078>.

Though the RPC in PNG remains closed, and the RPC in Nauru is functionally empty, Australia retains an enduring capacity for offshore detention in Nauru.[175] Retaining Nauru as a viable contingency for future offshore detention is not a small expenditure. In addition to the over $12 billion estimated to have been spent on Australian offshore detention policy,[176] the current Albanese Government will spend $486 million in 2023 to maintain the facilities and has contracted a private prison company to manage the centre through September of 2025 for another $422 million.[177] As long as the policy allowing for offshore detention endures, so too does the potential for future human rights abuses.

The consequences of Australia's model of offshore processing are not limited to the domestic arena. Countries including Denmark and the United Kingdom (**UK**) have been inspired by this policy to similarly institute the transfer of people seeking asylum to a third country for processing. The former amended their legislation in 2021, permitting offshore processing when partnered with another State.[178] The latter enacted parallel legislation that same year with the Nationality and Borders Bill 2021,[179] and the current UK Prime Minister Rishi Sunak proposed a bill in March of 2023 that would send people seeking asylum from the UK to Rwanda.[180] The goals of that proposed legislation blow the familiar rhetoric embedded in the discourses of Australian offshore processing: to 'stop the boats' and to 'break the business model of human traffickers'.[181]

However, the UK Court of Appeal found by majority on 29 June 2023 that the scheme proposed by the Home Office was not lawful. The Court ruled that there was a real risk that those transferred to Rwanda may be at risk of refouled due to the deficiencies of the procedures in the country to protect against *refoulement.*[182] To do so, the Court noted that RSD processes in Rwanda are a relatively recent creation, the obscurity around how protection interviews would be conducted, limitations on submissions made by lawyers before the Refugee Status Determination committee and the efficacy of the Rwandan judiciary. [183] The Court also made assessments as to whether the proposed scheme would be consistent with *the Human Rights Act 1998* (UK). The substantial risk of

[175] Eden Gillespie, 14 June 2023, *Australia to transport last asylum seekers off Nauru within weeks, refugees say*, <https://www.theguardian.com/australia-news/2023/jun/14/australia-to-transport-last-asylum-seekers-off-nauru-within-weeks-refugees-say>.

[176] Ben Doherty and Eden Gillespie, 24 June 2023 *Australia to move last refugee from offshore processing on Nauru – but its cruelty and cost are not over*, <https://www.theguardian.com/australia-news/2023/jun/24/australia-to-move-last-refugee-from-offshore-processing-on-nauru-but-its-cruelty-and-cost-is-not-over>.
[177] Refugee Advice & Casework Service, 25 June 2023, *Media Statement: Refugees evacuated from Nauru after a decade, 80 people remain in PNG*, <https://www.racs.org.au/news/refugees-evacuated-from-nauru-after-a-decade-80-people-remain-in-png>.
[178] Madeline Gleeson and Natasha Yacoub, 2021, *Policy Brief - Cruel, costly and ineffective: The failure of offshore processing in Australia* n.4, <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf>.
[179] Ibid.
[180] Rajeev Syal, 28 March 2023, *Rishi Sunak's 'stop the boats' bill is an election gamble fraught with risk*, <https://www.theguardian.com/politics/2023/mar/27/rishi-sunaks-stop-the-boats-bill-is-an-election-gamble-fraught-with-risk>.
[181] Ibid.
[182] *AAA and others v. The Secretary of State for the Home Department [*2023] EWCA Civ 745 (CA) [109].
[183] Ibid [145] – [223].

refoulement was interpreted to constitute a breach of article 3 of the *European Convention on Human Rights* (**ECHR**) (the prohibition on torture) and thus a contravention of article 6 of the UK's human rights legislation which requires that public authorities act in a way that is compatible with the rights enshrined in the ECHR.[184] The articles of the ECHR are incorporated in Schedule 1 of the *Human Rights Act 1998* (UK).

There are significant parallels to be drawn between the issues raised in this case, and the implementation of offshore processing in Nauru and PNG. Judicial discussions around a State's institutional capacity for fair and functional processing is particularly relevant. When the transfers of people seeking asylum to Nauru began in 2012 the country did not have a legislative framework for RSD.[185] It had only acceded to the Refugee Convention a year prior,[186] and passed the *Refugee Convention Act* in 2012.[187] The UNHCR commented that in practice, this system of RSD implemented offshore fell short of a fair and functional system that complied with international standards.[188] Such analogous characteristics beg the question of how the implementation of this policy may have occurred differently in the Australian context if we could have relied on domestic legislation to hold the government accountable to human rights. This case exemplifies the need for such legislation to adequately protects human rights against violations or abuse.

[184] Ibid [293].
[185] UNHCR, *UNHCR Mission to the Republic of Nauru* (2012).
[186] Convention relating to the Status of Refugees (acceded to 28 June 2011).
[187] *Refugees Convention Act 2012* (Nr).
[188] UNHCR, *UNHCR Mission to the Republic of Nauru* (2012).

Statelessness

A person is stateless where they are not considered a national of any State. Stateless people do not have any nationality, and as such, can face numerous barriers to accessing and exercising their fundamental rights.

The two key international instruments that address the issue of statelessness are the 1954 Convention relating to the Status of Stateless Persons (1954 Convention)[189] and the 1961 Convention on the Reduction of Statelessness (1961 Convention).[190] Australia has ratified both the 1954 Convention and the 1961 Convention, without reservation. [191] Australia is also party to several international agreements that protect the rights of stateless persons and ensure the right to nationality, including the ICCPR,[192] ICERD,[193] CEDAW,[194] CRC[195] and CRPD.[196]

The Australian *Citizenship Act 2007* (Cth) (*Citizenship Act*) provides the legal framework for nationality in Australia. Section 21(8) of the *Citizenship Act* provides that a person born in Australia who is not (nor has ever been) a citizen or national of a foreign country and is not entitled to acquire citizenship or nationality of another state, is eligible for Australian citizenship.

Established in 2018, RACS' Stateless Children Project is Australia's first and only legal service dedicated to assisting stateless children in obtaining Australian citizenship. As part of this project, RACS also delivers the Stateless Legal Clinic in partnership with the Peter McMullin Centre on Statelessness and the University of Melbourne. Through working with key external partners in this space, RACS identified a specific need to assist

[189] Convention relating to the Status of Stateless Persons, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1 ('1954 Statelessness Convention')
[190] Convention on the Reduction of Statelessness, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) ('1961 Statelessness Convention').
[191] Australia ratified the 1954 Convention on 13 December 1973: UN Treaty Collection, 3. Convention relating to the Status of Stateless Persons, 1 <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-3.en.pdf>. Australia ratified the 1961 Convention on 13 December 1973: UN Treaty Collection, 4. Convention on the Reduction of Statelessness, 1 <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-4.en.pdf>.
[192] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR') Article 24(3). Australia ratified the ICCPR on 13 August 1980: UN Treaty Collection, 4. International Covenant on Civil and Political Rights <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4. en.pdf>.
[193] International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 600 UNTS 195 (entered into force 4 January 1969) ('ICERD') Articl 5(d)(iii). Australia ratified the ICERD on 30 September 1975: UN Treaty Collection, 2. Convention on the Elimination of All Forms of Racial Discrimination, 1 <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf>.
[194] Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW') Article 9. Australia ratified the CEDAW on 28 July 1983: UN Treaty Collection, 8. Convention on the Elimination of All Forms of Discrimination against Women, 1 <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf>.
[195] Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC') Articles 7 and 8. Australia ratified the CRC on 17 December 1990: UN Treaty Collection, 11. Convention on the Rights of the Child, 1 <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>.
[196] Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD') . Australia ratified the CRPD on 17 July 2008: UN Treaty Collection, 15. Convention on the Rights of Persons with Disabilities, 1 <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-15.en.pdf>.

stateless children born in Australia to apply for citizenship under domestic legislation. We identified that there are potentially dozens of stateless children in Australia with a *prima facie* entitlement to Australian citizenship who are not aware of this entitlement, or in contact with a specialised legal service for assistance. Through our project we have been able to assist families end generations of statelessness and uncertainty by accessing citizenship for their children. We refer to the *A Place to Call Home* Report which sets out the findings of our Stateless Children Project and explains the transformative impact that acquiring citizenship poses for stateless persons with reference to the stories of our clients.[197] One client explained that:

> 'For us, being stateless means we don't have any country or documentation. We feel very distressed about this. When our son was granted Australian citizenship we were extremely happy. It was a big deal, because we have never known in our lives what it is like to be a citizen. It is our hope that all of our children will have a good education, find jobs and live a good life.'[198]

While this provision has aided many to end the uncertainty of statelessness, stateless people who were not born in Australia are not able to apply for citizenship under S21 (8) of the *Citizenship Act*. This is the case for many stateless UMAs and transitory persons. RACS welcomes the opportunity for eligible stateless UMAs to transition to permanent protection in Australia and eventually acquire citizenship with the announcement of the RoS visa. However, there remains no opportunity for stateless transitory persons to access citizenship in Australia. This in spite of the obligations owed to stateless persons, assumed by Australia under the 1954 Convention and 1961 Convention, and other international agreements.

This exclusion continues to apply even in the case of family units where a transitory person has a stateless child who has acquired citizenship. Or where one child in a family unit was born offshore, and another was born onshore only the latter would be able to access citizenship in Australia. While eligible family members have the right to reside in Australia permanently, others live precariously on 6 month bridging visas with the ever-present threat of being returned to Nauru. Formerly stateless children who have acquired Australian citizenship are therefore at risk of being separated from their family members who are not able to acquire Australian citizenship in spite of their stateless status. Such separation would have detrimental effects of the mental health and development of the family, and would also be in contravention of Australia's international obligations to provide the widest possible protection for the family unit.

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[197] Katie Robertson and Sarah Dale, *A Place to Calll Home: Shining a light on unmet legal need for stateless refugee children in Australia* (Report, March 2021) < https://static1.squarespace.com/static/5ca341d4aadd343de55b7b50/t/60591b1b16c60504b1d50d54/1616452417526/StatelessChildrenReport-January2021.pdf>.
[198] Ibid.

As discussed earlier in this submission, RACS also holds concern for the particular risk of indefinite detention for stateless persons. We were grateful to have received an advance copy of the Peter McMullin Centre on Statelessness' submission to this inquiry and endorse their recommendations.

Family separation

Family is the fundamental unit of all cultural societies and foundational to human wellbeing. Australia is party to several treaties and international conventions which apply to the refugee or person seeking asylum in the context of their family unity and reunification. This includes:

- Articles 17, 23(1) and 24(1) of the ICCPR.[199] Together, these provisions respect family as the natural and fundamental group unit of society, prohibit arbitrary and unlawful interference with family and home life, and protect the rights of minors to receive protection required by their status as a minor from their family, society and State.
- Article 10(1) of the ICESCR which states that "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children… ."[200]
- Article 9 of the CRC which provides that States must allow children who have been separated from their parents to "maintain personal relations and direct contact with both parents on a regular basis, except where it is contrary to the child's best interests".[201]
- The Universal Declaration of Human Rights also contains several Articles in support of the rights of refugees and people seeking asylum to family unity and reunification. Article 12 of the UDHR mirrors Article 17 of the ICCPR,[202] Article 16 contains the right for all men and women to found a family and protects the family as the "natural and fundamental group unit of society".[203] Several other Articles such as Article 25 and 26 also provide protections for children's rights in the context of receiving protection from their parents.[204]
- States are also obliged under the CAT to prevent any acts of cruel, inhuman or degrading treatment or torture when such acts are committed by a public official or another person acting in an official capacity.[205]

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[199] *International Covenant on Civil and Political Rights* ('*ICCPR*') (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 171, Article 17, 23(1) and 24(1).
[200] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1986), 993 UNTS 3, Article 10(1) as discussed in Gallagher and Robinson 42 [3.51].
[201] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Article 9.
[202] *Universal Declaration of Human Rights* ('*UDHR*') (adopted 10 December 1948) UNGA Res 217 A(III), Article 12.
[203] *UDHR* Article 16.
[204] *UDHR* Articles 25 and 26.
[205] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987), Article 1.

While Australia has assumed these obligations under international law, in practice our policies are enabling protracted family separation. The separation of refugees and people seeking asylum by boat has been widespread and systematic. Section 5AA of the *Migration Act 1958* classifies those who enter Australia by sea without a valid visa as an UMA. Australia has various (and at times overlapping) policies that apply to these UMAs depending on their date of arrival. However, the Department has issued a statement arguing that 'there is no right to family reunification under international law' and that the Government's policies align with Australia's international obligations.[206] The following outlines the ways in which various cohorts of refugees and people seeking asylum have been systematically excluded from family reunion by virtue of Australian laws.

Legacy Caseload

Many members of the Legacy Caseload have been separated from their family members for over a decade. Those who arrived between 13 August 2012 and 1 January 2014 have historically only been able to hold TPVs or SHEVs, under which they had no rights to sponsor family. This applied without exception, including to persons who had been separated from partners and minor children. It also applied to extremely vulnerable refugees and people seeking asylum, such as the unaccompanied minors who arrived in Australia with no guardian or familial support.

Once an applicant held a TPV or SHEV, there were further restrictions on their ability to reunite with family members overseas. These visas do not have a travel facility and are subject to visa condition 8750 which restricts international travel. Each time a TPV or SHEV holder wishes to travel they must seek the Department's approval to do so by demonstrating compassionate or compelling reasons. Travelling overseas without written approval from the Department could make the visa holder vulnerable to cancellation while offshore.

The passage of the Legacy Caseload Act through parliament, and the subsequent detrimental impact of the Act on refugees and people seeking asylum is a clear example of the lack of human rights protections that exists within the current legal and legislative framework in Australia. Despite, this Act making refugees granted TPVs and SHEVs ineligible to sponsor family members to join them in Australia, the Statement of Compatibility with Human Rights that accompanied the Legacy Caseload Act, conclude it was compatible with the human rights to do so. More specifically, though among other reasons, it provided that the Act does not breach Australia's obligation as refugee holding

[206] Department of Home Affairs, 'Home Affairs Response to the Australian Human Rights Commission report – Lives in Limbo: protecting the human rights of refugees and asylum seekers in the 'Legacy Caseload' (Online, April 2019) <https://humanrights.gov.au/sites/default/files/2019-07/HOME_AFFAIRS_RESPONSE_180419_LEGACY_CASELOAD_OHR-19-00021.pdf?_ga=2.68475795.361827054.1688350119-788739480.1685505915> Rec 22.

TPVs or SHEVs will be able to voluntarily depart and return to their family and country of origin or any other country they have permission to enter at any time.[207]

Following the announcement of the RoS visa, those who applied for or held a TPV or SHEV before 14 February 2023 would be eligible for permanent residency. Once they hold a RoS, members of the Legacy Caseload may be able to sponsor family members through a class of visas known of the 'Family Visas' including Partner Visas and Child Visas. RACS celebrates the potential for families to be reunited as RoS visa holders can sponsor eligible family members to come to Australia through this family stream.

However, the UMA classification that applies to this cohort appears to endure through their permanent residency, and as it stands, even their citizenship. Under our current regulations, UMAs who arrived in Australia after 13 August 2012 are not able to access the Special Humanitarian Program (**SHP**) to sponsor their family.[208] UMAs are also precluded from sponsoring immediate family members through the Split Family Provisions.[209] This poses significant restrictions for UMAs who hold a RoS, as the SHP and Split Family pathways to family reunion have no cost, and the SHP has no restrictions on proposing non-immediate family members. Comparatively, family visas can range in cost from $8,085 for partner visa applications to over $45, 000 for parent visa applications. There are also strict eligibility requirements as to who is defined as a member of the family unit under the *Migration Regulations* for the purpose of these applications, with specific respect to a dependent child.[210]

This can represent a critical point of exclusion for UMAs who hold a RoS, who may have children that have aged out of the above eligibility criteria. This is through no fault of their own but is a consequence of the combined effects of the statutory bar placed on these applicants until 2015, the delays in processing their visa applications, and the sponsorship restrictions attached to TPVs and SHEVs.

[207] *Explanatory Memorandum, Migration And Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth), 12*
[208] *Migration Regulations 1994* sub-regs 202.211(2), 2.07AM(5).
[209] *Migration Regulations 1994* sub-regs 202.211(2), 2.07AM(5).
[210] *Migration Regulations 1994* reg 1.12(2).

Case study: aging out of a child visa

Athiran first arrived in Australia in 2013. After being barred from making an application for protection, he lodged his application for a SHEV in July 2016. At this stage, his daughter was 15 years old.

Athiran's SHEV was granted in 2018 when his daughter was 17 years old. He was not able to sponsor her at this time, as he had no rights to do so while holding a SHEV.

In 2023 RACS assisted Athiran to apply for a RoS. He has asked for advice on how to bring his now 23-year-old daughter to come to Australia. In order to demonstrate her eligibility, he would have to show that his daughter is not working, not married, and is reliant on him for financial support. Had his SHEV not precluded members of the Legacy Caseload from sponsoring family, he would have been able to bring his daughter to Australia when he was first found to be a refugee in 2018.

* Names and other personal identifiers have been changed in case studies in order to protect confidentiality.

We refer to and endorse RACS' submission to the Inquiry into efficacy, fairness, timeliness and costs of the processing and granting of visas which provide for or allow for family and partner reunions.[211] It is RACS' position that more needs to be done to address the accessibility of family reunification for this cohort, including eligibility criteria, cost and access to the Special Humanitarian Program which currently serves as a restriction to many applicants.

Transitory persons

Transitory people have been subject to the risk of family separation both on and offshore. If an individual required urgent evacuation to Australia for medical treatment not available in Nauru or PNG, they were often not accompanied by members of their family unit. This separation for medical treatment commonly involved women who had pregnancy

[211] Submission No 39 to the Senate Standing Committees on Legal and Constitutional affairs, Parliament of Australia, *Inquiry into the Efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions*, 2021 < https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/FamilyandPartnerVisas/Submissions>.

complications.[212] Hence, many pregnant women were evacuated to Australia, leaving their husband and/or other children behind.[213]

Refusing to allow family members to travel was possibly a deterrent measure to encourage split family members to return to Nauru or PNG despite their health or safety concerns.[214] However, in many cases, due to the complex or urgent nature of the evacuees' medical conditions, doctors in Australia would recommend that it was unsafe to return these people seeking asylum back to Nauru or PNG. Hence, they would be separated from their families who were left in the offshore RPCs.

On 2 March 2019, the Medevac Amendments allowed for the accompaniment of a person who was seeking medical treatment by a family member from an offshore detention centre. Hence, reunification was more likely this way. However, until we formally end arrangements for offshore processing, we submit that family separation for medical treatment in similar cases could still occur in future.

When family members arrived in Australia on different boats either side of the 19 July 2013, in many instances, those who arrived before 19 July 2013 found to be refugees have been able to settle in Australia. With the announcement of the RoS, those who form part of the Legacy Caseload may be eligible to transition to permanent residency and safety. However, those who arrived after 19 July 2013 were taken to offshore detention will never be able to settle in Australia under current policy. As explained above, most of those transitory persons have since been transferred to Australia, and 836 individuals are living in the community on precarious 6 month bridging visas. These bridging visas present no opportunity to sponsor family, and even pose the risk of separation from family members who have a right to reside in Australia permanently.

It is not uncommon for single-family unit to be subject to different policies on the basis of their mode and date of arrival in Australia. Statistics indicate that there are 90 transitory persons living in Australia who have family that are Australian citizens or permanent residents.[215] The government's commitment to not settling those subject to the policy of offshore processing represents a constant and looming risk of family separation. Such separation, including where it involves minor children, can violate the right to respect for the family enshrined in a number of international agreements including the ICCPR and CRC.

[212] Ibid.
[213] Ibid.
[214] Human Rights Law Centre, 14.
[215] Refugee Council of Australia, 30 June 2023, *Offshore processing statistics*, <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/5/>.

Case study: risk of separation from Australian citizen children and permanent resident partner

Afsaneh was sent to Nauru in 2013. She spent six years offshore before being transferred to Australia.

In December 2019 Afanseh married her partner, Zabe. Zabe was previously granted a permanent protection visa, and as such is an Australian permanent resident. Afsaneh has since had a child in Australia with Zabe. Given that one of the parents was an Australian permanent resident at the time of birth her child is an Australian citizen. She is also currently expecting a second child with Zabe, likely to also be a citizen.

RACS assisted Afsaneh with getting evidence of her child's citizenship in 2022. In April 2023 the citizenship application was approved. Afsaneh said this was the best news that she had received in the last ten years.

While Afsaneh's family are able to permanently reside in Australia, her situation is far more precious with no long term guarantee of her ability to lawfully remain in the country. RACS continues to provide her with assistance in applying for consecutive bridging visas, but we do not know when will be her final grant.

* Names and other personal identifiers have been changed in case studies in order to protect confidentiality.

One of the lawyers assisting transitory persons note how harshly family separation bears on this cohort:

> 'For most clients I speak with this is an ongoing issue. They have missed out on seeing loved ones, parents, children, partners for over ten years. They have missed out on holding family members for the last time before they passed away, missed out on seeing their children grow up and lost the love and fidelity of their spouses through the long separation'.

Direction 80

One of the most explicit limitations for refugees seeking to reunite with family members was Direction 80. Direction 80 was a legal instrument promulgated by the government that dictated the order of processing applications for family visas including Partner visas. It explicitly makes applications of which the applicant's sponsor (or proposed sponsor) is 'a person who entered Australia as an Illegal Maritime Arrival and holds a permanent visa' the lowest possible priority for processing. The only exception to this policy was if there were 'special circumstances of a compassionate nature', which was not defined, or if the applicant waited for citizenship. However, notably, delays for citizenship applications

could mean another five years before reunification with their families was possible. Applications for family visas sponsored by people who arrived in Australia by boat and were now PPV holders can be lodged but would be constantly "leapfrogged" in priority by every single other application for this kind of visa. The practical effect of this would be that most family visa applications of this kind would never be processed; they would remain in the queue forever, in a kind of Kafkaesque limbo.

In a welcome move, Direction 80 was recently revoked and repealed by *Ministerial Direction No. 102* – 'Order for considering and disposing of Family visa applications under sections 47 and 51 of the *Migration Act 1958*'.[216] This new policy removed the requirement to deprioritise family visa applications where the sponsor is a permanent visa holder who entered Australia as an unlawful maritime arrival. The Department commented that they are 'working through the large number of affected applications in lodgement date order, with the oldest applications generally being progressed first'.[217]

This appears on its face to be a win for PPV holders who arrived by boat and their rights to family reunification. However, the legacy of *Ministerial Direction No. 80* lives on. Many applicants are still awaiting processing of their applications, and the long delays for PPV holders has undoubtedly led to great suffering and harm.

Case study: the legacy of Direction 80

Imran arrived in Australia by boat in early 2012. Imran made the journey to Australia alone, leaving behind his wife and four children in Afghanistan. As he arrived before August 2012, he was able to make an application for a permanent protection visa. Imran was granted permanent protection and lodged a partner visa application to sponsor his wife and dependent children to come to Australia in 2015.

By the time he lodged his partner visa application, Imran had been separated from his family for three years. When he left Afghanistan, his eldest child was only 5 years old. Now, his eldest child is 16 years old and Imran has still not received an outcome for his application.

Given that he arrived by boat, the processing of Imran's visa applications has been affected by successive directions from the Minister. The first was Ministerial Direction 72 which gave applications sponsored by people who came by boat before 13 August 2012 the lowest priority for processing until they became Australian citizens. An exception was provided for applicants where there were special circumstances of a compassionate nature and compelling reasons for priority. Imran requested

[216] Department of Home Affairs, 'Family visa processing priorities', *Visa processing times* (Web page, 22 February 2023) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities>.
[217] Ibid.

prioritisation of his application in 2017. Supporting letters from his psychologist noted he suffered from his protracted separation from his family. He was diagnosed with a depressive condition with high levels of psychological stress, anxiety, persistent negative moods, anxious intrusive thoughts and difficulty sleeping. The Department rejected Imran's request for prioritisation, stating that there were not sufficient special circumstances of a compassionate nature or compelling reasons beyond what was normally seen with their caseload. They did not explain which circumstances would warrant departure from the Direction and did not provide a reason for their decisions.

Direction 72 was replaced by Direction 80 in 2018. Direction 80 continued to apply to Imran and deprioritised his application. The direction maintained the ability to prioritise applications for compassionate and compelling circumstances but made it even harder to achieve. It also removed a provision which allowed for an application to be processed where it has not been done so in a reasonable time frame.

The exception to Direction 80 is where a person who arrived by boat receives Australian citizenship. Imran received his citizenship in 2022, but this did not speed up his application's processing.

RACS has assisted Imran to seek an update from the Department and request that his partner visa application be expedited in May, June and July 2023. Imran fears for his family who are living in under the Taliban's government.

* Names and other personal identifiers have been changed in case studies in order to protect confidentiality.

Impacts of family separation

The impact of protracted family separation among refugees and people seeking asylum the in Australia and their family members is well documented. These impacts extend from destructive consequences on mental health and wellbeing, to developmental consequences for children and the potential for constructive refoulement.

Mental health and wellbeing

Evidence has shown that family separation increases the incidence of mental illnesses such as anxiety, depression and PTSD, and the risk of self-harm and suicidal ideation in both adults and children.[218]

A recent qualitative study by Liddell et al. has documented these impacts in detail among thirteen participants with a refugee background who experienced separation from

[218] Human Rights Law Centre, 16.

family.[219] All participants reported fearful feelings for the safety of their family members and themselves which was manifested by constant worry.[220] Interviewees reported experiencing other mental health issues including "anxiety, stress, depression and helplessness connected with their separation, as well as sleep disturbances, appetite changes and physical health issues".[221]

There were also negative impacts from not having practical support from separated family members such as a lack of childcare for children[222] and financial support. Interviewees also reported themes of struggling to concentrate on work or study as their preoccupation with their separated family members reduced their social functioning.[223]

Psychiatrist, Dr Beth O'Connor of Médicines Sans Frontières, spent almost a year working on Nauru as a part of a team providing mental health care to over 200 refugees, 40% of whom were separated from a family member. She was quoted in a report by the in the Human Rights Law Centre stating that "[s]uicidal thoughts were unfortunately very common … with 60% experiencing suicidal thoughts and 30% attempting suicide during out time on Nauru".[224] She observed that it was "simply unbearable" for many family members stranded on Nauru whose family members were evacuated to Australia for medical treatment.

Dr Beth O'Connor also speaks to the impact that family separation had on children's mental health. She witnessed many cases of 'Resignation Syndrome' where a child would become more depressed, withdrawing socially and eventually refusing to eat or drink, becoming mute and lying in bed without responding to anyone.[225] Parents would observe their child deteriorate and fear that their child would die.[226]

These severe mental health and wellbeing impacts would likely be in violation of Australia's obligations under the CAT to prevent 'severe pain or suffering, whether physical or mental' for the purposes of punishing the individual. The discriminatory policies applying to UMAs specifically that prevent access to family reunion could be interpreted as a punishment for arriving in Australia irregularly. Although we applaud the recent amendments to the law such as the introduction of the RoS visa and the introduction of *Ministerial Direction No. 102*, we submit that these changes do not go far enough to ensuring that Australia is upholding its international legal obligations and that the harmful policies of previous governments have lasting impacts.

[219] Belinda J. Liddell et al., 'Understanding the effects of being separated from family on refugees in Australia: a qualitative study' (2022) 46(5) *Australian and New Zealand Journal of Public Health* 647.
[220] Ibid 649.
[221] Ibid.
[222] Ibid.
[223] Ibid.
[224] Human Rights Law Centre, 18.
[225] Ibid.
[226] Ibid.

Refugees and people seeking asylum who see no hope of reuniting with their families may exercise the option to voluntarily return to their country of origin. Protracted family separation therefore gives rise of constructive refoulement; a potential breach of Article 33 of the Refugee Convention. For those in this situation, life may be 'so miserable for a refugee or asylum seeker that he or she 'decides' to return home'.[227] The pain of family separation may be so severe that a refugee would rather accept the risk of persecution than continue to be subject to Australia's arbitrary and cruel restrictions on family reunion.

Developmental impact on children

Attachment relationships between a child and its caregivers, such as its parents, are crucial to the emotional development of a child.[228] These relationships shape the child's neurological and psychosocial functioning and allow them to progress from infancy to adulthood.[229]

Separation of a child from its family members has been documented to negatively impact upon this connection. Where a parent is preoccupied with their own symptoms of depression, for example, and is unable to adequately care for a child, or they are physical separated from their child, the child may experience emotional neglect and may develop developmental problems.[230]

Where, for example, the child has been born in Australia by a mother who has been medically evacuated to Australia from Nauru, where their father has been forced to be left behind, the child would not be able to develop this attachment bond with him.[231] This could lead to early deprivation of care and a range of developmental problems and mental health issues for the child.[232]

This removal of the child from an attachment figure might be a major source of stress for the child. If removal occurs before the child is three years old, it could lead to 'cognitive delay and social and emotional withdrawal' and is associated with 'behavioural and emotional problems in later childhood'.[233] These behaviours could manifest as 'anger, aggression and disorders of social interaction' and also increase the risk of self-harm and suicidal ideation which could persist into adulthood.[234]

[227] Penelope Mathew, 'Constructive refoulement' [2019] ELECD 2038 in Singh Satvinder Juss (ed), 'Research Handbook on International Refugee Law' (Edward Elgar Publishing, 2019) 207.
[228] Ibid 21.
[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] Ibid 22.
[234] Ibid 23.

Clearly, these harmful impacts on children who have been separated from their caregivers have long-lasting consequences for not only those families involved but also high public health costs for the Australian Government. These risks, elevated by family separation, have roots in Australia's discriminatory policies which contravene our international obligations to ensure respect for family unity.

Concluding remarks and recommendations

This submission has drawn attention to the ways in which Australian laws, practice and policies have violated Australia's international human rights obligations and detrimentally impacted the human rights of refugees, people seeking asylum and the stateless. These violations have occurred in Australian jurisdiction in the absence of any dedicated human rights protections. We submit that this inquiry must seriously consider the human rights breaches experienced by refugees and people seeking asylum in Australia and ensure that any future human rights legislation prevent future breaches. It is our submission that the passage of human rights legislation would aid in recognising and protecting the rights of refugees, people seeking asylum and the stateless. It is important to note that the Australian government cannot relieve itself of the obligations it has assumed voluntarily under international law. A Charter of Human Rights would be a necessary step in bringing Australia in line with internationals standards on human rights protection and afford the proper respect to the human rights of refugees, people seeking asylum and the stateless.

Recommendation 1:

The Parliamentary Joint Committee on Human Rights recommend that the Australian Government enact an Australian Charter of Human Rights.

Recommendation 2:

An Australian Charter of Human Rights should apply to protect the rights of anyone within the power or effective control of the Australian Government.

Sarah Dale

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Refugee Advice & Casework Service (RACS)

Annexure

Please see a list of relevant submissions and reports previously made by RACS below:

Submission no. 7 to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, 2023 < https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CIORAct2021/Submissions>.

Submission no. 351 to the Joint Standing Committee on Migration, Parliament of Australia, *Ending Definite and Arbitrary Immigration Detention Bill 2021*, 2022 < https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/ImmigrationDetentionBill/Submissions>.

Submission no. 39 to the Senate Standing Committees on Legal and Constitutional affairs, Parliament of Australia, Inquiry into the Efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions, 2021 < https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/FamilyandPartnerVisas/Submissions>.

Submission to the *Joint General Comment – No. 4 of the CMW and No. 23 of the CRC (2017) – on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return,* <https://www.ohchr.org/en/documents/general-comments-and-recommendations/joint-general-comment-no-4-cmw-and-no-23-crc-2017> .

Submission no. 26 to the Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, Inquiry into the conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea, 2016, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Offshore_RPCs/Submissions>.

Submission no. 134 to the Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 2014, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Asylum_Legacy_Caseload_Bill_2014/Submissions>.

Submission no. 93 to the Select Committee on Temporary Migration, Parliament of Australia, Inquiry into the impact of Australia's temporary protection regime, 2020, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Temporary_Migration/TemporaryMigration/Submissions>.

Submission no. 47 to the Senate Standing Committees on Foreign Affairs Defence and Trade, Parliament of Australia, Inquiry into the issues facing diaspora communities in Australia, 2020, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Diasporacommunities/Submissions>.

Submission no. 20 to the Senate Legal and Constitutional Affairs Committee, Parliament of Australia, Inquiry into the performance and integrity of Australia's administrative review system, 2021, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Adminreviewsystem/Submissions>.

Submission no. 104 to the Joint Standing Committee on Migration Inquiry, Parliament of Australia, Migration pathway to nation building, 2023, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/MigrationPathway/Submissions>.