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Via email

Distinguished Committee members

**Follow-up Civil Society Report on United Nations Human Rights Committee Concluding Observations 2017 – 2019: Australia**

1. The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney, the Public Interest Advocacy Centre (PIAC), the Refugee Council of Australia (RCOA) and the Human Rights Law Centre, with pro bono support from Wotton + Kearney, welcome the opportunity to provide further information on the measures taken by Australia to implement the recommendations made by the Committee in paragraphs 34, 36 and 38 of its concluding observations on the sixth periodic report of Australia in relation to the International Covenant on Civil and Political Rights (ICCPR).
2. The purpose of this follow-up report is to respond to the information received by the Committee from Australia on 8 November 2019,<sup>1</sup> and provide a high-level summary of key developments since that time. It supplements the submission prepared by RCOA in November 2019 ('2019 Civil Society Report'),<sup>2</sup> much of which remains relevant.

***Non-refoulement***

**Paragraph 34(a): Repealing section 197 (c) of the *Migration Act 1958***

3. In 2019, Australia advised the Committee that, in spite of s 197C of the *Migration Act*, a commitment to upholding international obligations was 'reflected in current processes, which check for *non-refoulement* risks for all [unlawful non-citizens] prior to consideration for removal from Australia'.<sup>3</sup> In practice, the Department of Home Affairs adopted a policy of not removing individuals from Australia in circumstances where they were found to engage Australia's *non-*

<sup>1</sup> Human Rights Committee, *Concluding observations on the sixth periodic report of Australia, Addendum: Information received from Australia on follow-up to the concluding observations* (CCPR/C/AUS/CO/6/Add.1, 2 December 2019) ('Information received from Australia').

<sup>2</sup> RCOA, *Civil Society Report on United Nations Human Rights Committee Concluding Observations 2017 – 2019* (November 2019) ('2019 Civil Society Report').

<sup>3</sup> Information received from Australia, [3].



*refoulement* obligations.<sup>4</sup> Instead, people in this situation typically ended up in immigration detention while the Department looked for a safe place to remove them to. If no place could be found, the consequence was indefinite detention.

4. In 2020, the Federal Court found that the Department's policy of not removing individuals who had exhausted all visa avenues but who were owed *non-refoulement* obligations ran counter to the words of ss 197C and 198 of the *Migration Act*. The Court said that these provisions require that such a person be removed from Australia as soon as reasonably practicable, even if this would breach Australia's *non-refoulement* obligations.<sup>5</sup>
5. In 2021, Australia amended the *Migration Act* in response to the Federal Court decision.<sup>6</sup> These amendments modified s 197C. It now provides that, unless certain conditions are satisfied, the duty to remove an unlawful non-citizen under s 198 will not be enlivened if the person is owed *non-refoulement obligations*. When introducing the amending legislation, the Immigration Minister said that the amendments would 'clarify that, in line with Australia's international obligations relating to *non-refoulement*, the removal power in the *Migration Act* does not require or authorise removal of a person where they have been assessed as engaging those obligations'.<sup>7</sup>
6. Despite this statement, the 2021 amendments do not adequately address the Committee's concern that Australia's domestic legal framework does not afford full protection against *refoulement*.
7. Contrary to the Committee's recommendations, s 197C has not been repealed. Section 197C(1) continues to state that for the purposes of the removal obligations under s 198, Australia's *non-refoulement* obligations are irrelevant. Section 197C(2) continues to state that the duty to remove arises irrespective of whether there has been an assessment of Australia's *non-refoulement* obligations. Repealing these provisions would by far be the most efficient way to ensure consistency with Australia's *non-refoulement* obligations. Instead, new ss 197C(3)-(9) broadly prevent a person from being removed to a country if they have had a 'protection finding' made by the Minister with respect to that country. This is an assessment of whether the person meets protection obligations criteria specified under s 36 of the *Migration Act* and is separate to the narrower question of whether the person should be granted a protection visa.<sup>8</sup> While a 'protection finding' is similar to an assessment that a person is owed *non-refoulement* obligations, there has been some suggestion that the criteria in s 36 are narrower than Australia's *non-refoulement* obligations under international law.<sup>9</sup>
8. New s 197D grants the Minister a discretionary power to determine that a 'protection finding' that has previously been made should no longer apply. Where the Minister exercises this power, a person who was previously protected against removal to a country on the basis that they would face a risk of harm loses this protection and must be removed as soon as

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<sup>4</sup> See e.g. *AJL20 v Commonwealth of Australia* [2020] FCA 1305, [109]-[113]; [120]-[123]. For background to this case and an explainer of the key issues in a subsequent High Court appeal (which reversed the Federal Court decision, but on an unrelated ground), see Sangeetha Pillai, 'AJL20 v Commonwealth: Non-refoulement, indefinite detention and the "totally screwed"' (*AusPubLaw Blog*, 8 September 2021) <<https://auspublaw.org/2021/09/ajl20-v-commonwealth-non-refoulement-indefinite-detention-and-the-totally-screwed/>>. Dr Pillai is a Senior Research Associate at the Kaldor Centre for International Refugee Law and available to provide further submissions on the legal implications of this case if it would assist the Committee.

<sup>5</sup> *AJL20 v Commonwealth of Australia* [2020] FCA 1305, [123]-[126].

<sup>6</sup> *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth). For an explanation of what this amending legislation did, see Sangeetha Pillai, 'The *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*: A case study in the importance of proper legislative process' (*Kaldor Centre for International Refugee Law*, 10 June 2021) <<https://www.kaldorcentre.unsw.edu.au/publication/migration-amendment-clarifying-international-obligations-removal-act-2021-case-study>>.

<sup>7</sup> Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 25 March 2021, 3497 (Alex Hawke, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs).

<sup>8</sup> Section 36A of the *Migration Act*, introduced via the 2021 amendments, requires the Minister, when considering protection visa applications, to assess and make a record of whether an applicant meets the protection obligations criteria specified under s 36. Where no such record has been made (for example in cases where a protection application was considered and determined before s 36A came into effect), s 197C(5) deems a protection finding to have been made where the Minister was expressly or impliedly satisfied of the relevant criteria.

<sup>9</sup> See, for example, Chris Honnery, 'The confused construction of 'non-refoulement' in the Ministerial Directions for visa cancellations' (*AusPubLaw Blog*, 29 April 2020) <<https://auspublaw.org/2020/04/the-confused-construction-of-non-refoulement-in-the-ministerial-directions-for-visa-cancellations/>>.

reasonably practicable. This ministerial discretion risks violating Australia's *non-refoulement* obligations. While an Explanatory Memorandum accompanying the amendment legislation suggested that it would, in practice, be 'rare' for this power to be exercised,<sup>10</sup> there remains a real risk that the power will be exercised in a way that leads to *refoulement*. The availability of merits review provides some safeguard against this risk, but the effectiveness of such merits review is limited by a requirement that it must be completed within a prescribed timeframe.<sup>11</sup>

9. Finally, to the extent that the 2021 amendments do protect against *non-refoulement*, they do so in a way which gives rise to risks of other violations of international law, including arbitrary detention and cruel, inhuman or degrading treatment. Under s 189 of the *Migration Act*, a person who cannot be removed from Australia but who has not been granted a visa is subject to mandatory detention, which may be indefinite where no safe country willing to accept the person can be found.<sup>12</sup> Accordingly, the 2021 amendments exacerbate the concerns previously raised by the Committee, and addressed below, regarding Australia's mandatory immigration detention regime.

#### Paragraph 34(b): Interception of asylum seekers at sea

10. Australia has not taken any steps to implement the recommendations of the Committee in paragraph 34(b). It continues to intercept asylum seekers at sea under 'Operation Sovereign Borders' and to return them to their countries of origin and/or departure without allowing them access to fair and efficient asylum procedures, legal representation, an effective possibility to legally challenge return decisions, or legal remedies for violations of their rights at sea.
11. Australia's claims that it 'does not return people to situations where doing so would be inconsistent with Australia's non-refoulement obligations',<sup>13</sup> and that 'legal representation can be accessed by intercepted persons where appropriate, and legal remedies are available',<sup>14</sup> are not supported by Australian law or publicly available evidence of Australian practice at sea. We recommend that Australia be asked to substantiate these claims with specific details and evidence.
12. Nothing in the *Migration Act 1958* permits asylum seekers who have been intercepted by and are within the jurisdiction of Australian maritime officers at sea, but have not yet entered Australia, to lodge claims for protection, access legal representation, or access legal remedies in the event of breach of their rights.
13. The *Maritime Powers Act 2013* continues to authorise Australian maritime officers to exercise a wide range of powers in relation to people and vessels at sea, including detaining them and taking them to any place in or outside of Australia.<sup>15</sup> Officers do not need to take intercepted asylum seekers to land; they may leave them, for example, on vessels in the ocean.<sup>16</sup> Officers may also take intercepted asylum seekers to other countries even if Australia does not have any agreement with that country for the acceptance of those people, and 'irrespective of the international obligations or domestic law' of that other country.<sup>17</sup> The Act expressly provides that the exercise of these powers to detain and move people will not be invalid under domestic law even if they are inconsistent with Australia's international obligations.<sup>18</sup> As noted by RCOA:

These powers allow the Minister for Home Affairs to hold asylum seekers in arbitrary, indefinite and potentially incommunicado detention at sea and forcibly transfer them to countries where they could face persecution and other forms of serious harm, without any scrutiny by the public, courts or Australian Parliament. They grant a level of authority to the Minister which is well in

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<sup>10</sup> Supplementary Explanatory Memorandum to the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, [10].

<sup>11</sup> *Migration Act 1958*, ss 197D(6); 419. See further paragraph 46 of the 2019 Civil Society Report.

<sup>12</sup> This risk was noted by the Parliamentary Joint Committee on Human Rights (Report 5 of 2021 [2021] AUPJCHR 43, [1.59]). The potential for indefinite detention was confirmed by the High Court in *Al-Kateb v Godwin* (2004) 219 CLR 562 and recently reaffirmed on a broadened basis in *Commonwealth v AJL20* [2021] HCA 21.

<sup>13</sup> Information received from Australia, [5].

<sup>14</sup> Information received from Australia, [6].

<sup>15</sup> *Maritime Powers Act 2013* (Cth), Part 3, Divisions 7 and 8.

<sup>16</sup> *Maritime Powers Act 2013* (Cth), s 75C(1)(a).

<sup>17</sup> *Maritime Powers Act 2013* (Cth), s 75C(1)(b).

<sup>18</sup> *Maritime Powers Act 2013* (Cth), s 75A; see also s 22A.

excess of what is considered permissible under international maritime and human rights treaties.<sup>19</sup>

Nothing in the *Maritime Powers Act* permits intercepted asylum seekers to lodge claims for protection, access legal representation, or access legal remedies in the event of breach of their rights.

14. According to Australian government data provided to the Senate in 2020 (and reported still to be current as of late 2021<sup>20</sup>), 1264 asylum seekers (including 265 children) were intercepted at sea, brought to Australia and likely transferred offshore to Nauru or Papua New Guinea (PNG) between September 2013 and July 2014.<sup>21</sup> At least a further 818 asylum seekers (including 124 children) were intercepted at sea and 'returned' to their countries of origin and/or departure between December 2013 and January 2020.<sup>22</sup>
15. None of the people intercepted and returned to their countries of origin and/or departure since 2013 were given access to a full, fair and efficient refugee status determination procedure. The Committee has previously received information, and raised concerns, about the 'on-water assessment' process used by Australia to determine whether (some<sup>23</sup>) intercepted asylum seekers engage its *non-refoulement* obligations.<sup>24</sup> Those concerns remain relevant, albeit subject to the following developments.
16. Whereas previously 'on-water assessments' involved a form of 'enhanced screening',<sup>25</sup> in 2020 the Department of Home Affairs advised that it 'no longer conducts enhanced screening either at sea or on land',<sup>26</sup> giving rise to concerns that people seeking asylum might 'not even [be] given a rudimentary assessment of their refugee claims'.<sup>27</sup> Subsequently, in March 2021, the Department of Home Affairs was asked to explain to the Senate how Australia was ensuring that it was not returning people with legitimate claims for protection back to danger now that 'enhanced screening' was no longer occurring. The Department replied:

The term 'enhanced screening' has been superseded by the term 'entry screening'.

Entry screening refers to the process undertaken to determine if an asylum seeker who, upon entering the migration zone but before being immigration cleared, seeks to claim protection in Australia.

The Department conducts entry screening to ensure it does not refoule asylum seekers with legitimate protection claims, in breach of Australia's international obligations.

The screening process identifies if the asylum seeker has claims which may potentially engage Australia's protection obligations.

The Department can confirm that the entry screening process at sea is the same as the entry screening process that is sometimes referred to for people on land in Australia.<sup>28</sup>

17. This response does not provide sufficient information about current 'entry screening' processes to alleviate concerns that Australian practice continues to be inconsistent with its *non-refoulement* obligations. Nor does it clarify whether entry screening is applied to all intercepted asylum seekers prior to return, or only those who have 'enter[ed] the migration zone' (which would exclude asylum seekers intercepted on the high seas). It also remains unclear whether entry screening is conducted for asylum seekers turned back to Indonesia, or only those who are subject to a 'takeback' to other countries.

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<sup>19</sup> RCOA, *Pushback Practices and their Impact on the Human Rights of Migrants* (March 2021) 1

<<https://www.refugeecouncil.org.au/wp-content/uploads/2021/03/UN-SR-Pushback-practices-and-their-impact-on-the-human-rights-of-migrants.pdf>>.

<sup>20</sup> Senate Standing Committee on Legal and Constitutional Affairs, Budget Estimates, Home Affairs Portfolio – Australian Border Force, 25 October 2021, Answer to Question SE21-277.

<sup>21</sup> Senate Standing Committee on Legal and Constitutional Affairs, Additional Estimates, Home Affairs Portfolio, 2 March 2020, Answer to Question AE20-203. This figure excludes the people described as 'crew' in government reporting.

<sup>22</sup> *Ibid.*

<sup>23</sup> Asylum seekers turned back to Indonesia may be returned without even this rudimentary level of screening. See e.g. RCOA (n 19), 5.

<sup>24</sup> See e.g. 2019 Civil Society Report, [34]-[43].

<sup>25</sup> 2019 Civil Society Report, [34]-[35].

<sup>26</sup> Senate Standing Committee on Legal and Constitutional Affairs, Additional Estimates, Home Affairs Portfolio, 2 March 2020, Answer to Question AE20-206.

<sup>27</sup> RCOA (n 19), 3.

<sup>28</sup> Senate Standing Committee on Legal and Constitutional Affairs, Additional Estimates, Home Affairs Portfolio – Australian Border Force, 22 March 2021, Answer to Question AE21-311.

18. Historical statistics provided by the Australian Parliamentary Library indicate that between 70 and 100% of asylum seekers arriving in Australia by boat since the 1970s have been found to be refugees and granted protection either in Australia or in another country.<sup>29</sup> In light of these statistics, it is implausible that not a single person trying to reach Australia by sea since July 2014 has engaged Australia's protection obligations. When questioned on the discrepancy between the historical rates of successful asylum claims and the claim that almost no one trying to reach Australia by boat since July 2014 has engaged Australia's protection obligations, the Department of Home Affairs and the Australian Border Force have been unable to provide a satisfactory explanation, instead simply stating that: 'we understand that we meet our international and domestic legal obligations, and found that we owed them no protections'.<sup>30</sup>
19. Concerns about the risk of *refoulement* at sea are heightened by the ongoing and extreme secrecy around 'on-water' matters, including the processes used to determine whether asylum seekers engage Australia's protection obligations. Under Australian law, people who reveal information about these operations may be subject to criminal prosecution and jail time.<sup>31</sup> The Department of Home Affairs continues to refuse to provide meaningful information about the nature of these on-water assessments, even in response to direct questioning by Senators in the Australian Parliament. Rather, it has repeatedly provided answers in the following general terms:
- People intercepted seeking to enter Australia illegally by boat are not prevented from providing information about their personal circumstances at any time while they are detained or otherwise held by Australian Government authorities. All information provided by the person (including asylum claims) is appropriately considered, consistent with Australia's international obligations.<sup>32</sup>
20. Finally, Australia's maritime interception policies also carry inherent risks of violating other fundamental rights and the safety and well-being of asylum seekers at sea, especially in cases involving children and other vulnerable groups. There are concerns that Australian practice may violate articles 6, 7, 9 and 10 of the ICCPR. Of particular concern is the fact that Australian law authorises asylum seekers to be detained on the high seas in secret and for an indefinite period of time, without any procedural safeguards or guarantees or access to legal remedies.

**Paragraph 34(c):        *Repealing the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014***

21. Australia has expressed no intention to repeal the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, nor to amend the 'fast track' assessment process to address the concerns raised previously by the Committee and civil society about the removal of key procedural safeguards at merits review and the exclusion of certain category of asylum seekers from even that limited form of merits review.<sup>33</sup>
22. RCOA recently compared the rates at which negative decisions on asylum claims have been remitted to the Department by the Immigration Assessment Authority (IAA) applying the fast-track system (from July 2015 to September 2021), and the previous merits review system (from 2009 to 2013).<sup>34</sup> These comparisons reinforce concerns about deficiencies in the fast-track process. For example, the rate of remittal for applicants from Afghanistan dropped from 89% under the previous system to just 17% under the IAA. The rate of remittal for applicants from Sri Lanka fell from 60% to just 6%.<sup>35</sup>

<sup>29</sup> Janet Phillips, 'Asylum seekers and refugees: what are the facts?' (Australian Parliamentary Library, Research Paper Series 2014–15, 2 March 2015) 9 <[https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/HGNW6/upload\\_binary/HGNW6.pdf](https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/HGNW6/upload_binary/HGNW6.pdf)>.

<sup>30</sup> See, for example: Senate Legal and Constitutional Affairs Legislation Committee, Official Committee Hansard, 21 May 2018, 77.

<sup>31</sup> *Australian Border Force Act 2015*, s 42.

<sup>32</sup> See e.g. Senate Standing Committee on Legal and Constitutional Affairs, Budget Estimates, Immigration and Border Protection Portfolio, 22 May 2017, Answer to Question BE17-029. See also (from the same round of Budget Estimates), 6 June 2017, Answer to Question BE17-031.

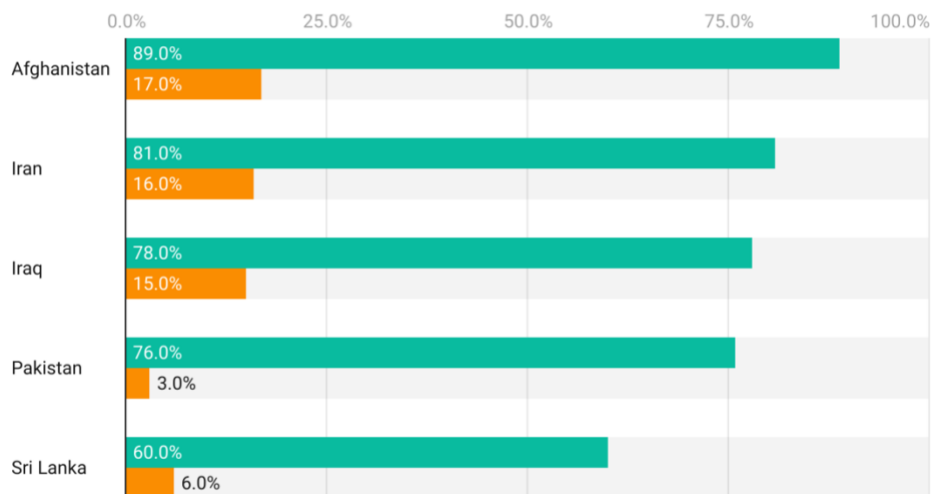
<sup>33</sup> See e.g. 2019 Civil Society Report, [44]-[55].

<sup>34</sup> RCOA, 'Fast tracking and 'Legacy Caseload' statistics: Review of fast-tracking decisions' (17 January 2022) <[refugeecouncil.org.au/fast-tracking-statistics/9/](https://refugeecouncil.org.au/fast-tracking-statistics/9/)>.

<sup>35</sup> The remittal rate fell to 6% despite a UN Special Rapporteur publishing a report during this period urging the international community to 'ensure that the principle of non-refoulement is upheld by not returning to Sri Lanka persons, in particular Tamils,

## Comparison of remittal rates between IAA and previous review system

IAA remittal rates from July 2015 to 30 September 2021 vs. average overturn rate (2009-2013) under previous review system

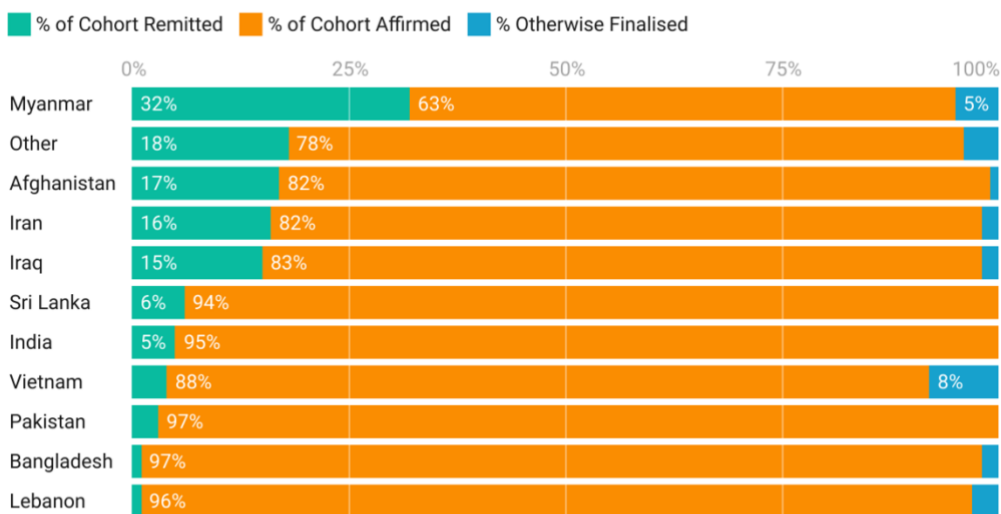


Stateless people were not included in the former statistics, so are excluded here for comparison.

Chart: Refugee Council of Australia • Source: Immigration Assessment Authority and Department of Immigration and Citizenship • Created with Datawrapper

## IAA outcomes by country

From 1 July 2015 to 30 September 2021



The IAA provides the following explanation for 'otherwise finalised': " Following the Full Federal Court's judgment in *DBB16*, a significant number of IAA cases were 'Otherwise Finalised' after having received confirmation from the Department of Home Affairs that affected applicants no longer met the definition of Unauthorised Maritime Arrival pursuant to section 5AA of the Migration Act 1958 (the Act)". Note figures of <1% are not included.

Chart: Refugee Council of Australia • Source: Immigration Assessment Authority • Created with Datawrapper

who may be at risk of torture or ill-treatment, in accordance with article 3 of the Convention against Torture': Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka* (A/HRC/34/54/Add.2, 22 December 2016), [122(b)].

## Offshore immigration processing facilities and Christmas Island

### Paragraph 36(a): End offshore transfer arrangements

23. According to the latest available government statistics, 228 people subject to offshore processing remained in Nauru and PNG as of 31 October 2021.<sup>36</sup> While the policy of offshore processing formally remains on foot, and the Australian government continues to state that 'anyone who attempts to enter Australia illegally by boat will be returned, or sent to Nauru',<sup>37</sup> no new arrivals are believed to have been sent offshore since 2014.
24. In September 2021, Australia and Nauru signed 'a memorandum of understanding to establish an enduring regional processing capability in Nauru'.<sup>38</sup> Unlike previous agreements underpinning the offshore processing arrangement, the terms of this agreement have not been made public.
25. In October 2021, the Australian and PNG governments announced that 'Australian Government regional processing contracts in PNG will cease on 31 December 2021 and will not be renewed'.<sup>39</sup> According to the announcement, anyone subject to offshore processing and still in PNG could volunteer to be transferred to Nauru prior to 31 December 2021, and then from 1 January 2022 'the PNG Government will assume full management of regional processing services in PNG and full responsibility for those who remain'.<sup>40</sup> There is concern that through this development Australia has attempted to shirk or deny its ongoing responsibility for the people it forcibly transferred to PNG in 2013-14.

### Paragraph 36(b): Protect the rights of refugees and asylum seekers affected by the closure of offshore processing centres

26. Australia continues to insist that responsibility for the treatment and well-being of people transferred to Nauru and PNG rests with those countries,<sup>41</sup> despite the Committee (and other international bodies and experts) rightly affirming that 'the significant levels of control and influence exercised by [Australia] over the operation of the offshore regional processing centres ... amount to ... effective control' such as to establish Australia's jurisdiction with respect to asylum seekers and refugees transferred offshore.<sup>42</sup> We recommend that Australia be reminded, again, that its international obligations did not cease when people were forcibly transferred outside its territory.
27. Asylum seekers and refugees subject to Australia's offshore processing regime – including those who have been transferred back to Australia on a temporary basis – have now endured more than eight years of severe human rights violations and are in urgent need of protection of their rights and appropriate durable solutions.
28. Almost 1,200 people are in Australia and classified as 'transitory persons' after being transferred back from offshore, primarily for medical reasons. Transitory persons have no right to apply for a protection (or any other) visa while in Australia, unless specifically permitted to do so by the Minister. While all the people in this cohort were subject to mandatory detention upon return to Australia, the majority are now living in the community, either in 'community detention' (which requires people to live in specific housing under a 'residence determination'), or on a

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<sup>36</sup> This 228 people was comprised of 106 people in Nauru (77 refugees, 16 still in a refugee status determination process, and 13 non-refugees) and 122 people in PNG (87 refugees and 35 non-refugees): Department of Home Affairs, 'Statistics of transitory persons in Nauru and PNG' (31 October 2021) <<https://www.homeaffairs.gov.au/about-us-subsite/files/population-and-number-of-people-resettled.pdf>>.

<sup>37</sup> Karen Andrews, 'Joint media release with the Hon. Westly Nukundj MP – Finalisation of the Regional Resettlement Arrangement' (6 October 2021) <https://minister.homeaffairs.gov.au/KarenAndrews/Pages/finalisation-of-the-regional-resettlement-arrangement.aspx>

<sup>38</sup> Karen Andrews MP, 'Joint media release with the Hon. Lionel Rouwen Aingimea - New agreement to secure our region from maritime people smuggling' (24 September 2021) <<https://minister.homeaffairs.gov.au/KarenAndrews/Pages/maritime-people-smuggling.aspx>>.

<sup>39</sup> Karen Andrews, 'Joint media release with the Hon. Westly Nukundj MP' (n 37).

<sup>40</sup> Ibid.

<sup>41</sup> Information received from Australia, [14].

<sup>42</sup> Human Rights Committee, *Concluding observations on the sixth periodic report of Australia* (CCPR/C/AUS/CO/6, 1 December 2017) [35].

bridging visa.<sup>43</sup> In August and September 2020, the Minister converted a significant number of the people who had previously been in community detention (including families with children) onto bridging visas, effectively stripping them of much of the support they had previously received and leaving many without housing or income in the middle of the COVID-19 pandemic.<sup>44</sup> The treatment of transitory persons in detention in Australia is discussed below in relation to the ‘medevac cohort’.

29. Asylum seekers and refugees still in Nauru continue to face difficult living conditions, exacerbated by the ongoing uncertainty about their futures and the denial of durable solutions.
30. According to the October 2021 announcement, ‘PNG will provide a permanent migration pathway for those wishing to remain in PNG – including access to citizenship, long-term support, settlement packages and family reunification’.<sup>45</sup> However, Australia sought, and PNG made to Australia, no commitments regarding permanent residence, citizenship or treatment of people remaining in PNG.<sup>46</sup> As such, longstanding concerns that PNG is not a suitable settlement country for most refugees remain relevant.<sup>47</sup> Asylum seekers and refugees in PNG in 2022, after the withdrawal of Australian service providers, have expressed confusion and anxiety about their situation.<sup>48</sup> They have also continued to voice fears for their safety and well-being, after many years of threats and violent incidents.<sup>49</sup>
31. As of 31 October 2021, 1026 refugees had been resettled from Nauru and PNG to other countries (of which approximately 995 people had been resettled in the United States (US)), and at least another 230 refugees had been provisionally approved to resettle in the US. In February 2019, it was reported that 265 people had been rejected for resettlement by the US. This number is believed to have increased since then, but further official data is not available.
32. Despite the lack of any pathway to durable protection for many of the people still in Nauru and PNG, or in Australia as transitory persons, the Australian Government continues to refuse to accept an offer from the New Zealand Government to resettle significant numbers of people who have been subject to offshore processing.

### **Paragraph 36(c): Christmas Island detention centre**

33. The 2019 Civil Society Report noted that Australia was planning to close the North West Point Immigration Detention Centre on Christmas Island in 2019 and return it to a ‘contingency setting’.<sup>50</sup> In August 2020, the Australian Government announced that it would re-open this detention centre in response to a surge in the immigration detention population caused by unlawful non-citizens who had been convicted of crimes being released from prison into immigration detention, difficulties in removing them from Australia due to global COVID-19 measures, and COVID-19 distancing measures in place within the detention network, which were placing the network under pressure.<sup>51</sup> According to the latest available government statistics, 226 people were in that detention centre as of 30 September 2021.<sup>52</sup> There have

<sup>43</sup> RCOA, ‘Offshore processing statistics: People transferred to Australia’ (8 January 2022)

<<https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/5/>>.

<sup>44</sup> Ibid.

<sup>45</sup> Karen Andrews, ‘Joint media release with the Hon. Westly Nukundj MP’ (n 37).

<sup>46</sup> Commonwealth of Australia, *Senate Estimates*, 25 October 2021, 111 (Marc Ablong)

<sup>47</sup> These concerns have been raised consistently by the UN High Commissioner for Refugees (UNHCR) since the reintroduction of offshore processing in 2012. See e.g. UNHCR, *UNHCR monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013* (26 November 2013) [120]-[128] <<https://www.refworld.org/docid/5294aa8b0.html>>; UNHCR, ‘Australia must secure solutions for refugees abandoned on Manus Island’ (22 December 2017) <<https://www.unhcr.org/en-au/news/briefing/2017/12/5a3cce224/australia-must-secure-solutions-refugees-abandoned-manus-island.html>>.

<sup>48</sup> See e.g. Eden Gillespie, ‘“Confusion, no answers” as Australia ends offshore asylum seeker processing deal with PNG’ (SBS News, 31 December 2021) <<https://www.sbs.com.au/news/confusion-no-answers-as-australia-ends-offshore-asylum-seeker-processing-deal-with-png/d5a65553-f611-4c1e-b121-967b19a97393>>.

<sup>49</sup> See e.g. Zoe Osborne, ‘Beyond the Park Hotel: Australia’s immigration detention network’ (*Al Jazeera*, 13 January 2022) <<https://www.aljazeera.com/news/2022/1/13/beyond-the-park-hotel-australias-immigration-detention-network>>.

<sup>50</sup> 2019 Civil Society Report [140]-[141]; Information received from Australia [20].

<sup>51</sup> Australian Border Force, ‘Statement regarding Christmas Island’ (4 August 2020) <<https://www.abf.gov.au/newsroom-subsite/Pages/statement-christmas-island-04-08-2020.aspx>>.

<sup>52</sup> Department of Home Affairs, ‘Immigration Detention and Community Statistics Summary’ (30 September 2021) 4 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-september-2021.pdf>>.



been several riots and protests at the detention centre since its reopening, including in response to the living conditions and treatment of people deprived of liberty there.

34. When the reopening of the Christmas Island detention centre was announced in August 2020, the Australian Border Force tweeted that no refugees would be sent there.<sup>53</sup> Despite this Tweet, the Department of Home Affairs advised a Senate Committee in 2021 that, as at 31 March 2021, 82 detainees on Christmas Island had previously held a protection, refugee or humanitarian visa.<sup>54</sup>
35. The 2019 Civil Society Report also noted that that a Tamil family with two young children was moved to the 'Alternative Place of Detention' (APOD) on Christmas Island in August 2019, and that their deportation to Sri Lanka was stayed by the Federal Court pending further determination of the youngest child's claim for asylum.<sup>55</sup> In June 2021, that youngest child became critically ill and required urgent medical evacuation to a hospital on the Australian mainland. Since that time, the family have remained in community detention in Perth.

## **Mandatory immigration detention**

### **Paragraphs 38(a)-(c): Arbitrary and indefinite detention**

36. Despite Australia's stated position that indefinite or arbitrary immigration detention is 'not acceptable',<sup>56</sup> it continues to operate a mandatory immigration detention regime which does not comply with article 9 of the ICCPR. The concerns with this detention regime previously raised by and to the Committee remain relevant, as Australia has failed to adopt the recommendations previously made by the Committee to bring its legislation and practices into line with its obligations under international law.
37. The average length of time people are held in immigration detention has increased further since the last reporting period. Detention times reached the highest ever recorded rate in August 2021, at 696 days.<sup>57</sup> According to the most recent government statistics (dated 30 September 2021), the average period of time for people held in detention facilities was 689 days.<sup>58</sup> Of the 1459 people in held immigration detention at that time, 510 (35%) had been detained for more than 2 years, and 117 (8%) had been detained for more than 5 years.<sup>59</sup>
38. Australia's claim that 'held (facility based) detention is a last resort for the management of unlawful non-citizens'<sup>60</sup> is not supported by law or practice. Rather, s 189 of the *Migration Act* continues to require that all unlawful non-citizens be detained on arrival, making detention the measure of *first* resort in all cases, without any individual determination of the need for, appropriateness of, or alternatives to, confinement.
39. A person in immigration detention may be able to seek merits or judicial review of visa decisions, depending on their circumstances, but has no domestic recourse to challenge their detention on the basis that it amounts to an arbitrary deprivation of liberty contrary to article 9 of the ICCPR.

### **Paragraph 38(d): Detention of individuals who have received adverse and qualified security assessments**

40. As at 30 September 2021, 11 individuals were being held in detention because they had been assessed by the Australian Security and Intelligence Organisation (ASIO) to be a security risk

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<sup>53</sup> Tweet from Australian Border Force (@AusBorderForce, 5 August 2020, 11:30am) <<https://twitter.com/AusBorderForce/status/1290822452063305730>>.

<sup>54</sup> Senate Standing Committee on Legal and Constitutional Affairs, Budget Estimates, Home Affairs Portfolio – Australian Border Force, 24-25 May 2021, Answer to Question BE21-395.

<sup>55</sup> 2019 Civil Society Report, [142].

<sup>56</sup> Information received from Australia, [31].

<sup>57</sup> RCOA, 'Statistics on people in detention in Australia' (8 January 2022) <<https://www.refugeecouncil.org.au/detention-australia-statistics/5/>>.

<sup>58</sup> Department of Home Affairs, 'Immigration Detention and Community Statistics Summary' (n 52), 12.

<sup>59</sup> *Ibid.*

<sup>60</sup> Information received from Australia, [28].

(and were the subject of either an 'adverse security assessment' or a 'qualified security assessment').<sup>61</sup> These people cannot appeal against the assessment or receive reasons or evidence.<sup>62</sup> The average length of time that these 11 people have been detained is 7.3 years. One individual has now been detained for more than 12 and a half years.

#### **Paragraph 38(e): Detention of children**

41. As of 31 September 2021, no children were reported to be held in a closed immigration detention facility, 176 children were in 'community detention' subject to a residence determination and 1636 children were living in the community on bridging visas.<sup>63</sup>
42. While the lack of children in closed detention facilities is a positive development, Australia's position continues to be that 'a person who does not hold a valid visa is an unlawful non-citizen, and must be detained under the Migration Act',<sup>64</sup> even if they are a child. Australia's claim that 'held immigration detention of children is always a last resort'<sup>65</sup> is not consistent with this position.
43. The government has demonstrated its determination to detain even very young children in harsh and dangerous detention conditions, in the interests of 'border protection'. For example, the Tamil family mentioned in paragraph 35 was taken from their home and detained in a closed immigration detention centre, unsuitable for young children, from March 2018 to August 2019. While in detention there, the youngest child (2 years old) had four teeth surgically removed, and another four treated, after they began to rot, reportedly due to a lack of access to fresh food and sunlight.<sup>66</sup> The family was subsequently held in the remote Christmas Island APOD under restrictive conditions until the youngest child (then 3 years old) was medically evacuated to Perth on the Australian mainland.
44. Finally, we note that some adults currently in immigration detention have been held there (and/or in detention offshore) since they were children, including people who arrived as asylum seeker children, have been recognised as refugees, and have committed no crime.<sup>67</sup> The ongoing detention of these individuals is a matter of grave and urgent concern.

#### **Health Services in immigration detention and APODs**

45. Contrary to Australia's assertion,<sup>68</sup> health care services for people in immigration detention are not comparable to those available to the Australian community. Longstanding, systemic failures to provide access to adequate and vital health services to people in immigration detention have been consistently documented, as have cases of vulnerable people being arbitrarily denied medical treatment.<sup>69</sup>
46. Of particular concern are the delays in accessing healthcare experienced by refugees and asylum seekers in the 'medevac cohort'. As detailed in the 2019 Civil Society Report, 'medevac' legislation came into force in March 2019, establishing an efficient pathway for

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<sup>61</sup> Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, Home Affairs Portfolio – Department of Home Affairs, 25 October 2021, Answer to Questions SE21-234 and SE21-235.

<sup>62</sup> RCOA, 'Statistics on people in detention in Australia: Reasons for detention' (8 January 2022) <<https://www.refugeecouncil.org.au/detention-australia-statistics/6/>>.

<sup>63</sup> Department of Home Affairs, 'Immigration Detention and Community Statistics Summary' (n 52), 4.

<sup>64</sup> Information received from Australia, [41].

<sup>65</sup> Information received from Australia, [47].

<sup>66</sup> Maani Truu, 'Two-year-old in immigration detention forced to have rotting teeth surgically removed' (SBS News, 25 July 2019) <<https://www.sbs.com.au/news/two-year-old-in-immigration-detention-forced-to-have-rotting-teeth-surgically-removed/42a2c80a-4cce-461d-bf18-a728028caca0>>.

<sup>67</sup> See e.g. Ben Doherty, "'Everyone asks about Novak' but Mehdi has languished for nine years in Australian immigration detention' (The Guardian, 7 January 2022) <<https://www.theguardian.com/world/2022/jan/07/everyone-asks-about-novak-but-mehdi-has-languished-for-nine-years-in-australian-immigration-detention>>.

<sup>68</sup> Information received from Australia, [57].

<sup>69</sup> See e.g. PIAC, *In Poor Health: Health care in Australian immigration detention* (13 June 2018) <<https://piac.asn.au/2018/06/13/in-poor-health-health-care-in-australian-immigration-detention/>>; PIAC, *Healthcare denied: Medevac and the long wait for essential medical treatment in Australian Immigration Detention* (3 December 2021) <<https://piac.asn.au/2021/12/03/healthcare-denied-medevac-and-the-long-wait-for-essential-medical-treatment-in-australian-immigration-detention/>>.

doctors to refer asylum seekers and refugees offshore for urgent medical transfer to Australia.<sup>70</sup> The medevac legislation was repealed in December 2019.<sup>71</sup> In the eight months of its operation, approximately 192 refugees and asylum seekers were transferred to Australia under the scheme.<sup>72</sup> All were detained in closed immigration detention facilities upon arrival, despite many having previously been living freely in the Nauruan and Papua New Guinean communities after being determined to be refugees.<sup>73</sup>

47. Many of the people in the medevac cohort were detained in hotels which had been designated as APODs. The use of these facilities has been widely condemned. In June 2019, the Australian Human Rights Commission recommended that hotels only be used as places of detention in exceptional circumstances and for very short periods of time, not least because of their lack of dedicated facilities and restrictions on access to open space.<sup>74</sup> Despite this recommendation, hotels have continued to be designated as APODs and used in preference to options such as the granting of bridging visas or release into community detention.
48. Many of the people in the medevac cohort experienced significant delays in accessing the healthcare for which they had been brought back to Australia. As of January 2022, some members of this cohort are still in detention and awaiting care. This delay in accessing treatment has had severe impacts, including for people awaiting treatment for painful and debilitating conditions such as severe gum disease, chest pain and heart palpitations. The combination of delayed treatment and long-term confinement has also exacerbated some existing medical conditions.
49. Delays in providing adequate healthcare to the medevac cohort are consistent with the experience of people in immigration detention in Australia more broadly. Delays can exacerbate existing conditions, in some cases causing irreparable damage, and also contribute to the development of serious mental health issues, such as depression, post-traumatic stress disorder and anxiety.
50. Civil society also holds urgent concerns about the failure to implement recommended treatment plans (for example, not providing access to a dental specialist despite referrals being made) and poor communication between agencies involved in providing health care to people in immigration detention. Poor detention conditions – including the use of ‘temporary’ hotels for long and indefinite periods, and a lack of access to adequate fresh air, sunlight, activities and visitors – have also led to worsening physical and mental health conditions.

### **Response to the COVID-19 pandemic**

51. The COVID-19 pandemic has negatively impacted on the mental health and wellbeing of people arbitrarily detained in immigration detention. All visits to immigration detention facilities ceased on 24 March 2020 due to COVID-19 and there have been restrictions on external excursions for activities outside detention facilities, such as gym visits and medical appointments.
52. Civil society remains concerned about the heightened risks of contracting COVID-19 in detention environments and overcrowded settings, and the heightened risks of severe or critical illness from COVID-19 because of relevant comorbidities such as hypertension, diabetes, and respiratory disease. In addition to the direct impact of current and rapidly spreading COVID-19 outbreaks in immigration detention,<sup>75</sup> the increased pressure on Australia’s health system has led to further delays in access to medical consultations and treatment.

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<sup>70</sup> 2019 Civil Society Report, [81]-[87].

<sup>71</sup> PIAC, *Healthcare denied* (n 69) 5.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Australian Human Rights Commission, *Risk Management in Immigration Detention* (2019) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>>.

<sup>75</sup> In October 2021, nearly one third of refugees and asylum seekers detained by the Commonwealth government at Melbourne’s Park Hotel tested positive for COVID-19. Reflecting the distress experienced by people being detained there, one detainee labelled it ‘a killer hotel, a torture hotel’: Elle Marsh, “This is a torture hotel”: Inside the Park Hotel outbreak’ (*The Saturday Paper* (online), 27 November 2021) <<https://www.thesaturdaypaper.com.au/news/politics/2021/11/27/this-torture->

53. Information on vaccination rates in immigration detention is not transparent. As at 13 January 2022, the *Guardian* reported that ‘across Australia’s immigration detention system, 59% of people detained are fully vaccinated, compared to 78% of the general community, and 92% of those aged over 16’.<sup>76</sup> Civil society is concerned about the apparent delay in the vaccination rollout amongst what should be a priority population (given the closed environment and underlying vulnerabilities).
54. In 2021, the Australian Human Rights Commission noted that while many other countries had responded to the risk of COVID-19 by reducing the number of people held in closed immigration detention, in Australia this cohort increased by nearly 12% in the first six months of the pandemic, resulting in significant strain across the immigration detention network as facilities operated close to or at their regular capacity.<sup>77</sup>
55. The Commission also noted that some measures introduced purportedly in response to COVID-19 restricted human rights more than was necessary or proportionate to reduce the health risks. It is particularly troubling that Australia and the private contractors who operate the immigration detention network have used solitary confinement as a means of limiting the spread of COVID-19.<sup>78</sup>

### Use of force in immigration detention settings

56. The Australian government’s claims that there is a presumption against the use of force, that it is used only as a measure of last resort, and that the amount of force used and the application of restraints must be reasonable,<sup>79</sup> are contradicted by testimony from people in immigration detention and others working in the sector,<sup>80</sup> as well as independent monitoring mechanisms.<sup>81</sup>
57. In 2019, the Australian Human Rights Commission published the findings from an inquiry into the use of force in immigration detention, after receiving a range of complaints against the Department of Home Affairs on this issue.<sup>82</sup> It found various breaches of rights protected under the ICCPR (and other human rights treaties), including in cases where:
- handcuffs were applied to a detainee for eight and a half hours over a significant wrist wound while he was transferred between detention centres;<sup>83</sup>

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hotel-inside-the-park-hotel-outbreak/163793160012962>. Reports included that medical care, food, COVID-19 safety protocols were not provided, or if they were provided, it was done so on an arbitrary basis.

<sup>76</sup> Ben Doherty, ‘“Rampant”: fears over growing Covid outbreak at Sydney’s Villawood detention centre’ (*The Guardian*, 13 January 2022) <<https://www.theguardian.com/australia-news/2022/jan/13/rampant-nearly-70-people-have-covid-at-sydneys-villawood-detention-centre-sources-say>>.

<sup>77</sup> Australian Human Rights Commission, *Management of COVID-19 risks in immigration detention* (16 June 2021) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/management-covid-19-risks-immigration-detention>>.

<sup>78</sup> Ibid. See also Sarah Price, ‘Villawood asylum seeker’s plea from solitary “torture” amid virus scare’ (*The Saturday Paper*, 18 September 2021) <<https://www.thesaturdaypaper.com.au/news/politics/2021/09/18/villawood-asylum-seekers-plea-solitary-torture-amid-virus-scare>>. The Special Rapporteur on Torture has stated that a person must not be kept in solitary confinement for longer than 15 days. A longer period amounts to torture under international law. This statement was endorsed by the UN Special Rapporteur on the right to health, the UN Working Group on arbitrary detention, and the UN Special Rapporteur on the rights of persons with disabilities: Office of the High Commissioner for Human Rights, ‘United States: prolonged solitary confinement amounts to psychological torture, says UN expert’ (28 February 2020), <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25633>>.

<sup>79</sup> Information received from Australia, [62].

<sup>80</sup> More information about the use of force and restraints in immigration detention can be provided by PIAC, which helps secure access to healthcare for people in immigration detention.

<sup>81</sup> Australian Human Rights Commission, *Use of force in immigration detention* (23 October 2019, [2019] AusHRC 130)

<<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/use-force-immigration-detention>>; Commonwealth Ombudsman, *Monitoring Immigration Detention: Review of the Ombudsman’s Activities Overseeing Immigration Detention, July–December 2019* (August 2020)

<[https://www.ombudsman.gov.au/\\_\\_data/assets/pdf\\_file/0015/111390/Six-monthly-immigration-detention-report-Jul-Dec-2019.pdf](https://www.ombudsman.gov.au/__data/assets/pdf_file/0015/111390/Six-monthly-immigration-detention-report-Jul-Dec-2019.pdf)>. See also: *FZ v Commonwealth of Australia (Department of Home Affairs)* [2019] AusHRC 135

<<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/fz-v-commonwealth-australia-department-home>>.

<sup>82</sup> Australian Human Rights Commission, *Use of force in immigration detention* (n 81).

<sup>83</sup> Ibid, [10(a)(i)].

- restraints were applied to people with low security risk ratings, to a man diagnosed with mental illness who had no history of aggressive or violent behaviour, to a minor, and to two men in wheelchairs;<sup>84</sup> and
- during an ‘extraction’ of 19 people from the family compound of the Wickham Point detention facility, the display of force gave ‘the feeling of a paramilitary operation’, with heavily armoured officers wearing balaclavas under helmets to conceal their faces.<sup>85</sup>

58. Upon receipt of the report, the Department denied that any of the conduct complained of involved a breach of human rights.<sup>86</sup> While it said that action would be taken to address some of the recommendations made in the Commission’s report, a report from the Commonwealth Ombudsman in 2020 again raised ‘increasing concerns about the use of force in detention facilities’,<sup>87</sup> and flagged it as a spotlight issue for ongoing monitoring. The Ombudsman’s report included findings relating to excessive use of force by detention centre staff to restrain a person in detention without any apparent lawful basis.
59. Civil society continues to be concerned about the excessive and arbitrary use of restraints in immigration detention, and most of the concerns detailed in the 2019 Civil Society Report remain relevant.<sup>88</sup> For example, people in immigration detention report being routinely handcuffed when transferred between facilities, to offsite medical appointments, and to court. The use of restraints is reported to be widespread, arbitrary, disproportionate to genuine individualised risk, and contrary to the ‘last resort’ principles developed by the Commonwealth’s own Detention Services Manual for safety and security management and the use of force.<sup>89</sup> In fact, the presumption against the use of force in the Detention Services Manual appears to have been reversed as a matter of practice.
60. The use of restraints often creates a new form of trauma for the individual, especially where that person has a history of abuse and torture. People in detention have reported to service providers that they find being handcuffed degrading and humiliating, particularly because they came to Australia to seek asylum. In these circumstances, it is not uncommon for a person in immigration detention to refuse to attend offsite appointments, including medical appointments, to avoid the harm and humiliation of being handcuffed. Accordingly, current use of restraints and force pose a significant barrier for people to access healthcare.

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<sup>84</sup> Ibid, [13(d)].

<sup>85</sup> Ibid, [457]-[463].

<sup>86</sup> Ibid.

<sup>87</sup> Commonwealth Ombudsman, *Monitoring Immigration Detention* (n 81) 4.

<sup>88</sup> 2019 Civil Society Report [230]-[241].

<sup>89</sup> Department of Home Affairs, *Detention Services Manual – Safety and security management – Use of force* (10 October 2018).