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

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

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About:

Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and

B. Immigration detention in Australia

(a) Mandatory and indefinite detention

4. Australia's claim that its policy since 2008 'has required that held detention be a last resort for the management of unlawful non-citizens who have not yet been granted permission to stay in Australia'[2] is inconsistent with Australian law and practice during the reporting period. By law, immigration detention continues to be automatic and mandatory for all people without a visa.[3] The (Cth) (Migration Act) does not provide for individual assessments of the need to detain prior to detention, nor do immigration officers have the discretion to exempt individuals from detention in appropriate cases. There are no procedures established under Australian law for people who may be particularly vulnerable to harm in detention environments, including survivors of torture or people with disability, to be screened prior to detention.

5. Release from detention is only possible upon grant of a visa (which is a matter of ministerial or departmental discretion) or removal from Australia.[4] Judicial, aut0.000017745 0 595.32 80087Ch/F50.000

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

20. There is also a high risk of indefinite detention following visa cancellation. As at 27 April 2021, 198 people who previously held a permanent refugee or humanitarian visa were held in immigration detention.[38] Following the ((Cth), people are at risk of arbitrary detention unless they 'voluntarily' chose to be refouled (see above at paragraph 9). Although the Minister has the power to intervene to grant someone a visa to release them from detention, this very rarely occurs, even if the person is owed non-refoulement obligations.[39]

21. In March 2021, the Australian Government issued an updated Direction (Direction 90) governing how decision-makers should exercise the discretion to refuse or cancel visas on character grounds.[40] The Direction makes clear that all persons who have engaged in broadly-defined family violence should be refused visas or have their visas cancelled, even where there are 'strong countervailing circumstances'. Direction 90 increases the risk of people facing indefinite detention and refoulement. Although the Direction purports to reduce the risk of family violence and protect survivors, neither objective is achieved, including because it may discourage reporting of family violence, can lead to the permanent separation of families regardless of survivors' wishes, and can trigger the consequential cancellation of survivors' and children's visas. The government issued Direction 90 without consultation with family violence survivors or organisations with family violence expertise.

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

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[37] (n 29).

[38] Ibid; Department of Home Affairs, Parliament of Australia, Freedom of Information Request, 'FA21/04/01002' (9 June 2021).

[39] Freedom of Information materials reveal that since 2015, the Minister has intervened less than five times per year under s 195A and s 197AB of the (n 3) (to grant a visa or transfer them into community detention) where a person's visa had been refused or cancelled under s 501 of the (n 3) (Department of Home Affairs, Parliament of Australia, Freedom of Information Request, 'FA21/03/01281' (23 June 2021)); the Minister's intervention under s195Afor persons who did not satisfy s 501 remained at less than five times per year regardless of whether they were owed non-refoulement obligations (Department of Home Affairs, Parliament of Australia, Freedom of Information Request, 'FA21/05/00505' (26 May 2021)); not a single person whose visa had been cancelled pursuant to s 501(3A) of the (n 3) and where that cancellation remained unrevoked has been granted a Protection (subclass 866) visa since 1 July 2015, but at least 215 people have applied (Department of Home Affairs, Parliament of Australia, Freedom of Information Request, 'FA21/04/01042' (17 May 2021) and Department of Home Affairs, Parliament of Australia, Freedom of Information Request, 'FA21/05/00993' (17 May 2021)).

[40] Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Cth), (8 March 2021).

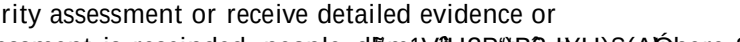
[41] Amy Bainbridge and Kate Ashton, 'Federal Court releases reasons for Novak Djokovic visa decision', (online, 20 January 2022) <https://www.abc.net.au/news/2022-01-20/novak-djokovic-visa-decision-reasons-released-federal-court/100760588>.

[42] For more information, see: Regina Jefferies, Daniel Ghezelbash and Asher Hirsch, 'Assessing Protection Claims at Airports: Developing procedures to meet international and domestic obligations (Policy Brief 9, Andrew & Renata Kaldor Centre for International Refugee Law, 15 September 2020).

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

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

(f) Security assessments causing arbitrary detention

33. As at 30 September 2021, 11 people were held in detention because they had been assessed by the Australian Security and Intelligence Organisation (ASIO) to be a security risk.[64] The average length of time that these 11 people have been detained is more than 7 years, and one individual has been detained for more than 13 years. They cannot appeal their security assessment or receive detailed evidence or reasons for the decision.[65] Even where a security assessment is rescinded, people d  here 8

(PNG) for processing since 2014, as Australia now intercepts and returns all new arrivals wherever possible (see the concerns regarding maritime interception operations at paragraphs 58 to 63 below). However, the policy remains formally in place. The former (Liberal-National Coalition) Australian Government maintained that 'anyone who attempts to enter Australia illegally by boat will be returned, or sent to Nauru'.[69] To formalise this commitment, Australia and Nauru signed a new 'memorandum of understanding to establish an enduring regional processing capability in Nauru' in September 2021.[70] The new (Labor) Australian Government has also indicated an intention to continue offshore processing in Nauru.[71] Australia's agreement with PNG formally ended on 31 December 2021, meaning no new arrivals can be transferred there, but the impact of the previous regime continues as many people transferred to PNG for processing re

41. In October 2021, Australia and PNG announced that 'regional processing contracts in PNG will cease on 31 December 2021 and will not be renewed'.[87] Anyone subject to offshore processing and still in PNG could volunteer to be transferred to Nauru before 31 December 2021, and from 1 January 2022 'the PNG Government will assume full management of regional processing services in PNG and full responsibility for those who remain'.[88] However, Australia retains the power to bring people who were sent to PNG back to Australia at any time,

critically ill people offshore were brought before the Federal Court of Australia.[106] These people had serious medical conditions, including sepsis, encephalitis, psychosis, resignation syndrome and pregnancy complications in which the life of the unborn child and mother were at risk. Every single court case was successful in securing a transfer to Australia for medical care. Many more people were

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

51. Most people transferred to Australia from the RPCs

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

54. Under the Fast Track p 72.0oc 72.0( )] ss, 54(p)-6( )-13(p)5(l)-2(e)-58()-2se(e.)] k h

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E. Separation of refugee families

65. The right to family unity and family reunification is recognised in many international human rights instruments to which Australia is a party. Despite this, a number of Australian laws, policies and practices have or continue to separate refugees from their family members or prevent them from reuniting.[143] For example, refugees who are granted temporary, rather than permanent, protection visas are not entitled to sponsor family members for Australian visas. Refugees holding permanent visas are entitled to apply for family reunification, but there is an express policy[144] which renders family visa applications sponsored by people who arrived in Australia by boat as the lowest processing priority – commonly leading to delays of 5 to 10 years in visa processing. The Australian Government has openly acknowledged that limitations on family reunification for refugees are intended to deter people from travelling to Australia by boat to seek protection.

66. Families have also been separated between Australia and the RPCs in Nauru and Papua New Guinea, particularly where one family member required medical transfer to Australia and other family members were forced to stay behind. This included pregnant women who were flown to Australia to give birth, whose partners and other children were prevented from accompanying them. Government whistleblowers have confirmed that refusing to allow family members to travel was part of an 'unofficial policy' to use family separation as a coercive measure to encourage refugees who were separated from their family members to agree to return to Nauru or Papua New Guinea despite their health and safety concerns, or even to abandon their protection claims.[145]

67. These policies and practices have led to the widespread separation of refugee families, including children from their parents. A detailed legal opinion provided to the Human Rights Law Centre in February 2020[146] indicates that the Australian Government's intentional separation of families may, in certain circumstances, violate the absolute prohibition on torture under the Convention and the jus cogens norm of international law, or the prohibition of acts of cruel, inhuman or degrading treatment or punishment under the Convention, as:

    (a) the immediate and long-term impacts of family separation, including serious adverse psychological, physical, and family life impacts, surpass the gravity threshold of severe physical or mental pain and suffering, particularly when concerning children;

    (b)

(c) while Australian laws and policies do not expressly state a policy of family separation, the practical impact has the effect of separating families and is acknowledged as such. This meets the requirement of consent or acquiescence by the State.

68. Following a group communication to the UN Human Rights Committee, domestic legal action, and the (brief) implementation of the Medevac laws, all families who were separated between Australia and regional processing countries have now been reunited. However, a number of those families remain at risk of future separation, either through detention, returns to RPCs or inflexible resettlement policies, and there have been no legal or practical changes to prevent other families being similarly separated in future. At the time of writing, family separation on account of temporary protection visas and the deprioritisation of people who arrived by boat continues.