UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Review into the Migration Amendment (Clarifying International Obligations for Removal) Act 2021

Parliamentary Joint Committee on Intelligence and Security

Submission by the Office of the United Nations High Commissioner for Refugees

23 June 2023

I. OVERVIEW

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS), in respect of its review by operation of law into the operation, effectiveness and implications of the amendments made by Schedule 1 to the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) (CIOR Act), which commenced operation on 25 May 2021.[1]

2. The Explanatory Memorandum to the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (the Bill) states that the purpose of the amendments was to "clarify that the duty to remove under the Migration Act should not be enlivened where to do so would breach non-refoulement obligations, as identified in a protection visa assessment process".[2] When introducing the Bill, the then Immigration Minister stated "under these treaties,[3] Australia has an obligation not to return individuals to situations where they face: persecution; a real risk of torture or cruel, inhuman or degrading treatment or punishment; arbitrary

[1] Paragraph 29(1)(cf) *Intelligence Services Act 2001* (Cth) provides that the PJCIS is required to commence its review by the second anniversary of the commencement of the CIOR Act. The Explanatory Memorandum notes PJCIS is to consider whether the amendments made by Schedule 1 to the Bill are operating as intended and are effective in ensuring that the removal from Australia of an unlawful non-citizen who has been found to engage Australia's protection obligations through the protection visa process is not required or authorised, unless relevant exceptions apply: Revised Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, p. 4, available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6696.

[2] Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, pp. 2-3, available at: https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6696_ems_4833e01d-035c-4015-9b26-b7187fb2d2fa/upload_pdf/JC001679.pdf;fileType=application%2Fpdf. The Revised Explanatory Memorandum taking into account amendments made by the House of Representatives notes that the additional purposes of the Bill includes: "to ensure that in the rare circumstances where an unlawful non-citizen is found by the Minister to no longer engage protection obligations, that the non-citizen will have access to merits review in the Migration and Refugee Division of the Administrative Appeals Tribunal"and also "to provide for the PJCIS to consider whether the amendments made by Schedule 1 to the Bill are operating as intended": Revised Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, p. 1.

[3] *1951 Convention Relating to the Status of Refugees* (and its 1967 Protocol); *International Covenant on Civil and Political Rights* (ICCPR), and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

deprivation of life; or the application of the death penalty. We take these obligations very seriously… This change will improve our nation's ability to uphold human rights. But this Bill goes one step further… It improves our ability to ensure that people who lodge valid protection visa applications will have their protection claims assessed in all cases"[4] including in circumstances where the applicant is ineligible for visa grant due to criminal conduct or risks to national security.[5] The Minister went on to say:

> "This is an important change which will further improve our ability to ensure that we uphold Australia's non-refoulement obligations. **It is essential that Australia sends a strong message that we are committed to upholding human rights, and that we remain steadfast in our commitment to these treaties and their underlying principles**". [Emphasis added].[6]

3. While UNHCR welcomes efforts by the Government to strengthen the domestic statutory protections afforded to those found to be in need of international protection through the protection visa assessment process, UNHCR is of the view that amended s 197C of the *Migration Act 1958* (Cth) (Migration Act),[7] which provides that Australia's non-refoulement obligations are irrelevant to the removal of unlawful non-citizens under s 198 of the Migration Act, remains incompatible with Australia's non-refoulement obligations under international law. It does not appear to safeguard against the removal of *all* asylum-seekers and refugees over which Australia exercises jurisdiction, as the changes enacted in 2021 do not benefit, for example, those precluded by domestic law or policy from accessing asylum through the protection visa process by virtue of their mode or manner of arrival.[8]

4. Moreover, for those who *are* eligible in law to engage in the protection visa assessment process, numerous changes have been made to the statutory criteria in recent years that are not consistent with a proper interpretation of Australia's obligations under the Refugee Convention.[9] The Refugee Convention affirms in its preamble that the refugee protection regime aims to ensure the 'widest possible exercise' of refugees'

---

[4] A Hawke (then Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs), Second Reading Speech: Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, 25 March 2021, p. 3492, available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F302fb6fd-7788-46eb-b3e8-f5b9025f39e8%2F0011%22.

[5] Revised Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, p. 2.

[6] A Hawke (then Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs), Second Reading Speech: Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, 25 March 2021, p. 3492.

[7] As inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

[8] For example, s 46A *Migration Act 1958* (Cth) (visa applications by unauthorised maritime arrivals); s 46B Migration Act 1958 (Cth) (visa applications by transitory persons); exercise of maritime powers (see also s 75A) *Maritime Powers Act 2013* (Cth); Kaldor Centre for International Refugee Law, Policy Brief 9 - Assessing Protection Claims at Airports: Developing procedures to meet international and domestic obligations, 15 September 2020, available at: https://www.kaldorcentre.unsw.edu.au/publication/policy-brief-9-airports

[9] For instance, UNHCR, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014, available at: https://www.refworld.org/docid/58a6c42f4.html.

'fundamental rights and freedoms'.[10] To safeguard against the refoulement of a refugee, Contracting States are required, *inter alia*, to apply the Refugee Convention in *good faith* and to implement asylum procedures which safeguard against the wrongful denial of refugee status.

5. Important procedural safeguards have also been removed from Australia's statutory framework, especially in the context of the fast-track review process[11] which has consequently increased the risk of refoulement. Fair and efficient procedures are an essential element in the full and inclusive application of the Refugee Convention. In view of the nature of the risks involved and the grave consequences of an erroneous determination, it is essential that asylum-seekers be afforded full procedural safeguards and guarantees at all stages of the procedure.

6. Notwithstanding the fact that the Minister's power in s 197D of the Migration Act is yet to be exercised,[12] the broad statutory power to remove a refugee from Australia who is effectively determined, to the 'satisfaction' of the Minister, to no longer engage Australia's protection obligations also raises concerns for UNHCR. The Refugee Convention stipulates the eligibility criteria for refugee status and, by necessary implication, the permissible bases for revocation or cancellation of that status, as well as the conditions precedent for cessation of refugee status and for the withdrawal of protection against refoulment under international refugee law. These conditions do not appear to have been incorporated into s 197D of the Migration Act so as to restrict the Minister's power under it, in accordance with international refugee law.

7. UNHCR also notes the comprehensive analysis of the Parliamentary Joint Committee on Human Rights (PJCHR) contained in its report that considered the Bill. The Committee considered, insofar as the measure may effectively result in the protracted or indefinite detention of persons who are found to engage Australia's protection obligations but are ineligible for a visa, that "there is a significant risk that it may be incompatible with the right to liberty and the prohibition against torture or ill-treatment". [13] If children were to be detained under such circumstances, there is a

---

[10] This finds expression, inter alia, in the first two recitals of the Preamble to the 1951 Convention and Recommendation E of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, which adopted the Refugee Convention. It is clear from the terms of the Preamble that the 1951 Convention was envisaged as a human rights instrument directed at a specific and identifiable group of victims (or potential victims) of human rights violations and designed to ensure that they obtain the fullest possible enjoyment of their human rights and, most specifically, their right to seek and enjoy asylum (as envisaged by Article 14 of the Universal Declaration of Human Rights) and their right to non-discrimination (as inherent in Arts 1 and 2 of the Universal Declaration of Human Rights).

[11] Such as the right to submit new information and to a hearing on review. Those determined to be "excluded fast track review applicants" are denied merits review altogether: see UNHCR, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014.

[12] Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Estimates, February 2023, SE23-496, available at: https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/legcon.

[13] Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report, Report 7 of 2021, 16 June 2021, pp. 123-124, available at: https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/reports/2021/Report_7/Report_7_of_2021.pdf?la=en&hash=EC00D71385AB6CE5D69110047E0B8AF2DBF1A6F6. See also the concerns raised by the Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6*, 21 April 2021, pp. 19–24, available at: https://www.aph.gov.au/senate_scrutiny_digest.

significant risk that it would also be incompatible with the rights of the child.[14] UNHCR echoes these concerns and also draws the Committee's attention to the United Nations Committee Against Torture's Concluding Observations on the sixth periodic report of Australia which recently recommended *inter alia* that Australia "guarantee that refugees with adverse security or character assessments and stateless persons whose asylum claims were refused are not held in detention indefinitely, including by resorting to non-custodial measures and alternatives to closed immigration detention and by providing for a meaningful right to appeal against such indefinite detention".[15]

8. UNHCR's regular monitoring of asylum-seekers, refugees and stateless persons in detention (most recently, in June 2023) has confirmed the severe and detrimental impact that protracted and indefinite immigration detention continues to have on the health and psycho-social wellbeing of those affected. In some instances, this has led to a return-oriented environment whereby some refugees 'voluntarily' decide to return to their countries of origin or former habitual residence than remain in protracted and indefinite detention. UNHCR's significant concerns with respect to Australia's immigration detention arrangements continue to be shared by numerous UN treaty monitoring bodies, UN special procedures, the UN Human Rights Council Working Group on Arbitrary Detention and others through the Universal Periodic Review.[16] UNHCR urges the Government to adhere to its international human rights obligations. Based on an analysis of data from Victoria, the composition of those in immigration detention with a history of criminal offending is unlikely to differ from the broader prison population in Australia, yet post-sentence detention is very rarely ordered. There are viable and practical alternatives to detention which can satisfy the concerns of the Government, but which enable those in need of international protection to be released, on conditions and with appropriate support, if necessary.

II. UNHCR'S AUTHORITY

9. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees

---

[14] Ibid.

[15] UN Committee against Torture, Concluding observations on the sixth periodic report of Australia, 5 December 2022, CAT/C/AUS/CO/6, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FAUS%2FCO%2F6&Lang=en.

[16] See for example: UN Committee against Torture, Concluding observations on the sixth periodic report of Australia, 5 December 2022, CAT/C/AUS/CO/6, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FAUS%2FCO%2F6&Lang=en; The United Nations Subcommittee on Prevention of Torture (SPT), *UN torture prevention body suspends visit to Australia citing lack of co-operation*, media statement, 23 October 2022, available at: https://www.ohchr.org/en/press-releases/2022/10/un-torture-prevention-body-suspends-visit-australia-citing-lack-co-operation; UN Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 1 December 2017, CCPR/C/AUS/CO/6, available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsoAl3%2FFsniSQx2VAmWrPA0uA3KW0KkpmSGOue15UG42EodNm2j%2FnCTyghc1kM8Y%2FLQ4n6KZBdggHt5qPmUYCI8eCslXZmnVlMq%2FoYCNPyKpq; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, 24 April 2017, A/HRC/35/25/Add.3, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/098/91/PDF/G1709891.pdf?OpenElement.

and other persons within its mandate, and for assisting governments in seeking permanent solutions for refugees.[17] As set forth in the *Statute of the Office of the United Nations High Commissioner for Refugees*, UNHCR fulfils its international protection mandate by, *inter alia*, '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto'.[18] UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the *1951 Convention relating to the Status of Refugees*,[19] according to which State Parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees […] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention." The same commitment is included in Article II of the *1967 Protocol relating to the Status of Refugees* (1967 Protocol).[20]

10. In accordance with UN General Assembly resolutions 3274 XXIX[21] and 31/36,[22] UNHCR has been designated, pursuant to Articles 11 and 20 of the *1961 Convention on the Reduction of Statelessness* (the 1961 Statelessness Convention),[23] as the body to which a person claiming the benefits of this Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authorities. In resolutions adopted in 1994 and 1995, the UN General Assembly entrusted UNHCR with a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons.[24] UNHCR's statelessness mandate has continued to evolve as the UN General Assembly has endorsed the Conclusions of UNHCR's Executive Committee.[25]

11. Australia is a Contracting Party to the *1951 Convention relating to the Status of Refugees* and its 1967 Protocol (together, the Refugee Convention), as well as the *1954*

---

[17] See *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1 (Statute).
[18] Statute, para. 8(a).
[19] UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.
[20] UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.
[21] UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 10 December 1974, A/RES/3274 (XXIX).
[22] UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 30 November 1976, A/RES/31/36.
[23] UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.
[24] UN General Assembly resolutions A/RES/49/169 of 23 December 1994 and A/RES50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI), *Prevention and Reduction of Statelessness and the Protection of Stateless Persons,* 20 October 1995.
[25] Executive Committee Conclusion No. 90 (LII), Conclusion on International Protection, 5 October 2001, para. (q); Executive Committee Conclusion No. 95 (LIV), General Conclusion on International Protection, 10 October 2003, para. (y); Executive Committee Conclusion No. 99 (LV), General Conclusion on International Protection, 8 October 2004, para. (aa); Executive Committee Conclusion No. 102 (LVI), General Conclusion on International Protection, 7 October 2005, para. (y); Executive Committee Conclusion No. 106 (LVII), Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, 6 October 2006, paras. (f), (h), (i), (j) and (t); all of which are available in: *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 1 – 114)*, October 2017.

Convention relating to the Status of Stateless Persons (the 1954 Statelessness Convention), and the 1961 Statelessness Convention. Through accession to these instruments, Australia has assumed international legal obligations in relation to refugees, asylum-seekers and stateless persons in accordance with their provisions.

III. CONSIDERATION OF THE OPERATION OF THE CIOR ACT

12. The Explanatory Memorandum notes that the CIOR Act was "anticipated to operate in relation to the very small cohort of serious character/national security concern detainees who enliven Australia's non-refoulement obligations".[26] Section 197C(1) of the Migration Act provides that "for the purposes of section 198 [removal powers], it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen". Further, s 197C(2) provides that "an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen".

13. Rather than repeal s 197C of the Migration Act (as recommended by the Committee Against Torture and the Human Rights Committee),[27] the CIOR Act instead qualified the section's operation. Amended s 197C now provides that the Migration Act does not require or authorise the removal of an unlawful non-citizen who has been found to engage protection obligations through a finally determined protection visa process in circumstances where to do so would be inconsistent with Australia's non-refoulement obligations.[28] The CIOR Act also inserted s 36A to ensure that, in considering a protection visa application, the Minister assesses protection obligations arising under s 36 of the Migration Act, including in circumstances where the applicant is ineligible for a visa due to criminal conduct or risks to national security.

14. Further, the CIOR Act inserted s 197C(3)(c) to permit the removal powers in s 198 of the Migration Act to operate where the decision in which the protection finding is made has been quashed or set aside; the non-citizen requests removal in writing; or the Minister decides under s 197D that the non-citizen is no longer a person in respect of whom a protection finding would be made (as affirmed or taken to have been affirmed on merits review). In this respect, the Explanatory Memorandum notes that "in practice, it would be rare that a person who has been found to engage protection

---

[26] Revised Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, p. 3.

[27] The Committee Against Torture (in its Concluding Observations) recommended Australia to "[c]onsider repealing section 197C (1) and (2) of the Migration Act 1958 and introduce a legal obligation to ensure that the removal of an individual must always be consistent with the State party's non-refoulement obligations." See UN Committee against Torture, Concluding observations on the sixth periodic report of Australia, 5 December 2022, CAT/C/AUS/CO/6, paras. 25(b) and 26(c), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FAUS%2FCO%2F6&Lang=en; The Human Rights Committee, while noting "[Australia]'s commitment to international protection and to upholding the principle of non-refoulement [expressed regret] that section 197C of the Migration Act has not been repealed. It reiterate[d] its recommendation." See HRC, Report on follow-up to the concluding observations of the Human Rights Committee, Addendum: Evaluation of the information on follow-up to the concluding observations on Australia, UN Doc. CCPR/C/134/3/Add.1, 20 May 2022, p. 2.

[28] This reflects Australia's international non-refoulement obligations in respect of a person under the Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

obligations, would no longer engage those obligations".[29] Official data confirms that since commencement, the Minister has not exercised the decision-making power contained in 197D to determine that a non-citizen is no longer a person in respect of whom a protection finding would be made.[30]

IV. NON-REFOULEMENT UNDER INTERNATIONAL LAW

15. The principle of non-refoulement is the cornerstone of international refugee protection. It is enshrined in Article 33(1) of the Refugee Convention, which prohibits a state from 'expelling' or 'returning' a refugee 'in any manner whatsoever' to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.

16. A 'refugee' is defined in Article 1A(2) of the Refugee Convention as including any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.

17. The protection against refoulement in Article 33(1) applies to any person who is a refugee under the terms of the Refugee Convention. A person does not become a refugee because of recognition but is recognised because they are a refugee.[31] It follows that the principle of non-refoulement applies not only to persons whose refugee status has been formally recognised, but also to asylum-seekers whose status has not yet been assessed.[32]

18. International human rights law provides additional forms of protection. Article 3 of the 1984 UN Convention against Torture stipulates that no State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Similarly, Article 7 of the International Covenant on Civil and Political Rights has been interpreted as prohibiting the return of persons to places where they would be exposed to the danger of torture or of cruel, inhuman or degrading treatment or punishment. While Article 33 (2) of the Refugee Convention foresees certain limited exceptions to the principle of non-refoulement, international human rights law sets forth an absolute prohibition, without exceptions of any sort.

[29] Ibid. p. 11.
[30] Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Estimates, February 2023, SE23-496.
[31] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (1979, reissued 2011), UN Doc. HCR/1P/4/ENG/REV.3.
[32] UNHCR Executive Committee, Conclusion No. 6 (XXVII) (1977) para. (c); UNHCR Executive Committee, Conclusion No. 15 (XXX) (1979) paras. (b) and (c); UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007); UNHCR, Note on International Protection, UN Doc. A/AC.96/694 (3 August 1987).

19. At international law, the principle of non-refoulement applies wherever and however a State exercises jurisdiction.[33] Numerous conclusions of UNHCR's Executive Committee, of which Australia is a founding member, have attested to the overriding importance of the non-refoulement principle irrespective of the geographic location of the asylum-seeker or refugee.[34]

20. When it comes to the establishment and implementation of national procedures for the determination of refugee status, measures are required to ensure that respect for the principle of non-refoulement remains the guiding principle and ultimate objective of any refugee protection regime. UNHCR continues to express concern that some of the legal and administrative measures adopted by Australia, including the insertion of statutory criteria that are not consistent with a proper interpretation of Australia's obligations under the Refugee Convention, measures to expedite asylum procedures without adequate procedural safeguards; measures that preclude irregularly arriving asylum-seekers from accessing asylum procedures, including through the interception and return of maritime vessels, may result in placing refugees in situations that could ultimately lead to refoulement.

V. LEGAL FRAMEWORK TO CONSIDER CRIMINAL CONDUCT AND CESSATION OF STATUS

Criminal conduct and security concerns

21. It is important to underscore that visa refusal or cancellation due to the operation of Australian law does not necessarily negate a person's refugee status at international law. In UNHCR's view, the Refugee Convention and 1954 Statelessness Convention provide the appropriate legal framework according to which matters relating to the conduct of a refugee or stateless person may be taken into account, insofar as such matters relate to questions of eligibility for international refugee protection and measures to address security concerns. This framework is already reflected in Australian law.[35] Clearly, refugees, asylum-seekers and stateless persons are required to conform to the ordinary laws and regulations of the country of asylum, as well as measures taken for the maintenance of public order. This is articulated in Article 2 of both the Refugee Convention and the 1954 Statelessness Convention. Those who commit punishable offences are, in general, liable to criminal prosecution and the imposition of penalties.[36]

22. In addition, Article 1F of the Refugee Convention exhaustively sets out the grounds on which a person who satisfies the inclusion criteria of the refugee definition in Article 1A(2) must nonetheless be excluded from international refugee protection due to the commission of certain serious crimes or heinous acts. While a serious non-political crime gives rise to exclusion only where the acts in question were committed

[33] Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol https://www.refworld.org/pdfid/45f17a1a4.pdf

[34] They have also emphasized the fundamental importance of fully respecting the principle of *non-refoulement* for people at sea: ExCom Conclusion No. 97 (LIV) 2003 [(a)(iv)].

[35] See for example *Migration Act 1958*, subsections 5H(2), 36(1C), 501(6)(f).

[36] Article 31(1) of the Refugee Convention.

outside, and prior to the person's admission to, a country of asylum,[37] the application of exclusion for crimes against peace, war crimes, crimes against humanity,[38] or for acts contrary to the purposes and principles of the United Nations[39] is not subject to geographic or temporal restrictions and may result in the revocation of refugee status if a refugee engages in conduct giving rise to individual responsibility for such acts after his or her recognition.[40] In respect of stateless persons, Article 1F of the Refugee Convention is mirrored in Article 1(2)(iii) of the 1954 Statelessness Convention.

23. The Refugee Convention also foresees that States may, under certain, exhaustively defined circumstances, expel a refugee, without, however, resulting in the ending of the person's refugee status. Article 32 of the Refugee Convention permits the expulsion of a refugee who is lawfully in the territory on grounds of national security or public order, subject to strict procedural safeguards, albeit only to a country where he or she would not be at risk of persecution. This is mirrored in Article 31(1) of the 1954 Statelessness Convention. For both refugees and stateless persons, expulsion on such grounds may only occur pursuant to a decision reached in accordance with due process of law. Furthermore, except where compelling reasons of national security otherwise require, the refugee or stateless person must be allowed to submit evidence to clear herself, and to appeal to, and be represented before, a competent independent and impartial authority.[41]

24. Expulsion to a country where a risk of persecution exists is permitted under international refugee law only as a measure of last resort, and again subject to procedural safeguards as well as considerations of proportionality, if one of the exceptions to the principle of non-refoulement provided for under Article 33(2) of the Refugee Convention applies. This may be the case with regard to a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is", or "who, having been convicted of a particularly serious crime, constitutes a danger to the community of that country." The application of Article 33(2) is without prejudice to other non-refoulement obligations of Australia under international human rights law, which do not contain any exceptions to the prohibition of refoulement.[42]

---

[37] Article 1F(b) of the Refugee Convention.
[38] Article 1F(a) of the Refugee Convention.
[39] Article 1F(c) of the Refugee Convention.
[40] Normally it will be during the process of determining a person's refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that facts justifying exclusion will become known only after a person has been recognized as a refugee. In cases where it is determined that refugee status recognition should not have been granted in the first place, the cancellation of the decision previously taken would be consistent with the Refugee Convention. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, p. 28. See also UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004, para. 1, https://www.refworld.org/docid/41a5dfd94.html. A note on terminology: the term 'revocation' is used by UNHCR when referring to the application of Article 1F(a) or (c) of the Refugee Convention to a refugee after recognition., whereas 'cancellation', in UNHCR's terminology, refers to the invalidation of a refugee status recognition decision that was incorrectly made.
[41] Article 32(2) of the Refugee Convention; Article 31(2) of the 1954 Statelessness Convention.
[42] *Non-refoulement* obligations under international human rights law allow no exception or derogation, and protection against refoulement under the relevant provisions is afforded to every individual, irrespective of their

25. While the above-mentioned provisions of the Refugee Convention, which limit eligibility for refugee status and permit States to take measures which affect certain rights adhering to refugee status, are given effect in Australia by existing provisions in the Migration Act, the character test operates above and beyond these provisions and is not in line with the provisions of the Refugee Convention or the 1954 Statelessness Convention mentioned above.

26. Importantly, although visa refusal or cancellation due to the operation of Australian law does not necessarily negate a person's refugee status or continued eligibility for international protection at international law, it may result in undue restrictions of their enjoyment of the rights and entitlements established by the Refugee Convention (or the equivalent status and rights of stateless persons under the 1954 Statelessness Convention), in addition to rights arising from international human rights law.

27. The cancellation or refusal of a visa on character grounds has significant consequences for asylum-seekers, refugees and stateless persons. If the person affected is in Australia, they must under relevant domestic law be detained until they are granted a visa or removed from Australia.[43] Notwithstanding the limited avenues for the subsequent grant of a visa, including the broad discretionary power available to the Minister to release a person from immigration detention, the ordinary operation of Australian law has the practical effect that a person whose visa is cancelled or refused on character grounds remains in detention until they are removed from Australia. Where a person is not able to be removed, because they continue to be considered eligible for international protection, Australian law operates to enable them to be kept in detention indefinitely.

28. For those in immigration detention with a history of criminal offending (including those who have been imprisoned),[44] the avenues for release from administrative detention are extremely limited and entirely discretionary.[45] UNHCR emphasises that immigration detention should not be punitive in nature.[46] Thus, in accordance with the normal operation of the Australian criminal justice system which is equipped to appropriately determine and manage risks to the community, any person who has served their criminal sentence (irrespective of whether they are a citizen or non-citizen)

---

legal status. This means that even if a person could be returned to the country where they face a risk of persecution in accordance with Article 33(2) of the Refugee Convention, international human rights law may still prohibit the transfer. For instance, the non-refoulement obligation under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3, which prohibits transferring persons to a place where they would be at risk of torture has an absolute character. Similarly, non-refoulement obligations under Articles 6 and 7 of the International Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee, prohibit transferring persons to a place where their life would be at risk or where they would be at risk of torture or other forms of cruel, inhuman or degrading treatment or punishment.

[43] *Migration Act 1958*, sections 189; 196.

[44] According to official data, as at 30 April 2023, there were 1,128 people in immigration detention. Of these, 90 per cent had a "criminal history". However, this term is undefined in the data.

[45] *Migration Act 1958*, sections 195A and 197AB.

[46] UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, para 48 and 32, available at: https://www.refworld.org/docid/503489533b8.html.

should normally be afforded the opportunity to re-enter the community.[47] This is particularly the case for those owed international protection, who by definition are unable to return to their countries of nationality or former habitual residence and thus otherwise face the real prospect of indefinite detention.

29. Leaving aside those in immigration detention *without* a history of criminal offending or with minor criminal offending not resulting in conviction,[48] it is likely that the composition of those currently in immigration detention with previous criminal convictions is not significantly dissimilar from a sizeable proportion of a typical prison population in Australia.[49] That is to say that the majority are not 'serious offenders', as defined in relevant State and Territory legislation.

30. Even where offences are defined as serious, the response to addressing risk in the criminal justice system a post-sentence order is very measured and importantly is determined by a court. For example, as at 30 June 2022, there were 1,701 offenders serving a custodial sentence for a 'serious sex offence' or a 'serious violence offence' in Victoria,[50] as defined by serious offender legislation.[51] Very few of these statutorily defined serious offenders will be subject to post-sentence detention or supervision additional to what is provided in the context of parole and correctional services. For instance, as at 30 June 2022, only five serious offenders were subject to post-sentence detention (up to three years duration, reviewable by the Court annually)[52] under the

[47] Australian legislatures have enacted statutes that authorise subsequent, non-punitive detention or lesser restraints on freedom of persons who have been convicted of crimes and served their sentences of imprisonment. The executive Government must satisfy a court that the continuing, post-sentence detention of the person is necessary to protect the community because of the nature and likelihood of the prospect that he or she will engage in conduct, usually, of the kind for which the person was sentenced: *DMQ20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCAFC 84 at 63-64.

[48] See for example Opinion No. 69/2022 concerning Mr. A who was detained immediately upon arrival in Australia from 2010–2012 and again since 2017, despite the dismissal of all criminal charges against him: Human Rights Council Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its ninety-fifth session, 14–18 November 2022, 8 March 2023, A/HRC/WGAD/2022/69, available at: https://www.ohchr.org/sites/default/files/documents/issues/detention-wg/opinions/session95/A-HRC-WGAD-2022-69-AEV.pdf.

[49] Of those who had their visa cancelled under s 501 or s 116 of the *Migration Act 1958* (Cth) who have been removed from Australia since 22 May 2022, the offending has mostly included drug offences and assaults: Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Estimates, February 2023, SE23-382.

[50] Post Sentence Authority (Victoria), Annual Report 2021-22, December 2022, p. 32, available at: https://www.postsentenceauthority.vic.gov.au/about-us/publications/the-post-sentence-authoritys-2021-22-annual-report.

[51] *Serious Offenders Act 2018* (Vic), available at: https://www.legislation.vic.gov.au/in-force/acts/serious-offenders-act-2018/006.

[52] The Supreme Court of Victoria can place an offender on a detention order or interim detention order, upon an application from the Director of Public Prosecutions. To make a detention order, the court must be satisfied that the serious offender poses an unacceptable risk and cannot be safely managed by a supervision order. Detention orders can be made for up to three years and they must be reviewed by the Supreme Court annually. Serious offenders on detention orders are detained in separate, self-contained units, within a custodial setting for the period of their order. Serious offenders on a detention order are not under sentence and must be treated in a way that is appropriate to their status as a person who is not under sentence. Serious offenders on detention orders may be permitted to wear their own clothes and undertake activities that are not otherwise available to prisoners under sentence. They are required to cook for themselves and maintain the accommodation that has been provided to them. As at 30 June 2022, three serious offenders were subject to a detention order and two were subject to an interim detention order: Post Sentence Authority (Victoria), Annual Report 2021-22, December 2022, p. 38.

Serious Offenders Act (0.03% of the eligible serious offenders at that time).[53]

31. UNHCR remains concerned that the effect of the current measures for many refugees and others determined to be in need of international protection is that they are effectively in detention without a court being satisfied that post-sentence detention is necessary in each individual case, to protect the community. As a result, the purpose of their continued detention remains unclear.

Cessation of status

32. International refugee law exhaustively specifies the circumstances in which refugee status comes to an end. Recognition of refugee status may accordingly only be withdrawn on the basis of cancellation or revocation or if the conditions for cessation of refugee status are met. The so-called 'cessation clauses' (under Article 1C of the Refugee Convention) are relevant in the context of the Minister deciding under s 197D that a refugee – that is, a person who meets the 'inclusion' criteria in Article 1A(2) of the Refugee Convention and does not fall within the scope of one of its exclusion clauses – is no longer a person in respect of whom a protection finding would be made. Article 1C articulates the conditions under which a refugee ceases to be a refugee at international law,[54] based on the consideration that international protection should not be maintained where it is no longer necessary or justified. Since the application of the cessation clauses in effect operates as a formal loss of refugee status, a restrictive and well-balanced approach should be adopted in their interpretation and procedures should respect the rules of fairness and natural justice.

33. The Refugee Convention does not envisage a loss of status triggered by domestic visa arrangements (such as through visa cancellation on character grounds), nor a requirement for refugees to periodically re-establish their refugee status – either as a result of the grant of temporary protection or effective loss of refugee status as a result of a Ministerial decision under section 197D of the Migration Act, even when such a decision is subject to administrative review.

34. This results from the need to provide refugees with the assurance that their status will not be subject to constant review in the light of temporary changes – not of a fundamental character – in the situation prevailing in their country of origin. When a State wishes to apply the ceased circumstances clauses, the burden rests on the country of asylum to demonstrate that there has been a fundamental, stable and durable change in the country of origin and that invocation of Article 1C(5) or (6) of the Refugee Convention is appropriate. Further, a refugee can invoke "compelling reasons arising out of previous persecution" for refusing to re-avail him or herself of the protection of the country of origin. This exception is intended to cover cases where refugees, or their

[53] 134 (about 8% of the eligible serious offenders at that time) were subject to community supervision orders under the Act which provided restrictions and treatment additional to that provided by routine correctional post-sentence supervision.

[54] Articles 1C(5)-(6), provide that—absent compelling reasons arising out of previous persecution—a person's refugee status ceases if the circumstances in connection with which she was recognized as a refugee have ceased to exist, such that the person can no longer refuse to avail herself of the protection of her country of nationality (or, in the case of a stateless refugee, is now able to return to her country of former habitual residence).

family members, have suffered atrocious forms of persecution and therefore cannot be expected to return to the country of origin or former habitual residence. In addition, UNCHR's Executive Committee, in Conclusion No. 69, recommends that States consider "appropriate arrangements" for persons "who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links".[55]

VI. ARBITRARY AND INDEFINITE DETENTION OF REFUGEES AND STATELESS PERSONS

35. As previously mentioned, when visa cancellation or refusal on character or national security grounds does not result in a refugee's removal from Australia, on the basis of Australia's international non-refoulement obligations, it can effectively render them subject to indefinite immigration detention. Detention ought, in accordance with international human rights standards, to be an exceptional measure and any decision to detain a refugee, asylum-seeker or stateless person should be strictly limited to the purposes authorized by international law.[56] Among other requirements, detention must be demonstrated to be necessary, proportionate to a legitimate purpose, non-discriminatory, and subject to judicial oversight.[57] Indefinite detention is arbitrary and so impermissible at international law; maximum limits on periods of detention should therefore be established in law.[58]

36. In the absence of any provision for asylum-seekers, refugees or stateless people to challenge detention in substantive terms, UNHCR remains concerned that a considerable number of refugees, asylum-seekers and stateless persons in Australia are currently in situations of protracted or indefinite detention. In the last six years to 31 December 2022, there have been 403 protection and humanitarian visas cancelled on character grounds - compared to fewer than ten in 2013-14.[59] Moreover, in the last six years, of the refugees who had their visas cancelled, less than five were detained in community detention under Residence Determination.[60] Less than five refugees a year, among those who had their visa refused or cancelled under s 501 of the Migration Act, were released from detention after Ministerial intervention between 1 July 2014 and 31 December 2022,. At the time of their release, they had been detained on average for 1,567 days (nearly 4.5 years).[61] For the last five years, the Minister has exercised his discretion under s 195A Migration Act to grant less than five visas a year to persons in detention who arrived as refugees or humanitarian entrants.[62]

---

[55] UNHCR Executive Committee Conclusion No. 69 (XLIII) Cessation of status, (a), 1992, available at: http://www.refworld.org/docid/3ae68c431c.html.
[56] UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012). See also UNHCR, *Stateless Persons in Detention: A Tool for their Identification and Enhanced Protection* (2017).
[57] Ibid.
[58] Ibid.
[59] Victoria of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Estimates, February 2023, SE23-465.
[60] Ibid.
[61] Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Estimates, February 2023, SE23-503.
[62] Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Estimates, February 2023, SE23-475.

37. The official data over the last ten years on those in indefinite detention with an adverse or qualified ASIO assessment is also of significant concern, as some of these individuals are refugees. While there are currently less than five refugees in detention with a Qualified Security Assessment (QSA) and currently less than five in detention with an Adverse Security Assessment (ASA),[63] it appears that their release, or even conditional release, is highly unlikely. From 1 January 2013 to 31 December 2022, of those who had received a QSA, none were involuntarily removed from Australia, and none voluntarily departed Australia. During this period, less than five were released into the community on a residence determination, despite 41 persons eventually being granted visas and released from detention. For those with an ASA, the outcomes are slightly different. From 1 January 2013 to 31 December 2022, less than 5 persons have been released into the community on a residence determination; zero have been involuntarily removed from Australia; and perhaps not surprisingly, less than five have voluntarily departed Australia.[64] These individuals are amongst those who have been in detention for the longest periods of time.

38. According to official statistics published by the Government, as at 31 March 2021, there were 620 asylum-seekers, humanitarian entrants and refugees (excluding persons transferred from Nauru and PNG) in immigration detention.[65] When the Bill was introduced in March 2021, the Australian Government reported that the average period of detention was 641 days.[66] Now, two years later, the average period of detention has risen to 735 days.[67] For asylum-seekers and refugees, the average duration of detention is currently an unprecedented 1,209 days (nearly 3.5 years) and for stateless persons the average has risen to 1,105 days.[68] However, UNHCR regularly engages with many asylum-seekers, refugees and stateless persons in Australia who have been detained for significantly longer than this average, some for up to 15 years.[69] Close to 100 of these persons are not engaged in any type of visa application, appeal, or Ministerial intervention process and are unable to return to their home countries.[70]

39. The length of time in immigration detention is far higher in Australia than in comparable jurisdictions. As observed by the Australian Human Rights Commission, in the United Kingdom, in December 2018, 87 per cent of all detainees had been in immigration detention for less than 6 months and 30 per cent for fewer than 28 days.

---

[63] Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Estimates, February 2023, SE23-544, SE23-546.
[64] Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Estimates, February 2023, SE23-548.
[65] Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Estimates, February 2023, SE23-442.
[66] Department of Home Affairs, Immigration Detention and Community Statistics Summary 31 March 2021, p. 12, available at: https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2021.pdf.
[67] Department of Home Affairs, Immigration Detention and Community Statistics Summary 30 April 2023, p. 12, available at: https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-april-2023.pdf.
[68]. Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Estimates, February 2023, SE23-444 and SE23-432.
[69] Ibid., SE23-461.
[70] Ibid., SE23-473.

In Canada, the average length of detention was 12.3 days between January and March 2019.[71]

40. During its regular independent immigration detention visits and regular engagement with asylum-seekers, refugees and stateless persons in detention, UNHCR has observed first-hand the significant detrimental impact long-term immigration detention has had on the health and psycho-social wellbeing of those affected, many of whom have already suffered from torture or trauma before arriving in Australia.[72] Family separation, as well as inadequate transparency surrounding processes and timeframes for release, contribute greatly to diminished mental health, often leading to depression, anxiety and feelings of hopelessness and resignation. It is of significant concern to UNHCR that despite the majority of persons in detention regularly engaging with external torture and trauma counselling services, in the last five years there have been approximately 2,180 instances of self-harm (actual and threatened) in detention facilities.[73]

41. It is of ongoing concern to UNHCR that hundreds of refugees and stateless persons have been detained for prolonged periods of time in unacceptable conditions of detention including in Alternative Places of Detention (APODs) such as hotels or in highly securitized detention facilities; while others have been transferred to remote detention facilities where they are geographically removed from their families and support networks. These concerns are equally shared by numerous UN treaty monitoring bodies, UN special procedures, the UN Human Rights Council Working Group on Arbitrary Detention and by others through the Universal Periodic Review.[74]

---

[71] Australian Human Rights Commission, *Inspections of Australia's immigration detention facilities 2019 Report*, December 2020, p. 16, available at: https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention.

[72] See for example: Hedrick, K., Armstrong, G., Coffey, G. *et al.* Self-harm among asylum seekers in Australian onshore immigration detention: how incidence rates vary by held detention type. *BMC Public Health* **20**, 592 (2020), available at: https://doi.org/10.1186/s12889-020-08717-2; Procter, N.G., Kenny, M.A., Eaton, H. and Grech, C. (2018), Lethal hopelessness: Understanding and responding to asylum seeker distress and mental deterioration, *Int J Mental Health Nurs*, 27, pp. 448-454, available at: https://doi.org/10.1111/inm.12325; Tosif S, Graham H, Kiang K, Laemmle-Ruff I, Heenan R, Smith A, et al. (2023) Health of children who experienced Australian immigration detention, PLoS ONE 18(3), available at: https://doi.org/10.1371/journal.pone.0282798; Silove D, Austin P, Steel Z. No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia, *Transcult Psychiatry*, 2007, 44(3), pp. 359-93.

[73] Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Estimates, February 2023, SE23-480.

[74] See for example: UN Committee against Torture, Concluding observations on the sixth periodic report of Australia, 5 December 2022, CAT/C/AUS/CO/6, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FAUS%2FCO%2F6&Lang=en; The United Nations Subcommittee on Prevention of Torture (SPT), *UN torture prevention body suspends visit to Australia citing lack of co-operation*, media statement, 23 October 2022, available at: https://www.ohchr.org/en/press-releases/2022/10/un-torture-prevention-body-suspends-visit-australia-citing-lack-co-operation; UN Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 1 December 2017, CCPR/C/AUS/CO/6, available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsoAl3%2FFsniSQx2VAmWrPA0uA3KW0KkpmSGOue15UG42EodNm2j%2FnCTyghc1kM8Y%2FLQ4n6KZBdggHt5qPmUYCI8eCslXZmnVlMq%2FoYCNPyKpq; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, 24 April 2017, A/HRC/35/25/Add.3, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/098/91/PDF/G1709891.pdf?OpenElement.

42. Although the principle of non-refoulement does not itself equate to a right to enjoy asylum in a particular country, a State exercising jurisdiction in relation to an asylum-seeker or refugee must not implement measures that result in their removal, either directly or indirectly, to a place where their lives or freedom would be in danger or there are substantial grounds to believe that they would be at risk of being subject to torture or other serious violations of human rights. A return-oriented environment arises when people in need of international protection remain without a durable solution for a prolonged period of time, often in indefinite detention, and with diminished mental and physical health, as is the case for many of those in detention in Australia. Over the last few years, persons found to be in need of international protection in open-ended detention have 'voluntarily' returned to such countries as Iraq, Afghanistan, Somalia, Sudan, Burundi, Sierra Leone, and South Sudan to put an end to their indefinite detention.[75] Such 'voluntary' returns are taking place in circumstances that appear to involve a significant risk of refoulement. UNHCR considers that a return-oriented environment is inconsistent with Australia's good faith implementation of the international obligation to protect against refoulement.

VII. CONCLUSION

43. UNHCR welcomes the Government's stated commitment to upholding its non-refoulement obligations by adhering to the international refugee and human rights treaties ratified by Australia and their underlying principles. However, the amendments introduced by the CIOR Act appear to have strengthened the removal protections afforded only to those who are found to be eligible for international protection through the protection visa assessment process.

44. Not only are such protections inadequate in scope, in UNHCR's view, the consequences of implementing domestic statutory interpretations that are not aligned with the obligations arising under the Refugee Convention, coupled with inadequate procedural safeguards in determination procedures, has in contrast created a heightened risk of refoulement. Accordingly, UNHCR recommends that sections 197C and 197D of the Migration Act are repealed as they are not consistent with Australia's international obligations.

45. Moreover, for those covered by the protections afforded by amended s 197C of the Migration Act, the very real consequence, as evidenced by UNHCR's own observations through its detention monitoring activities and official data released by the Government, has led to protracted and indefinite detention, contrary to international human rights and refugee law.

46. UNHCR additionally recommends that the Government urgently make every effort to address the protracted and indefinite detention of asylum-seekers, refugees and stateless persons, including those who may have a criminal offending history or who may be considered a security risk, to *inter alia* address the significant risk that their continued detention is incompatible with the international law, including the prohibition against torture or ill-treatment.

[75] Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Budget Estimates, March/April 2022, Question number BE22-086, BE22-465.

UNHCR

23 June 2023