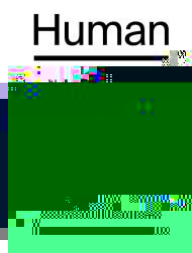




31 January 2022

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Secretary of the Human Ri



refoulement obligations.⁴ 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. *Q v W* (2020) 259 F.T.R. 101, 2020 FC 101. *Q* 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 s 198 non-refoulement obligations.⁵
5. In 2021, Australia amended the Migration Act in response to the Federal Court decision.⁶ 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 stated that the amendments would clarify that 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 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.⁷
6. Despite this statement, *K v M* (2021) 263 F.T.R. 101, 2021 FC 101. *K* was owed non-refoulement obligations. The court found that the amendments did not apply to *K*'s case.
7. *Co v W* (2021) 263 F.T.R. 101, 2021 FC 101. Section 197C(1) continues to state that for the purposes of the removal obligations under s 198, s 198 non-refoulement obligations are irrelevant. Section 197C(2) continues to state that for the purposes of the removal obligations under s 198, s 198 non-refoulement obligations are irrelevant. Repealing these provisions would by far be the most efficient way to address the issue. The amendments 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.⁸ While a person is owed non-refoulement obligations, there has been some suggestion that the criteria in s 36 are narrower than those that apply to non-refoulement obligations under international law.⁹
8. *New v M* (2021) 263 F.T.R. 101, 2021 FC 101. *New* is a person who was previously protected against removal to a country that they would face a risk of harm loses this protection and must be removed as soon as

⁴ 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 issue) see *AJL20 v Commonwealth of Australia* [2021] HCA 10, [1]-[10].
⁵ *AJL20 v Commonwealth of Australia* [2020] FCA 1305, [109]-[113]; [120]-[123].
⁶ *AJL20 v Commonwealth of Australia* [2021] HCA 10, [1]-[10].
⁷ *AJL20 v Commonwealth of Australia* [2021] HCA 10, [1]-[10].
⁸ *AJL20 v Commonwealth of Australia* [2021] HCA 10, [1]-[10].
⁹ *AJL20 v Commonwealth of Australia* [2021] HCA 10, [1]-[10].

excess of what is considered permissible under international maritime and human rights treaties.¹⁹

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 2021²⁰), 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 2014.²¹ At least a further 818 asylum seekers (including 124

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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.²⁹ In light of these statistics, it is implausible that not a single person trying to reach Australia by sea since July

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between the historical rates of successful asylum claims and the claim that almost no one trying
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Department of Home Affairs and the Australian Border Force have been unable to provide a
satisfactory explanation, instead VLPSO\ VWDWLQJ WKDW μZH XQGHUVWDQG WK

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 2021.³⁶ While the policy of offshore processing formally remains on foot, and the Australian government continues to state that new arrivals are believed to have been sent offshore since 2014.
24. In September 2021, the Australian Government announced its intention to establish an enduring regional processing capability in Nauru.³⁸ Unlike previous agreements underpinning the offshore processing arrangement, the terms of this agreement have not been made public.
25. The Australian Government's announcement that its regional processing contracts in PNG will cease on 31 December 2021 and will not be renewed.³⁹ 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.⁴⁰ 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,⁴¹ despite the Committee (and other international bodies and experts) rightly affirming that the influence exercised by [Australia] over the operation of the offshore regional processing centres « Hinder the rights of refugees and asylum seekers transferred offshore.⁴² We recommend that Australia be reminded, again, that its international obligations did not cease when people were forcibly transferred outside its territory.
27. 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. People 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 Australian Government should ensure that they are not subject to any form of detention or restriction of movement while in Australia.

53. Information on vaccination rates in immigration detention is not transparent. As at 13 January 2022, the Guardian UHSRUWHG WKDW μDFURVV \$XVWUDOLD¶V LPPLJUDWL people detained are fully vaccinated, compared to 78% of the general community, and 92% of WKRVH DJH⁷⁶ 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.⁷⁷
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-19.⁷⁸

Use of force in immigration detention settings

56. 7KH \$XVWUDOLDQ JRYHUQPHQW¶V FODLPV WKDW WKHUH LV D SUH is used only as a measure of last resort, and that the amount of force used and the application of restraints must be reasonable,⁷⁹ are contradicted by testimony from people in immigration detention and others working in the sector,⁸⁰ as well as independent monitoring mechanisms.⁸¹
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.⁸² 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;⁸³

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.

⁷⁶ %HQ 'RKRHW¶V IHDUV RYHU JURZLQJ & RYLG RXWEUHDN DW (The Guardian, 13 January 2022) <<https://www.theguardian.com/australia-news/2022/jan/13/rampant-nearly-70-people-have-covid-at>

