Joint Submission on the Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021

Introduction

This submission is jointly made by the organisations below, outlining the harmful impacts of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) ('**CIO Act**') since its introduction two years ago.

Two years ago, we wrote to the Australian Parliament expressing our concern with the then-Bill. We warned that it would increase the risk of indefinite, arbitrary detention, and did not in fact protect people from being returned to countries where they would be at high risk of harm.

The concerns we raised when the Bill was introduced have unfortunately been realised. The CIO Act has resulted in many people remaining detained arbitrarily and indefinitely, contrary to Australia's obligations under international human rights law. Since the CIO Act has been in place, refugees and others who have fled harm continue to be returned to harm, in violation of Australia's *non-refoulement* obligations. This is because refugees in detention are forced to choose between indefinite detention or 'voluntary' removal. Such a choice is neither free nor truly voluntary, and should be understood to be constructive *refoulement*, in further breach of Australia's international obligations.

Rather than clarifying Australia's obligations under international law, the CIO Act has increased the risk that people's rights will be violated - either through indefinite arbitrary detention or constructive *refoulement*.

The CIO Act was never genuinely intended to increase Australia's observance of international law. It was introduced purely to avoid the consequences of a court judgment which could have forced the Government to release some people from immigration detention. Bipartisan support for the CIO Act was ill-informed and misplaced, particularly as the Act was rushed through Parliament without appropriate community consultation or parliamentary scrutiny. The current government has an opportunity to rectify this.

We urge the Australian Government to repeal the CIO Act, and to instead codify Australia's *non-refoulement* and human rights obligations into domestic legislation. Refraining from explicit forced removals is not enough - it is critical that the Government finds real, community-based solutions for people facing arbitrary and indefinite detention.

Joint submission by the following organisations:

Amnesty International Australia
Asylum Seeker Resource Centre
Australian Lawyers for Human Rights
Human Rights Law Centre
Refugee Advice and Casework Service (RACS)
Refugee Council of Australia
SCALES Community Legal Centre
South East Monash Legal Service
Visa Cancellations Working Group

CIO Act does not prevent deportation to harm

The Department claims that no person subject to a protection finding within the meaning of s 197C of the CIO Act has been involuntarily removed from Australia.[1] But this does not tell the whole story. Under current laws, formal protection findings are not a reliable barometer for whether a person may face harm, and both voluntary and involuntary removals of refugees to extremely unsafe countries of origin continue.

Contrary to its stated intention, the CIO Act does not prevent the removal of people from Australia to places they face a real risk of serious harm. Rather, it contributes to instances of constructive refoulement, by creating intolerable circumstances that result in a person electing to return to harm rather than face a lifetime in detention.

People without protection findings may still face harm

The amendments (specifically, the insertion of s 197D) empowered the Minister and delegates to revoke existing protection findings through an opaque and procedurally unfair process, for the purpose of removing a person from Australia. There is no guaranteed opportunity for a person to provide reasons why they are still owed protection. A lack of procedural fairness can result in dangerous and unlawful decisions. This is also a disempowering process for applicants, particularly as they are held in isolated locations in immigration detention where there are significant barriers to accessing legal representation (see case study 1).

Existing visa refusal and cancellation processes also do not guarantee that a person will have a full and fair opportunity to have their claims for protection heard. There is no obligation for decision makers to conduct a comprehensive non-refoulement obligation assessment in the course of considering the refusal or cancellation of a non-protection visa, for example.[1] There are many reasons that a person may not subsequently choose to make an application for a protection visa, including the perceived (and actual) futility of the process where a person fails the character test, or lack of access to legal assistance while detained.

The removal of a person who does not have a formal protection finding may therefore still be in breach of international obligations or otherwise expose a person to a real risk or serious harm or death. In recent years the Government has continued to remove people to Afghanistan, Iran, Iraq, Myanmar, Sudan, South Sudan and Syria, for example – many of

[1] *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17

whom, according to Departmental statistics, were not the subject of formal protection findings.[2]

Removals of people who have held protection or humanitarian visas continue

Even more concerningly, both 'voluntary' and involuntary removals of people who previously held a humanitarian or protection visa continue to occur every year. For example, the Department continues to remove people to South Sudan involuntarily.[3] The Department classifies a very small number of all removals of people who have previously held protection or humanitarian visas as 'involuntary', as seen in the following Figure.[4]

The number of non-citizens removed from Australia (voluntarily or involuntarily) for each year since 2014, who had previously held a subclass 200, 201, 202, 203, 204, 785, 790 or 886 visa:

(Onshore) removals of those who ever held subclass visa's 200, 201, 202, 203, 204 785, 790 or 886								
	Fin Year							
	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	2021-2022
Involuntary Removal	0	<5	<5	<5	<5	<5	<5	0
Voluntary Removal	<5	5	14	18	17	9	8	18

While people who have previously held protection or humanitarian visas continue to be removed, the Department's claims that no person has been refouled must be treated with caution. Further, when people who are detained indefinitely, and have been for many years, elect to return to their country of origin, the 'voluntariness' of that decision ought to be interrogated.

Constructive refoulement

When a person faces the choice between detention for life, or returning to a risk of serious harm, it cannot be said that a choice to return is made freely and voluntarily. There is a real risk that the prospect of arbitrary and potentially indefinite detention may coerce the person into making that choice. This is known as constructive *refoulement*.

The prohibition on *refoulement* in article 33(1) of the Refugee Convention is cast in broad terms, and requires that:

> No Contracting State shall expel or return ('refouler') a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The travaux preparatoires (records of debate for the creation of the Refugee Convention) suggest that the expansive drafting of the provision was deliberate. In debating the terms of the prohibition in the draft Convention, State parties directly contemplated whether it 'would it cover the situations when a refugee found himself either in a country which, without directly

[2] In 2020-21, at least 24 (and potentially up to 54) people from these countries were removed from Australia: Department of Home Affairs, *FOI Release FA 22/01/00452.* However, only between 9 – 12 people *in total* who previously held a humanitarian or protection visa, or were the subject of a protection finding, were removed to any country in the same period: Department of Home Affairs, *FOI Release FA 22/08/01033.*
[3] Department of Home Affairs, *Freedom of Information Request FA22/12/00398* (13 January 2023).
[4] Department of Home Affairs, *Freedom of Information Request FA22/08/01033.*

threatening his safety, was disposed to accede to demands for extradition to the country of origin'.[5]

The phenomenon contemplated by the State parties, and now understood as 'chain *refoulement*', is conceptually linked with 'constructive refoulement' - both contemplate conduct by a receiving State that indirectly procures or compels refoulement.[6] UNHCR's Guidelines on Voluntary Repatriation provide that in order to freely choose to return to a country of origin, refugees must also have a legal basis to stay in their current host country:

> One of the most important elements in the verification of voluntariness is the legal status of the refugees in the country of asylum. If refugees are legally recognized as such, their rights are protected and if they are allowed to settle, their choice to repatriate is likely to be truly free and voluntary. If, however, their rights are not recognized, if they are subjected to pressures and restrictions and confined to closed camps, they may choose to return, but this is not an act of free will.[7]

The International Law Commission, in its draft articles on expulsion, gave explicit consideration to what it termed 'disguised expulsion', meaning 'disguised or indirect means or techniques in order to bring about the same result that it could obtain through the adoption of an expulsion decision, namely to compel an alien to depart from its territory'.[8] The draft articles identify the following conditions of 'disguised expulsion':

> Such cases would seem to presuppose at least (1) that the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and (2) that behind the events or acts leading to the departure there is an intention of having the alien ejected and these acts, moreover, are attributable to the State in accordance with principles of state responsibility.[9]

The European Court of Human Rights found in both *M.S. v Belgium*[10] and *N.A. v Finland*[11] that constructive or disguised refoulement, brought about where the applicants accepted return to their country of origin because they faced no prospect of ever living freely or legally in the country in which they had sought asylum, breached the State parties' non-refoulement obligations.

It is accepted that procedural unfairness in an asylum determination process, for example, will breach non-refoulement obligations.[12] On similar reasoning, policies that create a real chance that asylum seekers will return to a place where they face serious harm must also be understood to contravene the prohibition on refoulement.

The practical effect of the CIO Act has been to authorise the prolonged and indefinite detention of people who are owed protection obligations. Yet the explanatory materials to the amending legislation specifically contemplated that indefinite detention will be brought to an

---

[5] UN High Commissioner for Refugees, 'The Refugee Convention, 1951: The Travaux préparatoires Analysed with a Commentary by Dr. Paul Weis' <https://www.unhcr.org/en-au/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html> accessed 14 June 2023.
[6] Penelope Mathew, 'Constructive Refoulement' in Satvinder Juss (ed), Research Handbook on International Refugee Law (Edward Elgar 2019) 207, p 217.
[7] United Nations High Commissioner for Refugees, *Voluntary Repatriation: International Protection* (UNHCR, 1996) [2.3] <http://www.unhcr.org/en-au/3bfe68d32.pdf#zoom=95>.
[8] International Law Commission, Draft Articles on the Expulsion of Aliens, A/69/10, 2014, arts 10, (1).
[9] Ibid arts 10, (4).
[10] *M.S. v Belgium* (2012) App No 50012/08 (ECHR, 31 January 2012).
[11] *N.A. v Finland* (2019) App No 25244/18 (14 November 2019, ECHR).
[12] Mathew (n 19) 221, citing Mansour Ahani v Canada Human Rights Committee, Communication No. 1051/2002, UN document CCPR/C/80/D/1051/2002.

end by a person's 'voluntary' repatriation.[13] The intention and likely effect of the legislation is to generate constructive refoulement. This is evidenced by both the number of 'voluntary' returns of people who previously held protection or humanitarian visas, and the further unknown number of people who have elected to return to harm rather than pursuing a formal protection finding that would condemn them to indefinite detention.

CIO Act causes arbitrary and indefinite detention

Where a person without a visa is owed non-refoulement obligations, the CIO Act purports merely to prevent that person's removal – it is silent on what else must happen to that person. The broader migration framework provides that a person without a visa must be detained, without providing any genuine or long term solution for people who are owed protection but are considered not to meet the criteria for any visa. Consequently, people in this situation remain detained indefinitely.

The Government claimed that the amendments implemented by the CIO Act were necessary to ensure compliance with its non-refoulement obligations under international law. As previously noted, there are serious questions about whether the Department is in fact complying with these obligations, as involuntary removals of former protection and humanitarian visa holders continue. Yet even if this is accepted as true, the amendments have replaced one breach of human rights with two, by further authorising arbitrary detention, and creating the practical consequence of constructive refoulement arising from that indefinite, arbitrary detention.

Duration of detention has dramatically increased

Vast increases in the rates of visa refusals and cancellations on character grounds have resulted in more people entering the immigration detention system. As many of those people cannot be removed, but the Department refuses to issue them with any visa, people are now spending longer in immigration detention than ever before. At the beginning of this year, the average duration of detention – 806 days - was at its highest point since the publication of detention statistics commenced in 2013.[14]

By 30 April 2023, the average period of time had reduced slightly to 735 days,[15] on account of the release of a small number of people who had been held for exceptionally long periods of time.

However, the average period of detention remains just above two years largely due to the significant number of people (135) who have been detained for longer than five years.[16] Data from August 2022 showed that at least 10 people had been detained for longer than 10 years:[17]

[13] Explanatory Memorandum, *Migration Amendment (Clarifying International Obligation for Removal) Act 2021*.
[14] Department of Home Affairs, *Immigration Detention and Community Statistics Summary January 2023* (3 March 2023).
[15] Department of Home Affairs, *Immigration Detention and Community Statistics Summary April 2023* (30 May 2023).
[16] Department of Home Affairs, *Immigration Detention and Community Statistics Summary April 2023* (30 May 2023).
[17] Department of Home Affairs, *Freedom of Information Request FA22/08/00717* (4 October 2022).

Table 1: Number of Detainees by year of detention

Years in Detention	Number of detainees
5 – 6 years	58
6 – 7 years	27
7 – 8 years	26
8 – 9 years	<5
9 – 10 years	23
10 -11 years	5
11 or more	<10
Total	**150**

Increasing numbers of people are facing indefinite detention

Over 50% of all people in immigration detention have either applied for or previously held a protection or humanitarian visa.[18] An increasing number of people are now facing indefinite periods of detention, either because they are stateless or because they are the subject of a protection finding and cannot be removed. The average length of detention for people in these circumstances is vastly higher than the overall average.

There are approximately 35 stateless people currently held in detention in Australia. Twenty-one of those people have been held for longer than two years.[19] The average period of detention for stateless people as at 31 December 2022 was 1,105 days.[20]

The average period of detention for people who previously held a protection or humanitarian visa, excluding transitory persons, is 1,209 days.[21] This figure does not account for all people in detention who are owed protection obligations, for example those who have been refused a protection visa on character grounds despite a positive protection finding.

The people who spend the longest periods, on average, in immigration detention are people from Afghanistan, Sudan, Iran, Iraq and people who are stateless.[22]

[18] Department of Home Affairs, *SE23-442 - Visa Cancellation and Detention - Asylum Seekers, Humanitarian Entrants and Refugees in Immigration Detention Facility* (answer to question on notice), Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, February 2023; Department of Home Affairs, *Immigration Detention and Community Statistics Summary December 2022* (10 February 2023).
[19] Department of Home Affairs, *SE23-410 - Stateless persons in detention* (answer to question on notice), Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, February 2023.
[20] Department of Home Affairs, *SE23-432 - Visa Cancellation and Detention - Stateless Person* (answer to question on notice), Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, February 2023.
[21] Department of Home Affairs, *SE23-444 - Visa Cancellation and Detention - Humanitarian Entrants and Refugees in Immigration Detention Facility* (answer to question on notice), Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, February 2023.
[22] Australian Border Force, *SE23-538 - Immigration Detention - Length of Time spent by People in Immigration Detention* (answer to question on notice), Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, February 2023.

Nationality	Average days in held detention as at 31 December 2022
NEW ZEALAND	348
IRAN	1,166
VIETNAM	444
INDIA	695
SUDAN	1,259
IRAQ	1,035
TONGA	505
UNITED KINGDOM	388
AFGHANISTAN	1,458
STATELESS	1,104
OTHER	857
Average time in held detention (all nationalities)	803

Notes:
** Table includes the top 10 nationalities in terms of detention population.*
*** Figures are based on current days in detention. As such, excludes days for previous periods of detention.*

The Department claims that it does not know how many people in immigration detention in total have been found to be owed protection obligations.[23] It also claims not to know how many people currently in immigration detention cannot be removed from Australia because they are the subject of a protection finding as defined in s 197C, or have otherwise been assessed to be owed non-refoulement obligations.[24]

Yet a significant number of people who have either raised or established protection claims are said to be on a 'removal pathway'. As at 31 December 2022, 275 people who have previously held a protection or humanitarian visa, or have applied for a Protection visa, were on a removal pathway.[25] At least 12 stateless people are said to be on a removal pathway.[26]

People who have previously held a protection or humanitarian visa are currently on removal pathways to Sudan (14), Iraq (11), Afghanistan (9) and Iran (8), among others.[27] People who had applied for a protection visa are on removal pathways to Iran (54), Vietnam (34), India (21), Afghanistan (17), Iraq (12) Sri Lanka (12) and Sudan (9), among others.

It is unclear how many of the people on removal pathways are the subject of a protection finding within the meaning of s 197C, but in the absence of specific data from the Department it could be assumed that a **significant proportion of those 275 people are now facing indefinite detention**.

Indefinite detention is a violation of international law

The amendments to s 197C were said to be necessary to avoid the human rights violation of refoulement. Yet detention involves the deprivation of a person's liberty – one of the most

[23] Department of Home Affairs, *SE23-455 - Visa Cancellation and Detention - Protection Obligations* (answer to question on notice), Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, February 2023.
[24] Department of Home Affairs, *SE23-495 - Visa Cancellation and Detention - People in Detention that cannot be removed pursuant to s.189* (answer to question on notice), Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, February 2023.
[25] Department of Home Affairs, *E23-445 - Visa Cancellation and Detention - Asylum Seekers, Humanitarian Entrants and Refugees on Removal Pathway* (answer to question on notice), Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, February 2023.
[26] Department of Home Affairs, *SE23-446 - Visa Cancellation and Detention - Stateless Persons on Removal Pathway* (answer to question on notice), Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, February 2023.
[27] Department of Home Affairs, *SE23-498 - Visa Cancellation and Detention - People applied for Protection Visa on Removal Pathway* (answer to question on notice), Senate Standing Committee on Legal and Constitutional Affairs, Supplementary Budget Estimates, February 2023.

serious curtailing of rights. The harms of immigration detention in Australia are well documented. In the past five years, 21 people died in onshore Australian immigration detention centres, and over 800 instances of self-harm were recorded.[28]

It is also well established that prolonged, indefinite detention is arbitrary, and is a violation of the right to security of the person and freedom from arbitrary detention protected by the International Covenant on Civil and Political Rights.[29] Avoiding one human rights violation (refoulement) is not a justification for the imposition of another, potentially equally harmful violation – arbitrary detention.

CIO Act increases unfairness in visa cancellation decision making

The CIO Act has adverse implications for applicants subjected to a visa refusal or cancellation under section 501 of the Migration Act. In seeking to cancel or refuse a visa under s 501, decision makers must consider the legal consequences of their decision and whether their decision will impact Australia's non-refoulement obligations. Since the introduction of the CIO Act, decision-makers are able to give less weight to non-refoulement obligations and the risk of removal as a reason to revoke a cancellation. This disadvantages applicants and makes it more difficult to demonstrate that the balance of relevant factors favours the granting or reinstatement of their visa.

When a person is resisting the cancellation of a non-protection visa (for example, a humanitarian visa), even less weight is afforded to non-refoulement obligations as decision-makers consider the person can apply for an onshore Protection visa, and that non-refoulement obligation will be assessed in that context.

However, this overlooks the reality that many people may choose not to apply for a Protection visa, as it would merely result in indefinite detention when their application is inevitably refused on character grounds. Others may not be able to apply because of barriers to access to justice and legal advice.

The recent introduction of Direction no. 99 does not grapple with these issues and heightens the risk of unlawful or incorrect decisions being made with grave consequences, including refoulement, permanent family separation and indefinite detention.

Real solutions needed for people indefinitely detained

The progressively punitive and unreasonable visa cancellation and refusal regime has created a crisis in immigration detention. There are likely hundreds of people in immigration detention who cannot be forcibly removed. The previous government's approach of ignoring

[28] See Refugee Council of Australia, "Statistics on people in detention in Australia – The costs of detention - Human cost", 13 May 2023, available at https://www.refugeecouncil.org.au/detention-australia-statistics/10/.
[29] For a summary of instances in which indefinite immigration detention in Australia has been found to be arbitrary and in breach of Article 9 of the ICCPR, see Australian Human Rights Commission, 'Right to security of the person and freedom from arbitrary detention', https://humanrights.gov.au/our-work/rights-and-freedoms/right-security-person-and-freedom-arbitrary-detention.

this problem and leaving people locked up for years on end, while lives are irreversibly damaged and mental health deteriorates, cannot continue.

Despite the standard set out in international law at which refugee protection may be denied, the Australian Government has effectively substituted its own, lower threshold. The Refugees Convention recognises that a person will not be entitled to the protection of a country if they have committed a serious crime, such as a war crime, crime against humanity or serious political crime. This concept is reflected in s 36(1C) of the Migration Act, which sets out circumstances in which a person will not meet the criteria for a protection visa. It is this standard which is reinforced by the CIO Act, for the purposes of determining whether a person may be removed. However, the threshold for visa refusal or cancellation on character grounds, set out in s 501 of the Act, is much lower, and includes minor offending or behaviour which doesn't amount to a criminal offence at all.

While the domestic lawfulness of the dual existence of both s 501 and s 36(1C) has been upheld,[30] this does not equate to compliance with Convention obligations. The character regime results in people who pass the test in s 36(1C) nonetheless being denied protection, excluded from the Australian community and indefinitely detained or constructively refouled.

As demonstrated by the 135 people who have been detained for longer than 5 years, the Minister's personal powers of intervention are an inadequate tool to resolve this problem. The Government must develop community-based alternatives to detention for people who cannot be removed, but are considered not to meet the character test. This must involve holistic support to ensure people's fundamental health, housing, and social needs are met, and their rights to privacy, dignity and liberty are respected. This is essential for successful re-entry into the Australian community.

Case studies

Case study 1

Peter sought asylum from an African nation and was granted a Protection (subclass 866) visa in 2009. Peter has an Australian citizen partner and Australian citizen children.

In 2018, Peter's protection visa was cancelled on the basis of criminal offending. Peter has been incarcerated for over five years, including over four years in immigration detention, which has had a profound impact on him. He suffers from severe mental health issues due to his protracted detention.

Peter sought merits review and judicial review of his visa cancellation. In 2020 during his merits review process, the Department completed an International Treaty Obligations Assessment (ITOA) and held that Peter was not owed protection obligations. Peter was not interviewed as part of this process.

[30] *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 108

In 2022, Peter was impacted by a Department data breach and his personal information was publicly disclosed. This has impacted Peter's protection claims. Peter has requested the Minister to intervene in his case to release him from detention and grant him a visa, however he has not received a substantive response.

Peter's judicial review proceedings concluded in 2022. Peter was advised by the Department that it may commence a section 197D assessment in relation to protection obligations owed to him (introduced by the CIO Act). No confirmation was provided that such an assessment would be undertaken or the timeframe in which it would be completed.

Almost 1 year later, the Department contacted Peter to advise that it is conducting a section 197D assessment and provided him with 28 days to respond.

Peter continues to face indefinite detention. It is unknown when the Department will complete the section 197D assessment. If the Department's assessment overturns Peter's protection finding, Peter will have the right to seek merits review of this decision before the Administrative Appeals Tribunal. Processing times at the Tribunal can take up to 2,041 days.[31] **This means that Peter could remain in detention for over five more years (i.e. over nine years in total).**

The CIO Act has resulted in Peter facing indefinite detention, with devastating consequences for him and his family in Australia.

Case study 2

Imran is from Iraq and arrived in Australia in 2009 on a Global Special Humanitarian (Subclass 202) visa. In 2015, his visa was cancelled and **he has been held in immigration detention for almost 8 years**. He has been separated from his 3 children during this time. Imran has significant physical and mental health conditions, which have been exacerbated by his protracted detention, and he has been physically assaulted by a Serco officer.

In 2018, Imran lodged a Protection (subclass 866) visa application. The Department refused his protection visa application, however in 2021, the Administrative Appeals Tribunal found that Imran engaged Australia's protection obligations and remitted the matter to the Department. The Department has indicated they are considering whether Imran meets the criterion for s 36(1C)(b) of the Migration Act. No timeframe has been provided regarding how long this assessment will take.

In January 2023, following the Full Federal Court decision in *Pearson v Minister for Home Affairs* [2022] FCAFC 203, Imran was released from immigration detention. However later that month, the Minister cancelled his GSH visa under s 501(3)(b) of the Migration Act. As a result, Imran was re-detained and taken to Melbourne Immigration Transit Accommodation where he currently remains. Following passage of the Migration Amendment (Aggregate

[31] Administrative Appeals Tribunal, Migration and Refugee Division processing times, June 2023, https://www.aat.gov.au/resources/migration-and-refugee-division-processing-times.

Sentences) Act 2023, the original mandatory cancellation of Imran's GSH visa was reinstated.

As the Tribunal has made a protection finding in relation to Imran, he cannot be removed to Iraq in accordance with section 197C(3), even if the Department finds that Imran does not satisfy section 36(1C).

Also, there is no realistic possibility that the Minister will intervene in Imran's case to release him from detention and grant him a visa given that the Minister exercised his personal powers to re-detain Imran in January 2023.

Imran continues to face indefinite detention while the Department completes its section 36(1C) assessment. If the Department does not grant him a Protection visa, Imran's only option will be to seek review before the Administrative Appeals Tribunal. Processing times at the Tribunal can take up to 2,041 days.[32] **This means that Imran could remain in detention for over five more years (i.e. over 13 years in total).**

Out of desperation, Imran may seek to "voluntarily" return to Iraq despite his fears of serious harm, which would amount to constructive refoulement.

The CIO Act has caused devastating consequences for Imran, including indefinite detention and/or constructive refoulement.

Case study 3

Moses is from South Sudan and came to Australia on a Global Special Humanitarian (Subclass 202) visa. He started to rebuild his life, working and contributing to Australian society and raising his family. Sadly, due to past trauma, including being forcibly recruited as a child soldier, Moses struggled with alcohol abuse which led to criminal offending.

In 2016, Moses' visa was cancelled. **He has spent over 6 years in immigration detention since this time.**

Moses has multiple chronic mental and physical health conditions, which have been exacerbated by his protracted detention. Moses has also been separated from his three minor children, mother and siblings who are Australian citizens.

Moses sought merits review and judicial review of his visa cancellation. His most recent (and third) Tribunal decision was unsuccessful in 2021. During Moses' Tribunal proceedings, the CIO Act was passed. The Tribunal accepted the legal consequences of a non-revocation decision, including the impact of the CIO Act, would be that Moses would remain in indefinite detention and/or be refouled to South Sudan, yet the Tribunal did not revoke his visa cancellation.

[32] Administrative Appeals Tribunal, Migration and Refugee Division processing times, June 2023, https://www.aat.gov.au/resources/migration-and-refugee-division-processing-times.

Moses did not submit a Protection visa application because it was very likely that the Department would make a protection finding in relation to him, however his Protection visa would be refused under section 501 of the Migration Act for similar reasons to his visa cancellation. Moses was afraid of being trapped in a position where he could not be removed from Australia and would continue to face indefinite detention.

In 2022, Moses sought ministerial intervention for a visa grant and release from detention; he is yet to receive a substantive response.

Moses is fearful of being removed to South Sudan and is exhausted from waiting indefinitely in detention as his life passes by. Out of desperation for a final outcome, in 2023 Moses commenced proceedings in the Federal Circuit and Family Court seeking mandamus in relation to the Minister's duty to remove him in accordance with section 198 of the Migration Act.

The CIO Act has not prevented Moses' refoulement and has led to his indefinite detention.

Case study 4

'Joshua' came to Australia by boat in 2009, at the height of the Sri Lankan Civil War. His case was assessed, and it was found that he was a person owed protection. He was found as a genuine refugee, however, ASIO made an adverse finding against Joshua, meaning that he could not be released into the community. Joshua's adverse finding was not based on anything he had done, he had not been charged with or convicted of any crime, rather, the finding was a prediction on what he 'may' do in future. Refugees in immigration detention such as Joshua who have received an adverse security assessment are not provided with any information from ASIO as to how they made this decision or the evidence against them.

This meant that Joshua had no way of appealing this decision, no legal recourse, and yet could not leave immigration detention, and became subject to indefinite detention. Refugees with adverse security assessments cannot be returned to their country of origin as they have been found to have a well-founded fear of persecution (i.e. a protection finding as defined by the CIO Act). Present government policy requires that they remain in immigration detention facilities unless and until a third country agrees to resettle them. The chances of third country resettlement for a refugee with an adverse security assessment are unlikely.

He waited and waited and was detained over 8 years. During that time, his mental status worsened, and he became unwell. He was prescribed sleeping pills as he could not sleep at night. He was referred to by his boat ID number not his name, dehumanised and subject to racism from detention centre staff.

He attempted suicide and survived.

Finally he was released and let out into the community, still without knowing what the adverse findings against him were.

However, the lasting impact on his mental health remains. He can barely sleep and is still waiting to bring his wife and children to Australia. He missed his children growing up, missed being present for their milestones. His wife had to be the sole provider for the family for 8 long years and this has put stress on their relationship.

Joshua is now working and he wonders – what was the point of 8 years in detention- why was he deemed a security threat, and most of all, when he can finally see his wife and children again.

Case study 5

Ayuel Koth came to Australia as a refugee 15 years ago. She came along with her husband, and her younger brother Deng, of whom she was a care giver. She was born in South Sudan, but the family had spent much of their time in refugee camps in Egypt. Deng was 8 when he came to Australia.

The family had experienced much trauma and conflict by the time they arrived in Australia, including witnessing the death of their mother and not knowing where their father was. Deng grew up attending Australian schools and became a teenager in Australia. He became involved with a group of friends who sometimes engaged in anti-social behaviour and sometimes took drugs. His sister, in the place of his mother, tried her best to help Deng get on track.

However, while using drugs, Deng committed an armed robbery and received a 13 month jail sentence. During his sentence, Deng engaged with services, completed some short courses and began to plan for the future. His family prepared for his release. About 2 weeks before his release, Deng received a letter telling him his visa had been cancelled. He had no idea at the time that he was not a citizen. Through SMLS, Deng was referred to a legal service who handled his appeal. Deng was then transferred to an Immigration Detention Facility in his state, where his family could visit him. He was held there for several months. He was eventually transferred to Christmas Island Immigration Detention Centre. Ayuel was not informed of this until after it had happened. She found out when she went to visit Deng in Melbourne to find he was not there. Since the end of his prison sentence, Deng has been in immigration detention for over 2 years, awaiting the outcome of his appeal. Deng faces deportation to South Sudan, where he has very few connections, and does not speak the local language, having spent most of his early childhood in Egypt. Ayuel has had to take time off work to deal with the stress and struggles to care for her own children. The detention and possible deportation of Deng is like a death threat to the family, given the danger Deng faces in South Sudan. Ayuel worries that her other children's wellbeing will be significantly impacted.

The CIO Act will not prevent Deng's refoulement and he will remain indefinitely detained during his visa cancellation proceedings. If Deng's offshore visa remains cancelled, he may decide to apply for an onshore Protection visa; the Department is likely to make a protection finding in Deng's favour yet refuse his visa on the same basis as his visa cancellation. Due to the CIO Act, Deng will face indefinite detention or constructive refoulement.