



Review of Schedule 1 of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (CIOR Act)*.

Joint Submission from Refugee and Immigration Legal Service (RAILS) and Queensland Program of Assistance to Survivors of Torture and Trauma (QPASTT) to the Parliamentary Joint Committee on Intelligence and Security

23 June 2023

The Refugee and Immigration Legal Service (**RAILS**) was established in 1980 to provide free immigration advice, legal assistance and legal education to immigrants, refugees and asylum seekers in Queensland. As Queensland's only community legal centre specialising in refugee and immigration law, RAILS regularly assists vulnerable and disadvantaged refugees and asylum seekers in immigration detention in Brisbane. This includes those whose protection visas have been cancelled on character grounds.

The Queensland Program of Assistance to Survivors of Torture and Trauma (**QPASTT**) is a specialist service supporting the recovery from torture and trauma of people from refugee backgrounds. QPASTT has supported people seeking asylum in Australia for over 22 years, since the Australian Government passed legislation in October 1999 establishing temporary protection visas. Since 2009, we have also provided individual counselling and mental health support to people seeking asylum in held and Community Detention in Brisbane and across Queensland, including at the Brisbane Immigration and Transit Accommodation (**BITA**), the Scherger Immigration Detention Centre at Weipa, Far North Queensland and more recently at Alternate Places of Detention (**APODs**) in Brisbane.

QPASTT and RAILS thank the Committee for the opportunity to provide submissions in relation to this important Review of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (CIOR Act)*. The following comments draw upon QPASTT and RAILS' experience and expertise regarding refugees and asylum seekers in detention.

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Objective of the *CIOR Act*

The purpose of Schedule 1 of the *CIOR Act* was to clarify that the *Migration Act 1958* does not authorise the removal of a person who is found to attract Australia's protection obligations, and to require that Australia's protection obligations be considered before a decision is made to grant or refuse a protection visa.¹ It placed in legislation, the long-standing policy position of Australia honouring its international obligations relating to *non-refoulement*, whereby people cannot be returned to a country in which they are at risk of persecution or significant harm.

QPASTT and RAILS support the clarity that resulted from the *CIOR Act*'s insertion of s 197C(3) to the *Migration Act 1958*.

However, in our experience, two, presumably unintended, consequences have arisen to which we draw the Committee's attention. The first of these relates to the failure of the *CIOR Act* to also include measures to prevent an escalation in the rates of prolonged detention and the second to the exception provided in s 197C(3)(c)(iii) of the *Migration Act 1958*. Each of these are addressed in turn below.

1. *Prolonged Detention*

The *CIOR Act* amendment needs to be accompanied by appropriate measures to ensure that it does not result in an increase in prolonged or indefinite detention.

As the law currently stands, individuals who have been found to engage Australia's protection obligations but have had a protection visa cancelled or refused on character grounds, must be detained until removed to a country other than their country of nationality or former habitual residence or granted a visa.² There is, however, no obligation for the Department or Minister to take steps towards either locating a third country or granting them a visa. As a result, the default position is ongoing detention.

While the *CIOR Act* purports to speak to Australia's commitment to honouring its non-refoulement obligations, the absence of accompanying measures to address prolonged detention exacerbates the derogation of our obligations under the *International Covenant on Civil and Political Rights and Convention Against Torture (ICCPR)* in relation to arbitrary detention.³

The effect of the amendment on time spent in detention is evident from the statistics released by the Department of Home Affairs each month.⁴ From 2019 to 2023, there has been approximately a 53.5% increase in the average length of time that an individual spends in

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 March 2023, 2 (Alex Hawke, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs).

² *Migration Act 1958* (Cth) ss 189, 198, 197C.

³ *International Convention on Civil and Political Rights*, opened for signature, 16 December 1996 (entered into force 23 March 1976), art 9.

⁴ Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 30 April 2023, 12.

detention.⁵ Whilst average detention time stood at 497 days in 2019, there is now an average detention time of 763 days as of April 2023.⁶

The deleterious mental health impacts of indefinite and arbitrary detention have been robustly documented. Studies have consistently found that held detention leads to deteriorating mental health, self-harm and suicide⁷. Data has shown that self-harm in held detention is 200 times the level seen in the general Australian community⁸.

When attending appointments external to immigration detention facilities, QPASTT clients have been witnessed and report being subjected to the use of mechanical restraints (handcuffs) and report that at times they are also subjected to body searches, which they describe as 'intrusive' and 'degrading'. Additionally, clients report constant surveillance and lack of privacy, and fear of unpredictable transfer to other immigration facilities in Australia including Christmas Island. QPASTT clients also report inconsistent enforcement of rules, which contribute to high levels of fear and anxiety.

The reported conditions in the detention environment are frequent triggers for trauma memories and intrusive trauma symptoms, such as hypervigilance, panic attacks, ruminations, inability to concentrate, nightmares, flashbacks, night terrors and disturbed sleep, and a pervasive sense of helplessness and hopelessness. These symptoms remind clients of the persecution and trauma experienced prior to arriving in Australia (such as kidnapping, shootings and targeted beatings, witnessing family members being harmed, killed or kidnapped), and their detrimental impact is compounded by the fear of being returned to such an existence again.

To further evidence the impact of detention on mental wellbeing, QPASTT has drawn data of psychological functioning of clients in detention, community detention and those living in the community on substantive visas or having attained Australian citizenship. The data tables below are from clients who have been referred to QPASTT between 1/1/2018 and 1/5/2022. We have provided retrospective client data to protect identity of current detention and community detention clients, as also to enable review of a reasonable data pool.

The circumstantial difference between these three client cohorts is those who reside in immigration detention experience deprivation of liberty and precarious future prospects of residency. For these clients, as well as experiencing complex trauma prior to arrival in Australia, they are primarily focussed on the stressors of their current circumstance. In comparison, within QPASTT's PASTT funded program, clients are residing in Australia on substantive visas or with Australian citizenship. Therefore, their refugee status and protection

⁵ Department of Home Affairs, Immigration Detention and Community Statistics Summary, 2019-2023, 12.

⁶ Department of Home Affairs, Immigration Detention and Community Statistics Summary, 2019 & 2023, 12.

⁷ See Procter et al. (2018). "Lethal hopelessness: Understanding and responding to asylum seeker distress and mental deterioration." *Int J Ment Health Nurs*. Vol 27(1):448-454; and von Werthern et al (2018) "The impact of immigration detention on mental health: a systematic review". *BMC Psychiatry*. 2018 Dec 6;18(1):382.

⁸ See Hedrick et al (2019). "Self-harm in the Australian asylum seeker population: A national records-based study" *SSM – Population Health*. Volume 8, 2019; and Hedrick, K. Borschmann, R. (2020) Self-harm in immigration detention has risen sharply. *The Conversation*, 8 October 2020.

from harm is determined and continued residence in Australia affords them the opportunity to recover from past trauma and establish their life in Australia.

The following information explains the data presented in Tables 1-3, below:

- Psychological functioning is assessed by the counsellor and determined as either being absent, mild, moderate or severe. The data presented in the tables below is the proportion of clients who are assessed as experiencing severe symptoms, illness or distress.
- Initial assessment is completed during the first assessment period, which is generally within the first two sessions of engagement.
- Most recent assessment is the last subsequent assessment, which is completed every 10th session while counselling continues.

Please note that the data recorded in the tables below are the assessments where the client is exhibiting **severe** symptoms. Severe symptoms are characteristically causing severe distress for themselves and possibly other significant people in their life, and impairing functioning in many aspects of the person’s life.

Table One: Psychological functioning of Detention counselling clients over time

Severe Psychological Functioning Assessment Item	Detention Initial Assessment (n = 103)	Detention Most Recent as at May 2022 (n = 49)
Anxiety Symptoms	51.5%	55%
Depression	48.5%	45%
Family Dysfunction/Difficulties	27%	30.5%
Interpersonal Difficulties	24%	26.5%
Pain/Somatoform Symptoms	22%	26.5%
Severe Mental Illness	5%	4%
Social Isolation	57%	63%
Traumatic Grief	32%	55%
Traumatic Stress Symptoms	52.5%	59%

The above data indicates that severity of psychological functioning for clients in held detention either minimally improves or deteriorates over time.

Under some severe psychological functioning items - notably interpersonal difficulties, traumatic grief and traumatic stress – more clients deteriorate to experiencing severe symptoms over time despite the engagement in counselling.

It is particularly striking that for clients for whom counsellors have been able to complete a final assessment, the proportion of clients experiencing severe mental illness significantly

increases. This identifies the exacerbation of illness at point of end of engagement – likely speaking more to the impact of cessation of service.

Table Two: Psychological functioning of Community Detention counselling clients over time

Severe Psychological Functioning Assessment Item	Community Detention Initial (n=77)	Community Detention Most Recent as at May 2022 (n = 54)
Anxiety Symptoms	39%	39%
Depression	40%	31.5%
Family Dysfunction/Difficulties	23%	29.5%
Interpersonal Difficulties	26%	17%
Pain/Somatoform Symptoms	10%	11%
Severe Mental Illness	6.5%	2%
Social Isolation	30%	20%
Traumatic Grief	36%	20%
Traumatic Stress Symptoms	60%	44.5%

Compared to the held detention clients, Community Detention clients experience a reduction in severe social isolation, severe traumatic stress and traumatic grief over time.

Other severe psychological functioning items tend to plateau rather than improve, however increases in severe depression and interpersonal difficulties reflect the impact of prolonged detention.

Community Detention clients have been observed to have a complete reduction in severe mental illness over time. This is in sharp contrast to held detention clients and indicates the source of illness for held detention clients is highly likely to be circumstantial or situational.

Table Three: Psychological functioning of PASTT counselling clients over time (permanent or substantive visa holders, or Australian citizens)

Severe Psychological Functioning Assessment Item	PASTT Initial (n = 612)	PASTT Most Recent as at May 2022 (n = 371)
Anxiety Symptoms	29%	17%
Depression Symptoms	18%	10%
Family Dysfunction/Difficulties	31%	23%
Interpersonal Difficulties	23.5%	15%
Pain/Somatoform Symptoms	16%	14%

Severe Mental Illness	4.5%	3.5%
Social Isolation	15%	12%
Traumatic Grief	26%	14.5%
Traumatic Stress Symptoms	35%	20.5%

As a point of comparison, above is severe psychological functioning assessment data for clients engaged in our PASTT funded program (permanent residents, TPV/SHEV holders, people on sponsored visas and those who are now citizens).

Across all domains, reduction of severe symptoms is evident. Particularly notable is the reduction of severe social isolation, anxiety and depression symptoms, and reduction in severe traumatic stress symptoms.

This is the trauma recovery trajectory that is possible and expected for people that have not endured prolonged detention in Australia and who have a sense of safety and stability for their future.

2. *The Exception for Voluntarily Return*

The *CIOR Act* amendment relevantly provides in s 197C:

(3) ... section 198 does not require or authorise an officer to remove an unlawful non-citizen to a country if:

(a) the non-citizen has made a valid application for a protection visa that has been finally determined; and

(b) ... a protection finding was made... ; and

(c) none of the following apply:

...

(iii) the non-citizen has asked the Minister, in writing, to be removed to the country.

It is the view of QPASTT and RAILS that the exception for voluntary return is problematic, given the aforementioned propensity for prolonged and indefinite detention that the amendment creates.

If the only means by which an individual may remain in Australia is by accepting prolonged and, potentially, lifelong detention, the ability of that individual to consent to return is severely impeded. Indeed, there is a strong argument that Australia breaches its *non-*

refoulement obligations when an individual, facing the prospect of indefinite detention, purports to consent to being returned to a place from which they fled persecution.

As detailed above, the mental health impacts of prolonged detention include a significant deterioration in cognitive functioning as experience of traumatic stress increases over time. This means that informed decision making, particularly decisions of a complex nature, is challenging with the long term consequence of decisions almost impossible to consider. The prospect of indefinite or lifelong detention may be so intolerable that returning to country of origin or a third country becomes a solution that some individuals are willing to consider. For those, the willingness to return to a place where they believe they will be harmed or killed, is a reflection of the extreme hopelessness and powerlessness they experience in indefinite detention and not the result of a process of free and informed consent.

Recommendations

We note that the *CIOR Act* was passed relatively quickly in 2021 without the benefit of public consultation or consideration by the Legal and Constitutional Affairs Legislation Committee. Given the gravity of its consequences for individuals affected by it, and the concerns raised in this submission, QPASTT and RAILS makes the following two recommendations:

1. Alternatives to indefinite detention

QPASTT and RAILS consider that currently there are insufficient safeguards in place against the serious encroachment on individual rights imposed by the indefinite detention of such individuals under the amendment.⁹ Firstly, the *Migration Act 1958* should be amended to reflect the Government's policy that detention is a last resort.¹⁰ Secondly, a legal framework must be established that ensures that the detention of each individual is, and continues to be, reasonable, necessary, and proportionate considering the particular circumstances of each person.¹¹

It is paramount that the length of time an individual spends in detention is commensurate with the risk that individual poses to the safety, security, and good order of the Australian community. There must be formal, transparent processes for establishing that degree of risk and how this may affect an individual's release from detention. Less restrictive alternatives to detention must be utilised where appropriate.¹² This includes a greater emphasis on community detention and visa grants.

⁹ This was noted by the Parliamentary Joint Committee on Human Rights at the time of the *CIOR* amendment.

¹⁰ Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2021*, Parliament of Australia, 16 June 2021, 84.

¹¹ United National High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) 21-34.

¹² *Ibid* 35-42.

The process must include a system for regular assessments within defined timeframes. This allows for the risk that a particular individual may pose to the community be re-established on an ongoing basis. In turn, this will enable an increased number of individuals to be subjected to less restrictive measures in appropriate cases and reduce the escalation of mental health impacts of detention.

2. Voluntary return

The exception in s 197C(3)(c)(iii) should be reviewed, in conjunction with the adoption of a formal legislated process directed towards the avoidance of prolonged detention.

While not wanting to limit the options available to people who engage Australia's protection obligations, we note that the removal of the exception would not prevent a refugee from making their own arrangements to return home should, for instance, the conditions in their home country improve. It would, however, guard against the risk of coerced consent, as would the adoption of measures aimed at avoiding prolonged detention.