Submission to the UN Subcommittee on the Prevention of Torture, and its co-ordinator in Australia, from the Refugee Action Collective (Victoria) (RAC (Vic))

Noting that inspectors of the Subcommittee on the Prevention of Torture (SPT) (a) had abruptly left Australia in late October 2022 (having been wrongly obstructed by two State governments), and (b) are yet to complete their report, RAC (Vic) makes this submission, containing evidence and analysis not previously provided, to assist the SPT team to do so. This new material partly:

(1) *augments* the 3 October 2022 submission of the Human Rights Law Centre, the UNSW Kaldor Centre for International Refugee Law, and the Refugee Council of Australia ("the joint submission") – see, mainly, Parts II and IV of the Contents (below); but also

(2) after quoting public domain documentary evidence establishing, for example –

  (a) the cruel treatment by the Immigration/Home Affairs department of people held in immigration detention facilities (IDFs) – Commonwealth workplaces – has involved a decade of apparent *Work Health and Safety Act 2011* (Cth) (WHS Act) criminal offences;

  (b) in 2017 – 19, forced inter-IDF airlifts occurred (on average) 13 times per detainee; and

  (c) in 2019, the Migration Act's 'Medevac' regime – ensuring that ailing offshore detainees airlifted to Australia receive specialist medical care – was sabotaged by Home Affairs;

– *suggests* that Australia has employed 'whatever it takes' methods to inflict mass cruelty.

Note: because the cruelty at offshore IDFs attracted public criticism first, the joint submission's *Section C – Offshore processing* will be covered before *B – Immigration detention in Australia*.

CONTENTS

EXECUTIVE SUMMARY

Although the wide-ranging and heavily footnoted 3 October 2022 submission of the Human Rights Law Centre, the UNSW Kaldor Centre for International Refugee Law, and the Refugee Council of Australia (the joint submission) largely 'covers the field', it does not reference several relevant public domain documentary sources.

Drawing on such sources, RAC (Vic) augments some content of the joint submission, thereby further confirming that, invoking the wording of Article 1 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the 'CAT'),

> severe pain or suffering, whether physical or mental, [has been] intentionally inflicted on [thousands of persons, notably via the discriminatingly cruel treatment of detainees of immigration detention facilities (IDFs) and ex-detainees] …, [involving] punishing [them for having tried to come to Australia by boat seeking asylum], or intimidating [them], … at the instigation of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Secondly, evidence submitted by RAC (Vic) demonstrates that, while *political* decisions – regressive government amendments to the *Migration Act 1958* (Cth), and regressive government policies – *enabled* such infliction of pain or suffering, the duration and intensity thereof was *exacerbated* in IDFs:

(a) directly by the *administrative instigation* decisions of public officials (usually top public servants, rarely Ministers) of the variously named department – originally Immigration, more recently Home Affairs, notably its Australian Border Force (ABF) unit that, since its creation on 1 July 2015, has controlled IDFs; and

(b) indirectly by (i) the department's failure – as the operator of Commonwealth workplaces (IDFs) – to comply with its s 19(2) duty, under the *Work Health and Safety Act 2011* (Cth), to pro-actively eliminate, or at least minimise, risks to the physical and mental health of "other persons" (detainees), and (ii) the failure of the Act's regulator, Comcare, to compel compliance or punish non-compliance.

Two main category (a) exacerbations have been:

(1) the rejection by ABF (or sometimes a Minister's staffer, even a Minister) of most requests, made by in-house medical practitioners, that very ill detainees (offshore and onshore) receive external specialist care; and

(2) from July 2017 to May 2019, 8,000 forced transfers, by air, of onshore detainees from one IDF to another – a practice which, on average, saw each detainee forcibly relocated (often in handcuffs) every two months.

Thirdly, we note that, four months before the Morrison government repealed, in December 2019, the 'Medevac' amendments to the Migration Act (under which two treating doctors could get very ill offshore detainees brought to Australia ASAP for specialist care), a Senate Committee heard evidence from Home Affairs Secretary Pezzullo that, on analysis, was very disturbing. He told Senators that all the Medevac transferees were being held in IDFs – but didn't tell them that IDF controller ABF would prevent nearly all of them from receiving that care, even if recommended by an in-house doctor. So, what the Senators didn't realise was this: a *Commonwealth law* (the Medevac amendments, still in force) *was being sabotaged by the Commonwealth government* (via the Home Affairs department).

I PRELIMINARY POINT OF CLARIFICATION: OFFICIAL MEANING OF "TORTURE"

1. What is "Torture" as defined by the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the CAT)*?*

   1.1 The CAT's Article 1 reads as follows, effectively constituting a definition that answers the above question:

   > 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

   1.2 Before detailing (below) each instance of what RAC (Vic) says is "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (torture), we explain which Article 1 words and/or phrases apparently apply to the instance concerned. However, since the last 5 lines of Article 1 apply across the board, we clarify their meaning now.

   1.3 The wording "based on discrimination of any kind" (*5th last line*) appears to invite a broad reading. We take it to apply to people who came – or tried to come – to Australia by boat, seeking protection – most of whom were taken to an offshore Regional Processing Centre (RPC). The visa/detention/deportation regime clearly treats such 'boat people' far more harshly than anyone else.

   1.4 SInce the regime's over-all harshness derives from deliberate
   (a) Commonwealth government legislative decisions, and
   (b) administrative implementation decisions by government officials and/or contractors engaged by the Commonwealth,

   the wording (*4th last – 2nd last line*) – "when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" – just describes the actual regime, and thus does not qualify or limit the scope of Article 1's definition.

   1.5 As to the final wording (2nd *last & last lines*), we say that, almost self-evidently in each instance, none of the [physical or mental] "pain or suffering [was] arising only from, inherent in or incidental to lawful sanctions". For example, assuming for the sake of argument that a non-citizen's detention in an IDF, offshore or onshore, is a "lawful sanction", none of the following can rationally be said to arise *only from* – or be intrinsically *inherent or incidental to* – that sanction:
   - un-prevented sexual assault of detainee children;
   - at the clinic of an equatorially located IDF, non-provision of an antibiotic that effectively treats most tropical infections;
   - at a medically under-resourced and remote IDF, non-provision of a straightforward regime of prompt airlifts to Australia for emergency medical treatment; and
   - the forcible transfer of detainees by air (usually in handcuffs), from one IDF to another, every two months on average.

II AUGMENTING PARTS OF SECTIONS C & D OF THE JOINT SUBMISSION

C. Offshore processing

(c) Refugee Status Determination (RSD) in Nauru and PNG

2. Obviously, the longer people seeking asylum have to wait for an RSD decision, the more anxiety and stress they are likely to incur, especially if that waiting occurs in immigration detention. Over time, a psychological state of deepening depression, even terminal despair, could well ensue.

3. Paragraph 35 of the joint submission states, "No person seeking asylum has been transferred to Nauru or Papua New Guinea since 2014". So, the "12 people seeking asylum in Nauru [who are, according to paragraph 45] still going through the RSD process", would have been sent to Nauru before – or during – 2014. Those of them who applied for RSD before mid-2014 and still await a decision have been waiting for at least 7 years. There are some people (how many?) in PNG who could also be in that situation or, if they declined to participate in the RSD process, a worse situation.

4. All the 'boat people' who were sent to PNG or Nauru by Australia *and* are still living there are no longer in held detention, because the Manus Island RPC closed on 31/10/17, and Nauru's RPC has been empty since 31/3/19 (source: the *Immigration Detention and Community Statistics Summary* posted monthly by Home Affairs/ABF). So, held detention now exists only 'onshore' (on mainland Australia and Christmas Island).

5. The joint submission doesn't say whether anyone held in an onshore IDF is awaiting an RSD decision. Nor do the Home Affairs/ABF summaries. There may well be some.

6. At common law, the word "act" includes an omission – a failure to act when required. *Prima facie*, the 'act' of inordinately prolonging the RSD decision-making process, whether in response to applications from boat people or from any other category of non-citizens, appears to constitute torture as defined by Article 1:

   > an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as … punishing him for an act he … has committed … or intimidating or coercing him, or for any reason based on discrimination of any kind.

7. The following joint submission paragraphs indicate that a range of harsh measures have been and/or are being used by Australian authorities to variously punish, intimidate or coerce non-citizens, in apparent contravention of Article 1.

   20: As a result of the 'Clarifying International Obligations for Removal' amendments to the Migration Act, "people are at risk of arbitrary detention unless they 'voluntarily' chose to be refouled".

   24: … "significant delays to receive medical treatment";

   28: … "disproportionate reliance on solitary confinement as a punishment tool";

   65: … giving family reunion applications from boat people "the lowest processing priority – commonly leading to delays of 5 to 10 years".

   Separating families "to deter asylum seekers from asserting their rights of protection once … in Australia and to deter others from seeking to come to Australia."

   66: "Families have also been separated between Australia and the RPCs …, particularly where one family member required medical treatment in Australia and other family members were forced to stay behind … [as] part of an 'unofficial policy' to use family separation as a coercive measure to encourage … [the sick person] to return to Nauru or … [PNG] despite their health concerns, or even to abandon their protection claims."

So, Australia 'has form'. Inordinately delaying RSD decisions could well be another such measure, punishing people for coming/trying to come to Australia visa-less by boat, and/or deterring others from doing so.

8. Although only *some* people left on Nauru or PNG are still awaiting an RSD decision, the mere fact that, nine years after having been forcibly sent offshore, *anyone* remains 'warehoused' there, raises another question: is confining people to a country, not (as with 'held detention') a building – a "deprivation of liberty"? If so, it would also involve a contravention of Article 1, i.e., torture.

(d) Inadequate healthcare

9. The following joint submission paragraphs (minus footnotes) provide essential context.

> 46. The Australian Government owes a duty of care to ensure refugees and people seeking asylum who were transferred to Nauru and PNG receive appropriate medical treatment. In many cases, this treatment cannot be provided in Nauru or PNG, due to the complexity of the medical needs and/or the limitations of the health services in those countries. However, the Australian Government has maintained a long-standing resistance to bringing people back to Australia for medical care, even in critical and urgent cases where doctors have indicated an immediate threat to life. In some cases, this resistance has resulted in death. Twelve people have died while subject to offshore detention, most of whom were suffering from untreated physical or mental health conditions which had been caused or exacerbated by Australian Government policies. There is no indication that these policies were ever reviewed or changed after any of these deaths. At least six additional people who were previously subject to offshore detention have also died.
>
> 47. Because the Australian Government consistently refused to follow the advice of doctors about critically unwell people in its care, many people were forced to take court action to secure urgent medical transfers to Australia. Between December 2017 and February 2019, more than 50 cases involving critically ill people offshore were brought before the Federal Court of Australia. These people had serious medical conditions, including encephalitis, sepsis, psychosis, resignation syndrome and pregnancy complications in which the life of the unborn child and mother were at risk. Every single court case was successful in securing a transfer to Australia for medical care. Many more people were transferred to Australia for medical treatment only after lawyers intervened and threatened court proceedings. In total, more than 340 people were transferred to Australia as a result of this legal action, highlighting the serious unmet medical needs of people held offshore.
>
> 48. For a brief period in 2019, a better system for meeting the critical health needs of people offshore was introduced through an amendment to the Migration Act by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019*, known as the 'Medevac law'. This law, which was passed by Parliament against the then-Government's wishes and came into effect in March 2019, established an efficient pathway for independent doctors to refer people offshore for urgent medical transfer to Australia. The Medical Evacuation Response Group, a partnership of lawyers, doctors, caseworkers and counsellors, worked together to ensure the safe and effective submission of applications under the Medevac law. However, the former Coalition Government repealed the Medevac law in December 2019. In the eight months of its operation, approximately 192 refugees and people seeking asylum were transferred to Australia. The repeal of the Medevac law undermined the safety of people who required medical treatment.

10. RAC (Vic) now provides four pieces of evidence substantiating the above allegations that the Australian government "has maintained a long-standing resistance to bringing people back to Australia for medical care …", and "consistently refused to follow the advice of doctors about critically unwell people in its care …".

11. The first comes from ABC TV's *7:30* program that aired on 31 October 2017. It was also published on that date as an item of ABC News.

ABC 7:30 *Report: Manus Island doctors allege political prevention of health care*

> "Every clinical decision questioned": Doctor accuses Border Force of exerting political influence on Nauru: By Buzzfeed's Paul Farrell and Gina Rushton, Updated 31 October 2017. Dr Martin had worked for the Commonwealth's health contractor, International Health and Medical Services, at the Nauru RPC.
>
> Dr Nick Martin, a former surgeon lieutenant commander with the British Royal Navy, alleges that patients with breast lumps, kidney stones and neurological damage were delayed diagnostic treatments, and that severely diabetic asylum seekers held within the detention regime are at risk of going blind.
>
> "Every clinical decision you made was being questioned by a non-medic," Dr Martin said. "Your expertise and your autonomy were respected in the Royal Navy but in Border Force you did absolutely fee there was a political influence on the clinical cases."
>
> He said evacuation deadlines set by him and his staff were frequently "reached and breached" by the Australian Government, which he holds ultimately responsible for the delays. "These medical delays put in place are absolutely criminal, Dr Martin said.
>
> Dr Martin is the most senior official deployed on Nauru to speak publicly about Australia's offshore detention regime.
>
> His allegations are backed by an extensive cache of leaked documents obtained as part of a joint investigation between 7.30 and BuzzFeed News.
>
> They show that Dr Martin is not alone, with his concerns widely shared by other medical practitioners on Nauru contracted by the Australian Government.
>
> Dr Martin also wrote a letter to his superiors, backed by three medial colleagues, setting out major flaws at the Nauru hospital.
>
> He outlined shocking failures in services at the hospital, including … one refugee who received six referrals to the hospital and had been waiting 18 months for an MRI scan.
>
> At the hospital, doctors kept no notes on the patient's case.
>
> "If I referred a patient in Australia to a hospital where I knew that no form of clinical notes would be kept, no feedback would be given and often the referral would be lost or ignored even after repeated attempts to get the patient seen, I would expect to be up before the courts on a culpable negligence charge, along with the hospital," Dr Martin wrote in the letter.

12. Indeed, as Ben Doherty reported (*Guardian Australia,* 26/4/18), the Commissioner of Australian Border Force at the time, Roman Quaedvlieg, accepted Dr Martin's assertions that deserving cases were obstructed by ABF.

> In a tweet exchange, Dr Nick Martin told Quaedvlieg: "I appreciate your comments, but you must remember that every time, without fail, that I tried to get deserving cases the care they needed they were thwarted and obstructed by ABF. Every time."
>
> [Tweeting in reply] Quaedvlieg said: "Understood & I accept without equivocation. It's true that the threshold for medical repatriation to Australia is high; it's an issue which tormented me as far as I played any role in any case [because] every case was a practical v ethical dilemma …".

Continuing, Doherty's artice says

> The issue of medical transfers out of offshore processing has become one of acute tension between medical practitioners and ABF. Patient transfers to higher standards of care are routinely refused or delayed for months, even beyond a year.
>
> Critically ill patients – such as Hamid Kehazaei or Omid Maoumali – have had their transfers refused or delayed. Both men died.

…

> The Nauru hospital is deemed unsafe for surgery by the government' own contractor, IHMS, after a number of deaths.

13. The second piece of evidentiary material establishing the political prevention of medical care comes from Chapter 14 of the book, *Tour de Force* (Viking, 2020), by Australia's first Australian Border Force Commissioner, Roman Quaedvlieg.

An Australian Border Force Commissioner's book, Tour de Force, confirms such prevention

14. Quaedvlieg records (at p 196) being sworn in on 1 July 2015 as the inaugural Commissioner of Australian Border Force (ABF). But quite soon, "my first press conference … put me on [the] political quicksand" of offshore processing.

> The truth was that while I never held accountability for offshore processing, I was to become its demonised public face because departmental officers on those islands wore [the distinctive very dark blue, almost black, and braided] ABF uniforms.

15. RAC (Vic) notes here by way of explanation that the creation on 1 July 2015 of the ABF – via the *Australian Border Force Act 2015* (Cth) – involved not only the establishment of a new unit within the Department of Home Affairs, but also the takeover by ABF of the long-established and formerly separate Customs Service. Continuing, at p 197, Quaedvlieg explains as follows.

> I'd had zero involvement with Nauru or PNG until the final days before ABF came into existence. [Departmental Secretary Michael] Pezzullo and I had been working feverishly, rearranging departmental and Customs functions so that bureaucratic chains came under his command and operations ones under mine. Mostly, things ran smoothly. For example, processing travellers at airports was an ABF function but developing visa policy was a departmental function. [But some] thing weren't so easily labelled …
>
> One of those oddities was the management responsibility for offshore processing on Manus and Nauru. It was to sit notionally and operationally with the ABF but reporting directly to the secretary instead of the commissioner. … I had been excised out of any accountability or influence … so I marked [that anomaly] as one for later review.
>
> Since his appointment to the job of minister for immigration and border protection, Dutton had become increasingly exercised by the number of medical transfers of asylum seekers from Nauru and Manus to Australia. The Regional Resettlement Arrangements with both countries allowed for asylum seekers to be transported to Australia for medical attention that couldn't be provided at the OPCs [Offshore Processing Centres]. This was an obvious recognition that the medical amenities available at each location were fairly basic and from time to time asylum seekers would need more specialised medical care. … [If] Australian-contracted International Health and Medical Services (IHMS) … [and] local doctors … determined a case was beyond the local expertise or equipment, they would lodge a request with departmental officers for a medical transfer …
>
> [p 198] Initially … some cursory checks were imposed on this pathway, but after the 2014 death of Hamid Khazaie … after a delayed transfer out of Manus, medical transfer requests were simply taken on face value and approved quickly …
>
> Almost invariably, after an asylum seeker had completed the required medical treatment, an eleventh-hour injunction appeal would be lodged in the Federal Court seeking to prevent their return to Manus or Nauru. …
>
> … The way Dutton appeared to see it was that an asylum seeker could attend a clinic … complain of something trivial … a sympathetic medical practitioners would request … a transfer. The asylum seeker would … [soon] join the hundreds already in Australia, never to return to Manus or Nauru.
>
> Dutton wanted it stopped, or at least reduced. At the rate it was flowing, the centres would be empty … and, more disconcertingly, the medical pathway was starting to be touted as a selling point by people smugglers …: 'just get on a boat … you'll be taken to Nauru or Manus. Once you're there, pretend something is wrong and you'll [199] be transferred to the mainland.' …

Pezzullo … set about enforcing Dutton's new direction with vigour … we weren't going to be 'gamed' by activist doctors any longer. … medical transfer requests were to be scrutinised. IHMS was put on notice to be more stringent. … If the department could invest [more] … it would do so, even if that meant sending over specialists and more advanced equipment.

…

I listened to Pezzullo's instructions … and thought the intent and execution were fair, not reading any malice in his method. …

[200] The crackdown on medical transfers … initially … [reduced] the free flow to a trickle without controversy … but where … medical cases were more complex, it moved into the realm of strong subjective disagreements about the need for medical attention.

The department had recruited a new chief medical officer (CMO). Part of his job was to broker disputed cases and offer solutions. He was a respected practitioner with a specialist psychiatric background. …

He called me one evening … about a [Nauru] case: on-island doctors recommended [an airlift] … but the request had been rejected by ABF. … I explained that I had no power to make a decision … [and that] he needed to get approval from the Secretary. ….

[201] That was the first of many calls I received from senior officers … who understandably became more conflicted; on the one hand having robust clinical advice about a specific case, and on the other hand being told to find ways to reduce transfers … to an absolute minimum. … My medical knowledge improved exponentially … as a result. Mostly I was able to come up with an acceptable solution, but sometimes I was left with no choice but to ring Pezzullo or Dutton to discuss a specific case that I personally thought warranted a transfer. …

Dutton wasn't overly sympathetic in his reaction to my approaches, but at least he realised when I rang to advocate for a case, it was serious. I was no bleeding heart, and he knew I made evidence-based judgements.

On one occasion … he finally agreed but then launched a blistering attack on a particular senior officer, asking me 'which dickhead' in the department had hired him, saying 'he needs to go because he's nothing but an advocate'. I let him blow out on these tirades; the results were righteous and worth copping a spray.

I regularly expressed my strong opposition to unelected and unaccountable advisers in Dutton's office directing the department [202] to not transfer medical cases. It wasn't the advisers who would be hauled in front of royal commissions or coronial inquiries if people died, and they had no appointed, or even delegated, power to make the decisions. …

… I persuaded Pezzullo to establish an internal committee to consider individual cases. He agreed, and it was set up quickly. I wanted it to meet daily, as the cases evolved from day to day. I also wanted it to formally include Dutton's office. If the minister's office wanted to dictate operational decisions, then … its 'directions' should be recorded in the minutes so that accountability could be allocated.

It worked for a while, bringing some long-overdue coordination and accountability to the decisions, but, as I later watched from a position of forced leave, I saw the medical cases on the islands getting worse and self-harm increasing. The government was fighting cases in the courts that to me were no-brainers for transfer and that could have been quietly dealt with by the internal committee. When I started reading that [it] had morphed into a bureaucratic policy cell without a medical practitioner, I despaired that the last vestiges of common sense within the department had been extinguished.

16. The third evidence comes mainly from a submission by three Australian doctors to the Senate Committee inquiring into the LNP government's proposed repeal of the 'Medevac' amendments to the Migration Act. It is briefly supplemented by the oral evidence of one of them, Dr Jarakiramanan, whose research proved that the offshore detainees seeking to be 'medevaced' to Australia were extremely – and comprehensively – unwell.

Extracts from a submission (no. 52) to a 2019 Senate Committee, plus oral evidence

Submission to the Senate Inquiry into Migration Amendment (Repairing Medical Transfer) Bill 2019

Bill to amend the Migration Act 1958 to repeal the medical transfer provisions inserted by the Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019

August 2019

Submission authors
Dr. Sara Townend, BEd (Eng), MBBS, FRACGP
Dr. Natalie Thurtle, MBChB, DTMH, FACEM
Dr. Neela Janakiramanan, MBBS (Hons), MPH, FRACS

1. Introduction

We are three of the lead doctors implementing the medical transfer provisions of the *Migration Act 1958* (Cth), which provisions were inserted into the Act by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth). …

We are a part of a group of independent doctors who have been almost exclusively responsible for medical assessments of a cohort of refugees and asylum seekers currently in offshore processing locations, and the subsequent applications to the Minister for Immigration and the Minister for Home Affairs for medical evacuation on behalf of these patients.

The medical assessments we have undertaken are independent, and absent of any broader advocacy agenda.

As part of our assessments, we and the other doctors volunteering their time alongside us have collected and read hundreds of thousands of pages of medical records, and undertaken direct teleconference health assessments of a large number of individuals. We have conducted individual health assessments on every patient who, to date, has had an application made under the medical transfer provisions.

In undertaking these assessment, we have been able to conduct the first independent audit of the disease prevalence affecting this cohort of refugees and asylum seekers in offshore processing locations (both Papua New Guinea and Nauru), and also the first independent assessment of the health services which have been provided and the access these individuals have had to those health services. All the major Australasian medical Colleges and Societies have been briefed as to the nature and extent of these assessments.

We have obtained patient consent to access their medical histories and undertake these health assessments, but this consent does not extend to exposing their individual medical histories to public scrutiny as part of a Senate inquiry.

…

[As to the quality of] health facilities in Nauru and Papua New Guinea …, independent assessment by Australian medical Colleges and the AMA have not been able to be undertaken to date, despite repeated requests to do so.

…

5. Disease Prevalence

…

In addition to review of medical files, which contains [sic] the findings of the doctors contracted to care for these patients since 2013, telehealth assessments are undertaken where it is legal to do so. If clinical review confirms that the patient does have an unmet health need, a final assessment utilising all available information and a telehealth assessment (where … legal) is undertaken by two independent specialists. … If, at the end of this process, two independent doctors feel that there is a need for medical transfer, only then is an application prepared.

We present here a summary of the health burden experienced by refugees and asylum seekers remaining in [PNG] and Nauru. These data have been collated from reviews of all the available medical information. All cases have been identified from objective information – direct assessment by doctors or review of the medical records. Nothing … has been taken solely from patient applications or their accounts of their own ill-health. …

Where a potential diagnosis was unclear or not corroborated by objective evidence, it has not been included. … It should also be noted that conditions have only been recorded where they are symptomatic and causing significant morbidity. For example, dental problems were only recorded where they are causing significant pain and, in many cases, inability to eat solid food, resulting in weight loss and malnutrition; gastroenterological issues were only recorded where they are causing severe symptoms such as significant pain and/or gastrointestinal bleeding. The same criteria applied to all organ systems. Minor complaints not requiring further assessment or care by Australian standards [were not] recorded.

Physical Health Problems

… We found that 97% of the people reviewed … have a confirmed physical ailment. On average each patient had 4.6 distinct physical ailments, that is, separate problems in distinct areas of the body or bodily systems. The maximum … in a patient has been 15.

…

Psychiatric Health Problems

… Among our sample 91% experienced one or more psychiatric health problems. …

At present, 57% of the patients have been actively considering suicide (Suicidal Ideation in Table 2), and 31% have attempted suicide in the last six months. … It should further be noted that the suicide attempts are all high lethality events such as hanging, drug overdose, and self-immolation.

…

6. Conclusion

Following a detailed analysis of the disease prevalence affecting this cohort of refugees and asylums seekers in Papua New Guinea and Nauru, two things are clear.

First, the burden of disease is very high, and far exceeds the normal prevalence of disease in the Australian community. …

Second, the burden of disease is high as a consequence of their circumstances. Some of the documented health problems result directly from the conditions under which this cohort of refugees and asylum seekers reside. A high rate of kidney stones, for example, relate directly to poor diet and inadequate hydration. Others have been caused by inadequate medical care, with treatable complaints turning into chronic problems through lack of resolution. The high prevalence of surgical pathology, for example, is as a result of an accumulation of untreated disease over six years.

It is this health environment which has created a need for the medical transfer provisions. We refer back to our original recommendation:

> *That the Senate oppose Migration Amendment (Repairing Medical Transfer) Bill 2019.*

It is likely that should the Migration Amendment (Repairing Medical Transfer) Bill 2019 succeed, this cohort of individuals will continue to not have access to adequate health care. We should be quite clear that we believe this may lead, in some cases, to serious injury and/or death.

Supplementary oral evidence of Dr Janakiramanan

COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Migration Amendment (Repairing Medical Transfers) Bill 2019

(Public)

MONDAY, 26 AUGUST 2019

CANBERRA

Members in attendance: Senators Kim Carr [ALP], Chandler [Liberal], Griff [Centre Alliance], McKim [Greens], Stoker [Liberal, Chair].

…

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…

Dr Janakiramanan: I might explain a little bit about what we have found in terms of the disease burden. My role in this has been to conduct an audit, which is very much in line with standard medical practice in Australia. Every single hospital unit and every single hospital conducts audits on at least a three-monthly basis, with collation of data, to ensure that there is quality assurance at all levels. This is the first independent audit that we have conducted of the disease burden of this particular population. We have a significant proportion of this population … [currently] 581.

…

Senator KIM CARR: Can you outline what the audit is that you've undertaken?

Dr Janakiramanan: Yes. We have access to the medical records of a portion of the patients who have applied to this process. So 581 patients have written to us and said that they have unmet health needs. We have obtained the medical records or conducted direct teleconference health assessments for 338 of those patients. Those direct telehealth assessments range in time from 50 minutes to 170 minutes in length, so they are significant health consultations. We have gone through these medical records and documented the current health conditions that these patients have. Where there was any uncertainty about whether a diagnosis could be made it was not coded for. These are diagnoses that are based on standard diagnostic criteria and standard objective test findings—things like x-rays. If there's a broken bone, you can see it. It's very straightforward.

We have found—and I will reiterate the numbers—that 97 per cent of people have physical health complaints and 91 per cent of people have psychiatric health complaints. On average, each patient has 4.6 discrete organ systems that are involved with disease. There are a number of reasons for this. Part of the reason for it is the conditions in which they have lived for the last six years. There are certain diseases that are more common in disadvantaged populations. The second thing is because there has been no resolution to many of these health issues. So even though $400 million has been spent by the department on providing healthcare services to patients in Papua New Guinea and Nauru, as far as we can tell from the submission that the department has made there has been no audit of the outcomes that these services have actually provided. If we funded an Australian health service that delivered these sorts of outcomes, it would be shut down immediately. The numbers are absolutely gobsmacking.

17. The fourth piece of documentary evidence comes from a submission (no. 75) to the same Senate Committee.

Extracts from a WHS Act-based submission (no. 75) to the 2019 Senate Committee

18. In September 2019, Robert Richter QC (now KC) and RAC's Max Costello provided a co-written submission (no. 75) to the Senate Committee that was considering a bill, proposed by the LNP government led by PM Scott Morrison, to repeal the 'Medevac' amendments to the Migration Act.

19. No. 75 argued against the repeal, as did all but 3 of the 100+ submissions. But uniquely, because proven WHS Act breaches are crimes, it presented a criminal law perspective – see quoted paragraph 1.2 (below).

    (Editorial Note: to simplify and optimise the use of Submission 75 extracts:

    - quotes from the WHS Act will be in Times New Roman font, as they are in no. 75;
    - no. 75's footnotes have been incorporated into the body of the extracts;
    - three extra italicised subheadings have been inserted in the final six pages; and
    - a few minor typos and glitches of expression have been fixed up.)

A SUBMISSION – TO THE INQUIRY ON THE MIGRATION AMENDMENT (REPAIRING MEDICAL TRANSFERS) BILL 2019 – THAT HAS A UNIQUELY CRIMINAL LAW FOCUS

ABOUT THE SUBMITTERS

Robert Richter QC, Victorian barrister

I have decades of criminal law litigation experience, mainly in the superior courts, and have prosecuted major health and safety cases. I've also had a long-standing and active interest in matters of civil liberties, human rights and the laws affecting asylum seekers and refugees.

Max Costello, LLM

Now retired, my two-decade legal career (following a twenty-five year teaching career) included five years as a prosecuting solicitor with WorkSafe Victoria and fifteen years as a lecturer in Employment Law (which included health and safety law) at Melbourne's RMIT University. I wrote "Offshore Crimes", *The Monthly* online, 22 September 2016; and "It was the best of days; it was the worst of days", *Pearls and Irritations*, 6 August 2019.

…

Part 1: Why this submission's exclusive focus is on the criminal law

…

1.2 … the main reason for this submission's focus on the criminal law – more precisely, on the criminal offences that consist of non-compliance with any of the statutory health and safety duties – is this. Those duties are so exactingly protective that, had they been fully complied with, there may well have been no need for the Medevac amendments to the *Migration Act 1958* (Cth). Concomitantly, it was the complete failure of the relevant regulator, Comcare, to enforce compliance with the [WHS Act's] health-related duties, in relation to people held at regional processing centres ("RPCs"), that made the Medevac amendments absolutely essential.

A health-destroying and potentially life-threatening policy

4.7 As at 18 December 2018, four and a half months after coroner Ryan made his Recommendation 1 [that a simple, quick regime of emergency medical airlifts be established ASAP], the official Home Affairs 'medical airlifts to Australia' policy *still* read as follows:

> Requests for temporary medical transfers to Australia … will only be considered … where the person faces a life-threatening medical emergency that would otherwise result in their death or permanent, significant disability.
>
> Source: Home Affairs' own FoI disclosure logs 12 April 2019.

Note: only *considered*, not necessarily approved.

4.8 Who knows how long that had been the official policy: perhaps it went back to when Scott Morrison was the Minister. It is astonishing to realise that such a sociopathic official policy was generated and implemented by a department – presumably with the support of one or more Ministers – within the government of a supposedly civilised, Western, liberal democracy.

4.9 If there is any one reason or example to prove that the Medevac legislation must remain part of the law of Australia, that is it. *That* is what 'Medevac' protected [offshore detainees] from.

Comments of Federal Court of Australia judges making 'fly them here' orders

4.10 Because the existence of that policy only became public knowledge via FoI in April 2019 (after the Medevac regime had commenced), it is reasonable to presume that, during the pre-Medevac era, the FCA judges, and the lawyers acting pro bono for very ill people in 'fly them here' cases, did not know about it. But it is also reasonable to assume that

Minister Dutton and very senior Australian Border Force officers *did* know about it. The Department and such officers should be prosecuted for failing to comply with their duties under ss 19 and 27 (due diligence) respectively.

4.11 As at the end of September 2018, according to *Guardian Australia* (“GA”) (23/10/18):

> GA was aware of 32 federal court cases since January, including 22 brought by the National Justice Project, with 19 involving children [on Nauru] as the primary applicant.

[Joint submission parargraph 47 says “more than 50” over-all, Dec 2017 – Feb 2019.]

4.12 According to GA (29/9/18), defending the challenges cost Home Affairs (i.e., taxpayers) “more than $275,000 in [the 2017–18] financial year”. On 23/10/18, GA reported that Home Affairs told Senate Estimates on 22/10 that the 37 or so cases “heard in the first quarter of 2018–19 [cost] $480,000”. On 12/2/19, SBS reporter Jackson Gothe-Snape stated that “the public has … paid approximately $1 million in the past four years on legal fees spent on matters related to medical transfers”.

4.13 Many cases were settled at the last minute; a few were contested. Yet the government lost every case that it contested: judge after judge kept making ‘fly them here’ orders.

4.14 Several cases involved Nauru RPC children at imminent risk of death. Yet in two of them, counsel for minister Dutton’s Home Affairs department sought adjournments. Appendix C contains extracts of the FCA reports and a GA article about one of them.

4.15 In the December 2017 “FRX17” case (no names were disclosed [but the joint submission provides the full reference at footnote 103: *FRX17 as litigation representative for FRM10 v Minister for Immigration and Border Protection* [2018] FCA 63]) involving a suicidal young girl, Murphy J rejected the Home Affairs application for a hearing in early 2018. Setting out his reasons for making a ‘fly the girl here’ order on 22 December 2017, Murphy J wrote:

> the severity of the risk that the applicant will commit suicide means that an expedited trial, even one as early as February 2018, might be too late.

4.16 In the March 2018 “AYX18” case, involving a 10-year-old boy who had made repeated attempts to kill himself, counsel sought a two-week adjournment. According to GA’s Ben Doherty (21/318):

> Justice Nye Perram said, “there is a significant risk the boy would not be alive by that hearing, and I am not prepared to run that risk”.

But Minister Dutton was.

4.17 Admittedly, the pro bono challenges were civil law proceedings not based on health and safety legislation. (The civil law proceedings were needed because the common law duty of care is only enforceable by litigation.) But the WHS Act still applied at the Nauru RPC, and Home Affairs/ABF, as the PCBU [the party in charge], owed a *statutory* duty of care to pro-actively and preventively ensure that detainees’ health and safety was not put at risk. [Note, however, that since the Manus RPC was closed on 31/10/17, and since the Nauru RPC has been empty since 31/3/19, there is no longer a *functioning* RPC – a Common-wealth of Australia workplace – to which the WHS Act can apply. It would apply again if the RPC on Nauru were to be re-activated.]

4.18 Further, the WHS Act’s most serious ‘breach of duty’ offence provision, s 31, states that if a duty holder, “without reasonable excuse, exposes an individual to whom that duty is owed to a risk of death or … serious illness” and is “reckless as to the risk”, the maximum penalties, for those charged and found guilty, would be a fine of $3 million (Home Affairs/ ABF), and $600,000 and/or 5 years’ jail (officers).

4.19 Arguably therefore, in those imminent risk of death instances, taxpayer-funded barristers appearing at Mr Dutton’s behest were, in effect (but not in terms), asking judges to, in effect (but not in terms), approve the ongoing commission of a gravely serious crime. Having a strong border protection policy is one thing; implementing it by sociopathic and criminal means is quite another.

4.20 If the compulsory, statutory regime of the Medevac amendments is repealed [which it was in December 2019], desperately ill people in PNG and Nauru will presumably be left, once again, with (ultimately) only an implied common law duty of care that has no force unless enlivened by (pro bono) litigation which, if successful, can obtain injunctive 'fly them here' orders.

(e) Treatment of people transferred to Australia

20. RAC (Vic) now submits evidence substantiating the final assertion made in the Executive Summary, namely that, in 2019, Home Affairs apparently sabotaged the Medevac amendments to the Migration Act while they were in force.

Extracts from Max Costello's piece re Home Affairs sabotage, in Pearls and Irritations

Pearls and Irritations

John Menadue's Public Policy Journal

Being largely reactive, integrity commissions can't prevent all corruption: new laws could help

By Max Costello

Jun 14, 2022

…

When ousted Prime Minister Malcolm Turnbull resigned in 2018, former Australian Medical Association president Dr Kerryn Phelps won the ensuing by-election, depriving the then Morrison government of its one-seat majority. Led by Phelps, non-government legislators passed the 'Medevac' amendments to the Migration Act. They empowered two treating doctors to mainly decide which of the asylum seekers or refugees who'd been held in a regional processing centre in PNG or Nauru needed transferring to Australia "for medical or psychiatric assessment or treatment". So, how would the government's hard man, Home Affairs Minister Peter Dutton, react?

Maybe Mr Dutton, angry at having to obey the law (!) (by approving most recommended transfers), saw that the amendments' aim, securing high quality onshore care for offshore exiles, could be sabotaged, by having his department confine transferees to immigration detention facilities (IDFs) – mainly hotels called "alternative places of detention" (APODs) – where care could be denied.

Proceedings of a Senate Committee hearing in August 2019 (see below) – after 111 transfers had already occurred – reveal that, under the 'leadership' of Home Affairs Secretary Michael Pezzullo (and with Minister Dutton's approval?), Home Affairs' Chief Medical Officer (MOC) Dr Gogna had been initiating a care-limiting process.

But first we should note that the Medevac transferees were very, very unwell, as was proved by submission 52 (co-authored by three medical practitioners) to the 2019 Senate Committee reviewing the government's then proposed 'Medevac repeal' bill. The submission found that, among the Manus or Nauru ex-detainees applying to be 'Medevaced', 97% had physical ailments (averaging 4.6 each), 91% had a psychiatric illness, and 88% had both. …

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE, 26 AUGUST 2019, CANBERRA

Migration Amendment (Repairing Medical Transfers) Bill 2019

… **Mr Pezzullo**: … the MOC is presented with an assessment … [by] two treating doctors, socalled … Of the 111 transferees, even though the assessment … was 'inpatient care required', our MOC has to look at the papers as presented. Four persons have been hospitalised. … When we last looked …, not one … was in hospital. … Seventy of them are not even outpatients. (Page 78.)

… **Mr Pezzullo**: Ninety-eight are in [APODs], where the minister can designate … a residence, a hostel or hotel … [etc.] as a place of detention, with fewer than 10 in IDCs [immigration detention

> centres] … The health side … continues to be managed by IHMS [the Commonwealth's contractor, International Health and Medical Services Pty Ltd] … (Page 80.)

Apparently, Dr Gogna unilaterally over-rode 107 of 111 'inpatient care required' assessments. Michael Pezzullo's language – "doctors so called", and extremely ill transferees being "not even" outpatients – was not public service neutral, it was partisan political. Transferees would be denied assessment and treatment by being held in IDFs, where health was "managed", not by IHMS as Pezzullo misleadingly said, but by a non-medical body, the Home Affairs department's Australian Border Force unit (ABF).

That is, IHMS doctors might *recommend* external specialist care, but ABF would *decide* whether (if ever) it would occur. Let's remember: it was ABF's 'dog in the manger' approach – preventing very seriously ill offshore detainees, including children nearly at risk of death, from being flown here for medical care (unless a Federal Court injunctive order decreed otherwise) – that drove non-government Parliamentarians to enact the Medevac amendments.

By mid-April 2022 almost all Medevac transferees were released, but very few had received any specialist health care.

D. Australia's non-refoulement obligations

(a) Unfair RSD process

21. The joint submission's paragraphs 53 – 57 list (a) the 2014 Migration Act amendments used by the Abbott LNP government to create the so-called Fast Track processing regime, then (b) its systemically cruel outcomes. The amendments contravened several Refugee Convention obligations.

22. RAC (Vic) notes: had the Refugee Convention been listed as a human right in the *Australian Human Rights Commission Act 1986* and *Human Rights (Parliamentary Scrutiny) Act 2011*, most of the 2014 amendments would not – or should not – have been passed by the Parliament.

III THE HUMAN RIGHTS RELEVANCE OF THE WHS ACT TO IDF DETAINEES, esp. RE HEALTH

Further extracts from a WHS Act-based submission to the 2019 Senate Committee

23. The text of the next nine pages (16 – 25) has been cut & pasted from the Richter-Costello submission to the 2019 Senate Committee.

24. It effectively explains the CAT/OPCAT relevance of the WHS Act in relation to IDFs – by, in Part 3, quoting and explaining Act sections that impose pro-actively preventive duties on the operators of IDFs; in Part 4, outlining the two most egregious alleged detainee-related breaches of Act duties; in Part 5, outlining the most blatant examples of non-enforcement of Act duties by the regulator, Comcare. After that, on page 25, the process of augmenting the joint submission resumes.

Part 3: The potentially powerful reach of health and safety law

3.14 The WHS Act calls a workplace operator – the person or organisation traditionally called an employer – "a person conducting a business or undertaking", or 'PCBU'. The PCBU is the party in over-all charge of either a 'for profit' business or a 'not for profit' undertaking. … [IDFs] are undertakings. For conciseness in quoting s 19 and other provisions referring to "a person conducting a business or undertaking", this submission will insert the abbreviation "[PCBU]" instead. The terms 'PCBU' and 'workplace operator' will be used interchangeably.

The "primary duty of care" of the PCBU

3.15 Section 19 relevantly provides as follows [below]. Subsection (2) is the specific "other persons" duty. But subsection (3)(f) is also relevant. It effectively requires Home Affairs to ensure that all workers (and managers) are so informed, trained, instructed and *supervised* that they will work *in such a way* that "all persons" – including of course the "other persons", the residents – have their health and safety protected.

Part 2—Health and safety duties

…

Division 2—Primary duty of care

19 Primary duty of care

(1) A [PCBU] must ensure, so far as is reasonably practicable, the health and safety of:

(a) workers engaged, or caused to be engaged by the person; and

(b) workers whose activities in carrying out work are influenced or directed by the person;

while the workers are at work in the business or undertaking.

(2) A [PCBU] must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

(3) Without limiting subsections (1) and (2), a [PCBU] must ensure, so far as is reasonably practicable:

…

(f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and

…

3.16 The two provisions quoted below, ss 17 and 18, stipulate what a "so far as is reasonably practicable" duty entails. A novice PCBU might think that the "reasonably practicable" proviso makes duties un-demanding, or provides an excuse: "I can't prevent risk X because adding a barrier just isn't 'practicable'". *Au contraire*: s 18's step-by-step elaborations, plus s 17's emphasis on risk *elimination*, makes compliance with 'reasonably practicable' duties exacting.

What does taking care "so far as is reasonably practicable" mean in practice?

3.17. Sections 17 and 18 effectively operate in reverse order – because, logically, the s 18 process – identifying and assessing health & safety risks then finding ways of addressing them – must occur before the PCBU can then, as per s 17, implement ways and means of eliminating (or at least minimising) them.

3.18. Sections 17 and 18 read as follows.

Part 1—Preliminary

Division 1—Introductory

Subdivision 1—Principles that apply to duties

…

17 Management of risks

A duty imposed on a person to ensure health and safety requires the person:

(a) to eliminate risks to health and safety, so far as is reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

Subdivision 2—What is reasonably practicable

18 What is *reasonably practicable* in ensuring health and safety

In this Act, ***reasonably practicable***, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

(a) the likelihood of the hazard or the risk concerned occurring; and

(b) the degree of harm that might result from the hazard or the risk; and

(c) what the person concerned knows, or ought reasonably to know, about:

(i) the hazard or the risk; and

(ii) ways of eliminating or minimising the risk; and

(d) the availability and suitability of ways to eliminate or minimise the risk; and

(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

3.19. In ordinary language and in briefer terms, the steps below are what ss 18 then 17 require Home Affairs/ABF to do in the course of complying, systematically, with its 'reasonably practicable' duties – such as the s 19(2) duty of care in relation to other persons at an RPC:

(1) identify all possible hazards (potential dangers) to the residents' health and safety;

(2) risk-assess each one (how likely to eventuate, how harmful if it does) to sort out which are the significant risks;

(3) find out what available and suitable ways there are to eliminate all significant risks or – if that's not reasonably practicable – at least minimise (control) them;

(4) as required by s 17, implement all those ways and means (unless, as to a particular risk, the cost of doing so would be grossly disproportionate to that risk).

3.20 It should be noted that ABF, which was created by the *Australian Border Force Act 2015* (Cth) on 1 July 2015 has had, ever since then, operational control over all immigration holding facilities. As the ABF website states:

> We are responsible for the management of good order, safety and security within … [IDFs], including the health and welfare of detainees.

https://www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention/detention-management

…

3.24 Failing to work through the steps required by section 18 and then 17 is not an offence. But those two provisions effectively translate the phrase "so far as is reasonably practicable" into practice – the point being that, if workplace operators such as Home Affairs do not carefully work through the ss 18 & 17 processes, they may well fail to ensure "so far as is reasonably practicable" that the health & safety of "other persons" … is not put at risk – whereupon they *do* commit a criminal offence.

3.25 Prime Ministers and 'immigration' ministers have been saying for years that the legal responsibility for the health, safety and wellbeing of RPC residents lies with the host government concerned. Not so: s 10 says that a WHS Act duty "cannot be transferred to another person" – another government, for example. As if that were not clear enough, s 272 re-emphasises the message:

Part 14—General

Division 1—General provisions

…

272 No contracting out

A term of any agreement or contract that purports to exclude, limit or modify the operation of this Act or any duty owed under this Act or to transfer to another person any duty owed under this Act is void.

The exacting duty of "officers"

3.26 Unlike some other regulatory legislation, the WHS Act, and the near identical WHS Acts of both Territories and all States bar Western Australia and Victoria, impose a prescriptive duty on "officers".

247 Officers

(1) A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of a business or undertaking of the Commonwealth is taken to be an officer of the Commonwealth for the purposes of this Act.

(2) A Minister of a State or the Commonwealth is not in that capacity an officer for the purposes of this Act.

The section 27 duty – below – requires officers to exercise due diligence so as to ensure that their PCBU, their organisation, complies with all its duties and obligations under the Act.

3.27 Any 'due diligence' duty is fairly exacting in itself, but sub-section (5) further defines due diligence in workplace health and safety terms, then adds five examples, leaving CEOs and other senior individuals almost no 'wriggle room'.

Part 2—Health and safety duties

…

Division 4—Duty of officers, workers and other persons

27 Duty of officers

(1) If a [PCBU] has a duty or obligation under this Act, an officer of the [PCBU] must exercise due diligence to ensure that the [PCBU] complies with that duty or obligation.

…

(4) An officer of a [PCBU] may be convicted or found guilty of an offence under this Act relating to a duty under this section whether or not the [PCBU] has been convicted or found guilty of an offence under this Act relating to the duty or obligation.

(5) In this section, ***due diligence*** includes taking reasonable steps:

(a) to acquire and keep up-to-date knowledge of work health and safety matters; and

(b) to gain an understanding of the nature of the operations of the business or undertaking of the [PCBU] and generally of the hazards and risks associated with those operations; and

(c) to ensure that the [PCBU] has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and

(d) to ensure that the [PCBU] has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and

(e) to ensure that the [PCBU] has, and implements, processes for complying with any duty or obligation of the [PCBU] under this Act; and

(f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

Examples: For the purposes of paragraph (e), the duties or obligations under this Act of a [PCBU] may include:

(a) reporting notifiable incidents;

(b) consulting with workers;

(c) ensuring compliance with notices issued under this Act;

(d) ensuring the provision of training and instruction to workers about work health and safety;

(e) ensuring that health and safety representatives receive their entitlements to training.

3.28 Leading health and safety law academics Professor Richard Johnstone and Michael Tooma, in their text, *Work Health and Safety Regulation in Australia: The Model Act*, describe the inclusion of an "officer" duty as

> one of the most significant reforms in Australian work health and safety regulation. The positive and proactive duty on each officer to take reasonable steps to exercise due diligence should result in greater senior management commitment and attention to work health and safety. Furthermore, … [WHS] inspectors can now focus … on ensuring that officers are taking steps to exercise due diligence[1].

FOOTNOTE TEXT

Johnstone R & Tooma M, *Work Health and Safety Regulation in Australia: The Model Act,* Federation Press 2012, Chapter 6, at p 135.

3.29 The most egregious 'non-compliance with a health safety duty' offence is section 31's reckless non-compliance. Note: if the Commonwealth is guilty of an offence, the body corporate level of penalty applies – s 245(1).

31 Reckless conduct—Category 1

(1) A person commits a Category 1 offence if:

(a) the person has a health and safety duty; and

(b) the person, without reasonable excuse, engages in conduct that exposes an indivi-dual to whom that duty is owed to a risk of death or serious injury or illness; and

(c) the person is reckless as to the risk to an individual of death or serious injury or illness.

Penalty:

(a) In the case of an offence committed by an individual (other than as a [PCBU] or as an officer of a [PCBU])—$300 000 or 5 years imprisonment or both.

(b) In the case of an offence committed by an individual as a [PCBU] or as an officer of a [PCBU]—$600 000 or 5 years imprisonment or both.

(c) In the case of an offence committed by a body corporate—$3 000 000.

(2) The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse.

...

Part 4: Pre-Medevac extreme health risks created/exacerbated by Home Affairs/ABF

4.1 Numerous examples of such risks appear in Senate Committee reports and transcripts of hearings, books, and online sources, notably *Guardian Australia*. We therefore only point to a few shocking examples, in which Home Affairs/ABF has done the opposite of pro-actively and preventively ensuring RPC residents' health. Those examples involved serious apparent criminal offending which, as Part 5 explains, has occurred with impunity.

The Hamid Khazaei case

4.2 The August 2014 arrival of Manus asylum seeker Hamid Khazaei, brain dead, at a Brisbane hospital, eventually led to a coronial inquest and, on 30 July 2018, the release of the official report of that inquest. Here is a link to the report:
https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf

4.3 Queensland State Coroner, Mr Terry Ryan, called the death "preventable" (page 3) and found that the Department's "overly bureaucratic" airlift approvals process, involving "at least four levels of public servants" in Canberra, was a contributing factor (page 99).

4.4 Mr Ryan's Recommendation 1 was that Home Affairs "develop and implement" a simple airlift approvals process that is driven by treating doctors and has, "as an overriding consideration, the health and well-being" of RPC detainees (p 118).

4.5 A more fundamental contributing factor was the Department's failure to stock, at the Manus clinic, Meropenem, an antibiotic that "effectively [treats … most tropical infections], including the infection suffered by Mr Khazaei" (pp 3, 78).

4.6 When those contributory factors are set against the pro-active and preventive s 19(2) duty of care, it appears that the failure of Home Affairs to stock the vital antibiotic and to have a clear, simple and quick medical airlift procedure could amount to, *prima facie*, two s 31 'reckless non-compliance with duty' offences.

NOTE: paragraphs 4.7 – 4.20 have already been quoted under *C. Offshore processing: (e) Inadequate healthcare* – see pages 12 – 14 (above).

Part 5: Comcare WHS Act non-enforcements that necessitated Medevac amendments

5.1 Part 4 having established the existence of systemic criminality by Home Affairs /ABF, Part 5 will briefly catalogue the total failure of the WHS Act's regulator, Comcare, to enforce the law – the result being a situation of 'criminality with impunity'.

5.2 Comcare has never prosecuted Home Affairs or its predecessor Department of Immigration and Border Protection (DIBP), despite their apparent failures to effectively safeguard detainee health and safety, notably at the [then] still open Nauru RPC and former Manus Island RPC. [Update: there's been one prosecution: charges laid 2021.]

5.3 On 15 March 2017, Comcare acting CEO, Ms Lynette MacLean, told a Senate committee inquiring into alleged offshore abuse and neglect that the WHS Act applied to DIBP in relation to the Manus and Nauru RPCs, and that Comcare oversaw compliance there[2].

FOOTNOTE TEXT

2 Hansard, Senate Legal and Constitutional Affairs Legislation References Committee, serious allegations of abuse, self-harm and neglect of asylum seekers in regional processing centres, 15 March 2017, at 9.

> Ms McLean: I would like … to make an opening statement in relation to our functions and how they apply to the committee's inquiries.
>
> Comcare is the WHS regulator for the Department of Immigration and Border Protection, DIBP, and this covers … activities within Australia and overseas. In relation to the committee's inquiries, DIBP, under section 19 of the WHS Act, is the 'person conducting a business or undertaking' for the operation of regional processing centres, RPCs, on Manus Island and Nauru.

5.4 Senator Murray Watt asked whether DIBP had been complying with the WHS Act. Comcare took the question on notice: its 31 March written response was:

> Of the Inspections conducted and closed at Manus and Nauru to date, Comcare has not observed any breach of the WHS Act by DIBP.

5.5 One set of breaches not "observed" by Comcare involved the Khazaei matter.

Detainee death "preventable", says Coroner; Comcare says 'nothing to see here'

5.6 Comcare's cursory initial 'investigation' resulted in a 2014 Inspector Report – see Appendix D – that:– made no mention of the unstocked antibiotic; said the airlift delay did not "contribute" to the death; and found no evidence of a breach of the WHS Act.

5.7 But the Coroner's Report gave Comcare a second bite at the cherry: s 232(1)(b) allows a prosecution to be brought "within 1 year after a coronial report … if it appeared from the report … that an offence had been committed against this Act". The Report was dated 30 July 2018, so the deadline for laying charges was 29 July 2019.

5.8 In December 2018, Max Costello and another advocate [and RAC (Vic) member] with WHS knowledge [Margaret Sinclair, Dip WHS] wrote a long, legalistic letter to the Comcare CEO, reminding her of s 232, criticising the initial investigation, and urging Comcare to conduct a thorough re-investigation with a view to laying charges by the deadline.

5.9 In February 2019, the same two advocates wrote again to the CEO, sending the following 1-page version of the original letter, then circulating it to legal and other groups concerned with asylum seeker issues. Here is that letter, followed by three indications of support.

25. Note: since 2015, Ms Sinclair has written to Comcare 70 times and Mr Costello (separately) 6 times, with each of their letters:– alleging an apparent serious breach – by Immigration/ Home Affairs/ABF and/or an officer – of a WHS health and safety duty; detailing probative evidence thereof; and asking Comcare to take enforcement action (issuing a compliance-compelling "improvement notice", or investigating with a view to prosecution). But *every time,* Comcare's reply has been 'our inspector found no evidence of a breach of the Act'.

NB: this letter is effectively an ultra-précis of the 7-page, very legalistic 2018 original. It was endorsed by Gillian Triggs, Julian Burnside QC and 40+ other 'legals' or advocates.

To the CEO of Comcare, February 2019
Ms Jennifer Taylor
Email: general.enquiries@comcare.gov.au

Dear Ms Taylor,

Work Health and Safety Act 2011 (Cth) prosecution following Coroner's Khazaei Report?

On the 30th of July 2018, the Queensland State Coroner handed down his report of the inquest into the death of Mr Hamid Khazaei (**the Report**), who had been detained at the regional processing centre (**RPC**) on Papua New Guinea's Manus Island. The Report recounts that, after a 1-day delay involving at least four levels of the Department of Immigration and Border Protection (**DIBP**), the critically ill Mr Khazaei was flown to Australia in late August 2014, arriving brain dead at Brisbane's Mater hospital. He died on the 5th of September after life support was turned off. Here is a link to the Report.
https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf

As you know, a workplace law, the *Work Health and Safety Act 2011* (Cth) (**the Act**):
- has "extended geographical jurisdiction" at Commonwealth workplaces in countries like PNG that lack an equivalent law, and thus applied at the Manus RPC;
- requires DIBP to *pro-actively* "ensure … the health and safety of workers; [and] that the health and safety of other persons [detainees] is not put at risk …";
- has a standard 2-year limit on the laying of charges, but gives Comcare a further 1 year if Act offences are apparent in the report … of a coroner's inquest.

Possible offences against the Act are apparent in the Report. For example, it said (at p 3) that Mr Khazaei's death was "preventable", and criticised the slow, unwritten, unclear airlift approval process. It also found (at p 78) that an antibiotic (Meropenem) that would "safely and effectively treat" most common tropical infections, "including Mr Khazaei's", was not stocked at the Manus clinic. We therefore request that Comcare move from conducting "inquiries" (as advised by your Anthony Blucher in his e-mail to us on 17/12/18) to conducting a thorough re-investigation – aimed at compiling a full 'brief of evidence' in time to enable Comcare or the Commonwealth Director of Public Prosecutions (CDPP) to lay charge(s) before the 29th July 2019 deadline.

Such a re-investigation is required because Comcare in 2014 conducted a mere 'desktop exercise': Comcare's "Inspector Report" just asserted (relying solely on DIBP-supplied documents – no mention of any witness statement) that the delay was not "a contributing factor" to Mr Khazaei's sepsis-related death, and that there was no breach of the Act.

Because that 'investigation' was so inadequate, we have copied this letter to the CDPP, Ms Sarah McNaughton SC, asking that her lawyers give Comcare "pre-brief advice" – which, as the CDPP website says, aims to "assist investigators to focus their efforts and most efficiently gather admissible evidence [that can] … prove [any alleged] offence …".

Yours sincerely,

Max Costello LLM
former WorkSafe Victoria prosecuting solicitor

Margaret Sinclair
Diploma of Work Health and Safety
refugee advocate

Gillian Triggs [email address deleted]
Tue 11/12/2018, 4:26 PM
Dear Max.

I support your letters and have followed this work health and safety initiative for some time. ... Would you please add my names support for the letters.

Gillian Triggs

From: Robert Richter [email address deleted]
Sent: Wednesday, 12 December 2018 4:32 PM

Dear Max,

May I say that I entirely agree with your views and would be prepared to sign such a letter with one observation – which is why I am circulating this to all the recipients – I don't believe that individually signed letters have any impact and would urge you to consider a letter with a large number of signatories. …

Let me know what responses there are and we may then have letters with multiple signatories.

Robert Richter QC

Julian Burnside <burnside@vicbar.com.au>
Fri 14/12/2018 1:05 PM
Dear Max
Feel free to add my name
Julian Burnside AO, QC

5.10 Yet Comcare did not prosecute! On 6 August 2019 Comcare emailed Costello.

From: Justin Napier [email address deleted]
Sent: Tuesday, 6 August 2019 12:00 PM
To: maxcostello@hotmail.com <maxcostello@hotmail.com>
Subject: RE: Query in relation to a matter on Mr Hamid Khazaei [SEC=UNOFFICIAL]

Unofficial

Dear Mr Costello,

Thank you for email of 29 July 2019 to Ms Sue Weston querying if charges had been laid for Comcare by the CDPP, concerning the death of Mr Hamid Khazaei.

I am replying on Ms Weston's behalf. I can advise that no charges were laid for Comcare by the CDPP in relation to this matter.

> After assessing the Coroner's Report into the death of Mr Khazaei and considering the application of section 232 (1) (b) of the *Work Health and Safety Act 2011* (WHS Act), it did not appear to Comcare that an offence had been committed against the WHS Act. Therefore, the CDPP was not approached to lay charges on Comcare's behalf.
>
> Despite this position, Comcare will nevertheless undertake a planned program of verification inspections … designed to confirm that the Department of Home Affairs has taken steps to address the recommendations as outlined in the Coroner's report.
>
> Yours sincerely
>
> Justin Napier
>
> General Manager
> Regulatory Operations Group
> **Comcare**
> A: GPO Box 9905, Canberra, ACT 2601
> 1300 366 979 | www.comcare.gov.au

5.11 On 9 August 2019, Costello replied in detail, but only paragraphs (8) and (9) are sufficiently pertinent to this submission to be worth quoting from.

> (8) I find your email's statement, that "After assessing the Coroner's Report ... it did not appear to Comcare that an offence had been committed against the WHS Act", incredible. I feel sure that thousands of people, including quite a few lawyers, who have followed the Khazaei matter with interested concern, will also be incredulous. My resultant preliminary view is that any claim by Comcare to have been – in relation to immigration detainee-related apparent offences against the WSH Act – a regulator of competence and integrity, would be seriously, if not terminally, damaged by Comcare's 'no offence to see here' perspective on the Khazaei matter.
>
> (9) I now respond as follows to your email's last paragraph, which advises that Comcare will "undertake a planned program of verification inspections ... to confirm that ... Home Affairs has taken steps to address the recommendations ... [of] the Coroner's report".

[Costello quoted the … sociopathic policy, then continued.]

> … It is concerning that, 4.5 months after the coroner's Recommendation 1, Comcare had apparently not even examined, much less responded to, that sociopathic policy.
> …
>
> Given that the coroner's recommendations were made on 30 June 2018, it seems somewhat tardy to be only *planning* to confirm implementation progress over 12 months later.

Immigration held 15 Nauru RPC child rape reports: Comcare didn't even ask for them

5.12 Comcare's most shameless *non*-investigation was its failure to ask the Department to hand over the 15 reports – of child sexual assault at the Nauru RPC – that Comcare knew were in the Department's (electronic) possession.

5.13 Comcare knew so because Max Costello's 14 August 2015 "please prosecute" letter to Comcare quoted the transcript of a Senate Select Committee's proceedings on 20 July 2015. It recorded Ms Cheryl-Anne Moy (First Assistant Secretary, Children, Community and Settlement Services Division) telling Senators that the Department had received the 15 reports between late 2012 and 30 June 2015.

> **Ms Moy:** Okay. We are looking at from 14 September 2012 to 30 June 2015. I think you will find that the numbers that Transfield [the main contractor at the Nauru RPC] provided included all types of assaults against children … [As to the number] of sexual assault against minors, it was 15.
>
> **Senator HANSON-YOUNG:** So you believe that all the incidents that Transfield have in their reports to us have all been reported to the department?
>
> **Ms Moy:** Through the normal incident reporting—
>
> **Senator HANSON-YOUNG:** You would be aware of all of them?
>
> **Ms Moy:** Yes.
>
> **Senator HANSON-YOUNG:** In effectively real-time; the moment that they are reported?

> **Ms Moy:** Not necessarily the moment they are reported, but they are reported with regularity through to the department.

5.14 Costello's letter named 1 October 2014 as the date when the offences concerned first came to Comcare's notice: so the s 232(1)(a) 2-year deadline for laying charges was 1 October 2016. Yet during the 15/3/17 Senate Committee hearing previously referred to (at paragraph 5.3), *five and a half months after the 2-year time limit had expired* (a limit Comcare acknowledged), the following extraordinary Q & A exchange occurred.

> **Senator McKIM:** But you have not yet asked for a copy of all incident reports, have you?
> Ms MacLean **:** No, but we will. …

5.15 By not asking for and so not obtaining in time those 15 vital items of evidence, Comcare permanently deprived those children and their families of even the *possibility* of some justice. [The Act gives Comcare coercive power to obtain documents and information.]

5.16 As noted, Comcare told the 15/3/17 Committee in writing on 31/3/17 that, during its inspections to that date, had "not observed any breach of the WHS Act by DIBP".

5.17 One such inspection concerned the 3-day 'riot' at the Manus RPC in February 2014: 69 people were injured, some seriously, and asylum seeker Reza Barati was murdered. Astonishingly, Comcare's Inspector Report EVE00224256-0001 – see Appendix E – found that the Department "appeared … to provide a safe workplace …".

5.18 As noted (at paragraph 3.26), s 247(2) makes clear that Ministers are not "officers" – which effectively means that Ministers can't be prosecuted under the WHS Act.

WHS duty compliance or Comcare enforcement could've had a huge positive impact

5.19 Had Comcare prosecuted the Department and a senior officer in, say, 2015, over alleged RPC-related offences; so that by, say, July 2016, both were found guilty, with the Department being fined $2 m and the officer jailed for 2 years, the (disgraced) offshore cruelty regime could have been ended by, say, 1 October 2016.

5.20 If that had happened, the sociopathic 'not until near death' airlift policy would been replaced; some six deaths would have been prevented; and the remorseless mass destruction, offshore, of physical and psychological health would have been curtailed.

WHS duty non-compliance + Comcare non-enforcement had a huge negative impact

5.21 But Comcare didn't prosecute then, and (as per Khazaei) isn't prosecuting now. [Correction – Comcare has prosecuted once. In March 2021, the Cth DPP, relying on a Comcare brief of evidence, laid 4 WHS Act charges against the Commonwealth of Australia – effectively 2 each against Home Affairs and the Commonwealth's provider of IDF health care, International Medical Services Pty Ltd (IHMS). The charges arose from an investigation into the un-prevented suicide death of a detainee, at Sydney's Villawood IDF, in March 2019. A trial is pencilled in for hearing in 2023.]

5.22 The systemic, extreme breaches of WHS Act duties by Home Affairs/ABF are not accidental or random: they are officially approved (or condoned): their criminality is thus knowing and deliberate – that is, organised. So Comcare, by its ongoing and almost total 'nothing to see here' approach, has been, in effect, running protection for organised crime.

5.23 As to onshore matters, all the WHS/OHS inspectorates issue "improvement notices" far more often than they lay criminal charges. Improvement notices – see s 191, Appendix B – tell workplace operators that they're not complying with duty X, explain how, then require compliance by reasonable date Y, thereby nipping WHS risks in the bud.

5.24 Safe Work Australia's *Comparative Performance Monitoring Report*, Part 2, 20th Edition – December 2018, at p 14, reported that, in 2016–17, NSW and Vic regulators issued, respectively, 7,513 and 15,912 such notices: Comcare issued 8.

5.25 As with the banks, a Royal Commission on 'criminality with impunity' is needed.

5.26 More immediately, the Medevac amendments must be retained as a vital bulwark against shameless criminality and sociopathic cruelty, both of which are so deeply embedded in policy and practice as to warrant national and international outrage.

IV AUGMENTING SOME PARTS OF SECTION B OF THE JOINT SUBMISSION

B. Immigration detention in Australia

(a) Mandatory and indefinite detention

26. The Article 1 wording of relevance, mainly re *indefinite* detention, is as follows – with an explanatory example interpolated in brackets.

> severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as … intimidating or coercing him [to, e.g., return to the country he fled from] ...

However, severe mental pain or suffering can arise from 'mere' *long duration* mandatory detention, as evidenced by the ravaged mental health of 'boat people' who had been detained soon after PM Rudd's 'no re-settlement here' declaration of 19/7/13, *and are still detained*, 9 years later.

Mandatory detention

27. RAC (Vic) also notes that the 1992 High Court decision which made such detention mandatory, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs and Another* (1992) 176 CLR 1 (the *Lim* case), was not soundly based – according to Eve Lester, solicitor for Mr Lim and others. In her book, *Making Migration* Law (Cambridge University Press, 2008), Lester argues that the majority decision's 'reasoning' lacks evidence and logic. She points out, first, that:

> the processing of refugee claims does not necessitate detention. Indeed, at the time [when *Lim* was being heard], the vast majority of asylum seekers were not detained (p 194) … Of the estimated 23,000 applicants for refugee status … , less [sic] than 500 [about 2.2%] were in detention" (p 194, n 221).

Next, at pp 194–5, Lester quotes the decision's wording: the majority said (at 33) that the mandatory detention of such applicants was

> reasonably capable of being seen as necessary … to enable an application for an entry permit [nowadays, a visa] to be made and considered.

Lester might well have described that formulation as "tortured and counterfactual", but chose, instead, to respectfully observe that

> no insight was offered [by the majority] into the meaning of 'capable of being seen' (by whom?) as 'necessary' (according to a generic or individualised standard?) … Nor is light shed on how detention was 'necessary' to 'enable' an application to be made and considered.

Indefinite detention

28. The joint submission's paragraph 9 correctly states as follows:

> Recent developments in Australian law have confirmed the right of the Executive to subject people to indefinite immigration detention.

It notes the *legislative* confirmation, the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth), then adds:

> this amendment affirmed that a person who is owed protection obligations and cannot be removed from Australia due to its *non-refoulement* obligations can lawfully be detained indefinitely.

29. However, paragraph 9 does not mention the *judicial* confirmation – by the High Court in *Commonwealth of Australia v ALJ20* [2021] HCA 21. In that case, the Court held by majority (4:3) that ss 189(1) and 196(1) validly authorise and require the detention of an unlawful non-citizen until s/he is removed from Australia or granted a visa.

Section 189(1) relevantly provides thus

> If an officer knows or reasonably suspects that a person … is an unlawful non-citizen, the officer must detain the person.

Section 196(1) relevantly provides thus:

> An unlawful non-citizen detained under section 189 must be kept in immigration detention until:
>
> (a) he or she is removed from Australia under section 198 or 199; or
>
> …
>
> (b) he or she is deported under section 200; or
>
> (c) he or she is granted a visa.

30. Significantly, the (then) LNP government based its case – for entrenching indefinite detention (disguised as concern for obeisance to the Refugee Convention's *refoulement* proscription) – on the dilemma concerning a cohort of 21 visa-less and thus "unlawful" non-citizens. On the one hand, the 21 had criminal records or (in a few cases) negative ASIO assessments, so they were facing deportation. But on the other hand, they were un-deportable because they came from countries where, if returned, they would be persecuted or even killed. Accordingly, deporting them would constitute *refoulement*, which is prohibited by the Refugee Convention to which Australia is a party.

31. (Note: both LNP and ALP legislators had apparently overlooked the reality that *refoulement* isn't the only factor preventing deportations: some non-citizens come from a country – Iran for example – that won't accept people Australia tries to forcibly return, while others – such as Palestinians – are stateless, with no home country to go back to. If *those* categories of 'un-deportables' remain visa-less, should they also be detained indefinitely?)

32. As to the 21, the old 'lock-em-up-to-deter-boat-journeys' mantra seemed inapt, even to the LNP. Morrison's new focus was 'dangerous criminality'. Labor accepted it, as Murray Watt made clear during the Senate's Second Reading debate on 13 May 2021: "we don't want this cohort of potentially dangerous individuals released into the Australian community".

33. Watt described the cohort.

> [It] includes:
>
> …
>
> seven people who have received criminal sentences of more than 1 but less than 5 years;
>
> nine people who have received criminal sentences of 5-10 years;
>
> one person who has received a sentence of more than 10 years;
>
> …
>
> Two people have convictions for sexual assault; four have convictions for sexual assault against children; and twelve have convictions for other violent crimes.
>
> …
>
> Twenty of this cohort have been involved in violent incidents in detention.
>
> These are the people that this legislation is seeking to address. Put simply, they cannot be released safely into the community.

34. That garbled last sentence was presumably meant to assert that releasing them would be unsafe for the community. But that assertion has never been – and still is not – supported by evidence of, for example, much higher rates of re-offending among non-citizens than citizens.

35. The relevant reality here is that all prisoners with criminal records as described by Watt would be, *if they were* ***citizens***, released back into the community after completing their prison sentence (including parole, if granted). Those jailed for sex offences would of course be subjected to post-release restrictions (child sex offenders being the most restricted). *But they would all be released*. The unfounded and far harsher treatment of non-citizen *cf* citizen offenders appears to constitute torture as per Article 1:

> an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person … based on discrimination of any kind.

36. Yet the 2021 determinations of Australia's Parliament and High Court say, in effect, that, if ***non-citizens*** – who've also served their prison time – are un-deportable, it is lawful and appropriate to keep them detained in an IDF for the rest of their lives.

37. *Lim* also re-affirmed previous High Court decisions stating that such detention is merely "administrative" (meaning that it can lawfully be imposed by the Executive – a Minister or delegate), not "punitive" (imposable only by the Judiciary – a judge or magistrate).

38. As the leading judgment of Brennan, Deane and Dawson JJ explained at page 32 of *Lim*, the Constitution reserved the power of adjudging and punishing criminal guilt – including by depriving proven-guilty citizens of their liberty – exclusively to the courts. But it also empowered Parliament to make laws about "aliens" (non-citizens). Laws authorising their detention were valid, the three judges declared, provided such detention was "for the purpose of deportation or expulsion or consideration of an entry permit".

(c) Visa cancellations – risk of arbitrary detention and refoulement

(i) Visa cancellation on 'character' grounds

39. Joint submission paragraph 19 pointedly notes that

> … Australia deports people to refugee-producing countries with poor human rights records. Between 2014 and May 2021, Australia removed people to South Sudan, Sudan, Iraq, Liberia, Eritrea, Sri Lanka and Somalia, amongst others, and removed 7 stateless persons, all following visa cancellation.

40. Similarly, s 501 doesn't distinguish between justice systems that are based on the 'rule of law' and those that are not: s 501(6)(e) says "a person does not pass the character test if:

> (e) *a court in a foreign country* has convicted the person of one of more sexually based offences involving a child [emphasis added];".

RAC (Vic) says Australia should only accept criminal record evidence from States that comply with the rights & obligations set out in the following sections of the *International Covenant on Civil and Political Rights* – Rights to physical integrity; Liberty and security of person; Procedural fairness and rights of the accused; Individual liberties; Political rights.

41. One of s 501's many flaws is that it empowers a Minister to base her or his decision that a non-citizen does not pass the s 501 "character test" – and then, accordingly, refuse entry to a non-citizen, or cancel her/his visa – on merely subjective and/or speculative impressions. See, for example, s 501(6)(d), especially item (v).

> (d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:

(i) engage in criminal conduct in Australia; or
(ii) harass, molest, intimidate or stalk another person in Australia; or
(iii) vilify a segment of the Australian community; or
(iv) incite discord in the Australian community or in a segment of that community; or
(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way;

In 2018, if a Minister invoking s 501(6)(d)(v) decided that visa holders who campaigned for *or against* 'equal marriage' did not pass the character test – because they were "a danger to the Australian community or a segment [thereof] by being involved in activities … disruptive to … that community or segment" – mass visa cancellations and deportations may have ensued.

(ii) s116 'general' cancellations

42. Paragraph 22 calls the visa cancellation process at Australian airports "opaque". RAC (Vic)'s broader concern is that s 116(1)(e), like 501(6)(d)(v), empowers a Minister to cancel a visa immediately – with potentially harsh consequences – on the basis of a merely speculative personal hunch:

> if he or she is satisfied that the presence of its holder in Australia is or may be, or would or might be, a risk to:
>
> (i) the health, safety or good order of the Australian community or a segment of the Australian community; or
>
> (ii) the health or safety of an individual or individuals;

(e) use of force by detention personnel

43. Joint submission paragraph 27 says the use of "mechanical restraints" (usually handcuffs) was excessive, but doesn't mention that detainees were often handcuffed throughout long fights by air. Nor does it mention the frequency of such flights.

44. Research by University of Queensland Research Fellow, Michelle Peterie, found that forced inter-IDF transfers of detainees, by air, were extremely frequent. Her article in *The Conversation* summarising those findings.

Extracts from Michelle Peterie's piece re 8,000 forced transfers

THE CONVERSATION
'People are crying and begging': the human cost of forced relocations in immigration detention
Michelle Peterie
Published: March 2, 2020 11.06am AEDT

Between July 2018 and August 2019, the Home Affairs Department spent A$6.1m flying refugees, asylum seekers and other immigration detainees around Australia. [The cost was revealed in a tabular written answer to Senator Nick McKim's question (taken on notices) at Senate Estimates on 21 October 2019.]

1. Expenditure incurred by the Department of Home Affairs on the transfer of onshore detainees from 1 July 2018 to 31 August 2019 is as follows:

	2018-19 $'m	**2019-20 YTD $'m**	**Total $'m**
Commercial Flights	0.4	0.1	0.5
Charter Flights	5.7	-	5.7
Total	**6.1**	**0.1**	**6.1**

…

Over the past five years, I have conducted over 70 interviews with regular visitors to Australia's onshore immigration detention centres. Speaking with volunteers and advocates, as well as detainees' friends and family members, I have collected witness accounts of conditions and practices within the system. A constant theme in these interviews has been the harm caused by involuntary transfers.

Between July 2017 and May 2019, there were 8,000 involuntary movements within the system. Some of these were deportations, but others [surely the vast majority] were forced transfers between facilities.

Detainees are rarely given an explanation when they are moved. [This] opacity … has been criticised by the Australian Human Rights Commission (AHRC). In a report last year, the commission recommended that when a relocation occurs

> *the department and facility staff should ensure as far as possible that the person […] receives a clear explanation of the reasons for the transfer.*

'Sheer, random cruelty'

Participants in my study stressed the secrecy of relocations. Detainees were typically moved with minimal warning or explanation. At times they knew a transfer was pending, but they were often moved with just a few hours' notice. In some instances, the staff woke detainees up and gave them minutes to collect their belongings. As one regular visitor to Yongah Hill [IDF] described it,

> *It was always early in the morning - you've got 10 minutes to pack your bags. And they would lose things. They were always in such a hurry. It was made to be traumatic for them.*

Confronted with what a visitor to the Brisbane Immigration Transit Accommodation [facility] described as "the sheer, random cruelty of it", detainees felt their vulnerability. So, too, did those left behind.

> *There's constantly distressing scenes as one family or another is being dragged away to be put on a plane with very little notice. And it's so upsetting for all the other refugees […] that they're seeing people get hauled off and people are crying and begging […] You never know if it's going to be you tomorrow morning.*

The AHRC has documented the "excessive" use of restraints during transfers. Just in the last fortnight, the Commonwealth Ombudsman observed that handcuffs had become "accepted transfer practice" during transport operations.

In his recommendations, the ombudsman advised

> *the Aviation Transport Security Regulations [to] restrict the use of mechanical restraints to circumstances where there is a genuine risk to the safety of the aircraft that cannot be mitigated by any other option.*

The human costs of forced relocations

Beyond the stress of the transfer process, relocations separate detainees from support networks within the facilities, as well as friends, advocates, doctors and lawyers in the community. As a regular visitor to Melbourne Immigration Transit Accommodation explained, the relocation experience is one of loss.

> *They might put down roots and get a few mates where they are, but when they move they lose those bonds that they've developed. If they're getting any medical help they lose that contact with that medical care, their ability to learn English gets less.*

Interstate transfers are particularly devastating for people with families in the community. Partners and children without social or financial resources in Australia can rarely travel to visit loved ones.

The despair caused by relocations is perhaps best exemplified by stories I heard of detainees self-harming immediately before or after a transfer.

These testimonies accord with previous research at Victoria University that has found a link between forced relocations and self-harm in immigration detention facilities. Forced transfers, this researcher found, are among a number of "precipitating factors or triggers for self-harm" in both immigration detention and prison settings.

An unconscionable practice

The practice of moving detainees around Australia's immigration detention network is doubly unjustifiable on economic and humanitarian grounds. A consistent finding from my research is that forced relocations cause harm. They harm detainees, and they harm the people who love and support them.

As a country, we can find better ways to spend taxpayer money.

45. The average number of forced transfers per detainee per year can be calculated using (a) the total of 8,000 transfers between July 2017 and May 2019, a period of 23 months, and (b) the total number of detainees in onshore IDFs. According to Home Affairs/ABF's monthly statistical summary bulletins, the total number of detainees in onshore IDFs was 1,298 on 31 July 2017 and 1,270 on 31 May 2019 – an average of about 1,285 across the 23 months. To simplify the sum, let us assume that both the time period and the average number of onshore detainees were a tad higher – at 1,300 and 24 months respectively, then halve all figures.

46. So the sum, in question form, is this: how many times on average would each of the 650 detainees need to be moved to add up to 4,000 forced transfers in one year? The answer is 6.6666, rounded to 6.7. Even rounding down that average to 6 transfers per year would mean, on average, forcibly moving each detainee between IDFs every 2 months.

47. The huge cost – $6.1m for the 13 months July 2018 – August 2019 – partly resulted from the huge distances between IDFs. The 31 May 2019 bulletin lists only six main IDFs – three Detention Centres (Perth, Sydney and Yongah Hill, inland WA) and three Immigration Transit Accommodation facilities (Adelaide, Brisbane and Melbourne), plus a few alternative places of detention (APODs), most presumably located in capital cities.

The current level of Ombudsman oversight

48. The paragraphs quoted below from the Commonwealth Ombudsman's *Monitoring Immigration Detention* report for July−December 2019 don't match the Peterie account. They do not mention the extraordinary frequency of transfers (because only one transfer is looked at per inspection cycle?), and seem to accept a Home Affairs/ABF perspective.

Transfer operations

6.9 We assess at least one transfer operation per inspection cycle ... Transfer operations involve the transfer of a group of detainees by a chartered aircraft from one facility to another for operational reasons ranging from freeing up bed spaces in facilities to pre-positioning detainees for court hearings, medical appointments or removals.

6.10 We are satisfied that detainees involved in transfer operations are generally treated with dignity and respect throughout the operation. We have noted that the level of notice given to detainees prior to transfer varies and depends on factors including the general level of compliance in the facility and the security assessments of the individuals involved.

6.11 Where a detainee is compliant and does not present a risk to the conduct of the transfer, the maximum notice of 24 hours is generally provided. However, if earlier notification would jeopardise the transfer operation, the detainee may not receive any notice of the move.

49. Yet the Ombudsman made a few recommendations of relevance, with some success.

3.11 In this reporting period, the Ombudsman made 18 recommendations about detainee placement; eight to move the detainee to another IDF to be closer to their family, legal representatives or support network ….

3.12 In response, the Minister advised that in two cases the detainee had been relocated as recommended, one detainee's visa was reinstated, one transfer was not supported for security reasons, and four people no longer wished to be relocated.

50. The next report to consider transfer/placement issues (but not transfer operations – see 2.382.) was that for the period 1 July 2020 to 30 June 2021. As the extracts (below) indicate, there is less acceptance of Home Affairs/ABF blandishments, and more criticism.

> 2.378. Movement within the immigration detention network is frequent and occurs for various reasons. These may be related to the detainee, such as health concerns, or broader issues such as safety, security, and capacity.
>
> 2.379. In considering movement, policy requires the holistic circumstances of the detainee be considered. Where a detainee has a dependent child, policy notes the best interests of the child will be a primary consideration, consistent with international law. However, under policy, where a transfer is required to address a matter of security, good order or another operational reason, family links are not a barrier to transfer.
>
> …
>
> 2.381. The Office wishes to emphasise the impact individual operational decisions can have on the detainee, and the need to always consider individual impacts of any such decision.
>
> *Previous observations*
>
> 2.382. The Office previously made recommendations on the use of restraints on detainees, and access to activities, during transfers. While we did not inspect transfer operations this reporting period, we reiterate the impact prolonged mechanical restraint use, and lack of access to reading material or other entertainment during lengthy transfer operations can have on detainees' wellbeing.
>
> 2.383. We also noted in previous reports the need to ensure family links are considered, and provided a similar weighting to other factors, when determining network placement. Given our observations and the feedback we received from detainees …, particularly those at North West Point IDC [aka Christmas Island], we reiterate this point.
>
> *Detainee transfer requests*
>
> …
>
> 2.387. During our inspection at Yongah Hill IDC, we received feedback from multiple detainees expressing frustration with their current facility placement. These detainees were unhappy with being moved around the network and, specifically, away from their families on the east coast. The same detainees also spoke of multiple denied transfer requests.
>
> 2.388. Multiple transfer requests to be closer to family interstate also arose in conversations with detainees in Brisbane. At the Northern APOD, detainees noted various family and friend links in Sydney, Melbourne and Adelaide, on top of their broader frustrations with their long-term detention. As previously noted, family separation was a focal point of discussions with detainees at North West Point IDC.
>
> …
>
> 2.390. The Office considers the burden should rest with the ABF to justify why a detainee's placement cannot be close to family and support networks …
>
> 2.391. Departmental policy explicitly indicates placement in a particular facility 'must **not** be used as a behavioural management tool or punitive measure'. The Office is concerned there is some risk that inflexible placements may become punitive in effect, especially where this isolates detainees from their usual place of residence and their family.

51. That expression of concern is apt as far as it goes. However, RAC (Vic) suggests the Ombudsman, after reading Ms Peterie's startling March 2020 research findings, should have been pro-actively clarifying with Home Affairs/ABF whether detainees had been forcibly transferred every 2 months on average, and if so, concluding, not that such transfers "may be" – but rather that they "had routinely been" – used by Home Affairs/ ABF as a punitive management tool, blatantly breaching the Department's own emphatic prohibition, and inflicting mass distress.

V CONCLUSIONS AND RECOMMENDATIONS

Conclusions

52. RAC (Vic) has augmented the joint submission, *and* added evidence that 'paints a darker picture' – showing that, via regressive policies, practices, and Migration Act amendments, Australia has systemically subverted CAT obligations, often deploying sociopathic cruelty.

53. To elaborate by way of examples …

Bearing in mind the fundamental proviso of the definition of "torture" in Article 1 of the CAT, namely, that torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions", RAC (Vic) has adduced evidence of the following instances of "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" which do not fall foul of that proviso:

(1) 15 alleged un-prevented sexual assaults of children held in an IDF (on Nauru);

(2) at the clinic of the equatorially located Manus Island IDF, non-provision of an antibiotic that effectively treats most tropical infections;

(3) at that medically under-resourced and remote IDF, non-provision of a simple regime of prompt airlifts to Australia for emergency medical treatment;

(4) over 23 months 2017 – 2019, the forcible transfer of onshore detainees by air (usually in handcuffs), from one IDF to another, every two months on average;

(5) adoption of the following policy by Home Affairs, despite its being bound by the WHS Act to pro-actively eliminate (or at least minimise) risks to the physical and mental health of IDF detainees, including those held offshore:

> Requests for temporary medical transfers to Australia … will <u>only</u> be considered … where the person faces a life-threatening medical emergency that would otherwise result in their death or permanent, significant disability;

(6) politically/administratively preventing *very ill* IDF detainees and ex-detainees – offshore and onshore – from receiving external specialist medical care, via the systemic rejecting of most clinical recommendations and, in 2019, the sabotage *by the Commonwealth government* (via Home Affairs) *of a Commonwealth law* – the 'Medevac' amendments to the Migration Act – *while it was still in force*.

There are further examples, but those will suffice. Additionally, RAC (Vic) contrasts

- the meticulously objective medical evidence of Dr Janakiramanan, both within submission 52 and in her supplementary oral evidence, proving that, among the 581 applicants for transfer to Australia under the Medevac amendments, 97% were seriously unwell physically (with an average of 4.6 conditions each); 91% were seriously unwell psychiatrically; and 88% had both types of illness

with

- the non-empirical denigrations attributed to then Minister Dutton: "an asylum seeker could complain of something trivial … a sympathetic medical practitioner would request … a transfer … the asylum seeker would … [soon] join the hundreds already in Australia"; and
- Secretary Pezzullo's gratuitous comments (to a Senate Committee) referring to "doctors so called", and extremely ill transferees being "not even" outpatients.

Does that contrast speak volumes about the political attitudes underlying Australia's ruthless subversion of CAT (and other) obligations?

Recommendations

54. The joint submission's recommendations follow. Red text and cross-throughs indicate the recommendations or parts thereof that RAC (Vic) supports. Ensuing paragraphs will set out and explain our additional recommendations.

A. Introduction & recommendations

1. …
2. … Following a federal election in May 2022, the governing political party in Australia changed. Responsibility now lies with the [ALP] Government to openly and comprehensively interrogate Australia's ongoing non-compliance with the Convention and to remedy it.
3. Our recommendations for urgent reform in Australia include:
   (a) ending the mandatory detention of any person without a visa ~~and making the use of closed detention a genuine measure of last resort~~;
   (b) establishing statutory time limits to immigration detention and judicial oversight of decisions pertaining to immigration detention;
   (c) the immediate review of all persons currently detained and the reasons for their detention, particularly those who have been detained for long periods, and considering their release;
   (d) restricting the circumstances in which children may be detained and preventing the transfer of children to offshore processing countries;
   (e) developing an enforceable legal framework to govern conditions in immigration detention and protect the human rights of people detained, including to ensure access to appropriate medical care and accountability for incidents of excessive use of force by detention personnel;
   (f) reforming the laws and policies relating to visa cancellations, which presently create the risk of arbitrary detention and *refoulement;*
   (g) ending the offshore processing regime and providing permanent resettlement in Australia or safe third countries for all persons subjected to it;
   (h) repealing the 'Fast Track' asylum process and reinstituting a full, fair and independent refugee determination process that complies with international standards;
   (i) ensuring that all people seeking asylum ~~who are subject to maritime interceptions~~ are provided with a full, fair and independent refugee determination process that complies with international standards;
   (j) restoring government-funded legal assistance to people seeking asylum, especially those in detention; and
   (k) reforming the laws, policies and practices which intentionally seek to separate refugees from their family members as a method of deterrence – practices which may contravene Article 2.

55. As to the black text in (a)–(e) above, RAC (Vic) calls on the ALP government to end all immigration detention, including thereofore indefinite detention. (Non-citizens who arrive with communicable diseases do not need to be detained under the Migration Act: they could be quarantined under a health law.) Within (e), RAC (Vic)'s support for the CAT-compliant treatment of detainees carries an implicitly proviso: " – but only while the cruel inhumanity of such detention persists". Within (g), RAC (Vic)'s proviso is that resettlement "in safe third countries" is never acceptable as a means of Australia avoiding its Refugee Convention resettlement obligations: it is only acceptable if non-citizens freely choose to resettle elsewhere and Australia comprehensively assists them to do so.

56. Further to the joint submission's paragraph 2, RAC (Vic) calls on the ALP government to:
   (a) implement forthwith its pre-election commitment to convert temporary protection visas (TPVs) and Safe Haven Enterprise Visas (SHEVs) – which are of finite duration – into visas that are permanent; and

(b) implement ASAP all items in ALP Platform 2021 that uphold international human rights – such as no. 65, which declares, “Labor will ensure asylum seekers who arrive by irregular means will not be punished for their mode of arrival”. No. 65 was contradicted by a pre-election statement (on 14/4/22) by Anthony Albanese – then Opposition leader, now Prime Minister – that Labor “will turn boats back” and “keep the option of offshore detention centres”. The ALP government is doing both.

57. In addition to the RAC (Vic)-supported reforms in paragraph 54 (above) – reforms RAC (Vic) has long campaigned for and will continue to do so – other long-standing demands that we now add as recommendations include the following (the numbers are those used in our “Refugee Facts” pamphlet):

3. Reverse the 2014 ban on refugees and asylum-seekers in Indonesia seeking permanent protection.
4. [… bring to Australia all those people that Australia forcibly transferred to PNG and Nauru who still remain there.]
5. Provide Australian standards of healthcare to refugees and asylum-seekers, including specialist medical and psychiatric care for all who need it, as recommended by clinicians.
6. Legislate to abolish TPVs and Bridging Visas and grant permanent protection with the right to work and access education (as local students, not international student who pay full fees).
7. Review ASIO negative assessments and restore judicial review of all official decisions affecting refugees, including those rejected by the fast track process.
8. Compensate all who have suffered enduring physical or psychological harm because of being held in detention, compensation to include helping children to recover and obtain a good education.
9. Increase Australia’s humanitarian intake of refugees to at least 50,000 per year.
10. Decriminalise ‘people smuggling’ and adhere to international treaties dealing with safety of lives at sea.

58. Given the litany of CAT contraventions noted in the joint submission and this submission, **RAC (Vic) recommends the timely setting up of a formal inquiry – e.g., a Senate inquiry – into all alleged instances of ‘Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ in relation to any refugees or people seeking asylum in Australia who are being – or have been – held in an IDF.** Such an inquiry, by exposing how systemic and sometimes sociopathic such contraventions have been, should generate significant public pressure on government to make sweeping reforms to existing law, policy, and practice.

59. Only some paragraph 54−57 reforms can be achieved administratively (via a ministerial or departmental decision or action): legislative action is needed to achieve most of them. As well, the High Court has held that, in immigration and/or constitutional law cases, it can’t take international instruments into account until they’re incorporated into statute law. So, **RAC (Vic) recommends embedding international human rights into legislation, by:**

(1) enacting a Human Rights Charter;

(2) defining ‘human rights’ in the *Australian Human Rights Commission Act 1986* and the *Human Rights (Parliamentary Scrutiny) Act 2011* to include all applicable human rights instruments (remarkably, neither Act defines the 1951 Refugee Convention (including its 1967 Protocol) as a “human right”); and

(3) inserting – in the Object provision of the Migration Act and related Acts – wording such as “to give effect to Australia’s international obligations”, then, in Schedules to each Act, reproducing each relevant international instrument.

Despite their brief wording, these recommendations would have, if enacted, numerous, detailed and far-reaching effects, like ripples made by stones thrown into a pond. That is, they would ultimately compel the making of many legislative amendments whereby most of the reforms long sought by RAC (Vic) (and other advocacy groups) would be achieved.

60. In making recommendation (2) above, RAC (Vic) is basically agreeing with the October 2022 submission made by the Australian Human Rights Commission (AHRC) to the UN Committee Against Torture – a submission that noted and recommended as follows.

> 7. The Commission has a statutory power to promote and protect human rights under the *Australian Human Rights Commission Act 1986* (Cth) Act (AHRC Act). Human rights are defined as the international instruments scheduled to or declared under the AHRC Act. … [That] definition of 'human rights' … does not include the CAT.
>
> 9. [It] … is narrower than [that of] the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) … [which schedules] … seven instruments to which Australia is a party, including the CAT.
>
> **Recommendation 1: The Australian Government amend the AHRC Act to ensure … a comprehensive definition of human rights, including through [the] CAT being a scheduled instrument.**

61. Given that paragraph 59's package of recommendations might face political resistance, but given also the reasonableness of AHRC Recommendation 1, RAC (Vic) suggests, as a first step, the mounting of a broadly-based campaign urging the Labor government to implement AHRC Recommendation 1 – interpreted as follows. RAC (Vic) says that, since many refugees and asylum seekers are, clearly, victims of cruel and inhumane treatment by Australia, the AHRC's call for a "comprehensive" definition surely means that, in both Acts, the Refugee Convention needs to be scheduled as a 'human rights' instrument.

62. All the above are civil law matters. RAC (Vic) also makes a criminal law recommendation.

Prosecuting persons allegedly intentionally inflicting pain or suffering on a civilian population

63. RAC (Vic) notes that Article 4 of the CAT reads as follows.

> 1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
> 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Accordingly, as the AHRC submission notes at paragraph 6: "Australia has legislated to criminalise torture in the *Criminal Code Act 1995* … [see s 268.13, and the definition of torture in Division 274]". Section 268.13 of the Criminal Code Act provides as follows.

> **268.13 Crime against humanity—torture**
>
> A person (the ***perpetrator***) commits an offence if:
>
> (a) the perpetrator inflicts severe physical or mental pain or suffering upon one or more persons who are in the custody or under the control of the perpetrator; and
>
> (b) the pain or suffering does not arise only from, and is not inherent in or incidental to, lawful sanctions; and
>
> (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.
>
> Penalty: Imprisonment for 25 years.

64. RAC (Vic) recommends that, as per CAT Article 7, where "a person [is] alleged to have committed any … article 4 offence, … the State Party [in effect the Attorney-General?] shall submit the case to its competent authorities for the purpose of prosecution".

65. RAC (Vic) also notes that, as with the *Rome Statute of the International Criminal Court* from which the s 268 crimes against humanity have been virtually 'cut and pasted' into the Criminal Code Act, only individuals (not States, governments, or organisations) can be prosecuted. If certain individuals (such as those whose apparent s 268.13 offending has effectively been catalogued in this submission) are in due course prosecuted, found guilty and then imprisoned, that would be salutary indeed.