



# CCPR SUBMISSION: AUSTRALIA

SEPTEMBER 2017

The Global Human Rights Clinic<sup>1</sup> submits this information to the UN Human Rights Committee in order to inform its review of the 6<sup>th</sup> periodic report of the Australian government at its 121<sup>st</sup> session in October 2017. The Global Human Rights Clinic wishes to highlight issues related to the conditions in Australian ‘onshore’ and ‘offshore’ immigration processing centres, and the violations of civil and political rights suffered by asylum seekers for whom the Australian government is responsible. This submission highlights issues related to: **the detention of asylum seekers by the Australian government, the treatment of these asylum seekers in immigration processing centres, the conditions in these immigration processing centres, and the criminalization of human rights defenders working on these issues.**

The Global Human Rights Clinic has been working directly with human rights defenders in Australia, as well as those in detention, to gather primary evidence, including first-hand testimonials, from which we have formulated the concerns and recommendations below. Further information about any of the information in this summary Submission can be obtained from the Global Human Rights Clinic. Enhanced detail in relation to these issues was provided in our **Letter of Allegation to the UN Special Procedures**, which we **sent in a confidential communication to the Human Rights Committee in September 2015 along with a request that the Human Rights Committee address these concerns urgently with the Australian government.** Further Briefing Notes with supporting information will be provided to the Committee Members during the NGO formal and informal briefings at the 121<sup>st</sup> Session.

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<sup>1</sup> The Global Human Rights Clinic is an international not-for-profit NGO (an Association under Swiss law). It is in the process of applying for ECOSOC Consultative Status.

*The Global Human Rights Clinic is proudly part of the Global Human Rights Group.  
The Global Human Rights Group is a social enterprise based in Geneva,  
comprising of the not-for-profit NGO, the Global Human Rights Clinic (an Association under Swiss law),  
and the not-just-for-profit company, the Global Human Rights Consultants LLC.*

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## BACKGROUND

- ▶ The detention of asylum seekers who arrive by boat is mandatory under Australian law. Asylum seekers arriving by boat are detained indefinitely, and this decision is not reviewable. Currently, no asylum seeker trying to get to Australia by boat will ever be granted protection and resettled in Australia temporarily or permanently, regardless of the validity of their refugee claim.
- ▶ The Australian government detains approximately 2,000 asylum seekers in restrictive immigration detention on mainland Australia.
- ▶ The Australian government detains approximately 1,500 asylum seekers in immigration processing facilities at Manus Island (in Papua New Guinea), and in the Republic of Nauru, in so-called ‘off-shore’ processing facilities. Since mid-July 2013 every asylum seeker who arrives in Australia (or Australian seas) is immediately sent to one of these ‘off-shore’ processing centres. While these centres are supposedly ‘open’, and thus not formally classified as ‘detention centres’, the practical reality is that there are significant restrictions on freedom of movement and those living in these immigration processing centres are not free to integrate fully into the local communities, nor leave the islands.
- ▶ Detention centres ‘onshore’ in Australia are jointly operated by the Australian government, and corporate contractors, Serco Asia-Pacific (a British company), and serviced by other corporate contractors such as International Health and Medical Services (IHMS).
- ▶ Immigration processing facilities ‘offshore’ in Nauru and Manus Island are run jointly by the Australian government, the host states of Papua New Guinea and Nauru, and a number of corporations subcontracted by the Australian government, namely, the primary contractor Broadspectrum (formerly named Transfield Services, owned by Spanish infrastructure company Ferrovial), sub-contractor Wilson Security (a G4S subsidiary, G4S is a British-based multinational security company), and medical services contractor International Health and Medical Services (IHMS).
- ▶ Australia’s laws and policies are in line with the government’s deterrence policy to ‘stop the boats’, an attempt to prevent deaths at sea by treating those arriving by boat as harshly as possible. This policy is supported by both major political parties. It has been widely acknowledged that the systematic maintenance of harsh conditions in immigration detention and processing centres, and the deliberate failures to address reported abuses, is part of this policy of deterrence.<sup>2</sup>
- ▶ The lexicon adopted by the Australian government regarding asylum seekers and refugees dehumanizes and vilifies people who arrive in Australia by boat, to such a degree that it causes mental harm and anguish and may violate article 20(2) ICCPR, as an intentional incitement to discrimination.

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<sup>2</sup> Amnesty International and Human Rights Watch (2016) *Australia: Appalling Abuse, Neglect of Refugees on Nauru*, available at <https://www.amnesty.org/en/latest/news/2016/08/australia-abuse-neglect-of-refugees-on-nauru/>

## HUMAN RIGHTS CONCERNS

- ▶ **Immigration detention for all asylum seekers who arrive by boat in Australia constitutes arbitrary detention pursuant to article 9 of the ICCPR** due to its mandatory nature, disproportionate and unnecessary character, and the failure to consider individual circumstances that weigh against detention. **The average time spent in immigration detention / processing** (in ‘open’ centres) in Australia continues to increase and was at an average of 446 days in November and 445 days in December) and at the end of 2015 there were 23.3 per cent of detainees who spent more than 750 days in detention.<sup>3</sup> This **well exceeds the maximum in most countries**, where detention of asylum seekers, if at all, is for the minimum time required to verify identity. **Detention for this period, and in the conditions outlined below, is arbitrary and unnecessary.**
- ▶ **Asylum seekers and other migrants** being held in immigration detention by the Australian government **are being held in conditions that clearly violate international human rights laws and standards.** **Asylum seekers** detained (de jure and de facto) at the Manus Island and Nauru ‘regional processing centres’ **are held in conditions that constitute cruel, inhuman, and degrading treatment or punishment amounting to violations of articles 7 and 10(1) ICCPR.**
  - **Asylum seekers, particularly community leaders and human rights defenders, are subjected to torture and cruel, inhuman and degrading treatment.** The Australian government’s own Senate Inquiry,<sup>4</sup> as well as UNHCR<sup>5</sup> and other international observers,<sup>6</sup> have deemed the immigration detention facilities in Australia, Nauru and PNG as unsafe.

*The mission report of the UN Special Rapporteur on Torture verifies this;<sup>7</sup> current and previous communications before the UN Special Procedures demonstrate this and include details of allegations of torture and CIDTP; and photographic/video evidence can be provided to substantiate this claim, including testimony from the Australian government’s own Senate Inquiry into conditions at Nauru.*

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<sup>3</sup> Numbers sourced from Australian Department of Immigration, quoted in Stephanie Anderson, “Immigration Detention Times on Nauru and Manus Island Blow Out to 450-Day Average Under Liberals”, *ABC News*, 13 January 2016, available at <http://www.abc.net.au/news/2016-01-13/immigration-detention-times-blow-out-to-almost-450-days/7085264>

<sup>4</sup> Select Senate Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru (August 2015), Report and all other documents available at [http://www.aph.gov.au/select\\_regionalprocessingnauru](http://www.aph.gov.au/select_regionalprocessingnauru)

<sup>5</sup> United Nations Information Centre, “UNHCR Calls for Immediate Movement of Refugees and Asylum-Seekers to Humane Conditions”, 3 May 2016, Canberra, available at <http://un.org.au/2016/05/03/unhcr-calls-for-immediate-movement-of-refugees-and-asylum-seekers-to-humane-conditions/>

<sup>6</sup> UN Country Team in Port Moresby, Papua New Guinea, “Statement by the United Nations Country Team in Papua New Guinea”, 16 January 2017, available at <http://un.org.au/2017/01/18/press-release-statement-by-the-united-nations-country-team-in-papua-new-guinea/2/>; UN High Commissioner for Human Rights, “Human Rights Council Informal Briefing on Burundi, Tunisia, Migration crises in Europe and South-East Asia, and South Sudan”, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16012&LangID=E>

<sup>7</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Addendum, Observations on communications transmitted to Governments and replies received, A/HRC/28/68/Add.1, see para. 19;

- The placement of asylum seekers in places of detention where their **access to medical services is limited** (compared to elsewhere in Australia), **the standard of medical care is relatively low, and the known risk of disease is high**, amounts to a violation of the right to the highest attainable standard of health. Further, **neglect for the proper requirements to ensure a safe and adequate standard of living at Regional Processing Centres has led to violations of the right to housing, rights to water and sanitation, and right to food**. These socio-economic rights violations occur as a result of the discriminatory treatment of members of a minority group (refugees, asylum seekers and migrants).
- **Many asylum seekers being held in ‘offshore’ detention are being denied essential and life-saving medical treatment**, and/or are being under- or over-medicated – *medical records and testimony by doctors reveal that medical treatment is being withheld, leading to death(s) and serious medical issues that could have easily been prevented.*<sup>8</sup>
- **Women asylum seekers are subjected to violence and sexual assault**, either in detention or in the communities in which they are restricted to. These acts of sexual violence sometimes result in unwanted pregnancies, and the Australian government has denied medical treatment to victims of sexual violence.<sup>9</sup> *Repeated testimonies from women in detention show fear around showering and using toilet facilities, interacting with guards, and engaging with the community if allowed outside of detention. Independent visits, observations, and verified reports of sexual assaults substantiate this fear.*<sup>10</sup>
- **Gay men are forcibly sent to Manus Island** in Papua New Guinea for either detention and/or resettlement, **despite the fact that homosexuality is criminalized in PNG.**<sup>11</sup> *Australia knowingly sends asylum seekers and refugees entitled to resettlement into situations where their safety is at risk.*
- **Mental illness amongst those detained is high and rising**, made worse by the deteriorating conditions, rising uncertainty regarding their status, and changing laws and policies that are inflicted upon them on a regular basis. *There are gross and systematic violations of the right to the highest attainable standard of mental health occurring throughout the Australian immigration detention system.*<sup>12</sup>

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<sup>8</sup> See, e.g. The Nauru Files, available at <https://www.theguardian.com/news/series/nauru-files> and the Letter of Allegation to the UN Special Procedures dated 31 August 2015 filed by the Global Human Rights Clinic, copy sent to the Human Rights Committee in September 2015.

<sup>9</sup> See, e.g. OHCHR, “Press Briefing on Nauru and Australia”, 27 October 2015, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16657&LangID=E>

<sup>10</sup> See, e.g. The Nauru Files, available at <https://www.theguardian.com/news/series/nauru-files> and the Letter of Allegation to the UN Special Procedures dated 31 August 2015 filed by the Global Human Rights Clinic, copy sent to the Human Rights Committee in September 2015.

<sup>11</sup> See, e.g. Oliver Laughland, “Gay asylum seekers on Manus Island write of fear of persecution in PNG”, *The Guardian*, 24 September 2014, <https://www.theguardian.com/world/2014/sep/24/gay-asylum-seekers-manus-island-fear-persecution-png>

<sup>12</sup> Procter, N. G., Kenny, M. A., Eaton, H. and Grech, C. (2017), “Lethal hopelessness: Understanding and responding to asylum seeker distress and mental deterioration” in *International Journal of Mental Health Nursing*, doi:10.1111/inm.12325, available at <http://onlinelibrary.wiley.com/doi/10.1111/inm.12325/abstract>

- **Children are being detained in unsanitary, unhealthy conditions, some from birth. They are exposed to trauma, improperly fed and clothed, at risk of abuse (including sexual), subject to neglect, and suffer a high incidence of self harm.** Unaccompanied children have been sent to detention on Nauru. *This is in violation of the best interests of the child.*<sup>13</sup> The **prolonged detention of children**, including in offshore detention centres, **is contrary to the best interests of the child and exposes them to direct physical, sexual, emotional and environmental harm.**
- ▶ **The indefinite detention of persons whose asylum claims have been rejected** but whose country of origin refuse their repatriation, asylum seekers whose refugee visas will not be issued as their files raise security clearance concerns, and those whose refugee visas are refused as they have been found not to pass the ‘character test’ due to past criminal convictions, **amounts to arbitrary detention under article 9(1) ICCPR.**
- ▶ **Other asylum seekers whose claims have been denied are being forcibly returned to unsafe countries, or to third countries.** For example, Australia has recently returned a man to a war zone in Syria and has previously deported 3 stateless Rohingya men.<sup>14</sup>
- ▶ **The failure of the government of Australia to properly investigate and prosecute crimes committed against asylum seekers in detention, including torture and cruel, inhuman and degrading treatment, may amount to violations of articles 7, 10 and 14 ICCPR.**
- ▶ **There is a deliberate lack of transparency and accountability** regarding Australia’s detention immigration system, contrary to human rights principles.<sup>15</sup> **Violations of the rights to due process and access to justice, as guaranteed by article 14 ICCPR, are widespread, with systemic actions taken by the government to limit accessibility and availability of legal services**, and acts in defiance of court orders to protect detainees’ human rights, and many examples of restrictions of the right to access legal advice and representation.
  - **Access to lawyers and legal representation is restricted and denied** – *lawyers are unable to visit clients in detention facilities in Manus Island, and the ability to communicate in a timely manner with legal representatives is often restricted for other detainees. This has led to the involuntary return of asylum seekers to places like Iran, contrary to court orders, due to a refusal to allow access to lawyers in time.*
  - **Journalists and media have been denied access to people in detention, and refused visas or access to detention centres** – *this is concerning in terms of ensuring accountability and public awareness.*

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<sup>13</sup> See, e.g. *The Nauru Files*, available at <https://www.theguardian.com/news/series/nauru-files> and the Letter of Allegation to the UN Special Procedures dated 31 August 2015 filed by the Global Human Rights Clinic, copy sent to the Human Rights Committee in September 2015.

<sup>14</sup> See, e.g. Letter of Allegation to the UN Special Procedures dated 31 August 2015 filed by the Global Human Rights Clinic, copy sent to the Human Rights Committee in September 2015.

<sup>15</sup> See, e.g. *The Nauru Files*, available at <https://www.theguardian.com/news/series/nauru-files> and the Letter of Allegation to the UN Special Procedures dated 31 August 2015 filed by the Global Human Rights Clinic, copy sent to the Human Rights Committee in September 2015.

- **The UN Working Group on Arbitrary Detention has been denied access** to off-shore detention facilities.
- ▶ **The Australian government**, with the complicity of the governments of Nauru and Papua New Guinea and transnational corporations and business entities, **are infringing upon and failing to protect the right to freedom of expression of the human rights defenders in detention, as set forth in article 19 ICCPR, by limiting access to communications and the freedom to impart information**, and punishing asylum seekers who use mobile phones to convey images, videos and information to the outside world. **The government of Australia is responsible for the failure to protect human rights defenders in detention from harm, including against reprisals for their work as human rights defenders.**
- ▶ **The Australian government has legislated to criminalize human rights defenders.** By virtue of this new law, the regular activities of human rights defenders could carry a prison sentence. The submission of information to the UN, such as Letters of Allegation to Special Procedures and submissions to UN Treaty Bodies, possibly open complainants to risk of criminal charges. *While providing oral assurances that those reporting sexual assaults and child abuse, for example, and service-providing staff classified as ‘genuine whistleblowers’, are not the intended subject of legislation outlawing disclosure of information, and while providing amendments to the law to protect medical practitioners from prosecution, the fact remains that laws now make reporting such matters to police or to the UN a crime.*<sup>16</sup>
  - Under the *Border Force Act 2015*, which came into operation on 1 July 2015, **persons who share protected information about immigration detention facilities have committed a criminal act subject to 2 years imprisonment.**
  - The extended modes of criminal liability contained in the *Commonwealth Criminal Code Act* means that **it is not just those working as service-providers in detention facilities who are at risk of imprisonment** for sharing information about what is happening in Australia’s immigration detention centres. **Human rights defenders (including those outside of Australia) who have been given information by ‘whistleblowers’ and who share that information with the UN may also be liable to criminal charges and time in jail.**
  - The Australian government’s targeting of asylum seekers, staff members and human rights and refugee rights advocates for disseminating information about conditions in immigration detention is a **curtailment of the freedom of expression, and risks violating protections for human rights defenders** as established by General Assembly Resolution A/RES/53/144.
- ▶ **The Australian immigration system is structurally prejudiced against the full realization of the human rights of migrants.** Further, migrants are excluded from enjoying work rights.
- ▶ **The Australian government continues to avoid, deny or attempt to shift responsibility for asylum seekers**, despite its clear legal obligations – *they have sought to deny*

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<sup>16</sup> See, e.g. APP, “Chilling Effect on Rights Defenders: UN”, *SBS*, 18 October 2016, available at <http://www.sbs.com.au/news/article/2016/10/18/chilling-effect-rights-defenders-un>

*responsibility for human rights violations related to conditions of detention, laying blame instead at the feet of the private contractors, or foreign host governments. At times there have even been proposals that Australia should withdraw from the Refugee Convention 1951, oblivious to the fact international human rights obligations cannot be so easily withdrawn or 'unsigned'.*

- **Private actors, i.e. corporations, are contracted to operate detention centres, with insufficient oversight and responsibility** taken by the Australian government for the human rights violations perpetrated by these corporations and their staff.
- **It is claimed that the detention facilities are a matter of national sovereignty for Nauru and PNG, not Australia.** An Australian Parliament Senate Inquiry states that such moves are *'a cynical and unjustifiable attempt to avoid accountability for a situation created by this country'*.

## THINGS TO NOTE

- ▶ Australia is a candidate for election to the Human Rights Council in October 2018 for 2018-20.
- ▶ Australia has traditionally been active on human rights issues in the international sphere, however this positive engagement has not been reflected domestically for many years. A recent comment by the (now former) Prime Minister Abbott to the UN Special Rapporteur on Torture's report in March 2015 indicates the view most often touted to the public via the media in Australia: 'Australians are sick of being lectured to by the United Nations'. Domestically, the Australian government is dismissive of the UN, and pays little regard to the viewpoints of the Human Rights Council, the Treaty Bodies, or the Special Procedures. Yet internationally it seeks to be respected and engaged.
- ▶ This submission deliberately covers only a very limited aspect of the issues relevant to Australia's review by the Human Rights Committee. We support the Australian NGO Coalition Submission in relation to other aspects of the review of Australia vis-à-vis civil and political rights.
- ▶ The immigration detention system in Australia is punitive, and is ultimately designed to 'break' asylum seekers,<sup>17</sup> coercing them to return to the country they are fleeing from in order to deter others from making the journey. Offshore detention is the apogee of cruelty within the system, with even the prospect of offshore transfer inducing extreme anxiety, depression and suicidal ideation amongst asylum seekers.
- ▶ The immigration detention system is inherently discriminatory. On a meta scale, asylum seekers are discriminated against due to their mode of travel. If they arrive by boat, they are subject to indefinite detention. If they arrive by plane, they are not. Others are discriminated against and detained for more arbitrary reasons, including date of arrival

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<sup>17</sup> Amnesty International Australia, *This is breaking people: human rights violations at Australia's asylum seeker processing centre on Manus Island, Papua New Guinea*, Amnesty International Australia, December 2013, available online at: <http://bit.ly/QREjS7>

and selection for offshore processing to maximize the deterrent potential inherent in the system.

- ▶ The implementation of the *Border Force Act* is a particularly concerning development from a human rights perspective, as it has already induced a chilling effect in terms of information about the true conditions of detention and treatment of detainees, including abuse of children, being released from detention into the broader community. Despite a lack of charges being laid to date, there is a strong sentiment amongst human rights defenders that it is only a matter of time before the first arrests are made. Stronger rules to enforce secrecy throughout the detention network, such as have been enacted with the *Border Force Act*, will only lead to further human rights abuses, and will contribute to the general impunity afforded to detention workers and agencies.

*I am afraid of going back to place where they abuse sexually, mentally, and physically.*

*What was my fault? Asking for refuge? Right now I need help, your help. I feel helpless, hopeless ... I am sick of waking up every morning and seeing these horrible fences around me. I want to be free Let me admit that I wish I was dead in ocean, at least I would die once in my life, not every second in these detentions.*

*HELP ME PLEASE I am tired of this life...*

*I want to have a happy moment in my life. At least once.*

*(14 year old boy at Nauru RPC)*

## SUGGESTED RECOMMENDATIONS

We respectfully ask the Human Rights Committee to make the following recommendations to the government of Australia during the review of its 6<sup>th</sup> report:

1. That the government of **Australia fully implements its international human rights obligations towards all asylum seekers and refugees and other immigration detainees**, without delay, and in particular:
  - a. **end immediately the system of offshore detention and close the offshore detention and regional processing centres;**
  - b. **end immediately the system of onshore detention** (except where such detention is in accordance with UNHCR Detention Guidelines 2012 and only then for the shortest period of time necessary in order to ascertain identification and security checks, on an individual basis, and in conditions that comply with all international human rights laws and standards), i.e. **end mandatory and unreviewable detention of asylum seekers in Australia for indefinite periods and for unnecessary long lengths of time;** instead, ensure that any detention of asylum seekers is only as a last resort and for the shortest possible time. For example, adopt a widespread policy of home detention between the period of verifying ID and validating claims, and/or repatriating failed claims. Ensure that there is legislation protecting the maximum amount of time allowed for detention, and ensuring access to judicial review and full rights and practical access to legal representation.
  - c. **end immediately the internationally unlawful policy and practice of ‘turning back the boats’** and instead take all necessary and proportionate measures to safeguard the lives of any and all asylum seekers and others at sea in Australian waters (whilst respecting the prohibition on imposing penalties on asylum seekers for their mode of travel);
  - d. **Ensure the prompt and immediate processing of all remaining asylum claims** for those detained on Manus Island, Nauru, and within Australia, and facilitate immediate resettlement in safe countries, i.e. either Australia or other global partners where refugees or those unable to be returned are able to access their full human rights (including work, education, social security, physical and mental health and protection from violence).
2. That the government of **Australia fully implements its international human rights obligations towards all asylum seekers and refugees and other immigration detainees**, without delay, *inter alia*:
  - a. The prohibition on arbitrary detention;
  - b. The rights of the child;
  - c. The absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment;
  - d. The right to health;
  - e. The right to adequate housing;
  - f. The right to adequate and safe drinking water and sanitation;
  - g. The right to food;
  - h. Migrants rights;

- i. The right to work;
  - j. Access to justice;
  - k. Freedom of expression;
  - l. The protection of human rights defenders; and
  - m. The prohibition against discrimination.
3. That the government of **Australia stops transferring refugees and asylum seekers to Manus Island, Nauru, and other places where secure permanent residency is not ensured, and that it accepts for permanent residency within its own borders** asylum seekers who:
    - a. cannot access within the jurisdiction appropriate medical care needed to treat their conditions;
    - b. would be subject to criminal sanctions under domestic law as a consequence of aspects of their claims for asylum (such as their sexual orientation or gender identity); or
    - c. due to their special vulnerabilities (*inter alia*, age, physical or mental health, disabilities) are unsuitable for transfer or would suffer unnecessary or disproportionate hardship as a result.
  4. That the government of **Australia demand the transnational corporations and other business enterprises involved in the detention and transfer of asylum seekers, refugees and others in immigration detention**, including Broadspectrum, Serco, International Health and Medical Service, Wilson Security, and G4S, **to implement a ‘respect, protect and remedy’ framework in accordance with the Guiding Principles on Business and Human Rights**,<sup>18</sup> and, where applicable, to be fully comply with the International Code of Conduct for Private Security Service Providers.<sup>19</sup>
  5. That the government of **Australia promptly ratifies and fully implements without delay the Optional Protocol to the Convention Against Torture**, affording unimpeded access for international and domestic human rights observers to all places of detention within Australia and under its effective control.
  6. That the government of **Australia promptly allows the UN Working Group on Arbitrary Detention access to all ‘on-shore’ and ‘off-shore’ detention facilities**.
  7. That the government of **Australia protects the safety and security of human rights defenders, and their freedom of expression**, including through:
    - a. **repealing all legislation that has the effect of criminalizing the actions of human rights defenders**, in particular repealing the *Border Force Act 2015* sections which criminalize the provision of information on immigration detention, i.e. legislatively end the criminalization of human rights defenders.
    - b. **Providing assurances to all human rights defenders that they will not be subject to criminal prosecution** for providing information about Australia’s immigration detention system to the UN.
    - c. **Enact legislation to protect human rights defenders**, in line with the UN Declaration on Human Rights Defenders.

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<sup>18</sup> OHCHR, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect, and Remedy’ Framework, UN Doc. HR/PUB/11/04, 2011.

<sup>19</sup> Swiss Confederation, International Code of Conduct for Private Security Service Providers, 9 November 2010.