Chapter 1[1]

New and continuing matters

1.1 In this chapter the committee has examined the following bills and legislative instruments for compatibility with human rights:

- bills introduced into the Parliament between 22 to 25 March 2021;
- legislative instruments registered on the Federal Register of Legislation between 3 to 21 March 2021.[2]
- one legislative instrument[3] previously commented on.

1.2 Bills and legislative instruments from this period that the committee has determined not to comment on are set out at the end of the chapter.

1.3 The committee comments on the following bills and legislative instruments, and in some instances, seeks a response or further information from the relevant minister.

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 5 of 2021*; [2021] AUPJCHR 44.

2 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: https://www.legislation.gov.au/AdvancedSearch.

3 Social Security (Parenting payment participation requirements – class of persons) Instrument 2021 [F2021L00064].

Bills

Family Law Amendment (Federal Family Violence Orders) Bill 2021[1]

Purpose	This bill seeks to establish new federal family violence orders which, if breached, can be criminally enforced
Portfolio	Attorney-General
Introduced	House of Representatives, 24 March 2021
Rights	Life; security of the person; equality and non-discrimination; rights of the child; freedom of movement; private life

Federal family violence orders

1.4 This bill seeks to amend the *Family Law Act 1975* (Family Law Act) to introduce federal family violence orders in relation to a child or to a party to a marriage.[2] A listed court[3] may make a federal family violence order on application by a party or of its own motion.[4] The order may provide for the personal protection of a child or a person related to a child, such as their parent or a person who has parental responsibility for the child, or a party to a marriage.[5] In order to make a federal family violence order, the court would need to be satisfied that:

- it is appropriate for the welfare of the child (in relation to a child) or appropriate in the circumstances (in relation to a party to a marriage);
- on the balance of probabilities, the protected person has been subjected or (in the case of a child) exposed to family violence or there are reasonable

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Family Law Amendment (Federal Family Violence Orders) Bill 2021, *Report 5 of 2021*; [2021] AUPJCHR 45.

2 Schedule 1, item 1.

3 Schedule 1, item 2: A listed court includes the Family Court, Federal Circuit Court of Australia, Family Court of Western Australia and the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia.

4 Schedule 1, item 13, proposed subsection 68AC(2); item 36, proposed subsection 113AC(2).

5 Schedule 1, item 13, proposed subsection 68AC(3); item 36, proposed subsection 113AC(3).

grounds to suspect that the protected person is likely to be subjected or (in the case of a child) exposed to family violence;[6] and

- there is no family violence order in force in relation to the parties.[7]

1.5 The court would also be required to take into account other matters in making an order, including as the primary consideration, the safety and welfare of the child or protected person, as well as any additional considerations the court considers relevant, such as the criminal history of the person against whom the order is directed.[8]

1.6 The court may make the order on the terms it considers appropriate for the welfare of the child or in the circumstances, including any of the terms set out in the bill and any term the court considers reasonably necessary to ensure the personal protection of the protected person. For example, the terms may prohibit the person against whom the order is directed from: subjecting the protected person to family violence; contacting the protected person; being within a specified distance of the protected person or within an area that the protected person is likely to be located.[9]

1.7 The bill would make it a criminal offence to breach a term of a federal family violence order, carrying a penalty of imprisonment for two years, 120 penalty units or both.[10] The default defences prescribed in the Criminal Code would be available in relation to this offence, except for the defence relating to self-induced intoxication.[11] The bill also provides that criminal responsibility would not be extended to a protected

6 Section 4AB of the *Family Law Act 1975* defines family violence as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful'. Examples of family violence include assault, sexual assault, stalking and unreasonably denying the family member financial autonomy. A child is exposed to family violence if they see or hear family violence or otherwise experience the effects of family violence.

7 Schedule 1, item 13, proposed subsection 68AC(6); item 36, proposed subsection 113AC(4). Subsections 68AC(7) and 113AC(5) provide that in satisfying itself that no family violence order is in force, the court must inspect any record, database or register that contains information about family violence orders; is maintained by a Commonwealth, state or territory department, agency or authority; and is or can reasonably be made available to the court.

8 Schedule 1, item 13, proposed subsection 68AC(9); item 36, proposed subsection 113AC(7).

9 Schedule 1, item 13, proposed subsection 68AC(8); item 36, proposed subsection 113AC(6).

10 Schedule 1, item 13, proposed section 68AG; item 36, proposed section 113AG.

11 Schedule 1, item 13, proposed subsections 68AG(2)–(3); item 36, proposed subsections 113AG(2)–(3). See explanatory memorandum, p. 45.

person in relation to conduct engaged in by that person that results in a breach of the order.[12]

Preliminary international human rights legal advice

Multiple rights

1.8 The statement of compatibility notes that the measure would enable federal and family law courts to provide additional protection for victims of family violence by enabling the courts to make an order for their personal protection.[13] It states that the measure would offer stronger protection for victims of family violence and in turn, would address the impacts of gender-based violence on women.[14] The second reading speech notes that the measure will particularly benefit victims who are already before a family law court, as the measure will reduce the need for vulnerable families to navigate multiple courts, thus saving time and money, and enabling victims and survivors to access protection when they require it most.[15] To the extent that the measure protects individuals from family violence, particularly women from gender-based violence, it would promote a number of rights, including the rights to life, security of the person, equality and non-discrimination (noting that women disproportionately experience family violence) and the rights of the child.

1.9 The right to life[16] imposes an obligation on the state to protect people from being killed by others or identified risks.[17] The United Nations (UN) Human Rights Committee has stated the duty to protect life requires States parties to 'enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in the deprivation of life'.[18] The duty to protect life also requires States parties to adopt special measures of protection towards vulnerable persons, including victims of

12 Schedule 1, item 13, proposed subsection 68AG(4); item 36, proposed subsection 113AG(4). See explanatory memorandum, p. 45.

13 Statement of compatibility, p. 7.

14 Statement of compatibility, p. 7.

15 Second reading speech, pp. 4–5.

16 International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

17 United Nations Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3]: the right should not be interpreted narrowly and it 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

18 United Nations Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [20].

domestic and gender-based violence and children.[19] The UN Committee on the Elimination of Discrimination against Women has noted that:

> Women's right to a life free from gender-based violence is indivisible from and interdependent on other human rights, including the rights to life, health, liberty and security of the person, equality and equal protection within the family, freedom from torture, cruel, inhuman or degrading treatment, and freedom of expression, movement, participation, assembly and association.[20]

1.10 The right to security of the person requires the State to take steps to protect people against interference with personal integrity by others.[21] This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation (including providing protection for people from domestic violence).

1.11 The UN Committee on the Elimination of Discrimination against Women has stated that 'gender-based violence against women constitutes discrimination against women under article 1 and therefore engages all obligations under the Convention' on the Elimination of All Forms of Discrimination against Women.[22] Article 2 imposes an immediate obligation on States to 'pursue by all appropriate means and without delay a policy of eliminating discrimination against women', including gender-based violence against women.[23] Measures to tackle gender-based violence include 'having laws, institutions and a system in place to address such violence and ensuring that they function effectively in practice'.[24] The UN Committee on the Elimination of Discrimination against Women has recommended that States implement 'appropriate and accessible protective mechanisms to prevent further or potential violence', including the 'issuance and monitoring of eviction, protection, restraining or

19 UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [23].

20 Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* (2017) [15].

21 International Covenant on Civil and Political Rights, article 9(1).

22 Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* (2017) [21]. The Committee suggested at paragraph [2] that the 'prohibition of gender-based violence against women has evolved into a principle of customary international law'.

23 Convention on the Elimination of Discrimination against Women, article 2.

24 Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* (2017) [24].

emergency barring orders against alleged perpetrators, including adequate sanctions for non-compliance'.[25]

1.12 Regarding the rights of the child, children have special rights under human rights law taking into account their particular vulnerabilities.[26] States have an obligation to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual exploitation and abuse.[27]

1.13 In enabling the making of family violence orders, the measure promotes all of these human rights. However, in order to achieve its important objectives, it also necessarily engages and limits a number of other rights, insofar as the measure will have the effect of prohibiting and restricting certain behaviours, movements and communications of the person against whom the order is directed. The statement of compatibility does not relevantly recognise that any of these rights may be limited.

1.14 In particular, the measure would enable the court to include a broad range of terms in a federal family violence order, such as prohibiting a person from being within a specified distance of a specified place or area that the protected person is, or is likely to be, located, such as the protected person's place of residence, workplace, education or care facility, local shopping centre or gym.[28] A term may also require the person against whom the order is directed to leave a place or area if the protected person is at that same place or area, or the protected person requests that person to leave the place or area.[29] Such terms would limit a person's right to freedom of movement and right to a private life. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country.[30] It also encompasses freedom from procedural impediments, such as unreasonable restrictions on accessing public places. The right to privacy prohibits arbitrary and

25 Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* (2017) [31].

26 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

27 Convention on the Rights of the Child, articles 19, 34, 35 and 36.

28 Explanatory memorandum, p. 28.

29 Schedule 1, item 13, proposed subsection 68AC(8); item 36, proposed subsection 113AC(6).

30 International Covenant on Civil and Political Rights, article 12.

unlawful interferences with an individual's privacy, family, correspondence or home life.[31]

1.15 In addition, the bill would confer a broad discretion on the court to include in the order any term that it considers reasonably necessary to ensure the personal protection of the protected person. As such, it is possible that the terms of an order may also engage and limit other rights. The statement of compatibility does not acknowledge that the measure may limit these rights and as such there is no compatibility assessment as to whether any limitation is permissible. Most human rights, including the rights to freedom of movement and respect for private life, may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.16 As to the objective being pursued by the measure, the statement of compatibility states that it seeks to better protect victims of family violence and address the impacts of gender-based violence on women.[32] This is a legitimate objective for the purposes of international human rights and insofar as the measure would enable the federal and family courts to make federal family violence orders for the personal protection of victims of family violence, the measure appears to be rationally connected to this objective.

1.17 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In assessing the proportionality of this measure, it is necessary to consider the scope of the measure, the potential interference with rights, and the existence of safeguards. The explanatory memorandum states that proposed subsections 68AC(8) and 113AC(6), which set out a non-exhaustive list of the kind of terms the court could include in an order, are intended to remove any doubt as to the court's authority to impose terms of the kind specified in the provisions and, without fettering the court's discretion, to provide the court with some guidance about terms that may be suitable to include.[33] Regarding the broad discretion conferred on the court to include any terms that it considers reasonably necessary to ensure the personal protection of the protected person, the explanatory memorandum notes that this provision is intentionally non-prescriptive and is intended to confirm that the court is able and encouraged to customise orders on a case by case basis to meet the unique needs of the individuals

31 International Covenant on Civil and Political Rights, article 17; UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4]. The UN Human Rights Committee further explains that this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons.

32 Statement of compatibility, p. 7.

33 Explanatory memorandum, pp. 26, 88.

affected.[34] The explanatory memorandum states that there is no limit on the number or combination of terms that a court can impose, provided the terms are internally consistent and consistent with other relevant orders, reasonably capable of being complied with together, and practically enforceable.[35]

1.18 While proposed subsections 68AC(8) and 113AC(6) are drafted in broad terms, the bill appears to provide some legislative guidance as to how the courts should exercise their discretion. In particular, the bill provides that the terms should be appropriate for the welfare of the child or in the circumstances (for a party to a marriage), and reasonably necessary to ensure the personal protection of the protected person.[36] The safety and welfare of the protected person must also be a primary consideration. In addition, the explanatory memorandum provides useful guidance as to the kinds of term that could be included and how each term could be applied in practice, with an emphasis on terms being consistent and practically enforceable.[37] The broad scope of the measure would appear to ensure that the courts have sufficient flexibility to treat different cases differently, having regard to the facts and circumstances of each individual case. This flexibility may assist with the proportionality of the measure. However, the breadth of the measure may also mean that the potential interference with rights is substantial, for instance, if an individual's movements, communication, and privacy were restricted. In this regard, in assessing proportionality it is important that the measure is accompanied by sufficient safeguards to ensure that any limitation on rights is proportionate.

1.19 Noting that the statement of compatibility did not acknowledge that the measure may limit the rights to freedom of movement and a private life, in order to assess the proportionality of this measure, further information is required as to the existence of any safeguards and how such safeguards would likely operate in practice.

Committee view

1.20 The committee notes that the bill seeks to introduce federal family violence orders in relation to a child or a party to a marriage, which, if breached, can be criminally enforced. The court may make a federal family violence order on the terms it considers appropriate for the welfare of the child or in the circumstances, including any term the court considers reasonably necessary to ensure the personal protection of the protected person.

1.21 The committee considers that to the extent that the measure protects individuals from family violence, particularly women from gender-based violence, it

34 Explanatory memorandum, pp. 29, 91–92.

35 Explanatory memorandum, pp. 29, 92.

36 Schedule 1, item 13, proposed subsections 68AC(6) and 68AC(8)(h); item 36, proposed subsection 113AC(4).

37 Explanatory memorandum, pp. 25–29; 88–92.

would promote a number of rights, including the right to life, security of the person, right to equality and non-discrimination (noting that women disproportionately experience family violence) and the rights of the child. By enabling the court to make federal family violence orders for the personal protection of victims of family and gender-based violence, the measure would help to realise Australia's international human rights obligations to protect life; eliminate discrimination against women; including gender-based violence against women; protect people against interference with personal integrity by others; and protect children from all forms of violence and abuse. In particular, the committee notes the UN Committee on the Elimination of Discrimination against Women's recommendation that States implement appropriate and accessible protective mechanisms to prevent further or potential violence, including protection orders against alleged perpetrators and adequate sanctions for non-compliance with such orders.

1.22 However, the committee also notes that in order to achieve its important objectives, the measure also necessarily engages and limits a number of other rights insofar as it will have the effect of prohibiting and restricting certain behaviours, movements and communications of the person against whom the order is directed. These rights can be subject to permissible limitations that are reasonable, necessary and proportionate. However, the statement of compatibility does not relevantly recognise that any rights are limited and so provides no assessment as to the compatibility of the bill with these rights.

1.23 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this measure, and as such seeks the minister's advice as to the matters set out at paragraph [1.19].

Relationship between federal family violence orders and state and territory family violence orders

1.24 The bill seeks to introduce provisions to deal with the concurrent operation of federal and state and territory laws, and the relationship between federal and state and territory family violence orders. The bill provides that the proposed provisions establishing federal family violence orders are not intended to exclude or limit the operation of state or territory laws which are capable of operating concurrently. However, a state or territory family violence order that is inconsistent with a federal family violence order would be invalid to the extent of that inconsistency.[38] With respect to a federal family violence order in relation to a child, the bill provides that where a state or territory court is exercising powers to suspend or revoke a federal

38 Schedule 1, item 24, proposed sections 68NA and 68ND; item 44, proposed sections 114AB and 114AE.

family violence order, specified provisions of the Family Law Act do not apply, including any provision that would otherwise make the best interests of the child the paramount consideration.[39] With respect to a federal family violence order in relation to a party to a marriage, the bill would allow certain provisions to be specified in the regulations that would not apply to a state or territory court exercising its power to suspend or revoke a federal family violence order.[40]

Preliminary international human rights legal advice

Rights of the child

1.25 This aspect of the bill may engage and limit the rights of the child insofar as it would have the effect of not requiring the best interests of the child to be a paramount consideration in all actions concerning children. Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[41] This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[42] The UN Committee on the Rights of the Child has explained that:

> the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child.[43]

1.26 The right of the child to have his or her best interests taken as a primary consideration in all actions concerning them may be limited by proposed section 68NC, which provides that where a state or territory court exercises its powers to suspend or revoke a federal family violence order, any provision that would otherwise make the best interests of the child the paramount consideration would not apply.[44] Noting the UN Committee on the Rights of the Child's advice that children's best interests must have 'high priority and not just [be] one of several considerations', proposed section 68NC may have the effect of downgrading the 'best interests of the child' from a paramount or primary consideration to a relevant consideration.[45] In addition, in

39 Schedule 1, item 24, proposed section 68NC.

40 Schedule 1, item 44, proposed section 114AE.

41 Convention on the Rights of the Child, article 3(1).

42 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

43 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [37]; see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

44 Schedule 1, item 24, proposed section 68NC.

45 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [39].

circumstances where the terms of a state or territory family violence order are invalid to the extent of any inconsistency with a federal family violence order, it is unclear whether this could have the effect of weakening protection for victims of family violence, including children.

1.27 The rights of the child may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. The explanatory memorandum explains that proposed section 68NC is intended to clarify that the best interests of the child is not the paramount consideration in decisions to revoke or suspend a federal family violence order, although it would remain a relevant matter that the court would need to consider.[46] The objective being pursued by this measure is unclear, as the statement of compatibility and the explanatory memorandum do not identify that the measure may limit the rights of the child nor address why it is necessary to downgrade the 'best interests of the child' from a paramount consideration to a relevant consideration. While the broader objectives of the bill are legitimate objectives for the purposes of international human rights law, further information is required to assess whether there is a pressing and substantial concern which gives rise to the need for this specific measure, and whether the measure is rationally connected to that objective.

1.28 In relation to assessing proportionality, the explanatory memorandum notes that the best interests of the child would still be a relevant matter for the court to take into account when exercising its power to revoke or suspend a federal family violence order.[47] However, it is unclear whether this level of consideration would be adequate to meet the 'strong legal obligation on States' to give primary consideration to the best interests of the child.[48] Further information is therefore required to assess whether the measure is a proportionate limit on the rights of the child.

1.29 In order to assess the compatibility of this measure, further information is required as to:

(a) what is the objective being pursued by proposed section 68NC and how is the measure rationally connected to this objective;

46 Explanatory memorandum, p. 76.

47 Explanatory memorandum, p. 76; Schedule 1, item 24, proposed subsection 68NB(5), which would require the court to have regard to whether the federal family violence order is adequate or is appropriate for the welfare for the child and the purposes of Division 11, as set out in substituted subsection 68N(2)(e) and section 60B of the *Family Law Act 1975*, which includes ensuring the best interests of the child are met as one of the objectives.

48 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [36].

(b) the likely circumstances in which the best interests of the child would not be considered as a paramount or primary consideration;

(c) what safeguards exist, if any, to ensure that any limitation on the rights of the child is proportionate; and

(d) whether it is possible that the provisions which provide that terms of a state or territory family violence order are invalid to the extent of any inconsistency with a federal family violence order could have the effect of weakening protection for victims of family violence, including children.

Committee view

1.30 The committee notes that the bill seeks to introduce provisions that deal with the concurrent operation of federal and state and territory laws, and the relationship between federal and state and territory family violence orders. In particular, the bill provides that where a state or territory family violence order is inconsistent with a federal family violence order, it would be invalid to the extent of that inconsistency. The committee notes that the bill also provides that where a state or territory court is exercising powers to suspend or revoke a federal family violence order in relation to a child, any provision that would otherwise make the best interests of the child the paramount consideration would not apply.

1.31 The committee notes that this measure may limit the right of the child to have his or her best interests taken as a primary consideration in all actions or decisions that concern them. This right may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate. The committee notes that the statement of compatibility does not identify that this measure may limit rights and as such, no compatibility assessment has been provided.

1.32 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this measure, and as such seeks the minister's advice as to the matters set out at paragraph [1.29].

Migration Amendment (Clarifying International Obligations for Removal) Bill 2021[1]

Purpose	This bill seeks to amend the *Migration Act 1958* to: • modify the effect of section 197C to ensure it does not require or authorise the removal of an unlawful non-citizen who has been found to engage protection obligations through the protection visa process unless: - the decision finding that the non-citizen engages protection obligations has been set aside; - the minister is satisfied that the non-citizen no longer engages protection obligations; or - the non-citizen requests voluntary removal; and • ensure that, in assessing a protection visa application, protection obligations are always assessed, including in circumstances where the applicant is ineligible for visa grant due to criminal conduct or risks to security
Portfolio	Immigration, Citizenship, Migrant Services and Multicultural Affairs
Introduced	House of Representatives, 25 March 2021
Rights	Non-refoulement; liberty; prohibition against torture and ill-treatment; rights of the child

Removal of unlawful non-citizens where protection obligations engaged

1.33 Section 198 of the *Migration Act 1958* (the Migration Act) sets out the circumstances in which mandatory removal of an 'unlawful non-citizen' is authorised.[2] An 'unlawful non-citizen' is a person who is a non-citizen in the migration zone and does not hold a lawful visa.[3] Subsection 197C(1) provides that for the purposes of removal of an 'unlawful non-citizen' under section 198, 'it is irrelevant whether Australia has non-refoulement obligations in respect of that person'.[4] Non-

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, *Report 5 of 2021*; [2021] AUPJCHR 46.

2 *Migration Act 1958*, section 198.

3 *Migration Act 1958*, sections 13–14. Migration zone is defined in section 5.

4 *Migration Act 1958*, subsection 197(1).

refoulement obligations are international law obligations that require Australia not to return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm. Subsection 197C(2) specifies that an 'officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen'.[5]

1.34 This bill proposes to add subsection 197C(3), which would provide that 'despite subsections (1) and (2), section 198 does not require or authorise an officer to remove an unlawful non-citizen to a country if': that person's valid application for a protection visa has been finally determined; a protection finding has been made in relation to that person; that protection finding has not been quashed, set aside or found by the minister to be no longer applicable; and the person has not asked the minister to be removed from the country.[6] Proposed subsections 197C(4)–(7) would clarify the meaning of a protection finding for the purposes of proposed subsection 197C(3).[7] In addition, the bill proposes that a reference in 197C of the Migration Act to a protection finding within the meaning of proposed subsections 197C(5) or (6) would include a reference to a protection finding made before the Schedule commences.[8]

1.35 Proposed section 36A of this bill would also require the minister, in considering an application for a protection visa, to consider and make a record of whether they are satisfied that the applicant meets certain specified criterion for a protection visa under section 36 of the Migration Act.[9] The minister would be required to consider and make a record of their finding before deciding whether to grant or refuse to grant a visa or considering whether the person satisfies other criteria for the grant of a visa.[10] Read in conjunction with the proposed amendments to 197C, proposed section 36A would have the effect of ensuring that a protection finding is made within the meaning of proposed subsections 197(4) or (5) before the minister considers whether the person meets other criteria for the grant of a protection visa.[11]

5 *Migration Act 1958*, subsection 197(2).

6 Schedule 1, item 3, proposed subsection 197C(3).

7 Schedule 1, item 3, proposed subsections 197C(4)–(7).

8 Schedule 1, subitem 4(3).

9 Schedule 1, item 1, proposed subsection 36A(1).

10 Schedule 1, item 1, proposed subsection 36A(2).

11 Explanatory memorandum, pp. 5–6.

Preliminary international human rights legal advice

Rights to non-refoulement; liberty; rights of the child; prohibition against torture and ill-treatment

Non-refoulement obligations

1.36 The bill engages, and may support Australia to uphold, its non-refoulement obligations insofar as it seeks to amend section 197C of the Migration Act to clarify that the removal power under section 198 does not require or authorise the removal of a person who is deemed an unlawful non-citizen and for whom a protection finding has been made through the protection visa process. Australia has non-refoulement obligations under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[12] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[13] Non-refoulement obligations are absolute and may not be subject to any limitations.[14] The committee has previously raised concerns with respect to the implications of section 197C of the Migration Act for Australia's non-refoulement obligations.[15] The committee previously considered that section 197C of the Migration Act, by permitting the removal of persons from Australia unconstrained by Australia's non-refoulement obligations, is incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[16] The United Nations (UN) Human Rights Committee has also raised particular concerns about section 197C, recommending that Australia:

> ensure that the non-refoulement principle is secured in law and strictly adhered to in practice, and that all asylum seekers, regardless of their mode of arrival, have access to fair and efficient refugee status determination

12 Australia also has protection obligations under the Convention relating to the Status of Refugees 1951 (and the 1967 Protocol), however, this is not one of the seven listed treaties under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

13 UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018). See also UN Human Rights Committee, *General Comment No. 20: article 7 (prohibition against torture)* (1992) [9].

14 UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018) [9].

15 See the committee's analysis of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 in Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 77–78.

16 See the committee's analysis of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 in Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 77–78.

> procedures and non-refoulement determinations, including by…repealing section [197C of the Migration Act] and introducing a legal obligation to ensure that the removal of an individual must always be consistent with the State party's non-refoulement obligations.[17]

1.37 The statement of compatibility states that the measure would ensure that the removal powers do not require or authorise the removal of an unlawful non-citizen whose valid application for a protection visa has been finally determined, and for whom a protection finding has been made through the protection visa process, in circumstances where to do so would be inconsistent with Australia's non-refoulement obligations.[18] In this way, the measure would ensure that a person cannot be removed to the country in relation to which their protection claims have been accepted, unless the non-refoulement obligations no longer apply or the person requests in writing to be removed.[19] The statement of compatibility states that by ensuring that protection obligations are always assessed, even in circumstances where the applicant is ineligible for a visa because of criminal conduct or security risks, the measure enhances Australia's ability to uphold its non-refoulement obligations.[20] The measure appears to support Australia's ability to adhere to its non-refoulement obligations to the extent that it would provide a statutory protection to ensure that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, even where they are ineligible for the grant of a protection visa.[21]

Right to liberty and rights of the child

1.38 However, to the extent that the measure may also result in prolonged or indefinite immigration detention of persons who cannot be removed under

17 UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/6 (2017) [33]–[34].

18 Statement of compatibility, p. 12.

19 Statement of compatibility, p. 12.

20 Statement of compatibility, pp. 12–13.

21 Although, it is unclear whether ministerial Direction No. 90, which comes into effect on 15 April 2021, will have an adverse impact on this measure in practice, for example, by weakening the statutory protection of Australia's non-refoulement obligations. With respect to Australia's international non-refoulement obligations, the Direction provides that: '[i]n making a decision under section 501 or 501CA, decision-makers should carefully weigh any non-refoulement obligation against the seriousness of the non-citizen's criminal offending or other serious conduct. In doing so, decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable, and in the meantime, detention under section 189, noting also that section 197C of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen': Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Direction No. 90 – Visa refusal and cancellation under section 501 and renovation of a mandatory cancellation of a visa under section 501CA* (15 April 2021) [9.1(2)].

section 198 because Australia's non-refoulement obligations are enlivened, the measure may also engage and limit the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[22] The notion of 'arbitrariness' includes elements of inappropriateness, injustice, lack of predictability and due process of law.[23] Accordingly, any detention must not only be lawful, but also reasonable, necessary and proportionate in all of the circumstances as well as subject to periodic judicial review.[24] In the context of mandatory immigration detention, detention may become arbitrary where individual circumstances are not taken into account; other, less intrusive measures could have achieved the same objective; a person may be subject to a significant length of detention; and a person is deprived of legal safeguards allowing them to challenge their indefinite detention.[25]

1.39 Under the Migration Act, the consequence of a visa refusal or cancellation is mandatory immigration detention. This consequence is of particular concern in relation to individuals who have been found to engage Australia's non-refoulement obligations because, as clarified by the proposed amendments to section 197C in this bill, such individuals cannot be removed from Australia to the country in respect of which there has been a protection finding.[26] This may give rise to the prospect of prolonged or indefinite immigration detention.[27] The UN Human Rights Committee has made clear that '[t]he inability of a state to carry out the expulsion of an individual

22 International Covenant on Civil and Political Rights, article 9.

23 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.3].

24 UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/6 (2017) [38].

25 See UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [18]; *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.4]; *M.M.M et al v Australia*, UN Human Rights Committee Communication No. 2136/2012 (2013) [10.4].

26 *Migration Act 1958*, sections 189, 196 and 198. Section 196 provides that an unlawful non-citizen detained under section 189 can be kept in immigration detention until (a) they are removed from Australia under sections 198 or 199; (aa) an officer begins to deal with them under subsection 198AD(3); (b) they are deported under section 200; or (c) they are granted a visa.

27 See the discussion below at paragraphs [1.53]–[1.54].

because of statelessness or other obstacles does not justify indefinite detention'.[28] In relation to the mandatory detention scheme under the Migration Act, the UN Human Rights Committee has observed that the scheme:

> does not meet the legal standards under article 9 of the Covenant [with respect to the right to liberty] due to the lengthy periods of migrant detention it allows and the indefinite detention of refugees and asylum seekers who have received adverse security assessments from the Australian Security Intelligence Organisation, without adequate procedural safeguards to meaningfully challenge their detention.[29]

1.40 The statement of compatibility acknowledges that the right to liberty is engaged by the bill.[30] It states that the amendments are aimed at protecting from removal persons who engage Australia's non-refoulement obligations but are ineligible for a grant of a protection visa because of character or security grounds. The statement of compatibility states that this means that persons affected by this bill 'may be subject to ongoing immigration detention under section 189 of the Migration Act'.[31] It notes that such persons may be detained until their removal is reasonably practicable, for example, if the circumstances in the relevant country improve such that Australia's protection obligations are no longer engaged or a safe third country is willing to accept the person.[32] Therefore, to the extent that the measure would subject persons to whom protection obligations are owed but who are ineligible for a protection visa to ongoing mandatory immigration detention, without any time limit on the overall duration of detention, the measure limits the right to liberty.

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28 UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [18]. See, also*, C v Australia,* UN Human Rights Committee Communication No.900/1999 (2002) [8.2]; *Bakhtiyari et al. v. Australia,* UN Human Rights Committee Communication No.1069/2002 (2003) [9.3]; *D and E v. Australia,* UN Human Rights Committee Communication No. 1050/2002 (2006) [7.2]; *Shafiq v. Australia*, UN Human Rights Committee Communication No. 1324/2004 (2006) [7.3]; *Shams et al. v. Australia,* UN Human Rights Committee Communication No. 1255/2004 (2007) [7.2]; *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.3]; *F.J. et al. v. Australia,* UN Human Rights Committee Communication No. 2233/2013 (2016) [10.4].

29 UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/6 (2017) [37]. The Committee also raised concerns about 'poor conditions of detention in some facilities, the detention of asylum seekers together with migrants who have been refused a visa due to their criminal records, the high reported rates of mental health problems among migrants in detention, which allegedly correlate to the length and conditions of detention, and the reported increased use of force and physical restraint against migrants in detention (arts. 2, 7, 9, 10, 13 and 24)'.

30 Statement of compatibility, pp. 13–14.

31 Statement of compatibility, p. 13.

32 Statement of compatibility, p. 13.

1.41 Furthermore, where the measure applies to children, it may also engage and limit the rights of the child.[33] Children have special rights under international human rights law taking into account their particular vulnerabilities.[34] In the context of immigration detention, the UN Human Rights Committee has stated that:

> children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.[35]

1.42 The right to liberty and the rights of the child may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

Legitimate objective and rational connection

1.43 The statement of compatibility states that the purpose of the bill is to clarify that the duty to remove under section 198 of the Migration Act should not be enlivened where to do so would be in breach of Australia's protection obligations, as identified in a protection visa assessment process. The statement of compatibility[36] notes that the amendments are necessary because of the interpretation of section

33 Including the requirement that the best interests of the child be the primary consideration in all actions concerning children; the obligation to provide protection and humanitarian assistance to child refugees and asylum seekers; the requirement that detention is used only as a measure of last resort and for the shortest appropriate period of time; and the obligation to take measures to promote the health, self-respect and dignity of children recovering from torture and trauma: Convention on the Rights of the Child, articles 3(1), 22, 37(b) and 39.

34 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

35 UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [18].

36 Statement of compatibility, p. 11.

197C in the Federal Court decisions of *DMH16*[37] and *AJL20*,[38] in which section 197C was interpreted as obliging the minister to send an unlawful non-citizen back to a country despite any protection obligations owed (and where removal is not carried out as soon as reasonably practicable, the person may be found to be unlawfully detained and must be released from immigration detention). The objective of upholding Australia's non-refoulement obligations is a legitimate objective for the purposes of international human rights law. To the extent that the proposed amendments to section 197C prevent persons to whom protection obligations are owed from being removed to the country in respect of which there has been a protection finding, the measure appears to be rationally connected to the objective of upholding Australia's non-refoulement obligations.

Proportionality

1.44 The key question is whether the proposed limitation on rights is proportionate to the objective being sought. In assessing the proportionality of this measure, it is necessary to consider whether the proposed limitation: is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and whether there is sufficient flexibility to treat different cases differently. The UN Human Rights Committee has noted that decisions to subject asylum seekers to protracted detention 'must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review'.[39]

37 *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576. In this case, the Court ordered that the decision of the Minister to refuse to grant a protection visa to the applicant be quashed and returned to the minister for reconsideration. At [30], the court held that: 'Had the Minister properly understood the consequence of the refusal of the protection visa at the time he made the decision there is a possibility that he would have granted the protection visa in order to avoid the consequence that the applicant would be returned to Syria in contravention of Australia's non-refoulement obligations in respect of the applicant'.

38 *AJL20 v Commonwealth of Australia* [2020] FCA 1305. In this case, the court found the applicant's detention by the Commonwealth to be unlawful and ordered the applicant's release from detention. The detention was found to be unlawful because: 'the removal of the applicant from Australia has not been shown to have been undertaken or carried into effect as soon as reasonably practicable, that there was therefore a departure from the requisite removal purpose for the applicant's detention over the course of that period and that, as a consequence, the applicant's detention by the Commonwealth was unlawful throughout that period' (at [128] and [171]).

39 UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [18]. See also *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.3]; *MGC v Australia*, UN Human Rights Committee Communication No.1875/2009 (2015) [11.6].

1.45 With respect to the limit on the right to liberty, the statement of compatibility notes that immigration detention is a key component of border management and assists to manage potential threats to the Australian community as well as ensure that people are available for removal.[40] It explains that detention is a last resort measure for managing unlawful non-citizens, particularly those whose removal may not be practicable in the reasonably foreseeable future.[41] The statement of compatibility notes that the government's preference is to manage such persons in the community if possible, subject to meeting relevant requirements such as not presenting an unacceptable risk to the safety and good order of the community.[42] In addition, the statement of compatibility notes that the minister has a personal discretionary power to intervene in an individual case and grant a visa to a person in immigration detention where they think it is in the public interest to do so.[43] The statement of compatibility states that it is within the discretion of the minister to decide what is and what is not in the public interest.[44] The minister also has a discretionary power to make a residence determination allowing a detainee to reside outside of immigration detention at a specified address in the community, subject to conditions.[45] The statement of compatibility notes that these discretionary powers would enable the minister to take into account individual circumstances and implement the least restrictive option, thus helping to ensure that immigration detention is reasonable, necessary, proportionate and not arbitrary.[46] The statement of compatibility does not identify any other safeguards beyond the minister's discretionary powers.

1.46 While the minister's discretionary powers may provide some flexibility to treat individual cases differently, it is not apparent that they would necessarily serve as an effective safeguard in practice. This is because the minister is not under a duty to consider whether to exercise these discretionary powers; the threshold for exercising the discretionary powers is a broad public interest test; the powers are non-reviewable and non-compellable; and the powers do not attract the requirements of procedural fairness.[47] It is also unclear how often these powers are exercised in practice. Additionally, while the statement of compatibility indicates that it is the government's preference to manage non-citizens in the community wherever possible and use

40 Statement of compatibility, p. 13.

41 Statement of compatibility, p. 13.

42 Statement of compatibility, p. 13–14.

43 *Migration Act 1958*, section 195A; statement of compatibility, p. 14.

44 Statement of compatibility, p. 14.

45 *Migration Act 1958*, section 197AB; statement of compatibility, p. 14.

46 Statement of compatibility, p. 14.

47 *Migration Act 1958*, subsections 195A(4) and 197AE. See *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31.

detention as a last resort, there is no legislative requirement to do so.[48] Rather, detention is the default option for managing unlawful non-citizens under the Migration Act rather than a last resort.[49] The discretionary powers provide only a very limited exception to the rule of mandatory detention. It is also unclear the extent to which the individual circumstances of detainees, including the effect of detention on their physical or mental health, would be considered in the minister's decision as to whether exercising the discretion is in the public interest. The UN Human Rights Committee has indicated that detention may be arbitrary where there is a failure to take into account relevant individual circumstances in decisions about detention, including the effect of detention on a detainee's health, and there is an absence of particular reasons specific to the individual to justify detention.[50] For these reasons, it does not appear that the minister's discretionary powers alone would be a sufficient safeguard for the purpose of a permissible limitation under international human rights law.

1.47 A related consideration in assessing proportionality is whether there are less rights restrictive measures, that is, alternatives to detention, that could be applied to individuals affected by the measure.[51] In its *Detention Guidelines*, the UN High Commissioner for Refugees has made clear that:

> consideration of alternatives to detention – from reporting requirements to structured community supervision and/or case management programmes…is part of an overall assessment of the necessity, reasonableness and proportionality of detention. Such consideration ensures that detention of asylum-seekers is a measure of last, rather than first, resort. It must be shown that in light of the asylum-seeker's particular circumstances, there were not less invasive or coercive means of achieving the same ends.[52]

1.48 The UN High Commissioner for Refugees further stated that alternatives to detention must be accessible in practice (not merely available on paper) and should not be used as alternative forms of detention.[53] The minister's discretionary powers

48 Statement of compatibility, pp. 13–14.

49 Section 189 requires the mandatory detention of unlawful non-citizens without regard to individual circumstances: *Migration Act 1958*, subsection 189(1). The duration of detention is set out in section 196.

50 UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [18].

51 See UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [34].

52 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [35].

53 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [37]–[38].

do not appear to offer an accessible alternative to detention because there is no legislative requirement to assess, on a case by case basis, alternatives to detention; the Migration Act provides minimal flexibility to apply less restrictive measures in individual cases, noting that detention remains a first, rather than last, resort; and a residence determination is an alternative form of detention.

1.49 Another relevant factor in assessing proportionality is whether there is the possibility of oversight and the availability of review. Under international human rights law, a person who is detained, for any reason, has the right to challenge the lawfulness of their detention in court without delay.[54] The UN Human Rights Committee has emphasised that periodic re-evaluation and judicial review of immigration detention must be available to scrutinise whether the continued detention is lawful and non-arbitrary.[55] Judicial review in this context must also be effective so as to enable a detainee to challenge their detention in substantive terms. In considering the availability of judicial review under the Migration Act and detainees' ability to challenge the legality of their detention, the UN Human Rights Committee has observed:

> In view of the High Court's 2004 precedent in Al-Kateb v Godwin declaring the lawfulness of indefinite immigration detention and the absence of relevant precedents in the State party's response showing the effectiveness of an application before the High Court in similar situations, the Committee is not convinced that it is open to the Court to review the justification of the author's detention in substantive terms. Furthermore, the Committee notes that in the High Court's decision in the M47 case, the Court upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. The Committee recalls its jurisprudence that judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant.[56]

1.50 In the more recent case of *AJL20*, which the statement of compatibility states this bill is in response to, [57] an individual from Syria, who is owed protection obligations but has been refused a protection visa on character grounds, was successfully able to

54 UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [18].

55 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.3].

56 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.6]. See also *MGC v Australia*, UN Human Rights Committee Communication No.1875/2009 (2015) [11.6].

57 Statement of compatibility, p. 11.

challenge the legality of his detention, with the Federal Court ordering his release forthwith.[58] The Court held that detention was unlawful because:

> the removal of the applicant from Australia has not been shown to have been undertaken or carried into effect as soon as reasonably practicable [as obliged by section 198 of the Migration Act], that there was therefore a departure from the requisite removal purpose for the applicant's detention over the course of [the relevant periods] and that, as a consequence, the applicant's detention by the Commonwealth was unlawful throughout [those periods].[59]

1.51 However, this case has been appealed by the Commonwealth and the High Court of Australia has reserved its decision in this matter.[60]

1.52 In addition, this bill seeks to remove the basis on which the applicant was released in *AJL20* by clarifying that there is no requirement to remove an unlawful non-citizen from Australia to a country in respect of which there has been a protection finding in a protection visa process in relation to that person.[61] It appears that the effect of this bill would be to make it more difficult to mount a successful legal challenge to indefinite immigration detention for persons in similar circumstances to those of the individual in *AJL20.* If the bill did have this effect, questions arise as to whether a court could substantively review the justification for detention of such individuals and whether review would include the possibility of ordering a person's release from detention. In order for review in the context of this measure to be effective for the purposes of international human rights law, it must be 'in its effects, real and not merely formal' and the court must be empowered to order release.[62] More broadly, it is noted that the committee has previously concluded that judicial review without merits review is unlikely to be sufficient to fulfil the international standard required of effective review. This is because judicial review is only available on a number of restricted grounds and does not allow the court to take a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision.[63] While access to judicial review is available with respect to the lawfulness of

58 *AJL20 v Commonwealth of Australia* [2020] FCA 1305.

59 *AJL20 v Commonwealth of Australia* [2020] FCA 1305 [128] and [171].

60 See *Commonwealth of Australia v AJL20* [2021] HCATrans 68 (13 April 2021).

61 Statement of compatibility, pp. 11–12.

62 *A v Australia*, UN Human Rights Committee Communication No. 560/1993 (1997) [9.5].

63 See Parliamentary Joint Committee on Human Rights*, Report 1 of 2019* (12 February 2019) pp.14-17; *Report 12 of 2018* (27 November 2018) pp. 2-22; *Report 11 of 2018* (16 October 2018) pp. 84-90; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28; *Report 3 of 2021* (17 March 2021) pp. 58–59 and 91–97. See also *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]-[8.9].

immigration detention, there are serious concerns that, in the absence of merits review, this is not effective in practice to allow release from detention in appropriate cases and so does not appear to assist with the proportionality of this measure.

1.53 A further consideration in assessing proportionality is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate. The length and conditions of detention are relevant in this regard. As the UN High Commissioner for Refugees has observed:

> The length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary. Indefinite detention for immigration purposes is arbitrary as a matter of international human rights law.[64]

1.54 This measure may result in a significant interference with human rights as there is a risk that where a person is owed protection obligations and therefore cannot be removed from Australia, but is ineligible for a grant of a visa, they may be subject to ongoing immigration detention while they await removal.[65] The statement of compatibility notes that removal may occur where the circumstances in the relevant country improve such that the person no longer engages non-refoulement obligations or a safe third country is willing to accept the person.[66] However, without any legislative maximum period of detention and an absence of effective safeguards to protect against arbitrary detention, there is a real risk that detention may become indefinite, particularly where the circumstances in the relevant country are unlikely to improve in the reasonably foreseeable future. Where the measure results in the indefinite detention of certain persons, it does not appear to be proportionate to the aims of the measure.

Prohibition against torture and ill-treatment

1.55 Finally, to the extent that the measure results in prolonged or indefinite detention, it may also have implications for Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[67] This obligation is absolute and may never be limited. In cases considering individuals detained under Australia's mandatory immigration detention scheme, the UN Human Rights Committee has found that the combination of subjecting individuals to arbitrary and protracted and/or indefinite detention, the absence of procedural safeguards to challenge that detention, and the difficult detention conditions, cumulatively inflicts serious psychological harm on such individuals that amounts to cruel, inhuman or

64 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [44].

65 Statement of compatibility, p. 14.

66 Statement of compatibility, p. 13.

67 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5.

degrading treatment.[68] If the measure has the effect of subjecting persons who are owed protection obligations but ineligible for a visa to ongoing immigration detention in similarly difficult conditions, there would appear to be a risk that the measure may have implications for Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment. The statement of compatibility does not address the implications of the measure for the prohibition against torture and ill-treatment, and accordingly, no compatibility assessment is provided with respect to this right.

Concluding remarks

1.56 In conclusion, the measure pursues the legitimate objective of supporting Australia to uphold its non-refoulement obligations and the measure appears to be rationally connected to that objective insofar as it would ensure that persons to whom protection obligations are owed are not removed to the country in relation to which there has been a protection finding. However, there are serious concerns as to whether the measure is proportionate. While the minister's discretionary powers may provide some flexibility to treat individual cases differently, it seems unlikely that these non-reviewable and non-compellable powers would operate as an effective safeguard in practice or offer an accessible alternative to detention. To the extent that the effect of the measure would be to make it more difficult to mount a successful legal challenge to detention for persons who are owed protection obligations but are ineligible for a grant of a visa, there are concerns that access to review in these circumstances would not be effective in practice, noting that review of detention should not be limited to compliance with law and must include the possibility of release. Finally, if the measure resulted in the indefinite detention of individuals, this would represent a significant interference with their rights. For these reasons, there appears to be a significant risk that the measure impermissibly limits the right to liberty and the rights of the child, and has implications for the prohibition against torture or ill-treatment.

1.57 In order to fully assess the compatibility of this measure with human rights, further information is required, in particular:

(a) with respect to people to whom protection obligations are owed but who were ineligible for a grant of a visa on character or other grounds, in the last five years:

(i) how many people were, or are currently, detained in immigration detention, and for how long were they, or have they been, detained; and

68 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.8]. See also *F.J. et al. v. Australia,* UN Human Rights Committee Communication No. 2233/2013 (2016) [10.6].

(ii) of this number, how many were:

- granted a visa by the minister in the exercise of the minister's personal discretionary powers under section 195A (discretion to grant a detainee a visa) or were released into community detention under section 197AB (residence determination); and
- returned to the country in relation to which there had been a protection finding because conditions in that country had improved such that protection obligations were no longer owing or sent to a safe third country;

(b) what effective safeguards exist to ensure that the limits on the right to liberty and the rights of the child are proportionate;

(c) what effective safeguards exist to ensure that persons affected by this measure in immigration detention will not be indefinitely detained and consequently at risk of being subjected to ill-treatment, and how the measure is compatible with the prohibition against torture or other cruel, inhuman or degrading treatment or punishment; and

(d) whether this measure will have any impact on persons involved in current litigation or who have been unlawfully detained based on the caselaw established by the Federal Court decision in *AJL20*.

Committee view

1.58 The committee notes that the bill proposes to amend the Migration Act to clarify that the power to remove an unlawful non-citizen does not require or authorise an officer to remove a person where there has been a protection finding in relation to that person. The bill also proposes to introduce provisions which would have the effect of ensuring that protection obligations are always assessed, including before the minister considers whether the person meets other criteria for the grant of a protection visa.

1.59 The committee considers that the measure would support Australia's ability to uphold its non-refoulement obligations. However, the committee notes that the statement of compatibility states that these amendments are in response to two Federal Court cases that found that the current provisions oblige the minister to send an unlawful non-citizen back to a country despite any protection obligations owed, and if the minister will not do so as soon as reasonably practicable the person must be released from immigration detention. As such, to the extent that the measure may result in prolonged or indefinite detention of persons who are deemed to be unlawful non-citizens and cannot be removed because a protection finding has been made in relation to them, the measure also engages and limits the right to liberty and the rights of the child. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.60 In addition, the committee notes that to the extent that the measure results in indefinite detention, it may also have implications for Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment. This obligation is absolute and may never be limited.

1.61 The committee considers that the measure pursues the legitimate objective of supporting Australia to uphold its non-refoulement obligations and is rationally connected to that objective. However, the committee notes that there are serious concerns as to whether the measure is proportionate and therefore compatible with the right to liberty and the rights of the child. The committee also notes the statement of compatibility did not address whether the measure is compatible with the prohibition against torture or ill-treatment.

1.62 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and as such seeks the minister's advice as to the matters set out at paragraph [1.57].

Legislative Instruments

Social Security (Assurances of Support Amendment Determination 2021 [F2021L00198][1]

Purpose	This legislative instrument amends the *Social Security Act 1991* to: • make 31 March 2024 the new repeal date of the Social Security (Assurances of Support) Determination 2018 (the Determination); • clarify the values of securities for bodies under section 20 of the Determination, where the assurance period is for four years; and • replace references to newstart allowance with jobseeker payment
Portfolio	Social Services
Authorising legislation	*Social Security Act 1991*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 15 March 2021). Notice of motion to disallow must be given by 1 June 2021 in the House of Representatives and 4 August in the Senate[2]
Rights	Protection of the family and rights of the child

Extending the assurances of support determination

1.63 This instrument extends by three years an existing determination which specifies requirements to be met for assurances of support. An assurance of support is an undertaking by a person (the assurer) that they will repay the Commonwealth the amount of any social security payments received during a certain period by a

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Assurances of Support Amendment Determination 2021 [F2021L00198], *Report 5 of 2021*; [2021] AUPJCHR 47.

2 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

migrant seeking to enter Australia.[3] This period could be up to ten years. This would appear to include any class of visa, including child and parent visas. The Social Security (Assurances of Support) Determination 2018, which this instrument extends, specifies the social security payments subject to these assurances of support;[4] the requirements that assurers must meet to give assurances of support; the period for which assurances of support remain valid; and the value of securities to be given. In particular, it specifies that the period the assurances of support remain valid range from 12 months to 10 years, with most valid for 4 years.[5] In addition, it specifies that the value of securities to be provided by an individual (i.e. payment of an upfront bond) for a parent visa is up to $10 000, and for all other types is up to $5 000.[6]

Preliminary international human rights legal advice

Rights to protection of the family and the child

1.64 A measure which limits the ability of certain family members to join others in a country is a limitation on the right to protection of the family.[7] Insofar as the visa classes affected by the requirement for an assurance of support include child visas and adoption visas, the measure also engages the rights of children.

1.65 An important element of protection of the family[8] is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together will engage this right. Additionally, Australia is required to ensure that, in all actions concerning children, the best interests of the

3 Section 1061ZZGA(a) of the *Social Security Act 1991*. Recoverable social security payments for the purpose of assurances of support include widow allowance, parenting payment, youth allowance, Austudy payment, jobseeker allowance, mature age allowance, sickness allowance, special benefit and partner allowance.

4 Recoverable social security payments for the purpose of assurances of support include widow allowance, parenting payment, youth allowance, Austudy payment, jobseeker payment, mature age allowance, sickness allowance, special benefit and partner allowance. Social Security (Assurances of Support) Determination 2018, section 6.

5 For an assurance of support for aged parent visas, the period is 10 years; for an assurance of support for a Community Support Programme entrant, the period is 12 months; for an assurance of support for remaining relative, and orphan relative visas, the period is 2 years; and in any other case the period is 4 years. Social Security (Assurances of Support) Determination 2018, section 24.

6 Social Security (Assurances of Support) Determination 2018, section 19.

7 See, for example, *Sen v the Netherlands,* European Court of Human Rights Application no. 31465/96 (2001); *Tuquabo-Tekle And Others v The Netherlands,* European Court of Human Rights Application no. 60665/00 (2006) [41]; *Maslov v Austria,* European Court of Human Rights Application no. 1638/03 (2008) [61]-[67].

8 Protected by articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

child are a primary consideration, and to treat applications by minors for family reunification in a positive, humane and expeditious manner.[9]

1.66 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.67 The statement of compatibility states that the primary objective of the assurance of support scheme is to 'protect social security outlays while allowing the migration of people who might otherwise not normally be permitted to come to Australia'.[10] These may be capable of constituting legitimate objectives under international human rights law and the measure appears to be rationally connected to that objective.[11]

1.68 In respect of proportionality it is necessary to consider if there is flexibility to treat different cases differently and safeguards to help to protect the right to protection of the family and the rights of the child. The statement of compatibility does not provide any detail in relation to this. It states that migrants will continue to be able to apply for a visa to come to, or remain in, Australia permanently (including to reunite with family) and have their visa application granted, 'subject to meeting the eligibility criteria including, where relevant, obtaining an assurance of support'. It states that to the extent that the assurance of support scheme limits the right to the protection of the family, and rights of parents and children, this is reasonable and proportionate to achieving the legitimate purpose of the scheme.[12]

1.69 However, the statement of compatibility does not explain how the measure is proportionate. In particular, it is not clear what visa types this measure applies to. When the committee has previously examined the assurance of support scheme and sought advice from the relevant minister, the minister had advised that an assurance of support may be mandatory or discretionary, depending on the visa type. Specifically it was advised that Visa Subclass 101 (Child) and Visa Subclass 102 (Adoption) have a discretionary assurance of support provision, and therefore an assurer may not have to provide a monetary bond unless the Department of Human Services requests an assurance where further evidence is required to establish that the assurer can provide an adequate standard of living for the visa applicant.[13] However, this did not explain

9 Article 3(1) and 10 of the Convention on the Rights of the Child.

10 Statement of compatibility, p. 6.

11 The committee has previously considered the assurance of support scheme, see Parliamentary Joint Committee on Human Rights, *Report 5 of 2018* (19 June 2018) pp. 41–46, *Report 7 of 2018* (14 August 2018) pp. 126–133, *Report 2 of 2019* (2 April 2019) pp. 83–89 and *Report 5 of 2019* (17 September 2019) pp. 76–83.

12 Statement of compatibility, p. 8.

13 See minister's response in Parliamentary Joint Committee on Human Rights, *Report 5 of 2019* (17 September 2019) pp. 76–83.

whether there are other visa types that could apply when an assurer is seeking to sponsor a dependent relative, which may be subject to mandatory requirements for assurances of support, and therefore the requirement to pay an upfront monetary bond. It is also not clear how visa types are specified as being subject to the mandatory or discretionary assurances of support, and whether the rights to protection of the family and the rights of the child are considered when requiring a person to provide an upfront bond. It is therefore unclear, in practice, if there may be situations where an assurer subject to a monetary bond may be unable to provide such a bond and therefore unable to access family reunification, in circumstances that may not comply with their right to protection of the family.[14]

1.70 Further information is required to assess the compatibility of this measure with the right to protection of the family and the rights of the child, in particular:

(a) what visa categories are subject to the assurance of support scheme;

(b) what visa categories are subject to a mandatory assurance of support and what visa categories are subject to discretionary assurances of support (and how is this determined);

(c) what criteria does the Department of Home Affairs rely on to determine when it should use its discretionary powers to require an assurance of support (and where are these found);

(d) does the department consider the right to the protection of the family and the rights of the child when determining whether to require payment of an upfront bond, and what safeguards exist to ensure dependent family members are not involuntarily separated if family members cannot afford to provide an assurance of support.

Committee view

1.71 The committee notes this legislative instrument extends by three years an existing determination that specifies matters relating to the assurance of support scheme. An assurance of support is an undertaking by a person (the assurer) that they will repay the Commonwealth the amount of any social security payments received during a certain period by a migrant seeking to enter Australia.

1.72 The committee notes that requiring the payment of an upfront bond may limit the ability of certain family members, including potentially children, to join others in Australia. This would appear to limit the right to protection of the family, and insofar as the visa classes affected by the requirement for an assurance of support include child visas and adoption visas, also engages the rights of children. These rights may be permissibly limited where a limitation is shown to be reasonable, necessary and proportionate.

14 See articles 17 and 23 of the ICCPR and article 10 of the ICESCR.

1.73 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this legislative instrument, and as such seeks the minister's advice as to the matters set out at paragraph [1.70].

Social Security (Parenting payment participation requirements – class of persons) Instrument 2021 [F2021L00064][1]

Purpose	This legislative instrument specifies a class of persons, described as Compulsory Participants, for the purposes of paragraph 500(1)(ca) of the *Social Security Act 1991*, requiring them to participate in the ParentsNext program in order to be in continued receipt of the Parenting Payment
Portfolio	Education, Skills and Employment
Authorising legislation	*Social Security Act 1991*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 2 February 2021). Notice of motion to disallow must be given by 11 May 2021 in the Senate[2]
Rights	Social security; adequate standard of living; privacy; equality and non-discrimination; rights of the child; work; education

1.74 The committee requested a response from the minister in relation to the bill in *Report 2 of 2021*.[3]

Suspension of parenting payment for mutual obligation failures

1.75 This legislative instrument provides that a specific class of persons receiving parenting payment may be required to participate in the ParentsNext pre-employment program in order to remain eligible for the payment.[4]

1.76 A person would fall within this class if, on or after 1 July 2021, they:

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Parenting payment participation requirements – class of persons) Instrument 2021 [F2021L00064], *Report 5 of 2021*; [2021] AUPJCHR 48.

2 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

3 Parliamentary Joint Committee on Human Rights, *Report 2 of 2020* (24 February 2021), pp. 58-66.

4 This legislative instrument is made pursuant to subsection 500(1)(ca) of the *Social Security Act 1991*.

(a) reside in a 'jobactive employment region';[5]

(b) have been receiving parenting payment for a continuous period of at least six months prior to that day;

(c) have a young child who is between nine months and six years of age;

(d) have not engaged in work in the six month period immediately prior;

(e) are aged under 55 years; and

(f) are either

(i) an 'early school leaver' (that is, aged under 22 years and have not completed the final year of school);[6] or

(ii) are aged at least 22 years and have not completed their final year of school and have been receiving an income support payment for a continuous period of at least two years prior, or have completed their final year of school and have received an income support payment for a continuous period of at least four years immediately prior.[7]

1.77 Participation in the ParentsNext program may require that a person: attend playgroups or similar activities; complete further education and training (such as literacy and numeracy courses); or undertake referrals to services to address non-vocational barriers to employment like confidence building, health care or counselling.[8]

1.78 A person who is a compulsory participant would also be subject to the targeted compliance framework under the *Social Security (Administration) Act 1999*. Under this framework, where an individual fails to comply with their participation obligations their payment may be suspended, and where they are deemed to have persistently failed to meet their obligations without a reasonable excuse, their payment may be reduced by 50 to 100 per cent for a period, suspended, or cancelled.[9] An individual may also be exempted from participation requirements due to specified

5 This term is defined in section 4 of the instrument to mean 'a geographical region in Australia in which employment services were delivered by one or more jobactive employment service providers on 1 December 2020'.

6 Section 4.

7 Subsection 6(1).

8 Statement of compatibility, p. 6.

9 The *Social Security (Administration) Act 1999* sets out the compliance framework associated with mutual obligations. See, Part 3, Division 3AA.

circumstances including domestic violence, temporary incapacity, and some caring responsibilities.[10]

Summary of initial assessment

Preliminary international human rights legal advice

Multiple rights

1.79 This measure provides access to a program which is intended to provide early support to young parents with a lower level of educational attainment to help them plan and prepare for employment before their youngest child starts school, including by participating in educational activities or activities with their children. In this respect, it may engage and promote the rights to work, education, and the rights of the child. The right to work requires that, for full realisation of that right, steps should be taken by a State including 'technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and productive employment'.[11] The right to education provides that education should be accessible to all.[12] In addition, as the measure is aimed at disrupting intergenerational disadvantage and reducing the risk of long-term welfare dependency for participating parents and their children, it may promote the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.[13] These rights are protected under a number of treaties, particularly the Convention on the Rights of the Child.

1.80 However, by making participation in the ParentsNext program compulsory, and providing that a person who fails to participate may have their parenting payment reduced, suspended or cancelled, this measure also engages and may limit several other human rights including the rights to: social security; an adequate standard of living; and a private life.[14] These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to (that is, likely to achieve) that objective and is a proportionate means of achieving that objective. The measure also engages and limits the right to equality and non-discrimination. Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is

10 *Social Security Act 1991*, Chapter 2, Part 2.10, Division 3A.

11 International Covenant on Economic, Social and Cultural Rights, article 6(2).

12 International Covenant on Economic, Social and Cultural Rights, article 13.

13 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

14 If the right to an adequate standard of living is limited in this context, such that it restricts the capacity of a parent to provide for the basic needs for their child, this would also engage and limit the rights of the child.

based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[15]

1.81 Further information is required in order to assess the compatibility of this measure with the rights to social security, an adequate standard of living, privacy and equality and non-discrimination, in particular:

(a) what percentage of participants in the ParentsNext program are: Indigenous; from a culturally and linguistically diverse background; or identify as a person with disability;

(b) how reducing, suspending or cancelling a person's parenting payment where they fail to participate in the ParentsNext program would be effective to remove barriers to employment and education, and stabilise family life for those participants;

(c) how many compulsory participants in the ParentsNext program have had their payments suspended, reduced or cancelled, and what is the average duration in each case;

(d) how it is proportionate to the stated aim of this measure to reduce, suspend or cancel a participant's parenting payments for a failure to meet their engagement requirements under the ParentsNext program;

(e) whether other, less rights restrictive alternatives to compulsory participation have been considered, and why other, less rights restrictive alternatives (such as voluntary participation, or voluntary participation incentivised by an additional financial payment) would not be effective to achieve the stated aims of the measure; and

(f) what safeguards are in place to ensure that persons whose parenting payment is reduced, suspended or cancelled following a mutual obligation failure have funds available to meet their basic needs, and those of their children.

Committee's initial view

1.82 The committee noted that the ParentsNext program is intended to provide early support to young parents with a lower level of educational attainment to help them plan and prepare for employment before their youngest child starts school, and as such, this program would appear to engage and promote a number of human rights, including the rights to work, education, and the rights of the child.

15 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

1.83 However, the committee noted that making this participation compulsory, and causing a person's parenting payment to be reduced, suspended or cancelled should they fail to appropriately engage in the program, may engage and limit the rights to: social security, an adequate standard of living; a private life; and equality and non-discrimination. The committee noted that these rights may be permissibly limited where a limitation is reasonable, proportionate and necessary.

1.84 The committee considered that further information was required to assess the human rights implications of this bill, and as such sought the minister's advice as to the matters set out at paragraph [1.81].

1.85 The full initial analysis is set out in *Report 2 of 2021*.

Minister's response[16]

1.86 The minister advised:

> ParentsNext is a highly successful pre-employment program that helps parents plan and prepare for employment before their youngest child starts school. Parents receive personalised assistance to help them identify their education and employment goals, improve their work readiness and link them to services in the local community.
>
> The Instrument streamlines eligibility requirements for ParentNext participants from 1 July 2021. The changes to eligibility will better support those parents most in need and ensure all participants have access to financial assistance to help them achieve their education and employment goals. The Participation Fund, a flexible pool of funds to support work preparation expenses of participants, and access to wage subsidies will be available to all participants. This assistance is currently only available to those in the Intensive stream (40 per cent of participants).
>
> This Instrument does not introduce compulsory participation or the Targeted Compliance Framework (TCF) to ParentsNext participants. The TCF has applied to ParentsNext participants since the national roll-out of the program on 1 July 2018.
>
> In relation to the Committee's request for further information regarding participation requirements for ParentsNext, please find my responses below.
>
> **(a) what percentage of participants in the ParentsNext program are: Indigenous; from a culturally and linguistically diverse background; or identify as a person with disability**

16 The minister's response to the committee's inquiries was received on 12 March 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Percentage of ParentsNext participants by Indigenous, CALD, and Disability status as at 28 February 2021*	
Indigenous	18 per cent
CALD	21 per cent
Persons with Disability	15 per cent

*A participant who identifies with more than one of the above characteristics is included separately in each column

(b) how reducing, suspending or cancelling a person's parenting payment where they fail to participate in the ParentsNext program would be effective to remove barriers to employment and education, and stabilise family life for those participants

This instrument makes no changes to the program's participation requirements or consequences for non-compliance. Compulsory participation in active labour market programs has been shown to result in significantly better outcomes for participants.

ParentsNext continues to demonstrate positive outcomes for parents. Between 1 July 2018 and 28 February 2021:

- 69,528 participants had commenced education;
- 35,153 participants had commenced employment; and
- 4,909 participants had exited the program after achieving stable employment.

Participants are protected from lasting impacts to their payment by safeguards built into the TCF which is designed to give participants every opportunity to meet the mutual obligations that they have agreed with their provider (see further information below).

(c) how many compulsory participants in the ParentsNext program have had their payments suspended, reduced or cancelled, and what is the average duration in each case

Payment suspensions occur when a participant does not meet their participation requirements. Suspensions are lifted with full back-pay once a participant contacts their provider with a valid reason-for example if they or their child is/was unwell. As income support payments are made fortnightly, payment suspensions typically do not result in any delay in the person accessing their payment.

Since 7 December 2020, participants have two business days' 'resolution time' to contact their provider to discuss why they were unable to meet their participation requirement, or to reengage. Where this occurs, there is no payment suspension. For ParentsNext this has resulted in 3 5 per cent fewer payment suspensions.

Before ParentsNext participants face any lasting penalty for not meeting their requirements, they attend two assessments to ensure their requirements are appropriate for their circumstances and there is no undisclosed information affecting their capacity to meet requirements. One of these assessments is undertaken by the participant's provider, the other by Services Australia.

Payment reductions and cancellations are targeted to only those participants who have not met their requirements on at least five prior occasions, without a valid reason. As at 28 February 2021, ParentsNext has assisted more than 156,000 parents.

ParentsNext compliance events 2 July 2018 – 28 February 2021		
Type	***Parents***	***Average duration (calendar days)***
Parenting Payment Suspensions	52,343	5
Parenting Payment Reductions	10	14
Parenting Payment Cancellations*	1,072	28

*If a person's payment remains on hold for more than 28 days, their income support payment is cancelled, and they must reapply

(d) how it is proportionate to the stated aim of this measure to reduce, suspend or cancel a participant's parenting payments for a failure to meet their engagement requirements under the ParentsNext program

ParentsNext is designed with a focus on meeting the needs of parents. It is flexible, recognises parents' caring responsibilities, does not require them to look for work, and incorporates family friendly sites and activities.

ParentsNext participants are only required to attend a quarterly appointment with their provider. Aside from this quarterly appointment, participants are required to negotiate and agree to a participation plan which identifies education and employment goals, and participate in an agreed activity to assist in working towards those goals. Activities range from attending playgroups or similar activities, which provide social connections and networking opportunities for parents with limited work history, and significant non-vocational barriers, through to further education and training for parents who are work ready. Activities are agreed between the participant and provider and must take into account the participant's personal circumstances, including caring responsibilities. There is no minimum hourly participation requirement.

Compulsory requirements have been shown to be very effective in enabling participants to achieve significantly better outcomes. The achievement of better outcomes for participants is directly relevant to the stated aims of the ParentsNext program.

Where parents are genuinely unable to participate exemptions from requirements can be applied by the provider or Services Australia. There are a range of reasons why exemptions can be applied including due to domestic violence, caring responsibilities, sickness or injury.

(e) whether other, less rights restrictive alternatives to compulsory participation have been considered, and why other, less rights restrictive alternatives (such as voluntary participation, or voluntary participation incentivised by an additional financial payment) would not be effective to achieve the stated aims of the measure

Evidence from earlier similar pilots to the current ParentsNext program (Helping Young Parents and Supporting Jobless Families) in Australia showed significantly better results when the activity requirements were compulsory. Participating in Helping Young Parents (where participating in activities was compulsory) increased the chance of a person attaining a Year 12 or equivalent qualification by 14 percentage points, compared with a more modest 3 percentage points in Supporting Jobless Families (where participation in activities was voluntary).

ParentsNext is designed to engage the most disadvantaged parents. Parents who have experienced long-term disadvantages may not be fully aware of the program's benefits and opportunities for further support, and as a result can be reluctant to participate voluntarily. While parents can volunteer to participate, they rarely do. Since 1 July 2018 only 946 parents have volunteered to participate in the program.

While the most disadvantaged parents are less likely to seek assistance to improve their education or work readiness, program evidence shows that approximately 75 per cent of ParentsNext participants-that is, highly disadvantaged parents-report an improvement in their motivation to achieve their work or study goals. Additionally, the evaluation of the ParentsNext program found that a ParentsNext participant was 6.9 percentage points more likely to participate in employment than a comparable parent who did not participate in the program.

Compulsory participation requirements are necessary to ensure that the most disadvantaged parents receive the support they need. While an incentive based approach may encourage some parents to volunteer, it would be significantly less effective in targeting support to those most in need.

(f) what safeguards are in place to ensure that persons whose parenting payment is reduced, suspended or cancelled following a mutual

obligation failure have funds available to meet their basic needs, and those of their children

The TCF is designed to ensure only participants who are persistently and wilfully non-compliant incur financial penalties while providing protections for the most vulnerable.

Suspensions and penalties under the TCF only affect payments made in respect to the person themselves, such as Parenting Payment. Payments and supplements paid for the support of a person's children such as Family Tax Benefit (FTB) and child care assistance are not affected by the application of the TCF. Rent Assistance for parents is almost always paid through FTB, so it would also be unaffected by any penalties. The rate of payments and supplements paid for the support of a person's child depends on the individual and family circumstances.

Committee view

1.87 The committee thanks the minister for this response. The committee notes that this legislative instrument specifies a class of persons receiving parenting payment, who may be required to participate in the ParentsNext pre-employment program in order to remain eligible for the payment.

1.88 The committee considers further information is required to fully assess the compatibility of this legislative instrument with human rights. The committee has therefore resolved to conduct a short inquiry into this instrument. The committee is particularly interested in seeking evidence in relation to the following issues:

(a) whether and how it has been demonstrated that participants in the ParentsNext program who have had their Parenting Payment reduced, suspended or cancelled for non-compliance are able to meet their basic needs (and those of their children) in practice, such that they have an adequate standard of living, and whether and how this is assessed before payments may be affected;

(b) the extent to which the ParentsNext program operates flexibly in practice, such that it treats different cases differently (including for parents in regional areas and Indigenous parents);

(c) the extent to which participation in the ParentsNext program meets its stated objectives of effectively addressing barriers to education and employment for young parents in practice, and whether making participation compulsory is effective to achieve those objectives;

(d) what consultation has there been with Indigenous groups in relation to the compulsory participation of Indigenous peoples in the ParentsNext program;

(e) whether, and based on what evidence, it has been demonstrated that less rights restrictive alternatives to compulsory participation (such as

voluntary or incentivised participation) would not be as effective to achieve the stated objectives of this scheme; and

(f) the extent to which linking welfare payments to the performance of certain activities by the welfare recipient is consistent with international human rights law, particularly the rights to social security, an adequate standard of living, equality and non-discrimination, a private life, and the rights of the child.

1.89 The committee notes that the disallowance period for this legislative instrument ends in the Senate on 11 May 2021.[17] The committee notes that the disallowance procedure is the primary mechanism by which the Parliament may exercise control over delegated legislation. As the committee has agreed to conduct an inquiry into the instrument, the committee has resolved to place a protective notice of motion to disallow the instrument, to extend the disallowance period by a further 15 sitting days (to 11 August 2021) in order to protect parliamentary control over the instrument pending completion of the committee's inquiry.

1.90 The committee will conclude on this matter once it has concluded its inquiry.

17 The disallowance period for this legislative instrument ended in the House of Representatives on 22 March 2021.

Bills and instruments with no committee comment[1]

1.91 The committee has no comment in relation to the following bills which were introduced into the Parliament between 22 to 25 March 2021. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:[2]

- Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021;
- Charter of Budget Honesty Amendment (Rural and Regional Australia Statements) Bill 2021;
- Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021;
- Mitochondrial Donation Law Reform (Maeve's Law) Bill 2021; and
- Snowy Hydro Corporatisation Amendment (No New Fossil Fuels) Bill 2021.

1.92 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 3 to 21 March 2021.[3] The committee has reported on one legislative instrument from this period earlier in this chapter. The committee has determined not to comment on the remaining instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

Private Member's bill that may limit human rights

1.93 The committee notes that the following private member's bill appears to engage and may limit human rights. Should this bill proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill:

- Commonwealth Environment Protection Authority Bill 2021.

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 5 of 2021*; [2021] AUPJCHR 49.

2 Inclusion in the list is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

3 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: https://www.legislation.gov.au/AdvancedSearch.