Chapter 2

Concluded matters

2.1 This chapter considers responses to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is available on the committee's website.[1]

Bills

Family Law Amendment (Federal Family Violence Orders) Bill 2021[2]

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

2.3 The committee requested a response from the Attorney-General in relation to the bill in *Report 5 of 2021*.[3]

Federal family violence orders

2.4 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.[4] A listed

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Family Law Amendment (Federal Family Violence Orders) Bill 2021, *Report 7 of 2021*; [2021] AUPJCHR 66.

3 Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (29 April 2021), pp. 2-12.

4 Schedule 1, item 1.

court[5] may make a federal family violence order on application by a party or of its own motion.[6] 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.[7] 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 grounds to suspect that the protected person is likely to be subjected or (in the case of a child) exposed to family violence;[8] and
- there is no family violence order in force in relation to the parties.[9]

2.5 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.[10]

2.6 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

5 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.

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

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

8 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.

9 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.

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

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.[11]

2.7 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.[12] 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.[13] The bill also provides that criminal responsibility would not be extended to a protected person in relation to conduct engaged in by that person that results in a breach of the order.[14]

Summary of initial assessment

Preliminary international human rights legal advice

Multiple rights

2.8 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.[15] 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.[16] 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.[17] 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.

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

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

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

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

15 Statement of compatibility, p. 7.

16 Statement of compatibility, p. 7.

17 Second reading speech, pp. 4–5.

2.9 The right to life[18] imposes an obligation on the state to protect people from being killed by others or identified risks.[19] 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'.[20] The duty to protect life also requires States parties to adopt special measures of protection towards vulnerable persons, including victims of domestic and gender-based violence and children.[21] 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.[22]

2.10 The right to security of the person requires the State to take steps to protect people against interference with personal integrity by others.[23] This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation (including providing protection for people from domestic violence).

2.11 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.[24] Article 2 imposes an

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18 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.

19 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'.

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

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

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) [15].

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

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) [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'.

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.[25] 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'.[26] 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 emergency barring orders against alleged perpetrators, including adequate sanctions for non-compliance'.[27]

2.12 Regarding the rights of the child, children have special rights under human rights law taking into account their particular vulnerabilities.[28] 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.[29]

2.13 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.

2.14 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.[30] 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

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

26 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].

27 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].

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

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

30 Explanatory memorandum, p. 28.

place or area.[31] 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.[32] It also encompasses freedom from procedural impediments, such as unreasonable restrictions on accessing public places. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home life.[33]

2.15 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.

2.16 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.

2.17 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's initial view

2.18 The committee considered that 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 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.

2.19 However, the committee also noted 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.

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

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

33 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.

2.20 The committee considered further information was required to assess the human rights implications of this measure, and sought the Attorney-General's advice as to the matters set out at paragraph [2.17].

2.21 The full initial analysis is set out in *Report 5 of 2021*.

Attorney-General's response[34]

2.22 The Attorney-General advised:

> **Noting that the statement of compatibility did not acknowledge that Federal Family Violence Orders (FFVOs) may limit the rights to freedom of movement and a private life, in order to assess the proportionality of the measure, the Committee requested further information regarding the existence of any safeguards and how such safeguards would likely operate in practice.**
>
> To the extent that terms included by the court in a FFVO have the potential to limit the rights to freedom of movement and respect for private life of the person against whom the FFVO is directed, a collection of safeguards contained within the bill ensures means that any such limitation is proportionate to achieving the objective of better protecting victims of family violence and addressing the impacts of gender-based violence on women. The Committee has noted this as a legitimate objective, with which the measure appears rationally connected.
>
> *Safeguards in relation to discretion and the making of orders*
>
> (1) Terms of the order
>
> The court may make the FFVO on the terms it considers appropriate for the welfare of the child (in relation to a child), or appropriate in the circumstances (in relation to parties to a marriage). The bill contains a list of example terms that the court can include, which, while not exhaustive, serve to provide the court with some guidance about terms that may be suitable.
>
> To the extent that the example terms may limit the person's freedom of movement and right to a private life, they are framed with reference to the protected person. For example, prohibiting the person against whom the order is directed from being within a specified distance of a specified place or area that the protected person is, or is likely to be, located. It is not intended that such a term would be used to prohibit the person from being within a particular municipal area, state or township.

34 The Attorney-General's response to the committee's inquiries was received on 12 May 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.

The ability of the court to include any other non-listed term is subject to the requirement that the term must be considered by the court to be reasonably necessary to ensure the personal protection of the protected person. This ability has been deliberately included to ensure the court is not prevented from including a particular term that might best meet the specific safety needs of a particular protected person, in a particular case. It was not considered desirable to prevent the court from being able to flexibly tailor orders to the individual circumstances of a case, which would limit the effectiveness of the protections the measure seeks to afford, and risk limiting a number of rights that the measure seeks to promote, including the right to life, security of the person, and the rights of the child.

(2) Test for issuing a FFVO

The statutory test for the issue of a FFVO is proportionate to the criminal consequences of breaching such an order, with three separate matters as to which the court must be satisfied before it can make the order. The test for the issue of a FFVO will be considerably higher than the existing test for the issue of a family law personal protection injunction (PPI) under the *Family Law Act 1975* (Family Law Act), reflecting the more serious criminal consequences of a breach of the new orders.

For orders in relation to a child, the court must consider that the order is appropriate for the welfare of the child. This test ensures that, irrespective of whether the order is made for the protection of the child, or for the protection of a person close to the child, that the welfare of the child would be the fundamental purpose of the order. The court must also be satisfied on the balance of probabilities that either the protected person has been subjected to family violence or if the protected person is the child, subjected or exposed to family violence, or alternatively, that there are reasonable grounds to suspect that the protected person is likely to be subjected to family violence or, if the protected person is the child, is likely to be subjected or exposed to family violence.

For orders in relation to parties to a marriage, the court must be satisfied that the order is appropriate in the circumstances. Whether an order is appropriate is an objective consideration which would require the court to consider all the circumstances of the case. The court must also be satisfied on the balance of probabilities that either the protected person has been subjected to family violence, or alternatively, there are reasonable grounds to suspect the protected person is likely to be subjected to family violence.

The mere fact of previous violence will not of itself be sufficient to warrant the making of a FFVO.

A court would also be required to take into account as the primary consideration, the safety and welfare of the child, or of the protected person (as relevant). Other matters for the court to take into account include any criminal history, criminal charges and previous violent conduct of the person against whom the order is directed, if the court considers this

relevant. These factors may be relevant to determining whether and on what terms to issue a FFVO.

(3) Requirement to give reasons

As soon as practicable after making a FFVO, the listed court would be required to give reasons for the decision. Adequate reasons are required by the implied guarantee of procedural due process in the exercise of judicial power. The requirement to give reasons serves as a safeguard in promoting transparency and consistency in decision-making.

(4) Information included in a FFVO

A FFVO will be made in a standard form template and will contain important information for the person against whom the order is directed, including information about the criminal consequences of the order, and how the person can apply to have the order amended. The order will clearly identify the terms the person is subject to and contain examples of behaviour that may constitute family violence. This is to ensure that the person against whom the order is directed is informed and able to comply with the terms of the order.

(5) Power of a court to vary, revoke or suspend a FFVO

A listed court would be able to vary, revoke or suspend a FFVO, either by application or of its own motion, if the court considers that it is appropriate for the welfare of the child, or appropriate in the circumstances. The purpose for which the chosen course of action must be considered appropriate is to ensure the personal protection of the protected person from family violence. The court would also need to be satisfied that there is a change in circumstances since the order was made, or the court has before it material that was not before the court that made the order.

The requirement that there be a change in circumstances recognises the fact that the circumstances that gave rise to the making of an order may change during the life of the order. The change in circumstances may result in the order being too challenging to comply with or unduly restrictive. The court's ability to make changes to the order would address these concerns.

Separately to this bill, it should also be noted that the person against whom the FFVO is directed could ask the court to set aside the decision if it could be shown that the judge that issued the order erred.

Comparable existing measures

A broad discretion is currently available under the Family Law Act to decision-makers with respect to the issue of a PPI. The court can currently issue a PPI in relation to a child as it considers appropriate for the welfare of a child, or, in relation to a party to a marriage, as it considers proper with respect to the matter to which the proceedings relate. In practice, PPIs may include restrictions such as on a person's movements, and communication between the parties. While a PPI is a civilly-enforceable protection, the threshold test for the issue of a FFVO is higher to account for this.

The kinds of FFVO conditions listed in the bill are based on standard family violence order conditions in the States and Territories. In general, final State or Territory family violence orders may include such conditions as the court considers are necessary or desirable to achieve purposes associated with preventing family violence.

Concluding comments

International human rights legal advice

Multiple Rights

2.23 As was previously noted, the bill pursues a legitimate objective for the purposes of international human rights law (namely protecting victims of family violence and addressing gender-based violence) and the measure appears to be rationally connected to that objective.[35] The Attorney-General has provided advice regarding the proportionality of the measure. In particular, the Attorney-General identified five safeguards that will help ensure that any limitation is proportionate to achieving the objective of better protecting victims of family violence and addressing the impacts of gender-based violence on women. The first safeguard is the terms of the federal family violence order. The Attorney-General stated that the terms are intentionally non-exhaustive to enable the court to flexibly tailor orders to the individual circumstances of the case. Without this flexibility, the Attorney-General noted that the effectiveness of the measure may be limited. Regarding the potential breadth of the terms, such as a term directing a person not to be within a specified distance of a specified place or area where the protected person is located, the Attorney-General noted that the terms are not intended to be used to prohibit the person against whom the order is directed from being within a particular municipal area, state or township.

2.24 The second safeguard identified is the test for issuing a federal family violence order. The Attorney-General stated that the statutory test for issuing the order is higher than the existing test for a family law personal protection injunction, reflecting the more serious criminal consequences of breaching a federal family violence order. The Attorney-General noted that the mere fact of previous violence will not of itself be sufficient to warrant the making of a federal family violence order. The third safeguard is the requirement for the court to give reasons for its decision to issue a federal family violence order. The Attorney-General stated that this requirement serves as a safeguard in promoting transparency and consistency in decision-making. The fourth safeguard is the requirement for the order to contain certain information for the person against whom the order is directed, including the terms of the order, criminal consequences of breaching the order and how to apply to have the order

35 See Parliamentary Joint Committee on Human Rights, *Report 5 of 2021* (29 April 2021), p.7.

amended. The Attorney-General stated that this ensures that the person against whom the order is made is directly informed and able to comply with the order.

2.25 The final safeguard identified is the power of the court to vary, revoke or suspend an order in certain circumstances. The Attorney-General noted that if there is a change in circumstances that results in the order becoming too challenging to comply with or unduly restrictive, the court may make changes to the order to address such concerns (if it considered that it was appropriate for the welfare of the child, or appropriate in the circumstances). The Attorney-General further noted that the person against whom the order is directed can ask the court to set aside the decision if it can be shown that the judge erred in making the order.

2.26 The preliminary analysis considered that the scope of the measure, the extent of interference with rights and the existence of safeguards were relevant matters in assessing the proportionality of this measure. As noted by the Attorney-General, the measure is intentionally broad in scope to provide the court with sufficient flexibility to treat different cases differently and tailor the order to the individual circumstances of the case. This would appear to assist with the proportionality of the measure. While the potential interference with rights may be significant, depending on the terms imposed, the safeguards identified by the Attorney-General appear to be adequate to ensure that any limitation on rights is proportionate to the objective being sought, namely, the protection of individuals from family and gender-based violence. This is particularly so noting Australia's obligations under the Convention on the Elimination of All Forms of Discrimination against Women to 'pursue by all appropriate means and without delay a policy of eliminating discrimination against women', including gender-based violence against women.[36]

2.27 In addition, a court's power to vary, revoke or suspend a federal family violence order, either on application by the person against whom the order is directed or of its own motion, as well as other general appeal avenues, provides a degree of oversight and access to review for the person whose rights may be limited. The requirement for the court to give reasons and provide information about the terms of the order, and the consequences of breaching the order, to the person against whom the order is directed may also ensure that the order and consequent interference with rights is appropriately justified and reasonably necessary in the circumstances of the case. Having regard to the cumulative effect of these safeguards and the flexibility of the measure, and the importance of providing protection against gender-based violence, any limitation on the rights of the person against whom the order is directed would likely be permissible as a matter of international human rights law.

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

Committee view

2.28 The committee thanks the Attorney-General for this response. 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.

2.29 To the extent that the measure protects individuals from family violence, particularly women from gender-based violence, the committee considers that the measure 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. To this end, the committee considers that the measure would facilitate the realisation of 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.

2.30 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.

2.31 The committee considers that the measure pursues the legitimate objective of better protecting victims of family violence and addressing the impacts of gender-based violence on women. Having regard to the various safeguards identified by the Attorney-General as well as the flexibility of the measure to treat different cases differently, the committee considers that any limitation on rights would likely be proportionate to the important objective being sought. The committee therefore considers that the measure would likely be a permissible limitation on the rights of the person against whom the order is directed.

Suggested action

2.32 The committee recommends the statement of compatibility with human rights be updated to reflect the information which has been provided by the Attorney-General.

2.33 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

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

2.34 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.[37] 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 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.[38] 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.[39]

Summary of initial assessment

Preliminary international human rights legal advice

Rights of the child

2.35 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. As a matter of international human

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

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

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

rights law, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[40] 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.[41] 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.[42]

2.36 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.[43] 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.[44] In addition, in 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.

2.37 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.

2.38 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;

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

41 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).

42 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].

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

44 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].

(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's initial view

2.39 The committee noted 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. The committee considered further information was required to assess the human rights implications of this measure, and sought the Attorney-General's advice as to the matters set out at paragraph [2.38].

2.40 The full initial analysis is set out in *Report 5 of 2021*.

Attorney-General's response

2.41 The Attorney-General advised:

(a) The Committee requested further information regarding the objective being pursued by proposed section 68NC and how the measure is rationally connected to this objective.

Proposed section 68NC would set out a number of requirements and provisions of the Family Law Act that would not apply to a State or Territory court exercising the power to revoke or suspend a FFVO in proceedings for a family violence order under new section 68NB, including any provision that would otherwise make the best interests of the child the paramount consideration. For section 68NB, the adequacy of the FFVO, and its appropriateness for the welfare of the child would be a relevant matter that the court would need to take into account, as well as the best interests of the child, which are captured in the purposes of Division 11 of Part VII.

State and Territory courts have historically been reluctant to exercise the family law jurisdiction available to them, which is often unfamiliar.

Proposed section 68NC is designed to simplify the process for a State or Territory court in exercising jurisdiction under section 68NB, and what the court has to consider. The intention is to encourage the exercise of this jurisdiction by a State or Territory court. Although new subsection 68NB(2) would provide State and Territory courts with the power to revoke or suspend a FFVO, it does not impose an obligation on these courts to do so when issuing a family violence order.

In respect of paragraph 68NC(b), if State and Territory courts were required to consider the best interests of the child as the paramount objective when revoking or suspending a FFVO, it is anticipated they would be less inclined

to exercise that family law jurisdiction due to the added complexity involved with this consideration.

The best interests of the child principles in existing section 60B relate to the rights of children to know and be cared for by their parents, spend time and communicate regularly with both parents and other significant adults and enjoy their culture; and the responsibilities of parents to jointly share duties concerning the care, welfare and development of their children and agree about the future parenting of their children. In determining what is in the child's best interests, the court must consider, as primary considerations, the benefit to the child of having a meaningful relationship with both of the child's parents, and the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. The court is required to give greater weight to the latter.

State and Territory family violence orders are often required in urgent circumstances to provide protection for victims quickly, and a State or Territory court looking to revoke or suspend the FFVO in that proceeding would not have before it the information that was before the listed court that made the FFVO.

Underuse of section 68NB may result in State and Territory family violence orders made that are inconsistent with FFVOs, and which would be invalid and unenforceable to the extent of direct inconsistency with the federal order. Section 68NB is critical to the resolution of inconsistent FFVOs and family violence orders, and in so doing, in protecting victims by safeguarding against the risks to safety that would arise in the case of such an inconsistency, including lack of clarity around the source and enforceability of their protections. Having inconsistent State and Territory family violence orders would also create enforcement challenges for police, and increase the risk of unlawful arrests.

(b) The Committee requested further information regarding the likely circumstances in which the best interests of the child would not be considered as a paramount or primary consideration.

While State and Territory courts are not legislatively required to make the best interests of the child a paramount consideration in the exercise of jurisdiction under section 68NB (as above, due to the complexity involved in that consideration which may impede the ability of the State or Territory court to rapidly and appropriately construct family violence orders, given the decisions are likely to be made in tandem) the best interests of the child principles will remain an important consideration. Along with consideration of the welfare of the child, the child's safety is a key focus.

Any decision on the part of a State or Territory court to revoke or suspend a FFVO under section 68NB would be ancillary to a decision to issue or vary a State or Territory family violence order. This would be the primary matter at hand. The purpose of the power to suspend and revoke FFVOs is to avoid inconsistency with State and Territory family violence orders. Accordingly, as long as the State or Territory court is satisfied that a family violence order

can be made or varied under State or Territory law in the particular case, the power to revoke or suspend the federal order would be enlivened.

The best interests of the child principles, which are captured in the purposes of Division 11 of Part VII, would be a relevant matter that the court would need to take into account in revoking or suspending a FFVO. So too would be the adequacy of the FFVO, and its appropriateness for the welfare of the child.

Ensuring there are clear and enforceable family violence protections, through the resolution of any inconsistencies between orders, supports the protection of children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The safety and welfare of the child, including the need to protect the child from being subjected or exposed to family violence, is the primary consideration in a listed court's decision about making a FFVO in relation to a child. Whether an order is appropriate for this purpose is an objective consideration which would require the court to consider all the circumstances of the case. The court would also need to consider the matters set out in subsections 60CC(2) (applied in accordance with subsection 60CC(2A)) and (3) of the Act) which are about determining what is in the best interests of a child. These matters further demonstrate the centrality of the child to a FFVO made in relation to a child, regardless of whether the order is for the protection of the child or another person. The child's welfare is central to the order and its terms, ensuring that the FFVO is adequate to provide personal protection from family violence. The requirement 'for the welfare of the child' is also an element of existing section 68B, which provides for the grant of a PPI.

(c) The Committee requested further information regarding what safeguards exist, if any, to ensure that any limitation on the rights of the child is proportionate.

The court's consideration under section 68NB, taking into account the best interests of the child, the adequacy of the FFVO, and its appropriateness for the welfare of the child, ensures that the child is central to this decision.

Clear and enforceable family violence protections, whether under a FFVO in relation to a child and/or a State or Territory family violence order, are needed to protect the child from physical or psychological harm from being subjected to, or exposed to, family violence.

The bill contains safeguards against inconsistent federal and State and Territory orders arising, supporting the protection of the rights of the child in respect of whom the order is made. The bill would restrict a person from applying for a FFVO, and a listed court from making a FFVO, where there is a State or Territory family violence order in force between the same parties.

The bill would only allow a State or Territory court to revoke or suspend a FFVO when it is making or varying a family violence order. When revoking or suspending a FFVO, a State or Territory court must have regard to

whether the FFVO is adequate or is appropriate for the welfare of the child; and the purposes of Division 11 of Part VII. New paragraph 68N(2)(e) provides that one of the purposes of Division 11 is to achieve the objects and principles in current section 60B of the Family Law Act. The overarching objective in section 60B is to ensure that the best interests of the child are met.

It is intended that if the State or Territory court considers that the FFVO is adequate to provide personal protection of protected persons from family violence, and is appropriate for the welfare of the child in the current circumstances, the court would not revoke or suspend the order. If the court considers that the order is inadequate or is inappropriate for the welfare of the child, for example, because the terms of the order are insufficiently stringent, do not expressly prohibit particular violent conduct to which the protected person is vulnerable, or the order is due to expire imminently, it is intended that the court may revoke or suspend the order. It is intended that the court would consider the adequacy and appropriateness of the order in light of all the circumstances of the case.

(d) The Committee requested further information regarding 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

New section 68ND would clarify that to the extent that a family violence order is not able to operate concurrently with a FFVO made under Division 9A of the Family Law Act because the terms of those orders are directly inconsistent, section 109 of the Constitution would operate to invalidate the State order to the extent of that inconsistency. A FFVO would also invalidate conflicting Territory orders on a similar basis.

Section 109 of the Constitution provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Where some of the terms of a family violence order are directly inconsistent with the terms of a FFVO order, but other terms are not directly inconsistent, the family violence order would continue to be valid to the extent that it is not inconsistent. There would be a direct inconsistency if it would not be possible to comply with a condition of the family violence order without breaching a condition of the federal family violence order, or vice versa. The conditions of the family violence order that are not inconsistent with the FFVO order would remain enforceable.

As mentioned above, the Bill includes significant safeguards against inconsistent orders arising, due to the risk that such inconsistencies present for persons requiring protection from family violence.

Provisions that serve to resolve inconsistent FFVOs and State or Territory family violence orders thereby support the protection of victims of family violence, including children, by reducing confusion for victims as to which order terms they are protected by and the enforceability of their protections, assisting police and reducing the risk of unlawful arrests.

Concluding comments

International human rights legal advice

Rights of the child

2.42 Regarding the objective being pursued by the measure, the Attorney-General advised that it is designed to simplify the process for state or territory courts in exercising jurisdiction under proposed section 68NB (the power to revoke or suspend a federal family violence order), and encourage the exercise of this jurisdiction. The Attorney-General stated that it is anticipated that if the court were required to consider the best interests of the child as the paramount consideration when revoking or suspending a federal family violence order, it would be less inclined to exercise this jurisdiction due to the added complexity involved with this consideration. The Attorney-General noted that this complexity may impede the ability of courts to construct family violence orders rapidly and appropriately. The Attorney-General further stated that underuse of proposed section 68NB may result in inconsistency between state and territory family violence orders and federal family violence orders, with the former invalid and unenforceable to the extent of direct inconsistency with the latter. The Attorney-General explained that resolving inconsistencies between orders and ensuring that orders are clear and enforceable supports the protection of children from physical or psychological harm arising from being subjected to, or exposed to, abuse, neglect or family violence.

2.43 To be capable of justifying a proposed limitation on human rights, the legitimate objective sought must be necessary to address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. In general, the objective of encouraging state and territory courts to exercise their jurisdiction to resolve inconsistent family violence orders, in order to ensure protection orders are clear and enforceable so as to protect children from harm, may constitute a legitimate objective for the purposes of international human rights law.

2.44 However, questions remain as to whether overriding the provisions which would otherwise make the best interests of the child the paramount consideration is necessary to address an issue of public or social concern that is pressing and substantial enough to warrant limiting the rights of the child. The stated objective appears to be premised on the assumption that courts would be reluctant to use section 68NB if they were required to make the best interests of the child the paramount consideration. This is because of the added complexity involved with this consideration. The Attorney-General also noted that a state or territory court would be seeking to make a family violence order in urgent circumstances and would not

have before it the information that was before the court that made the federal family violence order. Accordingly, proposed section 68NC simplifies the considerations the court must have regard to in exercising its jurisdiction. It is not clear, however, that a state or territory court would necessarily lack the legal and technical expertise to consider the best interests of the child, and thus be reluctant to exercise this jurisdiction. While considering the best interests of the child may be complex, it would seem that judges are suitably qualified and possess the necessary experience to perform this judicial exercise, noting that state and territory courts regularly deal with family and domestic violence matters. If a state or territory court lacked the information necessary to consider the best interests of the child, expert evidence may be provided to the court to assist it in exercising its jurisdiction. Indeed, article 3 of the Convention on the Rights of the Child explicitly requires courts of law to make the best interests of the child a primary consideration in all actions concerning children. 'Courts of law' in this context is not limited to family law courts but encompasses 'all judicial proceedings, in all instances…and all relevant procedures concerning children, without restriction'.[45]

2.45 However, while accepting that as a matter of international human rights law all courts shall take as a primary consideration the best interests of the child, it is also acknowledged that if this consideration were to delay proceedings such that it would weaken protections for victims of family violence, there may be a pressing social concern to facilitate the rapid and appropriate construction of family violence orders and the quick resolution of inconsistent orders to protect children from harm. The extent to which making the best interests of the child the paramount consideration will, or is likely to, delay proceedings and impede the making of appropriate family violence orders is unclear. Thus, without further information it remains unclear whether the measure is necessary and addresses a pressing and substantial issue of public or social concern.

2.46 Under international human rights law, any limitation on a right must also have a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. The Attorney-General advised that proposed section 68NC was necessary to encourage the use of proposed section 68NB – the latter section being critical to the resolution of inconsistent federal and state or territory family violence orders. Resolving inconsistencies and ensuring that orders are enforceable in turn supports the protection of children from harm, violence and abuse. It is not immediately apparent, however, that downgrading the best interests of the child from a paramount to a relevant consideration would likely be effective to achieve the objective of encouraging courts to use proposed section 68NB. This is because, as noted above, it is not clear that courts, in exercising their power to suspend or revoke a federal family

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) [27].

violence order, would necessarily find the task of making the best interests of the child the paramount consideration too complex, so as to impede their ability to rapidly and appropriately construct family violence orders. Indeed, there could be a risk that the measure may not be effective in achieving even the broader objective of protecting children from harm insofar as it would have the effect of making the best interests of the child one of several considerations rather than making it the highest priority.[46] For these reasons, questions remain as to whether the measure would be rationally connected to the stated objective.

2.47 Regarding proportionality, the Attorney-General stated that the bill contains safeguards against the making of inconsistent federal and state or territory orders, which supports the protection of the rights of the child in respect of whom the order is made. These safeguards include restricting a person from applying for, and a listed court from making, a federal family violence order if a state or territory family violence order is in force between the same parties. Additionally, in exercising its power under proposed section 68NB, the court must have regard to whether the federal family violence order is adequate or appropriate for the welfare of the child, and the purposes of Division 11, which include ensuring the best interests of the child are met. Thus, while state and territory courts are not legislatively required to make the best interests of the child the paramount consideration, the Attorney-General stated that this principle will 'remain an important consideration'. The Attorney-General further noted that the safety and welfare of the child is the 'primary consideration' in a listed court's decision about making a federal family violence order in relation to a child.

2.48 The requirement that the safety and welfare of the child be a 'primary consideration' and the best interests of the child an 'important consideration' may operate to protect the rights of the child generally, including the right of the child to be protected from all forms of violence and abuse.[47] However, this requirement may not serve as an effective safeguard to protect the right of the child to have his or her best interests taken as a primary consideration. The UN Committee on the Rights of

46 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]–[40]. The Committee stated that where there are potential conflicts between the best interests of the child and the rights of other persons, such as a parent, the decision-maker must carefully balance the interests of all parties and find a suitable compromise. If this is not possible, the Committee stated that: 'decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best'. The Committee continued: 'Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned'.

47 Convention on the Rights of the Child, article 19.

the Child has made clear that the phrase 'shall be a primary consideration' in article 3 'place[s] a strong legal obligation on States and mean[s] that States may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken'.[48] It has further stated that 'the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations'.[49] In light of this strong legal obligation, the safeguards outlined by the Attorney-General may not be sufficient for the purposes of ensuring that any limitation on this right is proportionate in all circumstances.

2.49 Furthermore, the preliminary analysis sought further information as to whether it is possible that proposed section 68ND (which provides that the terms of a state or territory family violence order is 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. The Attorney-General advised that the bill contains significant safeguards against inconsistent orders arising (as outlined in paragraph [2.47]) and includes provisions that serve to resolve any inconsistencies should they arise. These safeguards appear to be sufficient to mitigate the risk that proposed section 68ND would weaken protection for victims of family violence.

2.50 In conclusion, while the general objective of encouraging courts to use their powers to revoke or suspend federal family violence orders to resolve any inconsistencies may be a legitimate objective, questions remain as to whether this specific measure is necessary and addresses a pressing and substantial issue of public or social concern or is likely to be effective to achieve the stated objective. Noting the strong legal obligation on States to protect the best interests of the child, the safeguards identified by the Attorney-General may not be sufficient to ensure that any limitation on this right is proportionate. As such, there appears to be some risk that proposed paragraph 68NC(b) could impermissibly limit the right of the child to have his or her best interests taken as a primary consideration.

Committee view

2.51 The committee thanks the Attorney-General for this response. 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

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].

49 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].

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.

2.52 The committee notes that this measure limits 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.

2.53 The committee notes the Attorney-General's advice that the measure seeks to encourage courts to exercise their power to revoke or suspend a federal family violence order so as to resolve inconsistencies between federal and state or territory family violence orders and in turn, protect children from harm. While the committee notes that this important objective could constitute a legitimate objective for the purposes of international human rights law, questions remain as to whether this specific measure is necessary and addresses a pressing or substantial concern. The committee notes that it is not clear whether the courts are reluctant to exercise their jurisdiction due to the complexity of considering the best interests of the child and the extent to which this reluctance could cause delay in proceedings and place victims of family violence at risk of harm. Without further information in relation to this, the committee is unable to conclude that the measure is rationally connected to the stated objective. As regards proportionality, while the committee notes that the best interests of the child would be an important consideration, this safeguard alone may be insufficient to protect the right of the child to have his or her best interests taken as a primary consideration.

Suggested action

2.54 The committee recommends the statement of compatibility with human rights be updated to reflect the information which has been provided by the Attorney-General.

2.55 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

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 *Received Royal Assent on 25 May 2021*
Rights	Non-refoulement; liberty; prohibition against torture and ill-treatment; rights of the child

2.56 The committee requested a response from the minister in relation to the bill in *Report 5 of 2021*.[2]

Removal of unlawful non-citizens where protection obligations engaged

2.57 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.[3] An 'unlawful non-citizen' is a person who is a non-citizen in the migration zone and

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, *Report 7 of 2021*; [2021] AUPJCHR 67.

2 Parliamentary Joint Committee on Human Rights, *Report 5 of 2021* (29 April 2021), pp. 13–28.

3 *Migration Act 1958*, section 198.

does not hold a lawful visa.[4] 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'.[5] Non-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'.[6]

2.58 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.[7] Proposed subsections 197C(4)–(7) would clarify the meaning of a protection finding for the purposes of proposed subsection 197C(3).[8] 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.[9]

2.59 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 criteria for a protection visa under section 36 of the Migration Act.[10] 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.[11] Read in conjunction with the proposed amendments to 197C, proposed section 36A would have the effect of ensuring that a protection finding is

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

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

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

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

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

9 Schedule 1, subitem 4(3).

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

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

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.[12]

Summary of initial assessment

Preliminary international human rights legal advice

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

Non-refoulement obligations

2.60 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.[13] 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.[14] Non-refoulement obligations are absolute and may not be subject to any limitations.[15]

Right to liberty and rights of the child

2.61 However, to the extent that the measure may also result in prolonged or indefinite immigration detention of persons who cannot be removed under 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.[16] The notion of 'arbitrariness' includes elements of inappropriateness, injustice, lack of predictability and due process of law.[17] Accordingly, any detention must not only be lawful, but also

12 Explanatory memorandum, pp. 5–6.

13 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*.

14 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].

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

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

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

reasonable, necessary and proportionate in all of the circumstances as well as subject to periodic judicial review.[18] 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.[19]

2.62 Furthermore, where the measure applies to children, it may also engage and limit the rights of the child.[20] Children have special rights under international human rights law taking into account their particular vulnerabilities.[21] 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.[22]

2.63 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.

2.64 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:

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

19 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].

20 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.

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

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

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

(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's initial view

2.65 The committee considered that the measure would support Australia's ability to uphold its non-refoulement obligations. However, the committee noted 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.

2.66 In addition, the committee noted 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.

2.67 The committee considered further information was required to assess the human rights implications of this bill, and sought the minister's advice as to the matters set out at paragraph [2.64].

2.68 The full initial analysis is set out in *Report 5 of 2021*.

Minister's response[23]

2.69 The minister advised:

> **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:**
>
> - **the number of people who were or are in detention, and the length of their detention; and**
> - **how many of this number have been either:**
>   - **granted a visa under section 195A of the Migration Act;**
>   - **placed in the community under a residence determination under section 197AB of the Migration Act; or**
>   - **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.**
>
> As at 31 March 2021, there were 1,482 people in an immigration detention facility, and 537 under a residence determination. This represents total numbers, rather than the cohort of persons who have been found to engage protection obligations. Further, it is important to note that there are over 390,000 people in the community on Bridging visas. This includes 31,557 people on Subclass (050 & 051) Bridging visa Es (including 8,894 on Departure Grounds). Many of these visas are granted by delegates and do not require my personal intervention.
>
> Statistics relating to the detention of the cohort who have been found to engage protection obligations but who were ineligible for a visa on character or other grounds are below:

23 The minister's response to the committee's inquiries was received on 25 May 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.

Length of time in detention^ of the 63 non-citizens* who were detained between 1/7/15 and 3/5/21		
Period Detained	**Total**	**% of Total**
7 days or less	0	0.0%
8 days – 31 days	<5	<5%
32 days – 91 days	<5	<5%
92 days – 182 days	<5	<5%
183 days – 365 days	0	0.0%
366 days – 547 days	<5	<5%
548 days – 730 days	<5	<5%
731 days – 1095 days	7	11.1%
1096 days – 1460 days	13	20.6%
1461 days – 1825 days	6	9.5%
Greater than 1825 days	28	44.4%
Total	**63**	**100.0%**
^Period detained is based on accumulative days in detention, including time in detention prior to 1 July 2015.		
**People who engage protection obligations but who were ineligible for a grant of a visa on character or other grounds.*		

Length of time in detention^ of the 29 non-citizens* who were detained in Immigration Detention Facilities		
Period Detained	**Total**	**% of Total**
7 days or less	0	0.0%
8 days – 31 days	0	0.0%
32 days – 91 days	0	0.0%
92 days – 182 days	0	0.0%
183 days – 365 days	0	0.0%
366 days – 547 days	0	0.0%
548 days – 730 days	0	0.0%
731 days – 1095 days	<5	6.9%

1096 days – 1460 days	6	20.7%
1461 days – 1825 days	5	17.2%
Greater than 1825 days	16	55.2%
Total	**29**	**100.0%**
^Period detained is based on accumulative days in detention, including time in detention prior to 1 July 2015.		
**People who engage protection obligations but who were ineligible for a grant of a visa on character or other grounds.*		

There are no children who have been found to engage protection obligations but who were ineligible for a grant of a visa on character or other grounds, in the last five years, who were, or are currently, detained in immigration detention facilities.

Historical statistics relating to section 195A for this cohort group are below.

Granted a visa under s 195A of the Act – persons in immigration detention who were found to engage protection obligations but were ineligible for grant of a visa on character or other grounds

Financial Year	Number of persons
2015-16	0
2016-17	<5
2017-18	<5
2018-19	<5
2019-20	<5
2020-21 (as at 30 April 2021)	<5

Information on the number of persons in detention (who have previously been found to engage protection obligations or who arrived in Australia as refugee) for whom the Minister has made a residence determination is not available in departmental systems in a reportable format.

In the last 5 years no person found to engage protection obligations has subsequently been returned to the country in relation to which they were found to engage protection obligations, or any third country.

Of the current cohort in immigration detention facilities who have not been granted a bridging visa or placed in community detention, the majority have convictions for crimes involving non-consensual sexual conduct and/or other violent crimes. A small number (less than 5) have been assessed as raising national security concerns.

Advice on safeguards to ensure that the limits on the right to liberty and the rights of the child are proportionate

I note the Committee's concerns about the Bill engaging the right to liberty and the rights of the child. The Committee notes that the Statement of Compatibility does not identify any safeguards beyond discretionary Ministerial intervention powers.

At the outset, it is relevant to reiterate that what the Bill does is protect non-citizens in respect of whom a protection finding has been made in the protection visa process, from the application of the removal provisions in section 198 of the Migration Act. The Bill makes no change to the existing provisions of the Act relating to the detention of unlawful non-citizens. Accordingly, the fact that the unlawful non-citizens who are covered by the Bill will, instead of being liable to removal irrespective of protection obligations, be subject to the existing provisions governing the detention of unlawful non-citizens while other options are explored, will be the result of those existing provisions.

That said, to address the Committee's concerns, I draw the Committee's attention to:

- The existing internal assurance processes and external oversight by scrutiny bodies;
- The Government's position around the detention of children; and
- Recent Bridging visa amendments.

Internal assurance processes and external scrutiny

The length and conditions of immigration detention are subject to regular internal and external review. The Department and the Australian Border Force use internal assurance and external oversight processes to help care for and protect people in immigration detention and maintain the health, safety and wellbeing of all detainees.

The Department has a framework of regular reviews in place, and escalation and referral points to ensure that people are detained in the most appropriate placement to manage their health, welfare and resolution of their immigration status. The Department also maintains that review mechanisms regularly consider the necessity of detention and where appropriate, identify less restrictive means of detention or the grant of a visa.

Each detainee's case is reviewed monthly by a Status Resolution Officer to ensure that emerging vulnerabilities or barriers to case progression are identified and referred for action. In addition, the Status Resolution Officer also considers whether ongoing detention remains appropriate and refers relevant cases for further action. Monthly detention review committees also provide formal executive level oversight of the placement and status resolution progress of each immigration detainee.

The Department proactively continues to identify and utilise alternatives to held detention. Status Resolution Officers use the Community Protection Assessment Tool to assess the most appropriate placement for an unlawful non-citizen while status resolution processes are being undertaken. Placement includes consideration of alternatives to an immigration detention centre, such as placement in the community on a bridging visa or under residence determination arrangements. The tool also assesses the types of support or conditions that may be appropriate. Theses supports and conditions are generally reviewed every three to six months and/or when there is a significant change in an individual's circumstances.

Using the Community Protection Assessment Tool, Status Resolution Officers assess and determine whether the detainee meets the legislative requirements and criteria for a bridging visa to allow the non-citizen *to* temporarily reside lawfully in the community while they resolve their immigration status. Status Resolution Officers identify cases where only the Minister has the power to grant the non-citizen a visa or to make a residence determination in order to allow an unlawful non-citizen to reside in community detention. Where the case is determined to meet the Ministerial Intervention Guidelines, the case is referred to the Minister for consideration under section 195A of the Act for grant of a visa or under section 197AB of the Migration Act for placement in the community.

The Office of the Commonwealth Ombudsman (the Ombudsman) and the Australian Human Rights Commission have legislative oversight responsibilities. These bodies conduct oversight activities, publish reports and make recommendations in relation to immigration detention.

In addition to these activities, under the Migration Act, the Secretary of the Department of Home Affairs, the Ombudsman and the Minister have statutory obligations around the oversight of long-term immigration detainees. These provisions are intended to provide greater transparency in the management of long-term detainees through independent assessments by the Commonwealth Ombudsman.

The Secretary must provide reports to the Commonwealth Ombudsman on individuals who have completed a cumulative period of two years in immigration detention and then for every six months that they remain in detention. The Ombudsman must then provide an assessment of these individuals' detention to the Minister, which the Minister then tables in Parliament, including any recommendations from the Ombudsman. Once all domestic remedies are exhausted, individuals may also submit a complaint *to* relevant United Nation bodies such as the United Nations Committee against Torture or the UN Human Rights Committee.

Government position on the detention of children

The principle that a minor should only be placed in immigration detention as a measure of last resort is prescribed in Australian law, specifically section 4AA of the Migration Act. It remains the position that children are not held in immigration detention centres.

In the event that an unlawful non-citizen child is detained, they are accommodated in alternative places of detention, such as immigration residential housing precincts designed for families, or in the community under a residence determination.

Unaccompanied minors and family groups with minor children are routinely prioritised for consideration of a community placement. This means that vulnerable non-citizens may be able to reside in the community either under residence determination arrangements (community detention) or on a bridging visa while they resolve their immigration status.

The number of minors in held detention at any one time is generally less than five. On the whole, if a minor is detained, it is usually only briefly and as a result of immigration activities such as being turned around at an airport or in preparation for removal to their country of origin.

There are currently no minors in held immigration detention who have had a visa refused or cancelled on character or national security grounds but who have been found to engage protection obligations.

Recent Bridging visa amendments

As the Committee notes, the Statement of Compatibility with Human Rights acknowledges the Government's policy that detention in an immigration detention centre continues to be an option of last resort for managing unlawful non-citizens who cannot be removed and present a risk to the community. Whether the person is placed in an immigration detention facility, or other arrangements are made, including placement in the community under residence determination arrangements or consideration of the grant of a visa, is determined using a risk-based approach. Where appropriate, it is the Government's preference to manage individuals in the community.

To complement this Bill, the Government continues to explore ways to improve options for managing unlawful non-citizens in the community in a manner that would seek to protect the Australian community while addressing the risks associated with long-term detention.

- For example, on 16 April 2021, amendments were made *to* the *Migration Regulations 1994* to allow additional existing visa conditions to be imposed on certain Bridging visas granted under Ministerial Intervention powers. These amendments strengthen the community placement options available for detainees who may pose a risk to public safety. They are an additional safeguard designed to complement this Bill.

These amendments will enable the Minister to have further options available to assist in minimising the risk to public safety when considering whether to release the detainee from immigration detention.

Where a visa is not granted, people in immigration detention are accommodated in facilities most appropriate to their needs, circumstances and risk, with services developed to suit each individuals needs.

Advice on safeguards to ensure that people affected by the Bill in immigration detention will not be indefinitely detained and consequently at risk of being subjected to ill-treatments and how the measure is compatible with the prohibition against torture or other cruel, inhuman or degrading treatment or punishment

The amendments will provide a safeguard which ensures that an officer is not obliged to remove an unlawful non-citizen in breach of *non-refoulement* obligations. Such an unlawful non-citizen will be subject to the existing provisions of the Act relating to the detention of unlawful no-citizens while other options are explored.

Under the Migration Act, immigration detention is not limited by a set timeframe. It ends when the person is either granted a visa or is removed from Australia. The timeframe associated with either of these events is dependent upon a number of factors.

Removal in such cases may become possible if, for example, the circumstances in the person's home country improves such that they no longer engage *non-refoulement* obligations, or if a safe third country is willing to accept the person. An unlawful non-citizen may also request in writing to be removed from Australia at any time. The Bill will provide a clear legislative basis to allow adequate time to take active steps to consider alternative management options for people in detention who engage *non-refoulement* obligations.

As noted above, the Statement of Compatibility with Human Rights acknowledges the Government's policy that detention in an immigration detention centre continues to be an option of last resort for managing unlawful non-citizens who cannot be removed and present a risk to the community. Whether the person is placed in an immigration detention facility, or other arrangements are made, including community detention or consideration of the grant of a visa, is determined using a risk-based approach. Where appropriate, it is the Government's preference to manage individuals in the community.

- To reinforce this position, I wish to draw your attention to the widespread use of Bridging visas as an alternative to immigration detention. While I have provided statistics on the grant of visas under Ministerial Intervention powers this does not provide the full picture.
- While there are 1482 people in an immigration detention facility, and 537 under residence determination arrangements, it is important to note that there are over 390,000 people in the community on Bridging visas. This includes 31,557 people on Subclass (050&051) Bridging visa Es (including 8,894 on Departure Grounds). Many of these visas are granted by delegates and do not require my personal intervention.

- Without a Bridging visa, these people would be unlawful non-citizens and would need to be detained under the Migration Act.

As outlined further above, the viability of Bridging visas as an alternative to immigration detention has recently been improved through regulation amendments.

As also noted above, where a visa is not granted, people in immigration detention are accommodated in facilities most appropriate to their needs, circumstances and risk with services developed to suit each individual's needs.

Detainee welfare

I note the Committee's comment that the Statement of Compatibility did not address whether the measure is compatible with the prohibition against torture or ill-treatment.

The Government accepts that the prohibition on torture and ill-treatment includes protecting the physical and mental well-being of detained individuals. The Government takes the welfare of those in immigration detention very seriously. All people in detention are treated with respect dignity and fairness. I am committed to ensuring detainees in immigration detention are provided with high quality services commensurate to Australian standards and that the conditions in immigration detention are humane and respect the inherent dignity of the person. The Government works closely with its service providers to ensure immigration detainees are provided with adequate accommodation, infrastructure, medical services, security services, catering services, programs, activities, support services and communication facilities.

Some detainees may be in more vulnerable circumstances than others. This includes people who have complex health needs including mental health or where they have a history of torture, trauma or people who have been subject to people trafficking or domestic or family violence. Any detainee who discloses a history of torture and/or trauma ls offered referral to specialist torture and trauma counselling.

The Detention Health Procedural Instruction on Mental Health outlines the services made available to persons in immigration detention, in order to manage a range of mental health issues that may present.

The Australian Government's contracted detention health services provider is responsible for mental health care and support services which are delivered by general practitioners mental health nurses, psychologists, counsellors and psychiatrists, including those specialising in torture and trauma counselling services (on a visiting basis, or through the use of tele-health facilities or external appointments).

Regular mental health assessments are performed and delivered in line with the relevant Australian standards.

Where the Department identifies that a detainee has significant vulnerabilities that indicate management within an immigration detention centre is no longer appropriate, they may be considered for alternative management options. These could include grant of a Bridging visa by a departmental delegate (if possible), or referral to a Minister for consideration under the Minister's personal intervention powers including those under section 197AB of the Migration Act to allow a detainee to reside in an Alternate Place of Detention.

Detainees are able to access legal representation in accordance with the Migration Act and the Government provide detainees with the means to contact family, friends and other support. The Government respects and caters for religious and cultural diversity.

Detainees who are unsatisfied with the conditions in immigration detention can raise concerns in person with Australian Border Force officers and service provider staff, or in writing or by telephone with the Department of Home Affairs or external scrutiny bodies.

In 2018 the Office of the Commonwealth Ombudsman was nominated as the National Preventive Mechanism Coordinator and the inspecting body for Commonwealth places of detention for the purpose of Australia's obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This function includes oversight of immigration detention facilities.

Advice on whether this measure will have any impact on persons involved in current litigation or who have been unlawfully detained based on the case law established by the Federal Court decision in AJL20 v Commonwealth of Australia [2020] FCA 1305.

After commencement, the new provisions in section 197C will apply to all unlawful non-citizens who are subject to removal but engage protection obligations that have been assessed and accepted during the Protection visa process. This means first and foremost that officers will no longer be authorised or required to remove a person in breach of *non-refoulement* obligations. If this Bill is not passed, there is a strong possibility that the Migration Act will require the removal of certain unlawful non-citizens in breach of *non-refoulement* obligations.

The new section 36A will apply to all new Protection visa applications. This means the Bill will provide a clear legislative basis to require the Minister or a delegate to consider and make a record of protection findings when assessing whether a non-citizen satisfies the protection visa criteria. This will ensure that unlawful non-citizens who are found to engage protection obligations are not removed in breach of *non-refoulement* obligations. While this is an important measure, it largely codifies existing processes outlined in Ministerial Direction 75 made under section 499 of the Migration Act.

Impact on AJL20 litigant

The Commonwealth has appealed the judgment in AJL20 in the High Court and judgment is reserved. If the Court accepts the Commonwealth's arguments, the Migration Act will have validly authorised AJL20's detention. ln that case, the Bill will not have any effect on unlawful detention claims based on AJL20.

If AJL20 is upheld, the Bill may prospectively validate a person's detention in analogous circumstances to AJL20. However, this will not have retrospective effect on any persons' unlawful detention claims.

It would not be appropriate to comment further on active litigation before the Courts.

Concluding comments

International human rights legal advice

Rights to non-refoulement; liberty; rights of the child

2.70 As was previously noted, the measure pursues the legitimate objective of supporting Australia to uphold its non-refoulement obligations and 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.[24] The preliminary analysis raised serious concerns as to whether the measure is proportionate and sought further information from the minister in this regard. Key considerations in assessing the proportionality of this measure include: whether it is accompanied by adequate safeguards and is the least rights restrictive alternative; whether it provides access to review and the possibility of oversight; and whether it constitutes a significant interference with rights.

2.71 In assessing whether the minister's discretionary powers would likely operate as an adequate safeguard, a relevant consideration is the extent to which these powers are exercised in practice. In relation to persons in immigration detention who engage protection obligations but are ineligible for a grant of a visa on character or other grounds, the minister advised that in the 2015-16 financial year, no persons were granted a discretionary visa under section 195A and less than five people were granted these visas in each financial year between 2016 and 2021. The minister did not specify the exact number of visas granted under section 195A between 2015 and 2021 and stated that the number of persons granted a residence determination under section 197AB is not available in a reportable format.

2.72 While exact figures are unavailable, it appears that the minister's discretionary powers to grant a visa under sections 195A or 197AB are exercised infrequently. The preliminary analysis noted that the minister's discretionary powers have the potential

24 Parliamentary Joint Committee on Human Rights, *Report 5 of 2021* (29 April 2021), pp. 20 and 26.

to operate as a safeguard by providing the minister with flexibility to treat individual cases differently. However, given that these discretionary powers appear to be exercised infrequently in practice, as well as the fact that they are non-reviewable and non-compellable, and do not attract the requirements of procedural fairness, they do not appear to be a sufficient safeguard for the purpose of a permissible limitation under international human rights law.

2.73 In addition, the minister advised that the recent amendments to the *Migration Regulations 1994*, which allow additional visa conditions to be imposed on visas granted by the minister under section 195A, would serve as a further safeguard to accompany this measure.[25] The minister stated that these additional conditions strengthen community placement options and improve management of unlawful non-citizens in the community. To the extent that these additional conditions would facilitate the granting of a visa under section 195A and result in the release of individuals from detention, they may promote the right to liberty.[26] However, these additional conditions may also limit a number of other rights. As outlined in the committee's preliminary analysis of these regulations (set out in Chapter 1 of this report), there are a number of concerns that the conditions may not: meet the quality of law test; address a pressing and substantial concern for the purposes of international human rights law; be sufficiently circumscribed; include sufficient safeguards; or include access to effective review.[27] In light of these concerns, it is unclear that the additional conditions would in fact operate as a safeguard against arbitrary detention in the context of this measure. Thus, notwithstanding the provision of these additional conditions and the stated preference to manage non-citizens in the community and use detention as a last resort, the infrequent use of the minister's discretionary powers in practice and the consequent protracted length of time non-citizens spend in immigration detention (with the majority of non-citizens currently in immigration detention having spent over five years in detention), indicates that the discretionary powers are not an accessible alternative to detention.[28] As observed by the UN High Commissioner for Refugees, alternatives to detention must

25 See Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444].

26 The amendments to the *Migration Regulations 1994* were considered by the committee in Chapter 1 of this report. See Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444], *Report 7 of 2021* (23 June 2021) pp. 51-75.

27 Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444], *Report 7 of 2021* (23 June 2021) pp. 51-75.

28 The statement of compatibility notes that the minister's 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 used as a last resort: pp. 13–14.

be accessible in practice (not merely available on paper) and should not be used as alternative forms of detention.[29]

2.74 Regarding the availability of review and the possibility of oversight, the minister advised that the length and conditions of immigration detention are subject to regular internal and external review and oversight processes. The minister stated that the department has a regular reviews framework in place, including a monthly review of each detainee's case by a Status Resolution Officer. The officer considers the vulnerabilities of each detainee and whether ongoing detention remains appropriate. The officers use the Community Protection Assessment Tool to assess the most appropriate placement for the detainee, including alternatives to detention such as a bridging visa or residence determination, and the types of support or conditions that may be appropriate for the detainee. The minister noted that these supports and conditions are generally reviewed every three to six months and/or where there is a significant change in an individual's circumstances. The minister advised that the officers use the Community Protection Assessment Tool to identify cases where only the minister has the power to grant the person a visa or to make a residence determination. These cases may be referred to the minister for consideration under sections 195A or 197AB for placement in the community. The minister stated that the monthly detention review committees also provide formal executive level oversight of the placement and status resolution progress of each detainee.

2.75 In addition, the minister advised that the Office of the Commonwealth Ombudsman and the Australian Human Rights Commission have legislative oversight responsibilities, including overseeing activities, publishing reports and making recommendations in relation to immigration detention. The minister also noted that the Secretary of the Department of Home Affairs and the minister have statutory oversight obligations in relation to long-term immigration detainees. The secretary must provide reports to the Ombudsman on persons detained in immigration detention for a cumulative period of two years and then provide to the minister an assessment of these individuals every six months that they remain in detention. This assessment is tabled in Parliament. Finally, the minister stated that once all domestic remedies are exhausted, individuals may submit a complaint to the relevant UN bodies.

2.76 These internal review mechanisms and the availability of oversight by the Commonwealth Ombudsman and Australian Human Rights Commission could serve as a safeguard against arbitrary and unlawful detention. In particular, the monthly reviews by a Status Resolution Officer of the necessity and appropriateness of detention may help to ensure that detention is justified on an individual basis. The UN Human Rights Committee has made clear that periodic re-evaluation and judicial

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

review of immigration detention must be available to scrutinise whether the continued detention is lawful and non-arbitrary.[30] This includes an individual assessment of the need to subject a person to continuous and protracted detention and the State party demonstrating that 'other, less intrusive, measures could not have achieved the same end'.[31] However, questions arise as to whether these internal review mechanisms and oversight frameworks would in fact be an effective safeguard in practice. This is because they may not necessarily result in the release of an individual from detention, as release is only possible where the minister exercises their discretionary powers to grant a visa under sections 195A or 197AB—which seems to occur infrequently, noting in particular that of those detained under these powers in the last five years, three-quarters were detained for over two years, and almost half were detained for over five years. As noted in the preliminary analysis, 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 (as opposed to being based on the needs and vulnerabilities of individual detainees); and the powers are non-reviewable and non-compellable.

2.77 Regarding the oversight functions of the minister and the Secretary of the Department of Home Affairs, there are concerns that these may not be adequate because they are not an independent oversight mechanism. The UN Human Rights Committee has emphasised the importance of access to independent procedural safeguards and regular review by an independent body. In relation to the right to take proceedings before a court to review the lawfulness and arbitrariness of detention, the Committee has stated that ordinarily the court should be within the judiciary and in exceptional circumstances, may be before a specialised tribunal or other body. This other body must still be established by law and 'must either be independent of the executive and legislative branches or enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature'.[32] As the minister and Secretary of the Department are not independent of the executive or legislature branches of government, their oversight functions would not appear to assist with the proportionality of this measure.

2.78 In addition, under international human rights law, detainees have the right to access judicial review to challenge the lawfulness of their detention.[33] To be effective, judicial review of detention should not be limited to compliance with law and must

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

31 *MGC v Australia*, UN Human Rights Committee Communication No.1875/2009 (2015) [11.6].

32 UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [45]. See also [14] and [21].

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

include the possibility of release.[34] It should also be 'open to the Court to review the justification of [an individual's] detention in substantive terms'.[35] As noted in the preliminary analysis, this bill seeks to remove the basis on which the applicant was released in *AJL20*[36] 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 relation to that person.[37] Regarding the impact of this bill on the *AJL20* case, the minister advised that if the decision is upheld by the High Court, the bill may prospectively validate a person's detention in analogous circumstances to *AJL20* but it will not have retrospective effect on any persons' unlawful detention claims. If the Commonwealth is successful in its appeal of *AJL20*, the minister stated that the bill will not have any effect on unlawful detention claims based on this case. It appears, therefore, that the effect of this measure would be to make it more difficult to mount a successful legal challenge to detention for persons in similar circumstances to *AJL20* (namely, those who are owed protection obligations but are ineligible for a grant of a visa). As such, it seems unlikely that judicial review in these circumstances would include the possibility of release in appropriate cases and so does not appear to assist with the proportionality of this measure. Concerns therefore remain that, in the absence of merits review, judicial review in the context of this measure may not be effective for the purposes of international human rights law. 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

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

35 *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].

36 *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]).

37 Statement of compatibility, pp. 11–12.

law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision.[38]

2.79 A further consideration in assessing proportionality is the extent of any interference with human rights. The length of detention is relevant in this regard.[39] The minister advised that between 1 July 2015 and 3 May 2021, of the 63 people in detention who engage protection obligations but are ineligible for a grant of a visa on character or other grounds, 54 people have been in detention for more than two years and of those people, 28 have been in detention for more than five years. Of the 29 non-citizens currently in detention, all persons have been detained for over two years and 16 people have been detained for more than five years. The minister advised that no children have been in the past five years, or currently are, in immigration detention as a result of being found to engage protection obligations but being ineligible for a grant of a visa.

2.80 These figures indicate that persons who are found to engage protection obligations but are ineligible for a visa on character or other grounds are frequently detained in immigration detention for significant periods of time. The minister stated that there is no legislative limit on the length of immigration detention and that detention will end when the person is either granted a visa or is removed from Australia. However, for persons to whom this measure applies, they are ineligible for the grant of a substantive visa and they cannot be removed from Australia because they are owed protection obligations. Therefore, without any legislative maximum period of detention and an absence of effective safeguards to protect against arbitrary detention, there is a real and significant risk that detention may become indefinite. The UN Human Rights Committee has made clear that '[t]he inability of a state to carry

38 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].

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

out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention'.[40]

2.81 The minister further noted that removal from Australia may become possible if the circumstances in the person's home country improve such that they are no longer owed protection obligations or where a person requests to be removed from Australia. This possibility of removal, however, does not mitigate the risk of protracted or indefinite detention, especially where the circumstances in the relevant country are unlikely to improve in the reasonably foreseeable future. As such, where the measure would result 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

2.82 Finally, the preliminary analysis noted that, 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.[41] This obligation is absolute and may never be limited. The length and conditions of detention are relevant in this regard.[42]

2.83 As noted above, the minister indicated that immigration detention is not limited by a set timeframe and will end when a person is granted a visa or is removed from Australia. The minister advised that where a person is not granted a visa, they are accommodated in immigration detention facilities most appropriate to their needs, circumstances and risk, with services developed to suit each individual's needs. For example, a detainee who discloses a history of torture and/or trauma is offered a referral to specialist torture and trauma counselling. The minister stated that detainees have access to health and other support services, including regular mental health assessments. The minister also noted that detainees have access to legal representation and are provided with the means to contact family, friends and other support. Finally, the minister stated that the Office of the Commonwealth

40 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].

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

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

Ombudsman provides oversight of immigration detention facilities as part of its functions as the National Preventative Mechanism Coordinator and inspecting body for the purpose of Australia's obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2.84 The services outlined by the minister and the Commonwealth Ombudsman's oversight functions could help to ensure that detention conditions are humane. However, it is unclear whether these services are sufficient to ameliorate concerns about the implications of the measure for the prohibition against torture and ill-treatment. It is noted that the UN Human Rights Committee has previously characterised the conditions in Australia's detention facilities as 'difficult'. The UN Committee found that these difficult detention conditions in combination with the arbitrary character of detention, its protracted and/or indefinite duration and the absence of procedural safeguards to challenge detention, cumulatively inflicted serious psychological harm on detainees that amounted to cruel, inhuman or degrading treatment.[43] Noting the possibility of indefinite or protracted detention, the absence of effective review and other procedural safeguards as well as the uncertainty as to whether the services outlined by the minister are sufficient to ensure detention conditions are humane, there appears to remain 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.

Subsequent amendments to the bill

2.85 The minister advised that on 13 May 2021, the bill was passed by the Senate following amendments. The amendments included new section 197D, which allows the minister to make a decision that an unlawful non-citizen to whom a protection finding is made is no longer a person in respect of whom any protection finding would be made.[44] If such a decision is made, the minister must notify the non-citizen of the decision and the reasons for the decision as well as their review rights in relation to the decision.[45] The minister advised that the effect of the amendments is to provide access to merits review for individuals who were previously determined to have engaged protection obligations but are subsequently found by the minister to no longer engage those obligations. New paragraph 197C(3)(c) permits the removal powers in section 198 to operate where a decision is made under section 197D.[46] The

43 *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].

44 *Migration Act 1958*, subsection 197D(2).

45 *Migration Act 1958*, subsection 197D(4).

46 Revised statement of compatibility, p. 17.

minister noted, however, that a person cannot be removed under section 198 until the merits review process is finalised.

2.86 These amendments may have significant human rights implications insofar as they have the effect of allowing the minister to overturn a protection finding, thereby exposing the person to the risk of being returned to the country in relation to which a protecting finding was previously made. It is not clear on what basis the minister would make this decision, noting that section 197D provides limited guidance as to the circumstances in which the minister would be 'satisfied' that a person is no longer owed protection obligations. The revised explanatory memorandum notes that in practice, it would be rare that a person who has been found to engage protection obligations would no longer engage those obligations.[47] If this is the case, it is unclear why this amendment was necessary. It is difficult to assess the full human rights implications of these amendments, particularly in relation to Australia's *non-refoulement* obligations, as they were introduced after the committee undertook its preliminary analysis and the revised statement of compatibility does not provide a detailed compatibility analysis of this specific measure.[48]

Concluding remarks

2.87 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, the minister's response has not alleviated the serious concerns raised in the preliminary analysis regarding the proportionality of this measure. While the minister's discretionary powers may provide some flexibility to treat individual cases differently, these powers appear to be infrequently exercised in practice and are non-reviewable and non-compellable. Thus, they are unlikely to be an effective safeguard in practice or offer an accessible alternative to detention. Given the effect of the measure is 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, it seems that access to review in these circumstances would not be effective in practice, noting that review of detention must include the possibility of release. Finally, the statistics provided by the minister regarding the length of detention of persons who are found to engage protection obligations but are ineligible for a visa on character or other grounds, indicate that such persons are frequently detained in immigration detention for significant periods of time, with over three-quarters of such persons being detained for over two years, and almost half detained for over five years. Insofar as the measure

47 Revised explanatory memorandum, p. 11.

48 It is noted that the amendments to the bill were introduced and considered on 12 May 2021 and the bill passed both Houses of Parliament with amendments on 13 May 2021.

would effectively result in protracted or indefinite detention of these individuals, this represents a significant interference with their rights. For these reasons, there is a significant risk that the measure is incompatible with the right to liberty and the prohibition against torture or ill-treatment, and were children to be detained under these circumstances, with the rights of the child.

Committee view

2.88 The committee notes that this bill, which has now received royal assent, proposed 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 proposed 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.

2.89 The committee considers that the measure would support Australia's ability to uphold its protection obligations. However, 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.

2.90 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.

2.91 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 considers that the minister's response has not alleviated its serious concerns regarding the compatibility of this measure with the right to liberty, the rights of the child and the prohibition against torture or ill-treatment. The committee notes that for persons who are found to engage Australia's protection obligations but are ineligible for a visa on character or other grounds, the minister's advice indicates that such persons are frequently detained in immigration detention for significant periods of time, with over three-quarters of such persons being detained for over two years, and almost half detained for over five years. As such the committee does not consider the minister's discretionary powers to grant a visa to such persons has operated as an effective safeguard on the possibility of indefinite detention. Therefore, insofar as the measure may effectively result in the protracted or indefinite detention of these individuals, the committee considers there is a significant risk that it may be incompatible with the right to liberty and the prohibition against torture or

ill-treatment, and were children to be detained under these circumstances, with the rights of the child.

2.92 Noting that this bill passed both Houses of Parliament on 13 May 2021, the committee makes no further comment.

Legislative instruments

Migration (Granting of contributory parent visas, parent visas and other family visas in the 2020/2021 financial year) Instrument (LIN 21/025) 2021 [F2021L00511][1]

Purpose	This legislative instrument determines the maximum number of visas that may be granted for certain classes of visas in the financial year from 1 July 2020 to 30 June 2021
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	This legislative instrument is exempt from disallowance (as it is made under Part 2 of the *Migration Act 1958*, which is prescribed in paragraph (a) of item 20 of the table in section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015)
Rights	Protection of the family; rights of the child

2.93 The committee requested a response from the minister in relation to this legislative instrument in *Report 6 of 2021*.[2]

Capping numbers of parent visas

2.94 This legislative instrument sets out the maximum number of visas that can be granted in the 2020–2021 financial year for contributory parent visas; parent visas; and other family visas. The cap set by the instrument is 4,500 for parent visas and 500 for other family visas. This is in comparison to the cap set for the previous financial year of 7,371 for parent visas and 562 for other family visas.[3]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Granting of contributory parent visas, parent visas and other family visas in the 2020/2021 financial year) Instrument (LIN 21/025) 2021 [F2021L00511], *Report 7 of 2021*; [2021] AUPJCHR 68

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2021* (13 May 2021), pp. 8-10.

3 See Migration (LIN 19/131: Granting of Contributory Parent Visas, Parent Visas and Other Family Visas in the 2019/2020 Financial Year) Instrument 2019 (F2019L01496).

Summary of initial assessment

Preliminary international human rights legal advice

Right to protection of the family and rights of the child

2.95 Capping the number of parent visas and other family visas, which it appears may limit the ability of certain family members (including parents of children aged under 18) to join others in Australia, engages and may limit the right to protection of the family and the rights of the child.[4] An important element of protection of the family[5] 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 child are a primary consideration, and to treat applications by minors for family reunification in a positive, humane and expeditious manner.[6]

2.96 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.

2.97 As this legislative instrument is exempt from disallowance by the Parliament, it is not required to be accompanied by a statement of compatibility with human rights.[7] As such, no assessment of the compatibility of this measure with the rights to protection of the family or the rights of the child has been provided. It is therefore not clear what is the legitimate objective of this measure, nor whether the measure is proportionate to that objective.

2.98 As such, 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) whether setting a cap on the number of parent and other family visas seeks to achieve a legitimate objective for the purposes of international human rights law;

4 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].

5 Protected by articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights.

6 Convention on the Rights of the Child, articles 3(1) and 10.

7 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

(b) whether the cap on the number of visas is a reasonable and proportionate measure to achieve the stated objective;

(c) why the cap on numbers in this financial year is lower than that in the previous financial year;

(d) whether any children under 18 years would be likely to be separated from their parents as a result of caps imposed on the numbers of parent visas granted;

(e) whether there is any discretion to ensure family members are not involuntarily separated as a result of the cap on the number of parent and other family visas; and

(f) whether the right to the protection of the family and the rights of the child were considered when these capped numbers were determined.

Committee's initial view

2.99 The committee considered that capping the number of parent and other family visas engages and may limit the right to protection of the family and the rights of the child. The committee sought the minister's advice as to the matters set out at paragraph [2.98]. The full initial analysis is set out in *Report 6 of 2021*.

Minister's response[8]

2.100 The minister advised:

(a) whether setting a cap on the number of parent and other family visas seeks to achieve a legitimate objective for the purposes of international human rights law;

(b) whether the cap on the number of visas is a reasonable and proportionate measure to achieve the stated objective;

Australia's Family Migration Program facilitates the reunification of family members (including Parents and Other Family) with Australian citizens, permanent residents or eligible New Zealand citizens. The requirement not to arbitrarily or unlawfully interfere with the family unit under Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) does not amount to a right to enter Australia where there is no other right to do so. While there is no absolute right to family reunion at international law, Australia recognises that it is an important principle and it is facilitated where possible.

8 The minister's response to the committee's inquiries was received on 26 May 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.

It has been the long-standing practice of successive governments to manage the orderly delivery of the Migration Program against planning levels. Each year, the Government sets Migration Program planning levels following consultations with state and territory governments, business and community groups and the wider public.

The Department of Home Affairs (the Department) manages the allocation of resources to deliver the Family Program, including Parent and Other Family visas, in line with the planning levels and priorities set by the Government.

Furthermore, section 85 of the *Migration Act 1958* (the Act) allows the Minister to determine the maximum number of visas which may be granted in each financial year in certain visa categories, including, Parent and Other Family visas. If a visa class has been 'capped' this means that if the number of visas granted within that financial year have reached the maximum number determined by the Minister, no more visas of that class may be granted in that financial year. Those visa applications will be 'queued' for further processing in the next financial year.

The 'cap and queue' power allows the annual Migration Program to be managed more efficiently by:

- limiting the number of visas that may be granted under a specific class, while queueing additional applications which satisfy the criteria for grant; and
- ensuring that applications which do not satisfy the criteria for a visa can be refused and do not remain in the queue for years before a decision is made on their application.

The number of Contributory Parent, Parent and Other Family visa application lodgements continue to exceed the visa places allocated each financial year by the Government. In order to facilitate the orderly and equitable processing of visa applications in these categories, Parent, Contributory Parent and Other Family visas are capped at their respective planning levels via a legislative instrument under annual Migration Program arrangements that have been in place for over ten years.

(c) why the cap on numbers in this financial year is lower than that in the previous financial year;

As noted above, each year the Parent, Contributory Parent and Other Family visas are capped at their respective planning levels, which are set by the Government following public consultations. Community views, economic and labour force forecasts, international research, net overseas migration and economic and fiscal modelling are all taken into account when planning the program.

In the 2020-21 Migration Program, in response to the impacts of the COVID-19 pandemic, including international travel restrictions, the Parent visa category was reduced to 4,500 and Other Family visa category to 500

places in favour of Partner visa places, which were increased to 72,300 places. An expanded Partner visa program is intended to support the reunification of Australians with their spouse or de *facto* partners during the COVID-19 pandemic and provide greater certainty for those who may have been waiting for extended periods for a visa outcome in Australia. The increase in Partner places is also expected to improve Partner visa processing times and reduce the number of applications on hand.

In line with the Migration Program planning levels set for 2020-21, the Migration *(Granting of contributory parent visas, parent visas and other family visas in the 2020-2021 financial year) Instrument (LIN 21/025) 2021* sets the cap for Contributory Parent visas at 3,600 and Parent visas at 900 (equal to the 4,500 places allocated for the Parent category). The cap for Other Family visas has also been set in line with the 2020-21 planning level of 500 places.

(d) whether any children under 18 years would be likely to be separated from their parents as a result of caps imposed on the numbers of parent visas granted;

(e) whether there is any discretion to ensure family members are not involuntarily separated as a result of the cap of the number of parent and other family visas;

While Australia recognises that family reunion is an important principle and will be facilitated where possible, as noted above, rights in relation to family reunion, including those under Articles 17 and 23 of the ICCPR, and Article 10 of the Convention on the Rights of the Child, are not absolute rights at international law and do not amount to a right to enter Australia where there is no other right to do so.

The capping of Parent and Other Family visas made under section 85 of the Act facilitates the orderly and equitable processing of all visa applications in these categories, including those involving children under 18 years of age.

In addition to Australia's permanent Family Migration Program, the Government also facilitates short-term family reunification through temporary visas, which allow for a temporary stay in Australia. Family visa applicants, including those awaiting an outcome of their permanent Parent visa, may be able to reunite with family members in Australia, subject to meeting the visa eligibility criteria. Visa options may include:

- Visitor visas which are available for the purposes of a short-term stay in Australia, including family visits. These include the Electronic Travel Authority (ETA) (subclass 601) and eVisitor visa (subclass 651), which are available to particular citizenships only for stays of up to three months at a time; and the Visitor visa (subclass 600), which is available to all citizenships for a stay of up to 12 months.
- The Visitor visa (subclass 600) which includes the Sponsored Family stream, which enables settled Australian citizens and permanent

residents, aged at least 18 years, to sponsor a relative for short-term stays in Australia. Visitor visa policy also allows for parents of Australian citizens or permanent residents to be granted Visitor visas (subclass 600) with visa validity periods greater than the standard 12 months.

- The Sponsored Parent (Temporary) Visa (subclass 870) (SPTV), which opened to visa applications on 1 July 2019, provides an alternative pathway for parents to reunite with their children in Australia, and has been capped at 15,000 places per program year. The SPTV allows parents of Australian sponsors (who are at least 18 years of age) to visit Australia for up to three or five years at one time, for a combined maximum stay of up to 10 years.

In recognition of the impact of COVID-19 travel restrictions on Parent visa applicants and their Australian citizen or permanent resident sponsors, and to facilitate family reunification, on 24 March 2021, the Government introduced a temporary concession that removed the requirement to be in or outside Australia at the time of visa grant for certain Parent visa applicants. This means that affected applicants would no longer be prevented from being granted a visa to stay in or enter Australia because they do not meet the criteria requiring them to be either in or outside Australian at the time of visa grant.

(f) whether the right to the protection of the family and the rights of the child were considered when these capped numbers were determined.

When developing policies and drafting legislation related to the Family Program, the Department carefully considers compliance with Australia's international human rights obligations.

Concluding comments

International human rights legal advice

Rights to protection of the family and rights of the child

2.101 The minister has advised that it is the government's view that the right to protection of the family and the rights of the child do not amount to a right to enter Australia where there is no other right to do so, but that the government recognises that family reunion is an important principle that is facilitated where possible. The minister has advised that the capping of the parent and other family visas would apply to all visa applications, including those involving children under 18 years of age. The minister has also advised that the cap on parent visas and other family visas is lower in 2020–2021 in favour of increasing the number of partner places during the COVID-19 pandemic. The minister has further advised that in addition to the permanent family migration program, there is the possibility of short-term reunification through temporary visas, such as visitor visas – subject to applicants and sponsors meeting the visa eligibility requirements. In response to whether the right to the protection of the family and the rights of the child were considered when capping

these numbers, the minister has advised that the department carefully considers compliance with Australia's international human rights obligations when developing policies and drafting legislation related to the family program.

2.102 The right to protection of the family is found in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Those treaties state that the family 'is the natural and fundamental group unit of society and is entitled to protection by society and the State' and that the 'widest possible protection and assistance should be accorded to the family'.[9] While the state has a right to control immigration, this right does require Australia to create the conditions conducive to family formation and stability, including the interest of family reunification.[10] The term 'family' is to be understood broadly as to include all those comprising a family as understood in the society concerned,[11] and is not necessarily displaced by geographical separation if there is a family bond to protect.[12] This clearly includes couples and the parent-child relationship, and may include parents and their adult children[13] and other family members,[14] depending on the level of dependency, shared life and emotional ties. As such, if parents are separated from their children (including children aged under 18 years and adult children), where it can be demonstrated that there is a family bond to protect, a failure to allow for family reunification limits the right to protection of the family. This is not an absolute right and may be limited, so long as the limitation can be demonstrated to pursue a legitimate objective, and the measure is rationally connected to (that is, effective to achieve) the objective and is a proportionate way in which to achieve the stated objective.

2.103 In addition, the Convention on the Rights of the Child requires that the best interests of the child must be a primary consideration, and children should not be separated against their will from their parents (except if in their best interests), and States should respect the primary responsibility of parents or guardians for promoting

9 International Covenant on Civil and Political Rights, article 23 and the International Covenant on Economic, Social and Cultural Rights, article 10.

10 See *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4]–[6.5].

11 See General Comment No. 16, *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, 8 April 1988.

12 *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4].

13 See *Warsame v Canada*, United Nations Human Rights Committee, Communication No. 1959/2010 (2011) [8.8].

14 See *Nystrom v Australia*, United Nations Human Rights Committee, Communication No. 1557/2007 (2011) [7.8], where the Committee referenced the applicant's family life with his mother, sister and nephews.

the development of children.[15] In particular, article 10 of the Convention on the Rights of the Child requires that applications by a child or his or her parents for the purpose of family reunification must be dealt with in a positive, humane and expeditious manner. As such, capping the number of parent visas for parents of children aged under 18, which may result in the separation, or continued separation, of children from their parent (such as where a child is in Australia with one parent but the other parent is in another country and is ineligible for any other type of visa) engages and limits the rights of the child. Similarly to the right to protection of the family, many of the rights of the child may be permissibly limited, if necessary, reasonable and proportionate to do so.

2.104 As the minister does not recognise that the cap on the number of parent or other relative visas may limit the right to protection of the family or the rights of the child, the minister has not advised what the legitimate objective of the measure is, and whether the cap is a reasonable and proportionate measure to achieve the stated objective. The minister has stated that the cap on visas allows the annual migration program to be managed more efficiently, and facilitates the orderly and equitable processing of visa applications. It also appears the lowering of the cap in this financial year has been to grant more partner visas. Any limitation on a right must be shown to be aimed at achieving a legitimate objective. A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. It is not clear that managing the migration program efficiently and facilitating the processing of visa applications would constitute a legitimate objective for the purposes of international human rights law. In addition, while increasing the number of partner visas available is likely to help promote the right to protection of the family for those partners affected, it is not clear that it is necessary to reduce the number of parent or other family visas in order to do so.

2.105 Further, a key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective sought to be achieved. This includes considerations of whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case, and whether it is accompanied by sufficient safeguards. The minister's response states that the minister determines the maximum number of visas which may be granted in relation to parent and other family visas, and when a visa class has been capped, no more visas of that class may be granted in that financial year. As such, it would appear that there is no capacity for flexibility to grant any further visas, regardless of the individual merits of a case. So, for example, if the cap has been reached, the parent of an Australian child aged under 18 years of age would not be eligible to be granted a parent visa, regardless of whether to do so would be in

15 Convention on the Rights of the Child, articles 2, 3, 5, 8–10, 18 and 27.

the best interests of the child or promote the right to protection of the family. The only identified possible safeguard is if the parent were eligible for another type of visa, such as a temporary visa. However, if a person does not meet the eligibility requirements (which often include financial contributions by themselves or their sponsor) this cannot operate to safeguard these rights. In addition, it is noted that the minister's response states that many of these visa types would require sponsorship by a person aged over 18 years of age, so the child could not themselves sponsor their parent under these categories of visas. It is also noted that the Department of Home Affairs website states that new visa applications for contributory parent visas (which require a contributory payment of close to $50,000) [16] are likely to take over five years for final processing, and new parent and aged parent visa applications (which do not require the contributory payment) are likely to take approximately 30 years for final processing.[17] It therefore appears that the cap on the number of visas ensures there are significant delays in the processing of visa applications, making family reunification extremely difficult (particularly for those who cannot afford the contributory payment).

2.106 As such, in relation to those applicants who can demonstrate that there is a family bond with persons in Australia to protect, a failure to allow for their family reunification limits the right to protection of the family. In addition, where a child aged under 18 in Australia is separated from their parent or other close family member, this may also limit the best interests of the child. As it is not clear that the measure seeks to achieve a legitimate objective for the purposes of international human rights law, and as there is no flexibility to consider the individual merits of an application once the cap is reached, there is a significant risk of this measure being incompatible with the right to protection of the family and the rights of the child.

Committee view

2.107 The committee thanks the minister for this response. The committee notes this legislative instrument sets a cap on the number of parent visas and other family visas for the 2020–2021 financial year (which is lower than the cap set in the previous financial year). Once the cap is reached no further visas of this kind may be granted in that financial year.

16 Department of Home Affairs website, 'Contributory parent Visa' which states the cost is 'From AUD $47,755)' see: https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/contributory-parent-143 (accessed 1 June 2021).

17 Department of Home Affairs website, 'Visa processing times, Parent visas – queue release dates and processing times', see: https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates#:~:text=Applications%20for%20these%20visas%20are%20subject%20to%20capping%20and%20queueing.&text=New%20Parent%20and%20Aged%20Parent,30%20years%20for%20final%20processing (accessed 1 June 2021).

2.108 The committee notes that this measure may engage and limit the right to protection of the family. While States have a right to control their migration program, international human rights law requires Australia to create the conditions conducive to family formation and stability, and this includes the interest of family reunification. The committee also notes that the measure may limit the rights of the child, which requires that the best interests of the child must be a primary consideration, and applications by a child or his or her parents for the purpose of family reunification must be dealt with in a positive, humane and expeditious manner.

2.109 The committee considers there will be many cases of family reunification where capping the number of parent or other family member visas will not limit the right to protection of the family or the rights of the child under international human rights law (as the family member in question is not part of the core family). However, the committee is concerned that no consideration can be given to these rights once a cap is set, as no further visas can be granted in that year. The committee considers that the cap on such visas is contributing to the significant delay in the processing of visa applications, and considers that a 30 year wait for a parent visa renders family reunification effectively impossible. As it is not clear that the measure seeks to achieve a legitimate objective for the purposes of international human rights law, and as there is no flexibility to consider the individual merits of an application once the cap is reached, the committee considers there is a significant risk of the measure being incompatible with the right to protection of the family and the rights of the child.

2.110 The committee draws these human rights concerns to the attention of the minister and the Parliament.

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

2.111 The committee requested a response from the minister in relation to this legislative instrument in *Report 5 of 2021*.[3]

Extending the assurances of support determination

2.112 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 7 of 2021*; [2021] AUPJCHR 69.

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 5 of 2021* (29 April 2021), pp. 29-33.

migrant seeking to enter Australia.[4] 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;[5] 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 ranges from 12 months to 10 years, with most valid for 4 years.[6] 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.[7]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to protection of the family and the child

2.113 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.[8] 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.

2.114 An important element of protection of the family[9] 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

4 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.

5 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.

6 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.

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

8 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].

9 Protected by articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights.

required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration, and to treat applications by minors for family reunification in a positive, humane and expeditious manner.[10]

2.115 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.

2.116 The objectives of the measure, to 'protect social security outlays while allowing the migration of people who might otherwise not normally be permitted to come to Australia',[11] may be capable of constituting legitimate objectives under international human rights law and the measure appears to be rationally connected to those objectives.[12] However, questions remain over whether the measure is proportionate, particularly whether there is flexibility to treat different cases differently and safeguards to help protect the right to protection of the family and the rights of the child.

2.117 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's initial view

2.118 The committee noted 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

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

11 Statement of compatibility, p. 6.

12 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.

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.

2.119 The committee considered further information was required to assess the human rights implications of this legislative instrument, and as such sought the minister's advice as to the matters set out at paragraph [2.117].

2.120 The full initial analysis is set out in *Report 5 of 2021*.

Minister's response[13]

2.121 The minister advised:

> **a) What visa categories are subject to the Assurance of Support (AoS) scheme?**
>
> **b) What visa categories are subject to a mandatory AoS and what visa categories are subject to a discretionary AoS? How is this determined?**
>
> The Department of Home Affairs has policy responsibility for deciding which visa subclasses are subject to an AoS. This is based on the visa applicant's (assurees) likelihood of requiring income support.
>
> The following visa subclasses are subject to an AoS:
>
> Mandatory ten year AoS:
>
> - Subclass 143 (Contributory Parent (Migrant) (Class CA) visa)
> - Subclass 864 (Contributory Aged Parent (Residence) (Class DG) visa)
>
> Mandatory four year AoS:
>
> - Subclass 103 (Parent visa)
> - Subclass 114 (Aged Dependent Relative visa)
> - Subclass 804 (Aged Parent visa)
> - Subclass 838 (Aged Dependent Relative visa)
>
> Discretionary four year AoS:
>
> - Subclass 101 (Child visa)
> - Subclass 102 (Adoption visa)
> - Subclass 151 (Former Resident visa)
> - Subclass 802 (Child visa)
>
> Mandatory two year AoS:

13 The minister's response to the committee's inquiries was received on 12 May 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.

- Subclass 115 (Remaining Relative visa)
- Subclass 835 (Remaining Relative visa)

Discretionary two year AoS:

- Subclass 117 (Orphan Relative visa)
- Subclass 837 (Orphan Relative visa)

Discretionary one year AoS:

- Subclass 202 (Global Special Humanitarian visa)

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?

Where are these found?

Where an applicant has applied for a visa that carries a discretionary AoS provision, Home Affairs will assess the applicant's financial, employment and family circumstances to determine whether they are likely to access Australia's social security system. A monetary bond is not required for a discretionary AoS.

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.

An AoS enables entry to Australia for migrants who may not otherwise be eligible to come, for example, in the family reunion categories, while protecting Australian Government social security outlays. It is also a commitment by an assurer to assume financial responsibility for supporting the visa applicant(s) during their Assurance of Support period.

Migrants entering Australia with an AoS do so on the condition a person (the assurer) provides an assurance to undertake financial responsibility for the migrant (the assuree) for the duration of the Assurance of Support period. An income test is used to assess the capacity of the assurer to support the potential migrant. The income test is incremented according to the number of assurers, the number of dependent children in the assurer's family and the number of adults to be supported under the AoS.

In the case of a mandatory AoS a bond is also required. The amount of the security is determined by the visa subclass and number of adult visa applicants. Currently for a two or four year AoS a security for the value of $5,000 for the primary visa applicant and $2,000 for any adult secondary visa applicant must be paid. In the case of contributory parent visas a security for the value of $10,000 for the primary visa applicant and $4,000 for any secondary visa applicant must be paid. The purpose of this bond is to assist the Australian Government to recover any debt incurred by the assurer under the terms of the AoS. Services Australia will recover the

amount of an AoS debt from this term deposit. When the term deposit does not fully cover the amount of the debt, the assurer must also repay the outstanding balance. The bond is deposited with the Commonwealth Bank of Australia and the balance is released to the assurer at the end of the AoS period.

If an individual cannot afford to provide an AoS, they have the option of entering into a joint AoS arrangement. In a joint AoS arrangement, up to three people sign the AoS and are held equally liable for any social security debts that arise as a result of the AoS.

Businesses and unincorporated bodies (such as community groups) are also able to provide an AoS, providing they meet income test requirements for individuals and other requirements such as proof of company registration in Australia.

Concluding comments

International human rights legal advice

Rights to protection of the family and the child

2.122 The minister has advised that mandatory assurances of support are required for parent visas, dependent relative visas and remaining relative visas. For all such visas an assurer in Australia must provide an upfront monetary bond of between $5,000 to $10,000 for the primary applicant and between $2,000 to $4,000 for any secondary applicant. The assurer must also assume financial responsibility for supporting that applicant for up to 10 years.

2.123 The minister has also advised that discretionary assurances of support may be required for child visas, adoption visas, former resident visas, orphan relative visas and Global Special Humanitarian visas. An upfront monetary bond is not required for these types of visas. However, if the Department of Home Affairs considers the applicant is likely to access Australia's social security system, an assurer will be required to assume financial responsibility for supporting that applicant for up to four years.

2.124 The Social Security (Assurances of Support) Determination 2018, which the instrument under consideration extends, provides that individuals will only be able to provide an assurance of support if they are an Australian resident, an adult, and meet the income test requirements.[14] The income test requirements differ depending on the number of people being given an assurance of support, and whether the assurer has children of their own. For example, a single person sponsoring their single parent, would need to demonstrate an annual minimum income of $32,281.60.[15] A partnered

14 Social Security (Assurances of Support) Determination 2018, sections 11 and 15.

15 Social Security (Assurances of Support) Determination 2018, section 15, based on the applicable rate of jobseeker (being $16,140.80 as at April 2021) multiplied by the total number of the assurer and the assure (two).

parent with three children in Australia wanting to sponsor their child would need to demonstrate a combined annual minimum income of $39,388.15 if required to provide an assurance of support.[16]

2.125 The right to protection of the family is found in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Those treaties state that the family 'is the natural and fundamental group unit of society and is entitled to protection by society and the State' and that the 'widest possible protection and assistance should be accorded to the family'.[17] While the state has a right to control immigration, the right does require Australia to create the conditions conducive to family formation and stability, including the interest of family reunification.[18] The term 'family' is to be understood broadly as to include all those comprising a family as understood in the society concerned,[19] and is not necessarily displaced by geographical separation if there is a family bond to protect.[20] This clearly includes couples and the parent-child relationship, and may include parents and their adult children[21] and other family members,[22] depending on the level of dependency, shared life and emotional ties.

2.126 In addition, the Convention on the Rights of the Child requires that the best interests of the child must be a primary consideration, and children should not be separated against their will from their parents (except if in their best interests), and States should respect the primary responsibility of parents or guardians for promoting the development of children.[23] In particular, article 10 of the Convention on the Rights of the Child requires that applications by a child or his or her parents for the purpose

16 Social Security (Assurances of Support) Determination 2018, section 15, based on the applicable rate of jobseeker (being $16,140.80 as at April 2021) multiplied by two (if giving a joint assurance) plus the base FTB child rate and the applicable supplement amount multiplied by the total number of the assurer's children (three). See also Guide to Social Policy Law, Social Security Guide, version 1.282, 9.4.3.60.

17 International Covenant on Civil and Political Rights, article 23 and the International Covenant on Economic, Social and Cultural Rights, article 10.

18 See *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4]–[6.5].

19 See General Comment No. 16, *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, 8 April 1988.

20 *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4].

21 See *Warsame v Canada*, United Nations Human Rights Committee, Communication No. 1959/2010 (2011) [8.8].

22 See *Nystrom v Australia*, United Nations Human Rights Committee, Communication No. 1557/2007 (2011) [7.8], where the Committee referenced the applicant's family life with his mother, sister and nephews.

23 Convention on the Rights of the Child, articles 2, 3, 5, 8–10, 18 and 27.

of family reunification must be dealt with in a positive, humane and expeditious manner.

2.127 The minister's response did not address the question as to whether the department considers the right to the protection of the family and the rights of the child when determining whether to require payment of an upfront bond. In the case of mandatory assurances of support, it appears there is no flexibility, and all assurers for visas in this category will be required to meet the residency, age and income test requirements, and provide an upfront monetary bond, in order to be eligible to sponsor family members in such visa categories. As such, it would appear a child would not be eligible to sponsor their parent, for example, where they were living with their father in Australia but wanted to sponsor their mother to join, or stay with them (in circumstances where the parents were now separated) – as children cannot provide assurances of support. The only possible safeguard identified in the minister's response is that if an individual cannot afford to provide an assurance of support, they have the option of entering into a joint arrangement, whereby up to three people, if they meet the assurance requirements, will be held equally liable for any social security debts that arise. In addition, businesses and unincorporated bodies (such as community groups) may also be able to provide an assurance of support. However, if a family member cannot find others willing to provide such an assurance, there appears to be no flexibility for those in the visa categories subject to mandatory assurances of support to be able to be reunited with their family member.

2.128 In addition, in relation to discretionary assurances of support, the minister advised that when deciding whether to require an assurance the department will assess the applicant's financial, employment and family circumstances to determine whether they are likely to access Australia's social security system. The minister did not state that the department would consider the assurer's family ties to the applicant, or in the case of children within Australia's jurisdiction, the best interests of the child. It therefore does not appear that the rights of the child or the right to protection of the family is a factor that is considered when making this determination.

2.129 Where assurances are sought to be made for family members who do not have a shared life with the assurer (for example, parents and their adult children who may not have lived with, or relied on, one another for many years), a requirement for an assurance of support is unlikely to engage the right to protection of the family. However, the right is likely to be engaged and limited when family members can demonstrate a close family bond and shared life together but are unable to meet the assurance of support requirements. In these circumstances, the assurance of support could prevent family reunification. In addition, the rights of the child will be limited where children in Australia are unable to be reunited with their parent, or other close relative, if an assurance of support is required but cannot be met. In these circumstances, noting the lack of any flexibility in relation to those visa categories subject to mandatory assurances of support; that the family ties of members, or the rights of the child, do not appear to be considered when a decision is made to impose

a discretionary assurance of support; and the lack of any safeguards to protect the rights of those who cannot meet the age or income requirements or the payment of an upfront bond, there is a risk that extending this measure by a further three years may not be compatible with the right to protection of the family and the rights of the child.

Committee view

2.130 The committee thanks the minister for this response. 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.

2.131 The committee notes that this measure may engage and limit the right to protection of the family. While States have a right to control their migration program, international human rights law requires Australia to create the conditions conducive to family formation and stability, and this includes the interest of family reunification. The committee also notes that the measure may engage the rights of the child, which requires that the best interests of the child must be a primary consideration, and applications by a child or his or her parents for the purpose of family reunification must be dealt with in a positive, humane and expeditious manner.

2.132 The committee notes that this measure requires all applications for parent visas (including parents of those under 18 years old) to have an Australian sponsor who is an adult, who meets set income requirements and can provide an upfront payment of a bond of up to $10,000. The committee also notes the measure enables the Department of Home Affairs to exercise its discretion to impose similar requirements (although without payment of the bond) for child visas (for example, where a parent in Australia is seeking to sponsor their child).

2.133 While the committee considers there will be many cases of family reunification where requiring an assurance of support does not limit the right to protection of the family or the rights of the child (as the family member in question is not part of the assurer's core family), the committee is concerned that no consideration is given to these rights when an assurance of support is imposed. As such, the committee considers there is a risk that requiring an assurance of support for certain family members may not be compatible with the right to protection of the family and the rights of the child.

Suggested action

2.134 The committee considers the proportionality of this measure may be assisted if:

(a) the Social Security (Assurances of Support) Determination 2018 is amended to provide that an assurance of support is not required where to do so would arbitrarily limit the right to protection of the family or the rights of the child;

(b) as a matter of policy, all assurances of support are made discretionary in order to assess the family circumstances of each application; and

(c) guidelines are developed to guide officials in assessing whether an assurance of support would be likely to limit the right to protection of the family or the rights of the child in each individual case.

2.135 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Dr Anne Webster MP

Chair