Ministerial responses — Report 7 of 2021[1]

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Senator the Hon Michaelia Cash
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Reference: MC21-019935

Dr Anne Webster MP
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By email: human.rights@aph.gov.au

Dear Dr Webster

Thank you for your email of 29 April 2021 seeking additional information about the Family Law Amendment (Federal Family Violence Orders) Bill 2021 (the bill) to inform the deliberations of the Parliamentary Joint Committee on Human Rights (the Committee).

The bill would amend the *Family Law Act 1975* to establish new federal family violence orders (FFVOs) which, if breached, can be criminally enforced. FFVOs would offer stronger protection for victims of family violence than existing family law personal protection injunctions which can only be enforced civilly. Access to FFVOs would mean that persons before a family law court would not be required to initiate proceedings in a State or Territory court for a criminally enforceable protection order, but could seek the protections they need in the court where their existing matter is already being heard.

I have noted the comments of the Committee in its *Report 5 of 2021* that, in respect of protecting persons from family violence, the bill would promote a number of human 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.

I provide the attached information about the bill in response to the Committee's request. This information includes details about the federal family violence orders and their relationship with state and territory family violence orders.

I trust this information is of assistance.

Yours sincerely

Senator the Hon Michaelia Cash
12 /05/ 2021

Encl. Response to the Parliamentary Joint Committee on Human Rights – Report 5 of 2021: Family Law Amendment (Federal Family Violence Orders) Bill 2021

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Response to the Parliamentary Joint Committee on Human Rights – *Report 5 of 2021*
Family Law Amendment (Federal Family Violence Orders) Bill 2021

Federal Family Violence Orders

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.

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.

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

(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 insodoing, 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 an 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.

THE HON ALEX HAWKE MP
MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Ref No: MS21-000989

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Dear Chair,

Thank you for your correspondence of 29 April 2021 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee), regarding the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (the Bill).

The Bill amends the *Migration Act 1958* (the Migration Act) to strengthen Australia's ability to uphold *non-refoulement* obligations to not return individuals to a country where they face persecution or a real risk of torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the application of the death penalty.

In the Parliamentary Joint Committee on Human Rights Report 5 of 2021, the Committee sought clarification on the following matters:

- statistics relating to people in immigration detention, the use of Ministerial Intervention powers and removal outcomes;
- safeguards regarding the right to liberty and the rights of the child;
- safeguards regarding immigration detention; and
- advice on caseload impacts.

I am pleased to provide the Committee with additional information in response to these questions. A copy of the detailed response is enclosed.

In addition to the enclosed response, I wish to advise the Committee that on 13 May 2021 the Bill was passed by the Senate, following amendments which seek to provide further assurance and safeguards for the effective implementation and operation of proposed provisions. These amendments:

- amend the the Migration Act to provide access to merits review for certain individuals who were previously determined to have engaged protection obligations but are subsequently found by the Minister to no longer engage those obligations;

- amend the Migration Act to ensure that an unlawful non-citizen will not be removed in accordance with section 198 of the Migration Act where the Minister has decided that the unlawful non-citizen no longer engages protection obligations before:
  - the period within which an application for merits review of that decision under Part 7 of the Migration Act could be made has ended without a valid application for review having been made; or
  - a valid application for merits review of that decision under Part 7 was made within the period but has been withdrawn; or
  - the Minister's decision is affirmed or taken to have been affirmed upon merits review;
- amend the *Intelligence Services Act 2001* to require the Parliamentary Joint Committee on Intelligence and Security to commence a review of the operation, effectiveness and implications of the provisions amended or inserted by Schedule 1 to the Bill, by the second anniversary of the commencement of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021.*

Yours sincerely

ALEX HAWKE

25 / 5 / 2021

Annex A

Parliamentary Joint Committee on Human Rights, Report 5 of 2021

Migration Amendment (Clarifying International Obligations for Removal) Bill 2021

Minister's Response

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, statistics relating to:

- **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:

Length of time in detention^ of the 63 non-citizens* who were detained between 1/7/15 and 3/5/2021		
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* currently 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 individual's 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-treatment, 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 is 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. In 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.

THE HON ALEX HAWKE MP
MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Ref No: MS21-001086

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

by email: human.rights@aph.gov.au

Dear Dr Webster

Thank you for your correspondence of 13 May 2021 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee), regarding the Migration (Granting of contributory parent visas, parent visas and other family visas in the 2020/2021 financial year) Instrument (LIN 21/025) 2021 [F2021L00511].

The Instrument determines the maximum number of visas that may be granted for certain classes of visa in the financial year 1 July 2020 to 30 June 2021.

In Parliamentary Joint Committee on Human Rights Report 6 of 2021, the Committee sought further information regarding:

- The compatibility of the cap on visa numbers sought to achieve a legitimate objective for the purposes of international human rights law and was reasonable and proportionate to achieving that objective;
- Why the cap on visa numbers for the financial year is lower than the previous financial year;
- Whether any children would be likely to be separated from their parents as a result of the cap on visa numbers;
- Whether there is any discretion to ensure family members are not separated as a result of the cap on visa numbers; and
- Whether the right to protection of the family and the rights of the child were considered in setting the annual cap on visa numbers.

My response for the Committee's consideration is attached. I appreciate the extension until 1 June 2021 in which to provide the response.

Yours sincerely

ALEX HAWKE

25 / 5 / 2021

Response to the Parliamentary Joint Committee on Human Rights (PJCHR) Scrutiny Report 6 of 2021

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

Right to protection of the family and rights of the child

1.25. 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;

(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.

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.

Senator the Hon Anne Ruston

Minister for Families and Social Services
Minister for Women's Safety
Senator for South Australia
Manager of Government Business in the Senate

Ref: MC21-003577

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
human.rights@aph.gov.au

Dear ~~Dr Webster~~ Anne,

Thank you for your email of 29 April 2021 regarding the *Social Security (Assurances of Support) Amendment Determination 2021.*

As requested, please find enclose my response in relation to the compatibility of the *Social Security (Assurances of Support) Amendment Determination 2021* to the right to the protection of family.

Should you have any further questions regarding this response, Mr Andrew Seebach, Branch Manager, Carer and Disability Payments, can be contacted on 02 6146 0558.

Yours sincerely

Anne Ruston

11 / 5 / 2021

Enc.

Parliamentary Joint Committee on Human Rights (Report 5 of 2021)

Social Security (Assurances of Support) Amendment Determination 2021

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

a) What visa categories are subject to the Assurance of Support (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:
- 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.