Australian Government
Department of Home Affairs

Department of Home Affairs submission to the review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021

The Parliamentary Joint Committee on Intelligence and Security

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Contents

Abbreviations

Australian Border Force (ABF)
Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
International Covenant on Civil and Political Rights (ICCPR)
Operational Notification (ON)
Migration Act 1958 (the Migration Act)
Migration Amendment (Clarifying International Obligations for Removal) Act (CIOR Act)
1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugees Convention)
The Third Country Options Taskforce (TCO TF)

Introduction

The Department of Home Affairs (the Department) welcomes the opportunity to provide a submission to the Joint Committee on Intelligence and Security's review of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (the CIOR Act).

The CIOR Act commenced on 25 May 2021. It amended the *Migration Act 1958* (the Migration Act) to:

- modify the effect of section 197C to ensure it does not require or authorise the removal of an unlawful non-citizen to a country in respect of which a protection finding has been made through a finally determined protection visa process unless:
  - the decision in which the protection finding was made has been quashed or set aside;
  - the Minister has made a decision under section 197D that they are satisfied that the non-citizen is no longer a person in respect of whom a protection finding would be made and that decision is not subject to merits review; or
  - the non-citizen makes a written request for voluntary removal;
- ensure that, in assessing a protection visa application, protection obligations are assessed, including in circumstances where the applicant is ineligible for visa grant due to criminal conduct or risks to national security;
- provide access to merits review for certain individuals who were previously determined to have engaged protection obligations but are subsequently found by the Minister under section 197D to no longer be a person in respect of whom a protection finding would be made; and
- 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 is no longer a person in relation to whom a protection finding would be made 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.

Background

The purpose of the CIOR Act was to clarify that the duty to remove an unlawful non-citizen under the Migration Act should not be enlivened where to do so would breach Australia's *non-refoulement* obligations, as identified in a finally determined protection visa assessment process through the making of a 'protection finding'. The term 'protection finding' reflects the circumstances in which Australia's *non-refoulement* obligations are engaged under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugees Convention), the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

The CIOR Act was introduced following a number of court decisions which found that section 197C of the Migration Act operated to require removal of an unlawful non-citizen who had been assessed as engaging *non-refoulement* obligations, including to the country where they faced harm, as soon as it was reasonably practicable to do so. This was not consistent with the original intent and is inconsistent with Australia's international obligations.

Section 197C of the Migration Act was introduced to deter the making of unmeritorious protection claims as a means of delaying an applicant's departure from Australia where the Department had already found the person did not engage *non-refoulement* obligations.

The CIOR Act more closely aligns section 197C with its original intent, and strengthens the ability for non-citizens to have protection claims assessed.

The purpose of the CIOR Act is also to ensure that, in the rare circumstances where the Minister (or the Minister's delegate) decides an unlawful non-citizen no longer engages protection obligations, the unlawful non-citizen will have access to merits review in the Migration and Refugee Division of the Administrative Appeals Tribunal. This amendment aligns with the Government's policy intention that decisions impacting on the rights and interests of individuals should be reviewable on their merits.

The CIOR Act introduced a new section 36A to ensure that the Minister or Minister's delegate assesses and records findings against the protection obligations criteria when considering a valid protection visa application, even where character or security concerns mean they are ineligible for the grant of the visa. This reflected the then existing administrative practices that were in place pursuant to Ministerial Direction 75, made under section 499 of the Migration Act.

The amendments made by the CIOR Act ensure that persons who have been found to engage Australia's *non-refoulement* obligations in a finally determined protection visa process, but are ineligible for the grant of a protection visa due to character or security concerns, or who are granted a visa and their visa ceases or is cancelled, are not involuntarily removed to the country in respect of which the protection finding was made. This means that persons affected by the amendments may be subject to immigration detention under section 189 of the Migration Act, while removal or other arrangements are made including for example alternatives to detention such as the grant of a visa.

The Department believes that the CIOR Act has been effective in clarifying these provisions and that steps have been taken to ensure that these changes are reflected in operational practices.

Overview of the impact of the changes

The CIOR Act, together with a variety of administrative and operational processes that the Department has put in place, has ensured that no unlawful non-citizen with a protection finding has been removed under section 198 of the Migration Act contrary to Australia's *non-refoulement* obligations.

In line with the amendments made by the CIOR Act, particularly the insertion of section 36A, the Department has ensured that relevant officers assess and record findings against the protection obligations criteria when considering a valid protection visa application, even where character or security concerns mean they are ineligible for the grant of the visa.

The Department has also taken a variety of administrative and operational steps to establish a process for considering cases and making decisions under section 197D, which was also inserted by the CIOR Act. Subsection 197D(2) permits the Minister, or the Minister's delegate, to make a decision that they are satisfied that an unlawful non-citizen is no longer a person in respect of whom a protection finding would be made. This means the unlawful non-citizen can be removed under section 198 of the Migration Act to the country by reference to which a protection finding had previously been made, for example if country conditions have improved.. Actions have been taken to assist subsection 197D(2) decision makers to consider whether an unlawful non-citizen still engages *non-refoulement* obligations as reflected in the 'protection finding' definitions in section 197C of the Migration Act.

Further, officers are aware of the processes that must be followed to notify a person of their right to seek merits review for a decision under section 197D that they are no longer a person in respect of whom a protection finding would be made, and to ensure that the person is not removed to the relevant country while they are in the merits review period and/or the merits review process is ongoing. Central to all of the Department's actions in ensuring section 197D of the Act is implemented is procedural fairness. As was indicated to the Australian Parliament when this change was proposed, it is rare that a person who has been found to engage protection obligations would no longer engage those obligations. No decisions under section 197D have yet been made.

Impact of reforms to section 197C

Prior to the CIOR Act, the Federal Court found that where it is reasonably practicable to remove a person, section 197C(1) of the Migration Act required the person's removal to their home country, even where the person had been found to engage Australia's non-refoulement obligations, in respect to that country. Accordingly, it became necessary to amend the Migration Act to restore the original intent of section 197C, which was not to require the removal of persons in breach of Australia's international obligations.

As intended, the CIOR Act ensures that the Migration Act does not require or authorise the removal of an individual to the country in relation to which a protection finding has been made through a finally determined protection visa application process. The CIOR Act resolved the issue of officers needing to comply with the duty to remove unlawful non-citizens in breach of Australia's *non-refoulement* obligations.

The Commonwealth's successful High Court appeal in *The Commonwealth v AJL20* [2021] HCA 21 clarified that a failure to comply with the duty under section 198 of the Migration Act does not make continued immigration detention unlawful, but does provide a basis for a court order (likely a writ of mandamus) compelling officers to comply with the duty to remove unlawful non-citizens as soon as reasonably practicable.

Operational changes to support section 197C

The Department has initiated operational activities to ensure that officers make reasonable enquiries and take reasonable steps to effect the removal of a detainee for whom a protection finding has been made to a safe third country to ensure that continued immigration detention remains lawful.

An operational notification (ON) was issued (ON2021-44). The ON described the legislative amendments; their implications; and minimum requisite steps removals officers of the Department of Home Affairs must follow in regards to investigation of third country removal options (TCO).

In the ON, officers were notified they are expected to:

- review their removal caseload regularly to identify those where a protection finding has been made in respect of the unlawful non-citizen's country of citizenship, former habitual residence, or any other relevant country (such that they cannot be removed there);
- in cases where first country removal appears to be unviable, identify and explore any third country removal options that may be available for the individual; and
- refer a person available for removal to the Protection visa Helpdesk if that person is not the subject of a 'protection finding' as defined in section 197C, but because they have been found to engage *non-refoulement* obligations through an International Treaties Obligations Assessment or other non-statutory process; or have never had a *non-refoulement* obligations assessment and there is reason to believe that *non-refoulement* obligations may be engaged.

Departmental officers from the International Division have supported third country removal investigations, utilising their extant relationships with foreign government representatives to explore options for individuals and cohorts of affected removees.

Procedural Instructions provide timely operational policy advice and guidance to operational officers. Operational policy advice is fully consulted and legally cleared, and supports ABF officers and stakeholders to conduct nationally consistent, lawful business activities. Since 25 May 2021, five removal operational policy documents have been amended to reflect the CIOR Act amendments, with the most comprehensive content detailed in Section 3.2 of the 'Removal from Australia- Impediments to Removal' Procedural Instruction. A further seven draft removal operational policy documents have also been updated to incorporate the changes, and are continuing through relevant internal processes including legal review to enable finalisation. The finalisation of removal operational process documents ensures all officers have access to advice about the elements of the removal process which have been changed due to the CIOR Act. Further, it ensures that all removals officers are aware of their legal obligations in regard to unlawful non-citizens who have been found to engage Australia's *non-refoulement* obligations.

Processes to identify people impacted by the CIOR Act

The Third Country Options Taskforce (TCO TF) commenced on 11 July 2022 to review and actively explore possible ways to resolve the immigration status of people about whom a protection finding has been made. Also in scope for consideration by the TCO TF are unlawful non-citizens who are stateless and cases where removal to a detainee's country of citizenship was impracticable due to reasons beyond the detainee's control.

The initial action of the TCO TF was finalised on 17 October 2022 with the Department identifying all detainees for whom third country removal options were needed. The specific recommendations made for unlawful non-citizens about whom a protection finding has been made were referred to allocated officers.

Options to resolve the immigration status of people who are found to engage protection obligations, are stateless or where a removal to a detainee's country of citizenship was impractical, can be summarised and grouped broadly into three categories:

1. Visa options available in Australia

Detainees able to lodge a protection visa application while they remain in Australia but have not done so. Protection obligations assessments are required prior to removal.

2. No visa options in Australia, however identified some third country links

A number of detainees have identified family links in third countries. These detainees were found to have no further visa options available to them while they remain in Australia.

Examples of countries include Canada, USA, Oman, Russia, Turkey, Germany, Egypt, Pakistan, Norway, Sweden, Malaysia, Lebanon, The Netherlands, Ukraine and Saudi Arabia. Efforts to explore removal options to these countries have been referred to the allocated ABF Removals officers.

Removal Officers liaise with relevant overseas Departmental officers to undertake enquiries to verify information provided by a detainee (identity, address information, travel movements, previous immigration status, whether family members remain in country) and/or to request general information in relation to entry and residency requirements.

3. Section 197D assessments and decision-making framework

The CIOR Act introduced a new decision point under subsection 197D(2) of the Act which provides that a decision can been made under section 197D(2) by the Minister (delegate) that the unlawful non-citizen is no longer a person in respect of whom a protection finding would be made. This is a non-compellable and discretionary process that would be commenced by the Department in circumstances where it appears that a reconsideration of whether the person continues to engage protection obligations is warranted, for example where there is a change in circumstance or country information. If a decision is made under subsection 197D(2) of the Migration Act that an unlawful non-citizen is no longer a person in respect of whom a protection finding would be made in relation to a particular country, and that decision is affirmed at merits review, the unlawful non-citizen may be removed under section 198 of the Migration Act to that country.

Section 197D

Subsection 197D(2) of the Migration Act permits the Minister, or the Minister's delegate, to make a decision that they are satisfied that an unlawful non-citizen is no longer a person in respect of whom a protection finding would be made. Subsection 197D(2) decision makers consider whether an unlawful non-citizen still engages *non-refoulement* obligations as reflected in the 'protection finding' definitions in section 197C of the Migration Act.

Section 411 of the Migration Act provides for the merits review of a decision made that the person is no longer a person in respect of whom a protection finding would be made within the meaning of subsections 197C(4), (5), (6) or (7). The Migration and Refugee Division of the Administrative Appeals Tribunal is responsible for the merits review of any decisions under subsection 197D(2). The AAT can affirm the decision or set the decision aside and substitute a new decision or find that it has no jurisdiction. If the decision is affirmed by the AAT, the unlawful non-citizen can seek judicial review of the decision.

The Department has disseminated information via appropriate official mechanisms to ensure that relevant officers are aware of the implications of section 197D of the Migration Act. Further, officers are aware of the processes that must be followed to notify a person of their right to seek merits review if they have been found that they are no longer a person in respect of whom a protection finding would be made.

The Department has an administrative framework in place to support decision-making under section 197D of the Migration Act, which is undertaken by delegates of the Minister. This includes the creation and implementation of procedures and resources to support decision makers, including in instances where decisions under section 197D cannot be made as the person continues to engage Australia's *non-refoulement* obligations.

Operational changes to support section 36A

The new section 36A ensures that, in assessing a Protection visa application, international protection obligations are assessed. This would include circumstances where the applicant is ineligible for visa grant due to criminal conduct, risks to security, where they have a right to enter and reside in another country and other conduct specified in the Migration Act, which may prevent the grant of the visa.

Following the insertion of section 36A into the Migration Act by the CIOR Act, the Department implemented a number of operational updates to support the new section including:

- updates to procedural guidance and training materials for protection visa processing staff;
- updates to protection visa decision and assessment record templates to include a facility to make section 36A records in a consistent way across the visa program;
- creation of a template for making a standalone section 36A record, for decisions where no decision or assessment record is produced; and
- holding virtual training and question and answer sessions for protection visa processing staff.

These procedures ensure that when considering a Protection visa application the Minister or their delegate must assess whether protection obligations are engaged, and findings must be recorded. This must occur before consideration of whether the applicant is ineligible for grant of the visa on other grounds, for example due to criminal conduct or risks to security. Enshrining this process within the Migration Act strengthened Australia's ability uphold its *non-refoulement* obligations.

Immigration Detention and Ministerial Intervention

Immigration detention remains a key component of border management and assists in managing potential threats to the Australian community – including national security and character risks – and ensures people are available for removal. Unlawful non-citizens who are unable to be removed due to barriers which include, but are not limited to, the situation where the amendments to section 197C made by the CIOR Act operate to protect them from removal in breach of *non-refoulement* obligations, may be detained until their removal is reasonably practicable. The amendments made to section 197C are a safeguard to clarify that detainees are not required to be removed in breach of Australia's *non-refoulement* obligations.

Removal in such cases may become possible if, for example, the circumstances in the relevant country improve such that a decision is made under section 197D that the person is no longer a person in relation to whom a protection finding would be made, 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, including to the country in relation to which a protection finding has been made.

Held detention in an immigration detention centre is a last resort for the management of unlawful non-citizens, particularly individuals whose removal may not be practicable in the reasonably foreseeable future. The Government's preference is to manage non-citizens in the community wherever possible, subject to meeting relevant requirements, including not presenting an unacceptable risk to the safety and good order of the Australian community, to ensure that immigration detention placements are reasonable, necessary and proportionate to individual circumstances.

Under the Migration Act, 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.

The Minister has a non-delegable, non-compellable power under section 195A of the Migration Act to intervene in an individual case and grant a visa, including a bridging visa, to a person in immigration detention, if the Minister thinks it is in the public interest to do so. The Minister also has a personal discretionary power under section 197AB of the Migration Act to allow a detainee to reside outside of an immigration detention facility, at a specified address in the community (residence determination). A residence determination permits an individual to be placed in the community subject to certain conditions. The person's individual circumstances, and the risk they may pose to the Australian community, are taken into account in the exercise of these powers. This enables the least restrictive option to be implemented for the person having regard to their circumstances.

The section 195A and 197AB Ministerial Intervention guidelines establish which cases should or should not be referred for ministerial consideration. The Department continuously reviews the immigration detention population to identify and refer cases for the Minister's consideration.

Referral of a case for Ministerial intervention consideration does not impact other operational activity, such as removal enquiries, from continuing.

The Department 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.