



**Australian
Human Rights
Commission**

Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021

Australian Human Rights Commission

Submission to the Parliamentary Joint Committee on Intelligence
and Security

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1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in relation to its review into the Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (the CIOR Act).

2 Summary

2. The CIOR Act enshrines the requirement that a person to whom Australia owes protection obligations not be removed from Australia. It also ensures that decision makers assess *non-refoulement* prior to considering other eligibility criteria such as character. These are positive developments which the Commission considers important to ensuring that Australia complies with its international obligations.
3. However, the Commission highlights with concern the prevalence of prolonged and indefinite detention within Australia's immigration detention network, including for those to whom Australia has made positive protection findings.
4. While the Commission welcomes the statutory protection of one important human right, the principle of *non-refoulement*, there also needs to be statutory protection of another important human right – the right not to be arbitrarily detained.
5. Australian caselaw makes clear that immigration detention remains lawful until a person in immigration detention is removed from Australia or granted a visa. This was confirmed recently by the High Court in *Commonwealth v AJL20* (2021) 273 CLR 43. The CIOR Act provides that a person owed protection by Australia must not be removed to the country where they fear persecution or other serious harm. If that person has also been refused a protection visa, they are generally not able to apply for another visa. The CIOR Act, therefore, highlights the potential for prolonged and indefinite detention for people who are owed protection obligations, for example because they are a refugee, but have been refused a protection visa.
6. Even though detention in these circumstances may be lawful under Australian law, it may still be contrary to Australia's international human rights obligations and 'arbitrary'. Arbitrary detention is that which is unnecessary, unreasonable, or disproportionate to the legitimate aims of the Australian government, and without

consideration given to the particular circumstances of the person detained.¹

7. A proper review of the CIOR Act must therefore consider the relationship of s 197C to other parts of the *Migration Act 1958* (Cth) (Migration Act), *Migration Regulations 1994* (Migration Regulations), ministerial directions and policy guidelines, which enable or contribute to the possibility of prolonged and potentially indefinite detention, for large numbers of immigration detainees.
8. Three of the Commission's recommendations are to the specific provisions inserted into the Migration Act by the CIOR Act. Now that there are clear and unambiguous statements in s 197C(3) that Australia will not remove a person to a country where they have a well-founded fear of persecution or other serious harm, the previously existing ss 197C(1) and (2) (inserted in 2014) should be repealed. Similarly, s 197D, which provides the Minister with the ability to reverse a person's protection finding, should be repealed. In the alternative, the Commission proposes that objective criteria according to which a protection finding may be reviewed be inserted, along with an additional step in the review to allow procedural fairness to those affected, prior to any decision being made.
9. The Commission has also reviewed the ministerial directions, regulations and policy guidelines, which identify factors that decision makers must or should consider prior to making a decision to refuse a visa application or cancel a visa. Compliance with Australia's international obligations should be a primary consideration for decision makers in each case, but this is not currently the case in the instances identified in these recommendations. Guidance should also be provided to decision makers on the kinds of international obligations which may be invoked by their decision, not just with respect to *non-refoulement*. In particular, the risk of subjecting a person to arbitrary detention should be explicitly considered.
10. The recommendations, if adopted, would provide additional safeguards to ensure that, before a decision is made which could have the consequence of causing or continuing prolonged or indefinite detention, Australia's international obligations are properly considered by decision makers.
11. Once a decision is made which does result in a person becoming or remaining an unlawful non-citizen, and when detention is the lawful consequence of that decision, then intervention by the Minister for Immigration, Citizenship and Multicultural Affairs (Minister) is often the

only means by which an alternative to closed detention can be considered. However, the ministerial guidelines presently in place limit or prevent the Department of Home Affairs (Department) from referring certain cohorts of detainees to the Minister for consideration, and do not encourage intervention as a means of ending or avoiding arbitrary detention.

12. The final recommendation of the Commission is that a broader review is conducted to identify ways of enhancing safeguards against arbitrary detention in the Migration Act. Recommendation 9 sets out a number of principles and processes to guide that review. The Commission would welcome an opportunity to contribute to such a review and make further specific recommendations on how this might be achieved.

3 Recommendations

13. The Commission makes the following recommendations:

Recommendation 1

The Commission recommends that s 197C(1) and s 197C(2) of the Migration Act be repealed.

Recommendation 2

The Commission recommends that s 197D of Migration Act be repealed, with corresponding redrafting of s 197C.

Recommendation 3

In the alternative to Recommendation 2, the Commission recommends that s 197D be amended to insert objective criteria for the exercise of the power to make a finding that an unlawful non-citizen is no longer a person in respect of whom any protection finding would be made. Suggested wording of the amendment may include:

- (3) For the purposes of subsection (2), the grounds on which the Minister may make a decision that an unlawful non-citizen is no longer a person in respect of whom a protection finding would be made are:
 - (a) in the case of a person about whom there has been a protection finding made under section 36(a):

- (i) the person can no longer continue to refuse to avail themselves of the protection of the country of their nationality; or
 - (ii) being a person who has no nationality, the person is able to return to the country of their former habitual residence, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist.
- (b) in the case of a person about whom there has been a protection finding made under section 36(aa), the grounds for believing that the person would suffer significant harm no longer exist.
- (4) It shall be an exception to subsection (3) if the person is able to invoke compelling reasons for refusing to avail themselves of the protection of the country of their nationality, or the country of their former habitual residence.
- (5) Without limiting subsection (4), compelling reasons may include:
- (a) those arising out of previous persecution or significant harm;
 - (b) the person is a child;
 - (c) the person has strong family, social and/or economic ties to Australia.

Recommendation 4

In the alternative to Recommendation 2, the Commission recommends that s 197D be amended to provide for procedural fairness to be given to a person whose protection finding is under review by the Minister.

Recommendation 5

The Commission recommends that the Minister's s 197AB and s 195A guidelines should be amended to provide:

- a) that all people in immigration detention are eligible for referral under s 197AB and s 195A, whether or not they have had a visa cancelled or refused, including under s 501 of the Migration Act.
- b) in the event the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility, the Department include in any submission to the Minister:
 - i) a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, and a

description of the inquiries undertaken by the Department in forming its assessment

- ii) an assessment of whether an identified risk could be satisfactorily mitigated if the person were allowed to reside in the community, including a description of the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment.
- c) in the event that the Minister decides not to exercise their discretionary powers, the Department conduct further assessments of risk and mitigation options every 6 months and re-refer the case to the Minister to ensure that detention does not become indefinite.

Recommendation 6

The Commission recommends that a new direction be issued pursuant to s 499 of the Migration Act to replace Direction No. 99, and that in the new direction:

- a) international obligations, including *non-refoulement*, be made a primary consideration
- b) as part of the legal consequences of a relevant decision, decision makers be required to explicitly consider the risk of:
 - i) prolonged and indefinite detention
 - ii) arbitrary detention, contrary to the ICCPR.

Recommendation 7

The Commission recommends that international obligations be included in the list of prescribed circumstances contained in reg 2.41 of the Migration Regulations.

Recommendation 8

The Commission recommends that the Department's procedural instruction on 'General visa cancellation powers (s109, s116, s128, s134B and s140)' be amended to:

- a) make explicit reference to the international obligation not to subject a person to arbitrary detention
- b) provide additional guidance to decision makers on how to assess international obligations as they relate to prolonged or indefinite detention.

Recommendation 9

The Commission recommends that a review of the Migration Act be conducted to enshrine the following principles and processes:

- a) a presumption against detention for those who have had positive protection findings made within the meanings prescribed by s 197C
- b) alternatives to detention, such as residence determination or bridging visas, must be considered prior to consideration of held detention
- c) for any person who is considered by the Minister to warrant being held in immigration detention, an application should be required to be made to a competent authority who is tasked with balancing the risk to the community against the impact on the individual to be detained
- d) decisions to detain, or to continue to detain, must be subject to merits and/or judicial review
- e) any person held in immigration detention must have their detention reviewed at regular intervals.

4 Background

14. The current review is commenced pursuant to s 29(1)(cf) of the *Intelligence Services Act 2001* (Cth) on the second anniversary of the commencement of the CIOR Act.
15. The CIOR Act amended s 197C of the Migration Act, to clarify Parliament's intentions with respect to Australia's *non-refoulement* obligations and following two Federal Court judgments.
16. Section 197C was inserted into the Migration Act in 2014 by the passing of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (Legacy Caseload Act).
17. At that time, s 197C provided as follows:

Australia's non-refoulement obligations irrelevant to removal of unlawful non-citizens under section 198

- (1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.
- (2) 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.

18. The explanatory memorandum accompanying the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) stated that the purpose of s 197C was to:

clarify Australia's international law obligations. It is important that the right mechanisms are in place to ensure that those who do not engage our protection obligations can be removed from Australia. ... This Bill will make clear that the removal power is available independent of assessments of Australia's *non-refoulement* obligations, where a non-citizen meets the circumstances specified in the express provisions of section 198 of the Migration Act. This is in response to a series of High Court decisions which have found that the Migration Act as a whole is designed to address Australia's *non-refoulement* obligations. There are a number of personal non-compellable powers available for the Minister to use, before the exercise of the removal power, to allow a visa application or grant a visa where this is in the public interest.²
19. The cases referred to include *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 (*SZQRB*), a decision of the Full Court of the Federal Court from which the Minister sought, but was refused, special leave to appeal to the High Court. More about this case and the stated purpose of the Legacy Caseload Act will be expanded upon below.
20. The CIOR Act amended s 197C by amending the title of the section to 'Relevance of Australia's *non-refoulement* obligations to removal of unlawful non-citizens under section 198', and by inserting sub-ss (3)-(9).
21. The amended title of the section recognises that, contrary to what is suggested by s 197C(1), Australia's *non-refoulement* obligations to a person *are* relevant to whether they are required to be removed from Australia.
22. Subsections (4) to (7) provide definitions of a new term, 'protection finding', which is a decision made in favour of a non-citizen that they satisfy either of the criteria set out in ss 36(2)(a) or (aa) of the Migration Act (which relate to eligibility for a protection visa because the applicant is a refugee or otherwise meets the complementary protection grounds), but are not eligible for the grant of a protection visa as a result of any of the exclusions which apply within ss 36(1C), 36(2C) or 36(3), or they fail to meet other criteria for the visa contained within the relevant clauses of schedule 2. This would include the requirement to meet public interest criteria 4001 which requires a visa

applicant to meet the character test as set out in s 501 of the Migration Act.

23. Similarly, a person who was granted a protection visa, but had it subsequently cancelled, would also fall within the ambit of this section.
24. Subsection (3) clarifies that s 198 of the Migration Act does not require or authorise an officer to remove to a country, a person who has made an application for a protection visa, and in the course of that application, a protection finding was made in their favour with respect to that country. The visa application must be finally determined, and the decision must not have been quashed or set aside on review.
25. The CIOR Act also inserted s 36A into the Migration Act which stipulates that, when processing protection visa applications, the Minister must consider protection obligations first before proceeding to consider exclusion grounds, and then other visa criteria.
26. The explanatory memorandum accompanying the CIOR Act stated that the purpose of the CIOR Act was 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;
 - 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 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 to no longer engage those obligations; 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 no longer engages protection obligations before:

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- 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.
27. The context to the introduction of the legislation is also important. At the time, the High Court was considering an appeal in the case *AJL20 v Commonwealth* (2020) 279 FCR 549. The applicant in that case was a citizen of Syria who had migrated to Australia as a child. He was granted a child visa but, after being in Australia for 9 years, this visa was cancelled on character grounds. The Commonwealth accepted that it had protection obligations to the applicant and could not return him to Syria, consistently with Australia's international *non-refoulement* obligations. However, s 197C of the Migration Act provided that these *non-refoulement* obligations were not relevant to the duty to remove. The Commonwealth was not taking sufficient steps to remove him from Australia and appeared to be in breach of the statutory requirement in s 198(6) to remove him from Australia 'as soon as reasonably practicable'. Justice Bromberg found that the relief to be granted was therefore to order his release from detention, because he was no longer being detained for the purpose of removal from Australia.
28. Parliament passed the CIOR Act with a view to ensuring that s 197C could not be interpreted in the way identified by Justice Bromberg. Shortly after the CIOR Act was passed, the High Court overturned the decision of Justice Bromberg.³ The Court held that the detention of the applicant remained lawful until he was actually removed from Australia or granted a visa. If the Commonwealth was in breach of its duty to remove him from Australia as soon as reasonably practicable, the appropriate remedy was a writ of mandamus requiring the Commonwealth to perform its duty to remove him from Australia. The Court said that if there was a breach of the duty to remove, the applicant was not entitled to be released from detention.
29. The potential for prolonged and indefinite detention in this situation is obvious. Based on the current state of the law, legislative and policy

changes are necessary to avoid detention for people like the applicant in AJL20 becoming arbitrary.

5 Relevant human rights

30. The CIOR Act contemplates a number of human rights instruments, most notably those known as containing *non-refoulement* obligations: the *Convention relating to the Status of Refugees* (Refugee Convention), the *International Covenant on Civil and Political Rights* (ICCPR), the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* (Second Optional Protocol) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).
31. Article 33(1) of the Refugee Convention prohibits the return of a refugee to the country in respect of which they have been found to be owed protection.
32. Australia's complementary protection framework encompasses Australia's commitment to not returning a person to a country where they face a real risk of harm under articles 6 or 7 of the ICCPR, article 3 of the CAT, and under the Second Optional Protocol.
33. On review of the CIOR Act, it is the Commission's view that further consideration must be given to its impact on Australia's other human rights obligations and particularly those within the ICCPR dealing with protections against arbitrary detention. At times, the *Convention on the Rights of the Child* (CRC) may also be relevant (eg, s 37(b)), although not considered by this submission.
34. The Commission is tasked with receiving complaints into acts or practices that may be inconsistent with or contrary to any human right: s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (AHRC Act).
35. The ICCPR falls within the definition of human rights within section 3 of the AHRC Act.
36. In the 2021–2022 financial year, 13% of the complaints received by the Commission were lodged under this function.⁴ Of these, 69% were complaints raising grounds under the ICCPR.⁵
37. To highlight the particular human rights breaches occurring in the context of detainees found to be owed protection obligations held in immigration detention, the Commission has published the following

report: *The detention of refugees following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2022] AusHRC 143.

38. This report, and others considering individual complainants, reflect the current tension caused by the operation of various sections within the Migration Act, whereby Australia recognises and upholds its obligations with respect to *non-refoulement*, while simultaneously allowing for the prolonged and indefinite detention of unlawful non-citizens.

6 Non-refoulement obligations

39. Section 36A, inserted into the Migration Act by the CIOR Act, achieves the important aim of ensuring that *non-refoulement* obligations are assessed and determined prior to any other eligibility criteria contained within s 36 or schedule 2. This means that a person will not be refused a visa and potentially face removal from Australia, without an assessment of whether there are countries that the person must not be returned to. The Commission does not recommend any changes to s 36A.
40. The Commission agrees with the objectives set out in the explanatory memorandum to the CIOR Act, which is to ensure that ss 197C(1) and (2) are not interpreted as requiring an officer to remove from Australia any person who has sought to invoke Australia's protection obligations, and for whom a final decision has not yet been made.
41. In the circumstances where this has been so clarified, the Commission queries the ongoing need for ss 197C(1) and (2). On its face, s 197C(1) is inconsistent with the Government's policy, which is now reflected in s 197C(3). That is, if Australia has *non-refoulement* obligations in respect of an unlawful non-citizen, this *is* relevant for the purposes of the duty of removal in s 198. The relevance is that the person should not be removed to a place where they have a well-founded fear of persecution or other serious harm.
42. The inconsistency created by subsections (1) and (3) leaves open the possibility of officers misunderstanding their duties and powers.
43. It is not clear that s 197C(2) has any real work to do, particularly now that there is an obligation under new s 36A to conduct an assessment of any *non-refoulement* obligations before considering any other eligibility criteria for a visa.

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44. The stated purpose of ss 197C(1) and (2), namely to ‘deter the making of unmeritorious protection claims as a means to delay an applicant’s departure from Australia’ is not being achieved by those subsections.
45. If a person has not previously made an application for a protection visa, they will usually be entitled to do so. If they have had a protection visa refused or cancelled, s 48A provides that they cannot make a further application, unless the Minister intervenes personally to allow such application to be determined (for example, because there is new information).
46. The original justification for s 197C(2) in 2014 was the case of *SZQRB*. This case was referred to extensively within the explanatory memorandum accompanying the Legacy Caseload Bill. Significantly, this case arose out of a non-statutory scheme (an International Treaties Obligations Assessment or ITOA), which the Department used at that time to assess complementary protection obligations, that is, *non-refoulement* obligations owed to a person other than because they were a refugee within the meaning of the Refugee Convention. The respondent had been found not to be a refugee, and the ITOA found that he was not owed complementary protection obligations, but the Department had applied the wrong test in assessing those complementary protection obligations. The Court issued an injunction to prevent the respondent’s removal from Australia.
47. Since the factual situation considered in *SZQRB*, the Migration Act has been amended to require consideration of complementary protection claims as part of the application for a protection visa.
48. While according to the Department’s Policy Advice Manual (PAM), there remain circumstances in which an ITOA will still be conducted,⁶ it will often be open for the person affected to apply for a protection visa, or otherwise for the Minister to intervene to allow an application to be made. These are preferable methods for determining protection obligations because there is an avenue for merits review associated with a visa application.
49. It is within the control of the government to ensure that it can effectively administer the Migration Act by adhering to the statutory scheme for assessing protection obligations – that is, by determining protection visa applications. In the event that an applicant is found not to be owed protection (either as a refugee or pursuant to complementary protection obligations), then s 198 will apply to require that person’s removal. Sections 197C(1) and (2) do not assist in achieving this aim.

50. If a person has not made a protection visa application, then similarly, the Act already provides for their removal.

Recommendation 1

The Commission recommends that ss 197C(1) and (2) are repealed from the Migration Act.

7 Cessation of protection findings

51. The CIOR Act also inserted s 197D into the Migration Act, which allows for the Minister to make a decision that the protection finding referred to under s 197C(4)–(7) no longer applies.
52. The Commission queries the necessity for s 197D in circumstances where protection findings may have already been the subject of merits and/or judicial review proceedings in relation to the protection visa decision, or cancellation decision.
53. This could result in a departmental officer essentially overturning the decision of a member of the Administrative Appeals Tribunal.
54. The Office of the United Nations High Commissioner for Refugees (UNHCR) provides guidance on the narrow circumstances within which a person's refugee status may cease. Its guidelines state that a 'strict approach is important since refugees should not be subjected to constant review of their refugee status'.⁷
55. Cessation of refugee status refers to circumstances changing such that a person is no longer in need of protection. It is to be distinguished from cancellation of refugee status: when the person should not have had that status conferred upon them in the first instance (such as due to fraud, misconduct as to eligibility, applicability of an exclusion clause, or error of law by the determining authority), or revocation; or when their actions subsequent to the determination put them within the scope of an exclusion clause.⁸
56. The UNHCR recommends that cessation of refugee status should only occur once there have been significant and profound changes in a country of origin, and usually over sufficient time to ensure the durability of the change.⁹ However, the UNHCR also identifies that there would be exceptions to cessation even in these circumstances, such as where the person found to be in need of protection has suffered such grave persecution that they cannot reasonably be expected to return. Similarly, those who have been long-term residents

in the country of asylum and who have established ties, should not be expected to leave.¹⁰

57. The Commission would like to see it clarified that s 197D would only apply to a change of circumstances which mean that the person affected is no longer in need of international protection. It would seem antithetical to the purposes of the CIOR Act that a s 197D review could be conducted as a result of conduct already known to the Department that was, or could have been, considered when the initial protection finding was made.
58. The wording of Recommendation 3 below adopts the language of article 1C(5) and (6) of the Refugee Convention.
59. Section 197D is framed in such broad language that no particular objective criteria need to be demonstrated. It is sufficient if the Minister is satisfied that if the extensive protection visa application process were to commence again, the person would not be found to be owed protection obligations this time around. In the event that the PJCIS considers that s 197D remains necessary, the Commission would welcome further amendments to the legislation to identify specific grounds on which a person might have their protection finding reviewed. It would be preferable for this to be by way of legislative amendment, rather than through delegated legislation.
60. The supplementary explanatory memorandum accompanying the CIOR Bill does not clarify this in any way, but identifies that 'it would be rare that a person who has been found to engage protection obligations, would no longer engage those obligations'.¹¹
61. The Commission has concerns about the process set out in s 197D, and considers that further consideration should be given to amendments to the Migration Act to ensure that procedural fairness is afforded to any person affected.
62. While acknowledging that review rights pursuant to Part 7 of the Migration Act apply to a person for whom a decision has been made to reverse the protection finding, it is a concern to the Commission that the legislation contains no requirement for the Minister to inform a person that their protection finding is under review, and to allow them to make submissions about their ongoing need for protection, or to attend an interview.
63. It would be far preferable to allow an affected person procedural fairness during the process of consideration, rather than to assume that they will be able to access their review rights under Part 7. In this

respect, the Commission notes that numerous cases have criticised the mechanisms for notification of visa related decisions under the Migration Act.¹²

64. The minimum requirements for consideration of reversing a protection finding should include:
- notice that a protection finding is being reviewed, with requirements about the provision of that notice to the affected person
 - an explanation contained within the notice the grounds on which the Minister will be reviewing the protection finding and factors relevant to the Minister's consideration
 - requirements surrounding the provision of adverse information or materials which may be used by the Minister in making the decision
 - an invitation to provide submissions to the Minister, either by way of an interview or written submissions, as to the reasons why the protection finding should not be reversed
 - if inviting written submissions, a clearly defined timeframe for doing so, which has the ability to be extended by the Minister should the affected person be unable to meet any deadline.
65. These minimum requirements are already contained within various sections of the Migration Act – and will be familiar to the Minister and Department. They are not onerous requirements, particularly in light of the confirmation in the explanatory memorandum that recourse to this power would be rare.

Recommendation 2

The Commission recommends that s 197D of the Migration Act be repealed, with corresponding redrafting of s 197C.

Recommendation 3

In the alternative to Recommendation 2, the Commission recommends that s 197D be amended to insert objective criteria for the exercise of the power to make a finding that an unlawful non-citizen is no longer a person in respect of whom any protection finding would be made. Suggested wording of the amendment may include:

- (3) For the purposes of subsection (2), the grounds on which the Minister may make a decision that an unlawful non-citizen is no longer a person in respect of whom a protection finding would be made are:

- (a) in the case of a person about whom there has been a protection finding made under section 36(a):
 - (i) the person can no longer continue to refuse to avail themselves of the protection of the country of their nationality; or
 - (ii) being a person who has no nationality, the person is able to return to the country of their former habitual residence, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist.
- (b) in the case of a person about whom there has been a protection finding made under section 36(aa), the grounds for believing that the person would suffer significant harm no longer exist.
- (4) It shall be an exception to subsection (3) if the person is able to invoke compelling reasons for refusing to avail themselves of the protection of the country of their nationality, or the country of their former habitual residence.
- (5) Without limiting subsection (4), compelling reasons may include:
 - (a) those arising out of previous persecution or significant harm;
 - (b) the person is a child;
 - (c) the person has strong family, social and/or economic ties to Australia.

Recommendation 4

In the alternative to Recommendation 2, the Commission recommends that s 197D be amended to provide for procedural fairness to be given to a person whose protection finding is under review by the Minister.

8 Arbitrary detention

- 66. Where a person has been found to be owed protection but is otherwise ineligible for the grant of a protection visa, the practical implication of the CIOR Act, combined with existing caselaw, is that this category of people may be indefinitely detained. Indefinite detention, or prolonged detention without purpose, may be arbitrary at international law, despite it currently being considered lawful within Australian jurisprudence.¹³
- 67. 1,128 people were held in immigration detention facilities as at April 2023.¹⁴ The Commission is not aware of how many of these have had

protection findings made in their favour, but notes that of these, 48 are from Afghanistan, 57 from Sudan, and 97 from Iran.

68. Those detainees who have had positive protection findings made in their favour, or who may have such a finding made in future, but who are otherwise ineligible for the grant of a protection visa, face the prospect of indefinite detention unless they voluntarily choose to return to their countries of origin.

69. The prohibition against arbitrary detention is set out in article 9(1) of the ICCPR:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

70. International human rights jurisprudence has provided the following set of principles in relation to article 9(1):

- ‘detention’ includes immigration detention¹⁵
- ‘arbitrariness’ is not to be equated with ‘against the law’; it must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability¹⁶
- detention should not continue beyond the period for which a State Party can provide appropriate justification.¹⁷

71. While the ICCPR itself does not define the term ‘arbitrary’, the UN Human Rights Committee (UNHRC) has emphasised the following:

- detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention
- detention for the purposes of immigration control is not per se arbitrary, but must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time
- less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding, must be taken into account
- the inability of a State Party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.¹⁸

72. The UN Working Group on Arbitrary Detention (UNWGAD) has stated that any form of detention in the context of migration must be applied

as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose.¹⁹

73. Under international law, the guiding standard for restricting rights is 'proportionality', which means that a deprivation of liberty – in this case, continuing immigration detention – must be necessary and proportionate to a legitimate aim of the State Party, and must be in the least restrictive form and for the shortest time possible in order to avoid being 'arbitrary'.²⁰
74. The Australian government has consistently stated to the UNWGAD that immigration detention is being utilised as an option of last resort, and that lawful detention under s 189 of the Migration Act is reasonable, necessary and proportionate where a person does not hold a visa to lawfully enter and remain in Australia. This includes in cases where a positive protection finding has been made in favour of the complainant.²¹
75. Despite these assertions, the UNWGAD has found, in 21 cases since 2017, that Australia has breached article 9 of the ICCPR by continuing to detain the individual complainants.²² Not all of those 21 complainants had the benefit of protection findings, but Australia continued to detain each of them regardless.
76. For many of the persons affected by the operation of the CIOR Act, decisions to cancel or refuse them a protection visa will have taken place pursuant to s 501 of the Migration Act. If so, they will be prevented from making any other visa application by s 501E.
77. Others will have been refused a protection visa pursuant to s 36(1C), (2C) or (3), in which case s 48 of the Migration Act will prevent their making a valid application for most types of visas. Limited options for applications will remain available for the visas listed in regulation 2.12 of the Migration Regulations.
78. Examples may also exist of persons having their visa cancelled under s 109 or s 116 (for example, s 116(1)(e)(i)), who would fall within this same category.
79. Some of the affected persons may be considered for the grant of a Bridging E visa pursuant to regulation 2.25 of the Migration Regulations, unless subject to one of the relevant bars (such as s 501E or s 46A). While not the subject of a specific recommendation to the PJCIS, the Commission would suggest as part of a review (per recommendation 9) additional powers for granting bridging visas being

given to the Department so as to lessen the reliance on the Minister to intervene.

80. In the Commission's experience, most if not all of the immigration detainees affected can only have their detention ended through a decision of the Minister, to use their discretionary power to grant a visa pursuant to s 195A of the Migration Act, or to make a residence determination to allow community detention under s 197AB of the Migration Act.
81. This was acknowledged in the human rights scrutiny report on the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (CIOR Bill) by the Parliamentary Joint Committee on Human Rights (PJCHR).
82. The PJCHR wrote:

while the statement of compatibility indicates that it is the government's preference to manage non-citizens in the community wherever possible and use detention as a last resort, there is no legislative requirement to do so. Rather, detention is the default option for managing unlawful non-citizens under the Migration Act rather than as a last resort. The discretionary powers provide only a very limited exception to the rule of mandatory detention. It is also unclear the extent to which the individual circumstances of detainees, including the effect of detention on their physical or mental health, would be considered in the minister's decision as to whether exercising the discretion is in the public interest. The UN Human Rights Committee has indicated that detention may be arbitrary where there is a failure to take into account relevant individual circumstances in decisions about detention, including the effect of detention on a detainee's health, and there is an absence of particular reasons to the individual to justify detention. For these reasons, it does not appear that the minister's discretionary powers alone would be a sufficient safeguard for the purpose of a permissible limitation under international human rights law.²³
83. The PJCHR also raised concerns about the potential for the CIOR Act to be inconsistent with other human rights, and particularly those contained within the CAT and CRC. The Commission shares those concerns, and would also draw the PJCHR's attention to article 7 of the ICCPR which may be enlivened by detention which causes harm to a detainee's mental health.²⁴
84. The conclusion drawn by the PJCHR was that the outcome of the CIOR Act on detainees was disproportionate to the aims purported to be achieved by it.²⁵

85. Similar concerns were raised by the Senate Standing Committee for the Scrutiny of Bills.²⁶

8.1 Ministerial guidelines

86. The process of referring matters to the Minister for their consideration has been the subject of previous Commission recommendations for reform,²⁷ and now must be reconsidered in light of the findings of the High Court in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10.
87. The Commission is of the view that the current guidelines with respect to the Minister's exercise of s 195A or s 197AB are overly restrictive, and have the effect of departmental officers not referring meritorious cases to the Minister for consideration.
88. The s 197AB guidelines issued in 2009 gave priority to cases that would 'take a considerable period to substantively resolve' and noted that 'detention which is arbitrary or indefinite is not acceptable'.²⁸ Detainees whose removal was unlikely to occur within 3 months would be considered under this power.
89. These grounds for referral were absent when new guidelines were issued in 2013, 2014, 2015 and 2017.
90. Similarly, the 2012 guidelines on s 195A provided, as a criterion for consideration, that

The person presents well-founded non-refoulement claims under the Convention relating to the Status of Refugees 1951, as amended by the Protocol relating to the Status of Refugees 1967 (Refugees Convention) or under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR) or the Convention on the Rights of the Child (CROC) as stipulated in paragraph 36(2) of the Act but has had a Protection visa (PV) application refused. The refusal may be affirmed by a tribunal or the person may not have sought merits review.

This would include persons who raise character issues which are likely to result in their exclusion or refusal of any further PV application lodged as a result of intervention under section 48B. These would be cases where the person:

- is excluded from the grant of a PV under Article 1F or 32 or 33(2) of the Refugees Convention, or is ineligible for the grant of a Protection visa under paragraph 36(2C)(a) or 36(2C)(b) of the Act;

- has had their PV cancelled or refused under section 501; and
 - has had a PV refusal decision affirmed by the RRT after having another substantial visa cancelled under section 501 (section 417).²⁹
91. The 2012 guidelines provided that the public interest is served through ‘ensuring that no person is held in immigration detention for longer than is necessary’.³⁰
92. Again, these statements were omitted when the guidelines were redrafted in 2016 to their current state.
93. Further barriers exist for referral of those affected, if their visa was refused or cancelled under s 501 of the Migration Act. The s 195A guidelines state that the Minister would generally not expect any such person to be referred for consideration.³¹ The s 197AB guidelines state that the Minister would not expect referral of ‘a person [who] presents character issues that indicate that they may fail the character test under section 501 of the Act’, unless there are exceptional reasons.³² While the Commission considers that a person’s prolonged or indefinite detention constitutes exceptional reasons, in practice this does not seem to be the way the Department interprets the guidelines.
94. This means that all persons with a protection finding in their favour and whose visas have been refused or cancelled pursuant to s 501, generally have no option for their release from immigration detention, unless they voluntarily choose to return to the country from which they are owed protection, or have their case referred to the Minister under a separate authority from the Minister outside of the usual guidelines.³³
95. The Commission understands from reporting on the issue that, since signing a briefing note inviting submissions from the Department on certain cohorts of detainees, the Minister has intervened in favour of releasing 30 people from held detention into either community detention or onto bridging visas.³⁴ While this is a welcome measure, it is only a temporary one, and highlights that by requiring personal intervention on each matter, the Department cannot move quickly or independently of the Minister, to end protracted detention in individual cases.
96. The Commission considers that not only is a review into Australia’s immigration detention regime required (Recommendation 9), but also as a short-term solution to ensuring that those affected by the CIOR Act are not arbitrarily detained, the Minister should reissue new guidelines that broaden the scope of who is eligible for referral. It

appears that new guidelines will be required in any event in order to respond to the High Court's decision in *Davis*.

Recommendation 5

The Commission recommends that the Minister's s 197AB and s 195A guidelines should be amended to provide:

- a) that all people in immigration detention are eligible for referral under s 197AB and s 195A, whether or not they have had a visa cancelled or refused, including under s 501 of the Migration Act.
- b) in the event the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility, the Department include in any submission to the Minister:
 - i) a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment
 - ii) an assessment of whether an identified risk could be satisfactorily mitigated if the person were allowed to reside in the community, including a description of the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment.
- c) in the event that the Minister decides not to exercise their discretionary powers, the Department conduct further assessments of risk and mitigation options every 6 months and re-refer the case to the Minister to ensure that detention does not become indefinite.

8.2 Direction No. 99

97. In order to avoid detention of those found to be in need of international protection, and as a further safeguard against *non-refoulement*, the Commission also draws the PJCIS' attention to Direction No. 99 – a mandatory direction issued by the Minister followed by decision makers with responsibility for visa cancellation or refusal decisions pursuant to s 501.³⁵ As outlined above, the Commission considers s 501 cancellations or refusal decisions would be the most prevalent mechanism resulting in prolonged or indefinite detention.

98. Direction No. 99 commenced on 3 March 2023, and was redrafted on that occasion with a focus on making as a primary consideration, the strength, nature and duration of the person's ties to Australia.
99. The Commission would like to see a new direction issued in the place of Direction No. 99 which also makes as a primary consideration, Australia's international obligations.
100. Currently, these fall under a heading 'Other considerations' as follows:

9.1 Legal consequences of decision under section 501 or 501CA

(1) Decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under section 189, noting also that section 197C(1) of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has *non-refoulement* obligations in respect of an unlawful non-citizen.

...

9.1.1 Non-citizens covered by a protection finding

(1) Where a protection finding (as defined in section 197C of the Act) has been made for a non-citizen in the course of considering a protection visa application made by the non-citizen, this indicates that *non-refoulement* obligations are engaged in relation to the non-citizen.

(2) Section 197C(3) ensure that, except in the limited circumstances specified in section 197C(3)(c), section 198 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 for the non-citizen in the course of considering their application for a protection visa. This means the non-citizen cannot be removed to that country in breach of *non-refoulement* obligations, even if an adverse visa decision under section 501 or 501CA is made for the non-citizen and they become, or remain, an unlawful non-citizen as a result. Instead, the non-citizen must remain in immigration detention as required by section 189 unless and until they are granted another visa or they can be removed to a country other than the country by reference to which the protection finding was made.

101. This final paragraph alludes to, but does not make explicit, the likelihood of prolonged or indefinite detention on a non-citizen as a result of a visa refusal or cancellation decision.
102. The Commission recommends that a new direction be drafted which does make this explicit, and make reference to Australia's international

obligations contained within the ICCPR, not to arbitrarily detain a person.

Recommendation 6

The Commission recommends that a new direction be issued pursuant to s 499 of the Migration Act to replace Direction No. 99, and that in the new direction:

- a) international obligations, including *non-refoulement*, be made a primary consideration
- b) as part of the legal consequences of a relevant decision, decision makers be required to explicitly consider the risk of:
 - i) prolonged and indefinite detention
 - ii) arbitrary detention, contrary to the ICCPR.

8.3 Other cancellation powers

103. It appears to the Commission that cancellation of visas pursuant to s 109 or s 116 of the Migration Act could also occur in respect of a person with a protection finding in their favour.
104. If that is the case, then the Commission's recommendations within recommendation 5 would also extend to the relevant regulations and guidelines that govern those cancellations powers.
105. Section 109 of the Migration Act allows for the cancellation of a person's visa if they have failed to comply with ss 101, 102, 103, 104 or 105 of the Migration Act. Broadly, these are sections requiring that a visa applicant must give the correct information in any visa application or passenger card, must not give a bogus document with respect to their application, and must notify the Department should they become aware of a change in circumstances, or a previously provided incorrect answer, relevant to their application.
106. Section 109 states that the Minister may cancel a visa, after considering the visa holder's response to notice provided, in addition to certain prescribed circumstances as set out in the Migration Regulations. The prescribed circumstances are supplemented by a policy document. This policy document is entitled 'General visa cancellation powers (s109, s116, s128, s134B and s140)', available on LEGENDcom.
107. The prescribed circumstances to be considered pursuant to s 109(1)(c) of the Migration Act, as set out in reg 2.41 of the Migration Regulations,

does not make any reference to *non-refoulement* or other international obligations.

108. Instead, these are set out in policy only as a matter that should be considered.
109. Section 116 of the Migration Act allows for cancellation of a visa in a range of other circumstances, such as where a visa holder has not complied with a condition of their visa – s 116(1)(c), or where the presence of the visa holder is or may be a risk to the health, safety or good order of the Australian community – s 116(1)(e)(i).
110. Unlike s 109 cancellation matters, there are no prescribed circumstances to be considered within the Migration Regulations for s 116 cancellations.
111. Instead, the ‘General visa cancellation powers (s109, s116, s128, s134B and s 140)’ policy document sets out what factors should be considered by the Department when deciding whether or not to cancel a visa.
112. *Non-refoulement* and the possibility of indefinite detention are included in the list of 9 matters which should be considered.
113. Indefinite detention is identified as a possible mandatory legal consequence to a cancellation decision, rather than being relevant to Australia’s international obligations – such as those under the CRC and the ICCPR.
114. A section in the relevant policy document is devoted to international obligations, however no mention of article 9 of the ICCPR, or the ramifications of indefinite detention, is made. The Commission would welcome a review of this policy guideline to assist decision makers fully to understand the consequences of their decision with respect to a broader range of international obligations.
115. While not the subject of a specific recommendation, the Commission is of the view that the requirement for decision makers to consider international obligations is best set out in legislation, or delegated legislation, rather than policy documents, which can be amended without sufficient oversight.

Recommendation 7

The Commission recommends that international obligations be included in the list of prescribed circumstances contained in reg 2.41 of the Migration Regulations.

Recommendation 8

The Commission recommends that the Department's procedural instruction on 'General visa cancellation powers (s109, s116, s128, s134B and s140)' be amended to:

- a) make explicit reference to the international obligation not to subject a person to arbitrary detention
- b) provide additional guidance to decision makers on how to assess international obligations as they relate to prolonged or indefinite detention.

9 Safeguards against arbitrary detention

116. In order to make recommendations about models which could be adopted by Australia to safeguard against arbitrary detention, the Commission has considered the mechanisms in comparable jurisdictions.
117. Much of this research has been drawn from the Commission's previous report, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141.

9.1 Canada

118. Canadian laws, including the *Immigration and Refugee Protection Act 2001* and its accompanying Regulations, contain a number of safeguards against indefinite detention.³⁶ The Federal Court has also confirmed that a person cannot be held indefinitely under the *Immigration and Refugee Protection Act 2001*.³⁷
119. The Immigration and Refugee Board (an administrative tribunal) must review an individual's detention every 30-day period to examine the circumstances of the detention, whether it is lawful, and whether it should be continued.³⁸ As part of the review, the government must demonstrate why alternatives to detention are not appropriate.
120. The assessment is a two-step process. First, the Immigration and Refugee Board must release the person from detention unless they are satisfied that one of the following grounds for detention exists:
 - they constitute a danger to the public
 - they are unlikely to appear for examination, hearings or removal from Canada

- the Minister is taking necessary steps to inquire into a reasonable suspicion they are inadmissible on grounds of security, human rights violations, or serious or organised criminality
 - the identity of the person has not been established.³⁹
121. Secondly, to mitigate against indefinite detention, if one of the above grounds for detention exists the following factors must also be considered:
- the length of time the person has spent in detention and the length of time detention will likely continue, and whether there is a possibility of it becoming indefinite
 - any unexplained delays or lack of diligence at the fault of one of the parties
 - the availability, effectiveness and appropriateness of alternatives to detention.⁴⁰
122. As a result of the above additional factors, the Immigration and Refugee Board may order the release of an individual, even if satisfied that a *prima facie* case for continued detention has been established. For example, the Board may order release because: detention has continued for an extremely long time with no realistic prospect of removal; the Minister is unable to explain a lack of diligence in taking steps to establish a detainee's identity; or it is satisfied that alternatives, such as release on conditions, would adequately address the concerns underlying the grounds for detention.⁴¹
123. If a person is released from detention, the Immigration and Refugee Board may impose any conditions that it considers necessary as alternatives to detention.⁴² The commonly imposed 'generic conditions' include keeping the authorities updated with a current address, reporting any criminal charges and convictions and obtaining ID documents. Other conditions and alternatives to detention include the issuance of deposits or guarantees, in person reporting, community case management and supervision, voice reporting and electronic monitoring.⁴³

Removals

124. A removal order may be stayed if the removal cannot be carried out.⁴⁴ The person is generally released if an order is stayed subject to other relevant reasons for detention such as posing a danger to the public.

125. The Canada Border Services Agency can impose an Administrative Deferral of Removal (ADR) or the relevant Minister may impose a Temporary Suspension of Removal (TSR) in certain circumstances of foreign crises where removal would be inappropriate.⁴⁵
126. An ADR is a temporary measure put in place to temporarily defer removals to certain countries in situations of humanitarian crisis. Countries currently listed include the Gaza Strip, Libya, Mali, Somalia, Ukraine, Yemen, South Sudan, Sudan, and Iran.⁴⁶
127. TSRs temporarily pause removals to a country where there is a risk to the entire civil population such as armed conflict.⁴⁷ These are currently in place for Afghanistan, the Democratic Republic of the Congo and Iraq.

9.2 Germany

128. Germany is subject to the European Union *Returns Directive* which provides for a number of safeguards against indefinite detention including:
 - a time limit for detention not exceeding 6 months, and this may be extended for not more than a further twelve months in exceptional circumstances
 - that detention may only be used if there are no sufficient alternatives to prepare or carry out removal, in particular if there is a risk of the individual absconding or avoiding or hampering the returns process
 - that detention should be for as short a period as possible and only be permitted while removal arrangements are currently in progress and being executed with due diligence
 - that detention shall be reviewed at reasonable intervals of time and if it is prolonged then the review should be subject to the supervision of a judicial authority.⁴⁸

Removals

129. German laws do not permit detention awaiting deportation if the purpose of the custody can be achieved by other less severe means and detention is required to be limited to the shortest possible duration.⁴⁹
130. Detention to secure deportation is not permitted if it is clear that it will not be possible to carry out deportation within the next 3 months for

reasons beyond the person's control, unless the person poses a significant threat to others or to significant security interests.

131. Detention to secure deportation may be ordered for up to 6 months,⁵⁰ but as a general rule, should not exceed 6 weeks.⁵¹ It may only be ordered if there is a risk of the person absconding, the person is required to leave the territory after entering the territory unlawfully or a deportation order has been issued but is not immediately enforceable.⁵²
132. The detention order may be extended by a maximum of 12 months in cases where the person hinders their deportation and may be extended by a further and maximum of 12 months where the transmission of the necessary documents by the third country is delayed. Custody to secure deportation may not last longer than 18 months.⁵³
133. Conditions may be imposed on persons who are not detained. These include restrictions on geographic movement if the deportation is imminent or the individual has been convicted of an offence, reporting duties, an obligation to provide a financial deposit or surrender documents.⁵⁴
134. Deportation is not permitted or may be temporarily suspended for a number of situations including risk of refoulement, humanitarian grounds or substantial public interest grounds.

9.3 New Zealand

135. In New Zealand, the *Immigration Act 2009* (NZ) regulates immigration detention and contains numerous protections against arbitrary and indefinite detention. These include reporting and residence conditions upon a detainee's release into the community and judicial oversight of detention warrants.
136. Section 309(1)(b) of the *Immigration Act 2009* (NZ) authorises the detention of persons who are liable for deportation (for example, persons whose visa has expired or been cancelled, persons considered a threat to security, or refugees who fall within the exclusion criteria within the Refugee Convention). A person may only be subject to an initial detention of up to 96 hours without a warrant. After this, an immigration officer may apply to a District Court Judge for a 'warrant of commitment' authorising a person's detention for up to 28 days.⁵⁵ A judge may issue the warrant if satisfied that the person is likely to be removed from New Zealand within 'not an unreasonable period', if it is

in the public interest or the person constitutes a threat or risk to security.⁵⁶

137. On determining whether the period of detention is unreasonable, the NZ High Court stated in *Tesimale v Manukau District Court* [2021] NZHC 2599, that this requires an assessment of the circumstances. Drawing on NZ and UK case law, the Court said relevant factors could include the detention conditions, the effect of detention upon a detainee, obstacles to removal, the diligence, speed and effectiveness of the steps taken by the authorities to effect removal, the realistic prospects of removal, the length of detention, whether 'too much time has elapsed', the risk of absconding, the risk of committing of criminal offences or re-offending.⁵⁷ The overriding requirement is that the judge is satisfied on the balance of probabilities that the circumstances preventing deportation will not continue for an unreasonable period.⁵⁸
138. Albeit considering provisions of the now repealed *Immigration Act 1987* (NZ), the cases of *Zaoui v Attorney General (No 2)* [2006] 1 NZLR 282 and *Chief Executive of Department of Labour v Yedegary* [2009] 2 NZLR 495 make clear that the law cannot be interpreted in such a way as to allow for indefinite detention. The principles contained in these cases have been applied in caselaw post-dating the introduction of the *Immigration Act 2009* (NZ).
139. If the judge is not satisfied that the detention is warranted, then the person must be released from custody on conditions, as discussed below.⁵⁹
140. Warrants are renewable every 28 days and there is no limit on the number of renewals. However, s 323 stipulates that if a person has been detained under consecutive warrants beyond 6 months, then they may only continue to be detained if a judge is satisfied that the person's deportation has been prevented by some action or inaction by the person and there are no exceptional circumstances that would warrant release. The Act does not define what is considered an exceptional circumstance however does specify that the period of time a person is detained, or the possibility the person's deportation or departure may continue to be prevented by some action or inaction of the person are not exceptional circumstances.⁶⁰ If a judge is not satisfied these conditions are met, they must order release of the person on conditions.⁶¹
141. Section 315(1) of the *Immigration Act 2009* (NZ) provides that instead of being placed in, or continuing to be held in detention, a person may be required to:

- reside at a specified place
 - report to a specified place at specified periods or times in a specified manner
 - provide a guarantor who is responsible for the person's compliance with any agreed requirements and reporting any failure to comply with the requirements
 - attend any required interview or hearing if they have made an application for a protection visa
 - undertake any other action to facilitate the person's deportation or departure from New Zealand.
142. Such conditions are offered at the discretion of the immigration officer.⁶² The immigration officer can end any such agreement at any time and failure to comply with any conditions may result in the resumption of that person's detention.⁶³ Similar conditions may also be imposed on a person detained who are liable for deportation as discussed above.
143. In addition, if the person is considered a threat or risk to security, then the following additional conditions may also be imposed:
- the person may not have access to or use specified communication devices or facilities (such as a telephone, the internet, or email):
 - the person may be required to refrain from associating with any one or more named individuals, or individuals associated with one or more named organisations.⁶⁴
144. There are also other safeguards against indefinite detention for refugees, protected persons and prolonged detention periods such as:
- the Minister has the discretion at any time to cancel or suspend for up to 5 years a person's liability for deportation.⁶⁵
 - persons who are recognised as refugees are not liable to arrest and detention, unless their deportation is permissible under the Refugee Convention (based on national security or public order concerns, Articles 32(1) and 33(2)).⁶⁶
 - persons who are recognised as 'protected persons' (a person who may be subject to the arbitrary deprivation of the right to life, to cruel treatment or to torture) under the Immigration Act may not be detained unless they can be removed to a country where they will not face torture or the death penalty. Unlike the Refugee Convention provision, a protected person cannot be deported on

the basis of national security concerns. If a protected person has committed serious international / war crimes, the Minister has discretion to decide their immigration status and whether to grant them a visa and under what conditions.⁶⁷

9.4 United Kingdom

145. Similar to the Minister's power to make a residence determination under s 197AB of the Migration Act, the UK 'immigration bail' scheme is designed to facilitate the release of persons in immigration detention awaiting the outcome of an application or their removal from the UK.
146. Any person who has been in detention for more than 4 months is automatically referred for an immigration bail assessment.⁶⁸ There is a presumption in favour of granting immigration bail.⁶⁹
147. Immigration bail may be granted by either the Secretary of State as determined by the Home Office without a hearing⁷⁰ or by an independent judge in the First Tier Tribunal after a hearing.⁷¹
148. In deciding whether to grant immigration bail and in deciding the condition or conditions to impose on such bail, the decision-maker is to have regard to the following:
 - the likelihood of the person failing to comply with a bail condition
 - whether the person has been convicted of an offence
 - the likelihood of a person committing an offence while on immigration bail
 - the likelihood of the person's presence in the United Kingdom, while on immigration bail, causing a danger to public health or being a threat to the maintenance of public order
 - whether the person's detention is necessary in that person's interests or for the protection of any other person.⁷²
149. Once a decision on immigration bail is made, the immigration officer or Tribunal must provide the person with a notice of decision setting out any relevant bail conditions.⁷³ Schedule 10 Item 2 provides a number of conditions that may be imposed on immigration bail if granted, including requirements to reappear, work or study restrictions, address restrictions, wearing an electronic monitoring tag, curfews, inclusion and exclusion zones.⁷⁴
150. For an immigration detainee who has had their visa cancelled as a result of a conviction for certain criminal offences - including homicide,

sexual offences, or violent crime – the UK Home Office’s guidance provides that immigration bail must include a condition imposing a curfew as well as electronic monitoring.

151. An individual may apply for immigration bail to the Tribunal every 28 days.⁷⁵
152. Under UK case law, detention may only be continued if there is a real prospect of removal within a reasonable timeframe. The ‘Hardial Singh’ principles from *R v Governor of Durham Prison ex p. Hardial Singh* [1984] 1 WLR 704 set out that a person may only be detained if there is a clear intention to deport them and only for a period that is reasonable and necessary in all of the circumstances of the case. If it becomes apparent that removal cannot be effected within a reasonable period, the person should either not be detained or be released from detention on immigration bail.

9.5 United States

153. US laws contain a number of safeguards against indefinite detention in removal cases, including a time limit on detention.
154. If a person is ordered to be removed, they must be removed within 90 days. During this period they cannot be released.⁷⁶
155. After 90 days, if the person does not depart or is not removed, the person is released and subject to supervision under regulations prescribed by the Attorney-General. The regulations include, among others, requirements that the person appears periodically before an immigration officer and obey written restrictions on conduct and activities.⁷⁷
156. There are certain exceptions to the 90-day time limit on detention and these include:
 - if the person fails or refuses to make timely application in good faith for travel or other documents necessary to departure or conspires or acts to prevent removal
 - due to health-related grounds (e.g. a communicable disease); criminal and related grounds such as drug trafficking, money laundering; participation in genocide or war crimes, security grounds, terrorist activities
 - if the person has been determined by the Attorney-General to be a risk to the community or unlikely to comply with the order of removal.

157. In *Zadvydas v Davis* 533 US 678 (2001), the US Supreme Court found that the law does not permit indefinite detention following the initial removal period as this would be unconstitutional (a violation of the due process clause), and ‘limits an aliens detention to a period reasonably necessary to bring about that removal’.⁷⁸ The Court found that post-removal detention would be presumptively reasonable for the first 6 months, and once that period ends, aliens seeking release must show that there is ‘good reason to believe that there is no significant likelihood of removal in the foreseeable future’.⁷⁹
158. A removal may be stayed if the Attorney-General decides their immediate removal is not practicable or proper. If a removal is stayed, the person may be released during this stay with the payment of a bond, condition that the person will appear as required and for removal, and any other conditions the Attorney-General sees fit.
159. A person may not be removed to a country where their life or freedom would be threatened on the grounds as set out in the Refugee Convention.⁸⁰ There are exceptions to this rule including where:
- the person ordered, incited, assisted or participated in the persecution of another individual
 - the person has been convicted of a particularly serious crime (at least 5 years imprisonment)
 - the person committed a serious non-political crime prior to arriving in the United States
 - the person is reasonably considered to be a danger to the security of the United States.⁸¹

9.6 Observations on other jurisdictions

160. Canada, Germany, New Zealand, UK and the US adopt a range of measures to safeguard against prolonged, indefinite and arbitrary detention, particularly in protracted removal situations. All countries contemplate the release of detainees where there are no realistic prospects of removal. In Canada and the UK, there is a presumption that individuals will be released from detention. These countries enable release with conditions to manage any risks to the community, with some exceptions such as where the person poses a significant threat to the community or national security.
161. These measures demonstrate how ongoing closed detention is not the only option where there are obstacles to a person’s removal. To

mitigate against the risk of prolonged, indefinite and arbitrary detention, these authorities use conditions analogous to those attached to parole or other conditional release schemes for the purpose of releasing detainees into the community pending their removal. The various measures demonstrate decision-making processes and conditions attached to release from detention that balance both protecting the community and safeguarding against arbitrary detention.

9.7 Recommendations with respect to safeguards against arbitrary detention

Recommendation 9

The Commission recommends that a review of the Migration Act be conducted to enshrine the following principles and processes:

- a) there should be a presumption against detention for those who have had positive protection findings made within the meanings prescribed by s 197C
- b) alternatives to detention, such as residence determination or bridging visas, must be considered prior to consideration of held detention
- c) for any person who is considered by the Minister to warrant being held in immigration detention, an application should be required to be made to a competent authority who is tasked with balancing the risk to the community against the impact on the individual to be detained
- d) decisions to detain, or to continue to detain, must be subject to appeal, merits and/or judicial review
- e) any person held in immigration detention must have their detention reviewed at regular intervals by an independent reviewer.

¹ UN Human Rights Committee, *General Comment No 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014).

- ² Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, p 9.
- ³ *Commonwealth of Australia v AJL20* (2021) 273 CLR 43. The majority at [73] concluded that the only order which could arise from the failure to remove AJL20 from Australia as soon as reasonably practicable were orders requiring them to perform their duty.
- ⁴ Australian Human Rights Commission, 2021-22 Complaint Statistics, <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2021-2022>, p 12.
- ⁵ Australian Human Rights Commission, 2021-22 Complaint Statistics, <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2021-2022>, 31.
- ⁶ Department of Home Affairs, *Policy Advice Manual 3: International Treaties Obligations Assessments*, reissued 18 August 2017, available on LEGENDcom, accessed 14 June 2023.
- ⁷ UNHCR, *The Cessation Clauses: Guidelines on their Application*, April 1999, available at <https://www.refworld.org/pdfid/3c06138c4.pdf>, [2].
- ⁸ UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03, available at <https://www.unhcr.org/media/guidelines-international-protection-no-3-cessation-refugee-status-under-article-1c5-and-6>, p 3.
- ⁹ *Ibid*, p 4.
- ¹⁰ *Ibid*, p 6.
- ¹¹ Supplementary Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, p 3.
- ¹² See for example *Minister for Immigration and Border Protection v EFX17* [2021] HCA 9; *EPL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 173.
- ¹³ *Al-Kateb v Godwin* (2004) 219 CLR 562; *The Commonwealth v AJL20* (2021) 273 CLR 43.
- ¹⁴ Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 30 May 2023, available at <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-april-2023.pdf>, p 4.
- ¹⁵ UN Human Rights Committee, *General Comment No 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014). See also UN Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) (*A v Australia*); UN Human Rights Committee, *Views: Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002) (*C v Australia*); UN Human Rights Committee, *Communication No 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (2003) (*Baban v Australia*).
- ¹⁶ *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee in *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (1990) (*Van Alphen v The Netherlands*); *A v Australia*, UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, *Views: Communication No. 631/1995*, 67th sess, UN Doc CCPR/C/67/D/631/1995 (1999) (*Spakmo v Norway*).
- ¹⁷ UN Human Rights Committee, *General Comment No 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; UN Human Rights Committee, *General Comment No 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, UN Doc CCPR/C/76/D/900/1999.

- ¹⁸ UN Human Rights Committee, *General Comment No 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014).
- ¹⁹ UN Human Rights Council Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, UN Doc A/HRC/7/4 (7 February 2018) <https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf>.
- ²⁰ UN Human Rights Committee, *General Comment No 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- ²¹ See for example UN Human Rights Council Working Group on Arbitrary Detention, *Opinion No. 42/2022 concerning Amani Bol Santino Visona (Australia)*, A/HRC/WGAD/2022/42 at [78]; *Opinion No. 69/2021 concerning Navanitharasa Sivaguru (Australia)*, A/HRC/WGAD/2021/69 at [88]; *Opinion No. 71/2020 concerning Mohammad Qais Niazy (Australia)*, A/HRC/WGAD/2020/71 at [62]; *Opinion No. 35/2020 concerning Jamal Talib Abdulhussein (Australia)*, A/HRC/WGAD/2020/35 at [55].
- ²² See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019, No. 74/2019, No. 35/2020, No. 70/2020, No. 71/2020, No. 72/2020, No. 17/2021, No. 68/2021, No. 69/2021, No. 28/2022, No. 32/2022, No. 42/2022 and No. 14/2023.
- ²³ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human rights scrutiny report*, Report 5 of 2021 (2021), p 21-22.
- ²⁴ UN Human Rights Committee, *C v Australia*, Communication No 900 of 1999, UN Doc. CCPR/C/76/D/900/1999; *F.K.A.G. et al v Australia*, Communication No 2094 of 2011, UN Doc CCPR/C/108/D/2094/2011; *M.M.M. et al v Australia*, Communication No 2136 of 2012, UN Doc CCPR/C/108/D/2136/2012. See also Australian Human Rights Commission, *CR and CS v Commonwealth of Australia (DIBP)* [2017] AusHRC 116.
- ²⁵ *Ibid*, p 25.
- ²⁶ Standing Committee for the Scrutiny of Bills, The Senate, *Scrutiny Digest 8 of 2021*, 16 June 2021, pp 82-89.
- ²⁷ See for example *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, pp 8-10.
- ²⁸ Department of Immigration and Citizenship, 'Ministerial guidelines – Residence determination powers', 1 September 2009, available on LEGENDcom.
- ²⁹ Department of Immigration and Citizenship, 'Ministerial detention intervention power', 24 March 2012, available on LEGENDcom.
- ³⁰ *Ibid*.
- ³¹ *Ibid*.
- ³² Department of Home Affairs, 'Ministerial guidelines – Residence determination powers', 1 September 2009, available on LEGENDcom.
- ³³ Department of Home Affairs, 'Detention Status Resolution Review' MS22-002407, 31 October 2022, released through FOI, including 'Long term detention overview', MS22-001225, 25 July 2022 and 'Alternatives to Held Detention Program', MS22-001397, 22 August 2022, p 4[9].
- ³⁴ The Guardian, *Home affairs asked Labor to extend support for asylum seekers as housing market worsens*, 11 June 2023, available at <https://www.theguardian.com/australia-news/2023/jun/11/home-affairs-asked-labor-to-extend-support-for-asylum-seekers-as-housing-market-worsens>, accessed 13 June 2023.
- ³⁵ Section 499 of the Migration Act.

- ³⁶ The *Immigration and Refugee Protection Act* SC 2001 and the *Immigration and Refugee Protection Regulations* SOR 2002.
- ³⁷ *Sahin v Canada (Minister of Citizenship and Immigration)* [1995] 1 FC 214.
- ³⁸ *Immigration and Refugee Protection Act* SC 2001, s 57. For more information, see Government of Canada, 'ENF 3 Admissibility Hearings and Detention Reviews', (Policy Manual, March 2022) <[https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf-3-admissibility-\(en\)-final.pdf](https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf-3-admissibility-(en)-final.pdf)>.
- ³⁹ *Immigration and Refugee Protection Act* SC 2001, s 58 and *Immigration and Refugee Protection Regulations* SOR 2002, Part 14. See also Government of Canada, 'ENF20 (Detention)' (Policy Manual, March 2022) 14 – 28, <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf20a-en.pdf>>.
- ⁴⁰ For more information, see Government of Canada, 'ENF20 (Detention)' (Policy Manual, March 2022), 27 [6.14].
- ⁴¹ Government of Canada, 'ENF 3 Admissibility Hearings and Detention Reviews', (Policy Manual, March 2022) 61.
- ⁴² *Immigration and Refugee Protection Act* SC 2001s 58(1).
- ⁴³ Government of Canada, 'ENF 34 Alternatives to Detention', (Policy Manual, June 2018) 6-16, 2 <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf34-eng.pdf>>
- ⁴⁴ *Immigration and Refugee Protection Act* SC 2001 s 50 and *Immigration and Refugee Protection Regulations* SOR 2002, Division 3.
- ⁴⁵ Canada Border Services Agency, 'Removal from Canada', (Webpage, February 2022) <<https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html>>. Also 'Overview of the Removals Program' (Webpage, March 2021) <<https://www.cbsa-asfc.gc.ca/pd-dp/bbp-rpp/pacp/2020-11-24/orp-vpr-eng.html#s8>>.
- ⁴⁶ Canada Border Services Agency, 'Removal from Canada', (Webpage, 5 June 2023) <<https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html>>.
- ⁴⁷ *Immigration and Refugee Protection Regulations* SOR 2002, r 230.
- ⁴⁸ *Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals* [2008] OJ L 348/98, Art 14 and 15.
- ⁴⁹ *Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory* (Germany), Residence Act, 2008 s 62 (1).
- ⁵⁰ Residence Act, s 62(4).
- ⁵¹ Residence Act, s 62(2).
- ⁵² Residence Act, s 62(3).
- ⁵³ The General Administrative Regulation to the Residence Act provides examples of such behaviour, including failing to assist in providing or obtaining travel documents, breaching the requirement to surrender a passport, and refusing to contact the diplomatic mission of their country of origin. See Global Detention Project, 'Immigration Detention in Germany' (Report, August 2020) 21.
- ⁵⁴ The General Administrative Regulation relating to the Residence Act, s 46. See Paula Hoffmeyer-Zlotnik, 'Grounds for detention: Germany', *European Council on Refugees and Exiles Asylum Information Database* (Webpage, 8 April 2022) <<https://asylumineurope.org/reports/country/germany/detention-asylum-seekers/legal-framework-detention/grounds-detention/>>.
- ⁵⁵ *Immigration Act 2009* (NZ) s 316.

- ⁵⁶ *Immigration Act 2009* (NZ) ss 317(2)–(4) and 318.
- ⁵⁷ *Tesimale v Manukau District Court* [2021] NZHC 2599 [54]–[66].
- ⁵⁸ *Tesimale v Manukau District Court* [2021] NZHC 2599 [65].
- ⁵⁹ *Immigration Act 2009* (NZ) ss 317(1)(b)(iii) and 320.
- ⁶⁰ Under s 323(10) of the *Immigration Act 2009* (NZ), exceptional circumstances do not include the period of time a person has already been detained or the possibility that a person’s deportation or departure may continue to be prevented by some action or inaction of the person.
- ⁶¹ *Immigration Act 2009* (NZ) s 323(3).
- ⁶² *Immigration Act 2009* (NZ) s 315(2).
- ⁶³ *Immigration Act 2009* (NZ) s 315(5)–(6).
- ⁶⁴ *Immigration Act 2009* (NZ), s 321.
- ⁶⁵ *Immigration Act 2009* (NZ) s 172.
- ⁶⁶ *Immigration Act 2009* (NZ) s 309(2). See also New Zealand Immigration, Immigration Instructions, C7.5 and C5.20, available: <https://www.immigration.govt.nz/about-us/policy-and-law/how-the-immigration-system-operates/immigration-instructions>
- ⁶⁷ *Immigration Act 2009* (NZ) s 137(2).
- ⁶⁸ *Immigration Act 2016* (UK) s 61 and Schedule 10 item 1 (1)–(3) and 11(1)(b).
- ⁶⁹ UK Home Office, ‘Detention: General instructions’, (Manual, 14 January 2022) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046288/Detention_General_instructions.pdf>
- ⁷⁰ UK Home Office, ‘Immigration detention bail’ (Webpage) <<https://www.gov.uk/bail-immigration-detainees/apply-for-bail>>.
- ⁷¹ UK Home Office, ‘Immigration detention bail’ (Webpage) <<https://www.gov.uk/bail-immigration-detainees/apply-for-bail>>.
- ⁷² *Immigration Act 2016* (UK) Schedule 10 Item 3(2). There is an explanation of these in the First Tier Tribunal ‘Guidance on Immigration Bail for Judges of the First Tier Tribunal’ (Guidance document, 15 January 2018) 31–51 <<https://www.judiciary.uk/wp-content/uploads/2018/05/bail-guidance-2018-final.pdf>>.
- ⁷³ *Immigration Act 2016* (UK) Schedule 10 Item 3 (4).
- ⁷⁴ *Immigration Act 2016* (UK) Schedule 10. See also: UK Home Office, ‘Immigration bail’, (Manual, 31 January 2022) 11 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051204/immigration_bail.pdf>.
- ⁷⁵ UK Home Office, ‘Immigration bail’, (Manual, 31 January 2022), 41.
- ⁷⁶ *Immigration and Nationality Act* SCA 8 USC §1231. Available here: <<https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-s1231&num=0&edition=prelim>>
- ⁷⁷ *Immigration and Nationality Act* SCA 8 USC §1231(a)(3).
- ⁷⁸ *Zadvydas v Davis* 533 US 678, [2].
- ⁷⁹ *Zadvydas v Davis* 533 US 678, [3].
- ⁸⁰ *Immigration and Nationality Act* SCA 8 USC §1231(b)(3)(A).
- ⁸¹ *Immigration and Nationality Act* SCA 8 USC §1231(b)(3)(B).