



Law Council
OF AUSTRALIA

Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021

Senate Community Affairs Legislation Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its Federal Litigation and Dispute Resolution Section's Migration Law Committee, and the National Human Rights Committee in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide a submission to the Senate Community Affairs Legislation Committee (**Committee**) regarding its inquiry into the Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021 (**Bill**).
2. The Bill will increase the period – the newly arrived resident’s waiting period (**NARWP**) – that newly arrived migrants must wait after entering Australia before they can be paid the following social security payments (**payments affected by this Bill**):
 - Family Tax Benefits A and B, under the *A New Tax System (Family Assistance) Act 1999* (Cth) (**Family Assistance Tax Act**);
 - Parental Leave Pay and Dad and Partner Pay, under the *Paid Parental Leave Act 2010* (Cth) (**Paid Parental Leave Act**); and
 - Carer Allowance and Carer Payment under the *Social Security Act 1991* (Cth) (**Social Security Act**) (**the social security payment Acts**).
3. The Bill will introduce a four-year NARWP for Family Tax Benefit B (which is currently not subject to a NARWP) and increase the NARWP for the other payments affected by this Bill from between one and two years to four years – the period of the NARWP which applies to other social security payments such as Jobseeker, Youth Allowance, and Parenting Payment.
4. The Law Council is aware that the measures proposed by the Bill raise matters of policy, which are ultimately for Parliament to determine. However, to assist with Parliament’s consideration of these measures, the Law Council has drawn attention to the way the measures in the Bill engage Australia’s international human rights obligations.
5. The payments affected by this Bill are made to families, mothers of newborns, and to carers of disabled persons and persons with severe medical conditions, including children – persons whose rights are afforded special protection under the International Covenant on Economic, Social and Cultural Rights (**ICESCR**),¹ Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**),² the Convention on the Rights of the Child (**CROC**),³ and the Convention on the Rights of Persons with Disabilities (**CRPD**).⁴
6. In recognition of the particular needs of recipients of these family and carer related payments, the NARWP for these payments was deliberately kept lower than the NARWP which applies to some other social security payments⁵ when the *Social Services and Other Legislation Amendment (Promoting Sustainable Welfare) Act*

¹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature on 16 December 1966 (entered into force 3 January 1976; entry into force for Australia 10 March 1976).

² *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature on 18 December 1979, (entry into force 3 September 1981; entry into force for Australia 27 August 1983).

³ *Convention on the Rights of the Child*, opened for signature on 20 November 1989, (entry into force 2 September 1990; entry into force for Australia 16 January 1991).

⁴ *Convention on the Rights of Persons with Disabilities and its Optional Protocol*, opened for signature on 30 March 2007, (entered into force on 3 May 2008; entry into force for Australia 16 August 2008).

⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2018, (Linda Reynolds, Assistant Minister for Home Affairs), 8913.

2018 (Cth) (**2018 Amendment Act**) was passed to amend the social security payment Acts to increase the NARWP for a number of social security payments.

7. The increase to the NARWP in relation to the family and carer related payments affected by this Bill limits the right to social security and the right to maternity leave under the ICESCR and the CEDAW.
8. The limitation on these rights is justified by the rationale that to maintain the financial viability of the social security scheme, it is reasonable to expect newly arrived migrants to be self-sufficient for a period after arrival. The Law Council considers this justification requires further scrutiny.
9. As the Bill would impose further limits on the right to social security, Australia would be expected to prove the measures were introduced after the most careful consideration of alternative options to achieve the same objectives and that they are justified in light of the full totality of ICESCR rights. It is not clear that consideration has been made.
10. In terms of the safeguards that apply, none of the family and carer related payments affected by this Bill are directly subject to an exemption from the NARWP (which applies to some other social security payments) if a person's circumstances change to their detriment after arriving in Australia.
11. Most family and carer related payments affected by this Bill are exempt from the NARWP if a person's circumstances have changed *and* they are receiving a separate payment. This essentially requires a person to continue to qualify for a different social security payment (one of which (Special Benefit) may be a time limited payment which is only payable to a person suffering significant financial hardship) receive a social security payment affected by this Bill.
12. The Carer Payment – which is paid to a person unable to work because of their domestic caring responsibilities – is not subject to any such exemption. That is, even if a person is recognised as suffering significant financial hardship, is receiving Special Benefit, and their circumstances have changed (eg they have suddenly acquired significant caring responsibilities for a very ill family member), under this Bill they will be unable to receive Carer Payment until they have been a permanent resident for four years. The justification for the lack of a change of circumstances-type exemption for this payment is unclear.
13. The right to paid parental leave is essentially a measure to address discrimination against women on the basis of maternity. The Government's economic justification for the extending the NARWP for this payment does not address this fundamental purpose.
14. To address these issues, the Law Council recommends consideration be given to amendments which:
 - provide exemptions from the NARWP appropriate to each of the family and carer related payments affected by this Bill, if a person's circumstances change to their significant detriment and it is no longer reasonable to expect them to be self-sufficient; and
 - remove the NARWP from paid parental leave or at least not extend it by the Bill.
15. The Law Council further remarks that Australia's future economic prosperity is recognised as depending in part on its migration policies. It is important to get the

relevant policy settings right to ensure that Australia continues to attract skilled migrants and their families in a competitive global economy.

16. For example, currently a person on a temporary skilled visa in a regional area will not have their NARWP begin to be reduced until they are granted a permanent skilled visa, which could effectively mean that they do not qualify for the family and carer related payments affected by this Bill until over seven and a half years after arrival in Australia. The Law Council recommends this be reviewed.
17. More generally, the Law Council recommends consideration be given to reviewing the adequacy of existing measures to support temporary migrants experiencing financial hardship. It notes that this group generally cannot receive most social security payments: the basic safety net provided by the Special Benefit may be time-limited and that the COVID-19 pandemic has affected the ability of many temporary migrants to be self-sufficient.

Functions of the Law Council engaged by this Bill

18. This Bill engages a number of Australia's international human rights obligations enshrined in treaties to which Australia is a party.
19. Every treaty to which Australia is party is binding upon it and must be performed by it in good faith. Australia is bound to comply with treaty provisions and to implement them domestically.⁶
20. The Law Council's functions include to promote and defend the rule of law in the public interest,⁷ and it is a key principle of the rule of law that states must comply with their international legal obligations.⁸
21. In performing this function, the Law Council is committed to promote the recognition, application and justiciability of international human rights standards in the Australian legal system,⁹ to support the scrutiny of legislation for compliance with Australia's international human rights obligations,¹⁰ and to challenge legislation, policies and practices that contravene Australia's international human rights obligations.¹¹

Current social security payments payable to migrants

Residence requirements for social security payments

22. Social security payments payable under the social security payment Acts are subject to residence rules which limit their availability to newly arrived migrants.
23. In all cases, social security payments are payable to an Australian resident¹² – that is, a person who resides in Australia and is either an Australian citizen, permanent visa

⁶ Law Council of Australia, *Policy statement on Human Rights and the Legal profession: Key principles and commitments*, May 2017, [10].

⁷ Constitution of Law Council of Australia Limited, [2.1(a)].⁸ Law Council of Australia, *Policy statement – Rule of Law Principles*, March 2011, principle 8.

⁸ Law Council of Australia, *Policy statement – Rule of Law Principles*, March 2011, principle 8.

⁹ Law Council of Australia, (n 6), commitment 1.¹⁰ Ibid, commitment 5.¹¹ Ibid, commitment 12.

¹⁰ Ibid, commitment 5.¹¹ Ibid, commitment 12.

¹¹ Ibid, commitment 12.

¹² Subsection 7(2) of the Social Security Act; subsection 3(1) of the Family Assistance Tax Act; and section 6 of the Paid Parental Leave Act.

holder, or protected Special Category Visa holder (a New Zealand citizen satisfying certain requirements, who arrived in Australia before 26 February 2001).¹³

24. However, some social security payments are payable to a limited number of other temporary visa holders – particularly temporary partner and protection visa holders and New Zealand citizens who arrived after 26 February 2001.
25. A full description of the residence requirements for the payments discussed in this submission is set out in the table at Attachment A.
26. The holders of any other temporary visas (for example, skilled and student visas) are unable to receive any social security payments payable under these Acts.

What is the NARWP?

Overview

27. Currently, most social security payments payable under the social security payment Acts are subject to a NARWP.
28. Subject to some exemptions, the NARWP currently operates to require migrants to be both in Australia *and* to hold a visa which would qualify them for a social security payment for between one and four years before they can receive the social security payment.
29. The length of the NARWP under the current law differs depending on the social security payment.
30. A full description of the NARWPs which apply to the payments discussed in this submission is set out in the table at Attachment A

Exemptions

31. Currently, a person may be exempt from the NARWP altogether either because of the kind of visa they hold, because of a change in their circumstances, or because they are receiving another social security payment.

Exemptions based on visa category

32. Generally, the kind of visas which, if held, are exempt from the NARWP for certain payments have been granted on the basis that:
 - the person has been found to engage protection obligations, been subject to persecution, or been subject to other classes of harm such as human trafficking or substantial discrimination amounting to a human rights violation (**protection-related visa**);¹⁴ or

¹³ Social Security Act, s 7(2A)-(2D). See also Australian Government, Services Australia, *Residence Descriptions* (website, 1 July 2021) <<https://www.servicesaustralia.gov.au/individuals/topics/residence-descriptions/30391>>. A protected SCV holder is distinguished from a non-protected SCV holder, which essentially means a New Zealand citizen satisfying certain requirements who arrived in Australia after 26 February 2001. See also *Migration Act 1958* (Cth), s 32.

¹⁴ These are detailed in the table in Attachment A. For example, several payments, allowances and benefits provide an exemption from the NARWP for persons who are a refugee, former refugee or family member of a refugee, within the meaning of section 7 of the Social Security Act: see, eg, Social Security Act s 7(6B) (definition of 'refugee'), s 7(1) (definition of 'former refugee'. As another example, subsection 739A(6) of the

- the person has family in Australia (**family related visa**).¹⁵
33. Holders of all permanent protection visas are exempt from NARWPs.¹⁶ The Minister explained this latter exemption in the Second Reading Speech for the Bill as follows:¹⁷

This exemption acknowledges that refugees settling here under the Humanitarian Program are particularly vulnerable. They generally have no other means of support and are not usually in a position to make plans for their own support prior to applying for, and being granted, a humanitarian visa.

Maintaining access to welfare payments will help to promote the successful long-term settlement of these humanitarian entrants and their families.

Exemptions based on a change of circumstances

34. Persons otherwise subject to the NARWP may be exempt from its application in relation to some social security payments as a result of a change in circumstances since they entered Australia. There are two types of these exemptions.
35. Firstly, a person will be exempt from the NARWP which otherwise applies to Jobseeker¹⁸ and Parenting Payment¹⁹ if the person:
- is the principal carer of one or more children; and
 - is not a member of a couple; and
 - was not a lone parent at the start of the person's current period as an Australian resident (**lone parent exemption**).

Social Security Act provides for holders of certain classes of visas to be exempt from the NARWP for the Special Benefit. The *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2015 (No. 2)* (Cth) sets out these classes, which include a number of temporary protection visas.

¹⁵ These are detailed in the table in Attachment A. See, eg, permanent visa subclass 116 (Carer) and subclass 836 (Carer), which may be granted to person who moves to Australia to provide care for a relative, or a member of their family who lives with them, who has no reasonable access to care in Australia: Department of Home Affairs, *Subclass 116 Carer Visa* (website, undated) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/carers-116>>; Department of Home Affairs, *Subclass 836 Carer Visa* (website, undated) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/carers-836>>. As another example, paragraph 31A(1)(b) of the Paid Parental Leave Act exempts from the NARWP for Paid Parental Leave a person who becomes the holder of a subclass 117 (Orphan Relative), subclass 837 (Orphan Relative), subclass 115 (Remaining Relative) or subclass 835 (Remaining Relative) visa. The former two subclasses allow a child whose parents are dead, unable to care for them, or cannot be found, to come to or stay in Australia to live with a relative who is an Australian citizen, Eligible New Zealand Citizen, or Australian permanent resident: Department of Home Affairs, *Orphan Relative Visa* (website, undated) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/orphan-relative-117>>; Department of Home Affairs, *Orphan Relative Visa* (website, undated) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/orphan-relative-837>>. The latter two subclasses allow a person to move to or stay in Australia to be with their only close family members who an Australian citizen, Eligible New Zealand Citizen, or Australian permanent resident: Department of Home Affairs, *Remaining Relative Visa* (website, undated) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/remaining-relative-115>>; Department of Home Affairs, *Remaining Relative Visa* (website, undated) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/remaining-relative-835>>.

¹⁶ See n 13.

¹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2021, 8 (Alan Tudge, Minister for Education and Youth).

¹⁸ Subsection 623A(7) of the Social Security Act.

¹⁹ Ibid, subsection 500X(3).

36. A similar exemption applies to Youth Allowance, albeit with an additional requirement that the person not be undertaking full-time study and not be a new apprentice.²⁰
37. Secondly, a person will be exempt from the NARWP which otherwise applies to Special Benefit (as discussed below, a safety net payment paid to a person in significant financial hardship) if the person, in the Secretary's opinion, has suffered a substantial change in circumstances beyond the person's control after the person first entered Australia (**uncontrollable change in circumstances exemption**).²¹
38. The Minister explained these two exemptions in the Second Reading Speech for the Bill as follows:²²

Most other permanent skilled or family migrants—those who have come to Australia to work or be with family—are well placed to be self-reliant during their four-year waiting period. However, the government understands that some migrants may experience a change of circumstances, which means they are no longer able to support themselves as they had originally planned. For this reason, there are key exemptions for migrants in this situation.

...
Together, these exemptions will continue to provide a comprehensive safety net for migrants who are particularly vulnerable as well as those who are placed in hardship because of circumstances beyond their control.

Exemptions based on receipt or payability of another payment

39. Finally, there are several payments for which a person is exempt from the NARWP if they are receiving or may receive another social security payment.
40. A full description of the exemptions to the NARWPs which apply to the payments discussed in this submission is set out in the table at Attachment A

Proposed amendments

Overview

41. The Bill will increase the NARWP for each of the family and carer related payments affected by this Bill from between zero and two years to four years, the period which applies to other social security payments such as Jobseeker, Youth Allowance, and Parenting Payment.
42. A full description of the amendments to the NARWPs which apply to the payments discussed in this submission is set out in the table at Attachment A
43. The Bill will not amend any of the exemptions which apply to these payments or others whose NARWP is not adjusted by the Bill
44. This is the second Bill introduced to Parliament in the last three years which seeks to raise the NARWP for social security payments.
45. In 2018, the Australian Government introduced the Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018 (Cth) (**2018 Amendment Bill**), which sought to raise the NARWP for a number of social

²⁰ Ibid, subsection 549D(6).

²¹ Ibid, subsection 739A(7).

²² Commonwealth (n 17), 8 (Alan Tudge, Minister for Education and Youth).

security payments from between zero and two years to three years (although it was later budgeted to be increased to four years).²³

46. Ultimately, following negotiation in Parliament, the 2018 Amendment Act increased the NARWP for some payments to four years (including Jobseeker, Youth Allowance and Special Benefit), and left the family and carer related payments affected by this Bill subject to a NARWP of between one and two years or with no NARWP at all.

Introduction to the payments affected by this Bill

47. Each of the payments subject to this Bill is directed to assist families with children or persons caring for children or severely disabled adults.
48. Carer Payment is payable to a person who is a carer of: a child who is severely disabled or has a severe medical condition; more than one person with a disability or medical condition (including an adult); or a child with a terminal condition, among other circumstances.²⁴ It is subject to a low income test²⁵ and assets test.²⁶ It is a payment which is intended to cover general living expenses of the carer and the person for whom care is being provided in lieu of employment.
49. Carer allowance is subject to a high income test²⁷ and no assets test.²⁸ It is a payment intended to supplement to care-related costs.
50. Family Tax Benefit A is generally paid to a one adult in a household who has a child under 16 or between 16 and 19 and attending secondary school.²⁹ The payment is paid on a scale calculated with reference to the income of the individual or couple.³⁰
51. Family Tax Benefit B is also paid if the caregivers are on lower incomes³¹ and:
- for couples – their youngest child is younger than 13;
 - for a single parent or grandparent carer – the person has a child under 16 or between 16 and 19 and attending secondary school.³²
52. Family Tax Benefits are means-tested payments directed to fund child rearing costs.
53. Finally, Parental Leave Payment and Dad and Partner Payments are payable to the primary carer or partner of a newborn, for a maximum of 18 weeks³³ and two weeks respectively, subject to a relatively high income test,³⁴ will not be working during the period, and worked for at least ten of the last 13 months for one day a week. These are payments which are intended to cover general living expenses of the parent and the newborn in lieu of employment

²³ Commonwealth, *Budget 2018-19 – Budget Measures Budget Paper No. 2 2018-19*, 172, <<https://archive.budget.gov.au/2018-19/bp2/bp2.pdf>>.

²⁴ Subdivision A of Division 1 of Part 2.5 of the Social Security Act.

²⁵ Adjusted taxable income of \$66,403 per annum – section 198A of the Social Security Act..

²⁶ Section 198D of the Social Security Act.

²⁷ Adjusted taxable income of \$250,000 per annum – see subsection 957A of the Social Security Act.

²⁸ Subdivision A of Division 2 of Part 2.19 of the Social Security Act.

²⁹ Subparagraph 21(1)(a)(i) of the Family Assistance Tax Act.

³⁰ *Ibid*, Part 1 of Schedule 1.

³¹ Adjusted taxable income of \$100,000 per annum – see section 28B of the Family Assistance Act.

³² Section 28D of the Family Assistance Tax Act.

³³ Subsections 11(5) and 31AB(2) of the Paid Parental Leave Act (Paid Parental Leave) and subsection 115AE(5) (Dad and Partner Pay).

³⁴ \$150,000 per annum – see section 41 of the Paid Parental Leave Act.

54. Neither the lone parent exemption nor the uncontrollable change of circumstances exemption applies to any of the social security payments affected by this Bill. However, the Carer Allowance,³⁵ Family Tax Benefits³⁶ and the Parental Leave Payments³⁷ are exempt from the NARWP if the person is receiving another payment. Carer Payment is not subject to an exemption of this kind.

Application of international human rights principles

55. As stated in the Statement of Compatibility with Human Rights in Schedule 1 to the Bill, the Bill engages several of Australia's international obligations.³⁸
56. For the purpose of this submission, the Law Council has addressed two such rights: the right to social security and the right to maternity leave.

Right to social security

Content of the right

57. Article 9 of the ICESCR, provides:

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

58. Article 10 of the ICESCR relevantly provides:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. ...

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. ...

59. The right to social security is a means to satisfy other rights protected by ICESCR. Specifically, parties are obliged to provide access to a social security scheme to enable people to acquire 'at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education'.³⁹
60. Article 2(1) of the ICESCR requires State Parties to undertake steps, to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized in ICESCR, including the above rights by all appropriate means.
61. The United Nations Committee on Economic, Social and Cultural Rights (**CESCR**) has commented that there is a strong presumption that retrogressive measures taken

³⁵ Subsection 966(4) of the Social Security Act.

³⁶ Subsection 61AA(7) of the Family Assistance Tax Act.

³⁷ Subsection 31A(5) of the Paid Parental Leave Act.

³⁸ Explanatory Memorandum, Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021, 13-14.

³⁹ United Nations Economic, Social and Cultural Rights Committee, *General Comment No. 19 – The right to social security (art. 9)*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008), [16].

in relation to the right of social security are prohibited.⁴⁰ Retrogressive measures are those which allow the existing protection of economic, social and cultural rights to deteriorate. If deliberately retrogressive measures are taken, a State would have to demonstrate that it adopted the measure only after carefully considering all the options, assessing the impact and that they are duly justified by reference to the totality of the rights provided for in the ICESCR, in the context of the full use its maximum available resources.⁴¹

62. Relevantly to the social security payments affected by this Bill, the CESCR makes specific comment about state party obligations in relation to the right in Article 9 in relation to people with disabilities, non-discrimination, women and migrants.

63. Specifically:

- in relation to people with disabilities, adequate income support should be provided to persons with disabilities and the support provided should cover family members and other informal carers;⁴²
- in relation to non-discrimination, all persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalised groups without discrimination whether in law or fact;⁴³
- in relation to women, article 9 requires, among other things, guaranteeing adequate maternity leave for women,⁴⁴ and account must be taken 'of the fact that women are more likely to live in poverty than men and often have sole responsibility for the care of children';⁴⁵
- in relation to migrants, 'non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support' and 'any restrictions, including a qualification period, must be proportionate and reasonable'.⁴⁶

64. Relatedly, article 26 of the CROC provides:

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

65. Further, article 23 of the CROC relevantly provides that:

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child

⁴⁰ Ibid, [42].

⁴¹ Ibid.

⁴² Ibid, [20].

⁴³ Ibid, [23], [29]-[30].

⁴⁴ Ibid, [32].

⁴⁵ Ibid.

⁴⁶ Ibid, [37].

and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

Analysis

Approach to analysis

66. As noted above, the international human rights obligations in the ICESCR, CEDAW, CROC and CRPD are binding on Australia, which is obliged to implement them in its domestic law.
67. The Law Council endorses the approach the Parliamentary Joint Committee on Human Rights (**PJCHR**) takes to assessing whether domestic laws (like the proposed Bill) which limit human rights are compatible with these international obligations. Specifically, the PJCHR considers three key questions:
 - 1) whether and how the limitation is aimed at achieving a legitimate objective;
 - 2) whether and how there is a rational connection between the limitation and the objective;
 - 3) whether and how the limitation is proportionate to that objective.
68. The Law Council also endorses⁴⁷ the approach to assessing proportionality taken by Dickson CJ of the Supreme Court of Canada in the case of *R v Oakes*,⁴⁸ interpreting section 1 of the Canadian Charter of Rights and Freedoms 1982, which has been subsequently applied by the Victorian Court of Appeal in *R v Momcilovic*.⁴⁹
69. In *Oakes*, Dickson CJ set down a three-part proportionality test:
 - (a) The measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective.
 - (b) The means should impair the right in question as little as possible.
 - (c) There must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be
70. For the purpose of this submission, the rational connection between the measure and the objective will be discussed as an aspect of an assessment of proportionality, consistent with the test in *Oakes*.

⁴⁷ Law Council of Australia, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, (submission to the Australian Law Reform Commission; March 2015),

⁴⁸ *R v Oakes* [1986] 1 SCR 103.

⁴⁹ *R v Momcilovic* (2010) 25 VR 436 (VSCA). In the High Court, this question was discussed directly only by Crennan and Kiefel JJ: *Momcilovic v The Queen* (2011) 245 CLR 1 at [541] – [559]. In adopting an analysis based on *R v Oakes*, the Law Council makes due allowance for the observation of Gummow and Hayne JJ that Australian courts must approach the questions presented by the Victorian Charter with a clear recognition of the constitutional framework within which those questions are to be decided, and the fact that both the structure and text of those other human rights systems (such as Canada's) reflect the different constitutional frameworks within which they operate: *Momcilovic v The Queen* (2011) 245 CLR 1 at [148]–[161], [280].

Legitimate objective

71. The first question is whether the limitation on the right to social security is directed towards a legitimate objective.
72. The limitation is tied to three related objectives:
 - (a) to maintain the sustainability of the welfare payment system;⁵⁰
 - (b) to reflect the reasonable expectation that skilled and family migrants who choose to come to or remain in Australia will take steps to provide for their own financial support or become financially self-sufficient when they first become permanent residents;⁵¹
 - (c) in relation to the particular measures in this Bill – to ensure a consistent approach to access to income support and family assistance for new migrants,⁵² which will make the system simpler and easier for new migrants to understand.⁵³
73. As the measures in the Bill would impose further limits on the right to social security, they amount to a retrogressive measure for the purposes of the ICESCR. In the context of any consideration of the lawfulness of this retrogressive measure under the ICESCR, as noted, Australia would be expected to prove that these measures were introduced after the most careful consideration of alternative options (which did not limit these rights) to achieve the same objectives and that they are justified in light of the full totality of ICESCR rights.
74. It is not clear from the explanatory and supporting materials that there has been consideration of alternative measures or the impact of the measure on the full totality of rights under the ICESCR.
75. The payments affected by this Bill are payable to persons which the ICESCR require be afforded the widest possible protection and assistance through social security: the family, carers of people with disabilities, mothers before and after childbirth, and children. These rights overlap with similar rights protected by the CEDAW, CRPD and CROC.
76. In considering the justification for increasing the NARWP for the family and carer payments affected by this Bill to four years, it is instructive to review the introduction of the 2018 Amendment Bill, which initially contained the same measures.
77. The 2018 Amendment Bill originally proposed increasing the NARWP for the payments affected by this Bill, as well as other social security payments like Jobseeker and Youth Allowance, to four years.
78. In considering that Bill, the Committee heard evidence that the Bill would have a disproportionate impact on vulnerable migrants.⁵⁴

⁵⁰ Explanatory Memorandum, (n 38), 3, 12.

⁵¹ Commonwealth (n 17), 8 (Alan Tudge, Minister for Education and Youth) and Explanatory Memorandum, (n 38), 12.

⁵² Commonwealth (n 17), 7 (Alan Tudge, Minister for Education and Youth) and Explanatory Memorandum, (n 38), 13.

⁵³ Explanatory Memorandum, (n 38), 3.

⁵⁴ Senate Community Affairs Legislation Committee, Parliament of Australia, *Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018 [Provisions]* (November 2018), [2.3].

79. A number of submitters raised specific concerns with the Committee that raising the NARWP for the family and carer payments affected by the present Bill to four years who have particularly deleterious impact on these vulnerable persons. They submitted that increasing the NARWP for:
- Family Tax Benefit would particularly affect women who have experienced domestic violence and left their partner⁵⁵ or may leave low income families in hardship and participation in early childhood education and care;⁵⁶
 - Parental Leave Payments and Dad and Partner Pay, would adversely impact migrant families entering Australia on skilled visas, particularly women who already find it difficult to enter the workforce and may exacerbate income and wealth disparities which already exist between men and women;⁵⁷
 - Carer Allowance, would particularly affect women, as women provide a disproportionate amount of care to family members and are more frequently reliant on a partner's income.⁵⁸
80. Following the publication of the Committee's report, the Australian Government made amendments to its own Bill to reduce the NARWP for the family and carer payments affected by the present Bill down from the proposed four years to between zero and four years, while retaining the amendments to lift the NARWP for payments like Jobseeker and Youth Allowance to four years. The Australian Government indicated these amendments were made in response to the concerns raised by submitters to the Committee about increasing the NARWP for these payments.
81. In her Second Reading Speech to the Senate, introducing the amended Bill, Senator Linda Reynolds, Assistant Minister for Home Affairs, stated:⁵⁹

The Government has responded to concerns raised during the Senate Committee inquiry process into the original Encouraging Self-sufficiency for Newly Arrived Migrants Bill and has adjusted the length of the new waiting period for [Carer Allowance, Family Tax Benefit, Parental Leave Pay or Dad and Partner Pay].

The new waiting period will be two years for Parental Leave Pay and Dad and Partner Pay and one year for Carer Allowance and Family Tax Benefit Part A [as opposed to the initially proposed four years].

These arrangements reflect that these payments support particular needs and costs for eligible individuals and families and provide a proportionate increase for payments which are having a waiting period introduced for the first time.

There will be no waiting period for Family Tax Benefit Part B. This recognises the role that this payment plays in supporting single parent families or those who

⁵⁵ Federation of Ethnic Communities' Councils of Australia (**FECCA**), Submission No 4 to the Senate Community Affairs Legislation Committee, *Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018 [Provisions]* (11 April 2018), 2.

⁵⁶ Brotherhood of St Laurence, Submission No 13 to the Senate Community Affairs Legislation Committee, *Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018 [Provisions]* (13 April 2018), 2-3.

⁵⁷ FECCA (n 80), 3 and Harmony Alliance, Submission No 19 to the Senate Community Affairs Legislation Committee, *Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018 [Provisions]* (13 April 2018), 2-3.

⁵⁸ Ibid, Harmony Alliance, 2.

⁵⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2018, (Linda Reynolds, Assistant Minister for Home Affairs), 8913.

have one main income earner to balance work and caring responsibilities, particularly when their children are younger.

82. Now, family and carer payments which in 2018 were left subject to a lower NARWP than other payments because of the particular needs of possible recipients of these payments will, under this Bill, have their NARWP increased to the period as other payments.
83. The Law Council considers that it has not been demonstrated why measures which were considered too burdensome three years ago are justified now.

Proportionality

Claims made in the State of Compatibility with Human Rights in support of proportionality

84. The Statement of Compatibility with Human Rights details a number of matters which are stated to render the measure proportionate.
85. It notes that these measures are prospective, providing people with an opportunity to adapt their conduct accordingly, which is consistent with the principle of proportionality.
86. It also states that the exemptions to the NARWP which applies to these payments render the measures proportionate by providing 'a safety net for potentially vulnerable individuals and families'.⁶⁰
87. On exemptions, the Statement of Compatibility with Human Rights points out that:
- permanent migrants are able to access child-care subsidies, Medicare, the National Disability Insurance Scheme, employment services, schools and tertiary education;
 - persons who arrive in Australia on temporary humanitarian visas and certain other family visa types are exempt from the NARWP, when it is not reasonable to expect the holder to be self-sufficient when they arrive.
88. These exemptions are welcome and consistent with the principle of proportionality.
89. The Statement of Compatibility with Human Rights also suggests that a person is exempt from the NARWP which applies to these payments if they are receiving other payments.

Assessment of exemptions

90. However, the exemptions from the NARWP which apply when a person is receiving a separate payment are in fact quite narrow.
91. If a person:
- (a) becomes a lone parent; and
 - (b) they qualify for Jobseeker or Youth Allowance; then
 - (c) they can be paid Carer Allowance, Family Tax Benefit and Paid Parental Leave without the NARWP applying.

⁶⁰ Explanatory Memorandum, (n 38), 18.

92. If a person:
- (a) suffers an uncontrollable change of circumstances; and
 - (b) they qualify for Special Benefit; then
 - (c) they can be paid Carer Allowance, Family Tax Benefit and Paid Parental Leave without the NARWP applying.
93. The availability of this exemption to the NARWP which applies to payments of Carer Allowance and Family Tax Benefit in subparagraph (c) of the above two paragraphs is subject to a person's ongoing eligibility for the payments in subparagraph (b).⁶¹ Whereas for the payments of Parental Leave, a person only needs to have been receiving the payments in subparagraph (b) on the day before the start of a period Paid Parental Leave will be payable.⁶²
94. As a result, unlike other potential recipients of Carer Allowance, Family Tax Benefit and Paid Parental Leave, a person subject to the NARWP will need to satisfy at the requirements of at least two social security payments in order to receive those payments.
95. This provides a substantive limitation in the case of Special Benefit, in particular, which is the only payment exempt from the NARWP due to an uncontrollable change of circumstances. This is because the Special Benefit may, subject to the discretion of the Secretary (or delegate), only be paid for a maximum of 13 weeks or less (it may be a greater period depending on the extent of a person's hardship).⁶³
96. As a result, if a person has suffered an uncontrollable change of circumstances which has affected their ability to support themselves, they may only receive enhanced benefits (of Special Benefit and any additional payments affected by this Bill) for a limited period.
97. Importantly, the Carer Payment is not subject to an exemption from the NARWP due to a person becoming a lone parent or suffering from a change of circumstances – even if they are receiving another social security payment. So a person who qualifies for Carer Payment because their child or partner becomes disabled or acquires a severe medical condition and requires ongoing care for reasons outside their control, would not be able to receive that payment for the first four years after arriving in Australia.
98. It is not clear why all of the family and carer related payments affected by this Bill are not subject to their own stand-alone exemptions from NARWP which apply when, due

⁶¹ See Family Assistance Tax Act, s 61AA(7)(a): the NARWP 'does not apply to an individual in respect of a day in the NARWP for the individual if *on that day*: (a) the individual *is receiving* a social security pension or a social security benefit' (emphasis added). See also Social Security Act, s 966(4)(a): the NARWP 'does not apply to a person if: (a) the person *is receiving* a social security pension or a social security benefit' (emphasis added). Cf Social Security Act, s 966(3), which uses different phrasing in relation to visa requirements to indicate that this only needs to be a one-off circumstance at the start of the process: the NARWP 'does not apply to a person if, *at the time the person made the claim for carer allowance*, the person holds a visa ...' (emphasis added).

⁶² See Paid Parental Leave Act, s 31A(5): the NARWP 'does not apply to a person if: (a) *on the day before the day* (the **relevant day**) that would be the start of the person's PPL period for a child if a payability determination were made; and (b) if the person is the primary claimant and the relevant day is at least 2 days after the day the child was born—*on the day the child was born and on each later day (if any) before the day applicable under paragraph (a)*; the person was *receiving* either of the following: (c) a social security pension or a social security benefit ...' (emphasis added).

⁶³ See section 729A of the Social Security Act. The factors which inform this determination include the quantum of a person's available funds, whether they hold a protection-type visa, whether they are a child, or a person with caring responsibilities: see *Social Security Guide* (Version 1.283, 1 July 2021) <<https://guides.dss.gov.au/guide-social-security-law/3/7/1/70>>.

to circumstances outside of their control, a person is no longer reasonably able to be self-sufficient.

99. The **PJCHR** considered the same justifications in assessing the proportionality of the increase to the NARWP proposed in the 2018 Amendment Bill.⁶⁴
100. Ultimately, the PJCHR considered the combination of the exemptions, including the availability of Special Benefit, the 'scope' of the measure,⁶⁵ and the availability of other government funded services including health care and education rendered the measures proportionate.⁶⁶
101. However, neither the Statement of Compatibility with Human Rights nor the PJCHR report address the key limitations of these exemptions mentioned immediately above, including the fact that the Carer Payment is not subject to this kind of exemption and thus cannot be received in any circumstances in the first four years after migration.⁶⁷
102. Nor do they address the obligations that State Parties have to give special attention to groups who traditionally face difficulties obtaining a right to social security, including, relevantly, women, children and adult dependents and non-nationals.
103. The Law Council considers that these matters should be addressed directly in relation to the payments affected by this Bill.

Recommendation

- **Consideration be given to applying the lone parent exemption and the uncontrollable change of circumstances exemptions to all social security payments affected by this Bill.**

Right to maternity leave

Content of the right

104. Article 11(2)(b) of the CEDAW provides that:

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: ... To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.

105. As noted, the right to maternity leave is also protected by article 10(2) of the ICESCR.

⁶⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report – Report 4 of 2018* (8 May 2018), [2.183]-[2.189].

⁶⁵ *Ibid*, [2.186].

⁶⁶ *Ibid*, [2.189] and [2.191].

⁶⁷ Further, the Statement of Compatibility with Human Rights does not appear to be accurate in implying that persons granted an exemption from Parenting Payment may benefit from a knock-on exemption to another benefit. A person must be receiving a 'social security benefit' or 'social security pension' in order to be exempt from the NARWP which applies to payments such as Family Tax Benefit, Paid Parental Leave and Carer Allowance. The term 'social security benefit' is defined to include Youth Allowance, Jobseeker and Special Benefit. However, Parenting Payment is neither a social security pension nor a social security benefit (see definitions in subsection 23(1) of the Social Security Act), and therefore does not appear to be a payment which, if received, enables a person to be exempt from the NARWP for a different payment.

Analysis

106. Paid parental leave is generally paid to a child's birth mother.⁶⁸ The Bill clearly further limits the right to maternity leave by increasing the NARWP for paid parental leave by two years to four years.
107. The United Nations Committee on the Elimination of Discrimination against Women (**UN Committee on the Elimination of Discrimination against Women**) has clarified that pursuant to the obligation in article 11(2)(b) includes ensuring that there is no indirect discrimination of women, which it defines as occurring:⁶⁹

when a law, policy, programme or practice appears to be neutral as it relates to men and women, but has a discriminatory effect in practice on women, because pre-existing inequalities are not addressed by the apparently neutral measure. Moreover, indirect discrimination can exacerbate existing inequalities owing to a failure to recognize structural and historical patterns of discrimination and unequal power relationships between women and men.

108. The UN Committee on the Elimination of Discrimination against Women has found that a failure to provide maternity benefits affects women adversely and therefore constitutes direct sex and gender-based discrimination against women.⁷⁰

Legitimate objective

109. The Statement of Compatibility with Human Rights sets out the objective for increasing the NARWP for paid parental leave social security payments need to be 'well targeted and sustainable'.⁷¹
110. The Statement of Compatibility with Human Rights justifies this measure by stating that, consistent with the principle of self-reliance it is reasonable to expect that migrants who make the decision to have or adopt a new child during their initial settlement period should allow for the costs of supporting themselves and their children during the waiting period.⁷²
111. However, this justification does not address the reasonable possibility that pregnancies can be unplanned. Further, the suggestion that rearing a newborn is effectively a matter of costs does not address the key feature of maternity leave that it promotes workplace security for women, and is also intended to promote the health of the mother and child.

Proportionality

112. In justifying the measure as proportionate, the Statement of Compatibility with Human Rights points to the exemption from the NARWP on Paid Parental Leave which applies to humanitarian migrants and to people who, due to become a lone parent or suffering from an uncontrollable change of circumstances, are receiving a separate

⁶⁸ Unless the child is adopted or exceptional circumstances apply: s 54 of the Paid Parental Leave Act.

⁶⁹ Committee on the Elimination of Discrimination against Women, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28 (16 December 2010), [16].

⁷⁰ Committee on the Elimination of Discrimination against Women, *Communication No. 36/2012 – Views adopted by the Committee at its fifty-seventh session, 10-28 February 2014*, CEDAW/C/57/D/36/2012 (24 March 2014), [8.9].

⁷¹ Explanatory Memorandum, (n 38), 19

⁷² Ibid.

social security payment.⁷³ It also points to other government funded benefits and services, including, health care and education being available to newly arrived migrants. The Statement suggests that these aspects constitute 'a safety net for the most vulnerable through a comprehensive range of exemptions and does not affect other non-Government funded parental leave which will continue to be available'.

113. The PJCHR found that it was not clear that the increase to the NARWP for paid parental leave in the 2018 Bill was compatible with the right to maternity leave.
114. Essentially, the reason is that while justifications provided for limiting access to maternity leave address alternative means of providing financial support to women, they did not address the fundamental purpose of maternity leave, being to give effect to the right to equality and non-discrimination.
115. The PJCHR noted that the measure was not means-tested to the extent of other social security payments and thus would disproportionately impact women who are on low incomes, and thus exacerbate the vulnerability of those women. The PJCHR considered that this result was not consistent with the justification of managing financial resources.
116. Ultimately, the PJCHR concluded:

The purpose of the right to paid maternity leave is to prevent discrimination against women on the grounds of maternity. By restricting access to paid maternity leave the measure may ultimately exacerbate inequalities experienced by women subject to the waiting period. It is unclear that the measure represents the least rights restrictive approach

117. The Law Council agrees with this view and considers the limit on the right to maternity leave which results from increasing the NARWP on paid parental leave to not be proportionate. It recommends that this measure not proceed.

Recommendation

- **Consideration be given to removing the NARWP from Paid Parental Leave or at least not extending as proposed by the Bill.**

Comment about temporary visas

Temporary visa holders on a permanent residency pathway

118. As discussed above, social security payments are not available to most migrants on temporary visas and the NARWP generally does not begin to reduce until a person is granted a permanent visa.⁷⁴ As noted, this can lengthen the periods that persons on temporary visas, but on permanent residency pathways, face before they can access social security payments.

⁷³ The Statement of Compatibility with Human Rights does not appear to be accurate in implying that persons granted an exemption from Parenting Payment may benefit from a knock-on exemption to another benefit. See note 69.

⁷⁴ See, for example, *Social Security Guide* (Version 1.283, 1 July 2021) < <https://guides.dss.gov.au/guide-social-security-law/3/1/2/40>>, [3.1.2.40] – 'Date of commencement and completion of the NARWP'.

119. The requirement that a person hold a visa which qualifies them for a social security payment in order to reduce the NARWP applies differently to different temporary visa holders who are on a pathway to permanent residency.
120. By way of example: consider the application of the parental leave payment and Jobseeker payment for Person A and Person B, who both arrived in Australia holding a temporary Subclass 482 (Temporary Skill Shortage) visa and a temporary Subclass 820 (Partner) visa, respectively.
121. Both intend to apply for the following permanent visas – specifically, a Subclass 187 (Regional Sponsored Migration Scheme) visa⁷⁵ and Subclass 801 (Partner) visa⁷⁶ respectively – which are dependent on them having held their temporary visa.
122. Person A is obliged to work in Australia on the Subclass 482 visa for at least three years as a criterion for a Subclass 187 visa⁷⁷ and they are likely to be granted the Subclass 187 visa after at least three and a half years in Australia on the Subclass 482 visa. The NARWP will not reduce for the three and a half years the person holds the Subclass 482 visa.
123. Person B may be granted a permanent visa after around 18 months in Australia.⁷⁸ The NAWRP which applies to parental leave payment will reduce while the person is on the Subclass 820 visa, so Person B will only be subject to the NARWP for a parental leave payment for another six months. However, the NARWP which applies to Jobseeker will not reduce while the person is on the Subclass 820 visa. So, Person B will not be able to receive Jobseeker until four years after they hold the permanent Subclass 801 visa.
124. As a result, currently:
- Person A will be able to receive:
 - Paid Parental Leave payments *five and a half years* after entering Australia;
 - Jobseeker payments *seven and a half years* after entering Australia;
 - Person B will be able to receive:
 - Paid Parental Leave payments *two years* after entering Australia;
 - Jobseeker payments *five and a half years* after entering Australia.
125. Two years will be added to the wait for the parental leave payments if the Bill is passed.
126. The above examples are based on an average processing time and a smooth application process – however, processing times can extend beyond this.

⁷⁵ See subregulation 5.19(5)(a)(ii) the *Migration Regulations 1994* (Cth) (**Migration Regs**) for the purposes of paragraph 1114C(3)(d) of Schedule 1 to the Migration Regs.

⁷⁶ See subclauses 801.221(2), (2A), (3), (4), (5), (6) and (8) of Schedule 2 to the Migration Regs.

⁷⁷ See subregulation 5.19(5)(e) the Migration Regs for the purposes of paragraph 1114C(3)(d) of Schedule 1 to the Migration Regs.

The Department of Home Affairs website suggests that 75% of Subclass 801 visa applications are processed within 11 months of application, although processing time is from the date of eligibility (two years after the application is lodged) - <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/global-visa-processing-times>>, accessed on 27 July 2021.

127. By way of example, the Law Council is aware of a temporary visa holder who arrived in Australia on a Temporary Work (Skilled) visa (subclass 457) in 2012, and whose application for an Employer Nomination (Permanent) (subclass 186) visa (lodged in 2017) was refused on a technical ground (an administrative error on a form) in 2018. An application to the Administrative Appeals Tribunal for a review of the decision was lodged in 2018 and in 2021 (3 years later) a decision was made by the Tribunal on the papers remitting the application to the Department of Home Affairs with the direction that the applicant meets the criteria for the permanent Subclass 186 visa. The temporary visa holder and her family still need to complete medicals and provide updated police checks before the permanent visa can be granted but the visa is likely to be granted by end 2021.
128. The person in this example has had two children since arriving in Australia nine years ago. However, the NARWP on affected social security payments will not begin to reduce until they are granted permanent residence. Under the current law, the person will not be able to receive Family Tax Benefit A until one year after becoming a permanent resident⁷⁹ (that is, ten years after arriving in Australia as a temporary skilled visa holder assuming she is granted the permanent visa in 2021). Under the Bill, the person will not be able to receive Family Tax Benefit A until four years after becoming a permanent resident (that is, in this example, thirteen years after first arriving in Australia as a temporary skilled visa holder).
129. This extensive waiting period could have a dampening effect on Australia's international competitiveness for skilled migrants, which will be vital to rebuilding the economy in the wake of the COVID-19 pandemic.
130. In its 2021 Intergenerational Report, the Treasury stated, with respect to skilled migrants:⁸⁰

Temporary migration provides a pipeline of migrants to the skilled stream of the permanent Migration Program. Over half of those on temporary skilled visas transition to permanency. Temporary migrants who arrive closer to their peak earning ages, and are more highly skilled, make a significant contribution to the Australian economy. Permanent migrants who enter the country on temporary skilled visas have much higher incomes than those who enter on other temporary visas or directly through the permanent stream.

... a well-targeted, skills-focused Migration Program can better support our ageing population by supplementing the stock of working-age people, slowing the transition to an older population, and improving Australia's fiscal outcomes.

131. The Law Council recommends that consideration be given to providing for the NARWP to be reduced by periods in which persons hold temporary visas, when the person is ultimately granted a permanent visa for which previously holding the temporary visa is a criterion.

Recommendation

- **The Law Council recommends consideration be given to reviewing the application of the NARWP to persons on temporary visas (particularly skilled visas) who are ultimately granted a permanent visa.**

⁷⁹ See subsection 61AA(5) of the Family Assistance Tax Act.

⁸⁰ The Treasury, *2021 Intergenerational Report Australia over the next 40 years*, (June 2021), <https://treasury.gov.au/sites/default/files/2021-06/p2021_182464.pdf>, 19.

Temporary visa holders not on a permanent residency pathway

132. The Law Council has previously expressed concern that most temporary migrants have been ineligible to benefit from COVID-19 crisis measures, given that they are among the groups whose work opportunities (for example, casual employment in catering and retail and the gig economy) have been rapidly constricted during COVID-19 restrictions.⁸¹
133. Temporary migrants fill key skills shortages, pay Australian taxes and are financially beneficial, with their input critical to Australia achieving budget surpluses. Failing to provide a safety net to temporary migrants who lose their jobs may undermine their health and welfare, create future labour shortages in vital sectors when the economy restarts, and breach Australia's international responsibilities.⁸²
134. The Law Council acknowledges the Australian Government's moves to enable most temporary visa holders with work rights to access their Australian superannuation to support themselves during the pandemic.⁸³ Measures have also been adopted to enable temporary visa holders to remain in key industries, such as health, aged and disability care, and to offer greater flexibility to many temporary migrants to assist them to avoid breaching their visa conditions.⁸⁴
135. On the other hand, official advice has been provided that temporary migrants who cannot support themselves should leave Australia.⁸⁵ That is also the essence of a policy which does not provide any social security payments to temporary migrants. The Law Council is concerned that many temporary migrants have been unable to do so and are reportedly at risk of destitution and homelessness.⁸⁶ Women who are temporary migrants may be at greater exposure to family violence as they are unable to leave dangerous homes due to limited financial resources.⁸⁷

Recommendation

- **The Law Council recommends consideration be given to measures to make available support to temporary migrants in financial hardship, in particular given the COVID pandemic.**

⁸¹ Law Council of Australia, Submission No 455 to the Senate Select Committee on COVID-19, *Inquiry into the Australian Government's response to the COVID-19 pandemic*, [95].

⁸² *Ibid.*, [99].

⁸³ The Hon David Coleman MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, Joint media release with the Hon Michael McCormack and the Hon David Littleproud MP - Supporting the agriculture workforce during COVID-19 (online, 4 April 2020)

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Joo-Cheong Tham, 'Why temporary migrants need JobKeeper', *The Conversation* (online, 7 April 2020) <<https://theconversation.com/why-temporary-migrants-need-jobkeeper-135688>>.

⁸⁷ Marie Segrave and Jane-Maree Maher, 'Coronavirus: Family violence and temporary migration in the time of COVID-19', *Monash University Lens* (online, 2 April 2020) <<https://lens.monash.edu/@politics-society/2020/04/02/1379949/coronavirus-family-violence-and-temporary-migration-in-the-time-of-covid-19>>.

Attachment A – Table of affected payments

In order to receive...	(a payment paid to a person in order to...)	the person must be...	Under the current law, must also have waited...	Under the proposed law, must also have waited...	Unless they hold...	or the following applies...
Carer Payment	support a carer of a person with a disability or severe medical condition in lieu of employment	an Australian resident ⁱ	Two years ⁱⁱ	Four years ⁱⁱⁱ	<ul style="list-style-type: none"> a permanent protection related visa^{iv} certain family related visas^v 	No exemption
Carer Allowance	supplement care related costs	an Australian resident ^{vi}	One year ^{vii}	Four years ^{viii}	<ul style="list-style-type: none"> a permanent protection related visa^{ix} certain family related visas^x 	<ul style="list-style-type: none"> They are receiving Youth Allowance, Jobseeker, or Special Benefit among others not included in this table; or Paid Parental Leave or Dad and Partner Pay is payable.^{xi}
Family Tax Benefit A	supplement child rearing costs for couples on middle incomes	<ul style="list-style-type: none"> an Australian resident; temporary partner visa; temporary protection visa holder; or New Zealand citizen who resides in Australia^{xiiixiii} 	One year ^{xiv}	Four years ^{xv}	<ul style="list-style-type: none"> a permanent protection related visa^{xvi} a temporary protection visa;^{xvii} certain family related visas^{xviii} 	<ul style="list-style-type: none"> They are receiving Youth Allowance, Jobseeker, or Special Benefit among others not included in this table; or Paid Parental Leave or Dad and Partner Pay is payable.^{xix}
Family Tax Benefit B	supplement to fund child rearing costs for couples on low incomes and single parents and grandparents	<ul style="list-style-type: none"> an Australian resident; temporary partner visa; temporary protection visa holder; or New Zealand citizen who resides in Australia^{xx} 	No period – payable on arrival ^{xxi}	Four years ^{xxii}	<ul style="list-style-type: none"> a permanent protection related visa a temporary protection visa; certain family related visas^{xxiii} 	Currently N/A, but if Bill passes: <ul style="list-style-type: none"> They are receiving Youth Allowance, Jobseeker, or Special Benefit among others not included in this table; or Paid Parental Leave or Dad and Partner Pay is payable.
Parental Leave Pay Dad and Partner Pay	support the parent and the newborn in lieu of employment	<ul style="list-style-type: none"> an Australian resident; temporary partner visa; temporary protection visa holder; or New Zealand citizen who resides in Australia^{xxiv} 	Two years ^{xxv}	Four years ^{xxvi}	<ul style="list-style-type: none"> a permanent protection related visa^{xxvii} a temporary protection visa;^{xxviii} 	They are receiving Youth Allowance, Jobseeker, or Special Benefit among others not included in this table. ^{xxix}
Special Benefit	provide a temporary safety net payment for a person in severe financial hardship	<ul style="list-style-type: none"> an Australian resident; temporary partner visa; temporary protection visa holder; or New Zealand citizen who resides in Australia^{xxx} 	Four years ^{xxxi}	Four years	<ul style="list-style-type: none"> a permanent protection related visa^{xxxii} a temporary protection visa;^{xxxiii} 	They experience an uncontrollable change of circumstances. ^{xxxiv}
Parenting Payment	support the main carer of a young child	an Australian resident ^{xxxv}	Four years ^{xxxvi}	Four years	<ul style="list-style-type: none"> a permanent protection related visa^{xxxvii} 	They become a lone parent. ^{xxxviii}
Jobseeker Youth Allowance	support an unemployed person	<ul style="list-style-type: none"> an Australian resident; or a New Zealand citizen who arrived in Australia after 26 February 2001, and who has lived in Australia for at least 10 years, but has received less than 6 months of payment^{xxxixxl} 	Four years ^{xli}	Four years	<ul style="list-style-type: none"> a permanent protection related visa^{xlii} 	They become a lone parent. ^{xliii}

Key: payments shaded blue are affected by the Bill.

- ⁱ Subject to a very limited exception related to certain circumstances where there is a scheduled international social security agreement: Social Security Act, ss 198(4), 198(6).
- ⁱⁱ Paragraph 201AA(1)(b) of the Social Security Act.
- ⁱⁱⁱ Ibid, items 5 and 6 of Schedule 1.
- ^{iv} A Subclass 852 (Referred Stay (Permanent)) visa – see subsection 201AA(2) of the Social Security Act and the *Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016*; or the refugee visas captured at subsection 201AA(5A).
- ^v A Subclass 116 (Carer) and Subclass 836 (Carer), but only until 1 October 2021 – see subsection 201AA(5) of the Social Security Act and *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Carer Payment) Determination 2018*. The amendments made by the Bill in relation to carer payment would not apply to a holder of a Subclass 117 (Orphan Relative) visa, Subclass 837 (Orphan Relative) visa, Subclass 115 (Remaining Relative) or Subclass 835 (Remaining Relative) – see subitem 17(2) of Schedule 1 to the Bill.
- ^{vi} Subdivision A of Division 2 of Part 2.19 of the Social Security Act.
- ^{vii} Paragraph 966(1)(b) of the Social Security Act.
- ^{viii} Ibid, items 13 and 14 of Schedule 1.
- ^{ix} A Subclass 852 (Referred Stay (Permanent)) visa – see subsection 966(2) of the Social Security Act and the *Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016*; or the refugee visas captured at subsection 966(5).
- ^x A Subclass 116 (Carer) visa and Subclass 836 (Carer) visa, but only until 1 October 2021 – see subsection 966(3) of the Social Security Act and *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Carer Payment) Determination 2018*.
- ^{xi} Subsection 966(4) of the Social Security Act.
- ^{xii} Specifically: a special category visa holder. See *Migration Act 1958* (Cth), s 32.
- ^{xiii} Residence requirements generally provided in paragraph 21(1)(b) of the Family Assistance Tax Act. See Social Security (Class of Visas – Qualification for Special Benefit) Determination 2015 (No. 2) (**Special Benefit Determination**), which is referred to in that paragraph.
- ^{xiv} Section 61AA of the Family Assistance Tax Act.
- ^{xv} Ibid, items 3-5 of Schedule 2.
- ^{xvi} The refugee visas captured at subsection 61AA(8).
- ^{xvii} See subsection 61AA(6) of the Family Assistance Tax Act and cl 6 of the *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2015* (No. 2).
- ^{xviii} Subclass 117 (Orphan Relative) visa, Subclass 837 (Orphan Relative) visa, Subclass 115 (Remaining Relative) or Subclass 835 (Remaining Relative) – see subitem 17(2) of Schedule 1 to the Bill – see subparagraphs 61AA(2)(b)(i) and (ii).
- ^{xix} Subsection 61AA(7) of the Family Assistance Tax Act.
- ^{xx} Ibid.
- ^{xxi} See section 61AA of the Family Assistance Tax Act.
- ^{xxii} This submission does not address the minor amendments made by the Bill to increase the NARWP applying to health care card and seniors health care card for non-protected SCV holders.) Ibid, items 3-5 of Schedule 2.
- ^{xxiii} Same as Family Tax Benefit A.
- ^{xxiv} Subsection 45(1) of the Paid Parental Leave Act. See Special Benefit Determination, which is referred to in that subsection.
- ^{xxv} Paid Parental Leave: subsections 31A(2)-(4) of the Paid Parental Leave Act. Dad and Partner Pay: subsections 115CBA(2)-(4) of the Paid Parental Leave Act.
- ^{xxvi} Schedule 3 to the Bill.
- ^{xxvii} The refugee visas captured at subsections 31A(7A) and 115CB(7) of the Paid Parental Leave Act.
- ^{xxviii} See subsections 31A(7) and 115CB(6) of the Paid Parental Leave Act and cl 6 of the *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2015* (No. 2).
- ^{xxix} Subsection 31A(5) of the Paid Parental Leave Act.
- ^{xxx} Subparagraph 729(2)(f)(v) of the Social Security Act. See Special Benefit Determination, which is made under this power. This is not payable. to New Zealand citizens who are not Australian residents.
- ^{xxxi} Subsections 739A(3)-(5) of the Social Security Act.
- ^{xxxii} The refugee visas captured at subsection 739A(8) of the Social Security Act.
- ^{xxxiii} See subsection 739B(6) of the Social Security Act and cl 6 of the *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2015* (No. 2).
- ^{xxxiv} Subsection 739A(7) of the Social Security Act.
- ^{xxxv} Paragraph 500(1)(b) of the Social Security Act.
- ^{xxxvi} Subsection 500X(1) of the Social Security Act.
- ^{xxxvii} A Subclass 852 (Referred Stay (Permanent)) visa – see subsection 500X(2) of the Social Security Act and the *Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016*; or the refugee visas captured at subsection 500X(4).
- ^{xxxviii} Subsection 500X(3) of the Social Security Act.
- ^{xxxix} Specifically: a special category visa holder. See Social Security Act, s 7(7). See also *Migration Act 1958* (Cth), s 32.
- ^{xl} Regarding Jobseeker: Subparagraph 593(1)(g)(i) of the Social Security Act. Regarding Youth Allowance: Subparagraph 540(d)(i) of the Social Security Act.
- ^{xli} Youth Allowance: paragraph 549D(1)(b) of the Social Security Act. Jobseeker: subsection 623A(1) of the Social Security Act.
- ^{xlii} A Subclass 852 (Referred Stay (Permanent)) visa – see subsections 549D(2) and 623A(2) of the Social Security Act and the *Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016*; or the refugee visas captured at subsection 549D(4) and 623A(8) of the Social Security Act.
- ^{xliii} Jobseeker: subsection 623A(7) of the Social Security Act. Youth Allowance: subsection 549D(6) of the Social Security Act.