Law Council
OF AUSTRALIA

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

Parliamentary Joint Committee on Intelligence and Security

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Table of Contents

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra. The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council of Australia is grateful for the input of the Migration Law Committee of its Federal Dispute Resolution Section, its National Human Rights Committee, the Law Society of New South Wales (**LSNSW**), the Law Institute of Victoria (**LIV**), the Law Society of the Australian Capital Territory (**LSACT**) and the Queensland Law Society (**QLS**) in preparing this submission.

Executive Summary

1. The Law Council thanks the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) for the opportunity to respond to its review regarding the operation, effectiveness and implications of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) (**the Migration Amendment Act**).

2. An objective of the Migration Amendment Act was to ensure that the *Migration Act 1958* (Cth) does not authorise or oblige an officer to remove a person found to engage Australia's international obligations relating to *non-refoulement*[1] to the country from which they seek protection, in breach of those obligations.[2] Prior to its passage, the Federal Court of Australia had made findings to the effect that the existence of non-refoulement obligations did not stay the obligation to remove a person to the country from which the person was owed protection.[3]

3. The Law Council is not aware of information that suggests that the Migration Amendment Act has failed to achieve that objective. To that limited extent—it has been effective.

4. Importantly, however, the Law Council maintains the concerns about the Migration Amendment Act's broader implications, that it raised in a public submission[4] after the Act's passage (**previous public submission**).[5] Specifically, the scheme provided by the Migration Amendment Act entrenches the exposure to indefinite detention of persons found to engage Australia's protection obligations, but who are refused a visa, or have their visa cancelled, including on character or national security grounds (**affected persons**).[6]

5. This is because an affected person must be detained in a detention facility unless:

    - the Minister decides it is in the public interest to exercise a personal, non-compellable power to grant the person a visa or determine they may reside in community detention; or
    - the person is returned to a third country.

6. It remains the Law Council's view that fundamental reforms are required to the Migration Act to ensure that there are mandated safeguards on immigration detention, consistent with rule of law principles and Australia's international obligations. This submission sets out principles for reform of the immigration detention scheme.

7. This submission also provides anecdotal information from legal practitioners regarding the handling of detained people who are affected persons, sets out some available data about the detention of such persons , and reiterates some technical concerns about the detention scheme established by the Migration Amendment Act.

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[1] Essentially, non-refoulement obligations prohibit Australia from returning a person to a State where they face a certain risk of a particular kind of harm or harm for a particular reason relating to their essential characteristics. These obligations are particularised in footnotes 10, 11 and 12 below.
[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 March 2021, 2 (Alex Hawke, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs).
[3] *AJL20 v Commonwealth* [2020] FCA 1305, [10] and [168]-[170].
[4] The then Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (Cth) was not referred to a Parliamentary Committee for inquiry.
[5] Law Council of Australia, submission to the Hon Karen Andrews MP, Minister for Home Affairs, *Submission on the passage of the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021* (**Law Council's previous public submission**).
[6] Ibid [7], [44].

The need for a broader review

8. The operation, implications and effectiveness of the Migration Amendment Act is subject to review by the PJCIS by virtue of the operation of paragraph 29(1)(cf) of the *Intelligence Services Act 2001* (Cth).

9. The functions of the PJCIS ordinarily include, most relevantly, ensuring national security legislation remains necessary, proportionate and effective by conducting statutory reviews.[7] However, the Migration Amendment Act is not, strictly speaking, national security legislation nor specifically directed to a national security purpose. Its purpose was to amend the Migration Act to ensure that Act was consistent with Australia's non-refoulement obligations. (Non-refoulement obligations prohibit Australia from returning a person to a State where they face a certain risk of a particular kind of harm, or harm for a particular reason relating to their essential characteristics.)[8]

10. This submission addresses the situation of persons found to engage those obligations, but who have not been granted a protection visa, for various reasons, including assessments of their character or risk to security, or their criminal history. Under Australia's migration laws, those persons face the prospect of indefinite detention. For the reasons set out in this submission, the Law Council considers this detention framework is inconsistent with Australia's international human rights obligations,

11. The review gives rise to complex issues, which traverse international human rights and treaty obligations, national security and public interest issues, and rule of law issues (relating to the clarity of Australia's domestic migration law). The Law Council suggests that the PJCIS recommend the Act be referred to a Parliamentary Committee with a broader remit able to consider these issues, such as the Senate Standing Committee on Legal and Constitutional Affairs.

Overview of the statutory framework

Connection between protection visa criteria and non-refoulement obligations

12. Section 36 of the Migration Act sets out the criteria for a protection visa. These include criteria that can be placed in the following categories:

    (i) criteria which must be satisfied for a person to engage Australia's non-refoulement obligations, because the person is:

        a. a refugee (as defined in the Migration Act[9] for the purposes of the Refugees Convention);[10] or

[7] Commonwealth of Australia, 'Role of the Committee' (webpage, accessed on 29 June 2023) https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Role_of_the_Committee.
[8] See footnotes 10,11 and 12.
[9] Migration Act section 5H.
[10] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954). Non-refoulement obligations arise under Article 33 of the Convention. Article 33(1) prohibits expulsion of return of a refugee to a State their 'life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion'. There are exceptions in Article 33(2), as discussed below.

b. owed complementary protection (under the International Covenant on Civil and Political Rights[11] (**ICCPR**) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[12] (**CAT**), as partially implemented in the Migration Act); and

(ii) criteria which are imposed on a person as a matter of policy, but do not affect whether a person engages Australia's non-refoulement obligations.

13. The distinction between these two categories is not clear on the face of the Migration Act—it requires consideration of extrinsic materials and an understanding of international law.

14. There are also criteria which apply to all protection visas, despite those criteria only reflecting the content of Australia's *non-refoulement* obligations under the Refugees Convention, and not the ICCPR and CAT.

15. For example, the *Migration Amendment (Complementary Protection) Act 2011* (Cth) amended the Migration Act to provide for a protection visa to be granted to persons who had been found to have engaged Australia's *non-refoulement* obligations under the ICCPR or CAT (which it termed 'complementary protection').[13] Prior to the passage of that amending Act, the Migration Act only expressly provided for a protection visa to be granted to a person recognised as a refugee under the Refugees Convention.[14]

16. At that time, a decision was made to require such persons to *also* satisfy a criterion—subsection 36(2C), which requires that the persons not be assessed as a danger to Australia's security or to have committed or been convicted of certain crimes—which reflects exclusionary provisions of the Refugees Convention.[15] The Explanatory Memorandum for the Migration Amendment (Complementary Protection) Bill 2011 (Cth) explained:[16]

> *In particular, the Bill amends the Act to:*
>
> *…*
>
> - *maintain strong arrangements for protecting the Australian community, by providing that non-citizens who would currently be ineligible for the grant of a protection visa because of exclusion provisions in Article 1F and Article 33(2) of the Refugees Convention, will also be ineligible for the grant of a protection visa when applying on the basis of their complementary protection claims because of similar exclusion provisions. Non- citizens who*

[11] *International Covenant on Civil and Political Rights* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**). Non-refoulement obligations arise by implication under articles 2, 6 and 7 of the ICCPR, which relevantly provide respectively that '[e]very human being has the inherent right to life' and '[n]o-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. See United Nations Human Rights Committee, General Comment No. 31 [80] 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add. 13 Adopted on 29 March 2004 (2187th meeting) [12]. See also Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) 3, [67].

[12] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (**CAT**). Non-refoulement obligations arise under Article 3(1) of the ICCPR, which provides that '[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

[13] See Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) 1-2.

[14] Commonwealth, *Second Reading Speech – Migration Amendment (Complementary Protection) Bill 2011,* House of Representatives, 24 February 2011, 1356 (Chris Bowen, Minister for Immigration and Citizenship).

[15] Ibid 2, [86]-[90].

[16] Ibid 2. See also [86]-[90] and Commonwealth, *Second Reading Speech – Migration Amendment (Complementary Protection) Bill 2011,* House of Representatives, 24 February 2011 1358 (Chris Bowen, Minister for Immigration and Citizenship.

are ineligible for a protection visa on complementary protection grounds because of the exclusion provisions will not be removed from Australia but will be managed towards case resolution, taking into account key considerations including protection of the Australian community and the individual circumstances of their case.

17. Subsection 36(1C) also reflects one of these exclusionary provisions of the Refugees Convention and applies it to all protection visa applicants.[17] Relatedly, subsection 36(3) provides that Australia is taken not to have protection obligations in relation to a person when they are found to have a right to enter and reside a third country.[18]

18. Under the Migration Act, a person without a visa must be detained[19] and kept in immigration detention until they are removed, deported, or granted a visa.[20]

Connection between non-refoulement obligations and the obligation to remove unlawful non-citizens

19. Section 198 provides that an unlawful non-citizen (in effect, a person who does not hold a visa)[21] must be removed from Australia as soon as reasonably practicable when certain factual circumstances are satisfied.[22] One of these circumstances, relevantly, is that the unlawful non-citizen:

    - is a detainee;
    - has made a valid application for a substantive visa which has been refused and finally determined or cannot be granted; and
    - has not made another valid application for a visa.[23]

20. Section 197C deals with the relevance of non-refoulement obligations[24] to the obligation to remove imposed by section 198. Subsections 197C(1) and (2) (which pre-dated the Migration Amendment Act) respectively provide that:

    - for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen; and
    - the duty in 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.

21. Subsection 197C(3), which was inserted into the Migration Act by the Migration Amendment Act, operates as an effective exception to subsections 197C(1) and (2) (and section 198). It provides that section 198 does not require or authorise removal to a country if:

[17] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 12.
[18] Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) [68].
[19] Migration Act section 189.
[20] Ibid section 196.
[21] Ibid sections 13 and 14.
[22] Ibid section 198.
[23] Ibid subsection 198(6).
[24] The Migration Act defines 'non-refoulement obligations' as non-refoulement obligations that may arise because Australia is a part to the Refugees Convention, the ICCPR, the CAT and 'any obligations accorded by customary international law that are of a similar kind' to the obligations arising from those three treaties: subsection 5(1).

- a person has applied for a protection visa which has been finally determined; and
- in the course of considering the application, a 'protection finding' was made with respect to the country; and
- none of the following apply:
  - the decision in which the protection finding was made was quashed;
  - the protection finding has been overturned by the Minister; or
  - the person has asked to be removed to the country.

22. The Migration Amendment Act also inserted subsections 197C(4)-(7) to the Migration Act. These subsections set out when a 'protection finding' has been made for the purposes of subsection 197C(3). In effect, subsections 197C(4)-(6) enumerate the various permutations of criteria in section 36 which, if satisfied (or not satisfied), will result in *non-refoulement* obligations being engaged.[25] These subsections are complex and need to be read with section 36.

23. These provisions capture circumstances where a person has been found to engage Australia's non-refoulement obligations in relation to their home country but does not hold a substantive visa.

24. This may be because the person was *refused* a protection visa on other grounds for the reasons described in [14]-[17].

25. It may also be because the person was granted a protection visa,[26] but later had had that visa *cancelled*, for example on character grounds under section 501 of the Migration Act. The Law Council has previously expressed its concerns that the threshold tests under which a person does not pass the character test in section 501 are too low. [27] For example, while the thresholds are satisfied where there is a risk the person would represent a danger to the community,[28] or the Australian Security Intelligence Organisation has assessed them to directly or indirectly be a risk to security,[29] it is also possible for a person to satisfy the threshold and fail the character test without a criminal conviction including where having regard to their general conduct, it is determined the person is 'not of good character'.[30]

26. A person to whom subsection 197C(3) applies (an affected person) will be kept in held immigration detention until they are either:
    - removed (to a third country—that is, a country other than the country to which it is recognised that removal would be a breach of Australia's *non-refoulement* obligations);
    - granted a visa by the Minister under section 195A of the Migration Act; or

[25] It should be read with section 36A of the Migration Act, which was also inserted by the Migration Amendment Act. See Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (Cth) [10] and [27].
[26] For example, paragraphs 197C(5)(a) and (b) of the Migration Act.
[27] See Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Strengthening the Character Test) Bill 2019,* 14 August 2019. This may result in a decision to refuse or cancel a person's visa. A separate discussion of the mandatory visa character test cancellation powers under section 501 is set out below.
[28] Migration Act subparagraph 501(6)(d)(v).
[29] Ibid paragraph 501(6)(g).
[30] Ibid subparagraph 501(6)(c)(ii).

- subject to a residence determination by the Minister under section 197AB of the Migration Act, which places them in community detention.[31]

27. The powers of the Minister in sections 195A and 197AB may be exercised by the Minister if they think it is in the 'public interest' (there are no other criteria).[32] Only the Minister personally can exercise the powers[33] and the Minister cannot be compelled to exercise them.[34]

28. For these reasons the Law Council outlined its concerns in its previous public submission that the Migration Amendment Act entrenches prolonged or indefinite immigration detention for persons who are found to engage Australia's protection obligations but are refused or have had a protection visa cancelled on other grounds.[35]

29. Such a person faces the prospect of indefinite immigration detention, without any means or basis to seek or require consideration of their personal circumstances, other than to request to go back to the country from which they are owed protection.

30. If they do not make that request (which would be against their own interest, given that Australia will have recognised that the person is to be protected from that country), they are dependent on:

    - the Minister deciding that it is in the public interest to grant them a visa—a decision they cannot compel be made; or
    - the Department finding a third country which will accept them.

31. This is a state which could be sustained indefinitely.

32. If the Minister does not make a decision to grant the person a visa under section 195A, removal to a third country becomes the only alternative to prolonged detention. The LIV, notes that in addition to impact on the detained person this places a significant administrative burden on Departmental officers, who must continually reassess whether there is a safe third country to remove the person to.

Law reform is necessary

33. The Law Council's primary submission is that reform is required to the detention framework in the Migration Act to ensure that it is consistent with Australia's international obligations which are described below.

34. The necessity for such reform in fact pre-dated the passage of the Migration Amendment Act. However, the passage of that Act underlined it.

35. As such, the need for this reform has been an *implication* of the passage of the Migration Amendment Act, from its commencement.

[31] Such a person is still considered to be in 'immigration detention', and is thus subject to section 198 – see subsection 198AC(1).
[32] Migration Act subsection 195A(2) and subsection 197AB(2).
[33] Ibid subsection 195A(5) and section 197AF.
[34] Ibid subsection 195A(4) and section 197AE.
[35] Law Council's previous public submission [7] and [44].

Overview of Australia's international obligations relating to immigration detention

Right to liberty

36. Australia has obligations under the ICCPR not to subject a person to arbitrary detention.[36] Under international law immigration detention should not in itself be arbitrary, it should only be a measure of last resort and must be justified as reasonable, necessary and proportionate in the light of the circumstances and regularly reviewed.[37]

37. According to the Detention Guidelines published by the United Nations High Commissioner for Refugees (**UNHCR**), in considering the context of the detention of asylum-seekers, the necessity, reasonableness and proportionality of detention are subject to the following considerations:

    - the **necessity** to detain the individual is to be assessed in light of the purpose of the detention—which may be either to protect public order (to prevent absconding, to document them, record claims, determine identity); public health; or national security;
    - the overall **reasonableness** of detention requires an assessment of any special needs or considerations in the individual's case;
    - the **proportionality** of detention requires that a balance be struck between the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights.[38]

38. The necessity and proportionality tests further require an assessment of whether there were less restrictive or coercive measures (that is, alternatives to detention) that could have been applied to the individual concerned and which would be effective in the individual case.[39]

Prohibition against torture and ill-treatment

39. It is also prohibited to hold a person in immigration detention in conditions that amount to torture or to cruel, inhuman or degrading treatment or punishment.[40] These obligations are absolute.[41]

40. The United Nations Committee against Torture has stated that:[42]

> *… parties should not adopt dissuasive measures or policies, such as detention in poor conditions for indefinite periods, refusing to process claims for asylum or unduly prolong them, or cutting funds for assistance programs to asylum seekers, which would compel persons in need of protection under Article 3 of the*

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[36] *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (entered into force 23 March 1976), art 9.
[37] UN Human Rights Committee, *General comment No. 35*, CCPR/C/GC/35 [18].
[38] UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) 21-34.
[39] Ibid, 35-42.
[40] ICCPR article 7; CAT articles 1, 2, 3 and 16.
[41] United Nations Committee on the Convention on Civil and Political Rights, 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 March 1992 [3]; Committee Against Torture, 'General Comment No. 2' CAT/C/GC/2 (24 January 2008) [5].
[42] Committee against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, 9 February 2018, [14].

> *Convention to return to their country of origin in spite of their personal risk of being subjected there to torture and other cruel, inhuman or degrading treatment or punishment.*

Compliance with international obligations

41. In its 2017 report on Australia's compliance with the ICCPR, the United Nations Human Rights Committee stated that it was 'concerned that the rigid mandatory detention scheme under the [Migration Act] does not meet the legal standards under article 9 of the Covenant' and made several recommendations to 'bring its legislation and practices relating to immigration detention into compliance with article 9',[43] including:

> *… (a) significantly reduce the period of initial mandatory detention and ensure that any detention beyond that initial period is justified as reasonable, necessary and proportionate in the light of the individual's circumstances and is subject to periodic judicial review; (b) expand the use of alternatives to detention; (c) consider introducing a time limit on the overall duration of immigration detention; (d) provide for a meaningful right to appeal against the indefinite detention of individuals who have received adverse security assessments from the Australian Security Intelligence Organisation, including a fair opportunity to refute the claims against them …*

42. Similarly, in its 2022 report on Australia's compliance with the CAT, the United Nations Committee against Torture stated:[44]

> *[T]he Committee remains concerned that detention continues to be mandatory under the Migration Act 1958 for all "unlawful non-citizens" until the person concerned is granted a visa or is removed from the State party. It is also concerned that the law does not establish a maximum length for a person to be held in immigration detention, reportedly resulting in protracted periods of deprivation of liberty. The Committee is further concerned at reports that refugees and asylum-seekers with an adverse character finding, or with an adverse security assessment from the Australian Security Intelligence Organisation, and stateless persons whose asylum claims have not been accepted can be detained indefinitely, without adequate procedural safeguards to meaningfully challenge their detention.*

43. The Explanatory Memorandum for the Migration Amendment Bill acknowledges that persons affected by the amendments 'may be subject to ongoing immigration detention' and 'may be detained until their removal is reasonably practicable'.[45] The Explanatory Memorandum identifies the Minister's discretionary powers as helping 'to ensure that an immigration detention placement is reasonable, necessary and proportionate to their individual circumstances and therefore not be arbitrary and contrary to Article 9 [of the ICCPR]'.[46]

44. However, these powers are non-compellable and do not require ongoing consideration of the necessity, reasonableness and proportionality of detention considering a person's particular circumstances. There is no statutory requirement that the factors material to the necessity, reasonableness and proportionality of detention of each individual person be considered, either initially or on an ongoing basis.

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[43] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/6 (2017) [38].
[44] United Nations Committee Against Torture, 'Concluding observations on the sixth periodic report of Australia', CAT/C/AUS/CO/6 (5 December 2022) [27].
[45] Revised Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (Cth) 19.
[46] Ibid.

45. If these powers are not exercised in relation to a person, the person will be detained until they can be removed, without any effective means or basis to seek or require consideration of their personal circumstances—despite being found to be owed protection.

46. The Parliamentary Joint Committee on Human Rights (**PJCHR**) raised serious concerns in relation to the compatibility of the Migration Amendment Act with the right to liberty, the rights of the child and the prohibition against torture or ill-treatment. It found [emphasis added]:[47]

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

47. The Law Council considers that Australia's international obligations require a more extensive legal framework directed at ensuring a person's detention remains reasonable, necessary and proportionate, including consideration of any risks posed to the community, and ensuring that detention is a measure of last resort. Enshrining such a framework in legislation will enable Parliamentary and meaningful judicial oversight of the operation of the immigration detention framework, consistent with rule of law principles.[48]

48. Furthermore, a framework of detention which lacks regard to necessity, reasonableness and proportionality (as is currently the regime, after the Migration Amendment Act) tends to undermine, for example, genuine national security concerns, by grouping trivial matters in the same category as the most serious.

Proposed approach

49. The Law Council reiterates its previous submission[49] that in order to ensure the scheme for immigration detention in the Migration Act is consistent with rule of law principles and international obligations, the Migration Act should:

- be based on a presumption that a person will not be detained, other than for a minimal initial period of detention to conduct initial health, identity and security checks;[50]
- once section 189 of the Migration Act is engaged, oblige the Minister (or official) to consider whether a person should be detained subject to clear criteria directed at considering whether detention is 'reasonable, necessary and proportionate in the light of the circumstances', consistent with the

[47] PJCHR, *Human Rights Scrutiny Report* 7 of 2021 (16 June 2021) [2.91].
[48] Law Council, Policy Statement – Rule of Law Principles (March 2011) 6b.
[49] Law Council's previous public submission [71].
[50] Law Council, Policy Statement on Principles Applying to the Detention of Asylum Seekers (22 June 2013) clause 5b https://lawcouncil.au/publicassets/c940d8f6-bdd6-e611-80d2-005056be66b1/130622-Policy-Statement-Principles-Applying-to-the-Detention-of-Asylum-Seekers.pdf.

principles articulated under international law—for example, having regard to a person's individual likelihood of absconding, or is individually assessed as presenting an unacceptable risk to the community which cannot be met in any less restrictive way t(including on the basis of risks to national security);[51]

- provide for procedural fairness in relation to that decision;
- provide for review by the AAT of that decision;
- provide for periodic review of detention by the Minister (or official); and
- permit a person to compel review of detention by the Minister in certain circumstances.

50. The Law Council submits that these proposals provide the minimum safeguards required to ensure that the grave activity of detaining a person is undertaken in a manner consistent with international obligations to which Australia has committed.

51. In addition to mandatory periodic review by the Minister of the reasonableness, necessity and proportionality of detention, consideration should also be given to providing for a maximum time limit on the duration of detention. Such consideration would heed the recommendations of the United Nations Human Rights Committee and Committee on Torture set out above and is consistent with Law Council policy.[52]

52. The Law Council does not at this stage have a position on what an appropriate maximum time limit would be. Thought should be given to whether the Minister would have an opportunity, at the expiration of that period, to demonstrate to an independent body or court that detention remained reasonable, necessary and proportionate. Any time limit should be *subject* to mandatory periodic review by the Minister of the reasonableness, necessity and proportionality of detention—in particular cases, detention may no longer be reasonable, necessary and proportionate before any maximum time limit is reached.

53. These are preliminary views. The Law Council could give further consideration to these issues if it would assist the PJCIS.

Recommendations

- **The scheme for immigration detention in the Migration Act should be consistent with these rule of law principles and international obligations:**
  - **there should be a presumption that a person will not be detained, other than a minimal initial period of detention to conduct initial health, identity and security checks;**
  - **once section 189 of the Migration Act is engaged, the Minister (or official) should be obliged to consider whether a person should be detained subject to clear criteria directed at considering whether detention is 'reasonable, necessary and proportionate in the light of the circumstances', consistent with the principles articulated under international law—for example, having regard to a person's individual likelihood of absconding, or the person is individually assessed as presenting an unacceptable risk to the community**

[51] Ibid 5b.
[52] Law Council, Policy Statement on Principles Applying to the Detention of Asylum Seekers (22 June 2013) clause 6 https://lawcouncil.au/publicassets/c940d8f6-bdd6-e611-80d2-005056be66b1/130622-Policy-Statement-Principles-Applying-to-the-Detention-of-Asylum-Seekers.pdf.

which cannot be met in any less restrictive way (including on the basis of risks to national security);

- **procedural fairness in relation to that decision should be afforded;**
- **review by the AAT of that decision should be available;**
- **there should be a periodic review of detention by the Minister (or official); and**
- **a person should be permitted to compel review of detention by the Minister in certain circumstances.**

- **Consideration should be given to, in addition to mandatory periodic review by the Minister of the reasonableness, necessity and proportionality of detention, providing for a maximum time limit on the duration of detention.**

Practitioner experience and available data

Practitioner experience

54. To assist the PJCIS to understand the practical implications of the Migration Amendment Act, the Law Council sought the views of the legal profession on whether the Minister or Department had adjusted their practices to more expeditiously remove affected persons from detention following its passage. The views of members of the Migration Law Committee, and the Constituent Bodies acknowledged above, have contributed to the following observations.

Processes generally

55. Members of the profession generally report that there is little to no apparent evidence of efforts to consider the ongoing appropriateness of immigration detention for affected persons.

56. The LSNSW's members report that while most cancellation decisions now acknowledge that a consequence of a decision not to revoke cancellation is prolonged or indefinite detention, 'it is rare that there is a sophisticated, individualised assessment of the necessity, reasonableness or proportionality of such detention'.

57. The QLS's members advise that a small number of persons whose protection visas had been cancelled have been granted bridging visa after their protection visa has been cancelled.

Removal to safe third countries

58. Members of the profession report having seen little apparent evidence of efforts being made to remove affected persons to third countries. Their feedback is that the process is inefficient, costly, extremely slow and there would appear to be a lack of incentive to investigate alternate options even where an applicant may request such action to be taken.[53]

59. The Law Council appreciates that there may be Departmental efforts occurring in this respect. However, it is important that affected individuals and their legal representatives

[53] The recent decision of *Jordan (a pseudonym) v Secretary of Department of Home Affairs* [2023] FEDCFAMC2G 515 summarises the case law regarding when it will be reasonably practicable to remove a person to a safe third country at [44].

are made aware of these efforts, to the greatest extent possible and appropriate in the circumstances.

60. The view of the LSNSW is that it is not appropriate for a country such as Australia to rely on the third country concept as a feasible solution for affected persons.

Voluntary removal

61. Anecdotally, the profession also reports that a number of detainees are considering or voluntarily consenting to removal despite facing the risk of serious harm on return. They are concerned that this is occurring as a result of the lengthy amount of time being spent in detention even where a person has a protection finding in their favour.

62. Particular concerns have been raised about the operation of subsection 197C(3)—that a person has requested return to their home country[54]—because when an affected person is faced with the prospect of indefinite, potentially lifelong detention, consent cannot be freely given. According to practitioners, detainees have reported that Departmental officials have informed them that they will never be released so their only option is to agree to voluntarily return. Alternatively, there are concerns that officials are not fully explaining to the detainee the risks of such a choice where a person has been found to owe protection obligations. Alternatively, in some cases, due to significant mental health concerns, detainees may lack the capacity to fully understand the implications of requesting to be returned to their home country in such circumstances.

63. The Law Council understands that a decision to return to a person's home country may be based on a range of reasons at any particular time and it will be difficult to ascertain an individual's reasons with any level of certainty. However, it would be of real concern if the prospect of indefinite immigration detention materially impacted a decision of a person, who is found to be owed protection from their home country, to return to a place where they continue to face a real chance or risk of persecution or significant harm.

64. A response by the Department to a question taken on notice at Senate Estimates on 13 February 2023[55] provided that between 1 July 2017 and 31 December 2022 there were 17 individuals removed from Australian voluntarily after their protection, refugee or humanitarian visa was cancelled under section 501.[56] This data is incomplete, as this is just a portion of the affected cohort, given that the affected cohort could include people refused visas, as noted above at [9]. It is also unclear whether these individuals were voluntarily returned to a country from which they were owed protection.

Residence determinations

65. No consistency has been observed by the profession as to whether there has been an increase in the exercise of the residence determination powers under section 197AB of the Migration Act, which places them in community detention.

Recommendation

- **To the greatest extent possible, the PJCIS should inquire into and assess the extent to which the immigration detention regime, and the prospect of indefinite detention, may be affecting the decision of affected persons to**

[54] Migration Act subparagraph 197C(3)(c)(iii).
[55] Commonwealth, *Senate Legal and Constitutional Affairs Legislation Committee Supplementary Budget Estimates*, Senate, 13 February 2023 (Senator Nita Green, Chair of Legal and Constitutional Affairs Legislation Committee).
[56] Ibid Question on notice no. 465.

voluntarily return to countries from which they have been found to be owed protection.

- **To undertake this assessment, the PJCIS should ask the Department and Minister for information about members of the affected cohort who have requested to be returned to a country from which they are found to be owed protection, with reference to citizenship and time in detention.**

Relevant information and data about the affected cohort

Information about the Minister and Department's processes

66. Earlier this month, the *Guardian Australia* published an article which detailed a direction given to the Department by the Minister for Immigration, Citizenship and Multicultural Affairs, the Hon Andrew Giles MP, regarding the affected cohort.[57] Specifically, according to the report, the Minister directed the Department to 'streamline reviews' of whether to grant a person a visa or make a residence determination in relation to them under the Minister's powers in sections 195A and 197AB of the Migration Act, respectively.[58]

67. The report says:[59]

> *In the brief dated 31 October [2022] the department noted many people in long-term immigration detention were unlikely to meet existing guidelines for release due to "a criminal history including where their visa was subject to mandatory cancellation".*
>
> *The department proposed "temporarily streamlining" the review process by waiving the guidelines that usually block cases going to the minister. Instead "agreed cohorts of individuals whose cases as a whole could be considered to represent compelling or compassionate circumstances", it said.*
>
> *By signing the brief on 14 November, Giles agreed to consider using his personal powers under the Migration Act to grant visas to people in the priority cohorts or allow them to move to community detention.*
>
> *Since the brief, the department sent 92 cases to the minister for consideration under the new rules, he considered 47 and intervened in 30.*
>
> *Lawyers for refugees and asylum seekers have noted an increase in releases of people in low-risk cohorts, such as those without a criminal record.*

68. The article goes on to indicate that the Department asked the Minister 'to consider extending "eligibility arrangements for SRSS transitional supports for individuals released from immigration detention"'.[60]

69. While it is positive that based on this report, the Minister is open to taking a more permissive approach to the exercise of his personal powers, this does not affect the overarching need for reform. These are broad, discretionary powers, regarding which different Ministers may lawfully take a different view on their exercise. The report indicates the change in approach was 'temporary'.

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[57] Paul Karp, 'Home affairs asked Labor to extend support for asylum seekers as housing market worsens' (Guardian Australia online, 27 June 2023) https://www.theguardian.com/australia-news/2023/jun/11/home-affairs-asked-labor-to-extend-support-for-asylum-seekers-as-housing-market-worsens.
[58] Ibid.
[59] Ibid.
[60] Ibid.

70. The Law Council's view is that the immigration detention framework is fundamentally in need of reform, regardless of the approach taken by an individual Minister in relation to the exercise of their discretionary powers under sections 195A and 197AC of the Migration Act or the efforts of the Department to remove detainees to appropriate third countries.

71. It adds that caution should be exercised in assuming, with respect to the above media report that 'many people in long-term immigration detention were unlikely to meet existing guidelines for release due to "a criminal history including where their visa was subject to mandatory cancellation"', that this refers to serious offenders. The Law Council has previously outlined its concerns, with respect to the mandatory cancellation provisions under section 501 of the Migration Act, that the existing provisions are based on thresholds that are far lower than those contained in the definitions of 'serious offences' which apply in Commonwealth and NSW law.[61] That is, currently, mandatory visa cancellation will occur if a person has been sentenced to a term of imprisonment of 12 months or more.[62] The Law Council considers that this threshold is too low.

Detention statistics

72. The following table records basic immigration detention data at:

- 31 May 2021[63] (just after the Migration Amendment Act commenced),64
- 31 October 2022[65] (the date of the brief to the Minister); and
- the most recent data, as of 30 April 2023:[66]

	People in held detention	Average time in detention	Percentage detained for greater than one year	Percentage detained for greater than 1,825 days	People living in the community after a residence determination
31 May 2021	1,486 (of which 1,221 (82.2%) have a criminal history)	668 days	55.9 per cent	7.5 per cent	526
31 October 2022	1,315 (of which 1,198 (91.1 per cent) have a criminal history)	774 days	56.3 per cent	11.9 per cent	542
30 April 2023	1,128 (of which 1,018 (90.2 per cent) have a criminal history)	735 days	51.2 per cent	12 per cent	319

[61] To meet these definitions, certain offences must be punishable by imprisonment for at least three and five years respectively: *Crimes Act 1914* (Cth), s 15GE (2); *Crimes Act 1900* (NSW), s 4. See Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Strengthening the Character Test) Bill 2019,* 14 August 2019.
[62] The person must also be serving a sentence of imprisonment on a full-time basis in custody: Migration Act, s 501(3A).
[63] Migration Amendment Act, table in subsection 2(1).
[64] Department, 'Immigration Detention and Community Statistics Summary 31 May 2021' https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-may-2021.pdf.
[65] Department, 'Immigration Detention and Community Statistics Summary October 2022' https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-october-2022.pdf.
[66] Department, 'Immigration Detention and Community Statistics Summary 30 April 2023', https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-april-2023.pdf/.

73. This data suggests that while the number of people in detention facilities has dropped a little of the period, the proportion of long-term detainees has increased, and the average time a person is detained is two years. It is noted that the reference to 'criminal history' is not defined. This is also general data, which applies beyond the affected cohort.

74. Responses by the Department to questions on notice resulting from the Senate Standing Committee on Legal and Constitutional Affairs Supplementary Estimates on 13 February 2023[67] also provides some insight on the number of people in the affected cohort who are detained:

    - at 31 December 2022 there were 27 individuals in immigration detention who had either their Protection, Refugee or Humanitarian visa refused under section 501 of the Migration Act;[68]
    - 'currently' 48 individuals in immigration detention who have had either their Protection, Refugee or Humanitarian visa refused as they failed to satisfy subsection 36(1C) of the Migration Act; [69]
    - at 31 December 2022, there were 185 individuals in immigration detention who were initially determined to be owed protection obligations due to holding a Protection, Humanitarian, Refugee visa, but have now had their visa cancelled on character grounds;[70] and
    - at 31 December 2022, there were seven people in immigration detention who were initially determined to be owed protection obligations due to holding a Protection, Humanitarian and/or Refugee visa, but have now had their visa cancelled under section 116 of the Migration Act.[71]

75. During the Senate Standing Committee, the Department was also questioned on how many people in held immigration detention were found to be owed protection obligations,[72] and how many cannot be presently removed because they were subject to a protection finding as defined under section 197C of the Migration Act (essentially, the affected cohort).[73] The Department replied that this information is not readily accessible in a report format and that it would require manual interrogation of systems, which would represent unreasonable diversion of resources.[74] It is somewhat of a concern that the Department does not maintain a centralised record of the affected cohort and instead would appear to rely on adequate management of individual in each case.

76. In regard to adult detainees, the Law Council notes the following information provided by the Department in response to questions on notice asked at the Senate Standing Committee on Legal and Constitutional Affairs Supplementary Estimates on 13 February 2023[75] in relation to the health and wellbeing of people in immigration detention generally. Over the five years to 31 December 2022:

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[67] Commonwealth, *Senate Legal and Constitutional Affairs Legislation Committee Supplementary Budget Estimates*, Senate, 13 February 2023 (Senator Nita Green, Chair of Legal and Constitutional Affairs Legislation Committee).
[68] Ibid Question on notice no. 450.
[69] Ibid 451
[70] Ibid 448
[71] Ibid 449.
[72] Ibid 455
[73] Ibid 495.
[74] Ibid.
[75] Commonwealth, *Senate Legal and Constitutional Affairs Legislation Committee Supplementary Budget Estimates*, Senate, 13 February 2023 (Senator Nita Green, Chair of Legal and Constitutional Affairs Legislation Committee).

- there were 874 incidents of actual self-harm and 2180 incidents of threatened self-harm;[76]
- there were 2,283 detainees who received mental health counselling through a Detention Health Service Provider;[77]
- there were 692 detainees who received counselling through an external torture and trauma service provider;[78] and
- as of 31 December 2022, there were 21 deaths in immigration detention with five deaths occurring after the Migration Amendment Act commenced.[79]

Overarching concerns with the Migration Amendment Act regime

77. In its previous public submission, the Law Council identified in some detail several overarching concerns with amendments made by the Migration Amendment Act. These are summarised below.

Clarity regarding protection-related provisions

78. The Law Council recommends that consideration be given to redrafting the provisions in the Migration Act which relate to protection visas and protection findings, so that they are centrally located and easy to understand.

79. As set out above, the provisions establishing whether a person is subject to a 'protection finding' are complex, and require reading section 36 with subsection 197C and an understanding of international law.

80. It is a principle of the rule of law that the law be certain and clear.[80] The Law Council considers that this principle is of particular importance , given that the individuals affected by these provisions may have English, literacy or other barriers which undermine their ability to understand the legislation.

81. The Law Council recommends that section 36 and subsections 197C(4)-(6) be centralised and simplified so it is made clear which criteria for a protection visa, if satisfied, will result in the Australia's non-refoulement obligations being engaged in relation to a person.

82. Specifically, the Law Council suggests that clarity could be achieved by re-ordering and re-classifying the criteria in section 36 as:

    - criteria which, if satisfied, would result in Australia's non-refoulement obligations being engaged in relation to the person because:
        - the person is a refugee under the Refugees Convention;[81] or
        - owed complementary protection under the ICCPR or CAT;[82] and

[76] Ibid Question on notice no. 480.
[77] Ibid 483.
[78] Ibid
[79] Ibid 481.
[80] Law Council of Australia, *Policy Statement – Rule of Law Principles*, March 2011, Principle 1, https://www.lawcouncil.asn.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf (**Law Council Rule of Law Principles**).
[81] Section 5H, section 5G, paragraph 36(2)(a), subsection 36(1C) of the Act.
[82] Paragraph 36(2)(aa) and subsections 36(2A) and (2B) of the Act.

- other relevant criteria for the visa.[83]

83. If this were done, there would be no need to refer to extrinsic materials or apply international law expertise to understand when Australia had non-refoulement obligations in relation to a person.

84. The Law Council also considers there is a tension between:

    - subsection 197C(1) which provides that for the purposes of the obligation to remove an unlawful noncitizen in section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of that person; and
    - subsection 197C(3) which stays the obligation in section 198 if a protection finding has been made, the substance of which is that Australia's non-refoulement obligations are engaged.

85. The Law Council discussed this tension in greater detail in its previous public submission.[84]

Recommendation

- **The provisions in the Migration Act which relate to protection visas and protection findings should be redrafted so that it is clear when a person will engage Australia's non-refoulement obligations.**

New power to reconsider protection obligations

86. Subsection 197D(2) of the Migration Act permits the Minister to make a decision that a person subject to a protection finding is no longer a person in respect of whom a protection finding would be made. This enables the Minister, in effect, to revisit his or her assessment of Australia's non-refoulement obligations as they apply in relation to a person and to find that the person no longer engages those obligations.

87. The Department has advised, in response to questions taken on notice by the Senate Standing Committee on Legal and Constitutional Affairs Supplementary Estimates that as of 13 February 2023, there have been no decisions[85] or assessments[86] made or conducted under section 197D(2).

88. The Law Council reiterates the following observations about this power:

    - There are no criteria prescribing circumstances in which this power may be exercised. This is inconsistent with the principle of the rule of law that the law must be both readily known and available, and certain and clear.[87] While the Law Council notes that it was anticipated that a decision made under this power would be 'rare'[88] - that 'rarity' is not reflected in the legislation. The exercise of this power will be a matter entirely at the discretion of the Minister.

[83] Subsection 36(1B) and subsection 36(3), and in the case of a person who is owed complementary protection under the ICCPR or CAT: subsections 36(1C) and 36(2C).
[84] Law Council's previous public submission [35]-[38].
[85] Ibid 476.
[86] Ibid 496.
[87] Law Council Rule of Law Principles, Principle 1.
[88] Revised Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (Cth) 3.

- The provisions do not currently provide for key procedural fairness guarantees with respect to the decision under new subsection 197D(2). That is, it appears that the affected person will only be informed about the decision after it is made. This is inconsistent with the Law Council's policy with respect to the application of the rule of law to asylum seekers, that protection determination processes must include procedural fairness guarantees, such as the right to be notified, and to present and challenge evidence where adverse decisions are made.[89] The Law Council's Rule of Law Policy Statement also provides that Executive decision making should comply with the principles of natural justice.[90]

- The general concept of the reconsideration of a person's protection status conflicts with Australia's international obligations, as recognised in the Law Council's policy.[91] These require that Australia respect the internationally recognised right to seek asylum, and the system of refugee protection envisaged by the Refugee Convention, by providing durable (rather than temporary) protection outcomes for those found to invoke Australia's protection obligations.

89. For the above reasons, the Law Council's view is that the Migration Act should be not permit the Minister, on an own motion basis, to reconsider protection findings. However, if this provision is retained, it recommends that amendments should be included to make clear the rare circumstances in which the Minister may revisit the power and for the affected person to have had the opportunity to make submissions into that process. They should also provide for prior notice and the right to respond, prior to an adverse decision being taken.

Recommendation

- **Subsection 197D(2), which permits the Minister to make a decision that a person is no longer a person in respect of whom a protection finding would be made, should be repealed.**
- **If subsection 197D(2) is retained it should be amended to make clear the rare circumstances in which the Minister may revisit the power and for procedural fairness to be provided to the affected person.**
- **The PJCIS should ask the Department and Minister whether a decision has been made under this power, the circumstances in which a decision may ever be made under this power, and why it remains appropriate for this power to remain in the Migration Act.**

Use of delegated legislation to determine protection obligations

90. Subsection 197C(7) of the Migration Act permits the regulations to prescribe circumstances in which a protection finding will be made. There are no express criteria or limits as to the regulations which may be prescribed for the purposes of this provision. The Law Council is not aware of any regulations made under this power.

91. It is a principle of the rule of law that 'the scope of that delegated authority should be carefully confined'.[92] While the apparent purpose of this power is permissive—that is, to expand the circumstances in which a person may be recognised as engaging Australia's non-refoulement obligations—it is not so expressly conditioned. As a result, it would

[89] Law Council of Australia, *Asylum Seeker Policy*, https://www.lawcouncil.asn.au/publicassets/129a0b1b-bed6-e611-80d2-005056be66b1/Policy-Statement-Asylum-Seeker-Policy.pdf, Principle 9(e).
[90] And be subject to meaningful judicial review Law Council Rule of Law Principles Principle 6(d).
[91] Law Council of Australia, *Asylum Seeker Policy*, Principle 7(a).
[92] Law Council Rule of Law Principles, Principle 6a.

appear open, on its face, to prescribe circumstances which require a person to have taken certain steps which are not required under international law.

92. It remains the Law Council's view that subsection 197C(7) should be repealed, so that all circumstances in which a protection finding can be made—which reflects when Australia will be taken to have non-refoulement obligations in relation to a person—are set out in the Migration Act.

93. At the least, subsection 197C(7) should be amended to explicitly confine regulations to be prescribed for the purpose of it to do no more than reflect when Australia may have non-refoulement and related obligations under international law.[93]

Recommendation

- **The Law Council recommends that subsection 197C(7) be:**
  - **repealed; or**
  - **at least amended to ensure that any regulations which prescribe circumstances in protection finding will be made must reflect international obligations.**
- **The PJCIS should ask the Department and Minister whether they intend to recommend that the Governor-General make regulations under subsection 197C and why it remains appropriate for this power to remain in the Migration Act.**

[93] In particular, Article 3 and Article 22 of the *Convention on the Rights of the Child*, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49. In summary, these articles require, respectively, that in the best interests of the child shall be a primary consideration in all actions involving children, and that appropriate measures be taken to ensure that a child who is seeking refugee status or who is considered a refugee in shall receive appropriate protection and humanitarian assistance in the enjoyment of rights provided by the Convention.