Submission on the passage of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*

The Hon Karen Andrews MP, Minister for Home Affairs

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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.

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- 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
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- Law Society Northern Territory
- Law Society of Western Australia
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- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
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Acknowledgement

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

Executive Summary

1. A key objective of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (**Migration Amendment Act**) is to ensure that the *Migration Act 1958* (**Migration Act**) does not authorise or oblige an officer[1] to remove a person found to engage Australia's international obligations relating to non-refoulement to the country from which they seek protection, in breach of those obligations.[2]

2. The Law Council welcomes the amendments made by the Migration Amendment Act to the extent that they better ensure that the Migration Act is consistent with Australia's international obligations in relation to non-refoulement.

3. The Law Council has previously made submissions expressing the view that section 197C of the Migration Act did not, prior to these amendments, accord with Australia's international obligations relating to non-refoulement and it increased the likelihood that Australia will fail to meet its obligations under the Refugee Convention.[3]

4. A recent decision by the Federal Court highlighted this issue.[4] The Federal Court held that the removal of a person from Australia had not been carried out as soon as reasonably practicable, as required by the Act, because no steps had been taken to remove the person to a country from which they had been found to be owed protection.[5] The issues raised by this decision required an urgent response.

5. Given the complexity and importance of the relevant issues, it is also important that the amendments made by the Migration Amendment Act and the implications of those amendments be subject to appropriate levels of scrutiny and consultation in the coming period.

6. To this end, the Law Council encourages the Australian Government to consider further amendments to the Migration Act to ensure greater consistency with rule of law principles, and Australia's international obligations.

7. This submission sets out key recommendations to further enhance the effectiveness of the amendments made by the Migration Amendment Act. It also includes suggested reforms to ameliorate the risk that the Migration Amendment Act may increase the likelihood that persons who are found to engage Australia's protection obligations, but who are refused a visa on character or national security grounds, will be subject to indefinite immigration detention.

8. The Law Council's proposed reform principles would also bring the Migration Act more in line with other Commonwealth countries – which provide mandated safeguards on immigration detention more in keeping with international obligations (see high level summary of the Canadian scheme, as one point of comparison, in **Attachment A**) – and would reduce the very high costs of detention.

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[1] Defined in subsection 5(1) of the Migration Act as, relevantly, an officer of the Department, an officer for the purposes of the *Customs Act 1901*, a protective service officer for the purposes of the *Australian Federal Police Act 1979*, a police officer, or a person authorised by the Minister.
[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 March 2021, 2 (Alex Hawke, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs).
[3] Law Council of Australia, submission no 129 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *An inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, [129]-[134].
[4] *AJL20 v Commonwealth* [2020] FCA 1305.
[5] *AJL20 v Commonwealth* [2020] FCA 1305, [10] and [168]-[170].

9. The Law Council considers that there is an opportunity now to review and enhance the immigration detention scheme provided for by the Migration Act and would like to work with the Australian Government to achieve this.

Specific comments about the Migration Amendment Act (aside from immigration detention)

10. In relation to the amendments made by the Migration Amendment Act, putting aside for now the way its interactions with immigration detention, the Law Council has identified several implications regarding which it recommends consideration be given to addressing through amendments to the Migration Act – these are summarised below.

Clarity regarding protection-related provisions

11. 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.

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

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

        a. a refugee (under the Refugees Convention);[6] or

        b. owed complementary protection (under the International Covenant on Civil and Political Rights[7] (**ICCPR**) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[8] (**CAT**)); 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 Act – it requires consultation with extrinsic materials and an understanding of international law. There are criteria which, while applying to all protection visas, only affect the content of Australian non-refoulement obligations under the Refugees Convention, but not the ICCPR and CAT.[9]

14. The Migration Amendment Act introduces the term 'protection finding' into the Migration Act to capture those persons who may have been found to engage Australia's non-refoulement obligations (due to satisfying the criteria in (i)), but do not hold a protection visa (due to not satisfying the criteria in (ii) or a refusal or cancellation on character grounds).[10]

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[6] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).
[7] *International Covenant on Civil and Political Rights* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
[8] *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)
[9] For example, subsection 36(1C) of the Migration Act, if satisfied, will affect whether Australia has non-refoulement obligations under the Refugees Convention, but not under ICCPR and CAT.
[10] That is, under section 501, 501A, 501B or 501BA of the Migration Act.

15. 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 but the visa being refused on some other grounds. These subsections are drafted in long form and need to be read with section 36, which itself is complex.

16. It is a principle of the rule of law that the law be certain and clear.[11] The Law Council considers that this principle is of particular importance here, given the individuals affected by these provisions may have English, literacy or other barriers which undermine their ability to understand the legislation.

17. 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.

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

- 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;[12]
    - owed complementary protection under the ICCPR or CAT;[13]
- other relevant criteria for the visa.[14]

19. 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.

Recommendation

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

Use of delegated legislation to determine protection obligations

20. New 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.

[11] 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.
[12] Section 5H, section 5G, paragraph 36(2)(a), subsection 36(1C) of the Act.
[13] Paragraph 36(2)(aa) and subsections 36(2A) and (2B) of the Act.
[14] 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).

21. It is a principle of the rule of law that ‘the scope of that delegated authority should be carefully confined’.[15]

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

23. Any regulations made for the purpose of subsection 197C(7) would need to be consistent with the Migration Act,[16] which may effectively confine the scope of regulations that can be validly be made for that purpose. However, under present drafting it would be necessary for a person aggrieved by the scope of any such regulations to challenge their validity in court – a time-consuming and expensive process.

24. This risk, and the lack of clarity about the provision in general, could be obviated by either of the following amendments to the Migration Act:

- preferably, repealing subsection 197C(7) altogether, and instead require any further circumstances in which Australia will be taken to have non-refoulement obligations in relation to a person to be given effect through amendments to the Act itself; or

- amending subsection 197C(7) 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.[17]

25. The former approach would be more consistent with the Law Council’s proposal in paragraph 18 to exhaustively capture non-refoulement obligations through explicit criteria in section 36.

Recommendation

The Law Council recommends that subsection 197C(7) either be:

- **repealed; or**
- **amended to ensure that any regulations which prescribe circumstances in protection finding will be made must reflect international obligations.**

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[15] Law Council of Australia (no 11), Principle 6a.
[16] See subsection 504(1) of the Act.
[17] 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.

New power to reconsider protection obligations

26. New subsection 197D(2) of the Migration Act will permit the Minister to make a decision that a person is no longer a person in respect of whom a protection finding would be made.

27. The Law Council makes the following observations about this new 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.[18] The Law Council notes that the Explanatory Memorandum for the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (**Migration Amendment Bill**) suggests it will be 'rare' that the Minister will revisit protection findings. While the Law Council acknowledges that, under the legislation as drafted, this will be a matter entirely at the discretion of the Minister – that 'rarity' is not reflected in the legislation.

    - 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.[19] The Law Council's Rule of Law Policy Statement also provides that Executive decision making should comply with the principles of natural justice.[20]

    - 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.[21] 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.

28. 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.

29. The Law Council supports the provision for merits review of the Minister's decision under this new power. Therefore if, contrary to its primary recommendations above, the Act is to contain the power, consistent with the Law Council's policy with respect to administrative decisions concerning protection status,[22] it should be merits-reviewable. However, the Law Council notes that the introduction into the Migration Act of a new

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[18] Law Council of Australia (no 11), Principle 1.
[19] 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).
[20] And be subject to meaningful judicial review: Law Council of Australia, *Rule of Law Policy Statement*, https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf Principle 6(d).
[21] Law Council of Australia, *Asylum Seeker Policy*, Principle 7(a).
[22] Ibid, Principle 7(b)(iii).

type of administrative decision will likely add to an already over-burdened Department, Administrative Appeals Tribunal (**AAT**) and court system. This is due to applications for merits-review of those decisions, and then applications to the Federal Circuit Court for judicial review of the resulting AAT decisions (and, in turn, appeals to the Federal Court from those decisions). As this is a new statutory scheme, applications may raise new grounds which test the scope of the scheme which will need to be adjudicated by the courts.

30. The Law Council submits that careful monitoring of the likely additional pressures on the AAT and courts may be needed in light of these amendments. Should additional budgetary resources be required, it submits that consideration should be given to offsetting savings measures which do not undermine individuals' access to justice. It would be happy to engage on this question further with the Department.

Recommendation

> **The Law Council recommends that 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, be repealed.**

Statutory timeframe for review decisions

31. New section 419 provides that the AAT must decide any application for review of a decision made by the Minister within 'the prescribed period', which will be a period prescribed in the *Migration Regulations 1994*.

32. The Law Council generally considers that decisions of this kind – which will determine whether a person engages Australia's protection obligations and therefore is liable to be removed to the place from which they seek protection – should not be subject to any statutory timeframe or prescribed in regulations.[23] Such decisions, as noted above, currently lack procedural fairness guarantees in relation to the original decision of the Minister.

33. Given the nature of the decision being reviewed, it is particularly important to ensure adequate time is afforded for a person to bring an application. Should a short period of review be prescribed, this may truncate the capacity for a person to obtain a fair hearing. Further, the legal profession's practical experience is that delays are common in hearing matters, and that persons who would be affected by this power (particularly those in detention) often have substantial difficulties in bringing forward review applications.

34. As a result, the Law Council suggests that consideration be given to amendments which remove the ability to prescribe the period for review altogether, consistent with all other reviewable decisions under the Migration Act. However, in lieu of such amendments, the Law Council recommends that a reasonable period – sufficient to allow the applicant to seek legal representation, access relevant material and put together an appropriate application – be prescribed.

Recommendation

The Law Council recommends that:

[23] The Law Council's Rule of Law Policy states that the 'scope of delegated authority should be carefully confined': Law Council of Australia, *Rule of Law Policy Statement*, Principle 6(a).

- **section 419 be amended so that the AAT's review a decision by the Minister to annul a previous protection finding is not required to occur within a prescribed period; or**
- **if the above recommendation is not accepted, a reasonable period which ensure a person is given proper opportunity to put their application for review.**

Further clarification regarding section 197C

35. The Migration Amendment Act did not address subsections 197C(1) and (2) of the Migration Act, which now effectively provide that unless Australia has non-refoulement obligations (ie, subsection 197C(3) applies) in relation to a person, for the purposes of removal:

    - 'it is irrelevant whether Australia has non-refoulement obligations in relation to the person': subsection 197C(1); and
    - the duty to remove a person arises 'irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen': subsection 197C(2).

36. There is an evident strain between subsections 197C(1) and (3), in that subsection (1) provides that non-refoulement obligations are irrelevant to removal, and subsection (3) provides that not only are they relevant, they override the obligation to remove the person. From a statutory interpretation perspective, it is difficult to see what useful work subsection 197C(1) has to do, which could result in further ambiguity as to the powers and obligations of immigration officers.

37. In its terms, subsection 197C(2) appears to permit removal, even if a person claims to be owed protection and those claims have not been assessed (the subsection may not be affected by subsection 197C(3)), which only applies once a protection finding has been *made* in relation a person). A provision which operates in this way may remain inconsistent with Australia's non-refoulement obligations. The Law Council suggests that if there is some legitimate purpose to be served by this provision, it should be more clearly expressed in the Migration Act.

38. According to the Explanatory Memorandum for the Migration Amendment Bill, section 197C was initially inserted into the Migration Act in 2014 'to deter the making of unmeritorious protection claims as a means to delay an applicant's departure from Australia'. The Law Council can see the benefit of this objective, but suggests that a legislative scheme more directly addressed to this issue, having regard to best international practice, may mitigate the possibility that the provision may unintentionally undermine Australia's international obligations relation to non-refoulement.

Recommendation

The Law Council recommends that section 197C be amended to better reflect international obligations and to ensure the section properly gives effect to its purpose.

Implications of the Bill for immigration detention

39. In his Second Reading Speech introducing the Migration Amendment Bill, the Hon Alex Hawke MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, stated:[24]

> *This is an important change which will further improve our ability to ensure that we uphold Australia's non-refoulement obligations. It is essential that Australia sends a strong message that we are committed to upholding human rights, and that we remain steadfast in our commitment to these treaties and their underlying principles.*

40. The Law Council agrees with and welcomes these comments. It also suggests that they provide a useful starting point for consideration of Australia's broader international obligations relating to human rights as applied to its scheme for immigration detention.

Overview of Australia's international obligations relating to immigration detention

41. Australia has obligations under the International Covenant on Civil and Political Rights (**ICCPR**) not to subject a person to arbitrary detention.[25] The position in international law is that immigration detention should not in itself be arbitrary, but detention 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 reassessed as it extends in time.[26]

42. According to the Detention Guidelines published by the United National High Commissioner for Refugees, in 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.[27]

43. 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.[28]

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[24] Alex Hawke, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (n 2).

[25] *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.

[26] UN Human Rights Committee, *General comment No. 35*, CCPR/C/GC/35 [18].

[27] UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) 21-34.

[28] Ibid, 35-42.

Migration Amendment Act increases the prospect of prolonged immigration detention

44. The Law Council considers that the Migration Amendment Act is likely to entrench prolonged immigration detention for persons who are found to engage Australia's protection obligations but refused a protection visa on other grounds.

45. Under the Migration Act, a person without a visa must be detained until they are removed, deported or granted a visa.[29] A person who has been found to engage Australia's protection obligations, but who is refused a protection visa on other grounds will be detained in a detention centre and must be removed as soon as reasonably practicable[30] unless:

    - they are granted another visa by the Minister under section 195A of the Migration Act; or
    - subject to a residence determination by the Minister under section 197AB of the Migration Act.

46. Following these amendments, the possibility of a person being removed (refouled) to their home country is no longer a relevant consideration for such a person in any decision of the Minister under those powers which will affect their ongoing detention.[31]

47. As a result, unless a country can be found to which to remove a person, such a person faces the prospect of prolonged immigration detention, without any means or basis to seek or require consideration of their personal circumstances – despite being found to be owed protection.

48. While, as noted, the Law Council supports amendments to foreclose the possibility of refoulement, it considers that Australia's international obligations require the Migration Act to mandate more active consideration of the individual circumstances of the detained person, in particular the necessity, reasonableness and proportionality of their detention, including any risks posed to the community, and ensuring that detention is a measure of last resort.

49. 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'.[32] 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]'.[33]

50. The Law Council notes, however, that these powers are non-compellable and do not require ongoing consideration of the necessity, reasonableness and proportionality of detention in light of a person's particular circumstances. That is, there is no statutory requirement that the factors material to the necessity, reasonableness and proportionality of detention on each individual person be considered, either initially or on an ongoing basis.

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[29] Section 196 of the Migration Act.
[30] Section 198 of the Migration Act.
[31] Section 197C(3) of the Migration Act.
[32] Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (Cth), 14.
[33] Ibid.

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

52. The Law Council considers that stronger legislative safeguards are needed.

Principles for reconsidering the scheme for immigration detention

53. Given such issues raised with respect to the Migration Amendment Act, the Law Council suggests that it is timely to revisit current mandatory detention regime under the Act more generally, for the following reasons.

Compliance with international obligations

54. 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*'.[34]

55. Accordingly, there is a clear opportunity to amend the Migration Act to address these issues.

56. The Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights both raised doubts as to whether the Migration Act as amended by the Migration Amendment Act would be consistent with Article 9 of the ICCPR as it relates to persons found to engage Australia's protection obligations but refused a visa on other grounds.[35]

57. The Law Council is aware that it is Australian Government policy that 'held detention (in an immigration detention centre) is a last resort for the management of unlawful non-citizens' and that Australia takes a 'risk-based approach' in determining whether a person is held in an immigration detention centre.[36] The Law Council is also aware it is the Australian Government's policy that children are not held in immigration detention centres at all,[37] and that as of 18 February 2021, there were fewer than five children held in alternative places of detention and 181 children in the community under residence determination.[38]

58. Australian law ought to reflect these policies in its laws. 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 at all times. Enshrining such a framework in legislation will enable Parliamentary scrutiny of their content, clarity as to the rights and obligations applied

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[34] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/6 (2017) [38].
[35] Standing Committee for the Scrutiny of Bills and Parliamentary Joint Committee on Human Rights, Parliament of Australia (n 4).
[36] Commonwealth of Australia, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Australia*, A/HRC/WG.6/37/AUS/1 (28 December 2020), [124] - https://undocs.org/A/HRC/WG.6/37/AUS/1.
[37] Ibid, 126.
[38] Department of Home Affairs, *Immigration Detention and Community Statistics Summary* 28 February 2021, 12.

to persons affected by them, and meaningful judicial oversight of its operation, consistent with rule of law principles.

Sustainability

59. Issues regarding the cost and duration of immigration detention challenges the sustainability of the current framework and further draws attention to the need for durable solutions consistent with the rule of law and Australia's international obligations.

60. Holding people in immigration detention is expensive and in Australia, the average duration of detention is as high as has ever been recorded – 627 days at 28 February 2021.[39]

61. The Law Council notes that the 2021-22 Budget budgeted for over $1.2 billion to be spent on onshore compliance and detention in the forthcoming financial year, and around $1 billion per year over the forward estimates.[40] The average estimate actual expenditure on onshore compliance over the last five financial years is $1,311,575,400.

62. This item includes expenditure on services other than running detention centres, and the cost of running onshore detention centres is not particularised. However, noting that recent monthly figures reported by the Department indicate that 1,500 are in held detention at any particular time, and that the estimated average per annum cost of a detainee in an immigration detention facility in 2019-20 was **$362,000** per person,[41] the cost of holding running immigration detention centres might be estimated at $545 million per annum.

63. In contrast, the estimated average annual cost of supporting an individual:

- on a bridging visa was **$4,429** in 2019-20;[42] and
- in community detention was **$103,343** in 2017-2018.[43]

64. Further, the 2021-22 Budget budgeted for expenditure of $464.7 million over two years ($201.8 million in 2020-21 and $262.8 million in 2021-22) to 'increase the capacity of the onshore Immigration Detention Network and to extend use of the North West Point Immigration Detention Centre on Christmas Island'.[44] This measure is intended to addresses ongoing capacity pressures resulting from the COVID-19 pandemic on Australia's ability to remove unlawful non-citizens from this country.[45]

65. However, these figures all present significant taxpayer costs, at a time in which the federal budget has been significantly stretched given the COVID-19 pandemic, given the necessary and welcome broader measures adopted by the Australian Government to address its many challenges.

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[39] Ibid.
[40] Portfolio Budget Statements 2021–22 Budget Related Paper No. 1.8, *Home Affairs Portfolio*, 53.
[41] Department of Home Affairs, *Response to Question on notice no. 326* asked on 6 November 2020, Budget Estimates, Legal and Constitutional Affairs Committee, Home Affairs Portfolio (Portfolio question number: LCC-BE20-326).
[42] Department of Home Affairs, *Response to Question on notice no. 327* asked on 6 November 2020, Budget Estimates, Legal and Constitutional Affairs Committee, Home Affairs Portfolio (Portfolio question number: LCC-BE20-327).
[43] Commonwealth, *Estimates,* Senate, 21 May 2018 (Ms Stephanie Cargill, Acting First Assistant Secretary, Finance Acting Chief Finance Officer).
[44] Budget Measures Budget Paper No. 2 2021–22, 131.
[45] Ibid.

66. In light of these overarching constraints, the Law Council suggests that it is timely to consider measures which alleviate budgetary pressures with respect to immigration detention, as well how best to avoid new potential pressures.

Experience of comparable countries

67. The position of Canada may be instructive as a point of reference. **Attachment A** contains a high-level comparative analysis with Australia. In Canada, unlike Australia:

- immigration detention is not mandatory for most persons;
- there must be regular review of a person's detention;
- a person must be released from detention unless satisfied the person is a danger to the
- public or enquiries are still being made as to whether a person is admissible for a visa grounds of security, violating human or international rights, serious criminality, criminality or organized criminality; and
- there are mandated factors to consider when making a decision to detain a person, including their length of detention and the existence of alternatives to detention.

68. This is based on an initial analysis.

69. The Law Council further notes that in Canada, over the 2019-2020 period, the average period of time for people held in detention facilities was 13.9 days.[46] During that time, the proportion of persons detained for longer than 99 days (the highest reported number) in Canada was 3 percent. In contrast, in Australia as at 28 February 2021, the proportion of persons detained for longer than 92 days is 81.8 percent and 6.9 percent of those had been detained for longer than 1,825 days.

70. It is difficult to precisely compare the expenditure on the detention and compliance network in Australia and Canada, given they each use different definitions. However, in 2019-20, the spending on the detention program in Canada was $71.38m,[47] which is 13 percent of the cost of Australia's held detention network alone, based on the figures calculated above.

Proposed approach

71. Specifically, the Law Council considers that in order to ensure the scheme for immigration detention in the Migration Act is consistent with these rule of law principles and international obligations, the Migration Act should:

- be based on a presumption that a person will not be detained;
- 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 principles articulated under international law – for example, having regard to a person's individual likelihood of absconding, or the danger of crimes against others, or risk of acts against national security;
- provide for procedural fairness in relation to that decision;
- provide for review by the AAT of that decision;

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[46] Canada Border Service Agency, Annual detention, fiscal year 2019 to 2020, https://www.cbsa-asfc.gc.ca/security-securite/detent/stat-2019-2020-eng.html.

[47] Government of Canada, *Infographic for Canada Border Services Agency*, https://www.tbs-sct.gc.ca/ems-sgd/edb-bdd/index-eng.html#orgs/dept/26/infograph/financial, accessed on 20 May 2021.

- provide for periodic review of detention by the Minister (or official);
- permit a person to compel review of detention by the Minister in certain circumstances.

72. 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 obligations to which Australia has committed.

73. Amendments of this kind would bring Australia more into line with the immigration detention regimes provided for by other Commonwealth countries, whose codified immigration detention regimes appear founded on a presumption against detention and provide for detention in only very limited circumstances which are more consistent with international obligations. These other regimes could be used as a basis for a review and amendments.[48]

Recommendation

The Law Council recommends that the Migration Act should:

- **be based on a presumption that a person will not be detained;**
- **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 principles articulated under international law – for example, having regard to a person's individual likelihood of absconding, or the danger of crimes against others, or risk of acts against national security;**
- **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.**

[48] See, for example: Division 6 of Part 1 of the *Immigration and Refugee Protection Act* S.C. 2001, c. 27; Part 9 of the *Immigration Act 2009* (NZ).