Chapter 2

Concluded matters

2.1 This chapter considers responses to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is available on the committee's website.[1]

Bill

Crimes and Other Legislation Amendment (Omnibus) Bill 2023[2]

Purpose	This is an omnibus bill that seeks to make numerous amendments to crime-related legislation, including amendments that seek to update, improve and clarify the intended operation of key provisions administered by the Attorney General's portfolio.
Portfolio	Attorney-General
Introduced	House of Representatives, 29 March 2023
Rights	Life and security of person

2.3 The committee requested a response from the minister in relation to the bill in *Report 5 of 2023*.[3]

Suspension of witness protection and assistance

2.4 Schedule 9 of this bill seeks to amend the *Witness Protection Act 1994* (Witness Protection Act) to enable the temporary suspension of a participant's protection and assistance provided under the National Witness Protection Program

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes and Other Legislation Amendment (Omnibus) Bill 2023, *Report 6 of 2023*; [2023] AUPJCHR 56.

3 Parliamentary Joint Committee on Human Rights, *Report 5 of 2023* (9 May 2023), pp. 20-25.

(Protection Program).[4] The bill provides that the Commissioner of the Australian Federal Police (AFP) or a delegate may suspend a participant's protection and assistance either on the request of the participant or at the discretion of the AFP.[5] Regarding the latter, protection and assistance may be suspended if, in the opinion of the Commissioner, the participant has done or intends to do something that limits, or would limit, the Commissioner's ability to provide adequate protection and assistance, and in the circumstances of the case, protection and assistance should be suspended.[6] The length of suspension in this context is determined by the Commissioner and may be extended or revoked by the Commissioner.[7]

2.5 The bill provides that if the Commissioner decides to suspend a participant's protection or assistance, they must take reasonable steps to notify the participant of that decision.[8] Within seven days of receiving the notification, a participant may apply to the Deputy Commissioner for a review of that decision, unless the decision was made personally by the Commissioner, in which case review is not available.[9]

2.6 The effect of a suspension means that the AFP must not provide protection or assistance to the participant while the suspension is in effect unless the Commissioner is satisfied that, in the circumstances, it is necessary and reasonable for the protection or assistance to be provided despite the suspension. The bill clarifies that a suspension does not result in the person ceasing to be a participant in the Protection Program while the suspension is in effect.[10]

Summary of initial assessment

Preliminary international human rights legal advice

Right to life and security of person

2.7 Suspending protection or assistance for a participant in the witness protection program at the discretion of the AFP may expose the participant to possible harm. As a result, the measure engages and may limit the rights to life and security of person. The right to life imposes an obligation on the state to protect

4 Schedule 9, part 2.

5 Schedule 9, part 2, item 4, new sections 17A and 17B. Item 5 provides that the Commissioner's powers in sections 17A and 17B may be delegated to an Assistant Commissioner. The Assistant Commissioner may, by writing, sub-delegate the power to a Commander or Superintendent in the AFP, who may exercise the power if the circumstances are serious and urgent.

6 Schedule 9, part 2, item 4, new section 17B.

7 Schedule 9, part 2, item 4, new subsection 17B(3).

8 Schedule 9, part 2, item 4, new subsection 17B(4).

9 Schedule 9, part 2, item 4, new section 17C.

10 Schedule 9, part 2, item 4, new subsections 17A(5)–(7) and 17B(5)–(7).

people from being killed by others or identified risks, including by enacting a protective legal framework and adopting special measures of protection for vulnerable persons, including victims of domestic and gender-based violence, and children.[11] The right to security of person concerns freedom from injury to the body and the mind or bodily and mental integrity, and requires the state to take steps to protect people against interference with personal integrity by others (including any governmental or private actors).[12] This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation, including providing protection for witnesses against retaliation.[13]

2.8 The rights to life and security of the person may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

Committee's initial view

2.9 The committee considered further information was required to assess the compatibility of this measure with the rights to life and security of person, and as such sought the Attorney-General's advice as to:

(a) what types of actions or circumstances would limit the AFP's ability to provide adequate protection or assistance to a participant;

(b) why it is appropriate that a participant's protection and assistance be suspended where they do something that 'limits' the AFP's ability to provide protection and whether this threshold should be higher, such as 'significantly limits';

(c) why it is necessary for the Commissioner's power to suspend protection and assistance to extend to possible future actions of a participant;

(d) how the Commissioner would assess an appropriate time period for the suspension to have effect and whether the Commissioner would be required to regularly review the case to assess whether circumstances have changed such that protection and assistance should be reinstated;

11 International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1. UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3], [20] and [23]. At [3], the UN Human Rights Committee stated that the right should not be interpreted narrowly and it 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

12 International Covenant on Civil and Political Rights, article 9(1). UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)* (2014) [3].

13 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)* (2014) [9].

(e) why decisions to suspend protection or assistance made by the Commissioner personally are not reviewable, noting the importance of the availability of review as a safeguard and the potentially significant consequences for a participants' rights of such a decision; and

(f) whether any less rights restrictive alternatives could achieve the same stated objective.

2.10 The full initial analysis is set out in Report 5 of 2023.[14]

Minister's response[15]

2.11 The minister advised:

a) What types of actions or circumstances would limit the Australian Federal Police's (AFP) ability to provide adequate protection or assistance to a participant

In order to exercise its powers and functions, such as providing protection and assistance to participants under the National Witness Protection Program (NWPP), the AFP must have legal jurisdiction to do so. Any activities that restrict or impede the AFP's ability to control or intervene in a situation could limit the AFP's ability to provide adequate protection or assistance. For example, if a participant were to put themselves in a situation that would place them outside the AFP's jurisdiction.

b) Why it is appropriate that a participant's protection and assistance be suspended where they do something that 'limits' the AFP's ability to provide protection and whether this threshold should be higher, such as 'significantly limits'

Whilst voluntary, participation in the NWPP is undertaken to provide protection and assistance to witnesses who are identified as having a significant level of threat to their safety. Any restrictions placed on participants are to protect their health, safety and wellbeing. As such, any limitation of the AFP's ability to provide protection and assistance is significant as it could have serious consequences (for example, result in death or serious injury to the participant).

The purpose of the suspension provisions in proposed sections 17A and 17B is to provide an alternative solution to terminating a participant from the NWPP in circumstances where the AFP is unable to provide adequate protection and assistance, as a result of the participants' actions or future actions. Temporarily suspending protection and assistance is significantly less restrictive for the participant than having to terminate the individual's participation in the NWPP entirely, as it allows for protection and

14 Parliamentary Joint Committee on Human Rights, *Report 5 of 2023* (9 May 2023), pp. 20-25.

15 The minister's response to the committee's inquiries was received on 19 May 2023. This is an extract of the response. The response is available in full on the committee's website.

assistance to be reinstated as soon as the circumstances limiting the AFP's ability to provide this protection and assistance are resolved.

c) Why it is necessary for the Commissioner's power to suspend protection and assistance to extend to possible future actions of a participant

Extending the ability to suspend protection and assistance to cover possible future actions of participants ensures that, in the event the AFP is aware that the participant intends to do something that may limit the AFP's ability to provide adequate protection and assistance, the AFP is able to take steps to respond to the emerging circumstances. For example, in cases where the AFP becomes aware that a participant intends to put themselves outside the AFP's jurisdiction. In these circumstances, the Commissioner may decide to temporarily suspend the participant's protection and assistance for the period of time that the AFP is unable to provide protection and assistance.

As outlined in paragraph 268 of the notes on clauses in the Explanatory Memorandum, suspension of protection and assistance takes effect at a time determined by the Commissioner, or at a time the Commissioner decides to suspend the protection and assistance. This allows for the decision maker to respond appropriately to operational circumstances that may warrant either an immediate or delayed commencement of the suspension of protection and assistance.

When making a decision about whether to suspend protection or assistance for a participant, proposed subsection 17B(1) appropriately requires that the AFP Commissioner must be satisfied that the circumstances of the case warrant the suspension of protection and assistance.

d) How the Commissioner would assess an appropriate time period for the suspension to have effect and whether the Commissioner would be required to regularly review the case to assess whether circumstances have changed such that protection and assistance should be reinstated

It is anticipated that the majority of suspensions under proposed sections 17A and 17B will be for short periods of time and will depend on the circumstances of each case. Proposed subsection 17B(3) requires that the duration of a suspension must be reasonable in all circumstances and the decision may be revoked if the Commissioner is satisfied that paragraph 17B(1)(a) or (b) no longer applies. Once the reason for suspension has ceased, these provisions would support the rapid reinstatement of protection and assistance for that participant.

e) Why decisions to suspend protection or assistance made by the Commissioner personally are not reviewable, noting the importance of the availability of review as a safeguard and the potentially significant consequences for a participants' rights of such a decision

As outlined in paragraph 280 of the Explanatory Memorandum, it is already the case under the Witness Protection Act that some decisions made personally by the Commissioner are not subject to merits review. One example of this is the Commissioner's power under paragraph 18(1)(a) to terminate an individual's participation in the NWPP.

Consistent with this approach, it is my view that decisions made personally by the Commissioner under new subsection 17A(1), should not be subject to merits review, as decisions to suspend the provision of protection and assistance at the request of the participant are unlikely to have a significantly adverse impact on the rights and interests of the individual.

For suspension decisions made under new section 17B of the Bill, in situations where protection and assistance may be suspended as a result of the actions (or intended actions) of the participant, I consider it is appropriate to provide for internal review of these decisions. I will undertake to amend the Bill to ensure these decisions may be subject to internal review. Further, I note that in these circumstances, external merits review would not be appropriate due to the need to limit knowledge of a participant's individual circumstances and the broader administration of the NWPP.

f) Whether any less rights restrictive alternatives could achieve the same stated objective

Currently, in situations where the AFP's ability to provide protection or assistance may be limited, participants must be considered for termination from the NWPP and may be required to undertake a full re-assessment process to re-enter the program. This process can be both time and resource intensive.

The intended purpose of proposed sections 17A and 17B is to create flexibility in how the AFP can respond to participants' actions (or intended actions) where these limit the AFP's ability to provide them with protection and assistance under the NWPP. Temporarily suspending the provision of protection and assistance is significantly less restrictive for the individual than terminating their participation in the NWPP. Further, proposed subsections 17A(6) and 17B(6) allow for protection and assistance to be provided, regardless of a suspension, if the Commissioner is satisfied that, in the circumstances, it is necessary and reasonable to do so.

Concluding comments

International human rights legal advice

2.12 The preliminary analysis noted that the measure likely pursues a legitimate objective for the purposes of international human rights law, that is, to increase the Commissioner's flexibility to enable the temporary suspension, rather than termination, of protection or assistance, and would be rationally connected to that objective. The key question is whether the proposed limitations on the rights to life

and security of person are proportionate to the objective being sought. In this respect, further information was sought regarding the scope of the discretionary power conferred on the Commissioner and the manner of its exercise. The Attorney-General advised that any activity that restricts or impedes the AFP's ability to control or intervene in a situation could limit the AFP's ability to provide adequate protection and assistance, such as where a participant places themselves outside the AFP's jurisdiction. The Attorney-General stated that extending the suspension powers to cover possible future actions ensures that the AFP can take steps to respond to emerging circumstances, such as where the AFP becomes aware that a participant intends to put themselves outside the AFP's jurisdiction. The type of actions that may trigger the exercise of the Commissioner's powers appears to be quite broad, encompassing both past and future actions, and it remains unclear exactly what type of actions (other than a participant placing themselves outside the AFP's jurisdiction) would, in practice, result in a suspension of protection or assistance.

2.13 As to the threshold at which the AFP's ability to provide protection would be limited, the Attorney-General advised that any limitation on the AFP's ability to provide protection and assistance is significant as it could have serious consequences, for example, it could result in death or serious injury to the participant. Given the severity of the consequences of not providing a participant with protection or assistance, it remains unclear why the threshold for suspending protection should not be limited to actions that 'significantly limit' (rather than simply 'limit') the Commissioner's ability to provide protection and assistance.

2.14 Regarding the length of time for which a suspension would have effect, the Attorney-General advised that it is anticipated that the majority of suspensions will be for short periods of time and will depend on the circumstances of each case. The Attorney-General noted that, as set out in proposed subsection 17B(3), the duration of the suspension must be reasonable in all the circumstances and the suspension may be revoked if the circumstances justifying the suspension no longer apply. This provision may operate as a safeguard to mitigate the risk of a suspension being in force for longer than is necessary. This safeguard would be strengthened if the Commissioner was required to regularly review the case to assess whether circumstances have changed such that protection and assistance should be reinstated and to reinstate protection where the circumstances justifying the suspension cease to apply, noting that this power is currently drafted in discretionary terms.

2.15 Regarding the existence of safeguards, as noted in the preliminary analysis, the ability to provide protection or assistance despite the suspension if considered reasonable and necessary for the assistance to be provided, and the availability of review in certain circumstances, could operate as important safeguards. However, as currently drafted, the bill excludes internal review of decisions made personally by

the Commissioner.[16] The Attorney-General advised that when a participant requests to suspend protection and assistance it is unnecessary to have internal merits review of such decisions, as such decisions are unlikely to have a significantly adverse impact on the rights and interests of the individual. However, in relation to decisions of the Commissioner to suspend protection or assistance based on the actions (or intended actions) of the participant (under section 17B), the Attorney-General advised that he planned on placing amendments to the bill to ensure these decisions may be subject to internal review. The Attorney-General noted that external merits review, however, would not be appropriate due to the need to limit knowledge of a participant's individual circumstances and the broader administration of the Protection Program. Were the bill to be amended to extend the availability of internal review to decisions made by the Commissioner personally pursuant to proposed section 17B, this would significantly assist with proportionality.

2.16 In conclusion, while the measure is accompanied by some important safeguards, concerns remain that the measure may not be sufficiently circumscribed having regard to the broad scope of the Commissioner's powers and the potentially low basis for suspending protection or assistance. As such, depending on how the AFP exercises its power to suspend protection and assistance in practice, there may be a risk that the proposed limitations on the rights to life and security of the person would not, in all circumstances, be proportionate.

Committee view

2.17 The committee thanks the Attorney-General for this response. As set out in the initial analysis, the committee welcomes those measures in this bill that would promote human rights, particularly expanding the scope of the mandatory ground of refusal with respect to mutual assistance requests to apply in situations where granting the request would result in a substantial risk of torture of any person, and expanding the matters to which Public Interest Monitors may make submissions.

2.18 In relation to providing the Commissioner with the discretion to suspend a participant’s protection or assistance in the National Witness Protection Program, the committee considers that the measure likely pursues a legitimate objective for the purposes of international human rights law. That is, to increase the Commissioner's flexibility to enable the temporary suspension, rather than termination, of protection or assistance, and would be rationally connected to this objective. The committee considers the measure is accompanied by some important safeguards. In particular, the committee welcomes the Attorney-General's undertaking to amend the bill to ensure decisions made by the Commissioner personally to suspend protection or assistance pursuant to proposed section 17B may be subject to internal review. The committee considers access to review to be an important safeguard in light of the potential severity of the consequences of

16 Schedule 9, part 2, item 4, new paragraph 17C(1)(b).

suspending protection and assistance on participants' rights to life and security of person.

2.19 However, the committee notes that some concerns remain as to whether the measure is sufficiently circumscribed given the broad scope of the Commissioner's powers and the potentially low basis for suspending protection or assistance. As such, the committee considers that, depending on how the suspension powers are exercised in practice, there may be a risk that the proposed limitations on the rights to life and security of the person would not, in all circumstances, be proportionate.

Suggested action

2.20 The committee considers the proportionality of this measure may be assisted were the bill amended to:

(a) require the Commissioner to regularly review a suspension decision to assess whether the circumstances of the case have changed such that protection and assistance should be reinstated;

(b) require the Commissioner to revoke a suspension of protection and assistance where the Commissioner is satisfied that the circumstances of the case that justified the suspension no longer apply;[17] and

(c) increase the threshold for suspending protection and assistance to actions that 'significantly limit' (rather than 'limit') the Commissioner's ability to provide protection and assistance under the Protection Program.[18]

2.21 The committee recommends that the statement of compatibility be updated to reflect the information provided by the Attorney-General.

2.22 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

17 See Schedule 9, item 4, proposed paragraph 17B(3)(c).

18 See Schedule 9, item 4, proposed paragraph 17B(1)(a).

Legislative instruments

Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 2023[1]

Purpose	These regulations facilitate Australia's bilateral arrangements for intercountry adoptions by prescribing the Republic of Korea and Taiwan as overseas jurisdictions for the purposes of section 111C of the *Family Law Act 1975*, and providing that adoptions made under the laws of a 'prescribed overseas jurisdiction' are recognised for the purposes of Australian law
Portfolio	Social Services
Introduced	House of Representatives, 23 March 2023
Rights	Rights of the child and protection of the family

2.23 The committee requested a response from the minister in relation to the bill in *Report 5 of 2023*.[2]

Intercountry adoption with prescribed overseas jurisdictions

2.24 These regulations declare the Republic of Korea and Taiwan as 'prescribed overseas jurisdictions' for the purposes of bilateral arrangements between Australia and these overseas jurisdictions with respect to intercountry adoptions.[3] The regulations also provide that an intercountry adoption will be recognised and effective for the purposes of Australian law if certain conditions are met, including that an adoption compliance certificate was issued by a competent authority of the prescribed overseas jurisdiction and the certificate states that the adoption was carried out in accordance with the laws of that overseas jurisdiction.[4] An adoption

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 2023), *Report 6 of 2023*; [2023] AUPJCHR 57.

2 Parliamentary Joint Committee on Human Rights, *Report 5 of 2023* (9 May 2023), pp. 51-57.

3 Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023 [F2023L00309], section 5. It is noted that the related instrument – Family Law (Bilateral Arrangements—Intercountry Adoption) (Repeals and Consequential Amendments) Regulations 2023 [F2023L00308] – repeals the Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 1998 and makes consequential amendments to the Australian Citizenship Regulation 2016 and the Migration Regulations 1994, to update the references to the 1998 regulations with the 2023 regulations.

4 Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023 [F2023L00309], section 7.

compliance certificate is evidence, for the purposes of Australian law, that the adoption to which the certificate relates was carried out in accordance with the laws of the prescribed overseas jurisdiction.[5] The effect of recognition for the purposes of Australian law is that the relationship between the child and their adoptive parents is the relationship of child and parent; each adoptive parent has parental responsibility for the child; and the child has the same rights as a child who is adopted under Australian state or territory laws.[6]

Summary of initial assessment

Preliminary international human rights legal advice

Rights of the child and right to protection of the family

2.25 To the extent that the regulations facilitate intercountry adoption between Australia and the Republic of Korea and Taiwan, they engage the rights of the child, particularly those rights relating to intercountry adoption, and the right to protection of the family.

2.26 Children have special rights under human rights law taking into account their particular vulnerabilities.[7] Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.[8] Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[9] This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[10]

2.27 Article 21 of the Convention on the Rights of the Child provides special protection in relation to intercountry adoption, seeking to ensure that it is performed in the best interests of the child. Specific protections include that inter-country adoption:

- is authorised only by competent authorities;

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5 Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023 [F2023L00309], section 9.

6 Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023 [F2023L00309], section 8.

7 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

8 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26.

9 Convention on the Rights of the Child, article 3(1).

10 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

- may be considered as an alternative means of the child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- is subject to the same safeguards and standards equivalent to those that apply to national adoption; and
- does not result in improper financial gain for those involved.

2.28 Article 21 also provides that States parties should, where appropriate, promote the objectives of article 21 by concluding bilateral or multilateral arrangements. Article 20 of the Convention on the Rights of the Child provides that should alternative child care arrangements be necessary, when considering options, due regard should be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

2.29 The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption[11] (Hague Convention) establishes a common regime, including minimum standards and appropriate safeguards, for ensuring that inter-country adoptions are performed in the best interests of the child and with respect for the fundamental rights guaranteed by the Convention on the Rights of the Child. The Hague Convention also assists in combatting the sale of children and human trafficking.

2.30 The right to respect for the family requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.[12] An important element of protection of the family is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, or involuntarily remove children from their parents, will therefore engage this right.

2.31 Noting that intercountry adoption may involve the separation of families and involves the placement of a child in alternative care outside their country of origin, there may be a risk that the rights of the child and the right to protection of the family are limited if the intercountry adoption is not undertaken in compliance with international human rights law.

2.32 The rights of the child and the right to protection of the family may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

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11 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (29 May 1993).

12 International Covenant on Civil and Political Rights, articles 17 and 23; and the International Covenant on Economic, Social and Cultural Rights, article 10.

Committee's initial view

2.33 The committee considered further information was required to assess the compatibility of this measure with the rights of the child and the right to protection of the family, and as such sought the minister's advice in relation to:

(a) whether the adoption laws of the Republic of Korea and Taiwan are compliant with the Hague Convention and the Convention on the Rights of the Child, and how the government confirms this compliance;

(b) what safeguards are in place to ensure that intercountry adoptions facilitated under bilateral arrangements with overseas jurisdictions that are not party to the Hague Convention are nevertheless compliant with international human rights law, and why such safeguards are not contained in the legislation itself; and

(c) noting that the Commonwealth-State Agreement says that the Commonwealth will provide states with a statement outlining partner countries' compliance with the requirements of the Hague Convention, are such statements publicly available, and if not, why.

2.34 The full initial analysis is set out in *Report 5 of 2023.*

Minister's response[13]

2.35 The minister advised:

> **(a) Whether the adoption laws of the Republic of Korea and Taiwan are compliant with the Hague Convention and the Convention on the Rights of the Child, and how the government confirms this compliance**
>
> The Department of Social Services (the department), in its role as the Australian Central Authority (ACA) for intercountry adoption, is required to review the ongoing compliance of Australia's intercountry adoption programs with partner countries against the *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption* (Hague Convention) every two years *(Commonwealth- State Agreement for the Continued Operation of Australia's Intercountry Adoption Program,* Part IV, section 16).
>
> Through this review process, the department has determined that the intercountry adoption programs between Australia and the Republic of Korea and Taiwan operate in compliance with the principles and obligations of the Hague Convention.
>
> The Hague Convention reinforces the *United Nations Convention on the Rights of the Child* (Article 21) and seeks to ensure that intercountry adoptions are only conducted when in the best interest of the child and

13 The minister's response to the committee's inquiries was received on 25 May 2023. This is an extract of the response. The response is available in full on the committee's website.

with respect of their fundamental rights. Through the department's review process, compliance with the Hague Convention also indicates compliance with the *United Nations Convention on the Rights of the Child.*

The Country Program Review (CPR) process

Review of Australia's intercountry adoption partner programs is an ongoing process, involving systematic review of intercountry adoption frameworks, safeguards, legislation, regulation, policy and practice, incorporating independent validation of local adoption practices, and close consultation with State and Territory Central Authorities (STCAs).

The purpose of the CPR is to assess the operation of each program, including its compliance against the Hague Convention, and highlight any issues or concerns raised by STCAs. Along with detailed information on local circumstances and identification of issues and challenges facing the program, the CPR also includes a finding or findings on the suitability of the partner's (known under the Regulations as the prescribed overseas jurisdiction) intercountry adoption framework, which is the basis for ongoing program operation.

The ACA undertakes the CPR process for each of its intercountry adoption partner programs, including the Republic of Korea and Taiwan. Although not Hague Convention signatories (or in the case of the Republic of Korea, a signatory, but not yet ratified), intercountry adoptions from the Republic of Korea and Taiwan conducted under the established bilateral arrangements are deemed to demonstrate practical compliance with the Hague Convention principles and standards via the CPR assessment process.

In addition to the CPR process, the ACA communicates with partner Central Authorities on an ongoing basis, including engagement on program operation and individual cases.

Republic of Korea Program status

The Republic of Korea signed the Hague Convention in 2013 and is expected to ratify as early as 2025.

Australia has had a bilateral arrangement with the Republic of Korea since 2014.

There is no formal Central Authority as appointed under the Hague Convention, however, the Ministry of Health and Welfare is the authority in charge of adoption.

Intercountry adoptions under the bilateral arrangement demonstrate practical compliance with the Hague Convention principles and standards. To maintain this arrangement, the ACA enters into annual agreements with Eastern Social Welfare Society (ESWS), the adoption agency with which Australia works in the Republic of Korea. The agreement is made on behalf of the ACA and all STCAs, and secures cooperation in intercountry

adoption with adherence to the principles, safeguards and procedures set out by the Hague Convention.

Republic of Korea CPR

The most recent Republic of Korea CPR was endorsed by STCAs in September 2021.

The review found the Program to implement sufficient safeguards, meaning the Republic of Korea operates in compliance with the Hague Convention. The review demonstrated that based on legislation, communication and in-practice examples, the Republic of Korea program operates in compliance with both the principles and obligations of the Hague Convention.

The Republic of Korea CPR is due for review and update in September 2023.

Taiwan Program status

Taiwan is not a signatory to the Hague Convention. Although Taiwan is not a Member State, the Competent Authorities, the Taiwanese Ministry of Health and Welfare and Social and Family Affairs Administration confirm that the operation of intercountry adoption in Taiwan strictly follows the principles and standards of the Hague Convention. In addition, the October 2018 International Social Service Country Situation Report found Taiwan to be consistent against the standards and principles of the Hague Convention.

Australia has had a bilateral arrangement with Taiwan since Australia established the former *Family Law (Bilateral Arrangements - Intercountry Adoption) Regulations 1998*.

Adoptions under this bilateral arrangement demonstrate practical compliance with the Hague Convention principles and standards. For example, consistent with the subsidiarity principle under the Hague Convention, Taiwan must have exhausted all options to place a child with a family in Taiwan before determining a child is eligible for intercountry adoption.

All Taiwan-Australia Program adoptions are facilitated by the appointed accredited bodies in Taiwan, the Child Welfare League Foundation (CWLF) and Chung Yi Social Welfare Foundation (Chung Yi). Both agencies have responsibility for the day to day management of intercountry adoption, including, but not limited to, determining children in need of intercountry adoption, counselling of biological families and the children, preparation of adoption and medical checks.

The ACA exchanges working agreement letters with CWLF and Chung Yi that set out the basis for the working relationship. New working agreements were signed by CWLF, Chung Yi and the ACA (on behalf of Australian STCAs) in September 2021. These agreements will continue until

replaced with a new agreement, or until terminated by either party giving 6 months' written notice.

Taiwan CPR

The most recent Taiwan CPR was endorsed in September 2022.

The review found that Taiwan has a suitable intercountry adoption framework, meaning the program holds a low risk for children adopted through it. There are little to no issues present in the program.

The Taiwan CPR is due for review and update in September 2024.

(b) What safeguards are in place to ensure that intercountry adoptions facilitated under bilateral arrangements with overseas jurisdictions that are not party to the Hague Convention are nevertheless compliant with international human rights law, and why such safeguards are not contained in the legislation itself

CPR Methodology

The department, as the ACA, assesses intercountry adoption partner programs against key principles and standards set out in the Hague Convention for a 2-year period of operation.

These reviews rely on the following:

- the Implementation and Operation of the 1993 Hague Intercountry Adoption Convention Guide to Good Practice;
- examination of partner's legislation and any available policy papers;
- independent advice from the non-government organisation, International Social Service (ISS) - primarily, Country Situation Reports. These reports involve systematic review of legislation, regulation, policy and practice (including the *United Nations Convention on the Rights of the Child),* as well as independent validation of local adoption practices. ISS updates Country Situation Reports on an as needed basis. For example, if there is a significant change to legislation ·or practice, or if alerted to issues of concern. Therefore, the ISS reports can be taken as current regardless of publication date;
- advice from Australian STCAs (including in-practice examples of compliance and/or non-compliance with Hague Convention principles); and
- comprehensive media scans to identify any issues impacting partner programs, including significant changes to legislation or practice, or relevant socio-economic or other environmental issues.

Assessment of the Partner Country Framework

The CPR contains a comprehensive section considering compliance of the relevant intercountry adoption program with key principles and standards

established by the Hague Convention. Hague Convention principles, requirements and obligations are categorised and rated across 3 tables:

- Table 1: Compliance with Principles

  (Rating options: Principle in place in law/in practice - Yes/No/Not Applicable)

- Table 2: Compliance with obligations on all Contracting States

  (Rating options: Obligation in place in law/in practice- Yes/No/Not Applicable)

- Table 3: Obligation on State of Origin

  (Rating options: Obligation in place in Law/Practice - Yes/No/Not Applicable)

Ratings are accompanied by a detailed explanation containing excerpts from and references to relevant legislation, civil codes, constitutions, international treaties, ISS Country Situation Reports, media articles or academic papers, and in-practice examples (including specific operational or case details) provided by STCAs and the ACA.

Prior to finalisation, the draft CPR is circulated to all STCAs for input. STCAs provide feedback on any changes in process, procedures or issues that arise in their day-to-day activity working with partner authorities, changes to state or territory intercountry adoption legislation, and any advice directly received from overseas adoption agencies or from individuals undergoing, or having completed, the intercountry adoption process.

As the relevant safeguards are comprehensive and process-driven, they are not currently contained in the legislation for which the department is responsible, including the *Family Law (Bilateral Arrangements-Intercountry Adoption) Regulations 2023.*

(c) Noting that the Commonwealth-State Agreement says that the Commonwealth will provide states with a statement outlining partner countries' compliance with the requirements of the Hague Convention, are such statements publicly available, and if not, why.

CPRs are not publicly available at the present time.

Since its inception, the CPR has been viewed as an internal management document between the ACA and STCAs, intended to inform policies, procedures, arrangements and future decisions on Australia's intercountry adoption partner programs. Input is provided by STCAs on this basis.

In-practice, case-specific information provided by STCAs is de-identified, however, due to the low numbers of intercountry adoptions that occur in Australia each year, the information is considered sensitive as it could potentially be used to identify adoptees and/or families involved. CPRs also contain commentary that is potentially critical of overseas authorities, their policies and practices.

The ACA could consider making the findings of the CPR publicly available in the future, however, further consideration would be required (for example, in respect of privacy issues), and agreement would need to be sought from STCAs.

Concluding comments

International human rights legal advice

2.36 The preliminary analysis noted that the regulations appear to pursue a legitimate objective for the purposes of international human rights law, that is, to facilitate Australia's bilateral arrangements for intercountry adoptions with the Republic of Korea and Taiwan. Further, the regulations would be rationally connected to this stated objective. The key question is whether the potential limitations on the rights of the child and the right to protection of the family are proportionate to the objective being sought. In this respect, further information was sought as to whether the adoption laws of the Republic of Korea and Taiwan are compliant with the Hague Convention and the Convention on the Rights of the Child, and how this compliance is monitored.

2.37 The minister advised that the Department of Social Services, in its role as the Australian Central Authority for intercountry adoptions, reviews the ongoing compliance of Australia's intercountry adoption programs with partner countries. The country program review process occurs over a two-year period and involves systematic review of intercountry adoption frameworks, safeguards, legislation, regulation, policy, practice (including examples of compliance or non-compliance with the Hague Convention) and comprehensive media scans. The department will consult with, and seek advice from, independent non-government organisations, such as the International Social Service, and Australian State and Territory Central Authorities, who can provide input based on their day-to-day activities working with partner authorities, overseas adoption agencies and individuals with lived experience of the intercountry adoption process. The minister advised that the most recent country program reviews of the Republic of Korea (in September 2021) and Taiwan (in September 2022) found that the intercountry adoption programs in both countries operated in practical compliance with the principles and obligations of the Hague Convention.

2.38 As to the availability of the country program reviews, the minister advised that the reviews are not publicly available as they are viewed as internal management documents and there may be privacy concerns with making such reviews publicly available.

2.39 The country program review process appears to operate as a strong safeguard to ensure that intercountry adoptions facilitated under bilateral arrangements with overseas jurisdictions that are not party to the Hague Convention, including the Republic of Korea and Taiwan, are nevertheless compliant with international human rights law. As outlined in the preliminary analysis, the

Commonwealth-State Agreement for the Continued Operation of Australia's Intercountry Adoption Program (Commonwealth-State Agreement) would also assist to ensure compliance with international human rights law as it requires, among other things, that the Commonwealth and states work together to ensure intercountry adoption practice focuses on the best interests of the child and is facilitated in compliance with the Hague Convention and the Convention on the Rights of the Child.[14] As to why these safeguards are not contained in legislation, the minister advised that because they are comprehensive and process-driven, they are not currently contained in the legislation. This reasoning does not completely explain why such safeguards cannot be included in the legislation itself, noting that government policies are not as strong as legislative safeguards. Nevertheless, noting the detailed advice provided, it appears that the country program review process and the Commonwealth-State Agreement would likely, in practice, substantially mitigate the risk that intercountry adoptions with overseas jurisdictions that are not a party to the Hague Convention may not be compliant with international human rights law.

Committee view

2.40 The committee thanks the minister for this response. The committee considers that by facilitating intercountry adoption between Australia and the Republic of Korea and Taiwan, the regulations engage the rights of the child, particularly those rights relating to intercountry adoption, and the right to protection of the family. The committee notes that the regulations could have a positive impact on these rights insofar as they facilitate legal recognition of intercountry adoptions.

2.41 However, noting that intercountry adoption may involve the separation of families and involves the placement of a child in alternative care outside their country of origin, the committee considers there may be risk that the rights of the child and the right to protection of the family are also limited if the intercountry adoption is not undertaken in compliance with international human rights law. The committee notes the minister's detailed advice that the country program review process found the intercountry adoption programs in both the Republic of Korea and Taiwan to be in practical compliance with the Hague Convention.

2.42 The committee considers the country program review process, as well as the Commonwealth-State Agreement, to be important safeguards. These help to ensure intercountry adoptions facilitated under bilateral arrangements with overseas jurisdictions that are not party to the Hague Convention are nevertheless compliant with international human rights law.

Suggested action

14 Commonwealth-State Agreement for the Continued Operation of Australia's Intercountry Adoption Program (2018), [I], [11]–[16].

2.43 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

2.44 The committee considers that its concerns have been addressed, and makes no further comment in relation to this legislative instrument.

Migration (Regional Processing Country—Republic of Nauru) Designation (LIN 23/017) 2023 [F2023L00093][33]

Purpose	This legislative instrument designates the Republic of Nauru as a regional processing country
Portfolio	Home Affairs
Authorising Legislation	*Migration Act 1958*
Last day to disallow	This instrument is exempt from disallowance under section 42 of the *Legislation Act 2003*
Rights	Non-refoulement; torture or cruel, inhuman or degrading treatment or punishment; effective remedy; rights of the child; equality and non-discrimination

2.45 The committee requested a response from the minister in relation to the instrument in *Report 4 of 2023* .[34]

Designation of Nauru as a regional processing country

2.46 This legislative instrument designates Nauru as a regional processing country, pursuant to subsection 198AB(1) of the *Migration Act 1958* (Migration Act). The effect of this designation is to enable the operation of section 198AD of the Migration Act, which requires that an officer must, as soon as reasonably practicable, remove an unauthorised maritime arrival from Australia and take them to a regional processing country.[35] The term 'unauthorised maritime arrival' includes a range of persons, including a person who entered Australia by sea without a valid visa.[36] Consequently, this legislative instrument has the effect of permitting the removal of unauthorised maritime arrivals from Australia to Nauru.

2.47 Nauru was previously designated as a regional processing country for the purposes of the Migration Act from 1 September 2012 to 1 October 2022, at which

33 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Regional Processing Country—Republic of Nauru) Designation (LIN 23/017) 2023, *Report 6 of 2023*; [2023] AUPJCHR 58.

34 Parliamentary Joint Committee on Human Rights, *Report 4 of 2023* (9 May 2023), pp. 26-33.

35 *Migration Act 1958*, section 198AD. The minister has a non-compellable and non-delegable discretion to determine that section 198AD does not apply to an unauthorised maritime arrival if they think it is in the public interest to do so. See, *Migration Act 1958*, section 198AE.

36 It also includes a child born of a person who is themselves an unauthorised maritime arrival and persons who entered Australia by sea after being rescued at sea. See, *Migration Act 1958*, section 5AA.

time the relevant legislative instrument sunsetted.[37] This legislative instrument commenced on 7 February 2023 and will sunset on 1 April 2033.

Summary of initial assessment

Preliminary international human rights legal advice

Right to non-refoulement; prohibition against torture and cruel, inhuman or degrading treatment; and right to an effective remedy

2.48 Providing for the removal of unauthorised maritime arrivals from Australia to Nauru engages Australia's non-refoulement obligations and the prohibition against torture. Australia is obliged not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[38] Australia is prohibited from expelling, returning (refouling) or extraditing a person to a country where there is a real or substantial risk that the person may be subject to particular forms of human rights violations under the International Covenant on Civil and Political Rights (ICCPR),[39] including a risk of being subjected to torture.[40] State parties are obliged to apply the principle of non-refoulement in good faith.[41] Australia's non-refoulement obligations, and the obligation not to subject a person to torture or other cruel treatment are absolute. They may never be subject to any permissible limitations.

37 Migration Act 1958 - Instrument of Designation of the Republic of Nauru as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - September 2012 [F2012L01851].

38 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5. It does not appear that this measure would engage the prohibition on the expulsion of aliens without due process, as this right protects persons who are *lawfully* present in a country (according to the State's own laws). See, International Covenant on Civil and Political Rights article 13, and *General Comment 15 The position of aliens under the covenant* at [9].

39 See, *GT v Australia*, UN Human Rights Committee (2007) at [8.1].

40 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5. See also, UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018); and UN Human Rights Committee, *General Comment No. 20: article 7 (prohibition against torture)* (1992) [9].

41 States 'may not pass laws or regulations, engage in policies or practices, or conclude agreements with other States or non-State actors that would undermine or defeat its object and purpose, which is to ensure that States refrain from any conduct or arrangement that they know, or ought to know in the circumstances, would subject or expose migrants to acts or risks of torture or ill-treatment by perpetrators beyond their jurisdiction and control'. See, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 23 November 2018 (A/HRC/37/50) at [42] and 10 April 2014 (A/HRC/25/60) at [40–58].

2.49 Numerous concerns have been raised in relation to the conditions and services provided to persons who have been transferred to Nauru in the past,[42] raising concerns about the effect of this measure on these rights. International human rights bodies have stated that the policy of offshore refugee processing is itself inconsistent with Australia's non-refoulement obligations and the prohibition against torture.[43] In 2017, in relation to the conditions on Nauru, the UN Special Rapporteur stated that '[t]he forced offshore confinement (although not necessarily detention anymore) in which asylum seekers and refugees are maintained constitutes cruel, inhuman and degrading treatment or punishment according to international human rights law standards'.[44]

2.50 As the removal of persons from Australia to Nauru pursuant to this measure may result in a violation of their human rights, this measure also appears to engage the right to an effective remedy. The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the ICCPR.[45] The obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[46] Jurisprudence from bodies recognised as authoritative in specialised fields of law makes clear that there is a strict requirement for 'effective review' of non-refoulement decisions.[47] These decisions also state that the purpose of an effective review is to 'avoid irreparable

42 See, most recently, submissions made to the following inquiry: Senate Standing Committees on Legal and Constitutional Affairs, Migration Amendment (Evacuation to Safety) Bill 2023 (7 March 2023).

43 See, most recently, UN Committee Against Torture, *Concluding observations on the sixth report of Australia*, (5 December 2022) CAT/C/AUS/CO/6 at [29].

44 See, UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [80].

45 International Covenant on Civil and Political Rights, article 2(3). See, *Kazantzis v Cyprus,* UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia,* UN Human Rights Committee Communication No. 1036/01 (2005). States parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia* UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

46 International Covenant on Civil and Political Rights, article 2.

47 See *Agiza v Sweden*, UN Committee against Torture Communication No.233/2003 (2005) [13.7]; *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]–[8.9]; *Josu Arkauz Arana v France*, UN Committee against Torture Communication No.63/1997 (2000); *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005 (2006) [11.8]. For an analysis of this jurisprudence, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183.

harm' to the individual.[48] Section 198AE of the Migration Act provides the minister with a non-compellable and non-delegable discretion to determine that section 198AD does not apply to an unauthorised maritime arrival if they think it is in the public interest to do so. However, such a discretionary safeguard is unlikely to be sufficient for the purposes of international human rights law, particularly where the rights in question are absolute and may never be permissibly limited. It is unclear when and how such a discretion may be utilised. It is also unclear what other procedural mechanisms, if any, persons subject to removal to Nauru could access to challenge that removal, particularly prior to their removal from Australia.

Rights of the child

2.51 Because section 198AD of the Migration Act establishes a requirement that all unauthorised maritime arrivals be sent to a regional processing country, this instrument may result in the expulsion of children from Australia to Nauru where they have arrived in Australia by boat without a valid visa.[49] Children are subject to the operation of section 198AD as a matter of law, and have historically been sent to Nauru on this basis. As such, the measure engages and is likely to limit the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.[50] Their rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.[51] Of particular relevance to this measure is that in all actions concerning children the best interests of the child are required to be a primary consideration. The UN Committee on the Rights of the Child has explained that:

> the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other

48 *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005 (2006) [11.8]; *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]-[8.9].

49 While there are no children currently on Nauru, children have historically been transferred there, see Australian Human Rights Commission, *Ms BK, Ms CO and Mr DE on behalf of themselves and their families v Commonwealth of Australia (Department of Home Affairs)* [2018] AusHRC 128, Report into the practice of the Australian Government of sending to Nauru families with young children who arrived in Australia seeking asylum.

50 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

51 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26.

considerations. This strong position is justified by the special situation of the child…[52]

2.52 In the migration context, the UN Committee on the Rights of the Child has further stated that unaccompanied children are to be provided with special protection and assistance, and that child asylum seekers are to receive appropriate protection and humanitarian assistance.[53] In particular, it has stated that a determination of what is in the best interests of the child (where a child is displaced) requires 'a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs'.[54]

2.53 Noting the power to send all unauthorised maritime arrivals to Nauru, it is unclear whether and how the measure is consistent with the rights of the child, particularly Australia's obligation to treat the best interests of the child as a primary consideration in relevant decisions.

Right to equality and non-discrimination

2.54 Only persons who meet the definition of an 'unauthorised maritime arrival' in section 5AA of the Migration Act (relevantly, having arrived in Australia by sea), are liable to removal to a regional processing country. As such, the re-designation of Nauru in this measure would only impact on persons who arrive in Australia by sea without a valid visa (and not people who arrive with a valid visa and subsequently claim asylum, or who otherwise arrive in Australia by plane). As such, while Australia is permitted to create laws regulating who it will admit to its territory, this measure may have a discriminatory impact on some non-citizens, and so engage the right to equality and non-discrimination.

2.55 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and

52 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013). In this General comment, the UN Committee further stated that 'Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned'. See also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

53 UN Convention on the Rights of the Child, articles 3(1), 20 and 22. See also UN Committee on the Rights of the Child, *General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin* (2005) (CRC/GC/2005/6) at [26–27].

54 UN Committee on the Rights of the Child, *General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin* (2005) (CRC/GC/2005/6) at [20].

non-discriminatory protection of the law.[55] Prohibited grounds of discrimination include discrimination based on nationality and national origin.[56] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[57] Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.[58] Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.[59] Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[60]

2.56 There appears to be a risk that in applying this measure only to persons who arrive in Australian territory by sea without a valid visa, the measure may have a disproportionate impact on persons of certain nationalities, and therefore indirectly discriminate against them on that basis. A recent statistical comparison of all persons who claim asylum onshore having arrived with a valid visa, compared to those who arrive in Australia by boat without a valid visa, does not appear to be readily available. However, relevantly, of all refugee lodgements made in the Administrative Appeals Tribunal in the 2022–23 financial year to date, 52 per cent of refugee lodgements by persons not classified as unauthorised maritime arrivals (totalling

55 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

56 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) at [10–11].

57 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

58 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

59 *D.H. and Others v the Czech Republic,* European Court of Human Rights (Grand Chamber), Application no. 57325/00 (2007) [49]; *Hoogendijk v the Netherlands*, European Court of Human Rights, Application no. 58641/00 (2005).

60 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

3,410 lodgements) were from Chinese and Malaysian citizens, whereas over 60 per cent of those from unauthorised maritime arrivals (totalling 14 lodgements) related to Iran, Sri Lanka and Afghanistan.[61] This raises the question of whether the measure may have an indirectly discriminatory impact on persons from certain nationalities in practice and, if so, whether this would constitute permissible discrimination.

Committee's initial view

2.57 The committee sought the minister's advice in relation to:

(a) whether and how the measure is consistent with Australia's non-refoulement obligations and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment;

(b) whether a person who is liable to removal to Nauru under section 198AD would have access to an effective remedy in relation to that power;

(c) how many times the ministerial discretion under section 198AE has been exercised previously, and in what circumstances;

(d) whether the measure is consistent with the rights of the child, and in particular with Australia's obligation to treat the best interests of the child as a primary consideration in relevant decisions, including:

(i) whether Australia conducts an assessment of the best interests of the child prior to their removal to Nauru under section 198AD, and if so, what this process entails; and

(ii) what other protection and humanitarian assistance is provided to child unauthorised maritime arrivals;

(e) whether the measure may have an indirectly discriminatory impact on persons from certain nationalities in practice and, if so, whether this would constitute permissible discrimination; and

(f) why this instrument will sunset in 10 years and not a shorter period of time.

2.58 The full initial analysis is set out in *Report 4 of 2023*.

61 Administrative Appeals Tribunal, Migration and Refugee Division, Caseload Report Financial year to 28 February 2023.

Minister's response[62]

2.59 The minister advised:

Non-refoulement

(a) whether and how the measure is consistent with Australia's non-refoulement obligations and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment

The Nauru designation instrument is consistent with the long-standing policy intention that UMAs be taken to a regional processing country for protection claims assessment as soon as reasonably practicable. Section 198AD creates a duty for an officer to take a UMA to a regional processing country as soon as reasonably practicable, unless otherwise exempted.

The Government recognises that non-refoulement obligations under the ICCPR and CAT are absolute and does not seek to limit Australia's obligations. The Government takes Australia's non-refoulement obligations seriously, and has ensured administrative arrangements are in place to support Australia to meet its non-refoulement obligations in relation to those UMAs subject to transfer to a regional processing country under section 198AD.

While an officer must take a UMA subject to regional processing arrangements to a regional processing country as soon as reasonably practicable under section 198AD, the Minister may, if he or she thinks it is in the public interest to do so, determine under section 198AE that section 198AD does not apply to a UMA. Ministerial Guidelines explain the circumstances in which the Minister may consider the exercise of the power to determine that section 198AD does not apply in relation to a UMA or UMAs. The Guidelines relevantly set out that the Minister does not expect cases to be referred unless the UMA, in the opinion of the relevant officer, has made a credible claim that:

- his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; or
- there is a real risk that he or she will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or have the death penalty carried out on him or her

against the regional processing country (or each regional processing country if there is more than one).

62 The minister's response to the committee's inquiries was received on 11 May 2023. This is an extract of the response. The response is available in full on the committee's website.

In exercising subsection 198AD(2), an officer will undertake a pre-transfer assessment for each UMA ahead of transfer to determine whether any obstacles exist making it not reasonably practicable to take the UMA to a regional processing country at that time. If obstacles exist that would make it not reasonably practical to transfer an individual to a regional processing country at any time, the case may be referred to the Minister for consideration under section 198AE. Section 198AE of the Act provides the Minister with a non-compellable and non-delegable discretion to determine that section 198AD does not apply to a UMA if they think it is in the public interest to do so.

In September 2021, Australia agreed a new memorandum of understanding with the Republic of Nauru for regional processing, Memorandum of Understanding between the Republic of Nauru and Australia on the Enduring Regional Processing Capability in Republic of Nauru (MOU).

The Government of Nauru is responsible for the administration and implementation of the MOU, and management of individuals taken to the Republic of Nauru for regional processing. In supporting the Republic of Nauru's implementation of the MOU, the Department of Home Affairs has engaged specialist service providers to provide access to accommodation, services and supports in Nauru, including health services, reception and new arrivals services, and facilities management and garrison.

Through the MOU, Australia and Nauru have agreed to treat transferees with dignity and respect and in accordance with international legal obligations, including relevant obligations under international human rights laws.

The Government is satisfied that arrangements are in place to receive new UMAs in Nauru and provide them with access to an appropriate standard of care and support while they remain in Nauru. There have been various changes to the operation of regional processing arrangements since Nauru was first designated as a regional processing country in 2012, including:

- open centre arrangements whereby UMAs are not detained or accommodated in closed centres for extended periods. All UMAs reside in the Nauruan community, accommodated in appropriate housing, with full freedom of movement, work rights and access to income support. UMA minors have access to education through the Nauruan education system;
- refugee status determination systems and processes – the Government of Nauru has a robust refugee status determination framework in place, including legislation supporting decision making and processes, review mechanisms (merits review and court appeals) and trained officials. UMAs have access to legal support (contracted by the Australian Government) to assist with the preparation of their protection claims;

- contracted health services, including mental health services and child specific health services, improved standards of care and access to services, and increased health professional to UMA ratios.

International Health and Medical Services (IHMS) is the contracted health service provider in Nauru. UMAs receive health care through an IHMS medical centre situated at the Regional Processing Centre (Reception Facility) and can also access health care through the Republic of Nauru Hospital. Primary healthcare is delivered through general practitioners, nurses and paramedics. Clinical team leaders oversee health care provided by nursing staff and clinicians, including obstetricians when females are among the regional processing population in Nauru. Mental healthcare is provided by mental health nurses and team leaders, psychologists, psychiatrists and counsellors, and specialist torture and trauma counselling is available. Specialty services are provided by radiographers, pharmacists, laboratory technicians, dentists and dental assistants. Clinic based health services are supplemented by visiting healthcare practitioners and medical transfers when required.

Access to effective remedy

(b) whether a person who is liable to removal to Nauru under section 198AD would have access to an effective remedy in relation to that power

A non-citizen without a valid visa has no right to enter Australia via sea, and may become a UMA under the Act, and subject to removal. The Act makes no provisions for a review mechanism or effective remedy against actions to take them to a regional processing country for protection claims assessment.

Section 198AD(2) requires that an officer must, as soon as reasonably practicable, take a UMA from Australia to a regional processing country. While section 494AA and subsection 486C(4) of the Act prohibits proceedings against the Commonwealth relating to the performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 of the Act in relation to a UMA from being instituted or continued in any court, these sections do not affect the High Court's original jurisdiction. Therefore, filing direct in the High Court to challenge any proposed taking to a regional processing country under section 198AD is an avenue to seek a judicial remedy.

Moreover, the aforementioned pre-transfer assessment provides a UMA the opportunity to identify any reasons why they cannot be taken to a regional processing country. If the identified reason/s engage Australia's human rights obligations, the Minister's section 198AE Guidelines provide for referral for section 198AE consideration.

Use of s198AE

(c) how many times the ministerial discretion under section 198AE has been exercised previously, and in what circumstances

Since the commencement of Operation Sovereign Borders (OSB) in September 2013, respective Ministers have exercised section 198AE to determine that section 198AD does not apply in relation to 342 UMAs involved in maritime people smuggling ventures ahead of their involuntary removal from Australia.

Section 198AE has been exercised ahead of involuntary removal for other UMAs, including people involved in maritime people smuggling ventures between August 2012 (introduction of the power) and September 2013 (commencement of OSB), however the Department's information holdings do not automatically capture these applications of the power.

Successive section 198AE determinations provide a blanket application of the power for UMAs seeking voluntary removal from Australia under section 198(1) of the Act. Exercise of such class exemption determinations do not carry tabling requirements and the Department's information holdings do not automatically capture applications of the determination.

Since the introduction of the power in August 2012, section 198AE has not been exercised on the basis of non-refoulement obligations.

Rights of the Child

(d) whether the measure is consistent with the rights of the child, and in particular with Australia's obligation to treat the best interests of the child as a primary consideration in relevant decisions, including:

(i) whether Australia conducts an assessment of the best interests of the child prior to their removal to Nauru under section 198AD, and if so, what this process entails

(ii) what other protection and humanitarian assistance is provided to child unauthorised maritime arrivals

The Government takes all matters concerning the rights of children and families seriously. Consideration of the individual circumstances of UMAs and their relationships with family members allows the Government to ensure that it acts consistently with the above CRC obligations. The best interests of the child are taken into account as a primary consideration in conjunction with other relevant considerations, such as the enforcement of Australia's border protection policies and national security.

In exercising section 198AD, departmental officers conduct a pre-transfer assessment for each UMA to identify whether there are any obstacles to transfer at that time. The pre-transfer assessment expressly includes consideration of the child's best interests for each minor under 18 years of age, covering issues relating to education services, accommodation, care, welfare and health services in the regional processing country for UMAs and specific to UMA minors. The requirement under section 198AD to take a UMA to a regional processing country and associated policy measures support family unity, with immediate family units being maintained during transfer. The scope of the right to respect for the family and the right to

freedom from interference with the family requires countries to adopt legislative, administrative and other measures to protect families, and to refrain from arbitrary interference with families. The obligations under the CRC include the obligation to treat the best interests of the child as a primary consideration and to treat applications for family reunification of children with their parents in a positive, humane and expeditious manner.

Nauru is a party to the CRC, and is responsible for its compliance with its obligations arising under that Convention. The Government of Nauru has in place legislation and policy frameworks developed in line with international obligations to promote the safety and wellbeing of children, including unaccompanied minors, in Nauru. Key legislation includes *Guardianship of Children Act 1975, Child Protection and Welfare Act 2016* and the *Asylum Seekers (Regional Processing Centre) Act 2012*, which provides that the Government of Nauru Minister for Multicultural Affairs is the legal guardian of any unaccompanied minor in Nauru.

The Department, through its contracted service providers and their contractual obligations, has in place arrangements to support the Government of Nauru to ensure the safeguarding and wellbeing of unaccompanied minors while in Nauru, consistent with Government of Nauru's legislation and policies. Measures include:

- appropriate screening and recruitment practices for staff working with children, which ensures workers and contracted service provider personnel meet the Department's Child Protection Mandatory Behaviours, outlining the required standards of behaviour;
- appropriate safety measures and policies which align with the National Principles for Child Safe Organisations;
- third party obligations relating to child safety are replicated in subcontracts and secondary subcontracts; where relevant;
- dedicated reception accommodation and case-workers for unaccompanied minors;
- dedicated child-specific case management;
- independent observers for interactions with unaccompanied minors and other minors where a parent is not available;
- a child-friendly complaints mechanism;
- specialist services and personnel such paediatricians, maternal and child health nurses, social workers, dedicated child safety officers, child specific mental health workers; and
- regular assessments to monitor childhood development and wellbeing.

Any departmental and service provider personnel must also comply with applicable Australian domestic laws and processes, including the

Department's Child Safeguarding Framework, as applicable to the Nauru operating environment.

While there have been no minors (ie, people under 18 years of age) in Nauru under regional processing arrangements since February 2019, arrangements are in place for a range of care, welfare and support services to be stood up at short notice to cater for the particular needs of children and young people. Service providers are contracted to deliver age-appropriate health, education, recreational, and cultural services. Under the arrangements in place, any transferred minors would be accommodated with their parents in family units, appropriate to the size of their family. Special arrangements are in place for unaccompanied minors, delivered in accordance with Government of Nauru requirements.

Right to equality and non-discrimination

(*e) whether the measure may have an indirectly discriminatory impact on persons from certain nationalities in practice and, if so, whether this would constitute permissible discrimination*

The regional processing provisions in the Act apply to all UMAs. The provisions do not distinguish UMAs by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, or other demographics, and only define the cohort based on their mode of transport and unlawful non-citizen status on arrival by reference to not having a lawful right to enter Australia.

The continued differential treatment of a group of non-nationals (namely UMAs) could amount to a distinction on a prohibited ground under international law on the basis of 'other status'.

The Government is of the view that this continued differential treatment of UMAs is for a legitimate purpose and based on relevant objective criteria, and is reasonable and proportionate in the circumstances. This measure is a proportionate response to prevent unlawful non-citizens from circumventing Australia's managed migration program. This measure is aimed at discouraging persons from risking their lives attempting hazardous boat journeys with the assistance of criminal people smugglers in the future, and encouraging them to pursue regular migration pathways instead.

Term of designation instrument

(f) why this instrument will sunset in 10 years and not a shorter period of time.

Subsection 198AB(1) of the Act provides the Minister may, by legislative instrument, designate that a country is a regional processing country. Subsection 198AB(1A) provides that a legislative instrument made under subsection 198AB(1) may only designate one country and must not provide that the designation ceases to have effect.

> The term of the designation instrument is governed by the sunsetting rules set out in Part 4 of Chapter 3 of the Legislation Act 2003. Section 50 of the Legislation Act repeals a legislative instrument on the first 1 April or 1 October falling on or after the tenth anniversary of the registration of an instrument registered after 1 January 2005.
>
> These provisions automatically set the validity of the designation instrument at 10 years. It is not open to the Minister to determine a shorter validity period at the time of designation given that paragraph 198AB(1A)(b) provides that the legislative instrument must not provide that the designation ceases to have effect. However, pursuant to section 198AB(6) of the Act, the Minister may, by legislative instrument, revoke the designation at any time.

Concluding comments

International human rights legal advice

Non-refoulement and prohibition of torture and other cruel, inhuman or degrading treatment or punishment

2.60 The minister advised that the government recognises that non-refoulement obligations are absolute and has ensured administrative arrangements are in place to support Australia to meet these obligations in relation to persons transferred to Nauru. With respect to processes prior to a person's removal to Nauru, the minister noted that an officer will undertake a pre-transfer assessment providing persons with the opportunity to identify any reasons why they cannot be taken to a regional processing country. The minister stated that the assessment will determine whether any obstacles exist making it not reasonably practicable to take the person to a regional processing country at that time, and that if obstacles did exist, the case may be referred to the minister for consideration under section 198AE. Section 198AE provides the minister with a non-compellable and non-delegable discretion to determine that section 198AD does not apply to a person if they think it is in the public interest to do so. The minister stated that if the identified reason/s engage Australia's human rights obligations, the minister's section 198AE Guidelines provide for referral for section 198AE consideration.

2.61 The departmental instruction document relating to 'pre-transfer assessments' is contained in the Department of Home Affairs 'LEGEND' intranet database.[63] It states that:

> Officers can seek advice on protection claims from an Onshore Protection officer with training and expertise in the consideration of protection claims by contacting the Director [of Irregular Maritime Arrival and Refugee Status Assessment Support]

63 The database is not directly available to the public. To access it, individuals must themselves subscribe (costing between $730 and $800 per year) or via a library scheme.

> If the person makes credible protection claims against all designated [Regional Processing Centres], officer should consider whether the person meets the s198AE Guidelines for referral and if so refer the case.
>
> Officers must not consider any protection claims put forward by the person against their home country. Protection claims against the UMA's home country will be assessed by the [Regional Processing Centre].[64]

2.62 The minister's 'section 198AE Guidelines', made on 28 July 2013, are also contained in the 'LEGEND' intranet database. They state that they inform departmental officers when to refer a case to the minister, and confirm that the minister does 'not wish to consider the exercise of [their] public interest power in any case other than those set out in these guidelines'.[65] The guidelines state that the minister does not expect to have cases referred by the department for consideration, unless the case relates to persons who, in the opinion of the relevant officer, have made a credible claim against the regional processing country that: his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; or there is a real risk that he or she will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or have the death penalty carried out on him or her.[66] The guidelines further state that the minister will determine what is in the public interest, and that this will depend on various factors, which must be assessed by reference to the circumstances of the particular case.[67]

2.63 As noted in the preliminary international human rights legal advice, a discretionary safeguard is unlikely to be sufficient for the purposes of international human rights law, particularly where the rights in question are absolute and may never be permissibly limited. Further, the minister advised that since September 2013, respective ministers have exercised section 198AE to determine that removal to a regional processing country did not apply in relation to 342 unauthorised maritime arrivals.[68] However since the introduction of the power in August 2012, it has not been exercised on the basis of non-refoulement obligations. Consequently, the minister's discretion under section 198AE to determine that a person should not be removed to Nauru would appear to have had no safeguard value with respect to the absolute rights in question.

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64 Departmental instruction, 'Regional processing – pre-transfer assessment' (February 2014).

65 At [2]-[3].

66 At [21]. The guidelines also provide, at [22], a list of cases that should be referred to the minister for persons who arrived in Australia between 13 August 2012 and 19 July 2013.

67 At [16].

68 This would appear to relate to a decision that section 198AD does not apply to a specified class of persons.

2.64 With respect to Nauru, the minister noted that in September 2021, Australia agreed a new memorandum of understanding (MOU) with Nauru regarding regional processing.[69] The MOU provides that Australia and Nauru agree to treat transferees with dignity and respect and in accordance with international legal obligations, including relevant obligations under international human rights laws. The minister stated that the Government of Nauru is responsible for the administration and implementation of the MOU, and the management of individuals taken to Nauru for regional processing. The minister noted that the Department of Home Affairs has engaged specialist service providers to provide access to accommodation, services and supports, including health services, reception and new arrivals services, and facilities management and garrison.

2.65 As to the implementation of this agreement, the minister stated that the government is satisfied that arrangements are in place to receive new persons in Nauru and provide them with access to an appropriate standard of care and support while they remain in Nauru. The minister noted that there have been changes to the operation of regional processing arrangements since Nauru was first designated as a regional processing country in 2012, including the establishment of 'open centre arrangements', access to Nauruan education services, refugee status determination processes, and contracted health services through the International Health and Medical Services centre at the Regional Processing Centre and other health services.

2.66 However, numerous serious concerns—both historical and contemporaneous—have been raised in relation to the conditions and services provided to persons who have been transferred to Nauru, and those who remain there.[70] For example, the Office of the United Nations High Commissioner for Refugees has consistently raised serious concerns regarding allegations of abuse, widespread self-harm and inadequate services in relation to the health and wellbeing of asylum seekers, the absence of adequate safeguards, and a lack of comprehensive access to timely durable solutions.[71] This raises concerns about the effect of this measure.

2.67 International human rights bodies have stated that the policy of offshore refugee processing is itself inconsistent with Australia's non-refoulement obligations and the prohibition against torture. In 2017, in relation to the conditions on Nauru, the UN Special Rapporteur stated that '[t]he forced offshore confinement (although

69 Memorandum of Understanding between the Republic of Nauru and Australia on the Enduring Regional Processing Capability in Republic of Nauru

70 See, most recently, submissions made to the following inquiry: Senate Standing Committees on Legal and Constitutional Affairs, Migration Amendment (Evacuation to Safety) Bill 2023 (7 March 2023).

71 See, most recently, Office of the United Nations High Commissioner for Refugees, *submission to inquiry into the Migration Amendment (Evacuation to Safety) Bill 2023*, Senate Legal and Constitutional Affairs Legislation Committee (24 February 2023).

not necessarily detention anymore) in which asylum seekers and refugees are maintained constitutes cruel, inhuman and degrading treatment or punishment according to international human rights law standards'.[72] In 2022 the UN Committee against Torture recommended that Australia end the policy of offshore processing of asylum claims, transfer all migrants, asylum-seekers and refugees to mainland Australia and process any remaining asylum claims while guaranteeing all procedural safeguards.[73] Noting the conditions in Nauru and the views of relevant UN bodies, it appears there is a risk that the re-designation of Nauru as a regional processing country for the purposes of this policy may be inconsistent with Australia's absolute non-refoulement obligations and the prohibition against torture.

Effective remedy

2.68 As to whether a person who is liable to removal to Nauru under section 198AD would have access to an effective remedy in relation to that power, the minister advised that the Migration Act provides no review mechanism or effective remedy against actions to take a person to a regional processing country. However, the minister advised that an individual could still file in the High Court of Australia to challenge any proposed removal to a regional processing country through the court's original jurisdiction.[74]

2.69 However, the obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[75] The jurisprudence of the UN Human Rights Committee and the UN Committee against Torture establish the proposition that there is a strict requirement for 'effective review' of non-refoulement decisions.[76] The purpose of an 'effective' review is to 'avoid irreparable harm to the individual'.[77] In particular, in *Singh v Canada*, the UN Committee against Torture considered a claim in which the complainant stated that he did not have an effective remedy to challenge the decision of deportation because the judicial review available in Canada

72 See, UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [80].

73 UN Committee Against Torture, *Concluding observations on the sixth report of Australia*, (5 December 2022) CAT/C/AUS/CO/6 at [29].

74 See, Constitution, section 75.

75 International Covenant on Civil and Political Rights, article 2 (the right to an effective remedy).

76 See *Agiza v Sweden*, UN Committee against Torture Communication No.233/2003 (2005) [13.7]; *Josu Arkauz Arana v France*, UN Committee against Torture Communication No.63/1997 (2000); *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005 (2006) [11.8]. For an analysis of this jurisprudence, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183

77 *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005 (2006) [11.8].

was not an appeal on the merits but was instead a 'very narrow review for gross errors of law'.[78] In this case, the Committee against Torture concluded that judicial review was insufficient for the purposes of ensuring persons have access to an effective remedy.[79]

2.70 Consequently, while judicial review remains available pursuant to section 75 of the Constitution, external merits review is not available. Judicial review represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision. As such, judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review' for the purposes of Australia's non-refoulement obligations as it is only available on a number of restricted grounds of review.

Rights of the child

2.71 Further information was sought as to whether the measure is consistent with the rights of the child, and in particular with Australia's obligation to treat the best interests of the child as a primary consideration in relevant decisions, including: whether Australia conducts an assessment of the best interests of the child prior to their removal to Nauru, and if so, what this process entails; and what other protection and humanitarian assistance is provided to child unauthorised maritime arrivals. The minister stated that while no children have been removed to Nauru since February 2019, the government takes all matters concerning the rights of children and families seriously. The minister stated that consideration of the individual circumstances of persons and their relationships with family members allows it to ensure that Australia acts consistently with its obligations and the best interests of the child are taken into account as a primary consideration in conjunction with other relevant considerations, such as the enforcement of Australia's border protection policies and national security.

2.72 With respect to actions prior to a person being removed to Nauru, the minister stated that departmental officers conduct a pre-transfer assessment to identify whether there are any obstacles to transfer at that time, and that this assessment expressly includes consideration of the child's best interests for each minor under 18 years of age, covering issues relating to education services, accommodation, care, welfare and health services in the regional processing country and those specific to children. The minister stated that the requirement under section 198AD to take a person to a regional processing country and associated

78 *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8].

79 *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]-[8.9].

policy measures support family unity, with immediate family units being maintained during transfer. Under the arrangements in place, any transferred minors would be accommodated with their parents in family units.

2.73 With respect to services in Nauru, the minister stated that Nauru is a party to the Convention on the Rights of the Child and is responsible for its compliance with its obligations arising under that Convention. The minister noted that Nauru has in place legislation and policy frameworks to promote the safety and wellbeing of children, including unaccompanied minors, in Nauru, with the Nauruan Minister for Multicultural Affairs legally the guardian of any unaccompanied minor in Nauru. The minister stated that the department has in place arrangements to support Nauru to ensure the safeguarding and wellbeing of unaccompanied minors while in Nauru, including: child-specific staff and case management; a child-friendly complaint mechanism; and regular assessments to monitor childhood development and wellbeing.

2.74 However, serious concerns have been raised in relation to the welfare of children sent to Nauru historically. Of note, a recently published study of young people who had been sent to Nauru found that: almost 90 per cent of children brought to Australia from Nauru suffered physical health problems, including malnutrition and dental disease; almost 80 per cent reported one or more mental health symptoms; and 45 per cent had reported suicidal ideation, a suicide attempt, or self-harm.[80] Given these serious concerns, it is not clear that the processes in place relating to decisions to transfer children from Australia to Nauru, and the services that would be available should children be placed there in future, would be sufficient such that they would adequately protects the rights of children. In particular, while the pre-transfer assessment process requires the completion of a 'best interests assessment' in relation to children, it is not clear that this process meets the criteria required under international human rights law.[81]

Right to equality and non-discrimination

2.75 As to whether the measure may have an indirectly discriminatory impact on persons from certain nationalities in practice and, if so, whether this would constitute permissible discrimination, the minister stated that the continued differential treatment of a group of non-nationals (namely unauthorised maritime

80 Lahiru Amarasena, Nora Samir, and Louise Sealy et al, Offshore detention: cross-sectional analysis of the health of children and young people seeking asylum in Australia, *Archives of Disease in Childhood* 2023 vol. 108, pp. 185-191.

81 UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*. The application of this test in the specific context of sending children to a regional processing centre, and in particular the sufficiency of the 'best interest assessment' document itself, has been considered by the Andrew & Renata Kaldor Centre for International Refugee Law. See, *Research Brief: Australia's obligation to asylum seeker children sent to Nauru* (March 2021).

arrivals) could amount to a distinction on the basis of 'other status'. The minister stated that the government is of the view that 'this continued differential treatment of UMAs is for a legitimate purpose and based on relevant objective criteria, and is reasonable and proportionate in the circumstances'. The minister stated that the measure is a proportionate response to prevent unlawful non-citizens from 'circumventing Australia's managed migration program', and is aimed at discouraging persons from seeking to reach Australia by boat.

2.76 However, as noted in the initial assessment, applying this measure only to those non-citizens who arrive in Australian territory by sea without a valid visa, appears to have a disproportionate impact on persons of certain nationalities (currently, Sri Lanka, Iran and Afghanistan).[82] As such, it appears to be indirectly discriminatory on the basis of national origin.

2.77 For discrimination to be permissible, the differential treatment must be based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving it. The stated objective in this instance is to discourage persons from circumventing Australia's migration program by seeking to claim asylum via boat. It is not clear that this would constitute a legitimate objective, particularly given that Australia is a signatory to the 1951 Refugee Convention and 1967 Protocol. In this regard, the UN High Commissioner for Refugees Mr Filippo Grandi recently advised Australia, in relation to this legislative instrument, that offshore processing or 'externalisation' arrangements 'shift asylum responsibilities, evade international obligations, [and] are contrary to the letter and spirit of the Refugee Convention'.[83] It is not clear that pursuing such an objective would be regarded as a legitimate objective under international human rights law, and consequently it is not clear that this measure would constitute permissible differential treatment.[84]

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82 Of all refugee lodgements made in the Administrative Appeals Tribunal in the 2022–23 financial year to date, 52 per cent of refugee lodgements by persons not classified as unauthorised maritime arrivals (totalling 4, 106 lodgements) were from Chinese and Malaysian citizens, whereas over 60 per cent of those from unauthorised maritime arrivals (totalling 17 lodgements) related to Iran, Sri Lanka and Afghanistan. See, Administrative Appeals Tribunal, Migration and Refugee Division, Caseload Report Financial year to30 April 2023.

83 This advice was provided most recently with respect to this legislative instrument. See, Mr Filippo Grandi, UN High Commissioner for Refugees, letter to the Hon Claire O'Neil MP, Minister for Home Affairs (4 February 2023).

84 In this regard, in May 2018 the UN Committee on the Elimination of Racial Discrimination reiterated its recommendation that Australia process asylum claims in Australia, guaranteeing all procedural safeguards to migrants, asylum seekers and refugees. See, UN Committee on the Elimination of Racial Discrimination, *Follow up letter sent to State Party*, CERD/98thsession/FU/MJA/ks (10 May 2018).

Sunsetting

2.78 Lastly, it was noted that this instrument designates Nauru as a regional processing country for 10 years, and further information was sought as to why it does not provide for a shorter time. The minister advised that if the minister makes a designation under paragraph 198AB(1) of the Migration Act, the Act provides that the instrument must not provide that the designation ceases to have effect. However, the minister noted that pursuant to subsection 198AB(6) of the Act, the minister may, by legislative instrument, revoke the designation at any time. The minister stated that the term of the designation instrument is, therefore, governed by the sunsetting rules set out in Part 4 of Chapter 3 of the *Legislation Act 2003*. Subsection 50(1) repeals a legislative instrument on the first 1 April or 1 October falling on or after the tenth anniversary of the registration of an instrument registered after 1 January 2005. It is acknowledged that the legislation, as it currently stands, prevents this instrument from including a shorter date for sunsetting. If subsection 198AB(1A) of the Migration Act were amended future designations could include a shorter period of designation, allowing for regular review of the appropriateness and necessity of such designations. The fact that the designation remains in force for ten years without any requirement of review means the measure is less likely to be considered proportionate.

Committee view

2.79 The committee thanks the minister for this response. The committee notes that providing for the removal of unauthorised maritime arrivals from Australia to Nauru engages several human rights. The committee notes that it has repeatedly raised serious concerns about the adequacy of protections against the risk of refoulement in the context of offshore refugee processing, and has raised a range of human rights concerns in relation to persons removed to Nauru.[85] The committee considers, therefore, that the re-designation of Nauru as a regional processing country enlivens these human rights concerns.

2.80 The committee considers that, having regard to the numerous human rights concerns raised in relation to offshore processing in Nauru, there is a risk that this

85 See, for example, the committee's analysis of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 in Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 77-78. The UN Human Rights Committee in its Concluding observations on Australia recommended '[r]epealing section 197(c) of the *Migration Act 1958* and introducing a legal obligation to ensure that the removal of an individual must always be consistent with the State party's non-refoulement obligations': CCPR/C/AUS/CO/6 (2017), [34]. See, also, Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp.14-17; *Report 12 of 2018* (27 November 2018) pp. 2-22; *Report 11 of 2018* (16 October 2018) pp. 84-90; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28, *Report 6 of 2019* (5 December 2019), pp. 83-98.

legislative instrument is not consistent with Australia's absolute non-refoulement obligations and the prohibition against torture. Further, the committee considers that the remedies available to persons subject to removal to Nauru do not meet the threshold required by the right to an effective remedy.

2.81 The committee welcomes the fact that no children have been transferred to Nauru since February 2019, but as a matter of law and policy, children would be liable to such removal in future. The committee considers that having regard to the seriousness of the concerns raised in relation to the welfare of children in Nauru historically, and noting that there are no existing processes in Nauru for children sent from Australia, it is not clear that the processes in place relating to decisions to transfer children from Australia to Nauru, and the services in place should any children be subsequently placed there, would be sufficient such that they would adequately protect the rights of the child, including the requirement to consider the best interests of the child as a primary consideration.

2.82 The committee further notes that applying this measure only to those non-citizens who arrive in Australian territory by sea (and not by plane) without a valid visa, has a disproportionate impact on persons of certain nationalities in practice, and considers that it is therefore indirectly discriminatory on the basis of national origin. The committee considers that it is not clear that this differential treatment is permissible, meaning there is a risk that the measure breaches the right to equality and non-discrimination.

2.83 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Mr Josh Burns MP

Chair