UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Inquiry into the Migration Amendment Bill 2024

Senate Legal and Constitutional Affairs Legislation Committee

Submission by the Office of the United Nations High Commissioner for Refugees

22 November 2024

I. OVERVIEW

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee), in respect of its inquiry into the Migration Amendment Bill 2024 (the Bill), referred to the Committee on 19 November 2024 for inquiry and report by 26 November 2024.

2. In summary, the Bill introduces new measures designed to change the legislative framework to facilitate the removal from Australia of certain non-citizens, including those in detention who have been referred for removal and certain non-citizens living in the community on non-substantive visas on a "removal pathway". Both include asylum-seekers, refugees, and stateless persons, many of whom are long-term residents of Australia, whose visas were refused or cancelled on character grounds or whose visa will cease in accordance with the new cessation provisions inserted by these amendments, as well as those subject to regional processing arrangements. More explicitly, it proposes to authorise the Government to enter into an agreement and pay foreign countries to receive persons to be removed from Australia involuntarily who are not its citizens.

3. There are very few safeguards or statutory parameters governing such proposed third country arrangements, whether in relation to Australia, a third country, or action to be taken in any other country. Rather, the amendments provide expansive immunity from civil liability in relation to good faith actions to (amongst other things) remove or take persons from Australia to a foreign country including to regional processing countries. The Government's stated intention is that "Australia would not exercise, in countries with which Australia enters into a third country reception arrangements or in regional processing countries, the degree of control necessary to enliven Australia's international obligations".[1]

[1] Explanatory Memorandum, Migration Amendment Bill 2024, p.31.

4. While removal to a country of a person with respect to whom a 'protection finding' has been made is not authorised under existing section 197C of the Act, the Bill proposes to expand the situations in which a decision can be made by the Minister that a person is no longer a person in respect of whom a protection finding would be made, thereby facilitating removal efforts of those who are currently owed non-refoulement obligations through an onshore statutory process.[2]

5. Despite welcomed efforts by the Government to provide some protections in the Bill (including with respect to children) and assurances by the Minister when introducing the measures, that the Government will exercise their removal powers in accordance with their international non-refoulement obligations, for the reasons discussed below, **UNHCR is strongly opposed to the measures contained in the Bill**.

6. At the heart of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol are the right to seek and to enjoy in other countries asylum from persecution and the right to protection against refoulement. The principle of non-refoulement protects individuals not only from removal to their countries of origin but also to any other territory where they have reason to fear persecution or other serious harm, or from where they may be removed to such territories, thereby ensuring protection from indirect (or chain) refoulement. Removal to a third country where a person's rights are not threatened *per se* but where no protection is available against onward transfer to a place of persecution or serious harm is therefore prohibited. Moreover, the potential for prolonged arbitrary detention of transferees who are refugees could itself amount to persecution, and thus the removal of a refugee to such a place could likewise amount to refoulement.

7. UNHCR considers that the measures proposed in the Bill further extend Australia's externalization of its international protection obligations because they attempt to shift to a foreign country responsibility for meeting the international protection needs of persons subject to such an arrangement, or accountability for leaving such needs unmet, and they provide inadequate safeguards in law to guarantee international protection, thereby making such proposed third country arrangements unlawful under international law.

8. UNHCR considers that safeguards afforded through various statutory and non-statutory processes are inadequate to appropriately protect the rights of those capable of being caught by the operation of the Bill. For instance, subsection 197C(3) does not provide statutory protection against refoulement with respect to the application of the removal measures including the disclosure of private information to third countries to facilitate such removal. Moreover, reliance on the Minister's personal non-compellable discretionary intervention powers to further safeguard against any possible arbitrary restriction of human rights, especially in the context of deprivation of liberty and preservation of family unity is considered equally inadequate.

[2] "A State can be held accountable for the violation of rights 'of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State': see *Issa and others v Turkey, European Court of Human Rights*, Application No. 31821/96 (2004) [71]": Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, *Report 10 of 2024*, 20 November 2024, pp18-19, available at: Report_10_of_2024.pdf.

9. The 1951 Convention envisages that criminal conduct after admission into the country of refuge would be handled through rigorous domestic criminal law enforcement and/or, where necessary and appropriate, the application of Article 32 or Article 33(2). A person's refugee status may be ended ("revoked") on account of crimes or acts committed after recognition only if these fall within the scope of Article 1F(a) or (c) of the 1951 Convention. Importantly, the commission of a crime *per se* is not an act that falls within the scope of the 1951 Convention's cessation provisions. Regardless of whether someone has committed a crime in the past and for which they have served their sentence, administrative detention must not be punitive. Moreover, the conditions imposed upon those required by law to be released from detention should also not be punitive and be another form of detention.

10. UNHCR's observations are structured as follows: Section II sets out the scope of UNHCR's authority. Section III contains an outline of the scope and application of proposed amendments. Section IV outlines UNHCR's concerns with respect to the proposed third country reception arrangements; Section V outlines UNHCR's concerns with respect to the reassessment of protection findings and cessation of refugee status; and Section VI sets out UNHCR's observations with respect to safeguards in law to ensure adherence with international refugee and human rights obligations. Section VII sets out the conclusion.

II. UNHCR'S AUTHORITY

11. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees, and for assisting governments in seeking permanent solutions for refugees.[3] As set forth in the *Statute of the Office of the United Nations High Commissioner for Refugees*, UNHCR fulfils its international protection mandate by, *inter alia*, '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto'.[4] UNHCR's supervisory responsibility under its Statute is reiterated in the preamble of the 1951 Convention and in Article 35, according to which State Parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees […] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention." The same commitment is included in Article II of the 1967 Protocol.

12. In accordance with UN General Assembly resolutions 3274 XXIX[5] and 31/36,[6] UNHCR has been designated, pursuant to Articles 11 and 20 of the *1961 Convention*

[3] See *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1 (Statute).
[4] Statute, para. 8(a).
[5] UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 10 December 1974, A/RES/3274 (XXIX).
[6] UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 30 November 1976, A/RES/31/36.

on the Reduction of Statelessness (the 1961 Statelessness Convention),[7] as the body to which a person claiming the benefits of this Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authorities. In resolutions adopted in 1994 and 1995, the UN General Assembly entrusted UNHCR with a global mandate for the identification, prevention, and reduction of statelessness and for the international protection of stateless persons.[8] UNHCR's statelessness mandate has continued to evolve as the UN General Assembly has endorsed the Conclusions of UNHCR's Executive Committee.[9]

13. Australia is a Contracting Party to the *1951 Convention*, the 1967 Protocol as well as the *1954 Convention relating to the Status of Stateless Persons* (the 1954 Statelessness Convention), and the 1961 Statelessness Convention. Through accession to these instruments, Australia has assumed international legal obligations in relation to refugees, asylum-seekers, and stateless persons in accordance with their provisions.

III. OUTLINE OF THE PROPOSED AMENDMENTS

14. Principally, the Bill intends to change the legislative framework relating to the removal from Australia of certain non-citizens. In summary, the Bill contains six schedules which propose to amend the *Migration Act 1958* (Cth) (the Act) in various ways summarised below.

Cessation of Visas when Permission Granted by a Foreign Country

15. Proposed new subsection 76AAA provides for the cessation of a Subclass 070 (Bridging (Removal Pending)) visas (BVR) when a visa holder is notified (orally or in writing) that permission has been granted by another country for the visa holder to enter and remain in that other country under a "third country reception arrangement" that is in force. The rules of natural justice do not apply to the giving of the notice. Permission may be conditional on the non-citizen doing something required by the foreign country before entering the country. Exceptions are provided for those under 18 years of age, those with visa assessments that have not been "finally determined", and those protected from removal by subsection 197C(3). Once the person is notified and their BVR ceases, the person will become an unlawful non-citizen and be liable for immigration detention pending their removal or the grant of another visa.

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[7] UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

[8] UN General Assembly resolutions A/RES/49/169 of 23 December 1994 and A/RES50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI), *Prevention and Reduction of Statelessness and the Protection of Stateless Persons,* 20 October 1995.

[9] Executive Committee Conclusion No. 90 (LII), Conclusion on International Protection, 5 October 2001, para. (q); Executive Committee Conclusion No. 95 (LIV), General Conclusion on International Protection, 10 October 2003, para. (y); Executive Committee Conclusion No. 99 (LV), General Conclusion on International Protection, 8 October 2004, para. (aa); Executive Committee Conclusion No. 102 (LVI), General Conclusion on International Protection, 7 October 2005, para. (y); Executive Committee Conclusion No. 106 (LVII), Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, 6 October 2006, paras. (f), (h), (i), (j) and (t); all of which are available in: *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 1 – 114)*, October 2017.

16. The Explanatory Memorandum notes that "some of the persons these amendments would affect are persons who have a 'protection finding' (that is, they have been found to engage Australia's non-refoulement obligations in a protection visa decision with respect to a particular country or countries)".[10] It goes on to state, "for those who do not have a 'protection finding' but make protection claims, there would be an opportunity to have those claims considered through a protection visa process or through consideration of ministerial intervention pathways where relevant. Similarly, where a person makes new protection claims in relation to a country they have previously been assessed against and had no protection finding made, or in relation to another country to which they may be removed, including a country with which Australia has a reception arrangement, or where there may be chain refoulement concerns with respect to the third country, there is scope to identify such cases and refer them for ministerial intervention consideration prior to removal actually taking place".[11]

Expanding Persons Liable for Removal from Australia

17. A new definition is to be inserted into subsection 5(1) of "removal pathway non-citizen" to include not only those captured by existing section 198 who must be removed from Australia as soon as reasonably practicable, but also those who have been granted a BVR, or a Subclass 050 (Bridging (General)) visa (or other visa to be prescribed by the regulations) which at the time the visa was granted, satisfied a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia. Those captured by this definition will be subject to new section 198AAA (disclosure of information to foreign countries) and amended subsection 197D(2A) (reconsideration of protection findings).

Expanding Scope to Revisit Protection Findings

18. Amendments to existing section 197D propose to expand its operation to enable a decision to be made that a "removal pathway non-citizen" is no longer a person in respect of whom a protection finding would be made. As previously mentioned, a protection finding is when a person has been found to engage Australia's non-refoulement obligations in a statutory protection visa process.

19. If under subsection 197D(2) a decision is made to set aside the protection finding, the removal would no longer be prevented by subsection 197C(3). The statutory safeguards to prevent removal in breach of Australia's non-refoulement obligations under existing subsection 197C(3) provide that removal to the country by reference to which a protection finding was made is not required or authorised unless the decision in which the protection finding was made is quashed or set aside, the person requests voluntary removal, or the person is found to no longer be a person in respect of whom a protection finding would be made in respect of the relevant country.

Broad Immunity from Civil Liability

[10] Explanatory Memorandum, p.26.
[11] Explanatory Memorandum, p.26.

20. Proposed new subsection 198(12) provides that no civil liability is incurred by an officer or the Commonwealth in relation to any act or thing done, or omitted to be done, by the officer in good faith in exercise of powers, functions or duties under section 198 in relation to the removal of a person from Australia following a decision to refuse or cancel a visa on character grounds; to refuse to grant a protection visa, relying on subsection 5H(2) or 36(1C) of the Act; or following cessation of a person's visa under proposed new section 76AAA.

21. Further, subsection 198(13) provides that no civil liability is incurred by an officer, an officer of the Commonwealth (including the Minister), or the Commonwealth for acts done by an officer or officer of the Commonwealth in good faith and in the exercise of powers, functions or duties or acts or omissions done by a foreign country or any person in a foreign country in relation to the acceptance of a removed person by a foreign country or the person's presence in the foreign country under or in relation to third country reception arrangements.

22. Moreover, proposed amendments to existing section 198AD provide that no civil liability is incurred by an officer of the Commonwealth (including the Minister) or the Commonwealth, in relation to any act or thing done, or omitted to be done, in good faith and in the exercise of powers, functions or duties, under section 198AD. Section 198AD applies to an unauthorised maritime arrival who is detained under section 189, and provides that an officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom the section applies from Australia to a regional processing country.

23. There is also immunity in proposed subsection 198AD(11B) from civil liability in respect of acts or omissions for things done under section 198AD to take a person to a regional processing country or another foreign country (including one where there is a third country reception arrangement), where those acts or omissions were done by: an officer or officer of the Commonwealth in good faith and in the exercise of their powers, performance of their functions or duties; or done by a regional processing country or another foreign country; or any person in a regional processing country or another foreign country.

Expanding Collection, Use and Disclosure of Personal Information

24. The proposed amendments contained in Schedule 3 provide that the Minister or an officer of the Department may collect, use, and disclose "criminal history information". This term is defined in subsection 5(1) to include information about: any charge against an individual (whether the individual has been found to have committed the offence or not); any finding that an individual has committed an offence (regardless of whether the person has been convicted of the offence); any convictions (including information about spent convictions); and any other result of a proceeding for the prosecution of the individual.

25. The Bill's Explanatory Memorandum notes that under Commonwealth, State, and Territory laws, certain types of convictions normally become spent after 10 years in which no further convictions are recorded against an adult offender which means a

person is not normally required to disclose the fact of conviction, and other persons are prevented from disclosing the conviction and from taking the conviction into account.[12]

26. Under the proposed amendments, collection, use and disclosure (including secondary use and disclosure) of criminal history information is authorised for the purpose of informing, directly or indirectly, the performance of a function or the exercise of a power under the Migration Act or the Migration Regulations. This includes to inform decisions whether to grant or refuse a visa, whether to cancel a visa, and for the purposes of providing advice with respect to the appropriateness of visa conditions.[13] The stated aim of this amendment "is to protect the safety of the Australian community by identifying person of character concern and imposing appropriate mitigations to that risk through visa conditions".[14]

Disclosure of Personal Information to Foreign Countries

27. The stated purpose of the amendments contained in schedule 4 "is to ensure that information can be disclosed to foreign countries, particularly countries of which the person is not a national, to see if the country will grant the person permission to enter and remain in that country".[15] Thus, the insertion of proposed new section 198AAA authorises the collection, use and disclosure to the "government"[16] of a foreign country of information, including personal information, for purposes related to determining whether there is a real prospect of the removal of the non-citizen from Australia or facilitating the removal of the non-citizen from Australia, including in relation to taking action or making payments under third country reception arrangements or functions or for purposes incidental or conducive to this.

28. Such disclosure to a foreign country is not authorised while the person has a protection visa application which has not yet been finally determined. Such disclosure is also not authorised to a country in relation to which a protection finding was made for the person in a protection visa application that has been finally determined.

29. The stated purpose of this amendment is "to ensure that information can be disclosed to foreign countries, particularly countries of which the person is not a national, to see if the country will grant the person permission to enter and remain in that country. The ultimate objective of such disclosures is to be able to effect the removal from Australia of non-citizens who are on a removal pathway because they do not have a substantive visa to remain in Australia – in many cases this is because their substantive visa was refused or cancelled on character grounds – but for whom there

[12] Explanatory Memorandum, p.15.
[13] Explanatory Memorandum, p.14.
[14] Explanatory Memorandum, p.33.
[15] Explanatory Memorandum, p.32.
[16] Proposed subsection 198AAA(6) defines "government" for the purposes of this section to include the government of the foreign country or part of the foreign country, an agency or authority of the government of the foreign country or part of the foreign country, or a local government body or regional government body of the foreign country.

have been barriers to effecting their removal, particularly to their country of nationality".[17]

Third Country Reception Arrangements

30. Schedule 5 inserts proposed new section 198HB which provides the statutory basis for Australia to take, or cause to be taken, any "action"[18] (not including exercising restraint over the liberty of a person) in relation to a third country reception "arrangement"[19] or the "third country reception functions" of the foreign country; make payment, or cause payments to be made, in relation to the third country reception arrangement or the third country reception functions of the foreign country; or do anything else that is incidental or conducive to the taking of such action or the making of such payments.

31. Subsection 198AHB(5) defines "third country reception functions", in relation to a foreign country, as implementation of any law or policy, or any action by that country (including, if the foreign country so decides, exercising restraint over the liberty of a person) in connection with the role of that country as a country which has agreed to the acceptance, receipt or ongoing presence of persons who are not citizens of that country, whether the implementation or the taking of action occurs in that country or another country.

32. While very few details or parameters of the arrangement are prescribed in the Bill, the Explanatory Memorandum states that "the Australian Government's long-standing view is that Australia's human rights obligations are essentially territorial. Persons subject to third country reception arrangements would be outside Australia's territory. Australia will also owe human rights obligations with respect to individuals who are outside Australia's territory but within its 'effective control'. In countries with which Australia enters into a third country reception arrangement, there is no intention that Australia will exercise effective control".[20]

Curfew and Monitoring Conditions for Some Released from Detention

33. Amendments made by Schedule 6 amend existing section 76E of the Act to align the test for the Minister to consider in response to representations made under that section by a BVR holder whose visa is subject to certain conditions including curfew and electronic monitoring, with the new test in the Migration Regulations as amended by the Migration Amendment (Bridging Visa Conditions) Regulations 2024 (the Amendment Regulations).[21]

34. These amendments immediately followed the High Court's decision on 6 November 2024 in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024]

[17] Explanatory Memorandum, pp.32-33.
[18] Subsection 198AHB(5) defines "action" to include action in a foreign country.
[19] Subsection 198AHB(5) defines "arrangement" to include an arrangement, agreement, understanding, promise or undertaking, whether or not it is legally binding.
[20] Explanatory Memorandum, p.29.
[21] Migration Amendment (Bridging Visa Conditions) Regulations 2024, available at: Federal Register of Legislation - Migration Amendment (Bridging Visa Conditions) Regulations 2024.

HCA 40[22] (YBFZ) which found that the imposition of each of the curfew and the monitoring conditions on a BVR is prima facie punitive and cannot be justified. It followed that clause 070.612A(1)(a) and (d), as in force prior to the commencement of the Amendment Regulations, infringed Chapter III of the Constitution and were invalid.

35. The Amendment Regulations introduced a "new community protection test" to provide that the Minister can only impose certain conditions including curfew and electronic monitoring conditions using a new test related to protecting any part of the Australian community from serious harm. The new test requires consideration of risk of the particular criminal conduct (serious offence) occurring and the nature, degree and extent of harm the BVR holder may pose to any part of the Australian community (poses a substantial risk). The Explanatory Statement to the Amendment Regulations notes that:

> "Placing a specific term of imprisonment threshold, along with an exhaustive list that constitutes a 'serious offence', reflects the intention of each of the visa condition(s) having a protective purpose, by referring to an objective way of demonstrating whether the offences that the Minister is concerned with are serious or not. This is in contrast to the way the invalid provision had purported to operate previously, which was that the Minister was required to impose the conditions unless satisfied that the imposition of the conditions were not reasonably necessary to protect any part of the Australian community."[23]

36. Existing Section 76E is not currently consistent with the new regulations, and thus the amendments will, amongst other things, insert the new test by inserting proposed paragraph 76E(4)(b). As the Minister explained when introducing the bill, "the way the regulations have been drafted it will be some weeks before section 76E will be required to be used. Therefore, while it is important for this legislation to go through within a reasonable time, it does not have to be rushed through this week".[24]

IV. THIRD COUNTRY RECEPTION ARRANGEMENTS

37. The amendments in the Bill propose to authorise the Government to spend money and enter "third country reception arrangements" with any foreign countries for the removal of certain non-citizens from Australia. Very few exemptions are outlined with respect to such removal arrangements, though children under 18 years are expressly excluded; as are those whose protection visa application has not been "finally determined"; and when removal cannot occur in relation to a particular country in respect of which a protection finding has been made under subsection

[22] *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, available at: https://eresources.hcourt.gov.au/showCase/2024/HCA/40.
[23] Explanatory Statement, Migration Amendment (Bridging Visa Conditions) Regulations 2024, p.6.
[24] Minister Tony Burke, Second Reading Speech, Migration Amendment Bill 2024, 7 November 2024, p. 36., available at: https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/28588/0057/hansard_frag.pdf;fileType=application%2Fpdf.

197(3), though as previously noted, the Government's ability to revisit such findings will be expanded significantly by amendments proposed under this Bill.

38. Persons who may become subject to such removal arrangements include those in the community who have been granted BVRs (including those released from detention following the High Court's ruling in *NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs & Anor*) (NZYQ) many of whom are unable to be involuntarily removed, including to their country of origin or former habitual residence owing to the fact that they are owed non-refoulement obligations, or because they are stateless.[25] Their re-detention would purportedly be justified if a foreign country has granted permission for the person to enter that country, as there would then be the requisite real prospect that they may be removed under section 198 in the reasonably foreseeable future.

39. Personal information to facilitate removal can also be shared with third countries with respect to "removal pathway non-citizens", which as mentioned above, includes those in detention who have been referred for removal and persons living in the community on certain bridging visas (and other visas to be prescribed). Such persons are classified to be on a "removal pathway", usually as result of not being eligible for grant of a substantive protection visa (sometimes for reasons related to character grounds due to prior criminal offending) despite many being owed non-refoulement obligations.

40. There are no statutory parameters outlined with respect to proposed "third country reception arrangements". Nor is the scope of reception functions of a third country (or another country) detailed or restricted. There are similarly no limitations or requirements regarding what must be done to protect the human rights of such persons or even any transparency to ensure a person who is removed to a third country is not subject to human rights violations or returned to their home country or another country where they may be at risk of harm. While the Bill provides that the Commonwealth may not exercise restraint over the liberty of a person in relation to third country reception arrangements, it explicitly envisages that a third country may do so, though there are no statutory safeguards in the Bill governing such action or treatment.[26] Rather, Schedule 2 appears to restrict the right to an effective remedy by providing broad civil liability immunity for acts or omissions done in good faith in the exercise of powers, functions, and duties by Commonwealth officials (including the Minister), a foreign country or any person in a foreign country, and by regional processing countries or any person in a regional processing country or another foreign country in the context of section 198AD.

41. UNHCR's longstanding position is that any cooperative arrangements between States need to be undertaken in accordance with international refugee and human rights law standards and in the spirit of international cooperation and solidarity, as called for under the 1951 Convention and the Global Compact on Refugees of 2018. The transfer

[25] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37; 97 ALJR 1005, also available at: https://jade.io/j/?a=outline&id=1055542.
[26] See definition of "third country reception function" in proposed subsection 198AHB(5).

of asylum-seekers and refugees to other countries without sufficient safeguards, can amount to **externalization of international protection**.[27]

42. The externalization of international protection in this context refers to measures taken—unilaterally or in cooperation with other States—which are implemented or have effects outside their own territories, and which directly or indirectly prevent asylum-seekers and refugees from being able to claim or enjoy protection there. The transfer of people from one country to another, without adequate protection safeguards or standards of treatment can lead to indefinite 'warehousing' exposing such persons to indirect refoulement and other dangers and such measures can also de-humanize and label people in need of international protection as unwanted.[28]

43. **UNHCR considers that the measures proposed in the Bill constitute externalization of international protection because they attempt to shift to a foreign country the responsibility for meeting the international protection needs of persons subject to such an arrangement, or accountability for leaving such needs unmet, and they provide inadequate safeguards in law to guarantee international protection, thereby making such proposed third country arrangements unlawful**.[29]

44. At a minimum and in summary, transfer arrangements in the third country need to ensure that: applicable refugee and human rights law standards are met (including protection against refoulement (and chain refoulement), access to health, education and basic services; safeguards against arbitrary detention, the principle of family unity and the specific needs of individuals need to be respected, and the best interests of the child must be a primary consideration); refugee status and/or other processing for international protection needs takes place fairly and efficiently; access to asylum and/or durable solutions are provided within a reasonable time; and/or the arrangement improves asylum space in the receiving State, the transferring State and/or the region as a whole. Moreover, the obligation to ensure that conditions in the receiving State meet these requirements in practice rests with the *transferring* State, prior to entering into such arrangements. It is not enough to merely assume that a person would be treated in conformity with these standards – either because the receiving State is a party to the 1951 Convention or other refugee or human rights instruments, or on the basis of an ongoing arrangement or past practice. Additionally, such arrangements would not be appropriate where they represent an attempt, in whole or part, by a 1951 Convention State party to divest itself of responsibility; or they are used as an excuse to deny or limit jurisdiction and responsibility under international refugee and human rights law. [30]

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[27] UNHCR, *UNHCR Note on the "Externalization" of International Protection*, 28 May 2021, https://www.refworld.org/policy/legalguidance/unhcr/2021/en/121534.
[28] Ibid.
[29] Ibid.
[30] See further: UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, https://www.refworld.org/policy/legalguidance/unhcr/2013/en/16943; UNHCR, *UNHCR Note on the "Externalization" of International Protection*, 28 May 2021, https://www.refworld.org/policy/legalguidance/unhcr/2021/en/121534; and UNHCR, *Annex to UNHCR Note on the "Externalization" of International Protection: Policies and practices related to the externalization of international protection*, 28 May 2021, https://www.refworld.org/policy/legalguidance/unhcr/2021/en/123811.

V. THE REASSESSMENT OF PROTECTION FINDINGS AND CESSATION OF REFUGEE STATUS

45. The amendments propose to expand the scope of existing section 197D to capture those who fall within the new definition of "removal pathway non-citizen" to enable a decision to be made that a person is no longer a person in respect of whom a protection finding would be made. A protection finding is when a person has been found to engage Australia's non-refoulement obligations in a protection visa process. Those with a protection finding in immigration detention, and those residing in the community on a BVR or a subclass 050 Bridging (General) visa on a removal pathway, as well as other visas to be prescribed in the Regulations.

46. While the Bill's Explanatory Memorandum suggests that such reconsideration is appropriate in circumstances where the protection finding is a barrier to removal for those on a removal pathway following the refusal or cancellation of a visa on character or security grounds, the protection findings of protection visa holders and holders of related substantive visas will not be re-assessed under the measures proposed in the Bill. Whilst a decision made under the proposed amendments will be subject to merits and judicial review, it is unclear on what basis the Minister would make this decision, noting that section 197D provides limited guidance as to the circumstances in which the Minister would be "satisfied" that a person is no longer owed protection obligations, nor has the power to revisit a protection finding reportedly been used in practice.[31]

47. It is also noteworthy that the Government's explanatory materials to the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, which introduced section 197D states that, in practice, it would be rare that a person who has been found to engage protection obligations would no longer engage those obligations.[32] If this is the case, it is unclear why this amendment to expand those persons liable to reassessment is considered necessary. Moreover, as discussed below, it is important to emphasise that visa refusal or cancellation due to the operation of Australian law does not necessarily negate a person's refugee status at international law.

The Loss of Refugee Status under the 1951 Convention

48. International refugee law exhaustively specifies the circumstances in which refugee status comes to an end. Recognition of refugee status may accordingly only be withdrawn on the basis of cancellation or revocation,[33] or if the conditions for cessation of refugee status are met.

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[31] Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Budget Estimates, May 2024, Home Affairs Portfolio, BE24-0648 - Decisions Made under s.197D(2), available at: 2024-25 Budget estimates – Parliament of Australia.

[32] Revised Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, p.11.

[33] A note on terminology: the term 'revocation' is used by UNHCR when referring to the application of Article 1F(a) or (c) of the Refugee Convention to a refugee after recognition, whereas 'cancellation', in UNHCR's terminology, refers to the invalidation of a refugee status recognition decision that was incorrectly made. See further: UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention*

49. The so-called 'cessation clauses' (under Article 1C of the 1951 Convention) are relevant in the context of the Minister deciding under s 197D that a refugee is no longer a person in respect of whom a protection finding would be made. Article 1C articulates the conditions under which a refugee ceases to be a refugee at international law,[34] based on the consideration that international protection should not be maintained where it is no longer necessary or justified. Since the application of the cessation clauses in effect operates as a formal loss of refugee status, a restrictive and well-balanced approach should be adopted in their interpretation and procedures should respect the rules of fairness and natural justice. Where an unjustified or premature application of a cessation clause results in the forced return of any refugee, the consequences could be extremely serious, leading to further displacement within the country of origin or renewed displacement outside, as well as risks to life and personal security.[35]

50. The 1951 Convention does not envisage a loss of status triggered by domestic visa arrangements (such as through visa cancellation on character grounds), nor a requirement for refugees to periodically re-establish their refugee status – either as a result of the grant of a temporary visa status or effective loss of status as a result of a Ministerial decision under section 197D of the Migration Act.

51. This results from the need to provide refugees with stability and the assurance that their status will not be subject to constant review. **When a State wishes to apply the ceased circumstances clauses, the burden rests on the country of asylum to demonstrate that there has been a fundamental, stable and durable change in the country of origin and that invocation of Article 1C(5) or (6) of the 1951 Convention is appropriate**. Further, a refugee can invoke "compelling reasons arising out of previous persecution" for refusing to re-avail him or herself of the protection of the country of origin. This exception is intended to cover cases where refugees, or their family members, have suffered atrocious forms of persecution and therefore cannot be expected to return to the country of origin or former habitual residence.

52. In addition, the right to family life and the principle of family unity are entrenched in international human rights and humanitarian law instruments, and apply to all human beings, regardless of their status.[36] Respect for the right to family life requires

relating to the Status of Refugees, 4 September 2003, https://www.refworld.org/policy/legalguidance/unhcr/2003/en/33331.

[34] Articles 1C(5)-(6), provide that—absent compelling reasons arising out of previous persecution—a person's refugee status ceases if the circumstances in connection with which she was recognized as a refugee have ceased to exist, such that the person can no longer refuse to avail herself of the protection of her country of nationality (or, in the case of a stateless refugee, is now able to return to her country of former habitual residence).

[35] Executive Committee of the High Commissioner's Programme; Standing Committee, *Note on Cessation Clauses*, EC/47/SC/CRP.30, UN High Commissioner for Refugees (UNHCR), 30 May 1997, https://www.refworld.org/reference/annualreport/unhcr/1997/en/57651.

[36] Although there is not a specific provision in the 1951 Convention, the strongly worded Recommendation in the Final Act of the Conference of Plenipotentiaries reaffirms the "essential right" of family unity for refugees. See UN General Assembly, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, A/CONF.2/108/Rev.1, 25 July 1951, www.refworld.org/legal/leghist/cpsrsp/1951/en/89635, Sec. IV B.

not only that States refrain from action which would result in family separation, but also that they take positive measures to maintain family unity and reunite family members who have been separated. UNHCR's Executive Committee, in Conclusion No. 69, **recommends that States consider "appropriate arrangements" for persons "who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links"**.[37]

53. **The cessation clauses in Article 1C (1-6) set out the only situations in which refugee status properly and legitimately granted comes to an end**.[38] **Once an individual is determined to be a refugee, their status is maintained unless they fall within the terms of these cessation clauses**.[39] Article 1C only "applies when the refugee, having secured or being able to secure national protection, either of the country of origin or of another country, no longer needs international protection [...and] the approach to such cases should be to ensure that no refugee is unjustly deprived of the right to international protection."[40] Accordingly, as already observed, a restrictive and well-balanced approach should be adopted in the interpretation of cessation clauses which in effect operate as a formal loss of refugee status. This strict approach is also important since refugees should not be subjected to constant review of their refugee status.[41]

54. The cessation clauses can thus be divided broadly into two categories: those relating to a change in the personal situation of the refugee brought about by his/her own acts, and those relating to a change in the objective circumstances which formed the basis for the recognition of refugee status.[42] When applied on an individual basis, re-assessment of the refugee's well-founded fear of persecution should not be required. This would defeat the purpose of the cessation clauses based on "ceased circumstances" under Article 1C as a distinct test in contrast to the inclusion test under Article 1A(2) of the 1951 Convention.

55. There is also no causal link between the commission of crimes by refugees and the application of a cessation clause under the 1951 Convention, nor is cessation of refugee status a pre-requisite for expulsion, provided the criteria for the application of Articles 32 and 33(2) of the 1951 Convention are met. The basis and application of the cessation clauses must be clearly distinguished from these provisions, which, taken together,

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[37] UNHCR Executive Committee Conclusion No. 69 (XLIII) Cessation of status, (a), 1992, available at: http://www.refworld.org/docid/3ae68c431c.html.
[38] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, https://www.refworld.org/docid/5cb474b27.html (UNHCR Handbook), paras. 115-116; UNHCR, The Cessation Clauses: Guidelines on Their Application, 26 April 1999 https://www.refworld.org/docid/3c06138c4.html (UNHCR, Application of the Cessation Clauses, 1999); UNHCR, Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees, 10 February 2003, HCR/GIP/03/03, http://www.refworld.org/docid/3e50de6b4.html.
[39] UNHCR Handbook, para. 112
[40] UNHCR, *Note on Cessation Clauses*, 30 May 1997, EC/47/SC/CRP.30 https://www.refworld.org/docid/47fdfaf1d.html paras. 4, 14.
[41] UNHCR, Application of the Cessation Clauses, 1999, para. 2
[42] Ibid, para. 5

may exceptionally justify expulsion or return to the country of origin (see "The Scope and Application of Articles 32 and 33(2) of the 1951 Convention" below).

56. The basis for the application of the cessation clauses in Article 1C of the 1951 Convention must be distinguished from those limited circumstances in which refugees who have committed a crime may lose their previously granted refugee status through cancellation or revocation, provided it is established, in line with certain procedural safeguards, that the relevant criteria are met.[43] Cancellation of refugee status arises when it is established that the decision to grant refugee status was incorrect, for example because it was obtained through fraud.[44] Revocation of refugee status applies when the individual commits crimes under the exclusion clauses Articles 1F(a), crimes against peace, war crimes, crimes against humanity, or Article 1F(c), acts contrary to the purposes and principles of the United Nations, including if committed in the country of asylum. In contrast, the exclusion ground in Article 1F(b), which covers "serious non-political crimes" is applicable only to crimes committed "outside the country of refuge prior to admission to that country as a refugee" and could thus not result in revocation of refugee status on the basis of a crime committed in the country of asylum.[45]

57. While the above-mentioned provisions of the 1951 Convention, which limit eligibility for refugee status and permit States to take measures, which affect certain rights adhering to refugee status, are given effect in Australia by existing provisions in the Act, the character test contained in subsection 501(6) of the Act operates above and beyond these provisions and is not in line with the provisions of the 1951 Convention. Except for acts within the scope of Article 1F(a) or (c) of the 1951 Convention, criminal conduct after admission into the country of refuge should be handled through rigorous domestic criminal law enforcement and/or, where necessary and appropriate, the application of Article 32 or Article 33(2).[46]

The Scope and Application of Articles 32 and 33(2) of the 1951 Convention

58. Only in the extreme cases where the individual meets the conditions contained in Article 33(2) can exceptions to the benefit of the principle of non-refoulement, enshrined in Article 33(1) of the 1951 Convention, be considered. A person expelled in line with the exception under Article 33(2) would still maintain refugee status. These considerations must be viewed in the context of the overriding humanitarian objective of the 1951 Convention and applicable human rights guarantees. The provision aims at protecting the safety of the country of refuge or the community. Its application hinges on the assessment that there are reasonable grounds for regarding the refugee in question as a danger to the security of the country or that, having been

[43] See fn. 32 above for an explanation of UNHCR's use of the terms 'cancellation' and 'revocation'.
[44] UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004, https://www.refworld.org/docid/41a5dfd94.htm , pp.15-29; UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003 https://www.refworld.org/docid/3f5857d24.html, paras. 13-16.
[45] UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003 https://www.refworld.org/docid/3f5857d24.html, paras. 11 and 17.
[46] UNHCR, *Additional UNHCR Observations on Article 33(2) of the 1951 Convention in the Context of the Draft Qualification Directive*, December 2002, https://www.refworld.org/docid/437c6e874.html, para. 6.

convicted by a final judgement of a particularly serious crime, such a refugee constitutes a danger to the community of the host country.

59. For the "danger to the security of the country" exception to the principle of non-refoulement to apply, there must be an individualized finding that the refugee poses a current or future danger to the host country. The danger must be serious, rather than of a lesser order, and it must be a threat to the national security of the host country. On this point, the drafters of the 1951 Convention clarified in their commentary to Article 33, that the security of the country exception may be invoked against acts of a serious nature, endangering directly or indirectly the constitution, government, the territorial integrity, the independence or the external peace of the country.[47]

60. For the "danger to the community" exception to apply, not only must the refugee in question have been convicted of a crime of a very grave nature by a final judgment, but it must also be established that the refugee, in light of the crime and conviction, constitutes a very serious present or future danger to the community of the host country. The fact that a person has been convicted of a particularly serious crime does not of itself mean that he or she also meets the "danger to the community" requirement. Whether or not this is the case will depend on the nature and circumstances of the particular crime and other relevant factors.[48] UNHCR recognizes that the term "serious crime" may have different connotations in different legal systems. In UNHCR's view, the gravity of the crimes should be judged against international standards, not solely by its categorization in the host State or the nature of the penalty and in order for Article 33(2) to apply, it must be a "particularly" serious crime, meaning a higher degree of gravity than the crimes falling within the scope of Article 1F(b).[49]

61. In either case, the removal of a refugee is lawful only if it is necessary and proportionate. This means that there must be a rational connection between the removal of the refugee and the elimination of the danger resulting from his or her presence for the security or community of the host country; refoulement must be the last possible resort for eliminating the danger to the security or community of the host country, and the danger for the host country must outweigh the risk of harm to the person as a result of refoulement. If less serious measures would be sufficient to remove the threat posed by the refugee to the security or the community of the host country, refoulement cannot be justified under Article 33(2) of the 1951 Convention.

62. The exceptions to the principle of non-refoulement in Article 33(2) are distinct from, yet linked to, Article 32(1), which clearly must be understood in the sense that

[47] UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, August 2006, https://www.refworld.org/docid/44dc81164.html, (UNHCR, Note on Diplomatic Assurances) para. 12. See also Grahl-Madsen, Commentary on the Refugee Convention, Commentary to Article 33, at (8).
[48] See, Grahl-Madsen, Commentary on the Refugee Convention, Commentary to Article 33.
[49] See, for instance, UNHCR, Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, HCR/GIP/03/05 https://www.refworld.org/docid/3f5857684.html, para. 14; UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003 https://www.refworld.org/docid/3f5857d24.html, para. 38.

"expulsion" is the only way by which a refugee "lawfully in the territory" may be removed from the territory of the host country. In other words, if a refugee is "lawfully in the territory" he or she is entitled to the benefits of Article 32 and may only be removed for reasons of national security or public order and subject to the procedural provisions of Article 32(2) and (3). Article 32 does not, however, permit the expulsion of a refugee to a country where he or she would be at risk of persecution.

63. The term "national security" in Article 32 encompasses cases of conduct of a serious nature that threaten the country's sovereignty, independence, territorial integrity, constitution, government, external peace, war potential, armed forces or military installations. The term "public order" in Article 32 should be viewed as an international concept – a technical term within its own meaning which does not necessarily coincide with the concept of public order in any particular domestic system of law. Even certain serious crimes do not automatically give the host country the right to expel a refugee by virtue of Article 32. Committing a serious crime and a criminal conviction do not in themselves justify the expulsion of the refugee for reasons of public order. There must be a separate finding as to whether the continued presence of the refugee is undermining the maintenance of public order.

64. The procedural safeguards applicable to expulsion as regulated by Article 32 must also be read into the application of the exceptions to refoulement in Article 33(2). The determination of whether or not one of the exceptions provided in Article 33(2) is applicable must be made in a procedure which offers adequate safeguards. At a minimum, these should be the same as the procedural safeguards required for expulsion under Article 32. Anything short of that, is considered a breach of both provisions.[50]

In all of the above situations, including where Article 32 and/or 33(2) is applicable, the individual still benefits from protection against removal to a country where they are at risk of torture or other cruel, inhuman or degrading treatment or punishment by virtue of non-refoulement obligations under other international instruments, most notably Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"),[51] and Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights.[52]

[50] UNHCR, Note on Diplomatic Assurances, p. 6, para. 14.
[51] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, https://www.refworld.org/docid/3ae6b3a94.html
[52] HRC, General Comment No. 31: The nature of the general legal obligation imposed on states parties to the Covenant (2004), UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, para. 12. It should be noted that the HRC lists violation of Articles 6 and 7 of the ICCPR as non-exhaustive examples of violation of rights that would trigger non-refoulement obligations. Similarly, in its General Comment No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin, U.N. Doc. CRC/GC/2005/6, 1 September 2005, the Committee on the Rights of the Child stated that States party to the Convention on the Rights of the Child "[…] shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 [right to life] and 37 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment.

VI. INADEQUATE SAFEGUARDS IN LAW TO ENSURE ADHERENCE WITH INTERNATIONAL REFUGEE AND HUMAN RIGHTS OBLIGATIONS

Preservation and Protection of the Family Unit

65. While the proposed new BVR cessation measures do not apply to persons under 18 years of age, the Explanatory Memorandum acknowledges that "some persons who hold BVRs may be long-term residents of Australia who had their substantive visa cancelled on character grounds".[53] Further as the cessation measures are intended to facilitate the person's removal from Australia, it also recognises that these measures "may separate that person from family members in Australia, including minor or dependent children".[54] UNHCR emphasises that during its regular independent immigration detention inspections and regular engagement with asylum-seekers, refugees, and stateless persons capable of being caught by this Bill, UNHCR has met with hundreds of persons under its mandate who are long-term residents of Australia with close and enduring family ties (including many who have minor children and partners who are citizens of Australia).

66. With respect to the imposition of the measures proposed in the Bill, UNHCR underscores that under international human rights law, the family is recognized as the fundamental group unit of society and as entitled to protection and assistance in Article 16(3) of the *1948 Universal Declaration of Human Rights* (UDHR);[55] in Article 23(1) of the *1966 International Covenant on Civil and Political Rights* (ICCPR);[56] and in Article 10(1) of the *1966 International Covenant on Economic, Social and Cultural Rights* (ICESCR).[57] The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (CMW) contains similar language,[58] as do the preambles to the CRC and the *2006 Convention on the Rights of Persons with Disabilities* (CRPD).[59]

67. While there is no single, universally agreed legal definition of family, the question of what constitutes a family should be assessed on a case-by-case basis and informed by the principle of dependency and, in the case of children, best interest procedures. Relevant considerations include biological and social connections, cultural variations as well as social, emotional, and economic ties or dependency factors. An open, culturally sensitive, and inclusive interpretation to considerations of family membership is encouraged.

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[53] Explanatory Memorandum, p.28.
[54] Explanatory Memorandum, p.28.
[55] 9 UN General Assembly (UNGA), Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html.
[56] UNGA, International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html
[57] UNGA, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS, vol. 993, p. 3, available at: http://www.refworld.org/docid/3ae6b36c0.html
[58] UNGA, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158, available at: http://www.refworld.org/docid/3ae6b3980.html, Article 44.
[59] UNGA, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, available at: http://www.refworld.org/docid/4680cd212.html.

68. The Committee on the Rights of the Child[60] has stated that the term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom" in accordance with Article 5 of the *1989 Convention on the Rights of the Child* (CRC).[61] Furthermore, the Committee has stated that the protections under Article 9 of the CRC concerning the separation of children from their parents also extend "to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship".[62] UNHCR's Executive Committee have also stressed that "all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity".[63]

69. UNHCR considers that **the stated safeguards outlined in the Explanatory Memorandum, including as afforded through various visa processes, are inadequate to appropriately preserve and protect family unity of those capable of being caught by the operation of this Bill.** Moreover, UNHCR considers that reliance on the Minister's personal non-compellable discretionary intervention powers to safeguard against derogation of these rights is equally insufficient.

70. UNHCR has consistently emphasised that family reunification is essential for refugees to enjoy the fundamental right to family life,[64] and a central consideration in regard to the best interests of children. When refugees are separated from family members because of their flight, a prolonged separation can have serious consequences on their wellbeing and the welfare of their families. The negative impact of separation affects the refugees' ability to integrate, become active contributors to the society, and rebuild their lives.[65] Conversely, the restoration of the family unit can help ease the sense of loss often experienced by refugees, who had to abandon their countries of origin, communities and previous way of life. Finding and reuniting with family members is often one of their most pressing concerns.[66] For these reasons, UNHCR's Executive Committee has repeatedly emphasized the fundamental importance of family reunification and underlined the need to protect the unity of the refugees' family by "measures which ensure respect for the principle of family unity, including, those to reunify family members separated as a result of refugee flight.[67]

60 CRC Committee, General Comment No. 14, 2013, available at: https://www.refworld.org/legal/general/crc/2013/en/95780.
61 UNGA, Convention on the Rights of the Child, 20 November 1989, UNTS, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html.
62 Ibid. Para. 60.
63 UNHCR, Executive Committee (ExCom), *Refugee Children*, Conclusion No. 47 (XXXVIII), 12 October 1987, available at: http://www.refworld.org/docid/3ae68c432c.html, para. (d).
64 See for example, UNHCR, Families together: family reunification for refugees in the European Union, February 2019: http://www.unhcr.org/nl/wp-content/uploads/Familiestogether_20181203-FINAL.pdf.
65 UNHCR, Summary conclusions on the right to family life and family unity in the context of family reunification, 4 December 2017, available at: www.refworld.org/docid/5b18f5774.html.
66 A. Miller, J.M. Hess, D. Bybee and J.R. Goodkind, *Understanding the mental health consequences of family separation for refugees*, American Journal of Orthopsychiatry, 2018, 88(1) 26, section 4.2.3.
67 ExCom Conclusion No. 9. See also Conclusion Nos. 1, 22, 24, 84, 85, 88, and 104. Conclusions on international protection adopted by the Executive Committee of the UNHCR 1975 – 2017 (Conclusion No. 1 – 114), available at: www.refworld.org/docid/5a2ead6b4.html.

Protection Against Refoulement

71. The principle of non-refoulement is the cornerstone of international refugee protection and constitutes a fundamental principle from which no derogation can be permitted.[68] It is enshrined in Article 33(1) of the 1951 Convention, which prohibits a Contracting State from 'expelling' or 'returning' a refugee 'in any manner whatsoever' to the frontiers of territories where 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.

72. International human rights law complements international refugee law[69] and provides additional forms of protection to prevent refoulement. Article 3 of the 1984 UN Convention against Torture stipulates that no State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Similarly, Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights have been interpreted as prohibiting the return of persons to places where they would be exposed to a real risk of irreparable harm such as a threat to life or a danger of torture or of cruel, inhuman or degrading treatment or punishment.[70] While Article 33 (2) of the 1951 Convention foresees certain limited exceptions to the principle of non-refoulement, international human rights law sets forth an absolute prohibition, without exceptions of any sort.

73. A State exercising jurisdiction in relation to an asylum-seeker or refugee must not implement measures that result in their removal, either directly or indirectly,[71] to a place where their lives or freedom would be in danger or there are substantial grounds to believe that they would be at risk of being subject to torture or other serious violations of human rights.[72]

74. The principle of non-refoulement is also inextricably linked to the right to life. The Human Rights Committee has noted that 'the duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for

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[68] Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. See also, UNHCR, Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09, para. 4, https://www.refworld.org/docid/3d60f5557.html.
69 Article 5, 1951 Convention.

[70] HRC, General Comment No. 31: The nature of the general legal obligation imposed on states parties to the Covenant (2004), UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, para. 12. It should be noted that the HRC lists violation of Articles 6 and 7 of the ICCPR as non-exhaustive examples of violation of rights that would trigger non-refoulement obligations. Similarly, in its General Comment No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin, U.N. Doc. CRC/GC/2005/6, 1 September 2005, the Committee on the Rights of the Child stated that States party to the Convention on the Rights of the Child "[…] shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 [right to life] and 37 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment.
[71] The prohibition against refoulement also protects from indirect (or chain) refoulement, i.e. the removal of a refugee to a third country where they are not at risk of persecution *per se*, but where no protection is available against onward transfer to a place of persecution or serious harm.
[72] UNHCR, Note on Non-Refoulement, para. 4. See also E. Lauterpacht and D. Bethlehem, at paragraph 124.

believing that a real risk exists [to] their right to life' and the obligations not to deport people under the right to life 'may be broader than the scope of the principle of non-refoulement.'[73]

75. **The principle of non-refoulement protects individuals not only from removal to their countries of origin but also to any other territory where they have reason to fear persecution or other serious harm, thereby ensuring protection from indirect (or chain) refoulement. Removal to a third country where a person's rights are not threatened *per se* but where no protection is available against onward transfer to a place of persecution or serious harm is therefore prohibited**.

76. Many of the safeguards afforded under the current Bill, rely on the flawed premise that subsection 197C(3) provides protection against refoulement for all owed non-refoulement obligations. Subsection 197C(1) of the Migration Act provides that "for the purposes of section 198 [removal powers], it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen". Subsection 197C(2) provides that "an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen".

77. Rather than repeal section 197C of the Migration Act (as recommended by many including the Committee Against Torture and the Human Rights Committee),[74] the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (Cth)* (CIOR Act), which commenced operation on 25 May 2021 instead qualified the provision's operation. Amended section 197C now provides under subsection (3) that the Act does not require or authorise the removal of an unlawful non-citizen to a country if through a finally determined protection visa application, a protection finding has been made for the non-citizen with respect to the country.

78. UNHCR draws the Committee's attention to the concerns raised in its submission to the Parliamentary Joint Committee on Intelligence and Security Review into the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*.[75] UNHCR maintains that amended section 197C remains incompatible with Australia's

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[73] UN Human Rights Committee, General Comment no. 36, Article 6 (Right to Life), September 2019, available at: refworld.org/docid/5e5e75e04.html, paras. 30-31.

[74] The Committee Against Torture (in its Concluding Observations) recommended Australia to "[c]onsider repealing section 197C (1) and (2) of the Migration Act 1958 and introduce a legal obligation to ensure that the removal of an individual must always be consistent with the State party's non-refoulement obligations." See UN Committee against Torture, Concluding observations on the sixth periodic report of Australia, 5 December 2022, CAT/C/AUS/CO/6, paras. 25(b) and 26(c), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FAUS%2FCO%2F6&Lang=en; The Human Rights Committee, while noting "[Australia]'s commitment to international protection and to upholding the principle of non-refoulement [expressed regret] that section 197C of the Migration Act has not been repealed. It reiterate[d] its recommendation." See HRC, Report on follow-up to the concluding observations of the Human Rights Committee, Addendum: Evaluation of the information on follow-up to the concluding observations on Australia, UN Doc. CCPR/C/134/3/Add.1, 20 May 2022, p. 2.

[75] UNHCR, Submission to the Parliamentary Joint Committee on Intelligence and Security, Review into the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, 23 June 2023, also available at: https://www.unhcr.org/au/media/2023-06-23-unhcr-submission-cior-act-2021-pdf.

non-refoulement obligations under international law because it does not provide a statutory safeguard against the refoulement of all asylum-seekers and refugees over which Australia exercises jurisdiction, such as those with ongoing refugee status at international law who have not applied for a protection visa.[76] As at 31 March 2024, 56 refugee and humanitarian entrants in immigration detention had not lodged a protection visa application.[77] These persons are not protected from removal under existing subsection 197C(3) and nor are those precluded by domestic law or policy from accessing asylum through the protection visa process by virtue of their mode or manner of arrival.[78] Thus this provision is not an adequate protection against risk of refoulement with respect to removal measures including the disclosure of private information to third countries to facilitate such removal.

Safeguards to Prevent Against Arbitrary Deprivation of Liberty

79. Detention ought, in accordance with international human rights standards, to be an exceptional measure of last resort and any decision to detain should be strictly limited to the purposes authorized by international law.[79] Among other requirements, detention must be demonstrated to be necessary, reasonable in all the individual circumstances of the case, proportionate to a legitimate purpose, non-discriminatory, and subject to independent judicial oversight.[80] Where detention is lawful, alternatives to detention should be sought and applied in lieu of detention.[81] Indefinite and open-ended detention is arbitrary and so illegal under international law; maximum limits on periods of detention should also be established in law.[82]

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[76] UNHCR has observed first-hand that there are several reasons why some persons in detention (including refugees) may not engage in a protection visa process. For instance, the duplication of processes for recognition of a status in law that has already been recognised by Australia; the high probability of failure to satisfy character requirements for visa grant to enable release from detention (noting some have already failed cancellation revocation and citizenship processes for prior criminal offending); some refugees may not meet the statutory criteria for an onshore protection visa (noting that the determination for recognition of status is different to the assessment process for cessation of status); the protracted nature of engagement in visa cancellation revocation appeal processes is a disincentive for some to commence new application processes; and the commencement of new visa application processes, appears in practice to lead to continued deprivation of liberty of persons in Australia who may have already cumulatively spent protracted periods of time in administrative detention and correctional facilities.

[77] Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Budget Estimates, May 2024, Home Affairs Portfolio, BE24-0637 - Detention - not lodged a protection visa application.

[78] For example, s 46A Migration Act 1958 (Cth) (visa applications by unauthorised maritime arrivals); s 46B Migration Act 1958 (Cth) (visa applications by transitory persons); exercise of maritime powers (see also s 75A *Maritime Powers Act 2013* (Cth)); Kaldor Centre for International Refugee Law, Policy Brief 9 - Assessing Protection Claims at Airports: Developing procedures to meet international and domestic obligations, 15 September 2020, available at: https://www.kaldorcentre.unsw.edu.au/publication/policy-brief-9-airports.

[79] UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012). See also UNHCR, *Stateless Persons in Detention: A Tool for their Identification and Enhanced Protection* (2017).

[80] Ibid. para 34

[81] See, Guideline 4.3, UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, https://www.refworld.org/policy/legalguidance/unhcr/2012/en/87776. See also, UN High Commissioner for Refugees (UNHCR), Unlocking rights: towards ending immigration detention for asylum-seekers and refugees, September 2024, https://www.refworld.org/policy/polrec/unhcr/2024/en/148655

[82] Ibid. See also Opinions of the Working Groupon Arbitrary Detention (WGAD) concerning immigration detention arrangements in Australia adopted in the last three years: WGAD, Opinion 23/2024 (Australia), Opinion 61/2023 (Australia), Opinion 71/2023 (Australia), Opinion 44/2023 (Australia), Opinion 14/2023 (Australia), Opinion 15/2023 (Australia), Opinion 69/2022 (Australia), Opinion 42/2022 (Australia), Opinion 28/2022 (Australia), Opinion 32/2022 (Australia); Opinion 33/2022 (Australia).

80. It is of significant concern to UNHCR that Australia's detention arrangements do not adequately align with these international laws and standards and several of the amendments proposed in the Bill will further diminish adherence. For instance, those in immigration detention on a removal pathway will be captured by the definition of "removal pathway non-citizen" and thus be subject to new section 198AAA authorising the disclosure of personal information to foreign countries in addition to the existing mechanism contained in section 197D to enable protection findings to be reassessed and potentially overturned.[83] Further, those released on a BVR, (including approximately 220 persons released on a BVR as a result of the High Court's ruling in NZYQ) may be re-detained under section 189 due to the cessation of their BVR under subsection 76AAA(4) for an undefined duration. Moreover, while the Bill provides that the Commonwealth may not exercise restraint over the liberty of a person in relation to third country reception arrangements, it explicitly envisages that a third country may do so, though as previously mentioned there are no statutory safeguards or limitations with respect to such decisions and treatment in detention.[84]

81. There is consistently close to 1,000 people in held immigration detention facilities across Australia.[85] Hundreds of asylum-seekers, refugees and stateless persons have been detained for prolonged periods of time in unacceptable conditions of detention including in Alternative Places of Detention (APODs) such as in hotels, temporary transit accommodation, or in highly securitized detention facilities; while others have been transferred to harsh and remote detention facilities where they have been geographically removed from their families and support networks.

82. During its regular independent immigration monitoring detention inspections and engagement with detained asylum-seekers, refugees and stateless persons, UNHCR has observed first-hand the significant detrimental impact long-term immigration detention (sometimes in excess of ten years) has had on the health and psycho-social wellbeing of those affected, many of whom have already suffered from torture or trauma before arriving in Australia.[86] Family separation, as well as inadequate transparency surrounding processes and timeframes for release, contribute greatly to diminished mental health, often leading to depression, resignation, and self-harm. These individuals have been deprived of many of their fundamental rights under

[83] As at 31 March 2024, more than 200 people under UNHCR's mandate in held detention had an active removals service – of whom more than 50 had been detained between 5-10 years: [83] Department of Home Affairs, Senate Standing Committee on Legal and Constitutional Affairs, Budget Estimates, May 2024, Home Affairs Portfolio, BE24-0634 - Removal Pathways - duration of detention.
[84] See definition of "third country reception function" in proposed subsection 198AHB(5).
[85] Department of Home Affairs, Immigration Detention Statistics, 31 September 2024, available at: Immigration Detention and Community Statistics Summary 30 September 2024.
[86] See for example: Hedrick, K., Armstrong, G., Coffey, G. *et al.* Self-harm among asylum seekers in Australian onshore immigration detention: how incidence rates vary by held detention type. *BMC Public Health* **20**, 592 (2020), available at: https://doi.org/10.1186/s12889-020-08717-2; Procter, N.G., Kenny, M.A., Eaton, H. and Grech, C. (2018), Lethal hopelessness: Understanding and responding to asylum seeker distress and mental deterioration, *Int J Mental Health Nurs*, 27, pp. 448-454, available at: https://doi.org/10.1111/inm.12325; Tosif S, Graham H, Kiang K, Laemmle-Ruff I, Heenan R, Smith A, et al. (2023) Health of children who experienced Australian immigration detention, PLoS ONE 18(3), available at: https://doi.org/10.1371/journal.pone.0282798; Silove D, Austin P, Steel Z. No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia, *Transcult Psychiatry*, 2007, 44(3), pp. 359-93.

international law which has, in some instances, resulted in irreparable harm. **UNHCR's significant concerns with respect to Australia's immigration detention arrangements continue to be shared by numerous UN treaty monitoring bodies, UN special procedures, the UN Human Rights Council Working Group on Arbitrary Detention and by the international community through the Universal Periodic Review**.[87]

83. UNHCR again emphasises that immigration detention should not be punitive and nor should alternatives to detention be alternative *forms of* detention.[88] Amendments proposed in the Bill align existing section 76E of the Act with the "new community protection test" in the Migration Regulations as amended by the Amendment Regulations,[89] in response to the High Court's decision in *YBFZ* which found that the imposition of each of the curfew and the monitoring conditions on a BVR is prima facie punitive and cannot be justified. Additionally, amendments proposed by the Bill permit for the collection, use and disclosure of criminal history information (including spent convictions) for the performance of a function or the exercise of a power under the Act and Migration Regulations, including to inform decisions with respect to visas, and the imposition of visa conditions having regard to the extent to which they pose a risk to any part of the Australian community.

84. UNHCR again reiterates that under the 1951 Convention criminal conduct after admission into the country of refuge is appropriately handled through domestic criminal law enforcement processes. **Regardless of whether someone has committed a crime in the past and for which they have served their sentence, neither administrative detention nor the conditions imposed upon those required by law to be released from detention may be punitive**.

85. UNHCR calls on Australia to implement legal and policy reforms and mobilize resources towards ending the detention of asylum-seekers, refugees, and stateless persons for immigration-related reasons. There is now an even broader suite of viable and practical alternatives to held detention which could enable people to be routinely

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[87] See for example: UN Committee against Torture, Concluding observations on the sixth periodic report of Australia, 5 December 2022, CAT/C/AUS/CO/6, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FAUS%2FCO%2F6&Lang=en; The United Nations Subcommittee on Prevention of Torture (SPT), *UN torture prevention body suspends visit to Australia citing lack of co-operation*, media statement, 23 October 2022, available at: https://www.ohchr.org/en/press-releases/2022/10/un-torture-prevention-body-suspends-visit-australia-citing-lack-co-operation; UN Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 1 December 2017, CCPR/C/AUS/CO/6, available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsoAl3%2FFsniSQx2VAmWrPA0uA3KW0KkpmSGOue15UG42EodNm2j%2FnCTyghc1kM8Y%2FLQ4n6KZBdggHt5qPmUYCI8eCslXZmnVlMq%2FoYCNPyKpq; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, 24 April 2017, A/HRC/35/25/Add.3, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/098/91/PDF/G1709891.pdf?OpenElement.

[88] UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, para 48, 32, and 38, available at: https://www.refworld.org/docid/503489533b8.html.

[89] Migration Amendment (Bridging Visa Conditions) Regulations 2024, available at: Federal Register of Legislation - Migration Amendment (Bridging Visa Conditions) Regulations 2024.

and systematically released, on conditions and with appropriate support,[90] as necessary and if appropriate.[91]

86. While not all persons in immigration detention have a criminal offending history, those that do have served their custodial sentence for the crimes they have committed and are not significantly dissimilar from a sizeable proportion of a typical prison population in Australia. Just like Australian citizens who have been released from prison, many in immigration detention and those released into the community on BVRs and other non-substantive visa holders in the community have developed strong ties to Australia and have been waiting years to begin rebuilding their lives for a better future with the support of their family and community.

VII. CONCLUSION

87. UNHCR is strongly opposed to the measures contained in the Bill and urges the Committee to recommend the Bill not proceed.

UNHCR
22 November 2024

[90] See: Sanmati Verma and Claire Loughnan, *Prison to Deportation Pipeline How mandatory visa cancellation creates a parallel form of imprisonment for non-citizens*, November 2024, available at: HRLC_MSEI-Prison+to+Deportation+Report_FINAL.pdf.

[91] See for example: *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023*, available at: https://www.legislation.gov.au/C2023A00110/asmade/text; Migration Amendment (Bridging Visa Conditions) Act 2023, available at: https://www.legislation.gov.au/C2023A00093/asmade/text; Migration Amendment (Bridging Visa Conditions) Regulations 2023, available at: https://www.legislation.gov.au/F2023L01629/asmade/text; Crimes Legislation Amendment (Community Safety Orders and Other Measures) Regulations 2023, available at: https://www.legislation.gov.au/F2023L01628/asmade/text.