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ARTICLE

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There was an old lady who swallowed a fly: progressively more troubling amendments to the Australian Migration Act

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ABSTRACT

The Migration Amendment (Clarifying International Obligations for Removal) Act 2021 sought to remedy failures of previous amendments contained in the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014. Despite both amendments, the Migration Act 1958 continues to provide for the indefinite detention of non-citizens, an existing human rights concern which the later amending legislation had sought to address. This paper illustrates how the enactment of these amendments constitutes poorly conceived quick fixes that exacerbate rather than remedy Australia's breaches of international obligations. Akin to the oft repeated nursery rhyme 'there was an old lady who swallowed a fly', then a spider to catch the fly, and a bird to catch the spider, the series of amendments discussed fail to address the initial problem—indefinite detention—while each exacerbates that failure with increasingly complex yet ineffective solutions. This paper argues that amending the fundamental failure of the Australian Migration Act to offer protection to non-citizens owed *non-refoulement* obligations requires more than changes to s 197C introduced in later amendments. It requires changes to the 'good character' provisions contained in ss 36 and 501 to ensure that individuals owed *non-refoulement* obligations by Australia are granted protection visas.

KEYWORDS

Migration; section 501; section 197C; character cancellation; indefinite detention; non-refoulement

On 13 May 2021, the Migration Amendment (Clarifying International Obligations for Removal) Act 2021 ('2021 amendments') was passed by both houses of the Australian Parliament with bipartisan support. The Act sought to remedy failures of a previous set of amendments, contained in the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 ('2014 amendments'),[1] and their lack of adherence to Australia's *non-refoulement* obligations. The 2014 amendments, in turn, were made in an effort to remedy a previously existing human rights issue, the indefinite detention of non-citizens of 'bad character' owed *non-refoulement* obligations by

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[1]Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (Explanatory Memorandum 2021).

This article has been corrected with minor changes. These changes do not impact the academic content of the article.

Australia. This flaw arose due to the operation of three interrelated provisions of the Migration Act 1958 ('Migration Act').

This paper illustrates how the enactment of these two amendments constitutes poorly conceived quick fixes that exacerbate rather than remedy Australia's breaches of international obligations. Akin to the oft repeated nursery rhyme 'there was an old lady who swallowed a fly', then a spider to catch the fly and a bird to catch the spider, the series of amendments discussed fail to address the initial problem. At the same time, each exacerbates the failure with increasingly complex and yet ineffective solutions, leaving the old lady, and the Australian migration system, in a quandary.

The fly: indefinite detention

The Australian Migration Act regulates the entry and presence of non-citizens in Australia.[2] It is the sole legislative instrument responsible for managing the right of non-citizens to enter or remain in Australia. It also provides the power to remove non-citizens in the absence of residence rights.[3] The Migration Act is thus the sole instrument by which Australia is able to serve its international obligations as they relate to non-citizens, key among them the obligation of *non-refoulement*. The obligation of *non-refoulement* requires that Australia does not return anyone to a country where: their life or freedom may be threatened[4]; they face cruel, inhuman, or degrading treatment[5]; or they face persecution for reasons of race, religion, ethnicity, membership of a particular social group, or political opinion.[6] The obligation of *non-refoulement* is central in the legislative changes discussed. Indeed, adhering to this obligation is the stated objective of the 2021 amendments.[7]

First, it is necessary to briefly introduce a few relevant provisions of the Australian Migration Act. The first is s 36. This provision is vitally important for the protection of non-citizens as it provides the requirements for the granting of a permanent Protection Visa on the basis that a non-citizen is owed *non-refoulement* obligations by Australia. The second is s 501, which provides 'character' requirements that apply both during a visa application and throughout the period in which a non-citizen holds a visa. If the non-citizen does not meet these requirements, their visa can be refused (at the application stage) or cancelled (if it has already been granted), leaving the non-citizen without a visa to remain in Australia. When a non-citizen is left without a visa, they are then subject to removal from Australia under s 198. It is within this context that the following analysis sits.

To fully understand the 2014 amendments, it is necessary to unpack the situation as it existed prior to 2014. This is because the 2014 amendments were directed at a legitimately troubling flaw in the Australian migration regime which required the indefinite detention of non-citizens in order to adhere to Australia's *non-refoulement* obligations. This situation arose from a series of High Court cases concerning three provisions of

[2]Migration Act 1958 (Cth), s 4.
[3]Ibid, s 198.
[4]International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 6, 7 (ICCPR); see also Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, arts 6, 37.
[5]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3 (CAT).
[6]Convention Relating to the Status of Refugees, adopted (28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33 (Refugee Convention).
[7]Explanatory Memorandum 2021 (n 1) 2.

the Migration Act and their interrelation: s 198, which provides that an officer must remove an unlawful non-citizen from Australia as soon as is 'reasonably practicable'[8]; s 189, which authorises an officer to detain an unlawful citizen[9]; and s 196, which requires that a non-citizen remain in detention until their removal under s 198.[10]

The High Court's reasoning, which resulted in indefinite detention, occurred in two steps. First, with *Al-Kateb v Godwin* ('*Al-Kateb*')[11] in which the full bench of the High Court found that the three provisions referred to above allowed for the indefinite detention of a non-citizen if removal from Australia was not 'reasonably practicable' in the foreseeable future. Later, the Court looked specifically to the term 'reasonably practicable' in relation to *non-refoulement* obligations when, in *NBMZ v Minister for Immigration and Border Protection* ('*NBMZ*'),[12] the Court unanimously held that an individual would not be removed from Australia in breach of *non-refoulement* obligations[13] rendering removal unworkable in these cases and thus not 'reasonably practicable'.[14] As a result, prior to 2014 when *NBMZ* was decided, the High Court had established that the removal of a non-citizen from Australia will not be 'reasonably practicable', within the meaning of s 198, in cases where a non-citizen is owed *non-refoulement* obligations.[15] And as a result, an officer was not required to remove under s 198 an unlawful non-citizen where to do so would breach international obligations.[16] This resulted in indefinite detention as allowed for by *Al-Kateb*.[17]

Indefinite detention in Australian immigration detention has been described as a state of 'legal limbo',[18] leading to criticism of the legality of long-term detention,[19] questions of double jeopardy—arising when a non-citizen has served time for a criminal conviction and then is also held in lengthy but administrative immigration detention[20]—and

[8]Migration Act (n 2) s 198.
[9]Ibid s 189.
[10]Ibid s 196.
[11]*Al-Kateb v Godwin* [2004] 219 CLR 562 (HCA) (*Al-Kateb*).
[12]*NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1 (FCA) (*NBMZ*).
[13]Ibid [95]-[96] (Buchanan J), [13]-[14] (Allsop CJ and Katzmann J), citing *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] 222 CLR 16 (HCA), [22]-[23] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan, Heydon JJ) (Kirby J agreeing) (*NAGV and NAGW*); *Plaintiff M70/2001 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (HCA), [92]-[94] (Gummow, Hayne, Crennan, Bell JJ) (*Plaintiff M70/2001*); *Plaintiff M47/2012 v Director General of Security and Ors* [2012] 251 CLR 1 (HCA), [39] (French J), [99]-[100] (Gummow J), [401] (Crennan J) (*Plaintiff M47/2012*).
[14]*NBMZ* (n 12) [121]-[122] and [135]-[139] (Buchanan J), [3] (Allsop CJ, Katzmann J).
[15]*Al-Kateb* (n 11), cited in *NBMZ* (n 12) [106]-[109] (Buchanan J).
[16]See *NAGV and NAGW* (n 13) [22]-[23] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan, and Heydon JJ); *Plaintiff M70/2001* (n 13) [92]-[94] (Gummow, Hayne, Crennan, and Bell JJ); *Plaintiff M47/2012* (n 13) [39] (French CJ), [99]-[100] (Gummow J), [401] (Crennan J); *Plaintiff M61/2010E v Commonwealth* (2010) 241 CLR 319 (HCA), [27] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ). See also *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 which extended to obligations under the CAT and ICCPR (*SZQRB*).
[17]*NBMZ* (n 12) [169] and [177] (Buchanan J), [3] (Allsop CJ, Katzmann J).
[18]Ibid [121]-[122] (Buchanan J); Peter Billings, 'Regulating Crimmigrants Through the 'Character Test': Exploring the Consequences of Mandatory Visa Cancellation for the Fundamental Rights of non-citizens in Australia' (2018) Crime Law and Social Change 1, 226.
[19]See, eg, Melissa Bull, Emily Schindeler, Janet Ransley, and David Berkman, 'Sickness in the System of Long-Term Immigration Detention' (2013) 26(1) Journal of Refugee Studies 47; Joyce Chia, 'Back to the Constitution: The Implications of Plaintiff S4/2014 for Immigration Detention' (2015) 38 UNSW Law Journal 628.
[20]See, eg, Michael Grewcock, 'Conviction, Detention and Removal: The Multiple Punishment of Offenders Under s 501 Migration Act' (2009) UNSW Law Research Paper No. 2009–49; Michael Grewcock, 'Punishment, Deportation and Parole: The Detention and Removal of Former Prisoners Under Section 501 Migration Act 1958' (2011) 44(1) Australia and New Zealand Journal of Criminology 56; Michael Grewcock, 'Conviction, Detention and Removal: The Multiple Punishment of Offenders Under Section 501 Migration Act' (Paper presented to the Australian and New Zealand Society of Criminology Conference, Perth, 24 November 2009); Michael Grewcock, 'Multiple Punishments: The Detention and

bringing into doubt Australia's adherence to international obligations under the Refugee Convention.[21]

Al-Kateb and *NBMZ* created a challenging and expensive situation for Australia. By virtue of two very onerous 'good character' provisions within the Migration Act, ss 501 and 36(2), many non-citizens were denied visas on the grounds of 'bad character'. However, these provisions were not written consistently with the good character provisions contained in Article 33(2) of the Convention Relating to the Status of Refugees 1951[22] as amended by the Optional Protocol to the Convention[23] (collectively referred to as the 'Refugee Convention') or *non-refoulement* obligations in other international treaties. The inconsistency in the legislation created a gap through which many non-citizens fell, as will be discussed below. Non-citizens were denied visas despite being owed *non-refoulement* obligations by Australia. As a result, and in keeping with the decisions of *Al-Kateb* and *NBMZ*, these non-citizens were held in indefinite detention. They were in a precarious position, not able to be returned to their home countries, but also consistently denied residence rights in Australia.[24]

The spider: 2014 amendments

In 2014, the Migration Act was amended explicitly with the purpose of overcoming both *Al-Kateb* and *NBMZ* and the issue of indefinite detention.[25] This was done through the inclusion of s 197C, which states that Australia's *non-refoulement* obligations will not prevent an unlawful non-citizen's removal from Australia.[26] Under this new provision, an officer must remove a non-citizen from Australia irrespective of the existence of, or assessment of, Australia's *non-refoulement* obligations.[27] As such, the amendment compels the removal of non-citizens in breach of Australia's obligations as a fix to the problem of indefinite detention; effectively remedying a human rights violation with a graver violation. Australia swallowed a spider to catch the fly that was indefinite detention—and made the situation worse.

Removal of Convicted Non-citizens' (Paper presented to Australian and New Zealand Critical Criminology Conference, Melbourne, 8–9 July 2009); See also discussion in *Falzon v Minister for Immigration and Border Protection* [2018] 351 ALR 61 (HCA) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[21]See, eg, Human Rights Council Working Group on Arbitrary Detention, *Opinion No 50/2018 concerning Edris Cheraghi (Australia)*, UN Doc A/HRC/WGAD/2018/50 (1 October 2018). Mr Cheraghi was held in detention due to a failure to meet the character test in s 501(6) after being charged with a criminal offence. He was not convicted of any crime. The working group found his detention to be arbitrary and recommends that the Government review the Migration Act in light of international obligations; See also Savitri Taylor, 'Exclusion from Protection of Persons of "Bad Character": Is Australia Fulfilling Its Treaty based Non refoulement Obligations?' (2002) 8(1) Australian Journal of Human Rights 83, 91 ('Exclusion of Protection of Persons of "Bad Character" … '); Savitri Taylor, 'Australia's Implementation of its *Non-Refoulement* Obligations under the Convention Against Torture and other Cruel Inhumane or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights' (1994) 17(2) UNSW Law Journal 433.

[22]Refugee Convention (n 6) art 33.

[23]Optional Protocol to the Convention Relating to the Status of Refugees 1967, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

[24]See, eg, *NBMZ* (n 12) [105]-[109] (Buchanan J), [15]-[17] (Allsop CJ, Katzmann J).

[25]Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), [1132]-[1137] (Explanatory Memorandum 2014).

[26]Migration Act (n 2) s 197C, as interpreted in *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576 (FCA), (North J) (*DMH16*). See also Explanatory Memorandum 2014 (n 24) [1139]-[1142].

[27]Migration Act (n 2) s 197C.

So, how did this come about? Section 197C makes clear that the removal power in s 198 of the Migration Act arises independently of an assessment of Australia's *non-refoulement* obligations.[28] Section 197C stated, prior to any amendment:

> **Australia's *non-refoulement* obligations irrelevant to removal of unlawful non-citizens under section 198**
>
> (1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.
>
> (2) 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.[29]

Following the inclusion of s 197C, the Federal Court made no immediate findings as to its interpretation or impact.[30] The courts continued to assume that a non-citizen would not be removed in breach of Australia's *non-refoulement* obligations and that the outcome of a visa refusal would be indefinite detention.[31] This shifted in 2017 when North ACJ held in *DMH16* that the correct understanding of s 197C, when read in conjunction with an officer's duty to remove under s 198, was that a non-citizen would be removed from Australia immediately[32] even if that removal was in breach of Australia's international *non-refoulement* obligations.[33] In fact, he read the section as compelling removal.[34] In so doing, North ACJ found that any reference to the prospect of indefinite detention was an erroneous reference to the situation as it would have existed before the introduction of the 2014 amendments and the introduction of s 197C.[35] This reasoning was subsequently endorsed, and continued to be applied.[36] Justice North's reasoning in *DMH16* bought to light the full impact of s 197C and was explicit in stating that the operation of s 197C abrogated Australia's *non-refoulement* obligations assumed under international law.[37]

[28]Explanatory Memorandum 2014 (n 25) [1138], [1141].
[29]Migration Act (n 2) s 197C.
[30]The interpretation of s 197C was considered by Rares, Perram and Griffiths JJ in *SZSSJ v Minister for Immigration and Border Protection* [2015] FCAFC 125 (*SZSSJ v Minister for Immigration*), [36]-[52] but was found not to apply in those proceedings. The case was then appealed to the High Court in *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 (HCA) (*Minister for Immigration v SZSSJ*) (French CJ, Kiefel, Bell Gageler, Keane, Nettle, and Gordon JJ) in which it was unanimously held, at [15]-[16], that s 197C was applicable to the applicant. However, it was held, at [15]-[16] that was no need to give consideration to the content of s 197C as the party concerned was not being considered for removal. Section 197C was then considered by Allsop CJ, Griffiths and Wigney JJ in *Minister for Immigration and Border Protection v Le* [2016] FCAFC 120 (*Le*), [60] in which the Court noted that s 197C would be a material issue in earlier stages in the decision making process (such as in s 501 cancellation decisions). However, the Court did not make any findings as to the extent or nature of the possible impact.
[31]See, especially, *ALN17 v Minister for Immigration and Border Protection* [2017] FCA 726; *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513 (FCA). See also *SZSSJ v Minister for Immigration* (n 30) (Rares, Perram, and Griffiths JJ) in which it was held that s 197C did not prevent the applicant being detained while alternative management options were considered (overturned on other grounds in *Minister for Immigration v SZSSJ* (n 30)).
[32]*DMH16* (n 26) [26] (North ACJ).
[33]Ibid [30] (North ACJ).
[34]Ibid.
[35]Ibid [24], [30] (North ACJ).
[36]Acting Chief Justice North's reasoning was subsequently applied in *NKWF v Minister for Immigration and Border Protection* [2018] FCA 409 (Siopis J) (*NKWF*) and *AQM18 v Minister for Immigration and Border Protection* [2018] FCA 944 (Moshinsky J).
[37]*DMH16* (n 26) [27] (North ACJ).

The Applicant in *DMH16* was then the subject of another Federal Court decision concerning the applicant's removal in *AJL20* where the Federal Court again found that, if a non-citizen has no further visa options in Australia, they are subject to removal and that, due to s 197C, if that removal would breach international obligations of *non-refoulement* then this fact is 'irrelevant'.[38] As such, Justice Bromberg ordered the removal of the applicant from immigration detention.[39]

The parliamentary materials surrounding the passage of this legislation state that a non-citizen will not be removed in breach of Australia's *non-refoulement* obligations despite the introduction of s 197C, suggesting that the 2014 amendments were passed by a parliament who did not intend nor foresee the outcome of *DMH16* and *AJL20*. The Statement of Compatibility with Human Rights explicitly stated that 'anyone who is found to engage Australia's *non-refoulement* obligations will not be removed in breach of those obligations'.[40] It additionally stated that 'the Government is not … seeking to avoid obligations'[41] and that '[w]hilst on its face the measure may appear to be inconsistent with *non-refoulement* obligations … anyone who is found through visa or ministerial intervention processes to engage Australia's *non-refoulement obligations* will not be removed in breach of those obligations'.[42] This sentiment was also reflected in the submission made by the Department of Immigration and Border Protection to the Senate Standing Committee's inquiry into the Amendment Bill,[43] the Explanatory Memorandum,[44] the Second Reading speech of Scott Morrison,[45] and in policy.[46] In light of this material, the impact of s 197C as interpreted in *DMH16*, and the impact that this would have, was never anticipated. This situation, and lack of forethought, gave rise to the introduction of the 2021 amendments which seek to reinstate the operation of s 197C as intended by parliament.[47]

The bird: 2021 amendments

The 2021 amendments were made with the explicit intention of addressing *DMH16* and *AJL20*.[48] The amendments, titled 'Clarifying International Obligations for Removal', were

[38] *AJL20 v Commonwealth of Australia* [2020] FCA 1305, [10] (*AJL20*); upheld by the High Court on this point in *Commonwealth of Australia v AJL20* [2021] HCA 21 [61], [91], [113], [119] though the Federal Court decision was squashed on other respects.

[39] *AJL20* (n 38), [72]-[74], [174]; for further writing on the process of visa cancellations based on criminal conduct and resulting indefinite detention in Australia prior to the 2021 amendments see: Chantal Bostock and Jason Cabarrús, 'Short Shrift to International Non-Refoulement Obligations? Australia's Approach to Criminal Deportation' (2020) 32 (4) International Journal of Refugee Law 587.

[40] Statement of Compatibility with Human Rights, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), 5, 29.

[41] Ibid 28.

[42] Ibid.

[43] Department of Immigration and Border Protection, Submission 171 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]* (24 November 2014), 17.

[44] Explanatory Memorandum 2014 (n 25) [1142].

[45] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10546 (Scott Morrison, Minister for Immigration and Border Protection).

[46] Minister for Immigration and Border Protection (Cth), *Direction [No 65] – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA*, 22 December 2014, 10.1(2), 12.1(2), 14.1(2), 10.1(6), 12.1(6), 14.1(6).

[47] Explanatory Memorandum 2021 (n 1) 2.

[48] Ibid 3.

created to 'clarify that the duty to remove under the Migration Act should not be enlivened where to do so would breach *non-refoulement* obligations'.[49] The Explanatory Memorandum to the amendments states: '[t]he need to modify section 197C follows the impact of two Federal Court judgments which have altered the intended effect of this provision on persons who have been found to engage protection obligations'.[50] It further states:

> In *DMH16* […] the Federal Court found that, where it is reasonably practicable to remove [an unlawful non-citizen], section 197C *obliges* the Department to remove the [unlawful non-citizen], even where the person had been found to engage Australia's *non-refoulement* obligations. This was not the intended purpose of section 197C.[51]

The 2021 amendments modify s 197C to provide for the relevance of Australia's *non-refoulement* obligations in cases of removal under s 198. Additionally, the amendments add a new provision, s 36A, which requires assessment of Australia's *non-refoulement* obligations at the application stage,[52] an assessment not previously conducted in a number of cases.[53] The next part will analyse whether the two amendments succeed in addressing the problem at which they are targeted.

Neither amendment addressed the fly: the underlying pre-2014 failure

The 2021 amendments undo a serious failure of the 2014 amendments, which allowed for breaches of Australia's obligation of *non-refoulement*. However, the 2021 amendments address only a small aspect of a far greater failure and leave a number of problematic elements of both the pre-2014 and pre-2021 legislation unchanged. This part delves into that underlying failure, the fly, and its continuing existence despite the amendments.

The Migration Act fails to offer visas to all those owed *non-refoulement* obligations. This is the fundamental failure of the Migration Act from which the failures of the post-2014 and post-2021 regimes flow. The failure of the Migration Act to provide visas to those owed *non-refoulement* obligations is due, in part, to the application of 'good character' provisions that exclude the grant of a visa in cases where a non-citizen has committed a crime. This is an exception that does not reflect existing international law. This part illustrates the three ways in which this fundamental failure occurs: first, through the application of character exclusions under s 36 which are not consistent with, and are broader than, the exclusion criteria of the Refugee Convention; second, through the application of s 501, a general character provision not designed for protection cases; and third, through the application of character exclusions to cases of *non-refoulement* under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 ('CAT')[54] and the International Covenant on Civil and Political Rights 1966 ('ICCPR')[55] for which no character exceptions exist in international law. All three failures are illustrated through a comparison of the domestic provisions with those existing in

[49]Ibid 2.
[50]Ibid 2.
[51]Ibid 2.
[52]Ibid 3.
[53]Billings (n 18).
[54]CAT (n 5) art 3.
[55]ICCPR (n 4) arts 6, 7.

international law. To illustrate this comparison, the author has created the 'fictional applicant' who is an amalgamation of six applicant profiles from Federal Court cases which exemplify the ways in which a non-citizen may fail to be granted a visa in Australia while being owed *non-refoulement* obligations under international law.[56]

The fictional applicant

The fictional applicant arrived in Australia by boat after travelling from Afghanistan. He landed on Christmas Island and was placed in immigration detention. While there, he was involved in a riot during which he damaged property inside the detention centre.[57] He pled guilty, was convicted of 'damage to Commonwealth property', and was sentenced to a 12-month good behaviour bond and ordered to pay damages.[58]

While the fictional applicant was in detention an independent protection assessor found him to be owed *non-refoulement* obligations:[59] the fictional applicant was found to face a real risk of being persecuted by the Taliban if he returned to Afghanistan, on account of his Hazara ethnicity and involvement with foreign troops in Afghanistan.[60] He was considered a spy and an infidel by the Taliban.[61] On the recommendation of the assessor, the Minister allowed the fictional applicant to apply for a protection visa under s 36 of the Migration Act.[62]

Section 36 provides the mechanism by which a non-citizen can apply for a protection visa in Australia. This is the primary mechanism by which non-citizens owed *non-refoulement* obligations can be given the residence rights.[63] The section has two paths, the refugee protection pathway and the 'complementary protection' pathway allowing for protection under the CAT and ICCPR.[64] The decision maker looked first to whether the fictional applicant met the criterion in s 36(a) or 36(aa)[65]: the positive criteria for the grant of a protection visa. The decision maker determined that the fictional applicant met the criteria for the grant of a protection visa under s 36(a)[66] as a refugee under the definition contained in s 5H.[67] The decision maker additionally found him eligible

[56]The Fictional Applicant is an amalgamation of the five applicants in *NBNB v Minister for Immigration and Border Protection* [2014] 220 FCR 44 (FCA) (*NBNB*), and the applicant in *NKWF* (n 35) with some elements also taken from *LKQD v Minister for Immigration and Border Protection (Migration)* [1918] AATA 2710 (*LKQD*) and *MZYYO v Minister for Immigration and Citizenship* (2013) 214 FCR 68 (FCA) (*MZYYO*).
[57]See *NBNB* (n 56).
[58]Ibid [12] (Buchanan J, Allsop CJ and Katzmann J agreeing).
[59]See generally Joint Standing Committee on Australia's Immigration Detention Network, Parliament of Australia, *Final Report* (2012), Ch 6.
[60]See *NKWF* (n 36) [7] (Siopis J); *NBNB* (n 56) [36], [45], (Buchanan J).
[61]See *NKWF* (n 36) [7].
[62]By exercising the power of the Minister under Migration Act (n 2) s 46A; see also *NBNB* (n 56) [29], [38], [47], [55], [63] (Buchanan J) (Allsop and Katzmann JJ agreeing).
[63]There are other mechanisms for certain groups of people including temporary protection under the TPV and SHEV visa systems. These allow for short-term visas to be granted to Unauthorised Maritime Arrivals. Additionally, Humanitarian Visas may be granted to people recognised as refugees before arriving in Australia.
[64]Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth), [63] (Explanatory Memorandum 2011).
[65]This is the order of assessment laid out in both Ministerial Direction 65 and PAM3: Minister for Immigration and Border Protection (Cth), *Direction [No 65] – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA*, 22 December 2014; Department of Immigration and Border Protection (Cth), *Policy and Advice Manual 3*, 21 September 2018, Refugee and Humanitarian, Protection Visas—all application processing guidelines, pt 12, [4.53.2] (PAM3).
[66]Migration Act (n 2) s 36(2)(a).
[67]Migration Act (n 2) s 5H.

for the grant of a protection visa under s 36(aa) as a person owed *non-refoulement* obligations under the CAT and ICCPR.[68] However, the fictional applicant was excluded from the grant of a protection visa.

Failures in granting protection visas to those owed non-refoulement obligations

This part looks to the first pathway available under s 36, illustrating how a non-citizen owed protection obligations under the Refugee Convention may be refused the grant of a protection visa. The provisions in s 36(1)(a) are intended to codify Australia's interpretation of its *non-refoulement* obligations under Refugee Convention.[69] Before the 2014 amendments, s 36 referred directly to the definition of a refugee contained in the Refugee Convention stating as criteria for the grant of a protection visa that the applicant was a non-citizen 'in respect of whom … Australia has protection obligations under the Refugee Convention'.[70] However, the 2014 amendments removed this reference to the Refugee Convention and introduced, instead, the definition of a refugee into s 5H.[71] The provision now operates as an 'independent and self-contained statutory framework which articulates Australia's interpretation of its protection obligations under the Refugee Convention'[72] and codifies these obligations within sections of the Migration Act.[73]

Following the finding that the fictional applicant was owed protection obligations by Australia, the decision maker moved to the exclusionary principles contained in ss 36(1C) and 36(2C)(b)[74] which require that the decision maker determine whether an applicant is a 'danger to the Australian community having been convicted by final judgement of a particularly serious crime'.[75] The definition of a particularly serious crime[76] requires the commission of either a serious Australian offence, or a serious foreign offence[77] where a serious offence is: an offence which involves violence against a person, is a serious drug offence, involves serious damage to property or is an offence relating to immigration detention[78]; and, is punishable by a term of over 3 years.[79]

[68]The normal process of a protection visa application would involve the decision maker deciding whether the applicant meets the criteria for the grant of a protection visa under s 36(a) and considering the criteria in s 36(aa) only if the applicant is not eligible under s 36(a). This means that a decision maker would be unlikely to make a finding that the fictional applicant is eligible for a protection visa under s 36(aa) alongside their finding in relation to s 36(a). Although not the usual decision making process, it assists with the discussion of the exclusion clauses to look at ss 36(a) and 36(aa) together as the exclusion clauses operate in the same way for both provisions. The distinction is largely immaterial as a case like the fictional applicant's would meet the criteria in s 36(aa) despite the lack of an express finding to that effect. However, there are examples of the two criteria being considered alongside one another: see, eg, *LKQD* (n 56).

[69]Explanatory Memorandum 2014 (n 25) [2].

[70]See Migration Act (n 2) (Superseded Version C2013C00679 valid as at 25 November 2013 available at <https://www.legislation.gov.au/Details/C2013C00679>); Administrative Appeals Tribunal, *Practice Direction—AAT Guide to Refugee Law*, 2018, Chapter 7, [7-3]. See also *Plaintiff M47/2012*, [39] (French CJ), [99]-[100] (Gummow J) discussing the role of s 36 in relation to the Migration Act prior to 2014.

[71]Explanatory Memorandum 2014 (n 25) [1243].

[72]Ibid 10.

[73]Ibid.

[74]PAM3 (n 65) Part 13, [4.57.2] states that provisions in ss 36(1C) and 36(2C)(b) are mirror provisions and the same considerations and findings should apply.

[75]Migration Act (n 2) s 36(1C)(b).

[76]Ibid s 5M.

[77]Ibid.

[78]Ibid s 5(1)(a)

[79]Ibid s 5(1)(b).

The conviction of the fictional applicant for his involvement in the riot on Christmas Island met the definition of serious Australian offence as it involved damage to property[80] for which the maximum penalty applicable is over 3 years imprisonment.[81] For this determination, the relevant period of imprisonment is the sentence that may be imposed for that type of offence, not the period actually imposed.[82] Thus, as the maximum sentence for damage to Commonwealth property is 10 years imprisonment,[83] the offence qualified even though the fictional applicant was not himself sentenced to any term of imprisonment.

The second limb of the exclusion criteria involves a consideration of whether the fictional applicant is a danger to the Australian community[84] which requires that the decision maker determine whether the applicant poses 'a real or significant risk or possibility of harm to one or more members of the Australian community'.[85] In the case of the fictional applicant, the decision maker found that he had been unstable due to psychiatric illness which resulted, at times, in violence towards the people around him.[86] On this basis, the decision maker found that he posed a significant risk of harm to members of the Australian community which could continue to occur in the future[87] and refused the grant of a protection visa.

Disconnect between section 36 and the Refugee Convention

The good character provisions of s 36 are intended to reflect the exclusion criteria that exist within the Refugee Convention,[88] which exclude from the protection of *non-refoulement* those who pose a threat to the community of the country in which they are seeking refuge.[89] Article 33(2) states that 'The benefit of the present provision [*non-refoulement*] may not, however, be claimed by a refugee whom … having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.[90] However, the seriousness of the consequences of a refugee being returned to their country combined with the humanitarian nature of *non-refoulement* obligations requires that this exception be interpreted restrictively[91] and with particular caution.[92]

[80]Ibid s 5(1)(a)(iii).
[81]Ibid s 5(1)(b).
[82]PAM3 (n 65) Part 13 [14.3].
[83]Crimes Act 1914 (Cth) s 29.
[84]There was no suggestion that any of the five applicants in *NBNB* were a risk to the Australian community: *NBNB* (n 56) [81] (Buchanan J, Allsop CJ and Katzmann J agreeing).
[85]*WKCG v Minister for Immigration and Citizenship* (2009) 110 ALD 434, [31]; applied in the federal court in *EWG17 v Minister for Immigration and Border Protection* [2018] FCA 1536 (Collier J).
[86]This aspect of the fictional applicant's case is based on the applicants in *LKQD* (n 56) and *MZYYO* (n 56).
[87]See, eg, *LKQD* (n 56); see also *MZYYO* (n 56).
[88]Explanatory Memorandum 2011 (n 64) [12].
[89]UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (February 2019) (UN Doc HCR/1P/4/ENG/REV 4), 116 (UNHCR Handbook).
[90]Ibid 4.
[91]UNHCR 'Advisory Opinion from the Office of the United Nations High Commissioner for Refugees (UNHCR) on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees' (6 January 2006), 4 (UNHCR Advisory Opinion) citing Nehemiah Robinson, *Convention Relating to the Status of Refugees—Its History, Contents and Interpretation: A Commentary* (UNCHR, ed, 1997), 136–137.
[92]UNHCR, *UNHCR Note on the Principle of Non-Refoulement* (November 1997), 4; Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement (Opinion) [Global Consultations on International Protection/ Second Track]* (20 June 2001), 159; UNHCR 'Refugee Protection in International Law—UNHCR's Global Consultations on International Protection' (2003), 12 (UNHCR Global Consultations).

These exceptions are exceptional in nature,[93] and their inclusion was accompanied by reluctance and concern that they could prejudice the *non-refoulement* principles as a whole,[94] further requiring restrictive interpretation.[95]

Under Article 33(2) of the Refugee Convention the requirement that the non-citizen is convicted of a 'particularly serious crime' is the primary hurdle[96] without which future risk to the community does not arise for consideration.[97] The types of crime that are likely to be covered by the serious crime definition include *inter alia* murder, rape, armed robbery, and arson,[98] and any determination will depend on the circumstances surrounding commission.[99]

This definition of 'particularly serious crime' is at odds with the definition in the Australian legislation as the Migration Act looks to the seriousness of the type of crime rather than particular circumstances of the case. Guy Goodwin-Gill and Jane McAdam state that an approach which looks at the penalty imposed alone will likely be arbitrary and inconsistent with international law[100] and that the determination of what constitutes a particularly serious crime ought to involve an assessment of all of the circumstances including the nature of the offence, the background to its commission, the behaviour of the individual and the actual terms of any sentence imposed.[101] The criteria in the Australian legislation do not consider any of these circumstances, considering only the type of crime and the penalty which *can* be imposed rather than that which was in fact imposed.

Further, at international law, a finding of 'danger to community of the receiving state' requires that the danger be 'serious'[102] and grounded on objectively reasonable suspicion based on evidence.[103] This is again at odds with the Australian definition, as in international law the finding must be forward looking[104] and requires consideration of individual circumstances and proportionality between the interests of the state and those of the applicant.[105] Additionally, the return of the individual must be the last resort available for dealing with the danger posed to the community.[106] In the domestic legislation, there is very little jurisprudence on what constitutes a danger to the Australian community.[107] However, a case like that of the fictional applicant illustrates a disconnect between domestic

[93]United Nations Conference of Plenipotentiaries on the Statues of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting* (23 November 1951) (UN doc A/CONF.2/SR.16), 8.
[94]UNHCR Advisory Opinion (n 91) 4.
[95]Ibid.
[96]For examples of what constitutes a particularly serious crime in Australia see *A v Minister for Immigration and Multicultural Affairs* [1999] FCA 227, [3]-[5] and *Betkoshabeh v Minister for Immigration and Multicultural Affairs* (1998) 157 ALR 95 (FCA), [100], reversed on other grounds in *Minister for Immigration and Multicultural Affairs v Betkoshabeh* (1999) 55 ALD 609. However, note that these cases were decided before the legislative changes in 2014 when the content of art 33(2) was not codified in s 36(1C).
[97]Lauterpacht and Bethlehem (n 92), 183.
[98]Ibid 186, citing UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr Paul Weis* (1990), 342; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd edn, 2007), 238.
[99]Goodwin-Gill and McAdam (n 98) 238.
[100]Ibid 239.
[101]Ibid 239–240.
[102]UNHCR Global Consultations (n 92) 12; see also *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 (SCC) (*Suresh*).
[103]*Suresh* (n 102).
[104]Ibid.
[105]Ibid 183; UNHCR Handbook (n 89) 116, 35–37.
[106]UNHCR Global Consultations (n 92) 12.
[107]Goodwin-Gill and McAdam (n 98) 237.

legislation and the Refugee Convention. For example, the harm that the fictional applicant may pose to the Australian community arising out of psychiatric illness may be manageable with psychiatric support and appropriate treatment. This fact renders the fictional applicant's removal from Australia less than the last resort available to manage that risk of harm. Additionally, the 'harm' posed by the fictional applicant is less than 'serious' and is likely outbalanced by the seriousness of the risk of *refoulement*. Further, the likelihood of repeat offending is low particularly given that the crime occurred in immigration detention, where conditions often have the effect of exacerbating behaviour such as this.[108]

The gap between the international and domestic definitions results in the refusal of the fictional applicant's protection visa application despite him not falling into the exclusion criteria provided by Article 33(2), and thus being owed *non-refoulement* obligations under the Refugee Convention.

Further disconnect with the Refugee Convention under s 501

The disconnect between domestic provisions and the Refugee Convention is further exacerbated by the application of s 501 to protection visa applications. Even if the fictional applicant's visa was not refused under s 36, it must pass the additional bar of additional character grounds provided by s 501. Unlike the provisions in ss 36(1C) and 36(2C)(b), the provisions in s 501 do not set out to codify Australia's *non-refoulement* obligations, and are not interpreted consistently with Australia's international obligations.[109] Although there is some overlap between s 501 grounds and the exclusion grounds in the Refugee Convention,[110] there are also a range of circumstances in which a non-citizen would fail to pass the character test contained in s 501(6), despite not meeting the 'particularly serious crime' and 'danger to the Australian community' criteria.[111] For example, the fictional applicant's visa could be refused under s 501(6) solely because his crimes were committed in immigration detention.[112] This illustrates that, even if s 36 is amended so that ss 36(1C) and 36(2C)(b) reflect the exclusion provisions in Refugee Convention, a non-citizen may still be refused a protection visa despite being owed *non-refoulement* obligations.

The refusal of protection visas using the character test in s 501(6) has been the subject of criticism, particularly on the basis that some non-citizens will 'automatically fail' the character test after being convicted of a criminal offence while in immigration detention regardless of the 'gravity of the crime, sentence imposed, or danger they present to the community'[113]; and on the basis that the standard of proof in s 501 is too low in

[108]See *LKQD* (n 56) and *MZYYO* (n 56) in which it was submitted that the applicant's behaviour was due, in part, to his being held in immigration detention. See also *NBMZ* (n 12) and *NBNB* (n 56) regarding crimes during riots in immigration detention. See also Billings (n 18), 231 writing about the potential for criminal conduct to result from time and circumstance of detention, citing *MZYYO* (n 56); D Mercurio and F Millevoi, 'Out of Character: The Impact of the 2011 Amendments to the Character Test' (2013) 26(1) Journal of Refugee Studies 47, 36–37; Bull (n 19); *Urahman v Semrad* [2012] NTSC 95, [32] (Southwood J).

[109]See *WASB v Minister for Immigration and Border Protection* (2013) 217 FCR 292 (FCA), [38]-[43] (Barker J); cited in Billings (n 18) 230.

[110]Billings (n 18), 229, citing *Plaintiff M47/2012 v Director General of Security and Ors* (2012) 251 CLR 1 (HCA), [40] (French CJ), [191] (Hayne J), [380] (Crennan J).

[111]See Billings (n 18) 229-231; see also, Taylor 'Exclusion from Protection of Persons of "Bad Character"' (n 21).

[112]*Migration Act* (n 2) s 501(6)(aa). See, eg, *NBNB* (n 56), discussed in Billings (n 18), 230.

[113]Billings provides the example of *NBNB* (n 56) as a case in which this has occurred: Billings (n 18) 230. See also Taylor 'Exclusion from Protection of Persons of "Bad Character" … ' (n 21) 88.

comparison to the standard of proof required under the Refugee Convention.[114] This, too, contributes to the potential for refusal of a protection visa applications in cases where non-citizens are owed *non-refoulement*. It has been argued that the Migration Act should be 'amended so that … the separate powers of refusal and cancellation of visas on character grounds contained in [s] 501 … do not apply to protection visas'[115] to avoid refusals in cases where non-citizens are owed *non-refoulement* obligations.[116] However, such amendments have not been made.

Application of good character provisions to complementary protection

The third way in which the Australian Migration Act fails in granting visas to those owed *non-refoulement* obligations is through the application of good character provisions to the complementary protection branch of s 36. For example, the fictional applicant is owed *non-refoulement* obligations under the CAT[117] and ICCPR[118] in addition to under the Refugee Convention.[119] This is the situation for many covered by the Refugee Convention as a majority owed protections under the Convention will also be caught in the net of complementary protection under the CAT.[120] *Non-refoulement* obligations under the CAT and ICCPR vary from that contained in the Refugee Convention in that they are without exception.[121] However, to be granted a protection visa on the grounds of complementary protection, a non-citizen in Australia must meet exclusion criteria[122] which are identical to those applied Refugee Convention limb of s 36.[123] Thus, the fictional applicant is excluded from the grant of a protection visa despite being owed *non-refoulement* obligations by Australia under the CAT and ICCPR.[124]

Therefore, while s 36 operates to codify Australia's international obligations it does not ensure that all non-citizens who are owed *non-refoulement* obligations are granted a protection visa by: first, failing to accurately reflect the exclusion principles contained in the Refugee Convention; second, applying s 501 to protection visa applications; and third, applying identical 'good character' exclusions to complementary protection cases. The result is that non-citizens can be refused the grant of a protection visa in Australia despite being owed *non-refoulement* obligations under both the Refugee Convention, and under the CAT and ICCPR.

[114]Billings (n 18) 229.
[115]Taylor 'Exclusion from Protection of Persons of "Bad Character"' (n 21) 91. However, note that the article was written before the inclusion of ss 36(1C) and 36(2C)(b) and that changes have been made to s 501 since this time also.
[116]Ibid 91.
[117]CAT (n 5) art 3.
[118]ICCPR (n 4) arts 6, 7.
[119]See, eg, *NKWF* (n 36) [7] (Siopis J); *NBNB* (n 56) [36], [45] (Buchanan J).
[120]Goodwin-Gill and McAdam (n 98) 243.
[121]CAT (n 5) art 3; ICCPR (n 4), arts 6, 7.
[122]Migration Act (n 2) s 36(2C).
[123]Ibid, s 36(2C) is identical provision to s 36(1C); Explanatory Memorandum 2011 (n 64) [87]-[88]. See also Administrative Appeals Tribunal, *Practice Direction—AAT Guide to Refugee Law*, 2018, [10.36]. See also, PAM3 (n 63) Part 13 Part 13, [4.57.2] which states that provisions in s 36(1C) and 36(2C)(b) are mirror provisions and the same considerations and findings should apply.
[124]McAdam, Jane, Submission No 35 to Senate Select Committee *Inquiry into Ministerial Discretion in Migration Matters* (2004). See also, McAdam, Jane, 'Australian Complementary Protection: A Step-By-Step Approach' (2011) 33 Sydney Law Review 687 for a detailed comparison of Australia Complementary Protection Criteria and international obligations under treaties including the CAT and ICCPR.

The 2021 amendments neither amend the content of Article 36 and s 501 such that those owed *non-refoulement* obligations are granted a visa, nor does it provide a solution for those who are caught in this position.[125] The amendments do add a provision to Article 36, the new s 36A, requiring consideration of Australia's *non-refoulement* obligations in determinations under s 36.[126] This provision deals with a different issue within the Migration Act,[127] but does nothing to address the abovementioned failures. As such, neither the 2014 amendments nor the 2021 amendments succeed in addressing the underlying failure, instead juggling between either indefinite detention or removal as possible outcomes.

The 2021 amendments fail to resolve the existence of the spider

The 2021 amendments also fail to significantly improve any of the failures introduced by the 2014 amendments. The 2014 amendments relied heavily on personal non-compellable powers of the Minister to ensure compliance with Australia's *non-refoulement* obligations. As discussed above, the 2014 amendments were passed through a parliament that did not intend nor anticipate breaches of Australia's *non-refoulement* obligations. This next part addresses the safeguards existing in the 2014 amendments on which parliament relied in making those statements, before addressing the lack of substantial improvement to this situation within the 2021 amendments. As such, not only does the fly continue to exist, but new issues introduced by the swallowing of the spider also persist.

The parliamentary materials accompanying the passage of the 2014 amendments state that 'Australia will continue to meet its *non-refoulement* obligations through other mechanisms'.[128] The safeguards removal in breach of *non-refoulement* obligations take the form of personal powers of the Minister,[129] sometimes referred to as 'alternative management options',[130] or 'Minister's public interest powers'.[131] The parliamentary materials state 'Australia's *non-refoulement* obligations will be met through … the use of the Minister's personal powers in the Migration Act'[132] which can be used when a non-citizen is in detention awaiting removal, has exhausted all available visa options, and where preventing removal is in the 'public interest'.[133] Two powers are available: first, under s 48B the Minister may allow a non-citizen to apply for a Protection Visa despite them being statute barred from doing so.[134] That is, they are given a second chance to go back through the

[125]Sangeetha Pillai, 'The Migration Amendment (Clarifying International Obligations for Removal) Act 2001: A Case Study in the Importance of Proper Legislative Process' (*Kaldor and Renata Centre for International Refugee Law*, 10 June 2021) <https://www.kaldorcentre.unsw.edu.au/publication/migration-amendment-clarifying-international-obligations-removal-act-2021-case-study> accessed 4 February 2022.
[126]Explanatory Memorandum 2021 (n 1).
[127]See Lillian Robb (2018) 'From Cancellation to Removal: Australia's Complex Migration Regime and its Implications for Australia's *Non-Refoulement* Obligations in Character Cases' (Honours thesis, Murdoch University), ch IV. Similar issues, the deferral of consideration of *non-refoulement* obligations to different stages in the decision making process persists as illustrated in the recent High Court Case of *M1/2021 v Minister for Home Affairs* [2021] HCA 17 (Kiefel CJ, Keene, Gordan, and Steward JJ, Gageler J agreeing, Edelman J and Gleeson J dissenting).
[128]Explanatory Memorandum 2014 (n 25) [1142].
[129]Department of Immigration and Border Protection (n 43) 17; Explanatory Memorandum 2014 (n 25) [1144]-[1145].
[130]See eg, *DMH16* (n 26), [8] (North ACJ); *NKWF* (n 36) [30] (Siopis J).
[131]See, eg, Department of Immigration and Border Protection (n 43) 17.
[132]Explanatory Memorandum 2014 (n 25) [1136], [1142] and [1146]; Statement of Compatibility with Human Rights (n 40) 20.
[133]Migration Act (n 2) s 195A(2).
[134]Ibid s 48B.

same process described above for a second time, still subject to the same character requirements. Second, under s 195A the Minister may grant a visa to a person in detention[135] if he considers it to be in the public interest to do so.[136]

However, the personal powers of the Minister are non-compellable,[137] meaning that there is no requirement that the powers be exercised fairly or at all.[138] Submissions made to the Senate Standing Committee inquiry into the 2014 Amendment Bill criticised the reliance on non-compellable powers. A submission to the inquiry by the Human Rights Law Centre states:

> Personal, non-compellable and non-reviewable ministerial discretion is an inadequate safeguard against wrongful return to persecution. Strong, clear and legally-enforceable protection, not personal discretion, is required to guarantee fundamental rights.[139]

The Australian Human Right Commission agreed that personal and non-compellable powers of the Minister are an insufficient safeguard to protect Australia's *non-refoulement* obligations,[140] citing the case of *Minister for Immigration and Citizenship v SZQRB* as illustrating that a non-compellable power is not a reliable means to prevent the removal of a non-citizen in all cases. In that case, the Minister decided against the exercise of personal powers even though his removal to Afghanistan would be in breach of Australia's non-refoulement obligations.[141]

In the 2014 amendments, it was explicitly stated that removal powers under s 197C may be exercised irrespective of whether there has been an assessment of Australia's *non-refoulement* obligations.[142] While the only way to know if a non-citizen would face a risk of harm on return to their home country is through an assessment of their claims, the 2014 amendments ensured that such assessment was not a requirement.[143] The Explanatory Memorandum made clear that a non-citizen would not be able to challenge their removal on the basis that their claims of *non-refoulement* have not been assessed.[144] As such, there was no way for the Minister to be made aware of *non-refoulement* obligations owed to a particular applicant, severely limiting the operation of personal powers as a safeguard. To compound this concern, an officer was not required to

[135]Ibid s 195A(1). Note that the Minister may also exercise power under s 197AB of the Migration Act to make a 'residence determination'. In *NKWF* (n 36) Justice Siopis states at [30] that the alternative management options are two-fold, including both ss 195A and s 197AB. However, s 197AB is not referenced in the Explanatory Memorandum 2014. Additionally, the exercise of this power does not add any further issues to those discussed in this chapter generally. For these reasons, this paper does not engage in a discussion of that provision.

[136]Ibid s 195A(2).

[137]See generally Senate Select Committee, Parliament of Australia, *Inquiry into Ministerial Discretion in Migration Matters* (2004), ch 2.

[138]Human Rights Law Centre, Submission No 166 to Senate Standing Committee Inquiry Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]* (24 November 2014) [41], citing *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (HCA). See also Australian Human Rights Commission, Submission No 163 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]* (24 November 2014) [25]-[26], citing *SZQRB* (n 16).

[139]Human Rights Law Centre (n 138) [43].

[140]Submission No 163 (n 138) [25]-[26], citing *SZQRB* (n 16) as an example of a case in which non-compellable personal powers are an insufficient safeguard.

[141]Australian Human Rights Commission (n 138) [24], citing *SZQRB* (n 16) [33], [110] (Lander and Gordon JJ).

[142]Explanatory Memorandum 2014 (n 25) [1130].

[143]Human Rights Law Centre (n 138) [40].

[144]Explanatory Memorandum 2014 (n 25) [1141], [1146].

consider whether the non-citizen was owed *non-refoulement* obligations before removal.[145] An officer was also under no obligation to check whether the Minister had considered exercising any personal powers.[146] Combined, these factors made it highly unlikely that the Minister would be notified of an applicant who is owed *non-refoulement* obligations before the removal occurs, and provided no recourse to personal powers in those cases.

The 2021 amendments added several elements to s 197C which removed the obligation to remove in cases where protection is owed. Previously, s 197C stated that, for the purposes of s 198, it is irrelevant whether Australia has *non-refoulement* obligations in respect of an unlawful non-citizen[147] and that an officer's duty to remove arises irrespective of whether there has been an assessment of Australia's *non-refoulement* obligations in respect of the non-citizen.[148] Both provisions remain, but additional provisions have been added stating that despite subsections (1) and (2) (the abovementioned provisions), s 198 does not require or authorise an officer to remove an unlawful non-citizen to a country if the non-citizen has made a valid application leading to the 'protection finding'[149]; being a finding under s 36 that an applicant meets the positive criteria for protection[150] irrespective of a refusal or cancellation on character grounds.[151] To put it simply, before 2021 an officer was obligated to remove a non-citizen in any case where they no longer held a visa even if to do so would breach Australia's *non-refoulement* obligations. After the 2021 amendments, a non-citizen would not be removed from Australia if they were owed *non-refoulement* obligations, even if they did not hold a visa.

Post-2021 amendments, a non-citizen owed protection will only be removed under s 198 in two circumstances: first, where the non-citizen has made a written request to be voluntarily removed from the country;[152] and, second, where the Minister makes a determination under the newly inserted s 197D that a non-citizen is no longer a person to whom protection obligations are owed.[153] This decision is reviewable on its merits[154] and such review must occur within a prescribed time period determined by regulations.[155]

This situation is a significant improvement on that of pre-2021. First, it does not rely solely on personal powers of the Minister to prevent removal but prevents removal as the default position. Second, it introduces a merits review process for removal decisions under s 197D. However, concerns abound regarding, for example, the time-period requirement that has now been imposed on the merits review process which, it is argued by Pillai, is so restricted that it has the potential to limit the thoroughness of the review possible within the prescribed timeframe.[156] Further, this system has been criticised as being inefficient, with officers being required to continually reassess whether

[145]Ibid [1132].
[146]Ibid [1146].
[147]Migration Act (n 2) s 197C(1).
[148]Ibid s 197C(2).
[149]Ibid s 197C(3)(a).
[150]Ibid s 197C(4).
[151]Ibid s 197C(4), (5), and (6).
[152]Ibid s 197C(3)(c)(iii).
[153]Ibid s 197D(2).
[154]Ibid Part 7, s 411.
[155]Ibid s 419.
[156]Pillai (n 125).

non-refoulement obligations continue to be owed or whether a change in circumstances allows the non-citizen's removal from Australia.[157] To this, the author would add one further criticism relating to the options available to a non-citizen in indefinite detention.

Due to the failures of the amendments to address the fundamental failings of the Migration Act, described above, and provide for the granting of protection to individuals owed *non-refoulement* obligations, non-citizens may end up in a legal limbo of indefinite detention. From this position, they have only two options: removal, whether that be voluntary or through a s 197D finding of the Minister; or re-application for a visa through appeal to the two personal non-compellable powers of the Minister to intervene. They could appeal to s 48B to ask the Minister to allow them to reapply, which is likely to be refused in character cases under the exclusion criteria of ss 36 or 501.[158] Or they could appeal to s 195A, under which the Minister may grant a visa on the ground of public interest.[159] Thus, while personal powers of the Minister are no longer the sole protection existing for the prevention of removal in breach of *non-refoulement* obligations, they do remain the sole pathway for relief of a situation of indefinite detention.

Conclusion: where is the old lady now?

This paper has used the nursery rhyme of 'the old lady who swallowed a fly' as an analogy for a series of amendments to the Australian Migration Act occurring between 2014 and 2021. When the old lady swallowed a fly, her remedy was to swallow a spider to eat that fly. Similarly, to address the indefinite detention of non-citizens in Australia, the 2014 amendments introduced a solution—compelling the removal of those non-citizens in breach of Australia's *non-refoulement* obligations through s 197C.

However, this spider turned out to be an even larger problem than the fly. Rather than addressing the fundamental failure of the Migration Act to grant visas to non-citizens owed *non-refoulement* obligations, the solution remedied a human rights violation with a further severe violation. Thus, in 2021, further amendments were introduced to solve the issue presented by the 2014 amendments through a modification of s 197C, preventing the removal of non-citizens in cases of *non-refoulement*. The old woman has now also swallowed a bird to eat the spider that was swallowed to eat the fly. However, the 2021 amendments continue to rely on personal and non-compellable powers of the Minister as the only option available to non-citizens in indefinite. Not only has the bird failed to eat the spider, by failing to remedy the flaws in the 2014 amendments, but it also failed to address the issue of the fly by failing to remedy the fundamental flaw of the Migration Act in granting visas to those owed *non-refoulement* obligations.

So, where is the old lady now? She is battling with a complex array of legal provisions, none of which resolve the core problem—the resulting provisions juggle between two troubling options of either indefinite detention or removal of non-citizens in breach of *non-refoulement* obligations.

This paper argues that amending the fundamental failure in the Australian Migration Act to offer protection to non-citizens owed *non-refoulement* obligations requires more

[157]Ibid.
[158]Migration Act (n 2) s 48B.
[159]Ibid s 195A(2).

than simply amending s 197C. It requires changes to the 'good character' provisions contained in ss 36 and 501 to ensure that individuals owed *non-refoulement* obligations by Australia are granted protection visas. Without this change, the fundamental flaw persists, and from its persistence arise the various challenges addressed by both the 2014 amendments and the 2021 amendments. The amendment of s 197C in isolation, as has been implemented by the 2021 amendments, results in indefinite, indeterminate immigration detention for people affected by character tests and the only recourse for those individuals is voluntary return to harm, or the personal and non-compellable powers of the Minister.

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