



FROM THE PERMANENT REPRESENTATIVE

AUSTRALIAN PERMANENT MISSION
GENEVA

4 September 2020

Ms. Beatriz Balbin
Chief
Special Procedures Branch
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
Palais Des Nations
1211 Geneva 10
Switzerland

Dear Madam

Re: Joint Communication of 7 July 2020 from Special Procedures mandate holders regarding the situation of Ms. [REDACTED] (Ref: AL AUS 1/2020)

I refer to the joint communication dated 7 July 2020 from the Working Group on discrimination against women and girls and the Special Rapporteur on the human rights of migrants.

The Australian Government notes the concerns expressed in the joint communication and provides the following information in response to the four matters raised.

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

The Australian Government does not have any additional information about the allegations made, but offers some comments of general relevance about the operation of Australia's family law system.

It would not be appropriate for the Australian Government to comment specifically on the handling of Ms [REDACTED] matter by the Family Court of Australia. Judicial independence is provided under the Australian Constitution to ensure that disputes between people, and between people and governments, are resolved by judges who are impartial and are not subject to improper control or pressure, whether governmental or private. Public confidence in the administration of justice is vital to the maintenance of the rule of law which underpins our democratic system of government.

The *Family Law Act 1975* provides a legal framework for resolving arrangements for children and property following a relationship breakdown. The 'best interests of the child' is the paramount consideration when resolving parenting matters. This includes the need to protect children from harm and, in the absence of factors such as violence or abuse, for children to

enjoy a meaningful relationship with each of their parents. The Family Law Act is gender neutral and focuses on the rights of children and the responsibilities that each parent has towards their children, rather than on parental rights. Under the terminology of the Family Law Act and based on the information provided in the joint communication, it appears the orders made by the Family Court would have provided for the children to live with Ms [REDACTED] and spend time with their father.

The joint communication makes brief reference to the right of children to have contact with both parents. The Family Law Act gives effect to Australia's obligations under the Convention on the Rights of the Child (CRC). Of note Article 3(1) of the CRC provides that:

in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Further, the CRC provides for the right of the child to know his or her parents. Specifically, Article 7(1) provides that:

the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.

Article 9(3) of the CRC provides that:

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

The provisions of the Family Law Act allow for decisions about parenting arrangements for children (custody arrangements) that are consistent with the obligations under each of these articles.

The Family Law Act provides for parties to make an application to the court, seeking interim spousal maintenance payments from their former spouse in particular circumstances. The body of case law that sits under the legislation also provides for interim property settlements, in the form of money or assets. The family courts apply a four step process when dividing the assets of the relationship, between the parties, on a final basis. These steps include consideration of the contributions made by each of the parties to the acquisition of the assets and their respective future needs, including but not limited to each parties' earning capacity, their age and health and any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

The Family Law Act therefore provides a regime governing the dissolution of relationships, including the making of custody arrangement decisions where appropriate, that applies fairly to parties regardless of gender and is consistent with Australia's obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

In March 2019, the Australian Law Reform Commission (ALRC) completed a comprehensive review of Australia's family law system. This included consideration of how to ensure the system protects the best interests of the child and keeps families safe from violence and abuse. The ALRC's final report is available from its website: www.alrc.gov.au/inquiries/family-law-system.

The Australian Government is considering the issues and recommendations set out in the ALRC report and has indicated that it will respond to its 60 recommendations. The Australian Government will ensure that any reforms adopted in response to this report maintain the high standard of protection of women and children which exist under Australian law which is in accordance with the Australia's international law obligations, particularly the CRC and the CEDAW.

2. Please provide any additional measures to be taken to grant Ms [REDACTED] full residents' rights in order to empower her to assume her responsibility as the primary caretaker of her children.

According to the joint communication, Ms [REDACTED] is a dual citizen of Poland and the United Kingdom who has resided in Australia since 13 October 2014. Ms [REDACTED] holds a New Zealand Citizen Family Relationship visa (subclass 461). After arriving in Australia, Ms [REDACTED] separated from her ex-partner and Family Court orders were made giving her primary care of their two children, with those orders also providing that the children spend time with their father. The effect of these orders is to prevent Ms [REDACTED] from leaving the country with her children.

The joint communication states Ms [REDACTED] is now residing in Australia long-term on a subclass 461 visa and has no pathway to Australian permanent residency. The subclass 461 is a temporary visa for non-New Zealand citizen family members of a New Zealand citizen that allows the holder to live, work and study in Australia for five years. While the subclass 461 visa does not provide a pathway to permanent residency, subclass 461 visa holders are eligible for further 5-year subclass 461 visas, even after their relationship with the original subclass 461 sponsor has broken down, provided that they:

- have not entered into a relationship with another person, and
- meet other relevant criteria for the grant of another subclass 461 visa, such as health and character requirements.

The joint communication is concerned that Ms [REDACTED] has no way to change status or achieve a more long-term solution regarding her residency (other than entering a relationship with an Australian citizen/permanent resident). As with all temporary visa holders, it is open for Ms [REDACTED] to apply for a permanent visa if she meets the eligibility requirements (for example a permanent visa under the Skills stream of the Migration Program). The Department of Home Affairs' website contains information about permanent visa options at: <https://immi.homeaffairs.gov.au/visas/permanent-resident/visa-options>

3. Please provide information on measures taken by your Excellency's Government in removing barriers faced by immigrant women and temporary visa holders in accessing essential social services, and other services such as pension benefits, or the right to acquire property; and in accordance with international human rights standards including the recommendation of the Special Rapporteur on Violence Against Women.

Australia's social security system is a non-contributory, residence-based system, which is designed primarily to support Australian citizens and permanent residents. For this reason, most temporary visa holders, including holders of the subclass 461 New Zealand Citizen Family Relationship visa, do not have access to Australian social security or family assistance payments. However, Ms [REDACTED] may have access to some support measures below.

Child Support

Ms [REDACTED] can apply to Services Australia for a child support assessment in Australia for each of her children, if she is not living with the other parent of the children as her partner on a genuine domestic basis. It does not matter that she is on a 461 temporary visa, and that neither she nor the other parent are Australian citizens.

An application for a child support assessment for a child may only be made if the child meets certain requirements, which includes:

- the child is under 18 years of age
- the child is not a member of a couple, and
- the child meets the residence requirements for a child support assessment.

The child meets the residence requirements for a child support assessment if on the day an application is made to Services Australia:

- the child is in Australia
- the child is an Australian citizen, or
- the child is ordinarily resident in Australia.

Services Australia also needs to be satisfied that Ms [REDACTED] and the other parent, to be assessed in respect of the costs of the child, are parents of the children.

If Services Australia accepts the application and registers the child support assessment, Ms [REDACTED] may be entitled to receive child support payments, provided that she has at least 35 per cent care of the children. The amount of child support received depends on a range of factors, such as the income of the parents, the amount of care each parent provides and the ages of the children.

Emergency Relief

The Australian Government is committed to supporting vulnerable people across Australia who are experiencing financial crisis. The Government recognises the important role Emergency Relief (ER) services play in providing immediate financial and material aid to eligible people.

ER can act as a safety net for people experiencing financial hardship and who have limited means to help them alleviate their financial crisis. ER services are delivered by community organisations and help people to address immediate basic needs in times of crisis. The type of assistance offered by ER providers may include food, clothing, vouchers, budgeting assistance, and referral to other services.

Access to ER is free. There are no citizenship or residency requirements to access ER. However, individual service providers may have certain criteria that need to be met in order to access their particular ER service.

Under the Financial Wellbeing and Capability Activity, the Government is investing more than \$200 million over four and a half years, from 1 January 2019 to 30 June 2023 for ER nationally. The Government is also providing:

- \$35 million in 2019-20 to assist Commonwealth-funded ER providers in bushfire-affected areas, and
- \$37 million over two years from 2019-20 for almost 200 Commonwealth-funded ER providers, as part of the \$200 million Community Support Package, to help vulnerable Australians impacted by coronavirus.

In addition, the Government is providing \$7 million for the Australian Red Cross, as part of the Community Support Package, to deliver ER and counselling support to up to 30,000 temporary visa holders. The Government is also investing \$6 million over four and a half years, from 1 January 2019 to 30 June 2023, for Food Relief nationally. The three Commonwealth funded Food Relief providers, Foodbank Australia, SecondBite, and OzHarvest, aim to increase Commonwealth-funded ER organisations access to a cost-effective supply of food items.

Furthermore, the Government is providing:

- \$5 million in 2019-20 to increase the provision of Food Relief to bushfire-affected communities; and
- Almost \$20 million in 2019-20, as part of the Community Support Package, so the three Commonwealth-funded Food Relief providers can increase their workforce, food supplies, and transport options.

Acquisition of Property

The joint communication also raises migrant's right to acquire property. At the Commonwealth level, temporary residents generally need to apply for and receive foreign investment approval before purchasing any residential real estate in Australia. Each application made involves a fee. Fees for residential land applications depend on the price for the acquisition of the interest. For

example, acquiring an interest in residential land where the price is \$1 million or less involves a fee of \$5,800. Some states and territories have also imposed duties on foreign persons acquiring property.

4. Please provide information on measures taken to ensure that immigration status does not lead to gender-based discrimination in the settlement of family law matters.

The joint communication asserts that migrant women on temporary visas (particularly dependent visas) in Australia experience disproportionate disadvantages. The Australian Government supports people with genuine need to stay in Australia by facilitating lawful visa status while they sort out their affairs in Australia. As noted above, Ms [REDACTED] is eligible for further 5-year subclass 461 visas and is able to remain in Australia on this or other visa pathways for which she meets the eligibility requirements. Ms [REDACTED] may also be able to access ER services as noted in the response to question three.

Commonwealth agencies are continuing work to support and promote better outcomes for women on temporary visas who are experiencing violence.

On 4 June 2020, the House Standing Committee on Social Policy and Legal Affairs adopted an inquiry into family, domestic and sexual violence. The Terms of Reference for the inquiry includes a specific reference to the experiences of all women, including culturally and linguistically diverse women and women on temporary visas. The findings of the inquiry will inform the next National Plan to Reduce Violence against Women and their Children.

In addition, the Fourth Action Plan of the National Plan to Reduce Violence against Women and their Children 2010-2022 has a number of priority areas for action, including supporting and addressing the diverse needs and experiences of women and their children affected by violence.

I trust the above information will be of assistance to the Special Procedure mandate holders.

Yours sincerely

A handwritten signature in black ink that reads "Sally Mansfield". The signature is written in a cursive, flowing style.

Sally Mansfield
Ambassador and Permanent Representative
Australian Permanent Mission to the Office of the United Nations and Conference on
Disarmament