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OFFICIAL
HOME AFFAIRS
QUESTION TIME BRIEF (QTB)
SIGNIFICANT LITIGATION AND ENQUIRIES

QUESTION: Is there significant litigation before the courts?

KEY TALKING POINTS:

- As these matters are still before the courts, it would not be appropriate to discuss.

BACKGROUND AND CHRONOLOGY

Nearly all of the Department's migration and citizenship administrative law litigation caseload (approximately 99 per cent) involves matters initiated by individuals seeking to overturn departmental or tribunal decisions. A relatively small proportion of these matters are legally significant or sensitive.

s. 22(1)(a)(ii)

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s. 22(1)(a)(ii)

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s. 22(1)(a)(ii)

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s. 22(1)(a)(ii)

XAD (by her litigation guardian XAE) v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs – Full Federal Court – s. 47F(1)
s. 47F(1)

- On 16 February 2021, the Full Federal Court (Flick, Charlesworth and White JJ) dismissed XAD's appeal and the Minister's cross-appeal and upheld the orders of the Federal Court made on 17 April 2020. This proceeding relates to the youngest daughter of the "Biloela family".
- On 11 March 2021, XAD filed an application for special leave in the High Court challenging the Full Federal Court's decision to dismiss her appeal. The Minister filed his reply on 1 April 2021. The High Court has not yet listed the special leave application for an oral hearing. It is possible the Court will instead decide the matter 'on the papers' without the need for a hearing. The Minister decided not to seek special leave of the Full Court's decision to dismiss his cross-appeal.
- Before the Federal Court (Moshinsky J), XAD contended that she satisfied the criteria set out in a 2017 Ministerial determination as the basis for her having a current valid visa application. The Federal Court accepted the Minister's construction of the determination, namely that the criteria must be satisfied at the time of making the application, and that as a result XAD's application did not meet the criteria at the date of her purported application for the visa. XAD challenged this finding in her appeal.
- The Federal Court also found that by requesting a full brief for the family in May 2019, Minister Coleman had made a personal decision to begin consideration of whether to exercise his ministerial power to lift the bar to enable XAD to make a valid protection visa application. The Court further found that as a result of making this decision XAD was owed but subsequently denied procedural fairness in relation to a protection assessment that was undertaken by the Department in August 2019. The Minister filed a cross-appeal challenging this finding.
- To give legal effect to the Full Federal Court's judgment, on 18 February 2021, the Department sent XAD a letter inviting comment on the latest Sri Lankan Country

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Information. On 8 and 23 April 2021, XAD's representative provided two separate responses to the Department. Those responses, along with the various attachments which accompanied them, will be included in a submission to Minister Hawke in which he'll be asked if he wishes to exercise his non-compellable ss 46A(2) and 48B powers in respect to the whole family.

XAE v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs – Federal Circuit Court – S. 47F(1)

- On 11 March 2021, the Federal Circuit Court (Judge Humphreys) made consent orders dismissing the matter in XAE's favour.
- On 13 July 2020, XAE had filed an application in the Federal Circuit Court seeking an injunction to prevent his removal from Australia and a declaration that the pre-removal clearance process, undertaken by an officer of the Department on 2 August 2019, did not comply with the rules of procedural fairness.
- XAE is the father and litigation guardian of XAD.
- XAE, relying on the findings of the Federal Court in XAD that the Minister had made a personal decision in May 2019, argued that his pre-removal clearance process attracted procedural fairness obligations which he was denied.
- A pre-removal clearance is an administrative process in which the Department reviews a person's circumstances to identify whether there is any risk that their proposed removal would breach Australia's non-refoulement obligations.
- In seeking to enter into consent orders, the Minister accepted, in accordance with the Full Federal Court decision in XAD, that the pre-removal clearance was undertaken subsequent to a procedural decision by Minister Coleman and therefore took on a statutory basis and attracted procedural fairness obligations that were denied to XAE.

Damages claim involving XAD and XAE

- On 17 December 2020, XAD also brought a damages claim against the Minister for Home Affairs, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, the Secretary of the Department of Home Affairs and the Commonwealth.
- XAD and XAE are seeking damages, including aggravated and exemplary damages, for false imprisonment.

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HOME AFFAIRS
QUESTION TIME BRIEF (QTB)
SIGNIFICANT LITIGATION AND ENQUIRIES

1

Contact: s. 22(1)(a)(ii)
SAS Civil, Commercial and Employment Law Branch
Division: Legal Group
Date first prepared: 12 January 2021
Originating Source: HA

Phone: s. 47E(d)
Action Officer: s. 22(1)(a)(ii)
Date last Updated: 4/05/2021 - 2:59 PM

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Matter

Issue

s. 22(1)(a)(ii)

***XAD (by her litigation guardian XAE) v
Minister for Immigration, Citizenship,
Migrant Services and Multicultural
Affairs – Full Federal Court***

s. 47F(1)

The parents and eldest child were refused protection visas, and lost all Court appeals. The youngest child (XAD) purported to apply for a temporary protection visa, which the Department deemed invalid. The Federal Court found that the Minister's construction of a Ministerial determination insofar as it applies to XAD was correct, which XAD appealed. However, the Court also found that Minister Coleman had begun consideration of whether to exercise his ministerial power and that XAD was owed and denied procedural fairness, which the Minister cross-appealed. The Full Federal Court dismissed both XAD's appeal and the Minister's cross-appeal. XAD has sought special leave in the High Court challenging the dismissal of her appeal.

Damages claim involving XAD & XAE

In December 2020, XAD and XAE brought a damages claim against the Department for false imprisonment

s. 22(1)(a)(ii)



Australian Government
Department of Home Affairs

Submission

For information

PDMS Ref. Number MS21-000798

Date of Clearance: 29/04/2021

To Minister for Home Affairs

Subject Current status of the s. 47F(1) family

Timing At your earliest convenience.

Recommendations

That you:

1. note the circumstances of the s. 47F(1) family's case; and noted / please discuss
2. note the work currently being progressed by the Department of Home Affairs (the Department) in relation to this case. noted / please discuss

Minister for Home Affairs

Signature.....

Date:...../...../2021

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Minister's Comments				
Rejected Yes/No	Timely Yes/No	Relevance <input type="checkbox"/> Highly relevant <input type="checkbox"/> Significantly relevant <input type="checkbox"/> Not relevant	Length <input type="checkbox"/> Too long <input type="checkbox"/> Right length <input type="checkbox"/> Too brief	Quality Poor 1.....2.....3.....4.....5 Excellent Comments:

Key Issues

1. This submission is to provide you with a briefing in relation to the s. 47F(1) family (often known in the media as the 'Biloela family'). This submission should be read in conjunction with MS21-000636 that outlines current litigation associated with the family.
2. s. 47F(1), both Sri Lankan nationals, arrived as illegal maritime arrivals (IMAs) in April 2012 and April 2013 respectively. Following their release from immigration detention, they married on 9 November 2014 and their children, s. 47F(1) and s. 47F(1) were born in Australia.
3. Protection claims raised by three of the four family members have been considered by merits and judicial review bodies, all of whom have concluded that they are not refugees. In February 2021, the Full Federal Court (FFC) found that s. 47F(1) does not have a temporary protection visa application before the Department and s. 47F(1) is seeking special leave to appeal this decision in the High Court (MS21-000636 refers).
4. The family have been detained since 5 March 2018 and were placed on Christmas Island (CI) on 30 August 2019, following a failed removal due to a Federal Circuit Court injunction.
5. CI was considered the most appropriate location due to its suitability as a location from which to effect the removal of the family to Sri Lanka. Removal considerations include both the security and safety of the family during a removal operation and the reduced flight times between CI and Colombo when compared to other locations on the Australian mainland.
6. The family were originally detained for the purpose of removal; however, they are currently detained lawfully while a ministerial intervention process is ongoing.
7. Accommodation arrangements for the family are regularly reviewed by the Australian Border Force, taking into consideration a number of factors, including the family's medical needs, their safety and security, and the availability of age appropriate services for the children. The placement of the family at the Phosphate Hill Alternative Place of Detention is considered to be appropriate at this point in time.

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8. s. 47F(1)

[Redacted]

9. s. 47F(1)

[Redacted]

10. s. 47F(1)

[Redacted]

11. s. 47F(1)

[Redacted]

12. s. 47F(1)

[Redacted]

13. s. 47F(1)

[Redacted]

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15. Separate to the ministerial intervention submission under sections 46A(2) and 48B of the *Migration Act 1958* (the Act) (discussed at paragraph 4), the s. 47F(1) family's legal representative lodged a request for ministerial intervention in July 2020 under section 195A of the Act. Section 195A of the Act provides portfolio Ministers with the power to grant a visa to a person in immigration detention. Section 197AB of the Act provides portfolio Ministers with the power to place a person into a residence determination arrangement. These powers are non-compellable, which means portfolio Ministers are under no obligation to exercise or to consider exercising their powers. The Department is drafting a ministerial intervention submission in relation to this request.

Background

16. Individual immigration histories are at Attachment E.
17. Following the FFC decision in February 2021, on 8 April 2021, the family's legal representative responded to the Department's invitation to comment. This response will be considered as part of a submission currently being prepared by the Department for Minister Hawke. The submission will ask Minister Hawke whether or not he wishes to exercise his personal non-compellable powers under section 46A(2) and/or section 48B of the Act. In the instance Minister Hawke chooses to exercise both of his personal, non-compellable powers, all four members of the s. 47F(1) family will be invited to lodge either a Temporary Protection Visa (TPV) or Safe Haven Enterprise Visa (SHEV). If Mr Hawke chooses not to exercise his personal power the family will be liable for removal from Australia.

Broader ministerial intervention powers

18. Section 46A(2) and 48B provide portfolio Ministers with personal intervention powers, providing them with the ability to lift statutory bars that would otherwise prevent an individual from lodging a visa application onshore. Section 46A prevents an IMA who is in Australia and is either an unlawful non-citizen or holds a prescribed temporary visa from making a valid visa application. Section 48 prevents a non-citizen who has been refused a protection visa application from making a further valid protection visa application.
19. As the s. 47F(1) family are detained under section 189 of the Act, ministerial intervention powers under sections 195A and 197AB of the Act are enlivened. Section 195A of the Act provides portfolio Ministers with the power to grant a visa to a person in immigration detention. Section 197AB of the Act provides portfolio Ministers with the power to place a person into a residence determination arrangement. These powers are non-compellable, which means portfolio Ministers are under no obligation to exercise or to consider exercising their powers.
20. It is also open to a portfolio Minister to consider exercising their power to lift the section 46A bar to allow a valid application for a Bridging visa be made, which would enable delegate management of the family.

Consultation – internal/external

21. Legal Division, Refugee, Humanitarian and Settlement Division, Child Wellbeing Operations, Detention Health and Status Resolution.

Consultation – Secretary

22. This submission did not involve consultation with the Department’s Secretary.

Client service implications

23. N/A.

Sensitivities

24. This case has been the subject of substantial media attention and public support.

25. The family has strong community support and links to the Sri Lankan Tamil community. There has been significant media attention of this case and the Department has received over 2,500 letters of support for the family’s release from detention and/or their stay in Australia. In addition, the Hon Barnaby Joyce MP, Senator David Fawcett and Mr Ross Vasta MP have all made representations in support of the family.

26. The information contained in this submission is classified and should not be publicly released without the authority of the Department of Home Affairs. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team
– media@homeaffairs.gov.au.

Financial/systems/legislation/deregulation/media implications

27. N/A.

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Attachments

- Attachment A** Review by s. 47F(1)
- Attachment B** s. 47F(1) Paediatrician Report June 2020
- Attachment C** Letter from the Commonwealth Ombudsman
- Attachment D** Paediatric report 10 March 2021
- Attachment E** Immigration histories

Authorising Officer
Cleared by:
 Andrew Kefford Deputy Secretary Immigration and Settlement Services
Date: 29/04/2021
Ph s. 47E(d)

Contact Officer Justine Jones, A/g First Assistant Secretary, Status Resolution & Visa Cancellation Division,
Ph: s. 47E(d)

CC Secretary
Deputy Secretary, Immigration and Settlement Services
General Counsel
First Assistant Secretary, Status Resolution and Visa Cancellation'
First Assistant Secretary, Citizenship
Assistant Secretary, Migration and Citizenship Litigation
Senior Director, Status Resolution Network

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Review of the detention and wellbeing of children currently accommodated on Christmas Island

Purpose of the Report

To provide the Department of Home Affairs (the Department) with independent advice and written observations on the arrangements in place to support children and families detained at Phosphate Hill Alternative Place of Detention (APOD) on Christmas Island (CI) and written recommendations for the redress of any child welfare or wellbeing issues identified. The contract requires me to consider the Department's current application of its child safeguarding and detention operations policies and practices. It does not require me to advise upon placement options.

s. 47C(1)

All behaviour is influenced by a variety of factors that work together as a system. A child's parents, friends, school, economic circumstances, living environment s. 47C(1)

The system impacts behaviour. Correcting missing or ineffective parts of the system can have a positive impact on behaviour and wellbeing. The reverse, of course, is also true.

I observed considerable effort by those people engaging at the Phosphate Hill APOD to enable child and family wellbeing within a system that imposes constraints and limits how far child and family wellbeing can be protected. This effort was demonstrated s. 47F(1), s. 47C(1)

as well as departmental and contracted service provider staff, staff from island services and volunteers from the CI community.

I acknowledge and commend the leadership provided by Superintendent s. 22(1)(a)(ii), s. 47E(d), s. 47C(1)

has also modelled and led the Department and contracted service providers in actively seeking opportunities to correct missing or ineffective parts of the system, which would otherwise have a negative impact on child and family wellbeing.

s. 47C(1)

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s. 47C(1)



Being in detention

Being in detention by its nature disrupts family life. Some of these features are described below.

s. 47E(d), s. 47C(1)



s. 47E(d), s. 47C(1)

the impacts are still experienced by the nature of being in detention.

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s. 47E(d), s. 47C(1)

s. 47E(d), s. 47C(1)

the Department and the contracted service providers have significantly mediated this

s. 47F(1), s. 47E(d), s. 47C(1)

s. 47F(1), s. 47E(d), s. 47C(1)

- Families are intimate places full of quiet tender moments between a child and their parent, between siblings, and intimacy between parents as a couple;

s. 47F(1), s. 47E(d), s. 47C(1)

s. 47F(1), s. 47E(d), s. 47C(1)

s. 47F(1), s. 47E(d), s. 47C(1)

Yet families are very different to this cohort and are less able than adult individuals to adapt to institutional requirements.

s. 47E(d), s. 47C(1)

s. 47E(d), s. 47C(1)

s. 47C(1)

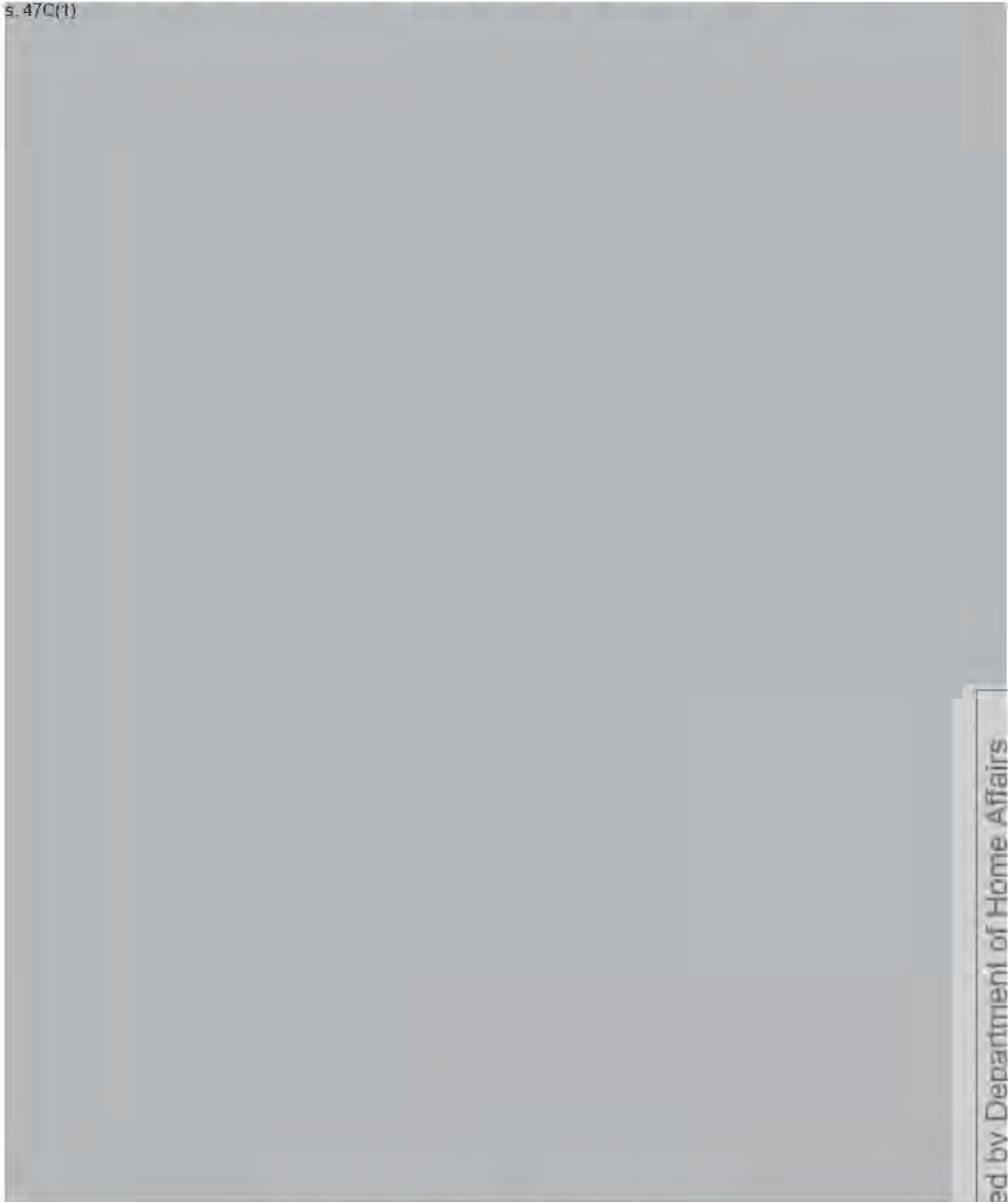
- Behaviour can be misinterpreted if it is not referenced to the system in which the family is living and staff is working. Some examples that illustrate this are:
 - Asylum seeking parents will often keep their children close because they worry about being separated and losing them. Failing to apply a systems lens can result in the parents being seen as overprotective.
 - Little things that usually don't matter become much bigger when in immigration detention. Failing to apply a systems lens can result in the parents being labelled as 'demanding'.

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- Stress levels for parents and staff are heightened so parents and staff react sooner and at escalated levels. Failing to apply a systems lens can result in the parents or staff continuing to over-react and tensions escalating.
- In a remote setting with few individuals detained, staff with less to do than usual survey the family at a level they wouldn't if they were more fully occupied. Failing to apply a systems lens can result in behaviours being interpreted as dysfunctional when they more reflect, for example, gendered and cultured notions of mothers' and fathers' roles.


s. 47C(1)



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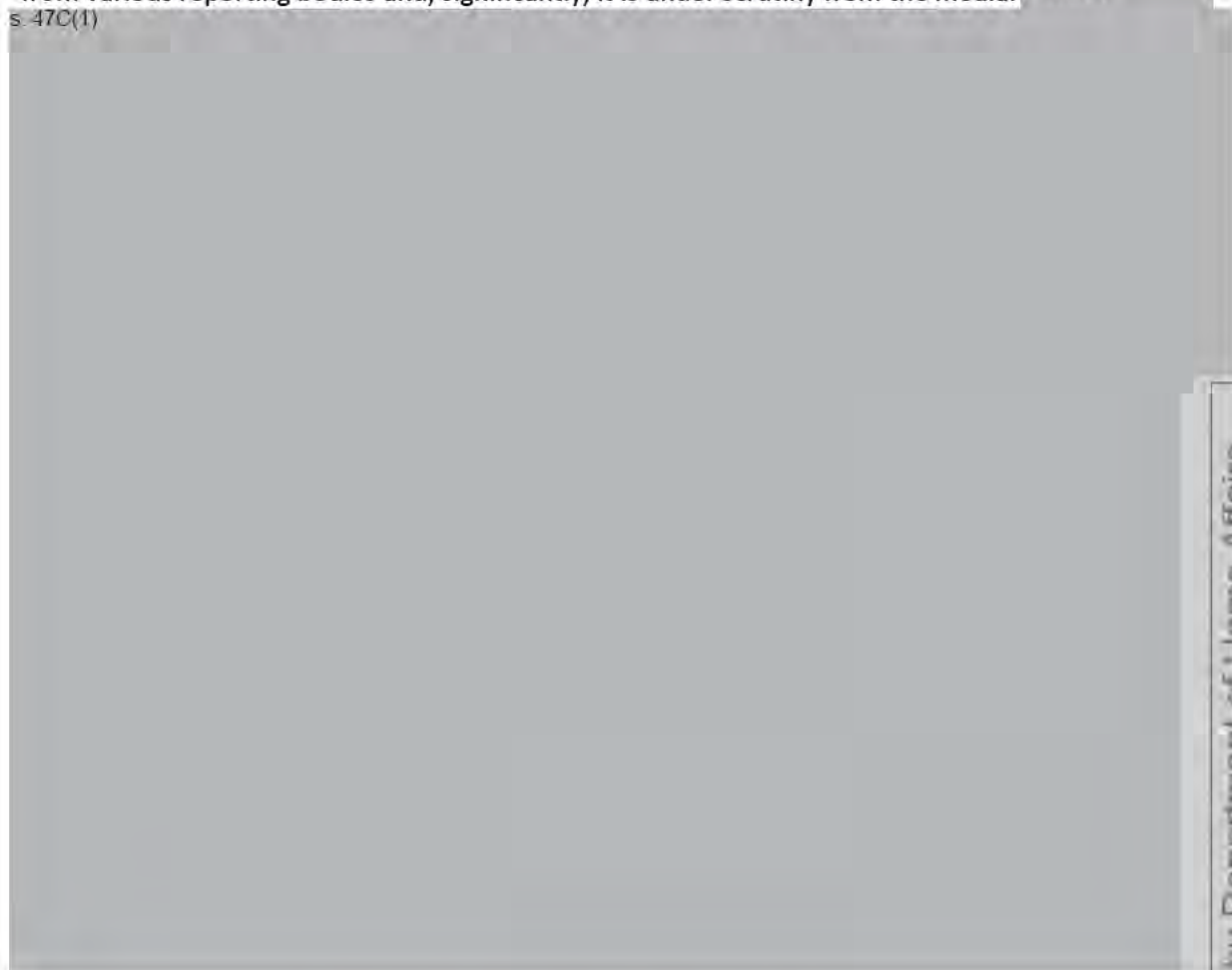
s. 47C(1)



The nature of immigration detention, as described above, means scrutiny is built into the system itself. s. 47F(1), s. 47E(d), s. 47C(1)

The contracted service providers are under scrutiny from their managers who in turn are under scrutiny from the Department to demonstrate compliance with contractual arrangements and budget. The Department's operational staff and leaders are under scrutiny to meet their obligations within their policies, protocols and budget. The Department is under scrutiny from various reporting bodies and, significantly, it is under scrutiny from the media. s. 47C(1)

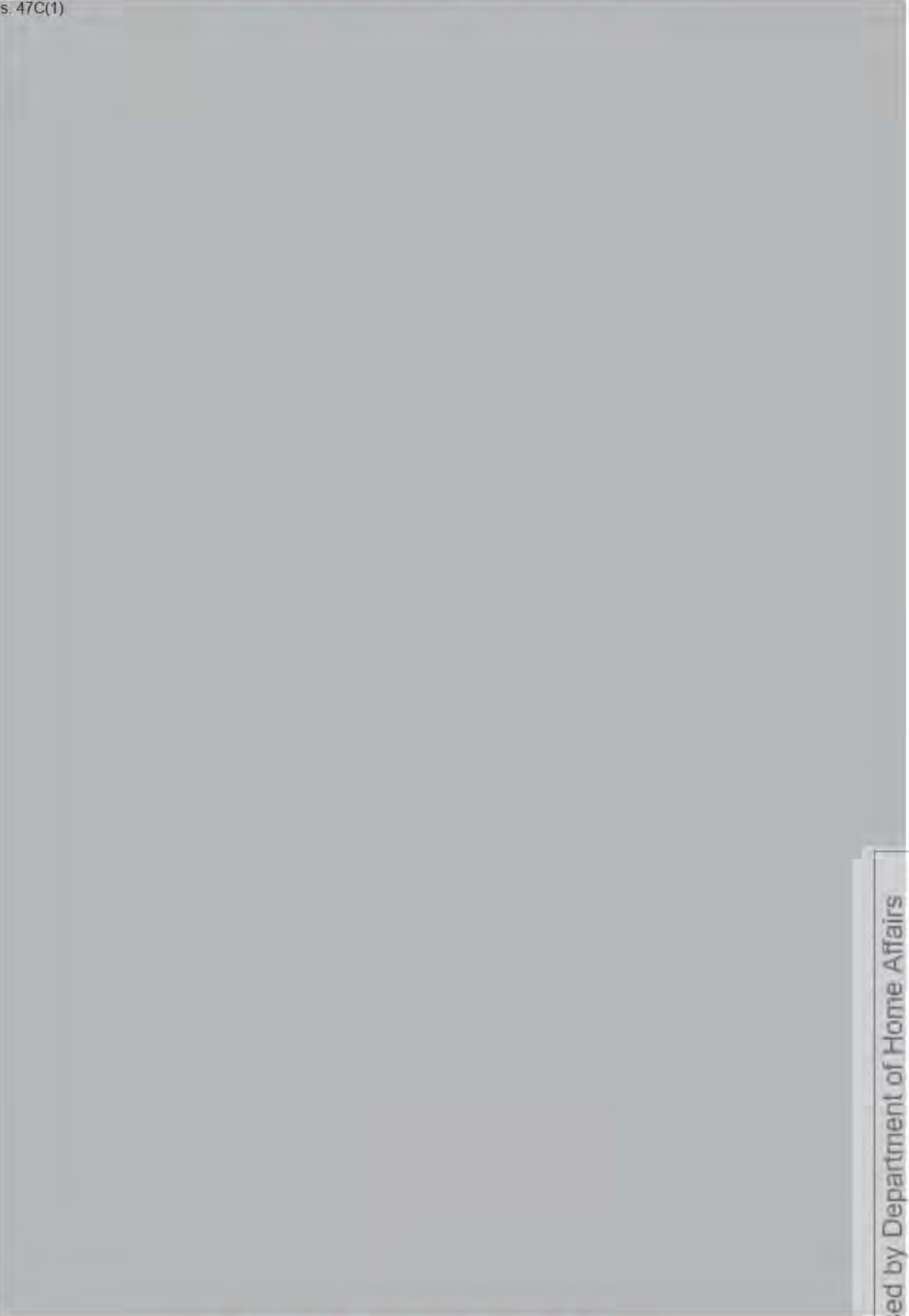
s. 47C(1)



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s. 47C(1)

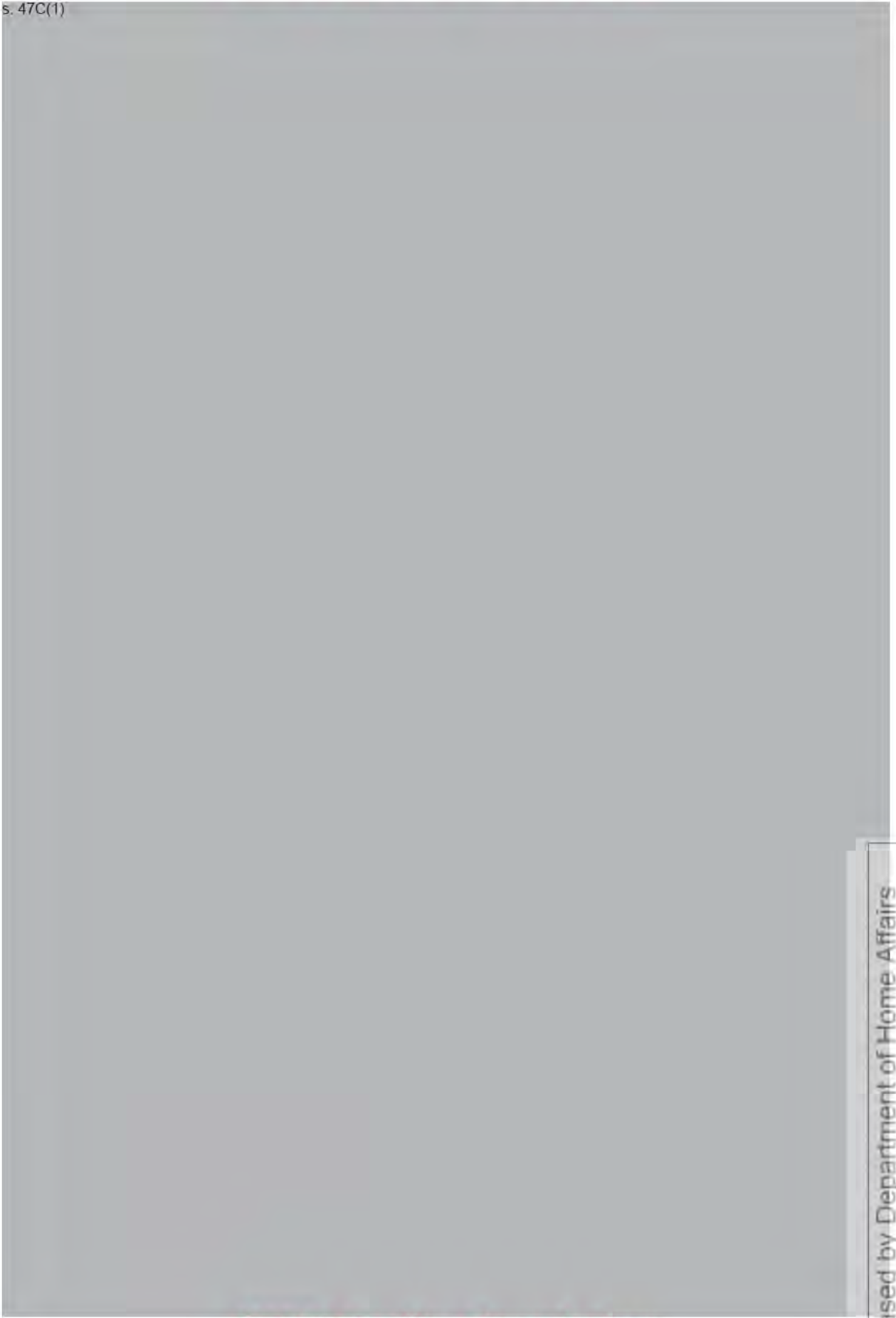


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s. 47C(1)




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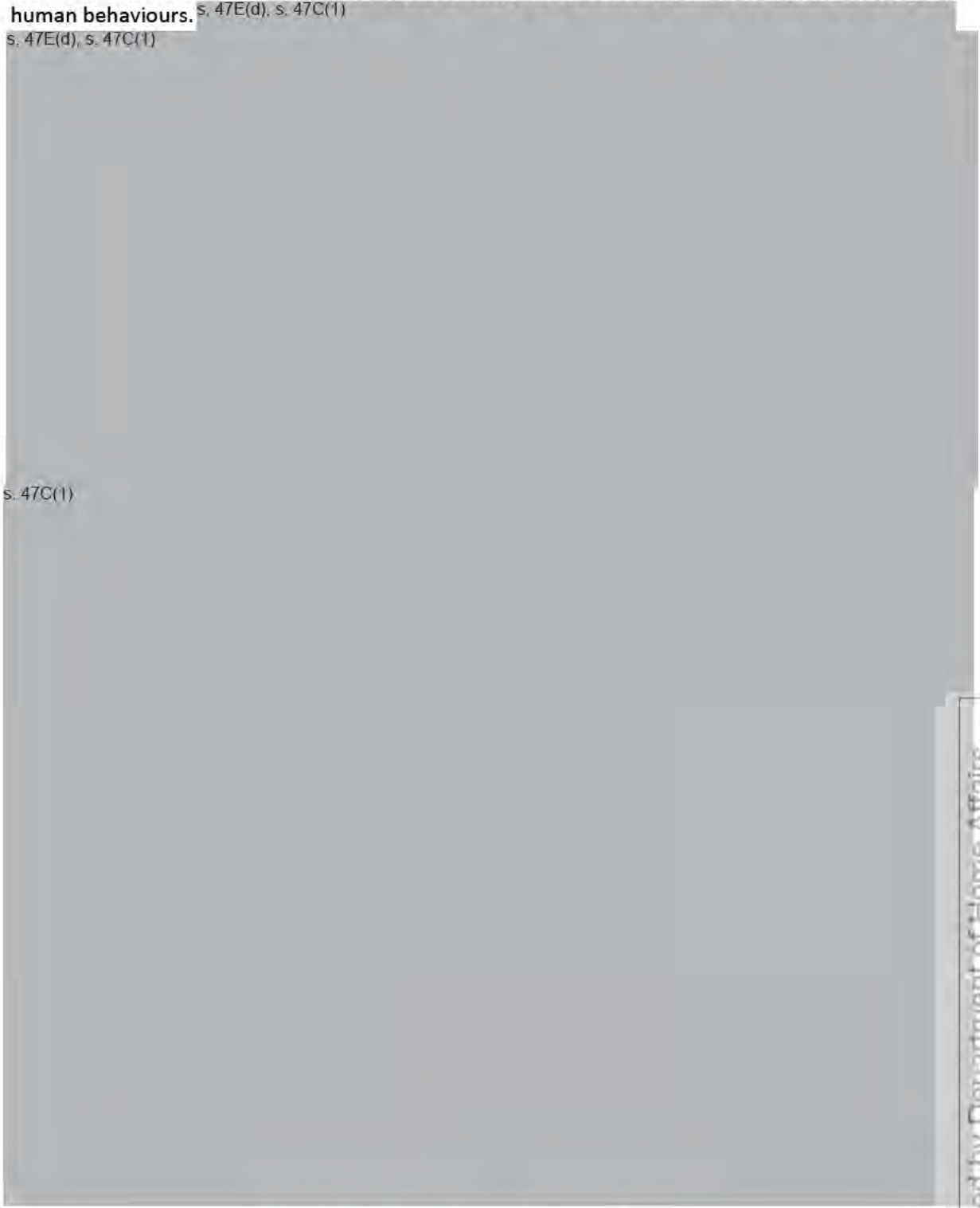
s. 47C(1)



Contracting and families

Most of the services within immigration detention facilities, including CI, are provided by 'for profit' organisations under contract. This provides certainty for the Department around cost, delivery and reporting. Contracts, however, cannot cover the range of situations families are in, nor the range of human behaviours. s. 47E(d), s. 47C(1)

s. 47E(d), s. 47C(1)




s. 47C(1)

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s. 47C(1)



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s. 47C(1)



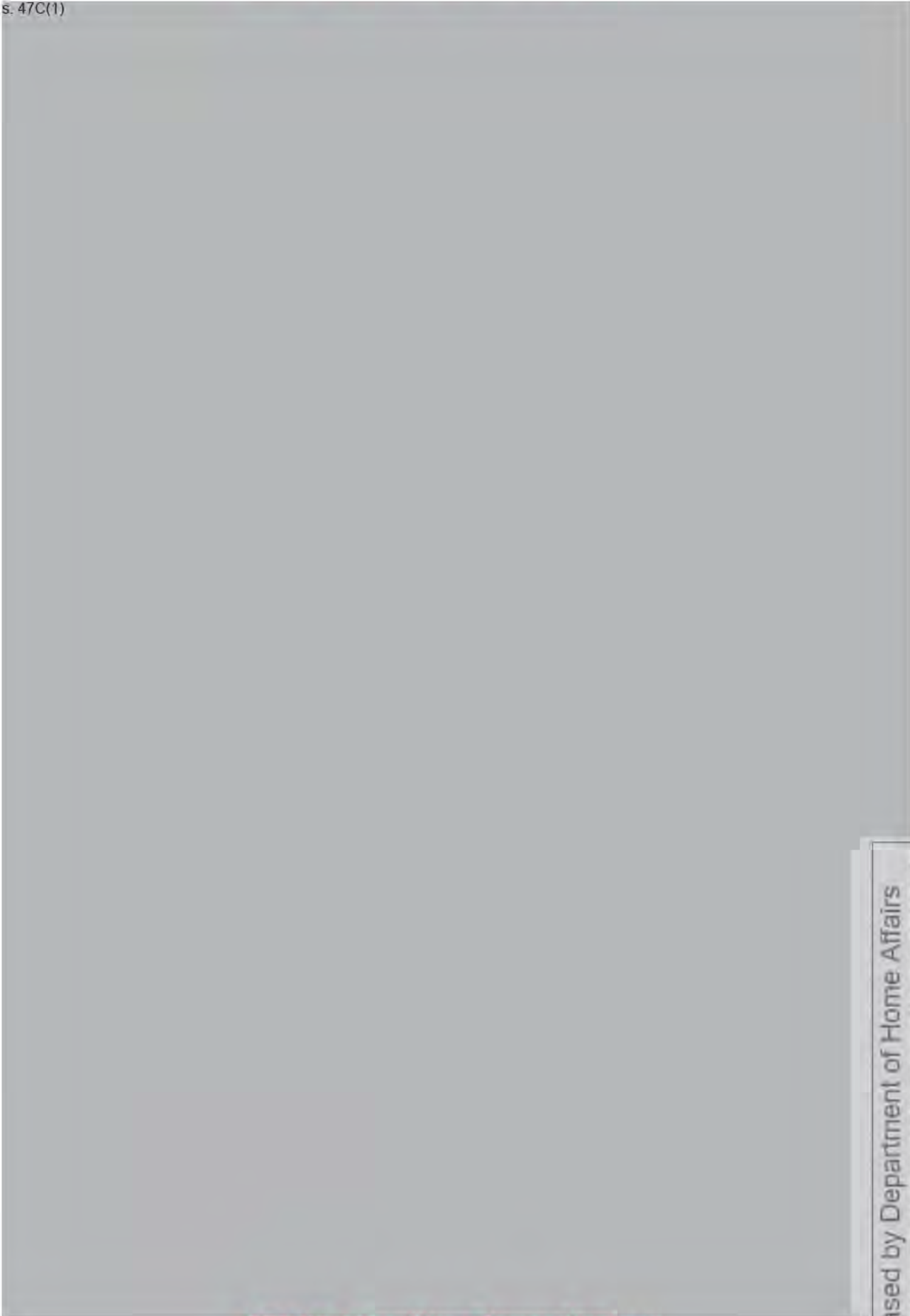
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s. 47C(1)




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s. 47C(1)

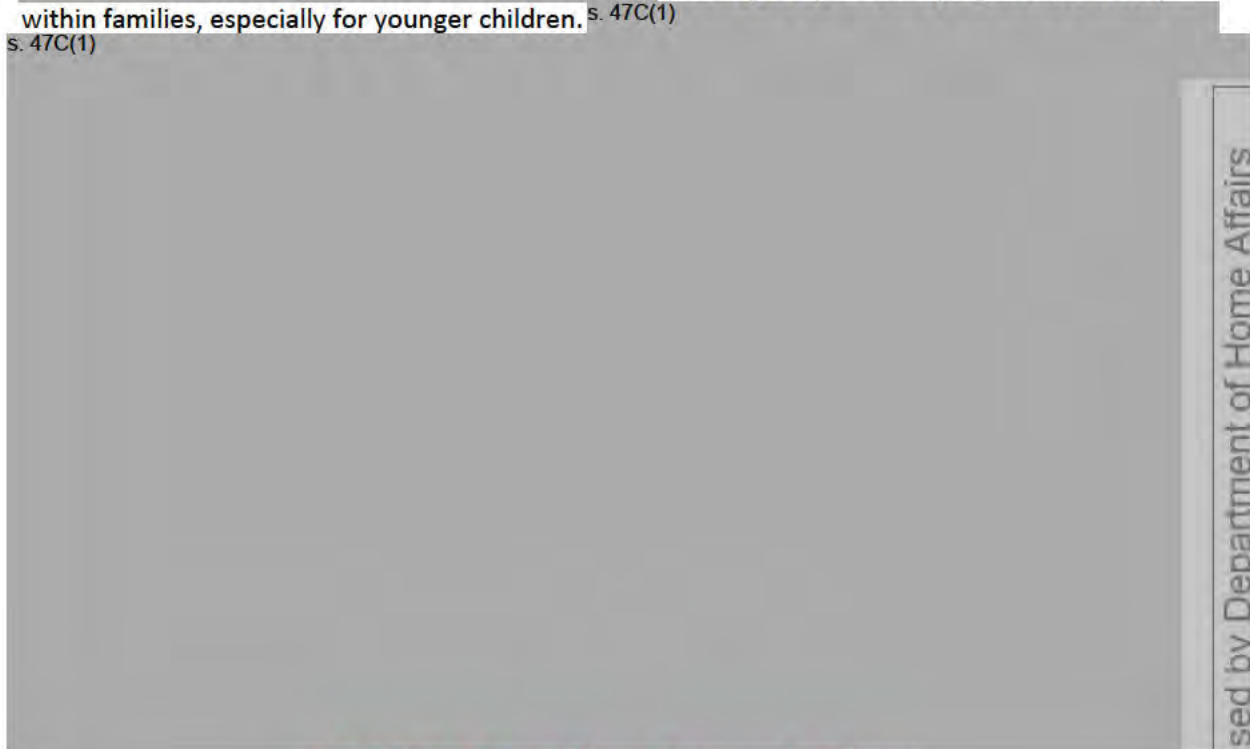


s. 47C(1)

Feeding is a particularly significant activity

within families, especially for younger children. s. 47C(1)

s. 47C(1)



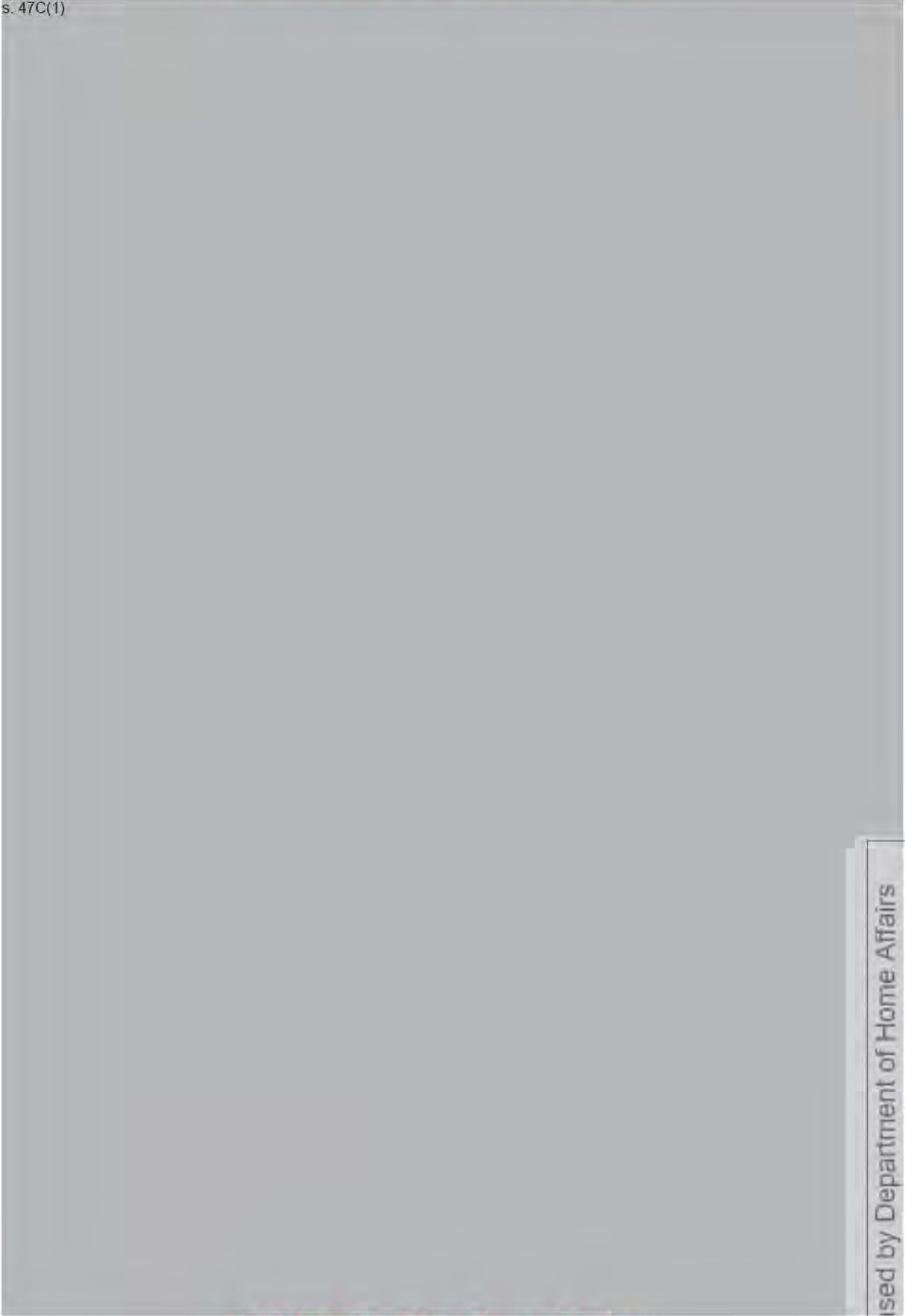
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s. 47C(1)

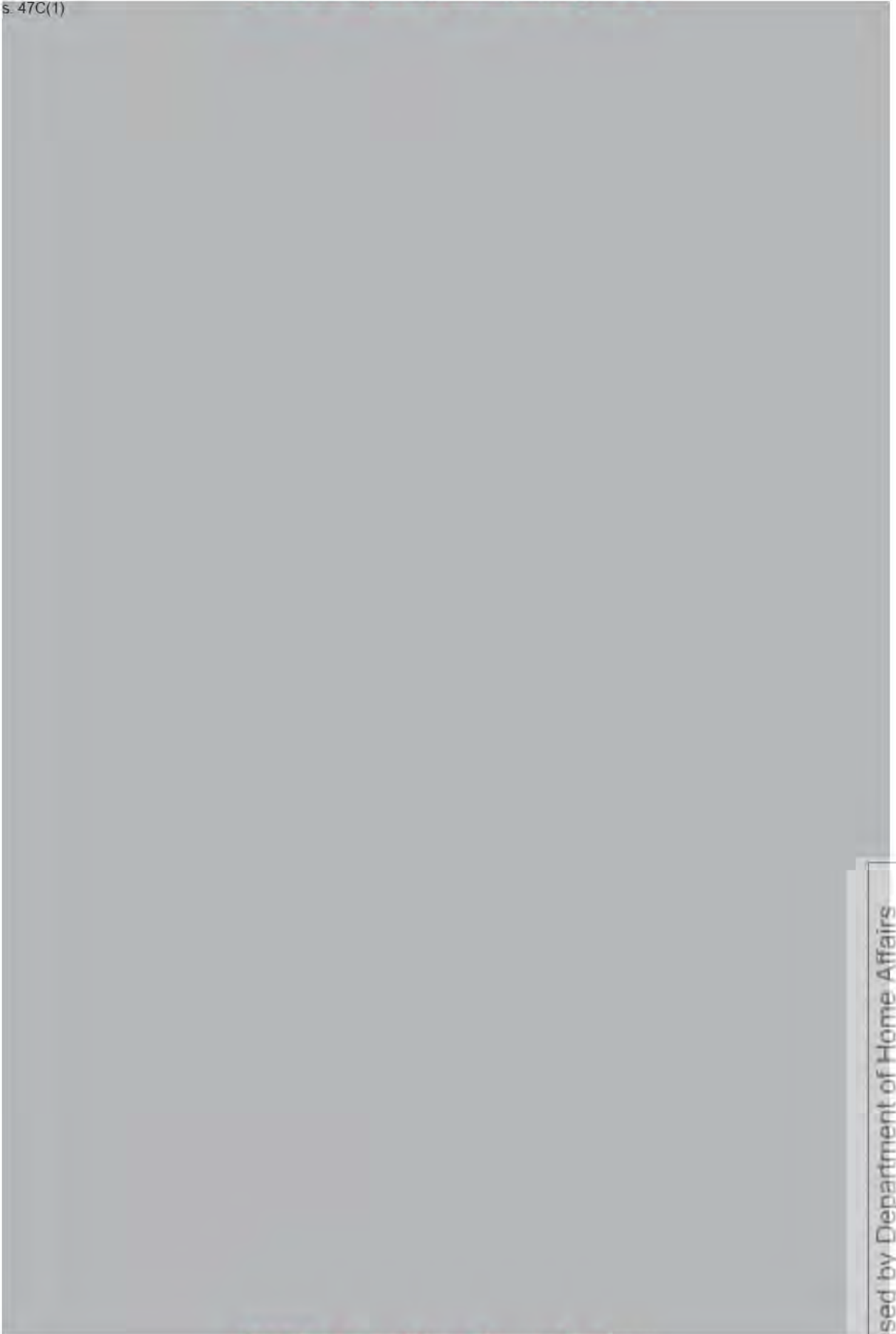


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s. 47C(1)

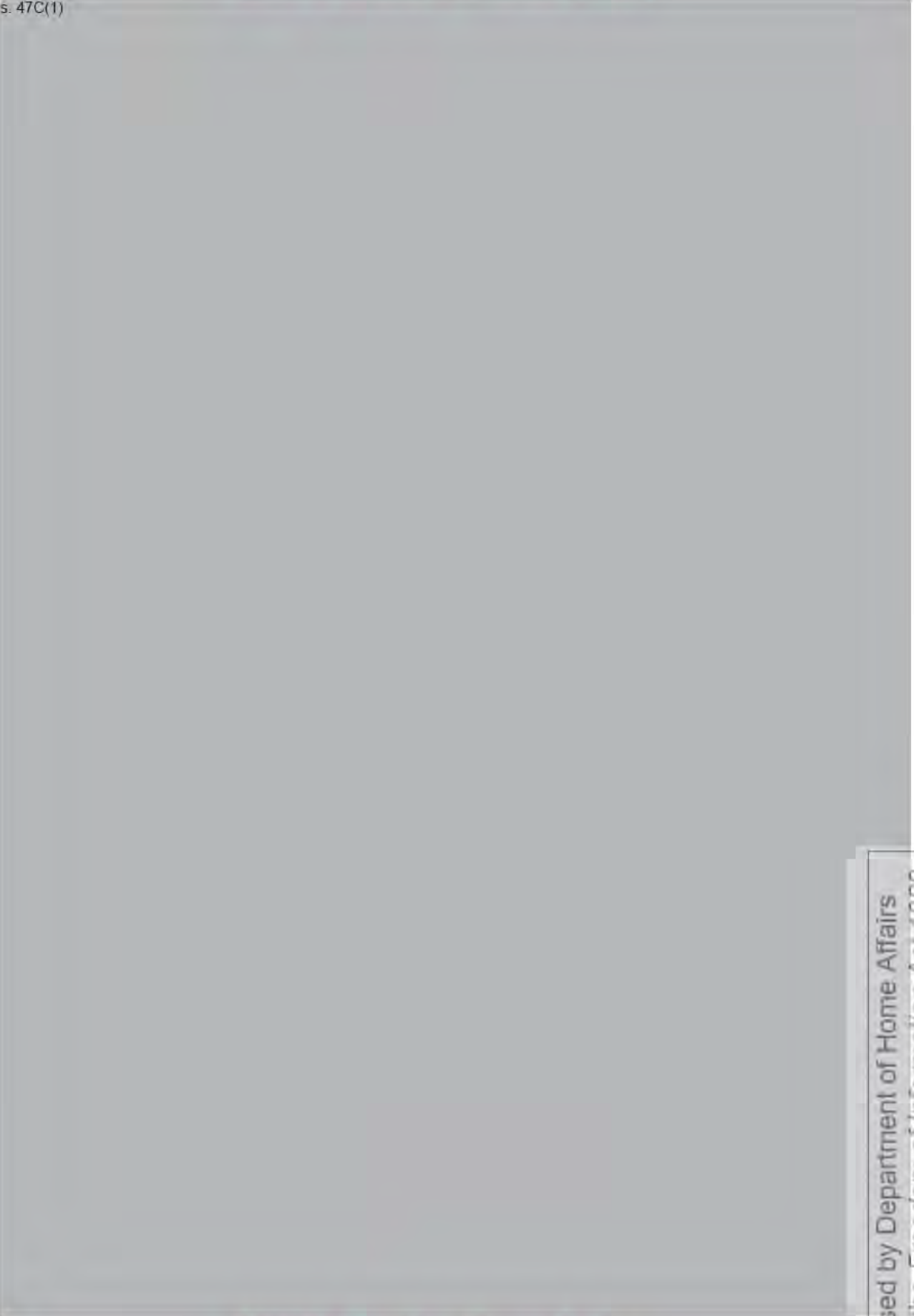


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s. 47C(1)



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Appendix C: Recommendations for the redress of immediate child wellbeing issues identified on CI from the report following my visit in January 2020

Continue seeking opportunities to correct missing and ineffective parts of the system

The Department and contracted service providers working alongside the family should continue to actively seek opportunities to correct missing or ineffective parts of the system which would otherwise have a negative impact on child and family wellbeing by:

- being innovative within the terms of the contracts
- being adaptive - given young children change rapidly and family needs also change
- being responsive to parents concerns and family needs
- building relationships and being cooperative with other service providers and external community agencies
- respecting family integrity, parental authority and family functioning

These features were illustrated s. 47F(1), s. 47E(d), s. 47C(1)

s. 47F(1), s. 47E(d), s. 47C(1)

Enabling peer connections

The Department and contracted service providers must continue to actively seek and enable opportunities for the children to build their peer connections including outside of school s. 47F(1), s. 47E(d), s. 47C(1)

s. 47F(1), s. 47E(d), s. 47C(1) This peer connection is important for children's development and wellbeing.

s. 47F(1), s. 47C(1)

The Department and contracted service providers must ensure parents and family can attend all family-based school and childcare activities and events, that they wish to. This should be done with a minimum of fuss and visibility of contracted service providers.

The Department and contracted service providers should continue to enable activities for the parents including within and with the community s. 47F(1), s. 47C(1)

s. 47F(1), s. 47E(d), s. 47C(1)

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s. 47E(d), s. 47C(1)

Accommodation

There are two options s. 47E(d), s. 47C(1)

Both

options are possible; neither is significantly better or worse from an operations viewpoint.

s. 47F(1), s. 47C(1)

Each option emphasises different aspects of family life. s. 47F(1), s. 47C(1)

s. 47F(1), s. 47C(1)

s. 47F(1), s. 47C(1)

should be led by Superintendent s. 22(1)(a)(ii)

s. 47C(1)

This process

Superintendent s. 22(1)(a)(ii) should be given a copy of this section of the report.

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Australian Government
Department of Home Affairs

Submission

For information

PDMS Ref. Number MS21-000636

Date of Clearance: 08/04/2021

To Minister for Home Affairs

Subject Significant Litigation

Timing At your convenience.

Recommendations

That you:

1. note the content of this submission.

noted / please discuss

Minister for Home Affairs

Signature.....

Date:...../...../2021

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Minister's Comments				
Rejected Yes/No	Timely Yes/No	Relevance <input type="checkbox"/> Highly relevant <input type="checkbox"/> Significantly relevant <input type="checkbox"/> Not relevant	Length <input type="checkbox"/> Too long <input type="checkbox"/> Right length <input type="checkbox"/> Too brief	Quality Poor 1.....2.....3.....4.....5 Excellent Comments:

Key Issues

1. The Department of Home Affairs (the Department) manages a large and diverse litigation caseload. This submission summarises the most high profile matters and disputes currently on foot.

Background

2. It was noted in your Incoming Minister Brief titled "*Working with General Counsel and Legal Group*" that Legal Group would brief you separately on significant litigation matters. This submission has been prepared for that purpose. Whilst this submission is for noting at your convenience, some of its content may be superseded by our *Weekly Litigation Reports* and a potential Question Time Brief on Significant Litigation when Parliament resumes sittings in May.

s. 22(1)(a)(i)

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s. 22(1)(a)(ii)

Migration Litigation

- *XAD (by her litigation guardian XAE) v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs – Full Federal Court – s. 47F(1)*
s. 47F(1)

s. 47F(1)

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s. 47F(1)

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Civil and Commercial Litigation

➤ *Damages claim involving XAD and XAE*

21. On 17 December 2020, XAD also brought a damages claim against the Minister for Home Affairs, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, the Secretary of the Department and the Commonwealth.
22. XAD and XAE are seeking damages, including aggravated and exemplary damages, for false imprisonment.

s. 22(1)(a)(ii)

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s. 22(1)(a)(ii)

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s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

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s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

Consultation – internal/external

81. Nil.

Consultation – Secretary

82. The Secretary was not consulted on the approach in the submission.

Client service implications

83. Nil.

Sensitivities

84. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – media@homeaffairs.gov.au.

Financial/systems/legislation/deregulation/media implications

85. Nil.

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Attachments

86. Nil.

<p>Authorising Officer</p> <p>Cleared by:</p> <p>Pip De Veau General Counsel/ Group Manager Legal Legal Group</p> <p>Date: 08/04/2021 Ph: s. 47E(d)</p>
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Contact Officer Alicia Wright, Deputy General Counsel/ Assistant Secretary, Legal Strategy and Services Branch,
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Through Senior Assistant Secretary of Civil, Commercial and Employment Law and
Assistant Secretary of Migration & Citizenship Litigation

CC Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
Secretary
Chief Operating Officer
Deputy General Counsel/ Assistant Secretary, Legal Strategy and Services Branch
Senior Assistant Secretary of Civil, Commercial and Employment Law Branch
Assistant Secretary of Migration & Citizenship Litigation Branch

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Australian Government
Department of Home Affairs

MEETING BRIEF

MINISTER: The Hon Karen Andrews MP

ADVISER: TBC

Senator Keneally – Overview of the Biloela family

1800-1830 hrs – Thurs 13 May 2021 - Parliament House - MG.46

Person/ Organisation

Senator the Hon Kristina Keneally

Purpose of Meeting

- Senator Keneally has sought an introductory meeting with Minister Andrews, following the Minister's appointment as the Minister for Home Affairs. Senator Keneally is seeking to discuss a number of issues, one of which is the case of the s. 47F(1) family, otherwise known as the "Biloela Family".

Key Messages

- The s. 47F(1) family's claims to engage Australia's protection obligations have been comprehensively assessed on a number of occasions by the Department and various merits review bodies and the family has consistently been found not to engage Australia's protection obligations. These decisions have also been the subject of judicial review, including in the Federal Circuit Court, the Federal Court and the High Court.
- The Government's preference in every case is for foreign nationals who do not hold a valid visa and who have exhausted all outstanding avenues to remain in Australia to depart voluntarily on their own accord. Those unwilling to depart voluntarily will be subject to detention and removal from Australia.
- The family were originally detained for the purpose of removal; however, they are currently detained lawfully while a ministerial intervention process is ongoing. A submission was commenced to give effect to the Full Federal Court's decision (*XAD by s. 47F litigation guardian XAE v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & ors* - VID323/2020) on 16 February 2021 in order to complete the ministerial decision making process that the Full Federal Court found had commenced. This submission is currently being prepared by the Department for Minister Hawke's consideration.
- Separate from the above, the family's legal representative also lodged a request for ministerial intervention in July 2020 under section 195A of the Act. The Department is preparing a submission for the Minister's consideration with options under sections 195A and 197AB of the Act. Further information on Ministerial Intervention powers is located in Background.
- Accommodation arrangements for the family are regularly reviewed by the Australian Border Force, taking into consideration a number of factors, including the family's medical needs, their safety and security, and the availability of age appropriate services for the children. The placement of the family at the Phosphate Hill Alternative Place of Detention on Christmas Island is considered to be appropriate at this point in time.

Background

- Senator Keneally recently visited the s. 47F(1) family on Christmas Island from 16 - 20 April 2021.
- s. 47F(1), both Sri Lankan nationals, arrived as illegal maritime arrivals (IMAs) in April 2012 and April 2013 respectively. Following their release from immigration detention, they married on 9 November 2014 and their children, s. 47F(1), were born in Australia.
- The family have been detained since 5 March 2018 and were placed on Christmas Island (CI) on 30 August 2019, following a failed removal due to a Federal Circuit Court injunction.
- Immigration detention accommodation arrangements for the family are regularly reviewed, taking into consideration a number of factors, including the family's medical needs, their safety and security and the availability of age appropriate services for the children. Their accommodation at the Christmas Island Alternative Place of Detention (APOD) is considered an appropriate facility for this purpose.
- In January 2020, child wellbeing expert, s. 47F(1) travelled to CI to review detention arrangements at Phosphate Hill Alternative Place of Detention (PH APOD) and provided the Department with independent advice and recommendations for the redress of any child welfare or wellbeing issues identified s. 47F(1) observed the detention environment may be impacting on the children's wellbeing and that of the family more broadly, s. 47C(1)
s. 22(1)(a)(ii)
. The Department has initiated contract arrangements to re-deploy s. 47F(1) to CI in June 2021, to review detention arrangements and their possible impact on the children's development and wellbeing.
- s. 47F(1)
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s. 47F(1)
- A letter to the Secretary from the Commonwealth Ombudsman, dated 3 March 2021, has raised concerns with their placement at the CI APOD. The Department regularly engages with the family to resolve any issues regarding their accommodation at the APOD.
- s. 47F(1)
s. 47F(1)

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s. 47F(1)

Litigation

- In April 2020, the Federal Court (FC) found that in May 2019, Minister Coleman, by requesting a full brief from the Department to reacquaint himself with the family's circumstances, had in fact made a procedural decision to begin consideration of whether to exercise his ministerial power to lift the section 46A bar to enable s. 47F(1) to make a valid protection visa application. This finding was based on the nature of the briefing material that was provided to the Minister, in the form of a ministerial submission and his purported level of engagement with that submission. This submission included ministerial intervention options for the entire family, therefore the consequence of the FC's decision is that Minister Coleman is taken to have begun to consider whether to exercise his ministerial power enable the entire family to make valid protection visa applications. This finding triggered an obligation for procedural fairness to be afforded in relation to an assessment relating to s. 47F(1) *non-refoulment* obligations. The FC also considered the terms of a 2017 Ministerial Determination, and whether it meant that the bar was lifted for children of IMA parents whose cases had not been refused and finally determined only for a particular period of time, or had an ongoing effect. The Minister's interpretation was preferred by the Court, which meant that s. 47F(1) purported Safe Haven Enterprise Visa (SHEV) application, submitted to the Department in 2019, was not valid.
- In May 2020, a Full Federal Court (FFC) appeal was filed by s. 47F(1), seeking to challenge the FC's finding that she did not have a valid application. The Minister also filed a cross appeal challenging the Court's finding that Minister Coleman had begun consideration of whether to exercise his ministerial power to lift the section 46A bar. The FFC dismissed s. 47F(1) appeal but also dismissed the Minister's cross-appeal. The FFC upheld the FC's findings that her SHEV application lodged in September 2019 was invalid and that Minister Coleman, by requesting a full brief on the family in May 2019, had commenced the process of considering whether or not to exercise his 46A(2) intervention power. As a result, the Court determined this process must now be completed.
- To give legal effect to the Full Federal Court's (FFC) judgment, on 18 February 2021 the Department sent s. 47F(1) the legal representative of the s. 47F(1) family, a letter inviting comment on the latest Sri Lankan Country Information by 8 April 2021.
- On 8 April 2021, s. 47F(1) responded to the Department's invitation to comment. This response will be considered as part of a submission currently being prepared by the Department for Minister Hawke.

Citizenship applications

- s. 47F(1)

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- s. 47F(1)

Ministerial Intervention powers

- Section 195A of the Act provides portfolio Ministers with the power to grant a visa to a person in immigration detention.
- Section 197AB of the Act provides portfolio Ministers with the power to place a person into a residence determination arrangement.
- Section 46A(2) and 48B provide portfolio Minister's with personal intervention powers, providing them with the ability to lift statutory bars that would otherwise prevent an individual from lodging a visa application onshore. Section 46A prevents an IMA who is in Australia and is either an unlawful non-citizen or holds a prescribed temporary visa for making a valid visa application. Section 48 prevents a non-citizen who has been refused a protection visa application from making a further valid protection visa application.
- These Ministerial Intervention powers are non-compellable, which means portfolio Ministers are under no obligation to exercise or to consider exercising their powers.

Consultation

- Legal Group, National Immigration Detention, Humanitarian and Child Wellbeing Policy and Capability.

Attachments

Clearance

Clearance officer: Justine Jones, First Assistant Secretary, Status Resolution & Visa Cancellations Division Phone: s. 47E(d) Date: 11/05/2021	Contact officer: Belinda Gill, Assistant Secretary, Status Resolution Branch Phone: s. 47E(d) Date: 11/05/2021
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