

The Senate

Legal and Constitutional Affairs
Legislation Committee

Migration Amendment (Removal and
Other Measures) Bill 2024

May 2024

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Acronyms and abbreviations

the 1951 Convention	United Nations 1951 Refugee Convention
AHRC	Australian Human Rights Commission
the Bill	Migration Amendment (Removal and Other Measures) Bill 2024
BVR	Bridging (Removal Pending) Visa
CALD	Culturally and linguistically diverse
the committee	Legal and Constitutional Affairs Legislation Committee
CROC	Convention on the Right of the Child
EM	Explanatory Memorandum
Home Affairs	Department of Home Affairs
Human Rights Committee	Parliamentary Joint Committee on Human Rights
IAA	Immigration Assessment Agency
IARC	Immigration Advice and Rights Centre
Kaldor Centre	Kaldor Centre of International Refugee Law, UNSW
Law Council	Law Council of Australia
the Migration Act	<i>Migration Act 1958</i>
the Minister	Minister for Immigration, Citizenship and Multicultural Affairs
QACC	Queensland African Communities Council
RACS	Refugee Advice and Casework Service
RCOA	Refugee Council of Australia
Scrutiny of Bills Committee	Senate Standing Committee for the Scrutiny of Bills

Statement of Compatibility

UNHCR

ZACA

Statement of Compatibility with
Human Rights

United Nations High Commissioner
for Refugees

Zimbabwe Australia Cultural
Association

List of recommendations

Recommendation 1

2.120 The committee recommends that the Minister considers community impacts when designating a country as a removal concern country.

Recommendation 2

2.121 The committee recommends that the Senate pass the Bill.

Chapter 1

Introduction

- 1.1 On 27 March 2024, the Senate referred the Migration Amendment (Removal and Other Measures) Bill 2024 (the Bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 7 May 2024.¹
- 1.2 The Bill would amend the *Migration Act 1958* (the Migration Act) to strengthen the legislative framework relating to the removal from Australia of certain non-citizens who are on a removal pathway.²

Conduct of the inquiry and acknowledgement

- 1.3 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to organisations and individuals, inviting them to make a submission by 12 April 2024. The committee received and published 121 submissions from organisations, which are listed at Appendix 1. As at the time of drafting, the committee also received a large volume of submissions from individuals, which the committee intends to publish.
- 1.4 The committee held a public hearing in Canberra on 15 April 2024. A list of the witnesses who appeared at the hearing is at Appendix 2. The committee also accepted into evidence the transcript of a public hearing held on 26 March 2024 prior to the referral of the inquiry (see ‘Purpose of the Bill’ below).
- 1.5 The committee thanks those individuals and organisations who made submissions and who gave evidence at the public hearing, especially given the short timeframe for this inquiry.

Structure and scope of the report

- 1.6 This report comprises two chapters:
 - Chapter 1 identifies the key provisions of the Bill and notes its consideration by other parliamentary committees; and
 - Chapter 2 examines some of the key concerns raised in relation to the Bill, before setting out the committee’s findings and recommendations.

Note on references

- 1.7 In this report, references to the *Committee Hansard* are to the proof (that is, uncorrected) transcript. Page numbers may vary between the proof and the official transcript.

¹ *Journals of the Senate*, No. 108, 27 March 2024, pp. 3227–3228.

² Migration Amendment (Removal and Other Measures) Bill 2024 (the Bill), Explanatory Memorandum (EM), p. 2.

Purpose of the Bill

1.8 The Bill was drafted in consultation with relevant agencies and introduced into the Parliament on 26 March 2024.³ In his second reading speech, the Minister for Immigration, Citizenship and Multicultural Affairs (the Minister), the Hon Andrew Giles MP, described the key provisions' primary purpose, as follows:

There are currently noncitizens in Australia who have exhausted all visa pathways to stay in Australia, who have been found not to be owed protection, but who refuse to engage with their home country to undertake actions like applying for a passport or attending meetings with officials from that country.

Unfortunately, examples of noncooperation with the government's removals efforts have been going on for far too long, against the expectations of the Australian community and undermining the integrity of our migration laws.

The government is determined to address this issue and to ensure this key aspect of our immigration system is better, stronger and fairer.⁴

1.9 While the Bill was being passed in the Lower House,⁵ the Opposition in the Senate successfully moved a motion to direct the committee to hold a public hearing later that day, of not less than two hours, for the purpose of hearing from officials from the Department of Home Affairs (Home Affairs) regarding the details of the Bill.⁶

1.10 The following day, on 27 March 2024, the Opposition supported a motion by the Australian Greens to refer the Bill to the committee for inquiry and report.⁷ During debate on the motion, Senator the Hon Katy Gallagher described the Bill as 'urgent'⁸ and noted advice from the Home Affairs' Secretary, Ms Stephanie Foster, at the 26 March 2024 public hearing:

We have been working really hard on improving the integrity of the migration system over the last 12 to 18 months. As we're identifying gaps in our system, we are moving as quickly as we can to fill those gaps. This is

³ *Votes and Proceedings*, No. 115, 26 March 2024, p. 1463. Also see: Department of Home Affairs, *Submission 75*, p. 9.

⁴ Hon Andrew Giles MP, Minister for Immigration, Citizenship and Multicultural Affairs, *House Hansard*, 26 March 2024, p. 1. Also see: Department of Home Affairs, *Submission 75*, p. 7.

⁵ *Votes and Proceedings*, No. 115, 26 March 2024, p. 1469.

⁶ *Journals of the Senate*, No. 107, 26 March 2024, pp. 3202 and 3205. Also see: Additional Information, Hearing transcript, 26 March 2024 (as directed by the Senate chamber on 26 March 2024).

⁷ *Journals of the Senate*, No. 108, 27 March 2024, pp. 3227–3228.

⁸ Senator the Hon Katy Gallagher, Minister for the Public Service, Minister for Finance, Minister for Women, Manager of Government Business in the Senate and Vice-President of the Executive Council, *Senate Hansard*, 27 March 2024, p. 19.

one which we believe is a significant issue to resolve within our migration system for its broader integrity.⁹

- 1.11 At the 26 March 2024 public hearing, Senator the Hon Tim Ayres reiterated that the Australian government is acting to strengthen the government's powers to remove from Australia people who should leave Australia:

...protecting the integrity of the immigration system is urgent national interest business...The government has acted in an orderly way. It is straightforward, and it ought to be passed by the parliament urgently.¹⁰

- 1.12 Home Affairs Secretary, Ms Stephanie Foster, added that 'we have an obligation to try and effect the removal of people who should be removed, who have exhausted all avenues and who no longer have a legal right to remain in Australia'.¹¹

Key provisions

- 1.13 The Bill comprises two schedules: Schedule 1 sets out the 'main' amendments to the Migration Act; Schedule 2 sets out the 'other' amendments to the Migration Act. The key amendments in each schedule are outlined below.

Duty to cooperate in relation to removal and 'removal concern countries'

- 1.14 Item 3 in Schedule 1 of the Bill would insert new Subdivision D into Division 8 of Part 2 of the Migration Act. According to the Explanatory Memorandum (EM):

The provisions in this Subdivision collectively strengthen the existing legislative framework in the Migration Act in relation to removal, by establishing new powers to address circumstances in which certain non-citizens who are on a removal pathway, and who have no valid reason to remain in Australia, are not cooperating with removal efforts.¹²

Express intention of the Parliament

- 1.15 Proposed section 199A of the Migration Act would set out a legislative expectation in relation to the behaviour of a 'removal pathway non-citizen'

⁹ Ms Stephanie Foster, Secretary, Department of Home Affairs, *Committee Hansard*, 26 March 2024, p. 2. Also see: Senator the Hon Katy Gallagher, Minister for the Public Service, Minister for Finance, Minister for Women, Manager of Government Business in the Senate and Vice-President of the Executive Council, *Senate Hansard*, 27 March 2024, p. 19; Ms Tara Cavanagh, Group Manager, Immigration Policy, Department of Home Affairs, *Committee Hansard*, 26 March 2024, p. 2, who added that this work began after the High Court of Australia handed down its judgement in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

¹⁰ Senator the Hon Tim Ayres, Assistant Minister for Trade, Assistant Minister for Manufacturing, *Committee Hansard*, 26 March 2024, p. 3.

¹¹ Ms Stephanie Foster, Secretary, Department of Home Affairs, *Committee Hansard*, 26 March 2024, p. 6.

¹² EM, p. 7.

(as defined, see ‘Definition of ‘removal pathway non-citizen’’ below), as well as an expectation in relation to foreign countries.

1.16 Proposed subsection 199A(1) would set out the expectation that a removal pathway non-citizen:

- (a) will voluntarily leave Australia; and
- (b) if the non-citizen does not voluntarily leave Australia, will cooperate with steps taken under this Act for the purposes of arranging the non-citizen’s lawful removal from Australia; and
- (c) will not attempt to obstruct or frustrate the non-citizen’s lawful removal from Australia.

1.17 Proposed subsection 199A(2) would set out a legislative expectation that ‘a foreign country will cooperate with Australia to facilitate the lawful removal from Australia of a non-citizen who is a national of that country’.

Definition of ‘removal pathway non-citizen’

1.18 Proposed subsection 199B(1) would define the term ‘removal pathway non-citizen’ to mean:

- (a) an unlawful non-citizen who is required to be removed from Australia under section 198 as soon as reasonably practicable [people without a visa, such as those in detention];
- (b) a lawful non-citizen who holds a Subclass 070 (Bridging (Removal Pending)) (BVR) visa;
- (c) a lawful non-citizen who:
 - (i) holds a Subclass 050 (Bridging (General)) (BVE) visa; and
 - (ii) at the time the visa was granted, satisfied a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia;

1.19 According to Home Affairs, there are about 150–200 people in the first category, many of whom are in detention because of character concerns,¹³ and 152 people in the community on BVRs. The number of people in the third category are more difficult to quantify, as people are on BVEs for many different reasons and the precise number is fluid. However, the number of people in this category is currently 4463 of whom about 1200 might present issues for departure of the person does not voluntarily engage.¹⁴

¹³ For further details, see: Department of Home Affairs, answer to question on notice from Senator Ghosh, Question No. 6, 15 April 2024 (received 1 May 2024).

¹⁴ Ms Stephanie Foster, Secretary, Mr Michael Thomas, Group Manager, Immigration Compliance and Ms Clare Sharp, Group Manager, Legal Group, Department of Home Affairs, *Committee Hansard*, 26 March 2024, pp. 4–5; Ms Stephanie Foster, Secretary, Department of Home Affairs, *Committee Hansard*, 15 April 2024, p. 52; Mr Michael Thomas, Group Manager, Department of Home Affairs, *Committee Hansard*, 15 April 2024, p. 54.

1.20 The EM acknowledged that the term ‘removal pathway non-citizen’ is broader than the term ‘unlawful non-citizens’ (as defined, section 14 of the Migration Act) who are required to be removed under section 198 of the Act. It explained that, following the case of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, many non-citizens were released from immigration detention on Subclass 070 (Bridging (Removal Pending)) visas (BVRs):

The intention [of proposed new subsection 199B(1)] is that lawful non-citizens who hold a BVR should be required to cooperate with efforts to facilitate their removal, or to determine whether there is a real prospect of their removal becoming practicable in the reasonably foreseeable future.¹⁵

1.21 The EM also explained that there is a long-standing practice of granting Subclass 050 (Bridging (General)) visas (BVE (050)) to certain non-citizens who are on a removal pathway. The term ‘removal pathway non-citizen’ is intended to facilitate the removal of this cohort, by capturing visa holders who, at the time the visa was granted, satisfied a criterion relating to them making acceptable arrangements to depart Australia.¹⁶

Minister may give ‘removal pathway directions’

1.22 Proposed section 199C would provide the Minister with discretionary direction powers: the Minister may, by written notice given to a removal pathway non-citizen, direct the non-citizen to:

- do one or more of the things specified in proposed subsection 199C(1);
- do or not do a thing, if the Minister is satisfied that the non-citizen doing, or not doing, the thing is reasonably necessary to:

(a) determine whether there is a real prospect of the removal of the non-citizen from Australia under section 198 becoming practicable in the reasonably foreseeable future; or

(b) facilitate the removal of the non-citizen from Australia under that section [proposed subsection 199C(2)].

1.23 According to the EM, these ‘removal pathway directions’ (as defined in proposed subsections 199C(1)–(2)) are intended to support proposed section 199A of the Migration Act.¹⁷

¹⁵ EM, p. 8.

¹⁶ EM, p. 8.

¹⁷ EM, p. 2. Note: the Bill would define the term ‘removal pathway direction’ in subsection 5(1) of the Migration Act (item 1 in schedule 1).

Circumstances in which the Minister must not give a removal pathway direction

1.24 Proposed section 199D would set out the circumstances in which the Minister must not give a removal pathway direction under proposed section 199C. These circumstances include, for example:

- to a removal pathway non-citizen, to do, or not do, a thing in relation to a particular country, if the person is an unlawful non-citizen who cannot be removed to that country because of a protection finding under subsection 197C(3) (proposed subsection 199D(1));
- to a non-citizen who has made a valid application for a protection visa and the application is not yet finally determined (proposed subsection 199D(2));
- to a non-citizen who is a child under 18 years of age, however, the direction may be given to the child's parent or guardian if they are a removal pathway non-citizen (proposed subsection 199D(4)–(5)).

1.25 The EM describes the provisions in proposed section 199D of the Migration Act as 'appropriate safeguards in relation to the exercise of [the Minister's powers under proposed section 199C]'.¹⁸

Offence for non-compliance with removal pathway direction

1.26 Proposed section 199E would create the following offence for non-compliance with a removal pathway direction:

(1) A person commits an offence if:

- (a) the person is a removal pathway non-citizen; and
- (b) the person is given a removal pathway direction; and
- (c) the direction has not been revoked; and
- (d) the person refuses or fails to comply with the direction.

Penalty: 5 years imprisonment or 300 penalty units [\$93 900], or both.

(2) If a person is convicted of an offence under subsection (1), the court must impose a sentence of imprisonment of at least 12 months.

Exception

(3) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the Criminal Code).

1.27 Proposed subsection 199E(4) would set out three matters that cannot be relied on by a person as a 'reasonable excuse' defence. It would not be a reasonable excuse that the person:

- (a) has a genuine fear of suffering persecution or significant harm if the person were removed to a particular country; or
- (b) is, or claims to be, a person in respect of whom Australia has non-refoulement obligations; or

¹⁸ EM, p. 2.

(c) believes that, if the person were to comply with the removal pathway direction, the person would suffer other adverse consequences.

1.28 The EM notes that proposed section 199D would ‘constrain’ the Minister’s power to make a removal pathway direction, where a non-citizen is subject to a protection finding or has applied for a protection visa (proposed subsections 199D(1)–(2)). However:

...where no such limitation is engaged, subsection 199E(4) makes it clear that certain subjectively-held fears do not amount to a ‘reasonable excuse’ for the purposes of subsection 199E(3).¹⁹

1.29 In his second reading speech, the Minister reiterated:

...these amendments are targeted at noncitizens who have come to the end of any visa application processes and who are on a removal pathway. These individuals may be unlawful noncitizens who have exhausted their visa processing options and who are being held in immigration detention. Or they may be in the community on a bridging visa that is issued for removal purposes. It is imperative that individuals who are on a removal pathway cannot be allowed to frustrate the government and the Australian people by refusing to cooperate with their removal from Australia.²⁰

Designation of removal concern country

1.30 Proposed subsection 199F(1) would provide the Minister with a non-delegable discretionary power to designate a country as a ‘removal concern country’ (as defined), if the Minister thinks it is in the national interest to designate the country to be a removal concern country.²¹

1.31 The Minister stated that this ‘significant measures’ is regrettable but necessary:

...some countries will not allow their nationals to return to their home country. This is unless the person being removed is voluntarily cooperating with removal efforts. The main objective of this designation is to gain the cooperation of that country in accepting and facilitating the removal from Australia of their citizens. The power to designate a country of removal concern is an appropriate and proportionate measure to safeguard the integrity of Australia’s migration system.²²

1.32 The EM explains that, if a country is designated as a removal concern country:

...the designation would have the effect, by operation of law, that a non-citizen who is a national of a removal concern country and who is

¹⁹ EM, p. 13.

²⁰ Hon Andrew Giles MP, Minister for Immigration, Citizenship and Multicultural Affairs, *House Hansard*, 26 March 2024, p. 2.

²¹ Bill, item 1 in schedule 1.

²² Hon Andrew Giles MP, Minister for Immigration, Citizenship and Multicultural Affairs, *House Hansard*, 26 March 2024, p. 3.

outside Australia cannot, subject to certain exceptions, make a valid application for a visa while the designation is in force.²³

1.33 Proposed subsection 199F(2) would create two pre-conditions on the exercise of the power: the Minister must first consult with the Prime Minister and the Minister for Foreign Affairs.

1.34 The EM states that the proposed provision ensures:

...the Minister's consideration of the national interest and thinking in relation to making the designation is appropriately informed by Australia's national interest and the national and international implications of the exercise of the power and its effect, including under new section 199G.²⁴

1.35 Proposed new subsection 199F(5) would provide that the rules of natural justice do not apply to the exercise of the power under proposed subsection 199F(1).

1.36 According to the EM:

This is consistent with the characterisation of the power as a legislative rather than administrative power, and is consistent with other powers enabling the Minister to make a legislative instrument. The tabling requirements in new subsections 199F(6) to (8) also provide for appropriate accountability to the Parliament following the exercise of this legislative power.²⁵

1.37 Proposed new subsection 199F(6) would require the Minister to lay before each House of the Parliament a copy of the designation and a statement of reasons for thinking it is in the national interest to designate the country to be a removal concern country.

Visa applications by certain nationals of a removal concern country

1.38 Proposed subsection 199G(1) would provide:

(1) An application for a visa by a non-citizen is not a valid application if, at the time the application is made:

- (a) the non-citizen is a national of one or more removal concern countries; and
- (b) the non-citizen is outside Australia.

1.39 Proposed subsection 199G(2) would set out exceptions to the bar on visa applications, including an application for a visa by a non-citizen if:

- (e) the non-citizen is included in a class of persons determined in an instrument made under subsection (3) of this section; or
- (f) the application is for the grant of a visa of a class determined in an instrument made under subsection (3) of this section.

²³ EM, p. 3.

²⁴ EM, p. 14.

²⁵ EM, p. 14.

1.40 Proposed subsection 199G(3) would provide the Minister with discretionary power to determine a class of persons for the purposes of proposed paragraph 199G(2)(e) or a class of visa for the purposes of proposed paragraph 199G(2)(f).

1.41 According to the EM,

In the event that a country is designated under subsection 199F(1) as a removal concern country, it is envisaged that a legislative instrument made under subsection 199G(3) for the purposes of paragraphs 199G(2)(d) [sic] and/or (e) could specify a range of additional classes of persons or classes of visas to ensure that the exercise of the designation power does not conflict with Australia's international obligations, or for any other purpose.²⁶

1.42 The EM also states:

Designating a country as a removal concern country, and imposing a bar on new visa applications from non-citizens outside Australia who are nationals of a country that does not accept removals reflects the Government's expectation that a foreign country will cooperate with Australia to facilitate the lawful removal of a non-citizen who is a national of that country. It is an appropriate and proportionate measure to safeguard the integrity of Australia's migration system, available if necessary to act in the national interest to slow down that entry pipeline into Australia and reduce growth in the cohort of potentially intractable removals over time. The designation would also ensure the removal concern country is aware of Australia's concerns in relation to the removal of the country's nationals from Australia where they have no valid reason to remain, and Australia's expectations of cooperation by that country in relation to the prompt and lawful removal of its nationals.²⁷

1.43 The Minister highlighted the proposed visa application measure is not unique to Australia and is already in place in at least two other countries:

It's important to note that the United States has a similar system in place to suspend visa grants for what they refer to as 'recalcitrant countries'. And in 2022 the UK also legislated for a similar scheme, which allows the Home Secretary to suspend or delay visa processing from countries which do not cooperate with removal of their citizens from the UK, or deem visa applications from these countries as invalid. So what we are proposing is in line with similar countries around the world.²⁸

Privative clause

1.44 Item 4 in Schedule 1 of the Bill would amend paragraph 474((7)(a) of the Migration Act, to include proposed section 199G as a privative clause decision. A privative clause is a provision that seeks to protect certain decisions from judicial review.

²⁶ EM, p. 16.

²⁷ EM, p. 3.

²⁸ Hon Andrew Giles MP, Minister for Immigration, Citizenship and Multicultural Affairs, *House Hansard*, 26 March 2024, p. 3. Also see: Department of Home Affairs, *Submission 75*, p. 7.

- 1.45 The EM explains that, in context, ‘a decision of the Minister not to exercise, or not to consider the exercise, of the Minister’s power under section 199G’ would not be subject to judicial review.²⁹

Revisitation of protection findings

- 1.46 Items 4–7 in Schedule 2 of the Bill would amend section 197D of the Migration Act. According to the EM, these amendments would enable a protection finding to be revisited for a broader range of non-citizens, than is provided for under current section 197D:

As well as unlawful non-citizens to whom section 198 applies, amended section 197D now applies to removal pathway non-citizens, including holders of Subclass 070 (Bridging (Removal Pending)) visas and Subclass 050 (Bridging (General)) visas granted on ‘final departure’ grounds. Where the circumstances of the person or the country in relation to which a protection finding has been made have changed, it may be necessary to revisit the protection finding. If under subsection 197D(2) a decision is made to set aside the protection finding, the removal of the non-citizen will, or would, no longer be prevented by subsection 197C(3).³⁰

- 1.47 The EM emphasises:

The focus of this amendment, and this Bill, is on facilitating the lawful removal of non-citizens who are on a removal pathway, and apply only in circumstances where a protection finding has not been made in relation to the non-citizen, or where the Minister determines that a non-citizen is no longer a person in respect of whom any protection finding would be made.³¹

- 1.48 The Minister noted that, following a recent decision of the High Court of Australia:

...we now face circumstances in which [section 197D] needs to be expanded to certain noncitizens who hold a visa—particularly BVR holders. Without this amendment, the act would not provide a means to revisit a protection finding while a removal pathway noncitizen is in the community on a visa. If the government is to ensure that BVR holders and other noncitizens on a removal pathway are able to be removed as soon as it becomes reasonably practicable to do so, it is essential the minister has the ability to revisit protection findings.³²

²⁹ EM, p. 16.

³⁰ EM, p. 18.

³¹ EM, p. 18.

³² Hon Andrew Giles MP, Minister for Immigration, Citizenship and Multicultural Affairs, *House Hansard*, 26 March 2024, p. 3. Also see: *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

1.49 The EM describes the amendments in Schedule 2 of the Bill as ‘minor and technical’.³³

Examination by other parliamentary committees

1.50 When examining a bill or bills, the committee takes into account any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) and the Parliamentary Joint Committee on Human Rights (Human Rights Committee).

1.51 The Scrutiny of Bills Committee assesses legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, the rule of law and on parliamentary scrutiny.

1.52 The Scrutiny of Bills Committee examined the Bill and noted that there might be concerns in relation to four matters: undue trespass on individual rights and liberties; significant matters in delegated legislation; broad discretionary powers; and parliamentary scrutiny.³⁴

1.53 As in the Chamber, the Scrutiny of Bills Committee commented on the ‘truncated’ time between the introduction of the Bill and the committee’s public hearing on 26 March 2024. In its view, this may have impacted the ability of senators, as well as the Scrutiny of Bills Committee, to meaningfully engage with the Bill and to fully scrutinise its proposed provisions:

The committee is of the view that truncated parliamentary processes by their nature limit parliamentary scrutiny and debate. This is of particular concern in relation to bills that may seriously impact on personal rights and liberties.³⁵

1.54 The Scrutiny of Bills Committee concluded:

While the procedure to be followed in the passage of legislation is ultimately a matter for each house of the Parliament, the committee reiterates its consistent scrutiny view that legislation, particularly legislation that may trespass on personal rights and liberties, should be subject to a high level of parliamentary scrutiny.³⁶

³³ EM, p. 3.

³⁴ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 5 of 2024*, 27 March 2024, pp. 2–9. Note: some of these concerns are discussed in Chapter 2.

³⁵ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 5 of 2024*, 27 March 2024, p. 8. Also see: Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. [1].

³⁶ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 5 of 2024*, 27 March 2024, p. 9. Note: a large number of submitters and witnesses supported a higher level of scrutiny, for example: International Commission of Jurists (Australian Section), *Submission 5*, p. [3]; Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. [1]; Law Council of Australia, *Submission 71*, pp. 6–7.

- 1.55 The Human Rights Committee examines bills and legislative instruments for compatibility with human rights and reports its findings to both Houses of Parliament. The Human Rights Committee reported that multiple rights are engaged and limited by the key proposals in the Bill, including, for example, the right to liberty and a fair trial, the right to protection of the family and rights of the child, and non-refoulement.³⁷
- 1.56 According to the EM, the Bill is compatible ‘in most respects’ with the human rights and freedoms that are required to be examined by the Human Rights Committee: ‘to the extent that the measures in this Bill limit human rights, they do so in order to maintain the integrity of the migration system’.³⁸
- 1.57 Chapter 2 of this report further discusses some of the issues raised by the Scrutiny of Bills Committee and the Human Rights Committee.

³⁷ Parliamentary Joint Committee on Human Rights, *Report 3 of 2024*, 17 April 2024, pp. 3–5 and 16–43. Note: the committee made recommendations designed to alleviate its human rights concerns.

³⁸ EM, p. 4.

Chapter 2

Key issues

2.1 The Migration Amendment (Removal and Other Measures) Bill 2024 (the Bill) elicited strong views from submitters and witnesses. This chapter focuses on the following key proposals in the Bill:

- the creation of:
 - a duty to cooperate in relation to removal and removal concern countries;
 - a ministerial power to give a removal pathway direction;
 - a ministerial discretionary power to designate a country as a removal concern country; and
- the extension of the minister’s ability to revisit protection findings for non-citizens on a removal pathway.

Duty to cooperate in relation to removal and removal concern countries

2.2 Proposed subsection 199A(1) would set out a legislative expectation that a removal pathway non-citizen is to voluntarily leave Australia and, if they do not do so, they are expected to cooperate with steps taken under the *Migration Act 1958* (the Migration Act) for the purposes of arranging their lawful removal from Australia.

2.3 The Law Council of Australia (Law Council) submitted that the proposed provision is unrealistic and unacceptable. It argued that, in combination with other provisions:

...proposed [sub]section 199A(1) will have the effect of requiring [refugees and asylum seekers] to comply with Ministerial directions facilitating their removal from Australia, even where they have a genuine fear of suffering persecution or significant harm if removed to a particular country, or a person may be someone to whom Australia has non-refoulement obligations (among other things). It is unrealistic to expect any person in such circumstances to adhere to this duty. It is also unacceptable to expect a person to do so, especially in circumstances where noncooperation is subject to the threat of very significant criminal sections as proposed by section 199E [see ‘Criminal offence provisions’ below].¹

2.4 In any event, Ms Sanmati Verma from the Human Rights Law Centre questioned the circumstances in which an individual’s cooperation would be central to effecting their removal from Australia: ‘removal operations from a

¹ Law Council of Australia, *Submission 71*, p. 8. Note: the submission stated that the proposed provision appears to be a statutory novelty. Also see: Mr Greg McIntyre SC, President, Law Council of Australia, *Committee Hansard*, 15 April 2024, p. 12, who suggested that deeming provisions might have been an alternative approach.

country are interstate matters, not matters contingent upon the taking of particular actions by individual noncitizens'.²

2.5 The Law Council also argued that it would not be appropriate to create a legislative expectation to require a foreign country to cooperate with Australia to facilitate the removal of its nationals from Australia (proposed subsection 199A(2)): 'the Australian Government [should] resolve issues arising with foreign countries via normal diplomatic channels', rather than creating an unenforceable legal duty.³

2.6 Mr Greg McIntyre SC, President of the Law Council, added:

Australian legislation can't force any other countries to do anything...What this legislation is doing, if it has the effect which is proposed, is punishing individuals...It's punishing individuals who may not agree with anything that the country they're coming from is doing or saying or failing to do. So the whole concept of legislating in Australia about this is misconceived.⁴

Ministerial power to give a removal pathway direction

2.7 Submitters and witnesses expressed concerns with proposed sections 199B and 199C of the Migration Act. These concerns encompassed the scope of the provisions, and Australia's obligations under international refugee and human rights law.

Definition of 'removal pathway non-citizen'

2.8 Many stakeholders argued that the definition of 'removal pathway non-citizen' (proposed subsection 199B(1)) is too broad.⁵ The International Commission of Jurists (Australian Section) submitted that, while the Bill aims to compel non-citizens to commence the removal process, the definition would capture non-citizens with valid grounds to remain in Australia.⁶

2.9 The Law Council noted two particular groups of non-citizens who could be captured by the proposed provision: lawful non-citizens without any apparent connection to a removal pathway (proposed paragraph 199B(1)(d)); and unlawful non-citizens in immigration detention whose applications for

² Ms Sanmati Verma, Acting Legal Director, Human Rights Law Centre, *Committee Hansard*, 15 April 2024, p. 6.

³ Law Council of Australia, *Submission 71*, p. 8.

⁴ Mr Greg McIntyre SC, President, Law Council of Australia, *Committee Hansard*, 15 April 2024, p. 16.

⁵ See, for example: Law Council of Australia, *Submission 71*, p. 9.

⁶ International Commission of Jurists (Australian Section), *Submission 5*, p. [2]. Also see: Australian Human Rights Commission, *Submission 68*, p. 9.

protection visas have been determined and refused under the ‘fast-track’ process.⁷

- 2.10 The Law Council commented adversely on the review process for fast-track applications conducted by the Immigration Assessment Authority (IAA). Its submission noted that the Australian government currently has legislation before the Parliament that would abolish the IAA, however, the Bill still might capture ‘individuals who are legitimate refugees’ whose case was unfairly and unjustly determined by the soon to be abolished IAA.⁸
- 2.11 More broadly, the Australian Human Rights Commission (AHRC) highlighted the legacy caseload, which, it argued, includes people who have established strong ties in Australia and people who may have experienced changes in their country of origin that have impacted the nature of their claims for protection.⁹
- 2.12 Mr Paul Power, Chief Executive Officer of the Refugee Council of Australia (RCOA), highlighted Afghanistan, Iran, Myanmar, Sudan and Sri Lanka as illustrative countries. He explained:

At the heart of many of the concerns of the Refugee Council is the government's failure to address concerns related to this fast-track process associated with temporary protection...[T]he fact is that so much has changed since people's initial assessments were conducted. A frustration that people have is that members of the current government...have in the past expressed concerns about this process. And yet those who are rejected through the fast-track process actually haven't had the opportunity, except in small numbers of cases where the minister has intervened, to have their concerns addressed.¹⁰

- 2.13 The AHRC submitted:

For most of [the legacy caseload], the only recourse which may allow them to remain in Australia, or have their protection claims reassessed, is by requesting the Minister to exercise the discretionary powers that exist within the Migration Act, for example in sections 46A, 48B, 195A, 351 or 417.

With no obligation on the Minister to intervene, there is a risk that a direction might be issued for a non-citizen to take steps to facilitate their removal from Australia while they have an outstanding request before the

⁷ Law Council of Australia, *Submission 71*, p. 9. Also see: Peter McMullin Centre on Statelessness, *Submission 63*, pp. 1–2, which argued that stateless people are captured by the Bill due to being processed for protection visas through Australia's refugee status determination procedures.

⁸ Law Council of Australia, *Submission 71*, pp. 9–10. Also see: Administrative Review Tribunal Bill 2023; Australian Human Rights Commission, *Submission 68*, p. 9; Mr Paul Power, Chief Executive Officer, Refugee Council of Australia, *Committee Hansard*, 15 April 2024, p. 27.

⁹ Australian Human Rights Commission, *Submission 68*, p. 10. Also see: Ms Rachel Saravanamuthu, Legal Policy Lead, Asylum Seeker Resource Centre, *Committee Hansard*, 15 April 2024, pp. 28–29.

¹⁰ Mr Paul Power, Chief Executive Officer, Refugee Council of Australia, *Committee Hansard*, 15 April 2024, p. 29.

Minister. The Commission considers that this discretionary power is an insufficient safeguard to protect members of the legacy caseload and other people who have sought asylum from being returned to countries where they may still have a genuine fear of harm.¹¹

- 2.14 Ms Isobel McGarity, Supervising Senior Solicitor at the Refugee Advice and Casework Service (RACS), expressed the following view:

...good laws are not based around intervention that may or may not be compellable by one person. Good laws consider individual rights and ensure safeguards exist so that our system isn't unfair and actually is just.¹²

Departmental response

- 2.15 The Department of Home Affairs (Home Affairs) submitted that Australia has a long history of orderly and well-managed migration: the 'bedrock' of this system is the visa and citizenship programs:

The effective administration of these programs remains fundamental to maintaining high levels of social cohesion and broad public support for immigration...Australia's immigration programs rely on the Government's ability to remove promptly from Australia persons found not to be in need of Australia's protection, and to appropriately resolve the status of individuals with no pathway to remain in Australia. This is done in full compliance with Australia's non-refoulement obligations under international law.¹³

- 2.16 Home Affairs highlighted that Australia has a robust system of visa decision-making, which is supported by merits review in the Administrative Appeals Tribunal and judicial review in the Federal Court of Australia:

Together, this system of decision-making and review ensures that outcomes are as fair as possible, and that Australia's non-refoulement obligations are given real effect.¹⁴

- 2.17 Specifically in relation to decisions made by the IAA, Home Affairs representative Ms Clare Sharp, Group Manager for the Legal Group, pointed out:

Currently there are 3,369 decisions of the IAA that are before the Federal Circuit and Family Court seeking judicial review. That is a core part of our system, that judicial review exists, and then it can be appealed to the

¹¹ Australian Human Rights Commission, *Submission 68*, p. 10. Also see: Ms Rachel Saravanamuthu, Legal Policy Lead, Asylum Seeker Resource Centre, *Committee Hansard*, 15 April 2024, pp. 28–29 and 34, where she stated that the process of ministerial intervention is 'slow and opaque'.

¹² Ms Isobel McGarity, Supervising Senior Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 15 April 2024, p. 34.

¹³ Department of Home Affairs, *Submission 75*, p. 4.

¹⁴ Department of Home Affairs, *Submission 75*, p. 5.

Federal Court as needed. This law that is being proposed [in the Bill] only applies when those judicial reviews processes are exhausted.¹⁵

2.18 Home Affairs advised that most non-citizens return to their home country when they have no lawful right to remain in Australia, however:

In a smaller number of cases the Department of Home Affairs engages closely with non-citizens once they have exhausted all legal avenues to remain in Australia, to monitor their departure, or to remove them to their country of nationality, voluntarily or involuntarily. In 2022-23, 2,274 unlawful non-citizens were removed from Australia in this way...[L]ike many other countries, Australia has an ongoing problem returning some non-citizens who will not cooperate with these removal efforts.¹⁶

2.19 Home Affairs emphasised that the Bill is directed towards:

...non-citizens who have exhausted all options to stay in Australia on a substantive visa but who do not cooperate with our efforts to remove them, and as a consequence cannot currently be removed from Australia...The changing nature of global migration trends, the legal landscape and increased concerns with cooperation in removals efforts by non-citizens has necessitated the need for changes to the Migration Act.¹⁷

Extension of the definition of ‘removal pathway non-citizens’

2.20 Proposed paragraph 199B(1)(d) of the Migration Act would enable additional classes of non-citizens to be defined by regulation as removal pathway non-citizens. The Kaldor Centre of International Refugee Law, UNSW (Kaldor Centre) argued that this provision is problematic and has not been sufficiently justified:

As the Senate Standing Committee for the Scrutiny of Bills observed, this section ‘is applicable to lawful non-citizens who have been granted a visa permitting residence in Australia, who may have lived in Australia lawfully for an extended period and have no certainty or clarity as to when a visa may be subject to a removal pathway direction’. We share the view of the Committee that, given the severe penalties for failing to comply with such a direction, ‘the ability to expand the scope of people that may be subject to removal pathway directions is a significant matter that would more

¹⁵ Ms Clare Sharp, Group Manager, Legal Group, Department of Home Affairs, *Committee Hansard*, 26 March 2024, p. 8.

¹⁶ Department of Home Affairs, *Submission 75*, p. 5. Also see: Ms Sandra Jeffery, Acting First Assistant Secretary, Immigration Programs, Department of Home Affairs, *Committee Hansard*, 15 April 2024, p. 51, who explained how the department currently consults with individuals to obtain their cooperation with respect to removal from Australia.

¹⁷ Department of Home Affairs, *Submission 75*, p. 5. Also see: p. 7; Ms Isobel McGarity, Supervising Senior Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 15 April 2024, p. 29, who noted that there are people who have not exhausted all avenues who are captured by the Bill.

appropriately be dealt with by way of primary rather than delegated legislation'.¹⁸

2.21 Similarly, Ms Carina Ford, Chair and Member of the Migration Law Committee at the Law Council, queried what visa classes could be captured by proposed paragraph 199B(1)(d):

...it could be a medical treatment visa or something in that order, so without scrutiny we could see a really major problem...There's just not enough scrutiny through legislative instruments, particularly in migration.¹⁹

2.22 Ms Verma also referred to the scope of proposed paragraph 199B(1)(d) and questioned whether in practice the minister would continue to carve individuals out from the definition of 'removal pathway non-citizen':

...you can visualise a future in which the minister just gets sick of people making ministerial intervention requests and specifies the bridging E visa class as being available to make removal directions.²⁰

Departmental response

2.23 Home Affairs submitted that the Bill does not expand the cohort of people who are eligible for removal from Australia:

The proposed legislative amendments apply only in respect of non-citizens who have exhausted all avenues to remain or for whom the Government is lawfully entitled or indeed required under the Migration Act to seek removal. Simply put, this Bill does not expand the definition of non-citizens who are required to depart Australia.²¹

2.24 In relation to proposed paragraph 199B(1)(d), Ms Tara Cavanagh, Group Manager for Immigration Policy, stated that this provision is about 'future proofing' the legislation. As explained in Home Affairs' submission:

The power at subsection 199B(1)(d) is intended provide flexibility, should another type of visa be determined the most appropriate visa for non-citizens to maintain lawful status in the community while making arrangements to depart or be removed from Australia, in the same way the [Subclass 070 (Bridging (Removal Pending)) visa] is used for this purpose. Any regulations made to prescribe a visa for the purposes of subsection 199B(1)(d) would be subject to scrutiny and disallowance by the Parliament.²²

¹⁸ Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 3. Also see: Australian Human Rights Commission, *Submission 68*, p. 11.

¹⁹ Ms Carina Ford, Chair and Member, Migration Law Committee, Federal Dispute Resolution Section, Law Council of Australia, *Committee Hansard*, 15 April 2024, p. 12.

²⁰ Ms Sanmati Verma, Acting Legal Director, Human Rights Law Centre, *Committee Hansard*, 15 April 2024, p. 6.

²¹ Department of Home Affairs, *Submission 75*, p. 9.

²² Department of Home Affairs, *Submission 75*, p. 11. Also see: Ms Tara Cavanagh, Group Manager, Immigration Policy, Department of Home Affairs, *Committee Hansard*, 26 March 2024, pp. 11 and

Breadth of the legislative language

2.25 Some submitters and witnesses expressed concern about the breadth of language used in the Bill. Commenting on proposed subsection 199C(1) of the Migration Act, which would empower the minister to give removal pathway directions, the AHRC, for example, agreed with the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee), which suggested that this provision could have been phrased in such a way as to limit the exercise of the proposed power.²³

2.26 Similarly, the Law Council considered the power to direct a non-citizen to do or not do a thing (proposed subsection 199C(2)) to be too broad:

The extent of the discretion conferred under section 199C(2) is exceedingly broad. There are few apparent limits on the things that the Minister may direct a removal pathway non-citizen to do or not to do, provided that the Minister forms the view that it is reasonably necessary to facilitate the person's removal from Australia, or to determine if there is a prospect of removal of the person from Australia under section 198 becoming practicable in the reasonably foreseeable future. In the context of non-compliance punishable by 1–5 years imprisonment [see 'Criminal offence provisions' below], such a breadth of power is of great concern.²⁴

2.27 The Law Council argued that there is a lack of procedural fairness in the making of a removal pathway direction, which should be rectified:

It is unclear if removal pathway non-citizens will be notified that the Minister is considering whether to exercise the directions powers in relation to them, or whether they will be entitled to obtain legal advice or make submissions relevant to that decision.²⁵

2.28 In addition, the Law Council argued that proposed section 199C does not set out any objective considerations that the Minister must consider when contemplating exercising, or actually exercising, the direction powers.²⁶

19; Ms Emily Rutherford, Senior Lawyer, Australian Human Rights Commission, *Committee Hansard*, 15 April 2024, pp. 3–4, who commented that it cannot be known how the provision would be used in the future.

²³ Australian Human Rights Commission, *Submission 68*, p. 9. Also see: Refugee Advice and Casework Service, *Submission 73*, p. 5; Ms Leonie Campbell, General Manager, Policy, Law Council of Australia, *Committee Hansard*, 15 April 2024, p. 13.

²⁴ Law Council of Australia, *Submission 71*, p. 11. Also see: Ms Sanmati Verma, Acting Legal Director, Human Rights Law Centre, *Committee Hansard*, 15 April 2024, p. 5, who said that the provision is not necessarily connected with a person's ability to achieve a thing.

²⁵ Law Council of Australia, *Submission 71*, p. 11. Also see: Ms Emily Rutherford, Senior Lawyer, Australian Human Rights Commission, *Committee Hansard*, 15 April 2024, p. 4, who said that provision for procedural fairness would assist the minister to conduct an assessment of the child's best interests.

²⁶ Law Council of Australia, *Submission 71*, p. 11.

- 2.29 Mr Beny Bol OAM, President of the Queensland African Communities Council (QACC), suggested, for example, that there would be a need to consult with an individual's local community, to understand how best to support a person:

Engaging with some of the other ways to safely and fairly remove some of those individuals with input from local communities through consulting widely and understanding the connections of those individuals here in Australia and overseas, where they are meant to be sent to, before any determination is actually made is absolutely important.²⁷

Departmental response

- 2.30 Home Affairs submitted that there are a number of safeguards and constraints in relation to the exercise of the new powers proposed in the Bill. In particular, the minister cannot give a removal pathway direction to a person with respect to a particular country, if a protection finding has been made in relation to a person with respect to a particular country. The same restriction would apply where there is an ongoing protection visa application (proposed subsections 199D(1)–(2) of the Migration Act, respectively).²⁸

- 2.31 Home Affairs pointed out:

A person may however be directed to comply with a direction that would help facilitate their removal to a safe third country, if for example their removal to a third country was a viable option and would be compliant with international human rights and non-refoulement obligations. The availability of the section 199C direction powers in these circumstances is clarified in proposed subsection 199B(3).²⁹

- 2.32 Home Affairs noted that ministerial directions would not be subject to merits review but may be judicially reviewable. Its submission emphasised that this review would be another layer of protection:

...directions would only be given once the person had exhausted all available avenues to remain in Australia following a decision to refuse or cancel a substantive visa including merits review and judicial review which together provides layers of protection to ensure those decisions are lawful and procedurally fair, and that, where relevant to an individual's circumstances, Australia is compliant with its *non-refoulement* obligations.³⁰

²⁷ Mr Beny Bol OAM, President, Queensland African Communities Council, *Committee Hansard*, 15 April 2024, p. 40. Also see: Ms Haatsari Marunda, Member, Zimbabwe Australia Community Association, *Committee Hansard*, 15 April 2024, p. 41, who called for further consultation on the bill with diplomatic and community organisations.

²⁸ Department of Home Affairs, *Submission 75*, p. 9.

²⁹ Department of Home Affairs, *Submission 75*, p. 12. Also see: Mr Peter Hughes PSM, private capacity, *Committee Hansard*, 15 April 2024, p. 21, who said that there have not been too many occasions where people have been sent to a third country.

³⁰ Department of Home Affairs, *Submission 75*, p. 12. Also see: Australian Human Rights Commission, *Submission 68*, p. 18, which suggested that the Bill could provide for merits review;

International refugee and human rights law

2.33 Submitters and witnesses considered that the Bill would contravene the United Nations' 1951 Refugee Convention (the 1951 Convention), as well as various other international human rights laws.³¹ The Law Council referenced the Bill's Statement of Compatibility with Human Rights (Statement of Compatibility), which, as noted in Chapter 1, concludes that the Bill is compatible 'in most respects' with the instruments required to be examined by the Parliamentary Joint Committee on Human Rights:

It is of significant concern that the Statement concedes that the Bill is only compatible in 'most respects' with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act. This is effectively an admission that aspects of the Bill do not comply with Australia's obligations under international law.³²

Non-refoulement

2.34 Submitters and witnesses argued that proposed section 199C of the Migration Act would breach Australia's international refugee law obligations, in particular the principle of non-refoulement:

The principle of non-refoulement is the cornerstone of international refugee protection and constitutes a fundamental principle from which no derogation can be permitted. It is enshrined in Article 33(1) of the 1951 Convention, which prohibits a Contracting State from 'expelling' or 'returning' a refugee 'in any manner whatsoever' to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.³³

2.35 The Office of the United Nations High Commissioner for Refugees (UNHCR) explained how contracting States comply with this principle:

...a State exercising jurisdiction in relation to an asylum seeker or refugee must not implement measures that result in their removal, either directly or indirectly, to a place where their lives or freedom would be in danger or there are substantial grounds to believe that they would be at risk of being subject to torture or other serious violations of human rights.³⁴

Ms Sanmati Verma, Acting Legal Director, Human Rights Law Centre, *Committee Hansard*, 15 April 2024, p. 4, who said that without merits review there is no remedy for any breach of human rights.

³¹ See, for example: Ms Laura John, Senior Lawyer, Human Rights Law Centre, *Committee Hansard*, 15 April 2024, p. 2.

³² Law Council of Australia, *Submission 71*, p. 6.

³³ Office of the United Nations High Commissioner for Refugees, *Submission 65*, pp. 6–7.

³⁴ Office of the United Nations High Commissioner for Refugees, *Submission 65*, p. 7.

2.36 Mrs Parichehr (Betia) Shakiba shared her experience and her concerns with the Bill, as follows:

Twelve years ago I came to Australia with my family of four, including myself, my father, my mother and my small brother, who was six years old at the time. We arrived as a cohesive family unit seeking safety and a better future. However, the system failed to recognise my mother as the heart of our family, denying her protection under the unfair fast-track system without considering the best interests of her children. For the past decade she has been stuck in limbo waiting for her case to be heard in the Federal Court and repeatedly appealing to the Department of Home Affairs for fair treatment. The fast-track process has neglected her, and now, with the looming threat of this bill, she faces the possibility of being deported or being sent to prison for simply being with her children in Australia, potentially leading to her separation from me.

The same unjust treatment applies to my husband, who, despite the harm he faced in Iran and our activism outside of Iran, has not been recognised as a refugee by the unfair Australian system...My husband's ability to remain with me in Australia remains uncertain, and he too faces threats of being drawn away from our family through being deported or facing imprisonment.

Our family was heavily involved in public activism for women's rights in Iran in the wake of Mahsa Amini's death in 2022. It's not safe for any one of us to return to Iran...The minister's power to direct people to cooperate with their own deportation regardless of whether they have had a fair assessment of their protection claims will expose refugees and people seeking asylum, including my family, to severe harm, including death and continued incarceration, imprisonment or immigration detention. How is this fair?³⁵

2.37 Ms Piumetharshika Kaneshan, a university student who is currently on a bridging visa, described her concerns if the Bill were to pass:

My mother's protection visa application was refused through the fast track when my sister and I were really young. The decision-maker accepted what my mother had gone through in Sri Lanka but said that we were safe because of my father. Now, years later, my father has passed away. Our case is in the Federal Circuit Court, but we don't know whether we will win. Our lawyer tells us there is no way of knowing if we will succeed. She tells us that, if our case fails, our bridging visa expires within 35 days. If that happened then this bill would see us put in jail if we don't go back to Sri Lanka. But this is our home. We don't have any other home. We consider ourselves Australian...As someone that has been in Australia for over 10 years, that has spent most of my life in Australia and that does not know anything about my home country of Sri Lanka, it's really upsetting.³⁶

³⁵ Mrs Parichehr (Betia) Shakiba, Lawyer, Aylum Seeker Resource Centre, *Committee Hansard*, 15 April 2024, p. 26.

³⁶ Ms Piumetharshika Kaneshan, Human Rights Law Centre and Refuge Women Action for Visa Equality, *Committee Hansard*, 15 April 2024, pp. 2 and 7–8. Also see: Ms Sanmati Verma, Acting Legal Director, Human Rights Law Centre, *Committee Hansard*, 15 April 2024, p. 5, who noted

2.38 Dr Abul Rizvi PSM stated that ‘the biggest cohort implicitly included in this bill are those boat arrivals who were subject to the former government’s fast-track asylum process and were refused asylum’ (potentially more than 7500 people):

Given the legitimate criticisms of the fast-track process and the fact that those people have now been living in and contributing to Australian society for over a decade, this parliament should find a way to provide those persons a pathway to permanent residence. It would be wrong for those persons to be subject to removal without proper consideration, on the one hand, of the contribution they have made and continue to make to Australian society and, on the other hand, of the potentially enormous costs and difficulties associated with removing such a large number of people.³⁷

2.39 Many stakeholders contended that the safeguards in proposed section 199D of the Migration Act are not sufficient to mitigate the risks of refoulement (see paragraph 2.30 above).³⁸ The Kaldor Centre submitted, for example:

...the bill could still result in people who do have protection needs being forced to return to countries where they would be at risk of persecution or other forms of serious harm [such as asylum seekers whose applications were assessed through the fast-track process]...For other people, their personal circumstances or the situation in their home country may have changed since their protection claim was determined.³⁹

2.40 In this context, several stakeholders referenced proposed subsection 199E(4), which would set out what does not constitute a reasonable excuse for refusing or failing to comply with a removal pathway direction. The AHRC argued that these exclusions cover a wide range of situations that disregard individual circumstances.⁴⁰

2.41 The Kaldor Centre singled out for comment proposed paragraph 199E(4)(b): where a person ‘is, or claims to be, a person in respect of whom Australia has

that there are thousands of people in the same situation as Ms Kaneshan; Mrs Parichehr (Betia) Shakiba, Lawyer, Asylum Seeker Resource Centre, *Committee Hansard*, 15 April 2024, p. 33, who described the sentiment among the Iranian community as ‘betrayed’.

³⁷ Dr Abul Rizvi PSM, personal capacity, *Committee Hansard*, 15 April 2024, p. 20. Also see: Ms Rachel Saravanamuthu, Legal Policy Lead, Asylum Seeker Resource Centre, *Committee Hansard*, 15 April 2024, p. 31, who suggested that there are many factors that should be considered when deciding whether someone should be removed from Australia.

³⁸ See, for example: Office of the United Nations High Commissioner for Refugees, *Submission 65*, p. 8; Law Council of Australia, *Submission 71*, p. 12; Refugee Advice and Casework Service, *Submission 73*, pp. 6–7.

³⁹ Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 4. Also see: Refugee Advice and Casework Service, *Submission 73*, pp. 6–10, which identified also people seeking judicial review of the decision on their primary application and transitory people as people at risk of refoulement.

⁴⁰ Australian Human Rights Commission, *Submission 68*, p. 9.

non-refoulement obligations'.⁴¹ The Law Council shared this specific concern, as well as proposed paragraphs 199E(4)(a) and (c):

Proposed section 199E(4) of the Bill appears to overlook the possibility that individuals—including parents of children—may have valid fears. The exclusion of persons with 'a genuine fear of suffering persecution or significant harm if the person were removed to a particular country', or a person in respect of whom Australia has non-refoulement obligations' or someone who 'would suffer other adverse consequences' from the basis of a what a reasonable excuse is, appears to punish those who will be faced with an impossible decision. A decision to return to a country where they may face persecution or death, or refuse to return and face 12 months in prison.⁴²

2.42 The RACS argued that the provision unfairly targets refugees and people seeking asylum and added:

We agree with the description used by the Human Rights Law Centre with respect to the 'roundabout' effect of the Bill: as people cannot comply with directions, they face criminal punishment, and go from prison to immigration detention and back again in a miserable, indefinite cycle.⁴³

2.43 The Law Council summarised its view, as follows:

The coercive nature of the direction raises the problem that Australia would be in breach of its international treaty obligations and customary international law, both of which prevent refoulement. The directions would create a veneer of 'voluntariness' from the person the subject of the directions, but in practice would be forcing the person to be removed against that person's will to a country where they may face serious harm, including death. This would at least amount to constructive refoulement, which is prohibited under international treaty and customary law.⁴⁴

International human rights law

2.44 Other submitters and witnesses argued that, in addition to international refugee law, the Bill is incompatible with international human rights law.⁴⁵ Information provided to the inquiry variously referenced, for example, articles 3 and 31–33 of the Convention Against Torture, articles 6–7 of the International Covenant on Civil and Political Rights, and articles 3(1) and 12 of the Convention on the Right of the Child (the CROC).

⁴¹ Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 4.

⁴² Law Council of Australia, *Submission 71*, pp. 17–18.

⁴³ Refugee Advice and Casework Service, *Submission 73*, p. 11.

⁴⁴ Law Council of Australia, *Submission 71*, pp. 12–13.

⁴⁵ See, for example: International Commission of Jurists (Australian Section), *Submission 5*, p. [1]; Office of the United Nations High Commissioner for Refugees, *Submission 65*, p. 7; Law Council of Australia, *Submission 71*, p. 11; Refugee Advice and Casework Service, *Submission 73*, pp. 12–13.

2.45 Multiple stakeholders particularly commented on the CROC. The Kaldor Centre, for example, remarked that the Bill would contravene two of the four general principles for interpreting and implementing all the rights of the child under the convention:

Two of the most fundamental principles underpinning the protection of children's rights under international law are that: i) the best interests of the child must be taken into account as a primary consideration in all actions concerning children (the 'best interests' principle), and ii) States must assure to children who are capable of forming their own views the right to express those views freely in all matters affecting them, and to have those views be given due weight in accordance with their age and maturity (the 'right to be heard' principle).⁴⁶

2.46 The Kaldor Centre argued that the 'best interests principle' should be a primary consideration in decisions concerning the deportation of a child. Further, 'it is not sufficient that consideration of a child's best interests be a matter of ministerial discretion or implied into other administrative processes'.⁴⁷

2.47 The AHRC agreed that the Bill does not include sufficient detail as to what factors must first be considered by the minister. It preferred the removal of proposed subsection 199D(5) from the Bill, which empowers the minister to give a removal pathway direction to a child's parent or guardian. Otherwise, the AHRC argued that additional safeguards should be included in the Bill to ensure compliance with the CROC:

The Commission considers that, prior to issuing a direction with respect to a child, an assessment should be made of what the child's best interests are...The best interests of the child should be a primary consideration given to the decision by the Minister to issue a removal pathway direction with respect to a child. Drafters of the amendment may like to consider outlining specific factors to be considered.⁴⁸

⁴⁶ Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 5.

⁴⁷ Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 6.

⁴⁸ Australian Human Rights Commission, *Submission 68*, p. 12.

2.48 The International Commission of Jurists (Australian Section) contended that, as drafted, proposed subsections 199D(4)–(5) might actually impose obligations on a parent or guardian to act in ways that are incompatible with the best interest of their child(ren).⁴⁹ The Law Council similarly commented:

...extraordinarily, parents are coerced—under the threat of criminal sanction and at the risk of mandatory imprisonment—to themselves undertake the steps for removal for their children, regardless of their fears for their wellbeing. If a parent refuses to comply because he or she genuinely fears for the persecution of a child if removed, the mandatory imprisonment provision in subsection 199E(2) will result in forcible separation of the family.⁵⁰

2.49 Some submitters and witnesses commented also on article 9(1) (separation from parents) and the issue of child statelessness, which they argued are matters not addressed in the Bill. Ms Verma from the Human Rights Law Centre pointed out, for example, the situation where parents—but not their children who were born in Australia—are given a removal pathway direction:

...we now have families who are going to be affected by this bill who have been failed through the fast track and who have children who were born in Australia who are citizens, so when removal directions are made in respect of their parents, that will involve those children being placed into state care. These are extraordinarily serious circumstances...There is simply no way, within the current mechanism that is proposed by the bill, that those interests would be sufficiently taken into account.⁵¹

2.50 In relation to statelessness, the AHRC submitted:

The Commission is concerned that the Bill also does not address the risk of child statelessness or the feasibility of a parent or guardian being able to comply with a removal pathway direction issued with respect to that child. Gender discrimination in nationality laws remains a real issue in many countries around the world. For example, a woman from Somalia, Lebanon or Iraq who has a child in Australia will be unable to confer nationality on her child under the laws of those countries. This issue should be required to be considered prior to the issuing of a direction, rather than allowing it to be a ‘reasonable excuse’ to be determined by a criminal court and where the onus is on the person relying on the excuse to establish it.⁵²

Departmental response

2.51 Ms Stephanie Foster, Secretary of Home Affairs, advised:

In making any decision to cancel or refuse a visa, that decision-maker must consider the best interests of the child. Our obligations under article 3 of the

⁴⁹ International Commission of Jurists (Australian Section), *Submission 5*, p. [2].

⁵⁰ Law Council of Australia, *Submission 71*, p. 12.

⁵¹ Ms Sanmati Verma, Acting Legal Director, Human Rights Law Centre, *Committee Hansard*, 15 April 2024, p. 4.

⁵² Australian Human Rights Commission, *Submission 68*, pp. 13–14.

Convention on the Rights of the Child [the best interests principle] are given effect through a series of operational policies and practices which have been the bedrock of our immigration system for many decades. I'd like to emphasise that this bill provides a series of measures of last resort to be used in situations where people have come to the end of a lengthy set of processes to determine their right to remain in Australia.⁵³

Criminal offence provisions

2.52 Most submitters and witnesses did not support the proposed mandatory minimum sentence (12 months) and potential five-year penal term for refusing or failing to comply with a removal pathway direction (proposed subsections 199E(1)–(2) of the Migration Act).

2.53 Dr Rizvi argued that there must be some penalty for non-cooperation to avoid the heightened risk of non-cooperation following the decision in *NZYQ*:

For any visa system to operate efficiently and effectively, there must be mechanisms that ensure noncitizens who have exhausted all legal options to remain in Australia can be removed. For some noncitizens, particularly noncitizens subject to criminal deportation, a lengthy period in immigration detention is sometimes necessary to make all the necessary removal arrangements and for the noncitizen to be available for removal. If immigration detainees can readily avoid removal simply by not cooperating with the Department of Home Affairs, there is a very real risk of creating an incentive for a growing number of noncitizens who are subject to removal to also not cooperate. That would undermine the objectives of an efficient and effective visa system.

The High Court decision in the second half of 2023 has created the incentive for noncitizens to not cooperate in their removal. They now know that the Department of Home Affairs must release them from immigration detention if they can delay removal through noncooperation. This is particularly the case for nationals of countries that do not accept back their citizens unless those citizens are returning voluntarily.⁵⁴

2.54 Dr Rizvi stated, however:

The question is whether the penalties for noncooperation as proposed in this bill are proportionate to ensuring cooperation in the vast majority of circumstances and whether penalties are the only or best option in all cases.⁵⁵

⁵³ Ms Stephanie Foster, Secretary, Department of Home Affairs, *Committee Hansard*, 15 April 2024, p. 47.

⁵⁴ Dr Abul Rizvi PSM, private capacity, *Committee Hansard*, 15 April 2024, pp. 19–20. Also see: Mr Peter Hughes PSM, private capacity, *Committee Hansard*, 15 April 2024, p. 23, who pointed out that no-one knows what the High Court of Australia would decide in relation to cases of non-cooperation.

⁵⁵ Dr Abul Rizvi PSM, private capacity, *Committee Hansard*, 15 April 2024, p. 20.

2.55 The AHRC described proposed section 199E as ‘disproportionate and unjust’. Its submission referenced the United Nations’ *Compact for Safe, Orderly and Regular Migration*, where member States have committed to ‘facilitate and cooperate for safe and dignified return and to guarantee due process, individual assessment and effective remedy’. The AHRC submitted:

It is not in the spirit of [the] Global Compact, nor recommendations by the United Nations High Commissioner on Refugees, to penalise individuals who have arrived in Australia from State parties who are failing to uphold their obligations under international norms.⁵⁶

2.56 Emeritus Professor Rosalind Croucher, President of the AHRC, reiterated in her evidence:

Dealing humanely with individuals is the core of a human rights framing, that everyone is to be treated with equality and dignity in human rights. The problem is this short-term reaction to a cohort where certain elements of it are deeply flawed.⁵⁷

2.57 The Kaldor Centre commented that there is no Australian legal precedent for a failure to comply with a direction resulting in mandatory imprisonment, not even in the context of terrorism offences. Where there are comparable state-based laws, these provide only for maximum sentences, not mandatory sentences.⁵⁸

2.58 The Kaldor Centre and the Law Council agreed that proposed subsection 199E(2)—the mandatory minimum sentencing provision—would impede judicial discretion. The Scrutiny of Bills Committee commented similarly and observed that the provision would deprive the courts of their ability to impose sentences suitably determined on a case-by-case basis.⁵⁹

2.59 In evidence, Mr McIntyre categorically stated:

Minimum mandatory sentences should have no place in the Australian justice system and they undermine its orthodox principles. They prevent

⁵⁶ Australian Human Rights Commission, *Submission 68*, p. 14. Also see: Refugee Advice and Casework Service, *Submission 73*, p. 11; Mr Paul Power, Chief Executive Officer, Refugee Council of Australia, *Committee Hansard*, 15 April 2024, p. 30.

⁵⁷ Emeritus Professor Rosalind Croucher, President, Australian Human Rights Commission, *Committee Hansard*, 15 April 2024, p. 5.

⁵⁸ Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 7. Also see: Ms Sanmati Verma, Acting Legal Director, Human Rights Law Centre, *Committee Hansard*, 15 April 2024, p. 8, who added that the element of criminalisation is globally unprecedented.

⁵⁹ Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 7; Law Council of Australia, *Submission 71*, p. 16. Also see: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 5 of 2024*, 27 March 2024, p. 4; Office of the United Nations High Commissioner for Refugees, *Submission 65*, p. 11.

individualised justice and fetter judges' discretion to impose penalties that are proportionate to the offending.⁶⁰

- 2.60 The Kaldor Centre and the AHRC questioned whether proposed section 199E would achieve its desired outcome: cooperation from removal pathway non-citizens. Both argued that people have their own reasons for failing or refusing to cooperate with a removal pathway direction.⁶¹ Similarly, the Refugee Council of Australia (RCOA) submitted:

The Refugee Council recognises that returns are part of a well-functioning asylum system. However, the approach taken in this Bill—criminalising non-compliance with administrative tasks—will not result in the outcomes the Australian Government desires. Adversarial, coercive, and a detention or prison-focused system will not facilitate voluntary removals. The more likely scenario is that people will face imprisonment and a further deterioration of their trust in the process and willingness to engage.⁶²

- 2.61 Mr Peter Hughes PSM acknowledged that the Bill deals with two genuine and serious immigration problems but argued that 'there seems to have been insufficient consideration of the underlying reasons why [people] won't cooperate'. Further:

I'm not confident that the threat of jail or the actuality of a jail sentence will affect the decision-making of these people...[W]e may simply end up with more people in jail but none of them actually leaving the country. Families with children present an even bigger dilemma. Are we really intending to put noncooperating parents in jail and their children into foster care?...My view is that other measures to encourage, rather than threaten, individuals to cooperate should be considered—measures that go to the heart of their reasons for noncompliance.⁶³

- 2.62 The AHRC also considered that detention in a criminal setting is no stronger a motivator than administrative detention or regional offshore processing, neither of which has previously been effective:

Australia has had legislation mandating immigration detention since 1992. Until November 2023 and the *NZYQ* decision, this included the potential for indefinite administrative detention for those whose removal was not practicable in the reasonably foreseeable future. Despite this, significant

⁶⁰ Mr Greg McIntyre, President, Law Council of Australia, *Committee Hansard*, 15 April 2024, p. 11. Also see: Dr Abul Rizvi PSM, personal capacity, *Committee Hansard* 15 April 2024, p. 20, who said that the proposed measure is not good public policy.

⁶¹ Australian Human Rights Commission, *Submission 68*, p. 15. Also see: Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 8; Office of the United Nations High Commissioner for Refugees, *Submission 65*, p. 15; Mr Peter Hughes PSM, private capacity, *Committee Hansard*, 15 April 2024, p. 19.

⁶² Refugee Council of Australia, *Submission 41*, p. 9. Also see: Emeritus Professor Rosalind Croucher, President, Australian Human Rights Commission, *Committee Hansard*, 15 April 2024, p. 7.

⁶³ Mr Peter Hughes PSM, private capacity, *Committee Hansard*, 15 April 2024, p. 19.

numbers of detainees elected not to be removed to their country of nationality. Similarly, large numbers of transitory persons have chosen to remain under Australia's offshore processing regime. Being faced with the prospect of detention in a criminal setting is, in the Commission's view, unlikely to be viewed as a more effective motivator than either of these prospects.⁶⁴

- 2.63 The AHRC pointed out that mandatory minimum sentencing provisions have the potential to engage articles 7 (inhuman or degrading treatment or punishment), 9(1) (arbitrary deprivation of liberty) and 14 (right to appeal against sentence) of the ICCPR.⁶⁵ In light of the 'complex human rights issues inherent in the circumstance captured by the Bill', the Law Council considered the proposed criminal sanctions to be 'inappropriate'.⁶⁶

Departmental response

- 2.64 Home Affairs submitted:

Decisions on who can enter and remain in Australia are for the Australian Government to make and the Australian community has a reasonable expectation that this should not be thwarted by the actions of non-citizens. It is therefore appropriate that new sanctions are introduced for those who do not comply and make deliberate attempts to frustrate removal.⁶⁷

- 2.65 The department argued that proposed section 199E reflects the seriousness of a non-citizen's offending, the need for a strong deterrent and the importance of the integrity of the migration system. Its submission also argued:

While the minimum and maximum penalties constrain what a court can impose, there is still flexibility within that range to consider individual circumstances, and treat individual cases differently.⁶⁸

- 2.66 Home Affairs observed that the penalty provisions proposed in the Bill are equivalent to those associated with offences in the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023*:

The offence of non-compliance with a direction intended to gain the cooperation of a removal pathway non-citizen is regarded by the Government as similarly serious in terms of frustrating migration law, as well as damaging the integrity of Australia's migration and temporary entry programs. Non-cooperation demonstrates a disregard for Australia's laws

⁶⁴ Australian Human Rights Commission, *Submission 68*, p. 15. Also see: Ms Sanmati Verma, Acting Legal Director, Human Rights Law Centre, *Committee Hansard*, 15 April 2024, pp. 5–6.

⁶⁵ Australian Human Rights Commission, *Submission 68*, pp. 15–18.

⁶⁶ Law Council of Australia, *Submission 71*, p. 14.

⁶⁷ Department of Home Affairs, *Submission 75*, p. 13.

⁶⁸ Department of Home Affairs, *Submission 75*, p. 13. Also see: Mr Peter Hughes PSM, private capacity, *Committee Hansard*, 15 April 2024, p. 21, who said that large penalties in criminal legislation do not have a deterrent effect.

and the Department's ability to manage the arrival and departure of non-citizens effectively. This is contrary to the community's expectations that non-citizens should abide by Australia's laws, and engage with resolving their migration status and removal, where required by law.⁶⁹

2.67 In relation to the 'reasonable excuse' defence, the department observed that there are also general defences available under the *Criminal Code Act 1995*. Its submission emphasised that proposed subsection 199D(4) is intended to ensure:

...where a person's protection claims have already been considered as part of a protection visa process, and found not to engage Australia's non-refoulement obligations, including because their fears of being subjected to harm are not well-founded, the person should not be able to rely on claiming that they still fear harm to excuse their non-cooperation with removal...[A] removal pathway direction cannot be issued to compel a person to interact with a country in relation to which a protection finding has been made, or during an ongoing protection visa process.⁷⁰

Ministerial discretionary power to designate a country as a 'removal concern country'

2.68 Submitters and witnesses commented on proposed section 199F and proposed subsection 199G(1) of the Migration Act. The first provision would provide the minister with discretionary and personal power to designate, by way of legislative instrument and if in the national interest, a country as a removal concern country. The second provision would prevent non-citizens from lodging valid visa applications if they are nationals of the removal concern country.

2.69 The Law Council argued that the provisions embody 'a blunt and punitive approach' that would create 'real and substantial risks of injustice'. Its submission explained:

[Proposed subsection 199G(1)] confers upon the Minister a power to reject visa applications from entire countries. It will prevent nationals of whole countries (as a class) from making visa applications, regardless of their individual circumstances and whether their applications would be considered valid. The combined effect of these provisions will be punitive and discriminatory and potentially in breach of international law. It will also mean the separation of families as the relevant exceptions are very limited.⁷¹

⁶⁹ Department of Home Affairs, *Submission 75*, p. 13.

⁷⁰ Department of Home Affairs, *Submission 75*, p. 14.

⁷¹ Law Council of Australia, *Submission 71*, p. 22, which noted that there is a longstanding system of merit-based consideration of every individual visa application and the inclusion of 'a national interest' criterion renders decisions effectively incapable of being judicially challenged. Also see: International Commission of Jurists (Australian Section), *Submission 5*, p. [3]; Kurdish Society of Queensland, *Submission 33*, p. [1]; Zimbabwe Australian Cultural Association, *Submission 34*, p. [2].

Personal impacts of the bar

2.70 Stakeholders provided the inquiry with information and examples of how proposed subsection 199G(1) could adversely and unfairly impact non-citizens who wished to apply for Australian visas. The Kurdish Society of Queensland, for example, submitted that the 'blanket ban' would deny 'refugees the opportunity to seek safety and rebuild their lives in Australia'.⁷²

2.71 Ms Haatsari Marunda, Member of the Zimbabwe Australia Community Association, spoke of the panic and anxiety within the Zimbabwean community, where people have little understanding of how the Bill will affect them:

With the way this has been done, there has not been any consultation and no-one has been spoken to about this bill. No-one knows exactly what is going on. So there is that anxiety and panic within the community as to what will happen.⁷³

2.72 Dr Hassan Sonboli, President of the Kurdish Society of Queensland, said that the Kurdish community was horrified to hear that family would not be able to come visit. He indicated how important family support is to the Kurdish diaspora, including for family reunification:

The bill creates barriers to family reunification for many migrants and refugees... This could result in significant emotional distress and hardship for individuals who are unable to reunite with their loved ones in Australia. It's essential to recognise the importance of preserving family unity and ensuring that migration policies support rather than hinder family reunification.⁷⁴

2.73 The QACC suggested that the Bill should target certain individuals and governments:

The halt in processing new visa applications for individuals from a country identified by the Minister as a removal concern unfairly penalizes genuine individuals who have neither engaged in criminal activities in Australia nor been associated with a government from the designated country that refuses to cooperate with directives from the Australian Government. We suggest that the Bill exclusively address individuals who have committed criminal offenses and governments of removal concern countries.⁷⁵

⁷² Kurdish Society of Queensland, *Submission 33*, p. [1].

⁷³ Ms Haatsari Marunda, Member, Zimbabwe Australia Community Association, *Committee Hansard*, 15 April 2024, p. 39.

⁷⁴ Dr Hassan Sonboli, President, Kurdish Society of Queensland, *Committee Hansard*, 15 April 2024, p. 40.

⁷⁵ Queensland African Communities Council, *Submission 6*, p. 3. Also see: Mr Peter Hughes PSM, private capacity, *Committee Hansard*, 15 April 2024, p. 19, who commented similarly in relation to potential incarceration.

- 2.74 In relation to uncooperative countries, the International Commission of Jurists (Australian Section) noted that designation as a removal concern country under proposed subsection 199F(1) is based entirely upon the actions of a non-citizen's government, which might be an authoritarian regime.⁷⁶
- 2.75 The QACC submitted that such regimes have 'abysmal human rights records and little regard for the rights, life, health, and well-being of their citizens'. Consequently, 'the likelihood of these governments cooperating with the Australian government regarding their nationals who have committed serious criminal offenses in Australia [and are being deported] is extremely low'.⁷⁷
- 2.76 The RCOA's Mr Power referred to evidence from Ms Foster that proposed section 199F is intended to be a 'diplomatic tool' (see paragraph 2.104 below). He suggested that, if there is no intention to use the proposed power, then:
- ...this legislation should be rejected or significantly amended to reflect that intention explicitly because what we've seen since the legislation was made public is the depth of concern this causes for people who are from communities associated with potential removal concern countries.⁷⁸

Departmental response

- 2.77 Home Affairs' Ms Cavanagh affirmed that designation as a removal concern country is not intended to punish individuals or communities:

The intent of this measure is not to punish Australian citizens or diaspora communities. It's about effecting a change in behaviour of a foreign government. ...[W]e do feel that the measures in the bill can be used so that it is very targeted and focused at what we need to change in the behaviour of a foreign government.⁷⁹

- 2.78 Ms Foster emphasised:

There is no preconceived list of countries that might be designated. In a situation where we face problems with another country, we would hope that, in the first instance, the fact of this legislation being in place would be sufficient to allow us to negotiate an outcome. In the case of a designation being made, the legislation provides significant flexibility for it to be designed in a way that provides the greatest incentive for a foreign

⁷⁶ International Commission of Jurists (Australian Section), *Submission 5*, p. [3].

⁷⁷ Queensland African Communities Council, *Submission 6*, p. 2. Also see: Mrs Parichehr (Betia) Shakiba, Lawyer, Asylum Seeker Resource Centre, *Committee Hansard*, 15 April 2024, p. 27.

⁷⁸ Mr Paul Power, Chief Executive Officer, Refugee Council of Australia, *Committee Hansard*, 15 April 2024, p. 27.

⁷⁹ Ms Tara Cavanagh, Group Manager, Immigration Policy, Department of Home Affairs, *Committee Hansard*, 15 April 2024, p. 53.

government to cooperate, as well as exemptions to ensure it does not punish communities in Australia.⁸⁰

2.79 Specifically in relation to the concerns raised by communities, Ms Foster gave evidence that ‘the bill has sufficient flexibility in the way in which it can be administered for those concerns to be accommodated’.⁸¹

Exceptions to the bar

2.80 Some submitters and witnesses commented on proposed subsection 199G(2) of the Migration Act, which would set out some exceptions to the bar on new visa applications from nationals of removal concern countries. In general, they argued that these exceptions would not go far enough.

2.81 The QACC submitted that proposed paragraphs 199G(2)(b)–(c) are too narrow and do not encompass a wide range of family members (for example, parents of independent children, grandparents, siblings, people who are culturally considered as family), meaning that these people cannot obtain visas to visit family who reside in Australia.⁸²

2.82 Mr Bol explained the impact of this narrow construction on his community:

We are a collectivist culture whose definition of family includes extended family members and every other person that has enormously contributed or positively contributed to our life and upbringing. We today have people who are struggling with their lives here because they are unable to bring out those that are important in their lives.⁸³

2.83 The Zimbabwe Australia Cultural Association (ZACA) agreed that the proposed exemptions do not ease its community’s concerns:

The Zimbabwean community, like many other culturally and linguistically diverse (CALD) communities, has more expansive views of the family that do not narrow family merely to the nuclear family, which is the case in the exemptions in s 199G...[T]he narrow exemption scope within the Bill may increase the number of incidents of forced family separations of the above classes of people, who are not captured by the exemption. This would [result in the] inability to attend important family functions such as weddings, funerals and birthdays which would be devastating to our community and to individuals affected, as many of those persons may have resided in Australia for a significant length of time and have strong ties and

⁸⁰ Ms Stephanie Foster, Secretary, Department of Home Affairs, *Committee Hansard* 15 April 2024, p. 49.

⁸¹ Ms Stephanie Foster, Secretary, Department of Home Affairs, *Committee Hansard* 15 April 2024, p. 54.

⁸² Queensland African Communities Council, *Submission 6*, p. 4.

⁸³ Mr Beny Bol OAM, President of the Queensland African Communities Council, *Committee Hansard*, 15 April 2024, p. 36.

connections within the Zimbabwean community and the wider Australian community broadly.⁸⁴

- 2.84 The ZACA submitted also that proposed section 199G does not consider broader economic, commercial, and cultural implications:

Australia, well-known for its rich cultural mosaic, has been a beacon of hope for many immigrants seeking a better life, including those hailing from Zimbabwe. With approximately 40 thousand Zimbabwean-born residents, our community's contributions are woven intricately into the fabric of the wider Australian society, notably enhancing sectors like healthcare, mining, finance, and entrepreneurship...

[Further] it will alienate and demoralise Australians of Zimbabwean descent, who have readily integrated into the wider Australian community, whilst maintaining strong social and cultural connections to their homeland. Zimbabwean culture espouses the virtues of *Hunhu/Ubuntu*, a philosophy which recognises the role that community plays in shaping an individual's humanity. As such, family and kin cannot be divorced from the individual without significantly affecting them. The prospect that the wider family, for example, grandparents, might not be able to visit and share in the raising of young children, or to renourish our social and cultural connections, will lead to emotional and mental distress for many Zimbabwean Australians.⁸⁵

- 2.85 Mr Nader Zoljalali, Board Member of the Australian Iranian Community Alliance, recognised the need to update Australia's migration law, bearing in mind the implications of those changes:

We all consider ourselves Australians and we want what's best for our country. We also come with a lineage and a heritage from different parts of the world, and that's what makes our country so great and wonderful. It would be a shame and it would be a loss to disregard and throw away the benefits and the privileges that Australia has been endowed with as a migrant country.⁸⁶

- 2.86 Similarly, Mr Joshua Strutt, Chief Executive Officer and Principal Solicitor for the Immigration Advice and Rights Centre (IARC), voiced the IARC's concern that 'this bill has the potential to irreparably damage the strong and vibrant multicultural fabric that makes up Australia'.⁸⁷

Departmental response

- 2.87 Home Affairs submitted that proposed paragraphs 199G(2)(e)–(f), in combination with proposed subsection 199G(3), would allow for the minister to

⁸⁴ Zimbabwe Australia Cultural Association, *Submission 34*, p. [3].

⁸⁵ Zimbabwe Australia Cultural Association, *Submission 34*, p. [3]. Also see: Queensland African Communities Council, *Submission 6*, p. 4.

⁸⁶ Mr Nader Zoljalali, Board Member, Australian Iranian Community Alliance, *Committee Hansard*, 15 April 2024, p. 41.

⁸⁷ Mr Joshua Strutt, Chief Executive Officer and Principal Solicitor, Immigration Advice and Rights Centre, *Committee Hansard*, 15 April 2024, p. 28.

determine, by legislative instrument, exceptions for particular classes of person or visa. In addition, its submission highlighted proposed subsection 199G(4) which would give the minister a personal power to allow a visa application by an individual where it is in the public interest.⁸⁸

Designation safeguards and accountability mechanisms

2.88 Proposed subsections 199F(6)–(8) of the Migration Act would require the minister to consult with the Prime Minister and Minister for Foreign Affairs, as well as tabling a designation and a statement of reasons for the designation in the Parliament within a specified timeframe.

2.89 Some submitters and witnesses voiced concerns about these proposed safeguards and accountability mechanisms. The Law Council, for example, emphasised the ‘exceptional’ breadth of the minister’s proposed power, which, it argued, is not constrained by any objective criteria or specified purpose: ‘at the very least, [proposed section 199F] should be made more certain and predictable in scope’.⁸⁹

2.90 In addition, the Law Council described the legislative safeguards in proposed subsections 199F(2) and (6)–(7) as non-meaningful and ineffective:

The requirement to consult two members of the same Executive Government does not represent a meaningful or effective safeguard, nor will the requirement to table a copy of the designation before Parliament within two days of it being made, considering that a failure to do so will not affect the validity of the designation [proposed subsection 199F(8)]...Provision should instead be made that any removal concern country designation will only take effect on the day after the designation has been tabled in compliance with proposed section 199F(6) for at least two days in each House.⁹⁰

2.91 The Kaldor Centre agreed with the Scrutiny of Bills Committee, who considered that designation should not be by way of legislative instrument:

The committee considers that the designation of a country as a ‘removal concern country’, the effect of which is to effectively ban those citizens from applying for an Australian visa, is a significant matter which is more appropriate for primary legislation and the full parliamentary consideration afforded to Acts of parliament. A legislative instrument, made by the Executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.⁹¹

⁸⁸ Department of Home Affairs, *Submission 75*, p. 16.

⁸⁹ Law Council of Australia, *Submission 71*, p. 23. Also see: p. 22; Emeritus Professor Rosalind Croucher, President, Australian Human Rights Commission, *Committee Hansard*, 15 April 2024, p. 3.

⁹⁰ Law Council of Australia, *Submission 71*, p. 23. Also see: Zimbabwe Australia Cultural Association, *Submission 34*, p. [2].

⁹¹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 5 of 2024*, 27 March 2024, p.7. Also see: Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 8;

2.92 The Law Council’s Ms Ford stated that there should be ‘more steps in place in term of that initial consideration’ but acknowledged that a sunset clause would also be a useful safeguard.⁹²

Departmental response

2.93 Home Affairs submitted that ‘appropriate safeguards and limitations are proposed in respect of the Minister’s power to designate a country as a ‘removal concern country’’ (such as the range of exceptions to the bar on visa applications in proposed section 199G of the Migration Act).⁹³

2.94 In response to consultation concerns, the department submitted that proposed subsection 199F(2) ‘appropriately reflects the significance of the power and the Minister’s role as a member of the Executive Government’, with the minimum legislated consultation requirement sufficient to inform the minister prior to exercising the designation power.⁹⁴

2.95 Home Affairs considered that proposed subsections 199F(6)–(8) provide ‘appropriate transparency and accountability to the Parliament in the event that the designation power is exercised’.⁹⁵

Support and cooperation from other countries

2.96 Several submitters and witnesses questioned whether potential or actual designation as a removal concern country (proposed section 199F) would achieve the support and cooperation sought from other countries under the Bill.⁹⁶ The Kaldor Centre, for example, submitted:

...pressure can work in some cases, in others, countries ‘may retaliate in ways detrimental to bilateral trade, tourism, law enforcement, or other forms of cooperation’. In our view, there are considerable risks to managing international relations through punitive unilateral measures. The issue of international cooperation concerning the return of nationals to their home

Ms Emily Rutherford, Senior Lawyer, Australian Human Rights Commission, *Committee Hansard*, 15 April 2024, p. 3.

⁹² Ms Carina Ford, Chair and Member, Migration Law Committee, Federal Dispute Resolution Section, Law Council of Australia, *Committee Hansard*, 15 April 2024, p. 13.

⁹³ Department of Home Affairs, *Submission 75*, p. 9.

⁹⁴ Department of Home Affairs, *Submission 75*, p. 15.

⁹⁵ Department of Home Affairs, *Submission 75*, p. 15.

⁹⁶ See, for example: Ms Carina Ford, Chair and Member, Migration Law Committee, Federal Dispute Resolution Section, Law Council of Australia, *Committee Hansard*, 15 April 2024, p. 16. Also see: Queensland African Communities Council, *Submission 6*, p. 2, which considered that foreign countries might cooperate ‘only to subject [political dissidents] to further severe punishments’; Dr Abul Rizvi PSM, private capacity, *Committee Hansard*, 15 April 2024, p. 24.

country is a diplomatic one that should be negotiated in good faith between political leaders.⁹⁷

2.97 The Kaldor Centre noted that the United States and the European Union also experience difficulties in not being able to remove certain non-citizens: '[Their] low rates were largely attributed to so-called 'uncooperative' or 'recalcitrant' countries of origin refusing to accept the return of their citizens'.⁹⁸

2.98 The Kaldor Centre noted, however, that there is a need to differentiate between those States which are being deliberately uncooperative and those that are unable to cooperate due to mitigating factors:

[This] is not always a straightforward task. Countries of origin may have valid concerns about accepting non-citizens by mistake, particularly where they are being pressured to do so by returning countries, or they may invoke the challenges of identifying individuals as 'convenient measures to avoid cooperation'. As one scholar has noted, '[t]he resultant opacity leaves deporting states in a conundrum. Politically motivated noncollaboration requires a different response than a simple dysfunctional bureaucracy'. This need for a differentiated responses brings into question the Australian government's assertion in the Explanatory Memorandum that blacklisting 'is an appropriate and proportionate measure to safeguard the integrity of Australia's migration system'.⁹⁹

2.99 The Law Council also contested this rationale, by arguing that there has been no rigorous assessment of whether the limitation on rights is proportionate to the objective sought:

Rather, barring visa applications from nationals of entire countries may be considered a sledgehammer response which will affect vast numbers of nationals who are subject to autocratic regimes and have not contributed to government decision-making regarding returning nationals. There may be less restrictive ways to achieve the Australian Government's objective. In our view, there should be a more nuanced approach to encourage international cooperation concerning the removal of nationals to their country of origin.¹⁰⁰

⁹⁷ Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 9. Also see: Zimbabwe Australia Cultural Association, *Submission 34*, p. [3]; Dr Abul Rizvi PSM, personal capacity, *Committee Hansard*, 15 April 2024, p. 20, who said that there should be 'an appropriate mix of carrots and sticks'.

⁹⁸ Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, pp. 8–9.

⁹⁹ Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 9, which noted that this differentiation occurs in the United States. Also see: Statement of Compatibility with Human Rights, p. 35; Mr Peter Hughes PSM, private capacity, *Committee Hansard*, 15 April 2024, p. 22, who highlighted Afghanistan as a country that was unable to cooperate.

¹⁰⁰ Law Council of Australia, *Submission 71*, p. 22. Also see: Queensland African Communities Council, *Submission 6*, p. 3.

2.100 The AHRC submitted that, unlike the United States and the United Kingdom, the Bill includes no mandatory factors for the minister to consider, when the discretionary power to designate a removal concern county is exercised. If the Bill were to be passed:

...the Commission recommends that the Bill be redrafted to include within section 199F of Schedule 1, a set of factors that must be considered prior to the Minister exercising their discretion to designate a removal concern country. The Bill should also include a mandatory review period of all designations to ensure their ongoing necessity.¹⁰¹

2.101 Ms Emily Rutherford, Senior Lawyer at the AHRC, conceded that it would be necessary to consider in-depth the efficacy of those two international examples, to draw from them what factors could be usefully considered by the minister.¹⁰²

Departmental response

2.102 Home Affairs argued:

Australia makes every effort to cooperate with countries in the context of deportations and removals. Australia accepts the return of its citizens and rightly expects other countries to do the same. The proper functioning of international migration systems depends upon nation states accepting this responsibility.¹⁰³

2.103 Home Affairs' Secretary Ms Foster explained that proposed section 199F would provide:

...a diplomatic tool that will give us leverage in working with countries to try and make sure we have effective options to return people, whether it's to country of origin or...to negotiate a broader range of third-party resettlements...[I]t's instructive that the system has been in operation...in the UK for a couple of years without it being used...[W]e could have some reasonable hope that we would be able to get some traction without necessarily declaring or designating.¹⁰⁴

2.104 Home Affairs further explained that the designation power would be exercised only after all other efforts had been exhausted:

Designation would only take place after a range of bilateral considerations were taken into account, and all reasonable and appropriate efforts and attempts had been made to engage the country to cooperate and facilitate the lawful removal of its nationals. In practice, the removal concern country designation would be considered following diplomatic and government to

¹⁰¹ Australian Human Rights Commission, *Submission 68*, p. 21.

¹⁰² Ms Emily Rutherford, Senior Lawyer, Australian Human Rights Commission, *Committee Hansard*, 15 April 2024, p. 3.

¹⁰³ Department of Home Affairs, *Submission 75*, p. 14.

¹⁰⁴ Ms Stephanie Foster, Secretary, Department of Home Affairs, *Committee Hansard*, 26 March 2024, pp. 9 and 14.

government engagement on the issues and challenges of returns before it is utilised.¹⁰⁵

2.105 Ms Foster stated that ‘there will be a range of countries for whom this will be an effective lever’.¹⁰⁶

Ministerial ability to revisit protection findings for non-citizens on removal pathway

2.106 Several submitters and witnesses noted the amendments proposed in items 4–7 in schedule 2 of the Bill, which would extend the minister’s ability to revisit a protection finding for an unlawful non-citizen (current section 197D of the Migration Act). These stakeholders argued that removal pathway non-citizens, including lawful non-citizens on valid visas, should not be encompassed by section 197D.

2.107 The Law Council submitted that it has concerns with section 197D, including:

- contrary to the rule of law, there are no criteria prescribing circumstances in which the minister may exercise the power; and
- the provisions do not provide for key procedural fairness guarantees, such as the right to be notified and present and challenge evidence where adverse decisions are made.¹⁰⁷

2.108 The Law Council also noted that there are very few circumstances in which a person’s refugee status legitimately ceases under the 1951 Convention and the ‘power to unwind protection findings under section 197D has not, to date, been exercised’. In this context, the Law Council questioned the rationale for extending application of the provision, as proposed in the Bill:

The expansion of the power to broader groups in the current context raises concerns about the underlying motivation. Persons who cannot be removed to their country of origin because doing so would contravene a protection finding, but who have been found to fail the criterion for a protection visa in section 36(1)(c) due to previous criminal offending, cannot be indefinitely detained following the High Court’s decision in *NZYQ*. In this context, a culture of encouraging reconsideration and revocation of protection

¹⁰⁵ Department of Home Affairs, *Submission 75*, p. 15. Also see: Ms Stephanie Foster, Secretary, Department of Home Affairs, *Committee Hansard*, 26 March 2024, p. 9.

¹⁰⁶ Ms Stephanie Foster, Secretary, Department of Home Affairs, *Committee Hansard* 15 April 2024, p. 51.

¹⁰⁷ Law Council of Australia, *Submission 71*, p. 26, which called for these two points to be addressed. Also see: International Commission of Jurists (Australian Section), *Submission 5*, p. [2]; Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 5, which questioned the rationale for the provision; Australian Human Rights Commission, *Submission 68*, pp. 22–23.

findings so that a person can be removed is very concerning. It is likely to result in refoulement of persons in need of protection.¹⁰⁸

2.109 Law Council representative Ms Sarah Fisher commented:

Australia should respect an asylum-seeker's right to seek protection. That protection, importantly, should be durable. Persons who have been found to be owed protection shouldn't be subject to the sword of Damocles, basically, of having that finding revisited from time to time without prior notice and without the right to make submissions on whether they have continuing protection claims. It is very, very concerning.¹⁰⁹

2.110 Similarly, Mr Hughes said:

...the power of the minister to change a protection visa finding is of concern. Protection findings are part of the exercise of our obligations under the 1951 refugee convention. A discretion to change them would have a profound effect on the individuals concerned. It's unclear what the purpose of a ministerial discretion to simply change those findings is, and how and when it would be used.¹¹⁰

Departmental response

2.111 Home Affairs submitted that 'the Government now faces circumstances in which [section 197D] needs to be expanded to certain non-citizens who hold a visa – particularly BVR holders'. It explained:

The affected persons are those who have a protection finding who hold a bridging visa and are on a removal pathway following the refusal or cancellation of a visa and who have, in most cases, completed merits review and judicial review of those visa decisions. Without this amendment, the Migration Act would not provide a means to revisit a protection finding while a removal pathway non-citizen is in the community on a visa...[T]he power is intended for those non-citizens on a removal pathway – that is where they have already been refused a substantive visa or their substantive visa has been cancelled on other grounds, such as on character grounds... For non-citizens on a removal pathway, this power might be exercised if the circumstances of the person or the home country has changed such that a protection finding would no longer be made.¹¹¹

2.112 In response to the Law Council's concerns regarding procedural fairness (see paragraph 2.108 above), Home Affairs reiterated that the minister's power to reconsider protection findings under section 197D of the Migration Act is subject to common law procedural fairness:

¹⁰⁸ Law Council of Australia, *Submission 71*, p. 27. Also see: *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

¹⁰⁹ Ms Sarah Fisher, Member Migration Law Committee, Federal Dispute Resolution Section, Law Council of Australia, *Committee Hansard*, 15 April 2024, p. 17.

¹¹⁰ Mr Peter Hughes PSM, private capacity, *Committee Hansard*, 15 April 2024, p. 19.

¹¹¹ Department of Home Affairs, *Submission 75*, p. 17.

This means that the Minister or delegated decision-maker must:

- give the person prior notice that a subsection 197D(2) decision may be made;
- give the person the opportunity, either in writing or at interview, to comment on any new information (including country information) that is adverse to their claims and is significant and credible and relevant to the decision being made under subsection 197D(2), and
- draw the person's attention the critical factor/s on which the decision is likely to turn and provide them with an opportunity to respond.¹¹²

2.113 In addition, a reconsidered decision may be subject to merits and judicial review.¹¹³

Committee view

2.114 The Migration Amendment (Removal and Other Measures) Bill 2024 aims to strengthen the legislative framework in the *Migration Act 1958* in relation to the removal from Australia of certain non-citizens who are on a removal pathway.

2.115 Prior to and throughout the inquiry, the committee received information from a large number of submitters and witnesses, most of whom rejected the Bill in its entirety based primarily on human rights concerns and the perceived impacts of the Bill on individuals, families and communities.

2.116 The committee acknowledges the expertise of the Parliamentary Joint Committee on Human Rights (Human Rights Committee), which has reported to the Senate its detailed concerns about the Bill's engagement with and limitations on human rights. These concerns reflect the information presented to the inquiry. To avoid duplication, the committee refers the Human Rights Committee's recommendations to the Senate for consideration.¹¹⁴

2.117 Reflecting on the submissions and evidence, including personal accounts from those with lived experience, the committee suggests that the minister should be mindful of the impacts that the Bill could have on communities.

2.118 The committee is of the view that there are ways in which adverse outcomes could be mitigated and urges the Australian government to give further and fuller consideration to how this Bill might impact those who now call, or wish to call, Australia home.

¹¹² Department of Home Affairs, *Submission 75*, p. 17. Also see: Department of Home Affairs, answers to written questions on notice from Senator Paterson, Question 51, 17 April 2024 (received 29 April 2024).

¹¹³ Department of Home Affairs, *Submission 75*, p. 9.

¹¹⁴ Parliamentary Joint Committee on Human Rights, *Report 3 of 2024*, 17 April 2024, pp. 31, 37 and 42–43.

2.119 The committee understands that the Australian government introduced the Bill into the Parliament in response to a recent and significant change in Australia's migration law.¹¹⁵ In the committee's view, it is incumbent upon the government to ensure that the migration framework is strong and robust. The Bill seeks to achieve this objective and in the committee's view should be supported.

Recommendation 1

2.120 The committee recommends that the Minister considers community impacts when designating a country as a removal concern country.

Recommendation 2

2.121 The committee recommends that the Senate pass the Bill.

Senator Nita Green
Chair

¹¹⁵ See: *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37.

Dissenting report by Coalition Senators

Executive Summary

- 1.1 The Coalition recognises the need to protect the integrity of Australia's immigration system, and the need to ensure the levers available to Government are fit-for-purpose in the current environment.
- 1.2 While the Coalition supports the policy intent of this Bill, the Coalition continues to hold significant concerns about potential unintended consequences created by a rushed process and a persistent refusal by the Government to materially engage with substantive concerns raised by multiple stakeholders throughout the inquiry process.
- 1.3 Firstly, the Department of Home Affairs has acknowledged the Bill has the potential to serve as a pull factor for illegal boat arrivals, but the Government has failed to articulate how it will adequately mitigate this risk. Not only has the Government refused to commit additional resourcing commensurate to this additional risk, resourcing for Operation Sovereign Borders is in fact going backwards on multiple metrics. This includes a reduction in funding of \$436.5 million over the forward estimates, a decrease in aerial flying hours and maritime patrol days, and a reduction in funding for strategic communications – which is the core of the Government's strategy to mitigate the pull factor created by this legislation.
- 1.4 Secondly, the truncated ad hoc process for public consultation and parliamentary scrutiny has created significant angst amongst many stakeholders who fear the unintended consequences of this legislation – consequences that have not been sufficiently considered in the Majority Report. This is most acute for the many diaspora groups who contributed to the inquiry who raised significant concerns that the Government has not considered the impacts on families and communities this legislation might have. The fact that the Majority Report proposes no amendments to the Bill shows a flagrant disregard for the views of these groups who have earnestly engaged with the inquiry process despite the significant time constraints.
- 1.5 Finally, the Coalition continues to hold concerns about the scope of the powers contained in the bill, and the lack of sensible checks and restraints that should accompany such far-reaching legislation. These concerns go to the lack of clarity around who would be caught by this bill, lack of safeguards; transparency and parliamentary oversight for the ministerial powers contained in the bill, and human rights concerns – particularly as they relate to the interests of children and families.
- 1.6 This dissenting report provides a comprehensive treatment of these issues, and provides a number of good-faith recommendations, focused on additional

safeguards and improvements to the operation to the bill in response to the concerns raised in this inquiry, for the Government's consideration.

- 1.7 The Coalition will continue to hold the Labor Government accountable for its rushed and reckless approach to this legislation, and will continue to advocate for the Government to honestly and openly engage with the plethora of serious issues raised by stakeholders throughout the consultation process.
- 1.8 A full list of recommendations is provided at Appendix A at the end of this dissenting report.

Introduction

Support for the policy intention of the Bill

- 1.9 The Coalition supports the general policy intent of the Bill which is described in paragraphs 1.8 of the Majority Report and in section 3 of the submission of the Department of Home Affairs; namely: 'to strengthen the tools available to the Government to effect removal of non-citizens who have no right to remain in Australia'. The Coalition's position in this regard has informed its review of the Bill.
- 1.10 During the term of this Labor Government, the Coalition has raised numerous concerns with respect to the management of Australia's immigration system, including:
 - (a) net migration numbers being at unsustainable levels given housing constraints – with Labor's 'Big Australia' policy on track to bring more than one million migrants into Australia in their first term in government;
 - (b) the release of hardcore criminals who were held in immigration detention, including seven murderers, 37 sexual offenders, and 72 people who have committed very serious crimes in the community and the failure of the Labor Government to apply for preventative detention orders under powers approved by the Parliament last year in order to protect the community;
 - (c) the dismantling of Operation Sovereign Borders after the 2022 election by removing one of the key three pillars; namely, abolishing temporary protection visas;
 - (d) a 20 per cent reduction in aerial surveillance and reduced on-water patrol days by the Australian Border Force;
 - (e) an influx of more than 311 illegal arrivals on at least 13 vessels since the election; and
 - (f) budget cuts of \$436.5 million to border security over the next four years. These are all matters which need to be addressed by the Labor Government. The Coalition will continue to hold the Labor Government accountable for its failures in managing Australia's immigration system.

1.11 As it has done throughout the term of this Labor Government, the Coalition will also constructively review any policy proposals put forward by the Labor Government and provide support where the Coalition believes this is in the best interests of Australia.

Need for scrutiny – the need for this inquiry

1.12 This report has been prepared following the conclusion of an inquiry by the Legal and Constitutional Affairs Committee which was strongly resisted by the Labor Government. Other than Labor Senators, every Senator voted for the holding of this Inquiry.¹

1.13 At a press conference held on 27 March 2024, the relevant Labor Government Ministers attacked the Opposition for supporting a motion referring this Bill to the Legal and Constitutional Affairs Committee for inquiry.² In attacking the Opposition, the Ministers were also (in effect) attacking all Senators who supported the referral of this Bill to an inquiry.

1.14 The substantial number of submissions to the inquiry and the content of this report proves that the Ministers were wrong in attacking Senators seeking greater scrutiny of this Bill. The Ministers were wrong in seeking to push this Bill through the Parliament in 36 hours. The Ministers were wrong in seeking to deny stakeholders, including those with extensive experience in dealing with the issues the subject of the Bill and communities who would be impacted by the provisions of this Bill, an opportunity to have their say. The Labor Government was wrong in seeking to deny the Senate the opportunity to hold an inquiry and to consider the numerous issues of substance raised during this inquiry.

1.15 For the following reasons, the provisions of this Bill warranted very close scrutiny:

- the importance of the effectiveness of the provisions in the Bill in promoting the integrity of Australia's migration system;
- the imposition of mandatory minimum criminal penalties in the Bill;
- the scope of people subject to the powers contained in the Bill, including children and people who have not committed any serious crime (i.e. the scope of this Bill includes people outside the NZYQ cohort and people who are not currently in detention);
- the unprecedented power for the Minister to declare an entire country a so called: 'removal concern country' with material impacts upon Australian communities with connections to those countries;

¹ *Journals of the Senate*, no.108, 27 March 2024, pp. 3227–3228.

² The Hon Clare O'Neil MP and The Hon Andrew Giles MP, Joint Press Conference transcript, 27 March 2024, <https://minister.homeaffairs.gov.au/AndrewGiles/Pages/press-conference-27032024.aspx>.

- the risk of unintended consequences arising from the provisions of the Bill, including in relation to the designation of a country as a ‘removal concern country’; and
 - the significant scope of the ministerial powers as it relates to the removal directions and the designation of removal concern countries and the very limited safeguards provided for under the Bill.
- 1.16 The reports of the Scrutiny of Bills Committee (which provided 8 pages of commentary)³ and the Parliamentary Joint Committee on Human Rights (which provided 28 pages of commentary)⁴ evidence the numerous scrutiny issues connected with the Bill. Further, it is noted that the report of the Parliamentary Joint Committee on Human Rights was released on 17 April 2024, more than two weeks after the Labor Government sought to put the Bill to a vote in the Senate. If the Labor Party had have succeeded in forcing this Bill to a vote in March, the Senate would not have had the benefit of the comments from one of the key scrutiny committees of the Parliament.
- 1.17 As noted in paragraph 1.3 of the Majority Report, the committee received and published 118 submissions from organisations in response to the inquiry. Further the committee has received hundreds of submissions from individuals which have not yet been published.⁵ All of this supports the decision of the Senate that an inquiry be held into the Bill.
- 1.18 It is noted that the Majority Report proposes no amendments to the Bill. This is surprising. We are concerned that the Majority Report fails to engage with the numerous issues raised by stakeholders and multicultural communities in relation to the Bill. This is emblematic of how the Labor Government has managed this legislative process – a lack of consultation and engagement.**
- 1.19 For the reasons stated in this Dissenting Report, if the Bill is to be passed, we believe that amendments should be made to the Bill to address material issues raised during this inquiry. The Labor Government needs to engage with the material issues and concerns that have been raised in this inquiry.**
- 1.20 Given its position to date, it is an open question as to whether the Labor Government is prepared to engage in a meaningful manner to make material improvements to the Bill to address the substantial concerns which have been raised during the scrutiny process. To do so, would be to acknowledge that the Labor Government was wrong – profoundly wrong – in opposing this scrutiny process. The Coalition hopes that the Labor Government

³ Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5 of 2024, 27 March 2024, pp. 2–10.

⁴ Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, Report 3 of 2024, 17 April 2024, pp.16–43.

⁵ Paragraph 1.3 of the Majority Report.

will engage in good faith and in a constructive manner to improve the Bill and to address a number of the material scrutiny concerns which have been raised.

Impact of time and process constraints

- 1.21 It has been disappointing that due to the constraints imposed by the Labor Government, the Inquiry has suffered due to a lack of time and an inability to call all the witnesses who would have been able to further assist the inquiry. This includes parties who made submissions and sought an opportunity to be called as witnesses, including individuals who will be impacted by the Bill (if it is passed).
- 1.22 The Coalition sought additional time for hearings so that further witnesses could be called. That was denied by the Labor Government. The Labor Government should explain to potential witnesses who requested an opportunity to appear before the inquiry why the Labor Government chose to hold limited public hearings thereby denying them that opportunity to be heard. They are owed an explanation.
- 1.23 In addition, the Coalition Senators sought to call representatives of the following Departments to give evidence to the Committee:
- Department of Prime Minister and Cabinet;
 - Department of Foreign Affairs; and
 - Department of the Attorney General.
- 1.24 Again, this opportunity was denied. This is extremely disappointing; especially when one considers the following:
- The Committee was denied the opportunity to hear from the Department of Foreign Affairs in the context of legislation which would provide the Minister for Home Affairs the power to designate an entire country as a removal concern country with material consequences for the relationship between Australia and that foreign country.
 - The Committee was denied the opportunity to hear from the Department of Attorney General in the context of legislation which would impose a mandatory minimum criminal penalty of 12 months imprisonment for an offence. The Committee was denied the opportunity to engage in a detailed discussion with the Department with respect to the structure of the offence provisions and the 'reasonable excuse' defence.
- 1.25 No explanation has been provided by the Labor Government for its failure to make officers of these Departments available.
- 1.26 The time for parties to prepare submissions and respond to questions on notice has been very abbreviated. None of this is acceptable in the context of the serious nature of the powers contained in the Bill nor in the context of the potential impact of this Bill upon vulnerable people and communities.

- 1.27 The Scrutiny of Bills Committee – one of the standing committees of the Senate which applies scrutiny principles in a non-partisan manner – stated (unanimously):

The committee is of the view that truncated parliamentary processes by their nature limit parliamentary scrutiny and debate. This is of particular concern in relation to bills that may seriously impact on personal rights and liberties...

The committee notes that the standing orders of both houses of the Parliament with respect to legislation were designed in order to provide members of Parliament with appropriate time to consider and reconsider the proposals contained in the bills.

While the procedure to be followed in the passage of legislation is ultimately a matter for each House of Parliament, **the committee reiterates its consistent scrutiny view that legislation, particularly legislation that may trespass on personal rights and liberties, should be subject to a high level of parliamentary scrutiny.**⁶

- 1.28 The Scrutiny Committee raised a number of scrutiny concerns with respect to the Bill, including in relation to: (a) significant matters being contained in regulation, not legislation; and (b) broad discretionary powers.
- 1.29 The concerns of the Scrutiny Committee were echoed by a number of other organisations who made submissions.
- 1.30 The Law Council of Australia stated:

The Law Council of Australia also reiterates its objection to the rushed process for passage of this Bill, which has not allowed time for the kind of scrutiny required of such far-reaching changes to the law – changes potentially affecting tens of thousands of migrants (see further below). The Government's initial intention, as we understand it, was to pass the [Bill] with the support of the Opposition and with no committee scrutiny at all. When it became clear that was not tenable, an out-of-session meeting of this Committee was held to hear evidence from the Department of Home Affairs. Only after concerns were raised, including by some members of this Committee was the present inquiry convened. Even then, the timeline for submissions and opportunity for hearing from witnesses has been limited.

The Law Council recommends that, particularly for new laws with significant impact on rights and liberties, proper committee scrutiny (including by this Committee and the PJCHR) be the default. This default position should only be departed from in times of genuine emergency. Given the lack of justification provided to date for the measures in this Bill the Law Council does not consider there to be such an emergency in this instance.⁷

⁶ Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5 of 2024, 27 March 2024, pp. 8–9.

⁷ Law Council of Australia, Answers to questions on notice from Senator Scarr, 17 April 2024 (received 26 April 2024), p. 5.

1.31 The Refugee Advice and Casework Service stated:

RACS is grateful that the Bill is the subject of Parliamentary Scrutiny by way of this inquiry, given the very significant implications the Bill has for individual rights and liberties as well as Australia's national interest and international reputation.

RACS is concerned that rushing such radical and problematic legislation without adequate scrutiny or consultation with the communities it will impact is at odds with open and transparent government and could lead to serious implications for human rights as well as unintended drafting consequences.⁸

1.32 The Asylum Seeker Resource Centre submitted:

The ASRC echoes the concerns raised by the Senate Standing Committee for the Scrutiny of Bills regarding the Government rushing this Bill through Parliament outside usual parliamentary processes, especially in light of the significant impact on people's rights and liberties. The Government's trend of hurriedly passing complex legislation without adequate scrutiny or consultation, which significantly impacts the rights of refugees, people seeking asylum and their families, is troubling. **This type of government decision-making jeopardises our democracy and public confidence in the government's commitment to transparent governance. Plainly, it must stop.⁹**

Lack of prior consultation

1.33 The submission of the Department of Home Affairs makes it clear that there was no consultation with any organisations or stakeholders external to the Government prior to introduction of the Bill into the Parliament. The "Consultation" section of the Department's submission states:

The Department of Home Affairs has consulted relevant agencies in developing specific measures, including the Attorney-General's Department, the Department of Foreign Affairs and Trade, the Australian Federal Police and the Department of the Prime Minister and Cabinet.¹⁰

1.34 In answer to a question on notice from Senator Paterson, the Department advised:

Departmental officials did not hold meetings with community representatives in relation to the Bill in advance of its introduction to Parliament.¹¹

1.35 The Labor Government should reflect on the deep concern this legislative process has generated in many diaspora communities throughout Australia.

⁸ Refugee Advice & Casework Service, *Submission 73*, p. 3.

⁹ Asylum Seeker Resource Centre, *Submission 59*, p. 2.

¹⁰ Department of Home Affairs, *Submission 75*, p. 9.

¹¹ Department of Home Affairs, Answers to questions on notice from Senator Paterson, QoN Number 29, 26 March 2024 (received 29 April 2024).

The lack of prior consultation has meant that many communities have been blindsided by the introduction of this Bill. This is no way to make laws which would have far reaching consequences and impact some of the most vulnerable people in Australia. At the very least, this inquiry process has provided an opportunity for those communities to be heard prior to this Bill being considered by the Senate.

1.36 In relation to the lack of prior consultation, the Refugee Advisory Council stated:

The Panel is an independent group of people with lived experience of forced displacement as well as specialised policy, advocacy and legal expertise. The Panel is intended to provide a formal mechanism for meaningful refugee participation in Australia's engagement with the international refugee protection system. The Panel works to ensure that refugee perspectives, knowledge and experiences are consistently given a meaningful voice in multilateral settings relating to refugee issues...

Despite its formal advisory role, there was no consultation with the Panel ahead of introduction to the Parliament of [the Bill]. After hearing from the media about the Government's push to rush the Bill through parliament within 36 hours and without any debate or consultation, the Panel wrote to the Minister for Immigration, Citizenship and Multicultural Affairs on 27 March 2024, strongly opposing its provisions...¹²

1.37 Given the lack of prior consultation, it is even more concerning that the Labor Government sought to prevent this inquiry from occurring.

1.38 This report now turns to the provisions of the Bill.

Scope of the Bill

1.39 A key question for consideration is the scope of the Bill. Who will be subject to the giving of a removal pathway direction by the Minister? This is especially important because the consequence of failing to comply with a removal pathway direction is the imposition of a mandatory minimum criminal penalty of 12 months imprisonment.

1.40 Section 199B provides as follows:

- (1) Each of the following is a *removal pathway non-citizen*:
 - (a) an unlawful non-citizen who is required to be removed from Australia under section 198 as soon as reasonably practicable;
 - (b) a lawful non-citizen who holds a Subclass 070 (Bridging (Removal Pending)) visa;
 - (c) a lawful non-citizen who:
 - (i) holds a Subclass 050 (Bridging (General)) visa; and
 - (ii) at the time the visa was granted, satisfied a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia;

¹² Refugee Advisory Council, *Submission 99*, pp. 1–2.

(d) a lawful non-citizen who holds a visa prescribed for the purposes of this paragraph.

1.41 In his second reading speech, the Minister for Immigration, Citizenship and Multicultural Affairs stated:

There are currently non-citizens in Australia who have exhausted all visa pathways to stay in Australia, who have been found not to be owed protection, but who refuse to engage with their home country to undertake actions like applying for a passport or attending meetings with officials from that country.¹³

1.42 The Department reflected the phrase: “exhausted all visa pathways” (albeit with some minor variation) in its submission to this inquiry. The Department stated:

Without legislative amendments, the Migration Act would not provide a means to robustly and appropriately manage a non-citizen on a bridging visa granted to resolve their immigration status in the community while pursuing their departure or removal. **These are people who have exhausted all avenues to remain in Australia, and in respect of whom the Government is lawfully entitled to, or is required under the Migration Act to, progress their departure or to seek removal...**¹⁴

Importantly, this Bill does not expand the cohort of people who are eligible for removal from Australia. The proposed legislative amendments apply only in respect of non-citizens who have exhausted all avenues to remain or for whom the Government is lawfully entitled or indeed required under the Migration Act to seek removal.¹⁵

The cohorts of non-citizens falling within the scope of the Bill

1.43 The Bill would potentially apply to the approximately 150 persons who fall within the cohort released from detention following the NZYQ case and were granted a Removal Pending Bridging Visa. As stated above, the NZYQ cohort includes non-citizens with serious criminal convictions. It was in the context of this cohort that the Senate passed the Migration Amendment (Bridging Visa Conditions) Act 2023 which imposed a mandatory minimum criminal penalty of 1 year imprisonment for failing to comply with monitoring conditions, failing to comply with a curfew requirement (remaining at an address at notified times) or failing to comply with requirements relating to a monitoring device.¹⁶

1.44 The Bill would also potentially apply to a further estimated 150 to 200 unlawful non-citizens in immigration detention in Australia who the Department describes as follows:

¹³ The Hon Andrew Giles MP, Minister’s second reading speech, 26 March 2024, p. 1.

¹⁴ Department of Home Affairs, *Submission 75*, p. 6.

¹⁵ Department of Home Affairs, *Submission 75*, p. 9.

¹⁶ Refer to ss. 76B to 76DA of the *Migration Act 1958*, as amended by the *Migration Amendment (Bridging Visa Conditions) Act 2023*.

There are currently between 150 to 200 unlawful non-citizens in immigration detention in Australia who have no lawful basis to remain in Australia and who are refusing to cooperate with efforts to remove them from Australia. There is a clear need to address removal of this cohort and ensure Australia's migration laws and the expectations of the Australian community are well understood.¹⁷

- 1.45 The Department then comments on a further cohort of non-citizens covered by the Bill as follows:

There are additionally some bridging visa holders in the community with conditions relating to their removal from Australia who also have no valid reason for further stay in Australia and who are refusing to cooperate with removal efforts....

The amendments in this Bill are therefore directed towards those non-citizens who have exhausted all options to stay in Australia on a substantive visa but who do not cooperate with our efforts to remove them and as a consequence cannot currently be removed from Australia.¹⁸

- 1.46 In relation to the number of people who may be captured by the Bill (including the cohort referred to immediately above), in an answer to a question on notice asked by Senator Paterson on 26 March 2024, the Department responded as follows:

As at 31 January 2024, 25,533 people held Bridging E visas (BVEs). Of those individuals, 4,453 had BVEs granted on the basis that the non-citizen satisfied a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia.

The 4,453 people noted above are in various stages of engagement in the departure and removals pathway, including preparations to depart voluntarily.

The Department estimates that approximately 1,200 people from this cohort may require cooperation to issue a travel document, or may not be able to be involuntarily returned and therefore are required to depart voluntarily.¹⁹

- 1.47 In a follow up question on notice asked by Senator Paterson on 14 April 2024 (which is restated in full for ease of reference), the following response was provided by the Department:

Senator Paterson:

The department gave evidence to this committee that the removal directions powers could apply to about 4,400 people but that the intention of the government is to only exercise these powers to a subset of 1,200 of that total

¹⁷ Department of Home Affairs, *Submission 75*, p. 5.

¹⁸ Department of Home Affairs, *Submission 75*, p. 5.

¹⁹ Department of Home Affairs, Answers to questions on notice from Senator Paterson, QoN Number 2, 26 March 2024 (received 29 April 2024).

cohort who may have issues with cooperating with their departure. How many in this cohort have a serious criminal record?

Answer:

As at 31 March 2024, there were 4,463 Bridging E visas (BVEs) in effect on the basis that the holder satisfied subclause 050.212(2) of Schedule 2 to the Migration Regulations 1994 (referred to as a 'departure BVE', where the BVE has been granted to a person to facilitate a departure from Australia).

Of those noted above, as at 31 March 2024, it was estimated that approximately 1,218 BVE holders may have issues obtaining a travel document or would require cooperation from the individual to issue a travel document – subject to their individual circumstances, and pending the finalisation of any other immigration processes. This number was provided as an estimate of an example cohort and to provide an example of how the Bill may be applied. Each individual's ability to obtain a travel document will depend on their individual circumstances, including whether they engage in voluntary departure from Australia.

This data request is unable to be provided within standard data reporting. The data is unable to be manually collated in the allocated time.²⁰

1.48 Hence, the Department of Home Affairs was unable to provide an answer to the question regarding how many of the cohort of 1,218 BVE holders may have a serious criminal record.

1.49 In answer to a question on notice from Senator Scarr in relation to the scope of the Bill, the Law Council of Australia stated:

Finally, it remains unclear how many people may fall within the category set down in proposed paragraph 199B(1)(c). We note that the Department indicated in their evidence that 4,463 people may fall within it but, based on pipelines known to the Migration Law Committee of the Law Council's Federal Dispute Resolution Section, the figure is likely to be far greater.

According to the latest information available, 2,466 people in the 'legacy caseload' are likely to be subject to removal directions, and up to 29,571 people who have been refused a permanent protection visa may also be directly affected or affected if they do not engage in removal processes after these changes come into effect.²¹

Does the Bill only apply to non-citizens who have 'exhausted all avenues' to stay in Australia?

1.50 Following the hearing on 15 April 2024, Senator Scarr put a number of questions on notice to each of the Law Council of Australia, the Human Rights Law Centre, the Australian Human Rights Commission and the Kaldor Centre for International Refugee Law, including in relation to whether or not the scope of

²⁰ Department of Home Affairs, Answers to written questions on notice from Senator Paterson, QoN Number 54, 17 April 2024 (received 29 April 2024).

²¹ Law Council of Australia, Answers to questions on notice from Senator Scarr, 17 April 2024 (received 26 April 2024), p. 8.

section 199B was limited to: ‘people who have exhausted all avenues to remain in Australia’ as submitted by the Department of Home Affairs. A number of concerns were raised.

1.51 The Australian Human Rights Commission responded:

The Commission recognises the Department has provided evidence as to the intent of the legislation to only apply to those on a removal pathway. However, the Commission is concerned that the drafting of the Bill is insufficiently explicit to alleviate concerns that people could be captured by the legislation, who are not intended to be.²²

1.52 The Australian Human Rights Commission then gave three examples to support its concern:

- A person granted a Bridging E Visa on the ground that the person is making acceptable arrangements to depart from Australia where there is no such intention or expectation. For example, a woman who has been the victim of domestic violence, has Australian citizen children, but does not have a visa in her own right.
- A person who is statutorily barred from applying for a Bridging E Visa and the Minister has not (thus far) ‘lifted the bar’ to allow an application for a visa. They may be waiting for their case to be referred to the Minister. This person may have proceedings on foot with respect to their protection claims, but could be captured unintentionally by the legislation.
- An unlawful non-citizen is in detention with judicial review proceedings on foot. Their visa application may have been rejected and ‘finally determined’ for the purposes of merits review, but they still have judicial review proceedings on foot.

1.53 Whilst the Australian Human Rights Commission is of the view that the Bill should not be passed, it proposed two amendments to address the issue. First, amending the definition of ‘removal pathway citizen’ so that it explicitly excludes any person who had judicial review proceedings on foot or who has any other basis to remain in Australia (e.g. a family court proceeding). Second, insert a procedural fairness step whereby a person is given notice that the Minister is considering issuing a removal pathway direction. This would then provide an opportunity for the person to explain why their removal is not appropriate.²³

1.54 In responding to the same question, the Human Rights Law Centre advised:

²² Australian Human Rights Commission, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 23 April 2024), p. 1.

²³ Australian Human Rights Commission, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 23 April 2024), pp. 2–3.

We do not agree that the Bill is limited to people who have exhausted all avenues to remain in Australia or to people the government is entitled to remove from Australia.²⁴

1.55 In relation to the categories of visas referred to in section 199B, the Human Rights Law Centre advised:

None of these categories are contingent upon a person having first exhausted all avenues to remain in Australia. Instead the categories are framed exclusively by reference to a person's current visa status. Because of this, all of the categories could include people who have pending migration processes...²⁵

1.56 The Human Rights Law Centre then provided case studies to support its argument:

- a. A person whose protection visa application was refused through the 'fast track' process is seeking judicial review through the courts. Due to the operation of the statutory bar in section 46A of the Migration Act, the person is not able to apply for a bridging visa so could become subject to the proposed directions power. (In this regard, it should be noted that in its response to questions on notice, the Kaldor Centre submitted: 'From 2015 to 2023, 37% of judicial review applications relating to decisions made by the Immigration Assessment Authority ("IAA") were successful, resulting in cases being remitted back to the IAA for reconsideration'²⁶ – these statistics heighten the importance of giving due consideration to outstanding judicial review applications in relation to IAA 'fast track' determinations).
- b. A migrant worker who is exploited and bullied by an unscrupulous employer. He has successfully obtained compensation from the previous employer. He is seeking Ministerial Intervention to stay in Australia.
- c. A woman who is a victim-survivor of domestic violence is awaiting permission from the Minister to make a further protection visa application that raises new claims relating to family violence and her fear of being the victim of an honour killing if she is returned to her country of origin. While awaiting Ministerial intervention, she has been granted a Bridging Visa E on departure grounds and would be considered a removal pathway non-citizen.

²⁴ Human Rights Law Centre, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 24 April 2024), p. 1.

²⁵ Human Rights Law Centre, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 24 April 2024), pp. 1–2.

²⁶ Kaldor Centre for International Refugee Law, UNSW, Answers to written questions on notice from Senator Paul Scarr, 17 April 2024 (received 24 April 2024), p. 4.

- d. An Afghan asylum seeker who has sought permission from the Minister under section 48B of the Migration Act to lodge a new protection visa application due to the increased risk of harm that he faces in Afghanistan following the fall of Afghanistan to the Taliban. In the meantime, he has been given a direction requiring him to facilitate his departure to Afghanistan. In relation to this scenario, the Human Rights Law Centre further advises: 'it is deeply concerning that the Department's advice to people...who have been failed by the fast-track system is to lodge a request for ministerial intervention, despite the Department presumably being aware that a pending request would not prevent the person from being issued a removal pathway direction'.²⁷

1.57 The Human Rights Law Centre also argues:

It is also important to clarify that the directions power is not limited to people who are subject to removal.... Under s.198 of the Act, the government's power to remove a person from Australia is only enlivened with respect to people who do not hold a visa ('unlawful non-citizens') and only under certain circumstances. But people in the second, third and fourth categories are all visa holders for whom the power to remove is not presently engaged...

If the power to issue removal pathway directions was intended to be limited as identified in the Department's submission, proposed section 199B would need to be entirely re-drafted so that visa status was not the exclusive criterion. However, we remain of the strong view that no amendments would render the Bill compatible with human rights...²⁸

1.58 The Kaldor Centre made a number of observations in relation to the question put to them. First, that there is a difference between people who are not entitled to international protection and can be removed from Australia consistent with international law, and those who have 'exhausted all avenues to remain in Australia'. Second, the Bill is not limited in its application to non-citizens affected by the NZYQ decision.

1.59 The Kaldor Centre then made the following comments with respect to whether or not the Bill was limited to those 'who have exhausted all avenues to remain in Australia':

Again it is important to draw a distinction between people who have had their protection claims 'finally determined' under the Migration Act 1958 (Cth), and those who have 'exhausted all avenues to remain in Australia.

Under the Migration Act, an application is considered 'finally determined' when all avenues for merits review...have been exhausted. Proposed

²⁷ Human Rights Law Centre, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 24 April 2024).

²⁸ Human Rights Law Centre, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 24 April 2024), p. 3.

section 199D of the Bill would prevent the Minister from issuing a removal pathway direction to a non-citizen who has made a valid application for a protection visa which has not yet been finally determined.

However, a person whose protection visa application has been finally determined in this sense may nevertheless have other avenues to remain in Australia. Notably proposed section 199C would give the Minister the power to give removal pathway directions to non-citizens who have pending judicial review or ministerial intervention requests, and therefore have not 'exhausted all avenues to remain in Australia'...

While proposed section 199D(6) does place certain limitations on the Minister's power to give removal pathway directions in relation to specified actions involving court or tribunal proceedings, there is nothing in the Bill that would preclude the Minister from issuing directions to a person to cooperate in their removal while they are preparing to lodge a judicial review application or indeed while a judicial review application is ongoing...

Removing protection visa applicants from Australia before their judicial review applications or ministerial intervention requests are finalised further increases the risk that people with protection needs may be forced to return to countries where they would be at risk of persecution or other forms of serious harm, in breach of Australia's international obligations.²⁹

- 1.60 In responding to the question whether the current drafting of the Bill only includes those persons: 'who have exhausted all avenues to remain in Australia', the Law Council of Australia responded as follows:

The short answer to the question is no, because the cohort can be expanded by an instrument made by the Executive which may not be subject to the disallowance process.

...the way the provision is drafted would not prevent a person who is on a Bridging Visa E on departure grounds being removed if the individual had judicial review proceedings in progress or a ministerial intervention request unanswered, as the operation of the relevant power is only dependent on the bridging visa the individual holds. The Law Council does not consider this to be a principled approach to restricting the cohort affected by the Removal Bill to individuals who have 'exhausted all avenues to remain in Australia'...³⁰

Currently, the way section 199B is drafted does not meet the Department's stated intention that it only apply to those on a removal pathway, as it clearly could cover a far broader range of persons, including those who may exercise their right to judicial review. There is no requirement to consider

²⁹ Kaldor Centre for International Refugee Law, UNSW, Answers to written questions on notice from Senator Paul Scarr, 17 April 2024 (received 24 April 2024).

³⁰ Law Council of Australia, Answers to questions on notice from Senator Scarr and Senator Thorpe, 17 April 2024 (received 26 April 2024), pp. 6–7.

ongoing migration processes, nor, for that matter, any other processes such as family court proceedings or any other matter...³¹

- 1.61 It should be noted that in evidence during the inquiry, the Group Manager, Legal of the Department advised that the Department would not attempt to affect the removal of someone while they have judicial proceedings on foot due to the risk of the person obtaining an injunction preventing their removal. Also refer to the intention of the Department as expressed by the Group Manager, Legal at paragraph 2.17 of the Majority Report. However, with all due respect, the issue should be dealt with explicitly in the Bill; especially given the consequence of failing to respond to a removal direction notice is the imposition of a mandatory minimum criminal penalty of 12 months.

Comments

- 1.62 On the basis of the strong submissions received by the Committee, there is a disconnect between the drafting of section 199B(1) and the stated intention of the Department of Home Affairs and the Minister that the section should only apply to persons ‘who have exhausted all avenues to remain in Australia’. Section 199B should be amended to align the scope of the section with the intention of the Minister and the Department. Both the Law Council of Australia and the Australian Human Rights Commission proposed amendments which should be adopted in this regard.

Recommendation 1

- 1.63 Proposed subsection 199B(1) be amended to reflect the Government’s stated intention that the cohort of ‘removal pathway non-citizens’ be only those individuals who have neither legal proceedings (relevant to their migration status) on foot, nor any pending ministerial intervention requests. Alternatively, consideration could be given to amending section 199D(2) to expand the circumstances in which a removal pathway direction cannot be given to include circumstances where judicial review proceedings are still on foot or there is an outstanding application for Ministerial intervention.**

Subsection 199B(1)(d) – expansion of visa categories

- 1.64 Under section 199B(1)(d), the Minister would have the power to expand the category of visas which would make the holders “removal pathway non-citizens.” As discussed at paragraphs 2.20 to 2.22, there was strong opposition to the inclusion of this clause.

- 1.65 With respect to that power, the Department stated:

The Department recognises that there has been commentary about proposed subsection 199B(1)(d) which provides the flexibility to prescribe categories

³¹ Law Council of Australia, Answers to questions on notice from Senator Scarr and Senator Thorpe, 17 April 2024 (received 26 April 2024), p. 8.

of visa holders who could be brought under the meaning of removal pathway non-citizen, if necessary to do so in the future. Importantly, this Bill does not expand the cohort of people who are eligible for removal from Australia, that is non-citizens who have exhausted all avenues to remain or for whom the Government is lawfully entitled or indeed required under the Migration Act to seek removal. Nor does prescribing a visa under the power in and of itself make that person liable for removal. The power at subsection 199B(1)(d) is intended [to] provide flexibility, should another type of visa be determined the most appropriate visa for non-citizens to maintain lawful status in the community while making arrangements to depart or be removed from Australia, in the same way the BVR is used for this purpose. Any regulations made to prescribe a visa for the purposes of subsection 199B(1)(d) would be subject to scrutiny and disallowance by the Parliament.³²

1.66 In responding to the explanatory memorandum's stated need for 'flexibility', the Scrutiny of Bills Committee stated:

While noting this explanation, the committee is of the view that the ability to expand the scope of people that may be subject to removal pathway directions is a significant matter that would more appropriately be dealt with by way of primary rather than delegated legislation. This is particularly the case due to the fact that, as discussed below, the failure to comply with a removal pathway direction is a serious offence carrying a severe maximum penalty and a minimum penalty of 1 year imprisonment.

The committee does not consider that the justification provided in the explanatory memorandum is sufficient, noting that the need for flexibility in the circumstances of the legislative scheme is not fully explained or balanced against the potential impact that the provision could have on individuals.

The committee's concerns are heightened in this instance as paragraph 199B(1)(d) is applicable to lawful non-citizens who have been granted a visa permitting residence in Australia, who may have lived in Australia lawfully for an extended period and have no certainty or clarity as to when a visa may be subject to a removal pathway direction.³³

1.67 In response to a question on notice asked by Senator Scarr, this view was echoed by each of the Law Council of Australia, the Human Rights Law Centre, the Australian Human Rights Commission and the Kaldor Centre.³⁴

³² Department of Home Affairs, *Submission 75*, p. 11.

³³ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2024*, 27 March 2024, para. 1.4, p. 3.

³⁴ Law Council of Australia, Answers to questions on notice from Senator Scarr, 17 April 2024 (received 26 April 2024); Australian Human Rights Commission, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 23 April 2024); Human Rights Law Centre, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 24 April 2024); Kaldor Centre for International Refugee Law, UNSW, Answers to written questions on notice from Senator Paul Scarr, 17 April 2024 (received 24 April 2024).

Comments

1.68 Given the nature of the penalties which would be imposed for failure to comply with a removal pathway direction; namely, the imposition of a mandatory minimum criminal penalty of 12 months imprisonment, the expansion of the categories of visas should be carefully circumscribed. As explained by the Department, there may be circumstances where the Department needs the flexibility to act through regulation. In such a case, the clause which provides the Minister with the power needs to clearly: (a) qualify the nature of visas which are intended to fall within the regulation making power; and (b) state that the delegated legislation is subject to the usual disallowance process (which the Department advised is the intention).

1.69 In relation to the first issue, the wording of subsection 199B(1)(d) is not qualified in any way. This needs to be addressed. The Department of Home Affairs stated in its submission that:

The power at subsection 199B(1)(d) is intended [to] provide flexibility, should another type of visa be determined the most appropriate visa for non-citizens to maintain lawful status in the community while making arrangements to depart or be removed from Australia, in the same way the BVR is used for this purpose.³⁵

1.70 The drafting of the subsection should reflect this intention.

Recommendation 2

1.71 Subsection 199B(1)(d) be amended to clarify that the power only applies to additional visas issued for non-citizens to maintain lawful status in the community while making arrangements to depart or be removed from Australia.

1.72 In relation to the disallowance issue, there is no requirement for a prescription made under subsection 199B(1)(d) to be made by disallowable regulation. This has raised a concern that the prescription could be made by some delegated legislation which is not subject to the same disallowance procedure as a regulation. Refer to the answers to questions on notice provided by the Law Council of Australia.³⁶

1.73 In response to a question on notice from Senator Paterson, the Department advised as follows:

The Department confirms that the way the Bill is drafted is consistent with the Government's intention that any legislative instrument made under proposed paragraph 199B(1)(d) is subject to parliamentary scrutiny and disallowance. Paragraph 199B(1)(d) refers to 'a visa prescribed for the

³⁵ Department of Home Affairs, Submission 75, p. 11.

³⁶ Law Council of Australia, Answers to questions on notice from Senator Scarr, 17 April 2024 (received 26 April 2024), p. 8, p. 15.

purposes of this paragraph'. The word 'prescribed' engages section 504 of the *Migration Act 1958*, which provides that the Governor-General may make regulations prescribing all matters which under the Act are required or permitted to be prescribed.³⁷

1.74 Hence, it is clear that the Department intends that any expansion of the visa categories should be made through disallowable regulations. This is appropriate. Given the significance of this matter and the concerns raised by the legal experts, all doubt with respect to the application of the disallowance process should be removed by explicitly referring to the need to make a regulation. In its submission, the Law Council of Australia gave an example of other provisions in the Migration Act which specifically refer to 'prescribed by regulations'.³⁸

Recommendation 3

1.75 Subsection 199B(1)(d) should be amended to specifically refer to prescription by regulation under section 504 of the Migration Act 1958 to remove any doubt that the exercise of the power will be by way of delegated legislation subject to disallowance.

Power to give a removal pathway direction

1.76 Section 199C of the Bill details the powers of the Minister to give a written notice to a removal pathway non-citizen. Heightened scrutiny of the powers is required given that non-compliance would constitute a criminal offence providing for a mandatory minimum criminal penalty of 12 months imprisonment.

1.77 The Law Council of Australia raised a number of concerns with respect to the power under section 199C; namely: (a) the scope of the powers; (b) the absence of indicators of procedural fairness; (c) the absence of objective considerations; (d) the human rights implications, including with respect to the impact on a family unit, the best interests of children and the impact on persons subject to the power; and (e) the directions themselves may give rise to a person having to do something which may make them subject to persecution.³⁹

1.78 In relation to the position of children, the Law Council of Australia notes:

We particularly underline the rights of the child in this context. While the Minister must not give a removal pathway direction to a removal pathway non-citizen if the non-citizen is a child under 18, the Minister may give a

³⁷ Department of Home Affairs, Answers to written questions on notice from Senator Paterson, 17 April 2024 (received 29 April 2024), QoN Number 59.

³⁸ Law Council of Australia, Answers to questions on notice from Senator Scarr, 17 April 2024 (received 26 April 2024), p. 8.

³⁹ Law Council of Australia, *Submission 71*.

direction to the parent or guardian of a child to do something on the child's behalf. This power may be exercised despite Australia's obligations under the Convention on the Rights of the Child, which require that, in all actions concerning children, the best interest of the child shall be a primary consideration. This requirement is absent from section 199D...

Instead, extraordinarily, parents are coerced – under the threat of criminal sanction and at the risk of mandatory imprisonment – to themselves undertake the steps for removal of their children, regardless of their fears for their wellbeing...⁴⁰

1.79 Similar concerns were raised by the Australian Human Rights Commission which stated:

The Commission is concerned that the Bill seeks to allow for a removal pathway direction to be provided to the parent or guardian of a child. The Bill, as drafted, does not include sufficient detail as to what factors must be considered prior to such an extreme measure being taken...

The Commission considers that, prior to issuing a direction with respect to a child, an assessment should be made of what the child's best interests are...⁴¹

1.80 In relation to the potential separation of families, the Australian Human Rights Commission states:

The Bill does not clearly address the issue of whether, by issuing a direction with respect to a child, that child may become separated from one or both parents...Separation could occur by a child being removed from Australia away from a parent remaining in Australia, or through a parent being removed from a child who will remain in Australia.

The potential for separation from family should be included as a mandatory factor to be considered when assessing the best interests of the child...⁴²

1.81 The Australian Human Rights Commission also raised concerns regarding the right of the child to have their views heard. Moreover, the Australian Human Rights Commission raised the risk of child statelessness or the feasibility of a parent or guardian being able to comply with a removal pathway direction issued with respect to the child. Examples were provided with respect to the impact of the operation of laws in other countries where the mother may not be able to confer nationality on her child. In this regard, the Australian Human Rights Commission submits:

The issue should be required to be considered prior to the issuing of a direction, rather than allowing it to be a 'reasonable excuse' to be

⁴⁰ Law Council of Australia, *Submission 71*, p. 12.

⁴¹ Australian Human Rights Commission, *Submission 68*, pp.11–12.

⁴² Australian Human Rights Commission, *Submission 68*, pp. 12–13.

determined by a criminal court and where the onus is on the person relying on the excuse to establish it.⁴³

1.82 With respect to operational safeguards which may be in place within the Department of Home Affairs, the Australian Human Rights Commission noted:

The Commission is aware that the Department has a child safeguarding policy statement, entitled the Child Safeguarding Framework ('CSF'), which is informed by Australia's international obligations. This is supported by policy and procedural documents, including the Best interest of the Child – Policy Statement (DM-5721). The Commission has not been in a position to view these documents prior to drafting this submission. These however are policy statements, and subject to amendment at any time.⁴⁴

1.83 Further concerns in relation to the breadth of the legislative language are detailed in paragraphs 2.25 to 2.29 of the Majority Report.

1.84 The Department responded to the concerns raised by stakeholders by referring to the safeguards and constraints contained in the Bill. Refer to paragraphs 2.30 to 2.32 of the Majority Report. Further, the Secretary of the Department explicitly confirmed that the Department would consider the best interests of the child (refer to paragraph 2.51 of the Majority Report).

Comments

1.85 In the context of a Bill which proposes the imposition of mandatory minimum criminal penalties, it is important that relevant safeguards are included in the Bill. In this regard, policy and procedural documents not contained in the Bill provide inadequate protection. In relation to the best interests of children, this is a matter of such significance that it should be dealt with explicitly in the Bill. There were several other helpful suggestions made with respect to how the Bill could be amended to address other concerns raised by stakeholders. These included the suggestion of the Scrutiny of Bills Committee that: (a) the Bill provide for a minimum time for compliance which would: 'allow a person to take steps to comply and seek legal advice';⁴⁵ and (b) 'better delimitation of the directions that may be given by the minister.' There was support from each of the Law Council of Australia and the Australian Human Rights Commission for these suggestions.

Recommendation 4

1.86 The Bill be amended to insert a requirement after section 199D(5) that, prior to giving a removal pathway direction in relation to any child, the Minister must conduct an assessment of whether the direction is in the best interests

⁴³ Australian Human Rights Commission, *Submission 68*, p. 14.

⁴⁴ Australian Human Rights Commission, *Submission 68*, p. 12.

⁴⁵ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2024*, 27 March 2024, para. 1.5, p. 3.

of the child, as one of the factors to be considered by the Minister prior to making a removal pathway direction.

Recommendation 5

1.87 Consideration be given to amending the Bill to provide for the additional safeguards proposed by the Scrutiny of Bills Committee in relation to the Minister's power to give removal pathway directions; namely: (a) providing a minimum time for compliance which would allow a person to take steps to comply and seek legal advice; and (b) better delimitation of the directions that may be given by the Minister.

Imposition of a mandatory minimum criminal penalty of 12 months' imprisonment

1.88 Section 199E of the Bill would impose a mandatory minimum criminal penalty of 12 months' imprisonment for non-compliance with a removal pathway direction. It is extraordinarily rare that a mandatory minimum criminal penalty is legislated under Australian law. As stated by the Scrutiny of Bills Committee:

While the committee acknowledges that the penalty and minimum sentence are intended to reflect the seriousness of the offence and act as deterrents, the committee reiterates its longstanding view that the use of mandatory minimum sentences impedes judicial discretion. The committee reiterates that the courts should not be limited in their ability to impose sentences with regard to the circumstances of the offending.⁴⁶

1.89 It is noted that the Parliament has recently enacted legislation providing for a mandatory minimum criminal penalty. This applied to offences committed by members of the so called NZYQ cohort who breach conditions imposed upon their Removal Pending Bridging Visas. The NZYQ cohort includes non-citizens with serious criminal convictions. The imposition of the conditions is directly linked to the safety threat they pose to the community.

1.90 It was in the context of this cohort that the Senate passed the *Migration Amendment (Bridging Visa Conditions) Act 2023* which imposed a mandatory minimum criminal penalty of 1 year imprisonment for failing to comply with monitoring conditions, failing to comply with a curfew requirement (remaining at an address at notified times) or failing to comply with requirements relating to a monitoring device.⁴⁷

1.91 However, as noted above, the persons falling within the scope of section 199B(1) is considerably larger than the NZYQ cohort – it includes persons who have not

⁴⁶ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2024*, 27 March 2024, para. 1.8, p. 4.

⁴⁷ Refer to ss. 76B to 76DA of the *Migration Act 1958*, as amended by the *Migration Amendment (Bridging Visa Conditions) Act 2023*.

committed any previous criminal offence. In many cases, they are vulnerable persons who have suffered great trauma over a long period of time and are fearful of being returned to their country of origin. However, the Bill would impose the same mandatory minimum criminal penalty to someone who has never committed a previous criminal offence as would apply to a convicted criminal within the NZYQ cohort who breaches a monitoring condition, fails to comply with a curfew requirement or interferes with a monitoring device.

1.92 In commenting on the minimum mandatory criminal penalty, the Department submitted as follows:

The offence of non-compliance with a direction intended to gain the cooperation of a removal pathway non-citizen is regarded by the Government as similarly serious in terms of frustrating migration law, as well as damaging the integrity of Australia's migration and temporary entry programs.

Non-cooperation demonstrates a disregard for Australia's laws and the Department's ability to manage the arrival and departure of non-citizens effectively...⁴⁸

1.93 The Department refers to laws in the United States and submits:

The United States has a similar provision where an individual wilfully fails or refuses to make timely application in good faith for travel or other documents necessary to their departure, which has a maximum sentence of 4 years (or up to 10 in certain circumstances, in effect since 1996).⁴⁹

1.94 However, in relation to the laws in the United States, the Australian Human Rights Commission noted:

The Commission would like to clarify a point made in its submission at [66], with respect to whether other jurisdictions have similar criminal provisions as proposed by the Bill. The Department referred to the US as having a similar offence...the Commission would like to point out that the US provision includes important judicial discretion as follows:

The Court may for good cause suspend the sentence of an alien under this subsection and order the alien's release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as:

- (a) the age, health, and period of detention of the alien;
- (b) the effect of the alien's release upon the national security and public peace or safety;
- (c) the likelihood of the alien's resuming or following a course of conduct which made or would make the alien deportable;

⁴⁸ Department of Home Affairs, *Submission 75*, p. 13.

⁴⁹ Department of Home Affairs, *Submission 75*, p. 13.

- (d) the character of the efforts made by such alien himself and by representatives of the country or countries to which the alien's removal is directed to expedite the alien's departure from the United States;
- (e) the reason for the inability of the Government of the United States to secure passports, or other travel documents, or removal facilities from the country or countries to which the alien has been ordered removed; and
- (f) the eligibility of the alien for discretionary relief under the immigration laws.⁵⁰

1.95 In commenting upon the imposition of the mandatory minimum criminal penalty, the Parliamentary Joint Committee on Human Rights commented as follows:

The statement of compatibility states that the objective of a mandatory minimum sentence is to provide a strong deterrent to non-cooperation, stating that 'if a non-citizen understands that they are facing a minimum term of imprisonment for non-cooperation then it is more likely they will comply with a direction to cooperate with efforts to remove them'. However, it also states that the inability of a court to impose a period of imprisonment of less than 12 months, or a pecuniary penalty only, if the person is convicted, 'may mean there could be a risk of incompatibility with the right in Article 9 of the ICCPR in some circumstances'...

In relation to the right to a fair trial, the statement of compatibility states that there is a risk that mandatory minimum sentencing is incompatible with the right to have a sentence reviewed by a higher tribunal according to law 'because mandatory sentencing prevents judicial discretion in relation to the severity or correctness of a minimum sentence'...

In order for detention not to be considered arbitrary under international human rights law it must be reasonable, necessary and proportionate in the individual case. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy). As mandatory sentencing removes judicial discretion to take into account all of the relevant circumstances of a particular case, it may lead to the imposition of disproportionate or unduly harsh sentences of imprisonment. In the context of a removal pathway direction, were a person to breach the direction by, for example, failing to fill in a passport application form in time, it may be that a mandatory sentence of one year in prison is a disproportionate punishment...

Consequently, as the measure would impose a mandatory minimum penalty without the possibility for any judicial discretion, the measure is incompatible with the right to liberty and to a fair trial...

In relation to mandatory minimum criminal penalties for any non-compliance with such a direction, the committee considers these to be incompatible with the rights to liberty and to a fair trial, as mandatory sentencing removes judicial discretion to take into account all of the relevant

⁵⁰ Australian Human Rights Commission, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 23 April 2024), p. 11.

circumstances of a particular case and may lead to the imposition of disproportionate or unduly harsh sentences of imprisonment (and the appropriateness of which cannot be reviewed by a higher court)..⁵¹

- 1.96 In the Majority Report there is a reference to the matters raised by the Parliamentary Joint Committee on Human Rights. In the Coalition's view, this reference is inadequate. There is a link between the concerns raised by the Parliamentary Joint Committee on Human Rights and the consideration which should be given to the Bill by this Committee. In a Bill which includes a mandatory minimum criminal penalty, there is an elevated obligation to ensure that appropriate safeguards are contained in this Bill. There is a link between the penalty the Bill seeks to impose, and the safeguards required to protect against injustice. This makes the case for additional safeguards to be inserted in the Bill more compelling.

Recommendation 6

- 1.97 The imposition of mandatory minimum criminal penalties elevates the need for additional safeguards to be inserted into the Bill through amendment (including through the amendments proposed in recommendations 1 to 5 of this report). Proposed amendments to the Bill should be considered in this context.**

Transparency in relation to exercise of power

- 1.98 Given the onerous nature of the powers which would be granted under the Bill, there should be a requirement for regular reporting with respect to the use of the powers. This should be through the tabling of a report to Parliament. In this way, the Parliament will be provided an opportunity to assess how the powers are being utilised, the regularity of exercise of the powers, and other relevant matters.
- 1.99 The Coalition proposed amendments in the House of Representatives which provided for a statement to be provided to both Houses of Parliament with respect to each removal pathway direction. The information provided would include: (a) the non-citizen's country of origin; (b) any visas held by the non-citizen; (c) whether the non-citizen is a serious offender for the purposes of Division 395 of the Criminal Code. The statement would not provide information revealing the identity of the non-citizen.⁵²

⁵¹ Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 3 of 2024*, 17 April 2024, pp. 16–43.

⁵² House of Representatives proposed amendments by Mr Dan Tehan MP.

Recommendation 7

1.100 Within seven days of the end of each month, the Minister should be required to provide a statement to be tabled in Parliament in relation to each removal pathway direction which is given by the Minister during the month with the detail proposed by the Coalition in its amendments to the Bill moved in the House of Representatives.

The designation of a country as a removal concern country

1.101 Proposed section 199F would empower the Minister to designate a country as a so-called removal concern country if the Minister considers it would be in the 'national interest' to designate the country to be a removal concern country.

1.102 At the outset, it should be noted that there are doubts with respect to the likelihood of the power to designate a country as a removal concern country to impact the policy positions of foreign countries; especially autocratic regimes. Whilst examples were provided by the Department of Home Affairs in relation to the impact of the exercise of such powers by the United States with respect to the policies of Guyana and Guinea, it is perhaps somewhat obvious to observe that Australia is not the United States, nor is Russia/Iran equivalent to Guyana/Guinea. However, it is noted that the Department considers that the availability of the power may be a tool which can be applied to convince foreign countries to accept the return of their citizens who are found to have no right to be in Australia.

1.103 The other policy issue which needs to be considered is the potential for unintended consequences to flow from the designation of a country as a removal concern country. This includes: (a) the impact on Australia diaspora communities; and (b) whether such a declaration may generate a 'pull factor'. We deal with these issues below.

Preconditions for declaration

1.104 As detailed in paragraph 1.33 of the Majority Report, there are only two preconditions for the exercise of the power; namely the Minister must first consult with the Prime Minister and the Minister for Foreign Affairs.

1.105 In its discussion of the power, the Department of Home Affairs stated:

Designation would only take place after a range of bilateral considerations were taken into account, and all reasonable and appropriate efforts and attempts had been made to engage the country to cooperate and facilitate the lawful removal of its nationals. In practice, the removal concern country designation would be considered following diplomatic and government to government engagement on the issues and challenges of returns before it is utilised.⁵³

⁵³ Department of Home Affairs, *Submission 75*, p. 15.

1.106 However, as noted by the Law Council of Australia, the Human Rights Law Centre, the Kaldor Centre and the Australian Human Rights Commission in answers to questions on notice asked by Senator Scarr, none of the pre-requisites are included in the drafting of the Bill.⁵⁴

1.107 This differs materially from the comparable UK provision which provides a number of considerations which must be taken into account under section 72 of the Nationality and Borders Act 2022 (UK). Given the absence of these considerations, the Law Council of Australia describes the powers as: ‘effectively unconstrained and open-ended’.⁵⁵

1.108 In answers to questions on notice, the Kaldor Centre expressed its strong opposition to the power, noting:

The blacklisting of entire countries may have significant economic, diplomatic and security implications for Australia which warrant careful consideration and consultation with all areas of government. Additionally, from a human centred perspective, punishing people who may wish to work, study in or visit Australia for the actions of their government is punitive – particularly when the countries are non-democratic autocracies.⁵⁶

1.109 In its answers to questions on notice, the Kaldor Centre provided helpful comments in relation to the use of such powers by the UK, the United States and the European Union.

1.110 In contrasting the proposed model under the Bill with the law applying in other jurisdictions, the Kaldor Centre submitted:

By contrast, the Australian model (proposed sections 199F and 199G) envisages that the Minister for Immigration may, ‘by legislative instrument, designate a country as a removal concern country if the Minister thinks it is in the national interest to designate the country to be a removal concern country.’ The power must be exercised personally and the Minister is only required to consult with the Prime Minister and the Minister for Foreign Affairs. The designation automatically covers all visa subclasses, except for those minor exceptions for immediate family members of Australian citizens/permanent residents and humanitarian entrants.

There is no flexibility in the way the bill is drafted for more targeted provisions focusing on specific visa subclasses. None of the issues considered by the US, UK or EU are mentioned in the bill – indeed, there is no indication of the factors that might lead the Minister to make such a

⁵⁴ Australian Human Rights Commission, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 23 April 2024); Human Rights Law Centre, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 24 April 2024); Kaldor Centre for International Refugee Law, UNSW, Answers to written questions on notice from Senator Paul Scarr, 17 April 2024 (received 24 April 2024).

⁵⁵ Law Council of Australia, Answers to questions on notice from Senator Scarr, 17 April 2024 (received 26 April 2024), p. 12.

⁵⁶ Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 8.

designation other than ‘think[ing] it is in the national interest’, nor any requirement for such a decision to be periodically reviewed.⁵⁷

1.111 In answers to questions on notice, the Human Rights Law Centre stated:

It is also important to clarify that the power to designate removal concern countries in proposed section 199F is not limited to countries that are unwilling to facilitate the removal of their nationals from Australia. There is nothing in the Bill that limits the Minister’s power in this manner. Instead, the Minister can designate any country that the Minister thinks it is in the “national interest” to designate with no objective statutory criteria to inform that assessment and no express statutory purpose to guide such a designation.⁵⁸

1.112 Whilst recommending that the power to declare a country as a removal concern country should be deleted, the Australian Human Rights Commission recommended that if the power was to remain in the Bill:

The Commission recommends that the Bill be redrafted to include within section 199F of Schedule 1, a set of factors that must be considered prior to the Minister exercising their power to designate a removal concern country. The Bill should also include a mandatory review period.⁵⁹

1.113 In relation to the concept of a review period, it is noted that there is no obligation upon the Minister to designate a period during which a country will be designated a removal concern country. In response to a question on notice from Senator Paterson, the Department stated:

There is no requirement or related power in the Bill for the Minister to specify the duration or period of effect for a designation. Instead, proposed s 199F(3) provides a power for the Minister to revoke the designation at any time after it is made – for example, if a designated removal concern country were to change its position and begin cooperating with Australia in line with the expectations set out in proposed s 199A(2).⁶⁰

1.114 Again, it is noted that the basis for revocation is simply the ‘public interest’. The drafting of the Bill is not precise with respect to the circumstances in which a declaration would be lifted.

1.115 Concerns in relation to the power were raised by a range of organisations representing diaspora groups, including: Hindus for Human Rights ANZ; the Multicultural Youth Advocacy Network; the Zimbabwe Australia Cultural Association; the Kurdish Society of Queensland; the Australian Iranian

⁵⁷ Kaldor Centre for International Refugee Law, UNSW, Answers to written questions on notice from Senator Paul Scarr, 17 April 2024 (received 24 April 2024), pp. 9–10.

⁵⁸ Human Rights Law Centre, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 24 April 2024).

⁵⁹ Australian Human Rights Commission, *Submission 68*, p. 5.

⁶⁰ Department of Home Affairs, Answers to written questions on notice from Senator Paterson, 17 April 2024 (received 29 April 2024), QoN number 46.

Community Alliance; and the Queensland African Communities Council.⁶¹ Refer to paragraphs 2.70 to 2.76 of the Majority Report.

1.116 Finally, it should be noted that the introduction of the Bill without prior consultation has caused considerable distress to diaspora communities. In its submission, the Australian Iranian Community Alliance Inc. attached a survey of the impact of the Bill upon the Australian Iranian community and noted:

An overwhelming 82% of respondents reported moderate to extreme levels of stress and anxiety due to the Bill, highlighting a significant deterioration in mental health across the community, largely driven by the fear of family separation and the instability of their future in Australia...

The potential blacklisting under the bill would influence major life decisions for 85% of the participants, including career paths, family planning, and financial investments, indicating widespread apprehension about establishing long-term plans in Australia...⁶²

1.117 The concern this Bill has caused in diaspora communities due to the lack of prior consultation is very unfortunate.

Comments

1.118 It is noted that the intent of the power is to: 'gain cooperation of that country in accepting and facilitating the removal from Australia of their citizens'. However, the prospect of a blanket prohibition (with very limited exceptions) of travel from a country is causing great concern amongst diaspora communities, and hence the exercise, or potential exercise, of this power may have a negative impact on diaspora communities.

1.119 In relation to any declaration made by the Minister, it is important that the impact on local communities should be considered by the Minister. As the introduction of this Bill has evidenced, the making of any declaration will cause considerable distress in the impacted communities. Further, it is also important that any decision to declare a country as a removal concern country be reviewed on a regular basis either by the Minister or an appropriate Parliamentary Committee; for example the Parliamentary Joint Standing Committee on Intelligence and Security.

Recommendation 8

1.120 The power to declare a country as a removal concern country be redrafted to require the Minister to consider a set of factors which must be considered

⁶¹ See: Queensland African Communities Council, *Submission 6*; Kurdish Society of Queensland, *Submission 33*; Zimbabwe Australia Cultural Association, *Submission 34*; Amnesty International Australia Victorian Activism and Leadership Committee, *Submission 35*; Multicultural Youth Advocacy Network Australia (MYAN), *Submission 46*; Australian Iranian Community Alliance, *Submission 74*.

⁶² Australian Iranian Community Alliance, *Submission 74*, p. 21.

prior to making a designation (e.g. those factors required to be included under the analogous UK legislation), including the potential impact on Australian diaspora communities of making such a declaration.

Recommendation 9

1.121 The Minister and/or the Parliamentary Joint Committee on Intelligence and Security be required to review the decision to declare a country as a removal concern country on a regular basis and be required to table in both Houses of Parliament the reasons why continued designation of a country as a removal concern country is justified.

Disallowance and Sunsetting

1.122 The instrument declaring a country a removal concern country is not subject to disallowance. This was confirmed by the Department in its answer to a question on notice asked by Senator Paterson. The Department advised:

A legislative instrument made under proposed s 199F(1) to designate a country as a 'removal concern country' would be exempt from disallowance under s 42 of the Legislation Act 2003. Paragraph 44(2)(b) of the Legislation Act provides for legislative instruments to be prescribed by regulation as exempt from disallowance under s 42 of the Act. Item 20 in the table under section 10 of the Legislation (Exemptions and Other Measure) Regulation 2015 (LEOMR) provides that legislative instruments (other than regulations) made under Part 2 of the Migration Act 1958 are exempt from disallowance. As proposed s 199F would be inserted in Part 2 of the Migration Act, and the Bill does not include a provision to expressly displace the exemption under the Legislation Act, a legislative instrument made under s 199F(1) would be covered by the exemption in s 10 of the LEOMR.⁶³

1.123 It is noted that the Explanatory Memorandum does not make this clear. Nor did the submission by the Department of Home Affairs to this Inquiry. It is unsatisfactory that it has required questions on notice to clarify such an important point of scrutiny.

1.124 In this regard, the Department's answer to a subsequent question on notice from Senator Paterson in relation to this disallowance issue was as follows:

If there had been an intention to make a legislative instrument made under s 199F(1) disallowable, the Bill would have included an amendment to expressly displace the exemption under s 44 of the Legislation Act 2003 and provide for the instrument to be disallowable under s 42 of that Act.⁶⁴

1.125 It is unsatisfactory for the Department to expect the Parliament to peer into the inner workings of the Legislation Act 2003 and its intersection with the

⁶³ Department of Home Affairs, Answers to written questions on notice from Senator Paterson, 17 April 2024 (received 29 April 2024), QoN number 44.

⁶⁴ Department of Home Affairs, Answers to written questions on notice from Senator Paterson, 17 April 2024 (received 29 April 2024), QoN number 45.

Migration Act 1958 in order to determine if an instrument will be subject to disallowance. This should be made clear either in the Bill or the Explanatory Memorandum or in the written Submission of the Department of Home Affairs. In this case, it was not.

1.126 With respect to the issue of whether a declaration should be subject to disallowance, the following is noted:

- a. The Scrutiny of Bills Committee considered the issue of such significance that the matter should only be dealt with through legislation, not through delegated legislation.⁶⁵
- b. The circumstances when delegated legislation should be exempted from disallowance are extremely narrow. Given the international connotation of any such declaration and the potential impact on the effectiveness of Australia's engagement with foreign countries in relation to complicated foreign policy matters, there is justification for considering that a declaration should not be subject to disallowance. However, that justification needs to be expressly set out in the Explanatory Memorandum – the reasons need to be explained. In this regard, the previous resolution of the Senate is noted to the following effect:
 - (1) That the Senate notes:
 - (a) the Constitution vests the legislative power of the Commonwealth in the Federal Parliament;
 - (b) if the Parliament is to satisfy this constitutionally mandated role, it must have the ability to scrutinise all legislation made by the executive; and
 - (c) exemptions from disallowance and sunseting undermine the ability of the Parliament, and particularly the Senate, to undertake this scrutiny.
 - (2) That the Senate resolves:
 - (a) delegated legislation should be subject to disallowance and sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances; and
 - (b) any claim that circumstances justify exemption from disallowance and sunseting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.⁶⁶

⁶⁵ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2024*, 27 March 2024, para. 1.23, p. 7.

⁶⁶ [Accountability – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au) (16 June 2021 J.3581)

- a. Given the impact that the declaration of a removal concern country would have on the wellbeing of members of diaspora communities (who are represented by elected members of Parliament), it is imperative that prior to any declaration being made there is consideration given to the impact on diaspora community and appropriate consultation (refer to Recommendation 8 above).
- b. If the declaration is not subject to disallowance, it is even more important that a declaration is subject to sunseting – a measure which was supported by the Australian Human Rights Commission and the Law Council of Australia,⁶⁷ and also similarly recommended by the Parliamentary Joint Committee on Human Rights.⁶⁸ It should not be left entirely to the discretion of the Minister. A period of three years may be considered appropriate.

Recommendation 10

1.127 The reasons for a declaration of a country as a removal concern country not being subject to disallowance should be clearly explained in the Explanatory Memorandum. If a declaration is not subject to disallowance that elevates the need for further details to be provided in the Bill with respect to the circumstances in which a declaration would be made (refer to Recommendation 9).

Recommendation 11

1.128 Any declaration of a country as a removal concern country should be subject to sunseting after three years.

Exemption from visa ban arising from declaration of country as a removal concern country

1.129 Section 199G(2) of the Bill sets out exemptions to the bar on new visa applications from nationals of removal concern countries. In relation to family members, this includes where the non-citizen is:

- a. The spouse, de facto partner or dependent child (within the meaning of the regulations) of:
 - (i) an Australian citizen;
 - (ii) the holder of a permanent visa that is in effect;

⁶⁷ Public hearing, Committee Hansard, 15 April 2024, pp. 4 and 13.

⁶⁸ Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report 3 of 2024*, 17 April 2024, para. 1.78 (b), p. 37.

(iii) a person who is usually resident in Australia and whose continued presence in Australia is not subject to a limitation as time imposed by law; or

(c) the non-citizen is the parent of a child who is under 18 and is in Australia.⁶⁹

1.130 As outlined in paragraphs 2.80 to 2.86 of the Majority Report, there were strong submissions made with respect to the inadequacy of these exemptions. In particular, concerns were raised that the exemption would not include parents of independent children, grandparents, siblings and people who are culturally considered to be close family. It is noted that the Minister has indicated that exemptions could be granted. However, as is always the case with such exemptions, there are legitimate concerns with respect to processing times and the capacity of the Department to administer such applications given limitations on resources.

1.131 It is also noted that the Parliamentary Joint Committee on Human Rights recommended that references to dependent child in the Bill should be amended to refer to 'dependent person' to reflect non-western kinship systems.⁷⁰

1.132 Given the intention of the power is not to punish Australian diaspora communities, it is recommended that the scope of the exemption be expanded.

Recommendation 12

1.133 That the exemptions under section 199G(2) from the prohibition on applying for visas should be expanded to include: parents of independent children, grandparents, siblings and dependent persons (to take into account non-western kinship systems as suggested by the Parliamentary Joint Committee on Human Rights).

Potential unintended consequences arising from declaration of country as a removal concern country – mitigating against potential pull factors

1.134 The question arises as to whether the declaration of a country as a removal concern country could have unintended consequences.

1.135 In its submission, the Department of Home Affairs stated:

Some people smugglers may seek to use some of the measures in the proposed legislation to market their services to vulnerable potential irregular immigrants, suggesting there is no legal way for them to travel to Australia. This risk would be mitigated through targeted strategic communications particularly if a 'removal concern country' were to be designated under sections 199F and 199G of the Bill, highlighting that the

⁶⁹ Section 199G(2)(b) and (c) of the Bill.

⁷⁰ Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report 3 of 2024*, 17 April 2024, para. 1.78 (b), p. 37.

proposed measures allow the continuation of humanitarian and family pathways for regular migration.⁷¹

1.136 It should be noted that when questioned in relation to the matter by Senator Paterson, the Department provided the following comments:⁷²

Senator PATERSON:

Ms Foster, on page 6 of your submission you say:

Some people smugglers may seek to use some of the measures in the proposed legislation to market their services to vulnerable potential irregular immigrants, suggesting there is no legal way for them to travel to Australia.

You then go on to talk about some possible mitigations to that risk through strategic communications. I'll come to the mitigations in a moment, but which are the parts of the legislation that you're concerned may be used by people smugglers to send that message?

Ms Foster:

I think the statement that's being made is one that's general, but I will pass to Rear Admiral Sonter to articulate the rationale behind that statement.

Rear Adm. Sonter:

It's not a new risk. We constantly know that the people smugglers monitor the Australian political domestic environment for key decisions or policy changes, whether real or perceived, to market to the unfortunate people that we see. Strategic communication is a tool that I have and have had for many years

Senator PATERSON:

I'll come to that. I've got some questions about that, but I want to establish the factual basis of your statement first, because it doesn't seem general in nature to me.

It says 'some of the measures in the proposed legislation', so it's clearly relating to this bill in some way.

Which are the measures in the proposed legislation that you are concerned could be misused by people smugglers in this way?

Rear Adm. Sonter:

My concern is that they would take any element of that particular bill and they would actually articulate it in a non-truthful manner. Again, as I say, we are constantly countering that with agile strategic communications.

Senator PATERSON:

So it's not the power to designate a country as a 'country of concern' and ban people from applying for visas? That's not the power?

Rear Adm. Sonter:

⁷¹ Department of Home Affairs, *Submission 75*, p. 6.

⁷² Public Hearing, *Hansard transcript*, 15 April 2024, p. 49.

That's not what I'm specifically talking to. It's more, as I say, some aspects which are general. We know that people smugglers take it, they take it into their own language and they try and sell it as the idea that our strong borders are no longer the case.

Senator PATERSON:

Rear Admiral, were you involved in preparing this submission?

Rear Adm. Sonter:

I was.

Senator PATERSON:

Is this particular part of the submission based on your advice?

Rear Adm. Sonter:

It is.

Senator PATERSON:

Why didn't you say in the submission what you just said then, which is that people smugglers are liars, they'll say anything and it doesn't matter what our legislation is—they'll tell desperate people anything? You didn't say that; you said 'some measures in the proposed legislation'.

Rear Adm. Sonter:

In hindsight, I probably should have. That's my mistake. But my indication, as I'm talking to you now, is that it's more on a generic basis, where they take the whole proposal and try and sell it.

Senator PATERSON:

Right. You go on to say that strategic communications can mitigate this risk. How significant do you think this risk is? How likely do you think it is that this bill will be misused in this way?

Rear Adm. Sonter:

Again, we know that people smugglers look at any changes, whether they are real or perceived, and they sell them, so we are constantly strategic messaging to make sure that vulnerable people understand what is right and what is not truthful.

1.137 The concern is that imposition of a prohibition (in most cases) upon applying for visas could lead to potential visa applicants seeking alternative irregular ways to come to Australia. This could be leveraged by people smugglers to promote their business model. The same point was made by the Australian Refugee Advisory Panel who advised:

In fact, this Bill will encourage people to seek asylum through irregular means leading to an increase in people smuggling activity.⁷³

1.138 Rear Admiral Sonter gave further evidence to this committee that Operation Sovereign Borders (OSB) was “in the midst of already getting that

⁷³ Australian Refugee Advisory Panel, *Submission 99*, p. 4.

additional resourcing in terms of more funding for strategic communications” and suggested that OSB is receiving “in the order of \$20 million a year for strategic messaging”, which included additional money to the baseline funding of \$8.5 million per year.⁷⁴ He clarified that there is no additional funding for strategic communications affiliated directly with this bill.⁷⁵

1.139 Rear Admiral Sonter explained this communications strategy is utilised in over 11 countries in 16 different languages, and that the effectiveness of this strategy is measured by a quantitative and qualitative inspection of how many people click and see this messaging. Rear Admiral Sonter admitted to the committee that “deterrence is always hard to measure”.

1.140 However, it is disappointing to discover in answers to follow-up questions on notice that Rear Admiral Sonter’s evidence on the funding levels for strategic communications was completely incorrect: the Department has admitted that total funding for OSB’s strategic communications is going down – not up – as initially suggested. The Department reveals:

The total budget for [OSB] strategic communications was \$17.1 million in 2022-23. \$2.9 million was subject to movement of funds from 2022-23 to 2023-24, resulting in a budget of \$14.1 million in 2022-23 and \$13.9 million in 2023-24. Any additional funding for 2024-25 to supplement the base funding of \$8.5 million is a decision for Government.⁷⁶

1.141 The downward trajectory of funding for strategic communications is deeply concerning at a time when our borders are being seriously challenged by people smuggling operators with 13 illegal boat arrivals with three illegal boats reaching the Australian mainland. These concerns are compounded by the fact the ABF has conceded that there is a 20.7% decrease in aerial flying hours and a 12.2% fall in maritime patrol days in 2022-23, compared to 2020-21 levels.⁷⁷ This weakening of our border security is an inevitable result of a cumulative cut of at least \$436.5 million over the forward estimates, and it is in this context that concerns of possible pull factors created by this bill should be viewed.⁷⁸

1.142 Given that the Government has conceded that this bill may be exploited by the people smugglers to market their illegal trade to vulnerable people to “[suggest]

⁷⁴ Public hearing, Committee Hansard, 15 April 2024, p. 50.

⁷⁵ Public hearing, Committee Hansard, 15 April 2024, p. 51.

⁷⁶ Department of Home Affairs, answers to written questions on notice from Senator Paterson, 15 April 2024 (received 1 May 2024), QoN number 5.

⁷⁷ Geoff Chambers, Simon Benson, Paige Taylor, *The Australian*, 20 February 2024, <https://www.theaustralian.com.au/nation/politics/ageing-fleet-and-pilot-shortage-cuts-aerial-and-maritime-patrols/news-story/ce8e000ed97137afaa72a7094d823998>.

⁷⁸ Department of Home Affairs, 2023-24 Portfolio Additional Estimates Statement, p. 49.

there is no legal way for them to travel to Australia”,⁷⁹ it is imperative that the Government undertake a comprehensive review of all mitigating measures that could be implemented to address any ‘pull factors’ arising from this Bill. That should include assessing additional resources which should be deployed to support such initiatives. Moreover, the Government should take action to restore the Operation Sovereign Borders framework in full, including through the reinstatement of temporary protection visas, reversing budget cuts to border protection, and restoring maritime and aerial surveillance levels to at least the levels in 2020-21.

Recommendation 13

1.143 That Government should:

- **undertake a comprehensive review of all mitigating measures (and resourcing requirements for such measures) beyond strategic communications that may be required to mitigate any potential ‘pull factors’ that may arise from the Bill; and**
- **commit to agreeing to implement such measures in the event the Bill is passed to ensure that any ‘pull factors’ are mitigated to the full extent practical.**

Recommendation 14

1.144 The Government should restore the Operation Sovereign Borders framework in full by: (a) reinstating temporary protection visas; (b) reversing the budget cuts to border protection; and (c) restoring maritime patrols and aerial surveillance levels to at least the levels in 2020-21.

Miscellaneous matters

1.145 There are a number of further matters which warrant comment.

Independent Statutory Review

1.146 Given the onerous nature of the powers under the Bill, an independent statutory review should be undertaken with respect to the exercise of the powers after 5 years. The review should be open to submissions from the public with respect to the exercise of the powers.

Recommendation 15

1.147 A statutory review should be undertaken with respect to the exercise of the powers under the Bill after five years of operation. The review should be open to public submissions.

⁷⁹ Department of Home Affairs, *Submission 75*, p. 6.

Intention of paragraph 199B(1)(c)

1.148 Finally, it is noted that the intention is that paragraph 199B(1)(c) is not to capture holders of subclass 050 Bridging (General) Visas who have received such visas in circumstances other than for the purpose of a final step before departure.⁸⁰

Recommendation 16

1.149 It is recommended that a note to drafting be added to proposed section 199B to clarify the Department's intention not to capture other holders of Subclass 050 (Bridging) General Visas.

Conclusion

1.150 The above amendments are proposed in good faith to advance consideration of the Bill. The Bill provides the Minister with substantial new powers. The removal direction power may result in the imposition of minimum mandatory criminal penalties; namely, 12 months imprisonment. The designation of a removal concern country would have material impacts on Australian diaspora communities. In all the circumstances, it is imperative that the Bill have appropriate safeguards.

Recommendation 17

1.151 Given the nature of the powers granted to the Minister under the Bill, it is recommended that the Bill be amended as detailed in this report to provide additional safeguards.

**Senator Paul Scarr
Deputy Chair**

**Senator Alex Antic
Member**

**Senator James Paterson
Participating Member**

⁸⁰ Explanatory memorandum to the bill, para. 20, p. 8.

Appendix A: List of recommendations

Recommendation 1

Proposed subsection 199B(1) be amended to reflect the Government's stated intention that the cohort of 'removal pathway non-citizens' be only those individuals who have neither legal proceedings (relevant to their migration status) on foot, nor any pending ministerial intervention requests. Alternatively, consideration could be given to amending section 199D(2) to expand the circumstances in which a removal pathway direction cannot be given to include circumstances where judicial review proceedings are still on foot or there is an outstanding application for Ministerial intervention.

Recommendation 2

Subsection 199B(1)(d) be amended to clarify that the power only applies to additional visas issued for non-citizens to maintain lawful status in the community while making arrangements to depart or be removed from Australia.

Recommendation 3

Subsection 199B(1)(d) should be amended to specifically refer to prescription by regulation under section 504 of the Migration Act 1958 to remove any doubt that the exercise of the power will be by way of delegated legislation subject to disallowance.

Recommendation 4

The Bill be amended to insert a requirement after section 199D(5) that, prior to giving a removal pathway direction in relation to any child, the Minister must conduct an assessment of whether the direction is in the best interests of the child, as one of the factors to be considered by the Minister prior to making a removal pathway direction.

Recommendation 5

Consideration be given to amending the Bill to provide for the additional safeguards proposed by the Scrutiny of Bills Committee in relation to the Minister's power to give removal pathway directions; namely: (a) providing a minimum time for compliance which would allow a person to take steps to comply and seek legal advice; and (b) better delimitation of the directions that may be given by the Minister.

Recommendation 6

The imposition of mandatory minimum criminal penalties elevates the need for additional safeguards to be inserted into the Bill through amendment (including through the amendments proposed in recommendations 1 to 5 of this report). Proposed amendments to the Bill should be considered in this context.

Recommendation 7

Within seven days of the end of each month, the Minister should be required to provide a statement to be tabled in Parliament in relation to each removal pathway direction which is given by the Minister during the month with the detail proposed by the Coalition in its amendments to the Bill moved in the House of Representatives.

Recommendation 8

The power to declare a country as a removal concern country be redrafted to require the Minister to consider a set of factors which must be considered prior to making a designation (e.g. those factors required to be included under section 72 of the UK's Nationality and Borders Act 2022), including the potential impact on Australian diaspora communities of making such a declaration.

Recommendation 9

The Minister and/or the PJCIS be required to review the decision to declare a country as a removal concern country on a regular basis and be required to table in both House of Parliament the reasons why continued designation of a country as a removal concern country is justified.

Recommendation 10

The reasons for a declaration of a country as a removal concern country not being subject to disallowance should be clearly explained in the Explanatory Memorandum. If a declaration is not subject to disallowance that elevates the need for further details to be provided in the Bill with respect to the circumstances in which a declaration would be made.

Recommendation 11

Any declaration of a country as a removal concern country should be subject to sunset after three years.

Recommendation 12

That the exemptions under section 199G(2) from the prohibition on applying for visas should be expanded to include: parents of independent children, grandparents, siblings and dependent persons (to take into account non-western kinship systems as suggested by the Parliamentary Joint Committee on Human Rights).

Recommendation 13

That Government should:

- (a) undertake a comprehensive review of all mitigating measures (and resourcing requirements for such measures) beyond strategic communications that may be required to mitigate any potential 'pull factors' that may arise from the Bill; and

(b) commit to agreeing to implement such measures in the event the Bill is passed to ensure that any 'pull factors' are mitigated to the full extent practical.

Recommendation 14

The Government should restore the Operation Sovereign Borders framework in full by: (a) reinstating temporary protection visas; (b) reversing the budget cuts to border protection; and (c) restoring maritime patrols and aerial surveillance levels to at least the levels in 2020-21.

Recommendation 15

A statutory review should be undertaken with respect to the exercise of the powers under the Bill after five years of operation. The review should be open to public submissions.

Recommendation 16

It is recommended that a note to drafting be added to proposed section 199B to clarify the Department's intention not to capture other holders of Subclass 050 (Bridging) General Visas.

Recommendation 17

Given the nature of the powers granted to the Minister under the Bill, it is recommended that the Bill be amended as detailed in this report to provide additional safeguards.

Dissenting report by the Australian Greens

- 1.1 The Migration Amendment (Removal and Other Measures) Bill 2024 (the Bill) should be rejected in full. This Bill is divisive and cruel legislation that fundamentally undermines social cohesion in Australia and stokes racism.
- 1.2 Not since the White Australia policy has a proposal by the Federal Government been so fundamentally against the spirit and intent of multiculturalism in Australia or been such an open and intentional threat to diaspora communities in the country.
- 1.3 The overwhelming rejection of this Bill from community groups, legal experts, international human rights organisations and charities shows the lack of public support for this measure.
- 1.4 With over 120 published submissions to the Senate Standing Committee on Legal and Constitutional Affairs inquiry, only one, submitted from the Department of Home Affairs (Home Affairs or Department), supported this Bill.
- 1.5 I cannot recall another occasion when the government of the day, with all its resources, persuasion and connections, has been unable to corral even a single organisation to support its legislative agenda. This is an unprecedented level of rejection.
- 1.6 This Bill has three broad elements. First, creating a blacklist of certain countries where citizens of that country can no longer seek a visa, similar to US President Donald Trump's 2017 travel ban.¹
- 1.7 Second, it creates a new ministerial power to issue a direction to a person on a bridging visa (or any other class of visa specified on the regulations) to facilitate their (or their child's) removal to a country they fled, attend an interview, report to a Home Affairs officer or provide any documents demanded. If the person does not comply with the direction they will be sentenced to a mandatory minimum of one year in prison and a maximum of five.
- 1.8 Finally, this Bill provides a new power to allow the Immigration Minister to overturn the visas of refugees who have already been provided protection.
- 1.9 Using this power, a mother and her children who fled a country like Iran—and went through an unfair refugee system in Australia—could have the protection finding overturned by the minister. Then the mother could be ordered to seek a passport from the country they fled or face years in jail. At the same time,

¹ The only exemptions to this ban is a small class of individuals who are children aged under 18 of an Australian resident, the parent of a child aged under 18 who is in Australia or the spouse of a person in Australia.

the minister can prevent anyone from her family in Iran from visiting her, by preventing all Iranians from accessing a visa to Australia.

Process

- 1.10 This Bill was introduced into the House of Representatives by the Labor government on 26 March 2024 and was rammed through that chamber later that day. The Albanese government said on introducing it that the Bill was essential, urgent and desperately needed in the national interest.
- 1.11 Efforts by Greens MPs and independents to prevent the Bill's rushed passing were repeatedly rejected by the government that used its numbers to override all parliamentary procedures designed to scrutinize laws.
- 1.12 On being introduced into the Senate the next day a snap two-hour inquiry was held that night, and it was nothing short of a train wreck for the government.
- 1.13 A panel of government witnesses could not answer the most basic questions about the Bill such as who would be impacted by it, which countries it was targeting or even why it was needed.
- 1.14 A generous description of that process would be shambolic.
- 1.15 As a result, a motion was then moved in the Senate by the Greens, as amended by the Coalition, to refer this Bill to this inquiry. Thank goodness we did.

Travel/Visa ban

- 1.16 This Bill will introduce an effective travel ban to selected countries, which the government has not yet specified. This will punish people born in a certain country for the actions of their government.
- 1.17 The government said in introducing the Bill that this new power was aimed at countries that were not cooperating with the forced removal of their citizens from Australia. When introducing the Bill the government listed Iran, Iraq, South Sudan and Russia as examples of such countries.
- 1.18 The obvious initial question communities are asking the government is which other countries are they intending to blacklist? On behalf of the Greens I asked this question of Home Affairs during the inquiry. The Secretary of Home Affairs had initially said she had 'not brought the list' to the inquiry. Then denied the existence of any such list.
- 1.19 Remarkably, when asked on notice in this inquiry which countries were allegedly not cooperating with Australia, the minister refused to specify the countries and made a claim of 'public interest immunity' to avoid answering alleging:

In relation to the damage to Australia's international relations and national security, the disclosure of this information would likely impact Australia's ability to positively engage with mentioned country partners through diplomatic avenues, and to pursue the removal of unlawful non-citizens

from Australia in the future. This harm to the ability to remove unlawful non-citizens from Australia in the future would have a flow on prejudice to the integrity of the wider migration system and the deterrent effect of Operation Sovereign Borders.²

1.20 This is an extraordinary proposition. The government has said it wants these powers to be able to compel other countries, with the threat of a visa ban if they don't comply, to accept forced removals. If the threat is never made, and the countries are never identified, then it can never be effective.

1.21 The obvious conclusion as to why the government is refusing to say which countries they will target with these powers is because it is politically damaging to them to admit the truth. The Labor government is hiding behind a wall of secrecy because they know listing the countries they want to target will be damaging, not only to Australia's international relations but to their support in the diaspora communities they are attacking with these appalling laws.

1.22 Proposed subsection 199F(1) would allow the Minister to designate a country as a 'removal concern country'.

1.23 This would ban anyone from that country seeking a visa to Australia, with minor exceptions that will be addressed later.

1.24 This has drawn widespread criticism, and has clear parallels to former US President Donald Trump's 2017 'Muslim Ban'.

1.25 As Refugee Advice and Casework Service in its submission said:

The provisions of the Bill that seek to prevent the entry to Australia of citizens from certain declared nations (called 'concern countries') is reminiscent of the 'Muslim ban' imposed by then President of the United States Donald Trump in 2017. This was widely seen as discriminatory and harmful to the American people and economy, and proposed section 199F of the Bill risks the same criticisms.³

1.26 While the ban will not include Refugee and Humanitarian (Subclass XB) visas in proposed paragraph 199G(2)(d) this aspect of the Bill will still prevent refugees from seeking safety and it will separate families. The Asylum Seeker Resource Centre explained:

While the entry ban will not apply to Refugee and Humanitarian (Subclass XB) visa applicants, the entry ban will still apply to refugees entering Australia on other visas such as parent, tourist, work and study visas. As processing times for Refugee and Humanitarian visas can take several years, refugees who are eligible for other types of visas sometimes apply via these pathways to escape harm and reunite with family. However, the entry

² Minister for Immigration, Hon Andrew Giles MP, Public Interest Immunity claim provided in response to written questions on notice from Senator Shoebridge and Senator Paterson to Department of Home Affairs, 17 and 19 April 2024 (received 29 April 2024), p. 2.

³ Refugee Advice and Casework Service, *Submission 73*, p. 12.

ban will prevent refugees from accessing safety and family reunion via these pathways.⁴

1.27 There are a tiny number of further exemptions made for children under the age of 18 and people with spouses in Australia in proposed section 199G, but these are clearly inadequate. This Bill would allow the government to permanently separate children over the age of 18 from their parents, as well as separate brothers and sisters, grandparents, uncles, aunts, cousins, adult children and their parents. This is not to mention friends, work colleagues, students and tourists.

1.28 This extremely restrictive view of family will have deeply destabilising impacts on diaspora communities in Australia. As the Zimbabwe Australia Cultural Association noted:

The Zimbabwean community, like many other culturally and linguistically diverse (CALD) communities, has more expansive views of the family that do not narrow family merely to the nuclear family, which is the case in the exemptions in s 199G.

Consequently, the narrow exemption scope within the Bill may increase the number of incidents of forced family separations of the above classes of people, who are not captured by the exemption.⁵

1.29 Not a single community group supports this Bill due to the devastating implications for diaspora communities in Australia and the threat it poses to the social fabric of the country. Multicultural Australia in its submission said:

This move is discriminatory and risks eroding the principles of fairness and equality – critical to our migration system...[Multicultural Australia] particularly notes that such a move has significant social cohesion implications for Australia.⁶

1.30 This comment was supported by the Federation of Ethnic Communities Councils of Australia, which said:

The discriminatory nature of the Bill also risks marginalising existing communities from the banned countries within Australia, undermining the Government's efforts to support and promote social [cohesion].⁷

1.31 Democracy in Colour addressed what they saw as the core of this law in its statement: 'it is our considered view that the travel ban is a racist law'.⁸

1.32 Apart from its discriminatory and offensive nature, this aspect of the Bill is also misconceived. A former very senior immigration official with some 30 years of

⁴ Asylum Seeker Resouce Centre, *Submission 59*, p. 12.

⁵ Zimbabwe Australia Cultural Association, *Submission 34*, p. 3.

⁶ Multicultural Australia, *Submission 67*, p. 2.

⁷ Federation of Ethnic Communities Councils of Australia, *Submission 69*, p. 5.

⁸ Democracy in Colour, *Submission 88*, p. 6.

experience in the portfolio, Mr Peter Hughes, gave evidence that the ban will be ineffective even if implemented, as this exchange makes clear:

Senator **SHOEBRIDGE**: This bill puts no parliamentary oversight on the proposal to blacklist countries. It puts no process other than a bare consultation process with two other ministers. If a government were going to propose such an expansive new power, would you find it surprising that it didn't come with any of those checks and balances?

Mr **Hughes**: Nothing surprises me, because different governments make decisions in their own ways. I will say, however, about the issue of visa sanctions against countries as a way of getting cooperation in return that, having worked across the table with both the Iranian government and the Afghan government, I don't believe I would have felt I was in a stronger position by having the ability to impose sanctions on their citizens.

Senator **SHOEBRIDGE**: It's hardly likely to significantly empower Australian diplomats when they're sitting opposite Vladimir Putin's representatives to try and persuade Russia to change their approach, is it?

Mr **Hughes**: What I'd say is that the countries who don't let their citizens back, and particularly don't let their citizens back on an involuntary basis, are usually dealing with issues and populations that are far in excess of the ones that Australia is dealing with. So we're a very minor player in their consideration, which is why we have to negotiate individually with them to get the cooperation we want and why sanctions in the form of visa sanctions against them really tend not to carry much weight.

...

Senator **SHOEBRIDGE**: But, from your experience, you don't see it as likely to have any meaningful impact on those negotiations.

Mr **Hughes**: No. As I said, having been involved in negotiations with both Iran and Afghanistan, I don't feel I would have been empowered in any way by being able to threaten them with visa sanctions.⁹

1.33 The Greens stand with multicultural Australia and every credible independent expert who gave evidence to the inquiry in rejecting Labor's travel ban proposal.

1.34 The Bill is racist, it is discriminatory, it is excessive and it is unworkable.

Forced criminalisation

1.35 Another element of this Bill will see the minister provided with 'god-like' powers to force people to facilitate their deportation back to a country they fled or face prison.

1.36 Under proposed section 199C the minister can order a person to do specific 'things'. These include ordering a person who fled a country to apply for a passport from the country they fled.

⁹ Mr Peter Hughes PSM, private capacity, *Committee Hansard*, 15 April 2024, p. 24.

1.37 Under proposed section 199E if the person fails to comply with this order they will have committed a criminal offence and face a minimum of one year in prison and a maximum of five years, or a financial penalty, or both.

1.38 This extraordinary power would lead to situations such as the one Human Rights Law Centre described:

The power would appear to permit a direction to be made requiring a person who lives in Ballarat to attend an appointment with an officer of the Department of Home Affairs 115km away in the Melbourne CBD, irrespective of the person's physical, practical or financial ability to attend. If the person couldn't afford to travel, missed their train or was unwell on the day, they would be in breach of the direction and because merits review is denied, there is no avenue for the person to challenge the appropriateness of the direction being made.¹⁰

1.39 This is extraordinary overreach.

1.40 Mr Greg McIntyre, President of the Law Council of Australia, when asked if the minister ordering a person to act in the way the Bill proposes would be seen as consent, responded:

Absolutely not. It's coercion. In some circumstances, coercion is a criminal offence in itself, but here we have the Commonwealth seeking to coerce people to do these things.¹¹

Returning refugees to harm and international obligations

1.41 This Bill in its current form will see refugees and people seeking asylum with a genuine and well-founded fear of persecution or significant harm, who have had their claims denied by an admittedly unfair and harmful process, choosing between being returned to the country they fled or prison.

1.42 If this Bill passes it will allow the government to threaten any non-citizen refugee or person seeking asylum in Australia with prison or removal to a country they have a genuine fear of persecution. This includes people subjected to the so-called Fast Track system.

1.43 The existing Fast Track process that has denied thousands and thousands of asylum claims is a failure and does not provide fair status determinations. The system is so deeply flawed that the Albanese government is currently in the process of dismantling it. However, the people who have been failed by this system will be directly impacted by this Bill.

1.44 Those who failed under Fast Track are mostly in the immediate cohort specified in the Bill, those on BVE in proposed subsection 199B(1).

¹⁰ Human Rights Law Centre, *Submission 18*, pp. 5–6.

¹¹ Mr Greg McIntyre SC, President, Law Council of Australia, *Committee Hansard*, 15 April 2024, p. 17.

Ms Piumetharshika Kaneshan spoke to the committee. She arrived in Australia at the age of 12, fleeing Sri Lanka with her mother and sister to rebuild their life in safety. Currently studying nursing, Ms Kaneshan explained the devastating impact this Bill would have:

For me, studying as a nurse in Australia, it's frightening. I could be forced to Sri Lanka in my first year. I could be forced to Sri Lanka next week...If I were to go back to Sri Lanka—my father is gone. The male in my family is gone. We would be returning to Sri Lanka as three females. To this day, the amount of news I see against women and women's safety in Sri Lanka is absolutely outrageous. If I were to return to Sri Lanka, I would be frightened for [my] life.¹²

1.45 Mrs Betia Shakiba also attending the hearing. While Mrs Shakiba has a permanent visa, her mother and husband were failed by the Fast Track system and are on bridging visas. Under this Bill, there is a threat that her mother and husband will be forced to choose between being returned to a country where they face persecution or jail. Fleeing Iran with her family over a decade ago, Mrs Shakiba explained:

Our family was heavily involved in public activism for women's rights in Iran in the wake of Mahsa Amini's death in 2022. It's not safe for any one of us to return to Iran...The minister's power to direct people to cooperate with their own deportation regardless of whether they have had a fair assessment of their protection claims will expose refugees and people seeking asylum, including my family, to severe harm, including death and continued incarceration, imprisonment or immigration detention. How is this fair?¹³

1.46 It is especially offensive to see this Labor government propose to send families like Mrs Shakiba's back to Iran when senior members of the government have attended rallies and said they support the Women, Life Freedom movement. This hypocrisy was noted in this inquiry. Despite my time in politics and the inevitable numbing effect it has on your sense of outrage, it has been hard to watch this level of hypocrisy so brazenly exercised by the government of the day.

1.47 There are further concerns, particularly with how this Bill will impact people who sought asylum by sea after 19 July 2013 and who are therefore not subjected to the Fast Track process and are in Australia. Refugees in this cohort are on never-ending bridging visas and will also face the choice between being forced to a country they fled or prison.

1.48 The prospect of returning refugees to a country where they are in immediate danger was clearly understood as a possibility by the Albanese government, with proposed subsection 199E(4) stating:

¹² Ms Piumetharshika Kaneshan, Human Rights Law Centre, *Committee Hansard*, 15 April 2024, p. 8.

¹³ Ms Parichehr (Betia) Shakiba, Lawyer, Asylum Seeker Resource Centre, *Committee Hansard*, 15 April 2024, p. 26.

For the purposes of subsection (3), it is not a reasonable excuse that the person:

(a) has a genuine fear of suffering persecution or significant harm if the person were removed to a particular country; or

(b) is, or claims to be, a person in respect of whom Australia has non-refoulement obligations; or

(c) believes that, if the person were to comply with the removal pathway direction, the person would suffer other adverse consequences.

1.49 This subsection would only be needed if the government were planning to send people to countries where they would face harm and breach Australia's non-refoulement obligations.

1.50 Multiple legal experts and international bodies noted that this will be in breach of Australia's international obligations.

1.51 The United Nations High Commissioner for Refugees (UNHCR) stated:

Measures to expedite asylum procedures through a fast track process without adequate procedural safeguards have also been adopted which place refugees in situations that could ultimately lead to their refoulement. Moreover, processes that are expanded in the Bill to determine that non-refoulement obligations are no longer owed to non-citizens do not adhere to the requirements of the cessation provisions of the 1951 Convention.¹⁴

1.52 The Australian Human Rights Commission also noted this issue, saying:

The Commission considers that the methods proposed by the Bill do not achieve this in a way consistent with human rights, and recommends that it not be passed.¹⁵

1.53 Furthermore, this Bill criminalises and forces people into a detention-to-prison cycle, effectively establishing indefinite detention through different means. The UNHCR also commented on this aspect, noting Australia's current treatment, which this Bill seeks to maintain and expand, of people subjected to this system:

[The current system has] deprived of many of their fundamental rights under international law which has, in some instances, resulted in irreparable harm, and even death.¹⁶

1.54 The Parliamentary Joint Committee on Human Rights also pointed out the failures of this Bill to adhere to international law and respect human rights, including breaches against non-refoulement. However, as the Law Council of Australia pointed out, these breaches of international law and human rights,

¹⁴ United Nations High Commissioner for Refugees, *Submission 65*, p. 11.

¹⁵ Australian Human Rights Commission, *Submission 68*, p. 23.

¹⁶ United Nations High Commissioner for Refugees, *Submission 65*, p. 3.

through the returning of people seeking asylum to a country from which they fled were apparent to the government in drafting the Bill and were purposefully included:

It is of significant concern that the [human rights compatibility] Statement concedes that the Bill is only compatible in 'most respects' with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act. This is effectively an admission that aspects of the Bill do not comply with Australia's obligations under international law.¹⁷

- 1.55 This is a uniquely cruel and punitive regime that should not, under any circumstances, be permitted to become law. As Ms Sanmati Verma, Acting Legal Director, Human Rights Law Centre said:

We talk about a Trump-style travel ban; it will be a sad day when we talk about an Albanese-style criminalisation of noncooperation.¹⁸

- 1.56 This power cannot be amended to be made safe or respectful, it is inherently contrary to legal principles, basic respect for human dignity and international law. It must be rejected.

Ministerial powers to revoke protection findings

- 1.57 The final major component of this Bill will allow the minister to review protection findings.

- 1.58 This Bill amends proposed section 197D of the *Migration Act 1958* to expand the powers to not just people detained, but to those on a 'removal pathway', which will include thousands of people. As Refugee Legal explained:

It is well established under international law and principle that once protection need has been recognised by a State, cessation of protection can only arise in very strict and narrow circumstances, with the burden falling squarely on the State to demonstrate why grounds for cessation now exist. Nowhere does the Bill contemplate this. Specifically, cessation does not arise due to changes in a person's visa status (for example, visa refusal or cancellation); nor should people be subject to continuing reassessment of their refugee or other protection status.¹⁹

- 1.59 The undermining of international laws concerning protection for refugees was also commented on by Ms Sarah Fisher speaking for the Law Council of Australia, who said:

We would consider that the power is in conflict with Australia's non-refoulement obligations. Australia should respect an asylum seeker's right to seek protection. That protection, importantly, should be durable.

¹⁷ United Nations High Commissioner for Refugees, *Submission 65*, p. 3.

¹⁸ Ms Sanmati Verma, Acting Legal Director, Human Rights Law Centre, *Committee Hansard*, 15 April 2024, p. 8.

¹⁹ Refugee Legal, *Submission 108*, p. 7.

Persons who have been found to be owed protection shouldn't be subject to the sword of Damocles, basically, of having that finding revisited from time to time without prior notice and without the right to make submissions on whether they have continuing protection claims. It is very, very concerning.²⁰

- 1.60 It is entirely possible that under this legislation someone who fled General Augusto Pinochet's regime in 1980s Chile, or persecution in Vietnam in the late 1970's and has lived in Australia since, could have their protection finding overturned and be subjected to these cruel new laws.²¹ Why would any Parliament give the minister these powers?

The extensive scope of the Bill

- 1.61 Due to the chaotic manner in which the Albanese government tried to ram through this Bill, there has been conflicting and unclear information on who this Bill will impact. This lack of clarity can be seen both in the information on the travel ban and the criminalisation of non-compliance.

- 1.62 The serious lack of information concerning which countries are targeted for the travel ban aspect of the Bill was apparent from the initial two-hours hearing with Home Affairs on March 26 2024. As noted above, Home Affairs indicated that some countries have already been identified saying:

Minister Giles mentioned a range of countries earlier today that do not cooperate with us. That included Iran, Iraq, South Sudan and Russia.²²

- 1.63 When asked by Senator D. Pocock in the same hearing to provide a 'list' of removal countries, Ms Stephanie Foster, Secretary of the Department, said: 'Senator, I don't have the list with me'.²³
- 1.64 Under further questioning the Secretary later claimed no list existed.²⁴ It is still unclear which countries are the target of this travel ban with the government now claiming public interest immunity as the reason for not giving the list to this inquiry.

²⁰ Ms Sarah Fisher, Law Council of Australia, *Committee Hansard*, 15 April 2024, p. 17.

²¹ P. Karp, 'Refugees risk being stripped of protection under 'draconian' Labor deportation bill, opponents say', *The Guardian*, 29 March 2024, www.theguardian.com/australia-news/2024/mar/29/labor-deportation-bill-refugee-protection-visas.

²² Ms Tara Cavanagh, Group Manager, Immigration Policy, Department of Home Affairs, *Committee Hansard*, 26 March 2024, p. 10.

²³ Ms Stephanie Foster, Secretary, Department of Home Affairs, *Committee Hansard*, 26 March 2024, p. 10.

²⁴ Ms Stephanie Foster, Secretary, Department of Home Affairs, *Committee Hansard*, 26 March 2024, p. 17.

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- 1.65 This is causing deep anxiety within diaspora communities in Australia, with people not knowing if they will be prevented from seeing their loved ones if this Bill passes.
- 1.66 Similarly unclear is the element of the Bill that seeks to criminalise non-compliance by those the government is seeking to remove from Australia. Through the hearing process and closer scrutiny, it became clear the Bill would directly impact thousands of people and could apply to every non-citizen in Australia.
- 1.67 It was indicated in the 26 March 2024 hearing that the Bill was designed to target between 150–200 people.²⁵
- 1.68 However, at the 15 April 2024 hearing, this was expanded to 1200 people referring to those on a ‘removal pathway’ where there may be an issue with their departure if they do not voluntarily engage.²⁶
- 1.69 When asked how many have applied for protection, by number of family members in Australia and age, the minister refused to provide the information under a public interest community claim.
- 1.70 Upon further questioning at the April hearing, it was later revealed that the number was not 1200 but close to 5000.²⁷
- 1.71 These powers to compel people to facilitate their own removal to a country they fled can also be expanded to any non-citizen visa. Proposed paragraph 199B(1)(d) makes clear that this Bill would impact ‘a lawful non-citizen who holds a visa prescribed for the purposes of this paragraph’.
- 1.72 This allows the government to expand the Bill to affect any non-citizen in Australia meaning the full scope of this Bill could cover millions of people. This clause provides an open door for exploitation, effectively making Australia a place where anyone without full citizenship can be subjected to criminal charges and mandatory imprisonment if they don't comply with ministerial directions.
- 1.73 Again, it is right to ask, why would any Parliament give the Minister such powers?

²⁵ Ms Stephanie Foster, Secretary, Department of Home Affairs, *Committee Hansard*, 26 March 2024, p. 6.

²⁶ Mr Michael Thomas, Group Manager, Department of Home Affairs, *Committee Hansard*, 15 April 2024, p. 55.

²⁷ Mr Michael Thomas, Group Manager, Department of Home Affairs, *Committee Hansard*, 15 April 2024, p. 55.

Best interests of the child

- 1.74 This Bill also undermines the international laws around the treatment of children and the basic human rights of children.
- 1.75 The United Nations International Children's Emergency Fund, in reference to the United Nations Convention on the Rights of the Child (CRC), said:
- UNICEF Australia believes that several provisions in the Migration Amendment (Removal and Other Measures) Bill may be contrary to the rights of children and their families and should be reconsidered, and that the Bill should not be passed in its current state.²⁸
- 1.76 Of particular concern is the ability of the minister to direct a parent to do something without regard for the best interest of the child.
- 1.77 The 'best interest' provision is one of the key tenets of the CRC, the disregard for this tenet means that this Bill is in breach of our international obligations to protect children.

Minimum mandatory sentences

- 1.78 This Bill through proposed section 199E introduces a minimum mandatory sentence for people who do not comply with a minister's direction.
- 1.79 Minimum mandatory sentencing is an attack on the independence of the judiciary and disproportionately punitive considering it will be enforced on people for tiny missteps such as missing a meeting or not reading an email.
- 1.80 The Albanese government in introducing this element is legislating against Labor's own 2023 National Platform, which states:
- Labor opposes mandatory sentencing. This practice does not reduce crime but does undermine the independence of the judiciary, lead to unjust outcomes and is often discriminatory in practice.²⁹
- 1.81 For Labor, this is a principle that is essential, except where it is not.
- 1.82 The Law Council of Australia made this point clearly stating:
- Minimum mandatory sentences should have no place in the Australian justice system and they undermine its orthodox principles. They prevent individualised justice and fetter judges' discretion to impose penalties that are proportionate to the offending.³⁰

The supposed purpose of the Bill

- 1.83 It is unlikely that the purported aims of the Bill would be achieved by its implementation.

²⁸ UNICEF Australia, *Submission 78*, p. 1.

²⁹ 2023 ALP National Platform, www.alp.org.au/media/3569/2023-alp-national-platform.pdf.

³⁰ Mr Greg McIntyre SC, President, Law Council of Australia, *Committee Hansard*, 15 April 2024, p. 11.

1.84 Home Affairs Secretary Ms Foster said the need for this Bill emerges as:

We have an obligation to try and effect the removal of people who should be removed, who have exhausted all avenues and who no longer have a legal right to remain in Australia.³¹

1.85 However, there is no evidence that the powers in this Bill will achieve the aim above. As the Human Rights Law Centre stated, concerning the travel ban aspect of the Bill:

[T]here is no evidence in support of the Bill that the cooperation of visa holders from certain countries – such as Iran or Russia – would actually enable their removal from Australia. It is therefore entirely possible that the Bill will establish a regime for coercion and punishment of non-citizens without any likelihood of achieving their removal from Australia.³²

1.86 If the government of a country is not cooperating with repatriation, then punishing the citizens of that country is not only a cruel response, but it is also ineffective.

1.87 It is laughable to think that Vladimir Putin or the appalling regime in Iran will change their immigration practices and allow forced deportations of citizens because Minister Giles threatens them with a travel ban on their citizens. These regimes repeatedly and unashamedly cause harm to their own citizens. They will not care.

1.88 Further, the premise of this Bill that the only way to achieve its aims is to undermine international law should be rejected. The Law Council of Australia and others made the clear point that a migration system will lack integrity if it is not based on Australia's international obligations.

1.89 The criminalisation of non-compliance is also not an effective policy to address the supposed issue, there is in fact evidence to the contrary.

1.90 As the Refugee Council of Australia noted:

[The Australian Government used to provide] tailored, individual support to people during and after their immigration process to facilitate their decision-making...The services available in these programs include intensive case management, accommodation support, access to healthcare and psychological counselling, immigration information and counselling services, and legal assistance via a separate program.³³

1.91 Analysis of the government's data from this program found that this case management pilot with vulnerable migrants achieved a 93 per cent compliance rate.

³¹ Ms Stephanie Foster, Secretary, Department of Home Affairs, *Committee Hansard*, 26 March 2024, p. 6.

³² Human Rights Law Centre, *Submission 18*, pp. 5–6.

³³ Refugee Council of Australia, *Submission 41*, p. 9.

1.92 Despite this program achieving the stated rationale for this Bill, the program has been gutted by the Liberal and Labor governments.

1.93 The conclusion is that this Bill does not aim to achieve the stated purpose, but rather to whip up fear to achieve Labor's narrow party-political aims.

Response to the majority report

1.94 Submissions to this inquiry and the expert analysis provided at the hearing saw an almost unanimous rejection of the Bill. The majority report acknowledged:

...a large number of submitters and witnesses, most of whom rejected the Bill in its entirety based primarily on human rights concerns and the perceived impacts of the Bill on individuals, families and communities.³⁴

1.95 This is the understatement of all understatements. Every single submission except that of Home Affairs and the Australian Federal Police (AFP) opposed the Bill and the AFP submission was neutral. Every single one.

1.96 Despite this, the only recommended change made in the majority report was that 'the minister considers community impacts when designating a country as a removal concern country'.³⁵

1.97 This shows a gross disregard for refugees, people seeking asylum, diaspora communities, legal experts, human rights groups and many others who overwhelmingly rejected this Bill.

1.98 Having heard from the community it is now clear why Labor wanted to ram this legislation through Parliament while it was still warm from the photocopier. They knew it was appalling, they knew any close scrutiny of it would tear it apart and they desperately wanted to avoid such scrutiny.

Conclusion

1.99 This Bill must be rejected. The conduct of the Albanese government in regards this legislation has been chaotic and shows a disregard for either public consultation or basic parliamentary procedure.

1.100 This Bill is fundamentally cruel, extreme and in opposition to social cohesion and multiculturalism.

³⁴ Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024*, May 2024, p. 42.

³⁵ Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024*, May 2024, p. 42.

Recommendation 1

1.101 This Bill should be rejected in full.

Senator David Shoebridge
Member

Dissenting report by Senator David Pocock

Introduction

- 1.1 During the introduction of this Bill and this inquiry, the Government and the Department of Home Affairs (the Department) have both rightly noted that protecting the integrity, strength and fairness of our migration system is critical to ensuring social cohesion and community safety.
- 1.2 It is important to this aim that the Government has the power to remove from Australia any person who has exhausted all avenues to remain in Australia, and to whom Australia does not owe refugee protection obligations.
- 1.3 It is true that we must make our migration system better, stronger and fairer.
- 1.4 However, this Bill fails to achieve that goal.
- 1.5 This Bill has the potential to criminalise people who are exercising their right to judicial review, who have been subjected to an unfair application process, or who are the family members of Australian citizens and permanent residents or have other compelling reasons to remain in Australia.
- 1.6 It also has the potential to punish Australian citizens for the actions of foreign governments.
- 1.7 These failures risk an erosion of community confidence in our migration system, which may make it more difficult to remove people who genuinely should be required to leave.

'Exhausted all avenues'

- 1.8 It is clear from the submissions to this inquiry that legal experts are unanimous in their assessment—this Bill provides the Minister with broad powers to give 'removal pathway directions' to people who have not exhausted all avenues to remain in Australia.
- 1.9 There are no safeguards in the Bill preventing these directions from being given to people who are exercising their right to judicial review, or who are seeking ministerial intervention due to compelling and compassionate circumstances.
- 1.10 This view is expressed by the Law Council of Australia in response to a written question on notice from Senator Paul Scarr:

[T]he way the provision is drafted would not prevent a person who is on a Bridging Visa E (BVE) on departure grounds being removed if the individual had judicial review proceedings in progress or a ministerial intervention request unanswered, as the operation of the relevant power is only dependent on the bridging visa the individual holds.

The Law Council does not consider this to be a principled approach to restricting the cohort affected by the Removal Bill to individuals who have ‘exhausted all avenues to remain in Australia’.¹

- 1.11 In addition to the above analysis of the Law Council of Australia, the Department has provided their own confirmation of this oversight. In response to my questions in the public hearing, the Legal Group Manager of the Department noted that the Department would be at risk of injunction if the Minister were to give ‘removal pathway directions’ to a person with a matter before the court. However, neither the Legal Group Manager nor her colleagues were able to point to any provision in the Bill that prevents this.²
- 1.12 During a previous public hearing on 26 March 2024, I also asked about protections for people who have compelling and compassionate reasons to remain in Australia, for example, due to the risk of family separation. The Department responded that applicants could make a request for ministerial intervention, but conceded that there is nothing in the Bill that prevents ‘removal pathway directions’ being given to them while this request is pending.³
- 1.13 It is clear from evidence given in this inquiry that the powers in the current form of the Bill go far beyond the Government’s stated aim of providing itself with the means of removing people from the country who have ‘exhausted all avenues to remain in Australia’.
- 1.14 This overreach risks a significant harmful impact on individuals, the Australian community and the overall integrity of our migration system. It is likely to erode the confidence of both applicants and the community in the fairness of decisions to pursue the removal of failed applicants from Australia, and it risks criminalising people who are simply exercising their right to a review of their migration decisions or to maintain their family unity.

Integrity and fairness

- 1.15 There are no safeguards in the Bill preventing ‘removal pathway directions’ from being given to those who have been subject to the flawed ‘Fast Track’ refugee status determination process, therefore, there is a grave risk that these directions may be given to people to whom Australia owes protection obligations, or where there are compelling circumstances that warrant them remaining in Australia.
- 1.16 As noted by the Asylum Seeker Resource Centre:

¹ Law Council of Australia, answers to questions on notice from Senator Scarr and Senator Thorpe, 17 April 2024 (received 26 April 2024), p. 6.

² Ms Clare Sharp, Department of Home Affairs, *Committee Hansard*, 15 April 2024, p. 56.

³ Ms Clare Sharp, Department of Home Affairs, *Committee Hansard*, 26 March 2024, p. 10.

People subjected to the unjust Fast Track process who were refused a protection visa have not had an opportunity for a fair assessment of their protection claims. For example, the IAA [Immigration Assessment Authority] was refusing protection visa applications for Afghans from minority groups in the weeks leading up to the return of the Taliban. From 2015 to 2023, 37% of IAA decisions reviewed by the courts were found to be unlawful, noting that many people would not have been able to access judicial review or legal representation, meaning the number of unlawful decisions is likely to be considerably higher. This demonstrates that thousands of people seeking asylum have had their protection claims unfairly refused by the IAA.⁴

- 1.17 These failures have been well-recognised by the Government, who opposed Fast Track when in opposition,⁵ went to the 2022 election with a promise to abolish Fast Track,⁶ and have laws before the Parliament that would do so.⁷
- 1.18 However, the Government has still chosen to apply the provisions of this Bill to those who have been subject to Fast Track (the legacy caseload). This could result in criminal penalties for genuine refugees who refuse to make arrangements to leave Australia.
- 1.19 Even setting aside the significant problems of unfairness and lack of access to tribunal review under Fast Track, for people where there has been a significant change in circumstances in their country of origin due to the length of time taken to process their applications (for example, people from Afghanistan, Iran and Sudan), there is still no provision for their protection from ‘removal pathway directions’. Their only avenue is to make a request for ministerial intervention, which does not protect them from the operation of this Bill.
- 1.20 As pointed out by Women’s Legal Services Australia, this issue also applies to people where issues related to family violence have arisen since a person had their claims assessed. As they explained:

Women’s Legal Services regularly assist women who have experienced family violence with protection visa applications where previous claims of family violence and gender-based harm have not been raised by applicants themselves or the family violence has occurred following a primary or merits review decision and the applicant is seeking Ministerial Intervention to make another application and raise these claims.⁸

⁴ Asylum Seeker Resource Centre, *Submission 59*, p. 6.

⁵ Tom Stayner, ‘Labor, Greens clash with Morrison government over asylum seekers fast track’, *SBS News*, 17 October 2019.

⁶ ALP National Platform as adopted at the 2021 Special Platform Conference, p. 124.

⁷ See: Administrative Review Tribunal Bill 2024 & Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023.

⁸ Women’s Legal Services Australia, *Submission 107*, p. 9.

1.21 Their view is that the Bill as currently drafted risks exposing victim-survivors of family violence and their children to serious harm, family separation, criminalisation and discrimination, along with exposing them to the risk of further gender-based violence.⁹

1.22 Further, the Australian Human Rights Commission pointed out:

Many Bridging E visa holders who are finally determined as part of the 'legacy caseload' have been in Australia for upwards of 10 years. They are likely to have established strong ties in Australia, and may even have partners and children here.¹⁰

1.23 The Fast Track system has also resulted in families having different refugee status determination outcomes, as evidenced by Mrs Betia Shakiba, an Australian permanent resident who gave evidence to the inquiry:

Twelve years ago I came to Australia with my family of four, including myself, my father, my mother and my small brother, who was six years old at the time. We arrived as a cohesive family unit seeking safety and a better future. However, the system failed to recognise my mother as the heart of our family, denying her protection under the unfair fast-track system without considering the best interests of her children. For the past decade she has been stuck in limbo waiting for her case to be heard in the Federal Court and repeatedly appealing to the Department of Home Affairs for fair treatment. The fast-track process has neglected her, and now, with the looming threat of this bill, she faces the possibility of being deported or being sent to prison for simply being with her children in Australia, potentially leading to her separation from me.¹¹

1.24 Again, there are no protections in the Bill for people in this situation.

1.25 The Bill as drafted has the potential to separate families or criminalise individuals for not making arrangements to leave their families, particularly where some members are Australian citizens or permanent residents.

1.26 It has the potential to criminalise young people for not making arrangements to leave who, due to delays and unfairness in their family's refugee status determination process, have lived most of their lives in Australia.

1.27 It is clear from the evidence that the powers in this Bill go much further than, and are in fact contrary to, the Government's stated aims of improving the integrity and fairness of our migration system.

⁹ Women's Legal Services Australia, *Submission 107*, p. 4.

¹⁰ Australian Human Rights Commission, *Submission 68*, p. 10.

¹¹ Mrs Betia Shakiba, Lawyer, Asylum Seeker Resource Centre, *Committee Hansard*, 15 April 2024, p. 26.

Protracted processing times

- 1.28 Frontline services tell us that the longer a person remains in Australia, and the more time they spend in immigration detention, the more difficult it is likely to become to remove them from Australia should it be found appropriate to do so. The impact of immigration detention on mental health is well-evidenced, contributing to ongoing PTSD, depression, mental health related disability and other severe mental health issues.¹²
- 1.29 Any of these factors can create practical and legal barriers, which contribute to a person 'be[ing] unable or unwilling to cooperate with their own deportation: poor mental health, language barriers, a need to remain with family or a genuine fear of what awaits them if they are deported'.¹³
- 1.30 As the Kaldor Centre for International Refugee Law explained:
- [T]he most effective approach to facilitating removals consistently with international law is to ensure that refugee status determination procedures are both fast and fair. The longer a person has been in Australia, the greater the legal and practical barriers to removal. At the same time, where an applicant feels they have not had an opportunity to have their protection claims fairly assessed, the more reluctant they may be to accept voluntary removal from the country. To the extent that certain non-citizens who do not have protection needs continue to refuse to cooperate with their removal, such situations are better resolved on an individual basis, according to the specific reasons for refusal, rather than blanket criminal provisions.¹⁴
- 1.31 The provisions in this Bill could impose criminal sanctions on people who are either seeking to remain in Australia for legitimate reasons related to the protracted length of their processing time, or who, for health or other reasons, simply cannot comply with removal pathway directions.
- 1.32 The minimum mandatory sentencing contained in proposed subsection 199E(2) would require a 12-months minimum sentence to be imposed on a person found guilty of offences in the Bill, which would restrict the ability of the courts to consider these reasons in sentencing decisions.

Australia's migrant community

- 1.33 This Bill seeks to punish not only those who refuse to cooperate with their removal from Australia, but also the broader Australian migrant community.
- 1.34 The powers in the Bill would provide the Minister with the power to designate a 'removal concern country', and to bar visa applications from those

¹² Von Wethern et al, 'The impact of immigration detention on mental health: a systematic review', *BMC Psychiatry*, Vol. 18, No. 382, 2018, p. 14.

¹³ Human Rights Law Centre, *Submission 18*, p. 7.

¹⁴ Kaldor Centre for International Refugee Law, UNSW, *Submission 11*, p. 10.

nationalities, with limited exceptions for humanitarian visas and immediate family (narrowly defined).

1.35 This inquiry received submissions from 20 different migrant community groups expressing opposition to the Bill, including the Federation of Ethnic Communities Councils of Australia, who stated that '[t]he discriminatory nature of the Bill [also] risks marginalising existing communities from the banned countries within Australia, undermining the Government's efforts to support and promote social cohesion'.¹⁵

1.36 As noted by the Law Council of Australia:

It will have a punitive effect on nationals from those countries who are seeking to apply for an Australian visa from overseas who would otherwise meet the visa criteria. The families in Australia will also be affected. If enacted, this discriminatory measure would represent a disturbing departure from Australia's longstanding system of merit based consideration of every individual visa application.¹⁶

1.37 From the evidence of the representatives of community organisations who appeared at the inquiry, the reaction from their communities has been one of horror. As explained by the Zimbabwe Australia Community Association, the confusion and distress is immense. Ms Haatsari Marunda explained that she has received calls asking:

[I]f there is a wedding tomorrow, and Zimbabwe is a designated country, what happens? Are my parents going to come? Are my aunts and uncles going to come? What is going to happen to my family? Worse, if there is a funeral tomorrow, if we are a designated country, who is going to attend the funeral if the whole country is banned? But not just funerals. What about a graduation? Christmas celebrations?¹⁷

1.38 It is simply not fair to punish Australia's migrant communities for the actions of foreign governments, particularly when there is evidence that recalcitrant countries may not be moved by these types of sanctions,¹⁸ and may retaliate in ways detrimental to trade, tourism, or international law enforcement.

1.39 This Bill provides the Minister with extraordinary powers to bar visa applications from entire countries. It is discriminatory and risks harming Australia's social cohesion by alienating Australia's migrant community, which is contrary to its stated aims.

¹⁵ Federation of Ethnic Communities' Councils of Australia, *Submission 69*, p. 5.

¹⁶ Mr Greg McIntyre, President, Law Council of Australia, *Committee Hansard*, 15 April 2024, p. 12.

¹⁷ Ms Haatsari Marunda, Zimbabwe Australia Community Association, *Committee Hansard*, 15 April 2024, p. 39.

¹⁸ Australian Human Rights Commission, *Submission 68*, p. 20.

Conclusion

- 1.40 There is very little evidence that the provisions in the Bill will successfully facilitate the removal of people who are required to depart Australia. Rather, among the submissions to this inquiry, there is significant evidence that it is in fact the protracted nature of Australia's migration system that causes the vast majority of the legal and practical barriers to the removal of unsuccessful applicants.
- 1.41 Almost all of the submissions to this inquiry suggest that the Bill is likely to cause harm to individuals, families and the broader Australian community.
- 1.42 Finally, this Bill provides a range of unfettered powers to the Minister, which are unjustified given the evidence that these powers are unlikely to achieve the Government's stated aims.

Recommendation 1

- 1.43 That the Senate does not pass the Bill.**

Recommendation 2

- 1.44 That the Government gives access to an expedited re-application process to everyone who has been subjected to the 'Fast Track system', including access to merits review in the Administrative Appeals Tribunal or the proposed future Administrative Review Tribunal.**

Recommendation 3

- 1.45 That all future refugee status determinations are conducted in a fast, robust and fair manner with access to both merits and judicial review, and that applicants are not subjected to protracted processing times that contribute to barriers to their removal should they be found not to be owed protection.**
- 1.46 Should the Senate choose not to follow these primary recommendations, and passes the Bill, I make the following recommendations:

Recommendation 4

- 1.47 That the Bill is amended to ensure that, if an applicant has not been eligible for review by the Administrative Review Tribunal or the Administrative Appeals Tribunal (for example, if they are a Fast Track applicant or a transitory person), they may not be given a removal pathway direction.**

Recommendation 5

- 1.48 That the Bill is amended to ensure that where a person's matter is subject to judicial review or where they have a pending request for ministerial intervention due to compelling and compassionate circumstances, they may not be given a removal pathway direction.**

Recommendation 6

1.49 That the Bill is amended to ensure that the immediate family of Australian citizens, permanent residents and stateless persons cannot be given a removal pathway direction.

Recommendation 7

1.50 That the Bill is amended to delete proposed paragraphs 199B(1)(c) and 199B(1)(d), to remove Bridging Visa E holders and the holders of additional classes of visas that may be prescribed in the future from the meaning of removal pathway non-citizen.

Recommendation 8

1.51 That the Bill is amended to remove the proposed subsection 199E(2) relating to a 12-months mandatory minimum sentence.

Recommendation 9

1.52 That the Bill is amended to remove the proposed subsection 199E(4), including paragraphs (a), (b) and (c), relating to exceptions to what is considered a 'reasonable excuse'.

Recommendation 10

1.53 That the Bill is amended to remove items 3–9 in Schedule 2, relating to the power to revisit protection claims.

Recommendation 11

1.54 That the Bill is amended to ensure that proposed section 199G 'Visa applications by certain nationals of a removal concern country' may only be applied to government officials of a removal concern country and their immediate family members.

Senator David Pocock
Participating member

Appendix 1

Submissions and Additional Information

- 1 Australia Iran Migration Consultants Association
- 2 Amnesty International - Bendigo Group
- 3 Rural Australians for Refugees
- 4 Queenscliff Rural Australians for Refugees
- 5 International Commission of Jurists (Australian Section)
- 6 Queensland African Communities Council
- 7 Blue Mountains Refugee Support Group
- 8 Casey/Cardinia for Refugees
- 9 Mums4Refugees
- 10 AUSIRAN Ltd
- 11 Kaldor Centre for International Refugee Law, UNSW
- 12 Human Rights for All
- 13 Rockhampton Asylum Seekers Action Group
- 14 Vietnamese Overseas Initiative for Conscience Empowerment (VOICE)
Australia
- 15 Uki Refugee Project
- 16 Amnesty International Australia South Australian and Northern Territory
Activism Leadership Committee
- 17 Amnesty International Australia National Youth Advisory Group
- 18 Human Rights Law Centre
- 19 Labor for Refugees NSW/ACT
- 20 Médecins Sans Frontières Australia
- 21 Rural Australians for Refugees (RAR) Southern Highlands
- 22 Centre for Asylum Seekers, Refugees and Detainees
- 23 The Salvation Army
- 24 Regal Migration Services
- 25 Social Responsibilities Committee, Anglican Church Southern Queensland
- 26 Amnesty International Australia
- 27 Fitzroy Legal Service
- 28 Tomorrow Movement
- 29 Migrant Workers Centre
- 30 Amnesty International Australia Feminist Network
- 31 Grandmothers for Refugees
- 32 Combined Refugee Action Group
- 33 Kurdish Society of Queensland
- 34 Zimbabwe Australia Cultural Association
- 35 Hindus for Human Rights Australia New Zealand

- 36 Amnesty International Australia Victorian Activism and Leadership Committee
- 37 The Bayside Refugee Advocacy and Support Association
- 38 Wesley Asylum Seeker Welcome Place
- 39 Young Labor Left
- 40 Refugee Communities Advocacy Network (RCAN)
- 41 Refugee Council of Australia
- 42 Refugee Advocacy Network (RAN)
- 43 Great Lakes Rural Australians for Refugees
- 44 Settlement Council of Australia
- 45 Forum of Australian Services for Survivors of Torture and Trauma (FASSTT)
- 46 Multicultural Youth Advocacy Network Australia (MYAN)
- 47 Iranian Student Association, University of New South Wales (IRANSA)
- 48 National Legal Aid
- 49 Social Responsibilities Committee, Anglican Diocese of Melbourne
- 50 Liberty Victoria
- 51 Bellarine Branch ALP
- 52 Welcoming Australia
- 53 Australian Lawyers Alliance
- 54 Justice for Refugees SA Inc
- 55 Forcibly Displaced People Network (FDPN)
- 56 Asylum Seekers Centre
- 57 Welcome to Maleny Refugee Advocacy Group (W2M)
- 58 Associate Professor Caroline Fleay
- 59 Asylum Seeker Resource Centre
- 60 Rural Australians for Refugees (RAR) Ballarat
- 61 Justice and Peace Office, Catholic Archdiocese of Sydney
- 62 Refugee Action Campaign Canberra
- 63 Peter McMullin Centre on Statelessness
- 64 Edmund Rice Centre for Justice and Community Education
- 65 Office of the United Nations High Commissioner for Refugees (UNHCR)
- 66 House of Welcome
- 67 Multicultural Australia
- 68 Australian Human Rights Commission
- 69 Federation of Ethnic Communities' Councils of Australia (FECCA)
- 70 Professor Marinella Marmo, Professor Alison Gerard and Professor Leanne Weber
- 71 Law Council of Australia
- 72 Immigration Advice and Rights Centre
- 73 Refugee Advice & Casework Service
- 74 Australian Iranian Community Alliance
- 75 Department of Home Affairs
- 76 Australian Council for International Development

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- 77 Migration Institute of Australia (MIA)
 - 78 UNICEF Australia
 - 79 NSW Council for Civil Liberties (NSWCCL)
 - 80 Dr Anthea Vogl and Dr Sara Dehm, University of Technology Sydney
 - 81 National Justice Project
 - 82 Ms Betia Shakiba
 - 83 Australian Muslim Advocacy Network (AMAN)
 - 84 Walk Free
 - 85 NSW Teachers Federation
 - 86 Asylum Seekers Advocacy Group
 - 87 Australian Iranian Society of Victoria (AISOV)
 - 88 Democracy in Colour
 - 89 Federation of Community Legal Centres (Victoria)
 - 90 Public Affairs Commission, Anglican Church of Australia
 - 91 Australian National University Law Reform and Social Justice Research Hub
 - 92 Aknoon Cultural Centre
 - 93 Association to Defend Freedom & Human Rights in Iran-Australia
 - 94 Australian-Iranian Community Organisation, Persian Library, Cinema Azadi Movie & Cultural Club, and Sunday Morning Radio Program
 - 95 Shayna Humanitarian Services
 - 96 Diversity Focus
 - 97 South Sudan Community Association of Western Australia (SSCAWA)
 - 98 Australian Medical Students' Association (AMSA)
 - 99 Australian Refugee Advisory Panel
 - 100 Tamil Refugee Council
 - Attachment 1
 - Attachment 2
 - 101 Uniting Church in Australia, Synod of Victoria and Tasmania
 - 102 Jesuit Refugee Service (JRS) Australia
 - 103 Human Rights Watch
 - 104 Australian Churches Refugee Taskforce, National Council of Churches in Australia (NCCA)
 - 105 Commonwealth Ombudsman
 - 106 Iranian-Australian Women in STEM
 - 107 Women's Legal Services Australia
 - 108 Refugee Legal
 - 109 Islamic Council of Victoria
 - 110 Multicultural Council of the Northern Territory
 - 111 Centre for Migrant and Refugee Health
 - 112 Rural Australians for Refugees Bendigo
 - 113 Brigidine Asylum Seekers Project
 - 114 Wellspring Community of Australia
 - 115 Australian Federal Police

- 116 Urban Group Amnesty International Aus-Tasmania
- 117 Human Rights For All
- 118 Refugee Women Action for Visa Equality
- 119 Fleurieu Refugee Support Group
- 120 Confidential
- 121 Asylum Seekers Advocacy Group

Additional Information

- 1 Hearing transcript, 26 March 2024 (as directed by the Senate chamber on 26 March 2024)
- 2 Department of Home Affairs correction of evidence from public hearing on 26 March 2024 (received 18 April 2024)

Answer to Question on Notice

- 1 Australian Human Rights Commission, Answers to questions on notice from Senator Paterson, 15 April 2024 (received 23 April 2024)
- 2 Australian Human Rights Commission, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 23 April 2024)
- 3 Human Rights Law Centre, Answers to written questions on notice from Senator Scarr, 17 April 2024 (received 24 April 2024)
- 4 Kaldor Centre for International Refugee Law, UNSW, Answers to written questions on notice from Senator Paul Scarr, 17 April 2024 (received 24 April 2024)
- 5 Law Council of Australia, Answers to questions on notice from Senator Scarr and Senator Thorpe, 17 April 2024 (received 26 April 2024)
- 6 Department of Home Affairs, Answers to questions on notice from Senator Paterson, Senator Shoebridge, and Senator Ghosh, 26 March 2024 (received 29 April 2024)
- 7 Department of Home Affairs, Answers to written questions on notice from Senator Paterson, 17 April 2024 (received 29 April 2024)
- 8 Department of Home Affairs, Answers to written questions on notice from Senator Thorpe, Senator Shoebridge, and Senator Pocock, 19 April 2024 (received 29 April 2024)
- 9 Department of Home Affairs, Answers to written questions on notice from Senator Shoebridge, 19 April 2024 (received 29 April 2024)
- 10 Department of Home Affairs, Answer to spoken question on notice from Senator Paterson, 15 April 2024 (received 30 April 2024)
- 11 Department of Home Affairs, Answers to questions on notice from Senator Ghosh and Senator Pocock, 15 April 2024 (received 1 May 2024)
- 12 Department of Home Affairs, Answers to questions on notice from Senator Paterson, 17 April 2024 (received 30 April 2024)

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- 13 Department of Home Affairs, Answers to questions on notice from Senator Paterson, 17 April 2024 (received 1 May 2024)
 - 14 Department of Home Affairs, answers to spoken question on notice from Senator Paterson, 15 April 2024 (received 1 May 2024)
 - 15 Department of Home Affairs, Answers to written questions on notice from Senator Paterson, 17 April 2024 (received 1 May 2024)
 - 16 Department of Home Affairs, Answers to written questions on notice from Senator Paterson, 17 April 2024 (received 20 April 2024)
 - 17 Department of Home Affairs, Answers to written questions on notice from Senator Shoebridge and Senator Pocock, 19 April 2024 (received 30 April 2024)
 - 18 Department of Home Affairs, Answers to written questions on notice from Senator Shoebridge and Senator Pocock, 19 April 2024 (received 3 May 2024)
 - 19 Department of Home Affairs, Answer to question on notice from Senator Paterson, 17 April 2024 (received 3 May 2024)
 - 20 Minister for Immigration, Hon Andrew Giles MP, Public Interest Immunity claim provided in response to written questions on notice from Senator Shoebridge and Senator Paterson to Department of Home Affairs, 17 and 19 April 2024 (received 29 April 2024)
 - 21 Department of Home Affairs, Answers to written questions on notice from Senator Paterson, 17 April 2024 (received 6 May 2024)

Appendix 2

Public hearing

Monday, 15 April 2024

Committee Room 2S3

Parliament House

Canberra

Australian Human Rights Commission

- Emeritus Professor Rosalind Croucher, President
- Ms Emily Rutherford, Senior Lawyer

Human Rights Law Centre

- Ms Sanmati Verma, Acting Legal Director
- Ms Laura John, Senior Lawyer
- Ms Piumetharshika Kaneshan

Law Council of Australia

- Mr Greg McIntyre SC, President (via videoconference)
- Ms Carina Ford, Chair, Migration Law Committee, Federal Dispute Resolution Section (via videoconference)
- Ms Leonie Campbell, General Manager
- Ms Sarah Fisher, Member, Migration Law Committee, Federal Dispute Resolution Section (via videoconference)

Dr Abul Rizvi PSM (via teleconference), Private capacity

Mr Peter Hughes PSM, Private capacity

Refugee Council of Australia (via videoconference)

- Mr Paul Power, Chief Executive Officer

Asylum Seeker Resource Centre

- Ms Rachel Saravanamuthu, Legal Policy Lead
- Mrs Parichehr (Betia) Shakiba, Lawyer

Immigration Advice and Rights Centre (via videoconference)

- Mr Joshua Strutt, Chief Executive Officer and Principal Solicitor
- Ms Stephanie Lee, Senior Solicitor

Refugee Advice and Casework Service (via videoconference)

- Ms Isobel McGarity, Supervising Senior Solicitor
- Mr Ahmad Sawan, Supervising Senior Solicitor

Queensland African Communities Council

- Mr Benny Bol OAM, President

Kurdish Society of Queensland (via teleconference)

- Dr Hassan Sonboli, President

Zimbabwe Australia Cultural Association

- Ms Haatsari Marunda, Member

Australian Iranian Community Alliance (via teleconference)

- Mr Nader Zoljalali, Board Member

Department of Home Affairs

- Ms Stephanie Foster, Secretary
- Mr Michael Thomas, Group Manager, Immigration Compliance Group
- Ms Sandra Jeffery, Assistant Commissioner, Immigration Compliance Group
- Ms Clare Sharp, Group Manager, Legal
- Mr Kevin Cunnington, Assistant Secretary, Legislation
- Ms Tara Cavanagh, Group Manager, Immigration Policy

Operation Sovereign Borders

- Rear Admiral Brett Sonter, Royal Australian Navy, Commander Joint Agency Task Force - Operation Sovereign Borders