

Migration Amendment (Removal and Other Measures) Bill 2024 (Cth)

Submission to the Senate Legal and Constitutional
Affairs Legislation Committee, Parliament of Australia

12 April 2024

Contents

Who we are	4
Introduction	5
'Removal pathway non-citizens' and removal pathway directions	6
The proposed new criminal offence for a failure to comply with a direction	7
Designating a country as a "removal concern country"	9
Conclusion	9

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to the Senate Legal and Constitutional Affairs Committee ('Committee') on the Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) ('Bill').
2. ALA members across Australia are greatly concerned about the provisions of this Bill and, in particular, the powers this Bill proposes to confer on the Minister.
3. The ALA accepts that Australia should be able to ensure that non-citizens who are deemed deportable assist in the process and do not remain in Australia through default and fault. However, the Bill seeks also to catch those who may not be able to return through genuine fear of persecution – the reason for non-cooperation from this group does not seek to have been addressed at all in this Bill and does not appear in the Explanatory Memorandum.
4. The ALA notes that Australia has international law obligations, incorporated into domestic law, to protect people fleeing persecution under international law. However, this Bill in essence proposes that Australia should punish and criminalise people who are seeking protection here and those who are even considering seeking protection in Australia.
5. This Bill can only be described as cruel and, if passed by the Parliament, will embarrass Australia on the international stage in a number of ways – including signalling that Australia is not committed to upholding human rights, the separation of powers, and the Rule of Law.
6. The ALA is concerned that this Bill gives the Minister new and excessive powers, which are not subject to proper review, to interfere with the lives of vulnerable individuals. The Bill, therefore, undermines the Rule of Law by giving Ministers and officials of the executive arm of government substantial powers without appropriate and sufficient protections against overreach and those powers being misused.
7. We note that, in the Appendix to the Explanatory Memorandum of this Bill, the human rights implications stated are vast.
 - a. The ALA notes in particular Article 9(1) of *the International Covenant on Civil and Political Rights* (ICCPR):

Everyone has the right to liberty and security of person. No-one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

- b. The ALA submits that the proposed punishment engages and breaches this right. The explanation provided in the Explanatory Memorandum for how the Bill engages this right is,² in the view of the ALA, circular and inadequate.
 - c. The ALA contends that the power to arrest and detain without a criminal pathway and the proposed minimum penalties are clearly in breach of Article 9(1) of the ICCPR.
8. The ALA's submission will focus on the proposed removal pathway directions (including the proposed new criminal offence for a failure to comply with a direction) and the proposal to confer power for the Minister to designate a country as a "removal concern country".

'Removal pathway non-citizens' and removal pathway directions

9. The Bill proposes to confer on the Minister power to:³

...give a direction to a removal pathway non-citizen to do specified things necessary to facilitate their removal, or to do other things the Minister is satisfied are reasonably necessary to determine whether there is a real prospect of their removal becoming practicable in the reasonably foreseeable future.

10. First, the ALA is concerned about the patently inappropriate use of delegated legislation, instead of primary legislation, for prescribing the categories of visa holders who could be brought under the meaning of "removal pathway non-citizen".

- a. The ALA expects that this delegated legislation would likely prescribe an expanded the scope of people who may be subject to removal pathway directions.
- b. With regard, therefore, to the significant implications of being classified as a "removal pathway non-citizen" and being subject to removal pathway directions, the ALA submits this should instead be addressed through primary legislation.⁴

11. As the Public Interest Advocacy Centre (PIAC) has warned:⁵

As a principle, the use of delegated legislation should be limited as far as possible to administrative or technical matters, or matters that require an urgent response. The rapid and

² Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 25.

³ Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 2; see: Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) cl 199B.

⁴ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 5 of 2024, 27 March 2024) 3 [1.3]–[1.4].

⁵ Public Interest Advocacy Centre, Submission to the Senate Scrutiny of Delegated Legislation Committee, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (25 June 2020) 1.

consistent increase in the amount of delegated legislation, linked to the proportion of instruments that are exempt from parliamentary oversight, shows it is used too often. Use of delegated legislation, in particular exempt from parliamentary oversight, should be limited and occur less frequently going forward.

12. The use of delegated legislation in this case proves that warning right.

13. Further, the ALA notes that clause 199C(4) of the Bill proposes that the direction must specify the period of time in which the person subject to the direction must do (or not do) the directed action. However, no minimum time period is set out in the legislation. The ALA supports the Senate Standing Committee for the Scrutiny of Bills' following assessment and recommendation regarding this provision:⁶

Given the significance of these measures on individual rights and liberties, the committee considers that the legislation should set out an appropriate minimum time period, such as, for example, 60 days, in which to allow the person to take steps to comply and to seek legal advice.

The proposed new criminal offence for a failure to comply with a direction

14. The Bill proposes a new criminal offence for a failure to comply with a direction. The offence has a penalty of five years' imprisonment or 300 penalty units (or both). There is a mandatory minimum sentence of at least 12 months' imprisonment.⁷

15. The ALA submits that this is an extraordinary offence accompanied by an even more extraordinary penalty, one which does not even apply to those in Australia who breach obligations – for example, those who breach obligations under what are commonly known as 'sex offender' registers.

16. The ALA is concerned that enforcing this proposed new offence will also mean that judicial officers, contrary to their oath and against the Rule of Law, will be forced to sentence individuals unjustly. This will result in unjust outcomes and judicial, legal and prosecutorial criticism. As the Victorian Court of Appeal said in 2022:⁸

Mandatory minimum sentences are wrong in principle. They require judges to be instruments of injustice: to inflict more severe punishment than a proper application of sentencing principle could justify, to imprison when imprisonment is not warranted and may well be harmful, and to treat as identical offenders whose circumstances and culpability may be very different.

⁶ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 5 of 2024, 27 March 2024) 3 [1.5].

⁷ See: Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) cl 199E(2).

⁸ *Buckley v R* [2022] VSCA 138 at [5].

17. The ALA notes that some of those affected by the Bill will be persons who have a genuine fear of suffering persecution or significant harm if removed to a particular country but who will be punished in such an extreme way for non-compliance with a direction or directions.

- a. The proposed amendments specifically state that “it is not a reasonable excuse” to refuse to comply with the removal direction that a person so requested has a “genuine fear of suffering persecution or significant harm” in the country to where they are expected to return.⁹ The ALA submits that this failure to include such a reason breaches Australia’s *non-refoulement* obligations. This is also, in the ALA’s view, an inappropriate use of the criminal justice system and does not recognise the failures that we know are present in Australia’s system of assessing refugee claims.
- b. The ALA submits that criminalising the fear of persecution not only carries enormous risk but is also characteristic of legal systems which are underpinned by arbitrariness, cruelty and contempt for human rights.

18. Additionally, the explanation in the Explanatory Memorandum for proposing a mandatory minimum sentence is to serve as a general and personal deterrent to refusal and is said to reflect the seriousness with which the legislature regards the offence.¹⁰

- a. The ALA strongly opposes this.
- b. We further submit that the seriousness of a legislative body in dealing with a new crime is reflected instead in a maximum penalty. By proposing a minimum penalty, this stops the sentencing court from taking into account – while not a reasonable excuse for offending but could be considered as a mitigating factor – the fear held by an individual, which might have resulted in less than 12 months detention.

Recommendation: That the Committee urges the Federal Government to abandon provisions of the Bill concerning removal pathway directions and the proposed new criminal offence for a failure to comply with a direction, including the minimum penalty provision.

⁹ Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 199E(4)(a).

¹⁰ Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 26.

Designating a country as a “removal concern country”

19. The Bill proposes to confer “a discretionary personal power” on the Minister,¹¹ allowing the Minister to 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”.¹² The ALA notes with concern that the rules of natural justice would not apply to the exercise of this power.¹³
20. Once this power is exercised, the effect of the determination of a country as a removal concern country would be to pause the processing of new applications for protection and visa applications from that country’s citizens.¹⁴ The ALA is deeply concerned that this will have a punitive effect on nationals from those countries who are seeking to apply for protection or another type of visa and who would have otherwise satisfied the visa criteria.

Recommendation: That the Committee urges the Federal Government to abandon the provisions of this Bill which seek to create a pathway for the declaration for a country to be considered a “removal concern country” and to ensure that any deportations are done with full regard to human rights and the utilisation of diplomatic and other channels.

Conclusion

21. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Senate Legal and Constitutional Affairs Committee on this Bill.
22. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.



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¹¹ Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 3.

¹² Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) cl 199F(1).

¹³ Ibid cl 199F(5).

¹⁴ Ibid cl 199G.