Committee Secretary

Senate Legal and Constitutional Affairs Committee

PO Box 6100

Parliament House

Canberra ACT 2600

12 April 2024

Dear Officer,

RE: Inquiry into the *Migration Amendment (Removal and Other Measures) Bill* 2024.

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Inquiry into the *Migration Amendment (Removal and Other Measures) Bill* 2024.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

We must express our regret at the pace at which this Bill has been sought to be introduced, debated, and passed through the parliamentary process, and furthermore at the limited opportunity for consideration of the Bill on the part of the public throughout the duration of this inquiry. This Bill proposes significant powers which would affect the lives of Australians, persons to whom Australia owes protection obligations, and other non-citizens who are subject to our laws. The speed at which the Bill was introduced and sought to be passed represents a flagrant disregard not only for democratic process, but also for the communities which the Bill would impact.

Nonetheless, we welcome the opportunity to respond to the Bill, and put forward our recommendations to the committee as below:

Summary of Recommendations:

1. That the Parliament not pass the Bill.

Should this recommendation not be followed and the Bill is passed, the following recommendations apply:

2. That the ministerial powers in s 199F be removed from the bill.
3. If the bill is to pass with s 199F included, that the ministerial powers ought to be rendered reviewable, subject to natural justice and that designations under the Act must be laid before parliament as a condition for valid exercise of the power.
4. That section 199G be removed.
5. That the mandatory sentencing of 12 months imposed by s199E(2) be removed.
6. That the proposed reasonable excuse provision in s199E(4) should be amended to state the rationale of the provision, and detail a list of acceptable excuses, noting that they are non-exhaustive.
7. That it is amended to consider those failed by the 'Fast Track' review proceed and that s199B is amended to reflect this.
8. That the Bill is amended to include a provision which preempts and seeks to prevent cycles of indefinite detention, by providing at least one mechanism of review.
9. That Parliament reconsider s199E(4), which is in direct violation of Australia's Refugee and Humanitarian Obligations.
10. That Parliament reconsiders the broad discretion granted under s 199F(1) to label a country as a 'removal concern country'.
11. That Parliament reconsider the usurpation of parental and child rights under s 199D(5).

If further information is required, please contact us at anulrsjresearchhub@gmail.com.

On behalf of the ANU LRSJ Research Hub,

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Ministerial powers

The Act provides that

- The Minister 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. (s 199F(1))
- If the Minister designates a country under subsection (1), the Minister may, by legislative instrument, revoke the designation. (s 199F(3))
- The rules of natural justice do not apply to the exercise of the power under subsection (1) or (3). (s 199F(5).
- A list of mandatory and/or optional considerations for the Minister in exercise of the s 199F(1) power should be added to section 199F.

The Act also provides that the Minister's exercise of this power shall not be invalid for reason of failure to lay before Parliament a copy of such a designation (s 199F(8)).

Lack of definition of removal concern country

The Act does not provide a meaningful definition of a 'removal concern country'. The term is defined circularly as a country designated under s 199F(1). This renders the ministerial power almost absolute to arbitrarily designate a country a 'removal concern country' regardless of whether any material facts exist to substantiate a state of affairs resembling the plain meaning of the term. This power is therefore prone to abuse. It also appears to run against the criticism by the High Court of circular definitions.[1]

Limited and unpredictable scope of review

The lack of a substantial definition of a 'removal concern country' either limits the scope of judicial review or makes the outcome of judicial review more uncertain. Both of these are intolerable outcomes. First, the overbroad scoping of the discretion makes it less likely that material jurisdictional error could be identified in an exercise of the power that exceeds the public's expectations for how the power is used. This is an outcome fundamentally inconsistent with the rule of law.[2] Second, where courts are able to identify grounds of review and jurisdictional error, it will more likely be on the basis of implication, necessarily a process that is less predictable. This has extreme adverse potential consequences given that personal, social and commercial matters of great importance depend on the predictable shape of border policy.

National interest

The Minister may designate a country a removal concern country if the Minister thinks it is in the national interest to designate the country to be a removal concern country (s 199F(1)).

[1] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37, [49].
[2] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 202.

Satisfaction of the national interest is a jurisdictional fact for the Minister to make a designation.[3] The term 'national interest' has a characteristically broad meaning, with the High Court of Australia commenting that '[i]t would be contrary to principle for the words "in the national interest" to be given a confined meaning'.[4] It is inappropriate for a power as fundamental as functionally 'banning' certain citizens from entering Australia be scoped with terms that place abstract and ill-defined limits on ministerial action.

Recommendation 1

By reason of the overbroad ministerial powers contained within the Bill, the Parliament ought to reject the bill in its entirety

In the alternate, if the bill is to pass, the ministerial powers in s 199F ought to be removed from the bill.

In the alternate, if the bill is to pass with s 199F included, the ministerial powers ought to be rendered reviewable, subject to natural justice and designations under the Act must be laid before parliament as a condition for valid exercise of the power. In detail:

- S 199F(5) should be removed.
- S 199F(8) should be amended to read: *'A failure to comply with subsection (6) or (7)* ***renders a*** *designation* ***invalid****.'*
- A substantive rather than self-referential definition should be given for 'removal concern country'.
- Further states of satisfaction should be added to s 199F(1) as preconditions for the Minister to make a designation, for instance:
    - "The Minister must be satisfied that no substantial harm will come to any section of the Australian community by reason of making the designation".
    - "The Minister must be satisfied that the making of the designation is, alone or in combination with other measures, the only means available to achieve the relevant policy objective".

[3] *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.
[4] *Re Patterson* (2001) 207 CLR 391, 502 (Kirby J).

‘Removal concern country’ and visa bar: Sections 199F and 199G

Section 199G(1) empowers the Minister for Home Affairs to invalidate any attempted visa application by citizens of a country designated as a ‘removal concern country’ by the Minister under section 199F. This is an extremely broad and sweeping power for the Minster to create an effective ‘travel ban’ for citizens of a country based on superfluous and undefined considerations of ‘public interest’. It represents a case of executive overreach which may invite xenophobic rhetoric, unacceptable to Australia’s diverse community. With few effective checks and balances, the amendments grant excessive and draconian powers to the Minister to exercise near-unilaterally and without effective accountability mechanisms, effecting a discriminatory scheme which adversely impacts entire communities of a current or former nationality based on the conduct of their governments.

Punitive powers

The powers granted under combined sections 199G and 199F purportedly equip the executive with a diplomatic tool to leverage the cooperation of otherwise uncooperative states with regard to persons designated as on a removal pathway in Australia. These powers raise a punitive spectre against individual citizens, by threatening to separate extended families (beyond the dependent child-spouse exception raised in section 199G(2)(b)) and isolate persons living in diaspora communities in Australia and abroad. The powers available under the subsection hold the potential to initiate a diplomatic tit-for-tat dynamic which could result in restrictions on Australian citizens’ rights to travel to countries designated as ‘removal concern countries’. These dynamics constitute a form of punishment of citizens and diaspora for diplomatic and policy failings at the governmental level, and grant broad, highly discretionary powers to the Minister. The potential for significant collateral consequences arising from the exercise of these provisions thus shows the policy to be a blunt instrument, the implications of which have not been sufficiently considered.

Inconsistent with good migration policy-making and protective obligations

The Government has stated that a secondary objective of the Bill is to ‘slow down [the] entry pipeline into Australia and reduce growth in the cohort of potentially intractable removals over time’ where a country is failing to cooperate with removal processes.[5] The toolkit provided by

[5] Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024, 3.

sections 199G and 199F to fulfil this objective risks running contrary to Australia's obligations to provide suitable mechanisms for the acceptance of refugees on humanitarian grounds.

Subsection 199G(2)(d) sets out exemptions to the rule in subsection (1) whereby visa applications from citizens of removal concern countries are invalidated for those citizens applying for the grant of a Refugee and Humanitarian (Class XB) visa. This exception, however, fails to account for the majority of persons seeking protection in Australia, who arrive through legal means as asylum seekers on alternative visa types, and make their claims for protection once already in Australia.[6]

The effect of invalidating alternative visa types for citizens of 'removal concern countries' is to remove a common, legal pipeline to protection. It necessitates that people remain in conditions which may expose them to danger in order to complete the extensive process of being assessed for refugee status through the Class XB visa process, which may take 'many months, or even years'.[7] Discordantly, the policy may incentivise irregular and dangerous forms of migration.

Lack of effective accountability mechanisms and indeterminate decision-making criteria

The Bill's primary mechanism for the discretionary granting of exceptions to the visa disallowance rule in section 199G is contained in subsections (4) to (8). Subsection (4) specifies that the Minister may, if they consider it in the public interest to do so, make a determination that the default rule created under subsection (1) on if a visa is invalid does not apply to an individual. At subsection (6), the Minister may vary or revoke such a determination. At subsection (7), the power is specified to be exercised by the Minister personally, and is thus non-delegable. Subsection (8) states that the Minister has no duty to consider whether to exercise the powers in any circumstances.

The structure of these provisions has become a common feature of the Migration Act, whereby the Minister is granted the power to create exceptions to the operation of the Act by 'lifting the bar' for an individual application based on their discretion and broad 'public interest' grounds. The breadth and indeterminacy of Ministerial discretion under these provisions, and the non-compellable and non-reviewable nature of the power to 'lift the bar', robs the operation of the power to bar visa applications of effective accountability - particularly concerning due to the significant personal and policy effects of visa decisions, and the broad discretionary power held by the Minister to determine them. As such, the procedure applied to the exercise of these powers threatens principles of good governance and the Rule of Law.

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[6] Janet Phillips, 'Asylum seekers and refugees: what are the facts?' *Australian Parliament House* (Web Page) <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1415/asylumfacts>.

[7] 'Subclass 200, 201, 203 and 204: Refugee category visas' *Department of Home Affairs* (Web Page) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/refugee-200>.

The power of the Minister to 'lift the bar' constitutes two levels of decision-making - the first being procedural, the second substantive.[8] The procedural decision is whether to consider, or not to consider, whether it is in the public interest to alter the default rule imposed under subsection 199G(1). If the answer to the procedural question is in the affirmative, the substantive question is whether to consider, or not, that it it is in the public interest to substitute or reverse the decision made under the default rule, and to do so - to 'raise the bar' - or to consider that it is not in the public interest to substitute or reverse the default rule, and hence to not do so.[9] Both decisions under this power constitute 'privative clause decisions', following the pattern of similar powers under the Act, and should thus be understood to be judicially reviewable for jurisdictional error.[10]

The first, procedural, decision involves consideration of 'public interest' features which weigh in favour of or against lifting the bar to allow a certain individual's visa application despite the default bar imposed under subsection (1). 'Public interest' considerations are myriad throughout the Migration Act, and are largely undefined, creating an unacceptably wide scope for Ministerial discretion in their consideration.[11] The High Court describes the 'public interest' criterion in *O'Sullivan v Farrer* as 'a discretionary value judgement to be made by reference to undefined factual matters'.[12] In *Plaintiff S10/2011*, the High Court stated that '"public interest" has no fixed or precise content. It involves a value judgement, often to be made by reference to matters that are not clearly defined'.[13] The criterion is a political consideration, not a legal one, and its widespread use in migration determinations by the Minister has been criticised by civil society and legal academics alike - its indeterminacy and breadth, as well as the personal discretionary nature of its consideration by the Minister, result in a lack of clarity, consistency, and predictability as to how the criterion is applied to decision-making. Such an ambiguous consideration cannot be considered consistent with the Rule of Law and principles of good governance which require stability, accountability, and predictability in law- and decision-making.[14]

The result of invoking this decision-making framework based on the 'public interest' as a supposed limitation on the visa bar powers exercised under 199G(1) is that the accountability and review mechanisms available for decisions made under the provisions are not sufficiently robust to be proportionate to the scope of the power granted to the Minister to make those decisions. Accountability is weak not only because of the indeterminacy of the 'public interest' criterion against which decisions to 'lift the bar' are made, but also because of the non-compellable nature of the Minister's power to consider whether to review an application to 'lift the bar', a feature which

[8] *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10, [14] (Kiefel CJ, Gageler and Gleeson JJ).
[9] Ibid.
[10] *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, 76 (Gaudron, Mchugh, Gummow, Kirby and Hayne JJ).
[11] See, for example, ss 351, 46A(2C), 48B(1), 195A(2) and 417 of the Migration Act.
[12] *O'Sullivan v Farrer* (1989) 168 CLR 210, [216] (Mason CJ, Brennan, Dawson and Gaudron CJ).
[13] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31, [99] (Gummow, Hayne, Crennan and Bell JJ).
[14] Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (Cambridge University Press, 2012).

has been described by the Federal Court as 'an extraordinary power of last resort'.[15] The result is that aggrieved persons encounter difficulty both understanding their rights, and determining a proper action to enforce them.[16]

In light of the breadth of these Ministerial powers, the weakness of accountability mechanisms provided for decisions made under them, and the potentially significant diplomatic and personal implications of the powers on Australian citizens and principles of dignity, good governance, and Rule of Law, we urge the committee to reject the Bill.

Recommendation 2

That the Parliament should reject the Bill in its entirety.

Failing that, should the Bill pass, that section 199G be removed.

Criminal provisions and indefinite detention

Coercive mandatory sentencing provisions

Section 199E makes it an offence for a removal pathway non-citizen to fail to comply with the Minister's direction to assist in their own deportation from Australia. If convicted, the punishment is up to five years of imprisonment, with a mandatory minimum sentence of 12 months.

We strongly oppose the mandatory sentencing provision on the basis that it is offensive to the administration of justice. It significantly curtails the ability of courts to apply sentencing principles to the unique circumstances of each case in accordance with the objectives of the criminal justice system. The criminal provisions do not allow for the differentiation between serious and minor offences or consideration of individual circumstances. The unfortunate but inevitable consequence will be the loss of proportionality and parsimony in the sentencing process.

In particular, there is a real danger that the least serious cases will enliven the prescribed minimum sentence, which is highly disproportionate to the circumstances of the offending act. Under the proposed amendments, a person could be sentenced to 12 months imprisonment for failing to produce a relevant document or provide up-to-date information, even in circumstances where a genuine attempt was made and there was no intention to offend. Compounded by the inherent uncertainty as to what constitutes a defence of a "reasonable excuse" (as expanded

[15] *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 213, [26] (Kenny J).
[16] Jason Donnelly, 'Utilisation of National Interest Criteria in the Migration Act 1958 (Cth): A Threat to the Rule of Law' (2018) 7(1) *Victoria University Law Review* 94, 98.

upon below), the proposed amendment is likely to result in harsh and unjust sentences that exceed the objective culpability of the offenders.

Notably, there is no precedent for the application of a minimum term of imprisonment for a failure to comply with a direction, not even in the context of terrorism offences. The extraordinary extension of state power must therefore be assessed against the legitimacy of its accompanying aims. According to the explanatory memorandum, the purpose of the mandatory minimum sentence is to "provide a strong deterrent to non-cooperation by non-citizens with a direction given by the Minister". However, while deterrence is often discussed as one of the main purposes of sentencing, its applicability to the current situation is to be seriously doubted. The forces compelling an individual to seek asylum are determined almost exclusively by factors such as war, poverty, environmental degradation or the fear of persecution or repression in their home country. None of these factors will be negated by the threat of a mandatory minimum sentence. If anything, the existence of these factors serve to diminish the overall effect of deterrence. For a person facing indefinite detention, the choice is not between liberty and the deprivation of liberty, but rather between deprivation of liberty in two invidious forms. To put it more bluntly, criminal sanctions will not encourage people to comply with their own deportation in circumstances where they have nothing to lose.

Overall, the mandatory sentencing provisions are coercive and fail to achieve their stated purpose.

Uncertainty as to what constitutes a 'reasonable excuse'

Under the proposed subsection 199E(4), the 'reasonable excuse' exception to the offence for non-compliance would *not* be available to a person who:

(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.

In such circumstances, the relevant person must cooperate with their own deportation, notwithstanding the adverse consequences genuinely contemplated. Such sweeping, significant exclusions beg the question: what *is* considered a reasonable excuse.

A key issue with the 'reasonable excuse' provision is its uncertainty and imprecision. A guide published by the Attorney-General's Department ('AGD') noted that the defence of a reasonable excuse should "generally be avoided" and only applied where it is not feasible to design more specific defences adapted to the particular circumstances of the offence or to rely on general defences. The AGD considered the defence of reasonable excuse to be "too open-ended" and

"difficult to rely on" due to a lack of clarity on what must be established.[17] Although the High Court has considered the 'reasonable excuse' to be a common legislative concept,[18] with Dawson J stating that "the fact that the test of reasonableness frequently involves a question of degree … does not justify confining its scope for the sake of greater precision or certainty",[19] the legislature should nonetheless provide as much clear guidance as possible.[20]

The 'reasonable excuse' provision in the proposed bill is arguably more problematic than the reasonable excuse provision in the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW) ('*Covid Order*'). The *Covid Order* was criticised for failing to "define proscribed conduct with sufficient precision" and not providing "a reasonable level of specificity to enable [the relevant person] a proper opportunity to understand what constitutes a reasonable excuse".[21] The *Covid Order* defined conduct according to a reasonable excuse and also provided specific examples of what would be considered a reasonable excuse.[22] In comparison, the proposed amendments to the *Migration Act* do not even include such examples, instead taking an exclusionary approach, providing only for what would *not* be accepted. Not only that, the exclusions are significant and arguably unreasonable, including "criminalising the fear of persecution".[23]

A further comparison can be made with the duties to report child sexual offences "unless the person has a reasonable excuse for not doing so". Mathews notes that the nature of the reasonable excuse exception results in it being of "uncertain application".[24] Though States and Territories have adopted different approaches to enumerate specific examples of when a reasonable excuse can be argued,[25] this further demonstrates the value of providing specific examples as guidance for what is within the reasonable excuse exception.

Recommendation: Drawing on suggestions of Mostyn and Kinchin in their critique of the *Covid Order*, the proposed reasonable excuse provision would benefit from explanation of the purpose of the provision, and stating a list of acceptable excuses, clearly outlining that they are non-exhaustive.[26]

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[17] Commonwealth Attorney-General, 'A Guide to Framing Commonwealth Offences, Infringement Notices andEnforcement Powers', Attorney-General's Department (September 2011) <https://www.ag.gov.au/sites/default/files/2020-03/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>; Ben Mostyn and Niamh Kinchin, 'Can I Leave the House? A Coded Analysis of the Interpretation of the Reasonable Excuse Provision by NSW Police During the COVID-19 Lockdown' (2021) 49(3) *Federal Law Review* , 465, 476.

[18] *Taikato v R (*1996) 186 CLR 454, 464.

[19] Ibid 470.

[20] Ben Mathews, 'Duties To Report Child Sexual Offences: A New Era In Australian Criminal Law' (2021) 18(2) *Canberra Law Review* 54, 68–9.

[21] Mostyn and Kinchin (n 17) 476.

[22] Ibid.

[23] Australian Lawyers Alliance, Submission no. 53, p. 8, para. 17.

[24] Mathews (n 20) 64.

[25] Ibid 67.

[26] Mostyn and Kinchin (n 17) 477.

No protection for people failed by the flawed Fast Track process

There are no protections in the Bill's exemptions for people who have been subject to the flawed Fast Track refugee status determination process ('Fast Track process'). Although the proposed section 199D aims to restrict the Minister from giving removal pathway directions to persons to whom Australia may owe protection obligations, the section fails to recognise the underlying flaws in refugee claim assessments, which deprive some claimants of opportunities for a fair hearing or review. The Labor Party has acknowledged that the Fast Track process has not been "fair, thorough and robust", resulting in the denial of protection visas to people with valid refugee claims. Though set to be abolished from 1 July 2024, the Fast Track process limits or excludes rights of appeal for asylum seekers, increasing risks of inaccurate decision-making, decreased decision scrutiny, and breaches of procedural fairness.[27] The effect of such flawed processes interacting with the proposed amendments is that people with strong claims for protection who were failed by the Fast Track process, may be unduly penalised and forced to return to positions of real harm.

The magnitude of these impacts would be extraordinary, given the number of people impacted by the Fast Track process. As noted by the Human Rights Law Centre in their submission to the present inquiry, an applicant from Sri Lanka is ten times more likely to have their protection claims upheld by the standard review process, rather than the fast-track system.[28] This should set off alarm bells in government that this bill may lead to significant breaches of Australia's non-refoulement obligations.

Further, the proposed section 199D exemption does not contemplate that personal circumstances and situations in particular countries may change since protection claim determinations.

Risk of compounding indefinite detention

The proposed Bill criminalises non-cooperation with removal and mandates a minimum 12-month sentence of imprisonment as a result of non-compliance. This risks compounding indefinite detention for 'removal non-pathway citizens' due to the absence of a post-sentencing scheme for these citizens, and lack of review process for ongoing detention.

a) Absence of a post-sentencing regime

The proposed Bill includes no detail regarding the fate of citizens after they have served their sentence. Rather, section 199C(7) stipulates that a non-citizen may be given more than one removal pathway direction, and hence have been found to have breached section 199E(1) on multiple occasions. Not only is this likely to result in an overly harsh sentence, but increases the likelihood of prolonged detention for this non-citizen. This is because if a non-citizen genuinely fears persecution from their country of origin, as discussed above, imprisonment is a relatively ineffective deterrence. Therefore, after a non-citizen has served their sentence, it is likely that it

[27] Monique Failla, 'Failla Providing permanent protection to refugees in Australia: Real change or window dressing?' (2024) 49(1) *Federal Law Review* 47, 50–1.
[28] Human Rights Law Centre, Submission no. 18, p. 10, para. 36.

is still unsafe to return to their country of origin, that they genuinely fear for their own or their family's safety, and/or because they are medically unwell, they will continue to refuse to comply with a Minister's direction order. Thus, they breach the same offence, or are alternatively returned to immigration detention, resulting in a cycle of indefinite detention. Thus, the proposed Bill merely provides another avenue for detention, yet this time with criminal sanctions. For BVE holders, these non-citizens may have already been transferred from Nauru or Papua New Guinea, and/or may be seeking ministerial intervention. Indefinite detention has incredibly adverse effects on the mental and physical health of non-citizens, who have likely already experienced trauma or been subject to grave human rights abuses, and are further harmed under this model. These non-citizens are deserving of dignity and protection, not punitive criminal sanctions.

b) Lack of review process for indefinite detention

The proposed Bill provides no measure of accountability nor review for this compounding of indefinite detention. The United Nations Human Rights Council stipulates that article 9 of the International Covenant on Civil and Political Rights requires that 'every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.[29] This safeguard is critical to protect individuals' right to liberty. Currently, Australia has no legally enforceable mechanism for the grounds of detention or alternatives to detention. In the recent Hansard Senate committee hearing, Ms Sharp (Group Manager, Legal, Department of Home Affairs) attempts to explain that the existence of the judicial review is an adequate review mechanism.[30] This is insupportable. Currently, 3369 decisions of the IAA are pending the hearing by the Federal Circuit and Family Court.[31] Meanwhile, complainants are subject to a prolonged period of detention, hastened by the proposed Bill. The recent *NZYQ* ruling emphasised that indefinite immigration detention is not immune to the doctrine of the separation of powers, and that the powers of the Minister must necessarily be constrained to detain people in immigration detention.[32] Thus, the proposed Bill must provide a review process for the Minister's proposed powers as per section 199C.

Recommendation: that the Bill is rejected, or failing that, is amended to include a provision which preempts and seeks to prevent cycles of indefinite detention by providing a mechanism of review.

Recommendation 3

That the Parliament should reject the Bill in its entirety.

Failing that, should the Bill pass:

1. The mandatory sentencing of 12 months imposed by s199E(2) be removed.

[29] A v Australia, UN Doc CCPR/C/59/D/560/1993, [9.4].
[30] Commonwealth, *Parliamentary Debates,* Senate, 26 April 2024, 8 (Clare Sharp).
[31] Ibid.
[32] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCCASP 36.

2. The proposed reasonable excuse provision in s199E(4) should be amended to state the rationale of the provision, and detail a list of acceptable excuses, noting that they are non-exhaustive.
3. The Bill considers those failed by the 'Fast Track' review process, and hence amends s 199B to reflect this.
4. The Bill is amended to include a provision which preempts and seeks to prevent cycles of indefinite detention, by providing at least one mechanism of review.

Obligations under refugee convention and international law

Inconsistency with Australia's international non-refoulement obligations

The proposed Bill is largely inconsistent with Australia's international non-refoulement obligations. This prohibition on refoulement has been codified in international human rights treaties to which Australia is a party, such as the 1951 *Convention Relating to the Status of Refugees*[33], which sets out that 'no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.'[34] Over time, this principle has also gained recognition as customary international law, establishing a legal obligation for all states to safeguard the human rights of refugees.[35]

The Bill fails to uphold this obligation through its proposed criminalisation of 'non-cooperation' with Ministerial direction (s 199E(4)). Such a provision has the potential to impinge upon our direct obligations under Article 33 of the 1951 Convention,[36] by forcing 'removal pathway non-citizens' to comply and assist with their refoulement, irrespective of 'whether the person genuinely fears harm or is otherwise medically unable to cooperate with their removal'.[37]

Indeed, per s 199E(4), it cannot be considered a 'reasonable excuse' defence to refusing to comply with the Ministers orders to assist in aiding removal, if a person has a 'genuine fear of

[33] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*').
[34] Ibid Art. 33(1).
[35]UN High Commissioner for Refugees, *The Principle of Non-Refoulement as a Norm Customary International Law*, 2018.
[36] 'Australia's International Obligations | Australian Human Rights Commission' (4 April 2023) <https://humanrights.gov.au/node/17639>.
[37] UN High Commissioner for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93* (UNHCR Publication, January 1994).

suffering persecution or significant harm if the person were removed to a particular country' or 'is, or claims to be, a person in respect of whom Australian non-refoulement obligations exist' or 'believes that, if the person complied with the removal pathway direction, the person would suffer other adverse consequences'. Thus, even if an individual claims to be a person to which refoulement obligations would extend, this is not considered a defence.

Further, it is clear that the relevant individuals targeted by this bill - those on Bridging (Removal Pending) visas (BVR) and Bridging (General) visas (BVE)- may still have protection needs despite an outcome that states otherwise. Indeed, the 'fast-track' visa program, which lacked a 'fair, thorough and robust assessment process for persons seeking asylum'[38] has undoubtedly allowed persons seeking asylum and protection to fall through the gaps. It is these very individuals that may be at risk under the new scheme.

Further, as observed by the Kaldor Legal Centre, circumstances of harm and persecution in an individual's home country are not static[39]; whilst it may have been concluded at a certain point in time that an individual did not meet the threshold for protection, this does not mean that circumstances have not evolved or changed in some way so as to now meet this watermark of protection. As such, simply deciding that these individuals should be removed, and assist with their own removal (under the proposed amendments), based on a process that lacked fair and proper consideration to begin with and looked only at a static window of harm, is unjust.

As such, it is likely that this Bill directly infringes Australia's international non-refoulement obligations, and will continue to uphold our disappointing record of migration and asylum seeker treatment.

Inconsistency with Australia's Refugee and Humanitarian obligations

Under the Migration Bill, the Minister may prohibit visa applications from a person who is a national of a country deemed to be a country of 'removal concern' (s 199F(1)). Further, the Minister may overturn a protection finding that had been previously made during the original assessment of an individual's visa application. [40]

This is of particular concern given that the decision of what constitutes a 'removal concern country' is, largely, up to the individual discretion of the Minister. Further, this is clearly inconsistent with the obligation to avoid discrimination against applicants based on where they come from or how they arrive.[41]

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[38] Australian Labor Party, ALP National Platform: As Adopted at the 2021 Special Platform Conference (March 2021) 124.
[39] Kaldor Legal Centre for International Refugee Law, *Migration Amendment (Removal and Other Measures) Bill 2024 Submission 11*, 2024.
[40] 'Explainer: Migration Amendment (Removal and Other Measures) Bill 2024', *Human Rights Law Centre* (26 March 2024) <https://www.hrlc.org.au/reports-news-commentary/2024/03/26/indefinite-detention>.
[41] See, for example, art 3 of the Refugee Convention, arts 1 and 26 of the ICCPR.

Inconsistency with Australia's Convention On the Rights of the Child Obligations

Australia has ratified the *Convention on the Rights of the Child*[42] thus, as a nation, we have positive obligations to uphold the standards set out in that Convention. This proposed bill undoubtedly possesses the potential to infringe on our obligations. Subsection 199D(5) allows the Minister to give a removal pathway direction in relation to the child, if the parent or guardian of that child is a removal pathway non-citizen. We foresee a dual impact as a result of this section. Firstly, it is expected that the Bill will allow for the separation of families, as the Minister may direct a person to comply with a direction, 'irrespective of the impact this would have on their spouse, children or other family members'.[43] This would directly contravene Australia's obligation under Article 9 of the *Convention on the Rights of the Child* [44] to ensure that children are not separated from their families except for when it is in the child's best interests.

Secondly, as a result of s 199D(5), the Minister will also be able to direct parents and guardians of the relevant child, on the child's behalf. This is a particularly problematic provision that seeks to usurp parental rights and places the direct control of the relevant child in the hands of the Minister. Indeed, as argued by the Kaldor Legal Centre, s 199D(5) 'could be used to compel parents to sign documents and take other actions on the child's behalf' and generally act in a way that is contrary to a 'child's best interests'[45] - a right protected by Art 3(1) of the *Convention on the Rights of the Child*.[46]

In addition, we note that this Bill also directly contravenes Article 5 of the same convention, which sets out that 'state parties shall respect the responsibilities, rights and duties of parents'.[47] Such a blanket discretionary power that seeks to allow the Minister to provide directives on behalf of a child, and potentially against a parent's wishes, also intrinsically usurps parental power and thus infringes upon this obligation. As such, we argue that this Bill clearly and directly contravenes Australia's obligations under the *Convention on the Rights of the Child*[48].

Recommendation 4

That the Parliament should reject the Bill in its entirety.

Failing that, should the Bill pass:

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[42] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[43] 'Explainer: Migration Amendment (Removal and Other Measures) Bill 2024', *Human Rights Law Centre* (26 March 2024) <https://www.hrlc.org.au/reports-news-commentary/2024/03/26/indefinite-detention>.
[44] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[45] Kaldor Legal Centre for International Refugee Law, *Migration Amendment (Removal and Other Measures) Bill 2024 Submission 11*, 2024.
[46] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[47] Ibid.
[48] Ibid.

1. That Parliament reconsiders s199E(4), which is in direct violation of Australia's Refugee and Humanitarian Obligations.
2. That Parliament reconsiders the broad discretion granted under s 199F(1) to label a country as a 'removal concern country'.
3. That Parliament reconsider the usurpation of parental and child rights under s 199D(5)