Senate Legal and Constitutional Affairs Committee Inquiry
Migration Amendment (Removals and Other Measures) Bill 2024

Introduction

Founded in 2001, the Asylum Seeker Resource Centre (ASRC) is Australia's largest independent aid and advocacy organisation for people seeking asylum and refugees, supporting and empowering people at the most critical junctures of their journey. Our services include legal, casework, housing, medical, education, employment and emergency relief. Based on what we witness through our service delivery, we advocate for change with refugees to ensure their human rights are upheld.

The ASRC welcomes the opportunity from the Senate Legal and Constitutional Affairs Committee to provide a submission regarding the Migration Amendment (Removals and Other Measures) Bill 2024 (the Bill). The ASRC's legal team has extensive expertise representing people seeking asylum and refugees, including all stages of the protection visa application process, visa cancellations, immigration detention and deportation matters. Many of the case studies in our submissions reflect how the Bill would impact our clients and their families.[1]

The ASRC is gravely concerned by the Bill, which introduces unprecedented and opaque ministerial powers to deport people and ban people from entering Australia, and imposes harsh criminal penalties on people refusing to cooperate with their own deportation. This Bill will have devastating consequences for vast sections of the Australian and international community, including permanent family separation, harm to children, and refugees being forced to return to countries where they face persecution. Disturbingly, the entry ban contained in the Bill has the hallmarks of former US President Donald Trump's "Muslim Ban" policy, targeting a select group of countries on a discriminatory and unfounded basis.

This Bill is antithetical to Australia's values of democracy and fairness, and undermines the social cohesion of our multicultural society by marginalising certain ethnic groups who will be unable to reunite with loved ones, work, study and visit Australia.

This Bill is yet another attack on migrants, refugees and people seeking asylum in the wake of the High Court of Australia's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,[2] which ruled that indefinite detention is unlawful,[3] and pending litigation in the High Court regarding involuntary removals.[4] However, the scope of this Bill is much broader than people currently on removal pathways and/or people released from detention due to *NZYQ*, and is likely to have unintended consequences for the Australian community, including economic and security implications, especially given the limited opportunities for scrutiny of the Bill.

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[1] All case studies are deidentified and include pseudonyms.
[2] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.
[3] Ibid.
[4] *ASF17 v Commonwealth of Australia*, Case No P7/2024.

The ASRC echoes the concerns raised by the Senate Standing Committee for the Scrutiny of Bills (Senate Scrutiny Committee) 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.[5] 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.

The ASRC recommends the Committee opposes the Migration Amendment (Removals and Other Measures) Bill 2024 in its entirety.

Returning refugees and people seeking asylum to serious harm

The Bill will cause people, including refugees, people seeking asylum and people who are stateless, to be removed to countries where they face serious harm, including death, consequently breaching Australia's obligations under the Refugee Convention and international law.

The Bill grants the Minister for Immigration, Citizenship and Multicultural Affairs (Minister) powers to direct a person in writing to cooperate with deportation from Australia (known as a 'removal pathway direction'), by doing things such as:

- Applying for a passport or travel document;
- Completing and sign documents to facilitate travel; and
- Attending interviews or appointments.

People who can be subject to these powers (known as a "removal pathway non-citizen") include:

- People who do not hold a visa and are required to be removed from Australia under section 198 of the Migration Act[6] (often these people are in immigration detention);
- People who hold a bridging visa R (BVR); and
- Certain people who hold a bridging visa E (BVE). This will depend on whether the BVE is granted on the basis they are making arrangements to leave Australia.[7]

The Minister's new deportation powers will apply to refugees and people seeking asylum who have lived in Australia for years and established themselves in our communities. Although the Bill provides limited exceptions for certain refugees and people seeking asylum, these protections are insufficient and there is a real risk that people who are owed protection will be refouled to life-threatening situations.

[5] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5 of 2024 (27 March 2024) [1.27]-[1.32].
[6] *Migration Act 1958* (Cth).
[7] Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed section 199B.

Refugees excluded from protection

The Minister cannot direct a person with a 'protection finding' (as defined in the Migration Act) to return to the country from which they are owed protection.[8] However, the definition of 'protection finding' is limited and mainly applies to people who have applied for a Protection visa (Subclass XA) in Australia.[9] This definition does not include all refugees and people who are owed protection, such as people who were granted a Refugee and Humanitarian (Subclass XB) visa outside Australia, people subjected to inadequate processes (see page 5 for more information), or people found to be owed non-refoulement obligations under an International Treaties Obligations Assessment conducted by the Department of Home Affairs (Department).

Case study

Ahmed fled to Australia from Iraq as a 15 year old boy on a refugee and humanitarian visa. He arrived in Australia with his parents and 2 siblings.

Ahmed struggled to adjust to life in Australia as he was suffering from post-traumatic stress disorder from witnessing violence in Iraq. He started using drugs and was convicted of drug-related offences. Ahmed's visa was cancelled and he was held in detention for 5 years while he sought review of his visa cancellation, which was unsuccessful.

In the meantime, Ahmed's parents and siblings became Australian citizens.

Ahmed has rehabilitated and wants to rebuild his life with his family in Australia. However, the Department has commenced action to deport Ahmed to Iraq.

If the Bill is passed, the Minister can direct Ahmed to cooperate with his deportation even though he is a refugee and it is unsafe for him to return to Iraq. He could be imprisoned for years for failing to do so.

There are no protections in the Bill to prevent refugees being deported to third countries where the person does not have a 'protection finding', including countries where they have no connection or support network and will be vulnerable to persecution and harm. The Department confirmed that provisions of the Bill were specifically drafted to permit deportation of refugees to third countries.[10] Consequently, refugees will continue to be exposed to deportation from Australia.

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

[8] Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed section 199D(1).
[9] *Migration Act 1958* (Cth), s 197C (4)-(7).
[10] Stephanie Foster, Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Removal and Other Measures) Bill 2024 (26 March 2024) 21. See Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed section 199B(2).

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 ban will prevent refugees from accessing safety and family reunion via these pathways.

Minister's expanded powers to overturn protection findings

Concerningly, the Bill expands the Minister's powers to overturn a person's 'protection finding' (which would then expose them to deportation). Currently the Minister has the power to overturn a 'protection finding' in relation to a person who is an unlawful non-citizen.[11] In practice, this mainly applies to people in immigration detention who do not have a visa. The Bill seeks to expand these ministerial powers to people who are lawful non-citizens (i.e. people who are visa holders and not in immigration detention). The current wording in the Bill includes people who are BVR holders and certain BVE holders. Consequently, refugees who have been living in our community for years can be exposed to deportation once the Minister overturns their 'protection finding'.

Case study

Mohammad fled to Australia from Iran on a visitor visa, and then applied for a protection visa. The Department made a protection finding, and Mohammad was recognised as a refugee and granted a permanent protection visa.

Mohammad's protection visa was cancelled and he was taken into immigration detention. He sought review of his visa cancellation, however was unsuccessful. Mohammad was held in detention for 6 years until the Minister intervened to grant him a BVR in 2022. Mohammad has rebuilt his life in the community and recently married Grace, an Australian citizen.

If the Bill is passed, the Minister can overturn Mohammad's protection finding to deport him to Iran despite the risk to his safety and separation from his wife. He could be imprisoned for years for failing to cooperate with his deportation.

The Minister can expand his power to overturn 'protection findings' for people on other visa categories as well without any oversight (see page 14 for more information).[12] As a result, the **Bill has the potential to give the Minister for Immigration the power to overturn the 'protection finding' of a Protection visa holder (who is an Australian permanent resident), and thereby proceed to deport them from Australia.**

[11] *Migration Act 1958* (Cth), s 197D.
[12] Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed section 197D(1)(a)(ii).

People seeking asylum at risk of harm

People who are afraid to return to their home country often have protection claims that have either not been assessed, or have been unfairly assessed via flawed processes. While the Bill includes protections for certain people seeking asylum, there are thousands of people seeking asylum who are excluded and at risk of refoulement.

The Bill states that the Minister must not give a 'removal pathway direction' to a person who has made a valid protection visa application and the application is not 'finally determined'.[13] The Migration Act defines 'finally determined' as whether the person has received a merits review decision from the Administrative Appeals Tribunal (AAT) and/or Immigration Assessment Authority (IAA) (or did not commence a review application within the relevant timeframe).[14] This means that people seeking asylum who have a valid Protection visa application on foot before the Department or are seeking merits review of a Department decision refusing their Protection visa before the AAT or IAA will not be subjected to 'removal pathway directions'.

However, this protection does not include people seeking asylum who are seeking judicial review of an AAT or IAA decision before the courts. There are currently over 4,700 people seeking judicial review of IAA decisions,[15] and thousands more seeking review of AAT decisions. While many people seeking asylum at judicial review stage are granted bridging visas on the basis of their court proceedings (and therefore are not the type of BVE holders mentioned by the Bill), there are some who are unable to apply for a bridging visa as they require Ministerial intervention (e.g. people who arrived by sea who require a section 46A bar lift) or are deemed ineligible for a BVE due to the application of certain Migration Regulations. The ASRC regularly witnesses people living in the community while seeking judicial review who have been refused bridging visas for these reasons, often facing severe destitution due to lack of work rights and access to healthcare. **This cohort of people seeking asylum without any bridging visa at judicial review stage could be directed to engage with their deportation from Australia under this Bill while they have court proceedings on foot about their protection visa application.** Although the Bill provides that the Minister must not give a 'removal pathway direction' in relation to commencing, discontinuing or taking particular steps in relation to court or tribunal proceedings,[16] it does not prevent people being deported during their court proceedings.

[13] Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed section 199D(2).
[14] *Migration Act 1958* (Cth), s 5(9), (9A).
[15] Department of Home Affairs, UMA Legacy Caseload, 31 January 2024, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.homeaffairs.gov.au/research-and-stats/files/unauthorised-maritime-arrivals-bve-31-jan-2024.pdf.
[16] Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed section 199D(6).

Case study

Geetha fled Sri Lanka and applied for a protection visa. She was subjected to the Fast Track process, and her protection visa application was refused by the Department and IAA without a fair opportunity to present her protection claims, which included experiences of severe gender-based violence.

Geetha sought judicial review of her IAA decision before the courts. She has been waiting 4 years for her final hearing.

During her court case, Geetha has tried to apply for a bridging visa several times, however the Department informed her that she requires ministerial intervention under section 46A of the Migration Act to be eligible to apply for a bridging visa. Geetha submitted a request to the Minister and has been waiting over 1 year for a response.

If the Bill is passed, the Minister can direct Geetha to cooperate with her deportation and deport her from Australia while her judicial review proceedings are on foot regarding her protection visa application. She could be imprisoned for years for failing to do so.

Additionally, the Bill does not include any protections for people seeking asylum who have been subjected to unfair processes and not had their protection claims accurately assessed. **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 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,[17] 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. **The Labor government has acknowledged that the Fast Track process is unfair and has committed to abolish the IAA in legislation currently before Parliament,[18] yet there are no protections in this Bill for people who were subjected to the Fast Track process and received unjust outcomes.**

Case study

Ali fled Afghanistan and applied for a protection visa. He was subjected to the Fast Track process, and his protection visa application was refused by the Department and IAA without a

[17] Kaldor Centre Data Lab, Submission No 11 to Standing Committee on Social Policy and Legal Affairs, *Inquiry into Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill)*, 25 January 2024, [5]-[6].
[18] Administrative Review Tribunal Bill 2023, Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023.

fair opportunity to present his protection claims. Ali sought judicial review of his IAA decision before the courts, but was unsuccessful.

After the fall of Kabul in 2021, Ali submitted a request to the Minister to allow him to apply for another protection visa as he faced an increased risk of harm on return to Afghanistan. Ali is still waiting for the Minister to intervene.

If the Bill is passed, the Minister can direct Ali to cooperate with his deportation and deport Ali from Australia even though Ali will face persecution, including death. He could be imprisoned for years for failing to do so.

Other cohorts of people seeking asylum who could be subjected to a 'removal pathway direction' include BVE holders who:

- are seeking ministerial intervention; and
- have been transferred from Nauru or Papua New Guinea (PNG) to Australia.

There are thousands of people seeking asylum who are seeking ministerial intervention due to being subjected to unfair processes (including the Fast Track process),[19] and/or who have had changes to their protection claims or new protection claims since their protection visa application was assessed, and are waiting for the Minister to intervene to allow them to apply for a protection visa. People in these circumstances are often granted a BVE on departure grounds to regularise their migration status while they await a decision from the Minister. The Bill threatens to deport people seeking asylum in these circumstances to countries where they face serious harm and persecution, often after living in Australia for over a decade.

Case study

Suja fled Pakistan with her husband, Muktab, and applied for a protection visa. Their protection application was refused by the Department and AAT. They sought judicial review of their AAT decision before the courts. During this time, Muktab was violent towards Suja and she separated from him. Muktab's family in Pakistan threatened to kill Suja if she returned to Pakistan because she had brought shame on their family.

Suja and Muktab's judicial review proceedings were unsuccessful.

Suja requested ministerial intervention on the basis that her protection claims had changed due to her experiences of family violence and fear of honor killings on return to Pakistan. Suja has been waiting over 1 year for a response from the Minister. During this time, Suja has been granted BVEs on departure grounds, which expire every 6 months.

[19] Department of Home Affairs, UMA Legacy Caseload, 31 January 2024, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.homeaffairs.gov.au/research-and-stats/files/unauthorised-maritime-arrivals-bve-31-jan-2024.pdf.

If the Bill is passed, the Minister can direct Suja to cooperate with her deportation and deport her from Australia even though she will face persecution, including death. She could be imprisoned for years for failing to do so.

Many people seeking asylum and refugees who were transferred from Nauru or PNG to Australia are BVE holders. Often these BVEs are granted on departure grounds (and consequently are covered by the Bill), even where people are not medically fit to travel or engage in resettlement processes. This Bill threatens their deportation to countries where they face persecution, including countries where they have been found to be owed protection under Nauruan and/or Papua New Guinean refugee status determination processes. However, as their protection claims were not assessed in Australia, they do not qualify for the 'protection finding' exception and are at risk of refoulement to countries where they face serious harm.

Case study

Sara fled Ethiopia and sought asylum in Australia. She was transferred to Nauru and held offshore for several years. Sara was recognised as a refugee under the Nauruan refugee status determination process. She was later transferred to Australia for medical treatment.

Sara has been living in the Australian community for several years. She is married to Juan, an Australian citizen, and together they have 2 children, Emmanuel and Jacob.

If the Bill is passed, the Minister can direct Sara to cooperate with her deportation and deport Sara from Australia despite her being a refugee and at risk of serious harm on return to Somalia, and the impact on her husband and children. She could be imprisoned for years for failing to do so.

Unfairly punishing refugees and people seeking asylum

The Bill introduces a harsh new criminal offence for people who fail to comply with a 'removal pathway direction' unless the person has a 'reasonable excuse', including a minimum one year mandatory imprisonment sentence (and maximum sentence of five years' imprisonment or a fine up to $93,900 or both).[20] The term 'reasonable excuse' is not defined, which creates ambiguity and, as observed by the Senate Scrutiny Committee, "may result in persons complying with directions even when it may be lawful for them to refuse to do so".[21]

[20] Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed section 199E.
[21] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5 of 2024 (27 March 2024) [1.10].

Disturbingly, the Bill states that it is not a 'reasonable excuse' that the person:

- has a genuine fear of suffering persecution or significant harm if the person were removed to a particular country;
- is, or claims to be, a person in respect of whom Australian non-refoulement obligations; or
- believes that, if the person complied with the removal pathway direction, the person would suffer other adverse consequences.[22]

The Department alleges that this provision is necessary to deport people with respect to whom Australia may have protection obligations to third countries.[23] However, the Bill does not restrict its application in this manner. Consequently, the fact that a person has protection claims and fears harm upon deportation will not be considered a reasonable excuse to exempt them from criminal liability for non-compliance with a 'removal pathway direction'.

The ASRC is deeply concerned regarding the Government's trend of using the migration system to criminalise people for innocuous conduct (such as failing to complete a form). People have valid reasons why they may be afraid and choose not to engage in a deportation process, including refugees and people seeking asylum who have not had their protection claims fairly assessed or people wanting to remain with their children and partners in Australia. **This Bill will further punish refugees, people seeking asylum and people who are stateless by forcing them to cooperate with their deportation or face imprisonment, resulting in people being incarcerated indefinitely, either in immigration detention or prison.**

Case study

James fled South Sudan with his mother and younger sister during the civil war. They lived in a refugee camp in Kenya for 2 years. They arrived in Australia on refugee and humanitarian visas when James was 12 years old.

James' visa was cancelled and he has been held in detention for over 4 years. He is seeking review of his visa cancellation, and his case is currently before the courts.

The Department has repeatedly asked James if he wants to return to South Sudan. He has told them that it is not safe for him to return and he doesn't want to leave Australia. The Department has also asked James if he would return to Kenya. James is scared to be deported to Kenya as he doesn't know anyone there and would not be able to survive.

If the Bill is passed, the Minister can direct James to cooperate with his deportation and deport James while his court case challenging his visa cancellation is on foot. If James

[22] Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed section 199E(4).
[23] Stephanie Foster & Clare Sharp, Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Removal and Other Measures) Bill 2024 (26 March 2024) 9, 21.

does not comply with the Minister's direction, he could be imprisoned for 5 years (with a minimum of 1 year in prison).

The Bill's imposition of a mandatory minimum sentence is unprecedented and disproportionate to the nature of the offence of non-compliance with a ministerial direction. The Senate Scrutiny Committee shared these concerns and noted that "courts should not be limited in their ability to impose sentences with regard to the circumstances of the offending".[24]

The Government itself has acknowledged the flaws of mandatory sentencing, with Labor's 2023 National Platform stating:

> "**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**."[25]

Disappointingly, the Albanese Government is acting contrary to its own principles by proposing mandatory sentencing in this Bill.[26] Political expediency must not dictate how the government makes laws; instead, law-making should be based on sound reasoning and evidence. The Law Council of Australia has advised that there is no evidence that mandatory sentencing reduces crime.[27]

The Government has also acknowledged that the Bill's mandatory sentencing provisions may breach international law. The Bill's Statement of Compatibility with Human Rights observed that the mandatory minimum sentence creates a risk of breaching Australia's obligations under articles 9 and 14 of the ICCPR in relation to the right to liberty and freedom from arbitrary detention, and the right to a fair trial and minimum guarantees in criminal proceedings.[28]

Permanent family separation and harm to children

The Bill does not consider the best interests of children and will cause migrant and refugee families in Australia to be permanently separated.

Impact of entry ban

The Bill grants the Minister for Immigration extraordinary powers to prevent people from certain countries from entering Australia. The Minister can designate countries as 'removal concern

[24] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5 of 2024 (27 March 2024) [1.8].
[25] Australian Labor Party National Platform, August 2023, 87 [46].
[26] The Government also passed mandatory sentencing provisions contrary to its party platform in November 2023 in the Migration Amendment (Bridging Visa Conditions) Bill 2023, and December 2023 in the Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023.
[27] Law Council of Australia, Mandatory Sentencing: Factsheet 2. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://lawcouncil.au/docs/3b338bbd-ae36-e711-93fb-005056be13b5/1405-Factsheet-Mandatory-Sentencing-Factsheet.pdf.
[28] Explanatory Memorandum - Attachment A, Statement of Compatibility with Human Rights, Migration Amendment (Removal and other Measures) Bill 2024 (Cth) 24-7.

countries' where he thinks it is in the national interest to do so.[29] In practice, this designation would result in the suspension of almost all visa applications from these countries.[30]

The Bill does not specify which countries will be designated as a "removal concern country", and the Department does not have a list of countries to be designated.[31] The Minister has stated that countries such as Iran, Iraq, South Sudan and Russia may be included.[32] However, it is possible the Bill could cover several more countries. In 2020, the United States considered the following 13 countries and territories were uncooperative with removals: Bhutan, Burundi, Cambodia, China, Cuba, Eritrea, Hong Kong, India, Iran, Iraq, Laos, Pakistan, and Russia.[33] Understandably, the lack of clarity provided in the Bill and the Government's response has created much distress, anxiety and confusion amongst migrant communities in Australia, who are afraid that they may be indefinitely separated from their families and loved ones.

Although there are limited exceptions to the entry ban regarding families,[34] they are not sufficient and many people will be unfairly punished by the Bill. **Family members such as adult children, siblings, parents of adult children and grandparents are not listed as exceptions to the entry ban.** Further, the limited exceptions do not consider the nature of family relationships in non-Western contexts, where extended family members such as aunties, uncles and cousins have close ties and are considered as immediate family members.

Case study

Sayeh is a refugee who fled from Iran due to persecution based on her gender and political opinion. She was granted a permanent visa and later became an Australian citizen.
Sayeh is expecting her first baby and wants her mother, Halima, to visit her to support her during the first few weeks after the delivery.

If the Bill is passed and Iran is designated as a removal concern country, Halima will not be able to visit her daughter and newborn granddaughter and she will be permanently separated from her family in Australia.

In addition, people who sought asylum by sea during 2012-2013 and were only eligible for a temporary protection visa, became eligible in 2023 to apply for permanent visas, and can now sponsor family members for the first time. However, the Bill will prevent people from reuniting with

[29] Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed section 199F.
[30] Ibid, proposed section 199G.
[31] Stephanie Foster & Tara Cavanagh, Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Removal and Other Measures) Bill 2024 (26 March 2024) 10-11,16-17.
[32] Ibid.
[33] Erlend Paasche, 'Recalcitrant' and 'Uncooperative': Why Some Countries Refuse to Accept Return of Their Deportees, Migration Policy Institute, 20 December 2022, https://www.migrationpolicy.org/article/recalcitrant-uncooperative-countries-refuse-deportation.
[34] These exceptions include the spouse, de facto partner or dependent child of an Australian citizen, permanent visa holder or person who is usually resident in Australia; the parent of a child in Australia who is under 18 years; and dual nationals. See Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed s 199G(2).

their family as there are no exceptions for visa categories used for family reunion such as parent and remaining relative visas.

Case study

Noor fled Iraq with her husband and daughter in 2013 and sought asylum in Australia by sea. Their son, Jamal, was 15 years old at this time and he remained in Iraq with his grandparents. Noor expected her son to join their family soon in Australia once they were granted visas.

Noor and her family were recognised as refugees and granted temporary protection visas in 2017. Around this time, Jamal's grandparents passed away. However, as Noor and her family arrived by sea, she was not eligible to sponsor Jamal to join them.

In 2023, Noor's temporary protection visa was converted to a permanent Resolution of Status Visa. After a decade, Noor is finally able to sponsor her son for a Remaining Relative visa to join their family in Australia.

If the Bill is passed and Iran is designated as a removal concern country, Noor will not be able to sponsor her son and he will be permanently separated from his family in Australia.

The Bill will have far-reaching impacts throughout Australia's multicultural and diverse society, with many Australian citizens and permanent residents being permanently separated from loved ones that live overseas, creating much suffering and distress across the community.

Impact of coercing people to leave Australia

Although the Minister cannot issue a 'removal pathway direction' to a child, he can issue a direction to any parent or guardian who is a 'removal pathway non-citizen' in relation to their child.[35] However, **the Minister is not required to consider the best interests of children when directing a person to cooperate with their deportation from Australia, including directions that apply to children.** Consequently, this Bill will cause serious harm to children and contravenes Australia's obligations under the Convention on the Rights of the Child, which requires the best interests of children to be a primary consideration in all actions concerning children.[36]

Case study

Shanthi and Jeeva fled Sri Lanka in 2013 and sought asylum under the Fast Track system.

[35] Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed section 199D(4), (5).
[36] UN General Assembly, Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989, articles 3(1), 12.

In 2016, Shanthi and Jeeva had a daughter, Sharmala. Sharmala has leukemia and requires significant support and medical treatment.

Shanthi and Jeeva's protection claims were not correctly assessed and their protection visa applications were refused by the Department and IAA. After several years of seeking judicial review at court, they were no longer able to afford a lawyer to assist them. They were unable to represent themselves and the Court dismissed their case.

If the Bill is passed, the Minister can direct Shanthi and Jeeva to cooperate with their deportation without considering the impact on Sharmala. Even worse, the Bill empowers the Minister to direct Shanthi and Jeeva to facilitate Sharmala's removal despite her medical condition and life-saving treatment that she can access in Australia. They could be imprisoned for years for failing to cooperate with their removal.

Additionally, the Minister is not required to consider family separation when issuing a 'removal pathway direction'. This means that **Australian citizen family members, including children, spouses, and parents, could be permanently separated from their loved ones.**

Case study

Chol fled to Australia from South Sudan when he was 10 years old on a refugee and humanitarian visa. Chol married an Australian citizen and has 3 Australian citizen children.

Chol's visa was cancelled and he was transferred to immigration detention. He sought review of his visa cancellation, however was unsuccessful. Chol has been held in detention for over 4 years. Chol wants to stay in Australia and reunite with his wife and children. The Department has commenced action to deport Chol to South Sudan.

If the Bill is passed, the Minister can direct Chol to cooperate with his deportation and deport Chol from Australia without considering the negative impact of permanent family separation on Chol's wife and children. He could be imprisoned for years for failing to do so.

As mentioned above, many people seeking asylum and refugees who were transferred from Nauru or PNG to Australia for urgent medical treatment are BVE holders covered by the Bill. A growing number of people in this cohort have family members, including children and partners, who are Australian citizens and/or permanent residents. This Bill threatens to permanently separate these families.

Unchecked, opaque and unnecessary ministerial powers

The Bill expands the Minister's god-like powers to unprecedented levels without adequate safeguards, and erodes accountability and transparency in government decision-making. For example, the Bill permits the Minister to unilaterally – subject only to consultation with the Prime Minister and Minister for Foreign Affairs – designate a country to be a "removal concern country", with the effect that almost all nationals from that country are prohibited from applying for any visa to come to Australia.[37] Only the Minister can decide in individual cases to lift that prohibition, however the Minister is under no duty to even consider a request.[38] This is an extremely inefficient and opaque mechanism that is apt to cause delay, confusion, and distress.

The Senate Scrutiny Committee echoed these concerns and observed:

> "**The committee is concerned that such a significant matter is being left to the broad and unfettered discretion of the minister and is to be set out in delegated legislation**. 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".[39]

Additionally, **the Minister's powers to overturn 'protection findings' and expose refugees to refoulement are unfounded and contrary to the rule of law.** The government should not have unfettered discretion to override assessments regarding a person's protection claims for the sole purpose of deporting refugees from Australia. The Senate Scrutiny Committee also shared these concerns and observed that "this is clearly a significant and rights affecting matter and it is not clear to the committee why such a power is necessary".[40] **The ASRC recommends that section 197D in its entirety should be repealed from the Migration Act.**

The broad scope of the Bill creates the potential for devastating and unintended consequences. While the Minister's powers to issue 'removal pathway directions' under the Bill is currently limited

[37] Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed sections 199F, 199G(1).
[38] Ibid, proposed section 199G(4)-(8).
[39] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5 of 2024 (27 March 2024) [1.23].
[40] Ibid [1.17].

to a group of people on a specific visa classes (BVRs and certain BVEs) or those in without a visa,[41] the Bill includes the ability for the government (or any future government) to expand the visa categories covered by these draconian provisions.[42] As the government can expand the scope via Migration Regulations, this circumvents any parliamentary scrutiny and reduces accountability. The Senate Scrutiny Committee raised similar concerns and considered that these matters were too significant to be covered by delegated legislation, especially given the gravity of the associated criminal offence and significant penalties. The Committee observed that it:

> "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**".[43]

Case study

Ivanna fled to Australia from Ukraine during the start of the war with her 2 teenage daughters. They arrived on visitor visas and were later granted temporary humanitarian stay visas.

If the Bill is passed, the government could at any time prescribe temporary humanitarian stay visa holders as "removal pathway non-citizens". ***This means that Ivanna and her daughters could be directed to cooperate with their deportation, even if it is not safe for them to return to Ukraine. They could be imprisoned for years for failing to do so.***

The Bill also confers extraordinarily broad powers on the Minister to issue a direction to a person to do anything to facilitate their deportation without appropriate limitations or guidance regarding how this power should be exercised.[44] The ASRC echoes the Senate Scrutiny Committee's concerns that the Bill does not include any safeguards to ensure that the time period for a person to comply with a 'removal pathway direction' is reasonable and sufficient to allow people to comply and seek legal advice.[45]

The government has justified the introduction of this Bill as necessary to deport certain non-citizens from Australia. However, this intention is not explicitly reflected in the Bill. The power to designate a 'removal concern country' extends to any country that the Minister thinks it is in the national interest

[41] Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed sections 199B(1)(a)-(c).
[42] Ibid, proposed section 199B(1)(d).
[43] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5 of 2024 (27 March 2024) [1.4].
[44] Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), proposed sections 199C(2).
[45] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5 of 2024 (27 March 2024) [1.5].

to designate, which could be much broader than countries that do not facilitate the deportation of their citizens. There is also no evidence that the Bill will assist in the deportation of a small existing cohort of people whom the Government wishes to deport from Australia. As observed by the Human Rights Law Centre, there is no evidence that issuing 'removal pathway directions' to people in Australia will in fact facilitate their deportation given the position of certain countries such as Iran.[46] Concerningly, the Department does not even know how many people are impacted by the Bill.[47] In these circumstances, it is difficult to conceive how the government considers that this Bill is an "appropriate and proportionate measure".[48]

The Government already has existing measures to facilitate the deportation of non-citizens. Section 198 of the Migration Act provides the Government with the power to deport non-citizens from Australia. The Government can also impose visa conditions on bridging visas (a number of which are currently imposed on BVR holders who were released from detention as a result of the High Court decision in *NZYQ*) to require them to comply with deportation efforts, such as attending interviews and presenting for deportation.[49] Additionally, the Government has the ability to engage in diplomatic measures to facilitate deportations.

Broader negative impacts on Australian community

This Bill, which targets migrant families and forces refugees and people seeking asylum to return to harm, is underpinned by xenophobia and racism, which threatens the multicultural fabric of Australian society and will adversely impact migration to Australia. It is grossly unfair to punish foreign citizens on the basis of their government's actions, especially when these countries are often not democratic nations. The entry ban will marginalise certain ethnic communities in Australia and jeopardies social cohesion.

Additionally, the entry ban will discourage migrants from coming to Australia to work, live and study, which will have a significant impact on the Australian economy. There are no exceptions to the entry ban for work, study and tourist visas, which will result in thousands of people from 'designated removal countries' being excluded from entry to Australia to meet labour shortages, access education and holiday in Australia. Further, even if the Government includes additional classes of visas as exemptions from the entry ban (which it has the power to do), the symbolic message of banning visitors from certain countries will discourage migrants from travelling to Australia.

Case study

[46] Human Rights Law Centre, Submission No 11 to the Senate Standing Committee on Legal and Constitutional Affairs, *Migration Amendment (Removal and Other Measures) Bill 2024* (10 April 2024) 6.
[47] See Senate Legal and Constitutional Affairs Legislation Committee, Proof Committee Hansard: Migration Amendment (Removal and Other Measures) Bill 2024, 26 March 2024, pp. 4-5.
[48] Explanatory Memorandum, Migration Amendment (Removal and other Measures) Bill 2024 (Cth) 3.
[49] Migration Regulations, Schedule 8, conditions 8541, 8542, 8543.

Hassan is an engineer in Iran. He has applied for a skilled visa to work in Australia, filling a critical role for an employer struggling to find staff. Hassan's brother is an Australian citizen, and he is looking forward to reuniting with family while working in Australia.

If the Bill is passed and Iran is designated as a removal concern country, Hassan will not be able to migrate to Australia to work. He will also not be able to apply for a visitor visa to see his brother in Australia.

The Bill is likely to jeopardise Australia's diplomatic relations and national security with a heavy-handed approach to diplomacy. The Explanatory Memorandum states the Bill would "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".[50] However, it is unclear why the Bill is necessary to achieve these objectives when the Government can engage in diplomacy to express Australia's concerns and work collaboratively with foreign governments. Instead, it appears the Bill will be used as a blunt tool to force certain countries to cooperate with Australia's attempts to deport non-citizens by punishing its citizens who will not be able to work, live and study in Australia. There is a high risk this approach could exacerbate diplomatic relationships with these countries, worsening outcomes for Australia as a whole and not achieving the Government's desired outcome of facilitating involuntary removals.

Conclusion

This Bill has no place in our democracy. The ASRC is deeply troubled by the introduction of this Bill, which infringes the rights of refugees, people seeking asylum, migrants and the broader Australian community. The unparalleled expansion of ministerial powers to ban people from entering Australia will have dire consequences for many Australians and their families, including permanent family separation. The powers to direct people to cooperate with their deportation, regardless of whether they have had a fair assessment of their protection claims, will expose refugees and people seeking asylum to severe harm, including death. Additionally, the criminal sanctions for failure to comply with a ministerial direction regarding deportation, including a mandatory sentencing regime, will coerce refugees to return to harm or face indefinite incarceration in prison and immigration detention. This Bill threatens the multicultural fabric of our society, and will have unintended consequences for the Australian community. The continual broadening of the Minister's powers without appropriate scrutiny and transparency is a worrying trend that should concern all Australians.

The ASRC recommends the Committee opposes the Migration Amendment (Removals and Other Measures) Bill 2024 in its entirety.

[50] Explanatory Memorandum, Migration Amendment (Removal and other Measures) Bill 2024 (Cth) 3.