Chapter 1
New and ongoing matters

1.1 The committee comments on the following bills and legislative instruments, and in some instances, seeks a response or further information from the relevant minister.

Bills

Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024[9]

Purpose	This bill seeks to extend for a further three years the declared area offence in the *Criminal Code Act 1995* that is scheduled to sunset on 7 September 2024
Portfolio	Attorney-General
Introduced	House of Representatives, 27 March 2024
Rights	Equality and non-discrimination; fair trial; freedom of movement; liberty; life; security of person

Extension of declared area offence provisions

1.2 This bill seeks to extend by a further three years (to 7 September 2027) the operation of the declared area offence provision in section 119.2 of the *Criminal Code Act 1995* (Criminal Code) which is due to sunset on 7 September 2024.[10] The bill also seeks to add a sunset date (of 7 September 2027) to section 119.3 of the Criminal Code, which empowers the minister to declare an area for the purposes of the offence provision (this is not currently subject to any sunsetting).[11] Under the current provisions, it is an offence, punishable by up to 10 years' imprisonment, to enter or remain in an area declared by the Minister for Foreign Affairs, unless the accused can raise evidence to demonstrate it is for one of a limited set of purposes as set out in the

9 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024, *Report 3 of 2024*; [2023] AUPJCHR 15.

10 Schedule 1, item 1.

11 Schedule 1, item 2.

Criminal Code.[12] The Minister for Foreign Affairs may declare an area in a foreign country for the purposes of this offence if they are satisfied that a listed terrorist organisation is engaging in a hostile activity in that area.[13]

International human rights legal advice

Multiple rights

1.3 The declared area offence provisions are intended to protect Australia's national security interests; deter Australians, including families, from travelling to dangerous conflict areas where listed terrorist organisations are engaging in hostile activities; and protect against the possibility of terrorist attacks in Australia, noting that foreign conflicts provide an opportunity for Australians to develop the capability and ambition to undertake terrorist acts.[14] If these provisions were capable of assisting in achieving these objectives, it would appear that extending the provisions for a further three years would promote the rights to life and security of the person. The right to life[15] includes an obligation on the state to protect people from being killed by others or identified risks.[16] The right to security of the person requires the state to take steps to protect people against interference with personal integrity by others.[17]

1.4 However, the declared area offence provisions also engage and limit numerous rights, including the rights to equality and non-discrimination, fair trial, freedom of movement and liberty.[18] The statement of compatibility acknowledges the engagement of some of these rights.[19] These rights may be subject to permissible

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12 *Criminal Code Act 1995*, section 119.2. Subsection 119.2(3) sets out that the offence will not apply if the person enters, or remains in, the area solely for one or more of the following purposes: providing aid of a humanitarian nature; appearing before a court; performing an official duty; acting as a journalist; making a bona fide visit to a family member; or any other purpose prescribed by the regulations. Subsection 119.2(4) provides it also will not apply if the person was there as part of the person's service with the armed forces of a foreign country (unless it is a prescribed organisation).

13 *Criminal Code Act 1995*, section 119.3.

14 Statement of compatibility, p. 7.

15 International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

16 UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3]: the right should not be interpreted narrowly and it 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

17 International Covenant on Civil and Political Rights, article 9.

18 International Covenant on Civil and Political Rights, articles 2, 9, 12, 14 and 26.

19 Statement of compatibility, p. 5. The statement of compatibility also identifies the engagement of other human rights, including the rights to privacy and freedom of association. As these rights are only marginally engaged, they are not discussed in this entry.

limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

1.5 The committee has previously considered the human rights compatibility of the declared area offence provisions proposed to be extended by this measure. After detailed consideration of these provisions, the committee has previously found that while the provisions are likely aimed at achieving a legitimate objective (namely, that of seeking to prevent terrorist acts), questions remain as to whether the provisions would be effective to achieve this objective and were necessary, noting the limited use of the provisions in practice. The committee further found that the provisions did not contain sufficient safeguards or flexibility to constitute a proportionate limit on rights. As a result, the committee previously found the provisions, as well as measures that extended the operation of the provisions (as was done in 2018 and 2021), were likely to be incompatible with a range of human rights.[20]

1.6 The same human rights concerns as were raised previously apply in relation to the further extension of these provisions. In particular, there are questions as to whether the provisions remain necessary and address a current pressing and substantial need. The statement of compatibility states that the measure seeks to address two pressing and substantial concerns:

> The first concern is that Australians who enter or remain in conflict areas put their own lives at risk. This concern also extends to children who have been taken to declared areas by their parents or guardians. The second is that foreign conflicts provide a significant opportunity for Australians to develop the capability and ambition to undertake terrorist attacks.[21]

1.7 As to the necessity of the measure, the statement of compatibility states that since the introduction of the provisions, two areas have been declared – provinces in Syria and Iraq, although both declarations have since been revoked and there are currently no declared areas in effect, and four Australians have been charged with the declared area offence.[22] The statement of compatibility explains that the provisions have only been used in the context of the Islamic State as this has been the only conflict which warranted the use of the powers. It notes that after the declarations were made with respect to areas in Syria and Iraq, there was a significant reduction in the number of Australians travelling to these areas, concluding that the provisions are likely to have contributed to discouraging people from travelling to these areas,

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20 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 34–44; *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 71–73; *Nineteenth Report of the 44th Parliament* (3 March 2015) pp. 75–82; *Report 4 of 2018* (8 May 2018) pp. 88–90; *Report 6 of 2018*, (26 June 2018), pp. 17–21; and most recently, *Report 10 of 2021* (25 August 2021), pp. 2–7.

21 Statement of compatibility, p. 7.

22 Statement of compatibility, pp. 4 and 7.

including discouraging parents from taking their children into those areas.[23] The statement of compatibility notes that the limited number of areas declared and limited number of people charged with the offence indicate the exceptional nature of the provisions and judicious use of the power and associated offence. It emphasises that it is 'not an indication of a lack of utility'.[24] It states that the provisions are capable of being used in response to future conflicts and will greatly assist the government's ability to rapidly respond to a future crisis in an appropriate and measured manner.

1.8 Another relevant consideration with respect to the necessity of the measure is the current threat environment. The statement of compatibility states that Australia's national terrorism threat level is 'possible', which means there is credible intelligence that, while Australia remains a potential terrorist target, there are fewer violent extremists with the intention to conduct an attack onshore.[25] It notes that a 'possible' threat level 'does not mean the risk is negligible'.[26] The statement of compatibility includes some statistics regarding the number of people in Australia who have been charged with terrorism offences and who have travelled to, and died in, Syria or Iraq. In particular, since 2012, around 230 Australians are said to have travelled to Syria or Iraq to fight with or support violent extremist groups and, at mid-2023, around 160 Australians who travelled to Syria or Iraq are believed to have died.[27] It is not clear, however, when these people travelled to Syria or Iraq and if such travel occurred when the areas were declared areas, noting that the declarations with respect to Syria and Iraq were revoked in 2017 and 2019 respectively. It is noted that since the committee's previous consideration of the declared area offence provisions in 2021, the national terrorism threat level has been lowered from 'probable' to 'possible'.[28]

1.9 The statement of compatibility further notes that the three year extension of section 119.2 would be consistent with the previous two extensions made in 2018 and 2021 in accordance with the recommendations made by the Parliamentary Joint Committee on Intelligence and Security (PJCIS).[29] In 2021, the PJCIS conducted a review of the declared area offence provisions in sections 119.2 and 119.3 of the Criminal Code. It recommended that these provisions be extended for a further three years (to 7 September 2024). It did so, despite noting the limited use of the offence and that there were no declared areas at the time of the review, on the basis that it would not be 'prudent' to repeal the provisions during a period of uncertainty as

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23 Statement of compatibility, p. 4.

24 Statement of compatibility, p. 4.

25 Statement of compatibility, p. 5.

26 Statement of compatibility, p. 6.

27 Statement of compatibility, p. 6.

28 The threat levels are set out in the National Terrorism Threat Advisory System. See Australian National Security, *National Terrorism Threat Advisory System* (11 November 2021).

29 Statement of compatibility, p. 5.

caused by COVID-19 and at a time when international borders may be reopening.[30] There has not been a more recent review of the declared area offence provisions by the PJCIS since 2021. Indeed, this bill would repeal paragraph 29(1)(bbaa) of the *Intelligence Services Act 2001*, which provides that the PJCIS may, should it resolve to do so, review the operation, effectiveness and proportionality of sections 119.2 and 119.3 of the Criminal Code prior to 7 January 2024.[31] The explanatory memorandum explains that the PJCIS did not resolve to undertake a review and as the mandate is exhausted, it is appropriate that the provision be repealed.[32] Noting the change in the threat environment from 'probable' in 2021 to 'possible' in 2024, the 2021 recommendation of the PJCIS to extend the provisions appears to have less relevance with respect to this measure.

1.10 Having regard to the limited use of the provisions, noting that no areas are currently declared and the last declaration was revoked in 2019; the lower national terrorism threat level; the absence of a recent review of the effectiveness of the provisions; and the availability of other counter-terrorism powers (noting that since these provisions were enacted in 2014, new legislation has conferred further powers to investigate terrorism related offences),[33] questions remain as to whether the extension for a further three years of the declared area offence provisions is necessary and addresses a current pressing and substantial concern.

1.11 With respect to proportionality, the committee has previously noted that the statutory exceptions or defences to the declared area offence contained in subsections 119.2(3) and 119.2(4) of the Criminal Code are relatively narrow and that the defendant bears an evidential burden in relation to these matters.[34] For example, it is not a defence to visit friends, retrieve personal property, transact business or undertake a religious pilgrimage. Accordingly, there may be a number of significant, innocent reasons why a person might enter or remain in a declared area, but that would not bring a person within the scope of the legitimate purpose defence. It is noted that the PJCIS, in its 2021 review of the provisions, recommended that the *Criminal Code Act 1995* be amended to allow Australian citizens to request an

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30 See Parliamentary Joint Committee on Intelligence and Security, *Review of 'declared areas' provisions: Sections 119.2 and 119.3 of the Criminal Code* (February 2021) p. 18.

31 Item 3; explanatory memorandum, p. 14.

32 Explanatory memorandum, p. 14.

33 Such as temporary exclusion orders; citizenship cessation; surveillance powers; the grounds for control orders; and a compulsory industry assistance scheme. For further details see Law Council of Australia, *Submission 2*, p. 14, to the Parliamentary Joint Committee on Intelligence and Security, Review of 'declared areas' provisions of the *Criminal Code Act 1995* (Cth), 25 August 2020.

34 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 41; *Report 6 of 2018*, (26 June 2018), pp. 18–20.

exemption to travel to a declared area for reasons not listed in the Criminal Code, but which are not otherwise illegitimate under Australian law.[35] It considered:

> providing an avenue for people, with legitimate reasons to travel, to request an exemption upon which the Minister for Foreign Affairs could decide to impose conditions (for example, regular contact with the closest embassy), would likely be significantly easier to manage than people traveling to a declared area under a current exception [under subsection 119.2(3) or 119.2(4)] … The Committee considers this method of providing individual exceptions to travel would be less burdensome than trying to list every possible reason a person may legitimately need to travel to a declared area.[36]

The government did not support this exemption recommendation.[37] Providing for greater flexibility to allow for travel to a declared area for legitimate purposes would assist with proportionality.

1.12 Further, as the committee has noted on a number of occasions, it remains unclear why other measures that may constitute a less rights restrictive approach, such as existing provisions of the Criminal Code which prohibit engaging in hostile activities in foreign countries,[38] cannot be relied on to achieve the stated objective.[39] Additionally, while the ability of the minister to revoke a declaration at any time prior to its expiration if it is no longer necessary and the PJCIS's ability to monitor a declaration on an ongoing basis may offer some safeguard value, it has not been established that these safeguards alone would be sufficient to ensure that any limitation on rights is proportionate.[40]

1.13 Noting this committee's previous conclusion that the declared area provisions did not contain sufficient safeguards or flexibility to constitute a proportionate limit on rights, and noting that questions remain with respect to the necessity of the measure, particularly in light of the downgraded terrorism threat level and limited use of the provisions in recent years, it has not been established that the extension of these provisions for a further three years is compatible with human rights.

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35 See Parliamentary Joint Committee on Intelligence and Security, *Review of 'declared areas' provisions: Sections 119.2 and 119.3 of the Criminal Code* (February 2021) p. 21.

36 See Parliamentary Joint Committee on Intelligence and Security, *Review of 'declared areas' provisions: Sections 119.2 and 119.3 of the Criminal Code* (February 2021) p. 20.

37 See Australian Government response to the Parliamentary Joint Committee on Intelligence and Security, *Review of 'declared areas' provisions: Sections 119.2 and 119.3 of the Criminal Code* (July 2021) pp. 2–3

38 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) p. 90.

39 See e.g. Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 36–37; *Report 6 of 2018*, (26 June 2018), pp. 18–20

40 Statement of compatibility, p. 9.

Committee view

1.14 The committee considers that the objective underpinning the measure is important, namely, to protect Australia's national security interests and deter Australians from travelling to dangerous conflict areas where listed terrorist organisations are engaged in hostile activity.

1.15 The Parliamentary Joint Committee on Human Rights supports the Parliamentary Joint Committee on Intelligence and Security's 2021 suggested amendment that would allow for Australian citizens to request an exemption to travel to a declared area for reasons not listed in the Criminal Code, but which are not otherwise illegitimate under Australian law.

1.16 The committee notes that while the provisions have been historically used, including declarations relating to provinces in Syria and Iraq, there are currently no areas declared. The committee also notes that the national terrorism threat level has been downgraded since the provisions were previously extended – from 'probable' in 2021 to the current threat level of 'possible'.

1.17 The committee has previously found that while the provisions likely pursue a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the provisions were necessary, and, in particular, the measures did not appear to be proportionate, and therefore were likely to be incompatible with a range of human rights. The committee notes that these same human rights concerns apply with respect to this measure. In light of the limited use of the provisions and the changed threat environment, as well as the availability of other counter-terrorism powers, the committee considers that questions remain as to whether the measure is necessary and addresses a current pressing and substantial concern. Additionally, noting the committee's previous conclusion that these provisions do not contain sufficient safeguards or flexibility to constitute a proportionate limit on rights, concerns remain as to the proportionality of the measure. As such, the committee considers that it has not been demonstrated that the extension of these provisions is compatible with human rights.

1.18 The committee draws its human rights concerns to the attention of the Attorney-General and the Parliament.

Migration Amendment (Removal and Other Measures) Bill 2024[41]

Purpose	This bill seeks to amend the *Migration Act 1958* to empower the minister to: issue an enforceable removal pathway direction to certain non-citizens; reverse previous protection findings made in relation to certain non-citizens; and designate a country as a 'removal concern country', meaning that a visa application from any citizen of such a country would be invalid unless subject to an exception. The bill would also make minor amendments relating to the granting of Subclass 070 Bridging (Pending Removal) Visas.
Portfolio	Home Affairs
Introduced	House of Representatives, 26 March 2024
Rights	Children's rights; equality and non-discrimination; expulsion of aliens; fair trial; freedom of movement; freedom of expression; freedom of assembly; freedom of association; liberty; privacy; protection of the family

Removal pathway directions and removal concern countries

1.19 Schedule 1 of the bill seeks to amend the *Migration Act 1958* (Migration Act) to provide for the removal of certain non-citizens from Australia by giving the minister the power to make a direction requiring a person to do certain things to effect their removal.[42] Failure to comply with a removal pathway direction would be an offence (see below for further detail).

1.20 The bill proposes that these powers would apply to 'removal pathway non-citizens', that is:

(a) an unlawful non-citizen who is required to be removed from Australia under section 198 of the Migration Act as soon as reasonably practicable (persons being held in immigration detention);

41 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Removal and Other Measures) Bill 2024, *Report 3 of 2024*; [2023] AUPJCHR 16.

42 Schedule 1, item 3, proposed Subdivision D.

(a) a lawful non-citizen who holds a Subclass 070 (Bridging (Removal Pending)) visa (the NZYQ cohort);[43]

(b) a lawful non-citizen who holds a Subclass 050 (Bridging (General)) visa and at the time the visa was granted satisfied a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia (non-citizens on a removal pathway);[44] and

(c) a lawful non-citizen who holds a prescribed visa (that is, any further categories of non-citizens who may be prescribed in future).

1.21 Item 5 provides that proposed paragraphs 199B(1)(b) and (c) (relating to Subclass 050 and 070 visa holders) apply in relation to a non-citizen who holds a visa whether the visa was granted before, on or after the commencement of this item.[45]

1.22 Proposed section 199B would clarify the way this interacts with protection obligations recognised in the Migration Act. It provides that if a protection finding (within the meaning of subsections 197C(4)–(7) of the Migration Act) has been made in relation to a non-citizen, the minister may give the person a removal pathway direction and they may commit an offence if they fail to comply. However, it confirms that the measures do not authorise or require the removal of an unlawful non-citizen under section 198 to a country to which the non-citizen could not be removed because of subsection 197C(3) (which relates to certain non-citizens who have a protection finding made in their favour and which has not been quashed or set aside).

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43 The cohort of people to whom this visa subclass applies are those non-citizens who were released from immigration detention following the orders of the High Court of Australia of 8 November 2023 in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, namely persons unable to be detained in immigration detention because there is no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future. While persons on this visa subclass may be subject to monitoring conditions (including corresponding criminal offences for non-compliance) this bill would confirm that failure to comply with a removal pathway direction does not constitute failure to comply with a monitoring condition. See, Schedule 1, item 3, subsection 199C(6).

44 This visa subclass enables a visa holder to remain in Australia while they arrange to leave, finalise their immigration matter or wait for an immigration decision. The explanatory memorandum states that there is also a 'longstanding practice' of granting this visa to certain non-citizens who are on a removal pathway, and states that this measure would only apply to those persons who, at the time the visa was granted, satisfied a criterion relating to them making acceptable arrangements to depart Australia (see, subclause 050.212(2) of Schedule 2 to the Migration Regulations). See, explanatory memorandum, p. 8.

45 In addition, Schedule 2, item 2 of the bill would confirm that nothing in section 76E prevents the grant without application, from time to time, of such a visa to an NZYQ-affected non-citizen. Section 76E of the Migration Act provides that rules of natural justice do not apply to decisions to grant a Subclass 070 visa, but does require the minister to invite the affected person to make representations about why they should not be subject to available monitoring conditions.

What a removal pathway direction may require

1.23 Proposed section 199C would empower the minister to make 'removal pathway directions' to a removal pathway non-citizen, requiring them to do one or more of the following:

(a) complete, sign and submit an application for a passport, and/or a travel related document, and/or a foreign travel document;

(b) complete, sign and submit 'any other document or form required for, or to facilitate, travel' (including by doing and providing all things required for submission);

(c) provide a document or information to an officer or another specified person;

(d) attend an interview or appointment with an officer or another specified person;

(e) report in person to an officer or another person in accordance with instruments specified in the direction.[46]

1.24 The minister would also be empowered to direct the person 'to do a thing, or not do a thing', if the minister is satisfied that the doing or not doing of the thing is reasonably necessary to determine whether there is a real prospect of the removal of the non-citizen from Australia under section 198 becoming practicable in the reasonably foreseeable future, or to facilitate the removal of the non-citizen from Australia under that section.[47]

1.25 A removal pathway direction must specify the period within which a person must do (or not do) a specified thing.[48] However, the bill does not specify a maximum duration during which a direction may apply. The minister may revoke a direction,[49] but would not be required to do so. A person may be given more than one removal pathway direction, but they must not be directed to do (or not do) a thing specified in a direction previously given for the period specified in the previous direction.[50]

Offence for failure to comply

1.26 Failure to comply with a direction would be an offence punishable by up to five years imprisonment or 300 penalty units (currently $93 900), or both, and subject to a mandatory minimum penalty of imprisonment of at least 12 months. A person would not be guilty of the offence if they could prove that they had a 'reasonable excuse'. However, the bill states that it would not be a reasonable excuse that the person 'has

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46 Schedule 1, item 3, proposed subsection 199C(1).

47 Schedule 1, item 3, proposed subsection 199C(2).

48 Schedule 1, item 3, proposed subsection 199C(4).

49 Schedule 1, item 3, proposed subsection 199C(3).

50 Schedule 1, item 3, proposed subsection 199C(7)–(8).

a genuine fear of suffering persecution or significant harm if the person were removed to a particular country'; that they are, or claim to be, a person in respect of whom Australia owes non-refoulement obligations; or that the person believes that if they complied with the removal pathway direction, they would suffer 'other adverse consequences'.[51]

When a direction must not be given

1.27 Proposed section 199D specifies the circumstances in which the minister may not give a direction to a removal pathway non-citizen.

1.28 In relation to a person who is an unlawful non-citizen subject to a protection finding, the minister must not give a removal pathway direction to do, or not do, a thing in relation to a particular country if the person could not be removed to that country because of subsection 197C(3) (namely that a protection finding has been made in relation to them).[52] If the person is a lawful non-citizen who is subject to a protection finding, the minister must not make a direction if the non-citizen could not be removed to that country because of that subsection if the non-citizen were an unlawful non-citizen. The explanatory memorandum states:

> The intention of subsection 199D(1) is to ensure that a non-citizen in relation to whom a protection finding has been made cannot be directed to do a thing to facilitate their removal to the country in relation to which the protection finding was made. It also ensures that the non citizen cannot be directed to do a thing to facilitate their removal to a third country, where doing that thing would necessitate doing a thing in relation to the country in relation to which the protection finding was made. However, subsection 199B(2) makes clear that a non-citizen in relation to whom a protection finding has been made can be the subject of a removal pathway direction where the circumstances outlined in section 199D do not apply.[53]

1.29 Further, the minister must not give a direction:

(a) to a removal pathway non-citizen if the non-citizen has made a valid application for a protection visa that is not yet finally determined;[54]

(b) to a person subject to a Subclass 070 visa (a member of the NZYQ cohort) subject to a monitoring condition, where there would be overlap between a removal pathway direction and an instruction or specification given under the monitoring condition;[55]

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51 Schedule 1, item 3, proposed subsection 199E(2).

52 Schedule 1, item 3, proposed subsection 199D(1).

53 Explanatory memorandum, p. 11.

54 Schedule 1, item 3, proposed subsection 199D(2).

55 Schedule 1, item 3, proposed subsection 199D(3).

(c) to a child, being a person aged under 18 years. However, if the parent or guardian of the child is a removal pathway non-citizen, a removal pathway direction can be given in relation to the child (to their parent or guardian);[56] or

(d) directing a non-citizen: not to commence, or to discontinue, court or tribunal proceedings; or to take or not take particular steps in the conduct of such proceedings; or not to make a visa application or to withdraw a visa application. It does not prevent the minister from directing a non-citizen to apply for a visa for any other country.[57]

International human rights legal advice

Rights to liberty and a fair trial

1.30 By requiring certain non-citizens to do things that would facilitate their removal from Australia, non-compliance with which carries a mandatory minimum sentence of one year imprisonment, the measure engages and limits numerous human rights.[58] The imposition of a mandatory minimum sentence of imprisonment for non-compliance with a removal pathway direction engages and limits the right to liberty and right to a fair trial.

1.31 The right to liberty protects the right not to be arbitrarily detained.[59] The United Nations (UN) Human Rights Committee has stated that 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability.[60]

1.32 The statement of compatibility states that the objective of a mandatory minimum sentence is to provide a strong deterrent to non-cooperation, stating that 'if a non-citizen understands that they are facing a minimum term of imprisonment for non-cooperation then it is more likely they will comply with a direction to cooperate with efforts to remove them'.[61] However, it also states that the inability of a court to

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56 Schedule 1, item 3, proposed subsections 199D(4)-(5).

57 Schedule 1, item 3, proposed subsection 199D(6).

58 In addition to the rights set out below, as the measure would apply only in relation to certain non-citizens, it may engage and limit the right to equality and non-discrimination if the measure applied disproportionately to citizens from a certain national background (for example). As there is no information as to whether this is likely, this report has not considered this in any detail.

59 International Covenant on Civil and Political Rights, article 9.

60 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of person)* (2014) [12]. It is noted that the UN Human Rights Committee has held that mandatory minimum sentences will not *per se* be incompatible with the right to be free from arbitrary detention, see *Nasir v Australia*, UN Human Rights Committee Communication No 2229/2012 (2016) [7.7].

61 Statement of compatibility, p. 26.

impose a period of imprisonment of less than 12 months, or a pecuniary penalty only, if the person is convicted, 'may mean there could be a risk of incompatibility with the right in Article 9 of the ICCPR in some circumstances'.[62] In relation to the right to a fair trial, the statement of compatibility states that there is a risk that mandatory minimum sentencing is incompatible with the right to have a sentence reviewed by a higher tribunal according to law 'because mandatory sentencing prevents judicial discretion in relation to the severity or correctness of a minimum sentence'.[63] In this regard, it states:

> If convicted of this offence, the court must impose a sentence of imprisonment of at least 12 months. This mandatory minimum sentence if convicted following a fair hearing before a court reflects the seriousness of the offending, the need for a strong deterrent to non-compliance with removal efforts for persons on a removal pathway and the importance the Government places on the integrity of the migration system.
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> It is the Government's view that breach of the proposed offence constitute [*sic*] a serious offence in the context of a removal pathway non-citizens has no other ongoing entitlement to be in Australia [*sic*]. A penalty of 12 months' mandatory minimum imprisonment provides for greater certainty. Any shorter duration would be unlikely to indicate that the offence is a serious one. The penalty is intended to provide an effective deterrent to the commission of the offence, and reflects the serious and damaging consequences to the integrity of the managed migration program. In particular, it is noted that disengagement from the removal process severely hampers the Government's ability to effect the removal of the individual.[64]

1.33 In order for detention not to be considered arbitrary under international human rights law it must be reasonable, necessary and proportionate in the individual case. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy). As mandatory sentencing removes judicial discretion to take into account all of the relevant circumstances of a particular case, it may lead to the imposition of disproportionate or unduly harsh sentences of imprisonment.[65] In the context of a removal pathway direction, were a person to breach the direction by, for example, failing to fill in a

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62 Statement of compatibility, pp. 26–27. In contrast, when the bill was introduced into the House of Representatives, the minister stated that the statement of compatibility accompanying it 'makes clear that this is a piece of legislation that is consistent with Australia's human rights obligations', see The Hon Andrew Giles MP, Minister for Immigration, Citizenship and Multicultural Affairs, *Hansard*, Tuesday 26 March 2025, p. 26.

63 Statement of compatibility, p. 27.

64 Statement of compatibility, p. 27.

65 Mandatory minimum sentencing has also been the subject of significant criticism by the judiciary on the basis that sentencing is a traditional function of the courts. See, for example, Barwick CJ in *Palling v Corfield* (1970) 123 CLR 52 [58].

passport application form in time, it may be that a mandatory sentence of one year in prison is a disproportionate punishment.

1.34 In addition, in relation to the right to have a sentence reviewed by a higher tribunal (an aspect of the right to a fair trial), mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence. A previous UN Special Rapporteur on the Independence of Judges and Lawyers has observed in relation to article 14(5) and mandatory minimum sentences:

> This right of appeal, which is again part of the requirement of a fair trial under international standards, is negated when the trial judge imposes the prescribed minimum sentence, since there is nothing in the sentencing process for an appellate court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards.[66]

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

Rights to privacy, and freedom of expression, assembly and association

1.36 The making of a removal pathway direction would require a person to disclose personal information, and otherwise undertake activities that may impact their personal life, and would therefore engage and limit the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[67] It also prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[68] A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.37 Further, a removal pathway direction may require the person to do (or not do) 'a thing', if the minister is satisfied that the doing or not doing of the thing is reasonably necessary to determine whether there is a real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future, or to facilitate the removal of the non-citizen from Australia. Depending on what 'things'

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66 Dato' Param Cumaraswamy 'Mandatory Sentencing: the individual and Social Costs', *Australian Journal of Human Rights*, vol. 7, no. 2, 2001, pp. 7–20.

67 International Covenant on Civil and Political Rights, article 17.

68 UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]-[4].

were directed pursuant to this measure, a removal pathway direction may engage and limit further rights, such as the rights to freedom of expression, assembly and association. For example, if the minister directed a person not to engage in certain speech or protest, or meet with certain people, if to do so might make the removal of the person to another country more difficult (for example, if attending such protests may make it more likely that the person would be owed protection given what the other country's views may be on the person attending such a protest).

1.38 The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.[69] The right to freedom of assembly provides that all people have the right to peaceful assembly.[70] This is the right of people to gather as a group for a specific purpose. It is strongly linked to the right to freedom of expression, as it is a means for people together to express their views. The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[71] This right supports many other rights, such as freedom of expression, religion, assembly and political rights. These rights may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals.[72] Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.[73]

1.39 The statement of compatibility identifies that a removal pathway direction engages and limits the right to privacy,[74] but does not identify whether the measure may engage and limit the rights to freedom of expression, assembly and association. It states that the objective behind the requirement to provide personal information is to protect the integrity of the migration system through removing non-citizens who no longer have the right to remain in Australia. Protecting the integrity of Australia's migration system constitutes a legitimate objective (one which would appear likely to meet the definition of a measure necessary to protect public order). To the extent that the measure would require an affected person to take only those steps that are in their own control (i.e. a direction may require the person to apply for a passport, but would not expose them to a penalty if that application was unsuccessful for some reason

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69 International Covenant on Civil and Political Rights, article 19(2).

70 International Covenant on Civil and Political Rights, article 21.

71 International Covenant on Civil and Political Rights, article 22.

72 The concept of 'morals' here derives from myriad social, philosophical and religious traditions. This means that limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32]

73 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

74 Statement of compatibility, pp. 31–32.

outside their control, or because the government authorities in the relevant country failed to respond) the measure would appear to be rationally connected to (that is, effective to achieve) that objective. However, it is noted that the bridging visas granted to the NZYQ-affected cohort (the BVR subclass 070 visa), which would be captured by this measure, are already subject to a mandatory visa condition to do everything possible to facilitate the person's removal from Australia and not attempt to obstruct efforts to arrange and effect their removal.[75] However, breach of that visa condition does not appear to constitute a criminal offence. Insofar as that visa condition may be unenforceable in relation to certain persons (who cannot be returned to indefinite immigration detention for breaching the condition), this additional measure may be rationally connected to the objective, on the basis that a criminal penalty may be necessary to enforce compliance.

1.40 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and whether there is the possibility of oversight and the availability of review.

1.41 In relation to safeguards, the statement of compatibility states that where information is provided to the department, the collection, use and disclosure of that information will be subject to the *Privacy Act 1988*. It states that operational guidance will be developed to ensure that directions to compel the provision of information 'are reasonable in the circumstances of the person'.[76] It states that, as a person cannot be directed to provide information to a country in relation to whom a protection finding has been made, or while their protection visa application is on foot, the guidance could, for example, deal with the situation where a person has made credible new claims in respect of that country that are under consideration. Existing guidance about identity interviews with consular officials will also be reviewed to ensure that the interviewer limits their questions to issues directly relevant to facilitating the removal and does not ask questions about whether the person had made protection claims in Australia, even where those claims did not result in a protection finding.

1.42 The breadth of the defence to the proposed offence for non-compliance with a removal pathway direction is also relevant to the adequacy of the safeguards. In this regard, the bill would provide that it would not be 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'; that they are, or claim to be, a person in respect of

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75 Migration Regulations 1994, Schedule 8, criterion 8541. See, Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Bill 2023, Migration Amendment and Other Legislation (Bridging Visas, Serious Offenders and Other Measures) Bill 2023, *Report 1 of 2024* (7 February 2024), pp. 43–93.

76 Statement of compatibility, p. 32.

whom Australian owes non-refoulement obligations; or that the person believes that if they complied with the removal pathway direction, they would suffer 'other adverse consequences'.[77] The term 'other adverse consequences' may encompass a broad range of negative impacts. For example, it is not clear whether it would encompass: a loss of personal connections, employment, or education activities in Australia; exposure to a war zone or other risks; or a loss of privacy, or the ability to speak or associate freely in Australia. As such, the applicability of the defence to the proposed offence may be very limited in practice.

1.43 In relation to whether the measure is sufficiently circumscribed, the statement of compatibility states that the bill provides for a power to direct a removal pathway non-citizen 'to take certain actions', such as applying for a passport or attending an interview with a specified person, with a criminal penalty for non-compliance. These actions will involve the provision of information by the person, in some cases directly to the authorities or consular officials of the relevant country and in some cases to the department.[78] It states that the person cannot be directed to provide information to, or otherwise interact with, a country in relation to which a protection finding has been made in respect of the person or where their protection claims are under consideration. It also notes that a direction cannot be issued directly to a child under 18 (although it can be issued to a parent or guardian in relation to the child if both the child and the parent/guardian are removal pathway non-citizens).

1.44 However, the bill would empower the minister to designate a person on *any* visa type to be a 'removal pathway non-citizen', meaning that this measure would potentially have very broad application. For example, there would be nothing to prevent the minister, as a matter of law, from prescribing all visa types, including permanent visas, as those to which this direction power could apply.[79] It would also appear that a legislative instrument prescribing such visa types would not be subject to parliamentary disallowance, unless it was made by way of regulations (which does not appear to be required).[80] Further, proposed subsection 199C(2) would empower

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77 Schedule 1, item 3, proposed subsection 199E(2).

78 Statement of compatibility, p. 31.

79 See Schedule 1, item 3, proposed paragraph 199B(1)(d).

80 This is on the basis that Schedule 1, item 3, proposed paragraph 199B(1)(d) is proposed to be inserted as a Subdivision of Part 2 of the *Migration Act 1958*. Yet, all legislative instruments made under Part 2 of the *Migration Act 1958* (except regulations) are exempt from disallowance pursuant to the Legislation (Exemptions and Other Matters) Regulation 2015, section 10, item 20. There is nothing in the provision that would require this to be prescribed by way of regulations (and it doesn't appear to fit within the regulation making power in section 504 of *the Migration Act 1958*), meaning it appears it could be prescribed by way of any legislative instrument, ensuring it would not be subject to disallowance. The explanatory memorandum states '[a]ny regulations made for the purposes of this paragraph would be a disallowable legislative instrument' (p. 8), however, does not make clear if regulations would be made rather than a general legislative instrument.

the minister to require, as part of a removal pathway direction, that a person do (or refrain from doing) 'a thing', if the minister is satisfied that the doing or not doing of the thing is reasonably necessary to determine whether there is a real prospect of the removal of the non-citizen from Australia becoming practicable, or to facilitate the removal of the non-citizen from Australia. Depending on the individual circumstances of the case, 'a thing' would appear, as a matter of law, to capture a potentially very broad range of conduct. For example, if it could be said to facilitate a person's removal from Australia (by ensuring a person does not, through their actions, create a protection obligation) it potentially may allow a direction to be made requiring a person to stop attending political protests or not make public certain statements. The explanatory memorandum does not provide any examples of the types of 'things' which it is anticipated this provision could provide for.

1.45 In addition, it would appear that a removal pathway direction order may compel a person to apply for a passport or travel document to a country other than their own. For example, it may compel them to apply to travel to a third country with which they have no connection, in order to facilitate their removal from Australia. Further, the bill does not impose a maximum duration for which a removal pathway direction may be in force, meaning that a direction could be in force indefinitely as a matter of law, and could require a person to do a range of things, or refrain from a range of behaviours, if the minister was satisfied that this was necessary. Further, the minister would not be required to revoke a removal pathway direction, meaning that a person may continue to be exposed to the risk of a criminal offence even in circumstances where the direction is no longer necessary or capable of compliance (for example, because the person's personal circumstances have changed, or the circumstances in the relevant country have altered and re-enlivened a claim for protection).

1.46 Consequently, noting the breadth of the measures, it is not clear that a removal pathway direction would constitute a permissible limit on the right to privacy, and there would appear to be a risk that a direction may impermissibly limit other rights, such as the right to freedom of expression or assembly, depending on what a ministerial direction specifically compelled.

Right to protection of the family and rights of the child

1.47 As a removal direction order is intended to result in a person leaving Australia, depending on the individual case, there may be a risk that a direction ultimately results in the separation of family members (such as where an affected person has children in Australia who are citizens). Further, a child in Australia may be directly affected by a removal pathway order (either because they are required to leave Australia with their parents, or because a member of their family is required to leave Australia). As such, the measure may indirectly engage and limit the right to protection of the family and rights of the child.

1.48 The right to protection of the family requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.[81] The family is recognised as the natural and fundamental group unit of society and, as such, being entitled to protection. An important element of protection of the family is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation or forcibly remove children from their parents will therefore engage this right. Further, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[82] It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

1.49 These rights may be subject to permissible limitations. As noted above at paragraph [1.38], protecting the integrity of Australia's migration system constitutes a legitimate objective (one which would appear likely to meet the definition of a measure necessary to protect public order), and the measure would appear to be rationally connected to (that is, effective to achieve) that objective. The key question is whether the measure would constitute a proportionate limit on the rights.

1.50 The statement of compatibility identifies that this measure engages the right to protection of the family and the rights of the child.[83] It states that in many cases, the impact of the person's removal from Australia on their family members (including consideration of the best interests of the child) would have already been considered as part of a decision to refuse or cancel the person's substantive visa on character or other discretionary grounds. It states that where such consideration has not occurred, or where the person's family circumstances have since changed, 'there may be opportunities for that consideration to take place as part of a ministerial intervention consideration and/or in the exercise of the discretion to issue a removal pathway direction'. It states that consideration of these issues in existing visa and ministerial intervention processes for a person who is a removal pathway non-citizen 'would ensure that any interference with the family as a result of the person's removal would not be arbitrary in the individual circumstances of the case'.[84] The existence of ministerial discretion to intervene may provide some safeguard value with respect to the right to protection of the family and the rights of the child. However, discretionary or administrative safeguards alone may not be sufficient for the purpose of a

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81 International Covenant on Civil and Political Rights, articles 17 and 23; and the International Covenant on Economic, Social and Cultural Rights, article 10.

82 Convention on the Rights of the Child, article 3(1).

83 Statement of compatibility, p. 28.

84 Statement of compatibility, p. 28.

permissible limitation under international human rights law.[85] This is because an administrative or discretionary safeguard is less stringent than the protection of statutory processes as there is no requirement to follow it.

1.51 The statement of compatibility further states that a person may argue that they have not complied with a removal pathway direction because removal would separate them from family members. This would appear to suggest that a person may raise a separation from their family members as a 'reasonable excuse' in the context of a prosecution being raised against them for an offence under proposed 199E. However, it offers no indication as to whether it is intended that such an argument would constitute a reasonable excuse in the context of the offence, or the likelihood that such an argument would be successful in court.

1.52 Consequently, there may be a risk that, in practice, a removal pathway direction which results in a person leaving Australia may impermissibly limit the right to protection of the family and the rights of the child.

Non-refoulement

1.53 A removal direction order is intended to result in a person leaving Australia. As such, depending on the individual case, there may be a risk that a direction ultimately results in the return of a person to a country where they face a risk of persecution. Australia has 'non-refoulement' obligations under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[86] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[87] Non-refoulement obligations are absolute and may not be subject to any limitations.[88]

1.54 The statement of compatibility states that the bill does not affect Australia's commitment to complying with its non-refoulement obligations.[89] It states that existing measures in the Migration Act (and proposed amendments in this measure)

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85 See, for example, Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)* (1999).

86 Australia also has obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, but it is noted that these conventions do not form part of the committee's mandate under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

87 UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018). See also UN Human Rights Committee, *General Comment No. 20: article 7 (prohibition against torture)* (1992) [9].

88 UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018) [9].

89 Statement of compatibility, p. 30.

ensure that a person is not removed in violation of Australia's non-refoulement obligations. In particular, it states that the Migration Act ensures that:

(a) removal to the country in relation to which a 'protection finding' was made in the course of considering the person's most recent protection visa application is not required or authorised unless the decision in which the protection finding was made is quashed or set aside, the person requests voluntary removal or the person is found, under section 197D of the Migration Act, to no longer be a person in respect of whom a protection finding be made in respect of the relevant country;

(b) removal to the country in relation to which a 'protection finding' was made is also not authorised or required while merits review of a decision under section 197D of the Migration Act is ongoing;

(c) for any removal pathway non-citizen who does not have a 'protection finding' but makes protection claims, there will be the opportunity to have those claims considered though a protection visa process or through consideration of ministerial intervention pathways where relevant;

(d) persons who have been found to engage Australia's non-refoulement obligations through the making of a protection finding in a protection visa decision cannot be required to cooperate with the making of arrangements for their departure from Australia to the country in respect of which the protection finding was made;

(e) a person in respect of whom a protection finding has been made cannot be required to take actions in relation to the country to which that finding relates, even for the purposes of removal to a third country; and

(f) the minister cannot issue a direction to an individual who has made a valid application for a protection visa which has not been finally determined.[90]

1.55 These all have the capacity to serve as important safeguards to ensure that a person is not returned to a country in a way that would breach Australia's obligations of non-refoulement. However, it is noted that some concern has been expressed that removal pathway directions would operate in relation to people who were the subject of 'fast track' protection assessment processes, a process which the Office of the High Commissioner for Refugees (UNHCR) considered to have been a defective mechanism

90 Statement of compatibility, pp. 29–30.

by which to assess protection claims.[91] The committee has previously considered that the fast track review process was incompatible with Australia's obligations of non-refoulement.[92] Consequently, if a person were at risk of being sent to a country where they do in fact face a real risk of persecution, despite an assessment in Australia that no such risk arose, that would breach the absolute prohibition against non-refoulement.

Committee view

1.56 The committee notes the intention of this legislation is to protect the integrity of Australia's migration system by requiring certain non-citizens to cooperate with efforts to remove them from Australia in accordance with enforceable removal pathway directions. However, by requiring certain non-citizens to do things that would facilitate their removal from Australia, non-compliance with which carries a mandatory minimum sentence of one year imprisonment, the measure engages and limits numerous human rights.

1.57 In relation to mandatory minimum criminal penalties for any non-compliance with such a direction, the committee considers these to be incompatible with the rights to liberty and to a fair trial, as mandatory sentencing removes judicial discretion to take into account all of the relevant circumstances of a particular case and may lead to the imposition of disproportionate or unduly harsh sentences of imprisonment (and the appropriateness of which cannot be reviewed by a higher court).

1.58 The committee also notes that, depending on what a removal pathway direction required a person to do (or not do), it may engage and limit the rights to privacy and freedom of assembly, association and expression. Further, the committee considers that such directions may have flow on effects which may limit other rights, including the right to protection of the family and rights of the child. The committee also notes that there may be a risk that some individual cases may engage the absolute prohibition against non-refoulement. As currently drafted, the committee considers there is some risk that a direction may breach these rights, depending on the nature of the direction in the individual circumstances.

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91 See, for example, Human Rights Law Centre, *Explainer: Migration Amendment (Removal and Other Measures) Bill 2024* (26 March 2024) in reference to UNHCR Refugee Agency, *Fact Sheet on the Protection of Australia's So-Called "Legacy Caseload" Asylum Seekers* (1 February 2018). The UNHCR expressed concerns that the fast track review process lacked procedural safeguards, thereby denying asylum seekers a fair and efficient protection assessment process. It also criticised the fast track process for denying asylum seekers the right to appear in person and address any negative credibility issues affecting their application.

92 See, for example, Parliamentary Joint Committee on Human Rights, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, *14th Report of the 44th Parliament* (October 2014), pp. 70–93; and *36th Report of the 44th Parliament* (16 March 2016), pp. 149–194.

1.59 The committee considers that many of these concerns may be addressed if the bill were amended as outlined below. The committee considers that these amendments would not frustrate the policy intention behind the proposed legislation.

1.60 The committee notes that it will ordinarily write to proponents of legislation seeking a response to any questions it has about the compatibility of proposed legislation with human rights. However, in this instance, this bill passed the House of Representatives on the day it was introduced, has been referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report by 7 May 2024, and a public hearing relating to this inquiry will be held on 15 April 2024. For this reason, it is not possible for the committee in the timeframe available to seek a response from the minister in relation to the matters it has raised. The committee instead provides its advice as to the human rights compatibility of the bill, in order that this analysis will be available to the Senate in its consideration of the bill. Absent this tight timeframe the committee would otherwise have written to the minister to seek further information.

Suggested action

1.61 The committee considers the proportionality of this measure may be assisted were the bill amended to:

(a) remove proposed subsection 199E(2), which seeks to impose a mandatory minimum sentence for non-compliance with a removal pathway direction;

(b) remove proposed subsection 199E(4), which seeks to qualify what a 'reasonable excuse' may constitute for the purposes of the offence of non-compliance with a removal pathway direction (meaning that a court would have the discretion to determine what is a reasonable excuse in each case);

(c) remove proposed paragraph 199B(1)(d), which would empower the minister to prescribe further visa classes for the purposes of 'removal pathway non-citizens'; and

(d) amend proposed section 199C to further limit the things which the minister may direct a person to do (or refrain from doing) pursuant to a removal pathway direction and establish a maximum period of time a direction may be in force.

1.62 The committee recommends that the statement of compatibility be updated to assess the compatibility of the measure with the rights to freedom of expression, assembly and association, and the right to a private life.

1.63 The committee draws its human rights concerns to the attention of the minister and the Parliament.

Designation of a 'removal concern country'

1.64 The bill also seeks to give the minister the power to designate, by legislative instrument, a country as a 'removal concern country' if the minister thinks it is in the national interest to do so, and provided they have consulted the Prime Minister and the Minister for Foreign Affairs.[93] Proposed section 199F provides that this is a personal power, and the rules of natural justice do not apply. The minister would be required to table a copy of the designation and statement of reasons in each house within two sitting days of it being made, however failure to comply would not affect the validity of the measure.[94] The legislative instrument would not be subject to parliamentary disallowance.[95]

1.65 The effect of this would be that an application for a visa by a non-citizen would be invalid if, at the time the application is made they were a national of one or more removal concern countries and were located outside Australia.[96] This would be subject to a number of exceptions, namely where the non-citizen:

(a) is a national of a country that is not a removal concern country and holds a valid passport from that country;

(b) is the spouse, de facto partner or dependent child of: an Australian citizen; the holder of an Australian permanent visa that is in effect; or a person who is usually resident in Australia and whose continued presence in Australia is not subject to a limitation as to time imposed by law;

(c) is the parent of a child who is under 18 and in Australia;

(d) is applying for a Refugee and Humanitarian (Class XB) visa;

(e) is included in a class of persons determined in an instrument made under subsection 199G(3); or

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93 Schedule 1, item 3, proposed section 199F. 'Country' would include a colony, overseas territory, protectorate, or an overseas territory for the international relations of which a foreign country is responsible. See, proposed subsection 199F(9).

94 Schedule 1, item 3, proposed subsection 199F(6).

95 Schedule 1, item 3, proposed paragraph 199F is proposed to be inserted as a Subdivision of Part 2 of the *Migration Act 1958*. All legislative instruments made under Part 2 of the *Migration Act 1958* (except regulations) are exempt from disallowance pursuant to the Legislation (Exemptions and Other Matters) Regulation 2015, section 10, item 20. The provision provides the minister may designate a country by 'legislative instrument', not by regulations.

96 Schedule 1, item 3, proposed section 199G.

(f) is applying for a visa of a class determined in an instrument made under subsection 199G(3).[97]

1.66 Further, proposed subsection 199G(4) would empower the minister to determine that the bar on visa applications does not apply to an application by a non-citizen for a visa of a class specified in the determination. Such a determination may provide that it has effect only for the period specified in the determination and, if it does so, the determination ceases to have effect at the end of the specified period, and may be varied or revoked if the minister thinks it is in the public interest to do so.[98] This power to make a determination would be personal, and the minister would not be under a duty to consider whether to exercise the power in respect of any non-citizen.[99]

International human rights legal advice

Rights to protection of the family; equality and non-discrimination

1.67 If a country was declared to be a 'removal concern country', all visa applications from all nationals of that country would be barred (subject to some exceptions). This could have significant impacts on people in such countries, including people who wish to work or study in Australia, those with extended family or friends in Australia, or those wishing simply to visit the country. However, most of the people who would be directly affected by this measure would be located outside Australian territory. The mandate of this committee is to consider whether legislation is compatible with Australia's international human rights obligations under seven core international human rights law treaties.[100] Under those treaties, Australia has an obligation to uphold human rights to all those subject to its jurisdiction (usually those in Australia).[101] As such, the examination of the effect of this measure is focused only on the effect it may have on people already located in Australia.

1.68 In relation to people in Australia, if a country were designated a removal concern country and, as a result, a person's family members were unable to travel to

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97 The explanatory memorandum states that if a country were designated, it is envisaged that a legislative instrument could specify a range of additional classes of persons or visas to ensure that the exercise of the designation power does not conflict with Australia's international obligations, or for any other purpose. For example, Diplomatic (Temporary) (Class TF) visa or the Return (Residence) (Class BB) visa). See, explanatory memorandum, p. 16.

98 Schedule 1, item 3, proposed subsections 199G(4)–(6).

99 Schedule 1, item 3, proposed subsections 199G(7)–(8). Item 4 would amend paragraph 474(7)(a) to confirm that a decision of the minister not to exercise, or not to consider the exercise, of the minister's power under section 199G is a privative clause decision.

100 *Human Rights (Parliamentary Scrutiny) Act 2011*.

101 For instance, article 2(1) of the International Covenant on Civil and Political Rights requires states parties 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.

Australia, this may engage and limit the right to protection of the family and the right to equality and non-discrimination. Pursuant to this measure, a person would not be prevented from applying for a visa to Australia where the non-citizen: is the parent of a child who is under 18 and in Australia; or is the spouse, de facto partner or dependent child of an Australian citizen, permanent resident or a person usually resident in Australia and whose continued presence in Australia is not subject to a limitation as to time imposed by law. As such, it would appear that an adult in Australia who wished for their dependent relative (such as an elderly parent who was dependent on them for care or emotional support) to travel to Australia would not have access to such family reunification unless the application was exempted from the automatic invalidation.

1.69 The right to protection of the family, and the circumstances in which it may be permissibly limited, is described above at paragraph [1.47]. The statement of compatibility identifies that this measure engages and limits the right to protection of the family. It highlights the exceptions to the effect of the designation, and notes that the designation does not affect visa applications made by persons who are already in Australia, including by those who are family members of other persons who are in Australia. However, the bar would apply to all visa applications from a designated country, meaning that it would have a broad blanket effect. The statement of compatibility notes that the minister would be empowered to exempt individuals from the operation of the designation where they consider it in the public interest to do so, and states that this power 'could be used in other situations affecting children and/or family units'.[102] The existence of a ministerial power to determine that the visa application bar does not apply in certain cases may have some safeguard value, although it is noted that in the case of an individual exemption, the minister may make such a determination only if they think 'that it is in the public interest to do so'. Further, this power would be a personal and non-compellable power of the minister alone, and the minister would not be under a duty to consider whether to exercise that power (including in cases where they are requested to do so). Consequently, it may be that, as a matter of practice, this power to exempt an individual from the visa bar has limited application in practice.

1.70 The minister would also have the power, under proposed subsection 199G(3), to designate a class of persons or visas as being exempt from the bar, which could limit the operation of the bar depending on its use. The explanatory memorandum states that this power will permit exceptions 'where they are necessary to meet a range of Australia's international obligations and commitments', including relating to international trade, diplomatic officers and other persons accorded privileges and immunities, the re-entry of certain long-term residents, and persons who hold a valid Refugee Convention Travel Document issued by Australia, as well as other cohorts

[102] Statement of compatibility, p. 29.

whose entry to Australia may need to be facilitated.[103] This power may, therefore, have some safeguard value, but only in limited circumstances.

1.71 As this measure would render all applications for visas from nationals of a specific country invalid (subject to some exceptions), it would likely have a disproportionate impact on persons in Australia of that same nationality, and so may engage and limit the right to equality and non-discrimination.[104] This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[105] It encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[106] Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[107]

1.72 The statement of compatibility identifies that this measure may engage the right to equality and non-discrimination as it will prevent applications being made by nationals of a designated country who are outside Australia, which may also mean that persons of particular national origins are disproportionately affected.[108]

1.73 The minister would be empowered to designate a removal concern country 'if the minister thinks it is in the national interest' to do so, in consultation with the Prime Minister and Minister for Foreign Affairs and must table a statement of reasons for this determination. The statement of compatibility states that the purpose of a designation 'would be to reduce the number of people arriving in Australia from the removal concern country who may then prove difficult to remove in the future, and to encourage those countries to cooperate with Australia's efforts to remove their nationals following the end of their lawful stay in Australia'.[109] Controlling Australia's system of migration constitutes a legitimate objective under international law, and so by extension the stated objective of this measure would appear to be capable of

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103 Explanatory memorandum, p. 23.

104 International Covenant on Civil and Political Rights, articles 2 and 26.

105 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

106 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

107 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

108 Statement of compatibility, pp. 34–35.

109 Statement of compatibility, p. 35.

constituting a legitimate objective, though noting that no evidence is provided as to whether a pressing and substantial concern exists as to warrant this measure (and that such evidence would likely vary from country to country). The measures would appear capable of achieving that objective.

1.74 As to proportionality, the statement of compatibility states that a designation would not affect visa applications made by people who are already in Australia, or the processing of existing visa applications or travel by existing visa holders, nor would it affect the making of visa applications in circumstances that may involve Australia's international obligations and commitments. It states that the minister would exercise the power to designate a removal concern country in the national interest following consultations with the Prime Minister and Minister for Foreign Affairs, and concludes that the designation would therefore 'be reasonable, necessary and proportionate to the legitimate aim of maintaining the integrity of the migration system and helping ensure that other countries readmit their nationals'.[110] However, no information is provided as to why other, less rights restrictive alternatives (such as a bar only on specific visa types) would be ineffective to achieve the stated objective. It is also unclear whether there are sufficient safeguards to ensure that a largely blanket visa ban does not impermissibly limit the right to protection of the family and to equality and non-discrimination for those affected persons in Australia. As the bar would not apply to non-citizens who are the spouse, de facto spouse or dependent child of Australian citizens or certain Australian residents, this limits the impact this will have on the right to protection of the family for people in Australia. However, as other dependent relatives are not excluded from the bar, there is some risk that the measure may impermissibly limit the right to protection of the family. In relation to the right to equality and non-discrimination of affected people in Australia, it is not clear that the measure would permissibly limit this right given the breadth of the measure.

Committee view

1.75 The committee notes that if a country was declared to be a 'removal concern country', all visa applications from all nationals of that country would be barred (subject to some exceptions). The committee considers that this may have significant impacts on people in many countries, however notes that the mandate of this committee is to consider whether legislation is compatible with Australia's international human rights obligations, which apply mainly in relation to people already in Australia.

1.76 The committee considers that there may be limited circumstances in which a person in Australia has dependent adult family members outside Australia who may be prevented from travelling to Australia as a result of this bar, meaning that the measure may limit the right to protection of the family. The committee considers that this could be alleviated by a minor amendment to the proposed measure.

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110 Statement of compatibility, p. 35.

1.77 In relation to the right to equality and non-discrimination, the committee considers that it is not clear that the measure includes sufficient safeguards such that it would constitute a proportionate limit on the right.

Suggested action

1.78 The committee considers the proportionality of this measure may be assisted were the bill amended as follows:

(a) amend proposed section 199F to establish a maximum period of time for which a removal concern country designation may be in force; and

(b) amend proposed paragraph 199G(2)(b) to change 'dependent child' to 'dependent person' including non-western kinship systems.

1.79 The committee draws its human rights concerns to the attention of the minister and the Parliament.

Reversing a protection finding

1.80 Schedule 2 of the bill seeks to amend section 197D of the Migration Act to expand the circumstances in which the minister may determine that a protection finding would no longer be made in relation to a person, to include the power to do this in relation to *lawful* non-citizens (that is, non-citizens who have a visa).[111]

1.81 The bill would repeal and replace subsection 197D(1) to provide that the minister may make a decision that a protection finding would no longer be made in relation to a person (that is, to reverse a protection finding) if the non-citizen is a 'removal pathway non-citizen'; they have made a valid application for a protection visa that has been finally determined; and in the course of considering that application, a protection finding was made with respect to a country (whether or not the protection visa was refused, or granted and subsequently cancelled). It also seeks to amend subsection 197D(2) by omitting reference to 'an *unlawful* non-citizen to whom paragraphs 197C(3)(a) and (b) apply in relation to a valid application for a protection visa' and substituting it with 'the non-citizen'.[112] The explanatory memorandum states that this would enable the minister to make a decision that a protection finding would

111 Migration Act, section 197D currently provides that reversing a protection finding may only be in relation to specific *unlawful* non-citizens and made for the purposes of subsection 197C(3), namely, where the non-citizen has made a valid application for a protection visa that has been finally determined; and in the course of considering the application, a protection finding was made with respect to the country (whether or not the visa was refused or was granted and has since been cancelled); and none of the following apply: the decision in which the protection finding was made has been quashed or set aside; or a decision made under subsection 197D(2) in relation to the non-citizen is complete within the meaning of subsection 197D(6).

112 Schedule 2, item 5, subsection 197D(2).

no longer be made in relation to certain *lawful* non-citizens, specifically those who are removal pathway non-citizens.

1.82 The bill would also provide that section 197D, as amended, applies in relation to a protection finding, whether the protection finding is made before, on or after the commencement of the item.[113]

International human rights legal advice

Rights to protection of the family; health; freedom of movement; expulsion of aliens; and non-refoulement

1.83 Currently, the power to reverse a protection finding can only be exercised in relation to *unlawful* non-citizens (that is, certain non-citizens without a visa). Following the decision of the High Court of Australia in NZYQ in late 2023, some of those unlawful non-citizens were required to be released from detention.[114] They were subsequently given a visa meaning they became *lawful* non-citizens (and so a protection finding relating to them could not be reversed). This amendment would enable the exercise of that power in relation to those lawful non-citizens (that is, non-citizens with a visa) who are subject to the removal pathway.[115] However, the bill provides that the class of non-citizens to whom this could apply could be broadened by the minister prescribing additional visa categories as subject to the removal pathway.[116]

1.84 The statement of compatibility with human rights states that this measure engages the prohibition on the expulsion of aliens without due process, which provides that an alien lawfully in a country may be expelled therefrom only in pursuance of a decision reached in accordance with law and with due process.[117] It states that a decision under section 197D may mean that a person becomes available for removal once their bridging visa ceases, and that the person is able to submit reasons why a protection finding should still be made as part of the section 197D decision-making process and have that decision reviewed by a merits review tribunal pursuant to existing provisions of the Act.[118] It also states, in relation to NZYQ-affected persons, that where a decision is made to cease a Bridging Visa because the person may be able to be removed following a section 197D decision, that decision is subject to natural justice processes and judicial review. These processes may mean that, in

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113 Schedule 2, item 9.

114 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

115 See, minister's second reading speech, *Hansard* (26 March 2024), p. 3.

116 See Schedule 2, item 4, proposed sub-paragraph 197D(1)(a)(ii) which references paragraph 199B(1)(d) which Schedule 1, item 3 proposes to insert. Proposed paragraph 199B(1)(d) defines 'removal pathway non-citizen' as a lawful non-citizen who 'holds a visa prescribed for the purposes of this paragraph'.

117 International Covenant on Civil and Political Rights, article 13. See, statement of compatibility, p. 32.

118 Statement of compatibility, p. 33.

practice, there are sufficient procedures in place such that a reversal of a protection finding may be compatible with the prohibition against the expulsion of aliens without due process. Further, if a reversal of a protection finding (and subsequent removal of the person to the relevant country) did accurately and appropriately determine that the person was no longer at risk of persecution, and so no such risk arose as a matter of fact, it may also be compatible with Australia's obligations in relation to non-refoulement.[119] But, as discussed above, much will depend on the quality of the decision-making as to whether a person is owed protection obligations.

1.85 The expansion of the power to reverse a protection finding to include lawful non-citizens may also engage and limit the right to health, having regard to the potential for a possible reversal of a protection finding, or actual reversal, to have a detrimental impact on an affected person's mental health. The right to health refers to the right to enjoy the highest attainable standard of physical and mental health.[120] The negative impacts of insecure visa status for refugees has, in particular, been considered in academic research.[121]

1.86 Further, depending on how the power to reverse a protection finding was used in practice, it may engage and limit other human rights. In this regard, proposed paragraph 199B(1)(d) would empower the minister to prescribe *any* Australian visa as one in relation to which a visa-holder would be a 'removal pathway non-citizen'. If the minister prescribed a large category of visas to which the removal pathway directions could apply, including visas granted to long-term residents, such as spouse visas or permanent residence visas, the effect on those who have been in Australia for a long period could be significant. If such visas were so prescribed, as the power to reverse a protection finding applies to people subject to a removal pathway direction, it would appear that a person who had a protection finding made in relation to them many years ago, and who had since lived for many years in Australia, could therefore be vulnerable to a reversal of that protection finding (regardless, it would appear, of whether that protection finding was relevant to their current visa status). If the power was used in relation to people who had been in Australia for a substantial period of time, including those who had established families and personal lives in Australia, it may engage and limit the rights to protection of the family and to a private life. These rights are set out above. It may also engage and limit the right to freedom of movement, which includes the right to enter, remain, or return to one's 'own country'.[122]

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119 See further, statement of compatibility, p. 24.

120 International Covenant on Economic, Social and Cultural Rights, article 12(1).

121 See, for example, Nickerson A, Byrow Y, O'Donnell M, et al, 'The mental health effects of changing from insecure to secure visas for refugees, *Australian & New Zealand Journal of Psychiatry*, 2023, vol. 57, no. 11, pp. 1486–1495.

122 International Covenant on Civil and Political Rights, article 12(4).

1.87 The statement of compatibility does not identify that this measure engages and may limit the right to health, or whether (and to what extent) it may engage and limit the right to a private life, and so no analysis is provided in relation to these matters. It states that this measure does not directly engage the right to freedom of movement, but acknowledges that some persons who are removal pathway non-citizens 'may be long-term residents of Australia who had their substantive visa cancelled on character grounds'.[123] It states that the 'strength, nature and duration of the person's ties to Australia would have already been considered as part of the decision to cancel their substantive visa on character grounds', which would help ensure that Australia was not the person's 'own country'. The statement of compatibility states that this measure does not directly engage rights relating to families and children, but as it may mean a person holding a bridging visa may be able to be removed if it is determined that a protection finding would no longer be made for that person, this may affect the rights of their family members in Australia.[124]

1.88 These rights may be limited where the limitation: seeks to achieve a legitimate objective (one which, in the case of the right to freedom of movement, is necessary to protect national security, public health or morals or the rights and freedoms of others); is rationally connected to (that is, effective to achieve) that objective; and proportionate. The explanatory memorandum states that the purpose of these amendments to section 197D is to facilitate the lawful removal of non-citizens who are on a removal pathway, and that they apply only in circumstances where a protection finding has not been made in relation to the non-citizen, or where the Minister determines that a non-citizen is no longer a person in respect of whom any protection finding would be made.[125] The statement of compatibility further states that the measure:

> would expand the situations in which a decision under section 197D can be made, that a person is no longer a person in respect of whom any protection finding would be made, to encompass persons who hold certain bridging visas as defined in new section 199AB, in addition to persons who are unlawful non-citizens. As such persons are on a removal pathway following the refusal or cancellation of a substantive visa, usually on character or security grounds, and a protection finding may be a key barrier to their removal from Australia, it is appropriate that reconsideration of their circumstances, to see if they continue to engage Australia's non-refoulement obligations, can take place. The Bill does not provide a mechanism to reconsider the protection findings of current protection visa

123 Statement of compatibility, p. 33.

124 Statement of compatibility, p. 29.

125 Explanatory memorandum, p. 18.

holders, or former protection visa holders who now hold visas such as Resolution of Status Visas or Resident Return Visas.[126]

1.89 As noted above, any limitation on a right must be shown to be aimed at achieving a legitimate objective that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. While regulating Australia's migration system is a legitimate objective, it is not clear that there is a pressing need to extend the power to reverse a protection finding in relation to potentially all lawful visa holders. In relation to proportionality, the statement of compatibility states that in many cases the impact of the person's removal from Australia on their family members would have already been considered as part of the decision to refuse or cancel their protection visa on character grounds, and states that 'there may be opportunities for that consideration to take place as part of a ministerial intervention consideration'. However, under the Migration Act there are certain bases on which a decision to cancel a visa on character grounds is not discretionary, but mandatory.[127] This includes when a person has been sentenced to imprisonment for 12 months or more (which incidentally would include imprisonment for failure to comply with a removal pathway decision). In relation to the cancellation of such visas, no consideration would have been given to a person's connection to Australia at the time the visa was cancelled, as there is no discretion to consider any individual circumstances. Further, the statement of compatibility does not identify that, because the 'removal pathway non-citizen' category could (as a matter of law) be expanded to include any Australian visa, the measure could operate in relation to a far more substantial group of non-citizens, including people with extensive social connections, families and private lives in Australia. This raises questions as to whether the measure is sufficiently circumscribed. Further, while the availability of this discretion may have safeguard value, its discretionary nature means there is a risk that it may be inadequate in practice. In this regard, it is not clear what information the minister would use to reverse a protection finding in relation to a person (particularly a protection finding made several years prior), particularly if the process did not permit the affected person to submit information or reasons.

1.90 Consequently, there is a risk that the proposed measure may impermissibly limit the rights to protection of the family, freedom of movement, and health depending on its application to individual cases.

Committee view

1.91 The committee notes that the stated purpose of these amendments is to facilitate the lawful removal of non-citizens who are on a removal pathway (namely,

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126 Statement of compatibility, p. 30.

127 See *Migration Act 1958*, subsection 501(3A) which provides that the minister 'must' cancel a visa if satisfied the person does not pass the character test because they are serving a sentence of imprisonment because of a substantial criminal record (being sentenced to imprisonment of 12 months or more) or sexually based offences involving a child.

persons released from immigration detention following the NZYQ decision and certain persons on a bridging general visa). The committee understands that without this amendment the Migration Act would not provide a means to revisit a protection finding while a removal pathway non-citizen is in the community on a visa. However, the committee notes that as proposed section 199B would empower the minister to prescribe *any* further visa (including permanent visas) for the purposes of the removal directions power, any visa class would, as a matter of law, be liable to the reversal of a protection finding pursuant to this measure, not just the NZYQ cohort.

1.92 The committee considers that the possibility that a protection finding may be reversed in future may engage and limit the right to health in relation to affected persons, noting the uncertainty as to whether a protection finding may be reversed at any time in the future may have on a visa holder's mental health. The committee also considers that, if this power was used in relation to lawful non-citizens who have lived in Australia for an extended period, there would be an increased risk that the reversal of a protection finding (which resulted in that person's removal from Australia) would impermissibly limit the rights to protection of the family, a private life, and freedom of movement.

1.93 The committee considers that if the bill were amended to provide that the minister may only reverse a protection finding in relation to a specified cohort of visa-holders (and not permit a future cohort of visa holders to be prescribed by legislative instrument) this may assist the compatibility of the measure with these rights.

1.94 In relation to the prohibition on non-refoulement, if a reversal of a protection finding did accurately and appropriately determine that the person was no longer at risk of persecution, and so no such risk arose as a matter of fact, the measure may also be compatible with Australia's obligations in relation to non-refoulement. However, the committee cautions that much will depend on the quality of the decision-making as to whether a person is owed protection obligations.

Suggested action

1.95 The committee considers the compatibility of this measure may be somewhat assisted were the power to reverse a protection finding be confined to the NZYQ cohort or to those on bridging visas who were subject, at the time of the grant, to making arrangements to depart Australia, and not applicable to any broader visa class.[128]

1.96 The committee recommends that the statement of compatibility be updated to include an assessment of the compatibility of this measure with the right

[128] This would require an amendment to Schedule 2, item 4, proposed sub-paragraph 197D(1)(a)(ii) to remove reference to paragraph 199B(1)(d); and item 6, proposed paragraph 197D(2A)(b) to remove reference to paragraph 199B(1)(d).

to health, rights to protection of the family and a private life, and right to freedom of movement.

1.97 The committee draws its human rights concerns to the attention of the minister and the Parliament.

Legislative instruments

Migration (Critical Technology – Kinds of Technology) Specification (LIN 24/010) 2024

Migration (Designated Migration Law – Visa Condition 8208) Determination (LIN 24/009) 2024[129]

FRL No.	F2024L00182 and F2024L00183
Purpose	The Migration (Critical Technology – Kinds of Technology) Specification (LIN 24/010) 2024 [F2024L00182] specifies the kinds of technology for the purposes of the definition of critical technology in regulation 1.03 of the Migration Regulations. The Migration (Designated Migration Law – Visa Condition 8208) Determination (LIN 24/009) 2024 allows for computerised decision-making in certain circumstances in relation to visa condition 8208.
Portfolio	Home Affairs
Authorising legislation	*Migration Regulations 1994*
Disallowance	Exempt
Rights	Education; equality and non-discrimination; freedom of expression; work

Restriction on visa holders relating to critical technologies

1.98 The Migration Regulations 1994 (Migration Regulations) were amended in 2022 to establish a framework by which to regulate the ability of specified visa holders to undertake study or research where there is an 'unreasonable risk of unwanted transfer of critical technology by the visa holder'.[130] These amendments:

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129 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Critical Technology – Kinds of Technology) Specification (LIN 24/010) 2024 and Migration (Designated Migration Law – Visa Condition 8208) Determination (LIN 24/009) 2024, *Report 3 of 2024*; [2023] AUPJCHR 17.

130 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541] and Migration Amendment (Postgraduate Research in Critical Technology – Student Visa Conditions) Regulations 2022 [F2022L00866].

- created a Public Interest Criterion 4003B (PIC 4003B) where the minister may refuse to grant certain visas if there is an unreasonable risk of unwanted transfer of critical technology by the visa applicant;[131]
- created visa condition 8208, requiring Student (subclass 500) visa holders to obtain approval from the minister before undertaking a new critical technology-related course in the postgraduate research sector;[132] and
- provided grounds for the cancellation of a visa where the minister is satisfied that there is an unreasonable risk of unwanted transfer of critical technology by the visa holder.

1.99 The 'unwanted transfer of critical technology' means any direct or indirect transfer of critical technology, or communication of information about such technology, by a person that would: harm or prejudice the security or defence of Australia, or the health and safety of the Australian public or a section of the Australian public, or Australia's international relations; or interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth.[133] 'Critical technology' refers to: technology of a kind specified by the minister in a further legislative instrument; or property (whether tangible or intangible) that is part of, a result of, or used for the purposes of researching, testing, developing or manufacturing any such specified technology.[134] However, until the minister specified technologies for the purposes of this definition, the framework did not have legal effect.[135]

1.100 The Migration (Critical Technology – Kinds of Technology) Specification (LIN 24/010) 2024 (the first instrument) activates that framework by defining 'critical technology'. It specifies the following kinds of technology for the purposes of the definition of critical technology:

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131 This screening applies where a person is: applying for a Student visa to undertake a postgraduate research course; a secondary applicant for a Student visa, and the primary applicant's intended course is a postgraduate research course; or applying for a range of other visas.

132 The visa condition would also apply to a further 12 subclasses of visas at a date to be specified by the minister.

133 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], item 2, subsection 1.15Q(1).

134 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], item 1, definition contained in section 1.03.

135 This information was provided by the minister in response to the committee's consideration of the legislation establishing the framework. See, Parliamentary Joint Committee on Human Rights, Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541] and Migration Amendment (Postgraduate Research in Critical Technology – Student Visa Conditions) Regulations 2022 [F2022L00866], *Report 5 of 2022* (20 October 2022), pp. 65–76.

- advanced manufacturing and materials technology;
- artificial intelligence technology;
- advanced information and communication technology;
- biotechnology;
- clean energy generation and storage technology;
- quantum technology; and
- autonomous systems, robotics, positioning, timing, and sensing technology.[136]

1.101 The Migration (Designated Migration Law – Visa Condition 8208) Determination (LIN 24/009) 2024 (the second instrument) enables the use of computer programs in determining visa condition 8208 which requires student visa holders to obtain approval from the minister before undertaking a new critical technology-related course in the postgraduate research sector. The minister's decision to approve the visa holder undertaking a course of study in a critical technology-related area is contingent on the minister's satisfaction that there is not an unreasonable risk of an unwanted transfer of critical technology by the visa holder. This instrument allows for the use of computerised decision-making to make a decision, exercise a power or comply with an obligation, or do anything else relating to a decision, power or obligation, in relation to critical technology-related study under condition 8208.[137]

International human rights legal advice

Rights to education; equality and non-discrimination; freedom of expression; work

1.102 While states have a right to control immigration, by allowing for visa cancellations for those in Australia, or requirements for certain visa holders to gain the minister's approval to change their course of study, this measure engages and may limit several human rights including the rights to education, work, freedom of expression and equality and non-discrimination. These two legislative instruments are exempt from parliamentary disallowance, and so no statement of compatibility has been provided.[138]

Requiring certain visa holders to seek ministerial approval to undertake certain studies engages and may limit the right to education. The right to education provides that

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136 Item 5.

137 Migration Amendment (Postgraduate Research in Critical Technology – Student Visa Conditions) Regulations 2022, explanatory statement, p. 1.

138 As a statement of compatibility is not required for legislative instruments that are exempt from disallowance, see *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

education should be accessible to all.[139] This requires that States parties recognise the right of everyone to education, and agree that education shall be directed to the full development of the human personality and sense of dignity, and shall strengthen the respect for human rights and fundamental freedoms. The requirement for certain visa holders to seek ministerial approval to undertake certain studies, and the provisions allowing for visa cancellations for persons in Australia, may also engage and limit the right to work, as the completion of the relevant study may be a requirement for specific jobs. This right provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[140] Enabling visas to be cancelled if certain information about such technology is communicated also appears to limit the right to freedom of expression. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.[141] Further, because these measures would only apply to non-citizens, and could potentially operate disproportionately in relation to people from particular countries, they also engage and may limit the right to equality and non-discrimination. It is recognised that nation states have a broad discretion to regulate the issue of visas, and to establish criteria accompanying those visas. However, those laws must be implemented in a non-discriminatory manner, consistent with the right to equality.[142] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[143] Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.[144]

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139 International Covenant on Economic, Social and Cultural Rights, article 13.

140 International Covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

141 International Covenant on Civil and Political Rights, article 19(2).

142 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

143 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

144 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

1.103 These rights may be subject to permissible limitations where the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to that objective, and is a proportionate means of achieving that objective. With respect to the right to equality and non-discrimination, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[145]

1.104 When the committee considered the measures which established this framework in 2022, it concluded that while it seemed that the measure may have a disproportionate impact on individuals of some nationalities more than others in practice, this differential treatment would appear to be based on reasonable and objective criteria.[146] It also concluded that the measure appeared to address a pressing and substantial concern for the purposes of international human rights law and that it may be effective to achieve the stated objective. The committee further considered that the measure may be a proportionate limit on the rights identified, if the detail of what constitutes a 'critical technology' was defined in a sufficiently clear and accessible manner. The first instrument provides that definition of what constitutes a 'critical technology'. As a result of the committee's previous assessment, it is only necessary to address the question of whether the first instrument is drafted in such a way as to capture the instances of unwanted transfer or communication of technology, and whether the detail of what constitutes a 'critical technology' is defined in a sufficiently clear and accessible manner.

1.105 The first instrument specifies seven types of technology (advanced manufacturing and materials technology; artificial intelligence technology; advanced information and communication technology; biotechnology; clean energy generation and storage technology; quantum technology; and autonomous systems, robotics, positioning, timing, and sensing technology). It includes a description of each technology, but confirms that this is intended for information only.[147] These types of technologies would appear to be very broad categories, and so could encompass a broad range of matters. Further, the description of individual technologies would also appear to be very broad (for example, advanced manufacturing and communications technology is described as 'Technology that produces, forms, shapes or structures

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145 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

146 Parliamentary Joint Committee on Human Rights, Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541] and Migration Amendment (Postgraduate Research in Critical Technology – Student Visa Conditions) Regulations 2022 [F2022L00866], *Report 5 of 2022* (20 October 2022), pp. 74–76.

147 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], explanatory statement, p. 7.

matter in forms with one or more definable properties, characteristics, qualities, or features, and the results thereof'). While it is not identified in the explanatory statement, the Department of Home Affairs website provides further information about critical technologies, identifying that they are defined consistently with the 'List of Critical Technologies in the National Interest' (maintained by the Department of Industry, Science and Resources).[148] This list of technologies (which lists the same technologies defined in this instrument) provides examples and further detail about each technology (for example, it states that 'advanced manufacturing and communications technology' includes 3D printing, critical minerals extraction and advanced composite materials).[149] This additional information indicates that these categories of technologies would encompass a very broad range of matters, and so suggest that the measure may have broad application. Consequently, while this would appear to capture instances of studies which could result in unwanted transfer or communication of technology, it raises questions as to whether the measure is sufficiently circumscribed (which goes to the proportionality of the measure).

1.106 The second instrument allows for the use of computerised decision-making to make a decision, exercise a power or comply with an obligation, or do anything else relating to a decision, power or obligation, in relation to critical technology related study under condition 8208. The explanatory statement states that the minister's decision 'would follow an assessment of the risk of an unwanted transfer of critical technology by the visa holder', a process which would appear to likely require the consideration of a range of factors relating to the individual (such as their nationality, the technology in question, and other personal factors). No information is provided as to what matters relating to this assessment may be subject to an automated decision by a computer, but as a matter of law, all aspects of the minister's discretionary decision-making powers could be exercised by a computer under the second instrument. Consequently, it is not clear whether providing for automated decision making would alter the application of this measure, and make it more or less likely that people would be denied permission to study particular things.[150] If all aspects of the decision were made by a computer this may mean that different cases are less likely to be treated differently and flexibly.

1.107 As such, as the detail of what constitutes a 'critical technology' is somewhat unclear, and as computerised decision making could be used to determine if there is not an unreasonable risk of unwanted transfer of critical technology, questions remain

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148 Department of Home Affairs, *Critical technology - enhanced visa screening measures* (accessed 8 April 2024).

149 Department of Industry, Science and Resources, *List of Critical Technologies in the National Interest* (accessed 8 April 2024).

150 The Senate Standing Committee on the Scrutiny of Delegated Legislation has sought a response from the minister in relation to the appropriateness of permitting the use of automated decision-making in this context. See, Delegated Legislation *Monitor 4 of 2024* (28 March 2024), pp. 3–7.

as to whether the measures are sufficiently circumscribed such that they would be a proportionate limit on the rights to work, education, freedom of expression, or equality and non-discrimination. It would appear that much will depend on how these measures are applied in practice.

Committee view

1.108 The committee considers that placing restrictions on visa holders relating to critical technology pursues an important objective, that of seeking to protect national security, public order, public health and safety, and Australia's international relations, by preventing the unwanted transfer of critical technology to malicious actors. The committee considers that there is an extant risk of unwanted transfers of critical technology, particularly in the higher education sector, and this measure as a whole seeks to address this pressing and substantial concern. However, the committee is concerned that the definition of 'critical technologies' as defined in the first instrument encompasses a very broad range of matters, suggesting that the measure may have broad application. Consequently, it raises some questions as to whether the measure is sufficiently circumscribed. In this regard, the committee considers that it is not clear whether the second instrument, in providing for computerised decision-making in certain circumstances (including whether the minister is satisfied that there is not an unreasonable risk of an unwanted transfer of critical technology), would make it more or less likely that people would be denied permission to study particular things. The committee considers that much will depend on how the measures operate in practice.

1.109 The committee notes that these two legislative instruments are exempt from disallowance, meaning they are not required to include a statement of compatibility with human rights.[151] The committee reiterates its position that, where a legislative instrument will have a potential impact on human rights (particularly where it relates to a measure this committee has considered in dialogue with the minister), it is appropriate that the measure should be accompanied by a detailed statement of compatibility.[152]

Suggested action

1.110 The committee recommends that statements of compatibility be prepared in relation to both of these legislative instruments.

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151 See *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

152 For example, the committee noted this on several occasions in 2020 in relation to exempt legislative instruments which dealt with matters relating to the COVID-19 pandemic. See, for example, Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020) pp. 3–4; *Report 12 of 2020* (15 October 2020) p. 13; *Report 14 of 2020* (26 November 2020) p. 81.

1.111 The committee draws its human rights concerns to the attention of the minister and the Parliament.

Mr Josh Burns MP

Chair

Senator Thorpe's Additional Comments[1]

Migration Amendment (Removal and Other Measures) Bill 2024

1.112 Senator Thorpe considers that the limitations on rights contained in this Bill are not reasonable, necessary or proportionate and therefore unacceptably erode fundamental human rights as it exposes vulnerable people to serious harm, separates families, discriminates and extends harsh and punitive restrictions on the basis of visa status or nationality, and dangerously expands ministerial power, which in most circumstances is not subject to administrative or judicial review.

1.112.1. The Bill facilitates banning nationals from specific countries, in an arbitrary and discretionary manner, criminalises people on the basis of their visa or nationality, places people seeking asylum and refugees at risk of being removed to countries where they face persecution or significant harm, in breach of Australia's international obligations and the non-derogable non-refoulement obligations, which are absolute and may not be subject to any limitations. This legislation in practice will target certain populations for criminalisation including asylum seekers, refugees and other non-citizens who can face a mandatory term of one year imprisonment for actions which could include failing to fill out a form. By way of example, as someone who is owed non-refoulement obligations under an International Treaties Obligations Assessment conducted by the Department of Home Affairs (Department) is not excluded from receiving a removal direction, and any protection order previously made could regardless be overturned by the Minister with the new powers, an LGBTQI+ person who faces active harassment, discrimination and arbitrary arrest and detention from their country based on their identity could be directed to go back to their country of origin, or to a third country to which any protection finding does not apply, or placed in prison for years for failing to do so.

1.112.2. These provisions are in violation with Australia's human rights obligations including but not limited to ICCPR Article 2(1), the right of non-discrimination, Article 26 prohibition of discrimination, Article 17 protection against unlawful or arbitrary interference with home and family; Article 23 protection of family life, Article 24 rights of the child, ICCPR Article 9 the right to liberty which protects the right not to be arbitrarily detained.

1.112.3. In particular, the criminalisation of non-cooperation with removal risks creating a roundabout regime of indefinite detention in

[1] This section can be cited as Parliamentary Joint Committee on Human Rights, Additional Comments, *Report 3 of 2024;* [2024] AUPJCHR 18.

contravention of ICCPR Article 9, the right to liberty which protects the right not to be arbitrarily detained.

1.113 This Bill is also in contravention of Australia's obligations under 1951 Convention relating to the Status of Refugees and its 1967 Protocol, but it is noted that these conventions which currently do not form part of this committee's mandate under the *Human Rights (Parliamentary Scrutiny) Act 2011.* The *Human Rights (Parliamentary Scrutiny) Act 2011* should be amended to allow the committee to consider the Convention and its Protocol. Senator Thorpe considers that the government already has tools including existing legislation, and diplomacy to achieve the stated policy intention. Further, Senator Thorpe considers that there is insufficient evidence to show how these provisions are aimed at achieving a legitimate objective, are necessary, address an issue of public or social concern that is pressing and substantial enough to warrant limiting the right, or that the legislation will even be effective in achieving the stated outcome.

1.114 Senator Thorpe notes her concern at:

1.114.1. the expedited manner through which the new legislative changes were attempted to be brought in;

1.114.2. the lack of engagement with the community and the lack of consultation;

1.114.3. the recourse to extreme criminal penalties including mandatory minimum one-year terms of imprisonment;

1.114.4. the emerging ministerial powers to remove people and prevent people from entering Australia as this power has serious repercussions and lacks important details;

1.114.5. the lack of procedural fairness protections for individuals who may have their protection visas overturned, with no safeguards in place to allow an individual to respond to information or evidence relied upon prior to the decision being made by the Minister to reverse a protection finding; and

1.114.6. the express removal of natural justice provisions as they apply to decisions on designation of a country.

1.115 Senator Thorpe's view is that this Bill should not proceed as it is fundamentally incompatible with Australian human rights obligations. If it passes, it is critical that the changes suggested by the committee are adopted, as well as the additional amendments below, which may in part address some of the human rights concerns raised.

1.115.1. Section 197D in its entirety should be repealed from the Migration Act and to remove the Minister’s powers to overturn a person’s protection.

1.115.2. That all current and former Australian permanent residents, and former Australian citizens, be inserted as an exemption in s 199G(2).

1.115.3. That the mandatory/minimum sentence penalty is removed.

1.115.4. That section 199B(1)(d) is restricted so that it does not allow the Minister to expand the category by Regulations; limiting it to the visas specified in the Act.

1.115.5. That a reasonable excuse for failure to comply with a removal order includes a genuine fear of suffering persecution or significant harm if the person were removed to a particular country; that they are, or claim to be, a person in respect of whom Australia owes non-refoulement obligations; or that the person believes that if they complied with the removal pathway direction, they would suffer 'other adverse consequences.

1.115.6. Amend to ensure that people seeking asylum who are seeking judicial review of an AAT or IAA decision before the courts cannot be subject to a 'removal pathway' direction.

1.115.7. Amend to ensure the Minister is required to consider the best rights of the child in his decisions as per obligations under s 3(1) and 12 of 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.

1.115.8. Amend to state that the Minister's powers cannot not apply to anyone who was subject to the fast track process which has been found to be unlawful.

Senator Lidia Thorpe

Senator for Victoria

Coalition Members' Additional Comments[2]

Migration Amendment (Removal and Other Measures) Bill 2024

1.116 Coalition members note that the Government presented this Bill to the Coalition moments before a 20-minute briefing. The Coalition was then asked to support the Bill's passage through Parliament within just 36 hours, leaving no time for proper parliamentary scrutiny or input from outside experts.

1.117 Coalition members note that the Government presented this Bill to the Coalition moments before a 20-minute briefing. The Coalition was then asked to support the Bill's passage through Parliament within jut 36 hours, leaving no time for proper parliamentary scrutiny or input from outside experts.

1.118 Given the extensive concerns with the Bill that have been highlighted through this Committee's consideration, Coalition members express alarm with the rushed process originally proposed by the Government.

1.119 The Coalition pushed for a Senate inquiry to provide the bare minimum of due diligence and parliamentary scrutiny of what are quite significant reforms to our migration laws. The Parliamentary Joint Committee on Human Rights' scrutiny of this Bill demonstrates why this action was necessary.

1.120 Coalition members consider this Bill, and the approach taken towards its consideration by the Parliament, to be symptomatic of the chaos Labor has created in the immigration portfolio.

1.121 It is noted that this marks the fourth occasion in five months where the Labor Government has sought to expedite a Bill to address issues of its own making.

1.122 Coalition members express profound concern over a recent series of mishandled decisions in the immigration portfolio, which have compromised Australia's ability to maintain secure borders and ensure community safety.

Henry Pike MP	**Senator Matt O'Sullivan**	**Senator Gerard Rennick**
Member for Bowman	Senator for Western Australia	Senator for Queensland

[2] This section can be cited as Parliamentary Joint Committee on Human Rights, Additional Comments, *Report 3 of 2024;* [2024] AUPJCHR 19.