



# Migration Amendment (Removal and Other Measures) Bill 2024

## **Senate Standing Committee on Legal and Constitutional Affairs**

Submission by the Commonwealth Ombudsman, Iain Anderson

**April 2024**

## Introduction

I welcome the opportunity to provide a submission to the Senate Standing Committee on Legal and Constitutional Affairs' inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024 (the Bill).

I have examined the Bill from the perspective of 2 of my statutory roles:

- as the National Preventive Mechanism (NPM) under the Optional Protocol to the Convention Against Torture (OPCAT) for places of detention under the control of the Commonwealth with responsibility for conducting regular preventative visits to detention facilities and
- as the Commonwealth Ombudsman with responsibility for reviewing the appropriateness of detention arrangements for persons who have been in immigration detention for 2 years in accordance with section 486O of the *Migration Act 1958* (Migration Act).

## The risk of indefinite detention

The Bill would amend the *Migration Act 1958* to require non-citizens who are on a removal pathway, having exhausted their options to remain in Australia, to comply with ministerial directions concerning their lawful removal from Australia (clause 199C). Under clause 199E, if a non-citizen did not comply with these ministerial directions, they would be convicted of an offence and subject to a mandatory minimum sentence of 12 months imprisonment.

A non-citizen in immigration detention who was subject to a removal pathway direction would have 2 choices: return to their country of origin or a safe third country; or go to prison. If the person chooses non-compliance with the direction, once they have served their prison sentence, without change to their visa status, they would be returned to immigration detention where they could be subject to further ministerial removal pathway directions (as per clause 199C(7)). The only way for a non-citizen to break the cycle of detention and imprisonment is to return to their country of origin or a safe third country.

In my view, immigration detention facilities are unsuitable for long term use.<sup>1</sup> My Office continues to receive reports from detainees about barriers to accessing medical care, dental treatment and drug and alcohol rehabilitation programs, as well as losing access to life and work skill programs they may have commenced while in the community or in correctional facilities.<sup>2</sup> Indeed, my Office has recorded instances of detainees expressing a preference for incarceration over immigration detention due to the certainty and better range of meaningful activities that can be attached with a prison term.<sup>3</sup> It is therefore possible that the deterrence potential of a prison term has been over-estimated and that some people on a removal pathway will choose non-compliance with a ministerial direction over removal and remain in a cycle of detention and imprisonment for prolonged periods or even indefinitely.

As the Commonwealth NPM and through my Migration Act statutory reporting functions as Commonwealth Ombudsman, I have raised ongoing concerns about the impact of long-term detention on the health and wellbeing of people in detention. I see consistent patterns of deteriorating mental and physical health for people facing long-term or indefinite detention, which is supported by widespread evidence that shows the correlation between long-term detention and poor mental and physical health outcomes.<sup>4</sup> I am concerned that creating a potential cycle of indefinite detention and incarceration is not a durable solution, is contrary to the intended purpose of the Bill and risks falling short of our obligations under OPCAT to prevent torture and ill-treatment in places of detention.

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<sup>1</sup> Commonwealth Ombudsman, [Commonwealth National Preventive Mechanism Report 2021-22](#), p35.

<sup>2</sup> Commonwealth Ombudsman, [Commonwealth National Preventive Mechanism Report 2021-22](#), p30.

<sup>3</sup> Commonwealth Ombudsman, [Commonwealth National Preventive Mechanism Report 2021-22](#), p35.

<sup>4</sup> Bosworth, M. (2016). 'The Impact of Immigration Detention on Mental Health: Literature Review'. In Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office by Stephen Shaw. London: HMSO, CM 9186.

Coffey GJ, Kaplan I, Sampson RC, Tucci MM. The meaning and mental health consequences of long-term immigration detention for people seeking asylum. Soc Sci Med. 2010 Jun;70(12):2070-2079. doi: 10.1016/j.socscimed.2010.02.042. Epub 2010 Mar 20. PMID: 20378223.