Australian Government
Department of Home Affairs

Department of Home Affairs submission to the Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024

The Senate Legal and Constitutional Affairs Legislation Committee

12 April 2024

Contents

Abbreviations

BVR - Subclass 070 (Bridging (Removal Pending)) visa

Criminal Code – *Criminal Code (Cth)*

Department – Department of Home Affairs

Migration Act – *Migration Act 1958*

Migration Regulations - *Migration Regulations 1994*

1. Introduction

The Department welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024 (the Bill).

The Bill was introduced to, and passed by, the House of Representatives on 26 March 2024. It was introduced to the Senate on 27 March 2024. This submission provides an overview of the measures included in the Bill and explains the rationale for the Bill and its intended operation.

2. Background

Australia has a long history of orderly and well-managed migration, and our visa and citizenship programs are the bedrock of our system[1]. The effective administration of these programs remains fundamental to maintaining high levels of social cohesion and broad public support for immigration.

Importantly, the Government's management of Australia's immigration program anticipates and responds to changing circumstances, at home and abroad. The Government's refugee and humanitarian programs are generous, with around 16,000 visas granted offshore and 2,000 granted onshore in 2022-23[2]. A total of 20,000 places in Australia's 2023–24 Humanitarian Program will ensure that we can provide permanent resettlement to those most in need from around the world, and protection in Australia to those who require it.

Australia's immigration programs rely on the Government's ability to remove promptly from Australia persons found not to be in need of Australia's protection, and to appropriately resolve the status of individuals with no pathway to remain in Australia. This is done in full compliance with Australia's *non-refoulement* obligations under international law.

The vast majority of non-citizens who travel to or visit Australia comply with the conditions of their visa including the requirement to depart if they no longer have a pathway to remain in Australia. The onus remains on non-citizens to comply with the requirements and conditions of their visa. Support services are available to assist individuals to depart, where required and subject to eligibility requirements[3].

Our migration system is administered according to the *Migration Act 1958* (the Migration Act). Under subsection 14(1) of the Migration Act a non-citizen in the migration zone who is not a lawful non-citizen (i.e. does not have permission to be in Australia in the form of a visa that is in effect) is an unlawful non-citizen. If an unlawful non-citizen is unwilling or unable to resolve their immigration status through the grant of a visa they have no right to remain in Australia and must be detained pursuant to section 189 of the Migration Act and removed from Australia under section 198 of the Migration Act as soon as reasonably practicable. Examples of unlawful non-citizens include, but are not limited to, persons who have overstayed their visa, have had their visa cancelled/refused or have arrived in Australia without a visa.

[1] As outlined in the Department of Home Affairs publication, The Administration of the Immigration and Citizenship Programs – see https://immi.homeaffairs.gov.au/programs-subsite/files/administration-immigration-program-11th-edition.pdf
[2] See 2022-23 Humanitarian Program Outcomes at Australias Offshore Humanitarian Program 2022-23 - at a glance (homeaffairs.gov.au)
[3] Returns and Reintegration Assistance Program – see Help to leave (homeaffairs.gov.au)

Australia has a robust system of visa decision-making, backed up by merits and judicial review

The making of visa decisions is generally subject to procedural fairness requirements, and in many cases merits review may be sought. At any one time the Administrative Appeals Tribunal will have more than 50,000 migration and refugee decisions under review, with around 40,000 of these being in respect of decisions on refugee status[4]. The Federal Court of Australia also receives hundreds of applications for judicial review of migration matters each year[5]. Together, this system of decision-making and review ensures that outcomes are as fair as possible, and that Australia's non-refoulement obligations are given real effect.

Managing Australia's immigration programs

Non-citizens who have exhausted their options for remaining in Australia lawfully on a substantive visa and are on a removal pathway are expected to depart voluntarily or cooperate in efforts to ensure their prompt and lawful removal from Australia. In the majority of cases, people return to their home country when they have no lawful right to remain in Australia. In a smaller number of cases the Department of Home Affairs engages closely with non-citizens once they have exhausted all legal avenues to remain in Australia, to monitor their departure, or to remove them to their country of nationality, voluntarily or involuntarily.
In 2022-23, 2,274 unlawful non-citizens were removed from Australia in this way.

However, like many other countries, Australia has an ongoing problem returning some non-citizens who will not cooperate with these removal efforts.

There are currently between 150 to 200 unlawful non-citizens in immigration detention in Australia, who have no lawful basis to remain in Australia and who are refusing to cooperate with efforts to remove them from Australia. There is a clear need to address removal of this cohort and ensure Australia's migration laws and the expectations of the Australian community are well understood.

There are additionally some bridging visa holders in the community with conditions relating to their removal from Australia who also have no valid reason for further stay in Australia and who are refusing to cooperate with removal efforts.

There are also some countries that are unwilling to accept the return of their nationals or are reluctant to facilitate the return of their nationals from Australia.

The amendments in this Bill are therefore directed towards those non-citizens who have exhausted all options to stay in Australia on a substantive visa but who do not cooperate with our efforts to remove them, and as a consequence cannot currently be removed from Australia.

The legal environment for immigration is changing rapidly

This legislation also recognises the changing landscape of migration law and immigration detention. New constitutional limits on executive power have been drawn and further cases are expected in the coming years, reflecting changes in the legal landscape and jurisprudence.

- On 8 November 2023, in the matter of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37 ('NZYQ'), the High Court of Australia ruled that immigration detention was unconstitutional where there is no real prospect of removal of a non-citizen becoming practicable in the reasonably foreseeable future. As a result, NZYQ affected non-citizens were required to be released from immigration detention into the community.

[4] See Summary of Lodgements, Decisions and Cases on Hand MRD Caseload Report 2022-23 (aat.gov.au)
[5] See Federal Court of Australia, Annual Report 2022-23, Appendix 5 Workload Statistics at Federal Court of Australia annual report 2022-2023 (fedcourt.gov.au)

Immigration detention has long been an important part of Australia's immigration status resolution framework, with held detention being used to manage the location of some non-citizens who are not cooperating with arrangements for their departure from Australia. Following the High Court decision of NZYQ, immigration detention is no longer always available in protracted removal cases. As a result of the High Court's decision, NZYQ affected non-citizens who were required to be released from immigration detention, were granted a Removal Pending Bridging Visa (BVR). Amendments to the Migration Act passed by the Parliament in 2023 were designed to ensure non-citizens affected by the High Court's ruling in NZYQ are subject to appropriate visa conditions, to mitigate any risks they may pose to the community, and to ensure they remain engaged with the Department, following their release from immigration detention.

The NZYQ High Court decision has highlighted the potential for court decisions to change the intended operation of the migration and detention framework. It also points to the importance of maintaining a robust and effective removals program for those who have no right to remain in Australia but can no longer be detained.

Following the High Court's decision in NZYQ, the Government faces circumstances in which certain powers need to be extended to non-citizens who hold bridging visas granted for the purpose of progressing their departure from Australia without having to be detained, for example, holders of BVRs and certain other bridging visas.

Without legislative amendments, the Migration Act would not provide a means to robustly and appropriately manage a non-citizen on a bridging visa granted to resolve their immigration status in the community while pursuing their departure or removal from Australia. These are people who have exhausted all avenues to remain in Australia, and in respect of whom the Government is lawfully entitled to, or is required under the Migration Act to, progress their departure or to seek removal.

The obligation or requirement to seek removal remains whether the person is an unlawful non-citizen in immigration detention or is a removal pathway non-citizen in the community on a bridging visa granted to maintain temporary lawful status in the community pending removal or departure from Australia.

Operation Sovereign Borders

The mission of Operation Sovereign Borders remains the same today as it was when it was established in 2013: '*deny any irregular maritime pathway to settlement in Australia and deter Potential Irregular Immigrants from attempting dangerous maritime journeys to Australia, in order to protect the integrity of the Australian border and prevent the loss of lives at sea*'. Operation Sovereign Borders will continue to detect and intercept anyone who attempts an irregular boat voyage to Australia and return them to their country of departure or origin, where it is safe to do so. People who cannot be safely returned will be transferred to a regional processing country for assessment of any protection claims. These policies have successfully stemmed the flow of people smuggling ventures to Australia and prevented avoidable loss of life at sea.

Under this construct, the current processes for managing unauthorised maritime arrivals who arrive in Australia on board maritime people smuggling ventures will not be directly affected by the Bill. That is, the pathways for resolution of unauthorised maritime arrivals under Operation Sovereign Borders (return to country of departure or origin, or transfer to regional processing) will remain unchanged.

The measures proposed in the Bill could be used by Operation Sovereign Borders to supplement existent deterrence messaging to various cohorts who may be attracted / susceptible to people smuggler marketing. For example, the proposed measures complement existing legal authorities in the *Maritime Powers Act 2013* and the Migration Act, which ensures that unauthorised maritime arrivals in Australia are unable to make a valid Australian visa application without ministerial intervention. Some people smugglers may seek to use some of the measures in the proposed legislation to market their services to vulnerable potential irregular immigrants, suggesting there is no legal way for them to travel to Australia. This risk would be mitigated through targeted strategic communications particularly if a 'removal concern country' were to be designated under sections 199F and 199G of the Bill, highlighting that the proposed measures allow for the continuation of humanitarian and family pathways for regular migration.

International Comparison

Governments around the world are grappling with similar issues and utilising a variety of avenues and tools to ensure that their migration systems continue to be effective in managing the arrival and departure of non-citizens. For example, governments of both the United States of America and the United Kingdom have country designation mechanisms similar to that proposed in proposed section 199F at item 3 of Schedule 1 to the Bill (adopted in 1952 and 2022 respectively).

The issue of return of people to their home countries has also been considered in a broad international context. For example in its *Conclusion on international cooperation from a protection and solutions perspective No.112*[6], the Executive Committee of the Programme of the United Nations High Commissioner for Refugees (UNHCR) noted:

> *'… that well-functioning asylum systems and international protection systems as a whole depend on efficient and expeditious return in safety and dignity to countries of origin of persons found not to be in need of international protection, recall[ed] the obligations of States to receive back their own nationals, and call[ed] for strengthened international support and cooperation to this end.'*

3. Purpose of the Bill

The primary purpose of this Bill is to strengthen the tools available to the Government to effect the removal of non-citizens who have no right to remain in Australia.

The Bill does this in three ways:

1. It ensures there is a consequence for individuals who choose not to cooperate with removal efforts. This is particularly important in situations where the individual cannot remain in immigration detention, and has been granted a visa to regularise their immigration status pending their departure or removal from Australia. Without any further consequence, there may be limited incentive for an individual to take steps to leave Australia voluntarily. In fact, a strong incentive is created for individuals who may in the past have cooperated, to cease cooperating and seek to remain in Australia, when they have been refused a substantive visa.

2. It increases the levers available to the Government to secure support from other countries to accept the return of their citizens.

3. It updates the Migration Act to ensure that the power that is available in relation to unlawful non-citizens under section 197D can also be used in relation to individuals who are now living in the community on a BVR and other removal pathway non-citizens. This includes those individuals who, but for the decision in NZYQ, would have remained in immigration detention.

Legislative change is required at this time to ensure the effectiveness of removal programs

The Department submits that it is both prudent and necessary to amend migration legislation to ensure that the Government retains the ability to give effect to the removal of a non-citizen who has exhausted all avenues to remain in Australia. Put simply, the status of removal pathway non-citizens in Australia must be resolved.

The changing nature of global migration trends, the legal landscape and increased concerns with cooperation in removals efforts by non-citizens has necessitated the need for changes to the Migration Act.

[6] https://www.refworld.org/policy/exconc/excom/2016/en/11534?prevDestination=search

In addition, the Department cannot rule out the possibility of further court decisions that could have a material impact on critical aspects of the migration system.

- For example, if a court were to draw a new constitutional limit on the power of the Executive to lawfully detain a non-citizen who is not cooperative towards their lawful removal – i.e. where the non-citizen's cooperation is material in determining whether there is a real prospect of removal from Australia becoming practicable in the reasonably foreseeable future – a key attribute of Australia's sovereignty could be severely circumscribed. There could be a greatly diminished capacity for the Parliament and Executive to create and administer an orderly migration system, including detention arrangements for unlawful non-citizens who are required to be removed from Australia.
- The implication of non-citizens enlivening a constitutional entitlement to release into the Australian community by choosing not to cooperate with removal, would require new responses by Government to bolster the migration framework.
- Moreover, a court decision that gives significance to the choices of some non-citizens on whether to cooperate or not cooperate with their removal would present new challenges to the Government in determining appropriate visa and entry arrangements for countries that do not cooperate with involuntary removal of their own nationals.

Non-compliance with Australia's migration system by non-citizens who do not, or no longer, have permission to remain is unacceptable. Such behaviour does not accord with community expectations.

This Bill sets out a clear legislative intention in relation to the expected behaviour of non-citizens on a removal pathway, and specifically sends a strong signal about the Government's expectations that they will depart Australia voluntarily – and if they will not depart voluntarily, that they will cooperate with their lawful removal from Australia.

In order to achieve these objectives, the Bill would amend the Migration Act to introduce the following key measures:

- establishing discretionary powers for the Minister to give a written direction to a non-citizen who is on a removal pathway to take certain actions to facilitate their lawful removal from Australia – and where non-compliance with the direction would be a criminal offence (in the event of criminal conviction)
- establishing a personal power for the Minister, acting in the national interest, to designate a country as a 'removal concern country', with the effect of preventing new visa applications by most nationals of that country who are outside Australia (the Bill establishes exceptions from this for certain types of visa applications see proposed section 199G at item 3 of Schedule 1 to the Bill), and
- amending an existing power, presently limited to unlawful non-citizens, for the Minister to revisit protection findings. The amendments extend the powers available to the Minister under section 197D of the Migration Act to revisit protection findings in relation to certain non-citizens who are on a removal pathway but currently hold a visa, such as a BVR.

The Bill would also make minor amendments to clarify that a new bridging visa may be granted at any time in accordance with section 76E of the Migration Act.

Together, the new powers make up a package of reforms that will, where necessary, direct non-citizens who are on a removal pathway to cooperate with their lawful removal, where they no longer have an entitlement to remain in Australia.

The Bill does not alter who is eligible for removal

Importantly, this Bill does not expand the cohort of people who are eligible for removal from Australia.

The proposed legislative amendments apply only in respect of non-citizens who have exhausted all avenues to remain or for whom the Government is lawfully entitled or indeed required under the Migration Act to seek removal. Simply put, this Bill does not expand the definition of non-citizens who are required to depart Australia.

While a removal pathway direction can be issued to certain bridging visa holders, they will not be the subject of the removal power at section 198 of the Migration Act unless they are first lawfully detained. However, the issuing of a removal direction to a bridging visa holder will send a strong message to that individual of the requirement to cooperate. The removal direction would be a measure of last resort for relevant bridging visa holders (as it would be for non-citizens in immigration detention) and it should be noted that certain bridging visa holders can have 'departure' visa conditions imposed [7]requiring them to cooperate with making departure arrangements.

As amended, the Migration Act will make clear that a non-citizen who is on a removal pathway is expected to voluntarily leave Australia, and will cooperate with steps taken under the Migration Act for the purposes of arranging the non-citizen's lawful removal from Australia. The statement in section 199A in the Bill would confirm that non-citizens who are on a removal pathway should not attempt to obstruct or frustrate the non-citizen's lawful removal from Australia.

This parliamentary statement would also make clear that Australia expects other countries to cooperate with us and take back their nationals when they are lawfully removed from Australia.

The Bill also includes a number of safeguards and constraints in relation to the exercise of the new powers, including that if a protection finding has been made in relation to a person with respect to a particular country then the Minister must not give that person a removal pathway direction in relation to that country. In addition, if the person has an ongoing protection visa application, the Minister must not give that person a removal pathway direction.

Appropriate safeguards and limitations are proposed in respect of the Minister's power to designate a country as a 'removal concern country'. For example a wide range of exceptions to the bar on visa applications may be found in proposed section 199G at item 3 of Schedule 1 to the Bill.

The existing power for the Minister to reconsider protection findings under section 197D is subject to common law procedural fairness (the process for which is described at subheading 5.7 below) and any decision may be subject to merits review and judicial review. These settings will remain unchanged should the Bill be passed by the Parliament.

4. Consultation

The Department of Home Affairs has consulted relevant agencies in developing specific measures, including the Attorney-General's Department, the Department of Foreign Affairs and Trade, the Australian Federal Police and the Department of the Prime Minister and Cabinet.

[7] For example, BVE conditions 8510, 8511 and 8512 – for information about visa conditions please refer to Check visa details and conditions (homeaffairs.gov.au)

5. Overview of the measures

5.1. Cooperating with removal efforts – express legislative statement of expectations (section 199A)

Proposed section 199A at item 3 of Schedule 1 to the Bill sets out the Australian Parliament's clear legislative expectations in relation to the behaviour of individual non-citizens who are on a removal pathway, as well as the expectation that other countries will cooperate with Australia in relation to the lawful removal from Australia and return of their nationals.

Proposed subsection 199A(1) makes clear that a non-citizen who is on a removal pathway is expected to leave Australia voluntarily. If the non-citizen does not do so, they are expected to cooperate with steps taken under the Migration Act for the purposes of arranging their lawful removal from Australia—and they are expected not attempt to obstruct or frustrate their lawful removal.

Alongside this, proposed subsection 199A(2) makes clear that Australia expects that a foreign country will cooperate to facilitate the lawful removal from Australia of a non-citizen who is a national of that country, and that other countries should receive back their own nationals in these circumstances.

5.2. Removal pathway non-citizens (section 199B)

Proposed section 199B establishes the term 'removal pathway non-citizen' as a statutory concept, to support the proposed powers to give 'removal pathway directions' under section 199C to removal pathway non-citizens, as well as the proposed amendments of current section 197D of the Migration Act.

Subsection 199B(1) provides that a removal pathway non-citizen includes:

- an unlawful non-citizen who is required to be removed from Australia under section 198 as soon as reasonably practicable;
- a lawful non-citizen who holds a Subclass 070 (Bridging (Removal Pending)) visa (BVR);
- 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; and
- a lawful non-citizen who holds a visa prescribed for the purposes of that paragraph.

The definition of 'removal pathway non-citizen' is broader than just those unlawful non-citizens who are required to be removed from Australia under section 198 of the Migration Act. Many non-citizens who were released from immigration detention following the High Court's decision in *NZYQ* were granted BVRs. The intention is that lawful non-citizens who hold a BVR should be required to cooperate with efforts to facilitate their removal, or to determine whether there is a real prospect of their removal becoming practicable in the reasonably foreseeable future. In addition, there are many non-citizens in the community who have been issued with a Subclass 050 (Bridging (General)) visa who at the time of visa grant were granted the visa on the criterion that they make acceptable arrangements to depart Australia.

The Department recognises that there has been commentary about proposed subsection 199B(1)(d) which provides the flexibility to prescribe categories of visa holders who could be brought under the meaning of removal pathway non-citizen, if necessary to do so in the future. Importantly, this Bill does not expand the cohort of people who are eligible for removal from Australia, that is non-citizens who have exhausted all avenues to remain or for whom the Government is lawfully entitled or indeed required under the Migration Act to seek removal. Nor does prescribing a visa under this power in and of itself make that person liable for removal. The power at subsection 199B(1)(d) is intended provide flexibility, should another type of visa be determined the most appropriate visa for non-citizens to maintain lawful status in the community while making arrangements to depart or be removed from Australia, in the same way the BVR is used for this purpose. Any regulations made to prescribe a visa for the purposes of subsection 199B(1)(d) would be subject to scrutiny and disallowance by the Parliament.

5.3. New powers to give 'removal pathway directions' (section 199C)

The Bill proposes new discretionary powers for the Minister to give written directions to removal pathway non-citizens to take certain actions within their control to support efforts to remove them from Australia.

Subsection 199C(1) would empower the Minister or a delegate to give a written direction to a removal pathway non-citizen to do certain specific things for the purposes of facilitating their lawful removal from Australia under the Migration Act.

The Bill does not change scope of the removal power under section 198 of the Migration Act. It provides a tool which can be applied in situations where individuals have exhausted all avenues to remain in Australia, to encourage compliance with their removal efforts.

The Explanatory Memorandum notes that subsection 199C(1) would empower the Minister to give a written direction to a removal pathway non-citizen to do certain specific things for the purposes of facilitating their lawful removal from Australia under the Migration Act. This may include directing the non-citizen to:

- do things such as completing, signing and submitting a passport application form, including doing and providing all things required for the application process by the passport issuing authority;
- provide specified documents or information to the Department or another specified person;
- attend an interview or appointment with an officer or another specified person.

Subsection 199C(2) would empower the Minister to give a removal pathway non-citizen a direction to do or not do a thing, if the Minister is satisfied that the non-citizen taking that action 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
- facilitate the removal of the non-citizen from Australia under that section.

Under subsection 199C(4), a removal pathway direction given under either subsection 199C(1) or (2) must specify the period within which the non-citizen is required to do what is specified in the direction. The written direction must also set out the consequences of non-compliance – specifically, that a non-citizen who refuses or fails to comply with the direction may commit an offence under proposed section 199E (see subheading 5.5 below).

The period for compliance with a direction is not fixed in proposed section 199C. This reflects that the appropriate period for compliance will be dependent on the detail of the direction. In practice, directions given to a removal pathway non-citizen would provide a rational and reasonable time for compliance. In some cases this may be relatively short - for example if all that is required is a signature on a passport application. In every case the Minister or delegate would consider the circumstances of the removal pathway non-citizen and what is being required of them in the direction, and would set the timing for compliance accordingly for each specific 'thing'. Failing to meet a period for compliance for any one specific thing listed in the direction, would constitute a breach of the direction overall.

In every case, clear information on the obligation of the non-citizen to comply as well as relevant time-frames for compliance and the potential consequences of non-compliance would be provided to a non-citizen who is given a removal pathway direction. These timeframes would be set so as to allow a reasonable opportunity for a non-citizen to comply. The intention behind the measure and the operational guidance to delegates will be to gain the cooperation of the person and to effect their removal from Australia, not to seek their punishment.

The Minister may give a removal pathway non-citizen more than one removal pathway direction; however, the Minister must not give a direction to a removal pathway non-citizen to do something that is the subject of a direction previously given by the Minister to the non-citizen, and for which the period specified in the direction has not ended. Under proposed subsection 199C(3), the Minister also has the power to revoke a direction.

Directions given by the Minister are not subject to merits review, but may be judicially reviewable. Nonetheless these directions would only be given once the person had exhausted all available avenues to remain in Australia following a decision to refuse or cancel a substantive visa including merits review and judicial review which together provides layers of protection to ensure those decisions are lawful and procedurally fair, and that, where relevant to an individual's circumstances, Australia is compliant with its *non-refoulement* obligations.

5.4. Safeguards and constraints on giving directions (section 199D)

Proposed section 199D includes a number of constraints on the exercise of the direction powers under subsections 199C(1) and (2).

The Bill provides safeguards for those non-citizens in respect of whom a protection finding has been made, as they cannot be directed to interact with the country to which that finding relates, nor to take any actions to facilitate their removal to that country (proposed subsection 199D(1)).

- The term protection finding in section 197C of the Migration Act reflects the circumstances in which Australia has non-refoulement obligations in respect of a person under international law – that is, to not return them to face certain types of harm.
- A person may however be directed to comply with a direction that would help facilitate their removal to a safe third country, if for example their removal to a third country was a viable option and would be compliant with international human rights and non-refoulement obligations. The availability of the section 199C direction powers in these circumstances is clarified in proposed subsection 199B(3)

Proposed subsection 199D(2) makes clear that a removal pathway direction cannot be given to a person who has applied for a protection visa and that visa application has not yet been finally determined (as defined in section 5 of the Migration Act).

In addition, a removal pathway direction cannot be issued to a child under 18 years of age, although it can be issued to a parent or guardian to do things in respect of the child if both the child and the parent/guardian are removal pathway non-citizens, to enable the removal of family units together (proposed subsections 199D(4) and (5)). If the parent (as a removal pathway non-citizen) does not comply with a direction given in respect of the child, it is the parent, not the child, who commits an offence under section 199E.

Further, the Bill does not allow for a removal pathway direction to require a person to not commence, discontinue or take or not take particular steps in the conduct of court or tribunal proceedings. In addition, a removal pathway direction cannot require a person not to make, or to withdraw, a visa application made under the Migration Act.

Proposed subsection 199D(3) provides that the Minister must not give a removal pathway direction under section 199C to a removal pathway non-citizen in certain circumstances, being where that non-citizen holds a BVR subject to certain monitoring conditions (within the meaning of subsection 76B(4) of the Migration Act) and where there would be overlap between a removal pathway direction and an instruction or specification given under the monitoring condition.

This provision clarifies interactions between the offences in proposed section 199E and current section 76B of the Migration Act, so that potentially affected individuals understand the operation of offences, their obligations and the potential consequences of non-compliance. This is also supported by proposed subsection 199C(6), which clarifies that non-compliance with a removal pathway direction does not constitute a failure to comply with a requirement of a monitoring condition under current section 76B of the Migration Act, if the removal pathway non-citizen is a BVR holder.

5.5. New criminal offence for non-compliance with direction (section 199E)

Decisions on who can enter and remain in Australia are for the Australian Government to make and the Australian community has a reasonable expectation that this should not be thwarted by the actions of non-citizens. It is therefore appropriate that new sanctions are introduced for those who do not comply and make deliberate attempts to frustrate removal.

The Bill proposes a new offence and penalty related to the direction power. If convicted, a court must impose a sentence of at least 12 months, with a maximum penalty of 5 years or 300 penalty units, or both. This mandatory minimum sentence and maximum penalty reflects the seriousness of the offending, the need for a strong deterrent, and the importance of the integrity of the migration system.

While the minimum and maximum penalties constrain what a court can impose, there is still flexibility within that range to consider individual circumstances, and treat individual cases differently.

The penalty provisions are equivalent to those associated with offences recently agreed to by the Parliament and enacted in the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023*. During Parliament's consideration of that legislation, the Government demonstrated a commitment to effective management of the migration system, and to keeping the community safe, by recognising that non-citizens with a history of serious criminal offending, require appropriate management. This was done through adding visa conditions to the BVR to allow the imposition of monitoring, reporting, notification and other requirements on BVR holders in the community while their migration status is being resolved.

The offence of non-compliance with a direction intended to gain the cooperation of a removal pathway non-citizen is regarded by the Government as similarly serious in terms of frustrating migration law, as well as damaging the integrity of Australia's migration and temporary entry programs.

Non-cooperation demonstrates a disregard for Australia's laws and the Department's ability to manage the arrival and departure of non-citizens effectively. This is contrary to the community's expectations that non-citizens should abide by Australia's laws, and engage with resolving their migration status and removal, where required by law.

Any charges brought as a result of non-compliance with a direction will be subject to the standard criminal prosecution process and criminal proceedings. Any sentence, including a term of imprisonment, would be imposed by the courts, if the non-citizen is convicted for the offence under section 199E following prosecution and trial.

As noted in the Explanatory Memorandum to the Bill, the objective of a mandatory minimum sentence is to provide a strong deterrent to non-cooperation by non-citizens with a direction given by the Minister under proposed section 199C. The maximum available penalty of 5 years' imprisonment is intended to provide an effective deterrent to the commission of the offence in section 199E.

The United States has a similar provision where an individual wilfully fails or refuses to make timely application in good faith for travel or other documents necessary to their departure, which has a maximum sentence of 4 years (or up to 10 in certain circumstances), in effect since 1996[8].

5.5.1. 'Reasonable excuse' defence (sections 199E(3) and (4))

In addition to the general defences available under the *Criminal Code Act 1995* (Cth) (Criminal Code), proposed subsection 199E(3) provides that the offence in section 199E(1) does not apply if the person has a reasonable excuse. The defendant bears the evidential burden in relation to the 'reasonable excuse' defence, per section 13.3(3) of the Criminal Code. It is the responsibility of the non-citizen to provide evidence relating to whether they have a reasonable excuse for their non-compliance, as they are best placed to explain their circumstances.

Proposed subsection 199E(4) sets out certain matters that cannot be relied on by a person as a 'reasonable excuse' defence. It is not a reasonable excuse that the person:

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

The intention of this provision is to ensure that where a person's protection claims have already been considered as part of a protection visa process, and found not to engage Australia's *non-refoulement* obligations, including because their fears of being subjected to harm are not well-founded, the person should not be able to rely on claiming that they still fear harm to excuse their non-cooperation with removal. As noted by the UNHCR, '...*well-functioning asylum systems and international protection systems as a whole depend on efficient and expeditious return in safety and dignity to countries of origin of persons found not to be in need of international protection*…'. As noted above, a removal pathway direction cannot be issued to compel a person to interact with a country in relation to which a protection finding has been made, or during an ongoing protection visa process.

Since not complying with a direction will be a criminal offence, operational guidance will be developed to ensure that directions to compel the provision of information are reasonable in the circumstances of the person. Since a person cannot be directed to provide information to a protection finding country, 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.

5.6. New power to designate a removal concern country (sections 199F and 199G)

Australia makes every effort to cooperate with countries in the context of deportations and removals. Australia accepts the return of its citizens and rightly expects other countries to do the same. The proper functioning of international migration systems depends upon nation states accepting this responsibility.

The Bill introduces a personal power for the Minister administering the Migration Act to designate a country as a removal concern country, if the Minister thinks it is in the national interest to do so. If the Minister designates a country as a removal concern country, this would bar most nationals of that country who are outside Australia from making a valid application for a visa while the designation is in force.

[8] 8 U.S.C. § 1253(a)(1)(B).

Such a designation will in some circumstances provide a strong incentive for the country concerned to cooperate with removals. This reflects the public's and the Government's expectations that countries will cooperate with Australia to facilitate the lawful removal of a non-citizen who is a citizen of that country. The Bill also provides the power for the Minister to revoke the designation if the country's stance on cooperating with removals changes.

This measure is to safeguard the integrity of our migration system and will be available as necessary to act in the national interest.

The changing landscape for migration law, including the possibility of future court decisions that could have a material impact on a non-citizen's cooperation with lawful removal efforts necessitates that, where possible, the Migration Act is reinforced to support the intended operation of the migration framework. The exercise of the designation power may be a necessary step to prevent a further inflow of nationals from the country concerned, and to prevent a build-up of intractable removals cases.

Designation would only take place after a range of bilateral considerations were taken into account, and all reasonable and appropriate efforts and attempts had been made to engage the country to cooperate and facilitate the lawful removal of its nationals. In practice, the removal concern country designation would be considered following diplomatic and government to government engagement on the issues and challenges of returns before it is utilised.

5.6.1. Mandatory consultation with other Ministers (section 199F(2))

Although the designation power would be exercised by the Minister personally, subsection 199F(2) provides that before the power may be exercised, the Minister must consult with the Prime Minister and the Minister for Foreign Affairs. This appropriately reflects the significance of the power and the Minister's role as a member of the Executive Government – with the Minister's consultation with the Prime Minister and the Minister for Foreign Affairs and Trade appropriately informing the Minister's consideration of whether it is in the national interest to make the designation.

The legislation does not preclude the Minister from seeking the views of other Ministers or the Cabinet, where consideration of the national interest may span a range of matters, including Australia's national security, foreign and international relations, defence, trade and economic interests, society and culture.

5.6.2. Accountability to the Parliament (sections 199F(6)-(8))

If the Minister designates a country as a removal concern country, the Minister is required to table a copy of the designation in both Houses of Parliament within two sitting days after the day the designation is made. When the Minister tables a copy of the designation, the Minister must also table a statement of the Minister's reasons for thinking it is in the national interest to designate the country as a removal concern country. This ensures there is appropriate transparency and accountability to the Parliament in the event that the designation power is exercised.

5.6.3. Bar on visa applications by certain nationals of a designated removal concern country (section 199G(1))

Proposed subsection 199G(1) provides for a general bar on visa applications by nationals of a designated removal concern country who are outside Australia.

Subsection 199G(1) provides that an application for an Australian visa by a non-citizen is not a valid application if – at the time the application is made – the non-citizen is outside Australia, and is a national of one or more removal concern countries.

The designation would not prevent:

- nationals of a removal concern country who are in Australia from lodging further visa applications while in Australia;
- nationals of a removal concern country who already hold a visa for Australia from being able to travel to Australia on that visa; or
- nationals of a removal concern country who are outside Australia having any existing visa applications processed, where the application was made before the designation came into force.

5.6.4. Exceptions to the bar on visa applications (sections 199G(2)-(8))

Under proposed subsection 199G(2)(b), the bar does not apply in relation to an application for a visa made by a non-citizen who is the spouse, de facto partner or dependent child (within the meaning of the Migration Regulations) of an Australian citizen, the holder of a 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. Regulation 1.05A of the Migration Regulations sets out the meaning of 'dependent'.

The bar does not apply in relation to an application for a visa made by a non-citizen who is the parent of a child who is under 18 and in Australia (subsection 199G(2)(c)).

Under proposed subsection 199G(2)(d), the bar does not in apply in relation to an application for a Refugee and Humanitarian (Class XB) visa.

The bar does not apply in relation to an application for a visa by a non-citizen who is a dual national of a removal concern country and another country that is *not* a removal concern country (see proposed subsection 199G(2)(a)). This exception is available so long as the non-citizen holds a valid passport issued by that other country.

The Bill also includes a power for the Minister to determine exceptions under subsection 199G(2)((e) and (f) for particular classes of persons or visas, by legislative instrument. If a country is designated a removal concern country, it would be possible, for example, to make a legislative instrument, under subsection 199G(3), to specify additional classes of persons or classes of visas to ensure that the exercise of the designation power is consistent with Australia's international obligations, or for any other purpose. These exceptions would likely include approved diplomatic and consular officers and other international representatives, returning permanent residents of Australia and other persons in respect of whom Australia may have international obligations or commitments, such as international trade obligations. To illustrate, the legislative instrument power could be used to specify the Diplomatic (Temporary) (Class TF) visa, the Temporary Work (International Relations) (Class GD) visa, or the Return (Residence) (Class BB) visa.

Under the proposed subsection 199G(4), the Minister can also decide to allow a visa application by an individual where it is in the public interest – this is a personal power of the Minister.

5.7. Revisiting protection decisions (section 197D)

Subsection 197C(3) of the Migration Act provides that removal of an unlawful non-citizen is not required or authorised in respect of a particular country if a 'protection finding' was made in respect of that country in the course of considering an application for a protection visa which has been finally determined, unless the protection finding decision is quashed or set aside, the person requests voluntary removal, or the person is found under section 197D to no longer be a person in relation to whom any protection finding would be made. Removal to a country in relation to which a 'protection finding' has been made is also not authorised or required while merits review of a decision under section 197D is ongoing.

Section 197D of the Migration Act establishes a mechanism whereby a protection finding can in effect be revisited for the purposes of section 197C of the Migration Act. If the Minister is satisfied that an unlawful non-citizen to whom subsections 197C(3)(a) and (b) of the Migration Act apply 'is no longer a person in respect of whom any protection finding would be made', the Minister may make a decision to that effect.

At present, it is only possible to revisit a protection finding using the mechanism in section 197D of the Migration Act for an unlawful non-citizen.

Following the High Court's decision in *NZYQ*, the Government now faces circumstances in which this power needs to be expanded to certain non-citizens who hold a visa – particularly BVR holders. The Bill therefore proposes amendments to allow the Minister to revisit the protection findings of those removal pathway non-citizens who hold a specified type of bridging visa (being a BVR or a Subclass 050 (Bridging (General)) visa who at the time of visa grant satisfied a criterion relating to the making of, or being subject to, acceptable arrangements to depart Australia or another visa prescribed for the purposes).

The affected persons are those who have a protection finding who hold a bridging visa and are on a removal pathway following the refusal or cancellation of a visa and who have, in most cases, completed merits review and judicial review of those visa decisions. 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.

As noted above, the power is intended for those non-citizens on a removal pathway – that is where they have already been refused a substantive visa or their substantive visa has been cancelled on other grounds, such as on character grounds.

This reflects Australia's long-standing position that humanitarian resettlement is considered durable, regardless of whether the person has an ongoing protection need. For example, it would not be appropriate to reconsider protection findings for anyone who was granted protection decades ago and continues to hold a substantive visa.

For non-citizens on a removal pathway, this power might be exercised if the circumstances of the person or the home country has changed such that a protection finding would no longer be made. For example, if the initial protection finding was made a long time ago or the conditions in a country may have significantly improved such that the person no longer faces a well-founded fear of persecution or real risk of suffering significant harm, and hence the person's removal to that country could be effected consistently with Australia's non-refoulement obligations. It should be noted that consideration under section 197D may result in a finding that a protection finding would still be made for the person, including on the basis of new claims, in which case their removal to that country will continue to prevented by subsection 197C(3).

The Bill does not provide for the reconsideration of the protection findings of current protection visa holders, or former protection visa holders who now hold substantive visas such as Resolution of Status Visas or Resident Return Visas. There is no intention to prescribe such visas for the purpose of the definition of a 'removal pathway non-citizen'.

Consideration by the Minister under section 197D is subject to common law procedural fairness.

This means that the Minister or delegated decision-maker must:

- give the person prior notice that a subsection 197D(2) decision may be made;
- give the person the opportunity, either in writing or at interview, to comment on any new information (including country information) that is adverse to their claims and is significant and credible and relevant to the decision being made under subsection 197D(2), and
- draw the person′s attention the critical factor/s on which the decision is likely to turn and provide them with an opportunity to respond.

When they provide this information to the person, the Minister or delegated decision-maker would:

- provide it to the person in the way that they consider appropriate in the circumstances; and
- ensure, as far as reasonably practicable, that the person understands why it is relevant to the matters under consideration.

A decision under section 197D is subject to both merits review and judicial review

The result of a decision that a person, including a person who holds the specified type of bridging visa, is no longer a person in respect of whom any protection finding would be made in respect of a country, is that the person could be removed to that country, consistently with Australia's non-refoulement obligations, once their bridging visa ceases.

5.8. Amendments to support management of Bridging (Removal Pending) visa holders

The Bill also includes minor technical amendments to support the effective administration of the Bridging (Removal Pending) visa scheme established to manage NZYQ-affected non-citizens.

This includes amendments to clarify that a new BVR may be granted without application at any time to a current BVR holder – for example, where it may be appropriate to adjust the imposition of certain visa conditions to respond to a change in the level of risk the visa holder presents to the community. This amendment is being made for the avoidance of doubt.

6. Conclusion

In summary this Bill seeks to uphold integrity in Australia's migration system by supporting the removal of non-citizens who have exhausted lawful avenues to remain in Australia. The Bill also sends a clear message about departure expectations for those non-citizens who have exhausted all avenues to remain in Australia.

The Bill also recognises the need to ensure that where countries are not cooperating effectively with the return of their nationals, appropriate tools are available to the Government to enable productive diplomatic and government to government engagement with the aim of removing barriers to the return of non-citizens to their home country, where this accords with international obligations.