



COMMONWEALTH OF AUSTRALIA

# Proof Committee Hansard

## SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION  
COMMITTEE

**Migration Amendment (Removal and Other Measures) Bill 2024**

(Public)

TUESDAY, 26 MARCH 2024

CANBERRA

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**LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

**Tuesday, 26 March 2024**

**Members in attendance:** Senators Cash, Ghosh, Green, Paterson, David Pocock and Shoebridge

**Terms of Reference for the Inquiry:**

To inquire into and report on the Migration Amendment (Removal and Other Measures) Bill 2024

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**AYRES, Senator the Hon. Tim, Assistant Minister for Trade, Assistant Minister for Manufacturing, Commonwealth Parliament**

**CAVANAGH, Ms Tara, Group Manager, Immigration Policy, Department of Home Affairs**

**CUNNINGTON, Mr Kevin, Assistant Secretary, Legislation, Department of Home Affairs**

**FOSTER, Ms Stephanie, Secretary, Department of Home Affairs**

**JEFFERY, Ms Sandra, Assistant Commissioner, Immigration Compliance Operations, Department of Home Affairs**

**SHARP, Ms Clare, Group Manager, Legal Group, Department of Home Affairs**

**THOMAS, Mr Michael, Group Manager, Immigration Compliance, Department of Home Affairs**

**Committee met at 18:03**

**CHAIR (Senator Green):** I now declare open this public hearing for the Legal and Constitutional Affairs Legislation Committee into the Migration Amendment (Removal and Other Measures) Bill 2024. I acknowledge the traditional custodians of the land on which we meet and pay my respects to their elders past and present. I would also like to acknowledge and welcome other Aboriginal and Torres Strait Islander people who are participating in today's public hearing.

These are public proceedings being broadcast live via the web. I'm joined today by the deputy chair, Senator Scarr, and Senators Antic, Ghosh, Polley, Shoebridge, Cash, Paterson and, at some stage, Senator Pocock as well.

I remind witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee. Such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee.

The committee prefers evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in confidence, described as being in camera. If you are a witness today and intend to request to give evidence in camera, please bring this to the attention of the secretariat as soon as possible. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

I now welcome representatives from the Department of Home Affairs. I also welcome Minister Ayres, representing the Minister for Home Affairs. Thank you for taking the time to speak with the committee today. Information on parliamentary privilege and the protection of witnesses in giving evidence has been provided to you and is available from the secretariat.

I remind senators and witnesses that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Would you like to make a brief opening statement before we go to questions?

**Ms Foster:** No, thank you.

**CHAIR:** Minister, do you have an opening statement?

**Senator Ayres:** No.

**CHAIR:** We'll now go to questions. Senators, as is the usual practice, we'll share the call around in blocks of time. I hand the call to the coalition.

**Senator PATERSON:** Ms Foster, thank you very much for being here at short notice. We're grateful to you and your staff for being available to facilitate this inquiry. I'm sorry that the government has placed you in a position where normally you would have more opportunity to prepare for a hearing like this, as would we, but we are where we are. Senator Ayres, it's good to have you here. You're an unexpected additional but welcome witness. Thank you for being here. Ms Foster, why is the bill so urgent?

**Ms Foster:** We have been working really hard on improving the integrity of the migration system over the last 12 to 18 months. As we're identifying gaps in our system, we are moving as quickly as we can to fill those gaps. This is one which we believe is a significant issue to resolve within our migration system for its broader integrity.

**Senator PATERSON:** Is it necessary, in your view, that the bill pass tomorrow before the parliament rises?

**Ms Foster:** I think the question of timing of passage is one for the government, and obviously I would not give an opinion at the hearing.

**Senator PATERSON:** Sure, but is it your evidence that the 'gaps' identified, as you put it, are so urgent that they must be closed so quickly?

**Ms Foster:** When we identify issues like this, we give advice to the government as quickly as we can. We will always act as quickly as we can to ensure that the system operates as it does.

**Senator PATERSON:** Sure, but, Ms Foster, you also understand it is not normal practice to pass a bill in 36 hours, unless there's a very good reason to—and the parliament sometimes does when there's an impending court matter or other issues. In this instance, are you aware of any impending court matters or any other issues that require very swift passage?

**Ms Foster:** I think I'd go back to my original answer, which is that we will give advice to government about gaps and we will work to support them to progress the resolution of those gaps as expeditiously as possible.

**Senator PATERSON:** Are there any upcoming court matters which are relevant for this legislation?

**Ms Foster:** We've had a range of issues that have come before courts in recent months. I think it's really important that we have a broad-base system with integrity to allow us to respond to those as they come up.

**Senator PATERSON:** Okay. When and how were these gaps identified?

**Ms Foster:** I'll let my staff assist with that.

**Ms Cavanagh:** Senator, you would be aware, of course, that following the High Court decision in NZYQ we have been looking very closely at our legislative framework and how it supports us in maintaining the integrity of the migration system. We've been looking very closely at every aspect of how we manage people through that system—in particular, those who are required to leave. This deep focus on our removals function has led us to identify what is currently a gap in our legislative framework. The legislation that pertains to who may come to Australia and who needs to leave Australia is fundamental to how our migration system operates.

**Senator PATERSON:** Thank you, but when and how were these gaps that Ms Foster just referred to identified?

**Ms Cavanagh:** We have been working very closely on the resolution of status of people since the High Court decision in NZYQ, and we've been working iteratively across all of the elements of our system, including with a very deep focus on removals.

**Senator PATERSON:** That still doesn't answer my question, because obviously, at some point, you saw or identified a gap and thought, 'This is a gap, and we're going to need to do something about this.' When did that happen?

**Ms Sharp:** Without having a precise date, I think it was around February that we identified this particular gap that we are talking about.

**Senator PATERSON:** Okay, I'm grateful for that. If you could take on notice when in February—a specific date—that would be helpful. When did the department first propose to the government that legislation was necessary to address this gap?

**Ms Sharp:** I think we need to take it on notice for the first question.

**Senator PATERSON:** But roughly in February as well, about a month ago?

**Ms Sharp:** Yes, about a month ago.

**Senator PATERSON:** Alright. Just do best endeavours for now. If you have that specific information and can bring it forward, that would be great and helpful. When did the government make a request for drafting to occur?

**Ms Sharp:** The first drafting instructions were issued on 5 March.

**Senator PATERSON:** On 5 March 2024—okay. Thank you. The draft that we were presented with this morning was dated as a final version on Friday afternoon. Is that when drafting concluded in a substantive sense?

**Ms Sharp:** Yes.

**Senator PATERSON:** So up until that point you were still doing drafting? There were iterative changes being made up until that point?

**Ms Sharp:** That's correct.

**Senator PATERSON:** Presumably it went to cabinet on Monday.

**Ms Foster:** I think you may need to direct that question to the minister.

**Senator PATERSON:** Anyone who has the answer is very welcome to answer it.

**Ms Foster:** We wouldn't normally comment on what went to cabinet.

**Senator PATERSON:** Sure, but there are not a lot of options here. The legislation was finalised on Friday. It was introduced on Tuesday. Cabinets generally meet on a Monday afternoon. You don't have to be Inspector Cluedo to work that one out.

**Senator Ayres:** The secretary has given you her answer to that question, to be fair, and I'll leave the 'Inspector Cluedo' routine to you and your colleagues.

**Senator PATERSON:** Thank you. I was inspired by what one of your colleagues said in Senate question time today, Senator Ayres. Anyway, Senator Watt said on 18 March, 'The legislation that we intend to introduce would make that crystal clear.' Obviously, the government made a policy decision, as long as eight days ago, that this bill was to be introduced. Is that right?

**Ms Sharp:** Yes, that's correct, because we issued the drafting instructions on 5 March.

**Senator PATERSON:** Why, then, was the government not able to brief the opposition and other parliamentarians, including crossbenchers and minor parties, sooner than Tuesday morning, if a policy decision was made 21 days ago to engage in drafting?

**Ms Foster:** Senator, I don't think that's a question that officials can answer.

**Senator PATERSON:** Well, Senator Ayres is here to help us.

**Senator Ayres:** Well, if we can add additional information tomorrow, we will, but it wouldn't be in the normal course of events to consult prior to final legislation being released. The appropriate policy authorities—

**Senator PATERSON:** It might be if you need passage in 36 hours and the goodwill of the parliament to do so.

**Senator Ayres:** As I was saying, it wouldn't be normal. The normal processes in relation to cabinet approval have been engaged here, and this is an important piece of legislation.

**Senator CASH:** Just on that—we'll share the call, if that's alright, in our 10 minutes—with all due respect, despite the answers that have been given—and thank you for providing the answers—Minister, you still haven't articulated any reason for the urgency. You've said it's an important piece of legislation, but that's not the actual question. We were presented with a bill this morning at approximately 7.30 am. We were given a 20-minute briefing. We had to push the government to undertake this hearing tonight. As we said, we're very grateful to the officials for making the time to come here tonight, but ultimately you want this bill passed tomorrow. All we're asking is: why?

**Senator Ayres:** We are acting to strengthen the powers that the government has to remove from Australia people who should leave Australia. Protecting the integrity of the immigration system is urgent national-interest business. As shown by the evidence that the officials have provided, it has worked its way through the processes of the department in terms of the issue being identified, drafting instructions being issued and final legislation being prepared. The truth is that there are individuals who haven't cooperated with their proper removal from Australia and who've been sitting in immigration detention, with the government being unable to do anything other—

*Senator Paterson interjecting—*

**Senator Ayres:** You've asked me about why this is important.

**Senator PATERSON:** Yes, and—

**CHAIR:** Senator Paterson, order!

**Senator Ayres:** And I'll respect that. It's up to you how this proceeding goes, but I think most of this proceeding should be directed towards some of the technical questions that you will want officials to answer. But this is important to protect the integrity of the immigration system. An opportunity and a requirement to do that have been identified. The government has acted in an orderly way. It is straightforward, and it ought to be passed by the parliament urgently.

**Senator PATERSON:** Thanks, Senator Ayres. As you have said, it is not a new issue that people refuse to cooperate with their removal. It's been a longstanding issue. What, therefore, is the urgency to pass this bill to remedy that problem, which has been known about for some time?

**Senator Ayres:** Well, once an issue like this about this cohort of people has been identified, it is important to act.

**Senator PATERSON:** Who's the cohort?

**Senator CASH:** Who's this cohort?

**Senator Ayres:** I'll let the department take you through that in detail so that I don't mislead you about the parameters of that.

**Senator PATERSON:** Alright. To the department, then: who's the cohort?

**Ms Sharp:** The bill will apply to three groups of people.

**Senator CASH:** Thank you.

**Ms Sharp:** It will apply to unlawful noncitizens—which by definition means they're in immigration detention—who are refusing to cooperate with the removal efforts in their country of origin, in situations where they're not owed protection in relation to their country of origin and their country of origin will not take them as long as they're refusing to cooperate. It will apply to holders of a bridging visa R, and it'll apply to certain holders of a bridging visa E.

**Senator PATERSON:** How many people are in each of those categories?

**Ms Sharp:** In the first category—and my colleague Mr Thomas might help me out—we consider there are around 150 to 200. The numbers in the system do move around.

**Senator PATERSON:** I understand. As best you can, there are 150 to 200 in the first category. In the second category?

**Ms Sharp:** In the second category—it's not as straightforward to define an answer.

**Senator PATERSON:** Sure. What can you tell me?

**Ms Sharp:** I can't give you a number.

**Senator PATERSON:** Nothing?

**CHAIR:** Senator Paterson.

**Senator PATERSON:** No, I'm just trying to assist. Is it one? Is it 1,000? Is it 10,000? There's got to be some estimated quantity.

**Ms Sharp:** For the cohort who are affected by the NZYQ decision itself, those people by definition have no real prospect of removal. Where this legislation may be useful in respect of them is that it can be used to ask them to do a thing that might help us establish a future prospect of removal.

**Senator PATERSON:** Including in a third country, presumably?

**Ms Sharp:** Correct. But it's too early for us to be able to give you a precise number in respect of who we might be able to utilise this in relation to.

**Senator PATERSON:** You should at least be able to give me an upper limit because there's a defined number of people on a BVR. How many people are on a BVR that this could apply to?

**Mr Thomas:** Currently, there are 152 that were released from immigration detention and placed on a BVR. That is the cohort Ms Sharp is talking about.

**Senator PATERSON:** And the third category, the BVE?

**Ms Foster:** That's a more complex case load for us to work through. People are on BVEs, as you know, for many different reasons. What we will need to do is clearly we'll give our priority to those people in detention frustrating removal and to those on BVR. We will then work through the BVE case load. Our objective here is to encourage people to cooperate with our processes. Where people are currently not choosing to leave, for example, it may be that simply having this as a tool is enough to encourage their voluntary cooperation. We'll need to work through that, basically, on a case-by-case basis.

**Senator PATERSON:** Sure. I'm just trying to—

**Ms Foster:** That's much harder to give you a number on.

**Senator PATERSON:** I understand. I really hesitate to interrupt—

**CHAIR:** Senator Paterson, I do need to share the call. Do you have another question in this line?

**Senator PATERSON:** Again, as with the BVR category, at least give me an upper limit for how many people are on BVEs and, if you can, how many this would possibly apply to on BVEs.



**Ms Foster:** The BVE number will be very large. I imagine it will be quite a small proportion of those that it would apply to. Michael, can you help with the number of BVEs?

**Mr Thomas:** Sorry, if you give me another minute—

**Ms Foster:** I stress that that's a very broad cohort.

**Senator PATERSON:** I know.

**Mr Thomas:** And I think it will be a very small percentage of that.

**Senator PATERSON:** As much as you can narrow it down will be very helpful.

**Ms Foster:** Senator, can we see if we can find you a number if not tonight absolutely for tomorrow? We will do our best.

**Senator PATERSON:** Thank you.

**CHAIR:** Senator Shoebridge, you have the call.

**Senator SHOEBRIDGE:** To be clear, the department's position is there's an absolute urgent need to get this legislation through, but you don't know who it will apply to?

**Ms Foster:** We're very clear about the priority groups. What the legislation does—and Ms Sharp will correct me if I get this wrong technically—is allow for those three groups that we talked about to be subject to these provisions. There's also capacity for us to add different visa types to those three groups. As I said, we know what the population in detention is. We have a good sense of the BVR population. And those are our priorities.

**Senator SHOEBRIDGE:** But the legislation, at 199B, extends it to a lawful noncitizen who holds a subclass 50 bridging general visa, and you have no idea even the total number of people with that visa class let alone any coherent way of telling us who you think it will apply to—is that the situation?

**Ms Foster:** No. What I said was that we're looking for the number of BVE holders, but that's a very broad group. It would be, I think, a small percentage of that group who would resist removal. What we're doing in the bill is giving ourselves the capacity to apply this provision to those people where we need to.

**Senator SHOEBRIDGE:** So are there characteristics—

**Ms Cavanagh:** If I could just—

**Senator SHOEBRIDGE:** of that population that you can identify? Are there characteristics of that population that you're going to be targeting?

**Ms Cavanagh:** Yes. What our secretary is explaining is that a person may be granted a bridging visa E, in particular, for a number of different reasons at a number of different stages of their migration application or status resolution. The only people who would come into scope for these measures would be people whose cases are finally determined, so both primary merits and judicial review avenues have been exhausted, and who we are—

**Senator SHOEBRIDGE:** I'll just stop you there, Ms Cavanagh. Where does it say that in the legislation?

**Mr Cunningham:** In terms of the bridging visa subclass 050, the subset that is defined within the legislation is that group who satisfied a criterion for grant of that bridging visa, subject to acceptable arrangements to depart Australia. As Ms Cavanagh was explaining, the BVE cohort more generally is used for a range of different purposes, including maintaining lawful status for a person while they are going through other processes, such as merits or judicial review.

**Senator SHOEBRIDGE:** Mr Cunningham, can you explain in simple language what this means:

... 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 ...

**Mr Cunningham:** In the context of the Migration Regulations, visas have what are called schedule 2 criteria. Those are usually identified with numeric sequences—for example, 050.222. What this is referring to, in narrative form, is a criterion within subclass 050 that expressly provides for grant in circumstances where the person is the subject of acceptable arrangements to depart.

**Senator SHOEBRIDGE:** What criterion is that?

**Ms Sharp:** They're being given the visa so they have time to make arrangements to leave Australia, in plain English.

**Senator SHOEBRIDGE:** This is targeted at a class of people with a BVE visa—is that right?

**Mr Cunningham:** BVE, but specifically subclass 050.

**Senator SHOEBRIDGE:** Who are the subject of a particular condition?

**Mr Cunningham:** Not a condition; a criterion for the grant of the visa.

**Senator SHOEBRIDGE:** You're saying that, in the month or so since this legislation was first conceived of, you haven't been able to identify how many people that is? Is that really the situation we're in—you don't even know how many people that is?

**Ms Foster:** As I said, there are clear priorities for us in prosecuting this, and we are working through those priorities—we will work through those priorities if the bill is passed by parliament.

**Senator SHOEBRIDGE:** But you also said, Secretary, that you didn't know how it was going to apply to bridging (removal pending) visas. You also said you were going to work out, at some point, how it would apply to the 152 people on a bridging visa R. That was your evidence earlier.

**Ms Foster:** I don't believe I said that, but I'm happy to stand corrected.

**Senator SHOEBRIDGE:** How do you intend to apply this legislation as against the 152 people on that class of visa who have been the subject of the High Court determination? How is it going to apply to them?

**Ms Sharp:** With the 152, we work our way carefully through them. The test for being released on a BVR is there being no real prospect of removal. As we look at individual cases and make removal efforts, it is possible we will get to the point where we can identify a removal pathway for an individual person. As that work's done, if this legislation was passed, we could use this power to assist us to progress their case towards removal.

**Senator SHOEBRIDGE:** So, if you don't know the general circumstances in which you're going to use it against people on a BVE visa and you're in the process of considering how you might possibly at some point in the future use it on a BVR visa, can you please explain to me the urgency, again?

**Ms Foster:** I don't think we would characterise our evidence in the way that you have.

**Senator SHOEBRIDGE:** Please explain to me the urgency for those two classes of visas where you don't know who they are and you don't know how you're going to apply it. Tell me the urgency.

**Ms Foster:** We are very clear about the cohort in detention. We are very clear about the BVR cohort. My evidence to Senator Paterson earlier was that the BVE cohort is a much larger, more diverse group and there will be a subset of those people that this will apply to.

**Senator SHOEBRIDGE:** But Ms Sharp made it clear there's no urgency on the BVR group and that you think you may, at some point, work out cases where you'll use it in the BVR group. That was Ms Sharp's evidence.

**Ms Foster:** It's a really important tool for us as we work through removing people from Australia who should be removed who no longer have a right to stay in Australia. It's a fundamental tenet of an effective migration system that we are able to enforce removal of people who shouldn't be here.

**Senator SHOEBRIDGE:** I'm asking you about urgency. I listened carefully to your answers to Senator Paterson, and I was confused as to your asserted case for urgency. I've listened to Ms Sharp. Ms Sharp is unable to identify any urgent case in the BVR category. You've said you don't know yet who it's going to apply to in the BVE category. So does that leave, in terms of urgency, people who are in detention? Is that where your urgency lies?

**Ms Foster:** I've said clearly that that is our priority cohort.

**Senator SHOEBRIDGE:** But they're already in detention. So what is the public interest and the urgency for dealing with a class of people—you think it's somewhere between 150 and 200 people—who are already in detention? What's the urgency there?

**Ms Foster:** We have an obligation to try and effect the removal of people who should be removed, who have exhausted all avenues and who no longer have a legal right to remain in Australia, whether they are in detention or not.

**Senator SHOEBRIDGE:** In respect of the 150 to 200 people in detention where you first want to use these powers, do you have a breakdown of which countries they're from? Are they overwhelmingly from Iran? Are they overwhelmingly from Afghanistan or South Sudan? Which country—you must have a breakdown of the profile?

**Ms Foster:** I don't have that detail in front of me, sorry.

**Senator SHOEBRIDGE:** But surely if you're asking parliament to give the minister power to effectively compel people to be returned to a particular country, which is the intention here, you have an obligation to tell the parliament which countries they are to be returned to. I think many senators would have deep trouble about you returning women seeking refuge to Iran or returning people who have made claims about asylum that have been rejected to Russia. It's remarkable you come here and you can't tell me which countries this will apply to. Can you find the information during the course of this hearing?

**Ms Foster:** I'm looking at colleagues to see if anyone can assist me. Obviously we've come as well prepared as we could tonight. I think it's important to make the point that this legislation only applies to people who have exhausted all avenues through the migration system and for whom removal is the only option. That means, in most cases, people have exhausted both their primary application, the merits review and a judicial review before they reach a point at which this could apply.

**Senator SHOEBRIDGE:** How many of the people in this cohort have been through the grossly unfair IAA process that your government is seeking to abolish? You acknowledge it's unfair. You're moving to abolish it and now you're proposing to potentially deport people who have had an unfair determination in the IAA. How many of this cohort have been through that unfair process?

**Ms Cavanagh:** Senator, I think that's probably a subset of some of the other data questions you've requested. We could take that on notice and we'd be happy to come back to you.

**Senator SHOEBRIDGE:** You can't really take things on notice in a two-hour hearing where the legislation is happening tomorrow. There is no taking on notice. It's just: you don't have an answer.

**Ms Cavanagh:** We can try and get it to you—

**CHAIR:** Senator Shoebridge, that's not a matter of standing procedure. Officials are able to take a question on notice. There will be, as I understand, an opportunity to get some answers back to you as quickly as possible, which they'll endeavour to do.

**Ms Foster:** We are endeavouring, where we can give a broad answer, to do so in a way which we would not normally do without having the facts in front of us. We're doing our best to be helpful.

**Senator SHOEBRIDGE:** But the government acknowledges that that process is unfair. It's seeking to abolish that process. The assertion is that these people should not be in this country because they haven't established a valid basis to seek asylum, but the very process through which so many of them have been run is grossly unfair, stacked against them, to the point that even this government is seeking to abolish it. I'm asking you: how many of these people—these women, these children, these fathers—how many of them have been through that unfair process?

**Ms Foster:** Senator, I'm looking for the actual data, but I'm conscious that there are a large number of people who have come through that process whose matters are not resolved and so would not fall under the purview of this legislation.

**Senator SHOEBRIDGE:** I'm not asking you about that group. I'm asking you about the group who will be the subject of this, who the government may be forcing onto a plane to return to Iran to face what they think is appalling persecution but which the IAA process says is not valid, of no substance. How many of them are there that are going to be returned to Iran as a basis of this after going through the IAA process? How many are going to be returned to Russia or South Sudan?

**Ms Foster:** Senator, Ms Cavanagh said that we will attempt to get you some data.

**Senator SHOEBRIDGE:** Has the government considered what the reality will look like when the first family is returned to, say, Iran, and then they're arrested on the tarmac and put into an Iranian prison? Is there any protection for them? Are we promising any protection for them if that happens? Is there anything in the bill that will provide any protection in those circumstances?

**Ms Cavanagh:** Senator, what I would say is that it's very clear on the face of the bill that it is not intended to apply to somebody to whom protection obligations are owed. There are processes for assessing a person's refugee claims, both at the primary stage, at the merits review and at judicial review. We engage with people around the need to return when all of those processes have been exhausted.

**Senator SHOEBRIDGE:** But if you get it wrong—

**CHAIR:** Final question, Senator Shoebridge.

**Senator SHOEBRIDGE:** But if you get it wrong, if the unfair process that the government acknowledges is unfair and is seeking to abolish got it wrong, and you force that family—mum and kids and dad—onto a plane to Iran, and they land in Iran and they're arrested on arrival and put into a brutally unfair Iranian prison, criminal justice system—if you get it wrong, are there any protections? Is there any promise, or is it just, 'Oh, well'?

**Ms Sharp:** I think the key protection in relation to a decision made by the IAA is the ability to seek judicial review. Currently there are 3,369 decisions of the IAA that are before the Federal Circuit and Family Court seeking judicial review. That is a core part of our system, that judicial review exists, and then it can be appealed to the Federal Court as needed. This law that is being proposed only applies when those judicial reviews processes are exhausted.

**Senator SHOEBRIDGE:** Well, Ms Sharp, if you can find that data, you can find the data I requested—

**CHAIR:** Order! Senator Shoebridge, I'm just going to share the call. Senator Ghosh.

**Senator GHOSH:** Thank you for being here; we appreciate it. What led to this legislation being developed? Was it just the NZYQ decision, or was the removals issue sitting in the background as well?

**Ms Foster:** We spoke earlier about the fact that we've had a very significant focus over the last 12 to 18 months on improving the integrity of the migration system more broadly. Whilst there are many factors that played into that, one of those turning points was the allegations that were aired about exploitation of the system facilitating sexual exploitation, which led to a review by Christine Nixon, which highlighted a number of areas that we needed to focus on. As well as looking at the specific recommendations from Dr Nixon's report, we have expanded that to take a fundamental look at how the overall system is working, where integrity gaps exist and what we can do about them.

As I said in evidence earlier, the capacity to remove someone—and particularly to not allow someone to frustrate their removal by refusing to cooperate—is absolutely fundamental to the effective operating of our system. So it's part of a much broader push looking at the integrity of the migration system and obviously has specific application. Our focus has been sharpened by the NZYQ case.

**Senator GHOSH:** Were there any challenges, in the drafting process, in trying to put into legislation what you've just described in terms of efforts to improve integrity?

**Ms Foster:** I'll let our lawyers answer that question explicitly for you. In fact, it is a relatively straightforward bill dealing with two principal elements of our capacity to remove. Would you like to amplify that, Ms Sharp?

**Ms Sharp:** I think it's fair to say that it's not one of the most complex bills we've drafted. Obviously, in any bill where you're dealing with an offence there is a bit of complexity in working through how it will interact with the Criminal Code and the 'reasonable defence'-type provisions. We worked our way very carefully through those, given the significant impact they will have, but it's sufficient.

**Senator GHOSH:** For my benefit, what are the two main limbs?

**Ms Sharp:** The bill has two areas where it's operative. The first is that it enables the minister to issue a direction to certain noncitizens who are on a removal pathway to undertake or to not undertake particular actions that will assist us to effect their removal. The types of directions we would envisage being given would be directing somebody to apply for a passport, for example. The bill then contains a number of safeguards that set out the situations when the minister cannot issue such a direction. They are set out in proposed section 199D. The most important—they're all important, but a critical one of those is where the person is owed protection. The minister cannot issue a direction to someone to do a thing that would seek to effect their removal to a country regarding which they are owed protection.

The other key power that this bill seeks to give the minister is the power to declare a country a 'removal concern country'—that is a legislative instrument that would be tabled and that would, in effect, bar new visa applications from offshore applicants who are nationals of that country while that instrument is in effect. Again, like the first power, it contains a number of safeguards to ensure it's operating in a targeted way.

**Senator GHOSH:** In relation to the first part of that answer, why is it not possible for the minister to issue that instruction in circumstances where there's a protection obligation owed?

**Ms Sharp:** Do you mean which provision of the legislation prevents that, or are you getting to the broader international law obligations and Australia's commitment under the Refugee Convention not to undertake refoulement?

**Senator GHOSH:** It's the latter.

**Ms Sharp:** Australia is a signatory to the Refugee Convention. The Migration Act puts into practice, if you like, our international law obligations that ensure we do not undertake refoulement for individuals to countries where they face persecution. Did you want to add to that, Ms Cavanagh?

**Ms Cavanagh:** Yes. It's probably also worth adding that it's also a well-established tenet of that international framework that countries should accept the return of their nationals, and the UNHCR has made several statements in recent years about the importance of well-functioning return and removal systems for countries that are a signatory to the convention.

**Senator GHOSH:** Were proposals or was draft legislation ever considered under past governments to deal with the two issues that this bill deals with?

**Ms Cavanagh:** Not that I'm aware of.

**Ms Sharp:** To clarify the way the protection obligation works, if a person is owed protection in respect of one country, the legislation operates in such a way that they cannot be given a direction in respect of that country. They could still be given a direction, though, to comply with removal efforts in respect of a third country, which is an important power to help us manage the integrity of our borders.

**Senator GHOSH:** So, for instance, the instruction could be given to someone to apply for a passport if that would permit their return to a third country rather than in a way that's inconsistent with our obligations under the Refugee Convention?

**Ms Sharp:** That's right.

**Senator GHOSH:** Can I ask how many removals occur each year?

**Ms Jeffery:** In the last financial year, it was 2,247.

**Senator GHOSH:** How does the removal process work?

**Ms Jeffery:** We do quite rigorous checks on each case before we remove somebody to look for things like their visa status and to establish their identity and their nationality to ensure the removal is lawful and consistent with international obligations, as we've already mentioned. Once that's done, we'd be looking to work with the embassy to get them a travel document. Some of those processes go smoother than others. It also depends on whether the person themselves is willing to cooperate with that country's requirements for things like filling out forms to apply for travel documents. Sometimes there's a biometric requirement to confirm identity. Sometimes an in-person interview is required. So you can see where people could frustrate that process if they're not willing to cooperate. There are other processes like fitness to travel that need to occur as well before we would put someone on a plane. If they've got health issues, they would need to be resolved; we'd need to get sign-off from a doctor to say that they were fit to travel or we'd make arrangements for medical staff to accompany them on the flight. Those kinds of things need to occur.

**Senator GHOSH:** When does the removal process begin? Is it after there's been an exhaustion of, essentially, an application process and then a review process?

**Ms Jeffery:** That's right. We wouldn't attempt to remove someone while they've got visa applications on foot or while they've got merit or judicial review.

**Senator GHOSH:** What proportion of that cohort, 247, have travel documents?

**Ms Jeffery:** I would have to check that. I haven't got that breakdown with me.

**Senator GHOSH:** Travel documents are one of the examples that have been given, but what are the ways that people try to stymie their removal from the country?

**Ms Jeffery:** The main one is the actual application process, or satisfying the country that they need to return to that they've provided enough information to establish their identity and complete the forms. For those countries that don't accept voluntary removals at all it's much more difficult just engaging that country to provide the documents. In some cases they might just take a very long time, so it's a very protracted process which essentially gets us to the same outcome of not being able to remove somebody.

**Ms Foster:** Part of our effort to enhance our capacity to remove people is all of the kind of operational work that Ms Jeffery and others have been articulating, but we also have a substantial effort, happening through the Department of Foreign Affairs and Trade, to engage with countries who might provide third-country resettlement. I should say that when Ms Sharp described the second major function of the bill—that is, the designation of countries of removal concern—we see that very much too as a diplomatic tool that will give us leverage in working with countries to try and make sure we have effective options to return people, whether it's to country of origin or, as I said, to negotiate a broader range of third-party resettlements.

**Senator GHOSH:** So a country which, for instance, has suboptimal systems in place might be encouraged to develop those systems because they face the prospect of that designation?

**Ms Foster:** There are probably two groups, two types of country. Some are those which have an explicit policy of not accepting involuntary returns; there are others who just don't. There'll be different ways of approaching both of those sets of countries.

**Senator GHOSH:** Thank you.

**Senator DAVID POCKOCK:** I'm interested in whether this legislation is designed to deal with issues that are likely to arise from ASF17, the upcoming matter in the High Court.

**Ms Sharp:** The matter before the High Court is whether or not people who remain in immigration detention for a protracted period where they're not cooperating with removal are affected by the NZYQ decision. The passage of

this legislation or not has no relevance to the outcome of that High Court case, because that court case is really considering immigration detention for the purposes of the executive function, which is a legitimate, non-punitive purpose of detaining someone, and the accepted reasons for that are where it's for the purpose of removal or where it's for the purpose of processing a visa. In the NZYQ decision it was found that if you're not doing one of those two things and there is no real prospect of removal you need to release the person from immigration detention. The ASF17 case will be looking at whether you can reach that threshold even if there would be a real prospect of removal if the person were to cooperate but they're not cooperating. So it's really testing whether the reason that you can't remove someone matters. In our view, no, this legislation isn't being driven by that High Court case, in the sense that it will operate equally in relation to someone who's in immigration detention or someone who's on a bridging visa R.

**Senator DAVID POCOCK:** What's the plan to handle people who are considered to be removal pathway noncitizens when their immediate family members may be citizens? What happens there?

**Ms Sharp:** It's important to think about how someone comes to be in that situation. Generally, it would be because the family, for example, has all been found to be owed protection. Then one family member—

**Senator DAVID POCOCK:** But that's not the case. Because of fast track, there are many families where one person didn't get refugee status. So I'm just wondering: for that specific example, what happens? Is there a provision under section 199D, or is there nothing to prevent that from happening?

**Ms Sharp:** The legislation doesn't prevent that from happening. It's possible that a minister might choose to exercise ministerial intervention to grant that person a visa if there were circumstances where they felt it warranted it.

**Senator DAVID POCOCK:** That was my next question. If someone has applied for ministerial intervention, is there a provision under section 199D that prevents them, in that time while they wait, from this happening to them?

**Ms Sharp:** No.

**Senator DAVID POCOCK:** Would you be able to provide a list of countries with whom Australia does not have agreements for them to accept forced return of their nationals?

**Ms Cavanagh:** There is no agreement framework around returns—

**Senator DAVID POCOCK:** Sure, but you must have a list. You said—

**CHAIR:** Senator, order! Could you let the official answer the question.

**Senator DAVID POCOCK:** My time is so limited.

**CHAIR:** I appreciate that, but I think a little bit of courtesy past the start of the first sentence—

**Senator DAVID POCOCK:** Yes, but they're masters at—

**CHAIR:** Senator Pocock, could you allow the official to answer the question past the first three words of a sentence.

**Senator DAVID POCOCK:** Alright. Let's hear what we've got.

**CHAIR:** Could officials take that into consideration. There isn't a lot of time left, so could you be brief in your answers. Thank you.

**Ms Cavanagh:** The ability to return isn't dependent on a framework. It is a longstanding tenet of international law that countries should accept the return of their own nationals. Minister Giles mentioned a range of countries earlier today that do not cooperate with us. That included Iran, Iraq, South Sudan and Russia. Beyond that, as Ms Foster just mentioned, there are some countries that are not openly objecting to receiving their nationals back but who make it difficult for us in practice. The countries that are either very direct about not accepting their nationals or, indeed, just obstructionist change. It is a very fluid state—

**Senator DAVID POCOCK:** Who are they at the moment?

**Ms Cavanagh:** depending on what's happening in that country at any given time.

**Senator DAVID POCOCK:** The minister mentioned four. You must have a list somewhere of more, given this legislation is here. Who else would you add to those four? Do you not have a list?

**Ms Foster:** Senator, I don't have the list with me. I'm also—

**Senator DAVID POCOCK:** This is extraordinary.

**Ms Foster:** I'm also conscious—as I said earlier, I think, to Senator Ghosh—that we see this provision, this capacity to declare a country in this way, as one of the tools in our diplomatic suite. I think that we would need to be careful about affecting our capacity to work constructively with those countries.

**Senator DAVID POCOCK:** Sure. I've certainly had concerns raised already, in however long we've had this conversation, from Australian citizens who are immigrants. They are concerned about what this means for friends being able to visit should the government list their country. You talked about a diplomatic tool. Have you assessed the risk of a tit-for-tat diplomatic response from these countries—that, after you list them, they actually ban Australians from travelling?

**Ms Foster:** I think there are a number of steps for us to go through before we get to the point of actually listing someone.

**Senator DAVID POCOCK:** But have you assessed the risk of that sort of tit-for-tat?

**Ms Foster:** Clearly, our approach to any negotiations would be on a case-by-case basis to assess what the reaction might be and what our chances of success might be. It is our hope, as I think Minister Giles said to you this morning, that in fact having the tool at our disposal gives us sufficient leverage, not necessarily to have to put it into place. But we won't know that until we start working on a case-by-case basis with countries. I also note that Minister Giles must consult with the foreign minister and the Prime Minister. So there are a bunch of safeguards built in which would mean that as we approach cases we would assess risk for those cases.

**Senator DAVID POCOCK:** I understand there are provisions that will allow the minister to add further cohorts of people other than those three cohorts outlined. The minister could do that through regulation. Is that correct?

**Ms Sharp:** Yes. Section 199B(d) does allow additional visa classes to be prescribed.

**Senator DAVID POCOCK:** What's the thinking behind that?

**Ms Sharp:** I think the intent is that will ensure that, if other types of visas are being used as the primary tool for managing people who are on a removal pathway, it's not necessary to amend the act itself; you can prescribe a regulation reflecting the way the visa types are being used.

**Senator DAVID POCOCK:** Is that disallowable?

**Mr Cunningham:** Any regulation is subject to parliamentary scrutiny and disallowable. I believe we're talking here about the 199B element other than the designation, so it is important to maintain a distinction between the two core measures. There is also a legislative instrument making power in the second measure that allows for visa classes as well as persons to be exempt from the bar. We just need to ensure that distinction is clear. Yes, regulations would be disallowable.

**Ms Cavanagh:** Going back to the policy intent, it is really about futureproofing our legislation. At any given time we have well over a hundred different types of visas. Given this is a really important part of the migration system framework, we wanted to make sure that it could act into the future.

**Ms Foster:** If I could very quickly add something to that, the safeguard—trying to understand the intent of your question—is that the legislation applies to people who are on the removal pathway. Whatever visa they're on isn't so relevant as the fact that they have exhausted all their revenues to stay legally in Australia.

**Senator DAVID POCOCK:** I understand you're in a tight spot. Minister, just finally, we've heard about the need to futureproof this legislation. Ramming it through in a day, is that the way to have futureproofed legislation?

**Senator Ayres:** In this case, fast passage of the legislation is important. Once an opportunity to add extra tools to the government's capacity to properly manage this cohort has been identified, it's the government's view that we should proceed quickly. It's been through the proper processes. As the evidence of the officials has outlined, it's a relatively straightforward piece of legislation, and we think we ought to get on with it.

**CHAIR:** Senator Paterson or Senator Cash.

**Senator CASH:** In the first instance, Ms Foster, has the Solicitor-General been approached for advice about this piece of legislation or on this piece of legislation?

**Ms Foster:** Yes.

**Senator CASH:** On what date?

**Ms Sharp:** That he was approached, or—

**Senator CASH:** Approached, and then I'll take you through that from there—so, approached, in the first instance.

**Ms Sharp:** I don't know the date that he was first approached.

**Senator CASH:** Approximately?

**Ms Sharp:** It was in either late February or March.

**Senator CASH:** On what date was the advice provided?

**Ms Sharp:** It was 12 March.

**Senator CASH:** Is it the only piece of advice that's been provided by the Solicitor-General in relation to this legislation?

**Ms Sharp:** He also reviewed the draft bill.

**Senator CASH:** Were changes made to the draft bill post the Solicitor-General reviewing it?

**Ms Sharp:** Yes.

**Senator CASH:** On what date were the changes made?

**Ms Sharp:** Can I give you a range? I'm sorry—I just don't know off the top of my head.

**Mr Cunningham:** The challenge is that the drafting is an iterative process. There were a number of changes made and several drafts that occurred after considering the Solicitor-General's views on the bill.

**Senator CASH:** Okay. That's fine.

**Senator PATERSON:** It was last week?

**Ms Sharp:** Yes. It was around the 20 March to 22 March.

**Senator CASH:** So, he provided advice on 12 March. That's when you received the advice. The bill was then revised as a result of that. How many times was the bill revised as a result of the Solicitor-General's advice?

**Ms Sharp:** To be clear, the Solicitor-General provided advice on the concepts, yes, that the bill was dealing with. That was what the 12 March advice dealt with.

**Senator CASH:** Yes, and then the bill was—

**Ms Sharp:** And then he reviewed the bill itself, and then, as we just flagged, some revisions were made following his review of the bill, and those revisions occurred around 20 to 22 March.

**Senator CASH:** Okay. Has the Solicitor-General reviewed the final form of the bill that we have in front of us?

**Mr Cunningham:** No, the Solicitor-General has not. We worked closely with the Australian Government Solicitor throughout the course of drafting the bill.

**Senator CASH:** Is the bill constitutionally valid?

**Ms Sharp:** Yes.

**Ms Foster:** We couldn't introduce a bill that we didn't believe was constitutionally valid.

**Senator CASH:** No; I just want that on the record—that you believe the bill is constitutionally valid.

**Ms Sharp:** I do believe that, yes.

**Ms Foster:** Yes.

**Senator CASH:** Okay. Thank you very much. In terms of the line of questioning that Senator Pocock was pursuing, and the interaction with the ASF 17 case, can I confirm that your evidence was that the bill does not respond to the proceedings currently before the High Court in relation to ASF 17?

**Ms Sharp:** It does not respond to the points of law that are being tested in ASF 17.

**Senator CASH:** Okay—does not respond to the points of law. Does it respond in any other way, other than the points of law?

**Ms Sharp:** This is more a question for my policy and operational colleagues, but it does deal with the same cohort of individuals who will be affected by the outcome in ASF 17.

**Senator CASH:** So the question then becomes: if the bill is passed this week—and we keep getting told that the bill is urgent, yet we don't seem to have yet established the urgency to have it passed within a period of 36 hours—is it the government's intention to give a removal pathway direction in relation to ASF 17?

**Ms Sharp:** We wouldn't comment on an individual case like this.

**Senator CASH:** Well, this is important, because it goes to the urgency of the passing of the legislation. When is the case before the High Court?

**Ms Sharp:** The hearing is on 17 April.



**Senator CASH:** Exactly—17 April. When is the next time the parliament sits, if we get up tomorrow without passing the bill? It is in May, budget week. So, it is actually relevant in terms of the urgency of the legislation. Is it the government's intention to give a removal pathway direction in relation to ASF 17?

**Senator Ayres:** I don't think the department is in a position where they could or should comment on individual cases.

**Senator CASH:** It does go to the urgency of the legislation, and if the answer is yes, then it might place a slightly different perspective on it. Is it the government's intention to give a removal pathway direction in relation to ASF 17?

**Senator Ayres:** Well, I did indicate that the department couldn't possibly and shouldn't comment in relation to an individual case. I should have indicated that the government can't and won't comment on future individual decision-making.

**Senator PATERSON:** I'll ask it from a different angle. If the Commonwealth were to lose the case, would this legislation give the government other options for dealing with that cohort? For example, if they continued to refuse to cooperate, would it then be an offence which they could be charged and incarcerated for?

**Ms Foster:** If this bill were passed, it would allow us to apply the provisions to anyone who tried to frustrate their removal.

**Senator PATERSON:** I know, and that might be especially important if the government lost the case, because otherwise there wouldn't be very many options to manage these people in the community. If the High Court finds they've been indefinitely detained, despite the fact that they've not been cooperating, they will have to be released from detention on a bridging visa, and this would allow you to charge them, if they don't cooperate, and put them back in incarceration.

**Ms Sharp:** Yes, subject to a full court process—being able to mount a defence, a prosecution and a court finding.

**Senator Ayres:** You may well say that, but the government cannot say anything that may prejudice the matter before the court.

**Senator PATERSON:** I'm not asking you to.

**Senator Ayres:** Yes, I understand that, but that's our position.

**Senator PATERSON:** It seems to me, from your answers, that the existence of the High Court case is a relevant consideration in bringing this legislation forward, and its urgency.

**Ms Sharp:** As I said, the legislation will operate on that group of people regardless of whether we win or lose in the High Court. It affects a person who is an unlawful noncitizen and it affects a person on a bridging visa R.

**Senator PATERSON:** But it will be particularly important if the government loses the High Court case?

**Ms Sharp:** The government's overarching goal is always to effect removal wherever we can, so we would—

**Senator PATERSON:** The nods are not being captured by Hansard.

**Senator CASH:** No, so we need it on the record, please.

**Ms Cavanagh:** Our view would be that these are powers that should exist in the migration strategy regardless of any litigation.

**Senator PATERSON:** I understand that, but it wouldn't be urgent if there wasn't this High Court case.

**Senator CASH:** Exactly.

**Senator PATERSON:** These might be desirable powers to have, which you might put through a normal parliamentary process in the normal circumstances, but they are urgent because the High Court case is pending and we have no guarantee on how it will be decided.

**Senator Ayres:** I've listened to this line of questioning. I did indicate earlier that the government received advice that there were steps that could and should be taken that would protect the integrity of the immigration system in the way that's been described. It's the government's view that we ought to proceed urgently. I've heard your line of questioning, but that first point stands, and that is the approach that we're taking.

**Senator PATERSON:** I'm actually trying to be helpful.

**Senator CASH:** Correct, exactly! We're trying to establish the urgency for you.

**Senator Ayres:** I understand, but—

**CHAIR:** Order!

**Senator CASH:** We're actually trying to help you!

**CHAIR:** Order, senators!

*Senator Shoebridge interjecting—*

**CHAIR:** Senator Shoebridge, that was not an invitation for you to interject while I was calling order. Senator Cash, you have the call if you'd like to use it.

**Senator CASH:** Ms Foster, have you obtained prospects advice on ASF17?

**Ms Foster:** We have.

**Senator CASH:** Did you obtain further or revised prospects advice after the bill was drafted?

**Ms Foster:** I don't believe so.

**Ms Sharp:** No.

**Senator CASH:** Does the bill change the prospects in the case?

**Ms Sharp:** I don't think we should comment on the content of prospects advice.

**Senator CASH:** Well, again, I would've thought this is one that we should be winning, given the circumstances of the case, because of the implications if we don't. The Attorney-General himself removed this to the High Court. One would think that's because he does believe that he has a chance of winning this case, so we would hope the Attorney-General is indeed correct.

**Senator Ayres:** You would know, Senator Cash, that neither officials nor the government can talk about the content of advice.

**Ms Foster:** To your earlier questions: yes, if the bill were passed and the case were unsuccessful, it would give us an additional tool to deal with people affected by that.

**Senator CASH:** Given the time, we might move on to another part of the bill—in particular, designating countries of concern. I know that Senator Pocock asked a series of questions in that regard. After the passage of the bill, how soon is the minister expected to make the first designation?

**Ms Foster:** As I tried to explain, we would, first of all, approach this issue with the tool as a leverage point to try and get a better outcome without having to use that blunt tool. I think it's instructive that the system has been in operation, I think, in the UK for a couple of years without it being used. I think we could have some reasonable hope that we would be able to get some traction without necessarily declaring or designating.

**Senator CASH:** In terms of the consultation that the minister is required to do—consult with the Prime Minister and the foreign minister before making a designation of a country of concern—what is actually defined as 'consultation'? What is the level of consultation that needs to occur?

**Ms Sharp:** That's not defined in the legislation. You would expect that it, being intergovernmental, would take the form of exchange of letters.

**Senator CASH:** As you say, there's no definition. There are no guidelines in the bill. Is there an expected consultation period, or this is also not in the bill?

**Ms Sharp:** No.

**Senator CASH:** That's fine.

**Ms Sharp:** The drafting is pretty similar to other provisions in the Migration Act where the minister's required to consult with other ministers. The drafting is very similar.

**Senator CASH:** If the foreign minister were to raise concerns about international relations if an immigration minister makes a particular designation, does the minister still have the power to proceed with the making of the designation?

**Ms Sharp:** On the face of the law, yes, but, in terms of inner-cabinet government, I think there's a requirement to consult with the Prime Minister as well. I would expect those consultations would provide an avenue to iron out that sort of weighing of the national interest that would need to occur.

**Ms Foster:** I think the fact that the Prime Minister needs to be consulted means that, where there are differing equities to be weighed up, that is built into the legislation.

**Senator PATERSON:** On another matter. Designating a country as a removal concern country means that, except for the exceptions described in the bill, it's not possible for anyone from that country to apply for a visa—right?

**Ms Foster:** That's correct. There is a bar that would be placed on others, but there would be the capacity for the minister to lift that bar in particular cases.

**Senator PATERSON:** If a minister did designate a country, you would assume, and the policy objective is, that fewer people from that country would then travel to Australia, recognising that, if we decide once they're here that they don't qualify to be here, we have limited options to send them home. That's the policy objective: fewer people will be coming, particularly via a plane, on various different visas to Australia?

**Ms Cavanagh:** The primary policy intent behind the designation would be to try to encourage a country to cooperate with us—

**Senator PATERSON:** Understood.

**Ms Cavanagh:** Yes, a secondary policy intent would be to limit the number of people from that country coming into Australia who would be impossible to remove—

**Ms Foster:** Potentially difficult to remove.

**Senator PATERSON:** If they attempted and successfully came here illegally by boat, would they still be able to lodge a protection claim?

**Ms Foster:** I think the answer is yes.

**Ms Sharp:** Operation Sovereign Borders would take effect and they would be removed to a regional processing country.

**Senator PATERSON:** Legally, would they be able to lodge a protection claim?

**Ms Foster:** They would, pursuant to the regional processing country they're in, not subject to the Migration Act.

**Senator PATERSON:** This is not an idle concern, because people have reached the Australian mainland and, in some cases, taken a couple of days to identify. If they come to Australia and are in the community, they cannot lodge a protection claim onshore?

**Ms Sharp:** They need to be taken to a third-party—

**Senator PATERSON:** I know that, but, in the meantime, before they're taken to a third country, can they lodge a protection claim?

**Ms Foster:** I think, as Ms Sharp said, Operation Sovereign Borders' strategy would take effect, and what we have seen is that people have been removed to regional processing centres.

**Senator PATERSON:** But say they met a lawyer in the Kimberley before they were removed and that lawyer lodged a protection claim for them—

**CHAIR:** Senator, just bring your questions back to the relevance of the bill—

**Senator CASH:** It is relevant!

**CHAIR:** I'm just asking you—

**Senator Ayres:** There is nothing different, in terms of the operation of Operation Sovereign Borders today, or tomorrow, as has been the case under the previous government either—

**Senator PATERSON:** Except that temporary protection visas have been abolished.

**Senator CASH:** Temporary protection visas—

**Senator Ayres:** The function will operate in exactly the same way.

**Senator PATERSON:** My question still hasn't been answered. Can they place a protection claim?

**Ms Sharp:** I don't want to give speculative legal advice at the table about what would happen in those circumstances. Our view is: the person would be removed to a regional processing country.

**Senator PATERSON:** One would hope so.

**Senator Ayres:** It's very important that that response be the government's response, for very good policy reasons, and that's why I reiterate: there is no difference in terms of the operation of Operation Sovereign Borders over the course of the last very many years, today, or tomorrow, following the passage of the legislation, if that's what the parliament does.

**Senator PATERSON:** I think, as a matter of logic, they could make that application. You don't want to say that—I understand you don't want to say that—but they could. Doesn't that give a perverse incentive for people to try and come here by boat? They can't come by plane because they can't get a visa to come here. So they can't come by plane and make an application. They may think that it is a good strategy to get on a boat and try and make a claim, because there's no other way for them to get here and make a protection claim.

**Ms Foster:** I think we'd be speculating, to respond to that question, and the basic principle remains: that Operation Sovereign Borders is providing strong protection from those occurrences, and will continue to do so.

**Senator PATERSON:** Well, hopefully we will successfully interdict any future boat arrivals so that it can operate successfully and remove people before they arrive on the Australian mainland.

**CHAIR:** Senator Paterson, I am trying to give you the majority of the call—

**Senator PATERSON:** Thanks, Chair.

**CHAIR:** but I do need to share it, in a moment, with Senator Shoebridge.

**Senator PATERSON:** Just one further question: in the EM, it states that the designation power will: ... slow down that entry pipeline into Australia and reduce growth in the cohort of potentially intractable removals over time. How many fewer intractable removals would there be under this bill?

**Ms Foster:** I'm sorry, Senator—could you repeat the question?

**Senator PATERSON:** As we've discussed, one of the secondary policy motivations of the 'removal concern country' designation is to:

... slow down that entry pipeline into Australia and reduce growth in the cohort of potentially intractable removals over time. How many fewer intractable removals would there be as a result of the passage of this bill?

**Ms Foster:** I think that's enormously difficult—

**Senator PATERSON:** Well, it's in your own EM that it will have this effect.

**Ms Foster:** for us to estimate the quantum. I'll look to colleagues—

**Ms Cavanagh:** It would really depend on the country—

**Ms Foster:** And the cost of arrivals from that country, and the types of visas that we typically get from that country, whether they're inside or outside the exclusion—there's a lot that we would have to calculate.

**Senator PATERSON:** Alright. Senator Cash has a final question for us.

**Senator CASH:** Senator Paterson was asking about impact. Has the government assessed the impact of the bill against pull and push factors?

**Ms Foster:** The focus of our development, the focus of our policy around this, has been, clearly, around the objectives that we have articulated to you. I think that inherent in your question is that this would operate, potentially, as a pull factor—

**Senator CASH:** You could make that claim if you'd assessed the impact. In terms of—

**CHAIR:** Senator Cash—

**Senator CASH:** No, this is just so we're on the same page. What Senator Paterson has just articulated is in relation to, as you said, there being two central points to this bill. One of them is that you can designate a particular country as a concern country. In the event that you designate the country as a concern country it basically puts—within reason, subject to exceptions—a block on people coming here. The other way they can still come here, though, is by boat. They can no longer come here by getting a visa so they jump on a boat and come to Australia. That's actually a potential consequence of the bill and so the question is a valid question in terms of: have you actually done the assessment against push and pull factors?

**Ms Cavanagh:** What I would say is that a really strong mechanism to return people is essential to send a strong message about the Australian government's management of the migration system. While it would not be appropriate here for me to get into the details, I can confirm that in designing the policy and the legislation before you we have consulted with our colleagues in Operation Sovereign Borders.

**CHAIR:** Thank you, Senator Cash. Senator Shoebridge, you have the call.

**Senator SHOEBRIDGE:** Thanks, Chair. Ms Foster, I was listening carefully to your evidence to Senator Pocock. You were asked questions about which countries would be removal concern countries. Do you remember the exchange with Senator Pocock?

**Ms Foster:** Yes.

**Senator SHOEBRIDGE:** You said, 'I didn't bring the list with me.' Where is the list? And who is on the list?

**Ms Foster:** Senator, that was very loose wording. I do not have a list with me.

**Senator SHOEBRIDGE:** Well, you said, 'I didn't bring the list with me.'

**Ms Foster:** I heard you, Senator, and I'm saying that I'm sorry, that was loose wording. I should have said, 'I do not have a list.'

**Senator SHOEBRIDGE:** You don't have a list?

**Ms Foster:** I don't.

**Senator SHOEBRIDGE:** Does somebody else have a list?

**Ms Foster:** I don't believe so, Senator.

**Ms Cavanagh:** I don't.

**Ms Sharp:** Of countries?

**Ms Cavanagh:** Of countries—no, I don't, Senator.

**Senator SHOEBRIDGE:** That's a lot of shaking heads—no list?

**Ms Foster:** No list.

**Senator SHOEBRIDGE:** Well, we know that Iran, Iraq, South Sudan and Russia are on the list because the minister said so. Are they still on the list or off the list?

**Ms Foster:** The minister cited those as examples of countries who currently do not accept involuntary returns.

**Senator SHOEBRIDGE:** So are they on the list?

**Ms Foster:** They're examples of countries who currently do not accept involuntary returns.

**Senator SHOEBRIDGE:** That, expressly, don't accept involuntary returns. But there is another unspecified list of other countries that you say have a de facto policy of not accepting returns. That was your evidence, wasn't it?

**Ms Foster:** Or who frustrate efforts to return people.

**Senator SHOEBRIDGE:** There are potentially millions of Australians who have family in other countries around the planet; they may have family in India, they may have family in Taiwan—millions of Australians. They are probably thinking: 'Is my family on the list? Is it intended to roll this out in relation to my family?' I think there's an obligation to say what the consideration is and which countries are potentially on the list.

**Ms Cavanagh:** Senator, there is no list which sits behind the legislation. The intent of the legislation is that it could be used in situations where negotiations with a country were not progressing in the direction that we would like. There's no predetermined set of countries that is factored into the legislation.

I guess the other thing I would point you to in terms of that question is the fact that there are specific measures in the legislation to ensure that direct family members of Australian citizens would not be prevented from joining them. My legal colleagues can point out those specific provisions.

**Senator SHOEBRIDGE:** For adult citizens of Australia whose parents are in Iran: if Iran were designated as a removal concern country their parents couldn't visit. Any visa application they put in would be considered not valid, wouldn't it?

**Ms Foster:** There is a provision for ministerial intervention which could be used in such cases.

**Senator SHOEBRIDGE:** Well, absent the unicorn of ministerial intervention, the law sets out what I said, doesn't it? If Iran is designated as a removal concern country, then adult citizens here who have parents in Iran—the future is that any visa application brought by their parents would be considered not to be a valid application under 199G(1). That's the truth, isn't it?

**Ms Sharp:** That's correct, unless—there are a couple of ways an exemption could be applied to them. The minister could either decide, as a class, that he was going to expand that family exemption under subparagraph (e) of the same provision, and say, 'Actually, we're going to include all parents as part of the family,' or he could do it on a case-by-case basis, if so minded, using ministerial intervention.

**Senator SHOEBRIDGE:** Absent ministerial intervention, as I said.

**Ms Sharp:** That's correct.

**Senator SHOEBRIDGE:** So entire communities in Australia may be denied the right that they have, until this passes, of having their parents come and visit. Entire communities can be denied that right. That's the effect of this legislation, isn't it?

**Ms Foster:** I think that the capacity for ministerial intervention is a really important safeguard in the bill.

**Senator SHOEBRIDGE:** Absent the minister plucking them out—the one in 10,000 cases for which the minister grants an exemption—entire communities face being permanently barred from their parents.

**Ms Foster:** As I think Ms Sharp has explained, the minister can choose to include other groups, so I don't think it's accurate to say they would not be able to travel or that they would not be able to seek a visa.

**Senator SHOEBRIDGE:** Good luck to anyone trying to get positive ministerial intervention in this cooked system. Could I ask you about some evidence you gave about the removal pathway for noncitizens in 199B? You'll

recall again that Senator Pocock was asking you questions about what it's intended to do with 199B(1)(d), which allows the expanded operation of the removal pathway directions to classes of visas that are prescribed. Do you remember those questions?

**Ms Foster:** I do.

**Senator SHOEBRIDGE:** Looking at 199B(1)(d), there's no limitation there about what classes of visas can be prescribed, is there? There's no limitations that I can see.

**Ms Foster:** As I was saying to Senator Pocock, the safeguard, if you like, is that this applies only to people who are on a pathway to removal. What kind of visa they're on is not relevant, so we're making sure that, where people have exhausted all of their legal avenues for staying in Australia, we would have capacity to take action.

**Senator SHOEBRIDGE:** I think I heard your evidence. You said it's limited only to removal pathway noncitizens, as defined in the bill. That was your evidence, wasn't it? And that's the safeguard?

**Ms Foster:** That's legally right.

**Senator SHOEBRIDGE:** That was the safeguard—it's limited to removal pathway noncitizens as defined in the bill.

**Ms Sharp:** That's correct. Just to clear it up, the—

**Senator SHOEBRIDGE:** No. Can I ask you my next question? Removal pathway noncitizens—

**Ms Sharp:** Could I just—

**Senator Ayres:** Honestly! The official is trying to answer the question. You don't get to talk over the top of her. Wait until you've heard the answer, and then let's try and proceed.

**Ms Sharp:** A removal pathway noncitizen is defined in the paragraph set out in (a) to (d) and the final class is a lawful noncitizen who holds a visa prescribed. It doesn't, in that subparagraph, require that they're on a removal pathway. That's the effect of the legislative instrument.

**Senator SHOEBRIDGE:** You see, removal pathway noncitizens are actually defined in clause 1 of schedule 1, rather unhelpfully, as—

**Ms Sharp:** Yes. I understand.

**Senator SHOEBRIDGE:** defined by section 199B(1). It's a circular definition, isn't it?

**Ms Sharp:** No.

**Senator SHOEBRIDGE:** The definition of removal pathway noncitizen—

**Ms Sharp:** Is anyone fitting any one of those circumstances.

**Senator SHOEBRIDGE:** And the circumstance identified in 199B(1)(d) is anybody in a class of visa as prescribed.

**Ms Sharp:** That's correct.

**Senator SHOEBRIDGE:** That could be literally any class of visa. There's no limitation at all from the so-called protection being limited to a removal pathway noncitizen. There's literally no limit, is there?

**Mr Cunningham:** In terms of the prescription power, there is no limit. The limit exists in terms of why you would use—and the extent to which the powers that are available in respect of—a removal pathway noncitizen event.

**Senator SHOEBRIDGE:** So, far from this being limited to just noncitizens in detention or those on the two classes of visa that have been put forward—literally—by regulation, this could be expanded to anyone who's a lawful noncitizen on any visa. It can be expanded by reg. I see you nodding, Ms Sharp, but that doesn't appear on the transcript.

**Ms Cavanagh:** If you think about the purpose of this, it is for people for whom we are trying to effect removal. It would not make sense for us to expand this to all substantive visas because the vast majority of people in Australia on a substantive visa have a lawful right to remain. There would be no need or intention to attempt to effect a removal for them.

**Senator SHOEBRIDGE:** So why on earth are you proposing that provision, which literally allows this to be applied to anybody without restriction, regardless of which visa they're on? It's a loophole that a noxious government could drive a truck through, isn't it?

**Ms Cavanagh:** The intent of including that provision was to ensure that if in future there were another visa—potentially, a visa that does not even exist in our framework yet—that was used by government to manage people

who are on a removal pathway, this framework would cover them. It's not an attempt to try to remove substantive visa holders. It's just the fact that we see this as a really integral part of the migration framework and, therefore, it makes sense to think about how that framework might evolve into the future. It's a fairly standard practice when we're drafting measures into the act to think about the future management of the system as well as today.

**Senator SHOEBRIDGE:** This is a far-from-standard act. It's giving an administrative power to the minister to issue a direction to somebody, and if they fail to comply with the direction then, with pretty much no legal defence, they can be prosecuted and put in jail on a provision that has a mandatory minimum of one year. These are not standard provisions. These are extraordinary powers that could potentially see people banged up in jail with no defence. And your evidence is, 'This is just standard practice,' to have this expansive proposal? Is that really your evidence?

**Ms Cavanagh:** That's not what I said. I don't think my answer went to the effect of any measures. What I was talking about was the decision to design the bill with that particular clause that could take account of a visa in the future that may be used to manage people on a removal pathway. The process that you described goes several steps beyond that into how the legislation would actually be implemented both by the Commonwealth and by the courts system.

**Senator SHOEBRIDGE:** You said you got advice from the Solicitor-General, and you got advice from the Australian Government Solicitor. Did you get advice from UNHCR? Did you consult with the UNHCR on the drafting of this legislation?

**Ms Cavanagh:** No, not that I'm aware.

**Senator SHOEBRIDGE:** Did you consult with anybody outside of the government in the drafting of this legislation—anybody at all? If the answer's no, we have a limited amount of time. Did you consult with anybody at all outside the government in the drafting of this legislation?

**Ms Cavanagh:** Not while the legislation was being drafted.

**Senator SHOEBRIDGE:** Well, before the legislation was drafted? Did you consult with anybody outside of the government on this legislation before it was drafted, while it was being considered or while it was drafted?

**Ms Cavanagh:** Not for this particular bill. As I mentioned earlier, there are very regular processes that we take part in through the UNHCR in regard to our international obligations.

**Senator SHOEBRIDGE:** Yes, but not on this.

**Ms Cavanagh:** As part of that process, UNHCR has made several statements publicly about the importance of well-functioning returns and removals processes for the two countries.

**Senator SHOEBRIDGE:** You have leaned into the UNHCR in your evidence, but the bald fact of the matter is you haven't asked them. You haven't even spoken to them about it, have you?

**Ms Foster:** I think Ms Cavanagh was saying that we are operating consistently with UNHCR advice that a robust removals process is fundamental to a well-functioning system.

**Senator SHOEBRIDGE:** Minister, can you see how offensive this is to any kind of sense of considered legislative process when the government has developed the legislation in secret, has spoken to nobody outside the government and then is literally trying to ram it through the parliament within less than 36 hours? Can you see how people might just criticise this legislation as being grossly undemocratic?

**Senator Ayres:** No.

**Senator SHOEBRIDGE:** So it's the government's position—

**CHAIR:** I do need to share the call, Senator Shoebridge.

**Senator SHOEBRIDGE:** that you can secretly hatch legislation that is potentially seeing people thrown in jail on mandatory sentencing, talk with nobody in the process and then ram it through parliament in 36 hours, and that's respectful of democracy? Is that seriously the government's position, Minister?

**Senator Ayres:** Well, you've adopted your usual pejorative reframing of the position to suit your—

**Senator SHOEBRIDGE:** I've just described it.

**Senator Ayres:** negative political narrative and to suit your partisan political purposes. I don't agree with the way that you've framed it.

**Senator SHOEBRIDGE:** I've just described it.

**Senator Ayres:** You've asked me whether I think there's a problem with the way that the government has approached this legislation, and my answer is no.

**Senator SHOEBRIDGE:** What's wrong with—

**CHAIR:** Thank you, Senator Shoebridge. I do need to share the call. Senator Pocock, I'm going to give you the call. I understand Senator Ghosh has a few more questions, and then Senator Paterson, so we will try to get there before we close off for this evening.

**Senator DAVID POCOCK:** Was the provision around the 12-month mandatory minimum sentence something that the government requested in the drafting instructions?

**Ms Sharp:** Yes.

**Senator DAVID POCOCK:** I'm trying to get across this. My understanding of the issue is that we don't have agreements with certain countries for them to accept involuntary removals. So, if the minister is directing people to take steps towards returning, wouldn't those countries still consider those steps to be involuntary?

**Ms Foster:** I know it's a technical point. I think Ms Cavanagh or Ms Sharp said before that this doesn't rest on the basis of agreements between countries and Australia. They're positions that countries take.

**Senator DAVID POCOCK:** Sure, if they've got a position.

**Ms Foster:** That's why we have a dual approach in the bill both to direct people to comply and to encourage countries to receive.

**Ms Sharp:** Just to clarify, just going to the second part of your question: if a person is directed to, say, apply for a passport, they apply for a passport and their country of origin still will not take them, they have not committed an offence. They've done what the direction asked them to do. They may still not be able to be removed, but that person is not exposed to the offence provision, because they followed the direction. What we are seeking here is their cooperation. We fully accept that their cooperation won't be enough in some instances to get them removed, but we're trying to do everything we can to move people along the pathway.

**Senator DAVID POCOCK:** You've got the stick to get people to apply and do those things. And, if that country then says, 'Well, actually we're not going to take them,' you've then got the diplomatic stick of saying, 'Well, we might actually bar anyone from your country visiting Australia by listing you.'

**Ms Foster:** In simple terms.

**Senator DAVID POCOCK:** That's how it goes. Okay. Then, on fast-track, you're saying that this will only apply to people who've gone through the fast-track process after their judicial review is finalised. But my understanding is that in Federal Court matters new or substantive issues can't be introduced and that it's only a question of whether the law was applied correctly. We have a government that has said that the AAT process was flawed—that fast-track was totally flawed. They abolished it. What's the plan to make sure that this group actually gets a fair hearing, if the government is saying that the process that led to that judgement was flawed?

**Ms Sharp:** Just going to the first part, yes, when the Federal Court hears a matter from the IAA it's doing it as judicial review, which means it's looking at whether there were any legal flaws in the decision. That would extend to legal unreasonableness in some instances of the decision, but it is limited to judicial review; you're correct. I don't think I can comment on the second part of the question, which was around whether the IAA is flawed or not.

**Senator DAVID POCOCK:** Minister, in opposition Labor voted against fast-track. You've absolutely slammed it over the years. You promised to abolish it. You said that it wasn't fast or fair. Now you're saying: 'Actually, we're just going to live with whatever outcomes people got under that system. So be it.' Now we're going to introduce legislation which could potentially return people who have had a determination under a system that you don't think is fair, Minister.

**Senator Ayres:** As you're aware, there will, of course, be an opportunity for people in that category to seek ministerial intervention if they have new merits, propositions to put—if I can put it that way, being a bush lawyer and not a real lawyer—that people who are in that position have exhausted the judicial review process. As you're aware, we are, as a government, proposing changes to the new ART more broadly, and I'd encourage senators to vote for that proposition when it comes along.

**Senator DAVID POCOCK:** Sure. Thank you, Minister. The ART doesn't help these people who have already had a determination. We heard earlier that, if you apply for ministerial intervention, that has no effect on the provisions in this bill and so—

**Senator Ayres:** I think that the answer of the officials in relation to ministerial intervention was in relation to a different arm of the legislation and the way that—and I'm happy, given time, but I don't know whether it's useful to go back and traverse that. I'm simply saying that ministerial intervention is available for people who are in the situation that you've described.



**Senator DAVID POCOCK:** But applying for ministerial intervention doesn't in any way stop the processes in this bill.

**Senator Ayres:** Well, in the event that there's not a ministerial intervention, I suppose that's right.

**Senator DAVID POCOCK:** Sure.

**Ms Foster:** Minister Giles, of course, mentioned this morning that people who've been through the fast-track process would have the opportunity to seek ministerial intervention. Practically, the department would not be looking to effect the removal of one of these people while that process was—

**Senator DAVID POCOCK:** I understand that, but we also heard from you about futureproofing. So if that's not the intention—let's chuck it in the bill. Let's make it explicit. Governments come and go, and we know they have various views on immigration, so, if we're going to futureproof it, I would argue, Minister and senior public servants, that we should be doing that.

Just finally—I know we're running out of time—section 199E(4)(b) makes it clear that, even with someone in respect of whom Australia has protection obligations, this will not be a reasonable excuse for noncompliance with directions. Why include this if government is sure that the provisions will not be used with respect to refugees?

**Ms Sharp:** The protection visa process and the process for claiming protection and having those considered is dealt with in another part of the Migration Act. Without these provisions included, it would be very difficult to ever successfully prosecute anyone under these laws. So it's not saying it's not important. The person's protection claims are considered through the protection visa application process, through merits review and through judicial review. If they're found, through that process, not to be owed protection, then the fact that they may then subsequently claim protection is not relevant. Otherwise it could be thrown up as a defence to why they didn't comply with the direction. What we're saying is that we need to use the protection visa process properly and then these provisions will apply only in situations where they're not owed protection.

**Senator DAVID POCOCK:** My reading of it is that being owed protections by Australia will not be a reasonable excuse for noncompliance with directions. Am I wrong? I may well be—I mean, we've had half a day with this.

**Ms Foster:** I think the issue is that, clearly, we will never breach our international law obligations not to refool people, but there may be third-country resettlement options for people who are owed protection.

**Senator DAVID POCOCK:** So this is the loophole. We could owe them protection, but we could also compel them to go to the US or New Zealand? That's what this provision is for?

**Ms Foster:** We could require them to participate in a removal process to a third country.

**Senator DAVID POCOCK:** Okay. So that's what that's about. Thanks.

**CHAIR:** Senator Ghosh, you have a short bracket. Then, if there's a final question from you, Senator Cash, we might be able to fit it in.

**Senator GHOSH:** Can you please expand on some of the safeguards in the bill in relation to the exercise of the minister's power to issue a direction?

**Ms Sharp:** I presume you're talking about the direction power to the individuals. They're set out in section 199D. The first of those is that the minister must not give a removal pathway direction to a noncitizen if, in the case of an unlawful noncitizen, the person cannot be removed to the country that we were trying to remove them to, because there's a protection finding. That's critical.

The second is where the person has an open application for a protection visa—so it hasn't been settled yet.

The third is where the minister would be directing the person to do a thing that—if they're on a BVR already and they have a monitoring condition that would effectively require them to do the same thing already, you can't give them a direction, under this legislation, to do the same thing that they're already required to do as part of their bridging visa R visa conditions.

The fourth is that a direction cannot be issued to someone aged under 18.

The fifth is that the minister cannot give a direction that would have the effect of telling the noncitizen not to lodge court or tribunal proceedings or to change their visa applications. So they can't interfere with the visa process or the court process using a direction.

**Senator GHOSH:** I'll swap over to the second part of the bill, which is in relation to the designation power. How do similar schemes in the US and the UK work?

**Ms Cavanagh:** You're correct that there are similar schemes in the UK and the US. The US, of course, has a legal system that's quite different to ours, so that one operates in quite a different way. The UK system is perhaps

the most similar. There are still some differences between it and the scheme in this bill. For example, this bill would have the effect, once a direction is issued, of making certain visa applications invalid. The UK legislation has a range of different mechanisms that can be enacted. As I think Ms Foster said earlier, while the UK has had a framework in place for approximately two years now, we're not aware that so far it has had to be used, which I think indicates that it has been successful as a signalling message and a tool of diplomatic leverage to ensure that conversations and negotiations with removal countries go well.

**Senator GHOSH:** What are those additional UK mechanisms?

**Ms Cavanagh:** For example, the UK can seek to slow down the pace at which visa applications from a particular country are processed. There are also measures, I believe, to make visa applications for particular nationality groups more expensive.

**Senator GHOSH:** Okay.

**CHAIR:** Senator Cash, you have the call.

**Senator CASH:** Just going back to the urgency in relation to the legislation et cetera, if tomorrow the legislation did not pass, so we don't have the additional tool that you have referred to, and then on the 17th the government were to lose ASF17, how many individuals could then be set free from immigration detention as a consequence?

**Ms Foster:** It's very difficult for us to speculate, without knowing the terms of the loss, on what that decision might mean.

**Senator CASH:** I'm assuming, though, you've actually looked at it, in the event that the Senate determines tomorrow that it won't pass this legislation. There is a High Court decision coming up. You would have done some analysis of the potential cohort that may then be released into the streets.

**Senator Ayres:** I understand the rationale for the question, Senator Cash.

**Senator CASH:** No, but in terms of the urgency et cetera.

**Senator Ayres:** I understand that, but it invites an assessment or some commentary from the officials about the merits or otherwise, or commentary about the case. As the secretary just indicated, it would be speculating upon the likely or otherwise outcomes of the case, and the government just must not do that lest it prejudice the application that's currently before the court and the government's position in relation to that application, which is to oppose the application.

**Senator CASH:** I totally understand that, and I'm certainly not inviting comments on the case, but I'm assuming that the government has looked at both the worst-case scenario and the best-case scenario. You certainly didn't look at the worst-case scenario when it came to NZYQ, because we obviously spent the latter part of last year trying to clean up the mess from not actually anticipating what the worst-case scenario could be, which was a loss in the court. So I will assume that the government, this time around, has done its homework and has looked at a best-case scenario—you win—and a worst case scenario—you lose. You just said this legislation is urgent. I'm trying to ascertain: in the event that the Senate determined tomorrow, for whatever reason, not to pass the legislation tomorrow, how many would be affected one way or the other, win or lose, by the ASF17 decision?

**Senator Ayres:** Of course the government is prepared for any changes, but we're not going to prejudice court outcomes here.

**Senator CASH:** It's not prejudicing court outcomes, but the disastrous result last year—

**Senator Ayres:** Because answering a question invites that discussion. If you want to traverse the history of NZYQ and the fact that Mr Dutton enabled NZYQ to come to Australia in 2017—

**Senator CASH:** The best-case and worst-case scenarios—

**CHAIR:** Senator Cash, order!

**Senator Ayres:** Mr Dutton got advice—

**CHAIR:** Order!

**Senator CASH:** It was a simple question.

**CHAIR:** Order!

**Senator CASH:** I'm disappointed.

**CHAIR:** Order!

**Senator CASH:** I'm disappointed, Chair.

**CHAIR:** Stop interjecting, Senator Cash.

**Senator CASH:** I'm just saying I'm disappointed.

**CHAIR:** I don't care if you're disappointed. I'm the chair. I have called you to order, and you're continuing to interject in a disorderly way for no reason.

**Senator CASH:** I am very disappointed.

**CHAIR:** We have reached the end of our hearing. Minister, if you would like to finalise your answer, then I can adjourn the hearing.

**Senator Ayres:** Well, I won't want there to be too much disappointment, Senator Cash.

**Senator CASH:** Well, I will be disappointed—

**CHAIR:** Senator Cash!

**Senator Ayres:** So I won't take the invitation to traverse the sad history of NZYQ's administration under Mr Dutton's administration of the portfolio. The government's made an assessment about the merits and urgency of this legislation, and our view, the government's view, is that it's important that the parliament gets on with it.

**CHAIR:** Thank you, Minister. That is all the time we have for this evening's hearing.

**Senator CASH:** Thank you to the officials.

**CHAIR:** Well, Senator Cash, if you could stop interrupting me, I might be able to do that.

**Senator CASH:** Just for the record.

**CHAIR:** Thank you very much. I thank all witnesses whose have given evidence to the committee today. I also want to thank Broadcasting and particularly the secretariat for the effort to make this hearing happen. We need to provide a date for answers to questions on notice to be provided. What I would propose to do is make that close of business this week, Friday, but we have asked you to do your best endeavours to bring as many of those answers back tomorrow as possible. Sorry, Friday's a public holiday. I mean Thursday as the close of business, because we will need those answers on the public record. But we're asking you to try to bring them to us as soon as possible.

**Senator SHOEBRIDGE:** Chair, what's the purpose this Thursday?

**CHAIR:** Well, Senator Shoebridge—

**Senator SHOEBRIDGE:** There's the legislation [inaudible] tomorrow. What purpose is there?

**CHAIR:** Senator Shoebridge, I'm about to adjourn the hearing. Thanks to Broadcasting and the secretariat.

**Committee adjourned at 20:01**