



Australian
Human Rights
Commission

Migration Amendment (Removals and Other Measures) Bill 2024

Australian Human Rights Commission

Submission to the Senate Standing Committee on Legal and
Constitutional Affairs

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ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

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1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Senate Standing Committee on Legal and Constitutional Affairs (Committee) in relation to its inquiry into the Migration Amendment (Removals and Other Measures) Bill 2024 (Cth) (the Bill).

2 Summary

2. The Bill is the latest in a series of measures taken by the Australian Government in response to the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (NZYQ) to address the fact that indefinite detention for administrative purposes is unlawful where there is no real prospect of a person's removal from Australia becoming practicable in the reasonably foreseeable future.
3. Since *NZYQ*, attempts have been made in a number of legal proceedings to extend the Court's reasoning to include situations where a detainee could be removed from Australia in the reasonably foreseeable future, but where the inaction of the detainee is preventing that from occurring.
4. There is currently no obligation on a non-citizen to assist with efforts to give effect to their removal.¹ The Bill seeks to change this, by enabling the Minister to issue a direction to a non-citizen who has no legal basis to remain in Australia, requiring them to take steps as directed, which will assist the Department in its removal efforts. Failure to comply with the direction without a reasonable excuse, will result in criminal sanctions.
5. The Bill also addresses the issue of countries refusing to facilitate the return of its own citizens, by enabling the Minister, acting in their personal capacity, to designate a country as a 'removal concern country'. Such designation will make it difficult for other citizens of that country to migrate to Australia.
6. The Commission is concerned about the implications of the Bill, and the very real prospect that non-citizens will be subject to disproportionately high sentences of imprisonment as a result of their refusal to participate in efforts to be removed from Australia. We recognise that Australia has the sovereign right to secure its national borders, govern migration within its jurisdiction, and distinguish between regular and irregular migration status. However, this must not be done in a way that compromises Australia's human rights obligations.
7. International norms require State parties to work collaboratively with one another to facilitate the dignified return of migrants to their country of

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citizenship.² Rather than using ministerial declaration in an attempt to enforce participation of non-participating countries, Australia should consider the reasons behind the unwillingness or inability of countries to facilitate the return of their own citizens in a timely manner, and focus diplomatic efforts on achieving its goal using a human rights-based approach.

8. The Commission considers that the human rights implications of the Bill are considerable, and that the Bill should not be passed (recommendation 1). However, if the Committee does recommend the passage of the Bill, then a series of other recommendations have been made (recommendations 2 – 11) which address some of the most serious issues identified by the Commission. However, it is stressed that these consequential recommendations, if adopted, will not alleviate the Commission's concerns.

3 Recommendations

9. The Commission makes the following recommendations:

Recommendation 1

The Commission recommends that the Bill not be passed.

Recommendation 2

The Commission recommends that section 199B(1)(d) in Schedule 1, clause 3 be removed from the Bill.

Recommendation 3

The Commission recommends that section 199D(5) of Schedule 1, clause 3 of the Bill be deleted.

Recommendation 4

In the alternative to recommendation 3, the Commission recommends that the Bill be amended to insert a requirement after section 199D(5) that, prior to giving a removal pathway direction in relation to any child, the Minister must conduct an assessment of whether the direction is in the best interests of the child.

Recommendation 5

The Commission recommends that Schedule 1 of the Bill be amended to delete section 199E(2), and reduce the penalty provision contained within section 199E(1).

Recommendation 6

The Commission recommends that Schedule 1 of the Bill be amended to include access to merits review by the Administrative Appeals (or

Administrative Review) Tribunal of the Minister's decision to issue a removal pathway direction.

Recommendation 7

The Commission recommends that sections 199F and 199G be deleted from Schedule 1 of the Bill.

Recommendation 8

In the alternative to recommendation 7, the Commission recommends that the Bill be redrafted to include within section 199F of Schedule 1, a set of factors that must be considered prior to the Minister exercising their discretion to designate a removal concern country. The Bill should also include a mandatory review period of all designations to ensure their ongoing necessity.

Recommendation 9

The Commission recommends that clauses 4–9 of Schedule 2 of the Bill be deleted.

Recommendation 10

In the alternative to Recommendation 9, the Commission recommends that the proposed amendments to section 197D be amended to insert objective criteria for the exercise of the power to make a finding that an unlawful non-citizen is no longer a person in respect of whom any protection finding would be made. Suggested wording of the amendment may include:

- (3) For the purposes of subsection (2), the grounds on which the Minister may make a decision that the non-citizen is no longer a person in respect of whom a protection finding would be made are:
 - (a) in the case of a person about whom there has been a protection finding made under section 36(a):
 - (i) the person can no longer continue to refuse to avail themselves of the protection of the country of their nationality; or
 - (ii) being a person who has no nationality, the person is able to return to the country of their former habitual residence, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist.
 - (b) in the case of a person about whom there has been a protection finding made under section 36(aa), the grounds for believing that the person would suffer significant harm no longer exist.

(4) It shall be an exception to subsection (3) if the person is able to invoke compelling reasons for refusing to avail themselves of the protection of the country of their nationality, or the country of their former habitual residence.

(5) Without limiting subsection (4), compelling reasons may include:

- (a) those arising out of previous persecution or significant harm;
- (b) the person is a child;
- (c) the person has strong family, social and/or economic ties to Australia.

Recommendation 11

In the alternative to recommendation 9, the Commission recommends that the proposed amendments to s 197D be amended to provide for procedural fairness to be given to a person whose protection finding is under review by the Minister.

4 Background

10. Following *NZYQ*, the Government introduced the *Migration Amendment (Bridging Visa Conditions) Bill 2023* (Cth). The Bill was passed by the Parliament as a matter of urgency and without referral to a scrutiny Committee. If there had been an opportunity to make a submission on the Bill, the Commission would have drawn attention to its punitive nature, with mandatory minimum sentences of at least one year imprisonment imposed for breaches of visa conditions.

11. The Bill now under consideration is aimed at requiring ‘non-citizens who are on a removal pathway and have exhausted all avenues to remain in Australia to cooperate in efforts to ensure their prompt and lawful removal’.³ This is to be achieved through two primary measures, vesting in the Minister the power to:

- direct certain non-citizens to cooperate with removal efforts (where the failure to comply will result in a mandatory minimum sentence of 12 months imprisonment and a maximum available sentence of five years imprisonment or 300 penalty units, or both)
- designate a country as a ‘removal concern country’, with the effect that visa applicants outside Australia of that nationality will be unable to make a valid visa application (with exceptions applying).

12. The first of these powers may be delegated, however the second may only be exercised by the Minister personally.

13. The Bill comes at a time when there is uncertainty about whether the principle of *NZYQ* will apply to those non-citizens who refuse to cooperate with efforts to facilitate their removal.
14. Specifically, in the case of *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497 (*AZC20*), Justice Kennett ordered the release from detention of an Iranian man who could not be returned to Iran unless he consented and cooperated with Iranian authorities to facilitate the issuance of a travel document.⁴ Justice Kennett stated:

People in immigration detention may seek to delay or frustrate their removal from Australia for a variety of reasons and are not under any general obligation to cooperate in the process.⁵
15. Ultimately, Justice Kennett found that the circumstances of the applicant in *AZC20* meant that he was unable to cooperate with efforts to effect his removal to Iran, predominantly due to his subjective fear of persecution there, and his mental health preventing him from changing his approach. He was, however, willing to be removed to any other country.⁶
16. Writs of *habeas corpus* have also been issued in *David v Secretary of Department of Home Affairs* [2024] FedCFamC2G 178 and *Adam v Secretary of Department of Home Affairs* [2024] FedCFacC2G 179 ordering the release of two more Iranian men.
17. In contrast, Justice Colvin dismissed a similar application by another Iranian man in *ASF17 v Commonwealth of Australia* [2024] FCA 7 (*ASF17*). The applicant in *ASF17* filed an appeal of the decision, which was removed from the Full Court of the Federal Court to the High Court, and is due to be heard on 17 April 2024.
18. Each case has considered the implications of *Plaintiff M47/2018 v Minister for Home Affairs* [2019] HCA 17 (*Plaintiff M47*), and whether it had been overturned by *NZYQ*. Both Justices Kennett and Colvin determined that it had not.
19. If this is correct, then it remains open to the Government to keep unlawful non-citizens in prolonged or indefinite immigration detention, where they are failing to cooperate in efforts towards their own removal (at least if that refusal is voluntary).
20. Despite these developments, the Department of Home Affairs informed this Committee that the Bill has not been drafted with a view to rectify the issue raised in *ASF17* prior to the High Court's determination.⁷

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21. The Department informed this Committee that three groups of people will fall within the scope of the power vested in the Minister to direct a non-citizen to cooperate with removal efforts. These are:

- detainees
- holders of a Bridging R visa
- holders of a Bridging E visa (whose visas were granted on the basis that they were making acceptable arrangements to depart Australia).

22. There is also the ability for the Minister to add other classes of non-citizens to this list, through amendments to the Migration Regulations 1994 (Cth) (Migration Regulations).

23. Only detainees may potentially be affected by the outcome of *ASF17*, which considers the lawfulness of detention.

5 Removal pathway directions

24. Pursuant to the Bill, a removal pathway direction may be issued to a person, requiring them to take certain actions to facilitate their removal from Australia, including but not limited to:

- completing and signing an application for a travel document
- providing documentation
- attending an interview
- reporting to an officer or person.⁸

25. The Minister must be satisfied that the action required in the direction is reasonably necessary, either to determine whether there is a real prospect of the person's removal becoming practicable in the reasonably foreseeable future, or reasonably necessary to facilitate their removal from Australia.⁹

26. The direction must specify a timeframe for compliance,¹⁰ and state that a failure to comply may result in the commission of an offence.¹¹

27. A direction cannot be given to a non-citizen who is subject to a protection finding within the meaning of section 197C of the *Migration Act 1958* (Cth) (Migration Act),¹² or where the person has a protection visa under consideration.¹³

28. A direction also cannot be given to a child,¹⁴ but can be given to a parent or guardian of a child where the direction also covers the child.¹⁵

29. There are certain acts which may not be the subject of a direction, namely actions with respect to the commencement or continuance of legal proceedings or the lodgement or withdrawal of a visa application.¹⁶
30. The maximum penalty for refusing or failing to comply with a removal pathway direction is 5 years imprisonment or 300 penalty units (over \$90,000), or both.¹⁷ On conviction, a court must impose a sentence of imprisonment of at least 12 months.¹⁸ A defence of 'reasonable excuse' exists,¹⁹ but a reasonable excuse excludes:
- a genuine fear of persecution or significant harm
 - a claim to non-refoulement
 - a belief that the person will suffer other adverse consequences.²⁰

5.1 Potential human rights breaches

31. The Commission is concerned about the broad language used in the Bill, allowing for the types of removal pathway directions which are permitted to be made. As identified by the Senate Standing Committee for the Scrutiny of Bills:

For example, the provision could specify that the minister may only give directions with which it is possible to comply, cannot give a direction to produce a document the non-citizen does not have or which has been destroyed, or must not give directions that do not relate to a purpose which is to enable removal.²¹

32. Similarly, the exclusions to the 'reasonable excuse' defence cover a wide range of situations that do not consider the individual circumstances of those on a removal pathway.
33. Despite the exemption from receiving a direction when subject to a protection finding, the Commission is concerned that people with genuine claims for protection, including those who were subject to the 'fast-track' process, may become subject to a removal pathway direction without having their claims reassessed.
34. This would potentially breach Australia's obligations under the Refugee Convention, articles 6 or 7 of the *International Covenant on Civil and Political Rights* (ICCPR) and/or article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.
35. Such applicants may have had their claims for protection considered by the Immigration Assessment Authority (IAA) – a body which has previously been

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subject to criticism by the Commission,²² and which is due to be abolished by the intended passage of the Administrative Review Tribunal Bill 2024 (Cth).

36. Many Bridging E visa holders who are finally determined as part of the 'legacy caseload' have been in Australia for upwards of 10 years. They are likely to have established strong ties in Australia, and may even have partners and children here.
37. Many of the legacy caseload had their protection claims refused under the 'fast-track' processing system, and do not feel that their claims have been properly addressed. Others, due to having been in Australia for a lengthy period, may have experienced changes in their country of origin that have impacted the nature of their claims for protection. This could be the case for applicants not a part of the 'fast-track' process, but who have experienced excessive delays at the visa processing stage, the Administrative Appeals Tribunal and/or the courts. Their fear of persecution in their country of nationality will not be sufficient to establish a 'reasonable excuse' under section 199E(3) of the Bill.
38. For most of those falling within these examples, the only recourse which may allow them to remain in Australia, or have their protection claims reassessed, is by requesting the Minister to exercise the discretionary powers that exist within the Migration Act, for example in sections 46A, 48B, 195A, 351 or 417. With no obligation on the Minister to intervene, there is a risk that a direction might be issued for a non-citizen to take steps to facilitate their removal from Australia while they have an outstanding request before the Minister.
39. The Commission considers that this discretionary power is an insufficient safeguard to protect members of the legacy caseload and other people who have sought asylum from being returned to countries where they may still have a genuine fear of harm.
40. For this, and other reasons set out below, the Commission recommends against the passage of the Bill.

Recommendation 1

The Commission recommends that the Bill not be passed.

5.2 Prescription of additional classes of visas

41. Proposed section 199B(1) defines three classes of non-citizens who will be known as a 'removal pathway non-citizen'.
42. These are:
 - detainees

- holders of a Bridging R visa
- holders of a Bridging E visa (whose visas were granted on the basis that they were making acceptable arrangements to depart Australia).

43. There is also the ability for the Minister in section 199B(1)(d) to add other classes of lawful non-citizens to this list, through amendments to the Migration Regulations.

44. The Commission considers that the nomination of any further class or classes of non-citizens who will become subject to the potential for harsh penalties for non-compliance with a removal pathway direction, should not be possible through delegated legislation. If the Minister considers it necessary to insert further classes to the list, they should be required to have the full scrutiny of the Parliament before doing so. The Committee for the Scrutiny of Bills also expressed this view.²³

Recommendation 2

The Commission recommends that subsection 199B(1)(d) in Schedule 1, clause 3 be removed from the Bill.

5.3 Implications for the rights of children

45. The Commission is concerned that the Bill seeks to allow for a removal pathway direction to be provided to the parent or guardian of a child. The Bill, as drafted, does not include sufficient detail as to what factors must be considered prior to such an extreme measure being taken. In light of this, the Commission, in the first instance, recommends that section 199D(5) be deleted from the Bill.

Recommendation 3

The Commission recommends that section 199D(5) of Schedule 1, clause 3 of the Bill be deleted.

46. In the alternative, the Commission considers that additional safeguards, by way of factors to be taken into account prior to issuing a direction, would be required for the Bill to be potentially compliant with the *Convention on the Rights of the Child* (CRC).

(a) Best interests of the child

47. Article 3 of the CRC states:

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1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

48. The Commission is aware that the Department has a child safeguarding policy statement, entitled the Child Safeguarding Framework (CSF), which is informed by Australia's international obligations. This is supported by policy and procedural documents, including the *Best Interest of the Child – Policy Statement (DM-5721)*. The Commission has not been in a position to view these documents prior to drafting this submission. These however are policy statements, and subject to amendment at any time.

49. The Commission considers that, prior to issuing a direction with respect to a child, an assessment should be made of what the child's best interests are. For guidance on preparing such assessments, the Commission refers to its report, *Safeguarding Children: Using a child rights impact assessment to improve our laws and policies*, which highlights the importance of developing child rights impact assessments measuring the 'anticipated impacts' that administrative decisions may have on children's rights and interests.²⁴

50. The best interests of the child should be a primary consideration given to the decision by the Minister to issue a removal pathway direction with respect to a child. Drafters of the amendment may like to consider outlining specific factors to be considered.

Recommendation 4

In the alternative to recommendation 3, the Commission recommends that the Bill be amended to insert a requirement after section 199D(5) that, prior to giving a removal pathway direction in relation to any child, the Minister must conduct an assessment of whether the direction is in the best interests of the child.

(b) Separation from parents

51. The Bill does not clearly address the issue of whether, by issuing a direction with respect to a child, that child may become separated from one or both of its parents.

52. Article 9(1) of the CRC relevantly states:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

53. Article 16 of the CRC states:

No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence

54. Separation could occur by a child being removed from Australia away from a parent remaining in Australia, or through a parent being removed from a child who will remain in Australia.

55. The potential for separation from family should be included as a mandatory factor to be considered when assessing the best interests of the child.

(c) Views of the child

56. Article 12 of the CRC states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

57. The Bill, as currently drafted, does not allow for the child the subject of the removal pathway direction to be heard by the Minister prior to issuing the direction.

58. This topic is developed in more detail below at section 5.5.

(d) Child statelessness

59. The Commission is concerned that the Bill also does not address the risk of child statelessness or the feasibility of a parent or guardian being able to comply with a removal pathway direction issued with respect to that child.

60. Gender discrimination in nationality laws remains a real issue in many countries around the world.²⁵ For example, a woman from Somalia, Lebanon

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or Iraq who has a child in Australia will be unable to confer nationality on her child under the laws of those countries.²⁶

61. This issue should be required to be considered prior to the issuing of a direction, rather than allowing it to be a 'reasonable excuse' to be determined by a criminal court and where the onus is on the person relying on the excuse to establish it.

5.4 Criminal penalties

62. The Commission considers that punishing individuals who do not cooperate with removal efforts is disproportionate and unjust. The burden of facilitating return should properly lie on the country of the person's nationality, not on the individuals themselves.

63. By resolution 73/195, the General Assembly of the United Nations adopted the Global Compact for Safe, Orderly and Regular Migration (Global Compact).²⁷ Objective 21 of the Global Compact is to 'cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration'. Member States

commit to facilitate and cooperate for safe and dignified return and to guarantee due process, individual assessment and effective remedy.²⁸

64. Australia abstained from voting on the resolution on 19 December 2018.²⁹ However, the UN General Assembly adopted the resolution with 152 votes in favour to 5 against, with 12 abstentions.³⁰

65. It is not in the spirit of Global Compact, nor recommendations by the United Nations High Commissioner on Refugees,³¹ to penalise individuals who have arrived in Australia from State parties who are failing to uphold their obligations under international norms.

66. Criminalising the failure to act in this context is unprecedented. The Commission has been unable to find any similar provisions in the laws of comparable jurisdictions within the limited time available to provide this submission.

67. Generally, failures to comply with statutory duties in the criminal law exist in contexts involving the provision of certain information to police, or lodging information (for example, tax returns). However, such examples are rare, and, to the best of the Commission's knowledge, do not come with mandatory minimum sentences attached.

68. The Australian Government in the explanatory memorandum accompanying the Bill claims that

The proposed offence and associated penalty are intended to ensure that non-citizens remain appropriately engaged and cooperate with arrangements to facilitate their removal from Australia. Non-cooperation with removal processes demonstrates a disregard for Australian laws. This behaviour is contrary to the Australian community's expectations that a non-citizen should engage with the process to resolve their migration status and to effect their removal from Australia where required by law.³²

69. The Commission challenges the contentions made in this statement in two respects.
70. First, it is unlikely that the criminalisation of a failure to cooperate with efforts towards removal will have the desired effect. Australia has had legislation mandating immigration detention since 1992. Until November 2023 and the *NZYQ* decision, this included the potential for indefinite administrative detention for those whose removal was not practicable in the reasonably foreseeable future. Despite this, significant numbers of detainees elected not to be removed to their country of nationality. Similarly, large numbers of transitory persons have chosen to remain under Australia's offshore processing regime. Being faced with the prospect of detention in a criminal setting is, in the Commission's view, unlikely to be viewed as a more effective motivator than either of these prospects.
71. Secondly, a failure to cooperate with removal efforts does not necessarily equate with a person disregarding Australia's legal system. Large numbers of visa holders (particularly holders of Bridging E visas) regard Australia's laws highly, but have reasons particular to their own situation that deter them from being removed (such as those outlined at paragraphs 36 and 37).
72. For those with families in Australia, their unwillingness to depart – with no certainty of being able to return to their families – should not somehow be equated with bad character.
- (a) Mandatory minimum sentencing
73. The Commission has raised concerns about mandatory minimum sentencing in Commonwealth and State legislation on numerous occasions.
74. The Senate Standing Committee for the Scrutiny of Bills also expressed its 'longstanding view that the use of mandatory minimum sentences impedes judicial discretion'.³³
75. The harshness of the sentence is unlikely to act as any deterrent, in light of the reasons outlined above at paragraph 70.
76. Furthermore, mandatory sentencing provisions have the potential to engage articles 7, 9 and 14 of the ICCPR.

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(i) *Arbitrary detention*

77. Article 9(1) of the ICCPR prohibits the arbitrary deprivation of liberty. It provides that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

78. The United Nations Human Rights Committee has held that 'arbitrariness' is not to be equated with 'against the law'; it must be interpreted more broadly to include such elements as inappropriateness, injustice and lack of predictability.³⁴ This interpretation has been affirmed by the High Court of Australia.³⁵

79. If a sentence is fixed in advance, without regard to the circumstances of the offence and the offender, and the court is not permitted to make an assessment of whether such a sentence is appropriate, then the sentence is bound to be arbitrary. There will be no rational or proportionate correlation between the deprivation of liberty and the particular circumstances of the case, and it is likely to cause injustice.

(ii) *Inhuman or degrading treatment or punishment*

80. Article 7 of the ICCPR prohibits inhuman or degrading treatment or punishment. Both the United States³⁶ and Canada³⁷ have constitutional Bills of Rights, and their highest courts have struck down mandatory sentencing provisions as unconstitutional where they were 'grossly disproportionate' to the gravity of the particular offence on the basis that such sentences amounted to inhuman or degrading punishment.

81. Australia does not have a constitutional or statutory Bill of Rights or Human Rights Act and the High Court has held that mandatory minimum sentences are not unconstitutional.³⁸ However, that does not mean that such provisions are good public policy. As former Chief Justice of the High Court, Barwick CJ, said in *Palling v Corfield*:

It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.³⁹

82. The key concept of proportionality was clearly explained by the Constitutional Court of South Africa in *S v Dodo*.⁴⁰ In that case, the Court considered the

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validity of a law that provided for imprisonment for life for particular offences unless the court was satisfied that 'substantial and compelling circumstances' existed. The Court said:

In the field of sentencing, however, it can be stated as a matter of principle, that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional state.⁴¹

83. The Court held that 'the concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading'.⁴² Further:

To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ... the offender is being used essentially as a means to another end and the offender's dignity assailed.⁴³

84. The Victorian Supreme Court in *Buckley v The Queen* stated:

Mandatory minimum sentences are wrong in principle. They require judges to be instruments of injustice: to inflict more severe punishment than a proper application of sentencing principle could justify, to imprison when imprisonment is not warranted and may well be harmful, and to treat as identical offenders whose circumstances and culpability may be very different.⁴⁴

(iii) *Right to appeal against sentence*

85. Article 14 of the ICCPR establishes certain procedural guarantees in civil and criminal trials. Relevantly, article 14(5) of the ICCPR provides that:

Everyone convicted of a crime shall have a right to his conviction and sentence being reviewed by a higher tribunal according to law.

A mandatory minimum sentence infringes this right by restricting the review of a sentence on appeal to higher court., in that the appeal court would be prevented from reviewing the severity or correctness of a minimum sentence.

86. Given the criminalisation of a failure to comply with a removal pathway direction is a pivotal part of the Bill, the Commission recommends that the Bill not be passed.
87. However, if the Committee is minded to support its passage, then the Commission recommends, in the alternative, that the mandatory minimum sentence of 12 months be removed, and that the maximum sentence imposed be reduced.

Recommendation 5

The Commission recommends that Schedule 1 of the Bill be amended to delete section 199E(2), and reduce the penalty provision contained within subsection 199E(1).

5.5 Lack of review process

88. There is no mechanism for review of the issuing of a removal pathway direction in the Bill. Instead, it falls on a criminal court to determine, following the laying of criminal charges, whether the removal pathway non-citizen's reasons for not complying with the direction are reasonable.
89. The Commission recommends that Schedule 1 of the Bill be amended to include access to merits review by the Administrative Appeals (or Administrative Review) Tribunal of the Minister's decision to issue a removal pathway direction.
90. The removal pathway non-citizen should not be required to comply with the direction while undergoing merits and/or judicial review of the Minister's decision.
91. Where the removal pathway direction has been issued with respect to a child, then the Tribunal must, where appropriate, allow for the views of the child to be heard prior to making a decision.

Recommendation 6

The Commission recommends that, Schedule 1 of the Bill be amended to include access to merits review by the Administrative Appeals (or Administrative Review) Tribunal of the Minister's decision to issue a removal pathway direction.

6 Removal concern countries

92. The Minister, exercising the power personally, may designate a certain country as a 'removal concern country' if it is in the national interest to do so.⁴⁵ The rules of natural justice do not apply to the designation.⁴⁶

93. The effect of such designation is that non-citizens outside of Australia will be unable to make a valid application for a visa, if they are a national of the designated country.⁴⁷

94. Exceptions will apply to non-citizens who are:

- also citizens of another country (dual citizens) for which they hold a valid passport⁴⁸
- the spouse, de facto partner or dependent child of an Australian citizen, permanent resident or person 'usually resident in Australia and whose continued presence in Australia is not subject to a limitation as to time imposed by law'⁴⁹
- the parent of a child under 18 in Australia⁵⁰
- applying for a Refugee and Humanitarian (Class XB) visa⁵¹
- in a class of persons, or an applicant for a visa, prescribed by regulations.⁵²

95. The Minister may also, in their personal and non-compellable discretion, determine that the bar on making a visa application does not apply to a particular non-citizen.⁵³

96. The Minister's decisions will be 'privative clause' decisions within the meaning of section 474(2) of the Migration Act, meaning that judicial review of the decisions will be limited, unless subject to jurisdictional error.

97. Since 1952, the United States has legislated an ability for the Secretary of State to order officers to cease granting visas to citizens of 'recalcitrant countries'.⁵⁴ The power was rarely used until President Trump issued Executive Order 13768, 'Enhancing Public Safety in the Interior of the United States', directing relevant officials to implement the sanctions.⁵⁵ Executive Order 13768 was revoked on 25 January 2021 by Executive Order 13993.⁵⁶

98. Immigration and Customs Enforcement (ICE) must take into account factors which might be inhibiting the country's ability to cooperate, such as natural disasters or their own limited capacity.⁵⁷

99. The US Congressional Research Service reported in 2020 that there can be negative impacts on foreign policy interests as a result of sanctioning a

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country, and that these are used only when alternatives to sanctions have not succeeded:

Some countries sharply restrict the foreign travel of their citizens and may be unmovable by visa sanctions; others may retaliate in ways detrimental to bilateral trade, tourism, law enforcement, or other forms of cooperation. In cases in which identity documents are not readily available and the foreign country questions the nationality of individuals with removal orders, a 'recalcitrant' classification or visa sanctions may impede friendly bilateral relations.

DHS and DOS report success in achieving cooperation without resorting to visa sanctions, resulting in countries being removed from the recalcitrant or ARON [At Risk of Non-compliance] lists. In July 2016, there were 23 recalcitrant and 62 ARON countries; as of May 2019, those numbers had dropped to 10 recalcitrant and 23 ARON countries, a reduction that DHS and DOS attribute to pressure and diplomacy.⁵⁸

100. Similarly, the United Kingdom introduced the ability to suspend, delay, make invalid, or impose additional financial requirements on, the visa applications for nationals of countries which do not cooperate with the United Kingdom on removal of its citizens.⁵⁹ According to the Secretary of the Department of Home Affairs, the United Kingdom has not yet used the power to make such specifications.⁶⁰

101. The UK legislation however requires the Secretary of State to review the necessity of any visa penalty provision in force in relation to a country every two months.⁶¹

102. Like the US, the UK Secretary of State must take into account other factors, such as:

- the length of time for which the government of the country has not been cooperating in relation to returns
- the extent of the lack of cooperation
- the reasons for the lack of cooperation
- such other matters as the Secretary of State considers appropriate.⁶²

103. Unlike the UK and the US, the Bill includes no mandatory factors for the Minister to consider, when they decide to exercise their discretion in the national interest.

104. Given the broadness of that term, the Commission considers that the Bill should include a set of factors that the Minister must also consider prior to designating a removal concern country.

105. However, the Commission repeats that its primary recommendation is not to pass the Bill.

Recommendation 7

The Commission recommends that sections 199F and 199G be deleted from Schedule 1 of the Bill.

Recommendation 8

In the alternative to recommendation 7, the Commission recommends that the Bill be redrafted to include within section 199F of Schedule 1, a set of factors that must be considered prior to the Minister exercising their discretion to designate a removal concern country. The Bill should also include a mandatory review period of all designations to ensure their ongoing necessity.

7 Expansion of section 197D

106. The Senate Standing Committee on Scrutiny of Bills also expressed concerns about the expansion of section 197D of the Migration Act, which allows for the Minister to revisit and potentially overturn, previously made protection findings of non-citizens.⁶³ Section 197D as presently drafted, allows this only to occur with respect to unlawful non-citizens.

107. The Explanatory Memorandum to the Bill provides:

Section 197D has been amended by items 4-7 of this Schedule so as to enable the revisitation of a protection finding in relation to a broader range of non-citizens. As well as unlawful non-citizens to whom section 198 applies, amended section 197D now applies to removal pathway non-citizens, including holders of Subclass 070 (Bridging (Removal Pending)) visas and Subclass 050 (Bridging (General)) visas granted on 'final departure' grounds. Where the circumstances of the person or the country in relation to which a protection finding has been made have changed, it may be necessary to revisit the protection finding. If under subsection 197D(2) a decision is made to set aside the protection finding, the removal of the non-citizen will, or would, no longer be prevented by subsection 197C(3).⁶⁴

108. The Commission, in its June 2023 submission to the Review of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* conducted by the Parliamentary Joint Committee on Intelligence and Security, recommended that section 197D of the Migration Act be repealed. In the alternative, the Commission recommended that it be amended to insert objective criteria for the exercise of the power to make a finding that an

unlawful non-citizen is no longer a person in respect of whom any protection finding would be made, and to provide for procedural fairness to be given to a person whose protection finding is under review by the Minister.⁶⁵

109. For the reasons outlined in the Commission's previous submission, section 197D should not be expanded to include other classes of non-citizens as proposed in the Bill. However, in the alternative, the Commission would like to see the Committee consider those same recommendations to be adopted in the Bill.

Recommendation 9

The Commission recommends that clauses 4-9 of Schedule 2 of the Bill be deleted.

Recommendation 10

In the alternative to recommendation 9, the Commission recommends that the proposed amendments to section 197D be amended to insert objective criteria for the exercise of the power to make a finding that an unlawful non-citizen is no longer a person in respect of whom any protection finding would be made. Suggested wording of the amendment may include:

- (6) For the purposes of subsection (2), the grounds on which the Minister may make a decision that the non-citizen is no longer a person in respect of whom a protection finding would be made are:
- (a) in the case of a person about whom there has been a protection finding made under section 36(a):
 - (i) the person can no longer continue to refuse to avail themselves of the protection of the country of their nationality; or
 - (ii) being a person who has no nationality, the person is able to return to the country of their former habitual residence, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist.
 - (b) in the case of a person about whom there has been a protection finding made under section 36(aa), the grounds for believing that the person would suffer significant harm no longer exist.
- (7) It shall be an exception to subsection (3) if the person is able to invoke compelling reasons for refusing to avail themselves of the protection of the country of their nationality, or the country of their former habitual residence.
- (8) Without limiting subsection (4), compelling reasons may include:

- (a) those arising out of previous persecution or significant harm;
- (b) the person is a child;
- (c) the person has strong family, social and/or economic ties to Australia.

Recommendation 11

In the alternative to recommendation 9, the Commission recommends that the proposed amendments to section 197D be amended to provide for procedural fairness to be given to a person whose protection finding is under review by the Minister.

110. As outlined above at paragraph 63, Australia should adopt and comply with the General Assembly's Global Compact, and focus its attention on enhancing diplomatic efforts to facilitate the dignified removal of unlawful non-citizens, and non-citizens on a removal pathway.

8 Conclusion

111. It is consistent with Australia's international obligations to seek to remove non-citizens who have been found not to be in need of protection. However, returns must be conducted in a way that respects each individual's human rights, and the rights of their families, particularly where children are involved.
112. Issues involving delay and incomplete assessments of protection claims have resulted in many people in Australia who should not be removed without proper oversight.

Once people seeking asylum have been lawfully assessed as individuals towards whom Australia does not owe protection obligations, with that assessment having occurred in a fair and expeditious manner, then it is appropriate that the Government work with countries to facilitate the removal of individuals. The Commission considers that the methods proposed by the Bill do not achieve this in a way consistent with human rights, and recommends that it not be passed.

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- ¹ *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497 at [64] (Kennett J).
- ² United Nations General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, UN Doc A/Res/73/195 (2019).
- ³ Explanatory Memorandum, Migration Amendment (Removals and Other Measures) Bill 2024 (Cth).
- ⁴ *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497 at [53], [102].
- ⁵ *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497 at [64].
- ⁶ *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497 at [65].
- ⁷ Commonwealth, *Proof Committee Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 26 March 2024, 9 (Clare Sharp, Department of Home Affairs).
- ⁸ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199C(1).
- ⁹ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199C(2).
- ¹⁰ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199C(4).
- ¹¹ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199C(5).
- ¹² Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199D(1).
- ¹³ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199D(2).
- ¹⁴ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199D(4).
- ¹⁵ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199D(5).
- ¹⁶ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199D(6).
- ¹⁷ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199E(1).
- ¹⁸ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199E(2).
- ¹⁹ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199E(3).
- ²⁰ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199E(4).
- ²¹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2024* (27 March 2024), p 5 [1.11].
- ²² Australian Human Rights Commission, *Lives on hold: Refugees and asylum seekers in the 'Legacy caseload'* (2019), <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>.
- ²³ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2024* (27 March 2024), p 3 [1.4].
- ²⁴ Australian Human Rights Commission, *Safeguarding Children: A child rights impact assessment tool* (2023), <https://humanrights.gov.au/our-work/childrens-rights/publications/safeguarding-children>, p 11-12.
- ²⁵ United Nations High Commissioner for Refugees (UNHCR), *Gender Discrimination and Childhood Statelessness* (undated) <https://www.unhcr.org/ibelong/gender-discrimination-and-stateless-children/>; UNHCR, *Background note on Gender Equality, Nationality Laws and Statelessness*, (March 2024) <https://reliefweb.int/report/world/background-note-gender-equality-nationality-laws-and-statelessness-2024>.
- ²⁶ UNHCR, *Background note on Gender Equality, Nationality Laws and Statelessness*, (March 2024) <https://reliefweb.int/report/world/background-note-gender-equality-nationality-laws-and-statelessness-2024>, p 9-11.
- ²⁷ United Nations General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, UN Doc A/Res/73/195 (2019).
- ²⁸ United Nations General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, UN Doc A/Res/73/195 (2019) at 30.

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- ²⁹ United Nations, *60th plenary meeting of the General Assembly*, 19 December 2018, UN Doc A/73/PV.60.
- ³⁰ United Nations, *General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants*, 19 December 2018, <https://press.un.org/en/2018/ga12113.doc.htm>.
- ³¹ UNHCR Executive Committee, Conclusion No. 96 (LIV) on the Return of Persons Found Not to Be in Need of International Protection (2003), UN Doc A/AC.96/987.
- ³² Explanatory Memorandum, Migration Amendment (Removals and Other Measures) Bill 2024 (Cth).
- ³³ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2024* (27 March 2024), p 4 [1.8].
- ³⁴ *Van Alphen v The Netherlands*, UN Doc CCPR/C/39/D/305/1988 (1990) at [5.8]; *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (1997) at [9.2].
- ³⁵ *Mabo v Queensland* (1998) 166 CLR 186 at 217 (Brennan, Toohey and Gaudron JJ).
- ³⁶ The Eighth Amendment of the US Constitution prohibits cruel and inhuman punishment. In *Solem v Helm* 463 US 277 (1983) the US Supreme Court held that a mandatory life sentence without the possibility of parole for a seventh non-violent felony, viz. knowingly passing a bad cheque for \$100, amounted to cruel and unusual punishment.
- ³⁷ Section 12 of the Canadian Charter of Rights and Freedoms provides that everyone has the right not to be subjected to cruel and unusual treatment or punishment. In *R v Smith (Edward Dewey)* [1987] 1 SCR 1045, the Supreme Court of Canada found that a mandatory minimum sentence of 7 years imprisonment for a narcotics offence was grossly disproportionate. More recently, in *R v Nur* [2015] 1 SCR 773, the Supreme Court of Canada found that a mandatory minimum sentence of 3 years imprisonment for a firearms possession offence was grossly disproportionate.
- ³⁸ *Magaming v The Queen* [2013] HCA 40.
- ³⁹ *Palling v Corfield* (1970) 123 CLR 52 at 58.
- ⁴⁰ *S v Dodo* 2001 (3) SA 382 (CC).
- ⁴¹ *S v Dodo* 2001 (3) SA 382 (CC) at [26].
- ⁴² *S v Dodo* 2001 (3) SA 382 (CC) at [37].
- ⁴³ *S v Dodo* 2001 (3) SA 382 (CC) at [38].
- ⁴⁴ *Buckley v The Queen* [2022] VSCA 138 at [5].
- ⁴⁵ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199F(1).
- ⁴⁶ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199F(5).
- ⁴⁷ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199G(1).
- ⁴⁸ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199G(2)(a).
- ⁴⁹ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199G(2)(b).
- ⁵⁰ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199G(2)(c).
- ⁵¹ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199G(2)(d).
- ⁵² Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199G(2)(e)-(f).
- ⁵³ Migration Amendment (Removals and Other Measures) Bill 2024 (Cth), s 199G(4)-(8).
- ⁵⁴ Immigration and Nationality Act, §243(d). See also Wilson, Jill, *Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals*, (2023) Congressional Research Service, available at <https://crsreports.congress.gov/product/pdf/IF/IF11025>, 2.
- ⁵⁵ Executive Order No. 13,768, 82 FR 8799 (2017) <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety->

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[in-the-interior-of-the-united-states](#). See also Wilson, Jill, *Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals*, (2023) Congressional Research Service, available at <https://crsreports.congress.gov/product/pdf/IF/IF11025>, 2.

⁵⁶ Executive Order No. 13,993, 86 FR 7051 (2021)

<https://www.federalregister.gov/documents/2021/01/25/2021-01768/revision-of-civil-immigration-enforcement-policies-and-priorities>.

⁵⁷ Wilson, Jill, *Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals*, (2023) Congressional Research Service, available at <https://crsreports.congress.gov/product/pdf/IF/IF11025>, 1.

⁵⁸ Wilson, Jill, *Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals*, (2023) Congressional Research Service, available at <https://crsreports.congress.gov/product/pdf/IF/IF11025>, 2.

⁵⁹ *Nationality and Borders Act 2022* (UK), s 72(1).

⁶⁰ Commonwealth, *Proof Committee Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 26 March 2024, 14 (Stephanie Foster, Secretary, Department of Home Affairs).

⁶¹ *Nationality and Borders Act 2022* (UK), s 74.

⁶² *Nationality and Borders Act 2022* (UK), s 72(3).

⁶³ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2024* (27 March 2024), p 6 [1.17].

⁶⁴ Explanatory memorandum, *Migration Amendment (Removals and Other Measures) Bill 2024* (Cth), p 18.

⁶⁵ Australian Human Rights Commission, *Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Submission to the Parliamentary Joint Committee on Intelligence and Security, 20 June 2023, https://humanrights.gov.au/sites/default/files/review_of_the_migration_amendment_clarifying_australias_obligations_for_removal_act_2021_0.pdf, pp 15-18.