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Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the Migration Amendment Bill 2024

22 November 2024

Acknowledgment of Country

We acknowledge the Traditional Owners, Custodians and Elders of the Gadigal People of the Eora Nation, past, present, and future, on whose traditional land we work.

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Summary

The Refugee Advice and Casework Service (**RACS**) provides critical free legal advice, assistance and representation to financially disadvantaged and vulnerable people seeking asylum in Australia. We advocate for systemic law reform and policy that treats refugees with justice, dignity and respect, and we make complaints about serious human rights violations to Australian and United Nations bodies.

RACS acts for and assists refugees, people seeking asylum, people that are stateless or displaced, in the community, in immigration detention centres, alternative places of detention and community detention. Our services include supporting people to apply for protection visas, re-apply for temporary visas, apply for work rights and permission to travel, apply for family reunion, lodge appeals and complaints, assist with access to citizenship and challenge government decisions to detain a person.

RACS welcomes the opportunity to provide comment on the *Migration Amendment Bill 2024* (**Bill**).

RACS is grateful that the Bill is the subject of Parliamentary scrutiny by way of this inquiry, given the very significant implications the Bill has for individual rights and liberties as well as Australia's national interest and international reputation.

RACS is concerned that rushing such radical and problematic legislation without adequate scrutiny or consultation with the communities it will impact is at odds with open and transparent government and could lead to serious implications for human rights as well as unintended drafting consequences. RACS particularly calls for closer consultation with people with lived experience on all laws that impact the lives of refugees and people seeking asylum. We further note, despite the engagement of the legal community with this Bill, the little time afforded to us and others to consider such implications does not provide us with an adequate scope to really consider the breadth of issues. RACS is concerned that rushing such radical and problematic legislation without adequate scrutiny or consultation with the communities it will impact is at odds with open and transparent government and could lead to serious implications for human rights as well as unintended drafting consequences. RACS particularly calls for closer consultation with people with lived experience on all laws that impact the lives of refugees and people seeking asylum. We further note, despite the engagement of the legal community with this Bill, the little time afforded to us and others to consider such implications does not provide us with an adequate scope to really consider the breadth of issues.

RACS has relied upon the submissions of our colleagues at the Kaldor Centre for International Refugee Law & Human Rights Law Centre for their thorough analysis of the legal details and interpretations. RACS submission has therefore focused on a rights-based consideration and highlighting the impacts on the community for whom we serve.

RACS considers that the Bill, which seeks to expand the government's ability to deport potentially unlimited groups of people to third countries with no legal safeguards in place and no potential recourse through civil action, does little to meaningfully manage the migration system, and instead proposes sweeping and ill-defined powers be vested in the Minister. RACS considers that no amendments would appropriately alleviate our concerns with the Bill, and we recommend that the Bill not be passed in its entirety.

Recommendations:

1. *That the Committee recommend that the Bill not be passed.*
2. *That the Committee recommend that Government better engage with communities and people with lived experience when drafting and proposing legislation that impacts them.*
3. *That the Committee recommend that migration bills have the benefit of full scrutiny, without truncated parliamentary processes.*
4. *That the Committee recommend that the Government consider alternative ways to address indefinite detention with a focus on community safety, rehabilitation and human rights considered for all impacted parties.*

Sarah Dale

Centre Director & Principal Solicitor

Ahmad Sawan

Supervising Senior Solicitor

Entering into arrangements with 3rd countries

The Bill seeks to expand the scope on which they are able to enter into arrangements with other countries where they would pay these countries to accept people currently in Australia but who cannot be returned to their countries of origin.

It is explained that the Government would be able to enter into "third country reception arrangements" with foreign states, regarding "the removal of non-citizens from Australia and their acceptance, receipt or ongoing presence in the foreign country."[1] Further, the new section 76AAA also introduced by the Bill, where a bridging visa R (**BVR**) may cease if the "non-citizen has permission (however described), granted by a foreign country, to enter and remain in that country" and "where the country is a party to a third country reception agreement that is in force".[2]

The combination of both sections within the Bill make it so that anyone who is on a BVR and where there is a country that is willing to accept them, can have their visas subject to a cessation order and then be removed from Australia to this third country.

The cohort of people that could be affected by these sections is much larger than what the intention of the Bill purports to be. In that it is possible to envision anyone who unlawful or is currently in Australia on a Bridging visa E (**BVE**), who, for example has been subject to the cruel and ineffective fast-track process potentially be at risk of being affected by the implications of this Bill also.

This definition could extend to thousands of people, including many people who are living, working and raising families in the community, and the breadth of the proposed Bill has no real justification to extend so widely. The group of people potentially caught by the proposed legislation extends well beyond people impacted by either the *NZYQ*[3] or *YBFZ*[4] decisions. The proposed legislation also has the potential to impact people who have lived, worked and contributed to Australia for many years, of which has no mechanism for consideration. We set out a case study below to demonstrate the broad application of the proposed provisions:

[1] *Migration Act 1958* (Cth) proposed s 198AHB(1).
[2] *Migration Act 1958* (Cth) proposed s 198AHB(2).
[3] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 415 ALR 254
[4] *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40

Case study: Survivor of domestic violence

Nur* arrived in Australia on a temporary visa from Malaysia, where she met her Australian partner and had a child. She suffered significant domestic violence in the relationship and separated from him. Her controlling partner never allowed Nur to lodge a partner visa application. The police became involved and the family court made an order that she was the have sole parental responsibility for her young son, as he was not safe in the presence of his father.

During the perpetration of violence, Nur found it difficult to focus on much else other than her safety, and fell unlawful. After seeking legal assistance, she regularised her visa status by applying for a Bridging Visa E, but she does not have a permanent visa pathway in Australia. She faces the impossible choice of returning to her home country where it is unclear if her child will have citizenship and the ability to join her, or leave her Australian citizen son behind. Nur is vulnerable to potential removal under the proposed laws..

*Name and country changed but based on an amalgamation of RACS cases.

Further we note that as currently drafted, Section 198AHB is ambiguous and could fall outside the Commonwealth's Constitutional power. Subsection 198AHB(2) purports to give the Commonwealth the power to take or cause to be taken any action in relation to, among other things, 'third country reception functions'. On the one hand, this subsection states the actions do not include 'exercising restraint over the liberty of a person'. However, the definition of 'third country reception functions' in subsection 198AHB(5) then includes the 'taking of any action, by that country (including, if the foreign country so decides, exercising restraint over the liberty of a person)'. This inconsistency makes it difficult to understand the scope of the Commonwealth's power. Reading both subsections together, the Commonwealth appears to intend to give itself the power to take, or cause to be taken, actions in relation to the restraint of liberty of people by a third country without any judicial process. We note there is no definition of what would constitute ‘restraint of liberty’.

There are potential serious constitutional issues with the Commonwealth participating in the restraint of liberty - and particularly, presumably, detention - of people under section 198AHB. In Plaintiff M68/2015 v Minister for Immigration and Border Protection [2016] HCA 1, a majority of judges recognised there is or may be a limit to the power of the Commonwealth to participate in the detention of a person, even where that detention is

carried out by a third country.[5] In that case, the High Court found that section 198AHA was valid largely because people were detained for the purposes of processing. This purpose clearly does not exist for anyone transferred under the proposed section 198AHB, as the purpose is not to process. In our view, this situation could contravene the principles in Lim - to the extent they apply - and potentially any other proportionality test adopted by the High Court.

Overall, the ambiguity in this section highlights the deficiencies of this Bill and the lack of fundamental human rights protections for people subject to the laws.

Implications for refugees

RACS is extremely concerned that the Bill will empower the Minister to forcibly remove refugees from Australia, in breach of our non-refoulement obligations.

While the Bill states that the cessation of a bridging visa and potential removal to a third country would not apply to people with a protection finding, this only protects against removal to their country of origin but not to third countries.

This is of grave concern to RACS due to the lack of legal safeguards around what this removal process will look like in practice and where there are no protections or guarantees around the conditions that refugees will face in this third country nor around the risk of refoulement that may occur from that third country that may not be bound to the same obligations that the Australian government is.

We note the Kaldor Centre in their submission note:

> *The bill contains no safeguards to ensure that people sent to third countries will be protected from refoulement. This is in contrast to existing arrangements for people who are taken to Nauru for assessment of their asylum applications: the Migration Act requires that the Minister assess whether a country would 'expel or return a person taken to the country… to another country where his or her life or freedom would be threatened', before designating a country as a 'regional processing country'.[6] There is no equivalent safeguard included in the bill (or under existing domestic law) with respect to the new powers to send non-citizens to countries that enter into a third country reception arrangement with Australia. While the Minister's Second Reading Speech states that Australia will continue to abide by*

[5] Plaintiff M68/2015 v Minister for Immigration and Border Protection [2016] HCA 1, per French CJ, Kiefel and Nettle JJ at [46]; per Bell J at [99]; per Gageler J at [[184]; per Gordon J at [379].
[6] *Migration Act*, s 198AB(3)(a)(i).

its non-refoulement obligations,[7] this is not enshrined in the legislation, which continues to state that non-refoulement obligations are 'irrelevant',[8] and that the duty to remove a non-citizen under section 198 'arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations'.[9] This gap is not filled in the bill, despite the risk of refoulement.[10]

There is a real risk that people will be deported to countries where they face serious and significant harm.

We make these comments based particularly on the following:

- Many people caught by the proposed provisions had their claims for protections assessed under the inadequate 'fast-track' process. In RACS' experience, many genuine refugees with meritorious claims were refused through this process. This has been acknowledged by the Australian Labor Party's 2021 National Platform where it was stated that the "existing fast track assessment process under the auspices of the Immigration Assessment Authority and the limitation of appeal rights does not provide a fair, thorough and robust assessment process for persons seeking asylum".[11]
- Other people caught by the provisions will have new claims for protection that have not been assessed, or the circumstances in their home country may have changed so that an earlier assessment that they would not face harm becomes factually incorrect.
- People who are seeking judicial review of the refusal of their visas could be subject to the deportation powers proposed by the Bill.
- Many people who have not had their claims assessed in Australia could be subject to the powers in the Bill, for example transitory people who are in Australia after being transferred from offshore processing countries.

Power to overturn protection findings

RACS is incredibly concerned by the powers contained in the Bill, which would repeal and replace subsection 197D(1) of the Migration Act. The amendments further empower the Minister to revisit the circumstances of an existing protection decision for removal

[7] The Hon Tony Burke, *Minister for Home Affairs*, House Hansard, Migration Amendment Bill 2024 Second Reading Speech, 7 November 2024, 37. [x-ref to earlier citation]
[8] *Migration Act* Section 197C(1).
[9] *Migration Act* Section 197C(2).
[10] See Kaldor Centre submission, paragraph 12.
[11] 'ALP National Platform' (2021) available at: <https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf.

pathway non-citizens and determine whether that person is no longer a person owed protection.

It is unclear what procedural fairness mechanisms or safeguards would apply in such circumstances. RACS is gravely concerned by these proposed amendments to the Migration Act without any definitive safeguards or the like.

In summary, the Bill has significant and concerning implications for refugees and people seeking asylum.

RACS notes that in viewing the implications of the Bill from an intersectional lens, the risk of refoulement is most acutely felt by people with disability, people with significant mental health diagnoses, members of the LGBTQIA+ community, and victim/survivors of violence, including women and children. This is because these groups face multiple, intersecting barriers that can prevent them from engaging with traditional protection obligations assessments, and many have been failed by the fast-track system. In these circumstances, it would be profoundly unjust to pass the Bill.

Fast track process

Much has been written about Australia's 'fast track' protection obligations assessment process since its introduction in 2014. Domestically, the system has been characterised as incompatible with Australia's obligations of non-refoulement,[12] as unjustifiably discriminatory,[13] as perpetuating limbo and uncertainty,[14] and as an erosion of due process.[15]

Internationally, Australia has been criticised for this system, including by the United Nations Refugee Agency (**UNHCR**) which has noted that the fast-track process 'does not contain key procedural safeguards and denies certain categories of asylum-seekers the right to access any form of merits review'.[16]

Fast-track processing of refugee claims leads to a failure to identify refugees, which means that, through this process, Australia has also failed in its 'foundational obligation

[12] Parliamentary Joint Committee on Human Rights, Parliament of Australia, Fourteenth Report of the 44th Parliament (Report No 44 of 2014, 28 October 2014) 88.
[13] Australian Human Rights Commission, Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload' (Executive Summary, 2019) 11.
[14] Amnesty International Australia, Submission to the Department of Home Affairs (Discussion Paper, 20 May 2023) 15.
[15] Amnesty International, Submission to the United Nations Committee Against Torture (53rd Session, 3-28 November 2014) 9.
[16] The United Nations Refugee Agency, "Fact Sheet on the Protection of Australia's So-Called 'Legacy Caseload' Asylum-Seekers" (Factsheet, 1 February 2018) 4.

not to refoule or send a refugee back to a place where they face death or persecution […] by creating a process so degraded that refugees fail to have their status recognised'.[17]

Acknowledgment of the failures of the fast-track system have been made by the Government when it was in opposition.[18] While the Immigration Assessment Authority has been dispensed with following the introduction of new legislation relating to a new merits review Tribunal, much of the harm of the fast-track process remains unremedied.

RACS is concerned that many people seeking asylum who were failed by the fast-track system could be subject to the risk of removal to third countries as set out in the Bill, despite holding genuine fears of harm.

Changes in circumstances

RACS is concerned that there could be numerous cases where a person does not have a protection finding, but that due to a change in their personal circumstances or the situation in their home country, they face a real risk of harm and should not be deported. The Bill provides no protections for this cohort of people, and Ministerial processes (for example, a request made under section 48B of the Migration Act) is not enough to protect a person from the proposed deportation powers.

Case study: Fast track process

Farid* arrived in Australia by boat from Iran. He left Iran in part due to his political activities, but mostly because he felt that he could be gay. This was something he had never explored nor shared with anyone before. During the fast-track assessment progress, Farid did not receive any funded legal assistance, and felt too uncomfortable in his interview with the government to express his sexuality openly, only mentioning it towards the end of the interview. He was refused protection as the interviewer did not believe him. Farid wanted to explain himself at the IAA, but he was not interviewed, and the IAA shared the Department's concerns about his credibility. Farid is at risk of being removed under the proposed legislation and further may be subject to transfer to a country that does not afford him protections as a member of the LGBTIQ+ community.

[17] Mary Crock and Kate Bones, "Australian Exceptionalism: Temporary Protection and the Rights of Refugees" (2015) 16(2) Melbourne Journal of International Law 1, 23-4.
[18] Guardian, (20 December 2022) https://www.theguardian.com/australia-news/2022/dec/20/labor-to-allow-19000-refugees-to-stay-permanently-in-australia-from-early-2023.

Transitory people

A transitory person, as defined in the Migration Act, is someone who arrived in Australia by boat and was subsequently transferred to an offshore regional processing country.[19]

Transitory people currently reside in Australia following transfer from regional processing countries in order to receive critical medical treatment that was not available to them offshore.

RACS is especially concerned about the impact the Bill can have on transitory people, as they also could be captured by the implications of this Bill, who are currently granted bridging visa Es on departure grounds, while they await third-country resettlement.

Many in this community have established lives and families in Australia, many have engaged with repeated resettlement opportunities in the United States, Canada & New Zealand – of which do not afford an adequate number of places for the entire cohort. Subjecting this community to indeed the prospect of another country is deeply cruel and only exacerbating their displacement tenfold.

Civil Liability

RACS shares the concerns raised by our colleagues across the sector with the Bill's proposed provisions to avoid civil liability as it relates to the exercise of their powers in the removal of the people that are subject to removal from Australia.

This protection from civil liability is wide ranging to the extent that it would protect the Minister or Commonwealth (or officer of the Commonwealth), when it comes to the exercise of the removal power with reference to decisions on visa pursuant to section 501, 501A, 501B, 501BA (Character cancellation powers) of the *Migration Act 1958* or a refusal under section 65 relying on section 5H(2) or 36(1C) or the introduced section 76AAA in this Bill.

The protections then further extend to anything that occurs while that person who has been removed is in that third country, including if that country is a regional processing country, in which there have been significant successful claims established. [20]

[19] *Migration Act 1958 s 5(1).*
[20] ABC News "Manus Island detainees' $70m compensation settlement approved", 6 September 2017, https://www.abc.net.au/news/2017-09-06/manus-island-detainees-settlement-with-commonwealth/8876934.

RACS is deeply concerned by the Government's willingness to rid itself of all responsibility to people that reside in Australia, and especially those who have been found to be refugees, that may potentially face harm as a result of the removal to a third country without adequate safeguards in place.

Impact on families and children

The Bill has concerning impacts on family unity and on children. These impacts threaten Australia's social fabric and social welfare and are at odds with Australia's international law obligations.

The proposed sections within the Bill might create a scenario where a parents to an Australia citizen child or partner to an Australian citizen may be subject to removal to a third country per a third country reception arrangement. In our submission, this is at odds with Australia's obligations under the Convention on the Rights of the Child (**CRC**), particularly Article 3 which requires states to primarily consider the best interests of children in all legislative and other action.

The Bill also has implications for Australia's ability to comply with Article 16 of the CRC, and article 24 of the International Convention on Civil and Political Rights (**ICCPR**). Those articles refer to the importance of family unity, and the right to enjoyment of family life without disruption. The Bill does this in two ways through the removal powers, which contain no carve outs or consideration of family rights.

Privacy

The Bill further aims to authorise the Government to violate individuals' privacy by gathering and sharing personal data with numerous organizations and countries. It grants the authority to collect, use, or disclose criminal history information to any individual or entity, to aid in the performance of duties or the exercise of powers under the Bill. This includes sensitive data that is typically protected, such as spent convictions. This power is not restricted to individuals being deported or visa holders and is not clear on what stage of the process such information would or could be shared. The breadth of this authority is unjustified, concerning, and in direct conflict with Australian privacy standards.

Additionally, the Bill authorizes the Minister to share personal details about a "removal pathway non-citizen" with foreign governments, for purposes like deportation or subjecting them to third-country arrangements. This could encompass a wide array of information, including whether an individual has sought asylum without receiving 'protection findings,' as well as other personal data, such as sexual orientation, that could

expose them to harm. This is of particular concern in conjunction with Australia's non-refoulement obligations, and our duty to protect those within our jurisdiction that have sought asylum from further harm.

The Bill seeks to legitimize any previous unlawful sharing of such information. This retroactive validation is troubling, suggesting that unlawful information sharing may have already occurred.

In light of this, we draw the Committee's attention to the significant repercussions established for individuals following the 2014 Immigration Data Breach, which saw the public sharing of basic biodata details and identified people as having arrived in Australia by boat, and detained. On 11 January 2021, the Office of the Australian Information Commissioner issued a determination under section 52 of the *Privacy Act*, finding that as a result of the Data Breach, the Department has engaged in conduct that interfered [21]with the privacy of an individual and that compensation is to be paid to Participating Class Members, which could include payments in excess of $20,000. We hold significant concerns if even more personal data has been shared through impermissible ways, as may be interpreted by the need for retrospective application.

The Government has failed to justify the need for these powers, and we strongly advise the Committee not to allow the erosion of individuals' privacy rights and civil liberties without legitimacy.

BVR Conditions

The government aims to reintroduce measures that were deemed punitive and thus unconstitutional by the High Court in the case of *YBFZ*.[22]

While curfews and electronic monitoring will seemingly be imposed in more restricted situations, the revised framework does not alter the fundamentally punitive nature of these measures. It still allows the government to impose conditions that limit individuals' liberty.

The revised approach defines a purpose for these conditions that the High Court has previously questioned as a legitimate. It continues to place the responsibility for determining whether such measures are necessary or reasonable, yet again in the hands of the Minister.

[21] https://www.oaic.gov.au/privacy/privacy-complaints/privacy-complaint-immigration-data-breach/immigration-data-breach-privacy-complaint-determination-in-english-and-other-languages/oaic-notice-immigration-data-breach-privacy-complaint
[22] *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40

Of significant concern is that neither the bill nor any supplementary materials outline the process by which the Minister would assess the "risk" posed by a visa holder. It suggests the government's intention is to reapply curfew and monitoring measures on BVR holders through a broad process that suggest individual decision making will apply, without clarity of such a process. This is yet another example of where expeditious law-making without proper and complete considerations only leaves a defunct and fraught system that does not ensure the rights of individuals.

Alternative approaches

RACS continues to recommend that the Government refocus on reforming the protection assessment process in Australia, and commends the Government on many reforms to date, including the re-introduction of permanent protection pathways, reform to merits review and changes to family reunification. Further area for reform could ensure that those aggrieved by the fast-track process are able to obtain justice and fair assessments of their claims.

RACS recommends that rather than continuing to punish and criminalise refugees, including those who have in the past committed offences, the Government look instead to implementing a rights-based approach to allow people to rehabilitate, access supports, obtain treatment and specialised medical attention for mental and physical ill-health, and learn skills to better adjust to life in the Australian community. In our submission, adequate community support and engagement can do much to lower risk of recidivism, and benefits the Australian community as a whole.

It is also important to understand that risk assessments, where they may be warranted, are fluid and can, and do change over time. To send someone offshore, with no pathway to return is very definitive and provides no prospect to have that risk reconsidered and comes at the cost of their family unity for instance.

RACS also recommends the government commit to reviewing the immigration detention framework with a view to to better allow detainees access to the help and services they need, to support them to safely reintegrate into communities where a risk may have been identified.

Conclusion

In summary, RACS considers the Bill to be an impermissible over-reach of executive power, with inadequate underlying justification for those powers. Vesting broad, vague, and wide-sweeping powers in a Minister is at odds with the division of powers in Australia and constitutes an over-step in executive function.

Good laws safeguard the rights of individuals in codified ways, meaning that no matter who the Minister of the day is, the migration system can be administered in a way that is fair, efficient and just. Allowing for Ministerial discretion and exemptions that are non-compellable does little to ameliorate the potentially significant impact the Bill could have on individuals.

RACS recommends the Bill not be passed, and advocates for thoughtful reforms in the immigration framework to address the issues in our migration system.

"The Australian government's so-called Migration Amendment is nothing but a move that puts people in more danger, exposes them to harmful situations, and violates human rights. In fact, they want to enable the government to use and display violence against people who have been part of the community for many years. This action is part of a pattern of violence targeting refugees, who are among the most marginalized and vulnerable groups, and it should be condemned by civil society in Australia."

– Behrouz Boochani

A writer, human rights defender and former refugee in Manus Island.