Migration Institute of Australia

Submission to the Inquiry into Migration Amendment (Removals and Other Measures) Bill 2024

12 April 2024

Migration Institute of Australia
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The Migration Institute of Australia welcomes this opportunity to provide this submission to the Senate Legal and Constitutional Affairs Committee's inquiry into Migration Amendment (Removals and Other Measures) Bill 2024.

The MIA is the leading Australian professional association for Registered Migration Agents and legal practitioners. MIA members provide a representative sample of the migration advice profession, operating across the range of practices in this unique sector from sole practitioner to large corporate migration advice organisations.

This submission reflects the collective knowledge and opinions of MIA members, obtained through methods including individual members' feedback and consultations with the MIA's Character & Cancellation Advisory Panel. It presents thoroughly considered insights and recommendations from the MIA on the potential impacts of the proposed legislation.

Reuben Saul
National President
Migration Institute of Australia

Migration Institute of Australia

The Migration Institute of Australia (MIA) is the longest-established professional association representing migration professionals in Australia, being initially established as the Australian Migration Consultants Association in 1987, before changing its name to the MIA in 1992. Through its public profile the MIA advocates the value of migration, thereby supporting the wider migration advice profession, migrants and prospective migrants to Australia. The MIA represents its members through regular government liaison, advocacy, public speaking and media engagements. The MIA supports its members through its separate but interrelated sections: professional support; education; membership; communications; media; business development and marketing.

The MIA operates as a company limited by guarantee under the *Corporations Act 2001 and* complies with all Australian Securities and Investments Commission (ASIC) requirements. The MIA is not empowered under its Constitution to pay dividends. The MIA and its elected office bearers are guided by the legal framework set out in the *Corporations Act 2001*, the MIA Constitution and Rules, the Corporate Governance Statement and Board Charter.

MIA members hold a further responsibility to their clients and the Australian community to abide by ethical professional conduct and to act in a manner which at all times enhances the integrity of the migration advice profession and the Institute. MIA members are bound by both statutory Code of Conduct of the Office of the Migration Agents Registration Authority which sets the profession's standards of behaviour and the MIA Members' Code of Ethics and Practice.

Acknowledgement

The MIA acknowledges the Traditional Custodians of the lands and waters throughout Australia. We pay our respect to Elders, past, present and emerging, acknowledging their continuing relationship to this land and the ongoing living cultures of Aboriginal and Torres Strait Islander peoples across Australia.

Attribution and Publication

This submission is fully attributed to the MIA, drawing upon the invaluable support and expertise of the MIA's Character & Cancellation Advisory Panel and Refugee & Humanitarian Advisory Panel.

Should there be any enquiries regarding this submission, we encourage direct contact with the MIA at 02 9249 9000 or via email at bronwyn.markey@mia.org.au.

The MIA consents to this submission being published on the Senate Legal and Constitutional Affairs Committee's webpage, in line with the Committee's processes and for the purpose of public consultation and transparency.

Summary of Recommendations

MIA recommendation 1

The MIA recommends that the proposed delegated legislation clause in s 199B(1)(d) be removed.

MIA recommendation 2

The MIA recommends that the proposed s 199B(1)(c)(i) be qualified to only include a Subclass 050 (Bridging (General)) visa granted on or after a date in the future.

MIA recommendation 3

The MIA recommends that the proposed s 199C(4) include a requirement that the a removal pathway direction must advise the removal pathway non-citizen of their right to seek legal advice or representation in relation to the direction, and that a copy of the direction must also be provided to the removal pathway non-citizen's authorised representative (if any).

MIA recommendation 4

The MIA recommends that the proposed s 199D(2) includes lawful and unlawful non-citizens who have:

- applied for judicial review of a decision to refuse to grant a Protection visa and the judicial proceeding (including any proceedings on appeal) have not been completed; or
- made a request to the Minister to substitute a more favourable decision under s 417 of the Act; or
- made a request to the Minister to determine under s 48B of the Act that section 48A of the Act does not apply to prevent an application for a Protection visa by the applicant; or
- who have requested revocation of a visa cancellation under s 501CA and are awaiting a decision by either the Minister or the AAT.

MIA recommendation 5

The MIA recommends that the proposed minimum mandatory sentence in s 199E(2) be removed.

MIA recommendation 6

The MIA recommends that the proposed s 199F establish a specific legislative criterion that must be satisfied for the Minister to designate a "removal concern country".

MIA recommendation 7

The MIA recommends that the proposed s 199G(1) establish that the Minister can deem certain classes of visa applications to be invalid by way of legislative instrument, rather than relying on a blanket ban on all visa applications from citizens of a "removal concern country".

The definition of "removal pathway non-citizens" and "removal pathway directions"

1. The Bill introduces the concept of a "removal pathway non-citizen" – which includes unlawful non-citizens who are required to be removed from Australia as soon as reasonably practicable under s 198 of the *Migration Act 1958* (Cth) (Act); lawful non-citizens who have been granted a Subclass 070 (Bridging (Removal Pending)) visa; lawful non-citizens holding a Subclass 050 (Bridging (General)) visa granted based on the holder making acceptable arrangements to depart Australia; and most concerningly, any other visa holder prescribed by the Minister.[1]

The non-exhaustive definition "removal pathway non-citizens"

2. Incorporating "a lawful non-citizen who holds any other visa specified for this category" into the definition of a "removal pathway non-citizen" poses significant risks, as it grants future Ministers extensive discretion to expand this definition without Parliamentary approval. This flexibility could lead to potentially expansive interpretations of who might be considered for removal, allowing a government to target any group of visa holders deemed undesirable at any particular time. For the sake of legislative clarity, the definition should be exhaustive, and not allow for such broad discretion.

Bridging Visa E holders granted the visa on departure grounds

3. The proposed s 199B(1)(c) also allows for the Minister to give removal pathway directions to a lawful non-citizen who holds a Subclass 050 (Bridging (General)) visa and "at the time the visa was granted, satisfied a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia".[2] While on the face of it, this proposed provision appears consistent with the Bill's objectives, it has been common practice for the Department of Home Affairs to grant Subclass 050 (Bridging (General)) visas under cl 050.212(2) of Schedule 2 of the *Migration Regulations 1994* (Cth) (Regulations) to certain unsuccessful Protection visa applicants (despite the individual having no intentions of returning to their home country). In fact, a significant number of these Subclass 050 (Bridging (General)) visa holders are Afghan citizens who the Australian Government undertook not to return to Afghanistan following the fall of Kabul in 2021.[3]

4. To counter this issue, the Bill should specify that s 199B(1)(c)(i) only includes those people who hold a Subclass 050 (Bridging (General)) visa granted on or after a certain date in the future. The practice of granting Subclass 050 (Bridging (General)) visas to unsuccessful Protection visa applicants that the Australian Government has no intentions of returning (e.g. Afghan citizens) should cease, and the relevant bars should

[1] Section 199B(1)
[2] Section 199B(1)(c)
[3] See: https://minister.homeaffairs.gov.au/AlexHawke/Pages/afghanistan-statement.aspx

be lifted as a matter of urgency to allow these individuals to relodge Protection visa applications.

Information provided to non-citizens as part of a removal pathway direction

5. The proposed s 199C(4)-(5) requires that a removal pathway direction must specify the timeframe within which a non-citizen must comply and set out that a non-citizen who refuses or fails to comply with the direction may commit an offence under the proposed s 199E.

6. To enhance procedural fairness and ensure that non-citizens fully understand their obligations and rights, it is advisable that the removal pathway direction also includes a clear notification informing the non-citizen of their right to seek legal advice or representation regarding the direction. This is particularly important given the criminal implications of failing to comply with such a direction.

7. Additionally, to ensure all parties involved are properly informed, the Bill should clarify that a copy of the direction should also be provided to the non-citizen's authorised representative, which could be a legal practitioner or a Registered Migration Agent. These amendments would help safeguard the rights of the vulnerable non-citizens (often in immigration detention or prison).

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The circumstances in which Minister must not give a removal pathway direction

8. The proposed s 199D(2) prescribes that the Minister must not give a removal pathway direction to a removal pathway non-citizen if the non-citizen has made a valid application for a protection visa; and the application is not yet "finally determined".[4]

9. Under the existing definitions under s 5(9)-(9A) of the Act, an application is "finally determined" only when:

    a. a decision that has been made in respect of that application is not, or is no longer, subject to any form of review under Part 5 or Part 7 of the Act by the Administrative Appeals Tribunal (AAT) or under Part 7AA of the Act by the Immigration Assessment Authority (IAA);[5] or
    b. a decision that has been made in respect of that application by a delegate of the Minister was subject to review under Part 5 or Part 7 of the Act by the AAT, but the applicant failed to lodge an appeal within the prescribed period;[6] or
    c. in relation to an application for a protection visa by an "excluded fast track review applicant", a decision has been made by a delegate of the Minister in respect of the application.[7]

10. Notably missing from this definition of "finally determined" are matters including, but not limited to, those in which the applicant has made:

    a. an application to the Federal Circuit and Family Court of Australia (Division 2) under s 476 of the Act;
    b. an application to the Federal Court of Australia under s 476A of the Act;
    c. an application to the High Court of Australia for special leave or under its original jurisdiction under s 75(v) of the Constitution;
    d. a request for Ministerial intervention for the Minister to substitute a decision of the AAT with a more favourable decision under s 351, 417 or 501J of the Act;
    e. a request to the Minister to determine under s 48B (and / or s 46A) of the Act that section 48A of the Act does not apply to prevent them making an application for a further Protection visa; or
    f. a request under s 501CA of the Act for revocation of a visa cancellation.

11. The wording of proposed s 199D(2) – specifically the use of "finally determined" – places many unsuccessful Protection visa applicants in a precarious position. They could be directed to make contact with the authorities of their home countries, only to discover later that their decision from the AAT or IAA has been overturned by a court. This would

[4] Section 199D(2)
[5] Section 5(9)(a) and 5(9A) of the Act
[6] Section 5(9)(b) and 5(9A) of the Act
[7] Section 5(9)(c) and 5(9A) of the Act

necessitate a reconsideration of their protection claims by the AAT or IAA, which would need to consider the applicant's forced contact with the authorities of their home country.

12. The number of matters being remitted to the AAT from the courts annually is not insignificant. In the 2022-23 financial year, 10.18% of AAT Protection visa decisions appealed to the courts were successful.[8] In real terms, this was 118 individual AAT matters. The IAA statistics are even more concerning, with 38.01% of IAA Protection visa decisions appealed to the courts being successful in the 2022-23 financial year.[9] In real terms, this was 153 individual IAA matters during that same period.

13. For Protection visa applicants who are found by the AAT not to be owed protection obligations under s 36(2)(a)-(aa) of the Act, but still have compelling reasons for being granted an Australian visa, they have the option of requesting Ministerial intervention under s 417 of the Act. Additionally, the AAT also has the capacity to refer such cases to the Minister for consideration for intervention. Under the proposed Bill, such cases awaiting a Ministerial intervention outcome (either referred by the AAT or self-requested) could also be directed to make contact with their home countries.

14. Requiring Protection visa applicants seeking judicial review or Ministerial intervention to make contact with the authorities from their home countries to facilitate documentation or arrange for their future return risks jeopardising their safety and that of their families remaining in their country of origin. Such contact could expose applicants and their families to heightened risks, including surveillance, harassment, or worse, by their home government or other non-state actors. Additionally, such directions could lead to the emergence of *sur place* claims, where individuals face persecution as a direct result of their actions after having left their home country. It is imprudent for the Australian government to enact laws that could inadvertently contribute to the potential creation of these claims, thereby increasing the individuals' need for protection.

15. The proposed s 199B(1)(a) is also likely to impact to individuals whose visas have been mandatorily cancelled under s 501(3A) of the Act, and who are currently awaiting a decision of a request to revoke that cancellation. There are noted instances where these former visa holders, while detained, are being urged by Australian Border Force Status Resolution Officers to sign documents to request removal from Australia, seemingly in accordance, with s 198 of the Act.

16. Consistent with the abovementioned Protection visa cohort, former visa holders who are awaiting an outcome of a request for revocation of a visa cancellation under s 501CA should be protected from being given a removal pathway direction until the Minister or AAT has made a decision on their matter.

[8] See page 65 of the AAT's 2022-23 Annual Report, available at https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2022-23-annual-report
[9] See page 6 of the AAT's 2022-23 Annual Report, available at https://www.aat.gov.au/about-the-aat/corpora7te-information/annual-reports/2022-23-annual-report

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- who have requested revocation of a visa cancellation under s 501CA and are awaiting a decision by either the Minister or the AAT.

Offences and penalties with respect to "removal pathway non-citizens"

17. The Bill stipulates that a non-citizen on a removal pathway commits an offense if they are given, and fail to comply with, a removal direction that has not been revoked. The penalty for non-compliance can be up to 5 years in prison, a fine of 300 penalty units ($93,900), or both.[10] Moreover, a minimum prison sentence of 12 months is mandatory for anyone convicted under this proposed law.[11] The Bill does provide an exception for those with a reasonable excuse, although fears of persecution, claims of protection under *non-refoulement* obligations, or beliefs of suffering adverse consequences if removed do not qualify as reasonable excuses.[12]

18. Mandatory minimum prison sentences have been criticised for their ineffectiveness in reducing crime rates and removing judicial discretion.[13] It is well established that such policies fail to consider the individual circumstances of each offense and offender, which can be crucial in determining the most appropriate and effective penalty. While it remains unclear whether mandatory sentences will deter migration non-compliance; it will almost certainly contribute to further prison overcrowding and impose significant costs on the Australian State and Territory justice systems.

19. The proposed offence and mandatory minimum sentence do not address the underlying reasons why an individual may resist departure, such as a subjective fear of persecution

[10] Section 199E(1)
[11] Section 199E(2)
[12] Section 199E(3)
[13] See the Law Council of Australia's Mandatory Sentencing Factsheet, available at: https://lawcouncil.au/docs/3b338bbd-ae36-e711-93fb-005056be13b5/1405-Factsheet-Mandatory-Sentencing-Factsheet.pdf

or harm (whether based in reality or not), the lack of security in a home country, or other compelling personal or familial circumstances. This approach overlooks the complexities driving non-compliance and assumes that further punitive measures will motivate compliance, ignoring the potential for these measures to exacerbate desperation and resistance rather than resolve the situation constructively.

20. Additionally, if immigration detention has not effectively encouraged individuals to voluntarily depart from Australia, it is doubtful that the prospect of prison would prove more persuasive. Immigration detention significantly limits freedom, and a State or Territory prison does not necessarily impose a harsher form of restriction. This suggests that escalating to prison sentences might not increase voluntary departure rates, again questioning the efficacy of such punitive measures in achieving the Bill's objectives.

MIA recommendation 5

The MIA recommends that the proposed minimum mandatory sentence in s 199E(2) be removed.

The designation of "removal concern countries"

The risks associated with broad and vaguely defined Ministerial powers

21. The proposed s 199F and 199G of the Bill grant the Minister the novel authority to implement travel bans which target all passport holders from designated countries. When used, this power would serve as a visa sanction prohibiting individuals from applying for a visa to enter Australia, based solely on their country of passport.

22. The Bill does provide a prescribed list of exemptions to a visa sanction which include applicants already in Australia; certain family members of Australian citizens, permanent residents or people usually resident in Australia (including spouses, de facto partners, dependent children, and parents of children under 18); applicants for offshore humanitarian visas; and dual nationals holding a passport from a country not affected by a visa sanction.[14] The Minister is also conferred with a personal power to intervene and exempt certain individuals from a visa sanction.[15] However, this discretionary power is non-compellable, non-reviewable and non-delegable.[16]

23. By enabling the imposition of country-wide bans, the Bill empowers the Minister to make determinations that would exclude vast groups of people from applying for visas to enter

[14] Subsection 199G(2)
[15] Subsection 199G(4)-(8)
[16] Subsection 199G(7)-(8)

Australia, not based on individual merit or risk, but rather on their collective identity based on country of passport. This raises important questions about the principles of non-discrimination and fairness that have traditionally underpinned Australia's migration system since at least the Whitlam Government, suggesting a move which would see visa sanctions become a tool in diplomatic strategies.

24. In the Bill, "removal concern country" is defined as "a country designated as such by the Minister under subsection 199F(1)"[17] which in turn states that "[t]he Minister may, by legislative instrument, designate a country as a *removal concern country* if the Minister thinks it is in the national interest to designate the country to be a removal concern country."[18] This somewhat circular definition vests in the Minister exceptionally broad and vaguely outlined powers, with the only qualification being that the Minister must consult with the Prime Minister and Minister for Foreign Affairs before making such a determination, with the term "consult" also being broad and vague.[19] For instance, it is not clear what would happen in the circumstance that the Foreign Minister or the Prime Minister disagreed with the Minister's proposed designation of a removal concern country.

25. It is significant that there is no statutory definition of the term "national interest" and while the courts have considered this expression on a number of occasions,[20] the concept has consistently been described as broad. In *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22, the High Court at [40] confirmed that "[w]hat is in the national interest is largely a political question". Later in *Plaintiff S297/2013 v Minister for Immigration and Border Protection (No 2)* (2015) 255 CLR 231, the High Court again discussed the concept of "national interest" at [18] and found that the Minister "may properly have regard to a wide range of considerations of which some may be seen as bearing upon such matters as the political fortunes of the government of which the Minister is a member and, thus, affect the Minister's continuance in office".[21]

26. This extremely broad discretion carries the inherent risk of potential misuse, particularly by future governments that may seek to leverage visa sanctions as a tool to address geopolitical conflicts or issues that extend well beyond the original intent of managing the re-admittance of involuntary returnees. The absence of a clear legislated criteria for the exercise of this power (other than "national interest") could see visa sanctions being used in future for purely political purposes, to exert pressure in international disputes or as punitive measures against countries for reasons unrelated to immigration compliance. Further, the power opens Australian citizens abroad to risk to retaliatory measures (such as the potential for the arbitrary detention of Australian citizens abroad) should the Minster designate a country a removal concern country.

[17] Subsection 5(1)
[18] Subsection 199F(1)
[19] Subsection 199F(2)
[20] the context of ss 501(3), 501A(2) and 501BA(2) of the Act, each of which permits cancellation of visas in the national interest.
[21] *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2015] HCA 3 at [18] citing *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51

27. Separate from the concern regarding the broad and ill-defined powers conferred on the Minister by the Bill, there is an equally important question on the effectiveness of the proposed laws in achieving their objectives though examining international comparisons.

28. In the U.S., s 243(d) of the *Immigration and Nationality Act* permits the Secretary of State to initiate visa sanctions against foreign governments which have denied or unreasonably delayed the acceptance of a national or nationals ordered removed from the U.S. While seldom used before the Trump Administration, the U.S Government employed the use of visa sanctions against Cambodia, Eritrea, Guinea, and Sierra Leone in September 2017; Laos and Myanmar in July 2018; Ghana in January 2019, Pakistan in April 2019; and Burundi in June 2020.[22]

29. However, rather than employing a blanket ban on the ability to make valid visa applications (as proposed by the current Bill), the U.S. strategy for visa sanctions under s 243(d) of the *Immigration and Nationality Act* has been to apply a targeted approach. The U.S. visa sanctions for all the abovementioned countries (except Eritrea, Laos and Burundi) were specifically designed to impact only the government officials, their immediate families, and attendants, with certain exemptions allowed.[23] The U.S. experience suggests that there is greater effectiveness in exerting pressure on foreign governments by restricting the mobility of a select group rather than imposing a blanket ban on all nationals.

30. Returning to the Australian context, media reports suggest that the proposed "removal concern country" provisions in the Bill are an attempt to primarily deal with a number of key countries which do not accept removals from Australia in including Iran, Iraq, South Sudan and Russia.[24] Looking to the U.S. experience, as of mid-2020, the U.S. Government had classified Iran, Iraq and Russia as "recalcitrant or uncooperative" because they systematically delayed or refused to accept the return of their citizens and classified South Sudan "at risk of non-compliance".[25]

31. Despite these the non-compliance of the Governments of Iran, Iraq, South Sudan and Russia, there is no evidence that the U.S. has been able to use visa sanctions effectively against these specific countries to shift them into accepting any or more removals. Considering the political influence of the U.S. and the appeal of its visa program, it is highly questionable whether Australia could succeed where the U.S. has not, in leveraging visa sanctions to induce compliance from these countries.

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[22] Congressional Research Service, 'Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals' (23 January 2020), available at: https://sgp.fas.org/crs/homesec/IF11025.pdf

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[24] See: 'Labor's deportation bill could be used to blacklist entire countries' citizens from obtaining visas to Australia', (28 March 2023), available at: https://www.theguardian.com/australia-news/2024/mar/28/labor-deportation-bill-blacklist-entire-countries-citizens-visas-australia-immigration

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Assessing the effectiveness of visa sanctions and international comparisons

32. While it is acknowledged that the Bill provides a comprehensive array of exemptions from the visa sanctions, it appears the categories of individuals most likely to be affected by the sanctions are skilled visa applicants, employer-sponsored visa applicants, students and tourists – all of whom contribute enormously to addressing Australia's skill shortages and bolstering the international education and tourism economy. The imposition of visa sanctions on these key categories of visa applicants is likely to adversely affect Australian businesses, potentially exacerbating skill shortages and hindering economic growth. In any case, there are already measures to refuse visas where a Delegate determines the risk of overstay or breach of other visa condition is high.

33. In light of the approach taken by the U.S., it would appear that a more targeted visa sanction program rather than a wide-reaching policy might be more effective for Australia. Implementing visa sanctions that specifically target government officials and their immediate families, as seen in the U.S., could pressure countries to cooperate on repatriation without broadly impacting sectors critical to Australia's economic and social fabric.

The impracticality of expanding the Minister's personal intervention powers

34. An additional layer of complexity is introduced by the provision for an exemption process, allowing prospective applicants from a "removal concern country" to request the Minister personally to lift the bar to allow them to make a valid visa application.[26] This requirement for Ministerial involvement would introduce a cumbersome layer to the decision-making process, potentially leading to protracted delays and an increased administrative burden on Departmental resources. Given the already significant backlog of cases awaiting Ministerial intervention decisions, this approach would only exacerbate the existing inefficiencies within the migration program.

35. Reflecting Australia's COVID-19 travel restrictions as a recent example, had the Minister been required to personally decide each travel exemption request, it is clear the system would have fallen into administrative paralysis. This comparison highlights the impracticality of a system that relies heavily on the discretion and direct involvement of a Minister for routine decisions. This bottleneck effect would not only hamper visa processing efficiency but also significantly disadvantage those in urgent need of travel or migration to Australia.

Conclusion

36. The proposed visa sanctions, while intended to strengthen the integrity of Australia's migration system, appears fraught with practical challenges that undermine its intended effectiveness. The experience of the U.S. shows that the threat of visa sanctions have not

[26] Section 199G(4)-(8)

proven successful against countries such as Iran, Iraq, South Sudan, and Russia. The U.S experience also appears to suggest that a more nuanced visa sanction strategy, focusing on particular visa categories, is more effective in attaining the intended objectives.

37. Finally, the proposed use of visa sanctions as a lever in international relations represents a significant departure from Australia's long-standing commitment to a non-discriminatory migration policy. The implications of such a shift are profound and could alter the perception of Australia in the international community – impacting its diplomatic relationships and its well-established reputation as a welcoming, multicultural society.

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