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Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the Migration Amendment
(Removal and Other Measures) Bill 2024

12 April 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 (Removal and Other Measures) 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.

RACS considers that the Bill, which seeks to deport potentially unlimited groups of people and bans others from entering Australia, does little to meaningfully address indefinite detention or better 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.*

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Broad categories of ‘removal pathway citizens’

The Bill seeks to coerce individuals to ‘co-operate’, under threat of imprisonment, with the Minister’s directions to facilitate their deportation from Australia.

The directions require people to do (or not do) any ‘thing’ that is directed.¹ In our submission, this drafting is unspecific and broad, and the required action could be unreasonable, harmful, and against the interests of the person and in breach of human rights including the rights of children.² The proposed directions could also be issued in cases where it is physically impossible for the person to comply, for example, where a person is directed to produce a document that they do not possess and cannot obtain. This is particularly concerning in the circumstances where non-compliance with a direction poses the risk of a mandatory minimum sentence of one year imprisonment (with a maximum sentence of five years’ imprisonment or a fine up to \$93,900 or both).

The cohort of people who could be subject to these coercive directions is impermissibly broad. The definition of proposed section 199B in the Bill sets out the categories of persons considered ‘removal pathway non-citizens’, which includes anyone without a visa, Bridging Visa R holders, certain Bridging Visa E holders and, per paragraph 199B(1)(d), any other visa holders the Minister designates under the *Migration Regulations 1994*.

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 proposed section 199B(1)(d) in particular has no apparent justification.³ The group of people potentially caught by the proposed legislation extends well beyond people who have ‘lost every appeal and are not owed protection’.⁴ The proposed legislation also has the potential to impact people who have lived, worked and contributed to Australia for many years. We set out a case study below to demonstrate the broad application of the proposed provisions:

¹ Proposed section 199C.

² While 199E(3) states that the offence does not apply if the person has a reasonable excuse for not doing the ‘thing’, the concept of reasonableness is not defined and the risk of imprisonment is significant.

³ The Senate Standing Committee for the Scrutiny of Bills Scrutiny Digest 5 noted that paragraph 199B(1)(d) is a significant matter that is better dealt with by way of primary legislation and lacks sufficient justification (at page 3).

⁴ Press Conference (27 May 2024) <https://minister.homeaffairs.gov.au/AndrewGiles/Pages/press-conference-27032024.aspx>

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 to 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 unwell. 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 deportation under the proposed laws, or criminal sanctions if she refuses to comply with a direction because she knows it is not in the best interests of her little boy.

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

Implications for people seeking asylum and 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 at proposed section 199D that removal pathway directions are not to apply to people with a protection finding, this is insufficient to ward off the very 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”.⁵

⁵ ‘ALP National Platform’ (2021) available at: <<https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf>>.

- 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.

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,⁶ as unjustifiably discriminatory,⁷ as perpetuating limbo and uncertainty,⁸ and as an erosion of due process.⁹

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'.¹⁰

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 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'.¹¹

Acknowledgment of the failures of the fast-track system have been made by the Government when it was in opposition.¹² While the Immigration Assessment Authority has

⁶ Parliamentary Joint Committee on Human Rights, Parliament of Australia, Fourteenth Report of the 44th Parliament (Report No 44 of 2014, 28 October 2014) 88.

⁷ Australian Human Rights Commission, *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'* (Executive Summary, 2019) 11.

⁸ Amnesty International Australia, *Submission to the Department of Home Affairs* (Discussion Paper, 20 May 2023) 15.

⁹ Amnesty International, *Submission to the United Nations Committee Against Torture* (53rd Session, 3-28 November 2014) 9.

¹⁰ The United Nations Refugee Agency, "Fact Sheet on the Protection of Australia's So-Called 'Legacy Caseload' Asylum-Seekers" (Factsheet, 1 February 2018) 4.

¹¹ 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.

¹² *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>.

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 coercive deportation powers set out in the Bill, despite holding genuine fears of harm.

Equally, RACS is concerned that litigants awaiting judicial review or other court processes are at risk of removal or criminal sanction for non-compliance with orders, even where litigation remains on foot. This also risks circumventing Australia's legal processes and interferes with judicial matters.

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 deported under the proposed legislation.

*Name and country changed but based on RACS cases.

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: Fadi* from Afghanistan

Many protection visa applicants from Afghanistan were refused visas, prior to the fall of Kabul to the Taliban in 2021, as some decision makers took an overly optimistic view of the security situation in Afghanistan.

Fadi, who arrived in Australia as an accompanied minor, was one such case. Fadi is a member of the persecuted Hazara ethnicity, but the Department and Immigration Assessment Authority decision makers said that he could move to Kabul safely. After the Taliban took power, it became obvious that Fadi could not return safely. Fadi would be subject to the removal powers in the Bill, as his protection claim has been finally determined and refused.

* Name and country changed, but based on RACS cases.

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.

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 are captured by the wide-ranging definitions contained in section 199B(1)(c). This is because transitory people in Australia are currently granted bridging visa Es on departure grounds, while they await third-country resettlement.

Case study: Transitory person

Jafar* arrived in Australia by boat in 2013 seeking asylum. Following his arrival, Jafar was transferred to Manus Island in Papua New Guinea as part of Australia's regional processing arrangements to have his refugee claims assessed. Jafar was assessed as a refugee by the PNG determination process. However he was unable to adequately settle in PNG and was refused resettlement to the US.

Jafar began developing significant mental health issues as a result of his prolonged time on Manus Island and in 2019 was assessed by medical practitioners to require transfer to Australia for ongoing medical treatment.

Jafar was initially held in immigration detention, but later released into the community on a 6-month bridging visa E, granted on departure grounds. Jafar continues to receive medical treatment and every 6 months applies for a new bridging visa E to remain lawful in the community.

Following the announcement of the New Zealand resettlement option, Jafar applied for consideration. Jafar is still waiting to hear on whether he will be approved for transfer in 2024. In that 5 year span, since returned to Australia, Jafar has held approximately 10 Bridging visa E's on departure grounds and continues to await for a permanent solution.

Under this Bill, the Minister will have the power to issue a removal direction to Jafar, even though he has been found to be a refugee within a regional processing arrangement and has suffered through the horrors of offshore processing, while remaining engaged with whatever options were available to him at the time.

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

Power to overturn protection findings

RACS is incredibly concerned by the powers contained in Item 4 of Schedule 2 to 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 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.

In summary, the Bill has significant and concerning implications for refugees and people seeking asylum. In a press conference on 27 March 2024, the responsible Ministers described the proposed legislation as aimed at people who 'have lost every appeal and are not owed protection'. In RACS' opinion, this is simply not true. The Bill, as it stands, poses a serious risk to Australia's ability to abide by its international obligations under the 1951 Refugee Convention, including the core principle of non-refoulement.

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.

Criminalisation of refugees

RACS shares the concerns raised by our colleagues across the sector with respect to the criminalisation of refugees, people seeking asylum, the stateless and those who have been forcibly displaced. The Bill seeks to impose extraordinary penalties¹³ for non-compliance with a Ministerial direction.¹⁴ These penalties are not proportionate and are at odds with the rule of law.

The Bill notes at proposed section 199E(3) that if a person has a ‘reasonable excuse’ for failing to comply, they are not subject to the offence. This term is not defined. The Bill states that it is *not* a reasonable excuse to say that a person has a genuine fear of suffering harm if they were removed to a particular country or suffer other adverse consequences. This unfairly targets refugees and people seeking asylum. It also has implications for children, and for people with significant health conditions or disabilities.

We agree with the description used by the Human Rights Law Centre with respect to the ‘roundabout’ effect of the Bill: as people cannot comply with directions, they face criminal punishment, and go from prison to immigration detention and back again in a miserable, indefinite cycle.

RACS is also deeply concerned by the introduction of mandatory sentencing, requiring a court to imprison a person for 12 months upon conviction.¹⁵ The Senate Standing Committee for the Scrutiny of Bills noted that, in its view, the use of mandatory minimum sentences impedes judicial discretion.¹⁶ The Law Council has said that mandatory sentencing is inconsistent with Australia’s voluntarily assumed international human rights obligations.¹⁷

¹³ Including a minimum 12 months imprisonment and maximum 5 years imprisonment or 300 penalty points, or both.

¹⁴ Proposed section 199E(1)-(2).

¹⁵ Proposed subsection 199E(2).

¹⁶ Senate Standing Committee for the Scrutiny of Bills Page 4

¹⁷ Law Council of Australia, Media Release (15 June 2020) <https://lawcouncil.au/media/media-releases/the-law-council-urges-against-mandatory-minimum-sentences>.

Travel ban

The provisions of the Bill that seek to prevent the entry to Australia of citizens from certain declared nations (called 'concern countries') is reminiscent of the 'Muslim ban' imposed by then President of the United States Donald Trump in 2017. This was widely seen as discriminatory and harmful to the American people and economy,¹⁸ and proposed section 199F of the Bill risks the same criticisms.

The ability of the Minister to determine, by delegated legislation, which countries to 'blacklist' could have serious and broad-reaching consequences on Australia's international reputation.

It will also have serious implications for Australian citizens, permanent residents and visa holders who have immediate and extended family members in 'removal concern countries'. At RACS we have already received calls from members of the communities we work with and support, concerned about the potential impact of this Bill on their ability to reunite with their loved ones.

As well as punishing people in Australia, the travel ban would also punish people who hope to visit, study or work in Australia for the diplomatic failings of Australia their government.

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.

While the Bill does not empower the Minister to issue removal pathway directions to unaccompanied children, such directions can be made to parents who are removal pathway non-citizens, and the powers extent to their children.¹⁹ 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. RACS underscores the submission made by the Kaldor Centre in this regard:

Proposed section 199D(5) could be used to compel parents to sign documents and take other actions on the child's behalf, even if those actions are not in the

¹⁸ Brennan Centre, (2 October 2017) 'Extreme Vetting and the Muslim Ban' <https://www.brennancenter.org/our-work/research-reports/extreme-vetting-and-muslim-ban>.

¹⁹ Proposed section 199D(4).

*child's best interests. The bill contains no other safeguards requiring that the best interests of affected children be considered in any way. As such, the bill fails to give effect to Australia's binding obligations under international law to ensure that the best interests of the child are a primary consideration in any decision concerning the deportation of that child and/or an immediate family member of that child.*²⁰

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: firstly, by through the deportation powers, which contain no carve outs or consideration of family rights; and secondly, through the proposal to ban citizens of certain countries from every coming to Australia irrespective of the family members they may have living here.

Alternative approaches

RACS recommends 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.

RACS also recommends the government commit to reviewing the immigration detention framework with a view to use detention as a last resort, and to better allow detainees access to the help they need, to support them to safely reintegrate into communities.

²⁰ See Kaldor Centre submission, paragraph 14.

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 indefinite detention.