Refugee Council of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

INQUIRY INTO THE MIGRATION AMENDMENT BILL 2024

As the national peak body for people from refugee and asylum seeking backgrounds and the organisations and individuals who work with and support them, the Refugee Council of Australia (RCOA) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee on the *Migration Amendment Bill 2024 [Provisions].*

On 7 November 2024, the Albanese Government introduced a new Bill to Parliament,[1] and issued new regulations under the Migration Act 1958 (Cth)[2] in response to the High Court of Australia's decision in YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs.[3]

The **Refugee Council strongly opposes the proposed Bill**, its broad discretionary powers, including the ability to remove refugees to unknown third countries, the Minister's sweeping powers to overturn protection findings, and the serious risk of sending people to countries where they could face imminent harm and persecution. RCOA is also deeply concerned at the Bill's attempt to reimpose curfews and monitoring conditions, circumventing the High Court's ruling that harmful restrictions on people released from detention are unjustifiable forms of punishment.

The Bill represents a direct breach and reversal of Australia's *non-refoulement* obligations and has significant consequences for people seeking protection. It exposes recognised refugees and people seeking asylum to being returned to places where they may face harm and persecution. The Bill also risks sending refugees to third countries where they might be detained or sent to a country where they face serious harm.

These proposed powers ignore and undermine Australia's international protection obligations and principles of equality before the law. RCOA has listed several areas of immediate and future concern:

1. **Coercion, *refoulement*, and overreach**
2. **Threat of indefinite immigration detention**
3. **Failures and further risks of offshore processing and detention**
4. **Removal of protection findings**
5. **Separation of Australian families**
6. **Reimposing curfew and ankle bracelets for BVR holders**
7. **Unrestricted powers to breach privacy**
8. **Risks of spending taxpayer money on "third country reception arrangements"**
9. **Dangers of returning to a country of origin**
10. **Broad discretionary powers**
11. **Alternatives to this Bill**

[1] Migration Amendment Bill 2024 (Cth).
[2] Migration Amendment (Bridging Visa Conditions) Regulations 2024 (Cth).
[3] [2024] HCA 40. In YBFZ, the High Court ruled that it is unlawful for the Australian government to impose curfew and ankle bracelet visa conditions on people upon their release from immigration detention.

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1 Coercion, refoulement and overreach

1.1 It is important to note that the group targeted by this legislation are people who have already served custodial sentences imposed by Australian courts. While citizens who have finished their sentences are released into the community, people in this group were then re-detained into immigration detention – most for several years – before finally being released when the High Court found their detention unlawful and unconstitutional.

1.2 The proposed legislation raises significant concerns regarding the ability to forcibly remove non-citizens to unspecified or undisclosed third countries. The Bill allows a person to be sent to a third country, even if the government of that third country might detain them or return the person to a home country where they may face serious harm. This could include Regional Processing Countries such as Nauru or other countries where people seeking protection face imminent harm and persecution. It risks indefinite detention for individuals who are unwilling to leave Australia, due to legitimate fears of harm or medical conditions that prevent their participation in the removal process.[4]

1.3 There are no safeguards in the proposed Bill to ensure people will be safe and treated humanely. The Bill relinquishes any liability or responsibility from the Australian government regarding people removed from Australia and their treatment in a third country. This includes protecting the government against accountability for the harm that people will suffer if sent offshore, including Nauru or their countries of origin.[5] Experts and human rights organisations have condemned the clear attempt by the Government to absolve Australia of its international responsibilities and domestic civil liability, calling out the legislation for undermining the High Court ruling and further punishing refugees, people seeking asylum and migrants.[6]

1.4 The Australian Law Reform Commission strongly asserts the principle of equality before the law: "It is a fundamental tenet of the rule of law that no one is above the law. This principle applies not only to ordinary citizens, but to the government, its officers and instrumentalities: their conduct should be ruled by the law…In general, the government, and those acting on its behalf, should be subject to the same liabilities, civil and criminal, as any individual."[7] In the past, such civil liability claims have been a crucial accountability mechanism for those transferred offshore.[8] For example, dozens of refugees have secured court orders to be brought to Australia to access urgent, lifesaving treatment unavailable in Nauru or Manus Island.[9]

Constructive and chain refoulement

1.5 *Non-refoulement* is a central tenet in refugee law: countries cannot *refoule or* return people to countries where they face persecution or irreparable harm. The prohibition of *refoulement* under international law applies to any form of removal or transfer of people, regardless of their status, where there are substantial grounds for believing that the returnee would be at risk of irreparable harm upon return on account of torture, ill-treatment or other serious breaches of human rights obligations. A fundamental element of non-refoulement "is its absolute nature without any exceptions."[10]

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[4] The Minister has the powers re-detain people if they are unwilling to leave to an unspecified third country. See Explanatory Memorandum, Migration Amendment Bill 2024 (Cth), 16.
[5] Migration Amendment Bill 2024 (Cth), Schedule 2.
[6] Refugee Council of Australia, Asylum Seeker Resource Centre, Human Rights Law Centre, and Refugee Advice & Casework Service, Joint Statement – "Government ducks High Court decision with brutal powers to deport people offshore and further punish refugees and people seeking asylum," 8 November, https://www.refugeecouncil.org.au/government-ducks-high-court-decision-deport-people-offshore/.
[7] Australian Law Reform Commission, "Traditional Rights and Freedoms—Encroachments by Commonwealth Laws," March 2016, https://www.alrc.gov.au/wp-content/uploads/2019/08/ir_127ch_17._immunity_from_civil_liability.pdf.
[8] Daniel Ghezelbash and Anna Talbot, "Another rushed migration bill would give the government sweeping powers to deport potentially thousands of people," 18 November 2024, *The Conversation*, https://theconversation.com/another-rushed-migration-bill-would-give-the-government-sweeping-powers-to-deport-potentially-thousands-of-people-243365.
[9] Ibid.
[10] United Nations Office of the High Commissioner for Human Rights, "The principle of non-refoulement under international human rights law," https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf.

1.6 The legislation would not only risk but also permit Australia to *refoule* people or return them to harm. ***Chain refoulement*** is a situation where one state (e.g. Australia) sends people to another state (Nauru, PNG or any other country), and that receiving state returns people to their home countries where they face serious and irreparable harm. Chain refoulement is a serious breach, and Australia would still be responsible for the return to persecution that people face. Unfortunately, Australia has recently participated in chain refoulement when it sent several people from a nation in central Africa who had arrived on the Australian mainland to PNG – the last country they had passed through – and PNG authorities then sent them back to the very country they fled from without adequately assessing their identity or protection needs.

1.7 ***Constructive refoulement*** occurs when a state or country like Australia creates intolerable conditions that compel or coerce refugees or asylum seekers to return to places where they face persecution and serious harm. The "choice" between indefinite detention in Australia and unknown conditions in an undisclosed third country creates the material circumstances for constructive refoulement. See Section 2 for further information about the threat of indefinite detention for people subject to this Bill.

Overreach resulting in a wider impact than officially explained

1.8 The Government's explanation of the new removal powers focuses on a few hundred people released from detention as a result of the NZYQ High Court ruling. What is outlined in the Bill, however, goes beyond those people on Bridging Visa R (BVR) and explicitly includes people on Bridging Visa E (BVE) as subject to being deemed a "removal pathway non-citizens". This includes people in detention who are liable for removal, BVR holders in the community, BVE holders in the community who were granted their visa on the basis that they are making arrangements to depart Australia, as well as other people in the community holding a type of visa that might be prescribed by regulations in future.

1.9 The Bill's creation of a "removal pathway non-citizen" targets individuals who have been denied visas, including protection visas, pushing them towards removal under the threat of deportation to a third country. The Bill also extends to thousands of people living in the community on bridging visas, who have established their lives in Australia. They have families, jobs, and strong communal networks.[11] Further, once people's BVEs expire, they would be exposed to immigration detention and removal to any third country that has agreed to accept them, regardless of issues of persecution or harm.

Impact on people failed by the flawed and unfair Fast Track process

1.10 Other groups subject to this Bill are people seeking asylum who have been granted BVEs on departure grounds. Some may have credible refugee claims which were not properly assessed. A significant number of these individuals have had their claims refused through the flawed 'Fast Track' assessment process.[12] The Fast Track assessment has been criticised in the past by members of the current Government for not providing fair, thorough, or robust assessments for asylum seekers,[13] thereby placing thousands at risk of returning to danger or facing years of detention.

1.11 The Albanese Government has recognised the inherent problems with the Fast Track process and abolished the Immigration Assessment Authority (IAA) via the *Administrative Review Tribunal Bill 2024*, in line with its commitment to improve fairness and efficiency in the asylum process.

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[11] See Refugee Council of Australia, "Economic, civic and social contributions of refugees and humanitarian entrants: A literature review." 2019, https://www.refugeecouncil.org.au/economic-literature-review/.
[12] Refugee Council of Australia. "New legislation puts refugees failed by fast track process at risk." https://www.refugeecouncil.org.au/new-legislation-puts-refugees-failed-by-fast-track-process-at-risk/.
[13] 2021 ALP National Platform, https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf.

1.12 The lack of procedural fairness and safeguards under the IAA has led to a higher refusal rate, putting people seeking asylum with credible refugee claims at risk of being returned to harm. As such, there are strong grounds to believe that those who may be subject to this Bill will include people who have strong claims for protection but have not had a fair process in which to have those claims assessed.

Coercive tactics for people subject to offshore processing living in Australia

1.13 Most of the recognised refugees – also known as "transitory persons" – who were transferred to Australia after detention in Nauru or PNG are BVE holders, with their visa called a "Final Departure Bridging Visa." Often these BVEs are granted on departure grounds, even where people are not medically fit to travel or are not engaged in resettlement processes. Most "transitory people" have been in Australia for several years with close links and deep roots in Australia. We are concerned about reports that the Government has indicated privately that it intends to rely on this Bill to remove people who have been medically transferred from Nauru or PNG to Australia.[14]

1.14 This threat of removal is despite the New Zealand arrangement winding up very soon and the allocation of 450 places likely to be filled if not oversubscribed, leaving almost 700 people without a resettlement pathway. The New Zealand arrangement, like other resettlement arrangements, **must be voluntary**, so any indication of threats or coercion to compel people to take up the offer violates a central tenet of the agreement.

1.15 This Bill threatens these recognised refugees by subjecting them to forced removal to countries where they could face persecution, including countries not signatory to the Refugee Convention or countries where they have been found to be owed protection under Nauruan and/or Papua New Guinean refugee status determination processes. As their protection claims were not assessed in Australia, they do not qualify for the 'protection finding' exception in the Bill and are at risk of *refoulement* to countries where they face serious harm.

1.16 Many of the 900 "transitory people" in Australia have close family members who are Australian citizens or permanent residents, so coercing them to go to these undisclosed third countries not only risks causing them harm but also threatens family unity (see Section 5 on family separation).

People seeking refugee protection in Australia

1.17 There are thousands of people seeking asylum who are seeking ministerial intervention and waiting for the Minister to intervene to allow them to apply for a protection visa due to: 1) being subjected to unfair processes (including the Fast Track process); 2) those who have had changes to their protection claims or new protection claims since their protection visa application was assessed. People in these circumstances are often granted a BVE on departure grounds to regularise their migration status (i.e. grant them a visa so they are not unlawful), often after living in Australia for over a decade, while they await a decision from the Minister. People are required to renew their BVEs (often every 3 to 6 months), and if they become unlawful, they would be exposed to detention and deportation to third countries under the Bill.

1.18 The Bill further impedes personal freedoms and civil liberties of people seeking protection. It effectively coerces individuals to engage unwillingly in the process of return or removal to a third country. Such attempts undermine Labor's 2023 National Platform pledge towards people in detention: "Labor believes that all persons in immigration detention should be treated with humanity and respect for the inherent dignity of the human person."[15]

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[14] Paul Karp, 'We don't want them in Australia at all': Labor wants more powers to re-detain and remove non-citizens to third countries, 7 November 2024, *The Guardian*, https://www.theguardian.com/australia-news/2024/nov/07/labor-immigration-detention-bill-tony-burke-pay-countries-unlawful-citizens
[15] 2023 ALP National Platform, https://www.alp.org.au/media/3569/2023-alp-national-platform.pdf.

1.19 Stripping individual rights and freedoms through coercive and punitive measures undermines democratic freedoms and Australia's commitment to upholding international laws and human rights.

1.20 We note the scrutiny report tabled yesterday, 20 November, by the Parliamentary Joint Committee on Human Rights that raises significant concerns about this Bill. The Parliamentary Committee notes that this legislation "may limit multiple human rights", so the Committee has sought further information from the Minister "in order to assess the compatibility of these measures with these human rights".[16] This response is grounds for, at the very least, a deferral of this legislation while the many concerns about its impact are fully investigated.

2 Indefinite immigration detention

2.1 The landmark NZYQ decision made by the High Court in November 2023 ruled it was unlawful and unconstitutional for the Australian Government to detain people in immigration detention indefinitely. The High Court ruled that it is not permissible for the Australian Government to continue to detain a person where there is no real prospect that they could be removed from Australia.[17] Nevertheless, the new Bill attempts to circumvent the High Court's ruling by coercing individuals to depart to unspecified countries where they could face serious harm, or alternatively be re-detained indefinitely in Australia.

2.2 In May 2024 in the ASF17 case, the High Court dismissed an Iranian man's request to be released from immigration detention, finding that immigration detention is unlawful when a person "voluntarily" refuses to cooperate with their removal. The immediate result of the High Court's decision was that ASF17 – a man who had already been subjected to close to a decade in immigration detention – faced a choice between indefinite detention in Australia or risking persecution in Iran.[18]

2.3 This legislation seeks to use the ASF17 decision erroneously to coerce people who were released from detention as a result of NZYQ because they did not have the option of returning to their home country, because they faced persecution, to either agree to go to an undisclosed third country or, if they refuse to engage in this removal pathway, face indefinite detention in Australia once again. The High Court ruling in NZYQ would no longer apply to them because they now would be "permitted entry" into the undisclosed or unknown third country for "reception arrangements."

2.4 Currently, there is no time limit for detaining a person under Australian law. Without legislated time limits, immigration detention remains indefinite, often with serious consequences for people in detention. There is substantial evidence that indefinite detention severely and negatively affects the physical and mental health of adults and children in detention.[19] Almost all UN Committees, tasked with monitoring the implementation of various conventions, have raised concerns about the impact of mandatory and indefinite immigration detention.[20] The Australian

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[16] Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, Report 10, tabled 20 November 2024 https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/reports/2024/Report_10/Report_10_of_2024.pdf?la=en&hash=3668D076CFE2D6C18160C5465B44E07A11D5E327

[17] Human Rights Law Centre, "Explainer: High Court ruling in NZYQ," 29 November 2023, https://www.hrlc.org.au/reports-news-commentary/2023/11/29/explainer-high-court-ruling-in-nzyq

[18] Human Rights Lax Centre, "Explainer: High Court's decision in ASF17 v Commonwealth," 10 May 2024. https://www.hrlc.org.au/reports-news-commentary/2024/05/10/asf17-high-court.

[19] See for example: Zachary Steel, Derrick Silove, Robert Brooks, Shakeh Momartin, Bushra Alzuhairi, and Ina Susljik, "Impact of immigration detention and temporary protection on the mental health of refugees," (2006) 188(1) *The British Journal of Psychiatry* 58-64; Louise K. Newman, Michael Dudley, Zachary Steel, 'Asylum, Detention, Mental Health in Australia' (2008) 27(3) *Refugee Survey Quarterly* 110-127; Guy J. Coffey, Ida Kaplan, Robyn C. Sampson, Maria Montagna Tucci, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) 70(12) *Social Science & Medicine* 2070-2079; Asylum Seeker Resource Centre (ASRC). "Cruelty by Design: The health crisis in offshore detention," July 2024, https://asrc.org.au/wp-content/uploads/2024/07/ASRCreport_Healthcrisisinoffshoredetention_July2024.pdf.

[20] See opinions adopted on Australia by UN Working Group on Arbitrary Detention: https://www.ohchr.org/EN/Issues/Detention/Pages/OpinionsadoptedbytheWGAD.aspx. For further reading see: Ben Doherty, "UN body condemns Australia for illegal detention of asylum seekers and refugees," 8 July 2018, *The Guardian*, https://www.theguardian.com/world/2018/jul/08/un-body-condemns-australia-for-illegal-detention-of-asylum-seekers-and-refugees.

Human Rights Commission states: "Prolonged detention is a risk factor for mental ill-health, as the negative impacts of immigration detention on mental health tend to worsen as the length of detention increases."[21] This is a major concern given the average time people are held in closed detention facilities. Many refugees and people seeking asylum have had traumatic experiences in their home countries and in transit and are therefore more vulnerable to developing mental health issues.

3 Failures and further risks of offshore processing and detention

3.1 The new Bill has the potential to create an expanded regime of offshore detention and allow the Australian Government to remove BVR holders (and others) to foreign countries like Nauru who may be willing to receive them. The new provisions in the Bill also provide immunity for Commonwealth officers regarding civil claims from deporting people offshore.[22] The irreparable harm inflicted by Australia's offshore policy has been widely condemned internationally, repeatedly coming under criticism from United Nations bodies, national and international human rights organisations.[23]

3.2 There are abundant reports and evidence that the offshore processing has caused irreparable harm to people subject to offshore detention. The violence linked to offshore processing — including medical neglect, sexual abuse, child abuse, inhumane treatment, suicide and murder — has been extensively documented. The Kaldor Centre Policy Brief *Cruel, Costly and Ineffective: the failure of offshore processing in Australia* argued that there were "strong grounds to conclude that the cruelty, suffering, abuse and neglect experienced by which asylum seekers and refugees in Nauru and PNG [is] deliberate and systemic."[24]

3.3 Further, a recently released 2024 study from the University of New South Wales found that asylum seekers detained offshore were at 20-times greater risk of post-traumatic disorder than someone who is not detained or held onshore for less than six months.[25] Earlier this year, the Asylum Seeker Resource Centre (ASRC) reported 100% of the refugees in PNG, and 65% of people detained in Nauru suffered physical health conditions, while 88% of the refugees in PNG, and 22% of people held in Nauru suffered severe mental health conditions.[26] 100% of people detained in Nauru and in PNG reported experiences of trauma relating to persecution, their journey to seek asylum by sea, family separation, medical trauma, experiences of violence in detention with 40% of refugees in PNG suffering chronic suicidal ideation and a history of suicide attempts.[27]

3.4 Australia continues to deny that its international obligations extend to ensuring the health and well-being of people forcibly transferred to Nauru and PNG. Numerous UN treaty bodies have made findings to the contrary.[28] In 2018, UNHCR stated:

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[21] Australian Human Rights Commission, "Inspections of Australia's immigration detention facilities 2019 report," December 2020.
[22] Migration Amendment Bill 2024 (Cth), Schedule 2.
[23] UNHCR, "UNHCR statement on 8 years of offshore asylum policy," 19 July 2021; Human Rights Watch, "Australia Universal Periodic Review Outcome Statement," 2021; Human Rights Law Centre, Kaldor Centre for International Refugee Law, Refugee Council of Australia, "Torture and cruel treatment in Australia's refugee protection and immigration detention regimes," 3 October 2022. Refugee Council of Australia and Amnesty International, "Until when: The forgotten men of Manus Island," November 2018; UNHCR, "UNHCR urges Australia to evacuate off-shore facilities as health situation deteriorates." 2018, https://www.unhcr.org/au/news/briefing-notes/unhcr-urges-australia-evacuate-shore-facilities-health-situation-deteriorates.
[24] Madeline Gleeson and Natasha Yacoub, *Cruel, Costly and Ineffective: the failure of offshore processing in Australia, August 2021, Kaldor Centre for International Refugee Law,* https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf
[25] Philippa Specker et al. "Investigating whether offshore immigration detention and processing are associated with an increased likelihood of psychological disorders."
[26] ASRC, "Cruelty by Design."
[27] Ibid.
[28] Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Australia, UN Doc E/C.12/AUS/CO/5 (11 July 2017) [18]; Human Rights Committee, Concluding observations on the sixth periodic report of Australia, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [35]; Committee on the Elimination of Racial Discrimination, Concluding observations on the eighteenth to twentieth periodic reports of Australia, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) [30]; Committee on the Elimination of Discrimination Against Women, Concluding observations on the eighth periodic report of Australia, UN Doc CEDAW/C/AUS/CO/8 (20 July 2018). See also: Madeline Gleeson and Natasha Yacoub, "Cruel, costly and ineffective: The failure of offshore processing in Australia," Kaldor Centre for International Refugee Law, August 2021) 12.

> *Australia remains responsible under International Law for those who have sought its protection. In the context of deteriorating health and reduced medical care, Australia must now act to prevent further tragedy to those forcibly transferred under its so-called 'offshore processing' policy.*[29]

3.5 In its December 2022 report on Australia, the United Nations Committee Against Torture reiterated that Australia maintained responsibility for people transferred to PNG, "…because, inter alia, they were transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice."[30]

3.6 The deviation of responsibility to third country arrangements and processing should be avoided at all costs, as it has already resulted in deaths, violence, abuse, medical neglect and life-long psychological and physical trauma. It should not be repeated under any circumstances.

4 Removal of protection findings

4.1 Due to the broad definition of "removal pathway non-citizen",[31] the Bill has the potential to give the Minister the power to overturn the 'protection finding' of a Protection visa holder (who is an Australian permanent resident), and proceed to deport them from Australia.[32] This applies to people defined as "removal pathway non-citizens", which includes Bridging Visa R holders, certain Bridging Visa E holders, and other people in the community holding any visa prescribed by regulations (which is currently undefined and could impact thousands of people).[33] Put simply, the Bill will give the Minister – and future Ministers – the power to revisit refugee determinations in relation to anyone in Australia in order to eliminate barriers to their removal.[34]

4.2 There is potential that these new powers will be used to send those with strong claims for refugee protection back to the hands of their persecutors. The proposed power allows the Government to revisit 'protection findings' made in relation to all refugees. While initially the powers would be limited to people on certain Bridging visas, they ***could be expanded at any time to people holding other visas***. As the Human Rights Law Centre has voiced, "Refugee status should be durable and lasting, not transient or open to reversal at the Government's convenience."[35]

5 Separation of Australian families

5.1 The Bill poses a significant threat to family unity, particularly for people from refugee and asylum seeking backgrounds. Parents or guardians who are "removal pathway non-citizens" would be subject either to removal from Australia to unknown third countries or subject to indefinite immigration detention. **It is unclear if these removal requirements would extend to their children**, leading to situations where families are forcibly separated as a result of compliance with the removal process.

5.2 As the Kaldor Centre for International Law has previously noted such bills "…contain no other safeguards requiring that the best interests of affected children be considered in any way."[36] Like the earlier *Removal and other Measures Bill*, the newly proposed legislation "fails to give effect to Australia's binding obligations under international law to ensure that the best interests

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[29] "UNHCR urges Australia to evacuate offshore facilities as health situation deteriorates." 2018.
[30] United Nations Committee Against Torture, Concluding observations on the sixth periodic report of Australia, 2022, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FAUS%2FCO%2F6&Lang=en
[31] Migration Amendment Bill 2024 (Cth), Schedule 1, Item 4.
[32] Proposed section 197D(1)(a)(ii)
[33] Proposed section 197D(1)
[34] Human Rights Law Centre, "Explainer: Labor's brutal Deportation and Surveillance Bill," 8 November 2024, https://www.hrlc.org.au/reports-news-commentary/2024/11/8/deportation-surveillance.
[35] Ibid.
[36] Kaldor Centre, Migration Amendment (Removal and Other Measures) Bill 2024 Submission 11, https://www.unsw.edu.au/content/dam/pdfs/law/kaldor/resources/2024-04-submissions/2024-04-migration-amendment-removal-and-other-measures.pdf,

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."[37]

5.3 For BVR holders, many of whom previously held permanent residence, they would face indefinite separation from the Australian family if they were coerced to go to unknown third countries. If the Bill is passed, people with expired BVEs would be exposed to detention and could be subject to removal to an undisclosed third country. Individuals would be permanently separated from their parents, partners and children and would be at risk of serious harm upon being removed to a third country which could detain them, despite having refugee protection needs in Australia.

5.4 Many people seeking asylum also have partners, children and close relatives in Australia. They have built strong connections and relationships with their local communities through work, education, cultural gatherings, volunteering and civil society commitments. While the intention of the legislation is directed towards the NZYQ cohort, the Bill's powers can be expanded to re-detain and remove individuals on other bridging visas and separate them from their families. This will have long-lasting impacts on local communities and social cohesion. Communities will feel marginalised and discriminated against, losing faith in Australia's immigration system and multicultural ethos.

6 Reimposing curfew and ankle bracelets for BVR holders

6.1 On 6 November 2024, the High Court ruled that forcing people released from immigration detention to wear ankle bracelets and live under curfews was unconstitutional.[38] The High Court found the measures, passed by Parliament following the NZYQ High Court decision last year, were punitive and infringed upon the separation of powers in Australia's constitution. The Court determined the curfew and ankle bracelet conditions are punitive because they infringe on a person's liberty and bodily integrity.[39]

6.2 The new Bill aims to circumvent the High Court's ruling by introducing a new test to reimpose curfew and ankle bracelets for BVR holders. This test requires the Minister to impose certain conditions, including the curfew and ankle bracelet conditions, on BVR holders if the Minister is satisfied on the balance of probabilities that: 1) the person poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and 2) the imposition of the conditions is reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the Australian community by addressing that risk.[40]

6.3 It is important to note that the individuals impacted by this decision who have been convicted of offences have already completed the sentences determined by courts and, in many cases, have served considerable additional time in immigration detention.

6.4 While the new test means that curfews and ankle bracelets will no longer be automatically applied to all BVR holders and can only be imposed in more limited circumstances, it attempts to permit the Government to continue imposing punitive conditions, which the High Court ruled were unlawful in YBFZ.

6.5 Given state, territory and federal measures already exist for people exiting correctional services who are perceived to continue to pose a safety risk, it remains unclear why this group are somehow considered an even greater risk requiring additional measures, imposed by the Executive, outside the regular judicial process. Again, this unnecessary Executive overreach could face further judicial challenges.

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[37] Ibid.
[38] High Court of Australia, YBFZ v MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS & ANOR, 6 November 2024, https://www.hcourt.gov.au/assets/publications/judgment-summaries/2024/hca-40-2024-11-06.pdf.
[39] YBFZ, [12], [87].
[40] Proposed section 76E(4)(b); Migration Regulations 1994 (Cth), Schedule 2, cl 070.612A(1).

7 Unrestricted powers to breach privacy

7.1 The Bill provides the Australian Government sweeping powers to collect and share personal information with foreign governments and other unspecified persons and bodies in Australia.

7.2 The Bill permits the Australian Government to collect private information which can be used or disclosed "to any person or body."[41] This includes criminal history information that would be protected from disclosure such as spent convictions or charges that have been dropped.[42] These powers also seek to validate unlawful sharing of information that may have occurred in the past.[43] This raises concerns if there has been any unlawfully disclosed personal or criminal history information in the past, and the potential to avoid accountability for those actions.[44]

7.3 The Bill allows for the disclosure of personal information about a current or former removal pathway non-citizen to the government of a foreign country for the purpose of attempting to remove the person from Australia or to subject them to a third country reception arrangement.[45] The Bill allows the Government to disclose information that may put a person at risk of persecution in the third country to which they are being removed, for example information pertaining to religion or sexual orientation.[46]

7.4 The Human Rights Law Centre notes in their submission that officers of the Department have a responsibility not to disclose personal information in certain circumstances.[47] For example, any information that is supplied by a law enforcement or intelligence agency under the condition of confidentiality must not be disclosed.[48] Under the *Public Service Regulations 2023*, Australian public servants are subject to a broad duty not to disclose information obtained in the course of their employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government.[49] Breaches by Commonwealth officers of this nature constitute a criminal offence, punishable by imprisonment of up to 2 years.[50]

8 Risks of wasting taxpayer money on "third country reception arrangements"

8.1 The Bill allows the Australian Government to spend taxpayer money and enter into "third country reception arrangements." The Bill states the Government would ensure that "any such arrangements are consistent with Australia's *non-refoulement* obligations," however, nothing in the Bill requires the Government to consider the safety and welfare of a person once they are removed to a third country pursuant to "reception arrangements."[51]

8.2 This and future Australian Governments could pay third countries to warehouse or otherwise deal with people who were deemed "removal pathway non-citizens". This includes people who have been living in the community and contributing to society after years in detention, who could be shipped to Nauru or elsewhere, where they can be re-detained.

8.3 Such financial arrangements with third countries carry substantial risks, as evidenced by the investigation the Australian Government launched last year[52] into allegations that hundreds of

[41] Migration Act proposed s 501M.
[42] Migration Amendment Bill 2024 (Cth), Schedule 3, Item 4.
[43] Migration Act proposed s 501M(4).
[44] Human Rights Law Centre, Submission to the inquiry into the Migration Amendment Bill 2024 (Cth).
[45] Migration Act proposed s 198AAA.
[46] Human Rights Law Centre, Submission to the inquiry into the Migration Amendment Bill 2024 (Cth).
[47] Ibid.
[48] Ibid.
[49] Public Service Regulations 2023 (Cth) s 7.
[50] Criminal Code Act 1995 (Cth), Schedule, cl 122.4.
[51] Human Rights Law Centre, "Explainer: Labor's brutal Deportation and Surveillance Bill."
[52] Paul Karp, "Labor launches inquiry into home affairs procurement after 'serious issues' with Nauru contracts," *The Guardian*, 31 July 2023, https://www.theguardian.com/australia-news/2023/jul/31/labor-nauru-contracts-inquiry-clare-o-neil.

millions of dollars of taxpayers' money were spent on suspect offshore detention payments to politicians and officials in Nauru and PNG.[53]

8.4 The current offshore processing system is extraordinarily expensive and a huge cost for Australian taxpayers. The Government has allocated $604.4 million for offshore processing in 2024-25, an increase of $40.6 million on actual spending in 2023-24. The total allocation for offshore processing since the policy was reintroduced in 2012 is now **$12.8 billion**.

9 Dangers of returning to country of origin

9.1 Under the new Bill, recognised refugees who have had their visa cancelled on character grounds, people who have been subject to the Fast Track process, and people who have been subject to offshore processing but medically evacuated to Australia are all at risk of being coerced into returning to their countries of origin where they fear persecution, torture and death. Conditions relating to human rights and democracy have deteriorated in many main source countries for people rejected years ago under the fast track process, including Iran, Pakistan, Bangladesh, Afghanistan, Myanmar, Somalia, Sudan and Syria.

9.2 Sri Lanka is the largest source country for people whose applications were rejected under the Australia's Fast Track process. The Office of the United Nations High Commissioner for Human Rights (OHCHR) recently released a comprehensive report on Sri Lanka detailing the ongoing violations and threats to basic freedoms that people – especially Tamils – face in Sri Lanka.[54] Authorities have continued to use the corrupt *Prevention of Terrorism Act* to arrest and detain people, primarily Tamils commemorating their family members who died in the civil war. In just over a year, more than 1,340 people were subject to arbitrary arrest and detention, with 26 people dying in custody and 21 people subject to extrajudicial killings. In light of the human rights situation in Sri Lanka, the UN Human Rights Council recommends that UN member States *review asylum measures with respect to Sri Lankan nationals to protect those facing reprisals and refrain from any refoulement in cases that present a real risk of torture or other serious human rights violations.*

9.3 A significant number of Iranian nationals in Australia have undergone the flawed Fast Track assessment. Approximately 3,000 Iranians, including stateless Feyli (Faili) Kurds from Iran, went through the Fast Track process with approximately 2,500 of them being denied protection visas. There are 400 people from Iran who are still awaiting decisions. Country information from the Australian Government and international human rights organisations highlight Iran's poor human rights record, persecution of minorities, cruel and inhumane treatment of political dissidents, LGBTQI+ activists, women and children.[55] In 2022, the death of 22-year-old woman Mahsa Amini in custody, who was arrested for allegedly not wearing the hijab (headscarf) properly, triggered nation-wide protests.[56] An independent international fact-finding mission has detailed the extent of the Iranian government's crackdown on the protests, including use of arbitrary arrests, enforced disappearances, unfair trials, torture and punishment – including death – of protestors, lawyers, journalists, teachers, students and women's rights defenders. This included the execution of nine young men in December 2022.[57] Further, DFAT's 2023 Country Information Report maintains that Iran is not a signatory to numerous international and human rights conventions.[58]

[53] Sydney Morning Herald, "Home Truths," https://www.smh.com.au/politics/federal/home-truths-20230725-p5dr4q.html
[54] The Office of the United Nations High Commissioner for Human Rights (OHCHR), "Situation of human rights in Sri Lanka," 22 August 2024, https://www.ohchr.org/en/documents/reports/ahrc5719-situation-human-rights-sri-lanka-comprehensive-report-united-nations.
[55] DFAT Country Information Report Iran, 24 July 2023. https://www.dfat.gov.au/sites/default/files/country-information-report-iran.pdf; Amnesty International, Iran, 2022. Human Rights Watch, Iran Events of 2022.
[56] UN News, "Iran: Harassment, reprisals continue for Mahsa Amini's family," September 2023, https://news.un.org/en/story/2023/09/1140777.
[57] UN General Assembly, Report of the independent international fact-finding mission on the Islamic Republic of Iran, 26 February–5 April 2024, https://documents.un.org/doc/undoc/gen/g24/008/67/pdf/g2400867.pdf?token=f0xQJBYdkbZZ2gnfWP&fe=true.
[58] DFAT Country Information Report Iran, 24 July 2023. https://www.dfat.gov.au/sites/default/files/country-information-report-iran.pdf

9.4 As highlighted in Section 1, this Bills significantly increases the risk of Australia participating in ***chain refoulement*** and ***constructive refoulement***, resulting in refugees and people in need of protection being returned to places where they will face irreparable harm.

10 Broad discretionary powers

Unchecked, unbridled power

10.1 The Bill empowers a future Minister to expand the classes of visas for individuals deemed to be a "removal pathway non-citizen" through ministerial instruments. This provision opens the door for an extensive expansion of executive power over immigration decisions, enabling future ministers to effectively manipulate visa categories and criteria to suit policy agendas or political motives. Such expansive powers, vested in a single office without sufficient oversight, risk being abused, particularly in ways that may undermine the fairness and integrity of the immigration system.

10.2 The potential for these powers to be expanded and applied in an arbitrary or politically motivated manner poses significant risks to the rights and freedoms of individuals seeking refuge or migration opportunities in Australia. The lack of safeguards to prevent such abuses represents a departure from democratic principles and the rule of law, underscoring the need for a careful re-evaluation of the Bill's provisions.

10.3 Even if the Government does not intend to use this power, the current Bill would create a law that permits this abuse of power. If a future Minister or future Government were to expand upon who would be considered a "removal pathway non-citizen" that is applied in an arbitrary or politically motivated manner, then the responsibility falls not only on that future Minister but also on this current Parliament if this legislation is passed.

11 Alternatives to this Bill

Rehabilitation services

11.1 The group being targeted by this legislation are people who had their permanent or temporary visas cancelled, and for those that have criminal convictions, they have completed the custodial sentences handed down by the courts. While citizens who have finished their sentences are released into the community, people in this group were then re-detained into immigration detention – most for several years – before finally being released when the High Court found their detention unlawful and unconstitutional.

11.2 People have been released on to temporary Bridging Visas (BVRs) and have begun to try to rebuild their lives in Australia. Many have spent most of their lives in Australia, with several people having spent their childhood and formative years in our communities. Many have close family members who are Australian citizens and permanent residents.

11.3 In recognition of the unique needs of people who have been held in institutional custody, there have been recently developed rehabilitation and reintegration support services for some people on BVRs. These rehabilitation services mirror the support offered to people when they transition from prison to the community and include healthcare treatment, employment and training support, and accommodation assistance. Rehabilitation support focuses on preventing re-offending and providing support to reintegrate into society.

11.4 Rehabilitation and support to rebuild their lives is a better approach than the adversarial, coercive and detention-minded approach currently being considered. These rehabilitation services are essential for others making the transition to living in the community again, so focusing effort on rehabilitation should be the priority.

Tailored support leads to engagement

11.5 The Refugee Council recognises that returns are part of a well-functioning asylum system. However, the approach taken in this Bill – forcibly deporting individuals to unspecified third countries – will not result in the outcomes the Australian Government desires. Adversarial, coercive, and a detention or prison-focused system will not facilitate voluntary returns. The more likely scenario is that people will again end up in indefinite detention, with a further deterioration of their trust in the process and willingness to engage.

11.6 In addition to the rehabilitation support for people who have spent years in immigration detention and other restrictive environments, there is a better approach available and one that the Australian Government had previously been a notable leader in. Tailored, individual support to people during and after their immigration process can help people to facilitate their decision-making if they are not found to be refugees or if they no longer hold a visa. This approach was heralded internationally and was known as the Community Care Pilot and subsequent Community Assistance Scheme (and currently Band 5 of the Status Resolution Support Service, SRSS). Engagement with SRSS would provide additional oversight to ensure that lapsed bridging visas do not occur or are remedied in a timely manner, reducing the group of people who remain without a visa.

11.7 The services available in these programs include intensive case management, accommodation support, access to healthcare and psychological counselling, immigration information and counselling services, and legal assistance via a separate program. This early intervention, tailored approach was first introduced under the Howard Coalition Government in response to recommendations made from the Palmer and Comrie Reports.[59]

11.8 The International Detention Coalition's analysis of the government's data found that this case management pilot with vulnerable migrants achieved a 93% compliance rate. In addition, 60% of those not granted a visa to remain in the country departed independently despite long periods in the country and significant barriers to their return.[60] The then government agreed that "[d]rawing on appropriate services and focusing on addressing barriers is proving a successful mix for achieving sustainable immigration outcomes."[61]

11.9 Sadly, while the program still exists, it has not been used properly and it is nearly impossible for people in need to get access to it. For example, last year, only 178 people were on Band 5 of the SRSS Program.[62] A concerted effort to expand eligibility and access to this program and use a positive, tailored approach to repatriation where available must be considered instead of this disastrous Bill.

11.10 The advantage of this approach would be to examine what the obstacles are for the people that require return. These barriers may include the lack of a fair assessment of the protection claims, worry about their financial situation upon return, or the risk of family separation – and the best interests of the child should form a key consideration. A positive approach is also more likely to counter the oppositional frame of mind that many people have in relation to their interactions with the government: rebuilding trust in order to support people to make clear decisions about their lives will not happen under threat of indefinite detention, either here or in a third country.

[59] See https://www.homeaffairs.gov.au/reports-and-pubs/files/case-management.pdf.
[60] International Detention Coalition, 2015, https://idcoalition.org/wp-content/uploads/2024/01/There-Are-Alternatives-2015.pdf.
[61] Department of Immigration and Citizenship Annual Report 2009-2010, p. 168.
[62] See answers to Question on notice no. 762, Portfolio question number: BE23-762, 2023-24 Budget Estimates, as at 31 March 2023.

11.11 It is paramount that the Australian Government refrain from using coercive tactics to facilitate repatriation or involuntary returns of people whose protection claims have not been fairly assessed.[63] UNHCR has previously made it clear that Australia should not coerce vulnerable people to return to harm.[64] For people not found to be refugees, more humane, community-based alternatives are used to engage and inform individuals of their removal options. Through casework management, maintaining contact with families, and the provision of adequate health and legal support, individuals will be better placed to make informed decisions about their futures. Repatriation needs to be undertaken in safety and dignity in accordance with international law and the wilful consent of individuals. Using coercive measures will only bring further harm to individuals, cause distrust and halt any constructive engagement.

Recommendation

The Refugee Council of Australia recommends that the Migration Amendment Bill 2024 be rejected in its entirety and that the Committee recommend that this Bill not be passed.

[63] Refugee Council of Australia, "Refugee Response Index (RRI) Australia Review," February 2024, https://www.refugeecouncil.org.au/rri-towards-durable-solutions/.
[64] UNHCR, "Australia should not coerce vulnerable people to return to harm," August 2017. https://www.unhcr.org/news/news-releases/australia-should-not-coerce-vulnerable-people-return-harm