Immigration Advice and Rights Centre

12 April 2024

Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Via email: legcon.sen@aph.gov.au

Dear Committee Secretary,

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

1. The Immigration Advice and Rights Centre (**IARC**) is a specialist community legal centre that has been operating for over 35 years and provides free immigration advice, assistance and education to people experiencing vulnerability. IARC is the only community legal centre in Australia that provides free advice and assistance on all immigration, refugee and citizenship matters.

2. We refer to the above inquiry and thank you for the opportunity to comment on the Bill. We note the short consultation period and regret that this impacts our ability to engage in depth with the contents of the Bill.

3. In summary, IARC does not support the Bill and it is our view that the Committee should recommend that the Bill not be passed. The Bill significantly expands Ministerial powers that appear to avoid necessary checks and balances and may force people to facilitate their own removal from Australia to a country where they could be harmed or have previously been subject to persecution. It also risks the permanent separation of families and seeks to significantly punish people who have already endured significant suffering both overseas and in Australia.

4. This submission is informed by our history as practitioners representing some of the most vulnerable people in our community navigating the Australian migration system. Due to the limited time provided to respond to the Bill, this submission will not comment on every proposed amendment but will focus on four key areas:

    a. The removal pathway direction.
    b. The creation of an offence for non-compliance with a removal pathway direction.
    c. Designation of removal concern countries and the implications for possible visa applicants from these countries.
    d. Extension of power for the Minister to reverse protection findings.

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The removal pathway direction

5. The Bill introduces an extraordinarily broad power allowing the Minister to require a "removal pathway non-citizen" to assist with their own deportation from Australia (see 199B, 199C and 199D of the Bill).

6. A "removal pathway non-citizen" under s 199B of the Bill includes:

    a. non-citizens who do not hold a visa and who are required to be removed from Australia under s 198 of the Migration Act 1958 (Cth) (**Act**) as soon as reasonably practicable;
    b. holders of a Bridging "R" Visa (**BVR**);
    c. all holders of a Bridging "E" Visa (**BVE**) if the visa was granted on the basis that the person was making, or subject to, acceptable arrangements to depart Australia (i.e. on departure grounds); and
    d. any other visa holder whose visa is prescribed in the *Migration Regulations 1994* (**Regulations**).

7. Section 199C of the Bill sets out the Minister's direction powers, including that the Minister can direct a person to, amongst other things:

    a. Apply for a passport or travel document;
    b. Attend interviews or appointments;
    c. Complete and sign documents.

8. The circumstances in which the Minister must not exercise this power are set out in s 199D of the Bill and include where people have not had a protection visa application "finally determined" and are children (i.e. under the age of 18). The Minister must also not direct someone to discontinue proceedings.

The broad scope of people possibly captured by the Bill

9. The Bill has the potential to allow the Minister to direct any visa holder to facilitate their removal from Australia without appropriate checks and balances (see s 199B(1)(d) of the Bill). This may mean individuals on substantive visas, including skilled and family visas, could be directed to facilitate their deportation from Australia at the request of the Minister. This direction does not require the Minister to take into account the individual circumstances of the person, including their health, age or connection to Australia.

10. We further note that victim-survivors of domestic, family and sexual violence are often granted BVEs on departure grounds as there are no other viable visa options available to remain in Australia (see Case Study **below**). These victim-survivors often have Australian citizen children who are unable to depart Australia due to the children being placed on a "no fly list" by the perpetrator. The Bill appears to also capture this cohort of individuals (see s 199B(1)(c) of the Bill), who may face having to facilitate their own deportation from Australia and likely permanent separation from their Australian citizen children.

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Case study – BVE holder - DFSV

Jeanne arrived in Australia on a Student visa to study engineering at an Australian university. During that time, she met George, an Australian man. After a few years together, George promised they would save for a Partner visa so she could live here permanently with him.

Unfortunately, George would often spend the money instead of saving for the Partner visa. He would also come home intoxicated and threaten her with violence. The violence escalated when she became pregnant and after the baby was born.

One night, when George was out, Jeanne left the house with their child seeking safety. She has been living in temporary accommodation since and has not been able to attend university while she is escaping an unsafe relationship. She has also found that George has put their child on a "no fly list" so that she cannot leave Australia with their child.

Jeanne's Student visa is about to expire, and she is afraid that she will be removed from Australia and separated from her Australian citizen child.

The women's refuge she is staying put her in contact with IARC for advice. Unfortunately, she did not have any viable visa options to remain in Australia because the application for a Partner visa was never made and her child is too young to sponsor her for a Parent visa. She is also not eligible for a Temporary Graduate visa as she had stopped studying due to DFSV and could not afford to enrol in another course to be eligible for another Student visa.

Jeanne is now on a Bridging (General) visa E (BVE), granted on departure grounds to remain in Australia with her child.

Broad scope of direction may lead people to unwittingly committing offences with significant penalties

11. The Bill contains a broad power to allow the Minister to direct someone to take any action to facilitate their deportation from Australia. In particular, s 199C(2) of the Bill states that the Minister may "direct the non-citizen **to do a thing, or not do a thing**, if the Minister is satisfied that the non-citizen doing, or not doing, the thing is reasonably necessary" to facilitate removal or determine that there is a real prospect of removal from Australia.

12. Unfortunately, there is no avenue for the person challenge this direction even if it may be impossible for the person to follow (i.e. they are unable to attend a place because it is too far or expensive to travel within the timeframe imposed). This may mean that a person falls foul of s 199E of the Bill, resulting in significant penalties (see below).

Insufficient protections available to "removal pathway non-citizens"

13. We note that the scope of the removal pathway directions that the Minister may give are extremely broad (see s 199C(2) of the Bill) and that the alleged protections built into the Bill are insufficient.

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14. The protections set out in s 199D of the Bill do not apply to people who have commenced judicial review proceedings where it is possible that a decision maker has incorrectly applied the law relating to a non-citizen's claims for protection (e.g. judicial review of a protection visa application refusal). Whilst the Bill purports to also protect children (see s 199D(4)), the Bill also allows the Minister to direct parents or guardians to facilitate the removal of a child, without the need to take into account the child's interests.

Creation of an offence for non-compliance with a removal pathway direction

15. The proposed section 199E would establish a new criminal offence of refusing or failing to comply with a removal pathway direction, implementing a mandatory sentence of between one and five years, a $93,900 fine, or both.

16. It is our view that the creation of an offence of mere non-cooperation unfairly targets a small group of non-citizens, and the mandatory penalties for non-compliance are disproportionate and excessively punitive.

17. The Law Council of Australia supports this view, stating 'the proportionality of prescribing a maximum sentence of five years imprisonment for failing to comply with such a direction, noting that the failure may involve relatively minor conduct which is not harmful or dangerous.' The Law Council of Australia President, Mr Greg McIntyre SC further states:

> "As we have warned before, mandatory sentencing results in harsh and unjust punishments because it tries to apply a theoretical blanket standard to the real life, complex circumstances that surround each criminal act."[1]

18. We refer to the submission from the Andrew and Renata Kaldor Centre for International Refugee Law and concur:

> "In our view, there are considerable risks to managing international relations through punitive unilateral measures. The issue of international cooperation concerning the return of nationals to their home country is a diplomatic one that should be negotiated in good faith between political leaders."[2]

19. The imposition of a mandatory sentencing is also extremely concerning as it has been shown to not reduce crime and undermines the independence of the judiciary leading to unjust outcomes. It is also often discriminatory in practice.[3]

[1] Mr Greg McIntyre SC, *Removal Bill causes rule of law and human rights concerns* (26 March 2024) https://lawcouncil.au/media/media-releases/removal-bill-causes-rule-of-law-and-human-rights-concerns
[2] The Andrew and Renata Caldor Centre for International Refugee Law, 'Migration Amendment (Removal and Other Measures) Bill 2024 Submission 11' dated 9 April 2024 [30].
[3] Australian Labor Party, ALP National Platform (2023), [46]

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Designation of removal concern countries and the implications for visa applications from these countries

20. Sections 199F and 199G of the Bill allow the Minister to impose a travel ban on entire countries by preventing entry to Australia based on a person's nationality.

21. We acknowledge that under the proposed amendments, dual nationals, spouses, de facto partners, dependent children, parents of children under the age of 18 and applicants for offshore humanitarian visas would be permitted to make a valid application for a visa from a "removal concern country", and the possibility of a waiver exists for other applicants.

22. Notwithstanding the above, it remains our view that the proposed travel ban will result in the permanent separation of families and friends. The Bill will have severe consequences for Australian citizens and permanent residents, as extended family members and friends from 'removal concern countries' will be denied the possibility of reuniting in Australia and even attending major life milestones such as weddings, funerals and the birth of children.

23. The proposed travel ban may also exclude essential investment and talent from Australia, via skilled visa subclasses. The proposed amendments are overall at odds with Australia being an attractive skilled migrant destination.

24. The Coalition inquiry into Australia's skilled migration program, stated in the Interim Report:

> The Australian Government recognises the importance of attracting global talents and the brightest skilled migrants as it relates to facilitating economic growth and ensuring a more prosperous Australia.[4]

25. This approach was supported by the Australian Government's 2023 Migration Strategy, which states:

> To ensure Australia is attracting the most innovative and productive migrants through the skilled migration program, we need a system that encourages rather than prevents workers in emerging occupations to join the Australian labour force.[5]

26. This travel ban is inconsistent with these aims and will act as a deterrent to people considering contributing their skills and capital to Australia, as it presents the possibility, however remote, that their home country could be included in a travel ban list in the future.

27. Lastly, a discriminatory regime will be an international embarrassment, analogous to the ban introduced by President Trump in 2017. That ban was widely criticised as discriminatory, sparked major demonstrations, chaos at airports and was subject to extensive litigation. In the Proclamation on Ending Discriminatory Bans on Entry to The United States, President Biden stated:

> Beyond contravening our values, these Executive Orders and Proclamations have undermined our national security. They have jeopardized our global network of

[4] The Joint Standing Committee on Migration, Interim Report of the Inquiry into Australia's Skilled Migration Program, (March 2021) https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/SkilledMigrationProgram/Report
[5] Commonwealth of Australia, Migration Strategy 2023 p. 44

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alliances and partnerships and are a moral blight that has dulled the power of our example the world over. And they have separated loved ones, inflicting pain that will ripple for years to come. They are just plain wrong.[6]

Extension of power for the Minister to reverse protection findings

28. The Bill proposes a mechanism to reverse existing protection findings through Schedule 2 of the Bill and the exclusion in s 199D(1) of the Bill. This could mean that people who have previously been found to be refugees and have been residing in the Australian community for years could face the prospect of facilitating their own deportation from Australia if the Minister determines that the person is no longer owed protection. It should also be noted here that this power could also extend to people who are lawfully living in the Australian community (i.e. hold a valid visa in Australia).

29. The mechanism in which the Minister may determine that a person is no longer owed protection is opaque. It also does not require the Minister to consider matters that would normally be relevant including the extent of connections to the Australian community and past persecutory conduct and lack of family ties in their home country. It also fundamentally undermines Australia's obligation to provide refugee with durable and permanent protection.

30. We welcome any opportunity to discuss our submissions further with the Committee.

Yours sincerely,
IMMIGRATION ADVICE AND RIGHTS CENTRE Inc

Joshua Strutt
CEO and Principal Solicitor

Stephanie Lee
Senior Solicitor

[6] President Joseph R Biden Jr, Proclamation on Ending Discriminatory Bans on Entry to The United States, (21 January 2021) https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/