Human
Rights
Law
Centre

Criminalise and punish: A failed response to indefinite detention

Submission on the Migration Amendment (Removal and Other Measures) Bill 2024

10 April 2024

Human
Rights
Law
Centre

Laura John
Senior Lawyer

Joel Harriss
Secondee Lawyer

Sanmati Verma
Acting Legal Director

Human Rights Law Centre
Level 17, 461 Bourke Street
Melbourne VIC 3000

W: www.hrlc.org.au

Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

Follow us at http://twitter.com/rightsagenda

Join us at www.facebook.com/HumanRightsLawCentreHRLC/

Contents

A. Summary 4

B. Coercing visa holders to depart 4

C. Disproportionate criminalisation 6

D. Inadequate protections for refugees 9

E. Discriminatory travel ban 11

F. Cruel separation of families 12

G. Dangerous expansion of ministerial powers 13

A. Summary

1. The Human Rights Law Centre welcomes the opportunity to contribute to the Committee's inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024 (**Bill**).

2. The Bill is the latest draconian measure designed to coerce people who have already been unlawfully subject to indefinite immigration detention to leave Australia. It goes significantly further than existing measures, extending harsh and punitive restrictions on the basis of visa status or nationality.

3. The new proposed power to direct a person to facilitate their own deportation is virtually unlimited in both the visa holders who could be subjected to it, and the directions that could be issued. With the proposed introduction of a criminal offence for a failure to comply with a direction, the Bill continues an alarming trend of using the migration system to criminalise people.

4. Concerningly, the Bill places people seeking asylum and refugees at risk of being removed to countries where they face persecution or significant harm, in breach of Australia's international obligations. The limited exceptions to the Minister's new powers for protection visa applicants and those with protection findings are weak, particularly given the extraordinary power that is proposed to reverse a finding that a person is owed protection – paving the way for their return to the country from which they fled. People who have been failed by the flawed fast-track system are also exposed to this risk of *refoulement*.

5. In an unprecedented attempt to prevent people from ever entering Australia, the Bill gives the Minister for Home Affairs the unilateral power to impose a travel ban on entire countries, excluding people on the basis of their nationality. Under the ban, the vast majority of people from a blacklisted country – including family members, friends and workers – will be locked out of Australia. That the Bill proposes to blatantly legislate this Trump-style discrimination is deeply concerning.

6. The Bill exposes people to serious harm, separates families, infringes fundamental rights, discriminates against people based on nationality and dangerously expands ministerial powers. It should not be passed.

Recommendations

1	The Committee should recommend that the Bill not be passed

B. Coercing visa holders to depart

7. The Bill confers an extraordinary power on the Minister to require a "removal pathway non-citizen" to assist with their own deportation from Australia.[1] It is deliberately designed to coerce people to leave Australia, regardless of their age, health, connection to Australia or individual circumstances.

Any visa holder could be subject to a "removal pathway direction"

8. The group of people who are "removal pathway non-citizens" is broad and extends far beyond those who were released from unlawful immigration detention following the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37. It 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. all holders of a Bridging "R" Visa (**BVR**), and

[1] ^199B, ^199C and ^199D of the Act. See also item 5 in the Bill. Note that ^ indicates that the provision is proposed to be inserted into the Act.

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.[2]

9. Concerningly, a removal pathway non-citizen also includes **any other visa holder** whose visa is prescribed in the *Migration Regulations 1994* (the **Regulations**).[3] This could include people whom the government has no present right to remove from Australia. The Bill does not propose any limitations on the visas that may be prescribed, and changes to the Regulations are subject to limited parliamentary oversight.[4]

The Bill empowers the government to compel any visa holder – including grandparents, parents and spouses – to cooperate with their own deportation. This power could be applied indiscriminately to any type of visa: for example, a Partner visa could be prescribed, and holders of that visa would be required to comply with removal directions. Or the government could prescribe holders of a Temporary Humanitarian Stay visa, leaving all of the evacuees from Afghanistan and Ukraine at risk of deportation. The power to designate "removal pathway non-citizens" could leave entire groups of visa-holders vulnerable to removal from the country.

---

10. Despite the significant consequences for removal pathway non-citizens, the Department of Home Affairs has been unable to identify with any precision the people who fall within these categories, nor provide an accurate estimate of the number of people likely to be affected.[5] Given the breadth of the definition, it has the potential to affect an **infinite number of visa holders**.

Scope of directions are virtually unlimited

11. The scope of the Minister's power to issue a "removal pathway direction", requiring a person to assist with their own deportation is far-reaching and virtually unlimited. A person can be directed to complete any application or document for travel, provide any documents or information, and attend an interview or report in person – without any consideration of the reasonableness of the requirement, its necessity or the person's practical ability to comply within the specified timeframe.[6]

12. The Minister can also direct a person to take any steps if the Minister is satisfied that it is reasonably necessary to determine whether there is a real prospect of the person's removal from Australia becoming practicable in the reasonably foreseeable future, or to facilitate the person's removal under s 198 of the Act.[7] This power to direct that a person must "do a thing, or not do a thing" (using the language in the Bill) is excessive. It confers an unparalleled power on the Minister to require a person to, in effect, **do absolutely anything or refrain from doing absolutely anything** if it would assist in their deportation.

13. For example, the power would appear to permit a direction to be made requiring a person who lives in Ballarat to attend an appointment with an officer of the Department of Home Affairs 115km away in the Melbourne CBD, irrespective of the person's physical, practical or financial ability to attend. If the person couldn't afford to travel, missed their train or was unwell on the day, they would be in breach of the direction

[2] This appears to be a reference to the criterion for the grant of a BVE in cl 050.212(2) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the **Regulations**). This might include the cohort of people who were transferred to offshore processing countries (Nauru or Papua New Guinea) and subsequently transferred back to Australia for medical treatment or for other reasons.
[3] ^199B(1)(d) of the Act.
[4] While regulations made for this purpose would be disallowable legislative instruments under the *Legislation Act 2003* (Cth), that does not entail the same level of scrutiny that should ordinarily be available for primary legislation that must pass both Houses of Parliament.
[5] See Senate Legal and Constitutional Affairs Legislation Committee, *Proof Committee Hansard: Migration Amendment (Removal and Other Measures) Bill 2024*, 26 March 2024, pp. 4-5.
[6] ^199C(1) of the Act.
[7] ^199C(2) of the Act.

– and because merits review is denied, there is no avenue for the person to challenge the appropriateness of the direction being made.[8]

14. It is evident that the direction power is designed to further punish people who were unlawfully held in indefinite immigration detention and who cannot be removed from Australia. Instead of giving people a chance to rebuild their lives in safety and security, the direction power is the latest in a series of draconian measures that restrict fundamental freedoms – with other visa holders as collateral damage.

No evidence that coercion will enable removal

15. The Bill would allow the Minister to compel cooperation by visa holders with their own removal, and to punish non-cooperation with criminal penalties. However, there is no evidence in support of the Bill that the cooperation of visa holders from certain countries – such as Iran or Russia – would actually enable their removal from Australia. It is therefore entirely possible that the Bill will establish a regime for coercion and punishment of non-citizens without any likelihood of achieving their removal from Australia.

16. As noted in the Explanatory Memorandum to the Bill, Iran has adopted a long-standing posture of refusing to re-admit its own citizens once they have sought protection abroad.[9] Iran's position in relation to the forced removal of its citizens from Australia is not known. In two recent cases of Iranian nationals facing removal from Australia – under the pseudonyms "Adam"[10] and "David"[11] – the Federal Circuit and Family Court could not be satisfied that Iran would accept removal of the men, even in circumstances where they possessed valid travel documents allowing their entry to the country. In Adam's case, the Court found it could not be satisfied that the Iranian authorities would issue him with a travel document even if he were to voluntarily depart, given that he was no longer in possession of the original travel document that he used to enter Australia.[12]

17. It is apparent that the future conduct of states such as Iran or Russia cannot be confidently predicted. If anything, Iran's longstanding position suggests that it will continue to obstruct and prevent the return of its own citizens, even in circumstances where they are compelled to consent to their removal by the threat or imposition of criminal sanctions in Australia.

18. Yet nothing in the Bill limits the power to issue removal pathway directions to only those circumstances in which removal can actually be effected. For instance, should the Bill pass, it is entirely possible that people in the position of Adam or David would be sentenced to serve time in jail for failing to obtain a travel document from Iran, even in circumstances where it was unclear whether Iran would permit them to re-enter with that travel document. The Bill therefore contemplates penalising non-citizens for its own sake, with no necessary connection with their actual removal from Australia.

C. Disproportionate criminalisation

19. The Bill continues an alarming trend of using the migration system to criminalise people on the basis of their visa status. A person who does not comply with a direction to facilitate their deportation will commit a criminal offence punishable by up to 5 years' imprisonment or 300 penalty points (or both).

20. But failing to comply with a direction falls far short of the type of conduct that should be deemed a crime. The criminal law is intended to prevent or punish conduct that causes harm, and new offences should not be hastily created. Under the Bill, the only identified "harm" that has been identified is the Australian government's inability to deport a small group of people, largely due to the policies of foreign governments.

---

[8] See Explanatory Memorandum to the Bill, [33]. A person may be able to seek judicial review of a direction in the courts, but this review would be limited to whether there was any legal error in the issuing of the direction, rather than the merits or appropriateness of issuing the direction.
[9] This position is in breach of Iran's obligations under customary international law: see *Nottebohm (Liechtenstein v Guatemala) Case* (1955) ICJ Reports 4, 47-48.
[10] *Adam v Secretary of Department of Home Affairs* [2024] FedCFamC2G 179 (hereafter ***Adam***).
[11] *David v Secretary of Department of Home Affairs* [2024] FedCFamC2G 178.
[12] *Adam,* [124] ("In the context of the present application and on the generic state of the evidence, it is not appropriate to infer that Iran would supply Adam with a *Laissez Passer* even if he were to voluntarily apply").

Yet as discussed at paragraphs 15 to 18 above, even if it is accepted that this is a justifiable purpose, it is far from clear that the measures proposed in the Bill would ever achieve that purpose.

21. Through other recent legislative changes, the government has hastily created criminal sanctions for benign conduct which no government has previously contemplated criminalising.[13] The Bill seeks to continue this trend, but goes much further. It reflects a chilling pattern of using the criminal law to deliver policies motivated by political considerations – both by appearing "tough" on borders and by manufacturing a justification for the harsh regime through the subsequent criminalisation of people impacted.

22. However, there are a number of legitimate reasons why a person may be unable or unwilling to cooperate with their own deportation: poor mental health, language barriers, a need to remain with family or a genuine fear of what awaits them if they are deported. Criminalisation of this conduct only further punishes people who are already suffering.

23. Regardless of the reasons that a person may not voluntarily depart Australia, many people who may be the target of a removal pathway direction have lived here for over a decade and have families, careers and lives established in Australia. People who are part of the Australian community in every sense except their visa status should not be criminally coerced into deportation – they should be provided with pathways to safe and stable futures.

24. While the criminal offence does not apply if the person has a reasonable excuse, the Bill expressly narrows the reasons that would constitute such an excuse. A genuine fear of suffering persecution, significant harm or other adverse consequences is not a reasonable excuse, nor is a claim that the person is owed *non-refoulement* obligations.[14] It is an invidious choice – either comply with a direction and be deported to a country where you believe you will face torture or even death, or fail to comply and face a criminal conviction.

25. Significantly, the penalty imposed under the Bill for non-compliance with a direction is wholly disproportionate to the conduct it seeks to punish. The maximum monetary penalty is presently $93,900[15] – far more than the median annual income in Australia, which is $54,890.[16] That the Bill imposes a penalty the equivalent of the average Australian's income over almost two years underscores its punitive design.

26. In addition, the imposition of a mandatory minimum 12-month prison sentence puts the offence on the same footing as some Commonwealth offences relating to the preparation of overseas child sexual conduct, where the offender has previously been convicted of a child sexual abuse offence.[17] Further, the possible imposition of a maximum sentence of 5 years' imprisonment puts the offence of breaching a removal pathway direction on the same footing as the following Commonwealth offences:

Offence	Sentence
Failure to protect a child at risk of a sexual abuse offence.[18]	Imprisonment for 5 years.
Importing a psychoactive substance into Australia.[19]	Imprisonment for 5 years, or 300 penalty units, or both.

[13] See *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth); *Migration and Other Legislation Amendment (Bridging Visas; Serious Offenders and Other Measures) Act 2023* (Cth).
[14] ^199E(3)-(4) of the Act.
[15] The penalty unit for breaches of Australian government laws on or after 1 July 2023 is $313. The maximum penalty under ^199E(1) of the Act is 5 years' imprisonment or 300 penalty units, or both.
[16] See Australian Bureau of Statistics, *Personal Income In Australia 2020-21 Financial Year*, 6 December 2023, available online: <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/personal-income-australia/2020-21-financial-year>. Note that this data is the most recent data in relation to personal incomes in Australia.
[17] Section 272.20(2) in the Schedule to the *Criminal Code Act 1995* (Cth) (**Criminal Code**); section 16AAB of the *Crimes Act 1914* (Cth) (**Crimes Act**). A person who engages in an act with the intention of preparing for sexual conduct with a child outside Australia is guilty of an offence under s 272.20(2). An offence against s 272.20(2) carries with it a maximum imprisonment of 5 years. Where the offender has previously been convicted of a child sexual abuse offence, the Court must impose a sentence of at least 12 months: s 16AAB of the Crimes Act.
[18] Section 273B.4 of the Criminal Code.
[19] Section 320.2 of the Criminal Code.

Offence	Sentence
Making, supplying or using identification information to enable someone else to use that information in order to commit, or facilitate the commission of, an indictable offence.[20]	Imprisonment for 5 years.
Providing material support or resources to a criminal organisation.[21]	Imprisonment for 5 years.
Contravening a community safety supervision order.[22]	Imprisonment for 5 years, or 300 penalty units, or both.
Dealing with proceeds of crime worth $1,000,000 or more (while being negligent as to the fact that the money or property is proceeds of crime or there is a risk that it will become an instrument of crime).[23]	Imprisonment for 5 years, or 300 penalty units, or both.
Dishonestly taking or concealing a mail receptacle, or article in the post, or postal message.[24]	Imprisonment for 5 years.
Using a carriage service to menace, harass or cause offence.[25]	Imprisonment for 5 years.
Using a carriage service for violent extremist material.[26]	Imprisonment for 5 years.
Dishonestly obtaining or dealing in personal financial information.[27]	Imprisonment for 5 years.

27. That is, under the Bill, a person could face the same sentence for a failure to complete a form or attend an interview or for an infinite range of conduct given the breadth of directions that can be made by the Minister.

28. The proposed imposition of mandatory sentencing is also deeply problematic. It disproportionately affects vulnerable groups, leads to harsh sentences, does not deter crime and undermines the rule of law. As noted in the Australian Labor Party's National Platform 2023, mandatory sentencing "does not reduce crime but does undermine the independence of the judiciary, lead to unjust outcomes and is often discriminatory in practice."[28]

Scenario: An individual on a BVR is required to comply with a removal pathway direction that they cannot practically comply with

Abdul is a national from Sierra Leone and he does not have a passport. Abdul arrived in Australia in 2014 and was held in immigration detention until he was released into the community on a BVR in November 2023, following the High Court's decision in *NZYQ*.

Abdul is given a removal pathway direction requiring him to obtain a police clearance from Sierra Leone to submit with an application for a Sierra Leonean passport. Abdul is given 21 days to comply with the direction.

Abdul has only limited schooling and is not confident in reading and writing. The forms to obtain a Sierra Leonean police clearance are complex and confusing. Abdul tries to seek help to complete the forms, but he has only a small network of family and friends after spending years in immigration detention and none are able to assist him. Abdul feels overwhelmed and does not know how to complete and lodge the forms to obtain the police clearance. He is unable to obtain the clearance within the specified 21 days.

---

[20] Section 372.1 of the Criminal Code.
[21] Section 390.4 of the Criminal Code.
[22] Section 395.38 of the Criminal Code.
[23] Section 400.3(3) of the Criminal Code.
[24] Section 471.3 of the Criminal Code.
[25] Section 474.17 of the Criminal Code.
[26] Section 474.45B of the Criminal Code.
[27] Section 480.4 of the Criminal Code.
[28] Australian Labor Party, ALP National Platform (2023), [46].

As Abdul has not complied with the removal pathway direction, he may be charged with a criminal offence and face at least 12 months in prison. Abdul is terrified that he will be detained again for a lengthy period.

---

29. The Bill will also compound the harmful effects of indefinite immigration detention by further penalising those people who were unlawfully subjected to it. The harsh criminal penalties for breach of a removal pathway direction will create a "roundabout" regime between immigration detention and prison – people who have recently been released from immigration detention will be issued directions and if they cannot comply, will be imprisoned and potentially then be taken back into immigration detention. The Bill seeks to detain by another name the same people whom the High Court has already determined cannot be locked up for the rest of their lives.

D. Inadequate protections for refugees

30. The Bill provides insufficient protections for people seeking asylum and refugees, and risks people being deported to countries where they face persecution.

Insufficient safeguards to protect against *refoulement*

31. The new power to direct a person to assist with their own deportation will apply to people who have serious and legitimate claims for protection.[29] While the Bill purports to introduce safeguards to prevent people being returned to countries where they would be persecuted or significantly harmed, those safeguards are weak.

32. A person cannot be subject to a direction if they have a pending application for a Protection visa.[30] However, this exclusion only applies to applications at the primary stage (Department of Home Affairs) or merits review (Administrative Appeals Tribunal (**AAT**) or Immigration Assessment Authority (**IAA**)). This means that a person whose application is being reviewed in the courts could be directed to cooperate with their removal to a country where they fear persecution – even if the court ultimately determines that their application was incorrectly decided and must be re-assessed.[31]

33. This will have significant consequences considering the number of Protection visa decisions remitted by the courts each year because of error. In 2021-22, the federal courts remitted 251 applications to the Migration and Refugee Division (**MRD**) of the AAT and 159 applications to the IAA.[32] In 2022-23, 251 applications were again remitted to the MRD and 151 applications to the IAA.[33] This means that over the last two years, over 800 visa applications were incorrectly decided. Yet under the Bill, all of those people could be required to assist in their own deportation while awaiting a decision from the courts.

34. There are also a significant number of people who will be subject to the direction power whose claims for protection were refused through the broken and defective "fast-track" assessment process. While the Bill does not permit a direction to be made requiring a person to assist in their removal to a country in respect of which they are owed protection,[34] this safeguard does not apply to people whose claims for protection have never been properly or fairly assessed under the fast-track system.

35. The fast-track system has been subject to extensive international criticism on the basis that it deprives applicants of basic procedural rights, including the right to a fair and proper hearing and to advance further

---

[29] See ^199B(2) of the Act.
[30] ^199D(2) of the Act.
[31] If the court remits the application to the Immigration Assessment Authority or the Administrative Appeals Tribunal, the Minister cannot issue a removal pathway direction to the applicant while the application is being considered by one of those bodies.
[32] Note that the Migration and Refugee Division of the Administrative Appeals Tribunal deals with all migration and refugee visa applications, including protection visa applications: see Administrative Appeals Tribunal, *Annual Report 2022-23*, 25 September 2023, p. 26.
[33] Administrative Appeals Tribunal, *Annual Report 2022-23*, 25 September 2023, p. 80.
[34] ^199D(1) of the Act. See also ^199B(2) of the Act and Explanatory Memorandum to the Bill, [45].

information in support of their claims.[35] These procedural defects lead to disproportionately adverse outcomes for applicants in the fast-track system.

36. The table below summarises compares the outcomes of applicants of the same nationality through the fast-track system (IAA) and the standard review process (AAT). As can be observed from these statistics, an applicant from Sri Lanka is ten times more likely to have their protection claims upheld by the AAT, rather than through the fast-track system (resulting in their application being remitted to the Department of Home Affairs):

Remittal to the Department of Home Affairs for Protection Visa applications: IAA and AAT (2023)		
Country of Nationality	**IAA[36]**	**AAT[37]**
Iran	16%	65.8%
Pakistan	8%	46.5%
Iraq	14%	59%
Sri Lanka	5%	50%

37. As well as resounding international criticisms, the Australian Human Rights Commission has observed that the fast-track system, coupled with the withdrawal of funding for legal assistance, has created a "significant risk that some people...who are in need of protection will be denied refugee status and removed from Australia, contrary to Australia's *non-refoulement* obligations."[38]

38. These criticisms of the fast-track system have been acknowledged by the Labor government, resulting in the introduction of legislation to abolish it with effect from 1 July 2024.[39] Despite this, the Bill contains no safeguards for victims of that system and instead paves the way for their return to a country where they have a well-founded fear of persecution.

Unfair reversal of protection findings

39. The risks to people seeking asylum and refugees are dramatically increased by the proposed introduction of a mechanism to reverse existing protection findings.[40] The effect of those amendments is that the Minister may determine that a removal pathway non-citizen who was previously assessed as a refugee is no longer owed protection, enabling the Minister to direct the person to assist in their deportation to the country from which they fled.[41]

40. The proposed amendments expand upon s 197D of the Act, which has been subject to extensive criticism by refugee and human rights bodies. That provision allows the Minister to reverse a protection finding made in relation to a non-citizen in the course of removing the person under s 198 of the Act. The power, as it is currently framed, is available in relation to people in detention who are immediately subject to the removal duty. The proposed amendments under the Bill would expand the power, so that it would apply in relation to **visa holders** who are removal pathway non-citizens – that is, people who are lawfully in the community, but whom the Minister wishes to deport.

41. Rather than expanding s 197D of the Act, that provision should be completely repealed. It fundamentally conflicts with Australia's international obligations. The Australian Human Rights Commission has made the

---

[35] See eg UNHCR Refugee Agency, *Fact Sheet on the Protection of Australia's So-Called "Legacy Caseload" Asylum Seekers*, 1 February 2018; UNHCR Refugee Agency, *Protecting Refugees in Australia and Globally*, May 2022.
[36] Immigration Assessment Authority, 'Caseload Report' (2024), available online: <https://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2023-24.pdf>.
[37] Administrative Appeals Tribunal, 'MRD refugee caseload summary by country of reference' (from 1 July 2023 to 29 February 2024), available online: <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-refugee-caseload-statistics-2023-24.pdf>.
[38] Australian Human Rights Commission, *Lives on Hold: Refugees and Asylum Seekers in the Legacy Caseload* (July 2019), available online: <https://humanrights.gov.au/sites/default/files/2019-07/AHRC_Lives_on_hold_2019_summary.pdf>.
[39] Item 228 of Schedule 2 to the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* repeals Part 7AA of the Migration Act. See also Australian Labor Party, ALP National Platform (2021), p. 124.
[40] Schedule 2 to the Bill, particularly items 4 and 6.
[41] The exclusion in ^199D(1) would not apply to people who no longer have a protection finding.

following observations in relation to Australia's obligation to provide refugees with durable, permanent protection:[42]

> The Office of the United Nations High Commissioner for Refugees (UNHCR) provides guidance on the narrow circumstances within which a person's refugee status may cease. Its guidelines state that a 'strict approach is important since refugees should not be subjected to constant review of their refugee status'…
>
> The UNHCR recommends that cessation of refugee status should only occur once there have been significant and profound changes in a country of origin, and usually over sufficient time to ensure the durability of the change. However, the UNHCR also identifies that there would be exceptions to cessation even in these circumstances, such as where the person found to be in need of protection has suffered such grave persecution that they cannot reasonably be expected to return. Similarly, those who have been long-term residents in the country of asylum and who have established ties, should not be expected to leave.

42. Despite this, the Bill seeks to expand upon a power that is already in conflict with Australia's obligations at international law through amendments that would allow the Minister, in an unspecified process, to unilaterally review protection findings for visa holders, some of whom have been in the community lawfully for years. The proposed power is at large; it is not limited by or referable to considerations ordinarily relevant to the cessation of refugee status, such as the past persecution suffered by the visa holder and the extent of their connection to the community. The proposed expansion of the s 197D power is a matter of grave and serious concern.

Scenario: A refugee has their protection finding reversed and is required to assist with their deportation

Saed is a 60-year-old Iraqi man who arrived in Australia in 1999 and sought protection, on the basis of his persecution by armed forces associated with then-president, Saddam Hussein.

Saed has lived in Australia nearly half of his life. He has a wife and two children, who are all Australian citizens. His children have only known Australia and have never been to Iraq. Saed has no remaining connections in Iraq, but has an extensive network of family and friends in Australia.

Saed was convicted of a driving offence and his visa was subsequently cancelled by the Minister, who then reconsidered Saed's protection finding and decided that Saed is no longer a refugee because the situation in Iraq has stabilised under a different governing regime. Saed is issued with a direction that he must obtain an Iraqi passport, as the Australian government intends to deport him to Iraq.

Saed is now required to leave behind his wife, two children and the place he calls home, or face imprisonment of up to 5 years if he does not comply with the Minister's direction.

---

43. The result is that the Bill disingenuously introduces limited protections for people seeking asylum and refugees, while significantly narrowing the class of people who will ever get the benefit of those protections.

E. Discriminatory travel ban

44. The Bill confers an unprecedented power on the Minister to impose a travel ban on entire countries, excluding people from entry into Australia on the basis of the nationality on their passport.[43] Such a ban is blatantly discriminatory and erodes fundamental principles of fairness and equality.

---

[42] See eg Australian Human Rights Commission, *Submission to Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (20 June 2023), available online: <https://humanrights.gov.au/sites/default/files/review_of_the_migration_amendment_clarifying_australias_obligations_for_removal_act_2021_0.pdf> [54]-[56].
[43] ^199F and ^199G of the Act.

45. Under the Bill, only 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 **any visa** if the Minister designates their country of nationality as a "removal concern country".[44] While the Minister may decide to allow a particular person to make a visa application on a case-by-case basis, the exercise of similar ministerial powers indicates that this is likely to be an illusory option for the vast majority of people.[45]

The scope of the travel ban extends to entire countries, while the limited exceptions are narrow and selective, leaving the vast majority of people – including family members, friends and workers – locked out of Australia.

---

46. The Bill indicates that the travel ban has been enacted "because the Parliament expects that a foreign country will cooperate with Australia to facilitate the lawful removal from Australia of a non-citizen who is a national of that country".[46] But this purported justification is not reflected in the actual terms of the power to impose the ban. Instead, the power to declare a removal concern country goes much further than countries that do not facilitate the deportation of their nationals and extends to **any** country that the Minister thinks it is in the national interest to designate; a designation that the Minister can make subject only to "consultation" with the Prime Minister and Minister for Foreign Affairs.[47]

47. A travel ban of this nature renders Australia an international outlier. While President Trump suspended the entry of nationals from a number of countries – including Burma, Eritrea, Iran, Kyrgyzstan, Libya, Nigeria, North Korea, Somalia, Sudan, Syria, Tanzania, Venezuela and Yemen[48] – that ban was promptly rescinded when President Biden was elected. The ban was widely criticised as discriminatory, in contravention of the values of the United States of America and a "a stain on [the] national conscience".[49]

F. Cruel separation of families

48. The Bill will permanently keep families apart on the basis of their nationality and visa status.

49. The new power to direct a person to facilitate their deportation completely ignores a person's family members in Australia. A direction could be made requiring a person to assist with their removal, notwithstanding that the person is the primary carer of an Australian citizen child or married to an Australian permanent resident.

50. While a direction cannot be made requiring a child to facilitate their deportation, their parent or guardian can be compelled to take steps to facilitate the child's removal with no consideration of their wishes, the potential separation of the child from their family members or whether removal would be in the best interests of the child.[50] Not only is this contrary to basic principles of decency, it also risks breaching the obligations in the *Convention on the Rights of the Child*, which require the child's best interests to be a primary consideration in all administrative, legislative and judicial decisions.[51]

---

[44] ^199G(2) of the Act.
[45] ^199G(4)-(8) of the Act.
[46] ^199A(2) of the Act.
[47] ^199F(2) of the Act.
[48] See generally Donald J Trump, *Presidential Proclamations 9645*; Donald J Trump, *Presidential Proclamations 9983*.
[49] US Department of State, *The Department's 45-Day Review Following the Revocation of Proclamations 9645 and 9983*, 8 March 2021.
[50] ^199D(4)-(5) of the Act.
[51] UN General Assembly, *Convention on the Rights of the Child*, United Nations, Treaty Series, vol. 1577, 20 November 1989, Act 3. See also Art 9: State Parties also shall ensure that a child is not separated from their parents against their will, except in circumstances where, among other things, the separation is necessary for the best interests of the child.

Scenario: A mother separated from her child

Ashani is a Sri Lankan refugee who fled to Australia in November 2013. She applied for a protection visa under the fast-track assessment system and her application was refused. She sought review in the courts in 2020 and is awaiting a hearing.

In 2018, Ashani met Matthew, an Australian citizen, and they began a relationship. Ashani gave birth to their son, Benjamin, the following year. Benjamin is an Australian citizen, because he was born in Australia to a father who is a citizen.

Shortly after Benjamin's birth, Matthew became very controlling. This escalated into physical and sexual abuse. Ashani was eventually able to leave the relationship and is Benjamin's primary carer, but Matthew was granted shared custody.

Although Ashani has a pending protection visa application, the Minister is still able to require her to assist in her deportation because her application is currently before the courts. The Minister issues Ashani a direction requiring her to apply for a Sri Lankan passport. Ashani is terrified about contacting the Sri Lankan authorities and does not want to return. She is also worried that her family members in Sri Lanka might be interrogated if the authorities become aware that she has sought asylum in Australia.

Ashani is faced with a decision no mother should face – she can comply with the Minister's direction and potentially be deported to Sri Lanka. Or she can refuse to comply and face a prison sentence. Under both options, she will be separated from Benjamin for a lengthy period, and potentially forever.

51. An inevitable consequence of the travel ban will also be the separation of families. As discussed at paragraph 45 above, the exceptions to the ban are limited and do not include parents of adult children, aunts, uncles, cousins or other extended family members. Instead, the Bill chooses to recognise only limited familial relationships as worthy of protection.

52. The travel ban is both discriminatory in its likely application to only certain countries, and indiscriminate in its extension to the vast majority of people from those countries. While the government has failed to disclose the countries on its blacklist who may be subject to the travel ban, there has been widespread speculation that Iran is likely to be considered due to the Iranian government's unwillingness to facilitate the non-voluntary return of its nationals.[52] The Bill does not explain why the 70,899 people living in Australia who were born in Iran,[53] of which over 60% are Australian citizens,[54] should be kept apart from their families. Or indeed, why people of any particular nationality should be separated from their families due to the policies of foreign governments.

G. Dangerous expansion of ministerial powers

53. The Bill gives the Minister unilateral powers to decide which countries will be subject to the travel ban, and who will granted permission to enter Australia. It is a dangerous expansion of ministerial powers that vests extraordinary powers in a politician with effectively no oversight.

54. As discussed at paragraph 46 above, the Minister's power to designate a country as a "removal concern country" is subject only to consultation with the Prime Minister and Minister for Foreign Affairs. There is no

---

[52] The other countries that may be subject to the travel ban include Iraq, South Sudan and Russia: Senate Legal and Constitutional Affairs Legislation Committee, *Proof Committee Hansard: Migration Amendment (Removal and Other Measures) Bill 2024*, 26 March 2024 p. 10; see also Paul Karp, 'Rushed bill forcing hundreds of non-citizens to facilitate own deportation passes lower house', *The Guardian* (online, 26 March 2024), available online: <https://www.theguardian.com/australia-news/2024/mar/26/deportation-bill-australia-rushed-passes-lower-house-immigration-detention>.
[53] Australian Bureau of Statistics, *2021 Census – People in Australia who were born in Iran* (2021).
[54] According to the Australian Bureau of Statistics, 44,418 people living in Australia who were born in Iran are Australian citizens: Australian Bureau of Statistics, *2021 Census – People in Australia who were born in Iran* (2021).

obligation on the Minister to heed their advice, or to engage more broadly with anyone else before exercising the power.[55] While the Minister must provide a copy of the designation and the reasons for imposing the ban to Parliament **after** a decision has been made, a failure to do so does not affect the validity of the ban.[56]

When imposing a travel ban, the Minister is not required to consult with the community whose family members and friends will be banned from entering the country, or to engage with businesses in Australia who may require the skills of workers from those countries. Instead, the Bill expressly excludes any requirement for consultation with those impacted by providing that the rules of natural justice do not apply.[57]

55. The Minister is also conferred with a personal power to allow particular applicants from banned countries to apply for a visa.[58] But like other ministerial powers, the Minister has no duty to even consider an applicant's request, there are likely to be lengthy delays in processing and there are very limited avenues to challenge the Minister's decision.[59]

56. The result is a Bill that dramatically expands the powers of the Minister, curtails fundamental rights and discriminates against people on the basis of their nationality. The Human Rights Law Centre strongly urges the Committee to recommend that the Bill should not pass.

[55] It appears that the designation of a removal concern country would not be subject to disallowance: see ss 42 and 44 of the *Legislation Act 2003* (Cth), read with item 20 in the table at reg 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015 (Cth)*.
[56] ^199F(6)-8) of the Act.
[57] ^199F(5) of the Act.
[58] ^199G(4)-(8) of the Act.
[59] ^199G(8) of the Act.