



Law Council
OF AUSTRALIA

Migration Amendment (Removal and Other Measures Bill) 2024 (Supplementary Submission)

Senate Legal and Constitutional Affairs Committee

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council is grateful for the contributions of its Federal Dispute Resolution Section's Migration Law Committee in developing this submission.

Overview

1. The Law Council set out its concerns about the Migration Amendment (Removal and Other Measures) Bill 2024 (**Removal Bill**) in its **primary submission** on 12 April 2024.¹
2. The Law Council regards the Removal Bill as highly disproportionate and punitive in its effect on predominantly vulnerable individuals. The Removal Bill poses serious questions about Australia's adherence and commitment to international law, both as to treaties that Australia has ratified and as to customary international law. No evidence of any serious or widespread problem to justify this response has been produced by proponents of the Removal Bill.
3. These conclusions are supported by the analysis of the Parliamentary Joint Committee on Human Rights (**PJCHR**) in its 3rd Report of 2024² (published since this Committee's hearing on the Removal Bill), which advised the Parliament relevantly:
 - Mandatory minimum criminal penalties engage and are incompatible with the rights to liberty and to a fair trial.
 - Removal pathway directions (depending on what they require a person to do) 'may also ... limit the right to privacy and freedom of assembly, association and expression'.
 - The direction power, along with the power to designate a 'removal concern country' may also indirectly limit the right to protection of family and rights of the child.
 - The power to reverse a protection finding may 'limit the right to health' (with respect to the mental health of those whose protection is put in doubt), and present an increased risk, if the reversal results in removal from Australia, of 'impermissibly limit[ing] the rights to protection of the family, a private life, and freedom of movement'.³
4. The Law Council also reiterates its objection to the rushed process for passage of this Bill, which has not allowed time for the kind of scrutiny required of such far-reaching changes to the law—changes potentially affecting tens of thousands of migrants (see further below). The Government's initial intention, as we understand it, was to pass the Removal Bill with the support of the Opposition and with no committee scrutiny at all. When it became clear that was not tenable, an out-of-session meeting of this Committee was held to hear evidence from the Department of Home Affairs (the **Department**). Only after concerns were raised, including by some Members of this Committee, was the present inquiry convened. Even then, the timeline for submissions and opportunity for hearing from witnesses has been limited. The Law Council recommends that, particularly for new laws with significant impact on rights and liberties, proper committee scrutiny (including by this Committee and the PJCHR) be the default. This default position should only be departed from in times of genuine emergency. Given the lack of justification provided to date for the measures in this

¹ Law Council, *Migration Amendment (Removal and Other Measures) Bill 2024* – Submission to Senate Legal and Constitutional Affairs Legislation Committee, 12 April 2024:

<<https://lawcouncil.au/resources/submissions/migration-amendment-removal-and-other-measures-bill-2024>>.

² PJCHR, *Report 3 of 2024*, 17 April 2024:

<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2024/Report_3_of_2024>, 16-43.

³ *Ibid.*, 3-4.

Bill, the Law Council does not consider there to be such an emergency in this instance.

5. This supplementary submission addresses questions taken on notice by the Law Council at its appearance on 15 April 2024, as posed by Committee Members Senator Paul Scarr and Senator Lidia Thorpe. The Senators' questions are set out below for reference. (Some questions have been grouped together as they appeared more than once in the supplied document.)

Questions on Notice—Senator Scarr (Deputy Chair)

Questions 1–8

On page 6 of its submission, the Department of Home Affairs states:

*“Without legislative amendments, the Migration Act would not provide a means to robustly and appropriately manage a non-citizen on a bridging visa granted to resolve their immigration status in the community while pursuing their departure or removal. **These are people who have exhausted all avenues to remain in Australia, and in respect of whom the Government is lawfully entitled to, or is required under the Migration Act to, progress their departure or to seek removal.**”*

Similarly, on page 9 of its submission, the Department of Home Affairs states:

*“Importantly, this Bill does not expand the cohort of people who are eligible for removal from Australia. **The proposed legislative amendments apply only in respect of non-citizens who have exhausted all avenues to remain or for whom the Government is lawfully entitled or indeed required under the Migration Act to seek removal.**”*

Do you agree that the Bill would only apply to the category of persons described above? Does the drafting of the Bill capture anyone who has not: “exhausted all avenues to remain” in Australia; for example, through exercising their rights for judicial review? Are there any amendments required to the Bill in order to reflect the intention referred to above? Do you have any other response to these statements?

Law Council Response

6. The short answer to the question is no, because the cohort can be expanded by an instrument made by the Executive, which may not be subject to the disallowance process.
7. During its testimony, the Department conceded that individuals may be placed on a removal pathway after exhausting all *merits review* avenues to remain in Australia.⁴ The Department clarified that individuals with judicial review proceedings on foot would normally not be subject to a direction under proposed section 199C, because the risk to the Department of having an injunction issued to restrain removal would be too great.⁵ Despite this clarification, the way the provision is drafted would not prevent a person who is on a Bridging Visa E (**BVE**) on departure grounds being removed if the individual had judicial review proceedings in progress or a ministerial intervention request unanswered, as the operation of the relevant power is only dependent on the bridging visa the individual holds. The Law Council does not consider this to be a

⁴ Law Council notes from session (Hansard unavailable at time of drafting)

⁵ Ibid.

principled approach to restricting the cohort affected by the Removal Bill to individuals who have 'exhausted all avenues to remain in Australia'.

8. The Bill, in proposed subsection 199B(1), defines 'removal pathway non-citizen' to be:

- (a) *an unlawful non-citizen who is required to be removed from Australia under section 198 as soon as reasonably practicable;*
- (b) *a lawful non-citizen who holds a Subclass 070 (Bridging (Removal Pending)) visa;*
- (c) *a lawful non-citizen who:*
 - (i) *holds a Subclass 050 (Bridging (General)) visa; and*
 - (ii) *at the time the visa was granted, satisfied a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia;*
- (d) *a lawful non-citizen who holds a visa prescribed for the purposes of this paragraph.*

9. None of the above provisions is contingent on a person having exhausted all avenues to remain in Australia—rather, each relates to an individual's visa status. As a result, the proposed paragraph 199B(1)(a)–(c) could apply to:

- Unauthorised maritime arrivals (**UMAs**) for whom the Minister has not lifted the section 46A bar to permit ongoing BVE applications, who are left without a substantive visa at the judicial review stage;
- UMAs who are granted short-term 'removal grounds' BVEs during the course of their judicial review proceedings by the Minister, through the exercise of section 195A;
- BVE holders who have an answer to a second ministerial intervention request pending and as such are on a BVE on departure grounds (including those with section 48B requests);
- Nauru/Manus Island transferees to Australia who are in community detention or BVE holders (including those who were recognised as a refugee in Nauru or Manus Island) who fall outside the definition of 'protection finding' under the Removal Bill, and
- BVE holders on departure grounds who have Australian citizen children.

2. Proposed paragraph 199B(1)(d) would allow the Government to prescribe, by means of delegated legislation, further classes of visa. The holders of any visa so prescribed would become 'removal pathway non-citizens'. The Bill, therefore, provides a direct avenue for the Executive to expand the cohort eligible for removal from Australia at any time.

3. There is nothing in the Removal Bill that -

- limits the use of paragraph 199B(1)(d) to visas that are granted on the basis of a person making acceptable arrangements to depart or being removed from Australia;
- prevents it being used on persons who may never be able to be removed;

- limits the scope of the visas to whom it could apply; or
 - requires consideration of any other factor before prescribing a visa.
4. The means by which the cohort of ‘removal pathway non-citizens’ could be expanded is not specified in the Removal Bill, but the Department testified before the Committee that delegated legislation made under provisions inserted into the *Migration Act 1958* (Cth) by the Removal Bill would be disallowable.⁶ The Law Council observes that, in the ordinary course of legislative affairs, such an instrument would normally be disallowable since the Removal Bill does not provide otherwise.⁷ However, an instrument other than a regulation made under Part 2 of the Migration Act (into which these provisions are to be inserted) is not disallowable. So if the visa classes were prescribed other than by regulation, the expansion would not be disallowable by Parliament.⁸
 5. Proposed paragraphs 199B (1)(b)–(d) make visa status the criterion for determining who is a removal pathway non-citizen, as opposed to whether or not an individual falls within section 198—which provides the power to remove a person in certain circumstances where the person **does not hold a visa**.
 6. Currently the way section 199B is drafted does not meet the Department’s stated intention that it only apply to those on a removal pathway, as it clearly could cover a far broader range of persons, including those who may exercise their right to judicial review. There is no requirement to consider ongoing migration processes, nor, for that matter, any other process such as family court proceedings or any other matter.
 7. Proposed section 199B would also allow for removal pathway directions to be issued to persons who have a valid visa. There are already conditions placed on BVEs on departure grounds that require a person to assist in facilitating that person’s departure. Failure to do so may lead to cancellation, which would enliven section 189 (the obligation to detain).
 8. Finally, it remains unclear how many people may fall within the category set down in proposed paragraph 199B(1)(c). We note that the Department indicated in their evidence that 4463 people may fall within it but, based on pipelines known to the Migration Law Committee of the Law Council’s Federal Dispute Resolution Section, the figure is likely to be far greater. According to the latest information available, 2466 people in the ‘legacy caseload’⁹ are likely to be subject to removal directions, and up to 29,571 people who have been refused a permanent protection visa may also be directly affected or affected if they do not engage in removal processes after these changes come into effect.¹⁰

⁶ Law Council notes (Hansard unavailable at time of drafting).

⁷ *Legislation Act 2003* (Cth), s 44(2).

⁸ *Legislation (Exemptions and other Matters) Regulations 2015* (Cth), reg 10 (item 20). Other provisions of the Migration Act (for example s 93) specifically define ‘prescribed’ as ‘prescribed by regulations...’.

⁹ See AHRC, *Lives on hold: Refugees and asylum-seekers in the ‘Legacy caseload’* (2019): <https://humanrights.gov.au/sites/default/files/2019-07/AHRC_Lives_on_hold_2019_summary.pdf>.

¹⁰ Statistics provided to the Law Council by the Refugee Council of Australia (derived from the Department’s own research and statistics at <<https://www.homeaffairs.gov.au/research-and-stats>>; up to date as of March 2024).

Recommendations

If, contrary to its primary recommendation, Parliament elects to pass the Removal Bill, in addition to the Law Council's existing alternative recommendations as set out in its primary submission:

- The Law Council recommends that proposed subsection 199B(1) be redrafted to reflect the Department's stated intention that the cohort of 'removal pathway non-citizens' be only those individuals who have neither legal proceedings (relevant to their migration status) on foot, nor any pending ministerial intervention requests.
- The Law Council further underlines its recommendation that proposed paragraph 199B(1)(d) of the Removal Bill be removed, due to the uncertainty it creates over the scope of application of the applicable powers in proposed section 199C.

Question 9

On page 7 of its submission to the Committee, the Department of Home Affairs states:

*"Governments around the world are grappling with similar issues and utilising a variety of avenues and tools to ensure that their migration systems continue to be effective in managing the arrival and departure of non-citizens. **For example, governments of both the United States of America and the United Kingdom have country designation mechanisms similar to that proposed in proposed section 199F at item 3 of Schedule 1 to the Bill (adopted in 1952 and 2022).**"*

Do you have any views with respect to any differences between the country designation mechanism in the Bill when compared to the mechanism in the United States and the United Kingdom? Are the differences material, and if so, in what respects? Are there any issues or learnings arising from how the mechanism works in practice in the United States and the United Kingdom which should be reflected in the Bill?

Law Council Response

9. The Law Council emphasises that it does not support the designation power in proposed section 199F. In our primary submission, we characterised this power as a 'sledgehammer response' that could breach Australia's international obligations relating to non-discrimination¹¹ and protection of the family unit.¹²
10. While not resiling from that position, we provide below some brief comparisons between the United States (**US**), United Kingdom (**UK**) and proposed Australian designation regimes.

¹¹ Primary submission, 22. See also *Convention relating to the Status of Refugees*, 189 UNTS 150, opened for signature 28 July 1951 (entry into force 22 April 1954), article 31.

¹² See PJCHR, *Report 3 of 2024*, 36.

United States

11. In the US, visa sanctions can be imposed against countries pursuant to subsection 243(d) of the *Immigration and Nationality Act 1952*.¹³ A lack of cooperation with requests for, for example, interviews, timely issuance of travel documents and acceptance of physical return of their nationals can result in States being deemed 'uncooperative' or 'recalcitrant'.¹⁴ According to the Congressional Research Service, such States include the Russian Federation, the Republic of Iraq, the Islamic Republic of Iran, the Islamic Republic of Pakistan, the Kingdom of Bhutan, the State of Eritrea, the People's Republic of China, Lao People's Democratic Republic and the Kingdom of Cambodia.¹⁵
12. In its evidence before the Committee on 15 April 2024, the Department stated that the US had imposed visa restrictions to bar applicants from Guyana and Guinea. In the time available, the Law Council has been unable to research the full details of these instances of its use. In the case of Guyana, one possibility is the visa ban imposed on individuals who were thought to have undermined democracy in that State by ignoring election recount results in 2020.¹⁶ Guinea was subject to similar restrictions for Government officials and their close relatives, according to reports from 2017.¹⁷ If these are the visa bans to which the Department was referring, they are hardly comparable to the near-blanket ban on applications from entire populations contemplated by proposed sections 199F and 199G.¹⁸
13. A broader ban on the issuance of visas to Guyanese nationals was reportedly issued in 2001 when that country refused to accept 113 criminally-convicted deportees, and caused the Government at that time to change its policy within two months.¹⁹ The Trump administration also imposed wider (though not blanket) bans on visa issuance to nationals of Eritrea, Laos and Burundi in 2017–2020.²⁰
14. Nevertheless, the diplomatic pressure the United States can bring to bear on nations such as Guyana, Eritrea, Laos and Burundi is not comparable to the pressure Australia might bring to bear on the most prominent countries reportedly refusing to cooperate with returns from Australia, such as the Islamic Republic of Iran, the Republic of Iraq and the Russian Federation (which, despite their 'recalcitrant' status, have not been sanctioned by the US²¹). Even with any extra leverage provided by the

¹³ *Immigration and Nationality Act 1952*: <<https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act>>.

¹⁴ US Immigration and Customs Enforcement, *Visa sanctions against multiple countries pursuant to section 243(d) of the Immigration and Nationality Act*: <<https://www.ice.gov/remove/visa-sanctions>>.

¹⁵ *Immigration: "Recalcitrant" Countries and the use of Visa Sanctions to Encourage Cooperation with Alien Removals*, Congressional Research Service, 10 July 2020: <<https://crsreports.congress.gov/product/pdf/IF/IF11025>>.

¹⁶ US Embassy in Guyana, *US Department of State Imposes Visa Restrictions on Guyanese Individuals Undermining Democracy*, 15 July 2020: <<https://gy.usembassy.gov/u-s-department-of-state-imposes-visa-restrictions-on-guyanese-individuals-undermining-democracy/>>.

¹⁷ Shaban, 'Eritrea and Guinea slapped with new US visa restriction regime', Africa News, 13 September 2017 (Last updated 12 September 2019): <<https://www.africanews.com/2017/09/13/eritrea-and-guinea-slapped-with-new-us-visa-restriction-regime/>>.

¹⁸ The Law Council acknowledges the exceptions in proposed subsections 199G(2)-(4), but maintains that 199G is drafted too broadly.

¹⁹ *Immigration: "Recalcitrant" Countries and the use of Visa Sanctions to Encourage Cooperation with Alien Removals*, Congressional Research Service, 10 July 2020, 2.

²⁰ *Ibid.*

²¹ At least since the Cold War, when various Soviet nations were sanctioned – see *Immigration: "Recalcitrant" Countries and the use of Visa Sanctions to Encourage Cooperation with Alien Removals*, Congressional Research Service, 10 July 2020, 1.

threat of use of the designation regime under proposed section 199F, Australia has little chance of influencing the immigration policies of those nations.

15. It is possible that the regime could make a difference in negotiations with other recalcitrant States such as South Sudan. However, in the absence of a detailed account of a pressing need (for example, concrete evidence of an unusual surge in applications from such a nation), barring visa applications from an entire country is a disproportionate measure. This is especially the case in South Sudan, since the war in neighbouring Sudan has put immense pressure on its population, and the South Sudanese Government itself has been the subject of international sanctions for human rights violations in recent years.²²
16. In addition, as the submission of the Kaldor Centre for International Refugee Law to this inquiry notes, the US only uses this regime to refuse to issue visas to nationals of 'recalcitrant' countries after:

*... it first considers whether a country is being deliberately uncooperative or is just unable to cooperate due to mitigating factors, such as disasters or limited capacity (for example, as a result of law enforcement issues, inadequate records, and/or an inefficient bureaucracy). By contrast, the Australian bill contains no indication that such considerations will be taken into account.*²³

United Kingdom

17. Under the *Nationality and Borders Act 2022* (UK) (the **UK Act**), the Secretary of State has the power to suspend or delay the processing of applications from countries that do not cooperate with the UK Government in relation to the return of nationals or citizens unlawfully in the UK.²⁴ In 2022, UNHCR deemed the Removal Bill for the UK Act to be 'fundamentally at odds with the Government's avowed commitment to upholding the United Kingdom's international obligations under the Refugee Convention and with the country's long-standing role as a global champion for the refugee cause'.²⁵
18. Importantly, the Law Council understands that the power to suspend or delay the processing of applications from certain countries has never actually been used by the UK Government.²⁶ In the hearing for this inquiry on 15 April, the Department indicated that it hoped not to have to use the designation power in the Removal Bill.²⁷ Generally speaking, the Law Council does not support the passage of powers in legislation where there is no need (or intent) to use them.
19. Of the UK Act's 'visa penalties for uncooperative countries' provision, in particular, the UNHCR observed:

In UNHCR's view, the prompt, safe and dignified return of those who are not in need of international protection and have no other basis for remaining in a host State promotes the integrity of the asylum system. In this regard, UNHCR urges States to cooperate with each other

²² See Council on Foreign Relations, *Global Conflict Tracker – Instability in South Sudan*: <<https://www.cfr.org/global-conflict-tracker/conflict/civil-war-south-sudan>>.

²³ Kaldor Centre Submission (Submission 11), 9.

²⁴ *Nationality and Borders Act 2022* (UK), s 72.

²⁵ UNHCR, *Updated observations on the Nationality and Borders Bill, As Amended*, January 2022: <<https://www.unhcr.org/uk/media/unhcr-updated-observations-nationality-and-borders-bill-amended>>, 1.

²⁶ Evidence of Peter Hughes (Law Council notes (Hansard unavailable at time of drafting).)

²⁷ Law Council notes (Hansard unavailable at time of drafting).

*regarding the return and readmission of their nationals who have no basis for remaining in another State. **However, we are concerned that as drafted, these visa penalties could also fall on individuals in need of international protection or who are seeking to join family members in the United Kingdom through refugee family reunion or other human rights routes. We therefore urge the United Kingdom to consider expressly exempting all such applications from the visa penalty scheme.***²⁸

20. If Australia were to adopt a designation/visa penalty scheme as set out in the Removal Bill, exemptions for those in need of international protection and seeking family reunion should be included, as recommended by the UNHCR. The limited exceptions in proposed subsection 199G(2) are insufficient for this purpose.

21. The UK Act sets out a number of considerations that must be taken into account before designating a country as uncooperative under section 72:

(2) *In forming an opinion as to whether a country is cooperating in relation to returns, the Secretary of State must take the following into account—*

(a) *any arrangements (whether formal or informal) entered into by the government of the country with the United Kingdom government or the Secretary of State with a view to facilitating returns;*

(b) *the extent to which the government of the country is—*

(i) *taking the steps that are in practice necessary or expedient in relation to facilitating returns, and*

(ii) *doing so promptly;*

(c) *such other matters as the Secretary of State considers appropriate.*

(3) *In determining whether to specify a country for the purposes of this section, the Secretary of State must take the following into account—*

(a) *the length of time for which the government of the country has not been cooperating in relation to returns;*

(b) *the extent of the lack of cooperation;*

(c) *the reasons for the lack of cooperation;*

(d) *such other matters as the Secretary of State considers appropriate.*

22. By contrast, the Removal Bill does not even define ‘removal concern country’, other than as ‘a country designated as such by the Minister under subsection 199F(1)’. It may be inferred that designating a country as being of ‘removal concern’ would entail consideration of factors similar to those specified in the provisions of the UK Act set out above. But those considerations are not set out in the Removal Bill, so the power in proposed section 199F is effectively unconstrained and open-ended.²⁹

²⁸ Ibid, 95 (emphasis added).

²⁹ Primary submission, 23-24.

23. Moreover, the proposed designation power, being a personal and non-compellable power of the Minister, to be exercised in the national interest, is likely to be effectively exempt from judicial review (the only safeguard therefore being consultation of other Ministers under proposed subsection 199F(2), which lacks independence and is more directed at maintaining foreign relations than protecting individual rights).³⁰

Recommendations

If, contrary to its primary recommendation, Parliament elects to pass the Removal Bill, further to the Law Council's existing alternative recommendations set out in its primary submission:

- The Law Council recommends that proposed section 199F be deleted from the Removal Bill, because there is insufficient justification for a regime that would place a near-blanket ban on visa applications from whole countries.
- However, if Australia does adopt such a regime, it would be more likely to be proportionate if it were targeted only at government officials of recalcitrant States.
- Proposed section 199F should also be amended as set out in our primary submission to include mandatory considerations for designation similar to those in section 72 of the *Nationality and Borders Act 2022* (UK).
- Proposed section 199F should additionally include safeguards such as requiring the designation to be a legislative instrument, to be tabled and debated in Parliament and subject to disallowance. Further, any designation should be time-limited and subject to ongoing review.

Question 10

On page 9 of its submission to the Committee, the Department of Home Affairs states:

“While a removal pathway direction can be issued to certain bridging visa holders, they will not be the subject of the removal power at section 198 unless they are first lawfully detained. However, the issuing of a removal direction to a bridging visa holder will send a strong message to that individual of the of the requirement to cooperate. The removal direction would be a measure of last resort for relevant bridging visa holders (as it would be for non-citizens in immigration detention) and it should be noted that certain bridging visa holders can have departure visa conditions imposed requiring them to cooperate with making departure amendments?”

Does the drafting of the Bill currently reflect the above statements? Do you have any other response to the above statement?

³⁰ Primary submission, 22-23.

Law Council Response

24. During its testimony, the Department repeatedly asserted that the direction power would be used only as a measure of last resort.³¹ However, there is nothing to limit its use in such a manner in the text of the Removal Bill itself (see responses to questions 1–8 above).
25. The Removal Bill could be made more consistent with Australia’s international human rights obligations if it were amended to clarify that the powers it contains are measures of last resort, and that less rights-restrictive/punitive measures must be exhausted by Government before they may be exercised.

Recommendation

If, contrary to its primary recommendation, Parliament elects to pass the Removal Bill, in addition to the Law Council’s existing alternative recommendations as set out in its primary submission:

- **The Law Council recommends that the powers in the Removal Bill be explicitly expressed as being powers of last resort, only to be exercised after other means of facilitating removal have failed, and only where compliance with the measures (such as a direction to engage with an individual’s own Government to obtain travel documents) would not itself create additional human rights risks for individuals.**

Question 11

On page 11 of its submission, the Department of Home Affairs states:

“The Department recognises that there has been commentary about proposed subsection 199B(1)(d) which provides the flexibility to prescribe categories of visa holders who could be brought under the meaning of removal pathway non-citizen, if necessary to do so in the future. Importantly, this Bill does not expand the cohort of people who are eligible for removal from Australia, that is non-citizens who have exhausted all avenues to remain or for whom the Government is lawfully entitled or indeed required under the Migration Act to seek removal. Nor does prescribing a visa under the power in and of itself make that person liable for removal. The power at subsection 199B(1)(d) is intended [to] provide flexibility, should another type of visa be determined the most appropriate visa for non-citizens to maintain lawful status in the community while making arrangements to depart or be removed from Australian, in the same way the BVR is used for this purpose. Any regulations made to prescribe a visa for the purposes of subsection 199B(1)(d) would be subject to scrutiny and disallowance by the Parliament.”

Does the drafting of the Bill currently reflect the above statement? In particular, is the drafting of subsection 199(b)(1)(d) limited to the intention referred to above? Do you have any other response to the above statement?

³¹ Law Council notes (Hansard unavailable at time of drafting).

Law Council Response

26. As noted in the response to Questions 1–8, there is no requirement on the face of the Removal Bill for a prescription made under proposed paragraph 199B(1)(d) to be made by way of disallowable instrument. Such a requirement should be added to hold the Department to its stated intention in this regard.
27. Proposed subsection 199B(1) also fails to reflect the limitation claimed in the paragraph of the Department’s submission set out above. It should be expressly limited in its application to visa classes that already set individuals on a removal pathway, so that it does not authorise the Government to ‘expand the cohort of people who are eligible for removal from Australia’—inadvertently or otherwise.

Recommendation

If, contrary to its primary recommendation, Parliament elects to pass the Removal Bill, in addition to the Law Council’s existing alternative recommendations as set out in its primary submission:

- **The Law Council recommends the removal of proposed paragraph 199B(1)(d).**
- **The Law Council recommends that proposed subsection 199B(1) (if retained, contrary to the relevant Recommendation in our primary submission³²) be amended to require that additional visa classes be prescribed only by Regulation, and to limit its application to visa classes that already set individuals on a removal pathway.**

Questions 12–14

On page 11 of its submission, the Department of Home Affairs states:

*“The period for compliance with a direction is not fixed in proposed section 199C. This reflects that the appropriate period for compliance will be dependent on the detail of the direction. **In practice, directions given to a removal non-pathway citizen would provide a rational and reasonable time for compliance.** In some cases, this may be relatively short—for example if all that is required is a signature on a passport application. **In every case the Minister or delegate would consider the circumstances of the removal pathway non-citizen and what is being required of them in the direction, and would set the timing for compliance accordingly for each specific thing.**”*

Does the drafting of the Bill currently reflect the above statements? In particular, are the statements with respect to proposed practice reflected in the drafting of the Bill? Does the Bill need to be amended to align the provisions in the Bill with the intention of the Department referred to above? Do you have any other response to the above statement?

Law Council Response

28. No, the Removal Bill does not currently reflect those statements by the Department.
29. Given the extreme severity of the potential consequences of non-compliance with a direction under proposed section 199C, it is inappropriate for safeguards such as reasonable time for compliance to rely on assurances regarding

³² Primary submission, 20.

Departmental/Ministerial practice and procedure, rather than in the primary legislation itself.

30. Proposed section 199C also fails to deal with the situation where notice to the 'removal pathway non-citizen' is defective, which could lead to a mandatory sentence of imprisonment for failure to comply with a direction that has not even been received. General principles of administrative law that would normally operate to protect an individual in such circumstances may not be applicable in any ensuing criminal proceedings (particularly given the lack of safeguards in proposed section 199E).

Recommendations

If, contrary to its primary recommendation, Parliament elects to pass the Removal Bill:

- **As per our primary submission,³³ the Law Council recommends (in line with the recommendation of the Scrutiny of Bills Committee) that at least a 60-day period should be mandated in the Removal Bill to give the non-citizen time to seek legal advice and notify the Minister of relevant claims.**

Question 15

The submission of the Department of Home Affairs refers to: "operational guidance" in the context of both the powers to give removal pathway directions (refer to section 5.3 of the submission) and the "reasonable excuse" defence (refer to section 5.5.1 of the submission).

Do references to "operational guidance" provide sufficient safeguards with respect to the operation of the powers or does the Bill need to be amended? Do you have any other response to the references by the Department to: "operational guidance" in the above or any other contexts?

Law Council Response

31. The Law Council considers that 'operational guidance' is by no means adequate as a safeguard when the potential consequences are 12–72 months' imprisonment.
32. Apart from its non-binding nature, 'operational guidance' may be changed at any time according to the operational needs of the Department, which effectively nullifies its value as a safeguard to restrain the use of such sweeping and rights-intrusive powers.
33. Further, the 'operational guidance' referred to in section 5.5.1 of the Department's submission has yet to be developed. In practice, it could therefore be as protective or restrictive of individuals' rights as the Department deems appropriate at any given time. In the Law Council's view, Parliament should not permit the Department such latitude when it comes to the bestowal of powers as far-reaching and draconian as those proposed in the Removal Bill.

³³ Primary submission, 20-21.

Question 16

In relation to the designation of a “removal concern country”, the submission of the Department of Home Affairs on page 15 states:

Designation would only take place after a range of bilateral considerations were taken into account, and all reasonable and appropriate efforts and attempts had been made to engage the country to cooperate and facilitate the lawful removal of its nationals. In practice, the removal concern country designation would be considered following diplomatic and government to government engagement on the issues and challenges of returns before it is utilised.

Is the drafting in the Bill consistent with the above intention and statement of practice?
Does the Bill need to be amended to align the intention and the wording of the Bill?

Law Council Response

34. As set out in our response to Question 9 above, none of these considerations is required to be taken into account under proposed section 199F. This stands in stark contrast to section 72 of the *Nationality and Borders Act 2022* (UK), which sets out comparable requirements in detail.
35. As proposed section 199F is currently drafted, the Minister could designate a country as a ‘removal concern country’ immediately after consulting the Prime Minister and Minister administering the *Diplomatic and Privileges and Immunities Act 1967* (Cth) (under the Foreign Affairs and Trade portfolio according to the present Administrative Arrangements Order). In theory, the Minister could proceed with the designation regardless of the outcome of the consultations, or any other relevant considerations.
36. The Law Council observes that the rights of those potentially affected by the making of a designation under proposed section 199F (whole populations, with few exceptions, who may be barred from applying for visas by means of the operation of proposed section 199G) also appear to have been entirely subordinated to the ‘national interest’ in the design of this proposed power. It does not require consultation with communities in Australia that are directly impacted by the Removal Bill, nor does it consider the impact on Australian citizens or permanent residents affected given close family ties in countries that may be designated as removal concern countries.

Recommendation

If, contrary to its primary recommendation, Parliament elects to pass the Removal Bill, in addition to the Law Council’s existing alternative recommendations as set out in its primary submission:

- **In addition to the recommendations made under Question 9 above, the Law Council recommends that proposed subsection 199F be amended to require the Minister to consider the humanitarian and human rights implications for affected populations of a decision to designate a ‘removal pathway country’.**

Question 17

In relation to the designation of a “removal concern country” and the tabling requirements under new subsections 199F(7) and the consequences of a failure to table under new subsection 199F(8), it is noted that the Explanatory Memorandum states at paragraph 78:

New subsection 199F(8) provides that a failure to comply with subsections 199F(6) or (7) does not affect the validity of the designation.

What is the practical effect of subsection 199F(8)? For example, what power is there to require the Minister to meet the tabling requirements if there are no consequences with respect to the validity of the designation? Does the section need to be amended to ensure the integrity of the disallowance process?

Law Council Response

37. As set out in our primary submission, we consider that the ‘no invalidity’ clause in proposed section 199F(8) is too broad and unjustified given that the designation is not a legislative instrument creating norms of conduct for the general public. Provision should instead be made that any removal concern country designation will only take effect on the day *after* the designation has been tabled in compliance with proposed section 199F(6) for at least two days in each House.³⁴

38. As drafted, there would be no legal consequence for a Minister failing to table a designation, effectively undermining the disallowance process (since the Parliament would presumably not have access to the designation or the Minister’s reasons for making it).

Recommendation

If, contrary to its primary recommendation, Parliament elects to pass the Removal Bill:

- **The Law Council recommends the removal of the ‘no invalidity’ clause in proposed section 199F(8) to preserve the ability of Parliament to supervise the extraordinary ‘removal concern country’ designation power.**
- **Proposed section 199F(7) should be amended so that any removal concern country designation will only take effect on the day after the designation has been tabled in compliance with proposed section 199F(6) for at least two days in each House.**

³⁴ Primary submission, 23.

Question 18

In relation to removal pathway citizens, the following statement is made to [sic] paragraph 20 of the Explanatory Memorandum:

There is a longstanding practice of granting Subclass (Bridging (General)) visas to certain non-citizens who are on a removal pathway. To facilitate the removal of this cohort, the definition of removal pathway non-citizen also includes lawful non-citizens who were granted this visa and who, at the time the visa was granted, satisfied a criterion relating to them making acceptable arrangements to depart Australia. This is a reference to the criterion currently set out by subclause 050.212(2) of Schedule 2 to the Migration Regulations.

Paragraph 199B(1)(c) is not intended to capture other holders of the Subclass 050 Bridging (General) visa, which is also used for a variety of purposes other than as a final step before departure.

Is the drafting of the Bill aligned with the statement of intention referred to in paragraph 20 of the Explanatory Memorandum? Does the Bill need to be amended to align the intention and the wording of the Bill?

Law Council Response

39. The Law Council considers proposed paragraph 199B(1)(c) to be ambiguous. Please refer to our response to Questions 1–8.

Recommendation

- **In addition to amendments already recommended, a Note should be added to proposed section 199B to clarify the Department’s intention not to capture other holders of Subclass 050 Bridging (General) visas.**

Question 19

In relation to revisiting protection decisions, there are a number of statements made in section 5.7 of the submission of the Department of Home Affairs with respect to: (a) the cohort of affected persons; (b) the intention with respect to exercise of the power, (c) the obligations imposed upon the Minister by “common law procedural fairness”; (d) the practice which would be followed by the Minister; and (e) availability of merits review and judicial review.

Is the drafting of the Bill aligned with the above statements? Are any amendments required to align the position as stated in the submission of the Department of Home Affairs with the drafting of the Bill?

Law Council Response

40. The Department’s submission notes that ‘it would not be appropriate to reconsider protection findings for anyone who was granted protection decades ago and continues to hold a substantive visa’.³⁵ The Law Council agrees, and fully supports durable solutions for those who have been granted visas on the basis of genuine humanitarian need.

³⁵ DHA Submission, 17.

41. The Law Council observes that reconsideration of protection findings, even for those already on removal pathways (for example due to visa cancellation), is a substantive task requiring careful consideration of relevant Country of Origin information. Such a task would add to the already immense workload of the Minister for Immigration, and the Law Council is concerned that either thoroughness or timeliness (or both) in the making of such a decision would suffer as a result.
42. The Department's submission asserts that a decision made under section 197D (as amended) would be subject to both merits and judicial review. This appears to be the case, as decisions under the existing section 197D are subject to review under Part 7 of the Act.³⁶ However, judicial review of Ministerial interventions under the Act is narrower in its availability than review of decisions by other decision makers.³⁷

Question 20

Do you have any other responses to the submission of the Department of Home Affairs or to the testimony given by representatives of the Department of Home Affairs on Monday 15 April 2024? In this regard, the testimony may be viewed through [ParlView | Video 2362453 \(aph.gov.au\)](https://www.parliament.gov.au/parlview/video/2362453) (It is further noted that a Hansard transcript will be made available).

Law Council Response

43. On page 4 of its submission, the Department states:

Australia's immigration programs rely on the Government's ability to remove promptly from Australia persons found not to be in need of Australia's protection, and to appropriately resolve the status of individuals with no pathway to remain in Australia. This is done in full compliance with Australia's non-refoulement obligations under international law.

44. The Law Council is of the view that compliance with Australia's *non-refoulement* obligations, which is placed at serious risk by the Removal Bill, should be mandated in the Removal Bill itself. The relevant obligations should have to be considered by the Minister when exercising powers under proposed section 199C, rather than only at an earlier stage by decision makers, or in the process of merits review.³⁸
45. The Law Council's primary submission, at pages 20–21, makes a number of additional recommendations about the proposed 'removal pathway direction' power, including that affected individuals should be given prior notice, the ability to identify concerns of persecution or significant harm or matters which otherwise enliven non-refoulement obligations. The Minister should then have to consider whether such claims are well-founded, and be satisfied that they are not well-founded before making a direction. The Minister should also have to consider the best interests of the child as a primary consideration and the right to respect for family life (if a family is involved). Proposed subsection 199E(4)—restricting what constitutes a 'reasonable excuse' for failing to comply with a direction—should be deleted.

³⁶ *Migration Act 1958* (Cth), ss 197D(4)(c) and (6).

³⁷ On judicial deference to Ministerial decision-making, see eg *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32, at [163]; further *Minister for Immigration v Jia* [2001] HCA 17.

³⁸ *Migration Act 1958* (Cth), s 36(2)(aa).

46. On page 5 of its submission, the Department states:

*New constitutional limits on executive power have been drawn and further cases are expected in the coming years, reflecting changes in the legal landscape and jurisprudence.*³⁹

47. The Department goes on to note relevantly that ‘immigration detention is no longer always available in protracted removal cases’ and ‘the Department cannot rule out the possibility of further court decisions that could have a material impact on critical aspects of the migration system’ and ‘a key attribute of Australia’s sovereignty could be severely circumscribed’.⁴⁰

48. With respect, the Law Council observes that the power to detain individuals indefinitely and without regular review outside wartime was strongly contested by the minority in *Al-Kateb v Godwin* [2004] HCA 37, was incompatible with Australia’s international human rights obligations,⁴¹ and should not have been available to the Executive for the past two decades. *NZYQ v Minister for Immigration* [2023] HCA 37 only corrected the constitutional record in this regard. The Department should have been mindful of the possibility of *Al-Kateb* being overturned and the need to develop a considered solution to the issue of long-term immigration detainees.

49. Further, the Law Council has been strongly encouraging the Department over many years to develop an alternative framework to indefinite detention, given findings that Australia’s system was in breach of its international law obligations. It does not agree that Australia’s sovereignty is under challenge, noting that Australia has freely entered into the relevant treaties which contain these obligations.

Questions on Notice—Senator Thorpe

Questions 1 and 4

Through the application of this new legislation, will a Visa breach or other crime, be criminalised according to the citizenry of the perpetrator or according to Australian law?

Law Council Response

50. The Removal Bill criminalises non-compliance with a ‘removal pathway direction’—that is, a direction to facilitate one’s own removal by obtaining travel documents or similar action.

51. The offence does not appear on its face to be discriminatory on the basis of citizenship. However, it is still highly problematic for the reasons explained in the Law Council’s primary submission.⁴²

52. By contrast, the bar on visa applications by ‘certain nationals of a removal concern country’ in proposed section 199G may discriminate on the basis of citizenship or nationality. This is also explained in the Law Council’s primary submission.⁴³

³⁹ DHA submission, 5.

⁴⁰ DHA submission, 6 and 8.

⁴¹ See eg Fletcher, ‘The Reception of International Law in Constitutional Litigation – the Al-Kateb Battle and its Aftermath’ in Groves et al, *The Legal Protection of Rights in Australia* (Bloomsbury 2019), 79-102.

⁴² Primary submission, 14-19.

⁴³ *Ibid*, 22-24.

Question 2

If a VISA requirement is breached, whether or not criminal penalties apply, will it depend on what country they are from?

Law Council Response

53. Our understanding is that the designation power in the Removal Bill, by means of proposed section 199G, would prevent applications for certain visas, rather than address visa condition breaches.
54. For a more specific response, the Law Council respectfully suggests that this question be directed to the Department.

Question 3

What countries do you anticipate will be on this list and why?

Law Council Response

55. The Law Council understands that the Islamic Republic of Iran, the Republic of Iraq, the Russian Federation and South Sudan have at various times been mentioned by the Department as countries that do not cooperate with the return of nationals who have had Australian visas refused or cancelled. There may well be others of which we are not aware (the US has identified others as set out in the answer to Senator Scarr's Question 9 above).
56. It would be up to the Government to decide whether to designate any of these nations as 'removal concern countries'. Presumably, that would only be done if such a designation would be likely to assist with diplomatic negotiations for return of nationals, but there is no purposive limitation in the Removal Bill itself.