Law Council
OF AUSTRALIA

Migration Amendment (Removal and Other Measures) Bill 2024

Senate Legal and Constitutional Affairs Committee

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About the Law Council of Australia

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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
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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

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Overview

1. The Law Council appreciates the importance of a well-functioning migration program and acknowledges that this is a legitimate objective. However, it has serious concerns about the Removal Bill and recommends that it not be passed.

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. In summary, the Law Council's concerns include:

    - the wide-ranging Removal Bill's removal pathway direction powers, enable the Minister to require individuals (**removal pathway non-citizens**, a group which the Minister can expand through delegated legislation) to take steps to facilitate their and their children's removal from Australia. Non-compliance with such a direction is an offence;
    - the Removal Bill would allow for such directions to be issued including in relation to fast-track applicants, who were subjected to a review process through the Immigration Assessment Authority (**IAA**) which was demonstrably unfair and is now being abolished. It appears that they may be issued where such persons have a request for ministerial intervention on foot;
    - the lack of procedural fairness in the issuing of these directions;
    - the insufficient safeguards that apply to their issue, placing Australia in potential conflict with its international law obligations;
    - the very real possibility that the process of issuing a direction itself creates a situation of a real risk of significant harm if a person is removed to that country;
    - the invidious position that parents of children are placed in under directions, having to choose between facilitating their child's removal overseas despite fears of harm or persecution, or the parent being subject to a mandatory sentence of 12 months for failing to follow the directions—separating their family;
    - the inclusion of a mandatory minimum sentence of 12 months for refusing or failing to comply with a 'removal pathway direction';
    - the proportionality of prescribing a maximum sentence of five years imprisonment for failing to comply with such a direction, noting that the failure may involve relatively minor conduct which is not harmful or dangerous;
    - while a reasonable excuse defence applies to the offence, it is *not* a reasonable excuse that the person has a genuine fear of suffering persecution or significant harm if removed to a particular country; is, or claims to be, a person in respect of whom Australia has non-refoulement obligations; or believes that they would suffer other adverse consequences if required to comply with the direction;
    - where foreign countries have previously failed to provide a pathway for person/s to be returned, the potential consequences for persons who will be returned are unknown;
    - the Removal Bill conferral of a personal and discretionary power to designate 'removal concern countries' in the national interest, which will have a punitive

effect on nationals from those countries who are seeking to apply for an Australian visa from offshore and would otherwise meet the visa criteria; and

- the expansion of the Minister's powers to revisit protection findings with respect to broader cohorts, when the existing powers are highly problematic given their absence of objective criteria, procedural fairness and extraordinary degree of discretion granted to the Minister in making such decisions.

4. The approach adopted in the Removal Bill does not appear to align with comments made by the United Nations High Commissioner for Refugees (**UNCHR**) (and cited in support of the Removal Bill in the Explanatory Memorandum's Statement of Compatibility with Human Rights),[1] which:

> *… note[d] that well-functioning asylum systems and international protection systems as a whole depend on efficient and expeditious return in **safety and dignity** to countries of origin of persons **found not to be in need of international protection**, recall[ed] the obligations of States to receive back their own nationals, and call[ed] for strengthened international support and cooperation to this end.* [emphasis added]

5. The Statement of Compatibility with Human Rights includes the following statement:

> *The Bill is compatible **in most respects** with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 1911. To the extent that the measures in this Bill limit human rights, they do so in order to maintain the integrity of the migration system.* [emphasis added]

6. It is of significant concern that the Statement concedes that the Bill is only compatible in 'most respects' with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act. This is effectively an admission that aspects of the Bill do not comply with Australia's obligations under international law.

7. The Statement suggests that non-compliance with Australia's international obligations is required 'to maintain the integrity of the migration system'. However, the migration system will lack integrity if it is not based on Australia's international obligations. It is inappropriate for such obligations to be overridden because they operate as a 'hindrance' to preferred policy settings for migration law.

Process

8. The Law Council has ongoing concerns about the Parliamentary process applied to the Removal Bill, which echoes responses to the *NZYQ v Commonwealth*[2] (***NZYQ***) decision.[3] While we welcome Parliament's referral of the Removal Bill to the Committee, the inquiry process remains heavily truncated, occurring over nine business days. It is well short of what is needed to ensure proper democratic scrutiny. For this reason, the Law Council's remarks in this submission should be considered preliminary and subject to amendment or clarification.

[1] Explanatory Memorandum to the Removal Bill, 20, citing Executive Committee of the Program of the UNHCR, *Conclusion on International cooperation from a protection and solutions perspective No 112*.
[2] [2023] HCA 37.
[3] Law Council of Australia, 'Rushed legislation requires urgent review', media release, 17 November 2023.

9. The High Court decision in *NZYQ* and the expected decision in the matter of *ASF17 v Commonwealth*[4] appear to have prompted the Removal Bill as a rushed legislative response, which has not been subject to appropriate consultation and transparency. It is very disappointing that the Australian Government has failed to consult with relevant stakeholders, including the legal profession and refugee organisations and communities, before introducing the Removal Bill to Parliament. Such consultation is particularly important for legislation of this kind, which has a significant impact on human rights and individual liberties, as well as consequences for the operation of Australia's migration program and foreign policy agenda.

10. The focus on improving the integrity of the migration system must be balanced with ensuring the process is fair and humane. The Australian Government has also failed to establish why it needed to be rushed and of such an urgent nature, given the problems outlined by the Government are not new. Key details remain unclear: for example, in Parliament, the Department of Home Affairs has been unable to outline how many people will be impacted by the Bill.[5]

11. There has been a failure to consider what less restrictive options may exist to address any legitimate concerns regarding the Australian Government's ability to ensure the orderly departure of non-citizens who do not engage Australia's international obligations. The Law Council strongly encourages the Australian Government to engage in a community dialogue on such matters, outlining the issues and relevant options as a basis for pursuing more moderate legislation.

Position and Primary Recommendation

12. Given our strong concerns, the Law Council opposes the Removal Bill's passage.

13. Should, Parliament elect to pass the Removal Bill, contrary to the Law Council's recommendation, several alternative recommendations are made below. The Law Council's clear position is that the Bill should **not** be passed, and these alternative recommendations should **not** be taken as indicating support for the Bill.

Recommendation

- **The Removal Bill should not be passed.**

Schedule 1

Duty to cooperate in relation to removal and removal concern countries

14. Under Schedule 1, item 3, proposed section 199A(1) of the Migration Act 1958 (Cth) would enshrine a Parliamentary expectation that 'removal pathway non-citizens'[6] will voluntarily leave Australia, cooperate with steps taken to arrange their lawful removal from Australia, and not attempt to obstruct or frustrate their removal from Australia.

15. It also includes, under proposed section 199A(2), a Parliamentary expectation 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.

[4] Case P7/2024
[5] Senate Hansard, Migration Amendment (Removal and other Measures) Bill 2024, 29 March 2024, 4-6.
[6] Defined under proposed s 199B(1) (sch 1, item 3), see also proposed amendments to s 5(1) (sch 1, item 1).

Comments

16. The Law Council does not support proposed section 199A. We are concerned that it is unrealistic and unacceptable to enshrine the kind of statutory expectation envisaged by proposed section 199A(1) on groups of individuals including (as noted below), possible refugees and asylum seekers. This approach also appears to be novel: in the short time available, we were unable to find reference to a similar "Parliamentary expectation" elsewhere in Commonwealth primary legislation.

17. Combined with broader item 3 provisions, proposed section 199A(1) will have the effect of requiring such individuals to comply with Ministerial directions facilitating their removal from Australia, even where they have a genuine fear of suffering persecution or significant harm if removed to a particular country, or a person may be someone to whom Australia has non-refoulement obligations (among other things). It is unrealistic to expect any person in such circumstances to adhere to this duty. It is also unacceptable to expect a person to do so, especially in circumstances where non-cooperation is subject to the threat of very significant criminal sections as proposed by section 199E.

18. We note with special concern proposed section 199A(1)(c), under which Parliament expects that removal pathway non-citizens 'will not attempt to obstruct or frustrate the non-citizen's lawful removal from Australia'. The absence of clarity regarding the meaning of these terms, coupled with the absence of procedural fairness in the exercise of powers under the Removal Bill,[7] gives rise to a real concern about what kinds of things may be considered to 'obstruct' or 'frustrate' removal from Australia.

19. The lack of clarity in proposed section 199A(1)(c) is compounded by our concerns (discussed below) regarding the breadth of the Minister's power under proposed section 199C(2) to direct a removal pathway non-citizen to 'do to a thing, or not do a thing' if satisfied that it is reasonably necessary to facilitate removal etc. This latter power will be interpreted by reference to proposed section 199A.

20. The Law Council further queries proposed section 199A(2), under which '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'. Instead of issuing expectations in legislation, which are incapable of giving rise to any legally enforceable duty, it would be appropriate for the Australian Government to resolve issues arising with foreign countries via normal diplomatic channels.

Removal powers

Removal pathway non-citizens

21. Proposed section 199B details the categories of persons considered 'removal pathway non-citizens' for the purposes of the Removal Bill, and clarifies the categories of people to whom provisions in the Removal Bill (particularly proposed sections 199C to 199F) apply. Proposed section 199B(1) provides that 'removal pathway non-citizens' include:

    (a) an unlawful non-citizen (e.g., any non-citizen without a visa entitling them to be in Australia)[8] who is required to be removed from Australia under section 198 of the Migration Act as soon as reasonably practicable;

[7] See discussion below regarding proposed s 199C (as well as ss 199F and 199G).
[8] Migration Act, s 14.

(b) a lawful non-citizen who holds a Subclass 070 (Bridging (Removal Pending) visa);

(c) a lawful non-citizen who holds a Subclass 050 (Bridging (General) visa) and, at the time the visa was granted, satisfies a criterion for the grant relating to the making of arrangements to depart Australia; and

(d) a lawful non-citizen who holds a visa prescribed for the purposes of this paragraph.

22. Proposed subsection 199B(2) elaborates that the definition of 'removal pathway non-citizen' includes those for whom a protection finding has been made within the meaning of section 197C(4), (5), (6) or (7) of the Migration Act.

Comments

23. The Law Council is concerned by the broad scope of persons considered 'removal pathway non-citizens', which covers a wide range of non-citizens beyond those who were released on the basis of the law, as declared in *NZYQ*, and does not support proposed section 199B.

24. In particular, we are concerned by proposed subsection 199B(1)(d). This paragraph encompasses lawful non-citizens without any apparent connection to a removal pathway. No clarification is provided regarding the basis on which additional visas may be prescribed. This provides scope for dramatic expansion of this scheme. There are no limits in the Bill on what classes of visa the Minister could designate under subsection 199B(1)(d). For example, this might include holders of refugee or humanitarian visas who have not committed an offence, not failed to pass the 'character test'—not done anything wrong at all—and are yet made liable to a direction. It might include persons who have established themselves in Australia for years and have Australian citizen children. It may include, for example, the holders of certain classes of business visas, making the holders liable to comply with removal directions.

25. We consider that any expansion of the scope of the 'removal pathway non-citizen' is highly inappropriate to be dealt with by delegated legislation, given the significant penalties associated with non-compliance with Ministerial directions. We strongly agree with the Scrutiny of Bills Committee's concerns as expressed on this matter.[9]

26. We are equally concerned that the definition under section 199B extends to individuals who are currently in immigration detention who had their applications for protection visas determined and refused under the 'fast-track' process. This process has consistently raised strong concerns as to its fairness, including due to its very limited rights of merits review under the IAA.[10]

27. Under IAA review, applicants have not had a right to an oral hearing or interview by the IAA, and there has been no obligation on the reviewer to consider new information from the applicant. Some individuals have been excluded from any merits review at all. In 2018, McDonald and O'Sullivan's analysis of the system concluded that it 'increases the propensity of such measures to lead to serious legal errors'.[11] In 2015,

[9] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, Scrutiny Digest (Digest No 5 of 2024, 27 March 2024) (**Scrutiny of Bills Committee Report)** 3, [1.4].
[10] Asylum Seeker Resource Centre, 'The Fast-Track Process' (Report, 2014), UNSW Kaldor Centre for International Refugee Law, *Fast Track Refugee Status Determination Research Brief*.
[11] Emily McDonald and Maria O'Sullivan, 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 41(3) *UNSW Law Journal* 1003, 1041.

the Australian Law Reform Commission questioned whether the exclusion of the duty to afford procedural fairness in the fast-track review process was proportionate, given the gravity of the consequences for those affected.[12] Legitimate protection visa claims may not have been processed properly and legitimate refugees and asylum seekers may have been refused visas.

28. In recognition of its significant shortcomings, the Australian Government has introduced legislation to abolish the IAA.[13] However, those who have had their claims already determined under it will be caught by the Removal Bill's definitions and be subject to the Bill. This may include individuals who are legitimate refugees and who face a real risk of persecution should they be returned to their country of origin.

29. Accordingly, the Law Council does not support proposed section 199B. If it is retained, it recommends that, at the very least, proposed subsection 199B(1)(d) be removed.

Removal pathway directions powers

30. Proposed section 199C vests the Minister with new discretionary powers to issue directions to removal pathway non-citizens by written notice.

31. Under proposed section 199C(1), the Mister may direct the non-citizen to do one or more things set out in subsections 199C(1)(a)–(e). This list includes, for example, that the non-citizen complete, sign, and submit an application for certain documents (like a passport), provide documents or information to a person specified in the direction, or attend an interview or appointment with a person specified in the direction. The subject matter of the direction is very broad and can include directing the person to do things such as apply for a passport or other official travel document from the country from which the person fled.

32. Under proposed section 199C(2), the Minister may direct the non-citizen to do a thing, or not do a thing, if the Minister is satisfied that the non-citizen doing, or not doing, the thing is reasonably necessary: to determine whether there is a real prospect of the removal of the non-citizen from Australia under section 198 becoming practicable in the reasonably foreseeable future; or to facilitate the removal of the non-citizen from Australia under that section.

33. Failure to comply with either of the direction powers is an offence under section 199E.

34. Section 199D provides for circumstances in which the Minister must not give a removal pathway direction. For example, not giving a direction in relation to:

    - non-citizens who cannot be removed to a particular country because of section 197C(3) of the Migration Act, which provides that unlawful non-citizens cannot be removed to a country if they have made a valid application for a protection visa that has been determined, and in the determination process a protection finding was made—regardless of whether or not a visa was granted;[14]

[12] Australian Law Reform Commission, Traditional Rights and Freedoms – Encroachments by Commonwealth Laws, Report No 129 (2015) 402 [14.47].
[13] Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, item 228.
[14] Removal Bill, s 199D(1). See also s 199D(2), which precludes a removal pathway direction in the case of a lawful non-citizen, if the non-citizen could not be removed to that country because of s 197C(3) if the non-citizen were an unlawful non-citizen.

- non-citizens who have made a valid application for a protection visa that has not yet been determined;[15]
- children (though directions can be issued to a parent or guardian in relation to them);[16] and
- potential interference with court or tribunal proceedings, or visa applications.[17]

Comments

35. The Law Council is concerned about the direction powers for several reasons.

36. Firstly, these powers are overly broad in scope. The extent of the discretion conferred under section 199C(2) is exceedingly broad. There are few apparent limits on the things that the Minister may direct a removal pathway non-citizen to do or not to do, provided that the Minister forms the view that it is reasonably necessary to facilitate the person's removal from Australia, or to determine if there is a prospect of removal of the person from Australia under section 198 becoming practicable in the reasonably foreseeable future. In the context of non-compliance punishable by 1–5 years imprisonment, such a breadth of power is of great concern.

37. Secondly, the Law Council is concerned by the absence of indicators of the application of procedural fairness in the exercise of the direction powers. It is unclear if removal pathway non-citizens will be notified that the Minister is considering whether to exercise the directions powers in relation to them, or whether they will be entitled to obtain legal advice or make submissions relevant to that decision.

38. There are no objective considerations listed that the Minister must consider when contemplating exercising, or actually exercising, the directions powers. While under proposed section 199C(4), the period for compliance must be specified, there is no minimum period of time specified for compliance which would include enabling the person to seek legal advice. The Scrutiny of Bills Committee has raised similar concerns on this point, recommending at least 60 days as an appropriate minimum time period.[18] There is also no requirement for transparency or accountability regarding the exercise of the powers, such as reporting to Parliament.

39. Thirdly, the Law Council has significant concerns about the human rights implications of the directions powers. The Minister is not required to consider the impact that the directions may have on the health, safety and family unity of affected non-citizens, nor are they required to consider the best interests of children who may be affected, or the impact on Australian citizens who are family members of removal pathway non-citizens. There are real concerns that the Removal Bill will result in families being permanently separated, and children being irretrievably harmed in the process.

40. Section 199C(1) appears to extend to attending an interview or appointment with a foreign embassy, or providing documents or information to that embassy, or applying for a passport from it, regardless of a person's genuine fears about suffering persecution or significant harm if removed to that country, or any assessments made regarding potential broader repercussions by the embassy/foreign country. This underlines the need to consider the human rights implications of exercising these powers, including the impact on a vulnerable individual's health and wellbeing.

[15] Removal Bill, s 199D(2).
[16] Removal Bill, s 199D(4) and (5).
[17] Removal Bill, s 199D(6).
[18] Scrutiny of Bills Committee Report, 3.

41. The current safeguards in proposed section 199D are insufficient to address the above concerns.

42. We particularly underline the rights of the child in this context. While the Minister must not give a removal pathway direction to a removal pathway non-citizen if the non-citizen is a child under 18,[19] the Minister may give a direction to the parent or guardian of a child to do something on the child's behalf.[20] This power may be exercised despite Australia's obligations under the Convention on the Rights of the Child (**CRC**),[21] which require that, in all actions concerning children, the best interest of the child shall be a primary consideration.[22] This requirement is absent from section 199D.

43. Instead, extraordinarily, parents are coerced—under the threat of criminal sanction and at the risk of mandatory imprisonment—to themselves undertake the steps for removal for their children, regardless of their fears for their wellbeing. If a parent refuses to comply because he or she genuinely fears for the persecution of a child if removed, the mandatory imprisonment provision in subsection 199E(2) will result in forcible separation of the family. By way of example, had such legislation been in place when the Nadesalingam family were in detention, they would have been forced under the Removal Bill to undertake such steps for their children and would then have been removed from Australia.

44. We also note that the safeguards at proposed section 199D(1) and (2)—which restrict the Minister from giving a removal pathway direction to those subject to a protection finding under section 197C(3), or those whose protection visa applications have not yet been finally determined—are very narrow and create the high risk that people who are genuine refugees will be deported to countries where they face harm.

45. Section 199B(2) makes clear that a removal pathway non-citizen can include those with protection findings under sections 197C(4), (5), (6) or (7). There is no safeguard for those who have not had their protection claims assessed (for instance, if they have not made an application), or had their claim unfairly assessed (for example, those people assessed under the 'fast-track' process which, as noted, the current government has acknowledged is unfair), or are in the process of seeking review of such a decision of the courts. Section 199B would appear to cover a large group of persons who have had protection findings being able to be removed to the country from which they sought protection from or to another country.

46. Section 199D also does not prevent a removal direction being made in relation to individuals who are statute-barred from making a visa application, even if they have protection claims which may inform the Ministerial discretions under the Migration Act to 'lift the bar'[23] and allow a valid application to be made. It also appears that directions may be issued where a person has a request for such Ministerial intervention already on foot. This may include fast-track applicants.

47. The coercive nature of the direction raises the problem that Australia would be in breach of its international treaty obligations and customary international law, both of

[19] Removal Bill, s 199D(4) .
[20] Removal Bill, s 199D(5).
[21] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (**CRC**).
[22] CRC, art 3(1).
[23] Under s 48A of the Migration Act, where a non-citizen has previously been refused a protection visa, or held a protection visa that was cancelled, the person cannot make another application for a protection visa. However, under s 48B, the Minister may intervene by lifting the bar and determining that s 48A does not apply to prevent a further application for a protection visa by the non-citizen. Only new protection claims can be considered in this context (s 50).

which prevent *refoulement*. The directions would create a veneer of 'voluntariness' from the person the subject of the directions, but in practice would be forcing the person to be removed against that person's will to a country where t may face serious harm, including death. This would at least amount to constructive refoulement, which is prohibited under international treaty and customary law.[24]

48. We add that section 199D(1) is further undermined by proposed Schedule 2, which expands the circumstances in which the Minister can revisit a protection finding. This Schedule is discussed below.

Directions themselves as triggers for persecution

49. As noted, under proposed section 199D, a direction cannot be given to require a person to take steps to facilitate removal to a country in respect of which the person has a 'protection finding' as defined.

50. However, this overlooks that it is common in the context of a protection visa application for a decision-maker to determine that the person does not face a real chance of serious or significant harm in the country in question only because the person's circumstances would be unlikely to come to the attention of the authorities of that country. In such a case, there is no 'protection finding', and so the carve-out in section 199D would not apply.

51. For example, it is common for a decision-maker to find that a person meets the definition of apostate, having been born Muslim and renounced Islam (whether or not they converted to another religion) and therefore to face the death penalty in countries including, for example, Taliban-run Afghanistan. But, in reliance on country information that the death penalty would only be applied if there was some reason that the renunciation would come to the attention of the authorities, it is also common for a decision-maker to find that there is a not a real risk that the death penalty would materialise. Similarly, it is common in relation to multiple countries for a decision-maker to accept that a person has posted material on social media that would lead to significant harm if that material were to come to the attention of the authorities (for example, if it is considered critical of the authorities in that country), but that it is unlikely to come to their attention.

52. A removal pathway direction under section 199C can include requiring a person to provide documents, attend an interview with or report to any person, which would include authorities of the country of origin. It is *that* act, forced by the direction, that could precipitate the attention of authorities of that country to the person which may not otherwise have been raised, by reason of that country conducting checks of social media (a practice which the Department of Home Affairs also uses for people wanting to enter or re-enter Australia), or making enquiries of Australia about the nature of protection claims made (which the Migration Act does not prohibit Australia from disclosing).

53. Accordingly, compliance with a direction under section 199C may *itself* create a situation of a real risk of significant harm if a person is removed to that country. As there will have been no protection finding under section 197C for such a person because the real risk may only materialise as a result of compliance with the

[24] MS v Belgium (2012) App No 50012/08 (ECHR, 31 January 2012); NA v Finland (2019) App No 2522/18 (14 November 2019, ECHR). See also Ben Saul, 'Dark Justice: Australia's indefinite Detention of Refugees on Security Grounds under International Human Rights Law' (2012) 13 *Melbourne Journal of International Law* 1.

direction under section 199C, there is nothing to preclude the giving of such a direction.

Offence for non-compliance with removal pathway direction

54. Section 199E provides that a person commits an offence if:

- the person is a removal pathway non-citizen; and
- the person is given a removal pathway direction under section 199C; and
- the direction has not been revoked; and
- the person refuses or fails to comply with the direction.

55. The standard 'default' fault elements under the *Criminal Code Act 1995* (Cth) (the **Criminal Code**) apply to this offence.[25] This means that the mental element in respect of the first three physical elements which refer to a circumstance[26] in which conduct occurs is recklessness. The mental element in respect of the final physical element, which refers to conduct, is intention.

56. The offence carries a penalty of 5 years' imprisonment or 300 penalty units, or both.

57. Subsection 100E(2) provides for a mandatory minimum sentence of 12 months' imprisonment for a person convicted of an offence under subsection 199E(1). The Explanatory Memorandum states that it is the Government's view that a penalty of 12 months' mandatory minimum imprisonment will serve as an 'effective deterrent to the commission of the offence' as well as reflecting the 'serious and damaging consequences to the integrity of the managed migration program.'[27]

58. Under proposed section 199E(3), a reasonable excuse defence is available. The defendant bears the evidential burden in relation to this defence.

59. However, under proposed section 199E(4), it is *not* a reasonable excuse that the person:

(a) has a genuine fear of suffering persecution or significant harm if the person were removed to a particular country; or

(b) is, or claims to be, a person in respect of whom Australia has non-refoulement obligations; or

(c) believes that, if the person were to comply with the removal pathway direction, the person would suffer other adverse consequences.

Comments

60. The Law Council opposes section 199E. We consider it inappropriate to impose criminal sanctions in light of the complex human rights issues inherent in the circumstances captured by the Bill.

61. Ironically, the criminalisation of non-compliance may actually make it much harder to remove persons in some cases, because the receiving country will be asked to receive a person who has criminal convictions.

[25] Criminal Code, s. 5.6 (offences that do not specify fault elements); Explanatory Memorandum, [61].
[26] See further, Criminal Code, s. 4.1 (physical elements).
[27] Explanatory Memorandum, 27.

62. We consider that the maximum sentence of five years imprisonment is highly disproportionate, given that the failure to comply could involve relatively minor conduct which is not harmful or dangerous. This does not sit well with the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (**AGD's Guide to Framing Offences*)*, which points towards higher maximum penalties where the consequences of the commission of the offence are particularly dangerous or damaging.[28]

63. A collection of other offences from the Criminal Code which carry the same maximum penalty demonstrates the unjustifiably high nature of the proposed maximum penalty:

    (a) corrupting benefits given to, or received by, a Commonwealth public official;*[29]*

    (b) abuse of public office;*[30]*

    (c) using a carriage service to menace, harass or cause offence;*[31]*

    (d) using a carriage service for violent extremist material.*[32]*

64. Comparable offences in states and territories that make it an offence to contravene police directions are generally either a fine-only offence or subject to a maximum penalty of 12 months' imprisonment.[33] We also note the availability of less disproportionate civil penalty provisions under the Migration Act.[34]

65. We strongly oppose the use of mandatory and minimum sentences[35] in the Removal Bill, and generally.

66. Mandatory and minimum sentences prevent individualised justice and fetter judges' discretion to impose penalties that are proportionate to the offending. Especially in the context of this legislation, they:

    (a) would not have a deterrent effect;

    (b) will disproportionately affect vulnerable members of the community, in particular refugees and persons with limited English language skills;

    (c) will result in unduly harsh punishment that is disproportionate to the criminality alleged;

    (d) will remove the ability of the judiciary to exercise a discretion with respect to mitigatory features that would otherwise be available.

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[28] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011), 38. ('***AGD Guide to Framing Commonwealth Offences***')
[29] *Criminal Code Act 1995* (Cth), s 35.
[30] Ibid, s 142.2
[31] Ibid, s 474.17.
[32] Ibid, s 474.45B.
[33] See for example, *Summary Offences Act 1966* (Vic), s. 6(4) (contravention of a direction to move on without reasonable excuse—fine only); *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s. 199 (failure to comply with directions—fine only); *Police Powers and Responsibilities Act 2000* (Qld), s. 53BJ (offence to contravene direction without reasonable excuse—fine or 1 year's imprisonment).
[34] See for example, Subdivision C and D of Division 12 of the Migration Act (work by non-citizens and civil penalties in relation to sponsored visas).
[35] Law Council of Australia, Mandatory Sentencing Policy, May 2014, <https://lawcouncil.au/publicassets/2c6c7bd7-e1d6-e611-80d2-005056be66b1/1405-Policy-Statement-Mandatory-Sentencing-Policy-Position.pdf>; Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing*, May 2014, <https://lawcouncil.au/publicassets/f370dcfc-bdd6-e611-80d2-005056be66b1/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf>.

67. We consider that mandatory and minimum imprisonment sentences breach Australia's international human rights obligations under the *International Covenant on Civil and Political Rights*,[36] including articles 9(1) and 14(5). They are, by definition, arbitrary and can limit an individual's right to a fair trial by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender.[37]

68. Importantly, the Explanatory Memorandum expressly recognises that the inclusion of the minimum mandatory sentence in the Removal Bill means that there could be a risk of incompatibility with the rights contained in articles 9 and 14 of the ICCPR.[38] It is concerning that the Australian Government is, by its own admission, at risk of breaching Australia's obligations in this manner.

69. In the current context, the mandatory sentence takes away the ability of the sentencing court to take into account the circumstances of the individual case, which could include the very trauma experienced by the person and a genuine fear of prosecution if returned (even though the latter cannot be a defence due to proposed section 199E(4)). Under orthodox Commonwealth sentencing principles, a person's ''mental condition''—which would include a mental impairment brought about by the very persecution from which the person has fled or the immigration detention which they have endured—must be taken into account in sentencing. The proposed mandatory minimum would prevent such matters from being taken into account even where they would have made a sentence of 12 months' imprisonment inappropriate.

70. Another problem with mandatory sentences is that they disincentivise a person from pleading guilty. If a person knows that however early they plead guilty they are destined to receive 12 months' imprisonment, they are more likely to contest the matter, perhaps trying to run technical or other unmeritorious defences in the belief that they have nothing to lose. This risks clogging already-overloaded courts with contested hearings and taxing the resources of the police and prosecution.

71. Notably, the AGD's Guide to Framing Offences encourages avoiding minimum penalties based on similar concerns.[39] We strongly agree with the Scrutiny of Bills Committee that the Removal Bill's minimum mandatory sentences are inappropriate, as they impede judicial discretion to ensure that the punishment fits the crime.[40]

72. It is particularly inappropriate to employ such sentencing practices in the context of failure to comply with a direction. As highlighted by the Kaldor Centre for International Refugee Law, while in some state legislation there are criminal penalties attached to a failure to comply with police directions to move on, or for reportable offenders who fail to produce electronic devices when directed by police, such provisions do not provide for mandatory minimum sentences.[41]

73. It is highly unusual for ancillary offences, intended to protect the integrity of a legislative scheme, to include mandatory penalties. For example, it is striking that ancillary offences, in respect of convicted high-risk terrorism offenders who are

[36] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[37] Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing*, May 2014, <https://lawcouncil.au/publicassets/f370dcfc-bdd6-e611-80d2-005056be66b1/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf>.
[38] Explanatory Memorandum, Statement of Compatibility with Human Rights, 26, 27.
[39] AGD Guide to Framing Offences, 38.
[40] Scrutiny of Bills Committee Report, 4.
[41] Kaldor Centre for International Refugee Law, Kaldor Centre Statement on New Migration Bill, 26 March 2024, available <https://www.unsw.edu.au/news/2024/03/Kaldor-Centre-statement-deportation-bill#:~:text=It%20gives%20the%20Minister%20extraordinarily,travel%20bans%2C%20prohibiting%20their%20citizens>.

subject to a post-sentence order under Division 105A of the Criminal Code, do not include mandatory penalties.[42] While the *Taxation Administration Act 1953* (Cth) contains a number of summary offences directed to protecting the integrity of the regulatory regime and to incentivise cooperation, none of those offences is subject to a mandatory penalty.[43]

Reasonable excuse

74. The Law Council is highly concerned that, under proposed section 199E(4), the scope of the 'reasonable excuse' defence does not apply to those who do not comply with a direction owing to a 'genuine fear of suffering persecution or significant harm if removed to a particular country', or believe themselves to be a refugee, or believe that they would suffer other adverse consequences. This refers to a 'genuine' fear, rather than a 'subjective' fear discussed in the Explanatory Memorandum.[44]

75. The Law Council queries why the Australian Parliament would not want to ensure that there can be no doubt about whether such risks exist, prior to an individual either being removed to a country or being imprisoned under proposed 199E for 1–5 years.

76. As noted, it appears that the Minister may give removal pathway directions to an individual whose protection visa has been refused or cancelled, and who may be statute-barred from making a further visa application, even if they had protection claims which may inform Ministerial discretions under the Migration Act to 'lift the bar' and allow a valid application to be made. This may include fast-track applicants, as well as persons who due to a change of circumstance in a particular country (e.g., change in political regime or policy) have developed a new and genuine fear of suffering persecution or significant harm. Directions may be issued even if they have already made requests to the Minister to lift the bar on making further applications in light of these fears.

77. Their fears may be objectively reasonable and well-founded, but as yet unassessed. For example, we refer to the Minister for Foreign Affairs' September 2023 announcement of financial sanctions and travel bans imposed under the recently expanded Iran autonomous sanctions framework.[45] This indicated that the ''Australian Government would continue to take decisive and targeted action to hold Iran to account for its egregious human rights violations' and noted that 'Australia stands in solidarity with the people of Iran, especially the courageous women and girls who continue to demonstrate immense bravery in the face of ongoing repression'.[46]

78. Proposed section 199E(4) of the Bill appears to overlook the possibility that individuals—including parents of children—may have valid fears. The exclusion of persons with 'a genuine fear of suffering persecution or significant harm if the person were removed to a particular country', or a person in respect of whom Australia has non-refoulement obligations' or someone who 'would suffer other adverse consequences' from the basis of a what a reasonable excuse is, appears to punish those who will be faced with an impossible decision. A decision to return to a country

[42] See further, Criminal Code, s. 105A.18A (offence for contravening an extended supervision order or an interim supervision order) and s. 105A.18B (offence relating to monitoring devices).
[43] See for example, *Taxation Administration Act 1953* (Cth), 8C (failure to comply with requirements under taxation law) and 8E (penalties for failure to comply with requirements under taxation law).
[44] Explanatory Memorandum, 22.
[45] Minister for Foreign Affairs, Senator the Hon Penny Wong, 'Targeted sanctions in response to human rights violations in Iran', Media release, 13 September 2023, <https://www.foreignminister.gov.au/minister/penny-wong/media-release/targeted-sanctions-response-human-rights-violations-iran>.
[46] Ibid.

where they may face persecution or death, or refuse to return and face 12 months in prison.

79. The criminal law should not be used to disproportionately punish those who have already served and completed a sentence, by forcing them into either further time in custody, or a possible death sentence by returning to their home country.

80. The proposed criminalisation of non-cooperation with Ministerial directions in such circumstances risks non-compliance with Australia's obligations including under customary international law, as well as the Convention relating to the Status of Refugees,[47] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[48] the ICCPR,[49] and the CRC.[50]

81. We also agree with the Scrutiny of Bills Committee that the reasonable excuse defence is unclear in its scope and lacks guidance.[51] Fundamentally, that Committee also recognises that, while the reasonable excuse defence is intended to be a safeguard, its lack of clarity suggests that the power of the Minister to give directions under proposed section 199C may be too broad in the first place.[52] It states that:

> *Many of the matters that could be taken to be reasonable excuses would have been more appropriately dealt with by better delimitation of the directions which can be lawfully given by the Minister. For example, the provision could specify that the Minister may only give directions with which it is possible to comply, cannot give a direction to produce a document the non-citizen does not have or which has been destroyed, or must not give directions that do not relate to a purpose which is to enable removal.*[53]

82. We agree and make additional recommendations to narrow the scope of the directions-making power accordingly below. If, however, these are not accepted, we recommend that proposed section 199E(4) be removed from the Removal Bill. Further, a non-exhaustive list of what constitutes a reasonable excuse should be included. Importantly, this should include a health condition, including a mental or physical health condition, which precludes compliance.[54]

83. Alternatively, the Law Council recommends that reasonable excuse be specified as an element of the offence in keeping with comparable broadly defined offences.[55] It is common to ameliorate the risk that very broadly defined offence provisions will

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[47] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), art 33.
[48] Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), art 3.
[49] ICCPR, arts 6, 7.
[50] Arts 4, 6, 37(a), (b) and (c).
[51] Scrutiny of Bills Committee, 4.
[52] Ibid, 5.
[53] Ibid.
[54] In this context, the Victorian Bar notes that in a number of Victorian statutes in which mandatory sentencing applies, there is an express exception where an accused is suffering from a mental impairment either at the time of sentence or at the time of offending: e.g., *Sentencing Act 1991* (Vic), s 5(2)(h)(c).
[55] See for example, *Summary Offences Act 1966* (Vic), s. 6(4) (contravention of a direction to move on without reasonable excuse); *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s. 199 (the offence of failure to comply with directions states 'a person must not, *without reasonable excuse*, refuse or fail to comply with a direction …'); *Crimes Act 1900* (NSW), s. 93ZA (the offence of displaying Nazi symbols proscribes 'a person who knowingly displays, by public act and *without reasonable excuse*, a Nazi symbol commits an offence'); *Police Powers and Responsibilities Act 2000* (Qld), s. 53BJ (offence to contravene direction without reasonable excuse).

capture a range of innocuous conduct by including reasonable excuse as an element of the offence rather than as an offence specific defence.

84. The distinction between an exception, included as an element of the offence, and an offence-specific defence is significant for two reasons. First, we consider that including a matter as an offence-specific defence is a departure from the general principle that a defendant is presumed to be innocent, and that the prosecution must prove every element of an offence. In particular, matters that are critical to evaluating a person's culpability should not be subject to an evidential burden on the defendant to establish.[56] As explained above, certain matters that may be relevant to a reasonable excuse defence, such as whether compliance with a removal pathway direction is practically impossible, are not peculiarly within the knowledge of a defendant. Second, given the likely inequality of arms between vulnerable persons who are likely to be subject to these orders and the state, it is appropriate that the state bear the burden of disproving that the defendant had a reasonable excuse for not complying with the removal pathway direction.

[56] Generally, there are two reasons for including a matter as an offence specific defence: when a matter is 'peculiarly within the knowledge of the defendant' or when 'it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter': AGD Guide to Framing Commonwealth Offences, 50.

Recommendations

The Law Council makes the following recommendations only in the event that, contrary to its primary recommendation above, Parliament elects to pass the Removal Bill including its removal pathway direction powers and offence. The Law Council does not support these provisions or the Removal Bill more generally.

- **Proposed section 199A(1)(c), concerning the expectation that removal pathway non-citizens will not 'obstruct or frustrate' their lawful removal, should be deleted from the Removal Bill.**
- **Proposed section 199B(1)(d), providing the Minister with the power to prescribe visas for the purposes of the removal pathway non-citizen definition, should be deleted from the Removal Bill.**
- **Proposed section 199C(2), providing the Minister with the power to direct non-citizens to 'do a thing, or not do a thing', should be deleted from the Removal Bill.**
- **Prior to making a removal pathway direction under proposed section 199C(1), the Minister must provide reasonable notice to a removal pathway non-citizen, which enables sufficient time (at least 60 days) to seek legal advice and notify the Minister of any claims that the person (or their child):**
  - **has a genuine fear of suffering persecution or significant harm if the person were removed to a particular country; or**
  - **is, or claims to be, a person in respect of whom Australia has *non-refoulement* obligations;**
  - **believes that, if the person were to comply with the removal pathway direction, the person (or their child) would suffer other serious adverse consequences; or**
  - **it is impossible to reasonably comply with the direction.**
- **The Minister must consider any such claims and supporting evidence, and prior to making a removal pathway direction, be satisfied on reasonable grounds that these claims are not well-founded.**
- **Prior to making a removal pathway direction under proposed section 199C(1), the Minister must further have regard to:**
  - **the best interests of the child as a primary consideration; and**
  - **the right to respect for the family.**
- **Proposed section 199C(4), concerning the period for compliance with removal pathway directions, should specify a minimum time period to enable compliance of at least 60 days;**
- **Proposed section 199D, should be expanded so that the Minister may not give a removal pathway direction if:**
  - **a removal pathway non-citizen was a fast-track applicant and has made, or advised the Minister that they intend to make, a request that the Minister lift the bar under section 48B of the Migration Act, and this request has not yet been considered;**
  - **there is reason to believe that the direction cannot be complied with; or**
  - **the direction does not reasonably relate to the purpose of**

facilitating the removal of the non-citizen from Australia.

- **Proposed section 199E(2), imposing a minimum mandatory sentence of 12 months, should be deleted from the Removal Bill.**
- **Proposed section 199E(1), should be amended to substantially lower the proposed maximum penalty of 5 years imprisonment to 12 months imprisonment.**
- **Proposed section 199E(4) should provide a non-exhaustive list indicating what constitutes a reasonable excuse, including where an individual's health condition, including a mental or physical health condition, precludes compliance.**
- **Proposed section 199E(4), indicating what does not constitute a reasonable excuse, should be deleted from the Removal Bill.**

Designation of removal concern country

85. Proposed section 199F(1) empowers the Minister to personally designate a country, by legislative instrument, as a 'removal concern country' if the Minister thinks it is in the national interest to designate the country to be a removal concern country.

86. Before making such a designation, the Minister must consult with the Prime Minister and the Foreign Minister.[57] The Minister may also revoke the designation.[58]

87. The Minister's powers to designate and revoke may only be exercised by the Minister personally. The rules of natural justice do not apply.[59]

88. If the Minister designates a country under proposed section 199F(1), the Minister must cause a copy of the designation and a statement of the Minister's reasons for why the designation is in the national interest to be tabled in Parliament within 2 sitting days. Failure to do so does not invalidate the designation.[60]

89. Under proposed section 199G(1), an application for a visa by a non-citizen is not a valid application if, at the time the application is made, the non-citizen is a national of one or more removal concern countries, and the non-citizen is outside Australia.

90. Under proposed section 199G(2), certain exceptions apply to this bar on visa applications, including for dual citizens of other countries, spouses, partners or dependent children of Australian citizens or permanent visa holders, parents of children in Australia, and applications for grants of a Refugee and Humanitarian (Class XB) visa.

91. Proposed section 199G(3)[61] further enables the Minister to determine classes of persons or classes of visa which fall within these exceptions. Under proposed section 199G(4), if the Minister thinks it is in the public interest to do so, the Minister may determine that proposed section 199G(1) does not apply to an application by the non-citizen for a visa of a class specified in the determination.

[57] Removal Bill, s 199F(2).
[58] Removal Bill, s 199F(3).
[59] Removal Bill, ss 199F(4) and (5).
[60] Removal Bill, ss 199F(6), (7) and (8).
[61] Combined with s 199G(2)(e) and (f).

Comments

92. The Law Council considers that the proposal to designate 'removal concern countries' is a blunt and punitive approach, which would create real and substantial risks of injustice. It confers upon the Minister a power to reject visa applications from entire countries. It will prevent nationals of whole countries (as a class) from making visa applications, regardless of their individual circumstances and whether their applications would be considered valid. The combined effect of these provisions will be punitive and discriminatory and potentially in breach of international law.[62] It will also mean the separation of families as the relevant exceptions are very limited.

93. We disagree with the assertion set out in the Explanatory Memorandum's Statement of Compatibility with Human Rights that a designation under proposed section 199F would be 'reasonable, necessary and proportionate to the legitimate aim of maintaining the integrity of the migration system and helping ensure that other countries readmit their nationals.'[63]

94. The Statement of Compatibility does not contain a rigorous assessment of whether the differential treatment in these provisions is proportionate to the objective sought. As noted by the Parliamentary Joint Committee on Human Rights, in determining whether a limitation on a right is proportionate, it is relevant to consider, for example, whether there are other less restrictive ways to achieve the same aim, the extent of safeguards, the extent of any interference with human rights, and whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.[64] These kinds of assessments are lacking.

95. Rather, barring visa applications from nationals of entire countries may be considered a sledgehammer response which will affect vast numbers of nationals who are subject to autocratic regimes and have not contributed to government decision-making regarding returning nationals. There may be less restrictive ways to achieve the Australian Government's objective.

96. In our view, there should be a more nuanced approach to encourage international cooperation concerning the removal of nationals to their country of origin. As pointed out by the Kaldor Centre for Refugee Law, this issue is a 'diplomatic one that should be negotiated in good faith between political leaders'.[65]

97. We add that the scope of the Minister's proposed power to make a designation is exceptionally broad. There are no objective criteria and no specified purpose to guide such a designation.

98. Decisions made will be effectively incapable of being challenged by way of judicial review, due to the 'national interest' criterion. For example, in the context of the Minister's personal section 501(3) 'character test' cancellation or refusal power, the Full Federal Court has previously remarked that:

> *There can be no doubt that, in this particular statutory context, the expression "national interest" is, like the expression "public interest", one of considerable*

[62] Eg, CCPR, arts 2, 26.
[63] Explanatory Memorandum, 35.
[64] Parliamentary Joint Committee on Human Rights, 1.21.
[65] Kaldor Centre for International Refugee Law,

breadth and essentially involves a political question which was entrusted to the Minister.[66]

99. The Law Council considers that the safeguards concerning proposed section 199F are insufficient. The requirement to consult two members of the same Executive Government does not represent a meaningful or effective safeguard, nor will the requirement to table a copy of the designation before Parliament within two days of it being made, considering that a failure to do so will not affect the validity of the designation.

100. It also suggests that the practical implications of proposed sections 199F and 199G need to be carefully considered. It is unclear how many countries would be listed as a removal concern country, which may include countries which refuse to accept the return of their own nationals, but also countries which make it difficult to return persons in practice. The impact is that many Australians with families in other countries may face the inability to sponsor relatives to visit them, with only the Minister being able to intervene under proposed section 199G(4).

101. This places additional pressures on the Minister to lift the bar with respect to individual applications, when following the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[67], the caseload before the Minister is already unmanageable.

102. The Law Council opposes the proposal to designate removal concern countries in the Removal Bill. If made, this discriminatory measure would represent a disturbing departure from the longstanding system of merit-based consideration of every individual visa application.

103. However, if these provisions are to remain, we suggest 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.

104. Further, proposed section 199F powers should be defined with greater precision, and amended to ensure their consistency with fundamental rights. At present and as noted, for example, the Minister's power to designate a removal concern country is enlivened based on the national interest. At the very least, this power should be made more certain and predictable in scope.

105. This could be achieved by requiring consideration, prior to its exercise, of listed factors such as:

    (a) whether there is a need to slow down the entry pipeline into Australia of foreign nationals from a particular country, based on the evidence of the policy settings in the country around readmitting citizens;

    (b) evidence regarding the current cohort of intractable removals in relation to the country;

[66] *Carrascalao v Minister for Immigration and Border Protection* (2017) 347 ALR 173, [156].
[67] [2023] HCA 10. In *Davis*, the High Court found that officers of the Department of Home Affairs were not legally allowed to determine whether an applicant's circumstances were 'unique or exceptional' as grounds for a Ministerial intervention and that this needed to be decided by the Minister for Immigration.

(c) human rights impacts, which take account of various factors, including potential effects on relevant family members and dependents, who may include Australian citizens and permanent residents, and on children; and

(d) less restrictive means of achieving the Australian Government's objectives.

Recommendations

The Law Council makes the following recommendations only in the event that, contrary to its primary recommendation above, Parliament elects to pass the Removal Bill including its removal concern country powers. It does not support the passage of these provisions or the Removal Bill.

- **Proposed section 199F(8) should be deleted.**
- **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.**
- **Proposed section 199F powers should be defined with greater precision, and amended to ensure their consistency with fundamental rights, by requiring regard to listed factors prior to their exercise.**

Schedule 2

Revisiting protection findings

106. Schedule 2 contains amendments to provide that a protection finding can be revisited in relation to a lawful non-citizen who holds a visa as a removal pathway non-citizen.

107. Current subsection 197C(3) of the Migration Act provides that removal of an unlawful non-citizen is not required or authorised in respect of a particular country if a 'protection finding' was made in respect of that country in the course of considering an application for a protection visa which has been finally determined. The term 'protection finding' as used in section 197C reflects the circumstances in which Australia has *non-refoulement* obligations under international law in respect of a person.

108. Subsection 197C(3) does not prevent removal of an unlawful non-citizen to the country in respect of which the protection finding was made in certain circumstances. These include where a subsection 197D(2) decision by the Minister in relation to the non-citizen is complete.

109. Section 197D establishes a mechanism whereby, for unlawful non-citizens only, a protection finding can in effect be revisited for the purposes of section 197C of the Act. If the Minister is satisfied that an unlawful non-citizen to whom paragraphs 197C(3)(a) and (b) of the Act apply in relation to a valid application for a protection visa 'is no longer a person in respect of whom any protection finding … would be made', the Minister may make a decision to that effect.

110. As noted in the Explanatory Memorandum,[68] this power is intended to be exercised if, for example, there is a change in country conditions which means that a person in respect of a protection finding has been made would no longer have that finding should the issue now be considered.

111. Current section 197D applies only to unlawful non-citizens to whom section 198 applies.

112. However, items 4–7 of Schedule 2 amend section 197D to enable the revisitation of a protection finding in relation to non-removal pathway non-citizens more broadly. As well as unlawful non-citizens to whom section 198 applies, this group includes holders of Subclass 070 (Bridging (Removal Pending) visas, Subclass 050 (Bridging (General) visas granted on final departure grounds, and visas prescribed for the purposes of the non-removal pathway non-citizens definition.

Comments

113. The Law Council is troubled by these amendments and does not support them.

114. Section 197D(2) was introduced by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) (**the 2021 Act**). The 2021 Act was not referred for Parliamentary Committee inquiry and passed, in the Law Council's view, without sufficient scrutiny.

[68] Explanatory Memorandum, 24.

115. In subsequent submissions to the then Minister for Home Affairs,[69] and the Parliamentary Joint Committee on Intelligence and Security,[70] the Law Council argued that subsection 197D(2) should be repealed.

116. We further observed that:

    (a) There are no criteria prescribing circumstances in which this power may be exercised. This is inconsistent with the principle of the rule of law that the law must be both readily known and available, and certain and clear. While the Law Council notes that it was anticipated that a decision made under this power would be 'rare' - that 'rarity' is not reflected in the legislation. The exercise of this power will be a matter entirely at the discretion of the Minister.

    (b) The provisions do not currently provide for key procedural fairness guarantees with respect to the decision under new subsection 197D(2). That is, it appears that the affected person will only be informed about the decision after it is made. This is inconsistent with the Law Council's policy with respect to the application of the rule of law to asylum seekers, that protection determination processes must include procedural fairness guarantees, such as the right to be notified, and to present and challenge evidence where adverse decisions are made. The Law Council's Rule of Law Policy Statement also provides that Executive decision making should comply with the principles of natural justice.

    (c) The general concept of the reconsideration of a person's protection status conflicts with Australia's international obligations, as recognised in the Law Council's policy. These require that Australia respect the internationally recognised right to seek asylum, and the system of refugee protection envisaged by the Refugee Convention, by providing durable (rather than temporary) protection outcomes for those found to invoke Australia's protection obligations.[71]

117. We further observed that the Migration Act should not permit the Minister, on an own-motion basis, to reconsider protection findings. However, if this provision is retained, we recommended that amendments should be included to make clear the rare circumstances in which the Minister may revisit the power and for the affected person to have had the opportunity to make submissions concerning that process. Amendments should also provide for prior notice and the right to respond, prior to an adverse decision being taken.[72]

118. The Law Council is concerned that, rather than repealing section 197D(2), this power is now proposed to be expanded to a broader group of individuals. It underlines that there are very few circumstances in which a person's refugee status legitimately ceases under the Refugee Convention,[73] and there is no indication that the exercise of power under section 197D is so limited. Further, the Office of the United Nations High Commissioner for Refugees provides that a 'strict

[69] Law Council of Australia, *Submission on the passage of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, Submission to the Hon Karen Andrews MP, Minister for Home Affairs, 7 June 2021 (**2021 Submission**).

[70] Law Council of Australia, *Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, Submission to the Parliamentary Joint Committee on Intelligence and Security, 4 July 2023.

[71] 2021 Submission, 9-10.

[72] Ibid.

[73] Australian Human Rights Commission, *Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Report, 20 June 2023) 15 [52].

approach' towards such decision is necessary as 'refugees should not be subjected to constant review of their refugee status.'[74]

119. This power remains objectionable because the absence of the objective criteria reveals the extent of the extraordinary degree of discretion granted to the Minister in making such decisions.

120. We understand that the power to unwind protection findings under section 197D has not, to date, been exercised. The expansion of the power to broader groups in the current context raises concerns about the underlying motivation. Persons who cannot be removed to their country of origin because doing so would contravene a protection finding, but who have been found to fail the criterion for a protection visa in section 36(1)(c) due to previous criminal offending, cannot be indefinitely detained following the High Court's decision in *NZYQ*. In this context, a culture of encouraging reconsideration and revocation of protection findings so that a person can be removed is very concerning. It is likely to result in refoulement of persons in need of protection.

121. For these reasons, the Law Council does not support the expansion proposed under items 4–7 of Schedule 2. Rather, ongoing concerns regarding current section 197D of the Migration Act should be referred for parliamentary inquiry.

Recommendations

The Law Council makes the following recommendations only in the event that contrary to its primary recommendation above, Parliament elects to pass the Removal Bill. It does not support the Removal Bill.

- **Items 4–7 of Schedule 2 of the Removal Bill should be deleted.**
- **Instead, ongoing concerns regarding the Minister's powers to revisit protection findings under current section 197D of the Migration Act should be referred for parliamentary inquiry.**

[74] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/REV.1 (January 1992), Chapter III, A. [112].