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Senate Legal and Constitutional Affairs Committee
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Dear Committee Secretary,

Response to Questions on Notice from Senator Paul Scarr

We thank the Committee for the opportunity to provide further input into its consideration of the Migration Amendment (Removal and Other Measures) Bill 2024.

Our responses to the Questions on Notice from Senator Paul Scarr are set out below. As a preface to these responses, we would like to make two points.

First, the Kaldor Centre is an academic research centre dedicated to the study of international refugee law. As such, our expertise is the law relating to people who are, or may be, entitled to international protection in Australia: namely, refugees and others who face a real risk of serious harm if returned to their countries of origin, including on account of torture; cruel, inhuman or degrading treatment or punishment; or being arbitrarily deprived of life.

We note that the bill has far-reaching ramifications, including – but also extending well beyond – the categories of people listed above. While our answers below acknowledge these wider ramifications where appropriate, they focus specifically on the bill's impact on people who are, or may be, entitled to international protection. As such, they do not necessarily address the full range of concerns about the bill and its impact on Australian citizens and non-citizens, including those raised in other submissions and by those providing evidence at the Committee hearing on 15 April 2024. Where a question falls outside our expertise, we have declined to answer but instead have referred the Committee towards experts who may be better placed to assist.

Second, we reiterate our serious concerns about the scope and ramifications of the bill, which are set out in detail in our submission to the Committee[1] and include:

- the bill's overly broad scope;
- the risk of *refoulement*;
- the impact on children and families;
- the further criminalisation of Australia's migration system;
- the impact and risk of unintended consequences resulting from travel bans; and
- alternative approaches to facilitating removals.

[1] Kaldor Centre, *Submission No. 11 to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (9 April 2024).

A number of the questions invite us to comment on amendments which might be required to address aspects of the bill. It remains our position that the bill is fundamentally flawed such that its deficiencies cannot readily be rectified through amendments; and that it should be rejected in its entirety. As such, we do not propose any specific amendments below, but do explain in greater detail the reasons for our concerns with parts of the bill.

Please do not hesitate to contact us if we can be of further assistance.

Yours sincerely,

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Director

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Questions on Notice and responses from the Kaldor Centre

1. 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?

Kaldor Centre response

Distinguishing people not entitled to international protection from people who have 'exhausted all avenues to remain in Australia'

At the outset, we wish to emphasise that there is a difference between people who are not entitled to international protection and can be removed from Australia consistent with international law, and those who have 'exhausted all avenues to remain in Australia'. The difference arises due to certain deficiencies in the Australian asylum system which may result in people who are entitled to international protection (see the preface to these answers) not being able to access it through the Australian system.

In this regard, we agree with and refer the Committee to Submission 65 from the UN High Commissioner for Refugees (UNHCR), in which:

> UNHCR continues to express concern that some of the legal and administrative measures adopted by Australia, including the insertion of statutory criteria that are not consistent with a proper interpretation of Australia's obligations under the 1951 [Refugee] Convention, and measures to expedite asylum procedures without adequate procedural safeguards may result in placing refugees in situations that could ultimately lead to refoulement.[2]

[2] UNHCR, *Submission No. 65 to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (12 April 2024) para 31.

In particular, we draw the Committee's attention to the concerns raised by UNHCR,[3] and previously by the Kaldor Centre,[4] about Australia's codification of its interpretation of the refugee definition in the 1951 Refugee Convention. This codification alters the meaning of 'refugee' in Australian law in certain important respects, rendering it narrower than its meaning under international law. As a result, people entitled to protection as refugees under international law may be denied recognition of their status in Australia and face removal to risks of persecution in their countries of origin.

As noted in our submission to the current inquiry, we are also concerned that the risk of people with protection needs being forced to return to a place where they have a well-founded fear of persecution or other forms of serious harm is particularly acute for asylum seekers who had their claims assessed through the fast-track process.[5] The Labor party has itself acknowledged that fast-track processes have not provided a 'fair, thorough and robust assessment process for persons seeking asylum',[6] meaning that some refugees were wrongly denied protection. From 2015 to 2023, 37% of judicial review applications relating to decisions made by the Immigration Assessment Authority (IAA) were successful, resulting in cases being remitted back to the IAA for reconsideration.[7]

In other cases, an individual's personal circumstances or the situation in their home country may have changed since their protection claim was determined.

In these and other circumstances, people may be entitled to international protection but have 'exhausted all avenues to remain in Australia'. Under the provisions of the bill, they would be required to comply with directions to facilitate their removal from Australia to a place where they face a real risk of persecution or serious harm, with the threat of criminal charges if they refuse.

The bill is not limited in its application to non-citizens affected by the NZYQ *decision*

In its submission, the Department of Home Affairs justified the need for the legislative amendments by reference to the new constitutional limits on executive detention set out by the High Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 ('*NZYQ*'), and the potential impact of these limits on future cases.[8]

However, as we set out in detail in our submission, the bill is overly broad in its scope and its application is not limited to the *NZYQ*-affected cohort and others in a comparable position.[9] Rather, it applies much more broadly to all 'removal pathway non-citizens'. This includes individuals whom the government continues to have the power to detain, as well as BVE and BVR holders who the government released into the community prior to the *NZYQ* decision.

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[3] Ibid, para 32.
[4] Kaldor Centre, *Submission No. 167 to the Senate Legal and Constitutional Affairs Legislation Committee Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)* (31 October 2014) 12–23.
[5] Kaldor Centre (n 1) para 7.
[6] Australian Labor Party, *ALP National Platform: As Adopted at the 2021 Special Platform Conference* (March 2021) <https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf> 124.
[7] Kaldor Centre, *Submission No. 11 to the Inquiry into the Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill)* (25 January 2024) 5.
[8] Department of Home Affairs, *Submission No. 75 to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (12 April 2024) 5–6.
[9] Kaldor Centre (n 1) paras 2–5.

The Department has not provided any justification for this broad application of the proposed legislative amendments. Even with respect to the narrower cohort of unlawful non-citizens who are affected by the *NZYQ* decision, the Department noted that:

> Amendments to the Migration Act passed by the Parliament in 2023 were designed to ensure non-citizens affected by the High Court's ruling in NZYQ are subject to appropriate visa conditions, to mitigate any risks they may pose to the community, and to ensure they remain engaged with the Department, following their release from immigration detention.[10]

The bill is not limited in its application to people who have 'exhausted all avenues to remain in Australia'

Again, it is important to draw a distinction between people who have had their protection claims 'finally determined' under the *Migration Act 1958* (Cth), and those who have 'exhausted all avenues to remain in Australia'.

Under the *Migration Act*, an application is considered 'finally determined' when all avenues for merits review (either at the Administrative Appeals Tribunal (AAT) or IAA) have been exhausted.[11] Proposed section 199D of the bill would prevent the Minister from issuing a removal pathway direction to a non-citizen who has made a valid application for a protection visa which has not yet been 'finally determined'.[12]

However, a person whose protection visa application has been 'finally determined', in this sense, may nevertheless have other avenues to remain in Australia. Notably, proposed section 199C would give the Minister the power to give 'removal pathway directions' to non-citizens who have pending judicial review or ministerial intervention requests, and therefore have not 'exhausted all avenues to remain in Australia'.

While proposed section 199D(6) does place certain limitations on the Minister's power to give removal pathway directions in relation to specified actions involving court or tribunal proceedings, **there is nothing in the bill that would preclude the Minister from issuing directions to a person to cooperate in their removal while they are preparing to lodge a judicial review application or indeed while a judicial review application is ongoing.** Thus, applicants may be forced to cooperate in their removal, and potentially be removed from Australia, before their judicial review or ministerial intervention applications have been finalised. Where an applicant's claims have arisen or developed after merits review, the only pathway for having these claims considered is through ministerial intervention.

Removing protection visa applicants from Australia before their judicial review applications or ministerial intervention requests are finalised further increases the risk that people with protection needs may be forced to return to countries where they would be at risk of persecution or other forms of serious harm, in breach of Australia's international obligations.

[10] Department of Home Affairs (n 8) 6.
[11] *Migration Act 1958* (Cth), ss 5(1), (9), (9A).
[12] Proposed s 199D(2).

2. 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?

Kaldor Centre response

We reiterate our view that this provision should be removed in its entirety. As we noted in our submission:

> The blacklisting of entire countries may have significant economic, diplomatic and security implications for Australia which warrant careful consideration and consultation with all areas of government. Additionally, from a human-centred perspective, punishing people who may wish to work, study in or visit Australia for the actions of their government is punitive – particularly when the relevant countries are non-democratic autocracies.[13]

Most countries have not seen fit to create similar provisions, notwithstanding comparable challenges with removing certain non-citizens.[14] For example, Canada has refrained from this approach[15] and, until recently, the European Union (EU) generally sought to rely on financial incentives to secure compliance, including development assistance.[16] While we believe that the bill's proposed measures are inappropriate, in the interests of assisting the Committee, we provide further information below about the practices of three jurisdictions which *have* adopted similar measures – the United States (US), the United Kingdom (UK) and the EU – before making some general observations about lessons Australia could draw from these practices.

United States

Since 1952, US law has enabled authorities to stop issuing visas to nationals of certain countries on account of their refusal to take back their own nationals.[17] The provision was utilised during the Cold War to restrict visas to nationals from former Soviet bloc countries.

[13] Kaldor Centre (n 1) para 26.
[14] Erlend Paasche, '"Recalcitrant" and "Uncooperative": Why Some Countries Refuse to Accept Return of Their Deportees' (*Migration Policy Institute*, 20 December 2022) <https://www.migrationpolicy.org/article/recalcitrant-uncooperative-countries-refuse-deportation>.
[15] Ibid.
[16] Ibid.
[17] The current provision is found in the Immigration and Nationality Act (INA) §243(d): 'On being notified by the Attorney General that the government of a foreign country denies or unreasonably delays accepting an alien who is a citizen, subject, national, or resident of that country after the Attorney General asks whether the government will accept the alien under this section, the Secretary of State shall order consular officers in that foreign country to discontinue granting immigrant visas or nonimmigrant visas, or both, to citizens, subjects, nationals, and residents of that country until the Attorney General notifies the Secretary that the country has accepted the alien.' The original provision introduced in 1952 was §243(g), with slightly different wording.

Subsequently, it was applied only once (against Guyana in 2001, following numerous diplomatic attempts to enable the removal of 113 Guyanese with criminal convictions), until President Trump revitalised its use in 2016 to impose visa sanctions on the Gambia.[18]

In early 2017, Trump introduced Executive Order 13768 'Enhancing Public Safety in the Interior of the United States'. Section 12 directed the Secretary of Homeland Security and the Secretary of State to 'effectively implement the sanctions provided by section 243(d) of the INA, as appropriate', noting that 'diplomatic efforts and negotiations with foreign states' include as a condition precedent the acceptance by those foreign states of their nationals who are subject to removal from the United States.'[19] Visa sanctions were imposed in September 2017 on Cambodia, Eritrea, Guinea, and Sierra Leone; extended in July 2018 to Burma and Laos; and then in 2019 to Ghana and Pakistan. Notably, '[w]ith the exception of Eritrea, all 243(d) sanctions have applied only to tourist/business visitor (B) visas for certain government officials and, in some cases, their families and attendants. The U.S. Embassy in Eritrea has discontinued issuing B visas to all residents of the country.'[20]

The US approach is that diplomatic efforts must always come first, only rising to formal visa sanctions when officials consider that the benefit outweighs the potential foreign policy costs. There are a variety of reasons that sanctions of this nature may not be effective, or may in fact be counterproductive.[21]

> Some countries sharply restrict the foreign travel of their citizens and may be unmoved by visa sanctions; others may retaliate in ways detrimental to bilateral trade, tourism, law enforcement, or other forms of cooperation. In cases in which identity documents are not readily available and the foreign country questions the nationality of individuals with removal orders, a 'recalcitrant' classification or visa sanctions may impede friendly bilateral relations.[22]

United Kingdom

In 2022, the United Kingdom introduced the *Nationality and Borders Act 2022*. Section 72 of this Act enables the government to impose visa penalties on uncooperative countries. To date, it has not been used.[23] Sanctions can be imposed if, 'in the opinion of the Secretary of State':

> (a) the government of the country is not cooperating in relation to the return to the country from the United Kingdom of any of its nationals or citizens who require leave to enter or remain in the United Kingdom but do not have it; and
> (b) as a result, there are nationals or citizens of the country that the Secretary of State has been unable to return to the country, whether or not others have been returned.[24]

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[18] Jill H Wilson, 'Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals' (Congressional Research Service, updated 23 January 2020) 2 <https://sgp.fas.org/crs/homesec/IF11025.pdf>.
[19] Executive Order 13768, 'Enhancing Public Safety in the Interior of the United States' (25 January 2017) <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states>.
[20] Wilson (n 18) 2.
[21] For instance, in July 2016, there were 23 recalcitrant/uncooperative countries and 62 at risk of non-compliance; by May 2019, there were only 10 recalcitrant and 23 at risk of non-compliance, which officials attributed to pressure and diplomacy: Wilson (n 18) 2. A 'recalcitrant' country is one that refuses or delays repatriation.
[22] Wilson (n 18) 2.
[23] Stephanie Foster, Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Removal and Other Measures) Bill 2024 (26 March 2024) 14.
[24] *Nationality and Borders Act* 2022 (UK), s 72(1).

In forming such an opinion, the Secretary of State must consider:

> (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.[25]

In addition, the Secretary of State must take 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.[26]

Furthermore, the Secretary of State must review the necessity of any visa sanctions every two months.[27]

European Union

In 2019, the EU amended the Visa Code to enable the Council of the EU to impose visa sanctions linked to countries' lack of cooperation on readmission.[28] With effect from 2 February 2020, the EU has 'experimented with visa sanctions for certain countries deemed uncooperative, though in a somewhat more limited and narrow scope than the U.S. actions.'[29] Bangladesh, the Gambia, Iraq, Senegal and Ethiopia have been designated as 'uncooperative'.[30] However, to date, temporary visa restrictions have only been imposed on the Gambia, 'prompting it to lift its moratorium on forced return in March 2022'.[31] By contrast, 'enhanced cooperation by Bangladesh and Iraq allowed their nationals to avoid visa sanctions'.[32]

A discussion paper by the Presidency of the Council of the EU stresses the *strategic* use of the tool, noting the importance of finding 'the right and delicate balance between incentivizing cooperation by giving enough time and space for dialogue and taking restrictive visa measures when no real progress is observed.'[33] In particular, the EU's dealings with Iraq show that by 'setting a deadline against which to evaluate whether satisfactory progress in the readmission

[25] Ibid, s 72(2).
[26] Ibid, s 72(3).
[27] Ibid, s 74.
[28] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L 243 (15 September 2009), art 25a.
[29] Paasche (n 14).
[30] Ibid; 'Deportations: EU Considers Stepping Up Visa Sanctions after Iraq and Gambia Change Policies' (*Statewatch*, 13 February 2024) <https://www.statewatch.org/news/2024/february/deportations-eu-considers-stepping-up-visa-sanctions-after-iraq-and-gambia-change-policies/>.
[31] Paasche (n 14).
[32] Ibid.
[33] Council of the European Union, *Presidency Discussion Paper on Effectiveness of the Visa Leverage (Visa Code Article 25a Mechanism)* (10 January 2024) 3 <https://www.statewatch.org/media/4172/eu-visa-sanctions-council-presidency-discussion-paper-17110-23.pdf>.

cooperation has been made', which is 'clearly communicated to the concerned third country … enables the EU to put pressure on the third country in transparent and precise way.'[34]

Considerations for designating countries: lessons for Australia

In the US, UK and EU, the processes for designating 'uncooperative' countries require far greater scrutiny than the model proposed for Australia. In the US, for example:

> [c]ountries are ranked on a scale ranging from uncooperative to cooperative, based on statistical data and expert analytic feedback on a range of assessment factors. These factors include a refusal to accept charter flight-based removals, the ratio of releases to removals, and average length of time between issuance of a removal order and removal. ICE [Immigration and Customs Enforcement] also takes into account mitigating factors, such as a natural or man-made disaster or limited capacity (e.g., regarding law enforcement, inadequate records, and/or inefficient bureaucracy), to assess whether a country is intentionally uncooperative or incapable due to country conditions. Some countries disagree with ICE's assessments, maintaining that the United States has not adequately demonstrated that the persons ordered removed are indeed their nationals.[35]

Furthermore, restrictions have only been applied to tourist and business visitor (B) visas and, with one exception, only with respect to certain government officials and their families.

As noted above, the UK procedure requires the Secretary of State to consider, *inter alia*:

- the extent to which the other country is taking steps to facilitate returns
- how long that country has been uncooperative in relation to returns
- the extent of the lack of cooperation
- the reasons for the lack of cooperation.[36]

Any decision to impose visa sanctions must be reviewed every two months.[37]

Similarly, in the EU, Member States must provide 'a large amount of data' in addition to that compiled by the European Commission and agencies.[38] Among other factors, the national context of the countries in question, their political situation, electoral agenda and any upcoming high level meetings with them should be taken into account.[39] The mere tabling of a proposal to list a country 'increases the probability of the third countries' readiness to engage on readmission and improve their cooperation.'[40]

By contrast, the Australian model (proposed sections 199F and 199G) envisages that the Minister for Immigration may, 'by legislative instrument, designate a country 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.'[41] The power must be exercised personally and the Minister is only required to consult with the Prime Minister and the Minister for Foreign Affairs. **The designation automatically covers all visa subclasses, except for those minor exceptions for immediate family members of Australian citizens/permanent residents**

[34] Ibid, 6.
[35] Wilson (n 18) 1.
[36] *Nationality and Borders Act* 2022 (UK), s 72(2)–(3).
[37] Ibid, s 74.
[38] Council of the European Union (n 33) 3.
[39] Ibid, 6.
[40] Ibid, 4.
[41] Proposed s 199F(1).

and humanitarian entrants. There is no flexibility in the way the bill is drafted for more targeted provisions focusing on specific visa subclasses. None of the issues considered by the US, UK or EU are mentioned in the bill – indeed, there is no indication of the factors that might lead the Minister to make such a designation other than 'think[ing] it is in the national interest',[42] nor any requirement for such a decision to be periodically reviewed.

We share the view of the Senate Standing Committee for the Scrutiny of Bills, which has noted that it is concerning that 'such a significant matter is being left to the broad and unfettered discretion of the minister and is to be set out in delegated legislation'.[43]

3. 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?

Kaldor Centre response

There is nothing in the bill that restricts the use of the direction power to 'a measure of last resort' for relevant bridging visa holders or with respect to non-citizens in immigration detention. Proposed section 199C(1) allows the Minister to give removal pathway directions to any removal pathway non-citizens. Proposed section 199D sets out the circumstances in which a Minister must not give a removal pathway direction. There are no requirements in that section for the Minister to explore alternate approaches to facilitating removal before issuing a removal pathway direction.

[42] Ibid.
[43] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2024* (27 March 2024), para 1.23.

4. 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 personal 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?

Kaldor Centre response

We reiterate our concerns in relation to the breadth of categories of visa holders who could be brought under the meaning of removal pathway non-citizens, and in particular, proposed section 199B(1)(d), which would allow holders of additional visa subclasses being prescribed through legislative instruments, with limited scrutiny. **The justification that the provision is needed to ensure 'flexibility' in the future is inadequate, given the significant impact this power would have on the human rights of those prescribed. As noted in our submission:**

> As the Senate Standing Committee for the Scrutiny of Bills observed, this section 'is applicable to lawful non-citizens who have been granted a visa permitting residence in Australia, who may have lived in Australia lawfully for an extended period and have no certainty or clarity as to when a visa may be subject to a removal pathway direction'. We share the view of the Committee that, given the severe penalties for failing to comply with such a direction, 'the ability to expand the scope of people that may be subject to removal pathway directions is a significant matter that would more appropriately be dealt with by way of primary rather than delegated legislation.[44]

As we discuss further in our response to question 11 below, proposed **section 199B(1)(d) is particularly concerning, given the fact that designation of holders of specific visa classes as 'removal non-citizens' will enliven the powers of the Minister to revisit protection findings under section 197D.**

We also note the concerns raised by the Parliamentary Joint Committee on Human Rights and the Australian Human Rights Commission **that the prescription of additional visa classes under proposed section 199B(1)(d) may not be subject to disallowance.[45]**

[44] Kaldor Centre (n 1) para 3, citing Senate Standing Committee for the Scrutiny of Bills (n 43) para 1.4.

[45] Parliament Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 3 of 2024* (17 April 2024) 25; Australian Human Rights Commission, 'Answers to written questions on notice from Senator Scarr, 17 April 2024' (23 April 2024) 6.

5. 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?

Kaldor Centre response

We reiterate our view that the powers in proposed sections 199C and 199D authorising the Minister to give removal pathway directions, and the associated criminal offences for the failure to comply with these directions in proposed section 199E, be rejected in their entirety. As we set out in our submission:

> proposed section 199C(4) would provide the Minister with a broad power to specify time periods for compliance with directions. The bill contains no safeguards to ensure that these time periods are reasonable and sufficient to allow affected individuals to 'take steps to comply and seek legal advice'.[46]

6. 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?

Kaldor Centre response

Please see above.

[46] Kaldor Centre (n 1) para 5, citing Senate Standing Committee for the Scrutiny of Bills (n 43) para 1.5.

7. 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?

Kaldor Centre response

We reiterate our view that the powers in proposed sections 199C and 199D authorising the Minister to give removal pathway directions, and the associated criminal offences for the failure to comply with these directions in proposed section 199E, be rejected in their entirety.

Safeguards provided in the form of 'operational guidance' are a wholly insufficient safeguard in relation to the operation of the direction powers set out in proposed section 199C. This is particularly so in a context such as this where the decision-making has a substantial impact on the rights and liberties of individuals. Operational guidance is a form of executive policy. These are non-statutory rules 'devised by the administration to provide decision-making guidance, particularly in administering legislation.'[47] They have no legally binding force, unless they are expressly authorised as such through legislation.[48] That does not appear to be the case here. Such guidance can be amended from time to time at the discretion of the executive, provided that the policy is not inconsistent with the legislation.[49] **As such, any safeguards included in operational guidance can be removed or amended at any time in the future.**

We also note that including these safeguards in the legislation would be insufficient to address the fundamental concerns we raised in our submission, and in our responses to other questions in this document, about the use of criminal sanctions to compel individuals to cooperate in their removal from Australia.

8. 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?

Kaldor Centre response

As set out in more detail in our response to question 2 above, the Minister's power to designate a 'removal concern country' is largely unfettered. It requires only that the Minister believes it is in the national interest, and that the Minister consults with the Prime Minister and Minister

[47] Robin Creyke, '"Soft Law"' and Administrative Law: A New Challenge' (2010) 61 *AIAL Forum* 15, 16.
[48] Ibid, 15.
[49] Ibid, 16.

of Foreign Affairs. **There is no requirement under proposed sections 199F or 199G that any of the steps or actions set out by the Department in the quote above be undertaken before a designation is made. This stands in contrast to similar sanction regimes in the US, UK and the EU, which set out a variety of safeguards and conditions that must be satisfied before a country is designated.**

9. 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?

Kaldor Centre response

This question relates to parliamentary procedure and falls outside the scope of our expertise. We refer the Committee to the answer provided by the Human Rights Law Centre on 24 April 2024. The Committee may also wish to direct this question to the Law Council of Australia, the Australian Lawyers Alliance or the Public Interest Advocacy Centre (PIAC).[50]

10. In relation to removal pathway citizens, the following statement is made to 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?

Kaldor Centre response

Proposed section 199B(c)(ii) provides that BVE visa holders will only be considered removal pathway non-citizens if 'at the time the visa was granted, [they] satisfied a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia'. However, as noted by the Australian Human Rights Commission, **there are**

[50] PIAC does not appear to have made a submission to this inquiry, but has made previous submissions on delegated legislation: eg Public Interest Advocacy Centre, *Submission No. 10 to the Senate Scrutiny of Delegated Legislation Committee, Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (25 June 2020).

circumstances where a BVE may be granted subject to this criterion where there is no intention or expectation that the person would in fact make such arrangements to depart Australia.[51] Further, as noted in our submission[52] and our answers to questions 1 and 4 above, the bill's scope is overly broad and proposed section 199B(1) targets anyone on a removal pathway, including people who may have been living in the Australian community for many years. In particular, we refer to our answer to question 4 above and our concerns about the designation of additional classes of non-citizens through proposed section 199B(1)(d).

11. 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?

Kaldor Centre response

Background to the provisions regarding revisiting of protection decisions

As set out in our submission, we have serious concerns about the proposed amendments to sections 197C and 197D of the *Migration Act,* which would significantly expand the Minister's powers to revisit and reverse protection findings made with respect to non-citizens:

> Under the current framework, the Minister only has the power to revisit protection findings made with respect to certain unlawful non-citizens. The amendments would expand this power to cover all removal pathway non-citizens, including lawful non-citizens on valid visas. According to the Explanatory Memorandum, this would include those on Bridging (Removal Pending) visas (BVR) and Bridging (General) visas (BVE) granted on 'final departure' grounds. We echo the concerns raised by the Senate Standing Committee for the Scrutiny of Bills about the lack of explanation or justification for why this amendment is needed, particular in light of the significant impact it will have on the rights of those affected.[53]

Section 197D(2) was introduced by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth). As the Law Council of Australia noted in its submission to the present inquiry, that Act 'was not referred for Parliamentary Committee inquiry and passed, in the Law Council's view, without sufficient scrutiny'.[54] The existing provisions have been the subject of widespread criticism, including on the basis that they are not compatible with Australia's obligations under the Refugee Convention. UNHCR, for example, has noted that:

> The Refugee Convention stipulates the eligibility criteria for refugee status and, by necessary implication, the permissible bases for revocation or cancellation of that status, as well as the conditions precedent for cessation of refugee status and for the

[51] Australian Human Rights Commission (n 45) 2.
[52] Kaldor Centre (n 1) paras 2–5.
[53] Ibid, para 10, citing Senate Standing Committee for the Scrutiny of Bills (n 43) para 1.17.
[54] Law Council of Australia, *Submission No. 71 to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024* (12 April 2024) para 114.

> withdrawal of protection against refoulment under international refugee law. These conditions do not appear to have been incorporated into s 197D of the Migration Act so as to restrict the Minister's power under it, in accordance with international refugee law.[55]

The Australian Human Rights Commission has also observed that '[s]ection 197D is framed in such broad language that no particular objective criteria need to be demonstrated.'[56]

In light of these concerns, we support the recommendations made (prior to the introduction of the current bill) by UNHCR, the Law Council of Australia, the Australian Human Rights Commission and many other organisations that section 197D of the *Migration Act* be repealed, with corresponding redrafting of section 197C.[57]

Cohort of persons affected by this bill

Rather than repealing and/or redrafting these provisions, the present bill significantly expands the cohort with respect to whom the Minister may exercise the power to revisit protection claims. In its submission, the Department appeared to justify the need for broader powers by reference to the High Court's decision in *NZYQ*. It claimed that this judgment means that 'the Government now faces circumstances in which this power needs to be expanded to certain non-citizens who hold a visa – particularly BVR holders'.[58]

Putting aside our concerns as to whether the power to revisit protection claims is in fact necessary for this narrow cohort of *NZYQ*-affected non-citizens (who are generally granted BVR visas), no justification has been provided for the inclusion of the much wider cohort non-citizens to which the bill applies, or may apply in the future. This includes holders of BVE visas granted on 'final departure' grounds, as well as holders of any other visas prescribed in the future under proposed section 199B(1)(d). **The interplay between section 197D and proposed section 199B(1)(d) is particularly concerning because the power to revisit protection claims could be extended to the holders of any prescribed visas.**

The intention with respect to exercise of the power

We note the Department's view that:

> The Bill does not provide for the reconsideration of the protection findings of current protection visa holders, or former protection visa holders who now hold substantive visas such as Resolution of Status Visas or Resident Return Visas. There is no intention to prescribe such visas for the purpose of the definition of a 'removal pathway non-citizen'.[59]

However, as drafted, there are no impediments or safeguards included in the legislation that would prevent holders of permanent visas (including protection visas) from being prescribed as 'removal pathway non-citizens', nor from having their protection findings

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[55] UNHCR, *Submission No. 6 to the Parliamentary Joint Committee on Intelligence and Security on the Review into the Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (23 June 2023) para 6. See also UNHCR (n 2) paras 56–59.
[56] Australian Human Rights Commission, *Submission No. 1 to the Parliamentary Joint Committee on Intelligence and Security on the Review into the Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (20 June 2023) para 59.
[57] See their submissions to the Parliamentary Joint Committee on Intelligence and Security <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CIORAct2021/Submissions>.
[58] Department of Home Affairs (n 8) 17.
[59] Ibid.

revisited and reversed. In effect, this would potentially allow the government to reinstate periodic reviews of protection findings for protection visa holders, in a manner similar to what occurred under the abolished Temporary Protection Visa regime.

Similarly, the Department's submission set out various examples of the types of circumstances in which the power might be exercised, including 'if the circumstances of the person or the home country have changed such that a protection finding would be made'.[60] **These intentions are not reflected in the drafting of the bill. As discussed above, the criteria for revisiting protection findings under section 197D are framed in broad discretionary terms, and there are no specific objective criteria that need to be satisfied for the exercise of the power.**

The obligations imposed upon the Minister by 'common law procedural fairness'

We note the Department's view that decisions made under section 197D will be subject to common law rules of procedural fairness. We agree with the view of the Australian Human Rights Commission on this point – namely, that it would be preferable for procedural fairness to be embedded into the legislation.[61]

The availability of merits review and judicial review

We note that decisions made under section 197D may be subject to merits review by the Migration and Refugee Division of the AAT under Part 7 of the *Migration Act*. However, **the Minister has the power to exclude access to review under Part 7 by issuing a conclusive certificate under section 411(3)** if the Minister believes that either (a) it would be contrary to the national interest to change the decision; or (b) it would contrary to the national interest for the decision to be reviewed.

If the Minister exercises the power to reverse a protection finding made with respect to a non-citizen, section 197D(4) requires the Minister to notify the non-citizen in writing of the decision, the reasons for the decision, the fact that the decision is reviewable under Part 7 of the *Migration Act*, and other specified particulars. However, section 197D(5) provides that a failure to comply with the notification requirements does not affect the validity of the decision. **As such, a decision to reverse a protection finding under section 197D could be made validly without any notice of the decision or its particulars being given to the affected non-citizen.**

This would, in effect, frustrate access to both merits and judicial review. Without notification that a decision has been made and is reviewable, an affected non-citizen may miss the strict procedural deadlines for applying for review. Similarly, without access to detailed reasons for the decision, an affected non-citizen will not be able to prepare adequate submissions as to the merits or legality of the decision.

[60] Ibid.
[61] Australian Human Rights Commission (n 45) 10.

12. 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) (It is further noted that a Hansard transcript will be made available).

Kaldor Centre response

We agree with and refer the Committee to the answer to this question provided by the Human Rights Law Centre on 24 April 2024.

We have no further specific issues to raise at this time, but again reiterate our view that the bill should be rejected in its entirety, based on the concerns we have raised in our submission and elaborated on in the answers to the questions above.