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

BY EMAIL: legcon.sen@aph.gov.au

22 November 2024

Dear Committee Secretary,

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney (Kaldor Centre) is pleased to provide a submission to the inquiry into the Migration Amendment Bill 2024 (Cth).

The Kaldor Centre is the world's leading research centre dedicated to the study of international refugee law. Founded in October 2013, the Kaldor Centre undertakes rigorous research on the most pressing displacement issues in Australia, the Asia-Pacific region and around the world, and contributes to public policy by promoting legal, sustainable and humane solutions to forced migration.

At the outset, we wish to express our concerns about the speed with which this bill has been introduced and the lack of consultation about it. The bill is the most recent in a series of legislative reforms the government has attempted to rush through Parliament in response to the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (*NZYQ*)[1] and subsequent decisions.[2]

As the Senate Standing Committee for the Scrutiny of Bills noted in relation to an earlier Migration Amendment Bill introduced into parliament in March 2024,[3] 'legislation, particularly legislation that may trespass on personal rights and liberties, should be subject to a high level of parliamentary scrutiny'.[4] Truncated parliamentary processes which limit parliamentary scrutiny and debate are not appropriate for bills such as this one which seriously impact on individual rights and liberties.[5] While this inquiry provides some opportunity to consider the wide-ranging and open-ended ramifications of the bill, it is insufficient to alleviate our concerns about the expedited nature of the process and inadequate scrutiny of the bill's provisions.

Moreover, given the former Immigration Minister's affirmations that 'the importance of lived experience in shaping national and international dialogue and policy cannot be overemphasised', and that it is time for the government to 'walk the walk on meaningful

[1] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.
[2] *ASF17 v The Commonwealth* [2024] HCA 19; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40; *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth); *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth); Migration Amendment (Removal and Other Measures) Bill 2024 (Cth); Migration Amendment Bill 2024 (Cth).
[3] Migration Amendment (Removal and Other Measures) Bill 2024 (Cth).
[4] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2024* (27 March 2024) para 1.32.
[5] Ibid, para 1.29.

participation for refugees',[6] it is disappointing that this bill was drafted without prior consultation with refugee communities.

The current Minister has said the measures in the bill are designed to protect the Australian community.[7] However, many of the new powers it sets out, including expanded powers to send non-citizens to third countries, are not restricted to those with criminal records who feature so prominently in political speeches and media reports.

These powers could be used to remove a wide range of people, including refugees and people seeking asylum who have lived in and contributed to the Australian community for many years. It could separate families and communities, adversely impacting Australian citizens and permanent residents left behind. The bill is already causing considerable fear within affected communities.

That is the focus of the present submission: namely, the bill's potential negative impacts on refugees and people seeking asylum. It is our view that some of the provisions raise serious constitutional concerns and may also violate Australia's obligations under international law. Accordingly, **it is our recommendation that the bill be rejected in its entirety**.

The reasons for this recommendation are set out in the following submission, which considers:

1. the expanded powers to remove people to third countries, giving rise to an increased risk of *refoulement*;
2. the broad civil liability immunity that would have far-reaching impacts in terms of government accountability for harm done to non-citizens in the removal process or in third countries;
3. the expanded powers to revisit protection findings, compounding the increased risk of *refoulement*; and
4. the reimposition of intrusive monitoring conditions on those released from detention without judicial oversight.

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

Yours sincerely,

Associate Professor Daniel Ghezelbash
Director

Anna Talbot
Strategic Litigation Network Coordinator

Scientia Professor Jane McAdam AO
Director, Evacuations Research Hub

Madeline Gleeson
Senior Research Fellow

Dr Tristan Harley
Senior Research Associate

[6] Andrew Giles MP, 'Refugee Communities Association of Australia Conference' (21 September 2023) https://minister.homeaffairs.gov.au/AndrewGiles/Pages/refugee-communities-assoc-aust-conf-21092023.aspx.
[7] The Hon Tony Burke, *Minister for Home Affairs*, House Hansard (7 November 2024) 67.

A Background

1. The Migration Amendment Bill 2024 (Cth) was introduced in response to the High Court's judgment in the case *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [8] (*YBFZ*) in early November 2024. The bill incorporates some concerning elements of the stalled Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), which was introduced in March 2024, apparently in anticipation of the ruling in *ASF17 v The Commonwealth*.[9] The present bill is the fourth piece of legislation introduced since the High Court's ruling in *NZYQ* in November 2023, representing a concerning trend over the last year for rushed legislative responses to High Court litigation. This fast paced and expedited nature of legislative reform has not allowed time for adequate scrutiny to ensure compliance with domestic and international law, the ramifications of which can be seen in the high levels of litigation since *NZYQ*. With this bill, the government is again trying to rush through legislation that would have far-reaching impacts on the rights and liberties of non-citizens, creating further uncertainty.

2. In *NZYQ*, the court found the government's indefinite immigration detention policy was unlawful because it constituted punishment, which under the Australian Constitution can only be imposed by courts.[10] In doing so, it brought Australia into line with international law and practice of comparable States. No other liberal democracy allows for, let alone requires, indefinite mandatory immigration detention of the kind previously in place in Australia. The ruling has led to the release of 224 people from detention.[11]

3. The government's response to the High Court's decision in *NZYQ* included passing legislation authorising monitoring conditions, including ankle bracelets and curfews, for many of the people released.[12] Any breach of those conditions could lead to criminal charges and imprisonment. The *YBFZ* case challenged these visa conditions. The High Court ruled these conditions also amounted to punishment in breach of the Constitution.[13] The government introduced the Migration Amendment Bill 2024 (Cth) a day later.

4. The new powers in the bill could impact a far larger group of people than those released as a result of *NZYQ*. It is also not clear that the bill adequately responds to the High Court's ruling in *YBFZ*, as it continues to allow for the imposition of harsh visa conditions without court involvement. This means that some of the provisions contained in the bill could potentially be found to be unlawful in future court challenges, imposing an unnecessary burden on the courts and subjecting refugees and people seeking asylum to potentially unlawful treatment.

---

[8] *YBFZ v Minister* (n 2).
[9] *ASF17 v The Commonwealth* (n 2).
[10] Ibid, para 45.
[11] Department of Home Affairs and Australian Border Force, 'Community Protection Summary October 2024' https://www.homeaffairs.gov.au/research-and-stats/files/community-protection-summary-report-october-2024.pdf.
[12] *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth).
[13] *YBFZ* (n 2) para 87.

B Expanded powers to remove people to third countries

5. Proposed sections 76AAA and 198AHB of the bill effectively broaden the government's powers to forcibly remove non-citizens to unspecified third countries. The new powers would permit the government to remove people from Australia even if it has not shown that they pose a risk to the community. It does not require consideration of the impacts of removal on those concerned or the broader community (including their families). We have six main concerns about these proposed expanded powers:

    a. expansion of the group of people to whom removal powers apply;
    b. expansion of the countries to which people can be removed;
    c. risks of *refoulement* (removal to persecution or other serious harm);
    d. the associated costs of the new removal powers;
    e. impact of removal powers on children, families and the community; and
    f. disclosure of criminal history information with third countries.

Expansion of the group of people to whom removal powers apply

6. Currently, unauthorised maritime arrivals can be sent to a regional processing country (such as Nauru) under existing section 198AD of the *Migration Act 1958* (Cth). The new provisions in the bill for the cessation of bridging visas (set out in proposed section 76AAA) would, in effect, extend the power to remove non-citizens to third countries to any bridging visa R (BVR) holder.

7. BVRs are issued to people in detention when there is no reasonable prospect of their removal from Australia. This could be, for example, because they have been found to be owed protection by Australia, are stateless, or their home country refuses to take them back. Currently, BVRs are primarily used for people released from immigration detention post-*NZYQ*. The 224 people currently on BVRs, as well as hundreds of other non-citizens in immigration detention, would potentially be susceptible to removal under the new provisions.[14] However, there is nothing stopping the government from also issuing BVRs to a much broader range of unlawful non-citizens (regardless of whether they are in detention) in the future, thus placing them at risk of removal to unspecified third countries as well.[15]

8. Other people currently living in the community on other bridging visas could potentially be moved onto a BVR and removed to an unspecified third country. The government could cancel or not renew their bridging visa, making them unlawful non-citizens. If the Minister is satisfied that there is no reasonable prospect of their removal from Australia, they can then be issued a BVR,[16] and as a result become susceptible to the new third country removal powers. Examples of cohorts currently living in the community on other bridging visas who could be potentially affected include:

---

[14] Department of Home Affairs, 'Immigration Detention and Community Statistics Summary September 2024' (October 2024) 3 https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-community-statistics-summary-30-sept-2024.pdf.

[15] Reg 2.25AA(2) of the Migration Regulations 1994 enables the Minister to grant a BVR to eligible unlawful non-citizens who are not in immigration detention where there is no reasonable prospect of their removal.

[16] Migration Regulations 1994, reg 2.25AA.

a. refugees and people seeking asylum previously brought to Australia from Nauru or Papua New Guinea (including under the 'Medevac' scheme);
b. people seeking asylum who had their protection visa applications refused through the flawed fast-track or other asylum processes; and
c. refugees with protection findings who have had their visas refused or cancelled on character grounds.

Expansion of the countries to which people can be removed

9. The bill anticipates Australia entering into 'third country reception arrangements'.[17] The bill provides no clarity as to which countries might enter into such arrangements with Australia. It does not set out any standards or criteria by which Australia would assess the appropriateness of third countries, nor does it contain any safeguards to ensure that people removed to third countries will not be exposed to foreseeable risks (including the risk of 'chain *refoulement*', where the third country later returns the person to a country where they face a real risk of persecution or other serious harm). This is particularly concerning since Australia owes human rights obligations to all people within its territory and/or jurisdiction,[18] and these obligations do not necessarily end if people are forcibly removed[19] – especially if Australia continues to be involved through funding arrangements like those envisaged by proposed section 198AHB (discussed further below).

10. The bill does not require consideration as to whether third countries that enter into arrangements with Australia offer a permanent or 'durable' solution, meaning that people could be transferred to situations of protracted uncertainty and even indefinite detention.[20] Such a proposal runs counter to the basic principle of international law that 'a State cannot do by another what it cannot do by itself.'[21] As various iterations of Australia's offshore processing regime have shown, sending people to third countries can result in significant, long lasting and sometimes irreversible harm to those subjected to it, as well as significant legal uncertainty while the legality of the arrangements are tested in the courts.[22] Further information on this point is provided in the next section of this submission on civil liability immunity.

Risks of* refoulement *(removal to persecution and other serious harm)

11. International law prohibits Australia from expelling or returning refugees and people seeking asylum to any place where their life or freedom would be threatened on

---

[17] Proposed s 198AHB.
[18] International Covenant on Civil and Political Rights, art 2(1).
[19] See, for example, *Hirsi Jamaa v Italy*, App No 27765/09 (2012, European Court of Human Rights); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, para 46 (French CJ, Kiefel and Nettle JJ).
[20] Proposed s 198AHB(5).
[21] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Commentary to Article 16, para 6 https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.
[22] Madeline Gleeson and Natasha Yacoub, *Cruel, Costly and Ineffective: The Failure of Offshore Processing in Australia*, Kaldor Centre for International Refugee Law Policy Brief 11 (2021) https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf.

account of their race, religion, nationality, membership of a particular social group or political opinion,[23] and from removing people to places where they would face a real risk of other serious harm, including being arbitrarily deprived of their life, tortured or exposed to other cruel, inhuman or degrading treatment or punishment or serious forms of discrimination against women.[24] This is known as the principle of *non-refoulement*. This obligation also forms part of customary international law.[25]

12. The bill contains no safeguards to ensure that people sent to third countries will be protected from *refoulement*. This is in contrast to existing arrangements for people who are taken to Nauru for assessment of their asylum applications: the *Migration Act* requires that the Minister assess whether a country would 'expel or return a person taken to the country… to another country where his or her life or freedom would be threatened', before designating a country as a 'regional processing country'.[26] There is no equivalent safeguard included in the bill (or under existing domestic law) with respect to the new powers to send non-citizens to countries that enter into a third country reception arrangement with Australia. While the Minister's Second Reading Speech states that Australia will continue to abide by its *non-refoulement* obligations,[27] this is not enshrined in the legislation, which continues to state that *non-refoulement* obligations are 'irrelevant',[28] and that the duty to remove a non-citizen under section 198 'arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations'.[29]

13. The new provisions in proposed section 76AAA provide some limited safeguards on the application of the new ceasing provisions and resulting powers of removal. Proposed section 76AAA(1)(d) provides that removal will not occur if:

    i. the non-citizen has made a valid application for a protection visa that has not been finally determined;
    ii. the non-citizen cannot be removed to the third country because a protection finding has been made with respect to that country; or
    iii. the non-citizen is a child under 18.

14. However, the new provisions would apply to non-citizens with ongoing judicial review or Ministerial intervention requests relating to their protection visa applications. This is a result of the narrow definition of 'finally determined' in s 11A of the *Migration Act*, which only extends to exhausting the merits review process.

15. Refugees whose claims were not properly assessed would also be susceptible to the new ceasing and removal powers. This includes those refused protection through the

[23] Refugee Convention, arts 33(1), 1A(2).
[24] See eg International Covenant on Civil and Political Rights, arts 6, 7; Convention against Torture and Other Cruel, Inhuman and Degrading Treatment, art 3; Convention on the Rights of the Child, art 27(a); Convention on the Elimination of All Forms of Discrimination against Women, art 2(d).
[25] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn, Oxford University Press, 2021) 300–06.
[26] *Migration Act 1958* (Cth), s 198AB(3)(a)(i). Note, however, that the existing provision may also not be adequate to protect against risk of *refoulement*.
[27] Burke (n 7) 37.
[28] *Migration Act*, s 197C(1).
[29] Ibid, s 197C(2).

flawed fast-track process,[30] which limited people's ability to provide crucial information to the decision makers reviewing their protection claims. This risk is compounded when taken in conjunction with the fact that these non-citizens may have pending judicial review or Ministerial intervention requests, which have to date been an important avenue for challenging flaws in decision-making as part of the fast-track system. The Labor party has itself acknowledged that fast-track process has not provided a 'fair, thorough and robust assessment process for persons seeking asylum',[31] meaning that some refugees were wrongly denied protection. To date, 37 per cent of judicial review applications lodged by fast-track applicants have been successful.[32] Removing applicants before their judicial review applications are finalised further raises the risk that those entitled to protection visas in Australia could be sent offshore.

16. Third countries may be particularly unsafe for certain cohorts. Women and members of the lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) communities may be at heightened risk, as they were in Nauru and Papua New Guinea. While Australia is aware of these risks, in the past it has not taken adequate action to keep people safe, with women and LGBTQI people reporting acts of violence, including sexual violence, against them, with no or inadequate investigation and treatment following such events.[33] Similarly, certain medical conditions may not be adequately catered for in third countries. In the past, the Minister has sent people offshore in contravention of medical advice, and was unwilling to facilitate transfers so that those whose medical conditions could not be treated offshore could have access to appropriate medical care. There is, accordingly, a real risk that the removal of non-citizens pursuant to the new arrangements could put Australia in conflict with its obligations under the International Covenant on Civil and Political Rights[34] and other human rights instruments. When combined with the civil liability immunity discussed below, this is particularly concerning.

Costs associated with the new removal powers

17. The power to fund removal and ongoing residence (including, potentially, detention)[35] in third countries is contained in proposed section 198AHB, which is drafted with similar, but not identical, language to the power that grants the government the power

---

[30] Daniel Ghezelbash, Mia Bridle and Keyvan Dorostkar, 'The Administrative Review Tribunal Bill: A Missed Opportunity for Ending Migration Exceptionalism and Creating an Unified Approach for Administrative Review' *AUSPUBLAW* (20 March 2024) https://www.auspublaw.org/blog/2024/3/the-administrative-review-tribunal-bill-a-missed-opportunity-for-ending-migration-exceptionalism-and-creating-a-unified-approach-for-administrative-review.

[31] Joint Standing Committee on Migration, *Report of the Inquiry into Efficacy of Current Regulation of Australian Migration and Education Agents*, Dissenting report (Labor members) para 1.4 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/Migrationagentregulatio/Report/section?id=committees%2Freportjnt%2F024186%2F27141.

[32] Daniel Ghezelbash and Constantin Hruschka, *A Fair and Fast Asylum Process for Australia: Lessons from Switzerland*, Kaldor Centre for International Refugee Law Policy Brief 16 (2024) 6 https://www.unsw.edu.au/content/dam/pdfs/law/kaldor/2024-10-a-fair-fast-aslyum-process-in-australia-lessons-from-switzerland.pdf.

[33] Anna Talbot, Anthea Vogl and Sara Dehm, 'The Gender- and Sexuality-Based Harms of Refugee Externalization: A Role for Human Rights Due Diligence' (2024) 36 *International Journal for Refugee Law* 60.

[34] See eg arts 6, 7, 9, 10, 13, 17, 26. In relation to the proposed civil liability immunity, discussed below, see art 2(3).

[35] Proposed s 198AHB(5).

to fund and transfer people seeking asylum to regional processing countries such as Nauru under section 198AHA of the Migration Act.

18. Proposed section 198AHB enables government spending to support these third country reception arrangements. It provides that Australia may take 'any action' in relation to third country reception arrangements *except* 'exercising restraint over the liberty of a person'. This language would appear to exclude Australia from detaining non-citizens itself in the territory of another country. However, the proposed provision then goes on specifically to authorise Australia taking action in relation to 'third country reception functions of the foreign country', which may include, 'if the foreign country so decides, exercising restraint over the liberty of a person'.[36]

19. The bill places no limit on how much Australia might spend to fund 'third country reception arrangements', including possibly new overseas detention centres. Nor does it set out any criteria, safeguards or accountability mechanisms regarding how that money should be spent. Historically, Australia has provided significant levels of ongoing funding to regional processing countries such as Nauru and Papua New Guinea.[37] The Australian National Audit Office has criticised the lack of adequate oversight for substantial contract variations.[38] Accordingly, the lack of safeguards or limits on government spending in this bill is concerning. This funding also has relevance for the civil liability immunity contained in the bill, discussed below.

Impacts on children, families and the community

20. Many of the people who may be removed under the proposed provisions will have developed deep community connections during their time in Australia. They may be married, have long-term partners, children, extended families and/or business relationships. These relationships could involve Australian citizens or other visa-holders, and all such relationships will be impacted by removals. Impacts could include severe financial impacts if the person liable for removal is financially supporting those who remain in Australia. There is currently no adequate avenue, however, for these impacts to be assessed, due to the automatic nature of the visa cessations that could occur under proposed section 76AAA. While it may be possible for the Minister to intervene in these cases, the automatic nature of the changes means that time for such intervention may be extremely limited, and those affected may not have time, knowledge or ability to engage the Minister before the removal occurs.

21. While proposed section 76AAA(d)(i) excludes non-citizens under the age of 18 from being removed, the new provisions could still have far-reaching effects on children and families. Children may be particularly impacted by the removal or detention of a parent,

---

[36] Ibid.

[37] Refugee Council of Australia *Offshore Processing Statistics* https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/7/. These figures do not appear to include court costs paid by the Commonwealth in defending claims brought on behalf of refugees and people seeking asylum who had been sent offshore, or compensation payouts for injuries allegedly caused by the Commonwealth or its agents, although it is estimated that these costs would be significant.

[38] Auditor-General, *Offshore Processing Centres in Nauru and Papua New Guinea: Contract Management of Garrison Support and Welfare Servies* (Report No 32, 2017).

guardian or other family member,[39] yet the current provisions do not adequately contemplate this potential risk. The consequences for a child would be particularly significant if the person liable for removal were the child's sole carer.

22. Deporting the family members of children in Australia may have a significant, potentially life-long, impact on children, some of whom may be Australian citizens. It could result in children being taken into state care and deprived of their cultural, religious and linguistic heritage, as well as the fundamental harm that is caused to children who lose a primary attachment figure.

23. Two of the most fundamental principles underpinning the protection of children's rights under international law are that: i) the best interests of the child must be taken into account as a primary consideration in all actions concerning children (the 'best interests' principle); and ii) States must assure to children who are capable of forming their own views the right to express those views freely in all matters affecting them, and to have those views be given due weight in accordance with their age and maturity (the 'right to be heard' principle).[40] The Committee on the Rights of the Child has emphasised the importance of ensuring that domestic law reflects these principles.[41] However, in its current form, the bill contravenes both. The fact that visas would cease automatically, making an individual liable to immediate deportation or detention, means that the scope for assessing the ramifications of deportation for any affected child or for taking their views into consideration is extremely limited or non-existent.

Disclosure of criminal history information

24. The bill proposes powers that would allow the Minister or Department to collect, use or disclose criminal history information, including for people on a removal pathway.[42] This could include unproven charges and spent convictions.[43] Where the information concerns a person on a removal pathway, this information could then be shared with third countries for the purposes of determining whether the individual might be able to be removed.[44]

25. There are no safeguards to ensure that the third country handles the information in a sensitive, confidential and appropriate manner. This could create a risk for the person removed, especially given that the bill does not ensure that people will be protected from *refoulement* by the third country. If such criminal history was shared with a country from which the person was entitled to protection, and the person was then *refouled* to that country, this would increase the risk of persecution and serious harm.

---

[39] Proposed section 76AAA(1)(d)(iii) excludes children under the age of 18 from the automatic cessation provisions which would trigger the obligation to remove non-citizens under existing section 198 of the *Migration Act*.

[40] Convention on the Rights of the Child, articles 3(1), 12. The Committee on the Rights of the Child has recognised these as two of the four general principles for interpreting and implementing all the rights of the child under the Convention: Committee on the Rights of the Child, *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, UN doc CRC/GC/2003/5 (27 November 2003), para 12.

[41] Ibid, para 22.

[42] Proposed s 501M.

[43] Explanatory Memorandum, para 65.

[44] Proposed s 198AAA(2).

C Civil liability immunity

26. Proposed Schedule 2 of the bill attempts to indemnify the government from civil liability for any actions taken to facilitate the removal of a person from Australia or their treatment (including possible detention) in the third country. Civil liability is the means by which courts ensure that public and private actors comply with their legal obligations, such as the obligation not to arbitrarily detain people or cause people harm when they are obliged not to (such as when they owe the person a duty of care). To date, civil liability claims have been a crucial accountability mechanism for people sent to third countries pursuant to Australia's offshore processing regime.

History of civil liability claims

27. In 2017, the largest human rights settlement at the time was agreed between the Commonwealth and people who had been detained in Manus Island, following a ruling in the Papua New Guinea Supreme Court that the detention contravened the Papua New Guinea Constitution.[45] The detainees had claimed that they had been unlawfully detained and subjected to personal injury by the Commonwealth and other actors.

28. For people sent to Nauru and Papua New Guinea, dozens of injunctions were commenced against the Minister or the Commonwealth between 2016 and 2019. These injunctions were based in the Minister's duty of care toward those who were transferred, a duty that was conceded for the purposes of the injunctions by the Minister (but otherwise disputed). The claims relied on expert medical evidence that each claimant had urgent, life-threatening conditions that could not be adequately treated offshore and required treatment in a tertiary level hospital with facilities similar to those found in major Australian hospitals.[46]

29. The importance of access to civil liability claims can be demonstrated by one of the first cases seeking to compel the Minister to provide medical care that he was not otherwise willing to provide. In the 2016 case of *Plaintiff S99 v Minister for Immigration and Border Protection*,[47] for example, a woman who had been raped in Nauru required a pregnancy termination, which was illegal in both Nauru and Papua New Guinea. For health reasons, this procedure needed to be conducted at a tertiary level hospital with EEG monitoring and psychological support, neither of which was available in Nauru or Papua New Guinea. Despite this evidence, the Minister refused to bring her to Australia for treatment, instead taking her to Papua New Guinea for the procedure. She was forced to bring a civil liability claim to court to access this urgent treatment, without which she may have been at risk of death due to the other complicating factors. Other individuals were similarly required to resort to mandatory injunctions (a form of

---

[45] ABC News 'Manus Island Detainees' $70m Compensation Settlement Approved' (6 September 2017) https://www.abc.net.au/news/2017-09-06/manus-island-detainees-settlement-with-commonwealth/8876934.
[46] Anna Talbot and George Newhouse, 'Strategic Litigation, Offshore Detention and the Medevac Bill' (2013) 13 *UNSW Law Society Court of Conscience* 85 https://classic.austlii.edu.au/au/journals/UNSWLawSocCConsc/2019/13.html.
[47] *Plaintiff S99 v Minister for Immigration and Border Protection* [2016] FCA 483.

civil liability claim) to access safe treatment when they had been subjected to female circumcision[48] or had severe mental illness.[49]

30. Hundreds of people were transferred to Australia pursuant to these injunctions, or as a result of negotiations with the Immigration Department in light of other civil liability claims being run at the time. A number of these cases have continued as compensation claims, as people argue that they have suffered ongoing serious injury as a result of the Commonwealth (in)action offshore. Some of these cases have been settled for undisclosed sums, with no liability conceded by the Commonwealth.[50] These settlements, while offering a level of compensation to those who suffered harm in offshore detention, mean that there has never been a comprehensive assessment of the legal issues involved.

Medevac reforms repealed

31. In 2018 and 2019, there were so many injunctions commenced that the then-Labor opposition supported a private member's bill formalising an administrative process whereby people could apply for review and, if approved, be transferred to Australia for treatment (the Medevac reform).[51] This reform alleviated a significant burden from the courts (and associated costs for the Commonwealth and applicants), as well as ensuring a much greater volume of people who needed medical treatment were able to access it. This reform was repealed following the 2019 election,[52] meaning this safeguard is no longer in place.

Shutting the door to civil liability claims

32. The bill seeks to remove the only mechanism that has been effective to protect people sent to third countries to date. As detailed above, deporting people to third countries has the potential to cause significant ongoing harm to people who have been removed. The Commonwealth will be aware that some people will be at heightened risk in third countries due to their personal characteristics, including physical or psychological injuries that they might have sustained in the Australian immigration detention system or elsewhere.[53] It is also aware that sending people to a third country in which they do not have any pathway to a lasting solution is an inherently dangerous act, which is likely to cause or exacerbate psychological injury.[54]

---

[48] In 2018, a woman who required a pregnancy termination who had been subjected to female circumcision was forced to bring court action to access treatment. She required a specialised doctor to perform the procedure, as well as specific cultural and psychological support to meet her needs. Despite this evidence being provided to the Minister, he refused to facilitate this treatment, instead offering to take the woman to Taiwan where there was no in-person translation service available and no one with the requisite surgical or psychological expertise: *DCQ18 v Minister for Home Affairs*: [2018] FCA 918.

[49] See eg *DWE18 as Litigation Representative for DWD18 v Minister for Home Affairs* [2018] FCA 1121; *EWR18 v Minister for Home Affairs* [2018] FCA 1460. Similar cases are referred to in Talbot and Newhouse (n 46).

[50] *DIZ18 (by her litigation representative DJA18) v Minister for Home Affairs (No 3)* [2023] FCA 1350; *FBV18 v Commonwealth of Australia* [2024] FCA 947.

[51] *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth).

[52] *Migration Amendment (Repairing Medical Transfers) Act 2019* (Cth).

[53] Talbot et al (n 33) 68–70.

[54] Médecins sans Frontiers, *Indefinite Despair* (2018) 6 https://www.msf.org/indefinite-despair-report-and-executive-summary-nauru.

33. Given its nature, it is anticipated that proposed Schedule 2 of the bill would be subject to legal challenge, which is likely to involve lengthy and complex litigation. If it were upheld, this would remove the only safeguard available to those who at risk of third country removals. If the challenge were successful, significant harm could already have occurred while the litigation was on foot.

34. Australia cannot, and should not be able to, absolve itself of its domestic or international legal obligations by removing people to third countries.[55] Given that proposed section 198AHB allows not only for Australian funds to facilitate the transfer, but also for ongoing financial involvement in the lives of people deported under these provisions, any attempt to remove liability in line with proposed Schedule 2 should be strongly resisted. To permit such a civil liability exclusion would enable Australia and Australian officials to operate with impunity beyond Australian borders, seriously undermining the rule of law and democratic accountability.

D Expanding powers to revisit protection findings

35. The proposed amendments to sections 197C and 197D of the Migration Act, which expand the Minister's powers to revisit and reverse protection findings, are also concerning. Revisiting protection findings in this way puts Australia at risk of violating its *non-refoulement* obligations.[56] Under the current framework, the Minister only has the power to revisit protection findings made with respect to unlawful non-citizens. The amendments would expand this power to cover a new class of removal pathway non-citizens, including lawful non-citizens on valid visas. This would include those on a BVR or Bridging (General) visa (BVE) granted on 'final departure' grounds.[57] It would also allow the government to add additional visa subclasses in the future, provided that the visa was granted on the condition that the visa holder would make acceptable arrangements to depart Australia.[58]

36. The stalled Migration Amendment (Removal and Other Measures) Bill 2024 (Cth), introduced in March 2024, included a similar measure. While the present bill is somewhat narrower, only permitting the addition of new subclasses liable to revisitation of protection findings to visas issued on final departure grounds,[59] it remains unclear why the government requires the power to add additional categories of affected individuals through regulations. We echo the concerns raised by the Senate Standing Committee for the Scrutiny of Bills in relation to the March 2024 bill about the

---

[55] *Hirsi* (n 19); *M68* (n 19), para 46.
[56] Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 10 of 2024*, para 1.39 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2024/Scrutiny_report_10_of_2024.
[57] Proposed s 5(1) creates a new definition of a 'removal pathway non-citizen', which can include both (b) Bridging (Removal Pending) visa holders and (c) Bridging (General) visa holders. A removal pathway non-citizen is liable to have their personal information shared with third countries under proposed section 198AAA(1), which would presumably be a first step before the removal pathway non-citizen were granted 'permission to enter and remain in another country'. In the interim, they could be moved from a Bridging (General) visa to a Bridging (Removal Pending) visa, which would mean they were liable for automatic cessation of their visa under proposed section 76AAA. Removal pathway non-citizens are also liable to have a protection finding revisited under proposed section 197D(1)(a)(ii), clearing the way for them to be deported in the absence of *non-refoulement* obligations.
[58] Item 4, 5(1)(d).
[59] Proposed s 197D(2A) and proposed s 5(1)(d) – definition of 'removal pathway non-citizen'.

lack of explanation or justification for why this amendment is needed, particularly in light of the significant impact it will have on the rights of those affected. As noted by the Parliamentary Joint Committee on Human Rights in relation to the present bill, "[w]hile regulating Australia's migration system is a legitimate objective, it is not clear that there is a pressing need to extend the power to reverse a protection finding in relation to a potentially significant number of lawful visa holders".[60]

E Reimposing intrusive conditions, such as ankle monitoring and curfews

37. The bill and associated regulations also seek to reimpose visa conditions, such as curfews and ankle monitoring bracelets, that were recently ruled unconstitutional by the High Court in *YBFZ*. These conditions would be imposed, unless the Minister were satisfied, on the balance of probabilities, that the non-citizen either:

    i. does not pose a substantial risk of harming the Australian community by committing a serious offence; or
    ii. does pose such a risk, but the Minister is not satisfied that the imposition of the conditions are reasonably necessary, appropriate or adapted for the purpose of protecting any part of the Australian community.[61]

38. We echo concerns raised by the Human Rights Law Centre that this would allow 'the government to make assumptions about people's future behaviour and continue imposing punitive conditions that limit people's freedom and bodily integrity.'[62]

39. It is unclear whether the changes meet the requirements set down by the High Court in *YBFZ*, given that restrictions would continue to be imposed without court involvement. As noted by the Parliamentary Joint Committee on Human Rights, 'as the conditions significantly interfere with multiple human rights, it is arguable that together they may be so severe as to constitute a 'criminal' penalty for the purposes of international human rights law'.[63] Accordingly, as with other aspects of the bill, these provisions could be open to successful legal challenge.

F An alternative approach to facilitate removals in accordance with international law

40. The removal of people found not to have protection needs plays an important role in maintaining the integrity of the refugee and migration system. As States noted in UNHCR's Executive Committee Conclusion No 96, 'the efficient and expeditious return of persons found not to be in need of international protection is key to the international protection system as a whole, as well as to the control of irregular migration and prevention of smuggling and trafficking of such persons'.[64] Indeed, 'the credibility of

---

[60] Parliamentary Joint Committee on Human Rights (n 56) para 1.45.
[61] Proposed s 76E(4)(b).
[62] Human Rights Law Centre, 'Explainer: Labor's Brutal Deportation and Surveillance Bill' (2024) https://www.hrlc.org.au/reports-news-commentary/2024/11/8/deportation-surveillance.
[63] Parliamentary Joint Committee on Human Rights (n 56) para 1.88.
[64] UNHCR Executive Committee, *Conclusion No 96 (LIV) on the Return of Persons Found Not to Be in Need of International Protection* (2003), Preamble.

individual asylum systems is seriously affected by the lack of prompt return of those who are found not to be in need of international protection'.[65]

41. However, the legitimacy of returns depends on the existence of fair, efficient and timely refugee status determination procedures to ensure that people with valid protection claims are not returned contrary to international law.[66]

42. As the European Council on Refugees and Exiles has observed: 'If states are concerned with being able to undertake successful and sustainable returns they must address the fairness of their asylum procedures first. Wrong decisions may lead to people being persecuted and having to flee from their countries of origin again'.[67] Moreover, '[u]nder no circumstances should a person be returned until it has been clearly and definitely established that there are no protection needs relating to the individual case in question and that return will therefore not put their life at risk. Essential measures to ensure this cannot happen include the granting of a suspensive right of appeal and allowing a procedure to be re-opened if new elements arise in a particular case.'[68]

43. Even where removal is appropriate, States have affirmed that the 'return of persons found not to be in need of international protection should be undertaken in a humane manner, in full respect for human rights and dignity and, that force, should it be necessary, be proportional and undertaken in a manner consistent with human rights law'.[69] Additionally, 'in all actions concerning children, the best interests of the child shall be a primary consideration'.[70]

44. Finally, UNHCR has emphasised that, in order to be effective, measures to remove non-citizens who do not have protection needs must be paired with broader approaches which respond to the realities of displacement and migration. Indeed, '[a] comprehensive approach to return is premised on the recognition that migration control and deterrence alone can have little lasting impact on curbing irregular movements, when the need or the desire to migrate prevails. Return-oriented measures must, therefore, be part of a broad range of migration management policies that go beyond short-term reactions to a perceived or real misuse of asylum systems.'[71]

45. In line with the above, the most effective approach to facilitating removals consistently with international law is to ensure that refugee status determination procedures are both fast and fair. The longer a person has been in Australia, the greater the legal and practical barriers to removal. At the same time, where an applicant feels they have not had an opportunity to have their protection claims fairly assessed, the more reluctant they may be to accept voluntary removal from the country. A recent Kaldor Centre

[65] Ibid, para (b).
[66] European Council on Refugees and Exiles, *The Way Forward: Europe's Role in the Global Refugee Protection System: The Return of Asylum Seekers Whose Applications Have Been Rejected in Europe* (1 June 2005) 12, https://www.refworld.org/reference/research/ecre/2005/en/42951.
[67] Ibid, 13.
[68] Ibid.
[69] UNHCR Executive Committee (n 64) para (c).
[70] Ibid.
[71] UNHCR, 'The Return of Persons Not in Need of International Protection' in *UNHCR Protection Training Manual for European Border and Entry Officials* 5.

policy brief, entitled *Fair and Fast,* outlines a series of detailed recommendations for how Australia could increase the efficiency of its asylum procedures without compromising fairness.[72] To the extent that certain non-citizens who do not have protection needs continue to refuse to cooperate with their removal, such situations are better resolved on an individual basis, according to the specific reasons for refusal, rather than through an automated system of visa cessation and removal to a third country.

46. In the present context, it would be appropriate to permit people whose protection applications were assessed through the flawed 'fast track' process to have them reassessed fairly, including an opportunity to submit fresh protection claims or appeal negative determinations issued by the now abolished Immigration Assessment Authority. Doing so would likely resolve the status of a number of people who might otherwise be subjected to the provisions in this bill.

G Recommendation

47. We recommend that the bill be rejected in its entirety.

[72] See Ghezelbash and Hruschka (n 32).