THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Dr Popple

Migration Amendment (Removal and Other Measures) Bill 2024

Thank you for the opportunity to provide input to the Law Council's submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to its inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024 (**Bill**). The Law Society's Human Rights, Public Law and Criminal Law Committees have contributed to this submission.

The Explanatory Memorandum sets out that the purpose of the Bill is to strengthen 'the integrity of the migration system by requiring non-citizens who are on a removal pathway and have exhausted all avenues to remain in Australia to cooperate in efforts to ensure their prompt and lawful removal'.[1] While the Law Society appreciates the importance of a well-functioning migration program, we share the serious concerns raised by the Law Council, including in its media release dated 26 March 2024.

We highlight the following in relation to the Bill:

Introduction of the Bill

The High Court decision in *NZYQ v Commonwealth* [2023] HCA 37, and the expected decision in the matter of *ASF17 v Commonwealth*, appear to have prompted rushed legislative responses, which have not been subject to appropriate consultation and transparency. It is disappointing that the Government failed to consult with relevant stakeholders, including the legal profession and refugee organisations and communities, before introducing the Bill to Parliament. Such consultation is particularly important for legislation of this kind, which has a significant impact on human rights and individual liberties, as well as consequences for the operation of Australia's migration program and foreign policy agenda.

Offence for non-compliance with removal pathway direction

Section 199E creates an offence for non-compliance with a removal pathway direction. The offence carries a penalty of 5 years' imprisonment or 300 penalty units, or both. Subsection 199E(2) provides for a mandatory minimum sentence of 12 months' imprisonment for a person convicted of an offence under subsection 199E(1).

[1] Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024, 2.

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The Explanatory Memorandum states that it is the Government's view that a penalty of 12 months' mandatory minimum imprisonment will serve as an 'effective deterrent to the commission of the offence' as well as reflecting the 'serious and damaging consequences to the integrity of the managed migration program'.[2]

The Law Society opposes the use of mandatory and minimum sentences. In our view, these inappropriately exclude judicial discretion, disproportionately impact disadvantaged groups, and can negatively impact guilty pleas and strain criminal justice resources, while having negligible deterrent effect. We are also of the view that mandatory and minimum imprisonment sentences breach Australia's international human rights obligations under the *International Covenant on Civil and Political Rights* (**ICCPR**), including Articles 9(1) and 14(5).

It is particularly inappropriate to employ such sentencing practices in the context of failure to comply with a direction. As highlighted by the Kaldor Centre for International Refugee Law, while in some state legislation there are criminal penalties attached to a failure to comply with police directions to move on, or for reportable offenders who fail to produce electronic devices when directed by police, such provisions do not provide for mandatory minimum sentences.[3]

Reasonable excuse

Section 199D sets out the circumstances in which the Minister must not give a removal pathway direction, including in relation to non-citizens subject to a protection finding and in relation to non-citizens who have made a valid application for a protection visa that is not yet finally determined. However, we note that this will not prevent a removal direction being made to individuals who are statute-barred from making a visa application, even if they have protection claims which may inform the ministerial discretions under the *Migration Act 1958* (Cth) to 'lift the bar' and allow a valid application to be made.

Subsection 199E(3) provides that a person does not commit an offence under subsection 199E(1) if the person has a 'reasonable excuse'. The defendant bears the evidential proof in relation to the 'reasonable excuse'. In addition, subsection 199E(4) sets out certain matters that cannot be relied on by a person as a 'reasonable excuse' defence, including if the person:

- has a genuine fear of suffering persecution or significant harm if the person were removed to a particular country; or
- is, or claims to be, a person in respect of whom Australian non-refoulement obligations, or
- believes that, if the person complied with the removal pathway direction, the person would suffer other adverse consequences.

As what constitutes a 'reasonable excuse' is a matter of judicial discretion, it is unclear, for example, whether those persons who were subject to the 'Fast Track Assessment' process will be able to make out the defence, as well as those persons who due to a change in circumstance in a particular country (e.g., change of political regime or policy), have developed a new and genuine fear of suffering, persecution or significant harm. In light of subsection 199E(4), consideration might be given to providing a non-exhaustive list of what could constitute a 'reasonable excuse', including the examples above.

[2] Ibid., 27.

[3] Kaldor Centre for International Refugee Law, Kaldor Centre statement on new migration bill (26 March 2024). See, for example, Failure to comply with Digital Evidence Access Order Direction (*Law Enforcement (Powers and Responsibilities) Act 2002*, s 80O) – max penalty 100 penalty units or 5 yrs imprisonment; and Failure to comply with reporting obligations under Child Protection Register (*Child Protection (Offenders Registration*) *Act 2000* (NSW) s17 – max penalty 500 penalty units or 5 yrs imprisonment.

Prohibition on visa application from 'removal concern countries'

Section 199F empowers the Minister to personally designate a country as a 'removal concern country'. Subject to the exceptions set out in s 199G(1)-(3), citizens from removal concern countries will be prevented from making a valid visa application.

The proposed legislation contains certain safeguards in relation to the exercise of the Minister's power, including the requirement to table a copy of the designation and a related statement of reasons. In our view, however, the proposal to designate 'removal concern countries' is a blunt and punitive approach which would create real and substantial risks of injustice. It confers on the Minister a discriminatory power to reject visa applications from entire countries, potentially targeting persons living under autocratic regimes, or those escaping conflict or persecution.

We disagree with the assertion set out in the Statement of Compatibility with Human Rights that a designation under s 199F would be a 'reasonable, necessary and proportionate to the legitimate aim of maintaining the integrity of the migration system and helping ensure that other countries readmit their nationals'.[4] In our view, there should be a more nuanced approach to encourage international cooperation concerning the removal of nationals to their country of origin following their lawful stay in Australia. As pointed out by the Kaldor Centre for Refugee Law, this issue is a 'diplomatic one that should be negotiated in good faith between political leaders'.[5]

We oppose this provision. However, if the provision is to remain, we suggest that the 'no invalidity' clause in proposed s 199F(8) is too broad and not justified given the designation is not a legislative instrument creating norms of conduct for the general public. Sub-sections (7) and (8) should be removed from the Bill, and provision instead made that any removal concern designation will only take effect on the day after the designation has been tabled in compliance with (6) for at least two days in each House.

Further, proposed s 199F powers should be defined with greater precision, and amended to ensure their consistency with fundamental rights. At present, for example, the Minister's power to designate a removal concern country is enlivened 'if the Minister thinks it is in the national interest'. At the very least, this power, which is a personal power of the Minister, should be made more certain and predictable in scope. This could be achieved by requiring consideration of whether there is a need to slow down the entry pipeline into Australia of foreign nationals from a particular country, based on evidence of the policy settings in the country around readmitting citizens, and/or evidence of the current cohort of intractable removals in relation to the country.

Section 199F should also be amended to require human rights impact assessments, which should take account of various factors, including potential punitive effects on relevant family members and dependents, who may include Australian citizens, and on children.

Thank you for the opportunity to contribute. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

Brett McGrath
President

[4] Explanatory Memorandum (above n 1) 35.
[5] Kaldor Centre for International Refugee Law (above n 4).