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

Per email: legcon.sen@aph.gov.au

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Dear Committee Secretary,

We are legal academics at the Faculty of Law at the University of Technology Sydney and write on the basis of our expertise in international, refugee and migration law to make the following submissions to the inquiry into Migration Amendment (Removals and Other Measures) Bill 2024.

While we address our concerns to one main aspect of the Bill, we recommend that it be abolished in full. This is due to the Bill's violation of numerous core principles of international law and the threat that its implementation poses to the fundamental human rights of the refugees and non-citizens who will be affected by its provisions.

The narrow focus of our submissions is partly a result of the extremely limited timeframe provided for consultation on the Bill. The speed with which the Bill has been drafted and opened for inquiry is a barrier to meaningful engagement and response from the community, experts and advocates, as well as those who will be most affected by these reforms. The Bill proposes sweeping and major reforms, that will drastically reshape Australian law and policy in relation to refugee protection, immigration policy and the regulation of the removal of non-citizens. We welcome the opportunity to make a submission; however, such comprehensive reforms, which straddle multiple areas of law and policy, require more careful and detailed consultation and consideration than the current process allows.

Meaningful public consultation is a core principle of good and accountable government, but it is even more imperative in regards to legislative reform that will affect the core human rights of individuals, including the right not to be returned to persecution, serious harm or death and the right to be free from cruel, inhumane and degrading punishment.

1. Powers Compelling Cooperation in relation to Removal from Australia

Our submissions relate specifically to powers under the Migration Amendment (Removal and Other Measures) Bill 2024 that apply to people designated as non-citizens on a 'removal pathway', including those whose claims were determined by the flawed and likely to abolished Fast Track and Immigration Assessment Authority (IAA) process.

Under the Bill, the Minister can order a person to undertake or not undertake a range of actions to facilitate their own removal, including for example applying for a passport from the country the person alleges to have persecuted them (ss 199C, 199D). If a person does not comply with such a direction, they will fall foul of a new criminal offence, with a penalty of 5 years' imprisonment or 300 penalty units (or both), as well as a mandatory minimum sentence of at least 12 months' imprisonment. As fellow refugee law experts have pointed out the reforms are without precedent in Australia and 'even in the context of terrorism offences, a failure to comply with a direction does not result in mandatory imprisonment.'

The offence will not apply to those with a 'reasonable excuse' for non-compliance (s 199E). However, despite the core right to *nonrefoulment* under the Refugee Convention, it is not a reasonable excuse that the person has a genuine fear of suffering if deported to a particular country, nor if a person is medically unable to cooperate with their removal.

The resulting situation is a perfect storm for extreme risk of returning genuine refugees to violence, persecution, or death. Furthermore, if the proposed reforms are passed, refugees who do not compel their own removal will be explicitly criminalised and subject to the criminal justice system by virtue of their claim to protection. Once a refugee applicant is subject to and convicted of criminal charges proposed under the Bill, powers to remove them based on such criminality will be triggered. As the Human Rights Law Centre has highlighted, the result will be a 'roundabout' regime, whereby asylum seekers and refugees who either cannot or should not be deported will once again be returned to detention indefinitely if in breach of the new Bill.

Our fundamental concern with these provisions is first: that they explicitly criminalise and punish people seeking protection and second: that they do not adequately protect people with the right to seek asylum against the possibility of *refoulement* to persecution, serious harm or death, and further compel them – at risk of serious criminal penalty and imprisonment – to cooperate in their own deportation.

2. The Bill applies to people with legal right to seek refugee protection, including those whose claims were determined by the flawed and discriminatory Fast Track Process

The risk of *refoulement* and the criminalising overreach of this Bill applies to all persons designated as 'removal pathway non-citizens'. However, this risk is particularly acute for those whose protection claims have been determined under by the IAA, as part of the flawed, discriminatory Fast Track process, which the current Government has proposed be abolished.

The current Labor government, when in Opposition, also accepted that the Fast Track process did *not* provide a 'fair, thorough and robust assessment process' and committed to abolishing it.

The Fast Track process is discriminatory and flawed because it accelerates decision-making timelines while denying asylum seekers basic procedural guarantees; proper access to legal advice or translation services; alongside significantly limiting avenues of semi-independent, de novo review crucial to principles of administrative fairness and justice. The Fast Track process

was introduced by the former Coalition government in 2014 as an explicitly discriminatory legal process that only applied to asylum seekers who had arrived in Australia by boat between 2010-2014, who mainly originated from state like Iran, Iraq, Sri Lanka and Afghanistan (states that are all considered to be significant 'refugee producing' states/countries of origin of people forcibly displaced by war, violence, or serious human rights violations).

Statistics consistently attest to the higher rates of refugee rejection under the Fast Track process due to it systemic denial of due process rights to asylum seekers. Between 2015 and 2023, the IAA refused to find a person to be a refugee in 89 per cent of cases, including in more than 94 per cent of all protection claims from Sri Lanka. In contrast, the former Refugee Review Tribunal refused to find a person to be a refugee in about 65 to 70 per cent of appeals. As we have previously argued in our research on this process, this high rejection rate says more about an unfair legal process designed to punish refugees, than about the quality of their asylum claims.

Our joint 2017 research report, *An Unfair and Dangerous Process* (available here), systematically outlines the unfairness embedded in the Fast Track process. Unlike the Administrative Appeals Tribunal (and Administrative Review Tribunal as currently proposed), the IAA primarily conducts 'on the papers' merits review, meaning that a person will not be called for another interview or present his or her claim in person. Further, asylum seekers subject to the Fast Track Assessment process do not have an automatic right to review by the IAA. It is the Department that determines and automatically refers applications for review to the IAA. Some people – deemed 'excluded fast track review applicants' – are prohibited from having their case reviewed by the IAA.

Under the Fast Track Assessment process, then, it is possible for a person's future to rest entirely with a single decision-maker. The exercise of such a high degree of non-reviewable power, especially for applicants is dangerous and unfair.

Under all asylum decision-making processes, the accuracy and detail in original applications are of great importance, since each refugee's claim is judged against the criteria of consistency and consistency. Under the Fast Track Assessment process, there is significantly more pressure on applicants to articulate the fullest and most accurate version of the claim in the first instance, since applicants no longer have access to full merits review of the Department's original decision. New information or additional details in a claim cannot be admitted to the IAA unless there are exceptional circumstances, and the IAA is satisfied that the new information was not known to the applicant or could not have been provided to the Department at the time of the applicant's original hearing. This significantly undermines the quality and accuracy of the decision-making process, and the right to administrative review.

Indeed, time of the introduction of the Fast Track Assessment process, the Parliamentary Joint Committee on Human Rights noted that while 'administratively efficient processes are generally desirable, it is unclear whether the … fast track process will ensure that genuine

claims for protection are identified and, in the case of the fast-track review process, that it is capable of ensuring that the true and correct decision is arrived at'.[1]

Despite consistent critique of the IAA process as failing to a fair and accurate process for review protection visa applications, under the proposed Bill, where asylum seekers' claims have been determined by this procedurally unfair process, they will nonetheless be able to be classed a 'removal pathway non-citizen' and subject to a direction from the Minister to undertake actions to facilitate their removal.

Crucially, this means the Bill will apply to those whose claims were determined by the IAA and Fast Track Processes, which the Labor Government's own reform agenda proposes to abolish.

We strongly recommend these provisions be abolished, *including* for those not subject to the Fast Track process but for all persons defined as 'removal pathway non-citizens' and subject to the criminalising and disproportionate effect of the provisions.

3. **Preventing people from entering Australia: power to designate a "removal concern country"**

We are also extremely concerned that the Minister, and future governments, will have the discriminatory power to prohibit visa applications from refugee-producing countries – such as Iraq or Iran (ss 199F, 199G). The most fundamental protection under international refugee law, the right not to be returned to persecution cannot operate in circumstances where Refugee Convention-signatory states enact mutual deterrence-style provisions such as this one, and make it impossible for people in need of safety to seek protection in their territory.

The Bill does not specify which countries will be included in the entry ban, subject only to consultation with the Prime Minister and Minister for Foreign Affairs (s 199F(2)). This puts unprecedented, opaque and unaccountable powers in the hands of the executive government, with unchecked consequences not only the rights of people seeking to travel Australia but also Australia's diplomatic and international relations.

Australia's enactment of the Bill goes against the Labor Government's election promises for fairer, more just and conscionable treatment of refugees and people seeking asylum. Moreover, the 'removal concern country' powers target people on the basis of their nationality alone, are underpinned by both xenophobia and racism. These reforms further entrench the racialised and exclusionary nature of measures put in place to deter people seeking asylum and undermine Australia's fulfilment in good faith of its core obligations under international law.

RECOMMENDATIONS

Recommendation 1:

That the Bill be abolished in full.

[1] Parliamentary Joint Committee on Human Rights, Fourteenth Report of the 44th Parliament (October 2014).

Recommendation 2:
That all asylum seekers with claims rejected under the Fast Track Process be provided with the opportunity for the reassessment of their claims, under a procedurally fair and de novo determination process which includes an oral hearing, access to legal assistance and interpreters and the opportunity to submit new evidence in support of the claim.

Please do not hesitate to contact us should any further information be required.