Senate Legal and Constitutional Affairs Committee
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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'

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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

communities.

That is the focus of the present submission: namely namely 4

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

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

account of their race, religion, nationality, membership of a particular social group or political opinion,[23] and from removing

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

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’ gr nted on ‘final

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 8871 0 595.30 1 207 nBT/F2 11.04 Tf1 0 0 1 249.17 223.25 Tm0 g0

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).