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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600
Email: legcon.sen@aph.gov.au

Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024

1. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations, tracing our history to Australia's first council for civil liberties, founded in Melbourne in 1936. We seek to promote Australia's compliance with the human rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. Further information may be found at www.libertyvictoria.org.au.

2. We appreciate the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024 (**Bill**).

3. In summary, Liberty Victoria opposes this Bill in the strongest terms.

4. Having had the opportunity to read the Asylum Seeker Resource Centre submission in draft and the Human Rights Law Centre's published submission to this Inquiry, Liberty Victoria endorses those submissions.

Overall Impact of the Bill – the Human and Social Cost of Political Point Scoring

5. Liberty Victoria is appalled by the introduction of a Bill that, among other things, seeks to jail people for at least a year if they fail to assist with their own removal even where they are owed Australia's non-refoulement obligations. The Bill also undoes protection findings to broaden who may be removed from Australia to the country from which they fled and excludes visa applications from countries left up to the Minister of the day to designate.

6. This Bill is a transparent and knee-jerk reaction to the High Court of Australia's decision in *NZYQ*,[1] and the perceived "threat" of the expansion of this precedent through the current matter before the High Court, *ASF17*.[2] The government response to *NZYQ* could have been to show leadership by acknowledging and respecting Australia's highest court's ruling in respect of the unconstitutionality of immigration detention where there is no real prospect of the removal of a person from Australia becoming practicable in the reasonably foreseeable future. It could have appreciated that the arbitrary deprivation of a person's liberty is a breach of one of the most fundamental of human rights. It could have proceeded to implement meaningful, considered reform of a system in crisis. Instead, the overwhelming political and media response has been to swiftly and forcefully marginalise non-citizens, including those most deserving of Australia's compassion – people who are refugees, stateless or seeking asylum.

7. This Bill does more than criminalise the act of seeking safety in Australia; it sends a message to broader members of the Australian community about who is welcome and who is not. It will effectively make some Australian residents and citizens second-class citizens, because the Government will decide whether those of particular nationalities or from a particular country will be allowed to have their friends and family visit them. The Bill is not far removed from the disgraceful White Australia policy in attempting to designate certain countries from which a person cannot apply to enter Australia. The impact on social cohesion, including the message sent those who have arrived from such a designated country and settled in Australia, will be felt far beyond the 170 or so

[1] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005; [2023] HCA 37.
[2] *ASF17 v Commonwealth of Australia* - Case P7/2024 - listed for hearing before the High Court on 17 April 2024.

individuals the government has reportedly assessed[3] as potentially being illegally detained, depending on the outcome of *ASF17*.

8. Following the remarkable lack of baseline scrutiny in the House, the Senate has an opportunity to listen to the overwhelming response to the Bill of experts and stakeholders. It is evident from the majority of the published submissions about the Bill that the overwhelming view is that the Bill should not pass the Senate.

Criminalising Non-compliance with Removal – Sections 199B, 199C, 199D and 199E

9. Liberty Victoria is gravely concerned about the broad scope of people who will be considered "removal pathway non-citizens" per s 199B. For example, in our experience, the Department regularly grants Subclass 050 (Bridging (General)) visas on the basis of a person making arrangements to depart Australia in circumstances where there is no such expectation or likelihood that a person will depart and instead because it is the only available basis upon which to issue a Bridging visa.[4] The Bill contains no nuance or reflection of this reality, however, and will apply broadly and indiscriminately to all those captured by s 199B(1).

10. Even more disturbingly, the Bill allows for the scope of who may be caught by s 199B(1) to be expanded at a later date to other classes of visa holders, without legislative amendment and instead simply through regulation. The potential breadth of visa types which may be prescribed in the future under this Bill is unchecked. In Liberty Victoria's view this presents a radical lack of clarity and transparency where the consequences of being deemed a "removal pathway non-citizen" are so extraordinary.

11. As has been highlighted in numerous submissions to this Inquiry, those deemed to be "removal pathway non-citizens" will include people who have been refused Australia's protection erroneously, including under the flawed fast-track scheme. The Australian Labor Party's platform has consistently recognised that the fast-track assessment process "does not provide a fair, thorough and robust assessment process for persons seeking asylum",[5] however the Bill includes no mechanism to ensure that protection claims have been adequately assessed for someone forced into removal. In such

[3] The Guardian, *More than 170 immigration detainees could be freed if Australian government loses high court challenge*, Paul Karp, 20 March 2024, available at: https://www.theguardian.com/australia-news/2024/mar/20/australia-asf17-immigration-detainees-high-court-challenge-more-than-170-could-be-freed.
[4] For example, because the person cares for an Australian citizen child, has been transferred to Australia from Nauru or Papua New Guinea, or may be seeking Ministerial intervention and requires work rights to subsist.
[5] See, for example, ALP National Platform 2021 available at https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf p 124 [16].

circumstances, the Bill will legalise refoulement and criminalise a person's attempts to avoid this fate.

12. Even where a person has received a protection finding within the s 197C(3) meaning, s 199B(2) and (3) allow for the person to be removed to a third country, with a criminal offence attached for non-compliance. This intention is stated explicitly in the Explanatory Memorandum which contains "… a non-citizen on a removal pathway cannot be directed to interact with, or be removed to, a country in respect of which the non-citizen has been found to engage Australia's protection obligations; **however, they may otherwise be given a direction to do certain things necessary to facilitate their removal to a safe third country**."[6] Sections 199B(2) and (3), however, provide no requirement that the removal of such a person is to a country where the person will be safe, not face serious harm or will be able to subsist and survive. This is in direct breach of Australia's international obligations to those it has assessed as requiring its protection and fails to confront the documented human rights failures and excessive delays of third country schemes of the recent past.[7]

13. The breadth and ambiguous nature of the Minister's "Directions powers" contained in s 199C – including that the person must provide "information"[8], or "do a thing, or not do a thing" to facilitate their removal – is alarmingly unclear and unconstrained particularly in light of the extreme penalties for non-compliance.

14. Particularly repugnant is the inclusion in s 199D(5) that the Minister may give removal directions to a parent or guardian in relation to their child – starkly at odds with any consideration of the best interests of the child and Australia's obligations under the Convention on the Rights of the Child.[9]

15. Above all else, the concept of criminalising non-compliance with removal is set to force people to choose between a prison sentence or aiding their own refoulement. There are no statutory safeguards for where a credible protection claim may arise after a person has received a negative protection finding. The Explanatory Memorandum's reference to "operation guidance" is entirely insufficient:

[6] Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 2, emphasis added.
[7] See, for example, the Australian Human Rights Commission's views available here: https://humanrights.gov.au/our-work/rights-and-freedoms/publications/asylum-seekers-and-refugees#third_countries.
[8] Section 199C(1)(c).
[9] Convention on the Rights of the Child, article 3(1).

> *Operational guidance will also ensure that, where a person makes credible new protection claims in relation to a country they have previously been assessed against and had no protection finding made, or in relation to another country to which they may be removed, a removal pathway direction is not issued while those claims are being assessed.*[10]

Rather, the Bill specifically excludes holding genuine fears of persecution or that a person is, or claims to be a person in respect of whom Australia has non-refoulement obligations, among other things, from being a reasonable excuse for non-compliance with removal per s 199E(4).

Jail Terms and Mandatory Sentencing – Section 199E

16. Liberty Victoria strongly opposes the severity of the penalty for non-compliance with removal and its mandatory nature. This is supposedly justified as being "intended to ensure that non-citizens remain appropriately engaged and cooperate with arrangements to facilitate their removal from Australia",[11] and by reference to "the need for a strong deterrent to non-compliance with removal efforts for persons on a removal pathway".[12] However, there is a lack of evidence showing that a more severe or mandatory penalty is effective in deterring offending generally,[13] let alone where the "offending" occurs as a result of refusing to engage with a person's own removal, including due to a person's "genuine fear of suffering persecution or significant harm"[14]. Mandatory sentencing will not deter people when desperation and fear underpins their decision to not cooperate with a removal pathway direction.

17. Mandatory sentencing is inconsistent with fundamental principles which underlie Australia's constitutional democracy. That is, it is inconsistent with the rule of law as it undermines the independence of the judiciary by fettering judicial discretion. It also subverts the separation of powers because it is meant to be the judiciary, not the executive or the legislature, who impose criminal punishment. Judges, when informed by all relevant information about the offending conduct and about the person who has committed an offence, are best placed to make reasoned, balanced and accountable decisions about how and to what extent a person is punished. The importance of fully considering a person's personal circumstances could be no more important than when dealing with a group of our community who have suffered trauma, and might live with

[10] Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 30.
[11] Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 2-3.
[12] Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 27.
[13] See, for example, Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing, May 2014 at [31] and [38].
[14] Section 199E(4)(a).

multiple mental and physical health issues. Mandatory sentencing removes this important feature of our criminal justice system and, in the case of this Bill, replaces it with an inflexible and disproportionate approach that inflicts unfair punishment on highly vulnerable people.

18. In relation to the use of mandatory sentencing, more broadly, we note the comments of the Victorian Court of Appeal:

> *Mandatory minimum sentences are wrong in principle. They require judges to be instruments of injustice: to inflict more severe punishment than a proper application of sentencing principle could justify, to imprison when imprisonment is not warranted and may well be harmful, and to treat as identical offenders whose circumstances and culpability may be very different.*[15]

19. We note that even the Explanatory Memorandum to the Bill admits that "[t]here is a risk that mandatory minimum sentencing is incompatible with the right to have a sentence reviewed by a higher tribunal according to law under Article 14(5) of the ICCPR because mandatory sentencing prevents judicial discretion in relation to the severity or correctness of a minimum sentence."[16] Liberty Victoria submits that it is not just a "risk" but the ***reality*** of mandatory sentencing. It is inconsistent with universal and fundamental human rights.

20. Further, mandatory sentencing simply does not work. Governments around Australia have introduced mandatory sentencing for various offences, the Northern Territory is a prime example. If mandatory sentencing worked as a deterrent, then the Northern Territory would have the lowest crime rate in the nation and its prisons would not be overflowing. However, the reality of mandatory sentencing is that it creates unjust outcomes, disproportionate sentences and overincarceration.

21. It is particularly egregious that the Bill specifies in proposed s 199E(4), that for the purposes of 199E(3), it is not a reasonable excuse if a person:

(a) has a genuine fear of suffering persecution or significant harm if the person were removed to a particular country; or

(b) is, or claims to be, a person in respect of whom Australia has non-refoulement obligations; or

[15] *Buckley v The Queen* (2002) 300 A Crim R 201; [2022] VSCA 138.
[16] Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 27.

(c) believes that, if the person were to comply with the removal pathway direction, the person would suffer adverse consequences.

22. Such a provision is contrary to fundamental sentencing principles,[17] which would prevent a person's 'mental condition' or mental state from being taken into account. This could include a mental impairment brought about by the fear that a person has from being returned to a particular country or the now unlawful indefinite immigration detention which they endured.

23. Effectively, the Bill, if enacted, will ask people to choose between serving a sentence in a prison or harm, including death or torture. Despite the directions creating a veneer of 'voluntariness' from the person the subject of the removal directions, in practice, it would amount to constructive refoulement, which is prohibited under international treaty and customary law.[18] It is unfathomable that a country such as Australia, that ought to be a champion of human rights, would allow this sort of injustice to stand and become law. There is no justification for such an egregious breach of human rights and obligations owed to vulnerable people.

24. In our view, adequate justification is not provided for the severity of the penalties, or evidence cited to support that such penalties will likely even assist with compliance. In this regard, we note that it is not just those who "refuse" to comply with a removal pathway direction who are subject to the mandatory minimum penalties, but also those who "fail" to comply within the timeframe, which failure could presumably occur for any number of reasons outside the person's control.

25. The Explanatory Memorandum also contemplates the possibility of double jeopardy, if a person serves a sentence for non-compliance with a removal pathway direction and then continues to refuse to facilitate their removal,[19] for example, if motivated by their genuine fears of returning. It appears the Bill contemplates replacing indefinite immigration detention – found to be illegal – with indefinite criminal detention for non-compliance with removal.

Reversing Protection Findings – Sch 2 Amendments to Section 197D

[17] *Crimes Act 1914* (Cth) s 16A(1)(2)(m); *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, [171]. See also *R v Verdins* (2007) 16 VR 240.
[18] *M.S. v Belgium* (2012) App No 50012/08 (ECHR, 31 January 2012); *N.A. v Finland* (2019) App No 25244/18 (14 November 2019, ECHR). See also 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law', Melbourne Journal of International Law, Vol 13, 2012: https://law.unimelb.edu.au/__data/assets/pdf_file/0007/1687381/Saul.pdf
[19] Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 27.

26. The Bill expands the categories of who may have a protection finding reversed. Presently this is only possible in relation to unlawful non-citizens, but the Bill seeks to broaden this power in relation to visa holders. The class of visas which may be subject to this power is undefined, because, as referred to above at 10, s 199B(1)(d) allows for visas to be prescribed without requiring legislative amendment.

27. In terms of justification for this extreme power, the Explanatory Memorandum contains:

> *If the government is to ensure that BVR holders and other noncitizens on a removal pathway are able to be removed as soon as it becomes reasonably practicable to do so, it is essential the minister has the ability to revisit protection findings.*[20]

28. It is notable that ensuring removal is the motivation for the increased ability to revisit protection findings, rather than evidence or even some sense that there are a wide range of protection findings which may no longer be current. Even if circumstances change for an individual previously found to be owed protection, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status contains:

> *It is frequently recognized that a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.* [21]

29. Liberty Victoria is aware of a s 197D process being initiated the day after the orders in *NZYQ* were pronounced, in respect of a person from South Sudan who has an extant protection finding and in relation to whom non-refoulement obligations were accepted just months prior. The timing of the commencement of the s 197D process in this instance appears to confirm that the Minister's department is actively seeking to attempt to use the 197D power to return people who are *NZYQ*-affected to the countries from which they fled, rather than acknowledge that their immigration detention was unlawful. It is alarming that the use of this power to reverse protection findings is even being considered in relation to those recently found to be owed Australia's protection and in relation to nationals of countries where Australia's

[20] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2024, 4 (Andrew Giles, Minister for Immigration, Citizenship and Multicultural Affairs).
[21] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, p 33, available at: https://www.unhcr.org/au/media/handbook-procedures-and-criteria-determining-refugee-status-under-1951-convention-and-1967.

Smartraveller website warns "do not travel", due to the "dangerous security situation and the threat of armed conflict".[22]

30. The wide-reaching and unrestricted expansion of a power which so fundamentally undermines Australia's protection of refugees must be opposed.

Designation of a "Removal Concern Country" – Section 199F and 199G

31. The intention of the Bill should not be underestimated. The Minister stated that designation under s 199F would "prevent **most** nationals of that country who are outside Australia from making new Australian visa applications while that designation remains in force".[23] The motivation for this is also clear – as a tool to "gain the cooperation of that country in accepting and facilitating the removal from Australia of their citizens".[24] Despite this intention, there is nothing in s199F to limit the Minister to make a designation for any other reason if the Minister subjectively believes the designation is in the national interest. Again, this is a further and vast increase of the personal powers held by the Minister of the day.

32. Liberty Victoria considers that banning individuals from travelling to Australia in order to send a message to international leaders is exceptionally cruel and lacks sophisticated diplomacy. Such global bans are inherently discriminatory and represent a disturbing departure from the longstanding system of merit-based consideration of every individual visa application. The collateral damage will be far-reaching, with dire impacts on family reunion including regarding vulnerable extended family members, carers and orphan relatives and by blocking refugees from travelling to Australia, for example on student visas, to seek asylum.

33. The assumptions and beliefs which inevitably surround the concept of a travel ban are a grave threat to social cohesion. This is exemplified in the Explanatory Memorandum, which contains that it is in the "national interest to slow down that entry pipeline into Australia and reduce growth in the cohort of potentially intractable removals over time".[25] To ban a person's entry to Australia because they are a national of a certain country, for the reason that in the future Australia may want, but be unable, to

[22] See https://www.smartraveller.gov.au/destinations/africa/south-sudan which contains, for example, "Kidnapping, murder, shootings, home invasions, armed robbery, carjacking and sexual assault are common throughout South Sudan".
[23] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2024, 1 (Andrew Giles, Minister for Immigration, Citizenship and Multicultural Affairs).
[24] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2024, 3 (Andrew Giles, Minister for Immigration, Citizenship and Multicultural Affairs).
[25] Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 3.

involuntarily remove that person, necessarily fosters the notion that people from particular countries are undesirable and unwelcome.

Recommendation:

- The Committee should recommend that the Bill not be passed.

Conclusion

34. The Explanatory Memorandum explicitly recognises that the Bill limits human rights, stating that this is "in order to maintain the integrity of the migration system".[26] Rather than upholding the integrity of the migration system, however, the Bill expands "God-like" powers to be wielded by the Minister of the day, dehumanises and punishes people seeking safety in Australia, introduces further inefficiencies, and stokes community division. Further, if the Bill were to pass it would in fact create a system that lacks integrity and any modicum of respect for human rights and Australia's international obligations.

35. Thank you for the opportunity to make this submission. We would be happy to assist further by giving evidence on this issue.

36. If you have any questions regarding this submission, please do not hesitate to contact Michelle Bennett, President of Liberty Victoria or our spokesperson

Michelle Bennett
President

Liberty Victoria
12 April 2024

[26] Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 4.