



**Australian
Human Rights
Commission**

Migration Amendment Bill 2024

Australian Human Rights Commission

Submission to Senate Legal and Constitutional Affairs Committee

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1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to make this submission on the [Migration Amendment Bill 2024](#) (Bill) to the Senate Legal and Constitutional Affairs Legislation Committee (Committee).
2. However, the Commission is concerned at the limited time that has been provided for this Bill to be scrutinised. This is an area of law that is complex and has substantial impacts on human rights. The specific details of any Bill seeking to amend the *Migration Act 1958* (Cth) (Migration Act) require careful consideration and scrutiny. Providing only three days from the date of the Senate referring the Bill for inquiry until the closure of submissions, and a further four days (including a weekend) for the Committee to report is inadequate and undermines the Committee process.
1. Following the passing of the *Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023* – which was drafted in response to the High Court decision in *NZYQ v Minister for Immigration*¹ (NZYQ) – the Human Rights Commissioner emphasised that policies concerning immigration and asylum seekers need to be deliberately and carefully calibrated and observed:²

‘The risk is the new laws do not strike the right balance, and do not provide a sustainable long-term solution in what is a complex policy area. This could potentially result in unintended consequences or a period of uncertainty as laws are drafted, amended and challenged in quick succession, and where implementation is hampered by confusion’.

Those concerns were borne out in the events leading up to the recent High Court decision in *YBFZ v Minister for Immigration* (YBFZ)³ and remain relevant when considering this Bill.

2 Key Concerns

3. The Commission acknowledges the importance of protecting community safety and maintaining the integrity of Australia’s migration system. These are both legitimate objectives. We also acknowledge that there is a need to respond to the recent High Court decision in *YBFZ*. It is critical, however,

that any such response is not only constitutionally permissible but also complies with Australia's international human rights obligations. There are a number of key human rights concerns – outlined below – that the Commission seeks to highlight with respect to this Bill.

4. *Ensuring Constitutional Validity*

The separation of powers that is provided for under Chapter III of the Australian Constitution – and that was the focus of the High Court decisions in both *NZYQ* and *YBFZ* – is an important rights-protecting feature of the Constitution. We note with concern the doubts expressed by a number of constitutional experts as to whether the Bill sufficiently addresses the concerns raised by the High Court about the need for the legislative scheme to be reasonably appropriate and adapted to a non-punitive purpose in order to be constitutionally valid. For example, Professor Anne Twomey has stated with respect to the proposed measures that:⁴

‘It’s fairly likely someone will challenge it, and there is a reasonable chance it will be struck down’.

5. *Extending Beyond Scope of High Court Decisions*

It is highly concerning that the removal arrangements provided for by this Bill extend beyond the scope of what is required to directly address the High Court decisions in both *NZYQ* and *YBFZ*. The amended provisions are not limited to providing new powers to deport individuals from the *NZYQ* cohort who are identified as having committed serious and violent crimes. Rather, the Bill potentially allows the Australian Government to remove a wider range of non-citizens and allows the Government to detain those people until they can be deported. To give just one example, this includes people who had their refugee claims assessed under the previous fast-track process which has been recognised as deeply flawed and problematic. The Bill potentially impacts people and families who have lived and contributed to Australia for many years.

6. *Third Country Deportation Arrangements*

The Bill provides for the Australian Government to deport people to third countries. The Bill authorises the Government to pay another country with which it has entered into a third country reception arrangement. There is a distinct lack of transparency and accountability measures in the Bill around this. For example, there is no requirement to publish information about how many people are being deported, what countries are accepting them, and how much money is being paid by Australia to these third countries. The Parliamentary Library Bills Digest confirms that ‘[t]here is no

requirement for the Commonwealth to report on these arrangements or table the text of the agreement in Parliament.⁵

7. There are also no minimum requirements prescribed by the Bill in terms of ensuring that third country reception arrangements are only entered into with countries who are signatories to key human rights instruments (such as the Refugee Convention or anti-torture and mistreatment treaties). There are no requirements in the Bill that other minimum human rights standards will be guaranteed as part of the terms of any agreement. This is inconsistent with the guidance provided by the United Nations High Commissioner for Refugees, which has stated that:
 - a. in principle, States involved in transfer arrangements should be parties to the *Convention relating to the Status of Refugees*, and
 - b. transfer arrangements must guarantee that people seeking asylum will not be forcibly returned to risks of torture, persecution and mistreatment and will be treated in accordance with accepted international standards.⁶

8. *Reversing a protection finding*

The Bill proposes to amend ss 197C and 197D of the Migration Act to provide that a protection finding can be revisited in relation to a person who is a lawful non-citizen who holds a visa as a 'removal pathway non-citizen'. This significantly expands the class of persons for whom the Minister is empowered to overturn a protection decision, and does so without sufficient safeguards (including procedural fairness safeguards). The Commission has previously opposed expanding s 197D to include other classes of non-citizens,⁷ and for those same reasons would recommend against these provisions in the current Bill.

9. *Civil Liability Immunity*

The Bill would establish immunity from civil liability for Commonwealth officers participating in removal processes, shielding government action from an important accountability mechanism. The Australian Law Reform Commission has stated that, as a general proposition, 'the government, and those acting on its behalf, should be subject to the same liabilities, civil and criminal, as any individual'.⁸

10. *Collection and Disclosure of Personal Information*

The Bill provides a broad authorisation for the collection and disclosure of personal information, including a person's criminal history. This overrides existing laws that limit the release of criminal history information, allows

for the retrospective validation of previous disclosures, and constitutes a potential breach of privacy rights.

11. As a general point, we also note that the Statement of Compatibility with Human Rights recognises that the Bill engages with a number of human rights but concludes that '[t]he amendments in this Bill are compatible with human rights so long as policies, practices and procedures are in place to ensure that the powers provided in these amendments are exercised consistently with Australia's human rights obligations, including in relation to removal to third countries'. This is not something that should be left to chance. The powers themselves should be defined by reference to Australia's human rights obligations, and the legislation should contain safeguards to ensure that those powers cannot be exercised in a manner that is inconsistent with those obligations.
12. For the reasons outlined above, the Commission makes the following recommendation:

Recommendation:

The Commission recommends that the Bill should not be passed in its current form.

Endnotes

¹ *NZYQ v Minister for Immigration* [2023] HCA 37.

² Lorraine Finlay, *Hasty detainee laws raise human rights concerns* (7 December 2023).

<<https://humanrights.gov.au/about/news/opinions/hasty-detainee-laws-raise-human-rights-concerns>>.

³ *YBFZ v Minister for Immigration* [2024] HCA 40.

⁴ Rhiannon Down, 'Constitutional experts warn Tony Burke's detainee laws 'vulnerable' to challenge', *The Australian* (7 November 2024).

<<https://www.theaustralian.com.au/nation/constitutional-experts-warn-tony-burkes-detainee-laws-vulnerable-to-challenge/news-story/e2775b8169b03ee3ede4a930423aee32>>.

⁵ Leah Farris and Dr Susan Love, *Migration Amendment Bill 2004* (Parliamentary Library; Bills Digest no. 31, 2024-25; 14 November 2024), 8.

<https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/10035910/upload_binary/10035910.pdf>.

⁶ United Nations High Commissioner for Refugees, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (May 2013).

<<https://www.refworld.org/policy/legalguidance/unhcr/2013/en/16943>>.

⁷ Australian Human Rights Commission, *Migration Amendment (Removal and Other Measures) Bill 2024* (Submission to the Senate Standing Committee on Legal and Constitutional Affairs, 12 April 2004); Australian Human Rights Commission, *Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Submission to the Parliamentary Joint Committee on Intelligence and Security, 20 June 2023).

⁸ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129, December 2015), [17.3].