

---

Submission to the Legal and Constitutional  
Committee regarding the Migration Amendment Bill  
2024 (Cth) introduced on 7 November 2024

---

20 November 2024



## THE NATIONAL JUSTICE PROJECT

---

The National Justice Project is a proudly independent not-for-profit human rights legal and civil rights service. Our mission is to fight for justice, fairness and inclusivity by eradicating systemic discrimination. Together with our clients and partners we work to create systemic change and amplify the voices of communities harmed by government inaction, harm and discrimination.

Through legal action, advocacy, education, and collaborative projects, we challenge systemic discrimination by defending and promoting the rights of people who have experienced racism and discrimination in healthcare and legal systems, immigration detention, prisons and juvenile detention, and policing.

## ACKNOWLEDGEMENT OF FIRST NATIONS PEOPLES' CUSTODIANSHIP

---

The National Justice Project pays its respects to First Nations Elders, past and present, and extends that respect to all First Nations peoples throughout this country. We acknowledge the diversity of First Nations cultures and communities and recognises First Nations peoples as the traditional owners and ongoing custodians of the lands and waters on which we work and live.

The National Justice Project acknowledges and celebrates the unique lore, knowledges, cultures, histories, perspectives and languages that Australia's First Nations peoples hold. We recognise that throughout history the Australian health and legal systems have been used as an instrument of oppression against First Nations peoples. The National Justice Project seeks to strengthen and promote dialogue between the Australian legal system and First Nations laws, governance structures and protocols. We are committed to achieving social justice and to bring change to systemic problems of abuse and discrimination.

## EXECUTIVE SUMMARY

---

1. Thank you for the opportunity to make submissions on the provisions of the Migration Amendment Bill
2. We reiterate the concerns of other organisations in the refugee sector such as the Kaldor Centre for International Refugee Law and the Asylum Seeker Resource Centre about the new powers which allow the government to:
  - send people offshore to unspecified third countries and spend money on such arrangements with third countries;
  - revisit protection findings; and,
  - reimpose visa conditions such as ankle bracelet monitoring and curfews.
3. To keep this submission brief we have limited our focus on the provisions of the Bill which provide civil liability immunity to the Commonwealth and its officers in relation to certain acts done to remove a person or to take, and keep, people offshore.
4. We focus on these provisions given our first-hand experience running such cases and our understanding of the key role that civil claims have played as a tool -perhaps the only effective tool - to hold government and its officials accountable for harm caused in the context of removing and holding people offshore.
5. We have represented, and continue to represent, many clients (mostly women and children) who have been sexually assaulted and abused and otherwise physically and mentally harmed in offshore detention. These individuals would be directly impacted by the proposed provisions of the Bill had its provisions applied to them when they were in offshore detention. It is from the perspective of this experience that we make the following submission.

## RECOMMENDATIONS

---

6. In order to mitigate the harsh impact of the proposed amendments, we recommend that Schedule 2 of the Bill be deleted in its entirety.

## BACKGROUND

---

7. Our concern relates to the proposed amendments to sections 198 and subsections 198AD(11) of the *Migration Act 1958* (Cth) (the **Migration Act**), as explained in paragraphs 51 to 60 of the Explanatory Memorandum to the Migration Amendment Bill 2024 (the **proposed Civil Liability Immunity**). We set out the sections below for ease of reference.

51. *The purpose of this subsection is to make clear that no civil liability attaches to an officer or the Commonwealth for acts or omissions done by an officer in good faith in the exercise of the officer's powers, functions or duties under s 198 to remove an unlawful non-citizen from Australia. The immunity will apply in relation to any act or thing done, or omitted to be done, in the exercise of the officer's powers, or the performance of the officer's functions or duties, under section 198.*

52. *In addition, new subsection 198(13) is added to the Act to provide that no civil liability is incurred by an officer as defined in section 5 of the Act, an officer of the Commonwealth, which includes the Minister, or the Commonwealth in relation to any act or thing done, or omitted to be done:*
- by the officer or an officer of the Commonwealth in good faith in the exercise of their powers or in the performance of their duties or functions; or*
  - by a foreign country; or*
  - by any person in a foreign country;*
- in relation to the acceptance or receipt by a foreign country, or ongoing presence in a foreign country, of a person removed from Australia under section 198 of the Act. This includes any act or thing done, or omission:*
- under or in relation to a third country reception arrangement (within the meaning of new section 198AHB of the Act); or*
  - in relation to the third country reception functions (within the meaning of section 198AHB) of the country.*
53. *The purpose of new subsection 198(13) is to make clear that no civil liability attaches to an officer as defined in section 5 of the Migration Act, an officer of the Commonwealth, which includes the Minister, or the Commonwealth for acts done by an officer or officer of the Commonwealth in good faith and in the exercise of powers, functions or duties or acts or omissions done by a foreign country or any person in a foreign country in relation to the acceptance of a removed person by a foreign country or the person's presence in the foreign country under or in relation to third country reception arrangements.*

**Item 2** After subsection 198AD (11)

54. *This item inserts new subsections 198AD (11A) and (11B) into section 198AD of the Act. Section 198AD applies to an unauthorised maritime arrival who is detained under section 189, and provides that an officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom the section applies from Australia to a regional processing country.*
55. *New subsection 198AD(11A) provides that no civil liability is incurred by an officer as defined in section 5 of the Act, an officer of the Commonwealth (including the Minister) or the Commonwealth in relation to any act or thing done, or omitted to be done, by the officer or officer of the Commonwealth in good faith and in the exercise of the officer's or officer of the Commonwealth's powers, or the performance of the officer's or officer of the Commonwealth's functions or duties, under section 198AD.*
56. *New subsection 198AD(11B) provides that no civil liability is incurred by an officer as defined in section 5 of the Act, an officer of the Commonwealth (including the Minister) or the Commonwealth in relation to any act or thing done, or omitted to be done:*
- by the officer or officer of the Commonwealth in good faith in the exercise of their powers or in the performance of their duties or functions; or*
  - by a regional processing country or another foreign country; or*
  - by any person in a regional processing country or another foreign country;*
- in relation to the acceptance or receipt by a regional processing country or another foreign country, or ongoing presence in a regional processing country or another foreign country, of an unauthorised maritime arrival taken to a regional processing country under section 198AD, including any act or thing done or omitted to be done:*
- under or in relation to an arrangement (within the meaning of section 198AHA of the Act) mentioned in subsection 198AHA(1) that is in relation to the regional processing functions of the applicable country; or*
  - in relation to the regional processing functions (within the meaning of section 198AHA of the Act) of the applicable country; or*

- under or in relation to a third country reception arrangement (within the meaning of new section 198AHB of the Act); or
  - in relation to the third country reception functions (within the meaning of new subsection 198AHB(5) of the Act) of the applicable country.
57. The purpose of subsection 198AD(11B) is to provide for immunity from civil liability in respect of acts or omissions in relation to things done under section 198AD to take an unauthorised maritime arrival to a regional processing country or another foreign country, including under or in relation to a third country reception arrangement (within the meaning of section 198AHB), where those acts or omissions were done by:
- an officer or officer of the Commonwealth in good faith and in the exercise of their powers or the performance of their functions or duties; or
  - a regional processing country or another foreign country; or
  - any person in a regional processing country or another foreign country.
58. For clarity, the immunity applies regardless of whether the regional processing country to which the unauthorised maritime arrival has been taken is the same as or different from the country which is a party to the third country reception arrangement under section 198AHB.
59. The immunities provided for in items 1 and 2 of this Schedule do not preclude remedies through the criminal justice system, administrative law remedies, constitutional remedies, remedies for actions that were not carried out in good faith or were beyond the exercise of powers or the performance of functions or duties, or preclude a person pursuing remedies through bodies such as the Commonwealth Ombudsman or the Australian Human Rights Commission.
60. This provision will ensure that no civil liability is incurred by an officer or the Minister when acting in good faith when exercising their powers or duties under the Migration Act. While the expression 'officers of the Commonwealth' has long been held to include Ministers and other officers of the executive government: *M68 (2016) 257 CLR 42* at [127], these amendments are intended to put this beyond doubt by reference to the expression "officer of the Commonwealth (including the Minister)".

## ACCESS TO JUSTICE IS A HUMAN RIGHT

---

8. "A system of justice is an institution for the redress of grievances. It can only command the respect of a society's members if they trust that it is an impartial, equal, transparent and principled system that gives effect to the rule of law."<sup>1</sup> These necessary qualities of any system of justice worthy of that name, were reflected in the original c. 40 of *Magna Carta*, that promised:

"To no one will we sell, to no one will we deny or defer [i.e. delay] right or justice<sup>2</sup>."

9. These values endure not only in Ch III of the *Constitution*, that vests the judicial power of the Commonwealth in the Courts, but also in Art 10 of the *1948 Universal Declaration of Human Rights* of the United Nations which provides:

---

<sup>1</sup>See also: *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 977 per Lord Diplock

<sup>2</sup> It read, in Latin, "Nulli vendemus, nulli negabimus aut deferemus rectum aut justiciam".

*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him<sup>3</sup>.<sup>4</sup>*

10. These proposed amendments to the Migration Act effectively remove access to the courts for those who have been harmed physically and mentally by the Australian Government, by its officers or by any person in a foreign country, which could include circumstances where government officials, workers or others are refusing them access to desperately required care or medical attention.

## JUSTIFICATION FOR THE BILL

---

11. The Migration Amendment Bill 2024 amends the Migration Act 1958 to:

- terminate Bridging Visa R (BVR) visas where permission (however described) is granted by another country for the BVR holder to enter and remain in that other country;
- enable the Minister to revisit a protection finding for a non-citizen who holds a visa as a removal pathway non-citizen;
- establish immunity provisions which provide that officers as defined in section 5 of the Migration Act, or officers of the Commonwealth (including the Minister), are not liable under Australian law in respect of civil claims relating to certain persons or under certain arrangements;
- enable the collection, use, and disclosure of criminal history information by the Minister or an officer of the Department for the purpose of informing, directly or indirectly, the performance of a function or the exercise of a power under the Migration Act and the Migration Regulations 1994 (the Migration Regulations), including collection, use and disclosure by a person or body who has received the information from the Minister or an officer, for the purpose of providing advice or recommendations in connection with those functions or exercises of powers under the Migration Act or Migration Regulations;
- authorise the collection, use and disclosure of information, including personal information, to the government of a foreign country for the purpose of determining whether there is a real prospect of the removal of a removal pathway non-citizen from Australia, facilitating the removal of the non-citizen, taking action or making payments in relation to third country reception arrangements or doing things incidental to those purposes;
- authorise spending on third country reception arrangements and authorise Commonwealth action in relation to third country reception arrangements;

---

<sup>3</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae663712c.html> [accessed 24 June 2015]

<sup>4</sup> Justice Rares: A paper presented at the *Access to Justice – Taking the Next Steps* Symposium held on 26 June 2015 at Monash University, organised jointly by the Australian Centre for Justice Innovation and the Australasian Institute of Judicial Administration.

- adjust the test for the Minister to consider in response to representations made under that section by a BVR holder whose visa is subject to certain conditions including curfew and electronic monitoring, with the community protection test in the Migration Regulations as amended by the Migration Amendment (Bridging Visa Conditions) Regulations 2024 following the High Court's decision on 6 November 2024 in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40; and,
  - make consequential amendments to the Act.
12. The government seeks to justify this Bill by indicating that the measures will protect the community from people with serious criminal histories. However, this Bill evidently relates to a much wider cohort of people, which may include people whose temporary visas have expired and people whose protection findings may be reopened by the government.
13. The Explanatory Memorandum nor the First Reading Speech includes any justification for the need to deny transferees, transitory persons or non-citizens the right to basic healthcare or to do harm to them, particularly when offshore.
14. If the government requires such an indemnity to undertake its policy objectives in the face of our criticisms, such a proposal should:
- only apply to a decision to remove an individual with a serious criminal history; and
  - permit civil claims where they relate to the health needs (including but not limited to the treatment, lack of treatment or mistreatment) of an individual in offshore detention or an individual transferred offshore by the Minister or their delegate.
15. However, it is our submission that the proposed Civil Liability Immunity is **not essential** to achieve the government's policy objectives and cannot be justified under the umbrella of "community protection" as even prisoners throughout Australia have a duty of care owed to them.

### **Proposed amendments to s 198**

16. The proposed amendment to introduce subsection 198(12) removes any civil liability by an officer of the Commonwealth in relation to any act or thing done, or omitted to be done, by the officer in good faith and in exercise of their powers, or performance of their functions or duties in relation to a person to which certain decisions have been made to cancel certain visas, refuse a protection visa or where visas have expired. This will have the effect of protecting the Commonwealth and its officers from injunctions to stop the removal of an individual or return them to Australia for care and any compensation claim that an individual may have as a result of their removal (this would include claims for assault, battery, false imprisonment, physical and mental harm).
17. The proposed amendment to introduce subsection 198(13) removes any civil liability by an officer, an officer of the Commonwealth (including the Minister) or the Commonwealth in relation to any act or thing done, or omitted to be done:
- a. by an officer or officer of the Commonwealth in good faith and in exercise of their powers or in the performance of their functions or duties;

- b. by a foreign country; or
- c. by any person in a foreign country;

in relation to the acceptance or 'ongoing presence' in a foreign country under these new proposed third-party arrangements.

18. Firstly, it is unclear how the determination of whether an act is in "good faith" will be considered by the government in this context. This is particularly concerning where this immunity extends to omissions. We know, based on our casework, that the government may attempt to justify not providing people with life-saving treatment (for example, due to the cost of the treatment or the unavailability of such treatment in the third country) and, accordingly, the government may argue that the omission to provide medical treatment or care was ultimately in "good faith".
19. Secondly, it is very concerning that the proposed immunity extends to any acts or omissions in the foreign country or by any person in the foreign country. This means third parties employed in the foreign countries or involved in the arrangements in the foreign countries are not liable for the harm caused to people who have been sent offshore from Australia.

#### **Proposed amendments to s 198AD(11)**

20. The proposed amendments to introduce subsections 198AD(11A) and (11B) are very similar, however, they relate to taking "unauthorised maritime arrivals" to a third party country under the potential new arrangements. This extends the cohort of those removed beyond "serious criminals"
21. We repeat our concerns above and are particularly concerned with how the government would be in a position where the Australian government, other nations and officials or workers in third countries, will not have any accountability for the harms caused to people held offshore.

## **RESPONSE**

---

22. Whilst many submissions express similar concerns about the Bill's impact, they do not address, in detail, the removal of the right to take civil action in tort law for harms done to them or to meet their urgent medical needs, a position which has never been a part of Australian Migration Law before these proposed amendments.
23. In fact, the Australian Labor Party understood the need to protect vulnerable individuals when they supported the Medevac Bill in 2018 which protected the health and welfare of offshore transferees - balancing humanitarian concerns with their desire to maintain strong border protections.
24. In 2018, Bill Shorten, then-Leader of the Opposition, framed Labor's support for the Medivac Law as a response to "basic humanity" and the importance of ensuring that medical decisions were made by doctors, not bureaucrats. He emphasised that Australia had a responsibility to provide adequate care for those under its protection.
25. When the repeal of the Medevac law was being considered, Kristina Kenneally, the opposition Immigration spokesperson said "If the government believes that the medevac legislation is no longer



necessary ... (or) if the government wants to improve the medevac legislation to ensure that people can more readily get the health care that they need, then the government needs to explain that to the parliament."<sup>5</sup>

26. After the repeal of the Medevac law, the right to make a civil claim is the only mechanism remaining that allows individuals to have their medical and other health care concerns ventilated. This minimal right will be removed if the amendments proceed.
27. It is ironic that the government is currently advocating for a duty of care on social media platforms to make them responsible for preventing harm to children, to protect young users and those being exploited on the platforms as soon as possible whilst at the same time removing the protection of civil laws that will expose children to harm in offshore detention or in foreign countries.<sup>6</sup>

## OBSERVATIONS

---

28. Judicial review is an essential to access to justice and human rights.
29. The proposed Civil Liability Immunity will remove the right for an Australian court to hear a limited class of civil claims about harms done to individuals or the risks of serious harm whilst in the care or control of our government and its officers in offshore detention. The explanatory memorandum notes that:

*"the immunities provided for in items 1 and 2 of this Schedule do not preclude remedies through the criminal justice system, administrative law remedies, constitutional remedies, remedies for actions that were not carried out in good faith or were beyond the exercise of powers or the performance of functions or duties, or preclude a person pursuing remedies through bodies such as the Commonwealth Ombudsman or the Australian Human Rights Commission."*<sup>7</sup>

30. However, those alleged pathways are effectively blocked by privative clauses in the Migration Act or they are neutered by the refusal of consecutive governments to heed the concerns of the Commonwealth Ombudsman or the Australian Human Rights Commission who do not have the power to force the government to act on the serious harms that may be experienced by individuals removed offshore. Accordingly, for many individuals, the only recourse for the grave harms suffered offshore is through civil claims.
31. Further, the proposed Civil Liability Immunity is drafted to extend well beyond what is necessary for the removal of individuals from Australia. As currently proposed it extends to protect the mistreatment

---

<sup>5</sup> <https://www.sbs.com.au/news/article/labor-withholds-support-for-repeal-of-medevac-bill/fc5t3bhw5>

<sup>6</sup> <https://www.abc.net.au/listen/programs/worldtoday/calls-to-fast-track-social-media-duty-of-care-rules/104600534> & <https://www.abc.net.au/news/2024-11-13/social-media-duty-of-care-laws-mental-health-harm/104597890>

<sup>7</sup> [Para 59 of the Explanatory Memorandum: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr7276\\_ems\\_75925219-1239-4ab1-ab92-cb88e2c2cbea%22](https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr7276_ems_75925219-1239-4ab1-ab92-cb88e2c2cbea%22)

and denial of treatment of seriously ill individuals (including women and children) transported to other jurisdictions under the changes to the Migration Act. Often these removal countries do not have effective justice systems themselves, for example Nauru stripped all rights of appeal to the High Court of Australia and sacked their Australian judges and Magistrates when they applied the law consistently and with integrity.

32. Without that protection, individuals may be subjected to cruel and inhumane treatment without an effective remedy.

Thank you for the opportunity to comment. We welcome any questions you may have for further information.

Adjunct Professor George Newhouse  
Chief Executive Officer, National Justice Project  
[info@justice.or.au](mailto:info@justice.or.au)  
02 9514 44440  
PO Box 123, Broadway, Gadigal Country NSW 2007