A number of the questions invite us to comment on amendments which might be required to address aspects of the bill. It remains our position that the bill is fundamentally flawed such that its deficiencies cannot readily be rectified through amendments; and that it should be rejected in its entirety. As such, we do not propose any specific amendments below, but do explain in greater detail the reasons for our concerns with parts of the bill.

Please do not hesitate to contact us if we can be of further assistance.

Yours sincerely,

Professor Jane McAdam AO
Director

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2. On page 7 of its submission to the Committee, the Department of Home Affairs states:

> *Governments around the world are grappling with similar issues and utilising a variety of avenues and tools to ensure that their migration systems continue to be effective in managing the arrival and departure of non-citizens.* ***For example, governments of both the United States of America and the United Kingdom have country designation mechanisms similar to that proposed in proposed section 199F at item 3 of Schedule 1 to the Bill (adopted in 1952 and 2022).***

Do you have any views with respect to any differences between the country designation mechanism in the Bill when compared to the mechanism in the United States and the United Kingdom? Are the differences material, and if so, in what respects? Are there any issues or learnings arising from how the mechanism works in practice in the United States and the United Kingdom which should be reflected in the Bill?

**Kaldor Centre response**

Subsequently, it was applied only once (against Guyana in 2001, following numerous

In forming such an opinion, the Secretary of State must consider:

(a) any arrangements (whether formal or informal) entered into by the government of the country with the United Kingdom government or the Secretary of State with a view to facilitating returns;
(b) the extent to which the government of the country is—
    (i) taking the steps that are in practice necessary or expedient in relation to facilitating returns, and
    (ii) doing so promptly;
(c) such other matters as the Secretary of State considers appropriate.[25]

In addition, the Secretary of State must take into account:

(a) the length of time for which the government of the country has not been cooperating in relation to returns
(b) the extent of the lack of cooperation;
(c) the reasons for the lack of cooperation;
(d) such other matters as the Secretary of State considers appropriate.[26]

Furthermore, the Secretary of State must review the necessity of any visa sanctions every two months.[27]

In 2019, the EU amended the Visa Code to enable the Council of the EU to impose visa sanctions linked to countries' lack of cooperation on readmission.[28] With effect from 2 February 2020, the EU has 'experimented with visa sanctions for certain countries deemed uncooperative, ~ o ve, ~ o ve,

cooperation has been made', which is 'clearly communicated to the concerned third country … enables the EU to put pressure on the third country in transparent and precise way.'[34]

In the US, UK and EU, the processes for designating 'uncooperative' countries require far greater scrutiny than the model proposed for Australia. In the US, for example:

> [c]ountries are ranked on a scale ranging from uncooperative to cooperative, based on statistical data and expert analytic feedback on a range of assessment factors. These factors include a refusal to accept charter flight-based removals, the ratio of releases to removals, and average length of time between issuance of a removal order and removal. ICE [Immigration and Customs Enforcement] also takes into account mitigating factors, such as a natural or man-made disaster or limited capacity (e.g., regarding law enforcement, inadequate records, and/or inefficient bureaucracy), to assess whether a country is intentionally uncooperative or incapable due to country conditions. Some countries disagree with ICE's assessments, maintaining that the United States has

**and humanitarian entrants. There is no flexibility in the way the bill is drafted for more targeted provisions focusing on specific visa subclasses. None of the issues considered by the US, UK or EU are mentioned in the bill** – indeed, there is no indication of the factors that might lead the Minister to make such a designation other than 'think[ing] it is in the national interest',[42] nor any requirement for such a decision to be periodically reviewed.

We share the view of the Senate Standing Committee for the Scrutiny of Bills, which has noted that it is concerning that 'such a significant matter is being left to the broad and unfettered discretion of the minister and is to be set out in delegated legislation'.[43]

3. On page 9 of its submission to the Committee, the Department of Home Affairs states:

> *'**While a removal pathway direction can be issued to certain bridging visa holders, they will not be the subject of the removal power at section 198 unless they are first lawfully detained**. However, the issuing of a removal direction to a bridging visa holder will send a strong message to that individual of the of the requirement to cooperate. **The removal direction would be a measure of last resort for relevant bridging visa holders** (as it would be for non-citizens in immigration detention) and it should be noted that certain bridging visa holders can have departure visa conditions imposed requiring them to cooperate with making departure amendments?'*

4. On page 11 of its submission, the Department of Home Affairs states:

> *'**The Department recognises that there has been commentary about proposed subsection 199B(1)(d) which provides the flexibility to prescribe categories of visa holders who could be brought under the meaning of removal pathway non-citizen, if necessary to do so in the future.** Importantly, this Bill does not expand the cohort of people who are eligible for removal from Australia, that is non-citizens who have exhausted all avenues to remain or for whom the Government is lawfully entitled or indeed required under the Migration Act to seek removal. Nor does prescribing a visa under the power in and of itself make that personal liable for removal. **The power at subsection 199B(1)(d) is***

5. On page 11 of its submission, the Department of Home Affairs states:

> *'The period for compliance with a direction is not fixed in proposed section 199C. This reflects that the appropriate period for compliance will be dependent on the detail of the direction.* ***In practice, directions given to a removal non-pathway citizen would provide a rational and reasonable time for compliance.*** *In some cases, this may be relatively short – for example if all that is required is a signature on a passport application.* ***In every case the Minister or delegate would consider the circumstances of the removal pathway non-citizen and what is being required of them in the direction, and would set the timing for compliance accordingly for each specific thing.****'*

7. The submission of the Department of Home Affairs refers to: 'operational guidance' in the context of both the powers to give removal pathway directions (refer to section 5.3 of the submission) and the 'reasonable excuse' defence (refer to section 5.5.1 of the submission).

   Do references to 'operational guidance' provide sufficient safeguards with respect to the operation of the powers or does the Bill need to be amended? Do you have any other response to the references by the Department to: 'operational guidance' in the above or any other contexts?

**Kaldor Centre response**

We reiterate our view that the powers in proposed sections 199C and 199D authorising the Minister to give removal pathway directions, and the associated criminal offences for the failure to comply with these directions in proposed section 199E, be rejected in their entirety.

**Safeguards provided in the form of óoperational guidanceôare a wholly insufficient safeguard in relation to the operation of the direction powers set out in proposed section 199C. This is particularly so in a context such as this where the decision-making has a substantial impact on the rights and liberties of individuals**. Operational guidance is a form of executive policy. These are non-statutory rules 'devised by the administration to provide decision-making guidance, particularly in administering legislation.'[47] They have no legally binding force, unless they are expressly authorised as such through legislation.[48] That does not appear to be the case here. Such guidance can be amended from time to time at the discretion of the executive, provided that the policy is not

of Foreign Affairs. **There is no requirement under proposed sections 199F or 199G that any of the steps or actions set out by the Department in the quote above be undertaken before a designation is made. This stands in contrast to similar sanction regimes in the US, UK and the EU, which set out a variety of safeguards and conditions that must be satisfied before a country is designated.**

9.

**revisited and reversed.** In effect, this would potentially allow the government to reinstate periodic reviews of protection findings for protection visa holders, in a manner similar to what occurred under the abolished Temporary Protection Visa regime.

**Similarly, the** Department's submission set out various examples of the types of circumstances in which the power might be exercised, including 'if the circumstances of the person or the home country have changed such that a protection finding would be made'.[60] **These intent]**

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| 12. Do you have any other responses to the submission of the Department of Home Affairs or to the testimony given by representatives of the Department of Home Affairs on Monday 15 April 2024? In this regard, the testimony may be viewed through ParlView \| Video 2362453 (aph.gov.au) (It is further noted that a Hansard transcript will be made available). |

**Kaldor Centre response**

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