Inquiry into the Migration Amendment Bill 2024

Senate Legal and Constitutional Affairs Committee

22 November 2024

Women's Legal Services Australia

Acknowledgements

We acknowledge the Traditional Owners of Country, recognise their continuing connection to land, water, and community, and pay respect to Elders past and present.

We acknowledge the victim-survivors of domestic, family, and sexual violence whom we work with and their voices and experiences, which inform our advocacy for justice, equality, and safety for women.

About Women’s Legal Services Australia

Women’s Legal Services Australia (**WLSA**) is the national peak body for 13 specialist Women’s Legal Services in each state and territory across Australia, including two First Nations Women’s Legal Services. We provide a national voice for Women’s Legal Services to influence policy and law reform, and advocate to increase access to gender-specialist, integrated legal services for women.

About Women’s Legal Services

Women’s Legal Services provide high quality free legal services for women, including legal advice and representation, support services and financial counselling, community legal education, training for professionals, and advocacy for policy and law reform. Some Women’s Legal Services have operated for more than 40 years.

WLSA members include:

- Women’s Legal Service Victoria
- Women’s Legal Service Tasmania
- Women’s Legal Service NSW
- Women’s Legal Service WA
- Women's Legal Service SA
- Women's Legal Service Queensland
- North Queensland Women's Legal Service
- First Nations Women's Legal Service Queensland
- Women's Legal Centre ACT
- Wirringa Baiya Aboriginal Women's Legal Centre NSW
- Top End Women's Legal Service
- Central Australian Women's Legal Service
- Katherine Women's Information and Legal Service

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Women's Legal Services Australia

Executive Summary

Women's Legal Services Australia (**WLSA**) welcomes the opportunity to contribute to the Senate Committee's inquiry into the Migration Amendment Bill 2024 (**the Bill**) and Migration Amendment (Bridging Visa Conditions) Regulations 2024 (**Regulations**).

Many Women's Legal Services across Australia have migration law practices that are currently funded by the Department of Social Services to provide legal assistance and support services to women on temporary visas or no visa, who are experiencing violence and abuse. These Women's Legal Services have expertise across the range of legal issues and systemic issues impacting migrant women who are victim-survivors of family violence, including in relation to migration law and family law.

WLSA opposes the Bill and Regulations in their entirety. We are deeply concerned about the impact this Bill will have on victim-survivors of family violence and their children who come from migrant, refugee and asylum-seeking backgrounds. For the reasons outlined in this submission, the Bill exposes people, particularly victim-survivors of family violence and their children, to real risks of serious harm, family separation, undue criminalisation and punitive, discriminatory measures that infringe fundamental human rights, and place people at significant risk of further family violence and gender-based harm.

We are particularly concerned that the Bill will result in:

- the increase of predominantly women victim-survivors of family violence who have been criminalised and have not had the opportunity to have their protection claims adequately assessed prior to being deported to an unknown third country;
- the removal of victim-survivors of family violence to countries where they face a risk of further family violence, gender-based harm without protections, and traumatisation;
- permitting the Australian Government to breach women's and children's privacy by collecting and sharing personal information with bodies, including foreign governments, which may place them at greater risk of harm;
- the real risk of family separation and the loss of a child's ability to form a meaningful relationship with their parent, contrary to the best interests of children;
- expanding the Minister's already grossly extensive powers to overturn protection findings for removal pathway non-citizens undermining Australia's non-refoulment obligations and placing women and children at risk;
- introducing a new test to impose curfew and ankle bracelets for bridging visa R (BVR) holders, resulting in invasive monitoring conditions that infringe on liberty and personal dignity;
- immunity for Commonwealth officers regarding civil claims from deporting people offshore, placing significant power in often flawed assessment processes, and removing essential accountability mechanisms.

The Bill dangerously expands Ministerial powers and has broad, serious, and life-long impacts on those affected.

The Bill and Regulations attempt to rush through parts of the widely criticised Migration Amendment (Removal and Other Measures) Bill 2024, which rightfully stalled in the Senate earlier this year due to lack of support. This approach to hurriedly passing complex legislation that significantly impacts peoples' rights — without adequate scrutiny or consultation — jeopardises our democracy and public confidence in the government's commitment to transparent governance.

The Bill is inhumane and breaches the rule of law and Australia's obligations under international law, including the Refugee Convention. The proposed expansion of the Australian Government's excessively

harsh and severe powers over refugees and asylum seekers with no lawful, demonstrable benefit to the Australian community is discriminatory and enables racism in decision-making by reneging fundamental human rights, that are the bedrock of Australia's democracy.

Critically, the Bill risks putting people at harm and tearing families apart. If passed, the Bill will have unjust and severe impacts on Australia's multicultural and diverse society, particularly refugees and people claiming protection who are deported to other countries where they may face serious harm and persecution.

We endorse the submissions of Asylum Seeker Resource Centre, Human Rights Law Centre and Refugee Legal, and share their concerns about the Bill.

Recommendations

- **Our strong position is that the Bill should not be passed, and the Regulations should be disallowed.**
- **We also recommend increased and ongoing funding be provided to the legal assistance sector, including specialist Women's Legal Services, to assist women in respect of departure pathways, with particular focus on women who have experienced, or continue to, experience family violence.**

The Bill will deter victim-survivors from reporting family violence

1. WLSA has significant concerns that if passed, the Bill and Regulations will act as a major deterrent to victim-survivors of domestic and family violence reporting to police and will result in substantial underreporting of family violence for victim-survivors from migrant, refugee and asylum seeking backgrounds.
2. A 2021 study undertaken by Monash University and Harmony Alliance found that one-third of migrant and refugee women have experienced some form of family violence, and this number is higher for temporary visa holders. Temporary visa holders also reported much higher patterns of migration-related systems abuse and threats (such as threats to be deported or separated from their children).[1]
3. The Government has acknowledged that temporary visa holders often face more significant barriers in escaping family and domestic violence due to their visa status.[2] This Bill will exacerbate these barriers.
4. We are concerned that the provisions in this Bill will mean that victim-survivors on temporary visas will not report family violence to police due to legitimate fears, including:
   - The person using violence may be criminalised and may eventually be deported, leading to the loss of financial support or the ability for children to have contact with family members;
   - The risk of permanently separating families and causing traumatisation; and
   - Mental health not being adequately considered in refugee and asylum seeker experiences.
5. If passed, the Bill will create a risk that migration agents and lawyers who work in a legal silo (for example, who provide migration advice only and do not have family violence expertise) will advise clients against reporting family violence due to the long term and severe impact the report may have on their family member, their migration claim and visa pathways. This will have the effect of creating a significant safety risk for victim-survivors and their children who may be forced to choose between their immediate versus long-term safety for themselves and their family.
6. The Bill in its current proposed form will discourage early reporting of family violence by victim-survivors, for example due to fear that it might result in adverse consequences for the person perpetrating family violence. The Bill negatively impacts early reporting and interventions that are considered the most effective tools to addressing family violence currently in Australia.

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[1] *Segrave, Marie; Wickes, Rebecca; Keel, Chloe (2021). Migrant and refugee women in Australia: The safety and security study. Monash University. Report. https://doi.org/10.26180/14863872*

[2] *Hon Amanda Rishworth MP and Hon Andrew Giles MP, 'Media Release: Increasing financial support for visa holders experiencing violence', 3 July 2023.*

Case Study - Lina's* story

Lina and her husband come from two separate countries but met and were married in a third country. The couple then made the decision to travel to Australia by boat with their only child. Once they had arrived and been processed through the Fast Track system, they made an application for a Safe Haven Enterprise Visa (SHEV). Lina's husband was the main applicant, coming from a well-known refugee group. Although the Department of Home Affairs initially refused their visa, the Immigration Assessment Authority found that the family unit met the definition of refugees. The matter was referred to Home Affairs for consideration.

During this time, Lina and her husband had more children. Lina's husband began engaging in significant family violence during this time. Fearing her visa was dependent on his claims and that he would be imprisoned while she was financially dependent on him, Lina did not report any of the family violence to police. Child Protection ultimately became involved when Lina's husband attempted to seriously harm the family. They removed the children from Lina's care for a short period of time and returned them only when she agreed to get a Family Violence Intervention Order. Lina separated from her husband, he was incarcerated, and she applied for a protection visa with her children. Lina has not obtained any financial support from her husband because of the family violence and his incarceration.

It took a Women's Legal Service more than two years to obtain a positive migration decision for Lina and the children, who can now access Centrelink benefits. During that period, Lina and her family were financially supported by family violence services. Members of the community have harassed Lina about reporting her husband's family violence and his consequent incarceration.

**Not her real name*

Inadequate protections for victim-survivors who have been misidentified as the predominant aggressor

7. Schedules 3 and 4 of the Bill create significant risks for victim-survivors who have been misidentified as the predominant aggressor of family violence. Police and other actors within the justice system continue to misidentify victim-survivors as the predominant aggressor of family violence, with significant adverse outcomes and legal consequences for the victim-survivor. Rates of misidentification have been conservatively estimated to be 1 in 10, and the evidence is clear that migrant women (particularly from culturally and racially marginalised backgrounds) are at greater risk of this occurring.3 The misidentification and criminalisation of migrant and refugee women have significant and far-reaching impacts on their migration status and this Bill will exacerbate these impacts.

[3] *Victorian Family Violence Reform Implementation Monitor, 'Misidentification is a significant issue that has enormous consequences for the victim survivor' 2021. Available at:* [Misidentification is a significant issue that has enormous consequences for the victim survivor | fvrim.vic.gov.au]

8. For example, significant cross-jurisdictional knowledge and expertise is required for a family violence practitioner to understand the impact of a family violence intervention order (FVIO) or State-based equivalent on a person's migration status. A victim-survivor may often be advised by duty lawyers or private practitioners to consent without admissions to a final FVIO, which, if breached, can create a life-long concern in terms of their character assessment in the migration context. Additionally, where a victim-survivor does not have a migration lawyer or advocate to provide context to findings of family violence or civil orders being made, it limits their ability to have their character correctly assessed. After the passing of Ministerial Direction 99, to which WLSA provided a submission raising our concerns around the lack of consideration for family violence victim-survivors, this is a significant concern for visa applicants and holders who are misidentified.

Inadequate protections for victim-survivors

9. The Bill provides inadequate protections for refugees and asylum-seeking victim-survivors of family violence from being deported to countries where they may face persecution, including women and children who have been through flawed and unfair legal processes.

10. The National Plan to End Violence Against Women and Children 2022-2032 identifies that women from migrant and refugee backgrounds, particularly temporary visa holders, face unique challenges in reporting family violence and accessing support:

> *"It is well recognised that temporary visa holders have specific experiences in relation to family and domestic violence, including perpetrators using a women's visa status to control and abuse them.* ***A 2021 study indicated that one in 3 migrant and refugee women had experienced some form of family and domestic violence, with temporary visas holders consistently reporting proportionately higher levels of family and domestic violence, including controlling behaviours.*** *In addition to the barriers outlined above, women on temporary visas may not access support services for violence due to fears that doing so will affect their ability to stay in Australia..."*

11. Women's Legal Services regularly assist women who have experienced family violence with protection visa applications where previous claims of family violence, sexual violence and gender-based harm have not been raised by applicants themselves or same has occurred following a primary or merits review decision and the applicant is seeking Ministerial Intervention to make another application and raise these claims.

12. It is well known and was recognised in the former Administrative Appeals Tribunal's Gender Guidelines that applicants face barriers in making and presenting gender-related claims:

> *"14. Applicants may, for social and cultural reasons, find it difficult presenting and pursuing gender-related claims in the protection visa process.*
>
> *15. The difficulties faced by applicants may include but are not limited to: an assumption that female applicants' claims are derivative of male relatives' claims; difficulty an applicant may have in discussing his or her experiences of persecution because of shame or trauma; cultural differences or experience of trauma affecting an applicant's ability to give testimony or his or her demeanour; the compounding effect on an applicant's trauma that immigration detention may have; difficulties establishing the credibility of an applicant's claims; a fear of rejection and/or reprisals from his or her family and/or community."*

13. The Bill, in its current form, does not account for the barriers faced by victim-survivors of family violence in raising claims related to family violence and places them at significant risk of being

re-traumatised by the potential of them being deported to a third country where they may also experience harm, persecution or discrimination.

Separating families and putting children at risk

14. The Bill fails to consider the reality of family separation across international borders and the complex legal processes, including family law litigation, that families must often undergo to determine suitable parenting arrangements for shared children following separation. Due to their complexity and the prospect of long-term family separation, we regularly see these matters develop into litigation cases, which can take years to resolve.

15. We are deeply concerned that this Bill is entirely inconsistent with the Federal Government's commitment to "ensure the best interests of children are at the centre of all parenting decisions made inside or outside the courtroom". The Bill undermines the principles of the best interests of the child test outlined in the UN Convention of the Rights of the Child, enshrined in the *Family Law Act 1975* (Cth). Children have the right to a meaningful, and safe, relationship with both parents. The risk of having a parent deported to a third-receiving country and the risk of secondary deportation to their country of risk —directly impacts the child and their right and ability to have a meaningful relationship with their parent. Unless no time and no contact for the parent on a removal pathway is granted by the family law courts, allowing a parent to be available to the child (should the relationship be of interest to them) is an essential right of the child that will be undermined if these proposals were to be passed into law.

16. The Hague Convention on the Civil Aspects of International Child Abduction prevents the removal of children from Australia without the permission of responsible parents or the authorisation of a court.

17. The Bill in its current form also raises significant safety risks for children where the court determines that it is in their best interest to remain in Australia and have some contact with both parents, and there is no suitable, safe, alternative primary carer to the parent on a departure or deportation pathway. In these situations, there is a real risk that children will be placed with a perpetrator of violence or placed in State/Territory care due to ongoing safety risks to the child.

Women's Legal Services Australia

Case Study - Cindy's* story

Cindy was 2 years old when she arrived in Australia with her family. Her parents separated almost immediately, leaving the mother to raise both Cindy and her older sister. When Cindy was 7, her mother would have a friend babysit her while she worked. Her mother's friend raped Cindy and was never held accountable for his actions as he passed away not long after.

Cindy's mother remarried and her new husband engaged in significant family violence, which was witnessed by and perpetrated against Cindy. Child Protection authorities intervened and removed Cindy from the family home but ultimately returned her even though her step-father remained in the home. When Cindy became a teenager, her step-father attempted to assault her and her friend and in self-defence, her and her friend caused injuries that ultimately led to his death. At 15 Cindy was convicted of manslaughter with no sentence of imprisonment.

Following that traumatic experience, all of Cindy's romantic relationships involved family violence. Cindy's second partner and father to several of her children introduced Cindy to drugs. Cindy was incarcerated for committing a crime while under the influence of drugs. Cindy was then moved to immigration detention. Cindy served three separate prison sentences for crimes all associated with her drug use and was in immigration detention twice. The Department sought to deport Cindy on the basis of character. Some of Cindy's children are Aboriginal, and she has shared parental responsibility of the children.

Deporting someone like Cindy on the basis of her visa when she had been significantly failed by her parents, the Child Protection system, police, the judicial system and the migration system in Australia would not only negatively impact Cindy, but would mean that her children lose the right to have a meaningful relationship with their mother whilst maintaining cultural connection.

* *Not her real name*

Women's Legal Services Australia

New offshore warehousing regime and foreshadowed exposure to serious harm

18. The Bill creates an expanded regime of offshore detention and allows the Australian Government to remove people to unspecified "third countries" (like Nauru), paying a fee to that third country. WLSA strongly opposes these provisions and are particularly concerned that victim-survivors of gender-based violence will be placed at risk if this Bill were to pass the Parliament. The evidence is clear that "violence against women is rife in Australian detention facilities, where women are victims of multiple forms of violence perpetrated by partners, families, other detainees, and staff" including family and sexual violence, and that '[w]omen will continue to be victimised in immigration detention until the Australian government abolishes the use of these facilities.'[4]

19. Further, the Bill provides no guarantee of a person's safety upon removal; in fact, it specifically contemplates that the third country may decide to detain the person or return the person to their home country, where they face serious harm. These proposals breach Australia's international legal obligations under the Refugee Convention to not expel or return a refugee to a place where their life or freedom would be threatened.[5]

20. WLSA holds particular concerns about the risks the Bill creates for victim-survivors of family violence who have been criminalised and detained offshore, particularly given that the United Nations High Commissioner for Refugees (UNHCR) - as recently as April when the Government attempted to legislate the Migration Amendment (Removal and Other Measures) Bill 2024 – has highlighted that Australia has failed in its international human rights obligations. The UNHCR's finding echoes the strong concerns held by others, including:

    The Refugee Council of Australia notes that between 1 July 2014 and 31 March 2024, there have been 29 deaths in offshore detention centres and 16 deaths in residence determination. That is 45 deaths due to multiple factors, including mental health exacerbated in detention and trauma compounding in detention.[6] They have also reported:

    "For years, there have been tragic accounts of rape and sexual abuse of females in Nauru, including by those paid to protect them. The accounts have come from people who lived through these experiences or witnessed them, and have been reported in multiple official reports.[7]

    In 2017, the UN Covenant on Civil and Political Rights Committee noted that they had serious concerns around offshore processing facilities, in particular:

    (a) the conditions in the offshore immigration processing facilities in Papua New Guinea (Manus Island) and Nauru, which also hold children, including inadequate mental health services, serious safety issues and instances of assault, sexual abuse, self-harm and suspicious deaths, and the fact that the harsh conditions have reportedly compelled some asylum seekers to return to their country of origin, despite the risks that they face there. [8]

    Even more heartbreakingly, children have also been physically and sexually assaulted by those paid to protect them. There have been reports of incidents of centre staff sexually

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[4] *Rivas, L. (2024). A safe haven? Women's experiences of violence in Australian immigration detention. Punishment & Society, 26(3), 547-565. https://doi.org/10.1177/14624745231214717*
[5] *UN Convention relating to the Status of Refugees, Article 33*
[6] *https://www.refugeecouncil.org.au/detention-australia-statistics/10/*
[7] October 2020, *the* Refugee Council of Australia released *their "Australia's man-made crisis on Nauru"*
[8] *United Nations Human Rights Committee Concluding observations on the sixth periodic report of Australia *CCPR/C/AUS/6. Available at: docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsoAl3%2FFsniSQx2VAmWrPA0uA3KW0KkpmSGOue15UG42EodNm2j%2FnCTyghc1kM8Y%2FLQ4n6KZBdggHt5qPmUYCl8eCslXZmnVlMq%2FoYCNPyKpq*

assaulting a child, choking a child, hitting at and spitting on children, and other physical assaults and threats to children.[9]

21. To accept this Bill in its current form is to support the ongoing breaches to the fundamental human rights of women and children.

Unchecked Ministerial powers to revisit refugee determinations

22. The Bill expands the Minister's extensive powers to unprecedented levels with no adequate safeguards. This jeopardises accountability and transparency in government decision-making.

23. Expanding existing powers to overturn protection findings undermines the rule of law. It will, in practice, give the Minister power to revisit refugee determinations in relation to virtually anyone in Australia (including those already failed by the Fast Track process), with very few stated exceptions. This is a disproportionate and unnecessary response to an alleged risk to communities: extensive protections already exist to manage community safety, which apply to everyone. Refugees who have been living in our community for years, including people with family members who are Australian citizens, would be exposed to deportation. When a human being is granted the protection of refugee status in Australia, this finding should be durable and lasting so people seeking safety, and their families can build their lives without fear of their immigration status being reversed by the Minister without due process, oversight or warning.

24. This approach is not trauma-informed and will exacerbate the harm experienced by victim-survivors of family and gender-based violence in particular, by creating constant uncertainty concerning refugee status and a requirement to constantly justify their status, including re-telling and re-living experiences of significant harm and trauma.

Avoiding accountability for harm caused

25. If passed, the Bill will give the Australian Government and immigration officials immunity against civil claims arising from the removal of a person (including to a third country under the new arrangements), or visa refusal or visa cancellation. The catastrophic harm suffered by people who were previously subjected to offshore processing in Nauru and Papua New Guinea is extensively documented.[10] People and families who are harmed as a direct result of the Australian Government breaching its non-refoulement obligations and removing or deporting them to a third country should not be unfairly barred from seeking accountability and remedies in relation to Australian Government decisions and actions. Civil liability claims have been a crucial accountability mechanism for those impacted by harmful immigration processes; this includes securing court orders to access life-saving treatment in Australia,[11] and successfully suing the government for damages for unlawful detention and negligence[12].

26. By shutting the door to future legal challenges, the government would effectively remove one of the few proven checks on its power in this area. The inclusion of this provision demonstrates the Government's awareness that refugees and people seeking asylum are likely to be harmed under this proposed bill and seeks to alleviate any legal responsibility.

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[9] *Senate Legal and Constitutional Affairs References Committee, Serious Allegations of Abuse, Self-Harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and Any like Allegations in Relation to the Manus Regional Processing Centre (No ISBN 978-1- 76010-563-1, 21 April 2017) , [2.23].*

[10] *See for example, Asylum Seeker Resource Centre, [Cruelty by design: The health crisis in offshore detention] (July 2024), Human Rights Law Centre, [Timeline – Offshore Detention] (July 2024).*

[11] *Talbot, Anna; Newhouse, George Strategic litigation, offshore detention and the Medevac Bill [2019] UNSWLawSocCConsc 13; (2019) 13 UNSW Law Society Court of Conscience 85*

[12] *Kamasaee v Commonwealth of Australia & Ors S CI 2014 6770*

Unrestricted breach of privacy

27. New provisions in the Bill would give the Australian Government nearly unrestricted power to breach people's privacy with respect to collecting and sharing criminal history information, including information that would otherwise be protected from disclosure, for almost 1.6 million temporary visa holders in Australia. WLSA is particularly concerned about provisions of the Bill which confer the Government with broad powers to collect, use and disclose personal information about a person, including their criminal history, to other persons or bodies (including foreign governments).

28. Privacy is recognised as an individual human right central to a person's autonomy.[13] These new provisions would constitute a breach of international human rights obligations,[14] and will undoubtedly lead to the erosion of public trust.

29. For victim-survivors of family violence, these provisions have the potential to be significantly retraumatising – including by disclosing sensitive private information about violent assaults, including rape and sexual violence. Personal information about family and sexual violence offences should not be shared without a victim-survivors informed consent.

30. The Government has not indicated which countries it intends to engage in "third country reception arrangements" if the Bill were passed. This intentional vagueness means that it is significantly unclear whether or not victim-survivors of family violence may be refouled (against Australia's protection obligations) to a country that does not observe appropriate human rights obligations, nor have appropriate family violence laws in place. Depending on country a victim-survivor is being sent to, such disclosures of private information could raise serious safety risks (for example countries that have inadequate responses to sexual and family violence and/or where there are inadequate protections from further harm).

Limiting freedom and bodily integrity

31. The new test in the Regulations for the imposition of curfews and electronic monitoring is in clear opposition to the High Court decision that such action is unlawful and fails to account for fundamental constitutional protections.[15] The Regulations would allow the Australian Government to impose punishment in ways only the courts can impose and are likely to be constitutionally invalid if challenged. The Bill fails to consider the principles derived of the recent NZYQ High Court Case where Chief Justice Gageler, Justice Gordon, Justice Gleeson, and Justice Jagot dissented that:

> *"(12) of fundamental importance for present purposes, however, is that NZYQ represents a specific example of a broader stream of common law and constitutional principle based on the pre-eminent value the law of this country gives to the protection of human life (from arbitrary capital punishment), limb now called bodily integrity (from arbitrary corporal punishment), and liberty (from arbitrary detention). This reflects the common law's acceptance of the inherent and irreducible status of each human being in the compact between the individual and the state, a compact which this country inherited and within which the Constitution was enacted". In summary, that whether a person is a citizen or non-citizen, they have a right to the constitutional principle of protection from deprivation of liberty"*

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[13] *Campbell v MGN Ltd [2004] 2 AC 457, [51].*
[14] *Including International Covenant on Civil and Political Rights (ICCPR) Article 17*
[15] *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs [2024] HCA 40*

32. Family violence often involves many acts which directly disempower women's capacity to participate in public life and live independently. The newly proposed test for imposition of curfews and electronic monitoring is likely to compound women's experiences and controlling their ability to reside in the community; a consideration that is not imposed on women who have committed similar criminal activities but are Australian citizens. This creates a tiered and racist class system and undermines the principles of doctrine of separation of powers.