

**HOME AFFAIRS PORTFOLIO
DEPARTMENT OF HOME AFFAIRS**

PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Senate Legal and Constitutional Affairs Legislation Committee

Migration Amendment Bill 2024 [Provisions]

21 November 2024

QoN Number: 1

Subject: Breach of visa conditions

Asked by: James Paterson

Question:

Senator Paterson: I come back to my question about sex offenders near schools. If this is a cohort which is routinely breaching their visa conditions when monitored under other conditions, how should we have any confidence that among the child sex offenders free in the community right now without electronic monitoring or a curfew are not also breaching the condition to not go near a school?

Ms Foster: So Senator, as I said at the outset of this block of questions, a good number of those breaches, and I will see if we can get any breakdown for you, were breaches of curfew, not necessarily breach of the provision to go near a school. We will try to get you a bit better clarity on that.

Answer:

Since 16 November 2023, there have been 99 breaches of condition 8620 (curfew), seven (7) breaches of 8623 (not approach school or childcare centre), and <5 breaches of both 8620 and 8623. The nature of these breaches varied (length, intent, etc), and not all breaches led to charges or convictions (due to the nature of the breach).

Bridging (Removal Pending) visa (BVR) holders, who are convicted of an offence involving a minor or vulnerable person, have the following mandatory conditions imposed, requiring them to:

- not approach within 200m of a school, child care centre or day care centre (condition 8623);
- notify the Department of Home Affairs (the Department) of their online profile and user name (condition 8626);
- not perform any work or regular organised activity, that involves more than incidental contact with a minor or other vulnerable person (condition 8622);

- notify details of any association or membership with an organisation that engages in activities involving more than incidental contact with a minor or other vulnerable person (condition 8615); and
- notify details of any persons residing with them within prescribed timeframes (condition 8615).

In addition to the above conditions, other mandatory conditions are imposed including reporting requirements and requirements to notify the Department of any change in name, address, travel or employment.

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Senate Legal and Constitutional Affairs Legislation Committee

Migration Amendment Bill 2024 [Provisions]

21 November 2024

QoN Number: 2

Subject: Convictions quashed as a result of YBFZ

Asked by: James Paterson

Question:

Senator Paterson: So how many people have been relieved or had their convictions quashed as a result of YBFZ?

Mr Thomas: I don't have that exact figure in front of me. We will need to check with the Australian Federal Police, but I understand it to be slightly above 20 but I would need to check that with the AFP for accuracy.

Senator Paterson: So that means there would have been 20 convictions.

Mr Thomas: Sorry, just to clarify the charges were dropped.

Senator Paterson: Charges were dropped for 20 people who violated the conditions of their visas?

Mr Thomas: I would have to check that number, Senator, but I believe...

Senator Paterson: Okay, in the vicinity of, I won't hold you to it, on notice give me the exact number, in the vicinity of 20 people's charges were dropped as a result of YBFZ, who breached their visa conditions. How many convictions though were overturned? Or quashed? Whatever the terminology is?

Ms Sharp: I think we are hesitating because we are not, we would need to take on notice the precise legal mechanism that the conviction of an offence that is subsequently based on an unconstitutional provision, exactly what the terminology is but I think we have...

Senator Paterson: I'm not hung up on terminology here, I just want the numbers.

Ms Sharp: I think we've provided evidence that there were two convictions and those would no longer, based on YBFZ, be valid.

Senator Paterson: I look forward to the clarity that you can provide on notice.

Answer:

As a result of the High Court decision in YBFZ, 28 people who had previously been charged by the Australian Federal Police (AFP) for visa breaches had their charges discontinued.

There have been no convictions quashed at this time, and less than five (<5) convictions are pending Commonwealth Director of Public Prosecutions advice.

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Senate Legal and Constitutional Affairs Legislation Committee

Migration Amendment Bill 2024 [Provisions]

21 November 2024

QoN Number: 3

Subject: When the Minister was provided the first draft of the Bill

Asked by: James Paterson

Question:

Senator Paterson: Probably then you will not be able to answer this but take it on notice please, when the Minister was first briefed on the drafting of the Bill?

Ms Sharp: Minister Burke was briefed on the YBFZ case almost immediately upon him becoming Minister. If you recall back temporarily he became the minister very shortly before the hearing in YFBZ so he was fully briefed on the case and what was at issue and operational planning.

Senator Paterson: Ok, how about, on notice, perhaps when the minister was provided the first draft of the bill?

Answer:

The Department first provided the Minister for Home Affairs with a draft of amendments contained in the Migration Amendment Bill 2024 on 2 October 2024.

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Senate Legal and Constitutional Affairs Legislation Committee

Migration Amendment Bill 2024 [Provisions]

21 November 2024

QoN Number: 4

Subject: When the Regulations were drafted

Asked by: James Paterson

Question:

Ms Sharp: Senator, I think it is important to also note the regs drafting was occurring. Because regs is a thing that needed to occur first, that was happening earlier than the bill as well.

Senator Paterson: Can you tell me when the drafting of the regs commenced?

Ms Sharp: Again, I would need to take it on notice but I think we will supply you with both dates to give you...

Senator Paterson: That would be helpful. I will take all information on notice about the drafting of the regs, all the legislation you can provide, and when the Minister was briefed and when the Minister signed off on each of those.

Answer:

As part of the preparation and planning for the legislative, policy and operational response to the High Court's decision in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 (YBFZ), the Department of Home Affairs (the Department) issued initial drafting instructions in relation to proposed amendments of the *Migration Regulations 1994* to the Office of Parliamentary Counsel (OPC) on 4 July 2024. The Department issued initial drafting instructions for related amendments of the *Migration Act 1958* on 10 July 2024. OPC commenced drafting and subsequently provided the first draft of the amendments of the Regulations and the Act to the Department on 18 July 2024.

The Department provided an initial briefing on YBFZ and related matters as part of the incoming briefing for the Minister for Home Affairs, the Hon Tony Burke MP, on 29 July 2024, following the Minister's appointment to administer the Department. The Department's General Counsel provided a further briefing on YBFZ and the proposed legislative response to the Minister on 31 July 2024, ahead of the High Court's hearing in the matter on 6 August 2024.

Following the hearing, the Department met again with the Minister and his Office on 14 August 2024. Development of the proposed legislative, policy and operational response and regular engagement between the Department and the Minister and his

Office continued in preparation for the High Court's decision throughout the period leading up to 6 November 2024, when the High Court delivered its judgment. A draft of amendments contained in the Migration Amendment Bill 2024 was provided to the Minister's Office on 2 October 2024 ahead of a meeting between the Department and the Minister on that day. Further revised drafts were provided to the Office on 31 October 2024 and 4 November 2024.

The High Court delivered its judgment in YBFZ on 6 November 2024. The Minister subsequently approved the proposed *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (the BVC Regulations) on 6 November 2024, informed by the High Court's written reasons in YBFZ. The amendments established a new community safety test in the Migration Regulations for the imposition of prescribed community safety conditions, including electronic monitoring and curfew, on a Subclass 070 (Bridging (Removal Pending) visa (BVR).

The BVC Regulations were made by the Governor-General on 7 November 2024, and commenced at 10:13 am (ACT) on that day, immediately after they were registered on the Federal Register of Legislation. The Minister also approved the text of the *Migration Amendment Bill 2024* on 7 November 2024, including amendments to align the community safety test in the post-decision procedural fairness process for BVRs under section 76E of the Migration Act with the new test established in the Migration Regulations by the BVC Regulations. Following completion of the Legislation Approval Process and other standard processes covered by the Department of the Prime Minister and Cabinet's Legislation Handbook, the Minister introduced the *Migration Amendment Bill 2024* in the House of Representatives on 7 November 2024.

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Migration Amendment Bill 2024 [Provisions]

21 November 2024

QoN Number: 5

Subject: Domestic legal restrictions

Asked by: David Shoebridge

Question:

Senator Shoebridge: You've repeatedly said in multiple answers to my colleagues that once somebody is removed from Australia to one of these third countries, that is the end of Australia's legal obligations, correct?

Ms Sharp: Correct

Senator Shoebridge: And if those countries don't have their own legal constraints on refoulement, then under your rationale, no problem for Australia because our legal obligations end when they leave our shores and enter that country.

Ms Foster: Senator, I think...I don't believe that is right Senator, because it assumes that we would have an agreement with a country that did not have those obligations. I think what we are trying to say is very clearly the Bill sets out a mechanism for us to make arrangements with third countries and Australia will continue to meet its refoulement obligations.

Senator Shoebridge: If you wanted to limit it to countries that were parties to the Refugee Convention, if that's the intent, why isn't it in the legislation?

Ms Foster: That was not my answer. I said the basis of what you are putting to us assumes that we would do that and that's not an assumption I think you can make.

Senator Shoebridge: I am just saying you can, and you clearly can, and for some reason there is no restriction on doing it and I am wondering why there is no restriction on sending it to third countries which don't have those same refoulement obligations?

Ms Sharp: Senator, there is a range of things any government would take into account as it is thinking about whether to enter into a third country arrangement...

Senator Shoebridge: The cheapest one...

Ms Foster: And one of those considerations will be Australia's capacity to meet its obligations under its international obligations.

Ms Sharp: And Ms Jeffery might be able to provide more evidence about this but whenever we affect a removal we do seek assurances from the country that we are removing somebody to that they will - that they will not chain refoule.

Senator Shoebridge: No legal obligation to do so under this Bill though? Do we agree on that?

Ms Sharp: The legislation does not set out...

Ms Foster: Senator, you can't look at the bill in isolation. Alongside the bill are Australia's obligations to meet its international obligations.

Senator Shoebridge: I invite you on notice to identify any actual domestic legal restriction that would prevent the government from doing so.

Answer:

Australia is committed to upholding its *non-refoulement* obligations under the 1951 *Convention relating to the Status of Refugees* and its 1967 *Protocol* and other international human rights instruments to which it is a party.

It is expected that any third country arrangement would reflect and support the upholding of those obligations.