Law Council
OF AUSTRALIA

Migration Amendment Bill 2024

Senate Legal and Constitutional Affairs Legislation Committee

21 November 2024

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

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- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council would like to thank the Migration Law Committee of its Federal Dispute Resolution Section and its National Human Rights Committee and National Criminal Law Committee for the contributions they made to this submission.

Overview

1. The Law Council thanks the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) for the opportunity to comment on the Migration Amendment Bill 2024 (**Bill**).

Introductory comments about the process

2. At the outset of this submission, the Law Council wishes to express its most serious concern about the lack of opportunity to scrutinise this Bill properly. The Law Council reiterates that concern in relation to the scrutiny timeframes given to a number of Bills during this term of the Parliament.

3. The Bill was introduced on 7 November 2024, just one day after the High Court handed down its decision in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 (**YBFZ**)—the decision to which this Bill purportedly responds. There was no public consultation or scrutiny prior to introduction.

4. On 19 November 2024, the Senate referred the provisions of the Bill to the Committee for inquiry and report by 26 November 2024.

5. As a result of the inquiry being restricted to one week in total, stakeholders, including the Law Council, were asked on 20 November 2024 to prepare a submission by, and appear at a hearing on, 21 November 2024. This makes proper consultation with the Law Council's Constituent Bodies and expert advisory committees impossible. For this reason, the Law Council's remarks in this submission should be considered preliminary and subject to amendment or clarification.

6. This truncated process does not ensure proper democratic scrutiny of the Bill by the Parliament and the community and undermines Australia's standing as a democratic global leader. The scrutiny process in relation to this Bill is particularly objectionable given that it includes far-reaching changes to the law which will likely have a significant impact on the rights and liberties of many members of our community.

7. It is imperative in assessing the necessity of a rushed legislative response to the YBFZ decision, to continue to bear in mind that persons who have completed their prison sentence are routinely released into the community. Australia has a strong police force with calibrated investigative and enforcement powers to respond to any further offending.

About the Bill

8. The Bill seeks to amend the *Migration Act 1958* (Cth) to achieve a number of aims related to removals, namely to:

   - establish a regime under section 76AAA of the Migration Act whereby Bridging Visa R holders' visas are no longer in effect by apparent operation of law if another country grants them permission to enter and remain, and the Government so notifies the holder;

   - amend section 76E of the Migration Act to align the test for the Minister to consider in response to representations made under that section by a Bridging Visa holder whose visa is subject to certain conditions including curfew and

electronic monitoring, with the community protection test in the *Migration Regulations 1994* (Cth) as amended by the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth) following the High Court's decision in *YBFZ*;[1]

- insert a new definition of 'removal pathway non-citizen' into section 5 of the Migration Act;
- amend sections 197C and 197D of the Migration Act so that their application is extended to 'removal pathway non-citizens', to enable the Minister to make a decision that *non-refoulment*/complementary protection obligations do not apply to the non-citizen in question;
- establish immunity from civil liability for Commonwealth officials participating in removal processes;
- provide for an effective authorisation—including retrospective authorisation—for the use/disclosure of criminal history information by the Minister or officials, or anyone with whom those officials share a non-citizen's relevant criminal history information in the course of exercising powers under the Migration Act or Migration Regulations;
- authorise the collection of personal information and its disclosure to a foreign government for the purposes of determining whether there is a real prospect of removal or cooperation related to removal of a non-citizen;
- authorise Government spending and related action to facilitate third country reception arrangements; and
- make a consequential amendment of the Act to ensure the consistent operation of the new definition of reviewable protection decision (section 338A) inserted in the Migration Act by the *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth) from 14 October 2024.

Summary of the Law Council's key positions

9. The Law Council emphasises that this Bill is a further example of a misguided approach to dealing with potential removals. As set out in our submission on the Migration Amendment (Removal and Other Measures) Bill 2024 in April 2024,[2] we acknowledge that having an orderly, well-functioning migration program is a legitimate goal (indeed duty) of Government. However, we regard measures targeting a broad category of Bridging Visa holders (many of whom are vulnerable and have not committed any offences) and facilitating their removal to third countries that have not yet been designated (and without any clear process of designation), rather than exploring less rights-restrictive alternatives, as an approach that is likely

[1] For background, Section 76E applies in relation to a decision to grant a non-citizen a Subclass 070 (Bridging (Removal Pending)) visa if the visa (the first visa) is subject to prescribed conditions (as provided for in regulation 2.25AD of the Migration Regulations) and at the time the visa is granted, there is no real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future.
[2] Law Council, *Migration Amendment (Removal and Other Measures) Bill 2024 – submission to Senate Legal and Constitutional Affairs Legislation Committee*, 12 April 2024: <https://lawcouncil.au/resources/submissions/migration-amendment-removal-and-other-measures-bill-2024> [1]-[6].

to be incompatible with Australia's international obligations and potentially inconsistent with the decision of the High Court in *YBFZ*.

10. We reiterate concerns expressed in previous relevant Law Council submissions that broadly-framed provisions, such as the proposed definition of 'removal pathway non-citizen' proposed to be inserted into section 5(1) of the Migration Act, are likely to capture more non-citizens than the cohort affected by the decisions in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs (**NZYQ**)*[3] and *YBFZ*. As explained below, the Bill could enable the removal of people who still have Ministerial intervention requests or even court challenges on foot, which is unacceptable.

11. This Bill goes beyond the ability to remove only those who may have had a visa cancelled on character grounds and be found to be owed protection, which is the ostensible basis for its introduction. It also fails to recognise the impact on those who have been released on Bridging Visa Rs after significant periods of detention. It would also cover transitory individuals in Australia who were transferred to Australia for medical treatment, including many parent/s and their children who have been here for years. If the Government chooses not to renew their Bridging Visas, and they have not been selected to take up the limited places in the New Zealand resettlement program (which we understand is due to close over the coming months), the consequences for this cohort are uncertain at best.

12. The 'integrity' of Australia's migration system, which is continually cited as justification for measures such as those contained in the Bill, is an important objective. However, it cannot provide blanket justification for measures which undermine the rights of vulnerable people.

13. The High Court's findings in *NZYQ*, and more recently *YBFZ*, centre on the proposition that, under the Commonwealth Constitution, punishment is properly the preserve of the Judiciary and not the Executive.[4] Measures such as those in the present Bill, which continually seek to test the bounds of the separation of powers doctrine, ought to be resisted on the basis that they may not sufficiently heed these important High Court judgments. These concerns are heightened given that there is such an abridged timeframe in which to assess the provisions for likely constitutional validity.

14. The Law Council has significant concerns that provisions of this Bill could be inconsistent with a number of Australia's international obligations, as well as rule of law principles, principles set out in *YBFZ*, administrative law principles and common law rights, including:

- the cessation of certain bridging visas by operation of proposed section 76AAA is accompanied by wholly inadequate notice requirements, contrary to procedural fairness principles;

- sharing vulnerable non-citizens' information with third country governments could constitute a breach of privacy rights (now recognised by the common law,[5] as well as international human rights law[6]) and put individuals at risk of *refoulement* under international refugee law;

[3] *NZYQ v MICMA* [2023] HCA 37.
[4] See the judgment of the plurality in *NZYQ* (Edelman J concurring) at [44]-[5] and *YBFZ* plurality at [81]-[88] (see further Edelman J's discussion "What is punishment?" at [124]-[132]).
[5] *WALLER Lynn (A Pseudonym) v BARRETT Romy (A Pseudonym)* [2024] VCC 962 (28 June 2024).
[6] ICCPR article 17.

- there are inadequate safeguards in the Bill in relation to third countries receiving returnees (and payments) from Australia;
- the provision of blanket immunity under proposed section 198(12) for things done (or omitted to be done) by officials—including foreign officials—in connection with removals may be contrary to the rule of law principles that no one is above the law and that all people should be held to account for breaches of the law, regardless of their rank or station;
- the revised 'community protection test' in proposed section 76E, drawing on the test inserted into Visa Subclass 070 by the recently-promulgated *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth), is potentially objectionable on two bases:
  - first, that it still may not be compatible with the High Court's ruling in YBFZ, and
  - second, that it is to be included in section 76E, which is headed 'Rules of natural justice do not apply to decision to grant certain bridging visas'. Such decisions, going as they do to life and/or liberty, should be subject to the fundamental administrative law principles of natural justice.
- the Bill has potentially significant financial implications, despite what is stated in the Explanatory Memorandum.

15. In the Law Council's view, a stronger focus on rehabilitation—including work rights to enable Bridging Visa holders to re-establish their lives and independence—would constitute a better approach than a series of rushed legislative proposals, the latest of which may yet be considered punitive. Non-punitive alternatives to keep track of Bridging Visa holders, such as reporting requirements, should also be prioritised.

Recommendations

1. **The Law Council recommends that the Bill be withdrawn.**
2. **If Recommendation 1 it is not accepted, to ensure that Bill receives proper scrutiny, the Bill should be subject to an inquiry period before the Senate Legal and Constitutional Affairs Legislation Committee of at least six weeks.**
3. **If Recommendations 1 and 2 are not accepted, the remaining recommendations in this submission should be implemented to ameliorate the Bill's most pressing issues.**

Commentary

Context—including previous relevant Law Council positions

16. The Law Council issued a media release shortly after the High Court's judgment in *NZYQ* was handed down in December 2023 entitled *Liberty, equality and proportionality must not be overlooked in response to High Court decisions.*[7] In it we acknowledged the legitimate community safety concerns raised by the order to release detainees, including detainees with character concerns. However, the Government's first response—the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth)—contained punitive and disproportionate measures which would be implemented over the next 12 months. Ankle bracelets, curfews and strict reporting conditions, with severe punishments for non-compliance, were the main focus of the Act—all in the name of 'effective management' of the relevant 'NZYQ-affected cohort'.[8]

17. The *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) passed shortly after the first Bridging Visa Conditions Act. Reinforcing the measures described above, it prescribed mandatory minimum sentences for breaches of relevant visa conditions. The Law Council opposes mandatory minimum sentences on principle, because they impose unacceptable restrictions on judicial discretion and independence, as well as undermining fundamental rule of law principles and breaching Australia's international human rights obligations.[9] The National Criminal Law Committee considers that the mandatory minimum sentences for short 12-month periods of imprisonment are designed to secure regulatory compliance and are inconsistent with sentencing principles including proportionality.

18. The Law Council made a submission on a third related piece of legislation—the Migration Amendment (Removal and Other Measures) Bill 2024 (Cth)—in April 2024.[10] That Bill has not passed at the time of writing.

19. Measures adopted in response to *NZYQ* have since been held to be punitive by the High Court in *YBFZ.* This latest decision has resulted in the Parliament again being asked to consider the Government's approach to removals.

20. Removing non-citizens without valid visas is within the Government's constitutional power. However, the High Court has made it abundantly clear that this cannot involve constitutional 'punishment'—whether it be indefinite immigration detention in circumstances where there is no foreseeable prospect of removal, or punitive conditions on removal pending visas such as ankle bracelets and overzealous monitoring measures.

21. The High Court's judgment in this matter should be respected and adequate time and scrutiny should be taken to ensure that legislation passed in response is likely to be held valid.

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[7] Law Council media release, 16 November 2023: <https://lawcouncil.au/media/media-releases/liberty--equality-and-proportionality-must-not-be-overlooked-in-response-to-high-court-decision>.
[8] Migration Amendment (Bridging Visa Conditions) Bill 2023, *Explanatory Memorandum*.
[9] See Law Council, *Policy Discussion Paper on Mandatory Sentencing* (May 2014).
[10] Law Council submission on the Migration (Removal and Other Measures Bill) of 12 April 2024: <https://lawcouncil.au/resources/submissions/migration-amendment-removal-and-other-measures-bill-2024-April>.

22. Alternatives should also be considered in this context. Other nations have adopted various mechanisms for dealing with non-citizens who are not owed protection under international refugee law, or who have visas cancelled due to the commission of offences.[11] Mandatory, indefinite detention of these individuals is not an approach consistent with either the Constitution or Australia's international human rights obligations, and appropriate alternatives, including those drawing on international examples, should have been evaluated and adopted many years ago.

Process

23. In our submission on the Migration Amendment (Removal and Other Measures) Bill 2024, we observed relevantly:

> *The Law Council has ongoing concerns about the Parliamentary process applied to the Removal Bill, which echoes responses to the NZYQ v Commonwealth decision. While we welcome Parliament's referral of the Removal Bill to the Committee, the inquiry process remains heavily truncated, occurring over nine business days. It is well short of what is needed to ensure proper democratic scrutiny. For this reason, the Law Council's remarks in this submission should be considered preliminary and subject to amendment or clarification.*
>
> *It is very disappointing that the Australian Government has failed to consult with relevant stakeholders, including the legal profession and refugee organisations and communities, before introducing the Removal Bill to Parliament. Such consultation is particularly important for legislation of this kind, which has a significant impact on human rights and individual liberties, as well as consequences for the operation of Australia's migration program and foreign policy agenda.*
>
> *The focus on improving the integrity of the migration system must be balanced with ensuring the process is fair and humane. The Australian Government has also failed to establish why it needed to be rushed and of such an urgent nature, given the problems outlined by the Government are not new.*[12]

24. The earlier Bills passed in response to the *NZYQ* decision (described in the Context section above) were subject to even more abbreviated and unsatisfactory processes, not even allowing time for reports from scrutiny committees before their passage,[13] and permitting no real opportunities for public or stakeholder input.

25. These were not emergency Bills, the rushed passage of which might be justified in wartime, or perhaps in the wake of some kind of national disaster. The *NZYQ* judgment overruled the decision in *Al-Kateb*,[14] finding that individuals cannot be detained indefinitely where there is no reasonable prospect of removing them from

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[11] See eg Human Rights Watch, *Dismantling Detention: International Alternatives to Detaining Immigrants* (Report, 3 November 2021): <https://www.hrw.org/report/2021/11/03/dismantling-detention/international-alternatives-detaining-immigrants>.
[12] Edited extract from the submission.
[13] See, in relation to the Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023, Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* and Joint Committee on Human Rights, *Report 1 of 2024*. In relation to the Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023, Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* and Joint Committee on Human Rights, *Report 1 of 2024*.
[14] *Al-Kateb v Godwin* [2004] HCA 37. On the erroneous nature of this decision, see eg McIntyre, 'The Long Overdue Fall of *Al-Kateb*' (*Verfassungsblog*, 13 December 2023): <https://verfassungsblog.de/the-long-overdue-fall-of-al-kateb>.

Australia in the foreseeable future, because that amounts to administrative punishment.

26. Rather than accept this constitutional reality, the legislative responses to *NZYQ* and *YBFZ*—including the present Bill—have attempted to 'regain control' by rushing through yet more punitive measures. This is a fundamentally misguided approach, and one which is highly likely to be challenged again. To lessen the likelihood of successful legal challenges to this and related legislation, the Law Council makes the following recommendations:

Recommendations

4. **Absent a national emergency, legislation affecting rights and liberties should always be subject to proper parliamentary scrutiny and inquiry processes. These processes must be given sufficient time and resources for the legislation to be evaluated properly.**
5. **The Australian Government should commit to genuine consideration of the reports of Parliamentary scrutiny and inquiry processes, with a view to proposing amendments to improve legislation in question before it passes.**

Breadth Concerns

27. Broadly-framed provisions, such as the proposed definition of 'removal pathway non-citizen' to be inserted into section 5(1) of the Migration Act, would capture many more non-citizens than the cohort affected by the decisions in *NZYQ* and *YBFZ*.[15]

28. In practice, the Department of Home Affairs will grant Bridging Visa Es on departure grounds, without departure conditions imposed, to a variety of different applicants who have a range of different circumstances and who are not, despite that grant, on a 'removal pathway'. At present, the proposed amendments at section 5(1) would capture these cohorts.

29. Such a definition could also capture those with pending Ministerial intervention requests or pending Court matters that challenge Ministerial intervention non-referral decisions (on the basis of a *DCM20*/*Davis*-type error and who are not otherwise eligible for a Bridging Visa in association with those judicial review proceedings.)[16] If the Bill proceeds, the definition should be amended to ensure those with pending Ministerial intervention requests or judicial review matters are not caught by these provisions.

30. The proposed amendments to section 197D(2) could also capture these cohorts and should be redrafted to apply only to unlawful non-citizens with no outstanding proceedings on foot. We note that the purpose of existing sections 197C and 197D of the Migration Act is to prevent *refoulement* (removal where there is a real risk of

[15] See Ghezelbash and Talbot, 'Another rushed migration bill would give the government sweeping powers to deport potentially thousands of people', *The Conversation*, 18 November 2024: <https://theconversation.com/another-rushed-migration-bill-would-give-the-government-sweeping-powers-to-deport-potentially-thousands-of-people-243365>.
[16] *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Ors; DCM20 v Secretary of Department of Home Affairs & Anor* [2023] HCA 10.

harm).[17] Exclusions from protections against *refoulement* should not be expanded lightly.

31. In addition, the Explanatory Memorandum states that:

> *The definition of **removal pathway non-citizen** is not intended to cover other holders of the Subclass 050 (Bridging (General)) visa, which is also used for a variety of purposes other than as a final step before departure from Australia.*[18]

32. It has not been made sufficiently clear in the actual definition proposed in the Bill that this includes individuals who have Ministerial intervention or judicial review matters pending. Nor does this explanation indicate that the Department processes in practice (as explained at paragraph [28] above) are properly understood.

33. There is concern that if a Bridging Visa (Subclass 050) is not extended for certain cohorts of individuals such as 'transitory persons in Australia', such persons might also be subject to this Bill. This cohort has experienced significant hardship and pain (both physically and mentally) from the periods spent in offshore immigration detention. Some are near completion of schooling or have just finished and live in limbo or rely on medical treatment due to long-term and enduring injuries and harm suffered as a result of offshore detention.

Recommendation

6. The definition of 'removal pathway non-citizen' in proposed section 5(1), and the references to this cohort in the proposed amendments to section 197D, should be clarified to exclude those who have Ministerial intervention or court proceedings on foot, or transitory persons, persons who may previously have had a protection finding in relation to their cases, or others who may not have had visas renewed and who could be captured by this Bill's provisions.

Constitutional Concerns

34. The proposed amendments to section 76E of the Migration Act would underpin the recently-introduced revised 'community protection test'.[19] Section 76E applies to a decision to grant a non-citizen a Subclass 070 (Bridging (Removal Pending)) visa if the visa (the first visa) is subject to prescribed conditions and at the time the visa is granted, there is no real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future. After making such a decision to grant a visa, subject to prescribed conditions, the Minister must give the non-citizen notice and provide an opportunity for the affected non-citizen to make representations as to why the first visa should not be subject to one or more of the prescribed conditions.

35. In the context of the non-citizen's submissions, the Minister must grant the non-citizen a second visa that is not subject to the prescribed conditions if the test in paragraph 76E(4)(b), as amended, is satisfied. Proposed section 76E(4)(b) would provide:

[17] See further OHCHR, *The principle of non-refoulement under international human rights law* (2018).
[18] Explanatory Memorandum, [29].
[19] Explanatory Memorandum, 21-22.

(b) either:

(i) the Minister is not satisfied, on the balance of probabilities, that the non-citizen poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; or

(ii) if the Minister is satisfied, on the balance of probabilities, that the non-citizen poses the substantial risk mentioned in subparagraph (i)—the Minister is not satisfied, on the balance of probabilities, that the imposition of that condition, or those conditions, is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.

36. The Government explains that the new test 'requires consideration of risk of particular criminal conduct (serious offence)[20] occurring and the nature, degree and extent of harm the BVR holder may pose to any part of the Australian community (poses a substantial risk)'.[21] However, there remains a risk that this amended power does not fall within the constitutional limitations of the Commonwealth Parliament deriving from the separation of powers established by Chapter III of the Constitution. That principle requires the exclusive assignment of authority to impose punishment to the judiciary.

37. Given that the plurality opinion in *YBFZ* already establishes that the character of a power to impose curfews or restrictive ankle monitoring devices is prima facie punitive[22]—in the constitutional context, the critical question is whether there is justification for this non-juridical exercise of power interfering with liberty or bodily integrity. This requires examining if the prima face punitive power is 'reasonably capable of being seen to be necessary' or 'reasonably appropriate and adapted' for a legitimate and non-punitive purpose.[23] Importantly, this inquiry is concerned with substance and not mere form.[24]

38. The Law Council is concerned that this revised test may still not be compliant with the High Court's decision in *YBFZ* because there is limited evidence to suggest that the proposed amendments to section 76E of the Migration Act are reasonably appropriate and adapted to a non-punitive purpose. In this regard, many of the observations made by the plurality in relation to the impugned regulations apply with equal force to this amended scheme:

> *84. While it is not essential to so observe, even if protection of the Australian community from the risk of harm arising from future offending were accepted to be a legitimate and non-punitive purpose, cl 070.612A(1)(a) and (d) are not reasonably capable of being seen as necessary for that purpose.*

[20] New subsection 76E(7) provides that in section 76E, the term serious offence (relied on in new paragraph 76E(4)(b)) has the same meaning as in Part 070 of Schedule 2 to the Migration Regulations 1994. That definition encompasses an offence against a law of the Commonwealth, a State or a Territory punishable by imprisonment for life or for a period, or maximum period, of at least 5 years including certain specified offences, for example, sexual assault domestic or family violence (including in the form of coercive control).
[21] Migration Amendment (Bridging Visa Conditions) Regulations 2024, *Explanatory Statement*, 1-2.
[22] See for example, the plurality characterised the substance and effect of the curfew condition as prima facie punitive: *YBFZ* [52] and in relation to the monitoring condition: [59] – [62] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
[23] Ibid, [18].
[24] Ibid, [17].

> *85. The required state of satisfaction in cl 070.612A(1)(a) and (d) involves a positive state of mind about a negative stipulation ("the Minister is satisfied that it is not reasonably necessary to impose that condition") so that if the Minister cannot be so satisfied the conditions must be imposed, meaning that the provision resolves all doubt and uncertainty in favour of the imposition of the conditions. It does so, moreover, in circumstances where the person's right to make representations against the conditions being imposed exists only after the conditions have been imposed. In the case of the power to impose the impugned conditions, therefore, the power can be exercised even where it cannot be and has not been established that the imposition of the condition is reasonably necessary for the achievement of the purported legitimate non-punitive purpose because the default position is that the Minister imposes the condition. Indeed, there may be cases where the Minister never has the information necessary to meaningfully assess whether the imposition of the condition is not reasonably necessary for the protection of the Australian community. In these cases, the condition will generally remain imposed for up to 12 months, notwithstanding that it is not reasonably necessary to impose the condition to protect any part of the Australian community. The law is framed such that, Ch III aside, the consequences set out above may result.*

39. The Law Council notes that the new test is highly likely to be the subject of a further challenge.

40. As a result of the truncated inquiry period, the Law Council has not had the opportunity to seek considered constitutional advice as to the likelihood that the revised test will be 'capable of being seen as necessary' for the purpose of protecting the community from 'the risk of harm arising from future offending'.

41. Given that the Government's rushed attempt 12 months ago to respond to the *NZYQ* decision resulted in the original test being held to be invalid by the High Court, the Law Council queries the Government's decision to again rush similar provisions through the Parliament without appropriate scrutiny.

42. Putting aside issues of constitutional validity, the Law Council has long considered that when the state imposes a restriction on a person's liberty, not for punitive purposes but in order to pre-empt and prevent criminal activity, it may only do so where the restrictive measures, such as the imposition of a curfew or ankle monitoring device, have been ordered by a court.[25] There should be an opportunity the affected person to make submissions and adduce contrary evidence. A court should only issue an order of this kind if the court is satisfied, to a high degree of probability, that such an extraordinary measure is necessary and reasonable, for example to prevent the commission of a relevant serious offence. A decision by the Minister as proposed under the Bill's provisions fall short of these parameters.

[25] Law Council of Australia, *Policy Statement on Principles Applying to Detention in a Criminal Law Context* (22 June 2013).

Recommendation

7. **The proposed 'community protection test' in section 76E and associated Regulations for Visa Subclass 070 should be reconsidered in light of *YBFZ*.**
8. **Restrictions on a person's liberty aimed with a preventative purpose, of the nature proposed by the Bill, should only be authorised where the measure has been authorised by a court.**

Administrative Law Concerns

43. The exclusion of the application of the principles of natural justice (known in more recent jurisprudence as procedural fairness) for decisions under the Migration Act is not a novelty. Indeed, as part of its comprehensive review *Traditional Rights and Freedoms: Encroachment by Commonwealth Laws,* the Australian Law Reform Commission observed that visa grants and cancellation powers are one of the three main areas in which Commonwealth law encroaches on this fundamental administrative law principle (the others being maritime powers and corporate/commercial regulation).[26]

44. There has been tension between the Executive's desire to have the final say in migration decisions—regardless of the courts' view of the fairness of the processes behind those decisions—and the need to provide for fair decision-making processes at least since the High Court decision in *Kioa v West* in 1985.[27] In a line of jurisprudence leading up to the decision in *Saeed v MIC*[28] in 2010, the High Court made it abundantly clear that decisions affected by serious procedural defects were susceptible to invalidity findings.

45. However, the High Court has not held that the rules of procedural fairness—fundamental though they may be to the integrity of administrative decision making—are constitutionally-entrenched.[29] As such, they may be overridden by excluding provisions such as section 76E (along with sections 51A, 97A, 127A, 133A, 133C, 134A, 140K, 198AB, 198AD, 198AE, 357A, 500A, 501, 501A and 501BA) of the Migration Act. It has been observed that the obstacles to their exclusion or even abolition are therefore likely to be political, rather than judicial.[30]

46. With this in mind, the Law Council observes that the Parliament has a responsibility to consider very carefully any new provisions—such as the proposed revisions to section 76E—that would further abrogate the rules of procedural fairness. In the regrettable absence of a Commonwealth Human Rights Act,[31] administrative law principles are the strongest bulwark this jurisdiction possesses against Executive overreach, and they should not be displaced lightly.

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[26] *ALRC Report 129*: <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/14-procedural-fairness-2/laws-that-exclude-procedural-fairness>; [14.37-14.82].
[27] *Kioa v West* (1985) 159 CLR 550.
[28] *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252.
[29] See Groves, 'Exclusion of the Rules of Natural Justice' (2013) *Monash University Law Review* 285 at 298-302.
[30] Ibid, 302.
[31] See Law Council, *Federal Human Rights Charter* (Policy Paper, 2020): <https://lawcouncil.au/resources/policies-and-guidelines/federal-human-rights-charter>.

Proposed Section 76AAA

47. Proposed subsection (6) of section 76AAA would provide that a Bridging Visa ceases once an offer is made to accept the holder of the visa by a foreign country even if that offer is 'subject to the non-citizen doing one or more things required by the foreign country that the non-citizen **is capable of doing** before entering the country.'

48. It is unclear how the non-citizen's capability is to be established. It would be better, and more readily capable of judicial interpretation, if this subsection were amended to say 'reasonably capable'. In addition, as the provision is currently drafted, there is nothing in it to say that the requirement is limited to the applicant taking action personally, as opposed to the applicant convincing someone else to do or achieve something.

49. Proposed subsection (2) of section 76AAA would require the Minister to give notice of cessation of certain bridging visas to affected individuals. It is highly unsatisfactory that, under proposed 76AAA(3)(b), such notice could be given orally.

50. Furthermore, the notice of cessation need not even be actually received (see proposed s 76AAA(4)(a)), and need not comply with the rules of natural justice (proposed s 76AAA(5)). This means the notice has no prescribed content, which is particularly problematic when it is considered that many of the affected individuals may require translated and/or otherwise accessible notifications. At the very least the notice should include matters such as the specific country which has offered to accept the person, and any requirements that the country has stipulated for the person to do under proposed 76AAA(6).

51. For an event which is potentially devastating for an individual—resulting in the loss of their liberty and removal from the country—this minimal notice requirement is wholly insufficient.

Recommendations

9. **If, contrary to the Law Council's position, section 76AAA(6) is to be included, it should be amended to require that a non-citizen be 'reasonably capable' of doing things required by a foreign country, rather than merely 'capable'.**
10. **If there is to be a provision that prescribes the cessation of a visa once another country has agreed to accept the visa holder, the notice requirement linked to the cessation should be more formal (requiring written notice; that it be effectively communicated to the individual in a form they understand), and include certain minimum content including the foreign country involved and any specified things that the person is required by that country to do.**
11. **Additionally, there should be a subsection providing for the notice and requirement(s) to be subject to review.**

52. We note that the Hon Allegra Spender MP has proposed an amendment[32] to limit the application of proposed section 76AAA to those who have committed serious

[32] Allegra Spender MP, Proposed amendment (especially proposed amendments (1)-(3)).

offences, the adoption of which would at least improve the Bill's appropriateness and proportionality.

Human and Common Law Rights Concerns

Criminal History Information

53. The amendments would authorise the use and disclosure of criminal history information, including information on spent convictions, for a range of purposes, including sharing with foreign countries to facilitate removals.[33]

54. There are two separate but related problems with these amendments.

55. First, such information sharing with foreign countries could put individuals' personal safety at risk and should be carefully circumscribed. Proposed section 501M, in conjunction with the related proposed definition of 'criminal history information' in section 5(1), is far too broad in its application.

56. In particular, charges, findings not resulting in any conviction and spent convictions should not be disclosed (and indeed should not justify removal—a matter addressed separately below). There must be disincentives for disclosures that would place individuals at risk, or Australia will risk facilitating breaches of international human rights obligations (see further comments on proposed immunities below).

57. Second, the Explanatory Memorandum is misleading when (at paragraph 67) it states that the purpose of the provision is to 'put beyond doubt that the Minister, officers and any other persons performing functions or providing advice under the Migration Act and Migration Regulations may collect information about a person's criminal history, including spent convictions'.

58. The High Court found in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 that it was unlawful for the Minister and the Department to take into account offences which courts had decided should not result in a recorded conviction. The reasoning in *Thornton* also applies to spent convictions. The purpose of proposed section 501M appears to be to reverse the effect of *Thornton*. Accordingly, the Explanatory Memorandum's implicit claim that the Minister already has the power to 'collect information about a person's criminal history, including spent convictions', is misleading. Contrary to the Explanatory Memorandum, the Minister does *not* presently have the power to take into account, including for the purposes of the 'character' provisions, offences in respect of which the sentencing court has decided not to record a conviction, or spent convictions.

59. There are sound policy reasons why this should remain the case, consistent with what the High Court has found. The very purpose of a court not recording a conviction, or spent convictions regimes in the various states, is to encourage rehabilitation and distinguish between offending that is serious and that which is less serious. To allow the Minister to take into account offending in respect of which a court has ordered that there not be a conviction recorded, or spent convictions, defeats the whole purpose of these sentencing regimes. It causes a conflict with what a sentencing court has decided, and, importantly, the underlying policy rationales which the various State Parliaments have thought fit to enact.

[33] Explanatory Memorandum, [66]-[67].

60. In fact, as presently drafted, the provision is so broad that it would even allow the Minister and the Department to take into account offending of a person who has been pardoned.

61. At the very least, the proposed retrospective authorisation of collection and use of information about offences in respect of which a court has ordered there not be a recorded conviction, or spent convictions, should not be enacted. This is because persons who will be affected will have conducted their criminal defences, including decisions to choose to plead guilty knowing that there would not be a conviction recorded or an offence immediately made spent, on the basis of the law that applied, which was that their offending would then not be taken into account in relation to their immigration status. Had these people known that their no-conviction or spent offending would be taken into account for immigration purposes, they may well have decided to plead not guilty, go to trial, and have ultimately been acquitted.

Recommendations

12. If there is to be an authorisation of the use and/or disclosure of 'criminal history information' in the Bill, it should be redrafted to exclude anything short of convictions (excluding spent convictions) for serious offences (as defined in the Migration Regulations for the purposes of Visa Subclass 070).

13. There should be a specific requirement on anyone availing themselves of this authorisation to ensure that it does not put an individual's personal safety at risk.

Third Country reception arrangements

62. There appears to be no obligation on countries that agree to accept returnees under the regime established by the Bill. These countries should be required, at a minimum, to be parties to the Refugees Convention[34] and/or the International Covenant on Civil and Political Rights,[35] as was the case in 2011 under the so-called 'Malaysia Solution'.

63. At the very least, the Bill should make minimum stipulations for the eligibility of third countries making these agreements—for example, that they do not carry out the death penalty, do not allow for *refoulement* to the country from which they sought protection, do not criminalise acts or behaviour such as same-sex relationships etc that could potentially put a person at risk of the same harm as they feared from the country from which they sought protection originally.

[34] Refugees Convention, opened for signature 28 July 1951, 198 UNTS 137 (entered into force 22 April 1954).
[35] ICCPR, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Recommendation

14. The Bill should specify that foreign countries agreeing to accept returnees under these new arrangements must meet minimum standards, including:

a. being parties to, at a minimum, the Refugees Convention and the International Covenant on Civil and Political Rights;

b. not having (or carrying out) the death penalty; and

c. committing to maintaining the privacy of any personal information of returnees that is disclosed as part of the removal process.

Rule of Law Concerns

Exclusion of Liability for Officials

64. Exclusion of all civil liability for officials acting or making removal-related decisions, as proposed by the Bill to be implemented into sections 198 and 198AD, would represent an attempt to shield officials from liability in circumstances that could facilitate rights breaches.

65. The Bill seeks to excludes liability in a number of circumstances as outlined in proposed subsections 198AD(11)-(13). It would appear to be an attempt to deny a duty of care to persons subject to offshore processing or removal to a third country. This is despite the fact that, since the inception of offshore processing, many individuals have been compensated due to the significant harm caused as a result of such detention. If for example, a person was injured or killed during the process of removal or on arrival to a third country, was detained in an offshore processing centre, and a duty of care was owed in relation to that person, the person or their family would be denied the ability to claim for such neglect.

66. There are already limited exclusions of civil liability in the Migration Act, for example in sections 140K and 245AU. However, those exclusions relate to officers of bodies corporate; not to Government officials.

67. Section 245AYM immunises officials from liability for publishing information about employers who have been prohibited from sponsoring migrant workers, but once again this is a limited protection which is likely to be proportionate to its aim of preventing defamation or related actions from businesses.

68. The intent behind these proposed provisions is not apparent from the Explanatory Material. However, it is presumed that the Government sees legal action against officials for their conduct in the course of removals as something other than genuine attempts to assert individuals' legal rights.

69. As set out in the Law Council's *Policy Statement: Rule of Law Principles,* 'no one should be regarded as above the law and all people should be held to account for a breach of the law, regardless of rank or station.'[36] Legislation excluding officials' liability for potential rights breaches threatens to undermine this important principle.

[36] Law Council, *Policy Statement: Rule of Law Principles* (2011): <https://lawcouncil.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf>, 2.

Good faith requirement

70. The good faith requirement for official action in proposed subsections 198AD(11A) and (11B) only applies to Commonwealth officials; not 'any person in a regional processing country or another foreign country' to whom these immunities would also apply. This is a potential oversight that could provide an overly broad immunity to foreign actors dealing with returned individuals. If the drafting deliberately excludes foreign actors, then it would appear to tacitly acknowledge the harm that is likely to be caused by the relevant removals.

Retrospective validation

71. The Bill would insert section 501M into the Migration Act, with accompanying application provisions,[37] to 'clarify' that past collection, use and/or disclosure of personal information, so long as it was directly or indirectly related to the exercise of *any* power under the Migration Act or Regulations, is deemed to be valid.

72. Such retrospective authorisation of actions that might otherwise breach laws such as the *Privacy Act 1988* (Cth) or Part VIIC of the *Crimes Act 1914* (Cth) is not an offence provision that falls within the key rule of law principle that *the law must be both readily known and available, and certain and clear*.[38] Nevertheless, retrospective authorisation of otherwise unlawful acts goes against the spirit of this important rule, and the potential for abuse of such authorisation is clear.

Recommendation

15. The provisions of the Bill creating immunity for privacy breaches should be removed.

16. The provisions of the Bill seeking to remove liability for harm that might be caused in relation to steps taken to remove people from Australia should be removed.

17. The provisions of the Bill that seek to remove liability for harm that is caused by the removal of the person to a third country should be removed.

Financial Concerns

73. The Law Council queries the statement in the Explanatory Memorandum for the Bill state that '[t]he amendments in the Bill are not considered to have any financial impact'.[39] There is evidently a financial impact from these amendments in terms of the costs to set up and maintain third country reception arrangements. The costs of removal are high, and they are unlikely to be recouped from non-citizens who are removed to any third country. As an example, practitioners report that a recent removal of a non-citizen cost AUD$100,000 (principally due to the cost of a dedicated charter flight). Such costs are unlikely to be repaid, and will be borne by the Commonwealth. They should be clearly acknowledged by Government.

74. In addition, proposed subsection 198AHB(2) authorises payments to third countries. Under subsection 198AHB(5), these payments can be based on non-binding

[37] Items 3 & 4 of the Bill.
[38] Law Council, *Rule of Law Principles*, March 2011: <https://lawcouncil.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf>, 2.
[39] Explanatory Memorandum, 3.

agreements, and there appears to be no real limitation on their use. It should be noted by Parliament that, according to practitioners experience, these payments are likely to be significant in dollar terms.

75. Practitioners have raised legitimate concerns that those removed to third countries could be in the same position as those on Papua New Guinea who have had their funding cut for accommodation with it being unclear who was responsible under opaque arrangements.[40]

76. The financial implications of the Bill and Condition 8618 under the associated Regulations are also questionable for affected individuals. One of the relevant conditions imposed by the Migration Amendment (Bridging Visa Conditions) Regulations 2024 (Cth) is a need to notify the Department of any debts that total AUD$10,000.00 or more.[41] It is unclear why this requirement exists. A debt of that amount is not an indication in and of itself of criminal activity. If this condition is to remain, it should be clarified that it does not apply to debts for migration related litigation because the Department would be aware of a non-citizen having a debt to the Commonwealth for that litigation. It is common for litigation to exceed that amount when the Minister seeks to recover costs where a non-citizen has been unsuccessful in litigation. Further, given the cohort that could be affected by this Bill, a debt may not be unusual and this condition appears to be a pretext for refusing the grant of such a visa, if a relevant debt is disclosed. It is unclear from the Bill or the Explanatory memorandum why this would be justified.

Recommendation

18. The provisions of the Bill creating financial liabilities for the Commonwealth should be clearly identified and acknowledged.

19. Appropriate limitations should be placed on Government spending on third country reception arrangements, in line with the Public *Governance, Performance and Accountability Act 2013* (Cth).

20. The requirement for Bridging Visa holders to report debts of $10,000 or more should be reconsidered.

Questions for Government

77. In the limited time available, we have not been able to consider all of the implications of this Bill fully. Some important contextual questions for Government have arisen. These include:

- There is now a Community Protection Board comprising Australian Border Force, Department of Home Affairs and former law enforcement officials.[42] How do this Board's decisions feed into the risk management measures established by this and related Bills, and what (if any) accountability measures apply to decisions made by this Board?

[40] Doherty and Dumas, 'Refugees in PNG told they will be evicted after Australian-sponsored housing bills not paid', *The Guardian*, 29 September 2023: <https://www.theguardian.com/australia-news/2023/sep/29/papua-new-guinea-refugees-evictions-unpaid-bills-rent>.
[41] *Migration Regulations 1994* (Cth), Schedule 2, 070.612A(1), as amended.
[42] Minister for Home Affairs, *Community Protection board established to keep Australians safe* (Media Release, 12 December 2023): <https://minister.homeaffairs.gov.au/ClareONeil/Pages/community-protection-board-established-keep-australians-safe.aspx>.

- Why does the Government consider Bridging Visa conditions less likely to be punitive, such as reasonable reporting requirements, to be insufficient to manage the NZYQ-affected cohort? Why is this not explained in the Explanatory Materials for this and related legislation?

- This Bill allows cancellation of the visas of Bridging Visa holders on a removal pathway once permission has been granted for them to enter and remain in 'another country'. Does this mean that, if any other country agrees to accept the relevant individuals, every person on a removal pathway can be re-detained?

- Is the Bill an attempt to avoid the Government owing a duty of care to those who may be transferred to third countries where harm is caused to that individual either in the removal process, being removed to such a third country or in that third country?

Recommendation

21. The questions in paragraph [77] above be put to Government. If satisfactory answers are not forthcoming, there would be additional justification for withdrawal of the Bill.