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Migration Amendment Bill 2024

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Key points

- The Migration Amendment Bill 2024 (the Bill) will amend the *Migration Act 1958* to introduce new measures for removing certain non-citizens from Australia. This includes enabling the Government to take actions regarding 'third country reception arrangements' to facilitate the removal of non-citizens to a foreign country.
- The Bill is set in the context of the High Court of Australia's judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, which found that indefinite immigration detention was unconstitutional because it was punitive.
- The Bill introduces measures to support the removal arrangements, some of which, including immunity protections for the Commonwealth and broad powers to collect and disclose information, will extend beyond the 'NZYQ cohort'.
- The Bill also responds to the decision of the High Court in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* regarding the unconstitutionality of imposing curfew and electronic monitoring conditions on Bridging (Removal Pending) visa holders, also finding this was punitive. The Bill introduces a new test which the Minister must apply before such conditions are imposed.
- Commentary from legal experts questions whether the test regarding the imposition of the conditions resolves the matter of unconstitutionality, and suggests the legislation will be challenged.
- Noting commentary on the Migration Amendment (Removal and Other Measures) Bill 2024, which also responded to *NZYQ*, stakeholders are likely to raise significant objections to the present Bill on the grounds of human rights concerns.
- At the time of writing, the Bill had not been referred to or reported on by any parliamentary committees; however, the Opposition has called for a parliamentary inquiry.

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Date of introduction: 7 November 2024

House introduced in: House of Representatives

Portfolio: Home Affairs

Commencement: the day after Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as of November 2024.

Purpose of the Bill

The purpose of the Migration Amendment Bill 2024 is to amend the *Migration Act 1958* to:

- enable the Government to take certain actions in order to enter into 'third country reception arrangements' with foreign countries for the purpose of removing non-citizens to these countries
- provide that where a Bridging (Removal Pending) visa holder is granted permission to enter and remain in a foreign country subject to these arrangements, their visa is ceased in order to facilitate their removal
- empower the Minister to reverse a protection finding in relation to a lawful non-citizen who is on a removal pathway
- establish broad civil liability immunity for the Commonwealth and its officers (including the Minister) with respect to the removal of a person from Australia under sections 198 and 198AD of the Act
- provide 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)
- retrospectively validate previous disclosures of a person's criminal history information and
- respond to the High Court's decision in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* by requiring the Minister, before imposing certain conditions on visa holders, to first consider the level of risk to the community and the need for such conditions to mitigate the risk.

Background

Power to remove non-citizens from Australia

Divisions 7 and 8 of Part 2 of the *Migration Act* provide for the mandatory detention and mandatory removal from Australia of an 'unlawful non-citizen', being someone who is a non-citizen in Australia who does not hold a valid visa.

While removal can be effected on a 'voluntary' basis under subsection 198(1), if a person does not cooperate with the processes to remove them to their country of origin, they may be removed involuntarily. According to the Department of Home Affairs, in 2022–23 there were 2,184 unlawful non-citizens voluntarily removed from Australia and 90 unlawful non-citizens were removed involuntarily (p. 48).

However, certain countries refuse to accept involuntary repatriation of their citizens and may, for example, refuse to issue travel or identity documents for the person (as noted in the Explanatory Memorandum to the Migration Amendment (Removal and Other Measures) Bill 2024, p. 22).

The NZYQ decision and subsequent legislative responses

High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*

On 8 November 2023, the High Court of Australia in the case of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (NZYQ decision) ordered the release of an individual known as NZYQ from immigration detention. NZYQ had been in immigration detention since 2018 after his temporary protection visa was cancelled following conviction for child sex offences. Because NZYQ is a stateless Rohingya person from Myanmar, he could not be removed to his country of origin. This meant he faced the prospect of indefinite detention in Australia.

In making orders for his release, the High Court ruled that NZYQ's detention was unlawful 'by reason of there having been and continuing to be no real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future'. In its judgment (which was released following the initial orders) the High Court found that indefinite immigration detention was unconstitutional because it was punitive – the *Constitution* sets out that punishment may only be ordered by a court, and not, as in this case, by powers under the *Migration Act*. The High Court unanimously overruled its 2004 finding in *Al-Kateb v Godwin*, where a 4–3 majority of the Court upheld the validity of provisions of the *Migration Act* requiring the continuing detention of unlawful non-citizens even where their removal was not reasonably practicable in the foreseeable future.

Passage of subsequent legislation

On 18 November 2023, the *Migration Amendment (Bridging Visa Conditions) Act 2023* commenced, which provided for the grant of bridging visas (specifically Subclass 070 (Bridging (Removal Pending)) Visa R (BVR)) to non-citizens in the 'NZYQ-affected cohort' with certain monitoring conditions placed on them (electronic monitoring and curfew conditions). A person commits an offence if they breach a relevant condition, and the court must impose a sentence of imprisonment of at least 1 year.

On 8 December 2023, the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* commenced, which provided for new and amended conditions for holders of BVR (see the Bills Digest for the Bill as introduced). The Act also introduced a new Community Safety Order scheme. Under this Scheme, the Minister can apply to a state or territory Supreme Court for a community safety detention order or community safety supervision order in relation to non-citizens who have no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future. A Community Protection Board was established to provide recommendations to the Minister on the management of individuals released from immigration detention into the community.

Migration Amendment (Removal and Other Measures) Bill 2024

On 26 March 2024, the Government introduced the Migration Amendment (Removal and Other Measures) Bill 2024 (the Removals Bill). This Bill was introduced ahead of a High Court decision on the appeal of an Iranian citizen in immigration detention, known as ASF17, who refused to engage with the removal process to that country. The High Court's decision was

handed down on 10 May 2024, unanimously upholding the validity of his continued detention.

The Removals Bill would allow the Minister to issue written directions to a 'removal pathway non-citizen' to facilitate their removal from Australia, introduce criminal penalties for refusing or failing to comply with such directions, and empower the Minister to reverse a protection finding in relation to a lawful non-citizen who is on a removal pathway.

The Government intended to pass the Removals Bill in the week it was introduced; however, it was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry with the support of the Opposition and the crossbench. The Committee tabled its report on 7 May 2024. While the Committee recommended that the Bill be passed, Coalition Senators who participated in the inquiry, the Australian Greens and Senator David Pocock all prepared dissenting reports.

The Standing Committee for the Scrutiny of Bills (pp. 2–9) and the Parliamentary Joint Committee on Human Rights (pp. 16–43) both noted a range of issues with the scope, provisions and speed of anticipated passage of the Removals Bill.

Key stakeholders commented on the broad scope of the Removals Bill and the significance of the amendments, questioning whether the measures are proportionate or effective. The measures raised widespread concern, particularly amongst community groups and service providers on the consequences the Bill would have on affected individuals and social cohesion (see the Bills Digest for the Removals Bill and the Legal and Constitutional Affairs Committee report for further details).

The Removals Bill passed the House on 26 March 2024 and was introduced to the Senate on 27 March 2024, and as at the time of writing had not progressed to the second reading debate in the Senate.

High Court decision in *YBFZ v Minister for Immigration*

On 6 November 2024, the High Court handed down its decision in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 (YBFZ decision).

The matter concerned a stateless Eritrean man who arrived in Australia on a refugee visa, which was subsequently cancelled upon his conviction for a serious offence. Following the NZYQ decision, he was released from immigration detention and given a BVR which included the monitoring device condition (8621) and the curfew condition (8620). These conditions (along with conditions 8617 and 8618 which relate to financial monitoring) were required to be imposed on all members of the NZYQ cohort unless the Minister was satisfied that it was not reasonably necessary to impose the conditions for the 'protection of the Australian community' (see subclause 070.612A(1) of Schedule 2 to the Migration Regulations). YBFZ was subsequently charged with failing to comply with these conditions and challenged the constitutional validity of the conditions in the High Court. The challenge argued that the imposition of the conditions was punitive and therefore infringed on the judicial power of the Commonwealth vested exclusively in the judiciary by Chapter III of the *Constitution*. Under the *Constitution*, punishment is an exclusively judicial power.

In a majority judgment (Gageler CJ, Gordan, Gleeson, Jagot JJ), the High Court held that the imposition of each of the curfew and monitoring conditions on a BVR is prima facie punitive

and cannot be justified. While a law may be prima facie punitive, it may still be valid 'if the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose' [para 64]. The court held that the stated purpose of 'protection of any part of the Australian community' is expressed at a high level of generality [para 65] and stated:

> The fundamental difficulty with cl 070.612A(1) is that protection of every part of the Australian community from any harm at all, like the protection of the Australian community as a whole, is "a concept of such elasticity that it is not necessarily inconsistent with the imposition … of a criminal punishment following an adjudication of criminal guilt – a function which lies in the heartland of judicial power". Clause 070.612A(1) therefore casts its net over all members of the class in circumstances where escape from this net depends on the Minister forming an opinion which the Minister is legally entitled not to form in a broad and flexible, as well as uncertain and unpredictable, range of circumstances not necessarily connected to the existence of any real risk of physical or other harm to any member of the Australian community. [para 81]

The court therefore held that the monitoring and curfew conditions required to be applied were unconstitutional. In a separate judgement, Justice Edelman arrived at the same conclusion as the majority. Justices Steward and Beech-Jones both dissented in finding that the regulations were not a breach of Chapter III of the *Constitution*.

Response to the YBFZ decision

Statistics from the Department of Home Affairs stated that as at 31 October 2024, there were 224 people in the community on a BVR, of whom 150 were subject to electronic monitoring (wearing an ankle bracelet) and 130 were subject to curfew arrangements.

On 7 November, media reported the Commonwealth Director of Public Prosecutions as confirming that 'Two defendants have been convicted and sentenced for Migration Act offences relating to breaches of curfew conditions' and would be notified of the YBFZ judgment, and that charges would be dropped in an additional 27 cases of alleged breaches of the 2 conditions.

On 7 November 2024 at 10:13am – prior to the introduction of the Migration Amendment Bill 2024 in the House of Representatives – the Migration Amendment (Bridging Visa Conditions) Regulations 2024 were registered and commenced. The purpose of the regulations was to introduce a new community protection test that the Minister must apply before imposing 8621, 8617, 8618 and 8620 conditions. These changes are discussed further below in the 'Key provisions' section of this Bills Digest.

Policy position of non-government parties/independents

On 7 November 2024, the Opposition called for a parliamentary inquiry into the Bill while indicating an intention that the legislation could pass in the last sitting fortnight of the year.

Greens Senator David Shoebridge has criticised the Bill, asking that the Government withdraw it and 'respect the decision of the high court'.

Key issues and provisions

Reversing a protection finding

Subsection 197C(3) of the *Migration Act* provides that unlawful non-citizens cannot be removed to a country if they have made a valid application for a protection visa that has been determined, and in the determination process a protection finding was made in relation to that country (regardless of whether or not a visa was granted).

Section 197D establishes a mechanism whereby the Minister can essentially revisit the decision to make a protection finding with respect to an unlawful non-citizen under subsection 197C(3). These provisions were inserted as Government amendments to the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 during debate on the Bill in the House of Representatives. As noted by the Department of Home Affairs, 'At present, it is only possible to revisit a protection finding using the mechanism in section 197D of the Migration Act for an unlawful non-citizen' (Submission 75, p. 17).

Items 5–9 of Schedule 1 of the Bill will amend sections 197C and 197D to provide that a protection finding can also be revisited in relation to a lawful non-citizen who holds a visa as a 'removal pathway non-citizen'. **Item 4** provides that a 'removal pathway non-citizen' is:

- an unlawful non-citizen who is required to be removed from Australia under section 198 as soon as reasonably practicable
- a lawful non-citizen who holds a BVR
- a lawful non-citizen who holds a Subclass 050 (Bridging (General)) visa and at the time the visa was granted, satisfied a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia or
- a lawful non-citizen who holds a visa as prescribed via the regulations and at the time the visa was granted, satisfied a criterion relating to them making acceptable arrangements to depart Australia.

These amendments were previously included in the Removals Bill. In the Explanatory Memorandum to that Bill, the Government referred to these amendments as a 'minor and technical amendment' (p. 3). However, it would appear that these amendments significantly expand the classes of persons for whom the Minister is empowered to overturn a protection decision, and stakeholders raised a number of concerns regarding their application (see the Bills Digest for further information).

Removal of a person to a third country

Under Government policy, asylum seekers attempting to arrive in Australia by boat without a valid visa are either turned back or transferred to a regional processing country to assess their protection claims (refer also to *Migration Act*, sections 5AA (definition of *unauthorised maritime arrival*) and 198AD). They are not permitted to settle in Australia. Australia currently has a regional processing arrangement with Nauru (the arrangement with Papua New Guinea ended on 31 December 2021). Some people taken to regional processing centres ('transitory

persons') have been brought to Australia temporarily for reasons such as medical treatment (see *The Administration of the Immigration and Citizenship Programs, 13th edition*, p. 52).

The Government encourages people in the regional processing cohort to seek resettlement in a third country. This is a voluntary process. Australia has agreed third country resettlement arrangements with the United States (now closed to new applicants) and New Zealand.

Schedule 5 of the Bill inserts **proposed section 198AHB**, which provides the Commonwealth with the legislative authority to make payments to a foreign country which it has entered into a third country reception arrangement with. It further provides that the Commonwealth may take any action (which would include actions in a foreign country, subject to what has been agreed to in the arrangement with that country).

The purpose of these arrangements is to allow non-citizens to be removed to these countries. While the Bill provides that the Commonwealth may not exercise restraint over the liberty of another person in relation to third country reception arrangements, the Bill specifically states that the third country may exercise such restraint over that person.

The Explanatory Memorandum does not provide clarity on which countries the Government intends to enter into arrangements with, though media reporting has suggested that New Zealand may be envisioned. There is no requirement for the Commonwealth to report on these arrangements or table the text of the agreement in Parliament.

The Government has stated that the Bill:

> ...is compatible in most respects with the human rights and freedoms...**so long as policies, practices and procedures are in place to ensure that the powers provided in these amendments are exercised consistently with Australia's human rights obligations, including in relation to removal to third countries**. To the extent that the measures in this Bill limit human rights, they do so in order to maintain the integrity of the migration system and protect the safety of the Australian community (p. 3). [emphasis added]

However, neither the Bill nor the Explanatory Memorandum provides guidance on what policies, practices and procedures will be in place to ensure a person who is removed to a third country is not subject to human rights violations or returned to their home country. The Office of the United Nations High Commissioner for Refugees (UNHCR) has stated that its longstanding position is that returns or transfers to safe third countries may only be considered appropriate if certain standards are met – in particular, that those countries fully respect the rights arising from the Refugee Convention (including non-refoulement) and human rights obligations, and if the agreement helps share the responsibility for refugees equitably among nations, rather than shifting it.

Proposed section 76AAA (**item 1** of Schedule 1) provides that where a third country party to such an arrangement has agreed to take a person, then the Minister must give (either orally or in writing) the person a notice advising them of this. **Proposed section 76AAA** does not apply where the person is under 18 years old, they have a valid application for a protection visa that has not been finally determined, or a protection finding has been made under subsection 197C(3).

Once the person receives the notice, their BVR ceases to be in effect. Natural justice does not apply to the giving of a notice. If a person becomes an unlawful non-citizen due to the cessation of a BVR under **proposed section 76AAA**, the person may be taken into immigration detention under section 189 and may be liable to be removed under section 198.

Permission to enter the foreign country may be unconditional or may be 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 (**proposed subsection 76AAA(6)**). For example, this may be a requirement for the non-citizen to provide evidence of their identity.

Civil liability immunity

As stated by the Australian Law Reform Commission (p. 452), 'In general, the government, and those acting on its behalf, should be subject to the same liabilities, civil and criminal, as any individual.'

Schedule 2 will establish broad civil liability immunity for the Commonwealth and its officers (including the Minister) with respect to the removal of a person from Australia or where a person is taken to a regional processing country. This would prevent a person from bringing a claim against the Commonwealth where they have suffered harm as a result of the actions of the Commonwealth or its officers.

Proposed subsection 198(12) (**item 1** of Schedule 2) provides that no civil liability is incurred by an officer or the Commonwealth when acting in good faith in relation to the removal of certain non-citizens. The scope of the immunity is not constrained to the removal of a person whose visa has ceased under proposed section 76AAA and also includes a person whose visa has been cancelled on character grounds or who has been refused a protection visa in certain circumstances.

Proposed subsection 198(13) provides civil liability immunity for the Commonwealth and its officers in relation to the removal of a person from Australia to a foreign country. The Commonwealth and its officers will also be immune in relation to any acts or omissions done by a foreign country or any person in a foreign country to a person who has been removed there, including under the third country reception arrangements.

Proposed subsections 198AD(11A) and (11B) (**item 2** of Schedule 2) provide similar broad immunity for the Commonwealth and its officers in relation to taking a person to a regional processing country and any act or omission done to the person while in the regional processing country or another foreign country.

The Commonwealth has previously paid significant amounts of compensation for actions that have taken place in regional processing countries. While the amendments are prospective and do not extinguish claims for conduct that has already occurred, they will significantly limit the rights of persons in immigration detention to seek compensation from the Commonwealth.

Disclosure of information

Schedules 3 and 4 of the Bill provide the Government with broad powers to collect, use and disclose personal information about a person, including their criminal history, and retrospectively validate previous disclosures of this information.

Collection, use, and disclosure of a person's criminal history information

Schedule 3 inserts a new definition of 'criminal history information' which includes:

- any charge against the individual for an offence against a law of the Commonwealth, a state or a territory, whether or not the individual has been found to have committed the offence
- any finding that the individual committed such an offence, whether or not the individual has been convicted of the offence
- any conviction of the individual of such an offence, whether or not the conviction is spent and
- any other result of a proceeding for the prosecution of the individual for such an offence.

Every Australian state and territory has laws that limit the release of information relating to some older offences (referred to as 'spent convictions') after a certain period of time (usually 10 years for adult offenders). Subject to a number of exclusions, where a conviction for an offence is spent, the offender is not required to disclose the fact of conviction, and other persons are prevented from disclosing the conviction without the person's consent and from taking the conviction into account (Explanatory Memorandum, p. 15).

Proposed section 501M (**item 1** of Schedule 3) will override these limitations and allow for the collection, use and disclosure of criminal history information for the performance of a function or the exercise of a power under the *Migration Act* and Regulations, even where Commonwealth, state or territory laws would otherwise prohibit the collection, use and disclosure. This includes to inform decisions whether to grant or refuse a visa; whether to cancel a visa; and whether certain visa conditions may or must be imposed on a visa having regard to matters such as a non-citizen's criminal history and the extent to which they pose a risk to any part of the Australian community (Explanatory Memorandum, p. 14).

Not only will the Minister or an officer of the Department have the power to collect, use or disclose the information, a person or body who receives criminal history information as a result of such a disclosure may collect, use or disclose the information for the purpose of providing advice or recommendations to the Minister or Department.

Item 4 of Schedule 3 provides that where the collection, use or disclosure of the information occurred prior to the commencement of proposed section 501M and would have otherwise been unlawful, it will now be considered to be lawful. According to the Explanatory Memorandum:

> The purpose of this item is to provide complete clarity as to the lawfulness and validity of the collection, use and disclosure of criminal history information (including information about spent convictions) in the relevant circumstances, whenever that collection, use or disclosure occurred. This operates to ensure that any disclosure of criminal history information, for the purpose of providing advice or exercising power under the Migration Act, was and is lawful. (p. 17)

The Senate Standing Committee for the Scrutiny of Bills 'has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively' (for example, see Scrutiny Digest 3/2024, p. 20). The Committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals. The Committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

Disclosure of a person's information to a foreign country

Schedule 4 of the Bill inserts **proposed section 198AAA** which allows the Minister or Department to disclose information about a current or former removal pathway non-citizen to a foreign country.

The disclosure must be in connection with one of the following purposes:

- determining whether there is a real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future (which may, for example, include the government of a foreign country considering whether a visa or other permission to enter and remain in the country should be granted to the non-citizen)
- facilitating the removal of the non-citizen from Australia (for example, in circumstances where the government of a foreign country is making arrangements for the reception of the non-citizen in the country and the information is required in respect of those arrangements)
- taking action or making payments in relation to a third country reception arrangement or the third country reception functions of a foreign country
- doing a thing that is incidental or conducive to the taking of a relevant action, or the making of a relevant payment or
- purposes directly or indirectly connected with, or incidental to, any of the above.

As with the provisions in Schedule 3 of the Bill, **proposed section 198AAA** will override existing Commonwealth, state and territory restrictions on disclosing spent conviction information (with certain exceptions) and includes disclosure of information obtained before commencement (though does not validate previous disclosures). Exceptions apply for former removal pathway non-citizens who now hold a substantive visa or a criminal justice visa, or those who are owed protection and therefore not subject to removal.

New test for imposing conditions on bridging visa holders

The *Migration Amendment (Bridging Visa Conditions) Act 2023* inserted section 76E into the *Migration Act*, which provides a mechanism for the holder of a BVR subject to certain prescribed conditions to make representations for the grant of a BVR without any one or more of those conditions, noting that decisions relating to the grant of a BVR are not subject to the rules of natural justice. The conditions which are prescribed are monitoring device (8621), financial monitoring (8617 and 8618) and curfew (8620).

Prior to the YBFZ decision, the Minister was required to grant a person a new BVR (the second visa) without one or more of the prescribed conditions if the person makes representations and the Minister is satisfied that the conditions are not reasonably necessary for the protection of any part of the Australian community. This test was inserted by amendments to section 76E by the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023*.

Schedule 6 of the Bill responds to the High Court's decision in YBFZ by amending paragraph 76E(4)(b) to provide that the new test for granting a visa without one or more of the prescribed conditions is that either:

- 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
- if the Minister is 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– 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.

Proposed subsection 76E(7) provides that 'serious offence' has the same meaning as that set out in the Migration Regulations. A 'serious offence' is an offence punishable by imprisonment for life or for a period, or maximum period, of at least 5 years and where the particular conduct constituting the offence involves:

- loss of a person's life or serious risk of loss of a person's life
- serious personal injury or serious risk of serious personal injury
- sexual assault
- the production, publication, possession, supply or sale of, or other dealing in, child abuse material (within the meaning of Part 10.6 of the *Criminal Code Act 1995*)
- consenting to or procuring the employment of a child, or employing a child, in connection with child abuse material
- acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16
- domestic or family violence (including in the form of coercive control)
- threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or one or more members of the group
- people smuggling or
- human trafficking.

These amendments reflect the amendments made to the Migration Regulations by the Migration Amendment (Bridging Visa Conditions) Regulations 2024 on 7 November 2024.

According to the Government:

> Placing a specific term of imprisonment threshold, along with an exhaustive list that constitutes a 'serious offence', reflects the intention of each of the visa condition(s) having a protective purpose, by referring to an objective way of demonstrating whether the offences that the Minister is concerned with are serious or not.
>
> This is in contrast to the way the invalid provision had purported to operate previously, which was that the Minister was required to impose the conditions unless satisfied that the imposition of the conditions were not reasonably necessary to protect any part of the Australian community. (Explanatory Statement, Migration Amendment (Bridging Visa Conditions) Regulations 2024, p. 6)

While section 76E as currently drafted is inconsistent with the Migration Regulations, the Minister has stated that 'the way the regulations have been drafted it will be some weeks before section 76E will be required to be used' and therefore the Bill is not time-critical.

Item 5 of Schedule 6 provides that the new test will apply to a visa that:

- is granted on or after the commencement of the Bill
- that was granted on or after the commencement of the Migration Amendment (Bridging Visa Conditions) Regulations 2024 but before the commencement of the Bill
- that was granted before the commencement of the Migration Amendment (Bridging Visa Conditions) Regulations 2024 where:
  - the time period for the visa holder to make representations to the Minister specified in paragraph 76E(3)(b) had not expired at commencement or
  - the visa holder had made representations and the Minister had yet to determine whether to grant them a second visa.

However, where the visa was granted prior to the commencement of the Bill or the Migration Amendment (Bridging Visa Conditions) Regulations 2024, the visa holder will be able to make representations to the Minister as to why the conditions should not be applied to them within 28 days of commencement of the Bill.

Concluding comments

Given the strong opposition from stakeholders in relation to the Removals Bill, it is likely that this Bill will attract significant criticism, particularly concerning human rights issues.

Constitutional law professor Anne Twomey and other legal experts have expressed views that the legislation may not resolve the issue of whether the imposition of the curfew and monitoring conditions are punitive or reasonably necessary. Professor Twomey is quoted as saying 'It's fairly likely someone will challenge it, and there is a reasonable chance it will be struck down'. The Human Right Laws Centre argued that the amendments continue to place decisions about whether such restrictions are necessary in the hands of the government, as opposed to the judiciary.

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