Ministerial responses — Report 1 of 2024[1]

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Senator the Hon Penny Wong
Minister for Foreign Affairs

MC23-010809

25 JAN 2024

Mr Josh Burns MP
Chair
Parliamentary Joint Committee on Human Rights
human.rights@aph.gov.au

Dear Chair

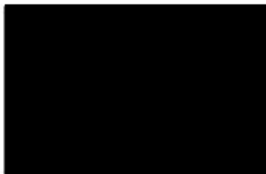
Thank you for your email of 15 November 2023 regarding *Report 12 of 2023* (the Report) of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2023 (the Instrument), and Part 4 of the *Charter of the United Nations Act 1945*, under which the Instrument is made.

Sanctions are an important aspect of Australia's foreign policy toolkit. They are used judiciously, following careful consideration, and consistent with our international obligations, including with respect to human rights. The document at Attachment A responds to the request for further advice made by the Committee in the Report.

I note the recommendations for changes to Australia's sanctions frameworks, which the Committee made in *Report 9 of 2016, Report 6 of 2018, Report 2 of 2019, Report 8 of 2021, Report 10 of 2021* and *Report 15 of 2021*. The Government is satisfied that Australia's sanctions frameworks are compatible with human rights and keeps its sanctions frameworks under review. The Government has no immediate plans to adopt the measures proposed by the Committee in paragraph 1.25 of the Report.

I trust the information provided will assist you in concluding your consideration of the Instrument.

Yours sincerely



PENNY WONG

Encl. Attachment

Attachment A

Response to Parliamentary Joint Committee on Human Rights
Human Rights Scrutiny Report 12 of 2023 (15 November 2023)

Report

On 10 October 2023, the Department of Foreign Affairs and Trade (the Department) registered on the Federal Register of Legislation the Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2023 (the Instrument), made under Part 4 of the *Charter of the United Nations Act 1945* (COTUNA).

To assess the human rights compatibility of the Instrument, the Parliamentary Joint Committee on Human Rights (the Committee) sought further advice as to why the sanctions framework does not include each of its recommendations at paragraph 1.25 of *Report 12 of 2023*. The Committee also sought further advice on the compatibility of the Instrument with the right to a private life. Each of these are addressed in turn below.

Response

Committee's recommendations

a) the provision of publicly available guidance in legislation setting out in detail the basis on which the minister decides to list a person;

The criteria for sanctions listings under the *Autonomous Sanctions Act 2011* (AS Act) are articulated in regulations 6 and 6A of the Autonomous Sanctions Regulations 2011 (AS Regs). Where these criteria are met, the Minister for Foreign Affairs' (the Minister) decision to list is discretionary. Sanctions decisions are made on a case-by-case basis, and are applied judiciously based on relevant evidence and following careful consideration. As each listing is determined on the facts specific to the individual and entity, which will differ depending on the situation of international concern, further detail on the basis on which the Minister decides a listing beyond that already provided in the AS Regs would not be appropriate.

The listing criteria for counter-terrorism financing sanctions are set out in United Nations Security Council Resolution (UNSCR) 1373 and implemented in Australian law by Regulation 20 of the Charter of the United Nations (Dealing with Assets) Regulations 2008, which provides that

> *the Minister must list a person or entity if the Minister is satisfied that the person or entity is a person or entity mentioned in paragraph 1 (c) of UNSCR 1373;*

That is:
- a person who commits, or attempts to commit, terrorist acts or participates in or facilitates the commission of terrorist acts;
- an entity owned or controlled directly or indirectly by such persons; or
- a person or an entity acting on behalf of, or at the direction of such persons and entities.

If the Minister is satisfied on reasonable grounds of the listing criteria, then the Minister must list them.

As such, the guidance for listing in relation to counter-terrorism financing sanctions is already provided for in publicly available legislation, and any decision by the Minister to list under Part 4 of COTUNA requires the Minister to be satisfied on reasonable grounds.

b) regular reports to Parliament in relation to the basis on which persons have been listed and what assets, or the amount of assets, that have been frozen;

The Department must maintain a Consolidated List setting out all persons and entities subject to sanctions under Australian sanctions law, as well as all assets or classes of assets currently listed under section 15 of COTUNA or regulation 7 of the AS Regs. The Consolidated List is available here.

The names of persons, entities, and assets or classes of assets subject to sanctions are also detailed within various legislative instruments made under Part 4 of COTUNA and the AS Regs (for example, the Charter of the United Nations (Listed Persons and Entities) Instrument 2022).

c) provision for merits review before a court or tribunal of the minister's decision to list a person;

It is the Government's position that any limitation on access to merits review for such decisions should be justified in line with the principles developed by the Administrative Review Council (ARC). The ARC's publication *'What decisions should be subject to Merits review?'* provides examples of situations where exclusion of merits review may be justified. Included in this category are policy decisions of a high political content (from 4.22).

The decisions of the Minister in relation to sanctions fall within the scope of this exception. The ARC cites illustrative examples of decisions that may fall within this exception, including decisions:

- affecting the Australian economy;
- affecting Australia's relations with other countries;
- concerning national security; and
- concerning major political controversies.

The Minister's sanctions decisions under Australian sanctions law engage most if not all of these characteristics.

Australian sanctions law has the legitimate objective of giving domestic effect to UNSCRs and providing a foreign policy mechanism for the Australian Government to address situations of international concern. The exclusion of merits review in relation to sanctions-related decisions is warranted by the seriousness of the foreign policy and national security considerations involved, as well as the potentially sensitive nature of the evidence relied on in reaching those decisions.

While merits review is unavailable for a sanctions decision by the Minister, an applicant can still seek judicial review of a decision.

d) regular periodic reviews of listings;

All listings under Part 4 of COTUNA and AS Regs expire three years after they are made, and the Minister must determine whether or not to remake them before that date. The Minister is therefore already required to make a fresh decision for each listing on a periodic basis.

e) automatic reconsideration of a listing if new evidence or information comes to light;

A person may request the revocation of their listing (under both Part 4 of COTUNA and the AS Regs) at any time, including on the basis that there is new information that the Minister should consider. The Minister also maintains the power to revoke a listing on their own initiative if they became aware of new information. A listing must be revoked if the Minister no longer considers that a person meets the relevant listing criteria.

f) limits on the power of the minister to impose conditions on a permit for access to funds to meet basic expenses;

Sanctions permits are requested by a range of individuals and entities in the Australian community, and in a range of circumstances. A fetter on the power to impose conditions may unintentionally limit the Minister's ability to ensure permits comply with our international obligations (for example, under UNSCR 1373) and accord with Australia's foreign policy. Such a permit would be decided on a case-by-case basis and the conditions (if any) placed on it would be fact-dependant.

g) review of individual listings by the Independent National Security Legislation Monitor (INSLM);

Listing decisions undertaken by the Minister already undergo consultation with a range of Government agencies as appropriate, and consultation is undertaken on a case-by-case basis depending on the relevant situation of international concern. The Prime Minister and Attorney-General also retain the power to refer matters related to national security or counter-terrorism to the INSLM for review (s 7 of the *Independent National Security Legislation Monitor Act 2010*).

The ability for any listee to seek to revoke their listing (under both Part 4 of COTUNA and the AS Regs), as well as the ability for the Minister to issue permits tailored to each individual case and specific to each situation of international concern, are appropriate and proportionate.

h) provision that any prohibition on making funds available does not apply to social security payments to family members of a listed person (to protect those family members);

There are very limited situations under which social security payments made to a family member of a listed person, rather than to a listed person themselves, would be a freezable asset, or under which social security payments to someone who is not a listed person would be prohibited. A blanket provision to that effect would, consequently, be unnecessary, and would not allow the Minister flexibility to apply such a prohibition in the unlikely event that it became necessary to do so.

In any case, the ability for the Minister to use permits is a flexible mechanism permitting Australia to consider its human rights obligations alongside its obligations under UNSCRs, in accordance with Australian foreign policy, and as appropriate on a case by case basis.

i) consultation with operational partners such as the police regarding other alternatives to the imposition of sanctions.

As the Minister has noted publicly, sanctions are not the only tool available in situations of international concern, and they will rarely be the Minister's first choice. Alternatives are explored, and consultation undertaken across Government (including with the Australian Federal Police), as appropriate on a case-by-case basis.

The Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2023

The Committee has also sought advice on the below questions:

a) whether consideration is given to the potential impact on family members or other dependents when a decision is made to freeze the assets of a person located in Australia;

As part of each listing, the Department undertakes a search to assess what transactions have been conducted by a potential listee, so that the impact of any asset freeze or targeted financial sanction can be assessed (including impacts on potential family members and dependents), and inform any listing decision.

If there are potential impacts on family members or other dependents, the ability for the Minister to use permits is a flexible mechanism permitting Australia to consider its human rights obligations alongside its obligations under UNSCRs, in accordance with Australian foreign policy, and as appropriate on a case by case basis.

b) if a freezable asset is a joint asset, such as a joint bank account of a listed person and their spouse, what safeguards are in place to ensure that any interference with the privacy of the joint asset owner is proportionate?

UNSCR 1373 requires signatories to, among other things, prevent and suppress the financing of terrorist acts, and freeze the financial assets of terrorists. This is implemented through Part 4 of COTUNA. Freezing joint assets is a necessary step in achieving this outcome, and is a proportionate response in preventing the financing of terrorism. Any joint asset owners may apply for authorisation in dealing with those assets. The ability for the Minister to use

permits is a flexible mechanism permitting Australia to consider its human rights obligations alongside its obligations under UNSCRs, in accordance with Australian foreign policy, and as appropriate on a case-by-case basis.

c) what types of conditions would the minister impose on a permit for access to funds to meet basic expenses?

Sanctions permits are requested by a range of individuals and entities in the Australian community. Types of conditions imposed by the Minister will be a matter for the Minister to decide, on a case by case basis, to ensure the specific conditions enable Australia to continue to meet its obligation to prevent and suppress the financing of terrorist acts, and freeze the financial assets of terrorists.

A permit may specify certain people, entities, organisations or institutions which may deal with the assets of, and / or provide assets to a listee, and the conditions may stipulate the circumstances under which such dealings can take place. The ability for the Minister to use permits is a flexible mechanism permitting Australia to consider its human rights obligations alongside its obligations under UNSCRs, in accordance with Australian foreign policy, and as appropriate on a case by case basis.

THE HON ANDREW GILES MP
MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MS23-002549

Mr Josh Burns MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear ~~Chair~~ Josh,

Migration Amendment (Bridging Visa Conditions) Bill 2023; Migration Amendment (Bridging Visa and Other Conditions) Bill 2023

I refer to your correspondence of 30 November 2023 concerning the above Bills considered in Report 13 of 2023.

Please find attached a response to your request, including advice in relation to the specific matters raised at paragraphs 1.46, 1.55 and 1.70 of the report.

I hope this information assists the Committee in its consideration of these instruments.

Yours sincerely

ANDREW GILES

11 / 1 / 2024

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Response to the Parliamentary Joint Committee on Human Rights

Report 13 of 2023 – Migration Amendment (Bridging Visa Conditions) Bill 2023, Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023

In Report 13 of 2023, the Parliamentary Joint Committee on Human Rights (the Committee) sought further information from the Minister in relation to the Migration Amendment (Bridging Visa Conditions) Bill 2023 (BVC Bill) and the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (BVCOM Bill)).

The BVC Bill and BVCOM Bill amend the *Migration Act 1958* (the Migration Act) and the *Migration Regulations 1994* (the Migration Regulations) to ensure non-citizens released from immigration detention following the High Court judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs (S28/2023)* [2023] HCA 37 (NZYQ) on 8 November 2023 and those in similar circumstances in the future (the NZYQ-affected cohort) are subject to appropriate visa conditions on the Bridging (Removal Pending) visa (BVR) granted to them following release.

The BVC Bill was introduced and passed on 16 November 2023. On 27 November 2023, the BVCOM Bill was introduced. On 29 November 2023, the Committee tabled Report 13 0f 2023, seeking further information on the BVC Bill and BVCOM Bill, as introduced on 27 November 2023. On 5 December 2023, Senate amendments were made to the BVCOM Bill, including renaming the BVCOM Bill the Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023 (BVSOOM Bill). On 7 December, the *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (BVC Regulations) were registered on the Federal Register of Legislation. On 19 December 2023 the Committee tabled Report 14 of 2023, commenting on the BVSOOM Bill. The below responses to the Committee's request for further information on the BVC Bill and the BVCOM Bill includes references to measures in the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023*, as passed, and the BVC Regulations.

The NZYQ-affected cohort is made up of people who have been refused grant of a visa, or had their visa cancelled, and who are on a removal pathway but who have no real prospect of removal becoming practicable in the reasonably foreseeable future. Of the current known cohort, the majority were refused a visa, or had their visa cancelled, on character grounds. Others in the cohort had their visa cancelled on other grounds, but had not previously been granted a bridging visa due to risks they present to the Australian community.

The objective of the amendments in the Bills and the Regulations is to ensure that members of the NZYQ-affected cohort are managed in the community in a way that supports community safety objectives and enables the management of the cohort to a removal outcome once removal becomes reasonably practicable.

Criminalisation of breach of mandatory bridging visa conditions

Committee view

1.44 The committee notes this legislation responds to a High Court decision which requires the release into the community of certain non-citizens, including individuals with serious criminal histories. The committee notes the intention behind the legislation to complement and strengthen existing safeguards to appropriately manage these individuals to meet the objective of community safety. In granting members of the NZYQ cohort bridging visas subject to mandatory conditions, noncompliance with which is a criminal offence carrying a mandatory minimum sentence of one year imprisonment, the committee considers the bill engages and limits multiple human rights, particularly the rights to privacy, work, freedom of movement and association, expression, liberty, fair trial and criminal process rights (if the conditions themselves are considered to be so severe as to amount to a criminal penalty for the purposes of international human rights law).

1.45 The committee notes the Migration Amendment (Bridging Visa Conditions) Bill 2023 passed both Houses of Parliament on the same day it was introduced. While the committee acknowledges that urgent bills are sometimes necessary, this meant the committee was unable to scrutinise this bill for compatibility with human rights prior to its passage. The committee notes that the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 is intended to complement amendments made by the first bill (now Act).

Minister's response

I thank the Committee for their consideration of this legislation and note the Committee's views regarding the speed with which the legislation was passed by Parliament. As the Committee notes, the measures were passed rapidly through Parliament because of the pressing need to ensure that members of the Australian community are not placed at risk due to the release of the NZYQ-affected cohort from immigration detention.

Many of these individuals do not meet the character or security requirements for a visa to remain in Australia, however as a result of the NZYQ decision, they can no longer be detained in immigration detention. Many have committed serious criminal offences, including violent and sexual assault offences. The Government is committed to protecting the safety of the community through the imposition of mandatory conditions and where necessary, imposing additional measures such as monitoring and curfews.

As reported on by the Committee in Report 14 of 2023, following the introduction of the BVCOM Bill, Senate amendments were made to the Bill, including a name change, and the BVCOM Bill was passed as the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023.* Supporting amendments were also made to the *Migration Regulations 1994* by the BVC Regulations. These amendments support and strengthen the BVR framework for the NZYQ-affected cohort including by:

- Creating a framework in the Criminal Code for Court-issued Community Safety Orders.
  - The Community Safety Orders scheme is a new judicially supervised regime that will enable the Minister administering the Migration Act (the Minister) to apply for court orders to detain certain high risk violence and sexual offenders for the purpose of community protection, or to impose other supervisory conditions, complementary to those already imposed on a BVR, in order to protect the Australian community.
- Creating new criminal offences for breaches of BVR conditions 8622 (no work with minors or vulnerable people), 8623 (must not go within 200 metres of a school) and 8624 (must not make contact with victim or victim's family) that appropriately apply where a person has a relevant criminal history.

- Changing the BVR grant provisions in regulation 2.25AA and 2.25AB to allow the Minister to grant a BVR to a non-citizen, without application, without requiring the Minister to be satisfied that the non-citizen will comply by the conditions of the visa. This amendment was necessary to ensure that a non-citizen cannot avoid the imposition of those conditions – and the consequences for breaching them – merely by informing the Minister Prescribing that these conditions must be decided by the Minister in a sequential order, to ensure that the extent to which other BVR conditions contribute to the protection of the Australian community is appropriately considered prior to imposing further conditions.
- Creating a 12 month time limit after which BVR conditions 8617, 8618, 8620 and 8621 cease to have effect. These are conditions that must be applied unless the Minister is satisfied that they are not reasonably necessary for the protection of the community. At any time before or after the 12 month period, the Minister can re-grant the person a BVR with these conditions imposed (subject to consideration of the Community Safety Test). This amendment ensures regular review that conditions remain appropriate for the particular circumstances of the individual and allows for a BVR to be re-granted without these conditions imposed if the Minister is satisfied that they are no longer reasonably necessary for the protection of the community.
- Creating a grant power in the Migration Act to enable new BVR to be granted, by operation of law, where a person is issued a Community Safety Order. This new BVR will be subject to a range of Status Resolution and National Security Conditions. These conditions are intended as far as possible to complement, but not duplicate, conditions that a Court might impose on a Community Safety Order.

In response to the Committee's specific questions:

1.46 The committee considers that as the legislation engages multiple and significant human rights and further information is required to assess its compatibility with these rights, and noting also the committee's function of examining Acts for compatibility with human rights, the committee seeks the minister's advice in relation to:

> ***(a) noting the conditions amount to a significant limitation on rights, why it is not appropriate for such conditions to only be imposed by a court following consideration of the individual circumstances of each case;***

The conditions allow for those detainees who have been released to be more effectively monitored and regulate certain activities. They will also help the Government ensure BVR holders cooperate in Government efforts to remove them from Australia when this becomes reasonably practicable.

For example, the electronic monitoring (8621) and curfew (8620) conditions must be imposed unless the Minister considers it is not reasonably necessary for the protection of the community. Some of the conditions are called the Community Safety Test conditions and must be decided by the Minister in a sequential order:

- the Minister must first consider whether to apply the electronic monitoring condition,
- followed by financial reporting conditions 8617 (notify of transactions over $10,000 AUD) and then 8618 (notify of debts in excess of $10,000 AUD and bankruptcy), and
- finally whether the curfew, condition 8620, is reasonably necessary for community protection, having regard to all other conditions applicable to the individual's BVR.

The requirement for the Minister to consider the Community Safety Test conditions in a sequential order is intended to ensure that the conditions imposed are adequate and proportionate. Where a monitoring condition is imposed, consideration is given to additional conditions that may also be applied. This is to ensure that the extent to which each of the visa condition contributes to protection of the Australian community is appropriately considered prior to imposing further conditions.

Additionally, the amendments create a 12 month time limit after which these conditions cease to have effect. At any time before or after the 12 month period, the Minister can re-grant the person a BVR with these conditions imposed (subject to consideration of the Community Safety Test).

This amendment improves proportionality by ensuring regular review that conditions remain appropriate for the particular circumstances of the individual and allows for a BVR to be re-granted without these conditions imposed if the Minister is satisfied that they are no longer reasonably necessary for the protection of the community.

Following the passage of the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* and the supporting amendments in the *Migration Amendment (Bridging Visa Conditions) Regulations 2023* in December 2023, the Australian Border Force established a Community Protection Board that considers the individual circumstances of each BVR holder to consider whether the imposition of BVR conditions are reasonably necessary. The Community Protection Board is made up of senior officials from the Department of Home Affairs, the Australian Border Force, the Australian Federal Police and independent experts in corrections, policing and a community representative. The Board then makes individualised recommendations to the Minister or the delegate about appropriate BVR visa conditions.

In addition to the BVR conditions, the Government introduced new measures that were enacted on 8 December 2023 in the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023.* This Act created a framework in the Criminal Code for courts to impose Community Safety Orders including Community Safety Detention Orders, and Community Safety Supervision Orders. Such an Order may be granted by a Court where the Court is satisfied that the conditions attached to the BVR would not be effective in protecting the community from the serious harm posed by an individual.

(b) whether, as a matter of international human rights law, the mandatory conditions are so severe as to be considered to be 'criminal' in nature under international human rights law. If so, how is the measure compatible with the criminal process rights in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to punished twice for the same offence, the right to be presumed innocent until proven guilty and the right to have a fair and public hearing by a competent, independent and impartial tribunal;

It is the Department's view that the mandatory conditions are not so severe as to be considered 'criminal' in nature. They are not imposed as a penalty, rather they are imposed on a member of the NZYQ cohort to ensure the safety of the Australian community and that the BVR holder remains in contact with the Department regarding removal from Australia. It is the expectation of the Australia community that non-citizens abide by all visa conditions, including that they be of good character. Non-citizens who do not (or no longer) have an entitlement to a visa to remain in Australia must depart Australia. These BVR conditions have been put in place to manage this cohort who would otherwise be expected to leave Australia, but who cannot be returned to their country of nationality, due to a range of factors. While they would previously have been held in immigration detention, following the High Court's judgment in NZYQ, this option is no longer available to the Government.

Some of the BVR conditions put in place to manage this cohort, only apply to those with serious criminal backgrounds, such as where the person has been convicted of a violent and/or sexual offence that could involve a minor or other vulnerable person. For example, BVR condition 8622 prohibits the holder from working with minors or other vulnerable people only where the holder has been convicted of an offence involving a minor or vulnerable person.

Some of these BVR conditions do not unreasonably limit the conduct or movement of the BVR holder in the Australian community, and apply only where the person has a history of serious violent and sexual assault offending, supporting the Government to protect the most vulnerable members of society.

Other conditions, such as curfew (8620) and electronic monitoring (8621) must apply unless the Minister is satisfied that it is not reasonably necessary for the protection of the community (i.e. "the Community Safety Test"). As noted above, a Community Protection Board has been established to individually consider the factual circumstances of each BVR holder to identify the community protection risk posed by that individual and whether conditions are reasonably necessary and make recommendations to the Minister or delegate.

New section 76E of the Migration Act creates a process where, following the grant of a first BVR, individuals will have the opportunity to make representations to the Minister about the imposition of the Community Safety Test conditions. If the Minister is satisfied that one of more of the conditions are not reasonably necessary for the protection of any part of the Australian community, the Minister must grant the individual a second BVR that is not subject to those conditions and provide the individual with a written notice and reasons for the decision.

Where the Minister considers that an individual's circumstances warrant consideration of imposing a Community Safety Order, the Minister will refer those individuals to the Court for assessment.

(c) how the conditions satisfy the requirements of legal certainty and foreseeability;

Information as to the BVR conditions imposed and the requirements that a BVR holder must fulfil will be provided to the BVR holder upon grant of the visa. Where applicable, the BVR holder is provided with information on how to maintain the electronic monitoring device, primarily around maintaining charge of the device and an accompanying FAQ. This information is being translated into a number of common languages and interpreters are available for BVR holders during conversations if required. Please see the response to paragraph 1.46(d) for more information on what advice is provided regarding the BVR conditions.

The amendments also create a 12 month time limit after which the BVR conditions 8617, 8618, 8620 (curfew) and 8621 (electronic monitoring) cease to have effect. These are BVR conditions that must be applied unless the Minister is satisfied that they are not reasonably necessary for the protection of the Australian community. A 12 month time limit creates certainty for a BVR holder as to when conditions in relation to the visa granted will cease to have effect.

At any time before or after the 12 month period, the Minister can grant the person a new BVR with these conditions imposed or not imposed (subject to consideration of the Community Safety Test). This ensures regular review that conditions remain appropriate for the particular circumstances of the individual and allows for a BVR to be re-granted without these conditions imposed if the Minister is satisfied that they are no longer reasonably necessary for the protection of the community.

This amendment ensures regular review that BVR conditions remain appropriate for the particular circumstances of the individual.

(d) whether visa holders and those enforcing the visa conditions will be provided with guidance as to how the conditions will be interpreted and applied in practice. For example, will guidance be provided as to what constitutes 'reasonable steps' or how 'good working order' is to be interpreted in the context of the electronic monitoring conditions so as to ensure visa holders understand what is expected of them;

A BVR holder can be notified of the grant orally or in writing, though in practice the Department provides written notification of all BVR grants. This notification includes information about all conditions that apply to the BVR holder. Where information is provided orally, either of a BVR grant or other related matters, interpreters are available for BVR holders during these conversations if required and a BVR holder may have a lawyer present or on the phone during notification. If the BVR holder has an authorised recipient (for example, a registered migration agent), the notification of the BVR grant and related matters will be sent to the authorised recipient.

The BVR holder is also provided with information on how to maintain the device, primarily around maintaining charge of the device and an accompanying FAQ. This is being translated into a number of common languages for this cohort.

During subsequent interactions with the Department and ABF, BVR holders will be reminded of their obligations to comply with BVR conditions including to report any changes in circumstances, in addition to discussing the person's well-being.

Where there is an electronic monitoring condition, the ABF is alerted to a potential device malfunction. In the first instance this will result a phone call from the ABF to assist the BVR holder to identify any issues with the device. At times, where a device is found to be faulty this will be rectified by providing new equipment to the BVR holder by the ABF.

(e) why is it appropriate that the minister specify matters relating to certain conditions orally, noting the risk that oral directions may lead to misunderstanding and confusion for visa holders whose primary language is not English;

Allowing the Minister to orally specify matters relating to visa conditions that a BVR holder must comply with helps ensure the affected BVR holders have an opportunity to ask questions to clarify and confirm their understanding of conditions when a BVR is granted or when there is a change in reporting conditions.

Where a BVR holder's primary language is not English, interpreters are available for these conversations for BVR holders if required.

Allowing the Minister to specify certain matters orally or in writing provides the Minister with the flexibility to contact BVR holders in the most appropriate way, to give directions on how to comply with certain visa conditions in the most suitable way. Oral directions may be given in person or by telephone. This enable the Minister to quickly and flexibly specify matters which may allow the BVR holder to immediately self-regulate their behaviour, and if necessary take remedial actions to comply

With regard to the reporting requirement in condition 8401, in many cases, the best time to notify a visa holder of a variation of the reporting requirements imposed for the purpose of visa conditions is during a reporting instance, when a discussion could take place about the reasons for considering whether or not to vary condition 8401 and taking into account the holder's ability to comply with the proposed variation of the condition (for example, ensuring the reporting condition does not conflict with the visa holder's work obligations).

As a matter of policy, oral notification of a variation to BVR conditions is followed up with written confirmation, and the holder's acknowledgement of their BVR conditions and any change in conditions is sought in writing.

(f) can visa holders travel overseas (noting the requirement for visa holders to notify of any overseas travel);

BVR holders may depart Australia voluntarily, or travel interstate, at any time.

Condition 8614 requires BVR holders to notify the Department of plans to travel interstate or internationally for a number of reasons including that if the person is subject to an electronic monitoring device, it will allow ABF to remove the device before the person departs Australia.

(g) how does the measure address a public or social concern that is pressing and substantial enough to warrant limiting rights, in particular:

- ***(i) noting that each individual is likely to pose a different level of risk; and***
- ***(ii) noting that Australian citizens who have previously offended and served their sentence are released in the community without strict conditions subject to criminal penalties, why do members of this cohort pose a greater risk to the community than Australian citizens who have committed equivalent offences;***

The conditions 8620 (curfew) and 8621 (electronic monitoring) must be applied unless the Minister thinks it is not reasonably necessary for the protection of the community. This means the risk that each BVR holder poses can be assessed and those conditions are applied in consideration of that risk.

Additionally the amendments create a 12 month time limit after which these BVR conditions cease to have effect. These are conditions that must be applied unless the Minister is satisfied that they are not reasonably necessary for the protection of the community. At any time before or after the 12 month period, the Minister can grant the person a new BVR with these conditions imposed or not imposed (subject to consideration of the Community Safety Test). This amendment ensures regular review that conditions remain appropriate for the particular circumstances of the individual and allows for a BVR to be granted without these conditions imposed if the Minister is satisfied that they are no longer reasonably necessary for the protection of the community.

These BVR conditions are appropriate because the NZYQ-affected cohort includes individuals with serious criminal histories who are no longer able to be managed in immigration detention where there remains no prospect of removal in the reasonably foreseeable future.

The curfew has the community protection purpose of BVR holders who have, for example, been assessed to fail the character test and to be of particular concern to the Minister in terms of future criminal offending. Therefore any deprivation of liberty that the curfew may constitute, is intended to protect public order and the rights and freedoms of others, and would not be arbitrary and be necessary, reasonable and proportionate to achieving that objective.

One purpose of electronic monitoring is to deter the BVR holders from committing further offences, knowing they are being monitored, and thereby keep the community safe. The electronic monitoring will also assist with prevention of absconding behaviour which is contrary to the obligation of the BVR holder to engage in the Department's efforts to facilitate their removal.

The use of electronic monitoring serves the legitimate obligation where there is a higher likelihood of non-compliance by the BVR holder, and provides an alternative avenue for compliance that will be more suitable to some circumstances such as where additional support alone will not prevent reoffending.

The provisions put beyond doubt the types of behaviours that are unacceptable for NZYQ-affected persons to engage in whilst they resolve their migration status residing in the Australian community, and the sanctions that will apply to any person who breaches the conditions of the BVR they are granted. This is appropriate and reasonable to ensure the Australia community can continue to have confidence that the migration system is being well-managed in respect of this cohort.

(h) how the measure will be effective to achieve the objective of removal from Australia if those to whom the measure applies are stated to have no real prospect of removal in the reasonably foreseeable future;

At the point in time an individual is identified as being NZYQ-affected, there is no real prospect of removing the person in the reasonably foreseeable future. However, a number of factors can influence whether or not a person is removable over time, including changing country information and new information regarding the individual becoming available. This means that it is possible that removal could become available for an individual in the NZYQ-affected cohort in the future.

For these reasons, it is important that the BVR holder adhere to reporting conditions so that the Department can locate the individual if and when removal becomes available.

(i) why is it necessary and appropriate to impose mandatory minimum sentences of imprisonment, noting that the statement of compatibility accompanying the Migration Amendment (Bridging Visa Conditions) Bill 2023 as first introduced acknowledged the importance of courts retaining discretion to consider the individual circumstances of the case so as to determine an appropriate sentence;

The mandatory minimum sentence of 1 year imprisonment was proposed by the Opposition in the Senate. As a result it was not referenced in the statement of compatibility with human rights for the BVC Bill.

The use of a minimum sentence of 1 year imprisonment and maximum penalty of 5 years imprisonment or 300 penalty units reflects the seriousness of the regard that the NZYQ-affected cohort are expected to have towards the conditions imposed on their BVR and reflects the level of protection necessary for community safety and the management of the cohort.

As BVR holders who continue to be NZYQ-affected cannot be detained in immigration detention, the usual potential consequences for breaching visa conditions, cancellation of that visa and immigration detention, is not available. This removes these measures as an effective deterrent against non-compliance with reporting requirements and other key visa conditions.

Breaches of conditions that fall within the new offences will be subject to the usual judicial processes. This includes the assessment by the Commonwealth Director of Public Prosecutions of whether to pursue a prosecution, taking into account whether it is in the public interest to do so. The defence of a reasonable excuse is available.

Members of the NZYQ-affected cohort have no substantive visa to remain in Australia, having had their visa applications refused, or a visa cancelled, in most cases on character grounds under section 501 of the Migration Act. Consequently, the Government considers that mandatory minimum sentencing is proportionate to the particular circumstances of the NZYQ-affected cohort and aimed at the legitimate objective of protecting community safety.

(j) why only imposing conditions on individuals who have been objectively assessed to pose a real risk to public safety and to apply the minimum necessary and least invasive or coercive conditions to mitigate that risk would not be effective to achieve the stated objectives;

The *Migration Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* created new conditions 8620 (curfew) and 8621 (electronic monitoring) which only apply to individuals where the Minister considers this reasonably necessary for the protection of the Australian community. As noted above, the Community Protection Board has been established to consider each individual's factual circumstances and make recommendations as to which conditions are reasonably necessary to manage the risk to the community.

(k) whether there is any limit on the length of time the conditions may be imposed on an individual; and

The *Migration Amendment (Bridging Visa Conditions) Regulations 2023* create a 12 month time-limit for certain visa conditions applied to BVRs after which these conditions cease to have effect. The time limit applies to the conditions that must be applied unless the Minister is satisfied that they are not reasonably necessary for the protection of the community.

At any time before or after the 12 month period, the Minister can grant the person a new BVR with these conditions imposed or not imposed (subject to consideration of the Community Safety Test).

This amendment ensures regular review that conditions continue to be reasonably necessary in light of the particular circumstances of the individual and allows for a BVR to be granted without these conditions imposed if the Minister is satisfied that they are no longer reasonably necessary for the protection of the community.

(l) what, if any, other safeguards (including the availability of review) exist to ensure that any limitation on rights is proportionate to the objectives being sought.

The following safeguards apply to ensure that limitation on rights is proportionate to the objectives being sought:

- The individual circumstances of each BVR holder will be considered to assess whether conditions are necessary for the protection of the Australian community. Conditions such as curfew (8620) and electronic monitoring (8621) must be imposed unless the Minister considers it is not reasonably necessary for the protection of the community. This provides scope for the Minister to consider whether it is not reasonably necessary in an individual's circumstances to impose those conditions.
- Importantly, where these conditions are imposed, they will be subject to a 12 month time limit after which they cease to be in effect on the individual's BVR. This ensures the circumstances of the individual are regularly reviewed and that assessments about whether the condition is reasonably necessary for the protection of the community remains relevant and appropriate.
- To improve proportionality, the BVC Regulations (registered on 7 December 2023) prescribe that condition 8401 (requirement to report) cannot be imposed where electronic monitoring (8621) is imposed. This ensures that a reporting requirement is not unnecessarily imposed where the holder is already subject to the electronic monitoring condition.
- The BVC Bill also created new conditions that will only apply where a person has a relevant criminal history. For example, conditions 8622 (the visa holder must not work or participate in any regular activity involving more than incidental contact with minors or vulnerable people), 8623 (the visa holder must not go within 200 metres of a school) apply only where the individual has been convicted of an offence involving a minor or vulnerable person. Condition 8624 (must not make contact with victim or victim's family) applies only where a person has been convicted of an offence involving violence or sexual assault. Further, the BVC Regulations prescribe condition 8262, which provides that if a BVR holder has been convicted of an offence involving a minor or a vulnerable person, the holder must notify the Minister of a change in an online profile or user name. The applicability of these conditions only to BVR holders who have previously been convicted of offences involving a minor or a vulnerable person ensures those conditions are appropriately targeted to protecting the Australian community and that the conditions are proportionate and reasonable to the circumstances of the individual.

Additional mandatory visa conditions

1.48 As a matter of statutory interpretation, the following conditions that require the visa holder to do the following things do not appear to be captured by these offence provisions:

- ***obtain the minister's approval before taking up specific kinds of employment or activities, undertaking flight training, or obtaining specific chemicals;***
- ***not acquire any weapons or explosives, or take up employment or undertake activities involving weapons or explosives;***
- ***not communicate or associate with a terrorist entity or organisation; and***
- ***not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community.***

1.49 Additionally, there are four conditions relating to notifying Immigration about certain financial matters, including when a visa holder is experiencing significant financial hardship, that are prescribed as conditions that are not a 'monitoring condition'. This means that non-compliance with these prescribed conditions does not constitute a criminal offence under new section 76B.

1.54 The committee notes that imposing mandatory visa conditions that require visa holders to, among other things, obtain the minister's approval before taking up specific kinds of employment and not communicate or associate with certain organisations,

engages and may limit multiple human rights, including the rights to privacy, work and freedom of assembly, association and expression. The committee notes that as a matter of statutory interpretation, it does not appear that breach of these visa conditions would be captured by the offence provisions, such that it is unclear what the legal consequences would be for non-compliance with the conditions. The committee notes that the explanatory materials do not clarify this issue and it is therefore difficult to properly assess whether these conditions are compatible with human rights.

Minister's response

I thank the Committee for its observations. The conditions imposed on BVRs are not all considered to be monitoring and curfew conditions (the breach of which constitutes a criminal offence).

Broadly, criminal offences apply in relation to breaches of monitoring conditions, curfew and electronic monitoring conditions. This means that those conditions as listed in the Committee's paragraph 1.48 do not attract criminal penalties as they do not fall into one of these categories.

The Committee also correctly notes that subsection 76B(4) of the Migration Act provides that certain prescribed conditions are excluded from criminal penalties. For the purposes of subsection 76B(4), regulation 2.25AC prescribes conditions 8612 (notify of household members), 8616 (notify of criminal contacts), 8617 (notify of transactions over $10,000 AUD), 8618 (notify of debts in excess of $10,000 AUD and bankruptcy) and 8621 (electronic monitoring).

This means that as a result of the BVC and BVSOOM Bills, criminal offences apply for breaches of the following monitoring conditions:

- 8401 – Must report at a specified time and place.
- 8513 – Must notify of residential address within 5 days of grant
- 8542 – Must report in person for removal when instructed
- 8543 – Must attend at a place and time to facilitate efforts to arrange removal
- 8552 – Must notify of change in employment details
- 8561 - Must attend a specified place and time for an interview relating to the visa
- 8614 – Must notify of interstate or overseas travel
- 8615 – Must notify of associations if convicted of offence involving minor or vulnerable person

Criminal offences also apply to breaches of the curfew condition (8620) and the electronic monitoring condition (8621).

Additionally, new criminal offences introduced in the BVC Bill apply for breaches of conditions 8622 (must not work or perform incidental activity with minors or vulnerable people), 8623 (must not go within 200 metres of a school) and 8624 (must not make contact with victim or victim's family). These conditions only apply where a person has a relevant criminal history.

The offences that apply to a breach of these BVR conditions are vital to ensuring that the NZYQ- affected cohort remain appropriately engaged with the Department and the ABF, and cooperate in arrangements to facilitate their removal from Australia. The new offence provisions provide a proportionate response in order to effect engagement of the NZYQ-affected cohort with the Department and ABF. Attempts to deliberately and repeatedly evade contact with, and monitoring by, the Department and the ABF demonstrates a disregard and contempt for Australian laws. This behaviour is contrary to the Australian community's expectations that the NZYQ-affected cohort abides by Australia's laws and will engage with the Department and the ABF to resolve their immigration status.

All visa conditions applicable to BVRs put beyond doubt the types of behaviours that are unacceptable for the NZYQ-affected to engage in whilst they resolve their immigration status residing in the Australian community.

However, only some of these BVR conditions attract criminal penalties when breached. This is appropriate and reasonable to ensure the Australia community can continue to have confidence that the migration system is being well-managed in respect of the NZYQ-affected cohort.

The consequence of breaching a BVR condition that does not attract criminal penalties could include that the individual will be warned and counselled about expected conduct.

Previous compliance with visa conditions is one factor that may be considered when assessing whether a person should be referred to the Court for consideration under the new Community Safety Order provisions.

In relation to the Committee's specific questions:

1.55 The committee notes that it has previously considered several of these visa conditions when they were first introduced in 2021, including the conditions requiring visa holders to obtain the minister's approval before taking up specific kinds of employment and not become involved in disruptive activities. The committee previously concluded that there may be a significant risk that the conditions impermissibly limit multiple human rights. Given the committee's previous human rights concerns with respect to many of the conditions and noting the insufficient information is contained in the explanatory materials, the committee considers further information is required to assess the compatibility of this measure with multiple human rights, and as such seeks the minister's advice in relation to:

(a) what are the legal consequences of not complying with conditions outlined in paragraphs [1.48, 1.49];

Some of the BVR conditions that do not attract criminal penalties are imposed so that the Government can be clear about what behaviour is expected of this cohort in the Australian community.

While failure to comply with a visa condition can render a BVR liable for cancellation, the Department and the ABF will consider compliance with the relevant BVR condition and other conditions, employing a flexible response to alleged breaches that will be proportionate to the severity of the breach. The Department and ABF ensure that BVR holders understand the conditions through the provision of information, education and counselling about expected behaviours and consequences of non-compliance.

The BVCOM Bill was amended by the Government in the Senate to introduce a Community Safety Order scheme in the *Criminal Code 1995* which includes Community Safety Detention Orders and Community Safety Supervision Orders that can be issued by a court.

Previous compliance with visa conditions is one factor that may be considered when assessing whether a person should be referred to the Court for consideration under these new provisions.

(b) are the conditions described in paragraph [1.48] sufficient to meet the quality of law test, in particular:

- ***(i) what activities would be considered 'disruptive' and would this condition limit a visa holder's right to freedom of assembly (for instance, by preventing the visa holder from engaging in peaceful protest);***
- ***(ii) what constitutes 'significant financial hardship' and how is this assessed;***
- ***(iii) what constitutes 'any significant change' in relation to a visa holder's 'debts, bankruptcy or financial hardship'; and***

Condition 8303 is an existing condition that has not been amended by either the BVC or BVCOM Bills. What would be considered 'disruptive' would depend on the factual circumstances.

The amendments in the *Migration Amendment (Bridging Visa Conditions) Regulations 2023* omit wording referring to significant financial hardship. Instead, condition 8618 has been reworded as follows:

8618 (1) If the holder incurs a debt or debts totally AUD10 000 or more, the holder must notify Immigration within 5 working days after the holder incurs the debt or debts.

(2) If the holder is declared bankrupt, the holder must notify Immigration within 5 working days after the holder is so declared.

(3) The holder must notify Immigration of any significant change in relation to the holder's debts or bankruptcy within 5 working days after the change occurs.

New condition 8618 clearly requires the BVR holder to whom the condition applies to notify of debts amounting to a total of AUD10,000 or more or bankruptcy.

The meaning of significant change as defined in policy by the Department is any receipt of AUD10,000 or more, and any increase in the level of debt of AUD10,000 or more.

These amendments strengthen and make clear what behaviour is required by the visa conditions.

(iv) is the visa holder provided with guidance as to the matters set out above (in subparagraphs (i)– iii));

Non-citizens granted any visa, including a BVR, are notified in writing of the decision to grant the visa. This notification includes information about any conditions that apply to the holder of the visa.

Additionally, the Department provides oral notification of the BVR grant to each individual and explains the conditions that apply. Interpreters are available for BVR holders during these conversations if required.

During reporting conversations, the Department gathers information from the BVR holder about compliance with visa conditions and if breaches are identified, counselling about expected behaviour is provided and the BVR holder's understanding is confirmed.

Failure to continue to comply may lead to formal warning notices, criminal penalties, and/or a referral to the court for consideration of a Community Safety Order.

(c) whether visa cancellation action remains a possible consequence of noncompliance and if so, whether the measure is compatible with the rights to work, an adequate standard of living, social security and health as well as the prohibition against inhuman or degrading treatment (noting that visa cancellation would result in the removal of work rights and eligibility for social security and Medicare); and

The provisions in the Migration Act that allow or require a visa to be cancelled will still apply to BVR holders. However, where that cancellation is discretionary, such as for breaching BVR conditions, it is expected to be used only in exceptional circumstances. This is because the usual consequence of visa cancellation is detention and removal, which are not available to the NZYQ-affected cohort. As the Committee has pointed out, visa cancellation would lead to the denial of the ability to support themselves while living in the community.

The Government has therefore created criminal penalties that apply to this cohort for breaches of certain BVR conditions and a Community Safety Order framework which includes Community Safety Detention orders as well as Community Safety Supervision orders. These provide an effective means of response to

potential serious breaches of visa conditions within the NZYQ-affected cohort, because it is clear that the normal consequences of breaching visa conditions will not apply to this cohort.

The Minister will consider a person's compliance with visa conditions as well as other aspects of the individual's circumstances when considering whether to make an application to the court for consideration for a Community Safety Order.

An individual's history of compliance with conditions on their BVR, including any warning notices previously issued, will be taken into account when decided whether to refer the individual to the Australian Federal Police for consideration of prosecution for a breach those visa conditions that are linked to criminal offences at sections 76B, 76C and 76D of the Migration Act.

(d) whether visa holders will be clearly notified of the specific consequences of breaching a mandatory visa condition (including specifying which conditions are subject to the offence provisions and which provisions do not carry a criminal penalty).

Upon grant of a BVR, individuals are given a grant notification letter which contains a list of all conditions imposed on the person's visa.

The grant notification also provides an explanation of which conditions are subject to an offence under the Migration Act, as well as those conditions for which breaches are excluded from the offences.

Committee view

Powers of authorised officers

1.69 The committee notes that empowering an authorised officer to do all things necessary or convenient to be done relating to a person's monitoring device; to determine or monitor the location of a person wearing a device; and to collect, use or disclose personal information to any person for a wide variety of purposes, would engage and limit the right to privacy. In addition, noting that personal information may be shared with 'any other person', including potentially the media or general public, for the broad purpose of 'protecting the community in relation to persons who are subject to monitoring', the committee notes there are concerns that the measure may limit the rights to life and security of person. Further, as the authorised officer's powers can be exercised despite any other law of the Commonwealth, a State or a Territory, the committee notes that this would remove any ability to take action with respect to a potential violation of rights, which engages the right to an effective remedy.

Minister's response

The safety of the Australian community is an absolute priority for the Government. The measures in the proposed legislation were enacted because of the pressing need to ensure that members of the Australian community are not placed at risk due to the release of the NZYQ-affected cohort from immigration detention.

Many of the people who have been released are individuals who have committed serious criminal offences, including violent and sexual assault offences. The Government is committed to monitoring the behaviour of these individuals and, where necessary, imposing additional measures to protect the Australian community.

Electronic monitoring must be imposed unless the Minister is satisfied that it is not reasonably necessary to impose the condition for the protection of any part of the Australian community. The provisions to support the use of electronic monitoring devices only apply where the electronic monitoring condition is imposed.

The objective of the amendments in the BVCOM Bill is to make clear on the face of the legislation the power to use electronic monitoring. This includes:

- authority for the installation, use and monitoring of the electronic monitoring devices
- authority for the collection, use and disclosure of information gained from electronic monitoring devices, and
- ensuring this authority extends to officers of specified Commonwealth, state and territory agencies.

Visa condition 8621(2) requires a visa holder to allow an authorised officer to fit, install, repair or remove a monitoring device. As such, under the current legislative provisions, it is necessary to obtain a BVR holder's consent to fit, install, repair and remove a monitoring device.

These provisions do not authorise the use of force to install monitoring devices, however a refusal to comply with this requirement constitutes a criminal offence (subsection 76D(2)).

Authorisation provisions in the *Criminal Code Act 1995* in relation to control orders have been adapted for this purpose – see for example subsections 104.5A(2), (4) and (5) of the Code. The provisions represent an appropriate and proportionate method of achieving the non-punitive object of community safety.

One purpose of electronic monitoring is to avoid a requirement for a BVR holder to have to report frequently to the Department and the ABF on their location, if the Department or the ABF already have that information via electronic monitoring. The amendments make the imposition of the conditions as a whole less of an interference in the day to day activities of an individual's life.

The scope of the authorisation to collect, use and disclose information raised a number of policy issues which were carefully worked through by the Department, including:

- who should be authorised to collect, use and disclose information
- the purpose for which the information may be collected, used and disclosed
- the scope of the information covered, for example:
  - the initial disclosure of information by the Commonwealth to State or Territory authorities, contractors and subcontractors for the purpose of configuring a monitoring device
  - information obtained through the use of monitoring devices
  - information obtained through other surveillance and enforcement activities, such as curfew checks
- safeguards or restrictions to prevent the misuse of this information.

Any use of personal information by ABF officers and Departmental officers is consistent with the *Privacy Act 1988*.

With respect to the Committee's specific questions:

1.70 The committee notes that the information sought from the minister with respect to the measures set out above will be relevant to the committee's assessment of the human rights compatibility of this measure. In addition to the information sought above, the committee considers further information is required with respect to this specific measure to assess its compatibility with the rights to privacy, life, security of person and effective remedy, and as such seeks the minister's advice in relation to:

(a) Why it is necessary to enable an authorised officer to do anything 'convenient' to be done for a number of listed purposes and not just that which is reasonably necessary;

The provisions to support the use of electronic monitoring devices only apply where the electronic monitoring condition is imposed. The provisions represent an appropriate and proportionate method of achieving the enabling authorised officers to carry out functions in relation to electronic monitoring, to protect community safety.

Applying these monitoring conditions in practice can be time-critical, and it is a policy decision of the Government to give authorised officers the power to do anything convenient that may help in determining the location of the BVR holder being monitored.

(b) why there is no requirement on an authorised officer to act reasonably when imposing a requirement on a person subject to monitoring to allow the officer to exercise their powers;

The provisions to support the use of electronic monitoring devices can only be imposed where this is necessary to support community safety and to be able to readily contact BVR holders should their removal from Australia become reasonably practicable. The provisions represent an appropriate and proportionate method of achieving the non-punitive object of community safety.

It is a policy decision of the Government to give authorised officers the power to do all things that may help in determining the location of the person being monitored.

All departmental employees and ABF officers are subject to the Department's Integrity and Professional Standards Framework, which supports officers' obligation to undertake their duties in accordance with the APS code of conduct. This framework ensures all behaviours and actions undertaken by employees is done so with consideration to the preservation of human rights, and respect and reasonableness, wherever possible and appropriate.

(c) why an authorised officer can do all things to determine or monitor the location of the person subject to monitoring rather than specifying that this is limited to determining whether a condition is being complied with, whether the person has committed an offence, to protect the public or to facilitate their location for the purposes of their removal;

The Government considers the imposition of these monitoring requirements to be reasonable and necessary both for the purposes of community safety and to ensure that members of the NZYQ-affected cohort remain engaged in arrangements to manage their temporary stay in, and when practicable removal from, Australia.

The monitoring conditions are targeted and applied where reasonably necessary, allowing the Department and the ABF to respond appropriately if the BVR holder engages in behaviour that may put the Australian community or public order at risk.

The targeted monitoring conditions apply where knowing the physical location of person is important for community protection, for example in ensuring that a convicted child sex offender complies with conditions relating to proximity to child-care centres and schools.

(d) with respect to proposed subsection 76F(2), which would empower an authorised officer to collect, use or disclose to any other person information for certain purposes, why is it not appropriate to:

(i) circumscribe the scope of information that may be collected, used or disclosed and to whom the information must relate (noting that as currently drafted, the measure would allow personal information about persons who are not subject to visa conditions (such as family members) to be collected and disclosed by authorised officers to anyone);

(ii) ***limit to whom personal information may be disclosed to only those Commonwealth, state and territory entities that require the information, such as law enforcement and corrections authorities and relevant departmental staff; and***

(iii) ***circumscribe the purposes for which information may be collected, used or disclosed, in particular, clarify the scope of 'protecting the community in relation to persons who are subject to monitoring'.***

The Government is committed to ensuring the safety of the Australian community and giving authorised officers the necessary powers to achieve this. This includes the collection, use and disclosure of information that may be necessary to protect the public.

There are a range of persons that may need to collect, use and disclose information obtained through the use of monitoring devices or in the course of other activities associated with monitoring compliance with BVR conditions. These people may be in government agencies at the Commonwealth, State or Territory level, and in some cases could be contractors and sub-contractors to government.

Monitoring and responding to potential BVR condition breaches requires a collaborative approach, which includes the sharing of information with third party agencies and sub-contractors. Prescribing the scope of information, and who it can be disclosed to, would limit this collaboration, and likely increase community risk as authorised officers may not be able to share information in all situations where it might be necessary.

Any collection, use or disclosure of personal information by authorised officers and must be consistent with the *Privacy Act 1988* (Privacy Act). For example, if a visa holder is alleged to have committed an offence, then the disclosure of that visa-holder's personal information to a law enforcement body, such as the Australian Federal Police, or a State or Territory police as part of the process of mitigating risk to the Australian community would be subject to the protections and regulatory actions afforded by the Privacy Act.

(e) why there is no legislative requirement to only share information between authorised entities in accordance with appropriate protocols and processes;

(f) what safeguards, if any, exist to ensure that any limitation on the right to privacy is proportionate, such as requirements as to what to do with the information collected, how to store it, how long to store it etc;

(g) what safeguards are in place to mitigate the risk of a person's rights to life and security of person being limited as a consequence of the potential sharing of information with the general public and the media;

The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

Personal information collected in the monitoring process would be held in accordance with the collection and security requirements of the Australian Privacy Principles, the policies and procedures of the Department and the Australian Government Protective Security Policy Framework (AGPSPF). The Department holds personal information in a range of audio-visual, paper and electronic based records (including in cloud-based applications and services). The Department complies with the AGPSPF for protecting departmental resources (including information) from harm or unauthorised access. If personal information held by the Department is lost, or subject to unauthorised access or disclosure, the department will respond in accordance with the Office of the Australian Information Commissioner's guidelines.

The Government is committed to ensuring the safety of the Australian community and to give authorised officers the necessary power to achieve this. This includes the collection, use and disclosure of information

necessary to protect the public and the provisions represent an objective and proportionate means of achieving that objective. Disclosure of information must be made in accordance with the Privacy Act and Departmental employees are also subject to the Department's Integrity and Professional Standards Framework, which supports officers' obligation to undertake their duties in accordance with the APS code of conduct. This framework ensures all behaviours and actions undertaken by employees is done so with consideration to the preservation of human rights, and respect and reasonableness, wherever possible and appropriate.

Any member of the NZYQ cohort who is in the community and is experiencing an emergency (whether that be to their personal safety or something such as a fire, flood or other natural disaster) has access to, and is entitled to receive, the same level of assistance from emergency services as any other member of the public.

(h) why it is necessary for the authorised officers' powers to be exercised despite any other law of the Commonwealth, a State or a Territory (whether written or unwritten); and

The legislation ensures that authorised officers – a class of persons which may include Commonwealth, State and/or Territory employees – can exercise powers as necessary under subsections 76F(1) and (2) of the Migration Act without contravening any Commonwealth, State or Territory legislation relating to the collection, use or disclosure of personal information; other restrictions on the use of information; or the use of surveillance devices. These powers are necessary to facilitate the physical operation of the electronic monitoring scheme as well as the exchanges of information necessary to facilitate that operation. Given the electronic monitoring devices may be applied in one jurisdiction and the individual may travel across state borders, making it clear that electronic monitoring pursuant to the Migration Act can operate without contravening state or territory legislation avoids any doubt about the interaction between laws and across jurisdictions.

(i) what remedies are available for any potential violation of rights arising from the exercise of an authorised officers' powers.

A BVR holder has the following remedies for the potential violation of any rights arising from the exercise of an authorised officer's powers:

- A right to seek a remedy in tort, for example damages for trespass, or false imprisonment
- A right to make a complaint to the Commonwealth Ombudsman, the Australian Human Rights Commission, or the National Anti-Corruption Commission as relevant.
- A right to make representations under subsection 76E(3) as to why their BVR should not be subject to a condition prescribed under paragraph 76E(1)(a) (which includes the monitoring condition, and so could be indirectly relevant to an authorised officer's exercise of powers under s 76F).
- A right to seek judicial review of a decision of the Minister (or a delegate) to grant a BVR with a monitoring condition imposed.