



Australian Government
Department of Home Affairs



Department of Home Affairs submission to the Inquiry into the Migration Amendment Bill 2024

Senate Legal and Constitutional Affairs Legislation
Committee

21 November 2024

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Abbreviations

BVR - Subclass 070 (Bridging (Removal Pending)) visa

Department – Department of Home Affairs

Migration Act – *Migration Act 1958*

Migration Regulations - *Migration Regulations 1994*

1. Introduction

The Department of Home Affairs welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Migration Amendment Bill 2024 (the Bill).

The Bill was introduced to the House of Representatives on 7 November 2024. This submission provides an overview of the measures included in the Bill and explains the rationale for the Bill and its intended operation.

2. Background

The Bill would make necessary changes to strengthen the effective administration of the Bridging (Removal Pending) visa scheme, established to manage the NZYQ cohort, and reduce impediments to the Government discharging its duty to remove people who have had their visas cancelled and who have no right to remain in Australia, including through removal to a third country.

The changes made through this Bill are also necessary following the 6 November judgment of the High Court in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2024] HCA 40, which found that the imposition of electronic monitoring and curfew conditions on certain Bridging (Removal Pending) visas (BVRs) was not valid.

The Court ruled that:

- the provision imposing each of the curfew and monitoring conditions on BVRs is *prima facie* punitive and not reasonably capable of being seen as necessary for a legitimate, non-punitive purpose, and
- the regulations that imposed the conditions infringed upon Chapter III of the Constitution and were invalid.

The majority reasoning of the Court was in part based on the negative framing of the test for the imposition of these conditions as set out in clause 070.612A(a) and (d) of the Migration Regulations. The test required that the conditions must be imposed unless the Minister was satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community.

The majority also found that the risk of harm to which the regulation was directed was broad, “unparticularised and indeterminate”. It was not necessarily connected to the existence of any real risk of physical or other harm to any member of the Australian community.

The effect of the Court's decision was that all electronic monitoring and curfew conditions applied through BVRs were invalid.

It also meant that no offence for breaching these conditions could have occurred (as the conditions were invalid from the time they were imposed).

The Migration Amendment (Bridging Visa Conditions) Regulations 2024

Amendments to the Migration Regulations were made by the Governor-General on 7 November 2024 through the Migration Amendment (Bridging Visa Conditions) Regulation 2024 establishing a new community safety test for the imposition of the electronic monitoring and curfew conditions, informed by the High Court's reasons in YBFZ.

Under the new community safety test the Minister or delegate must be positively 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 regulations inserted a new definition of a serious offence in clause 070.111 to mean an offence against a law of the Commonwealth, a State or a Territory where:

- it is punishable by imprisonment for life or for a period, or maximum period, of at least 5 years imprisonment under any Australian law, and

- the particular conduct constituting the offence involves, or would involve, one of the following:
 - Loss of a person's life or serious risk of loss of a person's life
 - Serious personal injury or serious risk of personal injury
 - Sexual assault
 - The production, publication, possession, supply or sale of, or other dealing in, child abuse material
 - 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
 - Human trafficking.

The Minister must also be satisfied on the balance of probabilities that the imposition of the conditions is reasonably necessary and reasonably adapted and appropriate for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.

Decision makers consider a number of factors when assessing whether this test is met. This could include the individual's criminal history, any rehabilitation, reports from experts and the views of the Community Safety Board.

As a matter of priority, affected BVR holders were considered for the grant of a new BVR applying the new test for imposing electronic monitoring and curfew arrangements.

3. Purpose of the Bill

In support of the Migration Amendment (Bridging Visa Conditions) Regulations 2025, the Bill would align the community safety test referred to in section 76E of the Migration Act, with the new community safety test set out in the regulations.

In addition, the Bill would strengthen the legislative framework relating to the removal from Australia of certain non-citizens who are on a removal pathway to third countries. The Bill also supports the ongoing effective management of holders of a Bridging (Removal Pending) visa in the community.

4. Overview of the measures

4.1 New provisions to strengthen the legislative framework for removals, including to third countries

The Bill contains a set of provisions that are intended to strengthen the legislative framework that underpins the removal of individuals who have no right to remain in Australia, including to third countries, where that is consistent with Australia's international obligations. Together these changes are necessary for maintaining a swift, robust and effective removals program for those where the duty to remove, as set out in section 198 of the Migration Act, has arisen.

This includes through:

- Provisions that authorise the Commonwealth to enter arrangements with foreign countries to allow removal from Australia of non-citizens who have exhausted all avenues to remain in Australia, but who cannot be removed to their home country or are stateless. The Bill will authorise spending on, and Commonwealth action in relation to, these arrangements.
- Provisions that authorise the collection, use and disclosure of information (including personal information) to the government of a foreign country for purposes such as determining whether there is a real prospect of the removal of a removal pathway non-citizen from Australia becoming practicable in the reasonably foreseeable future, facilitating that removal and taking action or making payments in relation to third country reception arrangements and functions.
- a new cessation event in section 76AAA which has the effect that a BVR ceases to be in effect once permission is obtained from another country for the holder to travel to, and remain in, that other country, and the holder has been notified of the grant of that permission.
- a new definition of a 'removal pathway non-citizen'.

Australia does not remove individuals to countries in respect of which they have been found to engage Australia's non-refoulement commitments. This Bill does not change that position.

These changes support the integrity of Australia's immigration system by providing additional levers to effect the removal of individuals who have no right to remain in Australia.

Where an individual can be removed to their home country, then the Department will and does manage removals accordingly.

Where a person cannot be removed to their home country, Australia will look for third country removal options and ask individuals to depart voluntarily. However, where individuals are not cooperative, this Bill is intended to support their removal.

4.2 Strengthening the framework for managing BVR holders in the Australian community

The Bill contains amendments that would strengthen the framework used to manage BVR holders in the Australian community and uphold community safety.

- In response to the High Court's decision in YBFZ, the Bill includes amendments to section 76E, which provides for a procedural fairness mechanism for individuals who have had electronic monitoring or curfew imposed on their visa.

These amendments align section 76E with the new community safety test provided for in the Migration Amendment (Briding Visa Conditions) Regulations 2024.

- The Bill clarifies that the collection, use, and disclosure of criminal history information (including information about spent convictions) by the Minister or an officer of the Department is, and always has been, authorised for the purpose of informing, directly or indirectly, the performance of a function or the exercise of a power under the migration law or for providing advice or recommendations in connection with those functions or powers. This is essential to ensure the migration system can operate effectively without placing the Australian community at unacceptable risk.

4.3 Government sponsored amendments in the House of Representatives

On 20 November 2024, the Government introduced amendments that are aimed at supporting potential amendments to the Migration Regulations to provide for a BVR granted to an unlawful non-citizen under the Minister's personal power under section 195A of the Migration Act, to be subject to the same community protection conditions as a BVR granted to a non-citizen who must be released from immigration detention in accordance with the High Court's decision's in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37, where the conditions for the imposition of those conditions are satisfied.

The Government amendments are as follows:

- amendments to section 76E would have the effect that the rules of natural justice do not apply to any decision to grant a BVR with one or more of the prescribed conditions imposed, such as electronic monitoring and curfew. Section 76E would provide for a 'post-decision' procedural fairness mechanism, for all individuals subject to the community protection conditions, not just those in the NZYQ cohort.
- the amendment to subsection 76B(1) maintains the NZYQ cohort as in scope of the offence, but also provides that a person commits an offence if the person was granted their initial BVR under the Ministerial Intervention powers at section 195A on or after commencement of this provision.
- amendments to subsection 68(5) provide expressly that a grant of a further BVR will cease the previous BVR. This avoids an earlier BVR 'reactivating' as can occur for other bridging visa classes.

5. Conclusion

The provisions in the Bill will apply to non-citizens who are on a removal pathway from Australia and for whom there is no right to remain. The provisions of this legislation do not expand the cohort of people who are eligible for removal, nor do they change Australia's international law obligations.

These changes are necessary to continue to effectively manage these individuals while they are in the Australian community to support more removal options and maintain an orderly and effective migration system.