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BILLS DIGEST NO. 38, 2023–24 **5 DECEMBER 2023**

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

Leah Ferris
Law and Bills Digest Section

Dr Susan Love
Social Policy Section

Key points

- The purpose of the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 is to make a number of amendments following the rapid introduction and passage of the *Migration Amendment (Bridging Visa Conditions) Act 2023*.
- Specifically, the Bill will create new criminal offences for breaching certain visa conditions, amend the circumstances when a Minister must vary the conditions for a Bridging Visa R, and introduce new powers for the collection and use of information related to an electronic monitoring device.
- On 8 November 2023, the High Court of Australia ordered the release of an individual known as NZYQ from immigration detention, finding his detention unlawful.
- On 16 November 2023, the Government introduced the Migration Amendment (Bridging Visa Conditions) Bill 2023. This Bill passed both Houses that day with the support of the Opposition and received assent on 17 November prior to the High Court handing down its reasons in the NZYQ decision on 28 November 2023.
- The *Migration Amendment (Bridging Visa Conditions) Act 2023* amended the *Migration Act 1958* and the Migration Regulations 1994 to allow for the imposition of new visa conditions and the creation of offences for breaches of certain visa conditions which apply to non-citizens for whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future (the NZYQ-affected cohort).
- Stakeholders have raised significant concerns with these new provisions, and they are already the subject of at least 3 High Court challenges.
- Media reporting has foreshadowed that the Government will seek to move amendments to the Bill to introduce a new detention order scheme to be modelled on the continuing detention order scheme in Division 105A of the *Criminal Code*.
- The Opposition and the Australian Greens, as well as a number of independents, did not support the passage of the Bill through the House of Representatives.

ISSN 1328-8091

Contents

Date introduced: 27 November 2023

House: 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 at December 2023.

Purpose of the Bill

The purpose of the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (the Bill) is to amend the *Migration Act 1958* to:

- create new criminal offences for breaching certain visa conditions
- amend the circumstances when a Minister must vary the conditions for a Bridging Visa R and
- introduce new powers for the collection and use of information related to an electronic monitoring device.

These amendments follow the recent enactment of the *Migration Amendment (Bridging Visa Conditions) Act 2023* (*First Amendment Act*) which was introduced and passed within the space of one day.[1]

Progress of the Bill as at the time of writing

The Bill passed the House of Representatives on the day of introduction. The Opposition, the Australian Greens, Bob Katter (Katter's Australian Party), Rebekha Sharkie (Centre Alliance) and Independents Russell Broadbent, Zoe Daniel, Andrew Gee, Monique Ryan, Allegra Spender, Zali Steggall, Kylea Tink and Andrew Wilkie did not support the passage of the Bill through the House of Representatives. Ms Daniel proposed an amendment that would have required the Bill to be reviewed within six months of commencement, with the report to be tabled in Parliament.

At the time of writing this Digest, the Bill is before the Senate. Amendments to the Bill have been moved by:

- Independent Senator David Pocock, to provide that the amendments made by the Bill and the *First Amendment Act* sunset after 12 months (or alternatively six months) and that amendments to provisions of the Migration Regulations introduced by the *First Amendment Act* do not commence until they have been approved by a resolution of each House of the Parliament
- Senator Malcolm Roberts of Pauline Hanson's One Nation, to require the Bill to be reviewed within six months of commencement, with the report to be tabled in Parliament.

Media reporting has foreshadowed that the Government will seek to move amendments to the Bill to introduce a new detention order scheme to be modelled on the continuing detention order scheme in Division 105A of the *Criminal Code*. The Minister for Home Affairs, Clare O'Neil, has stated 'we are not going home until a preventative detention regime has been adopted by this Parliament. We're not going home.'

Background

History of mandatory detention in Australia

The policy of mandatory detention was introduced in 1992 by the Keating Government.[2] It is currently provided for in section 189 of the *Migration Act*, which requires that all unlawful non-citizens must be taken into immigration detention.[3]

An unlawful non-citizen is a non-citizen in Australia who does not hold a valid visa (the meaning of *unlawful non-citizen* is set out in Division 1 of Part 2 of the *Migration Act*). If a visa is cancelled, its former holder becomes an unlawful non-citizen (unless they hold another visa which comes into

1. Australian Parliament, Migration Amendment (Bridging Visa Conditions) Bill 2023 homepage.
2. The Keating Government implemented this policy by passing the *Migration Amendment Act 1992* which amended the *Migration Act* to require certain 'designated persons' to be detained.
3. For historical background on immigration detention, including mandatory detention, asylum seeker issues and children in detention, see Janet Phillips and Harriet Spinks, *Immigration detention in Australia*, Background note, (Canberra: Parliamentary Library, 2013).

effect immediately after cancellation of the first visa). Section 198 of the *Migration Act* imposes duties on an officer to remove an unlawful non-citizen from Australia as soon as reasonably practicable, in a range of circumstances.

The 2015 report of the Australian Human Rights Commission into Children in Immigration Detention notes:

> There is nothing new in the finding that mandatory immigration detention is contrary to Australia's international obligations. The Australian Human Rights Commission and respective Presidents and Commissioners over the last 25 years have been unanimous in reporting that such detention, especially of children, breaches the right not to be detained arbitrarily. (p. 10)

The lawfulness of indefinite immigration detention was discussed in detail in the Bills Digest for the *Migration Amendment (Clarification of International Obligations for Removal) Act 2021*.[4]

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. He had been in immigration detention since 2018 after his temporary protection visa was cancelled following conviction for child sex offences. NZYQ is from the persecuted Rohingya people not recognised as citizens in Myanmar. He was therefore stateless and could not be removed to his country of origin. This meant he faced the prospect of indefinite detention.

In making these orders, 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'. The High Court did not release its reasons at the time it made the order.

On 28 November 2023, the High Court released the reasons for its judgment – initially, it had not been expected to do so until early 2024. The court found that indefinite immigration detention was unconstitutional because it was punitive – Chapter III of 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 ruling overturned a 2004 precedent set in *Al-Kateb v Godwin*, which held that even though the plaintiff – a stateless Palestinian and unsuccessful asylum seeker – could not be removed from Australia in the reasonably foreseeable future, he was not unlawfully detained. 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.

In its decision in NZYQ, the High Court provided some clarity on when detention would be considered lawful:

> Release from unlawful detention is not to be equated with a grant of a right to remain in Australia. Unless the plaintiff is granted such a right under the Migration Act, the plaintiff remains vulnerable to removal under s 198. Issuing of a writ of habeas corpus would not prevent re-detention of the plaintiff under ss 189(1) and 196(1) of the Migration Act in the future if, and when, a state of facts comes to exist giving rise to a real prospect of the plaintiff's removal from Australia becoming practicable in the

4. See also commentary on the 2021 legislation, for example Human Rights Law Centre (HRLC), 'Morrison government rushes through new laws that allow lifetime detention of refugees', media release, 13 May 2021; Sangeetha Pillai, 'The Migration Amendment (Clarifying International Obligations for Removal) Act 2021: A case study in the importance of proper legislative process', (AUSPUBLAW: Australian Public Law blog, 10 June 2021).

> reasonably foreseeable future. Nor would grant of that relief prevent detention of the plaintiff on some other applicable statutory basis, such as under a law providing for preventive detention of a child sex offender who presents an unacceptable risk of reoffending if released from custody. [para 72].

In a statement from the Attorney-General tabled in Parliament on 5 December 2023, the Government clarified its interpretation of the NZYQ decision and proposed preventative detention scheme:

> Any detention imposed under Commonwealth law otherwise than as a result of the adjudgment and punishment of criminal guilt must be directed to a legitimate non-punitive purpose, such as the protection of the Australian community from an unacceptable risk of grave or serious harm.
>
> The High Court has previously upheld preventative detention of High Risk Terrorist Offenders on community safety grounds, where that is ordered by a court, and where the scheme is tailored to protecting the community from the threat of harm from terrorism: Benbrika (2021) 272 CLR 68 at [36], [41], [43], [48] (Kiefel CJ, Bell, Keane and Steward JJ); see also [79], [100] (Gageler J), [163] (Gordon J).
>
> These principles have formed the basis of the Government's proposed preventative detention regime – a regime that is closely modelled, in all relevant respects, on the preventative detention laws for High Risk Terrorist Offenders which were first introduced by the former government in 2016.

The NZYQ-affected cohort

Following the release of NZYQ, a further cohort of over 140 people have progressively been released from immigration detention. A Department of Home Affairs 'dashboard' document released through a Senate order for the production of documents gave some details of the initial cohort of 92 people potentially affected by the ruling.

As explained in the Explanatory Memorandum to the Migration Amendment (Bridging Visa Conditions) Bill 2023:

> 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. In many cases, the person has a protection finding, within the meaning of section 197C of the Migration Act, which prevents their removal to their country of citizenship or habitual residence and there is currently no other country to which their removal can be effected. A 'protection finding' reflects the circumstances in which Australia has non-refoulement obligations with reference to a person. In other cases, removal is not practicable in the foreseeable future for other reasons, including where the person is stateless and their country of former habitual residence is not willing to accept their return.
>
> 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. (p. 30)

Migration Amendment (Bridging Visa Conditions) Act 2023

On 16 November 2023, the Government introduced the Migration Amendment (Bridging Visa Conditions) Bill 2023. This Bill passed both Houses that day with the support of the Opposition and received Royal Assent on 17 November. At that point, the High Court was yet to hand down its reasons in the NZYQ decision – it did so on 28 November 2023.

The amendments made by the *Migration Amendment (Bridging Visa Conditions) Act 2023* have the effect of providing for the grant of bridging visas (specifically Subclass 070 (Bridging (Removal Pending)) Visa R (BVR)) to non-citizens released from immigration detention with certain monitoring conditions placed on them. A person commits an offence if they breach a relevant condition. New conditions and the provisions under which they must or may be imposed were inserted into the Migration Regulations 1994.

Committee consideration

At the time of writing, the Bill has not been referred to any Committees.

Senate Standing Committee for the Scrutiny of Bills

The Scrutiny of Bills Committee has not reported on the Bill at the time of writing.

Position of major interest groups

The Law Council of Australia has released media statements on the present Bill and the previous Bill, urging further review of and consultation on the measures.

The Kaldor Centre for International Refugee Law has discussed the potential impacts regarding international law, including in an article in *The Conversation* following the release of the High Court's reasons, and in a piece on mandatory detention.

A number of commentators have discussed issues of the intersection of constitutionality, government, the parliament and the courts, including professor of law Rosalind Dixon and public policy researcher Bronwyn Kelly.

Others question the proportionality of the measures in the two Bills, for example the Australian Lawyers Alliance noted 'there's no suggestion or evidence [the released detainees] are high risk … there might be some who are, but there are ways of doing that [managing risk] for prisoners every day.' The Human Rights Law Centre criticised the breadth of the provisions of the first Bill concerning compliance with the imposed conditions.

Some commentators consider it possible the new measures could also be found unconstitutional, with a number of challenges already underway.

Financial implications

The Explanatory Memorandum states that the Bill will have a low financial impact (p. 3).

Statement of Compatibility with Human Rights

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Government has assessed the Bill's compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.[5]

Parliamentary Joint Committee on Human Rights

The Committee has not reported on the Bill at the time of writing.

Key issues and provisions

Creation of new offences for breaching visa conditions

As discussed in the background section to this Bills Digest, the *First Amendment Act* amended the *Migration Act* and the Migration Regulations 1994 to allow for the imposition of new visa conditions and the creation of offences relating to breaches of certain visa conditions, that will only apply to members of the NZYQ-affected cohort and not to other visa holders.[6] The new

5. The Statement of Compatibility with Human Rights can be found at pages 17–24 of the Explanatory Memorandum to the Bill.
6. Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, Explanatory Memorandum, 1–2. For a summary of the amendments contained in the Migration Amendment (Bridging Visa Conditions) Bill 2023, see Human Rights Law Centre, *Summary: Migration Amendment (Bridging Visa Conditions) Bill 2023*, 17 November 2023.

offences relate to breaching a monitoring condition, a requirement to remain at a notified address between certain times of the day, and requirements relating to wearing a monitoring device.

Amendments to the Migration Amendment (Bridging Visa Conditions) Bill 2023 proposed by the Government in the Senate (Item 9) introduced 3 new visa conditions to be applied to the NZYQ-affected cohort:

- New visa condition 8622 provides that if the holder has been convicted of an offence that involves a minor or any other vulnerable person, the holder must not perform any work, or participate in any regular organised activity, involving more than incidental contact with a minor or any other vulnerable person.
- New visa condition 8623 provides that if the holder has been convicted of an offence that involves a minor or any other vulnerable person, the holder must not go within 200 metres of a school, childcare centre or day care centre.
- New visa condition 8624 provides that if the holder has been convicted of an offence involving violence or sexual assault, the holder must not contact, or attempt to contact, the victim of the offence or a member of the victim's family.

Item 1 of the Bill will amend the *Migration Act* to insert 3 new offences with respect to breaches of visa conditions 8622, 8623 and 8624 which will also only apply to members of the NZYQ-affected cohort. These offences carry a maximum penalty of 5 years imprisonment, or 300 penalty units, or both.[7]

Item 2 provides that if convicted of one of these offences, the court must impose a sentence of imprisonment of at least one year (referred to as a 'mandatory minimum' sentence). As stated in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the Scrutiny of Bills Committee is likely to be critical of provisions that impose fixed or minimum penalties, as they limit the usual judicial discretion of the courts (p. 39).

The Government has argued that mandatory minimum penalties are appropriate in this case as ordinarily a visa holder who breaches a condition on their visa would be subject to visa cancellation, detention and removal:

> However, for the NZYQ affected cohort, this usual course of action is not available. The government therefore considers that the strengthened requirements of the minimum mandatory sentences, targeted towards only those individuals with serious criminal history, are necessary, reasonable and proportionate for protecting the most vulnerable members of society. Mandatory minimum sentences appropriately reflect the seriousness of these offences and the need to make clear that non-compliance with visa conditions that are aimed at protecting community safety is viewed seriously. (Explanatory Memorandum pp. 22–23)

The visa holder accused of non-compliance with a relevant condition will bear the evidential burden in relation to whether they have a reasonable excuse for their non-compliance (referred to as reversal of the burden of proof). As noted by the Scrutiny of Bills Committee, 'provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with [the] common law right [to be presumed innocent]' (p. 7).

Where a Bill reverses the burden of proof, the Scrutiny of Bills Committee expects the explanatory memorandum to the Bill to address the following matters:

- why it is appropriate to reverse the burden of proof
- whether the relevant matter is peculiarly within the knowledge of the defendant

7. The current amount of a penalty unit is $313.

- whether it would be significantly more difficult and costly for the prosecution to disprove the relevant matter than for the defendant to establish the matter
- if the defendant bears a legal burden rather than an evidential burden, why this is the case
- whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (p. 7).

The Explanatory Memorandum does not appear to address all of these matters with respect to the reversal of the burden of proof, stating:

> The visa holder accused of non-compliance with a relevant condition will bear the evidential burden in relation to whether they have a reasonable excuse for their non-compliance. This is reasonable and necessary in circumstances where, given the nature of the conduct subject of the conditions, the visa holder will have knowledge of the circumstances of their non compliance, such that the visa holder is best placed to furnish to the court the details of the reasonable excuse. (p. 21).

The new offence provisions will apply to a BVR granted after commencement or a BVR granted or taken to have been granted before commencement if the visa holder engaged in the conduct giving rise to the offence after commencement (**item 5** of the Bill).

Changes to when the Minister must vary conditions for a BVR

The *First Amendment Act* 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 currently prescribed are Condition 8620 (curfew) and Condition 8621 (electronic monitoring).[8]

Currently, the Minister is required to grant a person a new BVR without one or both of those conditions if the person makes representations and the Minister is satisfied that the person does not pose a risk to the community. **Item 3** of the Bill will amend paragraph 76E(4)(b) to provide that the Minister must instead be satisfied that the conditions prescribed are not reasonably necessary for the protection of any part of the Australian community.

The Explanatory Memorandum provides that the amendment will 'ensure that the protection of the Australian community is the paramount consideration in relation to whether one or more prescribed conditions must be applied to a BVR granted to a member of the NZYQ affected cohort' (p. 12).

New monitoring powers

Item 4 inserts **proposed section 76F** which provides for new powers that an authorised officer may exercise in relation to a person who has been or is subject to monitoring.

Proposed subsection 76F(1) provides that an authorised officer may do anything necessary or convenient in relation to a person who is subject to monitoring, provided it is done for one or more specified purposes (including installing, fitting or removing the monitoring device; operating or using the device; and determining or monitoring the location of the person). **Proposed subsection 76F(2)** sets out the purposes for which an authorised officer may collect, use or disclose information related to monitoring. **Proposed subsection 76F(4)** provides for an authorised officer's exercise of a power under **proposed subsections 76F(1) or (2)** to be subject to any conditions, restrictions or other limitations that are prescribed by the regulations.

These amendments will apply on and after commencement to:

8. Section 2.25AD of the Migration Regulations 1994.

- persons who become subject to monitoring **before, on or after that commencement**
- monitoring devices and related monitoring equipment installed or fitted **before, on or after that commencement**.

The Explanatory Memorandum states:

> The purpose of the provisions is to make very clear that collection, use and disclosure of personal information is authorised for the purposes of monitoring of relevant individuals, even where State or Territory laws in respect of use of surveillance devices might otherwise apply. (p. 24)

Concluding comments

At the time of writing, the provisions introduced by the *First Amendment Act* are already the subject of at least three High Court challenges.[9] The Law Council of Australia has called for an urgent parliamentary review of the *First Amendment Act*, stating that it has 'strong concerns about the rushed passage of an Act that imposes harsh offence provisions subject to mandatory sentences and draconian limitations on liberty that are disproportionate to the risks it seeks to address'.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.

9. Asylum Seeker Resource Centre, 'ASRC launches High Court challenge on overreach of new Federal Government laws', 1 December 2023; Monte Bovill, 'Refugee launches High Court challenge after being required to wear ankle bracelet and follow strict curfew', *ABC News Online*, 28 November 2023; Matthew Doran, 'Emergency powers regarding people released from immigration facing High Court challenge, less than a week after passing parliament', *ABC News Online*, 22 November 2023.