

OFFICIAL**Key Brief Number: LEG-01**

**Home Affairs Portfolio
Department of Home Affairs
Additional Estimates Hearing – February 2024**

KEY BRIEF

Topic: Citizenship loss legislation, including High Court challenges to ministerial power to cease/revoke Australian citizenship of dual citizens in certain circumstances

Responsible Deputy: Ms Clare Sharp, Group Manager, Legal Group

Key Points

- On 1 November 2023, the High Court delivered judgment in two constitutional challenges to citizenship cessation provisions in the *Australian Citizenship Act 2007* (Cth) (the Act), which it had heard consecutively on 14 and 15 June:
 - **Benbrika** was a constitutional challenge to s 36D of the Act, which empowered the Minister to cease the Australian citizenship of dual citizens who have been convicted of certain specified offences under the Criminal Code (Cth), including terrorism-related offences, where the Minister was satisfied those convictions demonstrated that the person had repudiated their allegiance to Australia and that it would be contrary to the public interest for the person to remain an Australian citizen.
 - **The High Court found s 36D to be invalid and that Mr Benbrika is an Australian citizen.** By majority, the High Court (Kiefel CJ, Gageler, Gleeson and Jagot JJ; Gordon J; Edelman J) found that s 36D of the Citizenship Act purported to vest in the Minister the exclusively judicial function of punishing criminal guilt, contrary to Ch III of the *Constitution*, and was indistinguishable from the power the High Court found to be invalid in *Alexander v Minister for Home Affairs* [2022] HCA 19 (s 36B) (*Alexander*).
As an Australian citizen, Mr Benbrika was no longer liable for immigration detention. Following the judgment of the High Court, he remained detained under a Continuing Detention Order (CDO), which was later revoked by the Supreme Court of Victoria on 19 December 2023. At that time, the Supreme Court of Victoria also made an Extended Supervision Order (ESO) in place until 19 December 2024.
 - **Jones** was a constitutional challenge to the validity of s 34(2)(b)(ii) of the Act, which empowers the Minister to revoke the Australian citizenship of dual citizens who have been convicted of a 'serious offence' at any time after making the application to become an Australian citizen where those offences were committed before the person became an Australian citizen.
 - **The High Court found that s 34(2)(b)(ii) of the Australian Citizenship Act 2007 (Cth) (Citizenship Act) is valid** as it is supported by the 'naturalization' limb of s 51(xix) of the *Australian Constitution* and does not vest in the Minister the exclusively judicial function of punishing criminal guilt.
Mr Jones remains in immigration detention following the cancellation of his Ex-citizen visa.
- These challenges followed an earlier decision of the High Court on 8 June 2022. In *Alexander*, the High Court held that s 36B of the Act was invalid because it conferred on the executive the exclusively judicial function of adjudging and punishing criminal guilt in breach of Ch III of the *Constitution*. This was because the section operated to empower the Minister to determine that someone engaged in certain conduct and impose

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punishment in response to this reprehensible conduct, such that the purpose and effect of the law were punitive. As such,

- Section 36B empowered the Minister to cease the Australian citizenship of a dual citizen upon being satisfied, amongst other things, that the person engaged in certain specified conduct, that the conduct repudiated their allegiance to Australia, and that it was not in the public interest for the person to remain an Australian citizen.
- As a result, Mr Alexander and another individual whose Australian citizenship was treated as having ceased under s 36B remain Australian citizens.
- On 28 November 2022, Minister O'Neil publicly stated that she was committed to legislating to create a sound citizenship cessation regime.
- The *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023* (the Amendment Act) amended the Citizenship Act to repeal the citizenship cessation provisions which were found to be invalid by the High Court judgments in *Alexander* and *Benbrika*. The Amendment Act commenced on 8 December 2023 and it empowers the Minister to make an application to a Court to make an order to cease a person's citizenship.

If asked**New Citizenship Cessation regime**

- The *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023* (the Amendment Act) amended the Citizenship Act to repeal the citizenship cessation provisions which were found to be invalid by the High Court judgments in *Alexander* and *Benbrika*. The Amendment Act **commenced on 8 December 2023**.
- The Amendment Act introduced a new citizenship cessation regime that empowers the Minister to make an application to the court, enlivening the courts discretionary power to make an order to cease a dual citizen's Australian citizenship, where the person has been convicted of a serious offence or offences.
- The application must be made prior to sentencing the person for the serious offence, or offences. The Court may only make the order if the person is sentenced to a term of imprisonment of at least three years. The Court may only make the order if it is satisfied that the person's conduct is so serious or significant as to demonstrate that he or she has repudiated their allegiance to Australia.
- As at 30 January 2024, no applications have been made under the new citizenship cessation regime.

Related documents

N/A

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OFFICIAL**Key Brief Number: LEG-02**

**Home Affairs Portfolio
Department of Home Affairs
Additional Estimates Hearing – February 2024**

KEY BRIEF**Topic: Save the Children Australia v Minister for Home Affairs****Responsible Deputy: Clare Sharp, Group Manager, Legal****Talking Points**

- As an appeal to the Full Federal Court is now on foot it would be inappropriate to comment.

Key Points

- On 1 December 2023, Save the Children Australia (STCA) filed a notice of appeal in the Federal Court from a judgment of the Federal Court (Moshinsky J) which dismissed STCA's application seeking a writ of habeas corpus, and on return of the writ, an order in the nature of habeas corpus to repatriate the 'remaining Australian women and children in Syria', including in Al-Roj camp. The appeal will be heard by a Full Court of the Federal Court on a date yet to be listed.
- On 3 November 2023, the Federal Court (Moshinsky J) had dismissed the application filed by Save the Children Australia (STCA) seeking a writ of habeas corpus, and on return of the writ, an order in the nature of habeas corpus to repatriate the 'remaining Australian women and children in Syria', including in Al-roj camp. The application also sought a declaration that the 'non-repatriation decision', which was said to be inferred to have been made, was invalid or that a further decision must be made.
- The Court was satisfied the Commonwealth did not have control over the detention of the relevant women and children and so the writ of habeas corpus should not issue. Further, it was not satisfied any decision not to repatriate had been made, or that there was any requirement for a decision to be made.

Background

- There are approximately 60 Australian men and women in Syria and approximately 35 Australian-linked children in Internally Displaced Persons Camps. In October 2022, the Australian Government repatriated four Australian women and their 13 Australian children from an IDPC in Syria.
- On 26 & 28 September 2023, the Federal Court (Moshinsky J) heard the application filed by Save the Children (STCA) seeking a writ of habeas corpus, and on return of the writ, an order in the nature of habeas corpus to repatriate the 'remaining Australian women and children in Syria'. In the alternative, the application seeks a declaration that the 'non-repatriation decision', which is said to be inferred to have been made, is invalid or that a further decision must be made.

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- STCA argued that the detention of Australian women and children in northeast Syria, specifically in Al-Roj, by the Autonomous Administration of North and East Syria (AANES) and its military wing, the Syrian Democratic Forces, is unlawful, that Australia is a member of the Coalition against ISIL, that the Coalition has allied with AANES and supports it to maintain the detention of these people, that AANES has asked members of the Coalition to repatriate their citizens and that, were Australia to request the release of its citizens for repatriation to Australia, AANES would release them. STCA submitted that the Court should infer from a reference to “the plan to repatriate further groups of women and children” in a file note from a meeting with AANES that an arrangement has already been made with the AANES for further cohorts to be repatriated.
- The Commonwealth argued that the detention of these individuals is not within its control and what in effect STCA seeks is an order for the Commonwealth to bring them within its control by entering into relations with AANES with respect to their repatriation, without there being a right or entitlement for the Commonwealth to have the detained people released. The Commonwealth submitted that there is no arrangement in place and the Court should not infer there is because of one reference to a further plan without any other evidence to support that an agreement had been reached.
- STCA also argued that the Court should infer that the Commonwealth has made a decision not to repatriate the women and children and that such decision can be judicially reviewed. STCA argued that the alleged decision took into account a prohibited consideration, was for an ulterior purpose or unreasonable, or that in failing to make a further repatriation decision, the Minister or the Commonwealth acted for an ulterior purpose or unreasonably.
- The Commonwealth argued that STCA has failed to demonstrate that a decision not to repatriate has been made, and to the extent that one has been made, it fails to prove the full reasons of that decision. Further, there is no obligation on the Commonwealth to make a repatriation decision.
- On 28 September 2023, the Federal Court reserved its decision.
- On 3 November 2023, the Court made orders dismissing the application and making the reasons for judgment confidential to the parties for the next seven days to allow the parties to consider whether to seek any confidentiality orders. At delivery of the judgment, the Court provided a summary of its reasons.
- Seven days later, the Court published its reasons for judgment. It was satisfied the Commonwealth did not have control over the detention of the relevant women and children and so the writ of habeas corpus should not issue. The Federal Court accepted that in some circumstances where there was doubt about control the pressure of the writ could be used to test it, but that in this case the evidence made it clear that there was no control. Further, it was not satisfied any decision not to repatriate had been made, or that there was any requirement for a decision to be made.

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- On appeal, STCA argue that the primary judge was wrong to find the Commonwealth did not have control over the detention of Australian women and children in Northeast Syria. Alternatively, STCA argue the primary judge made factual findings not open on the evidence in concluding the Commonwealth did not have control. In addition, STCA argue the primary judge erred in finding there was not sufficient doubt about the Commonwealth's control and that the writ should not issue to test whether the Commonwealth's lack of control was correct.
- In relation to the costs of the first-instance proceeding, on 7 December 2023, the Court made an order that each party bear its own costs in the proceeding. The Court found the proceeding raised novel and important questions of law concerning the liberty of the individual and amenability of a respondent who does not have custody to the writ of habeas corpus; the legal questions were 'difficult'; there was a 'factual foundation' for STCA's claims; there was no financial gain to STCA to bring the claims; the claims were brought in good faith; and the legal representation was provided free of charge and the quality on both sides enabled the proceeding to be conducted efficiently and expeditiously.
- AGS estimates the Commonwealth's costs to be approximately \$508,400 but these are not yet finalised.

Timeline of Key Dates

Timeline/Chronology of Key Dates	
Application filed by STCA	6 June 2023
Hearing	26 & 28 September 2023
Judgment	3 November 2023
Appeal filed by STCA	1 December 2023
Judgment on costs	7 December 2023

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**Home Affairs Portfolio
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Additional Estimates Hearing – February 2024**

KEY BRIEF

Topic: High Court Ruling – NZYQ decision and subsequent Litigation (including AZC20 and ASF17)

Responsible Deputy: Michael Willard, A/g Deputy Secretary, Immigration

Key Points

For reporting on operational matters related to the NZYQ cohort or compliance measures, see **IG-22**. The ABF's Key Brief is available at **ABF-10**.

- In *NZYQ* [2023] HCA 37 (NZYQ), the High Court held that detention of an unlawful non-citizen will cease to be constitutionally permissible when there is no real prospect of their removal from Australia becoming practicable within the reasonably foreseeable future.
- Having made a declaration of law to this effect, it was necessary for the Department to identify and release other detainees whose circumstances fell within the scope of the declaration. The fact that the High Court's orders were directed to NZYQ did **not** mean that they did not have consequences for the detention of other unlawful non-citizens. A declaration that a law is invalid for an identified reason necessarily informs the operation of that law generally.
- In *Al-Kateb* (2004) 219 CLR 562, the High Court decided (4:3) that as long as the purpose of detention is to make an unlawful non-citizen available for removal, detention will be both required and authorised even where there is no prospect of removal in the reasonably foreseeable future. In *NZYQ*, the Court unanimously overruled this constitutional holding of *Al-Kateb*.
- The High Court heard arguments in NZYQ on 7 and 8 November 2023. After retiring for a short period, the bench issued orders that had immediate effect on 8 November 2023. The High Court issued its reasons on 28 November 2023.
- Following *NZYQ*, the below litigation trends have emerged in relation to claims of unlawful detention.
 - Individuals who claim their detention is unlawful directly on the basis of the rule in *NZYQ*. In these cases, the Department is required to adduce evidence to prove that there exists a real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future. As at 24 January 2023, there are:
 - Two judgments of the Federal Court that concern the application of the principle in *NZYQ*: *AZC20* and *ASF17*;
 - Two ongoing proceedings in the Federal Court (*LRMM*; *EIX18*); and
 - Two ongoing proceedings in the Federal Circuit and Family Court of Australia (*CRU18* and *FJXD*).

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- Cases where a removal duty does not presently apply but the applicants have been detained for a significant period for the purpose of determining a visa application, and claim that the NZYQ limit has been reached. There are two ongoing proceedings in this category in the Federal Court which raise this issue (*LPSP*; *CLMF*).

Preparation for NZYQ

- The Department of Home Affairs prepared for the decision in *NZYQ* in a similar manner as four previous separate challenges to the correctness of *Al-Kateb* over approximately the past five years.¹ This included:
 - Ensuring that the Ministers, the Attorney General's Department (through the Office of Legal Services Coordination), the Department of Prime Minister & Cabinet and relevant policy and program Departmental stakeholders were aware of the proceeding, prospects, and its programme to final hearing;
 - Ensuring relevant Department stakeholders provided instructions on factual and policy questions as needed; and
 - Ensuring relevant stakeholders were appropriately involved in the preparation of evidence.
- As was brought into evidence in the High Court proceedings, the Department continued in the lead up to the hearing to look for opportunities to remove NZYQ from Australia.

Criteria applied to identify the cohort of impacted detainees

The Department applies the following criteria in determining whether a person is affected by the *NZYQ* judgment:

1. Whether the obligation to remove under Section 198 of the *Migration Act* (the Act) is engaged; and
2. If so, whether there is a real prospect of removal becoming practicable in the reasonably foreseeable future.

If pressed

This includes consideration of the below factors:

- Whether there is an identified country to which the person can be removed. This will generally not be the case where the person is stateless or there is a 'protection finding' within the meaning of the Act in respect of the person's country of nationality, citizenship or long-term residence, unless there is a third country to which the person can be removed.
- Whether there are other barriers to removal of the person, e.g.:
 - A serious health condition that prevents removal in the foreseeable future;
 - No travel documents and there is no pathway to obtaining one; or
 - The country to which the person could be returned is physically inaccessible.

¹ *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285; *Sami v Minister for Home Affairs* [2022] FCA 1513; *Carrascalao v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] HCATrans 169; *DMH20 v Minister for Home Affairs* (2023) 296 FCR 256.

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If asked: what about cases where detainees refuse to cooperate with their removal?

- The Department does not consider a person to be NZYQ-affected where they fail to cooperate with steps necessary to affect their removal, unless the person is incapable of cooperating because of medical or other reasons.
- This issue is the subject of two conflicting Federal Court judgments in *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1797 and *ASF17 v Commonwealth of Australia* [2024] FCA 7. The latter is consistent with the Department's position and found the former was "plainly wrong".
- On 19 January 2024 the Department filed an appeal to the Full Federal Court from *AZC20*. An appeal from *AZC20* (No.2) is necessary in order to seek clarity from an appellate court in light of conflicting Federal Court authority on an important point of principle concerning the lawful limits of immigration detention.
- On 24 January 2024 *ASF17* filed an appeal to the Full Federal Court.

If asked for content of any external legal advice provided in anticipation of the judgment

- I understand the Minister has already claimed public interest immunity with respect to that advice in response to General Business Notice of Motion No. 392, moved by Senator Paterson. On that basis, while we are happy to provide the date of legal advice and who provided it, we are not able to provide information about the content of that advice.
- AGS provided legal advice on 13 April 2023, 29 August 2023, 25 September 2023, 13 October 2023, and 6 November 2023.
- Counsel provided legal advice on 6 September 2023.

If asked: Did either Minister sign off on the statement of agreed facts which conceded that the plaintiff "could not be removed from Australia, [and] there was no real likelihood or prospect of the plaintiff being removed in the reasonably foreseeable future."

- Neither Minister personally approved the statement of agreed facts.
- The Department is not aware of any instance where a Minister has personally approved a statement of agreed facts or special case.
- The concession was properly made in relation to the circumstances that existed as at the relevant date – 31 May 2023.
- The Commonwealth argued before the High Court that subsequent developments meant there was a real prospect of NZYQ being removed in the reasonably foreseeable future.

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**Home Affairs Portfolio
Department of Home Affairs
Additional Estimates Hearing – February 2024**

KEY BRIEF**Topic: High Court challenges to the Validity of the New Bridging Visa Conditions****Responsible Deputy:** Ms Clare Sharp, Group Manager, Legal**Key Points**

- On 8 November 2023, the High Court made ex tempe orders in the matter of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & the Commonwealth* with reasons provided by the High Court on 28 November 2023 (*NZYQ*). In *NZYQ*, the High Court found that unlawful non-citizens cannot continue to be kept in immigration detention for the purpose of their removal from Australia once there is no real prospect of their removal becoming practicable in the reasonably foreseeable future.
 - The High Court provided reasons in support of these orders on 28 November 2023.
- On 18 November 2023, the Government amended¹ the *Migration Act 1958* (Act) and the *Migration Regulations 1994* (Regulations) to require electronic monitoring and curfew conditions to be imposed on Bridging (Pending Removal) visas (BVR) granted to non-citizens affected by the decision in *NZYQ* unless the Minister was satisfied that the individual did not pose a risk to the community.
- On 8 December 2023, the Act and the Regulations were further amended² to provide for:
 - New and amended conditions for BVR visa holders, some of which apply to those individuals who have committed offences involving a minor or a vulnerable person, or offences involving violence and sexual assault.
 - Introduction of a Community Safety Test for some of the conditions, which must be imposed unless the Minister is satisfied that it is not reasonably necessary to impose those community protection conditions for the protection of the Australian community. The Minister must apply the Community Safety Test when deciding whether to impose each of these conditions and the conditions must be considered in the following order:
 - condition 8621 (electronic monitoring);
 - conditions 8617 and 8618 (financial reporting); and last,
 - condition 8620 (curfew requirements).
 - The “Community Safety Test” conditions have twelve-month time limits after which they cease to be in effect. The Minister can re-grant the person a BVR with these conditions imposed for a further 12 months (subject to consideration of the Community Safety Test), at any time before or after the 12 month period.

¹ *Migration Amendment (Bridging Visa Conditions) Act 2023*.

² *Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* and *Migration Amendment (Bridging Visa Conditions and Other Measures) Act 2023* and *Migration Amendment (Bridging Visa Conditions) Regulations 2023*.

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- To date, there have been six constitutional challenges to the validity of the provisions as amended on 18 November 2023 (two are also challenging the constitutional validity of the provisions as amended on 8 December 2023) by non-citizens who were granted BVRs subject to the electronic monitoring and curfew conditions under the provisions as amended on 18 November 2023.
- On 20, 20 and 21 December 2023 (following the grant of further BVRs that were not subject to electronic monitoring and curfew conditions under the provisions as amended on 8 December 2023 by the Minister to the plaintiffs) the first three constitutional challenges (Plaintiff S151/2023, AUK15 and RVJB) were discontinued.

Current challenges

- The three most recent constitutional challenges (XTVC, DVU18 and KING) remain ongoing.
- None of the cases have been listed for hearing.

XTVC v Commonwealth of Australia & Anor – High Court – S167/2023

- On 20 December 2023, XTVC filed a writ of summons in the original jurisdiction of the High Court. XTVC seeks to challenge the validity of cl 070.612A of the Regulations, as amended by the *Migration Amendment (Bridging Visa Conditions) Act 2023* (first Amending Act) and the *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (amending Regulations). Clause 070.612A of the Regulations concerns the imposition of electronic monitoring and curfew conditions on BVRs.
- Before the Court, XTVC argues cl 070.612A of the Regulations, as amended by the first Amending Act and the amending Regulations infringes Chapter III of the Constitution by reposing in the Minister the exclusively judicial function of imposing punishment. XTVC argues that the curfew and electronic monitoring conditions are punitive in character as they constrain his liberty and interfere with his privacy, bodily integrity and dignity, and are not reasonably capable of being seen as necessary for any legitimate non-punitive purpose.

DVU18 v Minister for Immigration, Citizenship and Multicultural Affairs & Anor – High Court – S10/2024

- On 10 January 2024, DVU18 filed a writ of summons in the original jurisdiction of the High Court. DVU18 challenges the constitutional validity of cl 070.612A of the Regulations, asserts that the decision to grant him the BVR was affected by error and claims damages for unlawful imprisonment during four periods in which he was held in immigration detention from January 2019.

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- DVU18 argues that the electronic monitoring and curfew conditions are impermissibly punitive, that cl 070.612A of the Regulations cannot be characterised as having a legitimate non-punitive purpose, and that the clause is not reasonably capable of being seen as necessary for any legitimate non-punitive purpose. Consequently, that clause is invalid as it infringes upon Chapter III of the Constitution by reposing in the Minister the exclusively judicial function of imposing punishment. DVU18 also argues that the Minister could not reasonably have been satisfied that he would abide by the conditions of the BVR – as a precondition to the grant of that visa – having regard to information concerning DVU18’s mental health and intellectual capacity that was or should have been known by the Minister at the time the BVR was granted.
- DVU18 also argues that as a consequence of the decision in *NZYQ*, the periods in which he was held in immigration detention from the point at which there was no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future was unlawful, and he should be awarded compensatory and aggravated damages for that false imprisonment.

KING v Commonwealth of Australia & Anor – High Court – S17/2024

- On 16 January 2024, Plaintiff S17 filed a writ of summons in the original jurisdiction of the High Court. Plaintiff S17 seeks to challenge the validity of cl 070.612A of the Regulations, as amended by the first Amending Act and the amending Regulations.
- Before the Court, Plaintiff S17 advances the same arguments as those advanced by XTVC.

If asked about an individual case

- The Department does not comment on individual cases.
- It is inappropriate to comment while matters are before the Court.

Consultation

Nil

Attachments

Nil

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**Home Affairs Portfolio
Department of Home Affairs
Additional Estimates Hearing – February 2024**

KEY BRIEF**Topic: Community Safety Order Scheme****Responsible Deputy:** Clare Sharp, Group Manager Legal**Key Points**

- In response to the High Court's decision in *NZYQ*, the Government introduced legislation to establish a new Community Safety Order (CSO) scheme in Division 395 of the Criminal Code.
- The new CSO scheme commenced on 8 December 2023 with the commencement of the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offender and Other Measures) Act 2023*. The CSO scheme was modelled on the High Risk Terrorist Offenders (HRTTO) scheme in Division 105A of the Criminal Code.
- The object of the new CSO scheme in Division 395 is to *protect the community from serious harm by providing that non-citizens who pose an unacceptable risk of committing serious violent or sexual offences, and who have no real prospect of being removed from Australia in the reasonably foreseeable future, are subject to a community safety detention order or a community safety supervision order.*
- Under the CSO scheme, the Immigration Minister may apply to a State or Territory Supreme Court for a CSO (being either a community safety detention order or a community safety supervision order) in respect of non-citizens who have previously been convicted of a 'serious violent or sexual offence' or a 'serious foreign violent or sexual offence' and where their circumstances meet other statutory criteria.
 - A 'serious violent or sexual offence' means an offence against a law of the Commonwealth, State or Territory where the offence is punishable by imprisonment for life or for a period, or maximum period, of at least 7 years.
 - A 'serious foreign violent or sexual offence' means an offence against a law of a foreign country, or of part of a foreign country, where it is an offence punishable by imprisonment for life or for a period, or maximum period, of at least 7 years, and would constitute an offence against a law of the Commonwealth, a State or a Territory.
- There are two types of Community Safety Orders available under Division 395:
 - A Community Safety Detention Order (CSDO) – the effect of which is to detain the person in a prison for the period the order is in force; or
 - A Community Safety Supervision Order (CSSO) – the effect of which is to impose conditions on the person for the period the order is in force.
 - Conditions that may be imposed under a CSSO are broad and include therapeutic and rehabilitation conditions including requiring the offender to attend treatment, rehabilitation or intervention programs, or to undertake psychological or psychiatric treatment or counselling.

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- A court may make a Community Safety Detention Order if satisfied on the basis of admissible evidence, that:
 - there is a high degree of probability, that the offender will commit a serious violent or sexual offence, and
 - that there is no other less restrictive measure available under Division 395 (such as a community safety supervision order) that would be effective in protecting the community from serious harm by addressing the unacceptable risk; and
 - where the offender is a holder of a visa under the Migration Act that is subject to conditions, the court is satisfied that the conditions would not be effective in protecting the community from serious harm by addressing the unacceptable risk.
- A court may make a Community Safety Supervision Order if satisfied on the basis of admissible evidence, that:
 - on the balance of probabilities, that the offender poses an unacceptable risk of seriously harming the community by committing a serious violent or sexual offence; and
 - where the offender is a holder of a visa under the Migration Act that is subject to conditions, the court is satisfied that the conditions would not be effective in protecting the community from serious harm by addressing the unacceptable risk; and
 - the Court is satisfied on the balance of probabilities that each of the conditions and the combined effect of all of the conditions to be imposed on the offender is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from serious harm by addressing the unacceptable risk.
- A Court may not make a CSO for a period of more than 3 years and must be reviewed by the court annually or earlier upon application by the offender or Immigration Minister.
- The Minister may make subsequent applications for CSOs in relation to the same offender.
- The Department is assessing NZYQ affected persons to identify those individuals who pose an unacceptable risk of committing a serious violent or serious sexual offence, for referral to the Minister for consideration of making an application for a CSO.
- No applications have yet been made for a CSO under Division 395 of the Criminal Code.

Eligibility criteria for a CSO under Division 395

- A non-citizen is eligible for a CSO (a community safety detention order or a community safety supervision order) where:
 - the person has been convicted of a 'serious violent or sexual offence' or a 'serious foreign violent or sexual offence'; and
 - there is no real prospect of the person's removal from Australia becoming practicable in the reasonably foreseeable future; and
 - the person is detained in custody in a prison serving a sentence of imprisonment for a serious violent or sexual offence or a sentence of imprisonment for another offence; or
 - the person is in the community; or
 - the person is subject to a community safety detention order.

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- The person must be at least 18 years old at the time the Court makes a CSO.

Community Safety Order (CSO) Taskforce

Marian Agbinya, Assistant Secretary, CSO Taskforce, Legal Group

- On 8 December 2023, the Department established the Community Safety Order (CSO) Taskforce to support the Immigration Minister in the exercise of his functions under Division 395 of the Criminal Code.
- The CSO Taskforce is focussing on prioritising assessment of individuals in the NZYQ cohort, to determine their eligibility under Division 395 and consideration by the Minister for a possible application for a CSO to a State or Territory Supreme Court.
- To support this work, the CSO Taskforce is consulting with Commonwealth and state and territory stakeholders in gathering information to assist in identifying and assessing the most high priority individuals in the NZYQ cohort.
- Funding arrangements for the implementation of community safety orders are yet to be finalised, as those arrangements will hinge on the ongoing consultation and cooperation across the respective Commonwealth and state and territory stakeholder groups.

Related documents

- PQ24-00004 (Question No. 2988) and PQ24-0005 (Question No. 2988) – Senator Patterson – 15 January 2024.

Consultation

- The Chief Statistician has cleared the statistics contained within this brief.
- The Legal Group Manager has cleared the legal information contained within this brief.
- Immigration Compliance Division, Immigration Policy, Immigration Group.

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Clearing Officer: Marian Agbinya, Assistant Secretary, Community Safety Order Taskforce