

OFFICIAL: Sensitive Legal-Privilege

Australian Government
Department of Home Affairs

Submission

For decision

PDMS Ref. Number: MS23-002396

Date of Clearance: 24/11/2023

To Minister for Immigration, Citizenship and Multicultural Affairs

Subject Order for Production of Documents – tabling of various documents provided to Minister for Home Affairs, the Attorney-General and yourself in anticipation of the NZYQ High Court matter

Timing *As soon as possible, noting the documents were due to be provided to the Senate by no later than 12:00pm, Friday 24 November 2023.*

Recommendations

That you:

1. Agree either:

s. 47C(1)Agree Option 1 / Agree Option
2 / not agreed**s. 47C(1), s. 42(1)**Released by Department of Home Affairs
under the Freedom of Information Act 1982**OFFICIAL: Sensitive Legal-Privilege**

Minister for Immigration, Citizenship and Multicultural Affairs

Signature.....

Date:...../...../2023

Minister's Comments

Key issues

1. On 16 November 2023, the Senate agreed to a motion by Senator Paterson as amended, requiring an Order for Production of Documents (OPD) requiring you to table *'any emails, file notes, briefing materials and other written correspondence'* provided to the Minister for Home Affairs, the Attorney-General, or the Minister for Immigration, Citizenship and Multicultural Affairs prepared in anticipation of the possibility of the High Court making a decision with respect to *Plaintiff M47/2018 v Minister for Home Affairs* and *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (NZYQ).
2. A copy of Senator Paterson's Notice of Motion as amended is at Attachment A.

3.

s. 47C(1), s. 42(1)

4.

Background

5. On 8 November 2023, in the matter of *NZYQ v Minister for Immigration, Citizenship & Multicultural Affairs & Anor* (NZYQ), the High Court by at least a majority (as yet unspecified) issued a writ of *habeas corpus* requiring the Commonwealth to release NZYQ from immigration detention forthwith and declared that by reason of there having been and continuing to be no real prospect of his removal from Australia becoming practicable in the

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reasonably foreseeable future, his detention was unlawful as at 30 May 2023 and continued to be so. The Court reserved its written reasons and they are yet to be delivered.

6. On 14 February 2019 the High Court dismissed a similar attempt to overturn *Al-Kateb v Godwin* in *Plaintiff M47/2018 v Minister for Home Affairs* [2019] HCA 17. The Court found that due to a lack of cooperation by the plaintiff with efforts to resolve his identity it could not be said there was not real prospect of his removal in the reasonably foreseeable future and the constitutional issue decided in *Al-Kateb* was not reached on the facts.

7.

s. 42(1)

8.

s. 42(1), s. 47C(1)

9.

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Consultation – internal/external

11. Status Resolution and Visa Cancellation, Immigration Policy, ABF Detention and National Removals and Ministerial and Parliamentary Branch have been consulted on this submission.

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Consultation – Acting Secretary / Acting Deputy Secretary

12. The Acting Secretary has not been consulted on this submission.

Client service implications

13. Nil.

Risks and Sensitivities

s. 42(1)

s. 42(1), s. 47C(1)

17. The information contained in this submission is classified and should not be publicly released without the authority of the Department of Home Affairs. In accordance with our long-standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – media@homeaffairs.gov.au.

Financial/systems/legal/deregulation/media implications

18. This issue has been flagged with Media and Communication Branch.

Attachments

Attachment A Notice of Motion: Order for the Production of Documents – Senator Paterson – as amended 16 November 2023

Attachment B List of in-scope documents

s. 42(1)

Attachment D Draft cover letter for documents released in response to Senate Order, and claiming PII in respect of other documents

s. 47C(1)

Attachment F Documents for production with proposed redactions applied

Authorising Officer
Cleared by: Clare Sharp Group Manager Legal Group Date: 24/11/2023 Mob: s. 22(1)(a)(ii)

Contact Officer: Peter Frank, A/g Assistant Secretary, Security, Disputes & Operations Law.
Ph: s. 22(1)(a)(ii).
CC Minister for Home Affairs, Minister for Cyber Security
Minister for Immigration Citizenship and Multicultural Affairs
Acting Secretary
Acting Deputy Secretary, Immigration
Deputy Secretary Corporate and Enabling Group
Group Manager Immigration Policy

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**FORMAL BUSINESS—AMENDMENT TO BE MOVED TO GENERAL
BUSINESS NOTICE OF MOTION NO. 392**

*Amendment to be moved by a minister, by leave, to the motion standing in the name of
Senator Paterson*

- (1) Omit all words after “making a decision with respect to”, substitute “*Plaintiff M47/2018 v Minister for Home Affairs and NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*, that the ongoing detention of the plaintiffs in those matters was beyond the legislative power of the Commonwealth”.
-

AMENDED MOTION TO READ AS FOLLOWS:

To move—That there be laid on the table by the Minister representing the Minister for Immigration, Citizenship and Multicultural Affairs, by no later than midday on Friday, 24 November 2023, any emails, file notes, briefing materials and other written correspondence provided to the Minister for Home Affairs, the Attorney General or the Minister for Immigration, Citizenship and Multicultural Affairs prepared in anticipation of the possibility of the High Court making a decision with respect to ~~*NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*~~, which found that sections of the Migration Act that had been interpreted to authorise the ongoing detention of the plaintiff NZYQ were beyond the legislative power of the Commonwealth ***Plaintiff M47/2018 v Minister for Home Affairs and NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*, that the ongoing detention of the plaintiffs in those matters was beyond the legislative power of the Commonwealth.**

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
1.	13/10/2023	s. 42(1)	s. 42(1)	s. 42(1)	
2.	19/10/2023	doc738458267	Internal email with NZYQ dashboard and NZYQ Caseload snapshot		
3.	17//09/2023	doc738984739	Internal email chain – RE: CM: NZYQ v Minister - S28/2023 - s. 47F(1) s. 47F(1) indefinite detention/ Al Kateb challenge - update on case [SEC=PROTECTED, ACCESS=Legal-Privilege]		

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
					o
6.	22/08/2023	doc748244214	Internal Department email – RE: Draft Agenda - Minister O'Neil and Stephanie meeting [SEC=PROTECTED]	S. 42(1)	
7.	19/10/2023	Fwd Urgent NZYQ - MHA discussion 19 Oct 2023SECPROTECTED CAVEATSHCABINET	Internal Departmental Correspondence attaching S. 42(1)		
8.	10/10/2023	Lines of Effort - Al-Kateb NZYQ challenge - 10 October 2023 update	Lines of Effort - Al-Kateb NZYQ challenge - 10 October 2023 update		
9.	03/10/2023	Lines of Effort Plan- Al- Kateb NZYQ challenge - 3 October 2023 weekly update	Lines of Effort Plan- Al- Kateb NZYQ challenge - 3 October 2023 weekly update		

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
10.	11.10.23	01. doc743325302	Internal department email RE: NZYQ v MICMA – S28/2023 – Al-Kateb [SEC=OFFICIAL:Sensitive, ACCESS=Legal-Privilege] From s. 22(1)(a)(ii) attaching Media talking points	S. 42(1)	
10A		01a. Media Talking Points - NZYQ v1	Media talking points		
11	31.10.23	doc748052116	Internal department email 4pm 31 Oct: Policy discussion on NZYQ (Al Kateb) [SEC=PROTECTED, ACCESS=Legal-Privilege] From David Gavin attaching:		
11A	31.10.23	doc748052116	Attachment - Detention Framework Reform		

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
			Workshop 11 Oct 2023 - NZYQ Dashboard - NZYQ cohort snapshot Fact sheet RRAP and proposed settings	S. 42(1)	
11b/11c/11d			Attachments to email at item 11: NZYQ Dashboard NZYQ cohort snapshot Fact sheet RRAP and proposed settings		
13	30.10.23	doc748244211	Internal department email Agenda - Minister O'Neil and Stephanie meeting Email from Stephanie Kolobaric attaching: 30OCT23 Minister O'Neil Acting Sec Agenda		

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
13A	30.10.23	doc748244211	Agenda - Minister O'Neil and Stephanie meeting Email from Stephanie Kolobaric attaching: 30OCT23 Minister O'Neil Acting Sec Agenda	s. 42(1)	
14	10.10.23	doc748244212	Internal department email FW: NZYQ question [SEC=PROTECTED]		
16	26 May 2023 – 5 Sept 22023	Email thread titled 'FW: CM: NZYQ v Minister - S28/2023 s. 47F(1) s. 47F(1) indefinite detention/ Al Kateb challenge - update on case, s. 42(1) s. 42(1) [SEC=PROTECTED, ACCESS=Legal-Privilege]'	s. 42(1)		

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
			s. 42(1)	s. 42(1)	
16.01	1 Sept 2023	'FW:FW: request for s. 42(1) s. 42(1)			
16.02	1 Sept 2023	Plaintiff's submissions			

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
16.01.01	29 Aug 2023	s. 42(1)	s. 42(1)	s. 42(1)	s. 42(1)
16.01.02	22 Aug 2023	s. 42(1)			
16.01.02.01	2 May 2023	s. 42(1)			
16.01.02.02	28 May 2-13	s. 42(1)			

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
			s. 42(1)	s. 42(1)	s. 42(1)
16.01.02.03	14 Feb 2018	s. 42(1)			
16.01.02.04	3 Dec 2015	s. 42(1)			
16.01.02.05	2022	Attachment F – Ending indefinite and arbitrary immigration detention bill			
16.01.05.06	4 Oct 2012	s. 42(1)			

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
			s. 42(1)	s. 42(1)	s. 42(1)
17	Undated	'NZYQ – Action plan for potential release'			
18	12 Feb 2019	s. 42(1)			
18.01	Undated	Removal Pending Bridging visa (subclass 070) – conditions			
19	13 October 2023	s. 42(1)			
20	3 December 2018	s. 42(1)			

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
			s. 42(1)	s. 42(1)	s. 42(1)
21	12 Feb 2019	s. 42(1)			
22	13 Feb 2019	s. 42(1)			
23	30 Jan 2019	'M47 High Court proceedings'			
24	23 Jan 2019	'M47 - proposed meeting to discuss risks and prospects'			

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
25	17 Sept 2023	'FW: CM: NZYQ v Minister - S28/2023 -s. 47F(1) , s. 47F(1) indefinite detention/ Al Kateb challenge - update on case'	s. 42(1)		
26	16 Oct 2023	'RE: NZYQ v Minister - S28/2023 -s. 47F(1) M - indefinite detention/ Al Kateb challenge - 7/8 November hearing date'			

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
			s. 42(1)		
27	3 October 2023	'NZYQ v Minister - S28/2023 s. 47F(1) s. 47F(1) indefinite detention/ Al Kateb challenge - 7/8 November hearing date'			

Doc No:	Date	File name	Description	PII Claims Available?	Comments
			s. 42(1)		
28	20 Sept 23	s. 42(1)			
29	20 Oct 23	'FW: CM: NZYQ v Minister - S28/2023 - s. 47F(1) s. 47F(1) - indefinite detention/ Al Kateb challenge - update on case'			

Doc No:	Date	File name	Description	PII Claims Available?	Comments
			s. 42(1)s. 42(1)		
30	20 Oct 2023	'FW: M5 approaches for NZYQ v Minister - S28/2023 -s. 47F(1) s. 47F(1) indefinite detention/ Al Kateb challenge'			
31	30 Aug 2023	'RE: Action items: Mtg with MHA 29 Aug 2023'			
32	10 October 2023	'NZYQ Action Plan for potential release'			

Doc No:	Date	File name	Description	PII Claims Available?	Comments
			s. 42(1)s. 42(1)		
34	20 Oct 2023	'NZYQ Dashboard and cohort snapshot'			
34.01	1	19 Oct 2023			
34.02	18 Oct 2023	NZYQ Caseload snapshot			
35	11 Sept 23 – 12 Sept 23	'FW: Status of challenge to Al-Kateb (s. 47F(1) s. 47F(1) case NZYQ)'			

Doc No:	Date	File name	Description	PII Claims Available?	Comments
			s. 42(1)s. 42(1)		
38	5 Sept 2023	'FW: s. 47F(1) / AI Kateb challenge' doc748052150			

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
39	22 Nov 2023	'FW: NZYQ question'	s. 42(1)	s. 42(1)	
40	24 July 2023	'FW: NZYQ v Minister - S28/2023 - s. 47F(1), s. 47F(1) - indefinite detention/ Al Kateb challenge. Proposal to re-consider exercising ministerial intervention powers under the Act in light of litigation risk.'			
41	26 May 2023 – 20 Sept 23	'FW: NZYQ v Minister - S28/2023 - s. 47F(1) s. 47F(1) - indefinite detention/ Al Kateb challenge - 7/8 November hearing date'			
42	11/10/2023	Detention Framework Reform Workshop Summary as at 31 October 2023			

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
				s. 42(1)s. 42(1)	
43	27/08/2023	MS23-001295 - Minister Signed	Possible ministerial intervention – s. 47F(1)		
44	20/09/2023	RE NZYQ v Minister - S282023 - s. 47F(1) - indefinite detention AI Kateb challenge - November hearing date	Emails chain – NZYQ prospects advice		
45	19/10/2023	RE Data and cohort snapshot - AI-Kateb NZYQ	Email chain – administrative only – attaching NZYQ dashboard document as at 19 October		

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
		challenge - 17 October 2023 update	2023 (deidentified stats of s 197C protection obligations) – attaching NZYQ caseload snapshot as at 18 October 2023.	s. 42(1)s. 42(1)	
46	19/10/2023	NZYQ Dashboard as at 19 10 2023	NZYQ Dashboard as at 19 10 2023 attachment to Item no. 7		
48	3/10/2023	NZYQ v Minister - S282023 - s. 47F(1) - indefinite detention AI Kateb challenge - 78 November hearing date	Email chain – updates re NZYQ –s. 42(1) s. 42(1) – attaching Lines of Effort Plan as at 3 October 2023 – attaching Defendant submissions.		
48.1	25/09/2023	NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor (S28/2023) – options	s. 42(1)		

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
		to mitigate implications of a Commonwealth loss		s. 42(1)s. 42(1)	
48.2	03/10/2023	Lines of Effort Plan – A/- <i>Kateb</i> Challenge – Weekly SES Coordination Meeting – NZYQ vs Minister – S28/2023	Lines of Effort Plan – A/- <i>Kateb</i> Challenge – Weekly SES Coordination Meeting – NZYQ vs Minister – S28/2023		
48.3	03/10/2023	Notice of Filing S28/2023 Submissions of the Defendants	High Court Matter S28/2023 Submissions filed by the Defendants dated 3 October 2023		
49	20/10/2023	NZYQ Dashboard and cohort snapshot SECPROTECTED ACCESSLegal-Privilege	Email chain – forwarding documents - attaching Lines of Effort Plan as at 19 October 2023– attaching NZYQ Caseload Snapshot as at 18 October 2023		
51	Not dated	MS18-010936	Ministerial brief - s. 42(1) s. 42(1)		

Consolidated – Response to Notice of Motion of Senator Paterson – Documents prepared in anticipation of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

Doc No:	Date	File name	Description	PII Claims Available?	Comments
52	30/01/2019	M47 High Court proceedings DLMSensitiveLegal	Email regarding SG advice re M47	s. 42(1)	s. 42(1)
53	12/02/2019	M47 - request for instructions prior to High Court hearing tomorrow DLMSensitiveLegal	Email request for instruction on potential visa conditions for M47 – attaching Removal Pending Bridging visa (subclass 070)		
54	23/01/2019	M47 - proposed meeting to discuss risks and prospects DLMSensitiveLegal	Email – administrative – scheduling meeting		
55	19/09/2023	FW Request for advice re intractable detention cohort. SECOFFICIALSensitive ACCESSLegal-Privilege	Email – legal advice – intractable detention cohort		
56	10/10/2023	FW NZYQ question SECPROTECTED	Email – legal advice provided to PMC		
57	05/09/2023	FW s. 47F(1) Al Kateb challenge SECPROTECTED	Email – updates on NZYQ		

Doc No:	Date	File name	Description	PII Claims Available?	Comments
				s. 42(1)s. 42(1)	
57.1	22/08/2023	24.1. NZYQ v Minister - S28_2023 - s. 47F(1) s. 47F(1) indefinite detention_ Al Kateb challenge - update on case, draft s. 42(1) s. 42(1) [SEC=OFFICIAL_Sensitive, ACCESS=Legal-Privilege]	Email – updates on NZYQ – s. 42(1)		
57.1.1	16/08/2023	24.1.1. 20230816 NZYQ Prospects and implications(48834207.4) (002)	s. 42(1)		
58	20/10/2023	FW M5 approaches for NZYQ v Minister - S282023 - s. 47F(1) - indefinite detention Al Kateb challenge	Email – re M5 approaches – agenda update		



Australian Government
Department of Home Affairs

Submission

For decision

PDMS Ref. Number: MS23-002600

Date of Clearance: 4/01/2024

To Minister for Immigration, Citizenship and Multicultural Affairs

Subject Enhanced Status Resolution Support Services for NZYQ-affected and BVR cohort

Timing *For consideration by 12 January 2024 to enable full implementation of the enhanced program*

Recommendations

That you:

1. **agree** to enhanced Status Resolution Support Services for the NZYQ-affected and new Bridging (Removal Pending) visa (BVR) cohort to support their adjustment into the community and connection with rehabilitation services to mitigate community safety risks, under the following parameters:
 - a. clinical assessment to determine need and requirement and inform referrals;
 - b. promotion of offender and rehabilitation programs;
 - c. support for up to 12 months; and
 - d. bond assistance.

agreed / not agreed

Minister for Immigration, Citizenship and Multicultural Affairs

Signature.....

Date: 11/1/2024

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Minister's Comments

Key Issues

1. The High Court decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* on 8 November 2023 (the 'NZYQ decision') resulted in the immediate release from immigration detention of the plaintiff and subsequent release of approximately 150 individuals whose circumstances are determined to fall into the scope of the NZYQ decision. As you are acutely aware, the released cohort contains many individuals with serious and violent offending history, and significant mental health and physical health issues. This cohort requires additional support to adjust and comply with their new visa conditions, life in the Australian community and support to mitigate the risks of recidivism.
2. Individuals released on a Bridging (Removal Pending) visa (BVR) are bound by strict reporting conditions, which for all include regular reporting and notification, and for many, monitoring through electronic device, financial transactions and curfew. While these conditions are designed to monitor the cohort and provide a compliance regime, they do not support individuals to adjust or vary their behaviour and move away from their offending behaviour and reform.
3. For most in the group, prospects of removal from Australia are low, meaning they will likely remain in Australia indefinitely. It therefore becomes important to support individuals to connect to specialised health services and rehabilitation programs to assist their adjustment and efforts to curtail their offending behaviours. Not only will this approach benefit individuals by providing them with access to reformatory support services, it also benefits public safety.

Current support through Status Resolution Support Services (SRSS)

4. All individuals affected by the NZYQ decision are eligible for Band 4 SRSS, to assist their transition from held or community detention into the community. Under current policy, SRSS Band 4 is available to the NZYQ-affected and BVR cohort (being long-term detainees) for 12 weeks, with 12-weeks extension. Further extension is possible in exceptional circumstances, notably ongoing serious and complex health and mental health issues.
5. SRSS is delivered through a needs based, case management model by contracted service providers with support tailored to individual circumstances. Individuals receive assistance to link to community-based services, including health, education, employment and transitional or emergency accommodation. The SRSS program does not provide any in-house or bespoke services, instead connecting individuals to mainstream and public programs available to the broader community. Importantly, this aspect of the program ensures equity of access to services for other non-citizens not eligible for SRSS and the broader Australian community.

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s. 47C(1)

7. While SRSS links individuals to Services Australia and essential health, short-term accommodation and employment services, s. 47C(1)

s. 47C(1)

Enhanced SRSS for the NZYQ affected cohort

s. 47C(1)

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s. 47C(1)

9. The intent of the program will remain the same – support individuals to transition into the community while they achieve a status resolution outcome – s. 47C(1)

s. 47C(1)

s. 47C(1)

s. 47E(d)

s. 47C(1)

s. 47C(1)

Background

16. SRSS provides short-term support to non-citizens to support them residing in the community while they work to achieve a status resolution outcome.

Consultation – internal/external

s. 47C(1)

s. 47C(1)

s. 47C(1) The enhanced SRSS will be implemented by current SRSS providers, Life without Barriers and Settlement Services International.

Consultation – Secretary / A/g Dep Sec Immigration / ABF Commissioner

19. The Secretary is aware of the approach in the submission but was not consulted on the submission.
20. The ABF Commissioner is aware of the approach in the submission, but was not consulted on the submission.
21. The A/g Deputy Secretary was consulted on the submission.

Client service implications

s. 47C(1)

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Risks and Sensitivities

s. 47C(1)

28. The information contained in this submission is classified and should not be publicly released without the authority of the Department of Home Affairs. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – media@homeaffairs.gov.au.

Financial/systems/legal/deregulation/media implications

29. The SRSS program is one element of the Department's administered baseline funding for Program 3.5 – Onshore Compliance and Detention.

s. 47C(1)

s. 47C(1)

s. 47C(1)

32. Media and Communication Branch will be engaged in the development of communication material and media talking points to respond to enquiries regarding the enhanced support and any proactive communications products.

Attachments

Attachment A Overview of Enhanced SRSS for the NZYQ-affected cohort

Authorising Officer Cleared by: Michael Thomas First Assistant Secretary Immigration Compliance Division Immigration Group Date: 4 January 2024 Mob: s.22(1)(a)(ii)
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Contact Officer: s.22(1)(a)(ii), Senior Director, Resettlement and Support Programs Branch, Ph: s.22(1)(a)(ii) / s.22(1)(a)(ii)

Through Chief Finance Officer
A/g Deputy Secretary Immigration

CC Minister for Home Affairs, Minister for Cyber Security
Secretary
Deputy Secretary Chief Operating Officer
Deputy Secretary Executive
Group Manager Legal
First Assistant Secretary Executive Coordination
ABF Commissioner
Deputy Commissioner Regional Operations
Assistant Commissioner South
Commander Operation Aegis

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SRSS TO NZYQ AND AFFECTED COHORT – CURRENT

S. 47E(d)



Australian Government
Department of Home Affairs

Submission

For decision

PDMS Ref. Number: MS23-002480

Date of Clearance: 03/12/2023

To Minister for Immigration, Citizenship and Multicultural Affairs

Subject Approval of text: Government amendments to Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023

Timing For consideration by **as soon as possible** in order to progress the proposed Government amendments of the Bill through the Legislation Approval Process, and obtain policy authority for the amendments and related amendments of the *Migration Regulations 1994*, in accordance with **s. 34(2)**

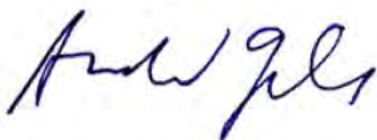
Recommendations

That you:

1. **approve** the text of the Government amendments (sheet SY101) of the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (Bill) (**Attachment A**); approved / not approved
2. **approve** the text of the supplementary Explanatory Memorandum (including the Statement of Compatibility with Human Rights) for the Government amendments (**Attachment B**); approved / not approved
3. **sign** the letter to the Prime Minister—to be countersigned by the Minister for Home Affairs and the Attorney-General—seeking further policy authority for measures contained in the Government amendments and proposed Migration Amendment Regulations (**Attachment C**); signed / not signed
4. **note** the draft Caucus brief (**Attachment D**) for consideration and completion by your Office; noted / please discuss
5. **note** that the draft speech to move the Government amendments, Talking Points, and Questions and Answers will be progressed to your office for consideration separately. noted / please discuss

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Minister for Immigration, Citizenship and Multicultural Affairs



Signature.....

Date: 03/12/2023

Minister's Comments

Key Issues

1. The Department of Home Affairs (Department) seeks your approval of the text of proposed Government amendments (sheet SY101) of the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (Attachment A) and the text of the related supplementary Explanatory Memorandum, including the Statement of Compatibility with Human Rights (Attachment B).
2. The written judgement of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37 (NZYQ), delivered on 28 November 2023, relevantly found that NZYQ's release from immigration detention does not prevent his detention on some other basis, such as a law providing for preventative detention of an offender who presents an unacceptable risk of reoffending if released from detention.
3. These Government amendments have been prepared by the Department and the Attorney-General's Department (AGD), working closely with the Australian Government Solicitor (AGS) and the Office of Parliamentary Counsel (OPC). s. 34(3)
[Redacted]
[Redacted]
[Redacted]
[Redacted] To establish the CSO Scheme, the Government amendments would insert a new Division 395, Part 9.10 (Community safety orders) in the *Criminal Code*, modelled on the existing High Risk Terrorist Offenders scheme in Division 105A of Part 5.3 of the *Criminal Code*.

4. s. 34(3), s. 42(1), s. 47C(1)
[Redacted]
[Redacted] s. 47C(1), s. 42(1)
[Redacted]

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s. 47C(1), s. 42(1)

s. 34(3), s. 47C(1), s. 42(1)

5. These amendments set out the visa conditions that will apply when a Community Safety Order is in place as well as enhancing the arrangements in relation to bridging visas and visa conditions, including electronic monitoring and curfews, implemented on 18 November 2023 on commencement of the Migration Amendment (Bridging Visa Conditions) Act 2023. The Amendment Regulations have been drafted to strengthen the constitutional validity of these arrangements, informed by views provided by the Solicitor-General in relation to the proposed Government amendments of the Bill and the draft Regulations.

Policy authority

6. s. 42(1)

s. 34(3), s. 42(1)

Measures in the Government amendments (sheet SY101)

7. The Government amendments would amend the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (Bill) to:

- amend the *Criminal Code Act 1995* (Criminal Code) to create a new framework allowing a court, in response to an application by the Minister for Immigration, to make a community safety detention order (CSDO) or a community safety supervision order (CSSO) (collectively, community safety orders or CSOs) with respect to non-citizens who pose an unacceptable risk of committing serious violent or sexual offences and have no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future;
- amend the *Migration Act 1958* (Migration Act) to provide for the grant of a Subclass 070 (Bridging (Removal Pending)) visa (BVR) to non-citizens in relation to whom a community safety order is in force as outlined in the Criminal Code;
- make consequential amendments to the *Administrative Decisions (Judicial Review) Act 1977*, *Crimes Act 1914*, *Surveillance Devices Act 2004* and *Telecommunications (Interception and Access) Act 1979*.

8. The Government amendments will also amend the short title and long titles of the Bill. As amended, the Bill will be the Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023.

Amendments of the Criminal Code – new Community Safety Order scheme

9. The amendments of the Criminal Code would introduce a new Community Safety Order (CSO) scheme, to protect the Australian community where certain non-citizens in the NZYQ-affected cohort, who have committed serious violent or sexual offences, may pose an unacceptable risk of engaging in further serious offending.
10. The new CSO scheme will allow the Immigration Minister to apply to the Court for a community safety detention order (CSDO) or community safety supervision order (CSSO) in relation to non-citizens who have no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future. The Court is also required to be satisfied that the offender poses an unacceptable risk of harming the community by committing a serious violent or sexual offence.
11. For CSDOs, a Court may make an order if satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of harming the community by committing a serious violent or sexual offence. The Court must also be satisfied that there is no less restrictive measure, such as a CSSO or visa conditions, available that would be effective in protecting the community from serious harm by addressing the unacceptable risk.
12. For CSSOs, a Court may make an order satisfied, on the balance of probabilities, on the basis of admissible evidence, that the offender poses an unacceptable risk of harming the community by committing a serious violent or sexual offence. The Court has the ability to consider a broad range of conditions to address the specific risks posed by the person. This includes restrictions on the person's movement, residence, communication and use of technology, and employment. It is necessary and appropriate that the Courts have flexibility to adapt CSSO conditions to each offender in order to maintain compliance, proportionality and primarily the safety of the community. The Court must be satisfied that each of the conditions and the combined effect of the conditions is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk.
13. The Bill creates offences for contravening a CSSO condition, which carry a mandatory minimum of one-year imprisonment, and a maximum penalty of five years' imprisonment. The penalties provide an effective deterrent to the commission of such an offence and reflect the potentially significant risk that the offenders may pose to the community.
14. The amendments also incorporate a number of safeguards to ensure there are appropriate checks and balance on this scheme, including:
 - the Immigration Minister has a number of specific disclosure obligations. This includes ensuring that the Court is provided with a statement of any facts that the Immigration Minister is aware of that could support a finding that the order should not be made;
 - in making a CSDO, the Court must be satisfied that there is no less restrictive measure that would be appropriate in mitigating the risk posed by the non-citizen;
 - a CSO must be reviewed by the Court at least annually, or earlier if the non-citizen or Immigration Minister apply for a review;

21. In this way, section 76AA operates to expressly manage a non-citizen's visa conditions where a CSO is made and comes into force in respect of that non-citizen, under the CSO Scheme, to ensure the court's order takes precedence over any visa conditions

Policy authority

s. 47C(1), s. 42(1), s. 34(3)

s. 42(1), s. 47C(1)

Background

24. On 8 November 2023, the High Court delivered an *ex tempore* decision in NZYQ, and made orders allowing NZYQ's application. Written reasons were delivered on 28 November 2023.
25. The High Court's judgment provides that the Migration Act does not, and cannot, authorise or require the detention of a non-citizen where, and for so long as, there is no real prospect that the removal of the non-citizen from Australia will become practicable in the reasonably foreseeable future.
26. The Parliament has passed legislation, and the Government has separately introduced further legislation, to address the implications that flow from the NZYQ decision prior to the written judgement of that case being handed down. Following the release of the written judgement, further amendments have been proposed to establish a judicially supervised CSO scheme.
27. The Table below provides a summary and progress of relevant legislation.

Table

Item	Legislation	Summary	Status
1.	<i>Migration Amendment (Bridging Visa Conditions) Act 2023</i>	This Act amends the Migration Act and Regulations to provide for certain conditions to be placed on bridging visas granted to non-citizens released from immigration detention.	Commenced on 18 November 2023.
2.	Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023	This Bill would amend the Migration Act to provide for additional conditions to be placed on bridging visas granted to non-citizens released from immigration detention, and clarify the authority for the collection and use of information gathered by an electronic monitoring device.	Before the Senate. MS23-002435 refers
3.	Government amendments of the Migration Amendment	These amendments are intended to establish a judicially supervised CSO scheme and make related amendments.	Proposed as part of this submission

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	(Bridging Visa Conditions and Other Measures) Bill 2023		
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Consultation – internal/external

28. Internal: Compliance and Community Protection Policy Branch; Detention Policy Branch; Refugee and International Law Section (in relation to the Statement of Compatibility with Human Rights) and AGS Special Counsel.
29. [REDACTED] s. 42(1) [REDACTED], Security and Counter-Terrorism Division, and the Criminal Law Division in the Attorney-General's Department, with all agencies providing input and advice to the extent possible in the time available. The government amendments to the Bill have been drafted in close consultation with the Office of Parliamentary Counsel (OPC). [REDACTED] s. 42(1) [REDACTED]
[REDACTED]
[REDACTED]

Consultation – Secretary / A/g Dep Sec Immigration / Australian Border Force Commissioner

30. The A/g Secretary was not consulted on this submission but is aware of the approach being taken.
31. The Australian Border Force Commissioner was not consulted on this submission.
32. The Chief Finance Officer was not consulted on this submission.
33. The A/g Deputy Secretary Immigration was not consulted on this submission but is aware of the approach being taken.

Client service implications

34. NZYQ-affected BVR holders will be subject to additional restrictive conditions intended to mitigate risks to the Australian community.

Risks and Sensitivities

Risks on the interaction between the CSO scheme and BVR scheme

35. The amendments will also provide that the Minister must not grant another BVR (with or without application) to a non-citizen who holds a BVR granted by operation of law while a CSO made in relation to the non-citizen is in force. [REDACTED] s. 42(1) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
36. [REDACTED]

S. 42(1)

37.

S. 42(1)

Impact on the 2024 Autumn legislation program

38. First Parliamentary Counsel at OPC has specifically noted that prioritising any urgent drafting will affect the ability of OPC to deliver T-status bills planned for the 2024 Autumn Parliamentary sittings.
39. Prioritising the development of these amendments will also affect the Department's ability to progress other legislative projects planned for the 2024 Autumn Parliamentary sittings.

S. 42(1)

Financial/systems/legal/deregulation/media implications

41. The intended approach to the financial implications is described in s. 34(2). The information contained in this submission is classified and should not be publicly released without the authority of the Department of Home Affairs. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – media@homeaffairs.gov.au.

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Attachments

- Attachment A** Government amendments (sheet SY101) of the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023
- Attachment B** Supplementary Explanatory Memorandum to the Government amendments
- Attachment C** Letter to the Prime Minister seeking policy authority
- Attachment D** Draft Caucus submission
- Attachment E** Prime Minister's original policy authority for the Bill as introduced

Cleared by:

Kevin Cunnington
Assistant Secretary
Legislation Branch

Date: 03 December 2023

Mob: s. 22(1)(a)(ii)

Kevin Cunnington, Assistant Secretary, Legislation Branch, Ph.: s. 22(1)(a)(ii)

CC

A/g Secretary
A/g Deputy Secretary Immigration
DS Social Cohesion and Citizenship
DS Chief Operating Officer
DS Executive
Chief Finance Officer
Group Manager Immigration Policy
Group Manager Legal
Group Manager Cyber and Infrastructure Security Centre
Chief Finance Officer
FAS Executive Coordination
FAS Immigration Policy
Assistant Secretary, Compliance and Community Protection Branch
Assistant Secretary, Migration & Citizenship Law Branch

ABF Commissioner
ABF Deputy Commissioner, National Operations North, West and Detention
ABF Assistant Commissioner, Detention and National Removals

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THE HON MARK DREYFUS KC MP

ATTORNEY-GENERAL
CABINET SECRETARY

THE HON CLARE O'NEIL MP

MINISTER FOR HOME AFFAIRS
MINISTER FOR CYBER SECURITY

THE HON ANDREW GILES MP

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MS23-002495

The Hon Anthony Albanese MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

s. 42(1)

s. 42(1)

s. 34(3), s. 42(1)

s. 34(3), s. 42(1)

s. 42(1)

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7770

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S. 42(1)

MARK DREYFUS

CLARE O'NEIL

ANDREW GILES

/ / 2023

/ / 2023

/ / 2023

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Detailed talking points for the parliamentary debate:

- The Migration Amendment (Bridging Visa Conditions and Cessation) Bill 2023 (the Bill) amends the:
 - *Migration Act 1958* (Migration Act) to complement and reinforce amendments made by the Migration Amendment (Bridging Visa Conditions) Act 2023 (First Amendment Act) on 18 November 2023, and
 - *Criminal Code Act 1995* (Criminal Code) to introduce a new Community Safety Order (CSO) scheme to protect the community from the risk of individuals who have committed serious violent or sexual offences.

Migration Act amendments – original Bill**New Criminal Offences**

- The Bill inserts new sections 76DAA, 76DAB and 76DAC.
- The maximum penalty for each offence is five years imprisonment or 300 penalty units, or both.
- **Section 76DAA** makes it a criminal offence for a Subclass 070 (Bridging (Removal Pending)) visa (BVR) holder to fail to comply with a condition of their visa, where the effect of the condition is to prohibit them from performing any work, or participating in any regular organised activity, involving more than incidental contact with a minor or any other vulnerable person.
 - Clause 8622 of Schedule 8 to the Migration Regulations (clause 8622) sets out the corresponding visa condition. Subclause 8622(1) states 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”. Subclause 8622(2) states that subclause 8622(1) applies “whether the work or activity is for reward or otherwise” and “whether or not a working with children or vulnerable people check (however described) is required in relation to the work”.
- Subsection 76DAA(3) states that ‘work’ for the purposes of section 76DAA means work whether for reward or otherwise. This imports the clarification in clause 8622 about the scope of the term ‘work’ and ensures that the scope is clear in this provision.
- Paragraphs 76DAA(1)(a) and 76DAA(1)(b) limit the application of this offence to BVR holders who are subject to the visa condition set out in clause 8622.
- Subsection 76DAA(2) provides that the offence in subsection 76DAA(1) does not apply if a person has a reasonable excuse. The note following subsection 76DAA(2) provides that the defendant bears the evidential burden of establishing they have a reasonable excuse consistent with subsection 13.3(3) of the Criminal Code. An evidential burden, in relation to establishing a matter, means the burden of adducing or pointing to evidence that

suggests a reasonable possibility that the matter exists or does not exist. If the person discharges that evidential burden, the prosecution must disprove that matter beyond a reasonable doubt.

- **Section 76DAB** makes it a criminal offence for a BVR holder to fail to comply with a condition of their visa, where that condition imposes a requirement that the person not go within a particular distance of a school, childcare centre or day care centre.
 - Clause 8623 of Schedule 8 to the Migration Regulations (clause 8623) sets out the corresponding visa condition. Subclause 8623 states 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”.
- The language of clause 8623 is partially replicated in paragraph 76DAB(1)(b). The exception to this is that paragraph 76DAB(1)(b) refers to the proximity of the school, childcare centre or day care centre as being ‘a particular distance’. This refers to the proximity as set out in the relevant condition. Clause 8623 currently quantifies that distance at ‘200 metres’.
- Subsection 76DAB(2) provides that the offence in subsection 76DAB(1) does not apply if a person has a reasonable excuse. The note following subsection 76DAB(2) provides that the defendant bears the evidential burden of establishing they have a reasonable excuse consistent with subsection 13.3(3) of the Criminal Code. An evidential burden, in relation to establishing a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. If the person discharges that evidential burden, the prosecution must disprove that matter beyond a reasonable doubt.
- **Section 76DAC** makes it a criminal offence for a BVR holder to fail to comply with a condition of their visa, where that condition imposes a requirement that the person not contact, or attempt to contact, the victim or the family of the victim of an offence that the person has been convicted of which involved violence or sexual assault.
 - Clause 8624 of Schedule 2 to the Regulations (hereafter clause 8624) sets out the corresponding visa condition. Subclause 8624 states 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”.
- The condition set out in clause 8624 will only be enlivened if the BVR holder has been convicted of an offence involving violence or sexual assault. The language of clause 8624 is replicated in paragraphs 76DAC(1)(b) and 76DAC(1)(c).
- Subsection 76DAC(2) provides that the offence in subsection 76DAC(1) does not apply if a person has a reasonable excuse. Subsection 76DAC(3) provides that without limiting what may be taken to be a reasonable excuse for the purposes of subsection 76DAC(2), there are specific circumstances in which a person will have a reasonable excuse. These circumstances include:

- where the victim or member of the victim's family being contacted was 16 or above and consented to the contact or attempted contact and had capacity to give consent (paragraph 76DAC(3)(a));
 - where the contact prohibited by subsection 76DAC(1) is required or authorised by or under a law of the Commonwealth, a State or a Territory or would be so authorised but for the Migration Act or the Migration Regulations (paragraph 76DAC(3)(b)).
- The note following subsection 76DAC(2) provides that the defendant bears the evidential burden of establishing they have a reasonable excuse consistent with subsection 13.3(3) of the Criminal Code. This also applies to the defence of reasonable excuse if a matter contemplated by subsection 76DAC(3) is raised, as that matter must be raised in reliance of the defence in subsection 76DAC(2). An evidential burden, in relation to establishing a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. If the person discharges that evidential burden, the prosecution must disprove that matter beyond a reasonable doubt.

Collection and use of information gathered from an electronic monitoring device

- New **subsection 76F(1)** provides for a list of purposes that an authorised officer may do all things necessary or convenient, in relation to a person who is or has been subject to monitoring. The new purposes under subsection 76F(1) are:
 - installing, fitting or repairing a monitoring device or related monitoring equipment for a person who is subject to monitoring (paragraph 76F(1)(a)); or
 - removing a monitoring device or related monitoring equipment for a person who is or has been subject to monitoring (paragraph 76F(1)(b));
 - operating a monitoring device or related monitoring equipment for a person who is subject to monitoring (paragraph 76F(1)(c));
 - determining or monitoring the location of:
 - a person who is subject to monitoring; (subparagraph 76F(1)(d)(i)); or
 - an object, or the status of an object, that relates to a person who is subject to monitoring (subparagraph 76F(1)(d)(ii));
 - through the operation of a monitoring device or related monitoring equipment.
- New **subsection 76F(2)** provides for a list of purposes that an authorised officer may collect, use or appropriately disclose information (including personal information). The new purposes for the collection, use or disclosure of information under subsection 76F(2) are:
 - determining whether the conditions of a visa held by a person who is subject to monitoring are being, or have been, complied with (paragraph 76F(2)(a));
 - determining whether a person who is subject to monitoring has committed an offence (paragraph 76F(2)(b));
 - investigating or prosecuting an offence against a law of the Commonwealth, a State or a Territory committed, or alleged to have been committed, by a person who is subject to monitoring (paragraph 76F(2)(c)); protecting the community in relation to persons who are subject to monitoring (paragraph 76F(2)(d));

- o facilitating the location of a person subject to monitoring who is suspected of having failed to comply with a requirement of a condition of a visa held by the person (paragraph 76F(2)(e));
- o facilitating the location of a person subject to monitoring in the event that either or both of the following apply:
 - There is a real prospect of the removal of the person from Australia becoming practicable in the reasonably foreseeable future (subparagraph 76F(2)(f)(i); or
 - a visa held by the person ceases to be in effect (subparagraph 76F(2)(f)(ii);
 - facilitating the performance of functions, and exercise of powers, of authorised officers under this Act (including this section) and the regulations in relation to persons who are subject to monitoring (subparagraph 76F(2)(g)).
- New **subsection 76F(3)** provides for an authorised officer to have the discretion to exercise a power under new subsection 76F(1) or (2), despite any other provision of this Act or the regulations (paragraph 76F(3)(a), or any other law of the Commonwealth, a State or Territory (whether written or unwritten) (paragraph 76F(3)(b)).
- New **subsection 76F(4)** provides for an authorised officer's exercise of a power under subsection 76F(1) or (2) to be subject to any conditions, restrictions or other limitations that are prescribed by the regulations for the purposes of this subsection.
- New **subsection 76F(5)** provides for the conferral of a power on an authorised officer by subsection (1) or (2) does not, by implication, limit any other powers that exist, or existed, for an authorised officer or any other person to do a thing authorised by either of those subsections (paragraph 76F(5)(a)), or any other thing (paragraph 76F(5)(b)).
- New **subsection 76F(6)** introduces four new defined terms for section 76F authorised officer, monitoring device, related monitoring equipment, and subject to monitoring:
 - o The term authorised officer, when used in subsection (1) or (2), is defined to include:
 - a person who is authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner for the purposes of that provision (paragraph (a)); or
 - a person who is included in a class of persons authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner for the purposes of that provision, including a person who becomes a member of the class after the authorisation is given (paragraph (b)).
 - o The term monitoring device is defined to have the same meaning as in section 76D, which provides that the term means any electronic device capable of being used to determine or monitor the location of a person or an object or the status of an object.
 - o The term related monitoring equipment, for a monitoring device, is defined to have the same meaning as in section 76D, which provides that the term means any electronic equipment necessary for operating the monitoring device.

- o The term subject to monitoring in circumstances where a person is subject to monitoring, is defined to mean if the person holds a Subclass 070 (Bridging (Removal Pending)) visa that is subject to a condition requiring the person to wear a monitoring device at all times.

Criminal Code Act 1995 amendments – New Community Safety Order scheme

- The new CSO scheme is centred on protecting the community.
- The scheme will provide new powers to detain and manage non-citizens who have no real prospect of removal from Australia in the reasonably foreseeable future (i.e. the NZYQ cohort).
- The scheme hinges on an assessment of the risk posed by a convicted violent or sexual offender, and a determination by the Immigration Minister as to whether or not the strict conditions that can be imposed through a visa will effectively limit that risk.
- If in the Minister's view the strict visa conditions may not effectively limit the risk to the community, this scheme empowers the Minister to apply to a Court for a community safety detention order (CSDO) or community safety supervision order (CSSO).
- The scheme would include safeguards, including disclosure obligations and requiring a review of the order occurs every year.
- Community safety detention orders
 - o CSDOs will be used for the highest risk individuals, where it is necessary for the person to be held in detention in order to manage the risk posed to the community.
 - o To make such an order, the Court must be satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious violent or sexual offence, *and* there is no less restrictive measure that would be effective in managing the risk.
- Community safety supervision order
 - o CSSOs will be used to imposed conditions on individuals while in the community to appropriately manage the risk.
 - o To make such an order, the Court must be satisfied:
 - on the balance of probabilities that the offender poses an unacceptable risk of harming the community by committing a serious violent or sexual offence
 - that any visa conditions applicable to the offender would not be effective in preventing the unacceptable risk, and
 - on the balance of probabilities that each of the conditions and the combined effect of all the conditions to be imposed on the offender by the order is reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the community from that unacceptable risk.

- o The amendments will provide law enforcement with the necessary powers to monitor an individual subject to a CSSO to ensure the individual is complying with the conditions imposed on them.
- Offences for breaching a CSSO:
 - o The amendments include offences for breaching conditions of a CSSO, to operate as a deter breaches which could cause harm to the Australian community.

Interaction between the CSO Scheme and the Migration Act

- This new regime would operate alongside the recent Migration Act changes that impose stringent mandatory visa conditions on the NZYQ cohort in the community. It is another layer of protection.
- Where a Court makes a CSSO, this will apply to the person to manage their risk to the community. By operation of law, their BVR would cease and be replaced by a new BVR that does not have electronic monitoring, a curfew or financial reporting requirements imposed. For the duration of the CSSO these visa conditions could not be imposed. This is to enable the court order to have precedence.
- This change is effected by the insertion of a new section 76AA into the Migration Act.

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PRIME MINISTER
The Hon Anthony Albanese MP

26 NOV 2023

Reference: MC23-100312

The Hon Mark Dreyfus KC MP
Attorney-General
Parliament House
CANBERRA ACT 2600

The Hon Clare O'Neil MP
Minister for Home Affairs
Parliament House
CANBERRA ACT 2600

The Hon Andrew Giles MP
Minister for Immigration, Citizenship and Multicultural Affairs
Parliament House
CANBERRA ACT 2600

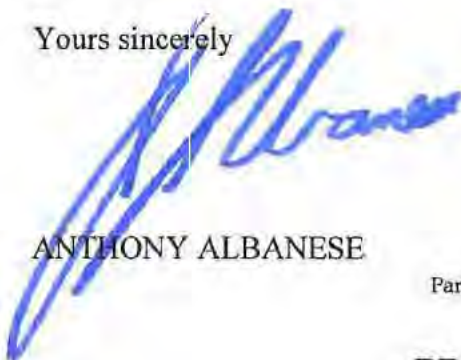
Dear Attorney-General and Ministers

Thank you for your letter dated 26 November 2023 seeking policy authority for amendments in the Migration Amendment (Bridging Visa and Other Measures) Bill and Migration Amendment (Bridging Visa Conditions) Regulations 2023 to address matters arising from the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (NZYQ).

I agree to the proposed amendments in the Bill and the Regulations which you outline in your correspondence and agree to the bill being introduced into the House of Representatives as soon as possible. I note you propose the Bill be introduced on 27 November 2023 and the Regulations s. 47C(1)
s. 47C(1)

I have written to the Governor-General, His Excellency General the Honourable David John Hurley AC DSC (Retd), requesting a special meeting of the Executive Council to consider the proposed Regulations.

Yours sincerely


ANTHONY ALBANESE

Parliament House CANBERRA ACT 2600
Telephone (02) 6277 7700
www.pm.gov.au

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Australian Government
Department of Home Affairs

Submission

For decision
PDMS Ref. Number: MS24-000333
Date of Clearance: 23/03/2024

To Minister for Immigration, Citizenship and Multicultural Affairs

Subject Approval of text: Migration Amendment (Removal and Other Measures) Bill 2024

Timing For consideration *by 11am Sunday 22 March 2024*, as agreed with your Deputy Chief of Staff, to facilitate the legislation approval process and other requirements for introduction of the Bill.

Recommendations (Mandatory Field)

That you:

1. **approve** the text of the Migration Amendment (Removal and Other Measures) Bill 2024 at **Attachment A**; and

approved / not approved
2. **approve** the text of the Explanatory Memorandum to the Bill, including the Statement of Compatibility with Human Rights at **Attachment B**; and

approved / not approved
3. **sign** the letter to the Prime Minister at **Attachment C** seeking further policy authority for measures in the Bill; and

signed / not signed
4. **note** the Department will provide your Office with a draft second reading speech, Caucus submission, talking points, 'Questions & Answers' document and other supporting materials as soon as possible for consideration.

noted / please discuss

Minister for Immigration, Citizenship and Multicultural Affairs

Signature.....

Date: 23 / 03 / 2024

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Minister's Comments

Key Issues

1. The Department seeks your approval of the text of the Migration Amendment (Removal and Other Measures) Bill 2024 (the Bill) (Attachment A) and the associated Explanatory Memorandum to the Bill (Attachment B). The Explanatory Memorandum (EM) also includes the Statement of Compatibility with Human Rights (SoC). If you approve the text of the Bill and its EM, the Department will provide confirmation of this to the Department of the Prime Minister and Cabinet (PM&C) urgently. PM&C is engaging with the office of the Assistant Minister to the Prime Minister, the Hon Patrick Gorman MP, in relation to his availability on Sunday 24 March 2024 to consider the Bill and EM for the Legislation Approval Process (LAP) – and subject to your text approval.

s. 34(3)

3. If you approve the text of the Bill and its EM, a letter to the Prime Minister has also been prepared for your consideration and signature (Attachment C). The letter sets out key features of the Bill, in line with guidance from the Office of Parliamentary Counsel, in order to settle final policy authority for the Bill for LAP purposes (and noting the existing policy authority in s. 34(2)).
4. The letter also describes significant provisions in the Bill. This includes the offence provisions and penalties (including a mandatory minimum sentence of 12 months' imprisonment), as well as the defence of 'reasonable excuse' and express exclusions from that defence. The letter describes the consequences of designating a country as a removal concern country, and exceptions to the bar on nationals of a removal concern country making valid visa applications outside Australia. Further information in relation to these matters is provided under Background and in the EM (Attachment B) and letter to the Prime Minister (Attachment C).

Background

5. The Migration Amendment (Removal and Other Measures) Bill 2024 at Attachment A includes the following key measures:
 - a statement of legislative expectations to frame and support the measures in the Bill, and which, if enacted, will provide that the Parliament expects that:

- non-citizens on a removal pathway will leave Australia voluntarily or, if they do not, will cooperate with, and not frustrate or obstruct, removal efforts;
- a foreign country will cooperate with Australia to facilitate the lawful removal from Australia of non-citizens who are nationals of that country;
- a power of the Minister to give a written direction to a removal pathway non-citizen to do certain specific things to facilitate removal efforts, as well as a power to direct a removal pathway non-citizen to do, or not do, things the Minister is satisfied are reasonably necessary to determine the non-citizen's removal prospects or facilitate their removal;
- a statutory concept of a 'removal pathway non-citizen', to support the direction powers, the related offence provisions and other amendments in the Bill – with the amendments providing that a removal pathway non-citizen is:
 - an unlawful non-citizen who is subject to removal powers under the Migration Act;
 - a Bridging Visa (Removal Pending) (BVR) holder;
 - a Subclass 050 (Bridging (General) visa (BE) holder who holds the visa on the basis of making acceptable arrangements to depart Australia; and
 - a lawful non-citizen who holds a visa that may be prescribed in relation to these measures as a removal pathway non-citizen;
- offence provisions for non-compliance by a removal pathway non-citizen with a direction given to them by the Minister under one of the new direction powers – with a maximum available sentence of 5 years' imprisonment, 300 penalty units, or both, and a mandatory minimum sentence of 12 months' imprisonment;
- a personal power of the Minister to designate a country as a removal concern country, by legislative instrument, if the Minister thinks it is in the national interest to do so – and subject to mandatory consultation with the Prime Minister and the Minister for Foreign Affairs;
- an 'operation of law' bar on making valid visa applications by nationals of a designated removal concern country who are outside Australia, with statutory exemptions for appropriate classes of persons, including close family of Australian citizens and permanent residents, applicants for a Refugee and Humanitarian (Class XB) visa;
- a legislative instrument-making power to provide for possible exemption of other classes of visa and/or classes of person from the bar (for example, the Subclass 995 (Diplomatic (Temporary) visa);
- a personal and non-compellable power of the Minister to determine, if the Minister thinks it is in the public interest to do so, that the bar does not apply to an individual in certain circumstances and for specified visas;
- amendments to enable a protection finding for a removal pathway non-citizen to be revisited under section 197D of the Migration Act – where this is currently limited to unlawful non-citizens to whom paragraphs 197C(3)(a) and (b) apply;

- technical amendments to clarify that a new BVR may be granted without application at any time ('from time to time') to an NZYQ-affected non-citizen, regardless of whether the Minister has invited a bridging visa holder to make representations in accordance with section 76E of the Migration Act in relation to the imposition of certain community protection-related visa conditions.

6. The Bill's EM provides further detail in relation to each of these measures, and each of the provisions in the Bill.

Policy authority

7. s. 34(3), s. 47C(1)

s. 47C(1)

8. s. 34(3), s. 47C(1)

s. 47C(1)

9. s. 34(3), s. 42(1)

s. 42(1)

Preparation of other supporting documents

10. Departmental input to the draft Caucus submission and second reading speech, as well as talking points, a 'Questions and Answers' document and other supporting materials are currently being prepared. These will be provided to your office as soon as possible for consideration.

S. 42(1)

Consultation – internal/external

13. Internal: Immigration Policy Division (policy instructors); Refugee, Humanitarian and Settlement Division; Immigration Compliance Division; Refugee and International Law Section.
14. External: OPC; AGS; AGD Criminal Law and Office of International Law; Department of the Prime Minister and Cabinet; Department of Foreign Affairs and Trade.

S. 42(1)

Consultation – Secretary / A/g Dep Sec Immigration / ABF Commissioner

16. The Secretary was not consulted on this submission but is aware of the approach being taken.
17. The Australian Border Force Commissioner was not consulted on this submission.
18. The Chief Finance Officer was not consulted on this submission.
19. The A/g Deputy Secretary Immigration was not consulted on this submission but is aware of the approach.

Client service implications

20. This submission has no direct client service implications. Other client service implications and operational planning have been, or will be, covered in related policy submissions and advice.

Risks and Sensitivities

21. [REDACTED] s. 42(1), s. 34(3)
[REDACTED] As described in that submission, s. 34(2), s. 42(1)
[REDACTED]
[REDACTED]

Released by Department of Home Affairs
under the Freedom of Information Act 1982

s. 34(2), s. 42(1)

s. 42(1)

Statement of Compatibility with Human Rights

22. The Statement of Compatibility with Human Rights (Attachment A to the Bill's EM) provides that the Bill is compatible in most respects with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. s. 42(1)

2 S. 42(1)

S. 42(1)

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Other matters

26. The information contained in this submission is classified and should not be publicly released without the authority of the Department of Home Affairs. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – media@homeaffairs.gov.au.

Financial/systems/legal/deregulation/media implications

27. The legislative and other legal implications are described in this submission and its attachments. Media and Communication Branch will be consulted in relation to any associated media strategy and communications, if the Minister and Government agree to proceed with the proposed legislation. This submission has no direction financial implications. Other financial, policy and operational, and legal implications are described in s. 34(2)

Attachments

Attachment A Migration Amendment (Removals and Other Measures) Bill 2024

Attachment B Explanatory Memorandum, including the Statement of Compatibility with Human Rights

Attachment C s. 42(1)

Authorising Officer
Cleared by:
Kevin Cunnington Assistant Secretary Legislation Branch
Date: 23 March 2024
Mob: s. 22(1)(a)(ii)

Contact Officer: Kevin Cunnington, Assistant Secretary, Legislation Branch, Ph.: 02 6275 5836 / Mob: 0478 264 628

Through For submissions where there are legal and/or financial implications/risks/sensitivities, consider if the Chief Finance Officer and/or Group Manager Legal are required to 'through clear' the submission

CC Minister for Home Affairs, Minister for Cyber Security
Secretary
ABF Commissioner
A/g DS Immigration
DS Chief Operating Officer
DS Executive
Group Manager Legal
Group Manager Immigration Policy
Group Manager Immigration Compliance
Group Manager Immigration Operations
Chief Finance Officer
FAS Immigration Policy
FAS Executive Coordination

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