Human Rights Law Centre

Explainer

Migration Amendment Bill 2024 (Cth) and Migration Amendment (Bridging Visa Conditions) Regulations 2024 (Cth)

On 7 November 2024 the Albanese Government issued new regulations under the *Migration Act 1958* (Cth), and introduced a new bill to Parliament,[1] in response to the High Court of Australia's decision in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*.[2]

The Bill and the Regulations are the latest in a series of punitive measures targeting the small group of people released from indefinite detention since November 2023. The new measures seek to drastically expand the Government's powers, allowing it to warehouse people in third countries, reverse protection findings made for refugees, and continue to impose punitive visa conditions on those who remain here.

What does the Bill do?

1. Allows the Australian Government to spend money and take action to enter into **"third country reception arrangements"** with foreign countries,[3] to create new ways for the Government to remove people from Australia. Any person liable for removal could be subjected to such arrangements. If a Bridging "R" Visa (**BVR**) holder is granted permission to enter and remain in a foreign country pursuant to such an arrangement, their BVR will cease, allowing for their removal from Australia.[4] In practice, this could create an **expanded regime of offshore detention** and **allow the Australian Government to remove BVR holders to foreign countries (like Nauru)** who may be willing to receive them.

2. There is no requirement that a person have any permanent right to reside in the third country, nor any guarantee of their safety. The Bill specifically contemplates that the third country may decide to detain the person.[5] The Bill would allow a person to be sent to a third country, even if the government of that third country might then return the person their home country, where they face serious harm.

3. Expands the Minister's existing power to overturn protection findings to apply to all "removal pathway non-citizens",[6] which includes people in detention who are liable for removal, BVR holders in the community, Bridging "E" Visa holders in the community who were granted their visa on the basis that they are making arrangements to depart Australia, and other people in the community holding any visa prescribed by regulations.[7] In practice, this will give the Minister power to **revisit refugee determinations in relation to virtually anyone in Australia,** to eliminate barriers to their removal.

4. Gives the Australian Government and immigration officials immunity against civil claims arising from the removal of a person following the cessation of a BVR or a character-based visa refusal or

[1] Migration Amendment Bill 2024 (Cth) (the **Bill)**.
[2] [2024] HCA 40.
[3] *Migration Act 1958* (Cth) (**Migration Act**) proposed s 198AHB.
[4] Migration Act proposed s 76AAA.
[5] Migration Act proposed s 198AHB(5).
[6] Migration Act proposed s 197D(1).
[7] Migration Act proposed s 5(1), definition of *removal pathway non-citizen.*

cancellation,[8] or the removal of a person to a foreign country pursuant to "third country reception arrangements" or regional processing arrangements.[9] These provisions attempt to **protect the Government against accountability for the harm that people will suffer if sent to a 'third country' (like Nauru) or returned to their countries of origin.**

5. Gives the Australian Government broad powers to collect and share personal information about people's previous interactions with the criminal legal system, with foreign governments or *any other persons or bodies*.[10] It seeks to validate any unlawful sharing of such information that may have occurred in the past.[11] These provisions would give the Government **nearly unrestricted power to breach people's privacy** with respect to criminal history information, including information that would otherwise be protected from disclosure such as spent convictions.[12]

6. Introduces a new test to impose curfew and ankle monitoring conditions for BVR holders,[13] in an attempt to **continue the punitive treatment which the High Court ruled yesterday must cease**.

What do the new Regulations do?

The new Regulations amend the *Migration Regulations 1994* (Cth) to require the Minister to impose certain conditions,[14] including the curfew and ankle monitoring conditions, on BVR holders only if the Minister is satisfied on the balance of probabilities that:

1. the person poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence;[15] and

2. the imposition of the conditions is reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the Australian community by addressing that risk.[16]

While the new test means that curfews and ankle bracelets will no longer be automatically applied to BVR holders, and can only be imposed in more limited circumstances, it allows the Government to **make assumptions about people's future behaviour and continue imposing punitive conditions that limit people's freedom and bodily integrity**.

What are the impacts?

The High Court of Australia sent a clear message that the Government does not have the power to impose punishment, and that non-citizens are entitled to the same protections against interferences with their liberty and dignity as everyone else. The Albanese Government has not listened.

Expanding offshore detention

Instead of heeding the Court's decision, the Government's legislative response would create a new offshore warehousing regime. The government would simply pay third countries to warehouse or

[8] Migration Act proposed s 198(12).
[9] Migration Act proposed s 198(13).
[10] Migration Act proposed s 501M.
[11] Migration Act proposed s 501M(4).
[12] Migration Act proposed s 501M(3)(a).
[13] Migration Act proposed s 76E(4)(b).
[14] The Regulations concern the curfew and electronic monitoring conditions that were the subject of the legal challenge in *YBFZ,* and also apply to the conditions requiring a person to report their financial circumstances and debt or bankruptcy to the Department.
[15] Migration Regulations cl 070.111 of Schedule 2 - a "serious offence" is defined as an offence punishable by imprisonment for life or for a period or maximum period of at least five years and where the offence involves certain conduct including, among other things, loss of life or risk of loss of life, serious injury or risk of serious injury, sexual assault and offences against children.
[16] Migration Regulations cl 070.612A(1) of Schedule 2.

otherwise deal with people who were released from indefinite detention in Australia. People who have only just begun to rebuild their lives after years in detention could be shipped to Nauru or elsewhere, where they may be locked up once again. The laws will rip people from their families and homes and prevent them from ever returning to their lives in the Australian community.

The catastrophic harm suffered by people who were previously subjected to offshore processing in Nauru and Papua New Guinea is well known. This is presumably why the Government is now attempting to shield itself from civil liability for harm that people may suffer as a result of these arrangements.

Exposing refugees to harm

The proposed new powers ignore Australia's international legal obligations and expose refugees to the risk of being returned to places they may face harm.

They would allow the Government to revisit 'protection findings' made in relation to all refugees. While initially the powers would be limited to refugees on certain Bridging visas, they could be expanded at any time to people holding other visas. Refugee status should be durable and lasting, not transient or open to reversal at the Government's convenience.

The Bill would allow refugees to be sent to third countries where they might, in turn, either be detained or deported back to a country where they face serious harm. Nothing in the Bill requires the Government to consider the fate of a person once they are removed to a third country pursuant to "reception arrangements."

Continuing constitutional risk of bridging visa conditions

The new test for the imposition of curfews and ankle bracelets on BVR holders does not account for the fundamental constitutional protections upheld by the High Court in *YBFZ*. It does not change the punitive nature of home detention and constant electronic surveillance, and it continues to place decisions about whether such restrictions are necessary in the hands of the Government.