EXPLANATORY STATEMENT

Issued by the Minister for Immigration and Multicultural Affairs

Migration Act 1958

Migration Amendment (Bridging Visa Conditions) Regulations 2024

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act. In addition, regulations may be made pursuant to the provisions listed in Attachment A.

The *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (the Amendment Regulations) amends the *Migration Regulations 1994* (the Migration Regulations) to require the Minister to impose the following visa conditions when granting a Subclass 070 (Bridging (Removal Pending)) visa (BVR), if the Minister is satisfied on the balance of probabilities that the BVR holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence (with new definition to be inserted into 070.111) under any Australian law, and the Minister is satisfied that imposition of the below condition(s) is on the balance of probabilities, reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing that significant risk:

- condition 8621 (electronic monitoring);
- condition 8617 (financial circumstances reporting);
- condition 8618 (debt or bankruptcy reporting);
- condition 8620 (curfew).

The previous subclause 070.612A(1) of Schedule 2 to the Migration Regulations required the Minister to impose conditions 8621, 8617, 8618 and 8620 on a non-citizen who subclause 070.612A(3) of Schedule 2 applied to, unless the Minister was satisfied that it was not reasonably necessary to impose each conditions to protect any part of the Australian community.

On 6 November 2024, the High Court delivered their judgment on the matter of *YBFZ v Citizenship and Multicultural Affairs & Anor* [2024] HCA 40 (YBFZ) finding, by majority, that the imposition of each of the curfew and the monitoring conditions on a BVR is prima facie punitive and cannot be justified. It follows that the High Court held clause 070.612A(1)(a) and (d), as in force prior to the commencement of the Amendment Regulations, infringed Chapter III of the Constitution and were invalid.

As a result, the Amendment Regulations introduces a new community protection test to ensure that the Minister can only impose 8621, 8617, 8618 and 8620 conditions using a new confined and specific test listed in the Amendment Regulations, related to protecting any part of the Australian community from serious harm. . The new test requires consideration of risk of particular criminal conduct (serious

offence) occurring and the nature, degree and extent of harm the BVR holder may pose to any part of the Australian community (poses a substantial risk).

The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to effectively manage the operation of Australia's visa program and respond quickly to emerging needs. The matters dealt within the Migration Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed matters of visa criteria and visa conditions in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations.

The Amendment Regulations amend the Migration Regulations, which are exempt from sunsetting under table item 38A of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015.* The Migration Regulations are exempt from sunsetting on the basis that the repeal and remaking of the Migration Regulations:

- is unnecessary as the Migration Regulations are regularly amended numerous times each year to update policy settings for immigration programs;

- would require complex and difficult to administer transitional provisions to ensure, amongst other things, the position of the many people who hold Australian visas, and similarly, there would likely be a significant impact on undecided visa and sponsorship applications; and

- would demand complicated and costly systems, training and operational changes that would impose significant strain on Government resources and the Australian public for insignificant gain, while not advancing the aims of the *Legislation Act 2003* (Legislation Act).

The Amendment Regulations will be repealed by operation of Division 1 of Part 3 of Chapter 3 of the Legislation Act. Specifically, that Division (under section 48A) operates to automatically repeal a legislative instrument that has the sole purpose of amending or repealing another instrument. As the Amendment Regulations will automatically repeal, they do not engage the sunsetting framework under Part 4 of the Legislation Act.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, and the overall assessment is that the Amendment Regulations are compatible with human rights. The Statement is at Attachment B.

The Office of Impact Analysis has been consulted in relation to the amendments and has determined that no Impact Analysis is required (Consultation reference number: OIA24-07714).

The Migration Regulations are a legislative instrument for the purposes of the *Legislation Act 2003.* Section 17 of that Act provides that the rule-maker must be satisfied that there has been undertaken any consultation that is appropriate and reasonably practicable before making a legislative instrument. The Department of Home Affairs has undertaken consultation with Commonwealth agencies in the course of developing the Amendment Regulations, including the Australian Government Solicitor and the Attorney-General's Department.

The Amendment Regulations commence immediately after they are registered on the Federal Register of Legislation. Further details of the Amendment Regulations are set out in Attachment C.

The Migration Act specifies no conditions that need to be satisfied before the power to make the Amendment Regulations may be exercised.

ATTACHMENT A

AUTHORISING PROVISIONS

The following provisions of the Migration Act provide the authority for making these Amendment Regulations:

- subsection 504(1) provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act;

- subsection 31(3) provides that the regulations may prescribe criteria for a visa or visas of a specified class;

- subsection 40(1) provides the power for regulations to be made to prescribe visa conditions;

- subsection 41(1) provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions;

- subsection 41(3) provides that in addition to any specified conditions, the Minister may specify that a visa is subject to such conditions as are permitted by the regulations for the purposes of this subsection;

- paragraph 76E(1)(a) provides that section 76E applies in relation to a decision to grant a non-citizen a BVR if the visa is subject to one or more prescribed conditions and, at the time of grant, there is no reasonable prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future;

- paragraph 76E(4) provides that the Minister must grant a non-citizen a second BVR that is not subject to any one or more of the conditions prescribed for the purposes of paragraph 76E(1)(a) if the non-citizen makes representations in accordance with the invitation, and the Minister is satisfied that those conditions are not reasonably necessary for the protection of any part of the Australian community.

ATTACHMENT B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Amendment (Bridging Visa Conditions) Regulations 2024

The Regulations are compatible 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.*

Overview of the Regulations

The *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (the Regulations) amend clause 070.612A of Schedule 2 to the *Migration Regulations 1994* (the Migration Regulations) to require the Minister to impose the certain visa conditions in that order when granting a Subclass 070 (Bridging (Removal Pending)) visa (BVR), only if the Minister is satisfied on the balance of probabilities that the BVR holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence (with a new definition of ***serious offence*** inserted in clause 070.111) under any Australian law, and the Minister is satisfied that the imposition of the condition(s) is, on the balance of probabilities, reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting any part of the Australian community by addressing that substantial risk. These conditions are: condition 8621 (electronic monitoring), 8617 (financial circumstances reporting), 8618 (debt or bankruptcy reporting) and 8620 (curfew).

On 6 November 2024, the High Court delivered their judgment on the matter of YBFZ v Citizenship and Multicultural Affairs & Anor [2024] HCA 40 (YBFZ) finding, by majority, that the imposition of each of the curfew and monitoring conditions on a BVR is prima facie punitive and cannot be justified. It follows that the High Court held clause 070.612A(1)(a) and (d), as in force prior to the commencement of the Amendment Regulations, infringed Chapter III of the Constitution and are invalid.

The Regulations introduces a new community protection test to ensure that the Minister can only impose 8621, 8617, 8618 and 8620 conditions using a new confined and specific test listed in the Amendment Regulations, related to protecting any part of the Australian community from serious harm. The new test requires consideration of risk of particular criminal conduct (serious offence) occurring and the nature, degree and extent of harm the BVR holder may pose to any part of the Australian community (poses a substantial risk).

The BVR is an existing visa that has been granted to non-citizens required to be released from immigration detention following the High Court judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (NZYQ) (the NZYQ-affected cohort).

The NZYQ-affected cohort is made up of people who have been refused grant of a visa, or had their visa cancelled, but who have no real prospect of removal becoming practicable in the reasonably foreseeable future.

The Regulations address legal issues the High Court found in relation to clause 070.612A in its judgment in the case of *YBFZ* v *Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (S27/2024) (YBFZ) on 6 November August 2024. The amendments require the imposition of visa conditions 8621, 8617, 8618 and/or 8620 only where the Minister is positively satisfied on the

balance of probabilities that the person poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence (as defined) under any law of the Commonwealth, State or Territory. The Minister must be satisfied on the balance of probabilities that imposing the condition, in addition to any other conditions imposed, is reasonably necessary and is reasonably appropriate and adapted for the purposes of protecting any part of the Australian community from serious harm by addressing that substantial risk.

The Regulations define 'serious offence' for the purposes of subclass 070.612A as an offence punishable by imprisonment for life or for a period, or maximum period, of at least 5 years and where the particular conduct constituting the offence involves:

(i) loss of a person's life or serious risk of loss of a person's life;
(ii) serious personal injury or serious risk of serious personal injury;
(iii) sexual assault;
(iv) the production, publication, possession, supply or sale of, or other dealing in, child abuse material (within the meaning of Part 10.6 of the *Criminal Code Act 1995* (Cth));
(v) consenting to or procuring the employment of a child, or employing a child, in connection with material referred to in subparagraph (iv);
(vi) acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16;
(vii) domestic or family violence (including in the form of coercive control);
(viii) threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or one or more members of the group;
(ix) people smuggling; or
(x) human trafficking.

The definition imposes a harm threshold to the Minister's consideration under subclause 070.612A(1) of Schedule 2 to the Regulations by providing for the nature of that serious harm.

Placing a specific term of imprisonment threshold, along with an exhaustive list that constitutes a 'serious offence', reflects the intention of each of the visa condition(s) having a protective purpose, by referring to an objective way of demonstrating whether the offences that the Minister is concerned with are serious or not.

This is in contrast to the way the invalid provision had purported to operate previously, which was that the Minister was required to impose the conditions unless satisfied that the imposition of the conditions were not reasonably necessary to protect any part of the Australian community.

Human rights implications

The Regulations engage the following rights and obligations:

- The rights of equality and non-discrimination in Articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR)
- The right to liberty in Article 9 of the ICCPR
- The right to privacy in Article 17 of the ICCPR
- The right to freedom of movement in Article 12 of the ICCPR

- The right to presumption of innocence and minimum guarantees in criminal proceedings in Article 14 of the ICCPR

Equality and non-discrimination

Article 2(1) of the ICCPR states:
Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In its General Comment 18, the UN Human Rights Committee (UNHRC) stated that:

The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR].

The ICCPR does not give a right for non-citizens to enter Australia. The UNHRC, in its General Comment 15 on the position of aliens under the ICCPR, stated that:

The [ICCPR] does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the [ICCPR] even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the [ICCPR].

As such, Australia is able to set requirements for the entry and stay of non-citizens in Australia, and does so on the basis of reasonable and objective criteria.

The Government considers the imposition of these conditions to be reasonable and necessary both for the purposes of community safety and to mitigate the risk posed by impacted BVR holders to the Australian community. As noted in the Overview, members of the NZYQ-affected cohort have no substantive visa to remain in Australia, having had their visa applications refused, or a visa cancelled, in most cases on character or security grounds.

In addition, as the NZYQ-affected cohort are not subject to immigration detention, the usual potential consequences for breaching visa conditions, which is cancellation of the visa to permit removal from Australia, and immigration detention pending that removal, are not an effective deterrent against non-compliance with reporting requirements and other key visa conditions. As

such, additional monitoring may, in some circumstances, be necessary to ensure compliance with visa conditions in line with community expectations.

As such, the Government considers these measures to be proportionate to the particular circumstances of the NZYQ-affected cohort compared to other visa holders who may pose community protection risks.

The ability to impose visa conditions 8621, 8617, 8618 and 8620 on members of the NZYQ-affected cohort only where the Minister is satisfied on the balance of probabilities that the holder of the visa poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence is aimed at the legitimate objective of mitigating risks to the Australian community posed by such non-citizens, who are on a removal pathway but who cannot remain in detention pending removal because there is no real prospect of their removal being practicable in the reasonably foreseeable future.

In assessing whether a substantial risk exists, the Minister, or their delegate will be required to be satisfied that the risk of harm to the community is not remote, farfetched or insubstantial. Applying the conditions under the new test is therefore appropriately limited and aimed at the legitimate objective of protecting the Australian community from serious harm.

Right to liberty

Article 9(1) of the ICCPR states:

> *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

In its General Comment 35 on Article 9 of the ICCPR, the UNHRC stated that:

> *Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12. Examples of deprivation of liberty include police custody, arraigo, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalisation, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported.*

The Parliamentary Joint Committee on Human Rights has previously observed (in the context of control orders), in its Thirty-second Report of the 44th Parliament, and with reference to General Comment 35, that:

> *In addition, a control order may include a requirement that a person be confined to a particular place and subject to a curfew of up to 12 hours in a 24 hour period. This would appear to meet the definition of detention (or deprivation of liberty) under international human rights law, which is much broader than being placed in prison.*

The Committee went on to suggest:

> *In assessing what constitutes a deprivation of liberty, the issue is the length of the period for which the individual is confined to their residence. Other restrictions imposed under a control order, which contribute to the controlee's social isolation, may also be taken into account along with the period of the curfew.*

Imposition of Curfews

Condition 8620 (curfew) limits the ability of visa holders to depart the place at which they are required to be during the curfew hours (which would ordinarily be the person's residential address, but can also be the address of a person with whom the visa holder has a close personal relationship or another address nominated by the BVR holder on the relevant day, and could, for example, be a place of employment or the house of a friend or relative). The maximum duration of the curfew is 8 hours (10pm to 6am or as otherwise specified by the Minister, but not exceeding 8 hours) for the day or days specified by the Minister and no other additional controls on the behaviour of the BVR holder during the hours of curfew will be imposed by this condition. This ensures that the hours of the curfew are not unreasonably long and allow for normal daily activity, as well as ensuring the visa holder can still access community services, employment, and other relevant supports, and is consistent with the legitimate objective of community safety and the rights and interests of the public, especially vulnerable members of the public.

The imposition of a curfew would persist only for the number of days required to effect community safety in circumstances where the Minister is satisfied on the balance of probabilities that the BVR holder poses a substantial risk of seriously harming any part of the community by engaging in conduct that would constitute a "serious offence", according to the specific circumstances of the case. In addition, section 76E of the Migration Act provides a mechanism for the person to make representations to the Minister as to why the BVR should not be subject to those conditions.

Importantly, while breach of the curfew condition would constitute a criminal offence, the defence of reasonable excuse is available, in addition to other standard defences.

The Government is aware that the imposition of the curfew condition limits the right to liberty of the individuals subject to it. The Regulations require the Minister to be satisfied on the balance of probabilities that the holder of the visa poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence and that the imposition of the condition is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing the substantial risk. These amendments help to ensure that any imposition of condition 8620 is reasonable, necessary and proportionate to achieving the legitimate objective of protecting public order and the rights and freedoms of others.

By amending the test for the imposition of the condition to require the Minister to be satisfied on the balance of probabilities that the condition is reasonably necessary, appropriate and adapted to protect any part of the Australian community from serious harm from a BVR holder who poses a substantial risk of engaging in conduct that would constitute a serious offence, the Regulations require the Minister to take into account the individual risks posed by a person before the conditions are imposed.

The Minister is supported by the Community Protection Board (the Board) when deciding whether to impose the condition. The Board was established in 2023 and provides informed, impartial and evidence-based recommendations that support the management of individuals who pose a risk to the safety and security of the Australian community.

The Board is comprised of eminent Australians from the fields of law enforcement, corrective services, academia, mental health, clinical psychology and the community and multicultural sector – as well as senior Department of Home Affairs (the Department) and ABF public servants with responsibility for law enforcement, compliance, status resolution and community protection.

In providing recommendations relevant to visa-decision making in relation to a particular non-citizen, the Board balances the circumstances of the individual with the potential risk they may pose to the Australian community. To do this, the Board will apply the new test, including consideration of substantial risk, which is that the risk to the community is not remote, far-fetched or insubstantial.

The Board places paramount importance on the safety and protection of the Australian community in the recommendations it makes. Having considered the risk, if any, posed to the Australian community by the non-citizen, the Board will make recommendations with respect to:

- the imposition of condition 8620 and other conditions that are considered to be reasonably necessary for the protection of any part of the Australian community; and
- other measures that may be considered beneficial in the ongoing case management of the individual.

There is a 12 month time-limit for condition 8620, after which time it would cease to have effect. At any time before or after the 12 month period, the Minister can grant the individual a new BVR with the condition imposed or not imposed, subject to the same consideration of whether the Minister is satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence. The Minister must also be satisfied on the balance of probabilities that the imposition of the condition is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk. In this way, it is ensured that there is regular review of whether the condition continues to be reasonably necessary, appropriate and adapted in light of the particular circumstances of the individual, and for a new BVR to be granted without the condition if the Minister is satisfied on the balance of probabilities that the holder no longer poses a substantial risk or that the condition is no longer reasonably necessary, appropriate and adapted for the protection of any part of the Australian community.

The imposition of the curfew condition would have the community protection purpose of regulating the behaviour of BVR holders who have, for example, been assessed to fail the character test and to be of particular concern to the Minister in terms of future serious criminal offending, and where it is considered to be reasonably necessary for the protection of the Australian community. Therefore any deprivation of liberty that the curfew may constitute would be intended to protect public order and the rights and freedoms of others, and would not be arbitrary and be necessary, reasonable and proportionate to achieving that objective.

Mandatory Minimum Sentences

The purpose of the Migration Act, as set out in section 4, is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". Members of the NZYQ-affected cohort cannot be detained under section 189 of the Migration Act as long as there is no real prospect of their removal becoming practicable in the reasonably foreseeable future.

The liberty of a BVR holder in the NZYQ-affected cohort may be affected should they fail to comply with the conditions imposed on their visa as a result of offence provisions in the Migration Act which carry penalties including terms of imprisonment up to a maximum of five years, including mandatory one year imprisonment. However, any term of imprisonment imposed for these offences, beyond the mandatory one year, would follow conviction by a court and would be imposed by the court in consideration of the seriousness of the person's offending and the individual circumstances of their case. In reaching its decision following a finding of guilt it is open to the court to take into account a wide range of factors, both aggravating and mitigating, to inform its view. Factors such as the nature and severity of the non-compliance, repeated breaches of visa conditions, degree of

contact with the Department, and the degree of steps taken to remediate non-compliance, or ensure future compliance with the requirement, are examples of factors that the courts may wish to take into consideration when considering whether to impose a term of imprisonment and in determining the appropriate length of sentence.

Section 76DA of the Migration Act imposes a minimum mandatory one year term of imprisonment for the conviction of an offence for failing to comply with condition 8620 and 8621 if imposed on a BVR for certain members of the NZYQ-affected cohort. It is reasonable, necessary and proportionate that a failure to comply with a condition carry a mandatory term of imprisonment.

These conditions may only be imposed where the Minister is satisfied on the balance of probabilities that the BVR holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence and that the Minister is satisfied on the balance of probabilities that the imposition of the conditions is reasonably necessary, appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.

Ordinarily, a visa holder who breaches a condition on their visa would be subject to visa cancellation, detention and removal. However, for the NZYQ affected cohort, this usual course of action is not available. The Government therefore considers that the requirements of the minimum mandatory sentences, targeted towards only those individuals where the Minister is satisfied on the balance of probabilities there is a substantial risk the person will seriously harm any part of the Australian community by engaging in conduct that would constitute a serious offence, are necessary, reasonable and proportionate for protecting the most vulnerable members of society.

Mandatory minimum sentences appropriately reflect the seriousness of these offences and the need to make clear that non-compliance with visa conditions that are aimed at protecting community safety is viewed seriously. As such, any term of imprisonment following a conviction for a breach of a conviction would not constitute arbitrary detention.

The right to privacy

Article 17(1) of the ICCPR states that:

> *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

Imposition of Electronic Monitoring

Condition 8621, requiring a BVR holder to wear an electronic monitoring device, requires the visa holder to wear a monitoring device at all times, allow an authorised officer to fit, install, repair or remove the monitoring device and, if they become aware that the monitoring device is not in order, notify an authorised officer as soon as practicable. Failure to comply with this condition amounts to an offence as set out section 76D of the *Migration Act 1958*.

The purposes of electronic monitoring as a condition is to deter the individual from committing further offences whilst holding the BVR, knowing they are being monitored, and thereby keep the community safe. Electronic monitoring will also assist with the prevention of absconding behaviour, which is contrary to the obligation of the visa holder to engage in the Government's efforts to facilitate their removal.

If imposed, this condition will limit the visa holder's right to privacy, as such devices record and monitor the movements of a person. However, the limitation on the right to privacy is reasonable and necessary to ensure the protection of the Australian community. The Minister is required to impose condition 8621, where the Minister is satisfied on the balance of probabilities that the holder poses a

substantial risk of seriously harming any part of the Australian community by committing a serious offence. The Minister also needs to be satisfied on the balance of probabilities that the imposition of the condition is reasonably necessary, appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk. This assessment will require the Minister to be satisfied that the risk is not remote, insubstantial or far-fetched, and will require consideration of the individual circumstances and risk profile of the prospective visa holder, as well as community safety concerns and the rights and protection of others.

The measure is proportionate, as the condition will not be required for all BVRs granted to the NZYQ-affected cohort, but only those who pose a substantial risk of seriously harming any part of the Australian community by committing a serious offence, and where the imposition of the condition is reasonably necessary, and reasonably appropriate and adapted for protecting any part of the Australian community from serious harm.

As mentioned above, the Board considers the individual circumstances of each BVR holder to consider whether the imposition of BVR conditions are reasonably necessary and makes individualised recommendations to the Minister or the delegate about appropriate BVR visa conditions.

By amending the test for the imposition of the condition to require the Minister to be satisfied on the balance of probabilities that the conditions are reasonably necessary, appropriate and adapted to protect any part of the Australian community from serious harm, from a BVR holder who poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence, the Regulations allow the Minister to take into account the individual risks posed by a person before the condition is imposed.

There is a 12 month time-limit for this condition, after which time it would cease to have effect. At any time before or after the 12 month period, the Minister can grant the individual a new BVR with the condition imposed or not imposed, subject to the same consideration of whether Minister is satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence. In this way, it is ensured that there is regular review of whether the condition continues to be reasonably necessary, appropriate and adapted in light of the particular circumstances of the individual, and for a new BVR to be granted without the condition if the Minister is satisfied on the balance of probabilities that the holder is no longer a substantial risk or that the condition is no longer reasonably necessary, appropriate and adapted for the protection of any part of the Australian community.

Any reduction in crime associated with this cohort means reducing the costs of criminal offending to the community, and supports the legitimate objective of protecting the rights and freedoms of others.

Taking all these factors into account, the importance of reducing absconding and recidivism through electronic monitoring means that, where the Minister is required to impose this condition on the basis that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence, this would represent a reasonable, necessary and proportionate limitation on the right to privacy.

Financial reporting

The imposition of conditions 8617 (reporting the receipt or transfer of AUD10,000 or more) and 8618 (reporting debts of AUD10,000 or more, bankruptcy or significant changes in relation to debts or bankruptcy) may limit the right to privacy. However, these conditions are reasonable and necessary as amounts of AUD10,000 or more are potential indicators that a person may be engaging in illegal activities and that the amounts may be connected to proceeds of crime or debts incurred as a result of criminal activity. As such, where the Minister is satisfied on the balance of probabilities

that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence, and the Minister is satisfied on the balance of probabilities that the imposition of the condition is reasonably necessary, appropriate and adapted for protecting any part of the Australian community from serious harm, it is reasonable to require that any such transactions or debts be reported so they can be investigated by law enforcement if required. The measure is also proportionate as AUD10,000 is a reasonably high threshold, with the result that those subject to the condition are not required to report the majority of their financial dealings. The requirement to report bankruptcy or significant changes in relation to debts or bankruptcy is also reasonable, necessary and proportionate. Significant changes to debts and bankruptcy may be an indicator that a person is more susceptible to approaches from criminal elements as a means of alleviating their financial situation. However, in addition to bankruptcy, it is only significant changes to debts that require reporting. 'Significant changes' is defined in policy as being the receipt of AUD10,000 or more, or an increase in debt of AUD10,000 or more.

The requirement to report this information reduces the likelihood of BVR holders subject to the condition engaging in criminal activity and supports the legitimate objective of protecting public order. All visa holders subject to these conditions are advised in writing of these content of these conditions and that they have the opportunity to seek a further visa without those conditions. The written advice invites the holder to make representations to the Minister about why the visa should not be subject to the conditions, and gives instruction about how those representations are to be made and the timeframes involved.

To the extent that imposing conditions 8617 and 8618 on a BVR holder limits the right to privacy, the limitation is reasonable, necessary and proportionate in achieving a legitimate objective.

Rights relating to the freedom of movement

Article 12 of the ICCPR relevantly states:

> *1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence*.
>
> …
>
> *3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.*

Article 12 concerns those *lawfully within the territory of a State*, and BVR holders subject to the conditions will be *lawfully* residing in the community.

Imposition of a Curfew

The amendments in the Regulation require the Minister to impose a curfew as a condition on the BVR where the Minister is satisfied on the balance of probabilities the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence. The Minister must also be satisfied on the balance of probabilities that the imposition of the condition is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.

The curfew would require that the BVR holder remain in one specified location during the curfew hours, which are 10pm to 6am or as otherwise specified by the Minister, but not exceeding 8 hours The BVR holder would be able to nominate the address at which they would remain during curfew hours, which would ordinarily be the person's residential address, but can also be the address of a

person with whom the visa holder has a close personal relationship or another address nominated by the BVR holder on the relevant day, and could, for example, be a place of employment or the house of a friend or relative.

This means that although the person would be required to remain in one place during the curfew hours, the curfew would not restrict their ability to choose where they spent it, who else could be there or limit their movements for most of each 24 hour period, thereby allowing normal daily activities. The defence of reasonable excuse available in relation to the associated offence, in addition to other standard defences, has the effect that the imposition of a curfew would also not restrict their ability to leave that place, for example in an emergency situation and/or to seek medical attention. Further, section 76E of the Migration Act provides a mechanism for the person to seek to have the imposition of the condition revoked.

The curfew would have the community protection purpose of regulating the behaviour of BVR holders who have, for example, been assessed to fail the character test and to be of particular concern to the Minister in terms of possible future criminal offending, and where the Minister is satisfied on the balance of probabilities the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence. The Minister also needs to be satisfied on the balance of probabilities that the imposition of the condition is reasonably necessary, appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk. Substantial risk means a possibility that is not remote, far-fetched or insubstantial. Therefore the limitations on movement would be intended to protect public order and the rights and freedoms of others, in accordance with the permissible limitations set out in Article 12(3).

Presumption of innocence and criminal process guarantees

Article 14 of the ICCPR relevantly provides:

> *1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…*
>
> *2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*
>
> *…*
>
> *5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*
>
> *…*

By introducing amendments that require the Minister to impose existing conditions 8620 (curfew) and 8621 (electronic monitoring) only where the Minister is satisfied on the balance of probabilities the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence and where it is reasonably necessary, appropriate and adapted to impose the condition for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk, the Regulations engage Article 14, as a failure to comply with these conditions is an offence under sections 76C and 76D of the Migration Act, respectively.

A person will not commit an offence if they have a reasonable excuse for failure to comply with the requirement of the relevant condition. Existing standard defences in the *Criminal Code 1995* will also apply.

Any charges brought as a result of these offences will be subject to existing criminal procedures and subject to judicial determination.

If convicted of one of these offences, the court must impose a sentence of imprisonment of at least one year (as a result of section 76DA of the Migration Act). This mandatory minimum sentence if convicted following a fair hearing before a court reflects the seriousness of the offending and the need to protect community safety. The offences carry a maximum penalty of 5 years imprisonment or 300 penalty units. The purpose of the maximum penalty available for the offences established by sections 76C and 76D is to appropriately reflect the seriousness of these offences and the need to make clear that non-compliance with visa conditions that are aimed at protecting community safety is viewed seriously. The maximum penalty provides flexibility for courts to consider individual circumstances and treat different cases differently, according to the circumstances of the offending.

In reaching its decision on sentencing following a finding of guilt, it is open to the court to take into account a wide range of factors, both aggravating and mitigating, to inform its view. Factors such as the nature and severity of the non-compliance, how much time has passed since the reporting requirement was issued, repeated breaches of visa conditions, degree of contact with the Department, and the degree of steps taken to remediate non-compliance, or ensure future compliance with the requirement, are examples of factors that the courts may wish to take into consideration.

Ordinarily, a visa holder who breaches a condition on their visa would be subject to visa cancellation, detention and removal. However, for the NZYQ affected cohort, this usual course of action is not available.

The government therefore considers that the strengthened requirements of the minimum mandatory sentences are necessary, reasonable and proportionate for protecting the Australian community.

Mandatory minimum sentences appropriately reflect the seriousness of these offences and the need to make clear that non-compliance with visa conditions that are aimed at protecting community safety is viewed seriously.

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

Consequently, the reverse burden in relation to the reasonable excuse provision does not limit the right to the presumption of innocence, as it is reasonable, necessary and proportionate in circumstances where the offender is best placed to provide the evidence of their reasonable excuse. The creation of these offences is intended to assist in ensuring compliance with conditions related to monitoring, and is intended to reflect the seriousness of a breach of conditions, which are imposed to ensure the Department remains aware of the non-citizen's location, activities and associations, and that the visa holder remains engaged in arrangements to manage their temporary stay in, and when practicable, removal from, Australia.

The Government considers that the additional visa conditions and offences are proportionate to the aim of mitigating risks to the Australian community posed by such non-citizens who are on a removal pathway but who cannot remain in detention pending removal because there is no real prospect of their removal being practicable in the reasonably foreseeable future.

Conclusion

The measures in the Regulations are compatible with human rights as, to the extent they limit human rights, those limitations are reasonable, necessary and proportionate to the objective of community safety and the effective management of the migration status of members of this cohort of non-citizens in Australia.

The Hon Tony Burke MP
Minister for Immigration and Multicultural Affairs

ATTACHMENT C

Details of the *Migration Amendment (Bridging Visa Conditions) Regulations 2024*

Section 1 – Name

This section provides that the name of the instrument is the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (the Amendment Regulations).

Section 2 – Commencement

This section provides that the Amendment Regulations will commence immediately after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the instrument is made under the *Migration Act 1958* (the Migration Act).

Section 4 - Schedules

This section provides for how the amendments in the Amendment Regulations operate. The effect of this provision is that the *Migration Regulations 1994* (the Migration Regulations) will be amended as specified in Schedule 1 to this instrument.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – Clause 070.111 of Schedule 2

Item 1 inserts a definition of ***serious offence*** to assist in interpreting the provision within Division 070.6 of Schedule 2 to the Migration Regulations. Under clause 070.111, serious offence is an offence against a law of the Commonwealth, a State or a Territory punishable by imprisonment for life or for a period, or maximum period, of at least 5 years, and that particular conduct constituting the offence involves or would involve:

(i) loss of a person's life or serious risk of loss of a person's life; or

(ii) serious personal injury or serious risk of serious personal injury; or

(iii) sexual assault; or

(iv) the production, publication, possession, supply or sale of, or other dealing in, child abuse material (within the meaning of Part 10.6 of the *Criminal Code*); or

(v) consenting to or procuring the employment of a child, or employing a child, in connection with material referred to in subparagraph (iv); or

(vi) acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16; or

(vii) domestic or family violence (including in the form of coercive control); or

(viii) threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or one or more members of the group; or

(ix) people smuggling; or

(x) human trafficking.

This definition applies in the context of 'serious offence' as provided in item 2 of Schedule 1 to the Amendment Regulations, where the Minister must impose conditions 8621 (electronic monitoring), 8617 (financial circumstances reporting), 8618 (debt or bankruptcy reporting) and 8620 (curfew) if the Minister is, among other things, satisfied on the balance of probabilities that the BVR holder poses a substantial risk of seriously harming any part of the community by engaging in conduct that would constitute a "serious offence".

The specific term of imprisonment threshold and list of elements in paragraphs 070.111(b)(i) to (x) constituting a 'serious offence' reflects the intention of visa condition(s) having a protective purpose, by providing for an objective assessment of the seriousness of the offences that the Minister must turn their mind to prior to imposing the above mentioned conditions under new subclause 070.612A(1).

Item [2] – Subclause 070.612A(1) of Schedule 2

Item 2 inserts a new community protection test pursuant to subclause 070.612A(1) of Schedule 2 to the Migration Regulations that the Minister must consider prior to imposing a BVR condition on a non-citizen.

As a result of the recent High Court decision of YBFZ holding that the previous clause 070.612A(1)(a) and (d) are constitutionally invalid, the new subclause 070.612A(1) of Schedule 2 will now require the Minister to impose each of conditions 8621 (electronic monitoring), 8617 (financial circumstances reporting), 8618 (debt or bankruptcy reporting) and 8620 (curfew) if:

(a) subclause 070.612A(3) applies to the visa; and

(b) notwithstanding any other conditions on the visa, the Minister is satisfied on the balance of probabilities that the BVR holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and

(c) on the balance of probabilities, the Minister is satisfied that the imposition of the condition (in addition to other conditions imposed by or under subclause 070.612A(1) or another provision of Division 070.6) is reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.

The Minister must decide whether or not to impose each condition in the order in which they are mentioned pursuant to subclause 070.612A(2) of Schedule 2 of the Migration Regulations.

For the purposes of subclause 070.612A(1)(a), subclause 070.612A(3) of Schedule 2 of the Migration Regulations provides that subclause 070.612A applies to a BVR if that visa was granted under regulation 2.25AA and, at the time of grant, there was no real prospect of the removal of the BVR holder from Australia becoming practicable in the reasonably foreseeable future; or if that visa was granted under regulation 2.25AB.

For the purposes of paragraph 070.612A(1)(b), item 1 of Schedule 1 to the Amendment Regulations, as explained earlier, provides for the definition and conducts that would constitute a 'serious offence'.

For the purposes of paragraphs 070.612A(1)(b) and (c), the Minister must be satisfied, on the balance of probabilities, that the imposition of each condition and the combined effect of the condition(s) imposed is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from serious harm by addressing that substantial risk. That is, the imposition of any of the conditions should be directed to enhancing community safety and mitigating the substantial risk identified of a 'serious offence' being committed.

Despite the subject of YBFZ being conditions 8621 and 8620, item 2 will impose a new community protection test on all four of the above mentioned BVR conditions to ensure a consistent test is considered by the Minister when deciding on the imposition of those conditions. Item 2 also demonstrates the Australian Government's intention to prescribing a higher bar when granting a BVR with condition 8621 and 8620 in particular, by applying objective criteria of 'serious offence' that the Minister must direct their attention to, as well as ensuring those conditions have a protective purpose against serious harm to the Australian community, having regard to the risk of harm the non-citizen poses.

The intention is to also ensure that the interpretation of 'serious harm' under subclause 070.612A(1) of Schedule 2 be distinguished from what amounts to 'serious harm' under sections 5J and 233B of the Migration Act, as well as the *Criminal Code* under the *Criminal Code Act 1995*. 'Serious harm', in the context of these amendments, is intended to apply only to the limited circumstances of when the Minister is considering whether to impose certain BVR conditions under Part 070 of Schedule 2 to the Migration Regulations in the context of protection against serious harm to any part of the Australian community.

Note under subclause 070.612A(1) of Schedule 2 to the Migration Regulations refers the reader to regulation 2.25AE of the Migration Regulations, which provides that if conditions 8621, 8617, 8618 and/or 8620 are imposed on a BVR, the BVR will be subject to those visa conditions for a period of 12 months from the day that visa is granted.

Item [3] – Subclause 070.612A(2) of Schedule 2

Item 3 amends subclause 070.612A(2) of Schedule 2 to the Migration Regulations by omitting reference to 'listed' (wherever occurring) and substituting it with 'mentioned'. This item is consequential to the amendments to subclause 070.612A(1) of Schedule 2 to the Migration Regulations in Item 2, as the visa conditions are no longer 'listed' in that provision, but are 'mentioned'. It does not affect the substantive operation of the provision.

Item [4] – At the end of clause 070.612A of Schedule 2

Item 4 inserts a new subclause 070.612A(4) in Schedule 2 to the Migration Regulations, clarifying that nothing in the clause requires the Minister to decide whether or not to impose a condition listed in subclause (1) if the visa must, under subsection 76E(4) of the Migration Act, be granted without it being subject to that condition.

Current subsection 76E(4) of the Migration Act provides that the Minister must grant the non-citizen another BVR (the second visa), under a prescribed provision of the regulations, that is not subject to any one or more of the conditions prescribed for the purposes of paragraph 76E(1)(a), if the non-citizen makes representations in accordance with the invitation, and the Minister is satisfied that those conditions are not reasonably necessary for the protection of any part of the Australian community.

Paragraph 76E(1)(a) of the Migration Act provides that section 76E applies to a decision to grant a non-citizen a BVR (the first visa), if the first visa is subject to one or more prescribed conditions, and at the time the first visa is granted, there is no real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future. Regulation 2.25AD of the Migration Regulations prescribes conditions 8617, 8618, 8620 and 8621 for the purposes of paragraph 76E(1)(a) of the Migration Act.

This item ensures that once the Minister has been satisfied that one or more prescribed conditions are not reasonably necessary for the protection of any part of the Australian community under subsection 76E(4) of the Migration Act, and a second visa must be granted without being subject to that condition, the Minister does not have to decide again under the requirements of subclause 070.612A(1) of Schedule 2, whether or not to impose that condition. This is a technical amendment to clarify the operation of the legislative framework.

Item [5] – In the appropriate position in Schedule 13

Item 3 inserts a new Part 143 in Schedule 13 to the Migration Regulations - "Part [143] – Amendments made by the Migration Amendment (Bridging Visa Conditions) Regulations 2024". The purpose of Part 143 is to set out the application of the amendments made by the Amendment Regulations.

Clause 14301 in the new Part 143 inserts an application provision. The new clause 14301 provides that the amendments in Schedule 1 to the Amendment Regulations apply to a visa granted on or after the commencement of that Schedule. The amendments in Schedule 1 commence immediately after the Amendment Regulations are registered on the Federal Register of Legislation.