

EXPLANATORY STATEMENT

Issued by the Minister for Immigration and Multicultural Affairs

Migration Act 1958

Migration Amendment (Subclass 070 (Bridging (Removal Pending)) Visa) 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.

The *Migration Amendment (Subclass 070 (Bridging (Removal Pending)) Visa) Regulations 2024* (the Amendment Regulations) amend the *Migration Regulations 1994* (Migration Regulations) to expand the cohort of non-citizens who would be eligible for grant of a Subclass 070 (Bridging (Removal Pending)) visa (BVR) with certain mandatory community protection-related conditions imposed on the visa. The Amendment Regulations will apply in relation to a non-citizen who is granted a BVR by the Minister under the Minister's personal power in section 195A of the Migration Act, and who is subsequently no longer detained under section 189 of the Migration Act.

Section 195A is a personal power of the Minister, available in circumstances where a non-citizen is in detention under section 189 of the Migration Act (that is, the non-citizen is an unlawful non-citizen who is in detention). If the Minister thinks that it is in the public interest to do so, the Minister may grant a non-citizen to whom this section applies a visa of a particular class (whether or not they have applied for the visa) to enable the person's release from detention. The amendments provide a mechanism by which the Minister will impose community protection conditions on a BVR granted under section 195A of the Migration Act.

In this context, the amendments of the Migration Regulations are necessary to ensure the non-citizen who presents community safety concerns would be appropriately subject to the same community protection-related visa conditions as NZYQ-affected BVR holders who have been released from detention in accordance with the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 on 8 November 2023.

The Regulations provide for a BVR granted under the Minister's personal non-compellable power in section 195A of the Migration Act to be appropriately subject to electronic monitoring (EM), curfew and other community protection-related conditions, following the non-citizen's release from detention. This is consistent with the established arrangements to manage NZYQ-affected BVR holders, following the High Court's decision in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 and commencement of the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* – where NZYQ-affected non-citizens are granted BVRs that are subject to mandatory conditions such as EM and curfew where the Minister is satisfied on the balance of probabilities that the visa holder poses a substantial risk to the Australian community and that

imposition of community protection conditions is reasonably necessary, and reasonably appropriate for the purpose of protecting the Australian community from serious harm.

The Amendment Regulations also provide for the grant of a further BVR without application to a non-citizen who is the holder of a BVR that was granted under section 195A of the Migration Act or, if the non-citizen has previously held other BVRs, their initial BVR was granted under section 195A of the Migration Act. This addresses circumstances that may arise from time to time whereby it may be necessary or appropriate for the Minister to grant a non-citizen a further BVR.

The Amendment Regulations also manage circumstances where, once a non-citizen who is granted a BVR under section 195A of the Migration Act is in the community and no longer detained under section 189 of the Migration Act, the Minister would be empowered to grant a further BVR from time to time to consider and if necessary, vary the imposition of certain community protection-related conditions. This is consistent with the established arrangements for managing community safety in relation to the NZYQ-affected non-citizens.

Importantly, the Amendment Regulations do not impact the ability to grant a BVR that is not subject to community protection conditions under regulation 2.20A where a non-citizen is invited to apply in writing by the Minister. Granting a BVR under regulation 2.20A will remain available where there are no community protection concerns in relation to the non-citizen.

The Amendment Regulations do not operate retrospectively. The Amendment Regulations apply to a BVR granted under section 195A of the Migration Act on or after commencement of the amendments. However, an eligible non-citizen may be eligible for the grant of a further BVR regardless of whether the grant of that visa occurred before, on or after the commencement of the Amendment Regulations.

The matters dealt within the 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 visa settings in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provision. 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.

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

The Office of Impact Analysis (OIA) has been consulted in relation to the amendments, advising that no Impact Analysis is required. The OIA consultation reference number is OIA24-08545.

The Amendment Regulations are consistent with current provisions of the Migration Regulations to manage the NZYQ-affected cohort. The amendments ensure a consistent approach to maintaining effective engagement with a BVR holder in the community and

appropriate focus on safeguarding the Australian community. No external consultation was undertaken in relation to the proposed amendments.

The Amendment Regulations commence on the day after registration on the Federal Register of Legislation.

Further details of the Regulations are set out in Attachment B.

The Amendment Regulations amend the Migration Regulations, which are exempt from sunseting under table item 38A of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. The Migration Regulations are exempt from sunseting 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 sunseting framework under Part 4 of the Legislation Act.

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

The Amendment Regulations are a legislative instrument for the purposes of the Legislation Act.

Statement of Compatibility with Human Rights

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

Migration Amendment (Subclass 070 (Bridging (Removal Pending)) Visa) Regulations 2024

This Disallowable Legislative Instrument is 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 (Subclass 070 (Bridging (Removal Pending)) Visa) Regulations 2024* (the Amendment Regulations) amend the *Migration Regulations 1994* (Migration Regulations) to expand the cohort of non-citizens who would be eligible for grant of a Subclass 070 (Bridging (Removal Pending)) visa (BVR) with certain mandatory community protection-related conditions imposed on the visa. The Amendment Regulations will apply in relation to a non-citizen who is granted a BVR by the Minister under the Minister's personal power in section 195A of the *Migration Act 1958* (the Migration Act) and subsequently is no longer detained under section 189 of the Migration Act.

Section 195A is a personal power of the Minister, available in circumstances where a non-citizen is detained in immigration detention under section 189 of the Migration Act (that is, the non-citizen is an unlawful non-citizen who is in immigration detention). If the Minister thinks that it is in the public interest to do so, the Minister may grant a non-citizen to whom this section applies a visa of a particular class (whether or not they have applied for the visa) to enable the person's release from detention. The amendments provide a mechanism by which the Minister will impose community protection conditions on BVRs granted under section 195A of the Migration Act.

Extending the application of these conditions to individuals granted under section 195A will allow community-safety conditions to be imposed on the BVR of an individual who is not NZYQ-affected, where the individual poses community safety risks and who would otherwise be subject to detention and removal, but who the Minister does not wish to remove until more clarity can be provided on Australia's international obligations in respect of the person. In such cases, it is open to the minister to grant a BVR with community protection conditions using the non-compellable, non-delegable power at section 195A of the Act, if the Minister considers that to be appropriate and that the public interest is served.

Importantly, the Amendment Regulations do not impact the ability to grant a BVR that is not subject to community protection conditions under reg 2.20A where a non-citizen is invited to apply in writing by the Minister. Granting a visa under reg 2.20A will remain available where there are no community protection concerns in relation to the individual.

In this context, the amendments of the Migration Regulations are necessary to ensure the non-citizen who presents community safety concerns would be appropriately subject to the

same community protection-related visa conditions as NZYQ-affected BVR holders who have been released from detention in accordance with the High Court’s decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 on 8 November 2023.

The Amendment Regulations provide for a BVR granted under the Minister’s personal non-compellable power in section 195A of the Migration Act to be appropriately subject to electronic monitoring (EM), curfew and other community protection-related conditions, following the non-citizen’s release from detention. This is consistent with the established arrangements to manage NZYQ-affected BVR holders – where NZYQ-affected non-citizens are granted BVRs that are subject to mandatory conditions such as EM and curfew unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community (and having regard to other mandatory conditions imposed on the BVR under Division 070.6 of Schedule 2 to the Migration Regulations).

The Amendment Regulations also provide for the grant of a further BVR without application to a non-citizen who is the holder of a BVR that was granted under section 195A of the Migration Act or, if the non-citizen has previously held other BVRs, their initial BVR was granted under section 195A of the Migration Act. This addresses circumstances that may arise from time to time whereby it may be necessary or appropriate for the Minister to grant a non-citizen a further BVR.

The Amendment Regulations also manage circumstances where, once a non-citizen who is granted a BVR under section 195A of the Migration Act is in the community and no longer detained under section 189 of the Migration Act, the Minister would be empowered to grant a further BVR from time to time to consider and if necessary, vary the imposition of certain community protection-related conditions. This is consistent with the established arrangements for managing community safety in relation to the NZYQ-affected non-citizens.

The Amendment Regulations do not operate retrospectively. The Amendment Regulations apply to a BVR granted under section 195A of the Migration Act on or after commencement of the amendments. However, an eligible non-citizen may be eligible for the grant of a further BVR regardless of whether the grant of that initial visa occurred before, on or after the commencement of the Amendment Regulations.

The following conditions will be imposed on BVRs granted under section 195A. These conditions are also mandatory for BVRs granted under reg 2.25AA and reg 2.25AB:

Condition #	Description
8551	<p>(1) The holder must obtain the Minister's approval before taking up employment in the following occupations, or occupations of a similar kind:</p> <p>(a) occupations that involve the use of, or access to, chemicals of security concern;</p> <p>(b) occupations in the aviation or maritime industries;</p>

	<p>(c) occupations at facilities that handle security-sensitive biological agents.</p> <p>(2) In this clause:</p> <p>chemicals of security concern means chemicals specified by the Minister in an instrument in writing for this definition.</p> <p>Note: The Minister's instrument will refer to chemicals that have been identified, by the Council of Australian Governments, as chemicals of security concern. Without limiting what the Council might identify, the chemicals may include:</p> <p>(a) industrial chemicals, including chemicals used in the retail, pharmaceutical or pool and spa sectors, that could be diverted from their lawful use to other purposes such as terrorist-related activities; and</p> <p>(b) agricultural and veterinary chemicals that could be diverted from their lawful use to other purposes, including terrorist-related activities.</p>
8552	The holder must notify the Minister of any change in the holder's employment details, not less than 2 working days before the change is to occur.
8553	The holder must not become involved in activities that are prejudicial to security (within the meaning of section 4 of the <i>Australian Security Intelligence Organisation Act 1979</i>).
8554	<p>(1) The holder must not acquire any of the following goods:</p> <p>(a) weapons;</p> <p>(b) explosives;</p> <p>(c) material or documentation that provides instruction on the use of weapons or explosives.</p> <p>(2) In this clause:</p> <p>weapon means a thing made or adapted for use for inflicting bodily injury.</p>
8555	<p>The holder must obtain the Minister's approval before undertaking the following activities, or activities of a similar kind:</p> <p>(a) flight training;</p> <p>(b) flying aircraft.</p>
8556	<p>The holder must not communicate or associate with:</p> <p>(a) an entity listed under Part 4 of the <i>Charter of the United Nations Act 1945</i>; or</p>

	<p>(b) an organisation prescribed by the regulations made under the <i>Criminal Code Act 1995</i> for the purposes of paragraph (b) of the definition of terrorist organisation in subsection 102.1(1) of the Criminal Code.</p>
8560	<p>(1) The holder must obtain the Minister's approval before acquiring chemicals of security concern.</p> <p>(2) In this clause:</p> <p>chemicals of security concern means chemicals specified by the Minister in an instrument in writing for this definition.</p> <p>Note: The Minister's instrument will refer to chemicals that have been identified, by the Council of Australian Governments, as chemicals of security concern. Without limiting what the Council might identify, the chemicals may include:</p> <p>(a) industrial chemicals, including chemicals used in the retail, pharmaceutical or pool and spa sectors, that could be diverted from their lawful use to other purposes such as terrorist-related activities; and</p> <p>(b) agricultural and veterinary chemicals that could be diverted from their lawful use to other purposes, including terrorist-related activities.</p>
8561	<p>If the holder is directed by the Minister to attend an interview that relates to the holder's visa (including an interview with the Australian Security Intelligence Organisation), the holder must comply with the direction.</p>
8562	<p>(1) The holder must not take up employment in:</p> <p>(a) occupations that involve the use of, or access to, weapons or explosives; or</p> <p>(b) occupations of a similar kind.</p> <p>(2) In this clause:</p> <p>weapon means a thing made or adapted for use for inflicting bodily injury.</p>
8563	<p>(1) The holder must not undertake the following activities, or activities of a similar kind:</p> <p>(a) using or accessing weapons or explosives;</p> <p>(b) participating in training in the use of weapons or explosives;</p> <p>(c) possessing or accessing material or documentation that provides instruction on the use of weapons or explosives.</p>

	(2) In this clause: weapon means a thing made or adapted for use for inflicting bodily injury.
8564	The holder must not engage in criminal conduct.
8614	The holder must notify Immigration of any travel interstate or overseas by the holder at least 7 working days before undertaking the travel.
8616	(1) The holder must notify Immigration of the details of any contact with any individual who is known by the holder to have been charged with, or convicted of, a criminal offence. (2) Subclause (1) does not apply to: (a) contact in the course of attending a therapeutic or rehabilitative service; or (b) contact in connection with legal proceedings or legal advice; or (c) incidental contact.
8625	The holder must notify the Minister of any change in the following: (a) the holder's name; (b) an address of the holder; (c) a phone number of the holder; (d) an email address of the holder; within 2 working days after the change occurs.

The following conditions will be imposed on BVRs granted under section 195A 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 must also be satisfied on the balance of probabilities that the imposition of the condition (in addition to other conditions imposed) is reasonably necessary and reasonably adapted and appropriate for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.

These conditions are also mandatory for BVRs granted under reg 2.25AA and reg 2.25AB:

Condition #	Description
8621	(1) The holder must wear a monitoring device at all times.

	<p>(2) The holder must allow an authorised officer to fit, install, repair or remove the following:</p> <ul style="list-style-type: none"> (a) the holder’s monitoring device; (b) any related monitoring equipment for the holder’s monitoring device. <p>(3) The holder must take any steps specified in writing by the Minister, and any other reasonable steps, to ensure that the following remain in good working order:</p> <ul style="list-style-type: none"> (a) the holder’s monitoring device; (b) any related monitoring equipment for the holder’s monitoring device. <p>(4) If the holder becomes aware that either of the following is not in good working order:</p> <ul style="list-style-type: none"> (a) the holder’s monitoring device; (b) any related monitoring equipment for the holder’s monitoring device; <p>the holder must notify an authorised officer of that as soon as practicable.</p> <p>(5) In this clause:</p> <p>“monitoring device” 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.</p> <p>“related monitoring equipment”, for a monitoring device, means any electronic equipment necessary for operating the monitoring device.</p>
8617	<p>The holder must notify Immigration of each of the following matters within 5 working days after the matter occurs:</p> <ul style="list-style-type: none"> (a) the holder receives, within any period of 30 days, an amount or amounts totalling AUD10 000 or more from one or more other persons; (b) the holder transfers, within any period of 30 days, an amount or amounts totalling AUD10 000 or more to one or more other persons.
8618	<p>(1) If the holder incurs a debt or debts totalling AUD10 000 or more, the holder must notify Immigration within 5 working days after the holder incurs the debt or debts.</p>

	<p>(2) If the holder is declared bankrupt, the holder must notify Immigration within 5 working days after the holder is so declared.</p> <p>(3) The holder must notify Immigration of any significant change in relation to the holder’s debts or bankruptcy within 5 working days after the change occurs.</p>
8620	<p>(1) The holder must, between 10pm on one day and 6am the next day or between such other times as are specified in writing by the Minister, remain at a notified address for the holder for those days.</p> <p>(2) If the Minister specifies other times for the purposes of subclause (1), the times must not be more than 8 hours apart.</p> <p>(3) In this clause:</p> <p style="padding-left: 40px;">“notified address” for a holder for a particular day or days means any of the following:</p> <p style="padding-left: 80px;">(a) either:</p> <p style="padding-left: 120px;">(i) the address notified by the holder under condition 8513; or</p> <p style="padding-left: 120px;">(ii) if the holder has notified another address under condition 8625 – the last address so notified by the holder;</p> <p style="padding-left: 80px;">(b) an address at which the holder stays regularly because of a close personal relationship with a person at that address, and which the holder has notified to Immigration for the purposes of this paragraph;</p> <p style="padding-left: 80px;">(c) if, for the purposes of this paragraph, the holder notifies Immigration of an address for that day or those days no later than 12 pm on the day before that day or the earliest day of those days (as the case may be) – that address.</p>

The following conditions will be imposed on BVRs granted under section 195A where the holder has been convicted of an offence involving a minor or any other vulnerable person. These conditions are also mandatory for BVRs granted under reg 2.25AA and reg 2.25AB:

Condition #	Description
8612	If the holder has been convicted of an offence involving a minor or any other vulnerable person, the holder:

	<p>(a) must, within 5 working days of the grant, notify Immigration of the full name, and date of birth, of each person who ordinarily resides with the holder at the holder's residential address; and</p> <p>(b) must notify Immigration of any change in the persons who ordinarily reside with the holder at the holder's residential address within 2 working days after the change occurs.</p>
8615	<p>(1) If the holder has been convicted of an offence involving a minor or any other vulnerable person, the holder must:</p> <p>(a) within 5 working days of the grant, notify Immigration of the details of the holder's association with, or membership of, any organisation that engages in activities involving more than incidental contact with minors or any other vulnerable persons; and</p> <p>(b) notify Immigration of any change in those details (including the beginning or end of any association or membership) within 2 working days after the change occurs.</p> <p>(2) Subclause (1) does not apply in relation to the following:</p> <p>(a) an organisation formed for a purpose of engaging in communications on governmental or political matters;</p> <p>(b) an organisation whose regular functions or activities involve communications on governmental or political matters.</p>
8622	<p>(1) 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.</p> <p>(2) Subclause (1) applies:</p> <p>(a) whether the work or activity is for reward or otherwise; and</p> <p>(b) whether or not a working with children or vulnerable people check (however described) is required in relation to the work.</p>
8623	<p>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.</p>
8626	<p>If the holder has been convicted of an offence involving a minor or any other vulnerable person, the holder must notify the Minister of any change in the following:</p> <p>(a) an online profile used by the holder;</p> <p>(b) a user name of the holder;</p>

	within 2 working days after the change occurs.
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The following condition will be imposed on BVRs granted under section 195A where the holder has been convicted of an offence involving violence or sexual assault. This condition is also mandatory for BVRs granted under reg 2.25AA and reg 2.25AB:

Condition #	Description
8624	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 imposition of these conditions may give rise to criminal penalties, including mandatory terms of imprisonment, for offences in the Migration Act associated with non-compliance of the conditions imposed on their BVR. If a person is convicted of an offence against one of those sections, the court must impose a sentence of imprisonment of at least 1 year, by operation of section 76DA of the Migration Act.

Human rights implications

These amendments engage the following rights:

- The rights of equality and non-discrimination in Articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 2 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- 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 freedom of expression in Article 19(2) ICCPR
- The right to freedom of assembly and association contained in Article 22 of the ICCPR
- The right to work in Article 6 of the ICESCR.

The rights of 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.

Article 2(2) of the ICESCR states:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to 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].

Similarly, in its General Comment on Article 2 of the ICESCR, the UN Committee on Economic, Social and Cultural Rights has stated (at 13) that:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the [ICESCR] rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.

Neither the ICCPR nor the ICESCR 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 amendments made by the Regulations will only apply where the Minister decides to exercise their intervention power under section 195A of the Act to grant to an individual detained in immigration detention a BVR (“the section 195A BVR cohort”) and thereby

release the individual from immigration detention. The measures introduced by these amendments also impose requirements on members of this cohort that would not apply to Australian citizens who have previously offended.

While the grant of a BVR with conditions attached to the section 195A BVR cohort may engage the right to freedom from discrimination, the BVR framework ensures that these conditions are applied in a way that takes into account the individual circumstances of the visa holder, and the community protection needs based on a risk assessment.

For example, clause 070.612A, which has been amended to apply to the section 195A BVR cohort, provides that the Minister must only impose each of the conditions 85621, 8617, 8618 and 8620 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.

Additionally, the Minister must be satisfied on the balance of probabilities that the imposition of the condition (in addition to other conditions imposed) is reasonably necessary and reasonably adapted and appropriate for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.

Similarly clause 070.612B, which has been amended to apply to the section 195A BVR cohort, imposes conditions only where an individual has a relevant criminal history. For example, conditions 8612, 8615, 8622, 8623 and 8626 must be applied where the individual has been convicted of an offence involving a minor or any other vulnerable person.

Further, the Minister retains the power to invite a detainee to apply for a BVR under regulation 2.20A, and any BVR granted as a result of this invitation process will not be subject to those community protection-related conditions. This means that, where the Minister does not consider it appropriate that the community protection conditions to apply to an individual, the process from regulation 2.20A remains available to grant a BVR without imposition of those conditions.

Additionally, the conditions will not apply universally to all current BVR holders or those granted BVRs in the future. These provisions are not retrospective and so will not apply to individuals who currently hold a BVR granted under section 195A.

Extending the application of these conditions to individuals granted under section 195A of the Migration Act will allow the Minister to grant a BVR with community-safety conditions to individuals who are not NZYQ-affected, but who pose community protection risks and who would otherwise be subject to detention and removal, but who the Minister does not wish to remove until more clarity can be provided on international obligations in respect of the person. Consequently, the Government considers these measures to be proportionate to the particular circumstances of this cohort and aimed at the legitimate objective of protecting community safety.

Right to privacy

Article 17(1) of the ICCPR states:

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.

Pursuant to Article 17(1) of the ICCPR, any interference with an individual's privacy must have a lawful basis. In addition to requiring a lawful basis for limitation on the right to privacy, Article 17 prohibits arbitrary interference with privacy. Interference which is lawful may nonetheless be arbitrary where that interference is not in accordance with the objectives of the ICCPR and is not reasonable in the circumstances.

This right is engaged by the Amendment Regulations in mandatorily imposing conditions 8552, 8612, 8614, 8615, 8625, and 8626 on BVRs granted to the section 195A BVR cohort. These conditions will require the visa holder to report specified personal information to the Department, including:

- the visa holder's address and any change of address,
- details of household members and any changes to household members
- the place and nature of employment
- interstate or overseas travel
- association or membership of an organisation and
- any contact with an individual, group or organisation engaging in, previously engaged in or has expressed an intention to engaged in criminal or illegal activities,
- any change to online profiles or user names.

Regular reporting assists the Department monitor a visa holder's personal situation and commence compliance action if necessary in the individual's circumstances. The objective of the imposition of the conditions is to support community safety objectives and enable the management of the cohort to a removal outcome. To ensure that the section 195A BVR cohort remain connected with the Department, it is reasonable and necessary they provide and update information about their residence, contact details, travel and employment. Considering that a proportion of the section 195A BVR cohort also present community safety concerns, it is reasonable and necessary that visa holders provide information that allow the Department to ascertain whether certain risk factors, such as engagement with criminal groups or organisations, increase the potential likelihood of the visa holder becoming a risk to the Australian community.

The imposition of these conditions is required to emphasise the Australian government's expectations regarding a person's conduct in the community, and the consequences for failing to meet those expectations. This includes an expectation not to engage in criminal behaviour.

Where an individual in the section 195A BVR cohort has been convicted of an offence involving a minor or any other vulnerable person, conditions 8612, 8615 and 8626 must be applied. These conditions provide, respectively, that the person must notify the department of the details of persons they reside with; that the person must notify the department within 5 working days of the details of any membership of any association or organisation and that the person must notify of any change to their online profile or user names. These limitations are reasonable and necessary as they are aimed at protecting community safety and the most vulnerable members of the community. They are proportionate as they are only mandatory

for persons of high risk in relation to the conditions, being persons who have previously been convicted of an offence involving a minor or another vulnerable person.

This right is also engaged by the Amendment Regulations in mandatorily imposing conditions 8617, 8618, and 8621 on BVRs granted to the section 195A BVR cohort 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.

- Condition 8621 requires a BVR holder in the section 195A cohort to wear a monitoring device at all times, to 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.
- Conditions 8617 and 8618 require that a BVR holder in the section 195A BVR cohort notify of significant financial transactions or debts and details of bankruptcy or financial hardship.

The purposes of allow 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. The electronic monitoring will also assist with 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.

Where 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 as assessed under the community protection test prior to imposing the conditions. Attachment of condition 8621 to a BVR is required 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. . In considering whether the condition is not reasonably necessary, the individual circumstances (including the capacity to maintain the equipment or lack of appropriate supports) and risk profile of the prospective visa holder as well as community safety and the rights and protection of others would be considered.

Importantly, where imposed, regulation 2.25AE prescribes conditions 8617, 8618 and 8621 will cease to be in effect 12 months after a BVR is granted. This further limits the impact on a person's right to privacy by prescribing an end date to those conditions, and if required a review of the individual's circumstances.

This further enhances proportionality of the imposition of the conditions by allowing regular review and the prospect of being granted a further BVR without these conditions.

Making these conditions mandatory for the section 195A BVR cohort, unless the Minister is satisfied that they are not reasonably necessary for the protection of the community, is the least rights restrictive means to obtain the legitimate objective of community safety, and it is reasonable, necessary and proportionate as it allows the Minister to consider the individual risk that the visa holder poses to the safety of the community and whether it is necessary in that individual's circumstances to have the conditions imposed.

Right to liberty of the person

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.

Imposition of a curfew – condition 8620

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*, mind detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalisation, institutional custody of children in 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 or 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.

The intention of the power is that it be exercised as proportionate to the community in safety risk posed, and in relation to the individual circumstances of the BVR visa holder.

The curfew limits the ability of visa holder 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, according to the specific circumstances of the case.

Importantly, while breach of the curfew would constitute a criminal offence, with a defence of reasonable excuse available in addition to other standard defences, there are no additional physical controls preventing the person from departing the place where they are spending their curfew hours, such as fences, controlled entry/exit, guards or a police presence.

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 will in terms of future criminal offending. 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.

Criminal offences associated with non-compliance with conditions

The liberty of a member of the section 195A BVR cohort may also be affected by the offences associated with non-compliance of the conditions associated with their BVR, and which carry penalties including mandatory terms of imprisonment. However, any term of imprisonment imposed for these offences 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. The courts are able to take a wide range of factors into account when considering in determining the appropriate length of sentence other than the mandatory period set out in section 76DA of the Migration Act. As such, any term of imprisonment following a conviction for a breach of a conviction would not constitute arbitrary detention.

The only less rights restrictive alternative that would not engage the right to liberty would be to not have a term of imprisonment attached to a breach of the conditions. However, a pecuniary only offence would not reflect the seriousness of the expectation the BVR holders adhere to the conditions of their visa or the need to ensure public safety. Imprisonment as a penalty for a breach of a condition is intended to act as an incentive to comply with conditions that are intended to ensure community safety.

Right to 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 considered to be *lawfully* residing in the community.

Condition 8620, which provides that a BVR holder in the section 195A BVR cohort needs to abide by a curfew, must be applied only if 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 (in addition to other conditions imposed) is reasonably necessary and reasonably adapted and appropriate 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, the Bill would provide 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 future criminal offending. 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).

Because regulation 2.25AE prescribes that condition 8620 ceases to be in effect 12 months after a BVR is granted, any restriction on movement is time limited and that a review of the individual's circumstances is required for condition to be imposed beyond this timeframe.

This ensures that the limitation on the right to freedom of movement is the least rights restrictive means of obtaining the legitimate objective of ensuring community safety, and is reasonable, necessary and proportionate to that objective as it allows the Minister to consider the individual risk that the visa holder poses to the safety of the community and whether it is appropriate in that individual's circumstances to have the conditions imposed.

While condition 8614 (which requires holders of a BVR visa in the NZYQ-affected cohort to notify Immigration of any interstate or overseas travel at least seven working days before undertaking the travel or within two working days after departing on the travel notify) places limitations on this right, the limitation is reasonable, necessary and proportionate when balanced against community protection concerns.

The condition does, not in itself, restrict an individual's freedom of movement but rather requires that the travel be notified to Immigration ahead of the planned travel.

The mandating of this condition for BVRs granted to the 195A BVR cohort is necessary as it allows the Department to closely monitor the circumstances of the individual and respond appropriately if the individual engages in behaviour that may put the Australian community or public order at risk. In light of the community protection considerations required for this cohort, the introduction of this mandatory condition represents the least rights restrictive measure available to protect community safety following the grant of a BVR.

The imposition of a reporting obligation prior to travel is the least restrictive measure that is no more than is reasonably necessary to achieve its objective, and does not amount to a

restriction on movements such as an obligation to seek approval prior to travel. The obligation to report travel is necessary for the legitimate purpose of being able to locate the visa holder for the purpose of resolving the visa holder's migration status and their participation in removal efforts.

Right to freedom of assembly and association contained in Article 22 of the ICCPR

Article 22 of the ICCPR relevantly states:

- 1) *Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
- 2) *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others...*

The right to freedom of association will be limited by amendments requiring that if a BVR holder in the section 195A BVR cohort has been convicted of an offence involving a minor, condition 8615 must be applied. This condition provides that the person must notify the department within 5 working days of the details of any membership of any association or organisation. This limitation is reasonable and necessary as it is aimed at protecting community safety and vulnerable persons in the community and it is proportionate as it is only mandatory for persons of high risk in relation to the condition.

The right to freedom of association may also be limited by amendments requiring condition 8624 to be imposed on a BVR holder in the section 195A cohort who has been convicted of an offence involving violence or sexual assault. Condition 8624 provides that the holder of the visa must not contact, or attempt to contact, the victim of the offence or a member of the victim's family. While this measure may limit the right to association if the condition is applied, this is reasonable, necessary and proportionate. The condition will only be applied where the BVR in the section 195A cohort has been convicted of a violent offence or a sexual assault and is aimed at the legitimate objective of protecting the victim of that offence or the victim's family.

The Amendment Regulations allow the mandatory imposition of conditions 8556, 8615 and 8616 on section 195A BVR cohort visa holders. These conditions respectively:

- Prohibit a visa holder from communicating or associating with an entity listed under Part 4 of the *Charter of the United Nations Act 1945*; or an organisation prescribed by the regulations made under the *Criminal Code Act 1995* for the purposes of paragraph (b) of the definition of terrorist organisation in subsection 102.1(1) of the *Criminal Code*.
- Require the visa holder to report the details of their association with, or membership of, any club or organisation, as well as any new association or the end of a previously reported association.

- Require the visa holder to notify the department of any affiliation or contact with any individual, group or organisation that is alleged, known or reputed to be, or has expressed an interest in, engaging in criminal or illegal activities.

These mandatory conditions will engage and limit the right to freedom of association. However, it is reasonable, necessary and proportionate to achieve the legitimate objective of protecting national security and public safety. It is reasonable and necessary to prohibit the section 195A BVR cohort from communicating with entities listed under the *Charter of the United Nations Act 1945* or with terrorist organisations. It is reasonable that an appropriate level of restriction should apply for non-citizens and any association with terrorist organisations. Similarly, given the likelihood of relevant criminal activity by some within the section 195A BVR cohort, it is reasonable, necessary and proportionate that they be required to report any contact with individuals, groups or organisations involved in, or likely to be involved in, criminal or illegal activities as a condition of their visa.

To the extent that being required to report such activity limits the visa holder's freedom of association, for concerns of the consequences of reporting contact, the limitation is reasonable and necessary to ensure that visa holders do not engage in criminal or illegal activities through the association with individuals, groups or organisations that do. The requirement to report such contact is intended to act as a disincentive to associate with individual, groups or organisations that are or may be involved in criminal or illegal activities.

The requirement to report details of an association or membership with an organisation is also reasonable, necessary and proportionate. The reporting condition does not prevent the visa holder from having the association or require them to cease the association or membership. Reporting such memberships will enable the Department to monitor the involvement of the section 195A BVR cohort in organisations that potentially raise significant community safety concerns or involve contact with vulnerable persons. It also provides the Department with an awareness of organisations that BVR holders in the section 195A BVR cohort are members of that may positively impact on applications for third country resettlement.

These reporting obligations support the legitimate objective of supporting Australia's managed migration system, while providing a disincentive for association with entities that may hamper the Government's objective of resolving the visa holder's status by way of third country resettlement. The reporting obligation achieves this objective in the least rights restrictive way.

Rights relating to work

Article 6(1) of the ICESCR provides:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right

The right to work will be engaged, and limited, by amendments requiring that if a BVR holder in the section 195A BVR cohort has been convicted of an offence involving a minor, condition 8622 must be applied. This condition provides that the person subject to the condition 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. This limitation is reasonable and necessary as it is aimed at protecting community safety and

vulnerable persons in the community and it is proportionate as it is only mandatory for persons of high risk in relation to the condition.

While conditions 8551, 8555, 8560 and 8562 were previously discretionary conditions where a BVR is granted under section 195A, the Amendment Regulations impose these conditions as mandatory conditions for BVRs granted to the section 195A BVR cohort. These conditions prohibit the visa holder from taking up certain high risk employment or require the Minister to approve certain high risk occupations prior to commencement. High risk employment includes working with, or having contact with, vulnerable members of the Australian community. The amendment of the regulations may limit the work rights provided for in the ICESCR to the extent that a member of the section 195A BVR cohort seeks approval from the Minister to engage in a particular occupation and approval is refused.

Importantly, the work restriction protects the rights of vulnerable people including children, and this protective factor is weighed against the impact on the BVR holder in being required to seek and obtain ministerial approval.

While these conditions will apply to all section 195A BVR cohort, they are the least rights restrictive option, as it is possible for the Minister to approve employment under conditions 8551, 8555 and 8560. Any limitation of this right is necessary considering the individual circumstances of the cohort. The measure is proportionate to the potential risk posed by each individual to public safety. The right to work does not guarantee an individual a right to a particular job and the relevant conditions do not stop the visa holder from engaging in any kind of employment, they only require the approval of the Minister to engage in certain kinds of employment that have a high risk to national security, public order and public safety.

The imposition of work-related conditions for the section 195A BVR cohort emphasises that the Government is committed to reducing community risk while also promoting the legitimate objective of resolving the non-citizen's migration status by reducing exposure to work that may hinder options for resettlement in third countries.

Conclusion

The measures in this Instrument are compatible with human rights as, to the extent they limit some human rights, those limitations are reasonable, necessary and proportionate to the objectives of ensuring the safety of the community.

The Hon Tony Burke MP

Minister for Immigration and Multicultural Affairs

Details of the proposed Migration Amendment (Subclass 070 (Bridging (Removal Pending)) Visa) Regulations 2024

Section 1 – Name of Regulations

This section provides that the title of the proposed Regulations is the *Migration Amendment (Subclass 070 (Bridging (Removal Pending)) Visa) Regulations 2024*.

Section 2 – Commencement

This section provides for the commencement of the proposed Regulations.

Subsection 2(1) provides that each provision of the instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

The table provides that the provisions of the proposed Regulations commence on the later of:

- for amendments provided by sections 1 to 4, and Schedule 1, Part 1 – immediately after the instrument is registered; and
- for amendments provided by Schedule 1, Part 2, the later of:
 - (a) immediately after the instrument is registered; and
 - (b) immediately after the commencement of the *Migration Amendment Act 2024*.

A note at the foot of the table under subsection 2(1) explains that the table relates on the provisions of the instrument as originally made. It will note be amended to deal with any later amendments to the instrument.

Subsection 2(2) provides that any information in column 3 of the table is not part of the instrument. Information may be inserted in column 3, or information in it may be edited, in any published version of the instrument.

Section 3 – Authority

This section provides that the *Migration Amendment (Subclass 070 (Bridging (Removal Pending)) Visa) Regulations 2024* are made under the *Migration Act 1958* (Migration Act).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Part 1—Main amendments

Migration Regulations 1994

Item [1] – Subregulation 2.20(1)

This item makes a consequential amendment of subregulation 2.20(1) of the *Migration Regulations 1994* (the Migration Regulations) to support the substantive amendment made by item [2]. As item [2] inserts a new subregulation 2.20(19) at the end of the regulation, it is necessary to revise subregulation 2.20(1) to reflect the inclusion of this new subregulation, which operates to prescribe an additional class of persons for the purposes of paragraph (b) of the definition of ***eligible non-citizen*** in subsection 72(1) of the Migration Act.

Item [2] – At the end of regulation 2.20

This item inserts new subregulation 2.20(19) in current regulation 2.20 of the Migration Regulations, supported by the amendment in item [1].

Regulation 2.20 operates to prescribe the classes of persons described in subregulations 2.20(6) to (12) and (14) to (18) for the purpose of the definition of ***eligible non-citizen*** in section 72 of the Migration Act. Section 72 deals with the persons eligible to be granted a bridging visa.

Section 73 of the Migration Act provides the power for the Minister to grant a bridging visa to an eligible non-citizen, if the Minister is satisfied that the non-citizen satisfies the criteria for a bridging visa as prescribed under subsection 31(3) of the Act. As such, if a non-citizen is *not* an eligible non-citizen within the meaning given by section 72, the Minister is not empowered under section 73 to grant that non-citizen a bridging visa.

The purpose of proposed subregulation 2.20(19) is to establish that where the Minister has exercised the Minister's personal power under section 195A of the Migration Act to grant a Subclass 070 (Bridging (Removal Pending)) visa (BVR) to a non-citizen who is in detention under section 189 of the Act, that non-citizen is then also an eligible non-citizen for the purposes of granting further BVRs from time, under regulation 2.25AB as amended by item [4].

Proposed subregulation 2.20(19) applies to a non-citizen if they are the holder of a BVR and either:

- the visa was granted under section 195A of the Migration Act; or
- if the non-citizen has previously held other BVRs, their *first* BVR was granted by the Minister under section 195A of the Migration Act.

This amendment operates together with the amendment in item [4] to enable the Minister to grant a further BVR under regulation 2.25AB to a non-citizen who is an eligible non-citizen under subregulation 2.20(19) whose first BVR was granted by the Minister under section 195A of the Act. Further information in relation to the operation of regulation 2.25AB is provided under item [4] below.

Section 195A of the Migration Act 1958

Section 195A is a personal power of the Minister, available in circumstances where a non-citizen is in detention under section 189 of the Migration Act (that is, the non-citizen is an unlawful non-citizen). If the Minister thinks that it is in the public interest to do so, the Minister may grant a non-citizen to whom this section applies a visa of a particular class (whether or not they have applied for the visa). Grant of a BVR under section 195A enables the non-citizen's release from section 189 detention, and with the BVR holder subject to the conditions imposed on the visa.

As section 195A may only be exercised in circumstances where the non-citizen is detained under section 189 of the Migration Act, this personal power of the Minister is not available in relation to a non-citizen who *holds* a visa. While the proposed amendments in items [6] to [8] provide for a BVR to be granted to a non-citizen under section 195A with certain conditions imposed for the purposes of community protection, once the non-citizen holds a BVR section 195A is no longer available to grant a further BVR to that non-citizen. It is for this reason that the amendments in items [2] and [4] are also necessary, so that further BVRs may be granted under regulation 2.25AB to the non-citizen as may be required from time to time, having regard to the community protection matters in clause 070.612A (item [7] refers).

Item [3] – Subregulation 2.25AB(1)

This item amends subregulation 2.25AB(1) to enable the grant of a BVR without application to a non-citizen who is an eligible non-citizen under proposed subregulation 2.20(19).

Current regulation 2.25AB operates to provide a power to grant a BVR without application to an eligible non-citizen under subregulation 2.20(18) of the Migration Regulations. Subregulation 2.20(18) covers the cohort of non-citizens who are affected by the decision of the High Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 on 8 November 2023 (*NZYQ*). *NZYQ*-affected non-citizens are granted a BVR under regulation 2.25AB to manage their immigration status and ensure that they are subject to appropriate and enforceable visa conditions while in the Australian community. In practice, this means that an individual may need to be granted a further BVR from time to time to allow for the variation and imposition of certain visa conditions relating to community protection to be adapted to reflect the individual's changing circumstances.

Under regulation 2.25AB, non-citizens in the *NZYQ*-affected cohort may be granted either an initial BVR following their release from immigration detention as an unlawful non-citizen, or a subsequent BVR where they are in the community.

For the additional cohort of eligible non-citizens established by the amendment in item [9], the initial BVR grant is effected by the Minister's exercise of the Minister's personal power under section 195A of the Act (where the non-citizen, at the time of this BVR grant, is in detention under section 189 of the Act).

The purpose of the amendment in item [4], together with the amendment in item [2], is to manage circumstances where, once the section 195A BVR holder is in the community (no longer detained under section 189), the Minister is also empowered to grant a further BVR from time to time to consider and if necessary vary the imposition of certain community protection related conditions under clause 070.612A – consistent with the established

arrangements for managing community safety in relation to NZYQ-affected non-citizens released from detention in accordance with the High Court's decision in *NZYQ*. This amendment of regulation 2.25AB also operates with the amendments in items [6], [7] and [8]

In certain circumstances, it may be appropriate or necessary to consider the grant of a further BVR to a current BVR holder, in order to vary one or more of the conditions that must be imposed under clause 070.612A of Schedule 2 to the Migration Regulations. This includes conditions requiring the BVR holder to:

- wear a monitoring device at all times, and comply with requirements in relation to keeping the device and any related monitoring equipment in good order (condition 8621 – electronic monitoring);
- remain at a notified address for the BVR holder between 10 pm and 6 am, or other such time specified in writing by the Minister (condition 8620 – curfew);
- notify Immigration of any receipt or transfer of funds of an amount or amounts totalling \$10,000 or more (condition 8617 – financial transactions);
- notify Immigration of any significant debts or bankruptcy (condition 8618 – financial position).

Current subclause 070.612A(1) of Schedule 2 provides that one or more of these four conditions must be imposed by the Minister when a BVR is granted if subclause 070.612A(3) applies to the visa, unless the Minister is satisfied that it is not reasonably necessary to impose the condition for the protection of any part of the Australian community. This includes because of any other conditions imposed by or under Division 070.6.

Current subclause 070.612A(2) of Schedule 2 provides that the Minister must decide whether or not to impose each of the conditions in the following sequential order: 8621, 8617, 8618, and 8620.

This means that the Minister must first consider whether to impose condition 8621 (electronic monitoring), having regard to the reasonable necessity of doing so for the protection of any part of the Australian community and any other conditions to which the visa is subject. The Minister must then decide whether to impose condition 8617, having regard to the reasonable necessity of doing so for the protection of any part of the Australian community and any other condition to which the visa is subject, including condition 8621 if that has been imposed as a result of the earlier consideration—and so on.

Subclause 070.612A(2A) of Schedule 2 provides that conditions imposed by or under this clause are in addition to any other condition imposed by or under another provision of Division 070.6 of Part 070 of Schedule 2.

This clause provides authority to the Minister to exercise a discretion not to impose one or more of these four mandatory visa conditions, if satisfied that a condition is not reasonably necessary for the protection of the community.

The requirement for the Minister to consider other conditions placed on the BVR is intended to ensure that in considering whether it is not reasonably necessary to impose a particular

condition for the protection of any part of the Australian community, the Minister must consider the extent to which other visa conditions contribute to that purpose.

Item [4] – Subclause 050.211(2) of Schedule 2

This item is machinery in nature and amends subclause 050.211(2) of Schedule 2 to ensure that a non-citizen who satisfies the definition of eligible non-citizen under subregulation 2.20(19) does not satisfy the criteria for a Subclass 050 (Bridging (General)) visa.

Item [5] – Clause 070.612 of Schedule 2

This item substitutes clause 070.612.

Current clause 070.612 differentiates certain conditions that must be imposed on all BVRs granted under regulation 2.25AA or 2.25AB (subclause 070.612(1)) from conditions that may be imposed on a BVR granted under section 195A of the Migration Act (subclause 070.612(2)).

As amended, new clause 070.612 operates to provide for the same mandatory conditions to be imposed on a BVR irrespective of whether it is granted under section 195A of the Migration Act or regulation 2.25AA or 2.25AB of the Migration Regulations.

This item provides that the following visa conditions must be imposed, in addition to any other conditions imposed by or under another provision in Division 070.6 of Schedule 2 to the Migration Regulations:

- 8551 must obtain approval for certain work (aviation; maritime; chemicals of security concern);
- 8552 must notify of change in employment;
- 8553 must not become involved in activities prejudicial to security;
- 8554 must not acquire weapons etc.;
- 8555 must obtain approval for flight training etc.;
- 8556 must not associate with terrorist organisation etc.;
- 8560 must obtain approval to acquire chemicals of security concern;
- 8561 must comply with direction to attend security interview;
- 8562 must not take up employment relating to weapons or explosives;
- 8563 must not engage in weapons/explosives training etc.;
- 8564 must not engage in criminal conduct;
- 8614 must notify of interstate/overseas travel;

- 8616 must notify of contact with individuals charged/convicted of criminal offence;
- 8625 must notify change of address / contact details.

The purpose of this amendment is to ensure that the same mandatory visa conditions are imposed on a BVR granted under section 195A as must already be imposed on a BVR granted under regulation 2.25AA or 2.25AB. This ensures a consistent approach to maintaining effective engagement with a BVR holder in the community, and an appropriate focus on safeguarding the Australian community.

Item [6] – At the end of subclause 070.612A(3) of Schedule 2

This item inserts new paragraph 070.612A(3)(c) in Schedule 2 to the Migration Regulations. New paragraph 070.612A(3)(c) operates to provide that clause 070.612A applies to a visa if the visa was granted to a non-citizen under section 195A of the Migration Act. This amendment extends the current operation of clause 070.612A so that it applies to BVRs granted under section 195A of the Act as well as BVRs granted under regulations 2.25AA and 2.25AB of the Regulations.

As described under item [2] above, clause 070.612A requires the Minister to impose the following mandatory conditions on a BVR:

- condition 8617 (financial transactions);
- condition 8618 (financial position);
- condition 8620 (curfew); and
- condition 8621 (electronic monitoring);

when a BVR is granted if subclause 070.612A(3) applies to the visa, unless the Minister is satisfied that it is not reasonably necessary to impose the condition for the protection of any part of the Australian community, including because of any other conditions imposed by or under Division 070.6. Including section 195A in subclause 070.612A(3) ensures that where the Minister makes a decision personally under section 195A of the Act to grant a BVR to a non-citizen who is detained under section 189 of the Act, the Minister must consider matters of community protection when weighing imposition of each condition – and unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community, the condition must be imposed.

Current subclause 070.612(2A) also makes clear that conditions imposed by or under clause 070.612A are in addition to any other condition imposed by or under another provision of Division 070.6 of Schedule 2.

Item [7] – At the end of subclause 070.612B(4) of Schedule 2

This item inserts new paragraph 070.612B(4)(c) in Schedule 2 to the Migration Regulations. New paragraph 070.612B(4)(c) operates to provide that clause 070.612B applies to a visa if the visa was granted to a non-citizen under section 195A of the Migration Act.

Consistent with the amendment of clause 070.612A in item [7], this amendment extends the operation of current clause 070.612B so that it applies to BVRs granted under section 195A of the Act as well as BVRs granted under regulations 2.25AA and 2.25AB of the Regulations.

Subclause 070.612B(1) provides for the mandatory imposition of the following five conditions in circumstances where the BVR holder has been convicted of an offence involving a minor or any other vulnerable person:

- 8612 must notify details of members of household;
- 8615 must notify details of any association / membership of organisation involving more than incidental contact with minors etc.;
- 8622 must not perform work or participate in regular organised activity involving more than incidental contact with minor etc.;
- 8623 must not go within 200 m of school, child care centre etc.; and
- 8626 must notify any change in online profile/user name.

Subclause 070.612B(2) provides for the mandatory imposition of the following condition in circumstances where the BVR holder has been convicted of an offence involving violence or sexual assault:

- 8624 must not contact / attempt to contact victim or victim's family.

Subclause 070.612B(3) provides that the conditions imposed under clause 070.612B are in addition to any other condition imposed by or under another provision of Division 070.6.

Part 2—Amendments consequential to the Migration Amendment Act 2024

Item [8] – Subregulation 2.25AD(1)

This item substitutes the reference to paragraph 76E(1)(a) of the Migration Act in subregulation 2.25AD(1) with a reference to subsection 76E(1) of the Migration Act. Subsection 2.25AD(1) provides for visa conditions to be prescribed by the regulations for the purposes of section 76E (Rules of natural justice do not apply to decision to grant certain bridging visas) of the Migration Act. This amendment is a technical amendment, consequential to amendments of section 76E made by the *Migration Amendment Act 2024*, which have the effect of changing the structure of subsection 76E(1).