Comment

Removal Pending Visas: The Australian Parliament's Answer to the End of Indefinite Detention

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Abstract

The High Court of Australia ruled in 2023 that the Commonwealth lacked the power to indefinitely detain aliens as it had done since the 2004 decision in *Al-Kateb v Godwin*. In response, the Australian Government released from immigration detention 149 aliens lacking any real prospect of being deported in the foreseeable future. The Australian Parliament swiftly enacted two immigration amendments to apply to these released aliens. The amending Acts placed the aliens on 'removal pending visas' bearing conditions ranging from daily curfews to constant monitoring. These visa conditions were imposed not by reviewable administrative decision, but by force of statute. A year later, the High Court invalidated two of the conditions. In a rapidly shifting space, this comment pauses to examine the unique process by which the removal pending visas were imposed, to illuminate: (i) the unique amenability of aliens to Commonwealth legislative power; and (ii) how a constitutional limitation on that power tempers that amenability.

I Introduction

In November 2023, the High Court of Australia unanimously held in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*')[1] that it was beyond the Commonwealth's legislative power to detain aliens indefinitely. The stateless plaintiff who had been held in immigration detention for over five years awaiting deportation had pleaded that the Court should reopen and overrule the constitutional holding from its 2004 decision of *Al-Kateb v Godwin* ('*Al-Kateb*').[2] *Al-Kateb* had controversially enabled the Commonwealth to indefinitely detain non-

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1 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) ('*NZYQ*').

2 *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*'). However, the Court declined to reopen the statutory construction holding from *Al-Kateb*.

citizens who it was unable to remove from Australia, such as NZYQ. The High Court agreed with NZYQ, holding that the *Migration Act 1958* (Cth) ('*Migration Act*')[3] could not validly authorise detention of aliens with no real prospect of removal from Australia in the foreseeable future. Detention so described contravened Ch III of the *Australian Constitution*.

In response, the Australian Government released from immigration detention 149 persons whom it had determined that the ruling applied to (the '*NZYQ*-affected cohort'). A scramble for a legislative response followed the decision. The Australian Parliament sought to amend the *Migration Act* to preserve the Government's ability to remove the *NZYQ*-affected cohort from Australia once it became practicable and to maintain community safety given concerns that those in the cohort with criminal convictions may reoffend once released.[4] Ten days after the decision in *NZYQ*, an amending Act came into force, and another followed suit 20 days thereafter.[5] The amending Acts deemed that following their release, the entire cohort was subject to Subclass 070 Bridging (Removal Pending) Visas ('removal pending visas') bearing up to 21 conditions. The non-citizens were required to disprove that they posed a risk to the community for any conditions to be removed. Breaches of certain visa conditions were punishable by mandatory imprisonment.

One cohort member challenged the validity of two such visa conditions subjecting him to daily curfews and constant electronic monitoring in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*YBFZ*').[6] As these conditions had been imposed by the Commonwealth Executive not the Judiciary, YBFZ contended that they violated the constitutional principle applied in *NZYQ*: that executive detention is only valid if it serves a legitimate and non-punitive purpose achievable in fact. The High Court agreed and extended the constitutional limitation originally applied to extra-judicial detention to curfews and electronic monitoring imposed by the Executive; Ch III provides that certain interferences with liberty and bodily integrity are exclusively exercisable by Commonwealth courts.

While migration law evolves at a relentless pace, the legislation enacted in response to *NZYQ* is worth isolating to dissect: (i) the process by which the removal pending visas were imposed on the *NZYQ*-affected cohort reveals that aliens are uniquely amenable to Commonwealth legislative power despite the finding in *NZYQ*; and (ii) the High Court's invalidation of the two visa conditions in *YBFZ* illustrates that this amenability is tempered by a constitutional limitation invalidating certain interferences with liberty and bodily integrity. In Part II of this comment, I contextualise how the end of indefinite detention culminated in the enactment of and challenge to the amending Acts. In Part III, I analyse issues (i) and (ii) to illustrate

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3 *Migration Act 1958* (Cth) ('*Migration Act*').

4 Explanatory Memorandum, Migration Amendment (Bridging Visa Conditions) Bill 2023 (Cth) 4–5; Brett Worthington, 'Decades after a Boat Arrived in Australia, The Government Suddenly Found Itself with an Immigration Detention System in Disarray', *ABC News* (online, 14 April 2024) <https://www.abc.net.au/news/2024-04-14/nzyq-immigration-detention-timeline-high-court-government/103699478>.

5 *Migration Act (Bridging Visa Conditions) Act 2023* (Cth) ('*Visa Conditions Act*') and *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) ('*Serious Offenders Act*'): collectively, 'the amending Acts'.

6 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 ('*YBFZ*').

the significance of this legislative scheme. In Part IV, I conclude by discussing how the law may continue to develop.

II Background

The decision in *NZYQ* was handed down on 8 November 2023, ordering the release of the plaintiff from immigration detention.[7] Before the High Court released its written reasons 20 days later, a cohort of other non-citizens had been released from detention and were subject to a new legislative scheme. In this Part, I: (A) trace Australia's history of indefinite detention until *NZYQ*; (B) outline how Parliament responded to *NZYQ* by enacting two amending Acts; and (C) introduce how *YBFZ* invalidated part of these Acts.

A NZYQ *and the End of Indefinite Detention*

Indefinite detention is the product of a legislative scheme introduced in 1994 and interpreted by the High Court in *Al-Kateb*.[8] Under s 189(1) of the *Migration Act*, Commonwealth officers are obliged to detain 'unlawful non-citizen[s]'. These are persons in Australia without Australian citizenship or a visa that is in effect.[9] Section 196(1) stipulates that their detention must continue, inter alia, until they are granted a visa or removed from Australia. As constructed by the High Court in *Al-Kateb*, and affirmed in *NZYQ*, an unlawful non-citizen's detention is an ongoing state of affairs that must continue until one of these stipulated events occurs.[10] Detention becomes indefinite when neither can be realised. For example, if an unlawful non-citizen's application for a visa has been finally determined in the negative, Commonwealth officers are obliged to remove them from Australia as soon as reasonably practicable.[11] However, if the non-citizen is stateless such as Al-Kateb or, due to Australia's international non-refoulement obligations, cannot be returned to their country of origin where they are liable to be subjected to persecution such as NZYQ, their removal can become impossible. *Al-Kateb* provided in 2004 that this legislative scheme was constitutional even if it resulted in non-citizens being indefinitely detained.[12] *NZYQ* overturned this proposition 19 years later.

NZYQ, a stateless man with no prospects of removal from Australia who had been held in immigrant detention for over five years, successfully pleaded that the High Court should reopen and overrule the constitutional holding in *Al-Kateb*.[13] The

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7 Transcript of Proceedings, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 154, 9104–9120 ('*NZYQ* Transcript of Proceedings').

8 *NZYQ* (n 1) 148 [11], citing *Migration Legislation Amendment Act 1994* (Cth).

9 *Migration Act* (n 3) ss 5(1) (definition of 'migration zone'), 5(1) (definition of 'non-citizen'), 13(1), 14(1).

10 *Al-Kateb* (n 2) 638–9 [226] (Hayne J, McHugh J agreeing at 581 [33]); *NZYQ* (n 1) 148 [12], 149 [14], 152 [23].

11 *Migration Act* (n 3) s 198(6); *Al-Kateb* (n 2) 581 [34] (McHugh J), 633 [206], 638–9 [226]–[227] (Hayne J); *NZYQ* (n 1) 146–7 [4], 148–9 [13].

12 *Al-Kateb* (n 2) 580–1 [31], 581 [34] (McHugh J), 651 [268] (Hayne J).

13 *NZYQ* (n 1) 146 [1]–[2], 156 [37].

Court ruled that these sections of the *Migration Act*, insofar as they authorised his continuing detention, were invalid as they contravened Ch III of the *Constitution*.[14]

The High Court restated in *NZYQ* the overarching principle that absent judicial mandate, the Executive could only detain persons if authorised by valid statutory provisions.[15] As the Court held in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*'),[16] these provisions will only be valid to the extent that the detention they authorise is 'reasonably capable of being seen to be necessary for a legitimate *and* non-punitive purpose'.[17] Beyond this, detention under Australia's constitutional system is an incident of the exclusively judicial function of adjudicating and punishing criminal guilt.[18] Applying *Lim*, the Court in *NZYQ* therefore held that:

> a Commonwealth statute which authorises executive detention must limit the duration of that detention to what is reasonably capable of being seen to be necessary to *effectuate an identified statutory purpose which is reasonably capable of being achieved*.[19]

Putting aside the different approach of Edelman J,[20] six members of the High Court held that this constitutional limitation 'would be devoid of substance' if there was no real prospect of achieving in the reasonably foreseeable future the legislative objects that the Commonwealth identified as providing the requisite legitimate and non-punitive purpose.[21] The six justices identified two legitimate and non-punitive purposes for detaining NZYQ: (i) enabling the determination of his visa application; and (ii) removing him from Australia.[22] As NZYQ's application for a protection visa had been finally determined in the negative,[23] the justices turned their attention to the second purpose. The Commonwealth had conceded at the initiation of the case that NZYQ could neither be removed from Australia nor was there a 'real prospect of [him] being removed from Australia in *the reasonably foreseeable future*'.[24] This refuted the existence of the second purpose.[25]

The High Court rejected the Commonwealth's alternative submission that separation from the Australian community constituted a legitimate and non-punitive purpose. As the six justices wrote, that 'impermissibly conflates detention with the purpose of detention'.[26] As the application of ss 189(1) and 196(1) to NZYQ was unconstitutional, the Court ordered his release from his unlawful detention.[27]

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14 Ibid 147–8 [9], 166 [71].
15 Ibid 153 [27], citing *Williams v The Queen* (1986) 161 CLR 278, 292 (Mason and Brennan JJ), *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 520–1 (Mason CJ, Wilson and Dawson JJ), 528 (Deane J).
16 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Lim*').
17 *NZYQ* (n 1) 157 [39] (emphasis added). See also 154–5 [31].
18 Ibid 157 [39]. See also 153 [28].
19 Ibid 157 [41], quoting *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 625 [374] (Gageler J) (emphasis added).
20 See *NZYQ* (n 1) 160–2 [51]–[54].
21 Ibid 158 [45] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).
22 Ibid 158–9 [46] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).
23 Ibid 146–7 [3]–[4].
24 Ibid 164 [63] (emphasis added). See also 166 [70].
25 Ibid 158–9 [46] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).
26 Ibid 159 [49].
27 Ibid 166 [71].

Before *NZYQ*, the High Court had declined to reopen *Al-Kateb* on three occasions.[28] However, Gageler CJ designated *NZYQ* the first case that his court would hear.[29] The hearing took place on 7–8 November 2023. Sixteen minutes after it concluded, His Honour revealed that 'at least a majority' of the Court favoured the announced order that effectively overturned *Al-Kateb*.[30] The reasons were only handed down on 28 November 2023.

B *The Legislative Response to* NZYQ

Following the release of the High Court's orders in *NZYQ*,[31] the Commonwealth sought to identify the *NZYQ*-affected cohort: those persons in immigration detention for whom the Commonwealth's duty to remove from Australia under s 198 of the *Migration Act* had been enlivened and who had no real prospect of such removal becoming practicable in the reasonably foreseeable future. The Department of Home Affairs ultimately identified 149 such persons who were progressively released over the next month.[32]

On 16 November 2023, the Labor Government proposed to Parliament an immigration Bill that specifically applied to the *NZYQ*-affected cohort.[33] In exchange for several amendments to the Bill, the Government secured the support of the Coalition Opposition to pass the Bill through the Senate.[34] The Bill was assented to the next day and the *Migration Act (Bridging Visa Conditions) Act 2023* (Cth) ('*Visa Conditions Act*')[35] came into force on 18 November 2023,[36] ten days after the orders in *NZYQ*. On 27 November 2023, the day before the High Court released its written reasons, the Government introduced to Parliament another Bill amending the *Migration Act*.[37] Again with support from the Opposition, the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders*

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28 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285.

29 Michael Pelly, 'Gageler Puts a Firm Stamp on "News" High Court', *Australian Financial Review* (online, 10 November 2023) <https://www.afr.com/politics/federal/gageler-puts-early-stamp-on-new-high-court-20231108-p5eidn>.

30 *NZYQ* Transcript of Proceedings (n 7) 9075. See also *NZYQ* (n 1) 147 [8].

31 *NZYQ* (n 1) 167–8 [74].

32 Department of Home Affairs (Cth), *Information Provided in Response to A Request from Senator James Paterson and Senator the Hon Michaelia Cash in relation to High Court Decision in NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (Report, 12 February 2024) 6.

33 'Migration Amendment (Bridging Visa Conditions) Bill 2023', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7114>.

34 Paul Karp, 'Labor Accused of Caving to Dutton as "Draconian" Bill Restricting Released Detainees Is Passed', *The Guardian* (online, 16 November 2023) <https://www.theguardian.com/australia-news/2023/nov/16/labor-emergency-immigration-detention-bill-strict-visa-conditions-electronic-monitors-curfews>.

35 *Visa Conditions Act* (n 5).

36 Ibid s 2.

37 'Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7128>.

and Other Measures) Act 2023 (Cth) ('*Serious Offenders Act*')[38] came into force on 8 December 2023.[39] Together, the amending Acts created a new legislative scheme.

The first amending Act, the *Visa Conditions Act*, was enacted to: (i) facilitate the removal of members of the *NZYQ*-affected cohort from Australia once it became practicable; and (ii) manage those non-citizens until said removal eventuates (if ever).[40] Until *NZYQ*, once the Commonwealth identified a country that would accept a non-citizen that it had a statutory duty to remove from Australia, it could effectuate that removal as it had that non-citizen in immigration detention. As that was no longer the case, the new legislative scheme provided alternative means for the Commonwealth to track members of the *NZYQ*-affected cohort so they could be re-detained when a real prospect of their removal becoming practicable in the reasonably foreseeable future eventuated.

The *Visa Conditions Act* subjected the entire cohort to removal pending visas allowing them to remain in Australia.[41] Media reporting at the time suggested that cohort members had been released from immigration detention both with and without bridging visas.[42] The Act inserted a new section into the *Migration Act* that ceased, by operation of law, any removal pending visas that cohort members were on before the section came into effect and placed each of them on a new such visa.[43] Further, by operation of law, the *Visa Conditions Act* imposed, with each removal pending visa, several mandatory conditions, the majority of which were introduced by the Act specifically for the *NZYQ*-affected cohort.[44] As soon as the Act came into force, cohort members were immediately required to comply with 21 different visa conditions.[45] These conditions enabled the Commonwealth to track a non-citizen's movements and financial circumstances to facilitate their re-detention, the first object of the Act.

However, given that the *NZYQ*-affected cohort had no real prospect of removal from Australia in the reasonably foreseeable future, the second object of the *Visa Conditions Act* was managing the cohort until that real prospect eventuated (if ever). The Government was largely concerned by the potential of cohort members to threaten community safety, particularly given that 144 of the 149 members had served criminal sentences for previous convictions for serious offences, including murder, attempted murder, sexual offences, domestic violence, people smuggling, kidnapping, serious drug offending, and armed robbery.[46] NZYQ himself had

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38 *Serious Offenders Act* (n 5).

39 Ibid s 2; Paul Karp, 'Labor's Preventive Detention Regime Passes Senate as Third Freed Immigration Detainee Arrested', *The Guardian* (online, 5 December 2023) <https://www.theguardian.com/australia-news/2023/dec/05/immigration-detention-detainee-arrested-dandenong-breached-bail>.

40 Explanatory Memorandum (n 4) 2, 4–5.

41 *Migration Act* (n 3) s 76A(5)(b), as inserted by *Visa Conditions Act* (n 5) sch 1.

42 Stephanie Borys, Detainees Released without Visas after High Court Decision in Immigration Revelation', *ABC News* (online, 15 November 2023) <https://www.abc.net.au/news/2023-11-15/detainees-released-without-visas-after-high-court-decision/103107738>.

43 *Migration Act* (n 3) s 76A, as inserted by *Visa Conditions Act* (n 5) sch 1.

44 *Migration Act* (n 3) s 76A(5)(c), as inserted by *Visa Conditions Act* (n 5) sch 1.

45 *Migration Regulations 1994* (Cth) sch 2 cl 070.612A ('*Migration Regulations*'); *Visa Conditions Act* (n 5) sch 2 item 13.

46 Department of Home Affairs (Cth) (n 32) 10.

pleaded guilty to a sexual offence against a child.[47] After completing his criminal sentence, he was placed in immigration detention as his conviction had persuaded the relevant delegate that he posed a danger to the community and, thus, to deny his application for a protection visa.[48] This safety concern largely motivated the enactment of the second amending Act, the *Serious Offenders Act*. Its objective was to strengthen relevant migration laws in response to *NZYQ* to keep the community safe.[49] It contained new offences for breaching certain mandatory visa conditions. Together the amending Acts introduced six criminal offences for such breaches, the maximum penalty for all offences being five years' imprisonment, 300 penalty units ($93,900 at the time of the Acts' enactments), or both.[50]

The only avenue available to non-citizens to remove any condition is to apply for a new less onerous removal pending visa without that condition.[51] The Minister of Immigration would need to be satisfied that said condition was not reasonably necessary for protecting any part of the Australian community.[52] This ministerial decision was not subject to procedural fairness requirements.[53]

It should be noted that discussion of the *Serious Offenders Act* in this comment is limited to migration law. The Act amended other Commonwealth legislation to introduce a Community Safety Order ('CSO') Scheme under which non-citizens falling within the *NZYQ*-affected cohort who have committed serious violent or sexual offences may be re-detained or placed under additional surveillance if the Commonwealth satisfies a court that such action is necessary to protect the community.[54] This scheme is analogous to existing legislative schemes at the Commonwealth and State level that have already been the subject of a significant amount of discussion.[55] However, the application of the CSO Scheme is limited to non-citizens falling within the *NZYQ*-affected cohort.

Unlike the removal pending visas, the CSO Scheme does not apply to the whole cohort due to their immigration status, but rather to individual non-citizens due to the nature of their prior criminal offending. Additionally, the Scheme likely does not offend the constitutional limitation recognised in *Lim*. As the High Court stated in *NZYQ*, the decision did not 'prevent detention of [NZYQ] on some other applicable statutory basis, such as under a law providing for preventive detention of a child sex offender who presents an unacceptable risk of reoffending if released from custody'.[56] In contrast, the High Court held a year later in *YBFZ* that the application of the removal pending visas to a cohort member was unconstitutional.

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47 *NZYQ* (n 1) 146 [2].
48 Ibid 146 [2]–[3].
49 Explanatory Memorandum, Migration Amendment (Bridging Visas Conditions and Other Measures) Bill 2023 (Cth) 2–3.
50 *Migration Act* (n 3) ss 76B, 76C, 76D, 76DAA, 76DAB, 76DAC, as inserted by *Visa Conditions Act* (n 5) sch 1 and *Serious Offenders Act* (n 5) sch 1; *Crimes (Amount of Penalty Unit) Instrument 2023* (Cth) ss 2, 5.
51 *Migration Act* (n 3) ss 76E(1), (4), as inserted by *Visa Conditions Act* (n 5) sch 1.
52 *Migration Act* (n 3) s 76E(4), as inserted by *Visa Conditions Act* (n 5) sch 1.
53 *Migration Act* (n 3) s 76E(2), as inserted by *Visa Conditions Act* (n 5) sch 1.
54 *Serious Offenders Act* (n 5) sch 2.
55 See, eg, Madeleine McNeil and Ashwini Ravindran, 'Innocent until Predicted Guilty: *Garlett v Western Australia* (2022) 404 ALR 182' (2023) 44(1) *Adelaide Law Review* 662.
56 *NZYQ* (n 1) 166 [72].

C YBFZ *and the Validity of the Amending Acts*

The plaintiff in *YBFZ* was a stateless alien released from immigration detention following *NZYQ* and placed on a series of removal pending visas following an assessment by the Department of Home Affairs that there was no real prospect of his removal becoming practicable in the reasonably foreseeable future.[57] All these visas included conditions requiring him to: (i) remain at a notified address for eight-hour periods ('the curfew condition'); and (ii) constantly wear an electronic device that could determine and monitor his location ('the monitoring condition').[58] YBFZ unsuccessfully applied to the Minster to reissue a removal pending visa without these conditions.[59] Having exhausted all avenues available to him under the amending Acts to remove these visa conditions, YBFZ successfully challenged their validity; a majority of the High Court ruled in November 2024 that the visa conditions infringed Ch III of the *Australian Constitution*.[60]

The plurality in *YBFZ*, consisting of Gageler CJ, Gordon, Gleeson and Jagot JJ, held that the constitutional limitation applied in *NZYQ* is not confined to its original application in *Lim* to involuntary detention; instead, any exercise of Commonwealth power characterised as *punishment* may only exist as an incident of the exclusively judicial function of adjudging and punishing criminal guilt ('the *Lim* principle').[61] The *Constitution* vests the power to order such punishment exclusively in the Judiciary, not the Executive.[62] To ascertain which involuntary hardships administered by the Executive infringe Ch III, the plurality asked a single question of characterisation of whether the hardship is 'properly characterised as punitive and therefore as exclusively judicial'.[63] The hardship will be properly characterised as punitive if: (i) its character is prima facie punitive; and (ii) it is not reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.[64] The plurality characterised the curfew and monitoring conditions as punishment as they were: (i) prima facie punitive; and (ii) lacked a legitimate non-punitive purpose to displace that character.[65]

This *Lim* principle is derived from the fundamental principle that the exercise of an exclusively judicial function other than by the Judiciary contravenes Ch III.[66] However, whether by the legislative enactment of s 76A of the *Migration Act* or administrative action under s 76E, YBFZ and other members of the *NZYQ*-affected cohort were made subject to the curfew and monitoring conditions by extra-judicial mechanisms. The courts' only role under the amending Acts was judicially

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57 *YBFZ* (n 6) 16 [39]–[43] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

58 Ibid 13–14 [26], 14–15 [30], 16 [42]–[43] (Gageler CJ, Gordon, Gleeson and Jagot JJ), citing *Migration Regulations* (n 45) sch 2 cl 070.612A.

59 *YBFZ* (n 6) 16–17 [44] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

60 Ibid 9 [4]–[5] (Gageler CJ, Gordon, Gleeson and Jagot JJ), 43 [170]–[171] (Edelman J).

61 Ibid 12 [17], quoting *Lim* (n 16) 27 (Brennan, Deane and Dawson JJ).

62 *YBFZ* (n 6) 9 [6], 12 [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

63 Ibid 12 [16], quoting *Jones v Commonwealth* (2023) 280 CLR 62, 82 [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ)). See also *YBFZ* (n 6) 54 [227]–[228], 55–6 [237]–[239] (Beech-Jones J).

64 *YBFZ* (n 6) 12 [16]–[18] (Gageler CJ, Gordon, Gleeson and Jagot JJ), 55–6 [237]–[239], 59 [251] (Beech-Jones J).

65 Ibid 23 [83] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

66 See, eg, *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

reviewing ministerial decisions to grant new visas or to enforce criminal sanctions for breaches of visa conditions. As the two visa conditions had been imposed on the cohort without judicial order, they were invalid.

III Analysis

Within a year of *NZYQ,* the two amending Acts were enacted in response and had been ruled partially unconstitutional in *YBFZ*. In this Part, I employ the Acts to illustrate: (A) the unique amenability of aliens such as members of the *NZYQ*-affected cohort to Commonwealth legislative power; and (B) the effect of the *Lim* principle on the exercise of this power to constrain the liberty of aliens.

A *The Amenability of Aliens to Commonwealth Legislative Power*

NZYQ and YBFZ were not just non-citizens at the time of their hearings; they were aliens. Alienage is conceptually distinct from a lack of statutory citizenship as the Australian Parliament lacks legislative power under the *Constitution* to characterise a person as an alien if they do not meet the ordinary understanding of the word.[67] In reality, however, most non-citizens are aliens,[68] and are subject to the Commonwealth's powers with respect to aliens.

The fundamental difference between aliens and non-aliens under the *Australian Constitution* lies in the former's vulnerability to exclusion or deportation from Australia by the Commonwealth without contravening Ch III.[69] The power to remove aliens in s 198 of the *Migration Act* is incidental to the Commonwealth's sovereignty over its territory.[70] Post-*NZYQ*, the Commonwealth is empowered to detain aliens to remove them from Australia,[71] so long as there exists a real prospect of that removal becoming practicable in the reasonably foreseeable future.[72] Such a power does not exist for non-aliens.

An alien's status, rights, and immunities differ from those of non-aliens in other ways. For example, those aliens who are non-citizens may have distinct rights in the employment market or marriage rights. Most of these differences are products of statute. As the *Constitution* empowers the Australian Parliament to make laws with respect to 'naturalization and aliens',[73] Parliament has broad discretion when legislating aliens' interests only fettered by constitutional limitations, such as the *Lim* principle.

The breadth of the Commonwealth's legislative power is not itself unique to aliens. Through the High Court's broad readings of the heads of power, the modern Commonwealth regulates nearly every facet of the lives of aliens and non-aliens

67 See, eg, *Pochi v Macphee* (1982) 151 CLR 101, 109–10 (Gibbs CJ).
68 Cf *Love v Commonwealth* (2020) 270 CLR 152.
69 *NZYQ* (n 1) 154 [29], quoting *Lim* (n 16) 29 (Brennan, Deane, and Dawson JJ).
70 *Lim* (n 16) 29 (Brennan, Deane, and Dawson JJ).
71 Ibid 30–2 (Brennan, Deane, and Dawson JJ).
72 *NZYQ* (n 1) 158 [44]–[45] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).
73 *Australian Constitution* s 51(xix).

alike.[74] This is at least partially driven by the trust placed by the *Australian Constitution* in the political process, not the courts, to hold the government accountable, fashion appropriate legislation, and curb abuses of power. The *Constitution* accordingly provides for a robust democratic system of government chosen by 'the people'.[75] However, with the limited exception of non-citizen British subjects who were registered Commonwealth electors in 1984, Commonwealth elected representatives are chosen exclusively by non-aliens.[76] As Deane J wrote in *Cunliffe v Commonwealth*, while 'an alien [in Australia] enjoys the protection of the ordinary law, including the protection of some of the *Constitution's* guarantees, directives and prohibitions, he or she *stands outside the people of the Commonwealth*'.[77] An alien is therefore amenable to legislation affecting their interests that they play no role in enacting. They are reliant on the electoral choices of non-aliens to influence government policies that affect them, but not non-aliens. The enactment of the amending Acts illustrates how this reliance plays out in practice. In this Part, I analyse: (1) the process by which members of the *NZYQ*-affected cohort were made subject to the removal pending visas; (2) the onerous conditions attached to those visas; and (3) the cumulative effect of this exercise of legislative power.

1 *The Imposition of Removal Pending Visas*

The corollary of the Commonwealth's power to exclude an alien from Australia is the power to issue visas stipulating the terms upon which the alien can enter and remain in Australia.[78] The Commonwealth often carves out different rights for an alien by attaching conditions to their visa. The legislative scheme that the amending Acts implemented was no different. Section 76A of the *Migration Act*, inserted by the *Visa Conditions Act*, imposed unique visa conditions on aliens in the *NZYQ*-affected cohort by simultaneously: (i) ceasing a prior existing visa of the alien, irrespective of whether it had any conditions attached; and (ii) placing them on a new removal pending visa with 21 mandatory conditions. These two steps were executed by operation of law and without an application from either the alien concerned or the Commonwealth.

Section 76A is the only such decision by operation of law in the *Migration Act*. It lacked the usual routes for administrative review available under the Act. Judicial review was unavailable despite the effect on the alien's interests as the imposition of the new removal pending visa did not constitute a decision under an enactment; the enactment was the decision.[79] It was not subject to requirements of procedural fairness. Merits review was unavailable. As *YBFZ* demonstrated, the only redress available to an alien subject to a removal pending visa with the mandatory conditions was: (i) satisfying the Minister that the conditions sought to be removed

74 See, eg, *Victoria v Commonwealth* (1971) 122 CLR 353, 396–7 (Windeyer J).
75 *Australian Constitution* (n 73) ss 7, 24.
76 *Commonwealth Electoral Act 1918* (Cth) s 93.
77 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 335–6 (emphasis added) (citations omitted).
78 See, eg, *Lim* (n 16) 25–6 (Brennan, Deane and Dawson JJ).
79 *Australian Constitution* (n 73) ss 75(iii), (v); *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1) (definition of 'enactment'); *Griffith University v Tang* (2005) 221 CLR 99, 130–1 [89] (Gummow, Callinan and Heydon JJ).

were not reasonably necessary for the protection of any part of the Australian community under s 76E; or (ii) challenging the constitutional validity of s 76A. If an alien's application under the former option failed, it was not subject to procedural fairness requirements, in contrast to other immigration decisions.[80]

Not all decisions under the *Migration Act* require procedural fairness: for example, the cancellation of an alien's visa under s 501.[81] This section requires that the Minister consider a visa-holder's character and decide to cancel their visa if satisfied that they are not of good character. Despite this discretion, the Minister is required by s 501(3A) to decide to cancel the visa if the visa-holder is currently serving a criminal sentence and either: (i) committed a child sexual offence; or (ii) has a 'substantial criminal record'.[82] This includes the visa-holder having been sentenced to more than 12 months' imprisonment for any offence.[83] Section 501(3A) converts visa-holders from 'lawful non-citizens' to 'unlawful non-citizens', thereby enlivening Commonwealth officers' duty to detain them and remove them from Australia as soon as reasonably practicable.[84] However, despite the harsh consequences of such a decision, there are more routes available to aliens to challenge it than the imposition of a removal pending visa by s 76A. Unlike s 76A, a mandatory visa cancellation under s 501(3A) is a decision made under an enactment and is thus amenable to judicial review, even if judges cannot consider procedural fairness.

Similar to the newly introduced s 76E, s 501CA provides an opportunity for an alien to satisfy the Minister that adverse action should not be taken against them. Section 501CA is enlivened if a visa is cancelled under s 501(3A).[85] The Minister is required to invite the visa-holder to make representations as to their character. If the Minister is satisfied that despite the visa-holder's criminal conviction(s) that enlivened the mandatory cancellation, they are of good character, the Minister may decide to revoke the cancellation, thereby reinstating their visa. Unlike a decision made under s 76E to issue a new removal pending visa, the decision to revoke a mandatory visa cancellation is not amenable to merits review.[86] Despite this difference, the process by which the amending Acts made aliens subject to new removal pending visas is analogous to the sections of the *Migration Act* mandating the cancellation of visas for aliens with substantial criminal records. The former, however, was distinct as it: (i) was self-executing, thus lacking judicial oversight; (ii) was enlivened by aliens' immigration status, not their criminal record; and (iii) could result in future criminal liability.

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80 *Migration Act* (n 3) ss 76E(2), 338(4)(c).

81 Ibid s 501(5), discussed in *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582, 592–3 [10] (Kiefel CJ, Keane, Gordon and Steward JJ) ('*Plaintiff M1/2021*').

82 *Migration Act* (n 3) s 501(7).

83 Ibid s 501(7)(c).

84 Ibid ss 189, 198, discussed in *Plaintiff M1/2021* (n 81) 593–4 [12]–[13] (Kiefel CJ, Keane, Gordon and Steward JJ).

85 *Migration Act* (n 3) s 501CA(1), discussed in *Plaintiff M1/2021* (n 81) 594 [14] (Kiefel CJ, Keane, Gordon and Steward JJ).

86 *Migration Act* (n 3) s 338(4)(c).

2 *Criminal Liability for Breaching Visa Conditions*

Aliens subject to removal pending visas would be particularly incentivised to challenge the imposition of certain onerous visa conditions, breaches of which constitute criminal offences with a maximum penalty of five years' imprisonment and a $93,900 penalty, and a mandatory minimum penalty of one year's imprisonment.[87] These conditions included: (i) the curfew condition;[88] (ii) the monitoring condition;[89] and (iii) a condition requiring an alien to engage with the Department of Home Affairs by notifying, reporting to, or attending it in specified ways at specified times and places.[90]

As noted above, the *Visa Conditions Act* inserted these three conditions into the *Migration Act* to specifically apply to the *NZYQ*-affected cohort.[91] Cohort members were suddenly required to comply with these onerous conditions as a result of their immigration status. Analogous conditions with analogous penalties for breaches exist under other legislative schemes that may apply to other non-citizens. The difference is that the conditions attached to a removal pending visa apply not due to previous criminal offending, but because of the Commonwealth's inability to remove the person from Australia. Some cohort members caught by the legislative scheme lacked a criminal record. All were burdened with the onus of proving they had reasonable excuses for even slight breaches of these conditions to avoid criminal liability.[92] The cumulative application of these conditions to an alien restricts their liberty. In Part III(B), I discuss the constitutionality of two of the 21 conditions. However, regardless of whether an alien can be subjected to this legislative scheme, there is a normative question of whether they should be.

3 *The Exercise of Commonwealth Legislative Power*

Under Australia's system of government, non-aliens decide through elected representatives how the Commonwealth should treat aliens. From one perspective, unlawful non-citizens chose to subject themselves to the exercise of this legislative power by entering Australia without a visa. This sentiment was recently reflected by the High Court's 2022 decision in *SDCV v Director-General of Security* ('*SDCV*'), where it ruled that there was no practical injustice in the Commonwealth not providing adverse security information to a migrant because he had made choices to potentially expose himself to a decision based on such information, particularly his decision to seek the privilege of a visa.[93] *SDCV* suggests there may be no practical injustice inflicted by imposing on an alien a removal pending visa that bears all the

87 Ibid s 76DA.
88 Ibid s 76C; *Migration Regulations* (n 45) sch 8 item 8620.
89 *Migration Act* (n 3) ss 76D; *Migration Regulations* (n 45) sch 8 item 8621.
90 *Migration Act* (n 3) ss 76B.
91 See above n 44 and accompanying text.
92 *Migration Act* (n 3) ss 76B(2), 76C(2), 76D(6).
93 *SDCV v Director-General of Security* (2022) 277 CLR 241, 254 [12] (Kiefel CJ, Keane and Gleeson JJ) ('*SDCV*'). The High Court recently affirmed *SDCV* in *MJZP v Director-General of Security* (2025) 99 ALJR 1108, 1111 [5], 1112–13 [12] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

mandatory conditions because it is the result of the choice of the alien whose interests were affected to be subject to the legislative scheme.

From another perspective, all non-citizens are subject to removal from Australia, and it is not desirable for the *NZYQ*-affected cohort to receive different treatment because that removal cannot be effectuated. Creating criminal offences for breaches of certain visa conditions promotes compliance where the incentive of avoiding deportation for breaches has been negated by *NZYQ*. Compliance may be particularly desirable where the condition is designed to protect victims of crimes that cohort members have committed.[94] The community safety concerns that drove the enactment of the amending Acts may be legitimised by the fact that several cohort members have reoffended.[95]

This comment does not opine whether any or all unlawful non-citizens in the *NZYQ*-affected cohort should be subject to onerous visa conditions. Rather, it draws attention to the process by which the Australian Parliament, by enacting s 76A, subjected cohort members to conditions as a consequence of their immigration status that they may face imprisonment for breaching. The Minister and their delegates are better placed to determine what conditions (if any) cohort members require attached to their visas based on their individual circumstances. While s 76E allows for ministerial discretion to make such determinations if cohort members apply for new removal pending visas, they are still subject to every condition unless and until that discretion is exercised. Regardless, courts should have retained the power to supervise the process by which the conditions were initially imposed.

The two amending Acts were rushed through Parliament, suggesting a clear mandate for their enactment. It is, however, unclear that non-aliens endorse or are aware of the Commonwealth's power to instantaneously affect a group's interests and deny them procedural fairness by virtue of the status of the group members. It is questionable whether non-aliens would authorise Commonwealth power to be exercised in this manner to affect their own interests, particularly to restrict their liberty. The amending Acts typify the unique amenability of an alien to Commonwealth legislative power. Their interests are often shaped by statutes whose enactment they cannot directly influence and whose operation they have limited options for challenging. The result is that, except for constitutional limitations such as the *Lim* principle, aliens are amenable to broad Commonwealth legislative power while in Australia. The application of the *Lim* principle, however, appears to be expanding.

B *Constitutional Limitations on Extra-Judicial Punishment*

The *Lim* principle primarily developed through a series of High Court decisions concerning the constitutionality of various forms of detention, such as indefinite detention. Before *NZYQ*, the High Court had extended the principle beyond involuntary detention in 2022, when it ruled in *Alexander v Minister of Home Affairs*

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94 *Migration Act* (n 3) ss 76DAB, 76DAC.

95 Paul Karp, 'Two Immigration Detainees Charged after Release due to High Court Ruling', *The Guardian* (online, 4 December 2023) <https://www.theguardian.com/australia-news/2023/dec/04/two-immigration-detainees-charged-after-release-due-to-high-court-ruling-ntwnfb>.

that Ch III precluded the Commonwealth from stripping a person's citizenship.[96] In *YBFZ*, the Court ruled that the curfew and monitoring conditions infringed Ch III. As previously mentioned, the plurality in *YBFZ* held that the *Lim* principle applies to invalidate any exercise of executive power properly characterised as punitive and that therefore only exists as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[97] The curfew and monitoring conditions were properly characterised as punitive as (1) they had a prima facie punitive character and (2) this character was not reasonably capable of being seen to be appropriate and adapted to a legitimate and non-punitive purpose.[98] Imposing these visa conditions on the *NZYQ*-affected cohort thus constituted an unconstitutional exercise of executive power. In this Part, I analyse the plurality's application of steps (1) and (2) to explicate the latest expansion of the *Lim* principle, before (3) deriving its implications for the constitutional protection of liberty.

1 *Prima Facie Characterisation*

The plurality in *YBFZ* noted that certain laws will have an unassailable default character as punitive, particularly laws providing for involuntary detention.[99] If not punitive by default, their Honours went on to say that the amending Acts would still be prima facie punitive if they materially interfered with liberty or bodily integrity of YBFZ and other members of the *NZYQ*-affected cohort.[100] Not all interferences with individual liberty or bodily integrity, however, engage the *Lim* principle;[101] the plurality's analysis of the curfew and monitoring conditions illuminate which interferences are unconstitutional.

The curfew condition required that YBFZ remain at a notified address between 10pm and 6am the next morning, or another eight-hour period as specified by the Minister, every day for 12 months.[102] While he could alter his notified address, he had to provide the Minister with the requisite notice.[103] Non-compliance without a reasonable excuse attracted a mandatory minimum sentence of one year's imprisonment, and a maximum of five years' imprisonment, and a financial penalty.[104] The plurality held that the 'essential character' of this condition was 'the confinement of [YBFZ's] movement, every night, to a single location',[105] which

96 *Alexander v Minister of Home Affairs* (2022) 276 CLR 336, 349 [3] (Kiefel CJ, Keane and Gleeson JJ), 376–7 [98] (Gageler J).

97 *YBFZ* (n 6) 12 [16]–[18]. See also *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1, 16 [35] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

98 *YBFZ* (n 6) 12 [16]–[18] (Gageler CJ, Gordon, Gleeson and Jagot JJ), 55–6 [237]–[239], 59 [251] (Beech-Jones J).

99 Ibid 12 [16]. See also *NZYQ* (n 1) 157 [40] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ), citing *Lim* (n 16) 27–8 (Brennan, Deane and Dawson JJ).

100 *YBFZ* (n 6) 12 [18].

101 Ibid 11–12 [15] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

102 Ibid 17 [48] (Gageler CJ, Gordon, Gleeson and Jagot JJ) discussing *Migration Regulations* (n 45) sch 8 item 8620.

103 *Migration Regulations* (n 45) sch 8 item 8620(3), discussed in *YBFZ* (n 6) 17 [48]] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

104 *Migration Act* (n 3) ss 76C, 76DA, discussed in *YBFZ* (n 6) 17–18 [50]–[51] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

105 *YBFZ* (n 6) 17 [49].

further constrained his movements for the other two-thirds of the day.[106] Their Honours characterised the condition as prima facie punitive because it involved 'material and relatively long-term' deprivation of his liberty.[107]

The monitoring condition required that YBFZ for 12 months constantly wore an electronic monitoring device that would appear to other persons as an ankle cuff.[108] Non-compliance without a reasonable excuse attracted the same criminal sanctions as the curfew condition.[109] The plurality found that the effects of the operation of the condition on YBFZ's bodily integrity were 'material and relatively long-term';[110] he would suffer 'a real physical and a real psychological and emotional burden' as he would always be aware of the device's physical presence and surveillance,[111] it required three hours of daily charging, and it affected his choice of clothing for fear of stigmatisation.[112] Their Honours also noted that installing the device would otherwise be a tort of trespass to the person.[113] This was compounded by an encroachment on personal liberty as the charging requirement limited the YBFZ's mobility, and his movements were limited by the constant tracking and stigmas associated with the ankle cuff.[114] The monitoring condition was prima facie punitive.[115]

The plurality eschewed generalised statements about the validity of categories of executive action, such as invalidating all curfews, and comparisons to other executive actions, particularly detention.[116] Their Honours instead extracted both the legal and practical operation of the amending Acts on YBFZ's behaviour and psychological state to ascertain the law's prima facie character. As their analysis of the operation of the monitoring condition especially demonstrated, a broad range of practical effects, such as the impact on his choice of clothing or consciousness of surveillance, are relevant to characterisation. Parts of the amending Acts were prima facie punitive as their legal and practical effects caused a material and relatively long-term restraint on liberty and bodily integrity; they infringed Ch III of the *Constitution* unless that character was displaced.

2 *A Legitimate and Non-Punitive Purpose*

The plurality in *YBFZ* held that if an executive exercise of power bears a prima facie punitive character, the power must have a legitimate and non-punitive purpose and be reasonably appropriate and adapted to achieving that purpose to escape that characterisation and not infringe Ch III.[117] 'Legitimate' means that the power is

106 Ibid 18 [51].
107 Ibid 18 [52].
108 Ibid 18–19 [56], 19 [58] (Gageler CJ, Gordon, Gleeson and Jagot JJ), discussing *Migration Regulations* (n 45) sch 8 item 8621.
109 *Migration Act* (n 3) ss 76B, 76D, 76DA, discussed in *YBFZ* (n 6) 19 [59], 19 [61] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
110 *YBFZ* (n 6) 19 [60].
111 Ibid.
112 Ibid 19 [59]–[60].
113 Ibid 19 [57].
114 Ibid 19–20 [61]–[62] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
115 Ibid 20 [63] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
116 Ibid 17 [46]–[47], 18 [55].
117 Ibid 12 [18], 20 [64].

compatible with the constitutionally prescribed system of government and 'non-punitive' means that it is not directed at adjudging and punishing criminal guilt.[118] The imposition of the curfew and monitoring conditions, however, lacked a legitimate non-punitive purpose.

The plurality concluded that the purported purpose of imposing the curfew and monitoring conditions was 'the protection of any part of the Australian community' as expressed in the amending Acts.[119] While community protection has been recognised as a legitimate and non-punitive purpose by the High Court before,[120] the amending Acts were distinct: a ministerial decision under s 76E of the *Migration Act* to issue a new removal pending visa without the curfew and monitoring conditions was not calibrated to protecting the Australian community from a particular nature, degree, or extent of harm.[121] The plurality noted that the harm sought to be protected from need not even involve the commission of a criminal offence.[122] Their Honours thus concluded that the purported purpose was too elastic to be legitimate.[123] The prima facie punitive character of the curfew and monitoring conditions had not been displaced.

While the plurality's analysis focused on the administrative decision to place YBFZ on a removal pending visa with the curfew and monitoring conditions, it is worth remembering that the amending Acts deemed that all non-citizens in the *NZYQ*-affected cohort would be subject to removal pending visas bearing those conditions. The imposition of those conditions was similarly not tied to any particular risk of harm that each non-citizen posed to the Australian community. Rather, it was a consequence of their immigration status.

3 *The Expanded Application of Lim Principle*

The plurality in *YBFZ* stressed that not every interference with personal liberty will engage the *Lim* principle.[124] However, the category of interferences requiring justification is no longer closed. The invalidated curfew and monitoring conditions were prima facie punitive because they respectively restricted YBFZ's liberty and bodily integrity materially and for a relatively lengthy period. This does not mean that a less restrictive curfew or monitoring condition would necessarily engage the *Lim* principle*,* nor does it preclude another visa condition from requiring a legitimate and non-punitive purpose for validity. The assessment is on the materiality and length of each restriction.

The *Australian Constitution* was enacted without an express protection of liberty. However, with the expanded application of the *Lim* principle beyond detention, Ch III of the *Constitution* precludes the Commonwealth from exacting certain interferences with personal liberty that are prima facie punitive, such as

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118 Ibid 10 [8] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *NZYQ* (n 1) 157 [39]–[40].
119 *YBFZ* (n 6) 20 [65], 22 [76].
120 See, eg, *Garlett v Western Australia* (2022) 277 CLR 1, 24–5 [46] (Kiefel CJ, Keane and Steward JJ), 113 [313] (Gleeson J).
121 *YBFZ* (n 6) 20 [65], 22 [76] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
122 Ibid 23 [82].
123 Ibid 23 [81], 23 [83].
124 Ibid 9 [6], 11–12 [15].

imposing the curfew and monitoring conditions of the *NZYQ*-affected cohort. In effect, the Commonwealth would need to justify every extra-judicial exercise of power that sufficiently restricted liberty or bodily integrity to attract a prima facie punitive character by demonstrating reasonable necessity for a legitimate and non-punitive purpose. Without said justification, that restriction may only be enforced by an exercise of judicial power. Unlike exercises of legislative and executive power, such as s 76A and s 76E of the *Migration Act*, exercises of judicial power are accompanied by safeguards such as procedural fairness.[125] In this way, *YBFZ* signifies an expanding constitutional protection for the manner in which the Commonwealth can affect personal liberty.

The expansion of the *Lim* principle may have a normative effect on how Commonwealth statutes that affect liberty and bodily integrity are drafted. For example, ministerial discretion such as in s 76E or s 501CA of the *Migration Act* would need to be confined to be exercised in service of a legitimate and non-punitive purpose if it was prima facie punitive. When the Australian Parliament legislates to seriously restrict a person's liberty or bodily integrity, the imposition of restrictions should bear greater consideration and scrutiny than the rushed enactment of the amending Acts. However, the potential for invalidity and constitutional challenges was flagged at the time of the amending Acts' enactment.[126] Parliament's decision to nonetheless legislate suggests an appetite for statutes applying prima facie punitive hardships to aliens that may be invalidated. In this way, aliens may continue to be uniquely vulnerable to Commonwealth legislative power.

IV Conclusion

This comment leveraged the amending Acts to illustrate: (i) the amenability of aliens to Commonwealth legislative power, and (ii) how the *Lim* principle may invalidate certain exercises of that power. In further response to *NZYQ*, the Department of Home Affairs this year started resettling members of the *NZYQ*-affected cohort in Nauru.[127] As the migration policy continues to shift, attention needs to be paid to (i) new legislation uniquely applying to aliens and (ii) whether application of the *Lim* principle continues to expand to invalidate said legislation for constituting punishment. As *YBFZ* demonstrates, the extent of the Australian Parliament's power to enact statutes affecting personal liberty is actively being clarified by the courts.

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125 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354 [54] (French CJ).

126 See, eg, Michael Bradley, 'Government's NZYQ Migration Amendments are Unconstitutional — I'm Sure of It', *Crikey* (online, 23 November 2023) <https://www.crikey.com.au/2023/11/23/nzyq-migration-amendments-unconstitutional/>.

127 Tom Crowley and Olivia Caisley, 'Nauru to Take Non-Citizen NZYQ Cohort Freed from Immigration Detention', *ABC News* (online, 16 February 2025) <https://www.abc.net.au/news/2025-02-16/nauru-agrees-to-settle-group-of-nzyq-cohort/104942562>.