CAUSING A STIR: UNWANTED ALIENS AND THE CAULDRON OF CRIMMIGRATION CONTROLS POST-*NZYQ*

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This article explains how the momentous High Court decision in NZYQ v Minister for Immigration *(2023) 280 CLR 137 ('*NZYQ*'), that triggered the release into the community of around 350 'unlawful non-citizens' for whom removal from Australia was impracticable, prompted a succession of innovative and controversial legislative responses amidst political concerns about effective migration management and community safety. The article tracks and carefully critiques political and legislative responses to* NZYQ*, and other subsequent High Court decisions in* ASF17 v Commonwealth *(2024) 98 ALJR 782 and* YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs *(2024) 99 ALJR 1, to demonstrate that crimmigration law, policy and practice is, more than ever, deeply and problematically entrenched in Australia. The article uncovers precisely who the unwanted aliens – the targets of crimmigration – are, why political uproar ensued following the* NZYQ *ruling, and how criminal and immigration law have been stitched together in novel ways to form a unique crimmigration control regime in Australia.*

I INTRODUCTION

The connections between criminal law and immigration law, and intersection of crime prevention and immigration enforcement, have a long history in Australia.[1] As these legislative, administrative and law enforcement relationships have evolved recently, amidst political unease about the risks certain migrants pose, they have been understood and critically assessed through the lens of 'crimmigration'. Arguably, Australia's most symbolic crimmigration law and enforcement practice has been the mandatory and indefinite detention of non-citizens, even where there is no prospect of their release into the Australian

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1 See, eg, Mark Finnane and Andy Kaladelfos, 'Australia's Long History of Immigration Policing and the Criminal Law' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 19. See also Mark Finnane and Andy Kaladelfos, 'British Migrants, Criminality and Deportation: Shaping the Australian Post-War Approach' (2017) 45(2) *The Journal of Imperial and Commonwealth History* 339.

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community or their removal to another country; in short, immigration detention without foreseeable end.

That approach gained constitutional legitimacy in the notorious case of *Al-Kateb v Godwin* ('*Al-Kateb*').[2] That case was overturned in November 2023 when, in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*'),[3] the High Court of Australia ('HCA') decided that administrative detention was only constitutionally valid when 'reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.' For the Court in *NZYQ*, detention without foreseeable end could not be seen as relevantly *justified* by its supposed (legitimate and non-punitive) immigration-related purposes (namely, removal or visa processing).

Does the post-*NZYQ* demise of indefinite immigration detention signal a turning point in Australia's crimmigration approach — heralding the adoption of a more balanced and less punitive response to certain, intractable, cases where a non-citizen's removal from Australia is hard to achieve? Since *NZYQ*, the answer has proven to be a resounding 'no'. The momentous decision in *NZYQ* lit a political fire beneath a cauldron of legal renovations — a succession of speedy and radical legislative responses by the Australian Parliament amidst political uproar about 'crimmigrants' living in the community. These contemporary reforms offer a striking illustration of how criminal and immigration laws, procedures and practices intersect and quickly evolve to form a unique 'crimmigration control' regime. One that is designed to contain a sub-group of undesired non-citizens (that includes refugees and stateless persons) whose ongoing presence in Australia is regarded, politically, as an affront to the sovereign power and right of the state to determine admission and expulsion, and thereby control community membership.[4]

This article will track and critique political and legislative responses to *NZYQ* and subsequent HCA case law to demonstrate that crimmigration law, policy and practice is, more than ever, deeply and problematically, entrenched in Australia. This overarching claim is evidenced by, inter alia: security-focused political rhetoric; legislative borrowing from other contexts (such as counterterrorism); and, broad and severe immigration (visa) conditions buttressed by criminal sanctions for non-compliance — in short, a coalescence of immigration and criminal law designed to strictly manage the '*NZYQ* cohort'.

This article begins, in Part II, with a brief background on immigration detention and an introduction to the concept of crimmigration. It then proceeds, in Part III, with a descriptive overview and succinct discussion of the importance of HCA decisions in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*'),[5] *Al-Kateb* and *NZYQ* respectively, before continuing, in Part IV, to focus upon the political response to the ruling in *NZYQ* that signalled

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2 (2004) 219 CLR 562 ('*Al-Kateb*').

3 (2023) 280 CLR 137 ('*NZYQ*').

4 See, eg, *Robtelmes v Brenan* (1906) 4 CLR 395, 400 (Griffith CJ); *Ruddock v Vadarlis* (2001) 110 FCR 491, 542–3 (Black CJ).

5 (1992) 176 CLR 1 ('*Lim*').

the end of indefinite detention for *some* non-deportable non-citizens.[6] Part V provides an explanation and analysis of the two immediate legislative rejoinders to *NZYQ* which sought to impose stringent visa conditions on freed non-citizens coupled to exorbitant criminal penalties for non-compliance, and to impose a community safety order regime modelled upon federal counterterrorism, and state serious sexual offender, laws. Part VI examines how a third tranche of laws was drafted in anticipation of another case before the HCA in *ASF17 v Commonwealth* ('*ASF17*'),[7] a case dealing with the constitutional limits on detention in circumstances where a non-citizen refused to co-operate with their removal. Part VII shows how the imposition of punishing visa conditions on the '*NZYQ* cohort' was, subsequently, deemed invalid in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*YBFZ*').[8] This analysis segues into an examination of Parliament's two recent, heavy-handed, attempts to regulate non-deportable non-citizens. The latest legislative salvo reworks provisions authorising stringent visa conditions for the '*NZYQ* cohort', as well as providing new rules that permit the re-detention and removal of non-citizens to third countries with which Australia has a 'reception arrangement'. The article concludes by offering critical reflections upon the assorted and disturbing aspects of crimmigration controls geared towards the immobilisation and exclusion of unwanted non-citizens and towards countering HCA rulings protective of individual liberty.

II Background on Immigration Detention in Australia

The intermingling of criminal law and immigration law, and intersection of crime prevention and immigration enforcement, is well established in Australia. The state's use of criminal law in the service of migration control has a prolonged history. For example, from 1901 to 1994,[9] unapproved entry and presence in Australia was criminalised, with federal offences that were punishable by a court

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6 The subsequent decision in *ASF17 v Commonwealth* (2024) 98 ALJR 782 ('*ASF17*') revealed that for some uncooperative immigration detainees, indefinite detention remains a legal possibility. Relatedly, see *CZA19 v Commonwealth* (2025) 99 ALJR 650 ('*CZA19*'), where the High Court of Australia affirmed the validity of detention pending consideration of a visa application within a reasonable time. A 'reasonable time' may be a prolonged period; many months or several years, depending on the complexity of the visa matter.

7 *ASF17* (n 6).

8 (2024) 99 ALJR 1 ('*YBFZ*').

9 The *Migration Amendment Act 1992* (Cth) introduced mandatory detention of designated boat arrivals. The *Migration Reform Act 1992* (Cth), which commenced on 1 November 1993, introduced mandatory detention of *all* unlawful non-citizens.

ordered sentence of imprisonment and/or by liability to deportation.[10] Additionally, from 1920, deportation could compound criminal punishment with respect to an immigrant who, within three years of arriving in Australia, was convicted of an offence punishable by imprisonment for one year or longer.[11] Subsequently, the administrative 'removal' of non-citizens of 'bad character' (including, but not limited to, felonious non-citizens) has accelerated since the late 1990s, and markedly so in the last decade.[12]

The system of regulating unlawful aliens (qua 'non-citizen')[13] introduced by the *Migration Reform Act 1992* (Cth) deliberately decriminalised certain aspects of immigration control, preferring administrative regulation to promote the enforcement of immigration law. Accordingly, non-citizens seeking entry without prior permission, or those in Australia without a valid visa, are not liable to criminal punishment in the traditional sense, as retribution for wrongdoing: their unlawful entry or presence. Instead, they are subject to an administrative detention regime, legally identified as non-punitive, and vulnerable to removal.

Thus, non-citizens entering without a valid visa (eg unauthorised maritime arrivals) or within Australia without a valid visa (eg visa has expired or been cancelled) are liable to immigration detention due to their presence and unlawful status. The primary, legal, justification for *pre-admission* detention correlates to administrative processes permitting or enabling an entry (visa) application to be received, investigated and determined. For *pre-expulsion* detention, the principal rationale is to effectively facilitate the removal or deportation of unlawful non-citizens by making them available for expulsion.[14] Additionally, detention has, in fact, served other political purposes (general deterrence)[15] and ancillary purposes

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10 The legislative history is outlined in *Al-Kateb* (n 2) 598 [86] (Gummow J), 632 [201]–[202] (Hayne J). Persons falling within the class of 'prohibited immigrant' were criminalised under the *Immigration Restriction Act 1901* (Cth) s 7, and liable to imprisonment. This continued via the *Migration Act 1958* (Cth) s 27 ('*Migration Act*'), and eventually s 77.

11 *Immigration Act 1920* (Cth) s 7, inserting s 8A into the Principal Act: *Immigration Act 1901-1912* (Cth).

12 See, eg, Michael Grewcock, 'Reinventing "The Stain": Bad Character and Criminal Deportation in Contemporary Australia' in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2015) 121. Khanh Hoang, 'The Rise of Crimmigration in Australia: Importing Laws and Exporting Lives' in Kerry Carrington et al (eds), *The Palgrave Handbook of Criminology and the Global South* (Palgrave Macmillan, 2018) 797.

13 The word 'alien' in the *Australian Constitution* s 51(xix) had become synonymous with the word 'non-citizen', however the constitutional concept of alienage is distinct from the statutory concept of 'non-citizen', though they largely coincide: *Love v Commonwealth* (2020) 270 CLR 152.

14 See *NZYQ* (n 3) 154–5 [31]–[33], 158–9 [46], 160 [50] (The Court); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 231 [25] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

15 Particularly general deterrence with respect to maritime arrivals seeking asylum. See Sharon Pickering and Leanne Weber, 'New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers' (2014) 39(4) *Law and Social Inquiry* 1006. There is no evidence that detention centres reduce inflows of migrants or increase safety in local communities: see Sharry Aiken and Stephanie J Silverman, 'Decarceral Futures: Bridging Immigration and Prison Justice towards an Abolitionist Future' (2021) 25(2) *Citizenship Studies* 141, 145.

— segregation[16] and community protection[17] — that are objects of criminal punishment. Evidently, successive governments have used immigration detention laws and institutions as a risk management tool: by confining people, who are or might be dangerous, pending identity and health checks and security clearance, and by incapacitating flight risks and certain, risky, non-citizens whose presence in the Australian community is unwanted.

Notoriously, the policy and legal scheme of *mandatory* immigration detention has applied regardless of the characteristics of the detainee. The scheme has been indifferent to whether detention is strictly necessary and justifiable (or proportionate) in individual circumstances.[18] Detention is *indefinite* because 'there is no fixed chronological end point' and 'the person whose liberty is lost has no way of ascertaining when she or he might regain her or his freedom'.[19] Detention in custody of this kind infringes 'basic rights' known to the common law,[20] and has punishing and harmful impacts for detainees,[21] with social harms reverberating beyond those detained.[22] Though legally categorised as administrative and 'non-punitive',[23] immigration detention has a security focus and parallels the criminal justice system in key respects. As border criminologists, sociologists and socio-legal scholars have explained, it entails physical segregation routinely experienced as punishing by non-citizens, and its penal character is discernible through the architectural and surveillance features of detention centres and the security practices used (by private corporations) to

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16 *Commonwealth v AJL20* (2021) 273 CLR 43, 64 [25], 65 [28], 70 [44] (Kiefel CJ, Gageler, Keane and Steward JJ) ('*AJL20*'). The Court identified segregation as a legitimate purpose for detention pending receipt, investigation and determination of a visa application.

17 The investigation of visa applications entails (inter alia) the administration of public interest criteria pertaining to national security risks and character: see, eg, *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 ('*M47/2012*'). Thus, detention is used to prevent entry into the community pending security vetting and individual character assessments. Moreover, non-citizens refused entry or facing visa cancellation, on adverse security or character grounds, are typically detained prior to their exclusion from Australia on a precautionary basis, to incapacitate those who pose a danger to the community protection: see *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 348 [49]–[50] (Kiefel CJ, Bell, Keane and Edelman JJ) ('*Falzon*').

18 See *Al-Kateb* (n 2) 574–5 [12] (Gleeson CJ) describing the blunt application of immigration detention.

19 *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463, 495 [123] (Kenny and Mortimer JJ).

20 *YBFZ* (n 8) 11 [14] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

21 *Falzon* (n 17) 359 (Nettle J). See Trine Filges, Edith Montgomery and Marianne Kastrup, 'The Impact of Detention on the Health of Asylum Seekers: A Systematic Review' (2018) 28(4) *Research on Social Work Practice* 399.

22 Michelle Peterie (ed), *Immigration Detention and Social Harm: The Collateral Impacts of Migrant Incarceration* (Routledge, 2024). See also Lorena Rivas, 'A Safe Haven? Women's Experiences of Violence in Australian Immigration Detention' (2024) 26(3) *Punishment and Society* 547.

23 *Falzon* (n 17) 343 [29] (Kiefel CJ, Bell, Keane and Edelman JJ), 360 [96] (Nettle J), citing *Lim* (n 5). Equally, deportation is not regarded as punishment, or as 'additional punishment' following conviction for prior offending and imprisonment, notwithstanding it may be burdensome for people: *Falzon* (n 17) 347 [47] (Kiefel CJ, Bell, Keane and Edelman JJ), 358 [93] (Nettle J).

police detainees.[24] In these and other respects immigration detention is akin to prison[25] and should be recognised as such.[26] Equally, immigration detention is not subject to the same level of independent monitoring and judicial supervision that characterises the criminal justice system.[27]

A federal government-commissioned report, in 2020, discredited the immigration detention regime for unlawful non-citizens.[28] The report examined the regulatory framework governing immigration detention and found that the system was dysfunctional and failing to meet two key principles: that immigration status should be resolved as quickly as possible; and that people should be managed in the community pending status resolution, unless they pose a risk to the community. The report highlighted a significant number of detainees who remained in long-term detention[29] — a recurring concern.[30] Indeed, mandatory immigration detention laws and government policy have triggered a serious problem: an increasing number of complex 'intractable' cases involving lengthy, indefinite, detention for non-citizens (including refugees and stateless persons

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[24] See, eg, Mary Bosworth and Sarah Turnbull, 'Immigration, Detention, and the Expansion of Penal Power in the United Kingdom' in Keramet Reiter and Alexa Koening (eds), *Extreme Punishment: Comparative Studies in Detention, Incarceration and Solitary Confinement* (Palgrave Macmillan, 2015) 50; Michelle Peterie, 'Deprivation, Frustration and Trauma: Immigration Detention Centres as Prisons' (2018) 37(3) *Refugee Survey Quarterly* 279; Louise Boon-Kuo, 'The Private Harms of Detention: Why Serco's Violence is not Criminalised' (2024) 36(2) *Current Issues in Criminal Justice* 219.

[25] See Louise Boon-Kuo, 'Do Mobile Phone Bans Show that Immigration Detention is Becoming More Like Prison?' (2023) 32(1) *Griffith Law Review* 62. A key difference, however, is that the rehabilitation of the detainee is not a goal of immigration detention and so there are typically no infrastructure or rehabilitation programs available. Another key difference is that a prison sentence is, generally, set for a specified term not an indefinite period.

[26] Cf Giuseppe Campesi, 'Genealogies of Immigration Detention: Migration Control and the Shifting Boundaries between the "Penal" and the "Preventive" State' (2020) 29(4) *Social and Legal Studies* 527.

[27] Aside from implied constitutional constraints, the courts have a limited capacity to review the administration (duration and conditions) of detention. The Immigration Ombudsman's statutory review powers are limited to making *non-binding* recommendations to the Minister about the status of people held longer than two years, an unacceptably long period before detention is subject to external oversight: *Migration Act* (n 10) ss 486N–486O. Equally, the Australian Human Rights Commission investigates complaints and reports on immigration detention facilities to promote compliance with international human rights standards but lacks coercive remedial powers vis-a-vis the executive.

[28] Robert Cornall, *Report to the Secretary for Home Affairs and the Commissioner of the Australian Border Force* (Independent Detention Case Review, March 2020) <https://www.homeaffairs.gov.au/foi/files/2023/fa-230300029-document-released.PDF>. The Report noted that there was no effective strategy to remove long-term detainees who had no pathway to a visa: at 8.

[29] Ibid 49. Detainees who have been held in detention for more than a total of 730 days or two years are categorised as long-term detainees. The Cornall Report recommended, inter alia, issuing short-term visas with appropriate conditions (and ongoing supervision) to low or medium risk detainees, and consideration of whether high-risk non-citizens be kept in gaol upon completion of their prison sentence pending removal: at 10.

[30] See, eg, Joint Standing Committee on Migration, Parliament of Australia, *Immigration Detention in Australia: A New Beginning* (Report, December 2008); Office of the Commonwealth Ombudsman, *2022–23 Annual Report* (Report, October 2023) 16.

owed protection obligations under international law) who 'fail' to satisfy visa preconditions on criminal or adverse character grounds but face removal barriers for legal, medical or other valid reasons.[31] The mandatory indefinite detention of unlawful non-citizens whose cases reach an impasse breaches human rights,[32] but was deemed constitutionally valid until the HCA ruling in *NZYQ*.[33]

A *Crimmigration as a Conceptual Framework*

The momentous decision in *NZYQ* and its immediate consequences initiated political pandemonium and a succession of speedy legislative responses by the Australian Parliament. These contemporary reforms offer a striking illustration of how criminal and immigration laws, procedures and practices intersect to form a unique 'crimmigration control' regime. There is no accepted definition of crimmigration, but it is widely accepted and appreciated as providing a 'powerful and systematic' conceptual framework for the critical examination of how states utilise criminal law and punishment for immigration enforcement purposes, and how states use immigration law and its enforcement for criminal justice purposes.[34]

Legal scholar, Juliet Stumpf, coined the neologism and mapped the geography of crimmigration in the United States as she examined the merger between immigration law and criminal law,[35] critically describing and theorising the legal, procedural and institutional confluences of those two public law domains. Stumpf's legal scholarship has encouraged and informed an extensive body of crimmigration law literature in the US, Canada, Europe and Australia, notably, which has progressively revealed that the crimmigration landscape (institutions, laws and policies) looks decidedly different across nations. As Ben Bowling and Sophie Westenra neatly explained, crimmigration law 'represents the distinct laws and legal procedures that states employ as a means of exerting

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31 See also Department of Home Affairs (Cth), *Alternatives to Held Detention: Phase 1 Program Report* (Report, 1 July 2022) <https://www.homeaffairs.gov.au/foi/files/2023/fa-230200887-document-released.PDF>.

32 See generally Matthew T Stubbs, 'Arbitrary Detention in Australia: Detention of Unlawful Non-Citizens under the Migration Act 1958 (Cth)' (2006) 25 *Australian Year Book of International Law* 273.

33 *NZYQ* (n 3). See Anne Twomey (ed), 'NZYQ v Minister for Immigration and Its Legislative Progeny' (2024) 98(2) *Australian Law Journal* 103.

34 Leanne Weber and Jude McCulloch, 'Penal Power and Border Control: Which Thesis? Sovereignty, governmentality or the pre-emptive state?' (2019) 21(4) *Punishment and Society* 496, 500.

35 Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power' (2006) 56(2) *American University Law Review* 367; Juliet Stumpf, 'Crimmigration: Encountering the Leviathan' in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2015) 237. See also Jennifer M Chacón, 'Managing Migration through Crime' (2009) 109 *Columbia Law Review Sidebar* 135; César Cuauhtémoc García Hernández, 'Creating Crimmigration' [2013] (6) *Brigham Young University Law Review* 1457; César Cuauhtémoc García Hernández, 'Deconstructing Crimmigration' (2018) 52 *University of California Davis Law Review* 197.

control over a sector of our global society'.[36] It is primarily, but not exclusively, a response to non-citizens who are perceived as a threat to community safety, national security, and/or the efficacy of immigration controls. The crimmigration literature is accompanied by the border criminology literature which offers wider, critical, perspectives on the immigration-penality nexus;[37] critically exploring the admixture of legal, political, cultural and social drivers fostering the convergence of crime prevention and effective border controls.[38]

Crimmigration has been described, in Australia, as the 'complex intersections between criminal law, immigration law and punishment',[39] and as 'the interlacing of criminal and immigration laws, processes, and enforcement practices'.[40] Crimmigration is best understood as bi-directional: it entails the criminalisation of immigration (or transfer of criminal law into the immigration realm) through the creation or intensification of criminal sanctions for particular immigration violations;[41] and, conversely, it involves the governing of felonious, risky, or otherwise rejected, non-citizens through immigration laws and procedures, including via broad visa cancellation provisions and administrative detention-removal powers.[42] In Australia, the 'intertwined regime of "crimmigration" law'[43] is also evidenced via immigration officers' police-like powers,[44] citizenship revocation laws, and in the realm of criminal sentencing, with several apex — state

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36 Ben Bowling and Sophie Westenra, 'The "Crimmigration Control System"' (2015) 77 (Winter) *British Society of Criminology Newsletters* 14 <https://britsoccrim.org/documents/Bowling2015.pdf>.

37 See, eg, Mary Bosworth and Mhairi Guild, 'Governing through Migration Control: Security and Citizenship in Britain' (2008) 48(6) *British Journal of Criminology* 703; Mary Bosworth et al (eds), *Handbook on Border Criminology* (Edward Elgar, 2024).

38 See also José A Brandariz, 'Criminalization or Instrumentalism? New Trends in the Field of Border Criminology' (2022) 26(2) *Theoretical Criminology* 285.

39 Grewcock (n 12) 123.

40 Peter Billings, 'Introduction' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics and Society* (Springer, 2019) 4.

41 Eg mandatory minimum sentences for a range of people smuggling offences, or for the use of false and misleading information relating to the entry of a non-citizen: see *Migration Act* (n 10) div 12 sub-div A (people smuggling and related offences); and five years' imprisonment for escape from immigration detention: *Migration Act* (n 10) s 197A.

42 *Migration Act* (n 10) pt 2 div 7 (detention of unlawful citizens); s 501 (refusal or cancellation of visa on character grounds). The character test provides (inter alia) that a non-citizen with a 'substantial criminal record' does not pass the test and must have their visa cancelled. See Peter Billings and Khanh Hoang, 'Characters of Concern, or Concerning Character Tests? Regulating Risk through Visa Cancellation, Containment and Removal from Australia' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics and Society* (Springer, 2019) 119.

43 David Alan Sklansky, 'Crime, Immigration, and Ad Hoc Instrumentalism' (2012) 15(2) *New Criminal Law Review* 157.

44 Leanne Weber, *Policing Non-Citizens* (Routledge, 2013) on the role of police and other social agencies in policing non-citizens and enforcing immigration law.

and territory — courts deeming a non-citizen's prospective deportation and collateral consequences relevant, mitigating, factors when sentencing offenders.[45]

In this article, the concept of crimmigration is drawn upon to help critically examine new intersections of criminal law/justice and immigration law/enforcement, directed to the purpose of controlling, containing and excluding a small cohort of non-deportable non-citizens in Australia. Inspired by Stumpf and Katja Aas,[46] among others, this article demonstrates how and explores why criminal law and immigration law interlink in novel ways. Drawing on David Sklansky, this article shows how different legal rules and procedures have been employed by the state instrumentally and interchangeably,[47] in mutually reinforcing ways. Legislators have employed civil and criminal law, including the threat of imprisonment, as a substitute means to effectively manage the perceived problem of community infiltration by dangerous non-citizens. This was responsive to *NZYQ*, the HCA ruling that depleted the executive's capacity to, effectively, deploy immigration detention as a form of preventive detention to segregate 'crimmigrants' from the wider community. The government's rapid and repeated legislative attempts to strictly govern non-deportable non-citizens it could no longer, legally, detain provides a vivid demonstration of modern crimmigration.

Adding to the literature on crimmigration law and border criminology in Australia,[48] the goal of this article is to describe and critically examine the politico-legal aftermath of *NZYQ*, drawing on the concept of 'crimmigration' as a theoretical framework of analysis. By examining the sequence of law reforms directed to the management and exclusion of non-citizens, and the political rhetoric around those reforms, this article reveals the targets of novel forms of crimmigration law and enforcement. It explores how these laws and processes operate and impact non-citizens and explains the causes of these recent developments.

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45 Ellen Moore, 'Sentencing "Crimmigrants": How Migration Law Creates a Different Criminal Law for Non-Citizens' (2020) 43(4) *University of New South Wales Law Journal* 1271; Louisa Jones, 'Punishment within Australia's Visa Cancellation Regime: Exposing the Discord between Migration Law and Criminal Law' (2025) 50(3) *Alternative Law Journal* 212.

46 Katja Franko Aas, 'Bordered Penality: Precarious Membership and Abnormal Justice' (2014) 16(5) *Punishment and Society* 520.

47 Sklansky (n 43).

48 See, eg, Peter Billings, 'Regulating Crimmigrants through the "Character Test": Exploring the Consequences of Mandatory Visa Cancellation for the Fundamental Rights of Non-Citizens in Australia' (2019) 71(1) *Crime, Law and Social Change* 1 ('Regulating Crimmigrants'); Leanne Weber and Rebecca Powell, 'Crime, Pre-Crime and Sub-Crime: Deportation of "Risky Non-Citizens" as "Enemy Crimmigration"' in John Pratt and Jordan Anderson (eds), *Criminal Justice, Risk and the Revolt against Uncertainty* (Palgrave Macmillan, 2020) 245; Mary E Crock and Kate Bones, 'The Creeping Cruelty of Australian Crimmigration Law' (2022) 44(2) *Sydney Law Review* 169.

III FROM *LIM* TO *AL-KATEB* TO *NZYQ*

This Part focuses on the identification and development of constitutional limits on immigration detention that arise from Ch III of the *Australian Constitution*. Those limits provide the context (and sometimes the catalyst) for the crimmigration reforms discussed in Parts IV to VI below.

That no person shall be imprisoned except pursuant to lawful authority is a 'fundamental and long-established principle'.[49] There can be no deprivation of individual liberty by mere executive action, absent valid statutory authority or judicial mandate.[50] Moreover, involuntary detention must not infringe the *Constitution*, including the strict separation of federal judicial power derived from Ch III.[51] Immigration detention must be subject to judicial oversight to enforce express and implied constitutional limits and ensure that executive action adheres to legislative criteria — criteria that cannot be too vaguely formulated so as to avoid scrutiny.[52]

The power of the federal Parliament to authorise or require the executive government to detain a non-citizen (absent a judicial order) is granted by the naturalisation and aliens power in s 51(xix) of the *Constitution*. This power to legislate with respect to aliens encompasses detention laws applicable to non-citizens who are unlawful — without an effective visa. Detention powers correlate to legislative authority conferred on the executive to remove a non-citizen or to permit their entry.[53] Crucially, 'the amplitude of the legislative power conferred by s 51(xix) is qualified by the implications of Ch III of the *Constitution*',[54] which focuses attention on the nature of federal judicial power and the separation of powers. A prominent limit on immigration detention powers arose from *Lim* in 1994.

In *Lim*, the HCA had to decide whether laws authorising the mandatory detention of two designated groups of asylum seekers were invalid for infringing the separation of powers. The impugned law provided for detention in custody — for a period capped at 273 days after making an entry application — until the unlawful non-citizens had been removed from Australia or granted an entry permit. The Court upheld the provisions and, in doing so, formulated a broad 'immunity'[55] from involuntary detention by the executive, other than by order of a court following a judicial finding of criminal guilt. The Court declared that immigration detention is one of a few exceptions to the general constitutional principle that detention is punitive in character and, therefore, only within

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49 *NZYQ* (n 3) 153 [27] (The Court).

50 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 528 (Deane J); *Lim* (n 5) 19 (Brennan, Deane and Dawson JJ).

51 This strict separation is grounded in the 'two limbs of *Boilermakers*', referring to the Court's decision in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. These rules generally limit federal courts to judicial powers (and ancillary or incidental non-judicial powers) and withhold federal judicial power from non-courts.

52 *AJL20* (n 16).

53 *Lim* (n 5) 10 (Mason CJ), 32 (Brennan, Deane and Dawson JJ).

54 *AJL20* (n 16) 63 [22] (Kiefel CJ, Gageler, Keane and Steward JJ).

55 *Lim* (n 5) 28 (Brennan, Deane and Dawson JJ).

judicial power to impose. However, the executive detention of an alien must be limited to a period that is reasonably capable of being seen as necessary for limited non-punitive purposes.[56] Accordingly, the connection between the non-punitive purpose and duration of detention was relevant to the Court's ruling about the validity of laws extant at the time.[57] The test for assessing the constitutional validity of detention laws required the identification of a legitimate non-punitive purpose and then an assessment of whether the law is reasonably necessary to achieve that purpose.

The strength of the Court's reasoning in *Lim* was undermined by several unsuccessful attempts to invoke its protection.[58] The most important case came a decade after *Lim*, in *Al-Kateb*. A majority of the HCA determined that — as a matter of statutory construction and constitutional interpretation — it was lawful for a stateless Palestinian man to be detained indefinitely if there was even a faint possibility that his removal might become practicable in the future. The primary focus of the Court's inquiry was on the purpose of the detention, which was found to be non-punitive because it was incidental to entry and removal proceedings. Therefore, detention was valid.[59] Neither the extended length of detention itself nor its impacts on the detainee were sufficient to alter the character of detention and render it punitive. Simply stated, a 'law that authorises detention will not offend the separation of powers doctrine as long as its purpose is non-punitive'.[60]

For the majority in *Al-Kateb*, the Ch III question was not answered with respect to whether the statutory *end* was capable of realisation in the reasonably foreseeable future, nor whether the legal *means* used to pursue the relevant end exceeded what was reasonably capable of being seen as necessary to effect the non-punitive purpose. As Heydon J later observed: 'From the day [*Al-Kateb*] was handed down, it became a very well-known decision. It also became a widely criticised decision because of its impact on liberty.'[61] Indeed, as Hohmann argued, the *Al-Kateb* judgment was

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56 Ibid 33 (Brennan, Deane and Dawson JJ).

57 As McHugh J explained in *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 36 [88] ('*Re Woolley*'). The presence of restraints on detention including statutory terms fixing time limits on the period of detention (273 days) after making an entry application, and a legislative requirement to remove a designated person 'as soon as practicable' after the refusal of an entry application and finalisation of appeals, were important factors in *Lim* that ensured detention powers were reasonably necessary for non-punitive purposes: *Lim* (n 5) 10 (Mason CJ), 33 (Brennan, Deane and Dawson JJ), 46 (Toohey J).

58 See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1, 109–10 (Gaudron J); *Behrooz v Department of Immigration & Multicultural & Indigenous Affairs* (2004) 219 CLR 486, 498–9 [19]–[20] (Gleeson CJ) ('*Behrooz*'); *Al-Kateb* (n 2) 648–9 [257]–[258] (Hayne J); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 94–5 [25]–[27] (Kiefel CJ, Bell, Keane and Steward JJ) ('*Benbrika [No 1]*').

59 See *Al-Kateb* (n 2) 584–5 [45]–[46], 595 [74] (McHugh J), 638–40 [225]–[231] (Hayne J), 658–62 [290]–[300] (Callinan J), 662–3 [303] (Heydon J).

60 *Re Woolley* (n 57) 32 [77] (McHugh J).

61 *M47/2012* (n 17) 128–9 [334] (Heydon J), a case in which the High Court of Australia declined to revisit and overrule *Al-Kateb* (n 2).

> a prime example of constitutional interpretation devoid of considerations of the key triumphs of constitutional democracies: liberty of the individual and protection against the abuse of executive power not least among them.[62]

The effect of *Al-Kateb* was harsh, described as 'segregation by incarceration … for an indefinite period, perhaps for life'.[63] Its impacts were compounded by other cases at the time that confirmed that immigration detention could be validly imposed on children as well as adults,[64] despite non-compliance with Australia's international obligations and it involving harsh conditions.[65] That situation persisted for twenty years during which time the legislature took no steps to correct it and the HCA found it unnecessary, or declined, to revisit *Al-Kateb* on three occasions.[66] However, in *NZYQ* the HCA re-opened and, unanimously, overturned the constitutional ruling in *Al-Kateb*.[67]

NZYQ concerned a stateless Rohingya man who had raped a child and had his visa revoked on adverse character grounds.[68] In the absence of a third country willing to receive him, he remained liable to executive detention for an unlimited period. In its reasons[69] the HCA adverted to *Lim* which they regarded as containing several authoritative background statements of principle. The Court affirmed that, no person may be detained by the executive absent statutory authority or judicial mandate. The Court reiterated the principle that involuntary deprivation of liberty *ordinarily* constitutes punishment, and its imposition is an incident of

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62 Jessie M Hohmann, 'The Thin End of the Wedge: Executive Detention of Non-Citizens & the Australian Constitution' (2006) 9 *Yearbook of New Zealand Jurisprudence* 91, 112. See also Dan Meagher, 'The "Tragic" High Court Decisions in Al-Kateb and Al Khafaji: The Triumph of the "Plain Fact" Interpretative Approach and Constitutional Form over Substance' (2005) 7(4) *Constitutional Law and Policy Review* 69.

63 Michael Head, 'Detention without Trial: A Threat to Democratic Rights' (2005) 9 *University of Western Sydney Law Review* 33, 34.

64 *Re Woolley* (n 57).

65 *Behrooz* (n 58).

66 *M47/2012* (n 17); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 ('*M76/2013*'); *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 ('*M47/2018*').

67 The High Court of Australia ('HCA') agreed in *NZYQ* (n 3) 150–2 [19]–[23] (The Court) with the majority's reasoning in *Al-Kateb* (n 2), on the statutory construction issue, citing cumulative considerations that pointed away from re-opening that matter: (i) legislative reliance and implicit legislative endorsement of *Al-Kateb* since 2004; and, (ii) the recent case of *AJL20* where a majority endorsed *Al-Kateb* on the statutory construction point: see *AJL20* (n 16) 66 [33]–[34] (Kiefel CJ, Gageler, Keane and Steward JJ).

68 A stateless refugee, NZYQ was found to be a danger to the community and had his protection visa refused under *Migration Act* (n 10) s 36(1C) because of his conviction and sentence for child sexual offences.

69 The HCA offered a single, 'unanimous', constitutional judgment in overruling *Al-Kateb* (n 2), though the style of joint judgment was noteworthy because it identified individual judicial positions. See Stephen McDonald, 'NZYQ: A New Style of Unanimous Judgment for the High Court of Australia' *Australian Public Law* (Blog Post, 31 January 2024) <https://www.auspublaw.org/blog/2024/1/nzyq-a-new-style-of-unanimous-judgment-for-the-high-court-of-australia>. The divergence of judicial opinion, and the reasons for that split, subsequently became clearer in the separate judgment of Edelman J in *ASF17* (n 6) 799 [85]–[89].

judicial authority to judge and punish criminal guilt.[70] Hence, a law authorising involuntary detention is characterised as penal or punitive, by default, unless justified otherwise. This translates to the separation of powers being contravened unless a law authorising executive detention is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.[71]

In *NZYQ*, the Court rejected the possibility that segregation from the community — separation of an alien from the community by means of detention — was a legitimate independent purpose for detention because it conflicted with *Lim*.[72] Unmoored from the administration of entry ('visa processing') or removal procedures, separation from the community is not a legitimate purpose for detention.[73] Furthermore, *NZYQ* offered no support for the view, articulated in *Al-Kateb*, that deterrence was a legitimate purpose,[74] nor that community protection is a, standalone, legitimate purpose for immigration detention. The Solicitor-General did not frame the government's argument, in *NZYQ*, in terms of a 'predictive protective framework' for legitimising detention.[75] Likely because there was no express legislative basis for justifying detention with reference to this community-protective end.[76] There are but two legitimate and non-punitive purposes capable of making detention of an alien constitutionally permissible if the detention is otherwise sanctioned by statute: (i) to facilitate visa processing and (ii) to facilitate removal by ensuring that an unlawful non-citizen will be available for removal when that becomes practicable.[77]

In *NZYQ*, the HCA unanimously decided that the constitutional holding in *Al-Kateb* was 'an incomplete and, accordingly, inaccurate statement' of principle.[78] Collectively, the Court disagreed with the proposition that as long as the purpose of detention is to make the alien available for removal or prevent them entering

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70 *NZYQ* (n 3) 153 [27] (The Court).

71 Ibid 154–5 [30]–[31]. For a succinct analysis of the constitutional dimensions of the case. see Emily Hammond, 'Continuity and Consistency in the Application of Fundamental Constitutional Principle: NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs (2023) 97 ALJR 1005; [2023] HCA 37' (2024) 35(1) *Public Law Review* 8.

72 *NZYQ* (n 3) 159 [48] (The Court).

73 Ibid 159–60 [49] (The Court). Also, see, *CZA19* (n 6) 660 [38] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 668 [76] (Gordon J).

74 *Al-Kateb* (n 2) 659 [291] (Callinan J).

75 Transcript of Proceedings, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 154.

76 Community protection mabe be viewed as a legitimate non-punitive purpose, that is incidental to the two over-arching legitimate purposes (entry and removal) identified in *Lim* (n 5) and affirmed in *NZYQ* (n 3) and *CZA19* (n 6).

77 In *CZA19* (n 6) the HCA explained that detention legitimately facilitates visa processing because it makes an unlawful non-citizen available for inquiries into their identity, nationality, criminal history, security profile and health, and allows conditions to be imposed or other steps to be taken to mitigate any risks that are identified as a result, before the non-citizen enters the community (at 661-662 [46] (Gageler CJ, Gleeson, Jagot, Beech-Jones JJ), 668 [75] (Gordon J), 670-671 [89]-[90] 674 [108] (Edelman J).

78 *NZYQ* (n 3) 158 [43] (The Court).

Australia, the detention is non-punitive in character, even if removal appears unlikely in the foreseeable future.[79] For six members of the HCA, NZYQ's detention was invalid because there was no *legitimate* non-punitive purpose capable of practical achievement in the reasonably foreseeable future.[80] The absence of a real prospect of achieving removal within this limited period, 'refuted' the existence of the legitimate purpose for detention.[81] Restoring the application of *Lim* to situations where a person's removal prospects were slight, their Honours declared that:

> The *Lim* principle would be devoid of substance were it enough to justify [executive] detention … that the detention be designed to achieve an identified legislative objective that there is no real prospect of achieving in the reasonably foreseeable future.[82]

By contrast, Edelman J did not base the detention law's invalidity on the *illegitimacy* of the avowed non-punitive purpose, but upon the *disproportionality* between the law's legitimate non-punitive ends ('removal') and its means of implementation. His honour maintained that if there is no prospect of removal in the reasonably foreseeable future, then it is not 'necessary to detain them to ensure that they are available for removal when practicable'.[83]

Consequently, what had begun as lawful immigration detention in 2018 became unauthorised, on constitutional grounds, several years later, producing the immediate release of NZYQ and others from detention. The Court claimed this restored the authority of *Lim* principles and *Al-Kateb* was abandoned as an 'outlier in the stream of authority'.[84]

NZYQ was a historic decision for several reasons. First, the HCA overruled one aspect of the 'tragic' case of *Al-Kateb*,[85] a twenty-year precedent that had permitted an illiberal regime perpetuating the prolonged and indefinite deprivation of liberty of, often, stateless people and refugees — refused a visa on character grounds — who could not be removed to any other country. Second, the HCA restated and reaffirmed certain constitutional principles, first articulated in *Lim*,[86] constraining the application of executive detention. Third, *NZYQ* better aligned (albeit imperfectly) the operation of the immigration detention regime with international

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79 Ibid; cf *Al-Kateb* (n 2) 584 [45] (McHugh J), 640 [231] (Hayne J), 658–9 [290] (Callinan J), 662–3 [303] (Heydon J).

80 *NZYQ* (n 3) 158 [44], 158–9 [46] (The Court).

81 Ibid 158–9 [46] (The Court). Note similar sentiments were expressed in dissenting judgments in *Al-Kateb* (n 2). Gleeson CJ opined that the purpose of s 196 rested on the assumption that removal was capable of fulfilment: *Al-Kateb* (n 2) 578 [22]. See also *Al-Kateb* (n 2) 608 [122], 613–14 [140] (Gummow J).

82 *NZYQ* (n 3) 158 [45] (The Court).

83 Ibid 160–2 [51]–[54] (The Court).

84 Ibid 156 [35] (The Court).

85 *Al-Kateb* (n 2) 581 [31] (McHugh J).

86 *Lim* (n 5).

laws protective of individual liberty.[87] Fourth, due to the ruling, unlawful non-citizens whose removal was impracticable — most, if not all, with criminal histories — were freed from immigration detention and entered the wider community. This created an inconvenient regulatory gap in the federal government's response to and containment of certain 'risky' non-deportable non-citizens. The balance of this article is focused upon why and how that gap was legislatively filled, which has proven highly politically charged, practically difficult, and legally controversial.

IV The Political Aftermath of *NZYQ*

Who, then, were the detainees affected by the HCA's ruling in *NZYQ*? Progressively, the decision led to the release of 358 people,[88] among them were non-citizens with serious criminal histories.[89] Some of the cohort had convictions for grave offences (including murder, rape, and other violent offences) and, thus, failed the 'character test' inducing visa refusal or cancellation. Others had no criminal convictions in Australia but were regarded as a future security threat by the Australian Security and Intelligence Organisation ('ASIO'). A small number of non-citizens were neither of character concern nor a security threat, their prolonged detention was, largely, attributable to the time taken by administrative and judicial decision-making.[90]

Complicating the deportation of people in the '*NZYQ* cohort' were legal rules precluding the removal of those the subject of a 'protection finding',[91] and, because some people were stateless or from disputed territories, faced practical

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87 See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Report 5 of 2021* (Report, 29 April 2021) 16–18, quoting the United Nations Human Rights Committee with respect to the unlawfulness and arbitrariness of Australia's mandatory detention scheme. See also Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2233/2013*, 116th sess, UN Doc CCPR/C/116/D/2233/2013 (2 May 2016, adopted 22 March 2016) ('*FJ et al v Australia*') ruling that the mandatory and indefinite nature of immigration detention violated the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 ('*ICCPR*').

88 Commonwealth, Legal and Constitutional Affairs Legislation Committee, *Senate Estimates*, 8 October 2025, 112 (Senator Chandler).

89 *YBFZ* (n 8) 16 [37] (Gageler CJ, Gordon, Gleeson and Jagot JJ). The released detainees included seven convicted murders, 37 sexual offenders and 72 violent offenders: Department of Home Affairs, Submission to Senate Standing Committees on Legal and Constitutional Affairs, *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* (12 February 2024) <https://www.aph.gov.au/-/media/Estimates/legcon/add2324/Home_Affairs/6_Dept_Home_Affairs___Info_request_from_Sen_Paterson_and_Cash_regarding_NZYQ.pdf>.

90 *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497 [2] (Kennett J) ('*AZC20*').

91 Removal was legally precluded due to Australia's *non-refoulement* obligations: see *Migration Act* (n 10) s 197C(3).

obstacles,[92] and/or health issues impeded their removal. Consequently, many of the cohort had been administratively detained for prolonged periods, often exceeding the duration of any prison sentence imposed that had triggered immigration enforcement — the longest period of immigration detention being thirteen years for a person with no convictions.[93] This institutionalisation of 'double punishment' for deportable non-citizens is an unfortunate hallmark of modern crimmigration practice in Australia.[94]

NZYQ reaffirmed the centrality of individual liberty to the constitutional framework, and the invalidity of executive detention in exceptional circumstances. While these are commendable objectives, the dominant political and media reaction to *NZYQ* was strongly adverse. Politicians and media called for immediate action to re-detain, or seriously constrain the liberty of, 'hardened criminals', released post-*NZYQ*.[95] The *NZYQ* ruling was welcomed by legal scholars, human rights institutions and advocates[96] but it left politicians aghast, with many expressing significant concerns about releasing into the community a cohort of non-citizens, most of whom were proven offenders. Although the number of people freed from detention after the *NZYQ* ruling was relatively small,[97] a political and media furore ensued. Propelling many of the demands for greater security over the management of the former detainees was a popular belief that the non-deportable non-citizens should simply not be freed from detention, regardless of the HCA's decision. Media headlines presented an undifferentiated image of former immigration detainees as highly dangerous and deserving of stringent restrictions on their liberty and freedoms. As Loughnan and Murray observed, 'criminalising narratives … have flourished since the High Court decision'. [98]

The parliamentary debates on the legislative response to *NZYQ* reveal a political yearning to, collectively, re-detain the '*NZYQ* cohort' based on their legal status and prior offending, without any genuine consideration of relevant

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92 Eg where a country does not accept involuntary returnees.

93 Matthew Doran, 'Document Reveals Snapshot of Crimes of Immigration Detainees Implicated by High Court Ruling', *ABC News* (online, 21 November 2023) <https://www.abc.net.au/news/2023-11-21/immigration-detainee-crimes-revealed-in-high-court-snapshot/103132018>.

94 See, eg, Michael Grewcock, 'Conviction, Detention and Removal: The Multiple Punishment of Offenders under Section 501 Migration Act' (Research Paper No 2009-49, Faculty of Law, University of New South Wales, 2 December 2009). Grewcock argued that although, formally, detention-deportation is not imposed as punishment, it has several punitive consequences.

95 The decision in *NZYQ* centred on one person but affected a broader cohort of non-deportable detainees.

96 See, eg, Australian Human Rights Commission, 'Commission Commends High Court Ruling on Indefinite Immigration Detention' (Media Release, 9 November 2023) <https://humanrights.gov.au/about/news/media-releases/commission-commends-high-court-ruling-indefinite-immigration-detention>.

97 Especially by comparison with the (approximately) 65, 000 prisoners released annually. See Australian Bureau of Statistics, *Corrective Services, Australia, December Quarter 2023* (Catalogue No 4512.0, 14 March 2024) <www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/dec-quarter-2023>.

98 See Claire Loughnan and Philomena Murray, 'Words Matter: Corrosive Narratives Dehumanise Refugees', *Asylum Insight* (Web Page, December 2023) <www.asyluminsight.com/loughnan-and-murray>.

evidence about a given individual's present circumstances and the level and type of risk they might pose to the community. The (then) Minister for Home Affairs, Mrs Clare O'Neil, stated that if it was within her power to keep those released in detention, she would do it.[99] Expressing the government's view, Minister O'Neil said the judicial ruling undermined the preferred practice of, essentially, preventive detention for all of them, forever:

> We knew that it was 20 years of legal precedent and we were advised that it was likely that the Commonwealth would win the case. That is, *allow us to do what we wanted to do, which is keep these people in detention*.[100]

These comments nourish the view that, since *Al-Kateb*, there has been a preparedness on the part of government officials to simply 'warehouse' or segregate the intractable cases via extra-judicial detention,[101] in the absence of dynamic risk assessments for individuals and considered application of community-based alternatives to prolonged detention.[102] Consequently, government policy and the, hitherto, lack of effective legal constraint on indefinite detention, has contributed to the slow progression of cases towards status resolution. [103] This has fostered a bureaucratic environment in which officials were 'immunised' to the prolonged incarceration of people.[104]

In summary, the laws hurriedly introduced in response to *NZYQ* were broadly and loosely justified on community safety grounds.[105] Evidently, some politicians regarded immigration detention as tool that was simply interchangeable with

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99 Paul Karp, 'Immigration Detention: Labor to Rush Through Emergency Legislation after High Court Ruling', *The Guardian* (online, 15 November 2023) <https://www.theguardian.com/australia-news/2023/nov/15/albanese-indefnite-detention-ruling-emergency-legislation>.

100 Michael Read, 'O'Neil Did Not Expect High Court to Overturn Indefinite Detention', *Australian Financial Review* (online, 19 November 2023) <https://www.afr.com/politics/o-neil-did-not-expect-high-court-to-overturn-indefinite-detention-20231119-p5el1j>. Emphasis added.

101 See Crock and Bones (n 48) 169, 172, 191 for a similar claim.

102 See Cornall (n 28), calling for more nuanced risk assessments and more modern management of detainees posing a medium risk of future criminal behaviour.

103 Ibid 55, citing the Commonwealth Ombudsman.

104 *Sami v Minister for Home Affairs* [2022] FCA 1513 [53] (Mortimer J) ('*Sami*'). For a discussion of *Sami* and related cases, see Peter Billings, 'Immunised and Indifferent to Indefinite Incarceration: The Corrosive Effect of Immigration Detention Laws on Officialdom' in Michelle Peterie (ed), *Immigration Detention and Social Harm: The Collateral Impacts of Migrant Incarceration* (Routledge, 2024) 175. See also Office of the Commonwealth Ombudsman, *Taking Liberties* (Report, February 2024) for a critical report on the government's policies and procedures for ensuring timely removal of unlawful non-citizens.

105 See Clare O'Neil, 'Keeping Australians Safe Following NZYQ Ruling' (Media Release, Parliament of Australia, 11 November 2023) <https://minister.homeaffairs.gov.au/ClareONeil/Pages/keeping-australian-safe.aspx>; Samantha O'Donnell and Lorena Rivas, 'Overlooked Harms: Indefinite Detention and the Australian High Court Decision', *Border Criminologies* (Blog Post, 11 December 2023) <https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2023/12/overlooked-harms-indefinite-detention-and-australian>.

criminal detention for 'enemy crimmigrants'[106] perceived as threatening. As Sanmati Verma observed:

> over the past 20 years, we have been led to believe and come to accept that immigration detention is an extension of prison, that migrants and refugees are inherently a risk to our safety and tacitly, that they deserve to be locked up forever.[107]

Thus, the '*NZYQ* cohort' became Australia's modern folk-devil,[108] and this served to justify novel, extraordinary and, arguably, disproportionate legislative responses affecting other non-citizens living on temporary (removal pending) visas in the community too.

V The Legislative Aftermath of *NZYQ*

A *The First Salvo of Reforms*

With indefinite detention outlawed as a means of excluding unlawful non-citizens from the community,[109] in a political state of emergency, Parliament rushed to legislate alternative forms of social exclusion that exhibited and reinforced political authority over immigration controls and placed restraints on the liberty and bodily integrity of non-deportable non-citizens. One week after the HCA issued (*ex tempore*) orders in *NZYQ* came the first legislative reply.[110] This rapid response afforded Parliament insufficient time for any proper scrutiny of matters that seriously impinged on personal rights and liberties,[111] and no opportunity to consider why the HCA had declared the impugned provisions invalid.

The emergency legislation was directed at all non-citizens immediately released into the community, on a temporary visa, because of the *NZYQ* ruling. However, the new rules could apply to any non-deportable non-citizen subsequently freed from detention. Parliament gave short shrift to equality-

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106 See Leanne Weber, Alison Gerard and Rebecca Powell, 'Indefinite Detention in Australia as "Enemy Crimmigration"', *Border Criminologies* (Blog Post, 8 December 2023) <https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2023/12/indefinite-detention-australia-enemy-crimmigration>.

107 Sanmati Verma, 'Released Detainees Have Done Their Time. Let Them Be', *The Sydney Morning Herald* (online, 17 November 2023) <www.smh.com.au/politics/federal/released-detainees-have-done-their-time-let-them-be-20231116-p5ekgt.html>.

108 See also Melanie Griffiths, 'Foreign, Criminal: A Doubly Damned Modern British Folk-Devil' (2017) 21(5) *Citizenship Studies* 527.

109 Subject to the later ruling in *ASF17* (n 6). Prolonged detention remains a real possibility pending the outcome of a visa application: see *CZA19* (n 6).

110 *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) ('*Bridging Visa Conditions Act*') commenced on 18 November 2023. There was just 12 hours from introduction to enactment on 17 November. The hasty and ill-judged response to *NZYQ* occurred in the absence of the HCA's reasons, which were not released until 28 November.

111 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 15 of 2023, 29 November 2023) 8.

based arguments to the effect that the released detainees did not necessarily pose any greater community risk than post-sentence Australian citizens, and that additional punitive measures were prejudiced and unnecessary.[112] Of greater import was their past offending allied to their alienage and, thus, liability to territorial exclusion.[113] As Aas claims, the lack of formal membership is the essential factor contributing to different, punitive, measures directed at populations of non-citizens.[114] Precisely because non-citizens are liable to executive detention (on grounds that do not apply to citizens) and deportation, they are exposed to alternative and extraordinary forms of coercive power under both immigration law and criminal law.

The first Amendment Act made significant changes to the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (the 'Regulations').[115] The objectives were: community safety; management of the '*NZYQ* cohort'; facilitation of removal when practicable; deterrence from future criminal offending; and, promoting public confidence in the migration system.[116] The legislation introduced major changes to an existing type of temporary visa — a bridging visa for people pending removal (a Bridging Visa R, 'BVR'). The reforms enabled the Minister for Immigration to grant a BVR to eligible non-citizens (encompassing the '*NZYQ* cohort') subject to several mandatory conditions involving, inter alia, assorted reporting requirements relating to residence and travel, associations and memberships, as well as restrictions on the performance of certain forms of work.[117] Especially severe were two additional visa conditions that the Minister could impose on people's liberty: a curfew condition, confining a person to a notified location between 10pm and 6am the next day, and an electronic monitoring ('EM') condition requiring the wearing of a device (a 'chunky form of ankle cuff in a plastic cover'[118]).

These methods of control entailed restraints that were not imposed on individuals following conventional procedural ('fair hearing') principles and a dynamic risk assessment.[119] Rather, conditions were imposed on BVR-holders *unless* the visa-holder subsequently, and successfully, made representations for their adjustment, such that the Minister (or their delegate) was satisfied that the non-citizen did not pose a risk to the community. There was no legislated time

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112 See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 13 of 2023, 29 November 2023) 24–5.

113 The Australian government's policy position is that entering or remaining in Australia is a *privilege* that is forfeited when a non-citizen has engaged in criminal conduct: Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 110: Visa Refusal and Cancellation under Section 501 and Revocation of Mandatory Cancellation of a Visa under Section 501CA* (7 June 2024) 5.2(1). This outlook informs a popular view that felonious non-citizens, liable to removal, should not enjoy freedom in the community.

114 Aas (n 46).

115 *Bridging Visa Conditions Act* (n 110) schs 1–2.

116 *YBFZ* (n 8) 21 [73] (Gageler CJ, Gordon, Gleeson and Jagot JJ) summarising the extrinsic material.

117 *Migration Regulations 1994* (Cth) sch 2 cl 070.612A(1) ('*Migration Regulations*') listed the conditions.

118 *YBFZ* (n 8) 19 [58] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

119 *Migration Act* (n 10) ss 76E(1)–(2) (the version currently in force reflects the ruling in *YBFZ*).

limit upon the imposition of the visa conditions which could interfere with human rights indefinitely pending the non-citizen's removal.

Although a curfew (or, 'home detention'[120]) and EM are relatively less burdensome restraints upon people's freedom of movement compared to the grave detriment occasioned by indefinite detention in secure detention, EM effectively criminalises, stigmatises and alienates non-citizens,[121] having a long association with criminal punishment, and exacting a human toll.[122] Equally, curfew restrictions are a familiar form of bail provision and an aspect of supervision regimes for people paroled from gaol before their criminal sentence ends. By contrast with bail conditions imposed on a criminal defendant by a judge, or conditions placed upon a parolee by an independent board, the new visa conditions were administered by public servants subject to further interposition by the Minister (or delegate).[123]

Additionally, the first Amending Act exposed former immigration detainees to the risk of gaol by creating three criminal offences for breaching specific BVR conditions relating to the curfew and monitoring conditions, without a reasonable excuse.[124] The policy shift to criminalising non-compliance with visa conditions was deemed the most effective response to manage the '*NZYQ* cohort', given the usual consequence of detention, triggered by visa cancellation, was inapplicable. Criminalising immigration violations is an escalating feature of crimmigration control globally, but what is remarkable, if not novel,[125] here is that the new offences carried a mandatory minimum sentence.

A visa holder convicted of breaching their visa conditions is liable to be sentenced to prison for at least 12 months for each proven offence, with a maximum five-year sentence, 300 penalty units or both. Reducing judicial discretion to impose a proportionate prison sentence for breaching visa

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120 *YBFZ* (n 8) 28 [104] (Edelman J).

121 Stephanie J Silverman, 'Electronically Monitoring Migrants Treats Them Like Criminals', *The Conversation* (online, 26 January 2018) <https://theconversation.com/electronically-monitoring-migrants-treats-them-like-criminals-90521>.

122 American Bar Association *Electronic Monitoring of Migrants: Punitive Not Prudent* (Report, 9 April 2024) 3 <https://www.americanbar.org/content/dam/aba/administrative/immigration/electronic-monitoring-report-2024-02-21.pdf>.

123 The Minister is assisted, in the task of assessing whether conditions are necessary, by a non-statutory advisory board established in December 2023 by the executive government, called 'The Community Protection Board'. The Board provides impartial and evidence-based recommendations to visa decision makers on visa conditions imposed on BVR holders. See Australian Government, 'Community Protection Summary', *Department of Home Affairs* (Web Page) <www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/community-protection#>.

124 The criminal offence provisions (ss 76B–76DA) were inserted into *Migration Act* (n 10) by sch 1 of the first Amending Act. Breach of a visa condition over several days constitutes several offences each carrying a minimum prison sentence of one year.

125 In *Magaming v The Queen* (2013) 252 CLR 381, the HCA rejected a challenge to the constitutionality of mandatory minimum sentences for 'people smuggling' because the applicant failed to persuade the court of a suitable basis on which to apply proportionality reasoning.

conditions is unorthodox and plainly conflicts with a primary objective of Australia's criminal law system.[126] Consequently, crimmigration law displays its distinctive character here by purporting to deny its subjects proportionality in punishment — the severity of the penalty does not fit with the nature of the offending.[127] The proportionality principle usually governs the sentencing of citizen-subjects of criminal law and cannot be trumped by the goal of community protection.[128] Not only does the principle of proportionality not constrain the criminal sanctioning of non-citizens in this context but, as several authors have observed, proportionality is often absent when deportation follows the administration of the mandatory visa cancellation regime, especially with respect to long-term permanent residents.[129]

The disproportionality of response occasioned by automatic visa conditions, regardless of the nature and extent of risk posed by an individual, cross-stitched to arbitrary minimum criminal sentences for visa infringements, alarmed parliamentary scrutineers who could only examine the initial legislative reforms post enactment.[130] The Parliamentary Joint Committee on Human Rights stated that mandatory visa conditions coupled to minimum sentences for visa non-compliance, constituted 'a significant interference with human rights'.[131]

In short, the initial, rushed, legislative response to *NZYQ* was not subject to meaningful parliamentary scrutiny and it was an excessive reaction. The reforms adopted harsh, extra-judicial measures that were not a tailored means to address the risk profile of individual non-citizens and promote the social goal of public safety.

B *The Second Legislative Salvo*

Further reforms quickly followed the publication of the HCA's reasons in *NZYQ*. Responding to the reasons for that decision, these reforms amended the bridging visa scheme and introduced a mutually exclusive community safety order ('CSO') regime for judicial orders to restrain the liberty of certain dangerous non-citizens.[132] Deterrence of future crime was the principal purpose of both the amended administrative visa scheme and the CSO regime to be applied by the

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126 See *Hoare v The Queen* (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) for a clear statement of the proportionality principle in sentencing.

127 Relatedly, see Stumpf, 'Crimmigration: Encountering the Leviathan' (n 35) 246.

128 See, Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 10th ed, 2022) ch 6. For a short history of mandatory sentencing in Australia, and challenges to mandatory detention laws, see David Brown et al, *Criminal Laws* (Federation Press, 8th ed, 2025) 1205–7.

129 See Crock and Bones (n 48); Billings 'Regulating Crimmigrants' (n 48).

130 See Senate Standing Committee for the Scrutiny of Bills (n 111) 13–14; Parliamentary Joint Committee on Human Rights (n 112) 123.

131 Parliamentary Joint Committee on Human Rights (n 112) 28.

132 *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) (in force from 8 December 2023); *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth) (in force from 8 December 2023).

judiciary. Again, the legislation was hurried through federal parliament, making a mockery of democratic processes designed to ensure robust scrutiny.[133]

With respect to enhancing the BVR framework, the government's second wave of reforms (inter alia) clarified the power of the Minister for Immigration to grant a BVR without application, ensured visa conditions were operative for 12 months from the date of grant, and introduced new, wide-ranging, mandatory visa conditions in tandem with criminal penalties for non-compliance for visa holders with a history of either offending in respect of minors or other vulnerable people, or violent offending or sexual assault. The reforms criminalised non-compliance with visa conditions that prevented non-citizens from working with children or other vulnerable persons, from being near a school, childcare or daycare centre, and from contacting the victims (or their relations) of violent or sexual crimes that the non-citizen had been convicted of.[134]

Moreover, the BVR reforms altered how a non-citizen could seek an exception to certain liberty-restrictive conditions imposed on their visa, to somewhat reflect the reasoning in *NZYQ*. Following a decision, made under s 73 of the *Migration Act*, to grant a bridging visa subject to conditions, the Minister was obliged, under s 76E(3), to provide notice of, and reasons for, the decision and, to invite representations about lifting the conditions. Critically, if the Minister was then of a mind ('satisfied') that the imposition of conditions was 'not reasonably necessary for the protection of any part of the Australian community', they were required, under s 76E(4), to grant a second visa without prescribed conditions. This scheme was substantively unjust and procedurally irregular.

The revised ministerial powers were ill-defined and unparticularised with respect to the extent and degree of risk of harm to the community potentially occurring. This lack of specificity proved to be a decisive legal defect.[135] Furthermore, natural justice — a person's opportunity to be heard and make representations — applied after their interests were affected by the imposition of visa restrictions: in circumstances where it had not been assessed and established that the imposition of the condition(s) was reasonably necessary for the achievement of the (broad) purpose of community protection; and, where the condition would remain for up to 12 months. Moreover, there was no safeguard in the form of independent (merits) review to check the substantive justice of administering visa conditions in individual cases, though judicial review action was possible.

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133 David Crowe, 'Teal MPs Slam "Perversion of Democracy" on Immigration Laws', *The Sydney Morning Herald* (online, 6 December 2023) <www.smh.com.au/politics/federal/teal-mps-slam-perversion-of-democracy-on-immigration-laws-20231206-p5epeg.html>. Similar criticisms were directed at the lack of debate around the enactment of the *Anti-Terrorism Act (No 2) 2005* (Cth), which introduced preventive detention orders into the *Criminal Code Act 1995 (Cth)* ('*Criminal Code*'). See Svetlana Tyulkina and George Williams, 'Preventative Detention Orders in Australia' (2015) 38(2) *University of New South Wales Law Journal* 738.

134 Explanatory Memorandum, Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (Cth).

135 *YBFZ* (n 8) 22 [79], 23 [81]–[82] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

As the second Amendment Bill progressed through Parliament, the government added another 'extraordinary' measure,[136] enabling a state or territory Supreme Court to impose 'community safety orders' for the preventive detention or supervision of the most dangerous non-citizens released from indefinite immigration detention.[137] This approach drew upon the reasoning in *NZYQ* which had flagged the legal possibility of a preventive detention regime for high-risk non-citizens. In *NZYQ*, the Court explained that release from immigration detention did not prevent detention on another legal 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'.[138] The possibility of re-purposing an existing legal framework, directed to protecting the community from a small group of high-risk non-citizen offenders, was realised by inserting a new div 395 into the *Criminal Code Act 1995* (Cth) ('*Criminal Code*').[139] The scheme parallels a federal regime reserved for high-risk terrorist offenders,[140] and enables the imprisonment or strict supervision of non-citizens with serious criminal histories who cannot be deported in the reasonably foreseeable future. Although contained in the *Criminal Code*, formally, this is a civil scheme with a non-punitive 'protective' purpose.[141] In several ways, this CSO scheme mirrored similar preventive schemes targeting high-risk individuals (including serious offenders under custodial sentence) in the states, which had weathered constitutional legal challenges.[142] Key features of the CSO hybrid scheme are briefly described, and analysed, below.

With respect to a community safety detention order ('CSDO'), upon application by the Minister for Immigration[143] a court must first determine that an adult non-citizen (who is in detention *or* the community) has a prior conviction in Australia *or* overseas for a serious violent or sexual offence, punishable by life imprisonment or a period of at least seven years.[144] A court must then be satisfied,

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136 *Benbrika [No 1]* (n 58) 98 [38] (Kiefel CJ, Bell, Keane and Steward JJ) describing *Criminal Code* (n 133) div 105A (continuing detention orders).

137 Community Safety Detention Order ('CSDO') or Community Safety Supervision Order ('CSSO').

138 *NZYQ* (n 3) 166 [72] (The Court).

139 *Criminal Code* (n 133) pt 9.10, div 395 (community safety orders).

140 Ibid pt 5.3, div 104 provides for interim control orders for prevention of terrorist acts. The validity of the scheme was upheld in *Thomas v Mowbray* (2007) 233 CLR 307.

141 Though, formally, imposed for 'protective' purposes, in practice preventive detention is always experienced as punitive. See Patrick Keyzer, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth' (2008) 30(1) *Sydney Law Review* 101. Maintaining a strict dichotomy between detention imposed as punishment for past criminal wrongdoing and preventive detention imposed for protective purposes is, arguably, erroneous: see *Benbrika [No 1]* (n 58) 155–7[197]–[200] (Edelman J); *YBFZ* (n 8) 34 [130]–[132] (Edelman J).

142 See, eg, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219; *Garlett v Western Australia* (2022) 277 CLR 1.

143 *Criminal Code* (n 133) s 395.8(1)(a).

144 Ibid ss 395.2 (defines a serious violent or sexual offence), 395.6 (preconditions for community safety orders).

based on admissible evidence, and to a high degree of probability, that the serious offender 'poses an unacceptable risk of seriously harming the community by committing a serious or violent sexual offence'.[145] Also, a court must be satisfied that less restrictive measures (eg visa conditions) would be ineffective in protecting the community from serious harm.[146] The effect of a CSDO is to commit a person to custody in prison for a maximum period of three years and a court can order successive CSDOs, such that when one order ceases another comes into effect immediately.[147] The orders are subject to annual judicial re-evaluation.[148]

The threshold for the application of preventive detention to non-deportable non-citizens is quite demanding. As a civil scheme, the rules of evidence and procedure for civil matters apply.[149] However, the standard of proof ('high degree of probability') appears elevated to a higher standard than the 'balance of probabilities' without rising to the evidential standard used in criminal cases. Additionally, the yardstick of 'unacceptable risk' is undefined, but use of that phrase in the parallel scheme for terrorist offenders (under div 105A of the *Criminal Code*) is understood to require a judicial determination of whether the likelihood of the commission of an offence and magnitude of possible harm is tolerable.[150]

There is also the option of a community safety supervision order ('CSSO') which the Minister for Immigration can apply for, or which a court may order when satisfied the thresholds for a detention order are not met.[151] For a CSSO, the court must be satisfied, on balance and upon admissible evidence, that an adult non-citizen (who may be in detention or the community) poses an unacceptable risk of committing a serious violent or sexual offence, and that visa restrictions would not be as effective for community protection.[152] A range of obligations, prohibitions or restrictions (eg on a person's movement, residence, associations and use of technology) may be ordered by a court if satisfied that each condition and their combined effect is reasonably necessary (appropriate and adapted) for community protection.[153] A court could order a monitoring condition such that the person must allow their photograph or fingerprints to be taken by a specified authority, or allow police officers to attend and enter their residence to confirm compliance with a curfew condition or the wearing of an EM device. Thus, invasive police powers, available for the monitoring

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145 Ibid s 395.12 (making a community safety detention order). The reference to 'admissible evidence' denotes that the court must apply the rules of evidence and procedure for civil matters: at s 395.27. A court may appoint one or more experts to assist the court in its determination of whether a non-citizen poses an unacceptable risk to the community: at s 395.9. Expert reports are provided equally to all parties to proceedings and these reports are one of several relevant matters the court must pay regard to in making a community safety order ('CSO'): at s 395.11.

146 Ibid ss 395.12(1)(c)–(d).

147 Ibid ss 395.12(5)–(6).

148 Ibid s 395.23.

149 Ibid s 395.27.

150 *Benbrika [No 1]* (n 58) 151–3 [190]–[192] (Edelman J).

151 *Criminal Code* (n 133) ss 395.8(1)(b), 395.13(1)(a)(ii).

152 Ibid ss 395.13(1)(b)–(c) (making a community safety supervision order).

153 Ibid ss 395.13(1)(d), 395.14 (conditions of community safety supervision orders).

of high-risk terrorist offenders under supervision orders, are extended to the supervision of non-citizens subject to CCSOs.[154] Supervision orders may also apply for up to three years and may be issued consecutively.

What is distinctive about this new CSO regime is that the executive can, *at any time*, request its application with respect to a deportable non-citizen living in the community *in addition* to a non-citizen held in criminal or immigration detention. So, the regime operates more expansively compared to the federal high-risk terrorist offender scheme, or state serious offender schemes, upon which it is based. Also conspicuous is the inclusion of serious foreign violent or sexual offences as qualifying offences for the CSO regime. This gives rise to concerns about whether criminal proceedings in foreign jurisdictions will have adhered to fair trial principles. This is not a fanciful concern. The problem has arisen in administrative review proceedings dealing with visa cancellations on adverse character grounds referable to overseas convictions. In *Trikilis v Minister for Immigration and Border Protection* ('*Trikilis*'), the Administrative Appeals Tribunal flagged serious concerns about the fairness of trials in Israeli Military Courts and, on the unchallenged evidence before it, had reservations about the circumstances on which convictions were based.[155]

Another unusual feature of the regime is the use of mandatory criminal sanctions for contravening a community safety supervision order given that the CSSO regime adopts a civil procedure. It is a criminal offence to contravene a CSSO,[156] which carries a mandatory minimum sentence of one year imprisonment and a maximum five-year term.[157] Additionally, there are offences relating to conduct that interferes with or disrupts the functioning of a monitoring device under a CSSO, that carry a maximum penalty of five years imprisonment.[158] This underscores the hybridity of CSSOs, akin to counter-terrorism control orders developed over twenty years ago.[159]

The use of preventive imprisonment, for lengthy periods, for dangerous non-deportable non-citizens, is a novel approach to migration control but fairly anticipated given the appetite for post-sentence preventive detention laws in Australia and the political rumpus around the *NZYQ* case. Yet the extension of a pre-crime scheme to non-deportable non-citizens, that puts them on a similar

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154 *Crimes Act 1914* (Cth) pt IAABA amends how pt IAAB operates and largely applies pt IAAB to community safety supervision orders.

155 [2017] AATA 1409 [54]–[57].

156 *Criminal Code* (n 133) s 395.38. This approach to restrictions borrows from the *Terrorism (High Risk Offenders) Act 2017* (NSW). See Supplementary Explanatory Memorandum, Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (Cth) 42 [208].

157 *Criminal Code* (n 133) s 395.40.

158 Ibid s 395.39. A 'reasonable excuse' defence is available for any contraventions of community safety orders, which is analogous to the defence created under *Bridging Visa Conditions Act* (n 110) (discussed above).

159 Ashworth and Zedner described control orders as 'hybrid civil-criminal': see Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) 184.

footing to high-risk terrorist offenders, came just shortly after a critical report on the effectiveness of preventive detention laws. Grant Donaldson SC recommended abolishing the power to make continuing detention orders, noting that the laws had made Australia a 'coarser and harsher society' without necessarily making the community safer.[160] Indeed, Donaldson sharply criticised the planned use of preventive detention laws for former immigration detainees.[161]

Essentially, one form of incarceration (immigration detention) has been exchanged for another (community safety detention). Although the latter regime does not have the safeguards of a criminal trial, it does at least have superior procedural, evidential and institutional safeguards compared to the mandatory immigration detention scheme,[162] notably: community safety detention is a measure of last resort; a CSDO can only be made after an *inter partes* hearing in open court at which civil procedural and evidential rules apply; there is provision for judicial reasons for decisions; and appeal rights.[163] These are key safeguards and mitigate the risk of unnecessary and unjustifiable detention.

At the time of completing revisions to this article, no preventive detention orders had been sought by the federal government, and just twelve supervision orders were under active consideration.[164] The spectre of judicial administration of community detention or supervision orders, coupled to reasonably stringent legal thresholds for the application of CSDOs, partly explains why no non-citizen has been detained under this regime to date — mirroring state experience with prevalent but little-used court ordered anti-bikie control order schemes.[165] The efficacy of the strict bridging visa conditions is another factor.[166] Extending preventive regimes for high-risk terrorist offenders or other serious offenders to non-deportable non-citizens appears to be an example of legislative overreach — a case of normalising exceptional pre-crime measures, despite their apparent lack of utility.

The risk of legislating in haste to bypass a politically inconvenient court decision protective of individual liberty is, as Anne Twomey suggested, that it may create a

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160 Grant Donaldson, 'Review into Division 105A (and Related Provisions) of the Criminal Code Act 1995 (Cth)' (Report, 3 March 2023) 7, 11 <https://www.inslm.gov.au/system/files/2024-02/inslm-report-division-105a-3-march-2023.pdf>.

161 Angus Thompson, 'Former Security Watchdog Labels Preventative Detention Laws a "Disgrace"', *The Sydney Morning Herald* (online, 3 December 2023) <www.smh.com.au/politics/federal/former-security-watchdog-labels-preventative-detention-laws-a-disgrace-20231201-p5eof6.html>.

162 The absence of substantive judicial review over the reasonableness and necessity for detention in individual cases, coupled with the absence of periodic review, have long been recognised as violating international laws prohibiting arbitrary detention. See Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997, adopted 3 April 1997) ('*A v Australia*').

163 *Criminal Code* (n 133) ss 395.35–395.36.

164 Commonwealth, Legal and Constitutional Affairs Legislation Committee, *Senate Estimates*, 27 March 2025, 68 (Clare Sharp).

165 See Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38(2) *Melbourne University Law Review* 362.

166 Commonwealth (n 164) 68.

'spiral of litigation and legislation'.[167] So it proved, with the Federal Court establishing a panel of judges to review an increasing and complex caseload in the fallout from *NZYQ*,[168] subsequent appeals to the HCA, and more legislative counterstrokes.

VI The Legislative Answer to *ASF17*

On 26 March 2024, the government unsuccessfully tried to enact more reforms without meaningful scrutiny and parliamentary debate.[169] The Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) ('Removal Bill') sought (inter alia) to address and reduce the intractable removals caseload and to slow down the entry pipeline into Australia of other potentially intractable removal cases in the future.[170] Reducing the intractable caseload was to be achieved by introducing behavioural expectations wedded to new criminal offences for non-citizens,[171] on a 'removal pathway', who refuse to follow administrative directions and engage with efforts to remove them, absent a reasonable excuse.[172] The measure was directed to (approximately) 150–200 unlawful non-citizens in detention who refused to co-operate with removal efforts and could also apply to the non-citizens released from detention following the *NZYQ* case. Yet, the Bill threatened punishment for a broader cohort, including non-citizens with a temporary visa (a Bridging Visa E, 'BVE') issued for removal

167 Anne Twomey, 'New Laws to Deal with Immigration Detainees Were Rushed, Leading to Legal Risks', *The Conversation* (online, 13 December 2023) <https://theconversation.com/new-laws-to-deal-with-immigration-detainees-were-rushed-leading-to-legal-risks-219384>.

168 Rhiannon Down, 'Federal Court Convenes Crisis Panel to Tackle NZYQ Case Wave', *The Australian* (online, 7 July 2024) <https://www.proquest.com/newspapers/federal-court-convenes-crisis-panel-tackle-nzyq/docview/3076532678/se-2?accountid=14723>.

169 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 5 of 2024, 27 March 2024) 8–9.

170 Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 3.

171 Excluding those non-citizens owed protection obligations, protection visa applicants, and children under 18 (though a direction may be given to a child's parent who is a removal pathway non-citizen).

172 The Bill gave examples of what would *not* be a reasonable excuse: eg a subjectively held fear of persecution, in situations where a non-citizen is not the subject of a formal protection finding or has no valid protection visa application ongoing.

purposes (over 4400 people). The latter group form part of the 'Legacy Caseload',[173] and include rejected refugee claimants residing in Australia.[174]

The Removal Bill proposed a new, extensive, power for the Minister for Immigration to give a written direction to a 'removal pathway non-citizen', whose visa application was finally determined, to force their cooperation with officials and removal to their home country or safe third country. To deter non-cooperation, the Bill threatened penalties equivalent to those in the second Amending Act of 2023, with a mandatory minimum twelve-month prison term and a maximum sentence of five years (300 penalty points or both) for non-compliance with administrative directions. The Bill also provided (inter alia) the Minister with a non-delegable power, to designate, by statutory instrument, a 'removal concern country' in the national interest; effectively enabling the Minister to impose a blanket ban on visa grants to nationals (subject to certain exceptions) from designated countries. The political goal was to provide the government with a negotiating tool, to leverage the cooperation of countries who refuse to accept involuntary returnees. The proposed means would serve to penalise blameless people wishing to travel to Australia (to visit family and communities or, potentially, seek asylum) rather than the government of the designated country that refuses to cooperate with Australia.

The draft laws stalled in the Senate which referred the Bill to a Committee inquiry. The government's haste to pass the Removal Bill stemmed, in part, from their desire to get ahead of a forthcoming case involving a 'failed' asylum seeker. An Iranian man (pseudonym ASF17) had been detained for almost ten years pending the outcome of legal proceedings. He was uncooperative with Iranian officials with respect to his removal due to a declared (but unproven) fear of persecution.[175] Before the HCA, ASF17 argued that, because of his recalcitrance, removal was impracticable in the reasonably foreseeable future. Therefore, the constitutional limit established in *NZYQ* was reached.

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173 Asylum seekers arriving by boat during the period August 2012 to 1 January 2014 are a distinct cohort of asylum seekers, that numbered around 30,000 people. They were designated the 'Legacy Caseload' under migration legislation introduced in 2014 and treated differently to other protection seekers in Australia. They were subject to a, flawed, 'fast-track' protection visa assessment process, and if successful they were subject to temporary protection arrangements with no path to permanent residency. Those refused substantive visas were placed on temporary bridging visas pending departure, but many remain in Australia due to practical obstacles inhibiting departure or unresolved legal proceedings.

174 The Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Removal and Other Measures) Bill 2024* (Report, May 2024) 4 [1.18]–[1.19], referring to Bridging Visa Rs ('BVR') (Subclass 070) and Bridging Visa Es ('BVE') (Subclass 050).

175 Problematically, ASF17 had not had a proper consideration of certain elements of his refugee claim (see *ASF17* (n 6) 794 [63] (Edelman J)), aspects which were raised, belatedly, after the merits of the initial protection visa application had been decided and rejected. Consequently, it is troubling that the HCA determined ASF17 was *choosing* not to co-operate with his removal. The choice is imagined in circumstances where, as the courts accepted in habeas corpus proceedings, ASF17 faced a real risk of persecution in Iran based on his sexuality.

In *ASF17*,[176] the HCA dispelled the federal government's fears about the prospect of another adverse court ruling and other detainees being freed. The HCA found that a person in the position of ASF17 (neither stateless nor a declared refugee) who has the capacity,[177] but chooses not to cooperate with administrative officials may, lawfully, be kept in detention. The bare fact of a detainee's non-cooperation with authorities was insufficient to refute the existence of the legitimate and non-punitive purpose of detention (removal), with six members of the Court agreeing that:

> The short point is, that conformably with the *Lim* principle, continuing detention for a non-punitive purpose that is occurring because of a voluntary decision of the detainee cannot be characterised as penal or punitive.[178]

Justice Edelman reached the same result by a different path of reasoning.[179] The unanimous decision of the court was welcomed by a government alarmed at the possibility of a prospective deportee 'engineering' their release into the community by refusing to cooperate in removal efforts.

One important implication of the HCA's ruling was that the government could lawfully detain, *indefinitely*, a non-citizen refusing to cooperate in their removal. Consequently, the government was faced with a cohort of up to 200 people in a similar position to ASF17 — uncooperative and seemingly unreturnable.[180] Therefore, the government pressed on with its plans to coerce and criminalise noncompliant 'removal pathway' non-citizens, and to impose a crude travel ban on most people from countries whose governments refuse to assist with the return of their nationals from Australia.

The Removal Bill was finally assented to on 4 December 2024, eight months after its initial introduction in Parliament.[181] The Act established the statutory expectation that certain deportable non-citizens, in detention and on temporary visas within the community pending removal, will act on administrative

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176 Judgment issued three days after the Senate Committee reported and recommended that the Removal Bill be enacted. See Senate Legal and Constitutional Affairs Legislation Committee (n 174).

177 Cf *AZC20* (n 90), a case in which the detainee lacked the capacity to co-operate with officials due to psychiatric illness.

178 *ASF17* (n 6) 791 [42] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

179 For non-citizens — such as ASF17 — who are capable of consenting but refuse to be removed to a country that requires voluntary removal, detention is reasonably necessary for their removal 'because there is a real prospect that aliens in that class (perhaps with counselling, advice and relocation assistance) will consent to be removed from Australia in the reasonably foreseeable future': *ASF17* (n 6) 803 [108] (Edelman J).

180 See Human Rights Law Centre, 'Explainer: High Court's Decision in ASF17 v Commonwealth' (Web Page, 10 May 2024) <https://www.hrlc.org.au/explainers/2024-05-10-asf17-high-court/>.

181 Notably, the amendments define a 'removal pathway non-citizen' and via sch 1 insert a new sub-div D into div 8 of pt 2 of the *Migration Act* (n 10). In a troubling development, sch 2 expanded ministerial powers to revisit and reverse refugee protection findings for lawful non-citizens in the community denied a substantive visa on adverse character grounds. See also Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report 3 of 2024, 17 April 2024) 37–43.

instructions and submit to their removal from Australia. However, it is doubtful that the threat or actuality of criminal sanctions will coerce detainees, like ASF17, or those non-citizens with mental illnesses,[182] into complying with administrative directions — especially when experience reveals that some non-citizens appear to have chosen to endure prolonged immigration detention over repatriation. As the Iranian applicant in *ASF17* explained, 'if I didn't fear harm, I wouldn't have stayed in this camp for 10 years. I would have quickly gone back to begin with the first day. Who … will leave their family and prefer the prison?'[183] The prospect of lengthy criminal imprisonment may not provide any greater motivation, for certain non-citizens, to comply with removal directions than prolonged immigration detention has since its introduction in 1992.

Indeed, it must be stressed that there are many non-citizens, like ASF17, who have a legitimate claim for protection that has gone unanswered due, in part, to deficiencies with truncated refugee status assessment procedures in Australia.[184] Those in a comparable position to ASF17 are in a catch22: return to a country where there is, perhaps, a real risk of persecution or death, or face a minimum twelve-month prison sentence. Should they 'choose' the latter option, doubtless they would be recycled back into immigration detention upon expiration of their prison sentence, unless they cooperated with their removal which is contingent on interstate agreement. Consequently, Australia may violate her *non-refoulement* obligations by coercing people's removal under threat of criminal sanction.

In short, imposing an arbitrary minimum prison sentence for failing to follow an administrative direction will criminalise many non-citizens in immigration detention and within the wider community, including refused refugee protection seekers (among the 'Legacy Caseload') on a 'removal pathway', who pose little risk to community safety. This is a disproportionate and punitive response for a group that have lived, under temporary visas and in very precarious circumstances, within the Australian community for the past decade.[185]

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182 *AZC20* (n 90).

183 *ASF17* (n 6) 805 [119] (Edelman J).

184 Ibid 790 [38] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ) where the High Court of Australia adverted to the possibility that a person could be removed in circumstances where they might have a genuine ('eleventh-hour') protection claim. Also, the fast-track process that ASF17 was subject to lacked procedural safeguards, casting doubt on the correctness of substantive asylum decisions. For a critique, see Emily McDonald and Maria O'Sullivan, 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 41(3) *University of New South Wales Law Journal* 1003; Linda Kirk, 'Accelerated Asylum Procedures in the United Kingdom and Australia: "Fast Track" to *Refoulement*?' in Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart Publishing, 2017) 243.

185 Australian Human Rights Commission, *Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload'* (Report, 2019). See also Laurie Berg, Sara Dehm and Anthea Vogl, 'Refugees and Asylum Seekers as Workers: Radical Temporariness and Labour Exploitation in Australia' (2022) 45(1) *University of New South Wales Law Journal* 35.

VII The Legislative Repercussions of YBFZ

Following *NZYQ* and the ensuing legislative responses, several challenges to the imposition of mandatory visa conditions upon the '*NZYQ* cohort' were filed in the HCA. Three cases were effectively shut down by the government after it removed curfews and monitoring devices from the plaintiffs soon after court papers were lodged.[186] This simply deferred a ruling on the validity of certain regulatory provisions that authorised visa conditions permitting confinement and surveillance: a curfew (for one-third of every day), and the wearing of a monitoring device at all times.

In *YBFZ*, a stateless Eritrean refugee, with a criminal history and no real prospect of removal, asked the HCA whether bridging visa restrictions impacting his liberty were punitive and, thus, constitutionally invalid.[187] Applying and extending the constitutional principle in *Lim*, as restated by six Justices in *NZYQ*,[188] to the impugned provisions,[189] the HCA decided, by a majority, that the regulations were invalid. The visa conditions imposed by the executive on *YBFZ* inflicted punishment, infringing the separation of powers.

The majority joint judgment (Gageler CJ, Gordon, Gleeson and Jagot JJ) held that the substance and detrimental effect of the curfew and monitoring conditions meant they were prima facie punitive.[190] The conditions amounted to 'material and relatively long-term' infringements of liberty and bodily integrity respectively.[191] Moreover, in their Honours' opinion, the conditions could not be justified as necessary for a legitimate and non-punitive purpose because the object (community protection 'from harm') was too ambiguous. Their Honours interpreted the regulatory provision to 'mean precisely what it says, that its object is the "protection of any part of the Australian community" in the broad sense',[192] rather than for more specific purposes, such as protection from the risk

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186 Matthew Doran, 'Immigration Detainees Drop High Court Challenges after Ankle Monitoring Bracelets Removed', *ABC News* (online, 1 February 2024) <https://www.abc.net.au/news/2024-02-01/immigration-detainee-challenges-dropped-ankle-monitoring-lifted/103409080>.

187 Following the Minister's decision (taken without according natural justice) to impose visa conditions, upon later invitation, YBFZ unsuccessfully petitioned the Minister to have the curfew and monitoring conditions removed from his BVR. YBFZ failed to comply with his conditions, and charges were pending in the Magistrates Court of Victoria at the time of his HCA appeal.

188 If a law authorises executive detention, it will contravene Ch III 'unless the law is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose. In other words, detention is penal or punitive unless justified otherwise': *NZYQ* (n 3) 157 [39] (The Court).

189 *Migration Regulations* (n 117) sch 2 cls 070.612A(1)(a), (d) provided for the imposition of conditions upon bridging visas (Subclass 070) granted by the Minister under the Regulations.

190 *YBFZ* (n 8) 17–18 [47]–[52], 19–20 [58]–[63] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

191 Ibid 18 [52], 19 [60].

192 Ibid 22 [76].

of serious harm arising from future offending.[193] This purpose was 'unparticularised' and 'indeterminate',[194] and a concept of such elasticity that it was not inconsistent with the imposition of a criminal punishment following an adjudication of criminal guilt, a function lying in the heartland of judicial power.[195] Accordingly, the purported non-punitive purpose failed the legitimacy test due to its generality. The majority concluded that the conditions were 'a form of extra-judicial collective punishment based on membership of the class' and infringed upon judicial power.[196] Justice Edelman agreed the conditions were punitive and invalid offering separate reasons.[197]

Immediately after the *YBFZ* decision came more regulatory reforms,[198] to restore curfews and EM conditions for certain BVR holders, then consequential legislative amendments on 4 December 2024.[199] Responding directly to the majority (joint judgment) reasoning in *YBFZ* the government's regulatory powers to impose surveillance and monitoring conditions were reworked again. The new 'community protection test' provides that the Minister for Immigration must first be satisfied that, on balance, the BVR holder poses a *substantial risk of serious harm* to community safety by committing a serious offence, and that each visa condition is the means reasonably necessary, and *reasonably appropriate and adapted*, for the protective purpose. Therefore, a positive and proportionate decision is now, *initially*, required from the Minister, with respect to both the nature of harm to be protected against, and degree of future risk, the BVR holder may pose — as opposed to visa conditions being presumptively imposed on a person who is regarded, broadly, as a risk to any part of the Australian community, unless the Minister later decides otherwise.

Additionally, the migration amendments supplied (inter alia) new powers to enable the re-detention of non-citizens in circumstances where the government reaches a financial arrangement with a third country to allow the non-citizen to enter and remain. Where a foreign country agrees to receive a 'removal pathway

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193 Ibid 20–2 [66]–[76]. Cf Edelman J at 29–32 [110]–[123]. His Honour viewed the evident purpose of the regulatory terms as being to protect the community from the risk of serious future harm, and comparable to the meaning and application of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 6(1).

194 *YBFZ* (n 8) 22 [76] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

195 Ibid 23 [81].

196 Ibid 24 [86]–[87].

197 His Honour determined that the two conditions had a punitive character because they were, in fact, imposed by the executive to deter crime and based on past criminal activity: ibid 42 [165]–[166]; and because of the harshness of the consequence of home detention sanctioned by mandatory imprisonment for breach of that condition: ibid 43 [167]–[168].

198 New regulations were registered and commenced the morning after the *YBFZ* ruling: *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth).

199 *Migration Amendment Act 2024* (Cth) schs 6–7 ('*Migration Amendment Act*') amended subclass 070 Bridging (Removal Pending) Visas. See also Explanatory Statement, Migration Amendment (Bridging Visa Conditions) Regulations 2024 (Cth).

non-citizen', the Minister must issue a notice which triggers visa cancellation.[200] This cessation process (which does not attract natural justice)[201] renders a non-citizen unlawful and liable to immigration detention, because the third country agreement raises the spectre of removal being in prosect in the reasonably foreseeable future, thereby meeting the *NZYQ* threshold.

The latest legislative reforms also establish broad civil liability immunity for the government with respect to the prospective removal of unlawful non-citizens to foreign countries, including but not limited to those it has third country reception arrangements with (as outlined above).[202] This is a significant manoeuvre coming, as it does, after the Commonwealth government has only recently settled compensation claims from refugee claimants,[203] for their negligent mistreatment in third countries — Nauru and Papua New Guinea — while detained under 'regional processing' arrangements established in 2012.[204]

VI Conclusions on Escalating Crimmigration Controls

This article has explained and critically examined how and why criminal law and immigration law have been employed in innovative, interchangeable and mutually reinforcing way with respect to regulating, in the national interest, small groups of unwanted non-citizens. The targets of crimmigration include what the government views as 'undesirable' non-citizens with criminal histories who cannot be deported in the foreseeable future, and extends to non-citizens

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200 *Migration Amendment Act* (n 199) schs 1, 5. In February 2025 the government announced that three non-citizens, with criminal histories, from the NZYQ cohort would be transferred to Nauru, under a bilateral arrangement, for long-term resettlement: Jessica Bahr, 'Burke Expects Legal Challenge to Nauru Deal Deporting Three Violent NZYQ Members', *SBS News* (online, 16 February 2025) <https://www.sbs.com.au/news/article/three-members-of-nzyq-cohort-to-be-deported-to-nauru/atjo9345q>.

201 See also *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540, where the Court rejected procedural unfairness claims with respect to both the third country reception arrangements with Nauru (at [130]–[131]) and the related exercise of statutory powers (at [152]–[161]). The Court also ruled that the evidence did not support a finding that there was a real risk of indirect *refoulement* from Nauru to Iran (at [176]–[177]) and that the lack of suitable medical services in Nauru (to deal with the applicant's asthma) did not serve to prevent removal (at [182]–[185]). The Australian government later relied on *TCXM* to justify the total legislative exclusion of procedural fairness with respect to third country arrangements for affected 'removal pathway' non-citizens (see Part VII Postscript).

202 *Migration Amendment Act* (n 199) sch 2.

203 See, eg, *FBV18 v Commonwealth* [2024] FCA 947 (breach of duty of care in relation to medical treatment of a child detained on Nauru); *AYX18 v Minister for Home Affairs* [2024] FCA 974 (breach of duty of care in relation to medical facilities for a child detained on Nauru).

204 Since 13 August 2012, 4183 asylum seekers arriving by boat, unauthorised, were transferred to Papua New Guinea or Nauru for 'offshore processing' in camps widely criticised by human rights monitors due to the prolonged and arbitrary nature of detention, poor living conditions, lack of physical security and inadequate access to healthcare: see, eg, Australian Human Rights Commission, *Asylum Seekers, Refugees and Human Rights: Snapshot Report (2nd edition)* (Report, March 2017).

who are uncooperative with removal processes, including rejected refugee claimants with cogent claims to protection left unanswered.

For two decades *Al-Kateb* stood, without legislative correction, as authority for the validity of an illiberal scheme of indefinite immigration detention that institutionalised 'double punishment' in practice. The HCA ruling in *NZYQ* signalled an end to indefinite detention for some intractable cases — when deportation was not in prospect in the reasonably foreseeable future. Deprived of the administrative means to indefinitely detain and segregate a small population of unwanted non-citizens in Australia, the federal government hastily replaced immigration detention with novel, stringent, visa conditions and assorted constraints on individual liberty and bodily integrity (wedded to criminal penalties for non-compliance) to manage the '*NZYQ* cohort', deter future offending and promote community safety. The coupling of far-reaching and harsh visa conditions with severe and disproportionate criminal sanctions for non-compliance amounted to taking a blunt statutory sledgehammer to fix complex matters, and to accomplish political purposes that had previously been realised via the uncompromising regime of mandatory immigration detention.

Crimmigration is often characterised by different and depleted procedural standards and safeguards, and recent legislative reforms in Australia clearly evidence distinctive forms of procedural justice. Notably, punitive visa conditions were, originally, applied to the '*NZYQ* cohort' automatically, in a bureaucratic manner without affording natural justice. (prior notice and an opportunity to respond), leading to imprudent administrative visa decisions: effectively, a 'punish first, appeal later' approach.[205] After the *YBFZ* ruling, the replacement visa scheme heralded a somewhat improved procedure entailing a form of proportionality testing — a scheme better designed to promote an appropriate and adapted approach to the imposition of visa conditions on a case-by-case basis by the executive. Yet, still conspicuously absent is an independent and impartial review mechanism to promote substantive justice.

Imposing restrictive visa conditions, under the pain of criminal sanction for non-compliance and associated mandatory sentence provisions, evidences the distinctive melange of criminal and immigration law emblematic of crimmigration control. That is, measures and detriments commonly associated with the criminal justice system (eg curfews and electronic monitoring) are injected into the immigration realm but without the associated institutional oversight and procedural justice safeguards protective of people's basic rights to life, liberty and bodily integrity.

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[205] This unconventional approach also characterises the mandatory visa cancellation scheme which operates without prior notice and an opportunity to be heard. Instead, there is a post-decisional procedural fairness via a 'revocation' process through which non-citizens may challenge cancellation decisions. See Billings, 'Regulating Crimmigrants' (n 48).

It is telling that some judges appear to have utilised their residual sentencing discretion to impose (wholly or partially) suspended custodial sentences for visa offences committed by the '*NZYQ* cohort',[206] likely born out of misgivings about the disproportionality of imposing a minimum 12-month custodial sentence in particular cases of visa non-compliance. In one reported case, a Perth Magistrate imposed a 12-month suspended sentence on a former immigration detainee for breaching his curfew and monitoring conditions. In deciding to bail him, the Magistrates Court took account of the fact that (inter alia) the offender would remain subject to strict monitoring under migration rules.[207] It remains to be seen if Parliament will tighten its crimmigration controls further by legislating to close this 'loophole' and remove judicial discretion over the mandatory sentencing provisions for certain visa breaches. Such a reform would further evidence how the substance of crimmigration laws and their consequences, in particular cases, may bespeak 'arbitrariness or disproportion of response'.[208]

Reforms to the *Criminal Code* enacted in December 2023 have permitted the preventive detention or strict community supervision of the riskiest among the people released from detention after the *NZYQ* decision and others who may be released in future. Intensifying crimmigration controls in this way — by utilising and broadening a scheme intended for high-risk terrorism offenders to net a small population of criminal non-citizens — has not resulted in any applications for CSOs before the courts to date. This is unsurprising given: (i) the complexity of cases (offender profile and mental health considerations); (ii) the relatively strict requirements for CSOs (including, burden of proof and evidentiary threshold); and (iii) the availability of less restrictive alternatives to prison (including, BVR conditions). Indeed, it took three years to prepare a case under the related, high-risk terrorist offender, scheme which was comparatively more straightforward to utilise.[209] Whether the preventive detention order powers will ever be used by a judge, to remove dangerous non-citizens from the community, appears doubtful. Redesigning the scheme to make it easier for the executive to bring a case to court successfully would invite constitutional challenges.

Following the opening legislative rejoinders to *NZYQ* enacted in December 2023, a year later, crimmigration controls were expanded further, with new powers targeting a small sector of, seemingly, 'uncooperative' immigration detainees to coerce their compliance with administrative removal directions. Criminalising non-compliance with administrative directions, combined with

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206 Commonwealth (n 164) 73–4.

207 Joanna Menagh and Tabarak Al Jrood, 'Ex-Immigration Detainee Released back into Community after AFP Arrest in WA over Curfew, Ankle Monitor Breaches', *ABC News* (online, 21 May 2024) <https://www.abc.net.au/news/2024-05-21/wa-ex-immigration-detainee-pleads-guilty-to-curfew-breach/103874566>.

208 See the observations of Allsop CJ in *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 6 [15] in the context of the consequences of a visa cancellation decision upon a long-term resident.

209 Commonwealth, Legal and Constitutional Affairs Legislation Committee, *Senate Estimates*, 24 February 2025, 117.

the imposition of mandatory minimum sentences, is novel in Australia. Globally, it appears to be an unparalleled means of facilitating 'voluntary' removals notwithstanding many other countries face a similar problem with repatriating certain non-citizens (including, refugees and stateless persons). These reforms extend beyond the deliberately uncooperative immigration detainees and may capture those in the community on bridging visa, including over four thousand people (among the 'Legacy Caseload') denied substantive refugee protection visas who have lived, on temporary visas, in the community for many years pending their departure. Again, while the prompt removal of non-citizens fairly refused a substantive visa is a legitimate end of an effective immigration system, threatening adults (who may, but need not, be of character concern) with prison, for at least one year, to procure immigration compliance denotes an inordinate means of control. This may lead to the indefinite recycling of people between prison and immigration detention, and may expose non-citizens (including those, like *YBFZ*, subject to the faulty 'fast-track' asylum process) to *refoulement*.

Legislators' hasty responses to *NZYQ* overreached by defaulting to criminalising people because of their lack of formal membership and unwanted presence, as much as (and seemingly more than) for the risk of harm they might cause through any future offending. The symbolic use of contemporary crimmigration controls — to communicate and re-assert the sovereign power of the state (qua government) over immigration enforcement — is plain to see. Australia remobilised criminal law to manage (and potentially segregate from the community) migrants on a removal pathway, in tandem with heightened immigration law measures, to effectively, side-step the constitutional limits on the immigration detention regime. This coupling of immigration (visa) restrictions and administrative (removal) directions with new criminal offences and severe penalties, and the civil-criminal hybrid CSO scheme exemplifies, somewhat, crimmigration control as, an 'instrumental panoply of laws, geared towards the exclusion of undesirable non-citizens, from which immigration officials may "cherry-pick" at their wish'.[210] As such, the legislative replies to *NZYQ*, *ASF17* and *YBFZ*, have underscored Australia's position as a state at the forefront of an expanding phenomenon — crimmigration — globally.

VII Postscript

In September 2025, after the completion and acceptance of this article for publication, the *Migration Act 1958* (Cth) was amended, yet again, via the *Home Affairs Legislation Amendment (2025 Measures No 1) Act 2025* (Cth), targeting non-citizens on a removal pathway. The reforms (inter alia) expressly stipulated that provisions authorising and enabling executive action with respect to third-country

[210] Bowling and Westenra (n 36).

resettlement arrangements and non-citizens' removal are unconditioned by natural justice obligations. Ostensibly, to reduce the scope for future litigation[211] and, thus, facilitate the swift, forcible exclusion of unwanted aliens from Australia (which, as discussed earlier, is a group wider than the small '*NZYQ* cohort' and includes stateless persons and refugees owed protection obligations under international law). The total exclusion of procedural justice requirements, coupled with the retrospective validation of all things done in relation to third country reception arrangements (again, to pre-empt legal challenges), is textbook crimmigration law. It will preclude people from being heard; denying them the opportunity of ensuring that removal action is based on all relevant information about their circumstances, including the likely effects of removal upon them. This latest reform paved the way for the announcement of a new (and financially costly) arrangement with Nauru to accept (and essentially 'warehouse') up to 280 non-citizens from the '*NZYQ* cohort' on long-term visas.[212] One member of the '*NZYQ* cohort', re-detained in Australia pending removal to Nauru under the new arrangements, stated:

> These days are like living in a nightmare. I made mistakes since I came to Australia – I have been punished for those mistakes. I have tried everything to put my life back on track. I am not a young man – I cannot keep rebuilding my life. I do not know why Australia has selected me for this terrible punishment.[213]

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211 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 August 2025, 1 (Tony Burke, Minister for Home Affairs). See also Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 5 of 2025, 4 September 2025) for initial, critical, scrutiny of the Home Affairs Legislation Amendment (2025 Measures No 1) Bill 2025 (Cth).

212 Michelle Grattan, 'View from the Hill: Albanese Government Resorts to Whatever-It-Takes to Rid Australia of Former Detainees', *The Conversation* (online, 31 August 2025) <https://theconversation.com/view-from-the-hill-albanese-government-resorts-to-whatever-it-takes-to-rid-australia-of-former-detainees-263914>.

213 Sarah Basford Canales, 'Adnan thought he'd served his time. But one night border force raided his home to deport him to Nauru', *The Guardian* (online, 28 October 2025) <https://www.theguardian.com/australia-news/2025/oct/28/australian-border-force-nzyq-non-citizens-nauru>.