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Liberty, equality and proportionality must not be overlooked in response to High Court decision

As Parliament today considers a legislative response to the recent High Court decision of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* it must weigh individual liberties and public safety carefully.

“The Law Council understands that there are community safety concerns following the High Court decision and that the Commonwealth has felt it needed to act quickly in response,” Law Council of Australia President, Mr Luke Murphy said.

“However, we are also conscious that the Migration Amendment (Bridging Visa Conditions) Bill 2023 contains extraordinary provisions, including restrictive visa conditions which would present significant incursions on individual freedom of movement. The Bill provides for significant criminal offences for breach of these conditions.”

The Law Council considers this proposed regime should be carefully scrutinised by Parliament in terms of its necessity and proportionality, noting that persons with criminal convictions who have been released from detention following the High Court decision have already served their custodial sentences prior to be transferred to immigration detention.

“Comparable existing post-sentence regimes apply to all offenders, regardless of citizenship or visa status, and are generally subject to judicial oversight. They require an assessment of the particular risk that a high-risk offender poses against prescribed thresholds – for example, that there is a high degree of probability that the offender poses an unacceptable risk of committing another serious offence. They are also time limited and require periodic review,” Mr Murphy said.

“In contrast, this Bill would empower the Minister to impose conditions that require an affected individual to, for example, wear a monitoring device, where failure to comply is an offence. There is no periodic review or time limit. The discretion available to the Minister to impose such conditions is not subject to any express limitations under the Bill. While retrospective natural justice is available to lift these conditions in some circumstances, this is an insufficient safeguard. The exercise of such a power should at the very least be subject to meaningful and ongoing judicial oversight. Any penalties applicable should be proportionate to the seriousness of the conduct, noting that under the Bill, failure to notify the Minister of changes to certain personal circumstances without reasonable excuse could subject a person to a maximum penalty of five years imprisonment.

“The Law Council’s longstanding view is that the imposition of restrictions on a person’s liberty to pre-empt and prevent criminal activity is only legitimate as an extraordinary and appropriately tailored scheme, for example, to prevent the commission of a serious offence in view of the seriousness of the harm to be averted and the level of risk posed by the person sought to be detained or otherwise restrained.

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“Further, we consider that principles of equality before the law are fundamental in this context. The Law Council’s Rule of Law statement says that where the law distinguishes between different classes of persons, there should be a demonstrable and rational basis for that differentiation. It is not aware of evidence demonstrating that a person without citizenship is more likely to reoffend than a person with citizenship.”

The Law Council would support a referral of the Bill to a Parliamentary Committee to ensure adequate community scrutiny, even with a relatively truncated inquiry timeframe.

Should the Bill progress without such inquiry, it strongly encourages that a provision requiring independent review be included, as well as reporting requirements regarding its implementation.

Non-legislative measures should also be considered to ensure that persons released from detention are assisted with rehabilitation and reintegration into the community, in turn promoting community safety. These include settlement, health and other support services.

The Law Council reiterates its longstanding view that Australia’s mandatory detention regime is in need of fundamental reform. It remains keen to work with the Australian Government and Parliament to that end.

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