Notice, Nullity and No Natural Justice: Constitutional Precariousness of Section 76AAA

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This article argues that recent amendments to the Migration Act 1958 (Cth) – in particular ss 76AAA, 189, 196 and 198AHB – create an architecture that is fundamentally incompatible with Australian administrative-law values. By allowing a Bridging (Removal Pending) visa to cease automatically once a non-citizen gains even conditional "permission" to enter a third country, and by expressly excluding the rules of natural justice, s 76AAA triggers a statutory pipeline to mandatory, potentially indefinite detention under ss 189 and 196. Section 198AHB simultaneously empowers the Commonwealth to support opaque third-country reception arrangements with minimal scrutiny. The article demonstrates that the scheme undermines procedural fairness, violates the principle of legality, strains the constitutional separation of judicial power, and positions Australia as an international outlier. It concludes with a suite of legislative and doctrinal reforms designed to restore fairness, legality and human dignity.

INTRODUCTION

On 17 November 2023, Parliament passed the *Migration Amendment (Bridging Visa Conditions) Bill 2023*, inserting the now-notorious s 76AAA into the *Migration Act 1958* (Cth).[1] Two further amendment Acts in 2024 and early 2025 tightened the provision's operation and expanded the Commonwealth's powers under s 198AHB.[2] The result is a legal mechanism that permits the executive branch to extinguish a person's lawful status by oral notice alone, immediately rendering that person an "unlawful non-citizen" who must be detained.[3]

The speed and opacity with which liberty can be lost raises profound questions of administrative-law unfairness. While Australia's migration control regime has always involved exceptional measures,[4] the latest amendments depart even further from the bedrock norms of procedural fairness, rationality and proportionality that have long constrained administrative power.[5]

This article provides the first comprehensive academic treatment of the four interlocking provisions. It situates them within the broader historical trajectory of Australia's detention system, analyses their compatibility with domestic administrative-law principles and constitutional limits and compares them with analogous regimes in other common-law jurisdictions.[6]

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

[2] *Migration Amendment Act 2024* (Cth) and *Migration Amendment (Removal and Other Measures) Act 2024* (Cth).

[3] Parliamentary Library, Australian Parliament House, *Bills Digest No. 31, 2024–25: Migration Amendment (Bridging Visa Cessation and Third Country Arrangements) Bill 2024*, 4 December 2024.

[4] J Jupp, "Refugees and Asylum Seekers as Victims: The Australian Case" (2003) 10(2) *International Review of Victimology* 157.

[5] T Harley, "The Consequences of the Government's New Migration Legislation Could Be Dire" (27 March 2024) *The Conversation* <https://theconversation.com/the-consequences-of-the-governments-new-migration-legislation-could-be-dire-for-individuals-and-for-australia-226713>.

[6] Grant Hooper, "Three Decades of Tension: From the Codification of Migration Decision-Making to an Overarching Framework for Judicial Review" (2020) 48(3) *Federal Law Review* 401.

Ultimately, it contends that the current statutory design is neither necessary nor proportionate to the stated policy objectives of migration management and border integrity.[7] By offering concrete reform proposals, the article seeks to contribute to an evidence-based legislative agenda that reconciles migration control with the rule of law.

LEGISLATIVE FRAMEWORK

Section 76AAA: Automatic Bridging Visa Cessation

Inserted by the *Migration Amendment (Bridging Visas and Third-Country Processing) Act 2024* (Cth), s 76AAA creates a self-executing mechanism for extinguishing the Subclass 070 Bridging (Removal Pending) visa ("Bridging R").[8] Four cumulative pre-conditions must coexist at the moment the Minister gives notice:

(1) Current status – the individual must presently hold a Bridging R visa;
(2) Foreign permission – a foreign state must have granted "permission" for that person to enter and remain (the language is broader than "visa" and is designed to encompass discretionary humanitarian admissions and temporary protection statuses);
(3) Treaty partner – that foreign state must be a party to a "third-country reception arrangement" declared under s 198AHB; and
(4) No exclusions – the person must not (i) have a protection visa application on foot, (ii) be shielded by the statutory non-refoulement bar in s 197C(3) (where removal would breach Australia's treaty obligations), or (iii) be a child.

Where these elements align, the Minister may give notice "in writing or orally, including by telephone".[9] Upon communication, the Bridging R visa "ceases to be in effect immediately".[10] Parliament has expressly ousted procedural fairness. Section 76AAA(5) declares that "the rules of natural justice do not apply to the giving of the notice". Nor is there a requirement to provide reasons or an avenue for merits review.

Even though Parliament has expressly ousted the "rules of natural justice" in s 76AAA(5) by stating they do not apply to the giving of the notice, this ouster is most likely directed only to the hearing rule (ie, the right to be heard) and does not extend to the bias rule. The bias rule is considered a distinct and fundamental part of fairness, and courts generally presume that clearer language would be required to exclude it.[11] The broad reference to "natural justice" could raise some ambiguity, but in Australian law, unless Parliament uses very clear and specific words, courts are reluctant to treat an ouster as displacing the bias rule.[12]

In effect, the provision authorises administrative status cancellation in real time, circumventing both the usual cancellation machinery in Pt 2 Div 3 of the *Migration Act 1958* (Cth) and the stay provisions that normally attend tribunal review. Judicial review remains theoretically available under s 75(v) of the Constitution, but the absence of a written record and the speed of implementation render relief practically elusive.

This aspect of the process can only be properly understood in light of *Public Service Board of New South Wales v Osmond* (*Osmond*),[13] which confirms that there is no common law right to reasons. Although

[7] See Department of Home Affairs (Cth), *Review of the Migration System* (Report, 2023) <https://www.homeaffairs.gov.au/reports-and-pubs/files/review-migration-system-final-report.pdf>.

[8] Law Council of Australia, *Migration Amendment Bill 2024* (Submission to Senate Legal and Constitutional Affairs Legislation Committee, 22 November 2024) <https://lawcouncil.au/resources/submissions/migration-amendment-bill-2024>.

[9] *Migration Act 1958* (Cth) s 76AAA(3).

[10] *Migration Act 1958* (Cth) s 76AAA(4).

[11] See further Matthew Groves, "The Rule Against Bias" (2009) 39 *Hong Kong Law Journal* 485.

[12] See further Matthew Groves, "Exclusion of the Rules of Natural Justice" (2013) 39(2) *Monash University Law Review* 285.

[13] *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

judicial review remains available, the absence of any obligation to provide reasons – combined with the speed of real-time administrative cancellation and the lack of a written record – creates a significant practical barrier to obtaining effective relief.[14]

Sections 189 and 196: Mandatory, Potentially Indefinite Detention

The moment the Bridging R collapses, the person becomes an "unlawful non-citizen". Section 189(1) imposes a non-discretionary duty on any officer who locates such a person in the migration zone to detain them "as soon as practicable". Detention continues under s 196(1) until the earliest of (1) removal, (2) deportation, or (3) grant of a further visa.[15] Because removal is now tied to the readiness of the third country (which may itself impose conditions or delays), detention can stretch for years.

The High Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (*NZYQ*)[16] held that detention becomes constitutionally unlawful once removal is not reasonably foreseeable in the practical sense. However, the Court declined to specify a temporal bright line, leaving lower courts to engage in fact-intensive inquiries. Post-*NZYQ* litigation shows divergent outcomes, underscoring the indeterminacy of "reasonable foreseeability".[17]

Section 198AHB: Executive Outsourcing of Removal Functions

Section 198AHB, enacted concurrently with s 76AAA, equips the Commonwealth with a capacious power to "take action, including by making, varying or administering arrangements or payments" in relation to third-country reception. Although s 198AHB(2) insists that it "does not authorise the restraint of liberty", its practical operation is to enable the funding and diplomatic scaffolding of offshore detention regimes.

The Minister may declare a "reception arrangement" by legislative instrument; neither the arrangement itself nor any associated memorandum of understanding need be tabled or subjected to disallowance. By allowing the Minister to declare a "reception arrangement" through a legislative instrument – without requiring the underlying arrangement or any associated memorandum of understanding to be tabled or subjected to disallowance – the process facilitates detention arrangements indirectly and thereby avoids many of the usual limitations on the ability of delegated legislation to restrict basic rights.[18]

Individual transfers effected under s 198AHB fall outside the Administrative Review Tribunal's jurisdiction because they are characterised as "non-reviewable personal decisions".[19] Consequently, parliamentary and judicial oversight is attenuated. The section represents a deliberate externalisation of Australia's removal obligations: physical custody is transferred to partner states such as Nauru or, under the 2024 Solomon Islands Compact, Honiara, while legal custody remains sufficiently distant to complicate habeas corpus relief.[20]

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[14] Bruce Chen, "A Right to Reasons: Osmond in Light of Contemporary Developments in Administrative Law" (2014) 21 AJ Admin L 208.

[15] Stephen McDonald SC, "Unlawful Failure to Remove Extends Lawful Detention? A Critique of the Decision in AJL20", *Australian Public Law* (Blog Post, 10 March 2023) <https://www.auspublaw.org/blog/2023/3/unlawful-failure-to-remove-extends-lawful-detention-a-critique-of-the-decision-in-ajl20>.

[16] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005; [2023] HCA 37 .

[17] Rule of Law Institute of Australia, *Case Note: NZYQ v Minister for Immigration* (17 November 2023) <https://www.ruleoflaw.org.au/case-studies/case-note-nzyq/>.

[18] See Matthew Groves et al, "The Principle of Legality and Secondary Legislation: the Role of Proportionality" (2024) 47(2) *Melbourne University Law Review* 429.

[19] See further Justice Emilios Kyrou, "A New Chapter in Merits Review: The Administrative Review Tribunal" (Speech delivered at the Federal Court of Australia, 16 April 2024) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-kyrou/kyrou-j-20240416>.

[20] Pacific Immigration Development Community, *Communiqué of the 26th Pacific Immigration Development Community Regular Annual Meeting 2024* (27 June 2024) <https://pidcsec.org/communique-of-the-26th-pacific-immigration-development-community-regular-annual-meeting-2024/>.

In *Save the Children Australia v Minister for Home Affairs*,[21] the Full Federal Court rejected an application for habeas corpus that sought to compel the Minister to facilitate the return of Australian citizens and residents detained in Syria, with the High Court later refusing special leave. The case highlights the difficulties of securing habeas corpus where physical custody has been externalised – as under s 198AHB transfers to partner states like Nauru or Honiara – while legal custody remains sufficiently remote to complicate both parliamentary and judicial oversight.

Taken together, ss 76AAA, 189–196 and 198AHB form an integrated architecture: automatic visa cessation triggers mandatory detention, which in turn primes the individual for outsourced removal under lightly scrutinised bilateral deals.

Historical Trajectory of Australia's Detention Regime

Australia's system of mandatory, non-reviewable immigration detention began with the *Migration Reform Act 1992* (Cth). Section 54P required every "designated person" – then, mainly Cambodian boat arrivals—to be detained for up to 273 days pending either grant of a visa or removal.[22] The objective was administrative efficiency, not punishment; Parliament assured critics that the nine month ceiling would prevent arbitrariness.

Yet the ceiling lasted barely two years. The *Migration Amendment Act 1994* (Cth) deleted the time-limit, making detention "until removed or deported." In *Al-Kateb v Godwin* (*Al-Kateb*)[23] the High Court held that the Constitution permits such indefinite confinement even where removal is impossible because no country will receive the person.

Political pressure after the 2001 Tampa incident produced the "Pacific Solution": asylum-seekers intercepted at sea were transferred to Nauru or Manus Island.[24] Onshore, the Howard Government began issuing Bridging Visa E to people judged a low flight-risk, a practice expanded by the Rudd–Gillard Governments, which in 2009 also created community detention under s 197AB.[25]

When offshore processing was revived in 2012, the pendulum swung back towards detention; but by 2013 overcrowding and mounting costs prompted Operation Sovereign Borders to rely on short-term detention followed by release on bridging visas coupled with strict reporting.[26]

The Bridging R (Subclass 070) visa, introduced in 2014 after an expert review of long-term detainees, was designed to "incentivise co-operation with removal" while avoiding warehousing people who could not be removed quickly.[27] Holders had to assist the Department with travel documents, but, crucially, they could live in the community.[28] In practice, the Bridging Visa R (BVR) became the default for stateless persons and failed-asylum seekers who posed no security threat but could not lawfully work.[29]

The 2023 High Court decision in *NZYQ*[30] overturned *Al-Kateb*[31] and rendered ongoing indefinite detention unconstitutional when removal is not practicable. The decision triggered the release of approximately

[21] *Save the Children Australia v Minister for Home Affairs* (2024) 304 FCR 262; [2024] FCAFC 81.

[22] Mary Piper, "Australia's Refugee Policy" (2000) 12(2) *The Sydney Papers* 78 https://search.informit.org/doi/10.3316/INFORMIT.766490998614953>.

[23] *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37.

[24] Robert Manne, "Reflections on the Tampa 'Crisis'" (2002) 5(1) *Postcolonial Studies* 29, 29.

[25] Asylum Seeker Resource Centre, *Information for People Applying for Community Detention (s 197AB)* (Factsheet, August 2021) <https://asrc.org.au/wp-content/uploads/2021/08/HRLP-Infosheet-Information-for-People-Applying-for-Community-Detention-s-197AB.pdf>.

[26] Michael Flynn, "There and Back Again: On the Diffusion of Immigration Detention" (2014) 2(3) *Journal on Migration and Human Security* 165.

[27] Department of Immigration and Border Protection, *Annual Report 2014–15* (Report, 2015) 127–130 <https://www.homeaffairs.gov.au/reports-and-pubs/Annualreports/dibp-annual-report-2014-15.pdf>.

[28] Department of Immigration and Border Protection, n 27.

[29] Amnesty International, *The Impact of Indefinite Detention: The Case for Release* (Report, 2005) 15–16 <https://www.amnesty.org/en/wp-content/uploads/2021/08/asa120012005en.pdf>.

[30] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005; [2023] HCA 37.

[31] *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37.

140 individuals, including stateless persons and refugees, and led to the introduction of new Bridging "R" visa conditions such as curfews and electronic monitoring, the constitutional validity of which remains uncertain.[32] However, *NZYQ* left unresolved critical questions, including the precise threshold for when removal ceases to be foreseeable, and whether other forms of non-judicial executive detention – such as preventive detention in national security and public health contexts – might also now be vulnerable to constitutional challenge.[33]

The Government's immediate legislative response was the *Migration Amendment (Bridging Visa Conditions) Act 2024* (Cth), which inserted s 76AAA. The section provides that a BVR "ceases to be in effect" the moment the Minister notifies the holder that a third country has granted them "permission to enter and remain" – no matter how provisional that permission.[34]

Once the visa ceases, the person again becomes an "unlawful non-citizen" liable to re-detention under s 189.[35] The cycle of administrative detention thus survives, but now via the visa-cancellation route rather than direct confinement.[36]

THEORETICAL FOUNDATIONS: RULE OF LAW AND PROCEDURAL FAIRNESS

General Remarks

Australian administrative law rests on the rule-of-law proposition that all public power must be authorised by statute and exercised rationally, in good faith and fairly.[37] Detention without trial is lawful only because Parliament has clearly said so; but clarity does not exhaust legality.[38] The courts deploy two overlapping doctrines to supervise executive power: procedural fairness (or natural justice) and the principle of legality.[39]

Procedural fairness serves an instrumental function – promoting accurate decisions by testing evidence – and a dignitarian function – affirming the individual's moral agency by allowing them to participate.[40] Beginning with *Kioa v West*[41] and culminating in *Plaintiff M61/2010E v Commonwealth* (*Plaintiff M61*),[42] the High Court has insisted that, absent unmistakable contrary intent, decision-makers must give notice of adverse material and an opportunity to respond.[43]

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[32] Laura John, Josephine Langbien and Sanmati Verma, "Liberty, Punishment and the Power to Detain: The Fallout from NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs" (Blog Post, 6 December 2023) <https://www.auspublaw.org/blog/2023/12/liberty-punishment-and-the-power-to-detain-the-fallout-from-nzyq-v-minister-for-immigration-citizenship-and-multicultural-affairs>.

[33] Human Rights Law Centre, *Explainer: High Court Ruling in NZYQ* (29 November 2023) <https://www.hrlc.org.au/explainers/2023-11-29-explainer-high-court-ruling-in-nzyq/>.

[34] Law Council of Australia, *Migration Amendment (Bridging Visa Conditions) Bill 2024* (Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 1 March 2024) 7–8 <https://lawcouncil.au/publicassets/add2a0c3-58a8-ef11-94ac-005056be13b5/4621%20-%20S%20-%20Migration%20Amendment%20Bill%202024.pdf>.

[35] Northern Territory Legal Aid Commission, *Removal and Deportation* (Legal Handbook, 2022) <https://www.austlii.edu.au/au/communities/NTLawHbk/RemovalAndDeportation>.

[36] AustLII, *Removal and Deportation* (AustLII Community Legal Handbook, 31 May 2022) <https://www.austlii.community/foswiki/ACTLawHbk/RemovalandDeportation>.

[37] Will Bateman and Leighton McDonald, "The Normative Structure of Australian Administrative Law" (2017) 45(2) *Federal Law Review* 153.

[38] Amelia Simpson, "Executive Detention as a Site for Creative Constitutional Interpretation in Australia" (2019) 45(2) *Commonwealth Law Bulletin* 296.

[39] Matthew Groves, "The Unfolding Purpose of Fairness" (2017) 45(4) *Federal Law Review* 653.

[40] Richard Kirkham et al, "Procedural Fairness and the Limits of Fitness to Practise Hearings: A Case Study into Social Work" (2020) 40(4) *Legal Studies* 610, 615.

[41] *Kioa v West* (1985) 159 CLR 550.

[42] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; [2010] HCA 41.

[43] See further R Creyke, "Kioa v West" in *Oxford University Press eBooks* (OUP, 2001).

In the United Kingdom (UK), Lord Reed, speaking for a unanimous court, explained that procedural fairness serves both an instrumental function – promoting accurate decision-making by testing evidence – and a dignitarian function – affirming the individual's moral agency by ensuring meaningful participation in the decision-making process.[44]

The principle of legality is a strong presumption that Parliament does not intend to curtail fundamental rights – liberty, due process, access to courts – without using words that irresistibly compel that conclusion.[45] Section 76AAA(5) does contain such words: "natural justice does not apply." Yet modern constitutionalism treats explicitness as the beginning of the inquiry, not its end.[46]

Although s 76AAA(5) expressly states that "natural justice does not apply," the High Court has increasingly recognised that even clear words must be read in light of broader constitutional values, including the rule of law and the maintenance of judicial review.[47] Thus, while the scheme's structure may support an argument of exclusion, constitutional norms require careful scrutiny of whether fundamental rights have been displaced to a greater extent than Parliament unmistakably intended.

Courts now ask whether the incursion on liberty is proportionate to a legitimate statutory purpose.[48] A measure that goes further than reasonably necessary may still be invalid even when the text is crystal clear. Consequently, s 76AAA's breadth – cancellation on the basis of opaque, untested diplomatic assurances – invites close proportionality review.

Deficient Notice Mechanism

Sections 494B–494C of the *Migration Act* allow the Minister to notify a non-citizen orally, to leave a message with "another person at the last-known address", or even to rely on a letter that is deemed received two working days after posting, irrespective of actual delivery.

Once deemed, the BVR automatically ceases 12 hours later.[49] The individual may be asleep, hospitalised, or homeless; none of that matters. Deemed notice combined with automatic cessation is antithetical to the core procedural-fairness requirement that affected persons be placed "in possession of all the material facts".[50]

However, the combination of deemed notice and automatic cessation undermines the core requirement of procedural fairness that individuals be placed "in possession of all the material facts" before adverse action. As in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*,[51] where the High Court assessed fairness by reference to the cumulative effect of multiple provisions, a contextual and holistic assessment here shows that while each element might be defensible alone, together they produce an unfair and unacceptable outcome.

No Opportunity to Contest the Third-Country "Permission"

Section 76AAA hinges on whether a foreign state has granted the person "permission to enter and remain". The statute neither defines "permission" nor requires the Department to disclose the underlying diplomatic cable. Moreover, s 76AAA offers no hearing – administrative or merits review – at which the person can test whether the permission is genuine, durable, or safe.

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[44] *R (Osborn) v Parole Board* [2014] AC 1115, [64]–[71]; [2013] UKSC 61.

[45] Bruce Chen, "The Principle of Legality: A Search for Legislative Intent" (2015) 41(2) *Monash University Law Review* 328.

[46] Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building" (1997) 11(2) *Studies in American Political Development* 191.

[47] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23.

[48] *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34; *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899; [2023] HCA 33.

[49] *Migration Act 1958* (Cth) s 76AAA(4).

[50] *Kioa v West* (1985) 159 CLR 550.

[51] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636; [2012] HCA 31.

Absence of Reasons and Merits Review

Unlike visa refusal decisions, the cessation of a BVR under s 76AAA is not a "decision" for the purposes of the *Administrative Review Tribunal Act 2024* (Cth); it is an operation of law. The Minister need provide no reasons. Judicial review remains theoretically available under s 75(v) of the Constitution, but without a statement of reasons or the underlying diplomatic material, a court cannot meaningfully scrutinise rationality. The result is an unreviewable executive trigger for detention.[52]

Chiam argues that the High Court's decision in *Osmond* should be reconsidered because the constitutionally entrenched supervisory jurisdiction of Ch III courts supports a common law duty for administrative decision-makers to provide reasons, relying on three main strands: that reasons facilitate effective judicial supervision; that recent High Court jurisprudence requires judicial review to be practically effective, not merely formal; and that the Constitution embodies accountability values consistent with a developing "culture of justification" in Australian public law.[53]

Comparative Perspective

The contrast with peer jurisdictions is stark. In the United Kingdom, limited-leave status may be curtailed only after the Home Office issues a minded to letter, discloses evidence and invites submissions.[54] In the United Kingdom, immigration detention is subject to the Hardial Singh principles: detention must be for the purpose of removal, within a reasonable period, and removal must be pursued with "all reasonable diligence".[55] Judicial review is available within days.

Canada imposes automatic detention review hearings at 48 hours, seven days, and then every 30 days.[56] The European Union's Returns Directive caps detention at 18 months and mandates judicial oversight.[57] Canada requires a written Pre-Removal Risk Assessment before removal, and the Supreme Court insists on periodic detention reviews with disclosure of classified evidence to a security-cleared special advocate.[58]

The United States Supreme Court, in *Zadvydas v Davis*,[59] read a six-month limit into executive detention where removal is not foreseeable. Section 76AAA therefore places Australia at the outer edge of liberal democracies by allowing liberty to pivot on a single, undisclosed ministerial notice. That said, Gilman exposes how reinterpretations of immigration law, particularly during the Trump Administration, quietly normalised mass, often unreviewable detention of migrants and asylum seekers without significant legislative change.[60] Gilman critiques the erosion of liberty principles, the rise of punitive detention conditions, and the threats to constitutional and human rights norms.[61] She advocates for statutory

[52] See further Isolde Daniell, "Overcoming Graham: The s 75(v) Constitutional Guarantee and Non-Disclosure in Migration and Citizenship Decisions", *AUSPUBLAW* (Blog Post, 30 July 2021) <https://www.auspublaw.org/blog/2021/07/overcoming-graham-the-s-75v-constitutional-guarantee-and-non-disclosure-in-migration-and-citizenship-decisions>.

[53] Christopher Chiam, "The Right to Reasons and the Courts' Supervisory Jurisdiction" (2020) 41(2) *Adelaide Law Review* 421.

[54] *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673.

[55] Joint Committee on Human Rights (UK), *Immigration Detention: Fourteenth Report of Session 2017–19* (House of Lords Paper No 279, House of Commons Paper No 1484, 7 February 2019) <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/1484.pdf>.

[56] Immigration and Refugee Board of Canada, *Detention Review Hearings* (2023) <https://www.irb-cisr.gc.ca/en/detention-hearings/Pages/detention-review-hearings.aspx>.

[57] European Parliament and Council Directive 2008/115/EC of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L 348/98, Arts 15(2), (5)–(6).

[58] *Charkaoui v Canada (Minister of Citizenship and Immigration)* [2007] 1 SCR 350, 2007 SCC 9; *Immigration and Refugee Protection Regulations*, SOR/2002-227, (Canada): <https://gazette.gc.ca/rp-pr/p2/2025/2025-01-01/html/sor-dors284-eng.html>.

[59] *Zadvydas v Davis*, 533 US 678 (2001).

[60] Denise L Gilman, "Immigration Detention Expansion by Stealth" (University of Texas Law, Legal Studies Research Paper, 10 March 2025) <https://ssrn.com/abstract=5172657>.

[61] Gilman, n 60.

reinterpretation, constitutional challenges, and reforms modelled on Spain's system, where liberty is the default and detention is strictly limited.[62]

Australia's regime lacks any statutory time limit and provides no automatic judicial review. The onus is on detainees to initiate costly Federal Court proceedings. Section 76AAA exacerbates this by pre empting review at the visa cancellation stage. The comparative analysis thus supports the argument that Australia is an outlier whose practices fail to meet evolving international standards.

Summary

Because s 76AAA simultaneously (1) denies effective notice, (2) forecloses participation, and (3) withholds reasons, it offends both the instrumental and dignitarian rationales of procedural fairness.[63] Its incompatibility with the emerging proportionality doctrine – and with international obligations under Art 9 of the *ICCPR* – sets the stage for inevitable constitutional litigation testing the outer limits of parliamentary power over non-citizens.[64]

Constitutional Implications

The High Court's migration-detention jurisprudence sits on a constitutional fault line that separates permissible executive confinement from punishment that only a Ch III court may impose. From *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (*Lim*)[65] in 1992 the Court has said that detention is constitutionally valid only when it is strictly ancillary to a non-punitive objective such as removal, quarantine or mental-health treatment.[66]

For two decades the decisive case was *Al-Kateb*,[67] where a bare majority accepted that Parliament could authorise detention that was, in practice, permanent, because the statutory purpose – removal "as soon as reasonably practicable" – remained intact in form. That formalist stance collapsed in *NZYQ*.[68]

A unanimous Court held that once removal is "not reasonably practicable in the foreseeable future" the detention loses its non-punitive character and exceeds the aliens power in s 51(xix) of the Constitution.[69] Yet *NZYQ* deliberately left three issues open for later cases: what period counts as the "foreseeable future", who bears the evidential onus of proving practicability, and what standard of proof applies when personal liberty is at stake.[70]

Two 2024 decisions began to fill those gaps. In *ASF17 v Commonwealth*[71] the Court held that where the sole obstacle to removal is the detainee's own refusal to co-operate, detention may lawfully continue; a real prospect of removal exists because the detainee could unlock it by changing position. Conversely, *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*[72] involved people released into the community under curfew and electronic-monitoring conditions. The majority invalidated

[62] Gilman, n 60.

[63] See further Robert J MacCoun, "Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness" (2005) 1(1) *Annual Review of Law and Social Science* 171, 172–174.

[64] As at the date of writing, the matter of *TCXM v Minister for Immigration and Multicultural Affairs* (NSD225/2025) is currently before the Federal Court of Australia, testing the outer legal limits of s 76AAA of the *Migration Act 1958* (Cth).

[65] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

[66] Kaldor Centre for International Refugee Law, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (Case Note, UNSW Sydney, September 2023) <https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/kaldor-centre/2023-09-case-notes/2023-09-Casenote_Chu-Kheng-Lim-final.pdf>.

[67] *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37.

[68] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005; [2023] HCA 37.

[69] Rule of Law Education Centre, *Case Note: NZYQ v Minister for Immigration* (2023) <https://www.ruleoflaw.org.au/case-studies/case-note-nzyq/>.

[70] Consider *CZA19 v Commonwealth* (2025) 99 ALJR 650; [2025] HCA 8.

[71] *ASF17 v Commonwealth* (2024) 98 ALJR 782; [2024] HCA 19.

[72] *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1; [2024] HCA 40.

those conditions, reasoning that their severity was disproportionate to the protective purpose and therefore punitive.[73] These cases reinforce two principles: capacity and contingency matter – if removal depends only on a detainee's will the executive may detain, but if removal turns on external facts the Commonwealth must prove practicability – and substance prevails over form, so even community-based restrictions can amount to punishment if they are excessive.

Against that backdrop, s 76AAA of the *Migration Act*, inserted in 2024, presents a constitutional sleight of hand. It declares that a Bridging (R) visa automatically ceases once any third country merely grants "permission" for the person to enter and remain.[74]

The moment the visa lapses the individual again becomes an "unlawful non-citizen" and is subject to mandatory detention under ss 189 and 196. Because the provision does not stipulate any minimum duration, enforceability or logistical feasibility of the permission, it offers the executive a ready-made answer to the *NZYQ* test: removal is said to be practicable because a country has issued a diplomatic nod. The underlying diplomatic exchanges are confidential, so detainees cannot test the claim; detention that is indefinite in fact acquires a veneer of formal compliance.

This situation revives the separation-of-powers concerns first articulated in *Lim*.[75] If, in truth, no realistic prospect of removal exists – because the accepting country imposes onerous health checks, lacks transport links, or will admit only after protracted negotiations – then the detention serves no genuine migration-control function.

Its practical effect is incapacitation for its own sake, a hallmark of punishment that only courts may impose. *YBFZ* underscores the point: even non-custodial measures can be punitive when disproportionate; a fortiori, physical incarceration justified by a paper "permission" is vulnerable to constitutional invalidity.[76]

Because the pertinent facts lie almost wholly within executive knowledge, there is a strong argument that both the legal and evidential burden must rest on the Commonwealth. *NZYQ*[77] hinted as much by observing that the government will have to demonstrate some "real prospect" of removal.[78]

If a detainee raises credible obstacles – lack of flights, transit visas, or quarantine facilities – the Minister should be obliged to produce probative material, redacted if necessary, or face a finding that removal is not practicable. A refusal to disclose would enliven procedural-fairness grounds under s 75(v) of the Constitution.

Comparative jurisprudence points in the same direction. The UK Supreme Court's *A v Secretary of State for the Home Department* decision struck down indefinite executive detention of foreign terror suspects as disproportionate and discriminatory,[79] while the US Supreme Court in *Zadvydas v Davis*[80] read a six-month ceiling into immigration detention to avoid serious Fifth-Amendment doubt. Both courts insist on temporal limits and meaningful review – principles now echoed in Australian law through *NZYQ* and *YBFZ's* proportionality analysis.

A future High Court challenge to detention triggered by s 76AAA would likely proceed on two fronts. First, the plaintiff would argue that despite the formal permission, removal is not reasonably practicable within any real timeframe, so detention is unconstitutional under the *NZYQ* criterion. Second, they

[73] Human Rights Law Centre, *High Court: Punitive Visa Conditions on Former Detainees Are Invalid* (6 November 2024) <https://www.hrlc.org.au/reports-news-commentary/2024/11/6/ybfz-high-court>.

[74] *Migration Act 1958* (Cth) s 76AAA(4).

[75] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

[76] *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1; [2024] HCA 40.

[77] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, [9], [13], [44]–[45]; [2023] HCA 37.

[78] See further *CZA19 v Commonwealth* (2025) 99 ALJR 650; [2025] HCA 8.

[79] *A v Secretary of State for the Home Department* [2004] UKHL 56.

[80] *Zadvydas v Davis*, 533 US 678 (2001).

would contend that the true purpose of the detention is punitive, not migratory, thereby infringing the separation of powers.

The Commonwealth would invoke *ASF17*,[81] claiming that permission renders removal contingent only on administrative steps. The Court would then conduct a deeply factual inquiry into transport arrangements, entry pre-conditions and diplomatic undertakings – an inquiry that s 76AAA was arguably designed to short-circuit.

Policy alternatives could avert this constitutional collision. Parliament could redefine "permission" to require a written guarantee of entry, a minimum stay period and concrete transport arrangements. It could mandate Federal Court review after six months, release detainees on reporting conditions tailored by risk assessment, and publish anonymised data on permissions and removals to ensure transparency.

Taken together, *NZYQ*, *ASF17* and *YBFZ* mark a shift from formalism to factual proportionality. *NZYQ* re-allocates the onus of proof to the Commonwealth when removal depends on matters within its exclusive control. *ASF17* confines executive advantage to cases where detainees themselves frustrate removal. *YBFZ* imports structured proportionality, meaning that even measures pursuing a legitimate migration purpose must be suitable, necessary and balanced.

Because s 76AAA allows detention to revive on the strength of diplomatic paperwork alone, it is exposed on two levels: courts may find that removal is not genuinely practicable, and they may deem the scheme punitive in purpose or effect. The broader resonance with recent preventive-detention and citizenship-stripping cases is unmistakable: executive power ends where punishment begins.

In the post-*NZYQ* landscape, any legislative workaround that consigns people to open-ended detention without demonstrable, imminent prospects of removal risks invalidation. Liberty, the High Court now insists, cannot be withdrawn indefinitely on the back of confidential correspondence; only concrete, timely removal can justify executive incarceration.[82]

Proposals for Reform

Restoring meaningful procedural fairness must begin with repealing s 76AAA(5), which presently allows a visa to cease – and detention to revive – on the strength of an oral notification. Requiring written notice that sets out the factual basis for the claimed "permission", together with a reasonable period to respond, would align the *Migration Act* with ordinary administrative-law standards recognised in *Plaintiff M61*[83] and *SZBEL*.[84]

A detainee who can test the accuracy of the Minister's assertions is far less likely to languish in custody on the back of diplomatic misunderstandings or expired clearances.

Second, automatic judicial oversight is essential to prevent executive inertia from calcifying into unlawful confinement. A model drawn from the *Bail Act* – mandatory Federal Circuit and Family Court of Australia (Div 2) review at fourteen days and every sixty days thereafter – would shift the onus onto the Commonwealth to demonstrate continuing practicability of removal with fresh, verifiable evidence.[85] Regular scrutiny also guards against the drift towards punishment condemned in *NZYQ* and *YBFZ*.

Third, merits review by the Administrative Review Tribunal should be restored for two discrete questions: whether a third-country "permission" genuinely subsists and whether that country offers

[81] *ASF17 v Commonwealth* (2024) 98 ALJR 782; [2024] HCA 19.

[82] See further Australian Human Rights Commission, "Commission Commends High Court Ruling on Indefinite Immigration Detention" (Media Release, 28 November 2023) <https://humanrights.gov.au/about/news/media-releases/commission-commends-high-court-ruling-indefinite-immigration-detention>.

[83] *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319; [2010] HCA 41.

[84] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; [2006] HCA 63.

[85] US Department of Justice, *Criminal Resource Manual – Release and Detention Pending Judicial Proceedings* (18 USC 3141 et seq): <https://www.justice.gov/archives/jm/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et>.

protection consistent with Australia's non-refoulement obligations. The ART's inquisitorial procedures and expertise in country information make it a more suitable forum than high-stakes judicial review for resolving factual controversies quickly and cheaply.

Fourth, Parliament should legislate a bright-line, 12-month cap on detention, extendable only by court order upon proof of concrete removal arrangements. Comparative experience – from *Zadvydas* in the United States to the *EU Returns Directive* – shows that temporal limits concentrate bureaucratic effort and reduce human and fiscal costs without compromising border integrity.

Fifth, transparency must replace secrecy. Amending s 198AHB to require tabling in Parliament of all transfer agreements, together with public human-rights impact statements, would enable civil-society and parliamentary scrutiny, mitigating the democratic deficit highlighted by the High Court's recent emphasis on factual accountability.

Finally, vulnerable cohorts demand categorical protection.[86] An explicit statutory bar on detaining children, and a presumption of community placement for people with serious physical or mental-health needs, would bring Australian practice into line with the *Convention on the Rights of the Child* and the *Mandela Rules*, while also reducing the litigation risk that punitive treatment of the vulnerable will once again be struck down as unconstitutional.[87]

CONCLUSION

The enactment of s 76AAA and its cognate provisions represents the most radical intensification of Australia's migration-detention architecture since the abolition of the nine-month cap in 1994.[88]

By enabling the executive to terminate a person's lawful status by a fleeting oral notice and thereby trigger mandatory, potentially indefinite detention, the scheme displaces the foundational precepts of Australian administrative law: open notice, participatory decision-making, reasoned justification, and independent review.[89] Its design privileges bureaucratic velocity over accuracy, secrecy over transparency, and executive convenience over individual liberty.

The article's doctrinal analysis shows that the mechanism cannot be squared with either the instrumental or dignitarian purposes of procedural fairness. A cancellation device that provides no reliable opportunity to test the genuineness or durability of a third-country "permission" cannot plausibly be defended as a proportionate means of achieving migration control.

Comparative study underscores the point: every cognate common-law or liberal-democratic jurisdiction couples status withdrawal with contemporaneous, often automatic, judicial or quasi-judicial oversight. Australia now occupies an outlier position that is increasingly at odds with the global convergence towards time-limited, review-rich migration detention.

Constitutionally, the post-*NZYQ* landscape has shifted decisively from formalism to factual proportionality. The High Court's insistence that executive detention must remain strictly ancillary to a practicable removal objective renders s 76AAA structurally precarious. A paper-thin diplomatic assurance – concealed from the affected person and untested by any tribunal – cannot, without more, establish the "real prospect" of removal that *NZYQ* demands. Nor can detention whose duration is entirely

[86] The Royal Commission into Robodebt placed significant emphasis on the detection and protection of vulnerability, particularly in light of its terms of reference requiring an inquiry into the scheme's impact on "particularly vulnerable individuals." As detailed extensively from page 350 of the final report, vulnerability was a key focus of the Commission's analysis. This highlights the inconsistency in the Commonwealth's approach, which gives weight to vulnerability in some contexts but not others. See Royal Commission into the Robodebt Scheme, *Report of the Royal Commission into the Robodebt Scheme* (Final Report, 7 July 2023).

[87] See further Dr Sharon Shalev, *Time for a Paradigm Shift: A Follow Up Review of Seclusion and Restraint Practices in New Zealand* (NZ Human Rights Commission, 2020) <https://tikatangata.org.nz/our-work/time-for-a-paradigm-shift>.

[88] See further Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee on the Migration Amendment Bill 2024* (Submission, 21 November 2024) <https://lawcouncil.au/resources/submissions/migration-amendment-bill-2024>.

[89] See further Samuel C Duckett White, "God-Like Powers: The Character Test and Unfettered Ministerial Discretion" (2020) 41(1) *Adelaide Law Review* 1.

contingent on opaque foreign processes satisfy the requirement that confinement remain non-punitive in both purpose and effect. On either limb, the current statutory design is exposed to invalidation.

Against this backdrop, the article's reform proposals – restoring written notice and a right to respond, reinstating merits and automatic judicial review, imposing a 12-month statutory ceiling, mandating transparency of third-country agreements, and protecting children and medically vulnerable cohorts – are not ambitious innovations but minimal conditions for legality.

They would align the *Migration Act* with the ordinary administrative-law values that govern every other sphere of executive power, reduce constitutional risk, and bring Australia back within the mainstream of liberal democracies.

More broadly, the analysis illuminates a deeper jurisprudential lesson. The rule of law is not a mere procedural nicety that can be waived when politically expedient; it is the constitutional grammar that renders the exercise of coercive state power intelligible and legitimate.[90]

When Parliament authorises detention on the basis of secret diplomacy and instantaneous status cancellation, it erodes that grammar and, ultimately, public confidence in lawful governance. The courts can – and likely will – police the outer limits, but judicial review is a back-end safeguard.[91] The front-end responsibility lies with the legislature to craft measures that are effective yet proportionate, firm yet fair.

Future scholarship should track the unfolding litigation to test the constitutional fragility diagnosed here, and should undertake longitudinal studies of the human and fiscal costs of the present regime versus the proposed alternatives. But the normative conclusion is already clear: a migration-control system worthy of a constitutional democracy must be transparent in its criteria,[92] participatory in its procedures, and strictly limited in its intrusions on personal liberty.

Section 76AAA, as presently framed, fails each of those tests. Reform is therefore not a matter of administrative tidiness but a constitutional imperative.

[90] Vasiliki Adamidis, "Democracy, Populism, and the Rule of Law: A Reconsideration of Their Interconnectedness" (2021) 44(3) *Politics* 386.

[91] Tom Ginsburg and Mila Versteeg, "The Bound Executive: Emergency Powers During the Pandemic" (2021) 19(5) *International Journal of Constitutional Law* 1498.

[92] Patti Tamara Lenard and Terry Macdonald, "Democracy versus Security as Standards of Political Legitimacy: The Case of National Policy on Irregular Migrant Arrivals" (2019) 19(2) *Perspectives on Politics* 371.