Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 13 of 2023

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PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823

Email: human.rights@aph.gov.au
Website: http://www.aph.gov.au/joint_humanrights/

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Membership of the committee

Members

Mr Josh Burns MP, Chair	Macnamara, Victoria, ALP
Mr Henry Pike MP, Deputy Chair	Bowman, Queensland, LNP
Senator Karen Grogan	South Australia, ALP
Mr Peta Murphy MP	Dunkley, Victoria, ALP
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Senator Lidia Thorpe	Victoria, IND
Ms Kylea Tink MP	North Sydney, New South Wales, IND

Secretariat

Anita Coles, Committee Secretary

Charlotte Fletcher, Principal Research Officer

Rebecca Preston, Principal Research Officer

Geoffrey Fricke, Senior Research Officer (A/g)

Rashmi Chary, Legislative Research Officer

Committee legal adviser

Associate Professor Jacqueline Mowbray

Contents

Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee's functions are to examine bills, Acts and legislative instruments for compatibility with human rights, and report to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation for compatibility with the human rights set out in seven international treaties to which Australia is a party.[1] The committee's *Guide to Human Rights* provides a short and accessible overview of the key rights contained in these treaties which the committee commonly applies when assessing legislation.[2]

The establishment of the committee builds on Parliament's tradition of legislative scrutiny. The committee's scrutiny of legislation seeks to enhance understanding of, and respect for, human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, most rights may be limited as long as it meets certain standards. Accordingly, a focus of the committee's reports is to determine whether any limitation on rights is permissible. In general, any measure that limits a human right must comply with the following limitation criteria: be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to (that is, effective to achieve) its stated objective; and be a proportionate way of achieving that objective.

Chapter 1 of the reports include new and continuing matters. Where the committee considers it requires further information to complete its human rights assessment it will seek a response from the relevant minister, or otherwise draw any human rights concerns to the attention of the relevant minister and the Parliament. Chapter 2 of the committee's reports examine responses received in relation to the committee's requests for information, on the basis of which the committee has concluded its examination of the legislation.

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1 International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

2 See the committee's *Guide to Human Rights*. See also the committee's guidance notes, in particular *Guidance Note 1 – Drafting Statements of Compatibility*.

Report snapshot[1]

In this report the committee has examined the following bills and legislative instruments for compatibility with human rights. The committee's full consideration of legislation commented on in the report is set out in Chapters 1 and 2.

Bills

Chapter 1: New and continuing matters	
Bills introduced 6 November to 27 November 2023	20
Bills commented on in report[2]	4
Private members or senators' bills that may engage and limit human rights	1
Chapter 2: Concluded	
Bills committee has concluded its examination of following receipt of ministerial response	0

Attorney-General's Portfolio Miscellaneous Measures Bill 2023

No comment

Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

No comment

Bankruptcy Amendment (Discharge From Bankruptcy) Bill 2023

No comment

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 13 of 2023*; [2023] AUPJCHR 121.

2 The committee has deferred its consideration of the following bills: Australian Naval Nuclear Power Safety Bill 2023; Australian Naval Nuclear Power Safety (Transitional Provisions) Bill 2023; Migration Amendment (Limits on Immigration Detention) Bill 2023; Online Safety Amendment (Protecting Australian Children from Online Harm) Bill 2023. The committee makes no comment on the remaining bills on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

Commonwealth Electoral Amendment (Voter Protections in Political Advertising) Bill 2023

No comment

Crimes and Other Legislation Amendment (Omnibus No. 2) Bill 2023

Advice to Parliament

Retrospective validation of actions by the Australian Crime Commission

Right to an effective remedy

The Board of the Australian Crime Commission has the power to make a written determination authorising an intelligence operation or an investigation relating to a federally relevant crime. If such an authorisation or determination is made, this grants coercive powers to officers within the Australian Crime Commission, enabling them to compel people to give evidence, attend before an examiner and produce documents or things. This bill (now Act) retrospectively validates all things done in reliance on, or in relation to, an authorisation given or determination made by the Board on or after 4 September 2013 and before 10 December 2019. This also has the effect of validating any further derivative uses of any information or intelligence obtained by the Australian Crime Commission in reliance on these authorisations and determinations.

The committee considers the existing coercive powers limits the right to privacy, and the existing abrogation of the privilege against self-incrimination limits the right to a fair trial. The committee has not undertaken an examination of whether these powers are a permissible limitation on rights, and notes that much would depend on how the powers are exercised in practice. However, by retrospectively validating all things done by a person in reliance on an authorisation or determination made by the Board over a six-year period the committee considers this engages the right to an effective remedy. As the bill makes all things valid and effective that may otherwise be invalid, this would appear to remove any remedy that a person whose privacy or fair trial rights may have been affected would otherwise have. Therefore, the committee considers there is a significant risk that Schedule 3 of the bill is incompatible with the right to an effective remedy.

The committee draws its human rights concerns to the attention of the Attorney-General and the Parliament, but as this bill has already passed, makes no further comment.

Fair Work Legislation Amendment (Asbestos Safety and Eradication Agency) Bill 2023

No comment

Fair Work Legislation Amendment (First Responders) Bill 2023

No comment

Fair Work Legislation Amendment (Small Business Redundancy Exemption) Bill 2023

No comment

Fair Work Legislation Amendment (Strengthening Protections Against Discrimination) Bill 2023

No comment

Federal Courts Legislation Amendment (Judicial Immunity) Bill 2023

No comment

Lobbying (Improving Government Honesty and Trust) Bill 2023

The committee notes that this non-government bill appears to engage and may limit human rights. Should this bill proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill.

Migration Amendment (Bridging Visa Conditions) Bill 2023
Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023

Seeking Information

Criminalisation of breach of mandatory bridging visa conditions

Criminal process rights; right to a fair trial; freedom of expression, movement and association; right to privacy; right to liberty; and right to work

The Migration Amendment (Bridging Visa Conditions) Bill 2023 (now Act) ('first bill') amended the *Migration Act 1958* and the Migration Regulations 1994 to grant non-citizens for whom there is no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future (the NZYQ cohort) a bridging visa subject to specified mandatory visa conditions. The mandatory conditions that are subject to a criminal offence for non-compliance include monitoring conditions (which require the person to either notify, report or attend); conditions requiring the person to remain at a notified address between certain times of a day; and conditions relating to electronic monitoring devices. Non-compliance with these conditions is a criminal offence carrying a mandatory minimum sentence of at least one year imprisonment and a maximum sentence of five years imprisonment. The Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 ('second bill') seeks to introduce additional criminal offences with mandatory minimum sentences for non-compliance with visa conditions relating to not performing certain work, not going within certain distance of a school or childcare or day care centre and not contacting the victim of the offence.

By requiring the visa holder to provide certain personal information, be electronically monitored at all times, remain at a particular address, notify Immigration of any travel and contact and association with certain persons, and not go within a certain distance of specified places, not perform certain work and not contact certain persons, the measure engages and limits the right to privacy, the right to work and

the rights to freedom of expression, movement and association. By imposing a mandatory minimum sentence of imprisonment for non-compliance with a condition, the measure engages and limits the rights to liberty and a fair trial. Further, questions arise as to whether the cumulative impact of all these conditions may be construed as an imposition of a criminal penalty for the purposes of international human rights law.

The committee considers that as the legislation engages multiple and significant human rights and noting its functions of examining Acts for compatibility with human rights, the committee is seeking further information from the Minister for Home Affairs to assess the human rights compatibility of the measure.

Additional mandatory visa conditions

Rights to privacy, work, adequate standard of living, health and social security; freedom of assembly, association and expression; and prohibition on inhuman or degrading treatment

The bridging visas granted to the NZYQ cohort are subject to additional mandatory conditions that do not appear to engage the offence provisions. For example, a visa holder is required to not become involved in activities disruptive to the Australian community. As this condition is neither a monitoring condition nor a condition relating to remaining at a notified address or wearing a monitoring device, it does not appear to be captured by the offence provisions. In order to assess whether these mandatory conditions would, in practice, limit human rights it is necessary to consider whether the conditions are enforceable and subject to legal consequences for non-compliance. If the conditions are not subject to the criminal offence provisions and noting that immigration detention is not a possible consequence for non-compliance (because of the recent High Court decision), it appears that the consequence for breaching one or more of the visa conditions is potential visa cancellation action. This may result in the person being denied the right to work and access to social security and Medicare.

Depending on the consequence of non-compliance with the additional mandatory conditions, the measure may engage and limit a number of human rights, including the rights to privacy, work, an adequate standard of living, health and social security and the rights to freedom of assembly, association and expression. If, as a consequence of visa cancellation action, a person was denied the necessary resources to meet their basic needs, such as housing, food and healthcare, to a seriously detrimental extent, the measure may also engage the prohibition against inhuman or degrading treatment.

The committee previously considered several of these visa conditions when they were first introduced in 2021 and concluded that there may be a significant risk that the conditions impermissibly limit multiple human rights. Given the committee's previous concerns and noting the insufficient information contained in the explanatory materials, the committee is seeking further information

from the Minister for Home Affairs to assess the compatibility of the measure with human rights.

Powers of authorised officers

Rights to privacy, life and security of person, and effective remedy

The second bill seeks to introduce two new powers relating to monitoring devices and the collection, use and disclosure of information by 'authorised officers'. In particular, an authorised officer may do all things necessary or convenient to be done to, among other things, install, fit or remove a person's monitoring device or determine or monitor the location of the person through the monitoring device. An authorised officer may collect, use or disclose to 'any other person' personal information for a variety of purposes, including protecting the community in relation to persons subject to monitoring. These powers may be exercised despite any provision of any law of the Commonwealth, State or Territory.

These new powers engage and limit the right to privacy and potentially the rights to life and security of person, noting that personal information may be shared with 'any other person', including possibly the media or general public, for the broad purpose of 'protecting the community'. As the powers may be exercised despite any other law, the measure also engages the right to an effective remedy. The committee is seeking further information from the Minister for Home Affairs to assess the compatibility of this measure with these rights.

National Redress Scheme for Institutional Child Sexual Abuse Amendment Bill 2023

Advice to Parliament

Limiting entitlement to seek redress

Rights to an effective remedy; equality and non-discrimination

This bill seeks to reduce the circumstances in which people who are, or have been, incarcerated may be prevented from applying for redress for institutional child sexual abuse. However, the committee notes that some people with some serious criminal convictions may still be precluded from accessing redress, and considers that the restrictions on the entitlement of survivors to claim redress itself engages and may impermissibly limit the right to an effective remedy and may also engage and limit the right to equality and non-discrimination. The committee draws its prior comments in relation to this to the attention of the Minister for Social Services and the Parliament.

Superannuation (Objective) Bill 2023

No comment

Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023

No comment

Legislative instruments

Chapter 1: New and continuing matters

Legislative instruments registered on the Federal Register of Legislation between 7 November to 20 November 2023[3]	59
Legislative instruments commented on in report[4]	0

Chapter 2: Concluded

Legislative instruments committee has concluded its examination of following receipt of ministerial response	1

Migration Amendment (Resolution of Status Visa) Regulations 2023

Advice to Parliament

Refusal of permanent visas on identity grounds

Right to protection of the family, equality and non-discrimination, liberty

This measure requires that an application for a permanent 'Resolution of Status' visa must be refused where the person does not satisfy identity requirements. This applies to people who claimed asylum in Australia after travelling by boat without a valid visa before July 2013 and who are currently on a temporary protection visa.

This measure engages and may limit the right to protection of the family as it may separate family members, the right to equality and non-discrimination as it may have a disproportionate impact on people of certain nationalities, and the right to liberty as refusal of the visa may lead to mandatory immigration detention.

While the committee acknowledges that the measure aims to facilitate the visa applicant's cooperation in attempting to establish their identity, and not necessarily impose a requirement that identity be confirmed, the committee is concerned that in practice this may

[3] The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function.

[4] The committee makes no comment on the remaining legislative instruments on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the instrument and relevant information provided in the statement of compatibility (where applicable). The committee may have determined not to comment on an instrument notwithstanding that the statement of compatibility accompanying the instrument may be inadequate.

operate to the significant detriment of certain applicants. Based on the information provided by the minister, it is not clear that this measure is directed towards an objective that would be regarded as legitimate under international human rights law. The committee considers that, in practice, were people to engage with the department, there may be sufficient legal and social supports in place to ensure that their individual circumstances are considered. However, the extent to which this measure may impermissibly limit human rights in practice will largely depend on the social and legal supports that are provided to persons with respect to the visa application process. The committee has made a number of recommendations that may assist somewhat with the proportionality of this measure, and draws its human rights concerns to the attention of the minister and the Parliament.

Chapter 1
New and ongoing matters

1.1 The committee comments on the following bills and legislative instruments, and in some instances, seeks a response or further information from the relevant minister.

Bills

Crimes and Other Legislation Amendment (Omnibus No. 2) Bill 2023[7]

Purpose	This bill seeks to amend: • the *Crimes Act 1914* to allow the Attorney-General to consider or reconsider the making of or refusing to make a parole order after the non-parole period has ended; • the *Criminal Code Act 1995* to ensure the relevant regulation-making powers are capable of listing known and emerging substances in the Criminal Code Regulations 2019 in a consistent manner and to make consequential amendments; • the *Australian Crime Commission Act 2002* to retrospectively validate all things done in reliance on, or in relation to, an authorisation given, or a determination made by the Australian Crime Commission Board on or after 4 September 2013 and before 10 December 2022
Portfolio	Attorney-General
Introduced	House of Representatives, 14 November 2023. *Passed both Houses on 17 November 2023*
Rights	Effective remedy

Retrospective validation of actions by the Australian Crime Commission

1.2 The Board of the Australian Crime Commission (the Board) has the power to make a written determination authorising an intelligence operation or an investigation relating to a federally relevant crime.[8] If such an authorisation or determination is made, this grants coercive powers to officers within the Australian Crime Commission,

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7 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes and Other Legislation Amendment (Omnibus No. 2) Bill 2023, *Report 13 of 2023*; [2023] AUPJCHR 122.

8 *Australian Crime Commission Act 2002*, section 7C.

enabling them to compel people to give evidence,[9] attend before an examiner and produce documents or things.[10] Failure to comply is a criminal offence and a person is not excused from producing a document or thing on the grounds it would incriminate them. There is a use immunity so that the evidence, document or thing cannot be produced in evidence against the person, but there is no derivative use immunity, so that information derived from the evidence, document or thing can be used in evidence.[11]

1.3 This bill (now Act) retrospectively validates all things done in reliance on, or in relation to, an authorisation given or determination made by the Board on or after 4 September 2013 and before 10 December 2019. This also has the effect of validating any further derivative uses of any information or intelligence obtained by the Australian Crime Commission in reliance on these authorisations and determinations.

International human rights legal advice

Right to an effective remedy

1.4 The existing powers of the Board to compel a person to give evidence, attend before an examiner and produce documents or things limits the right to privacy.[12] The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[13] Additionally, the existing abrogation of the privilege against self-incrimination engages and may limit the right to a fair trial, which provides that in the determination of any criminal charge a person is entitled to certain minimum guarantees, including the right not to be compelled to testify against oneself or confess guilt.[14] It is noted that the absence of a derivative use immunity could have significant and broad-reaching implications for a person's right not to be compelled to testify against themselves. A person compelled to give evidence may be required to answer questions about a specific matter, and while that answer itself cannot be used in evidence against the person, the information could be used to find other evidence against the person which could be used against them in a prosecution.[15] This may have the practical effect that the subject had been compelled to testify against and incriminate themselves with respect to related criminal proceedings.

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9 *Australian Crime Commission Act 2002*, section 28.

10 *Australian Crime Commission Act 2002*, section 21A.

11 *Australian Crime Commission Act 2002*, sections 21E and 30.

12 International Covenant on Civil and Political Rights, article 17.

13 UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4].

14 International Covenant on Civil and Political Rights, article 14(3(g).

15 UN Human Rights Committee has relevantly directed that in considering any abrogation of the privilege against self-incrimination, regard should be had to any form of compulsion used to compel a person to testify against themselves. See, UN Human Rights Committee, *General Comment No. 13: Article 14 (Administration of justice)* (1984) [14].

1.5 Persons whose rights to privacy and fair trial may have been violated have the right to an effective remedy.[16] The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.[17] It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse.

1.6 The statement of compatibility says the existing legislative framework engages the right to privacy but says that this bill does not amend or otherwise alter any of the existing legislative safeguards that apply to the Board's powers. It does not refer to the right to a fair hearing or the right to an effective remedy. While this bill does not itself engage the rights to privacy or fair hearing, by retrospectively validating actions taken in reliance on the Board's authorisations or determinations, this likely removes avenues for people to seek redress for actions that led to their privacy being interfered with, or actions relating to a conviction on the basis of evidence derived from information they were compelled to provide. It is not possible to conclude whether any such limitation on rights would be a permissible limitation noting that no information has been provided in the statement of compatibility regarding any such limitation and this may depend on the individual circumstances of a case.

1.7 The explanatory materials do not provide any reason as to why it is necessary to validate the actions of the Board over a six-year period. It just states that the validations in the bill will ensure things done in reliance on Board authorisations or determinations 'are and always have been valid, including the use and derivative use of information or intelligence obtained pursuant to these authorisations and determinations'.[18]

1.8 The explanatory materials provide no information as to whether a person affected by an authorisation or determination that was otherwise invalid (but for this bill) will have access to any other form of remedy. In relation to the right to an effective remedy, while limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the

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16 International Covenant on Civil and Political Rights, article 2(3).

17 See, *Kazantzis v Cyprus,* UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia,* UN Human Rights Committee Communication No. 1036/01 (2005), State parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia* UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

18 Explanatory memorandum, p. 3.

fundamental obligation to provide a remedy that is effective.[19] The retrospective validation of all things done under a Board authorisation or determination, which includes validating the derivative use of information or intelligence obtained under them, appears likely to remove the ability for anyone whose privacy or right not to incriminate themselves is affected to obtain a remedy. It therefore appears to be a significant risk that this measure is incompatible with the right to an effective remedy.

Committee view

1.9 The committee considers the existing powers of the Australian Crime Commission to compel a person to give evidence, attend before an examiner and produce documents or things limits the right to privacy, and the existing abrogation of the privilege against self-incrimination limits the right to a fair trial. The committee has not undertaken an examination of whether these powers are a permissible limitation on rights, and notes that much would depend on how the powers are exercised in practice. However, by retrospectively validating all things done by a person in reliance on an authorisation or determination made by the Australian Crime Commission Board over a six-year period, the committee considers this engages the right to an effective remedy. As the bill makes all things valid and effective that may otherwise be invalid, this would appear to remove any remedy that a person whose privacy or fair trial rights may have been affected would otherwise have. Therefore, the committee considers there is a significant risk that Schedule 3 of the bill is incompatible with the right to an effective remedy.

1.10 The committee notes that this bill was introduced into the House of Representatives on 14 November 2023 and finally passed both Houses of Parliament on 17 November 2023. The committee notes the speed at which this proposed legislation proceeded through the Parliament meant that the committee was unable to provide its scrutiny assessment of the bill prior to its passage.

1.11 The committee draws its human rights concerns to the attention of the Attorney-General and the Parliament, but as this bill has already passed makes no further comment.

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19 See UN Human Rights Committee, *General Comment 29: States of Emergency (Article 4)* (2001) [14].

Migration Amendment (Bridging Visa Conditions) Bill 2023

Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023[20]

Purpose	The Migration Amendment (Bridging Visa Conditions) Bill 2023 (now Act) amends the *Migration Act 1958* and the *Migration Regulations 1994* to grant certain non-citizens for whom there is no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future a Subclass 070 (Bridging (Removal Pending)) visa subject to specified mandatory visa conditions, breach of which is a criminal offence carrying a mandatory minimum sentence The Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 seeks to amend the *Migration Act 1958* to introduce new criminal offences with mandatory minimum sentences for breach of certain visa conditions and to empower authorised officers to do all things necessary or convenient in relation to monitoring devices and related monitoring equipment, and to collect, use or disclose to any other person personal information relating to the visa holder
Portfolio	Home Affairs
Introduced	Migration Amendment (Bridging Visa Conditions) Bill 2023: House of Representatives, 16 November 2023 *Finally passed both Houses, 16 November 2023* Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023: House of Representatives, 28 November 2023
Rights	Adequate standard of living; criminal process rights; effective remedy; fair trial; freedom of assembly; freedom of association; freedom of expression; freedom of movement; health; liberty; life; privacy; security of person; social security; torture or cruel, inhuman or degrading treatment or punishment; work

[20] This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Bill 2023, Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, *Report 13 of 2023*; [2023] AUPJCHR 123.

Criminalisation of breach of mandatory bridging visa conditions

1.12 The Migration Amendment (Bridging Visa Conditions) Bill 2023 (now Act)[21] ('first bill') amended the *Migration Act 1958* (Migration Act) and the Migration Regulations 1994 (Migration Regulations) to grant non-citizens for whom there is no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future a Subclass 070 (Bridging (Removal Pending)) visa (bridging visa) subject to specified mandatory visa conditions – non-compliance of which is a criminal offence carrying a mandatory minimum sentence of at least one year imprisonment.[22] The Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 ('second bill') seeks to introduce additional criminal offences with mandatory minimum sentences for non-compliance with visa conditions relating to not performing certain work, not going within certain distance of a school or childcare or day care centre and not contacting the victim of the offence.[23] The cohort of people to whom these bills apply are those non-citizens who were released from immigration detention following the orders of the High Court of Australia of 8 November 2023 in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affair* (the NZYQ cohort).[24]

1.13 The mandatory conditions that are subject to a criminal offence for non-compliance fall into the following categories:

(a) monitoring conditions;[25]

(b) conditions requiring the person to remain at a notified address between certain times of a day;[26]

(c) conditions relating to monitoring devices and related monitoring equipment;[27]

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21 This entry considers the Migration Amendment (Bridging Visa Conditions) Bill 2023 as passed by both Houses on 16 November 2023 (rather than the bill as introduced).

22 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, items 2 and 4. The Subclass 070 (Bridging (Removal Pending) visa granted to the NZYQ cohort (see footnote 4) under this bill effectively replaced the previous bridging visa that was granted to them on their release from immigration detention, as this previous visa ceased to be in effect after the commencement of the amendments in the bill.

23 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, Schedule 1, items 1 and 2.

24 This cohort of persons is unable to be detained in immigration detention under subsections 189(1) and 196(1) of the Migration Act as there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future. Migration Amendment (Bridging Visa Conditions) Bill 2023, explanatory memorandum, p. 2.

25 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, section 76B.

26 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, section 76C.

27 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, section 76D.

(d) conditions requiring that the person not perform any work or participate in any regular organised activity involving more than incidental contact with a minor or other vulnerable person;[28]

(e) conditions requiring that the person not go within a particular distance of a school or childcare or day care centre;[29] and

(f) conditions requiring that the person not contact or attempt to contact the victim of the offence or a member of the victim's family.[30]

1.14 The mandatory minimum sentence for non-compliance with any of these conditions is one year imprisonment and the maximum sentence is five years imprisonment or 300 penalty units or both.[31] The defence of 'reasonable excuse' applies to all six offences.[32]

1.15 In relation to a monitoring condition that engages the offence in section 76B, a 'monitoring condition' is specified to be a mandatory condition that requires the visa holder to:

- **notify** the minister or department of specified matters within a specified period or before or by a specified day;
- **report** at a specified time or times and at a specified place or in a specified manner; and
- **attend** at a specified place, on a specified day and at a specified time.[33]

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28 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, Schedule 1, item 1, proposed section 76DAA. This offence appears to most directly capture condition 8622 but it may also capture condition 8613, depending on how that condition was interpreted and applied in practice.

29 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, Schedule 1, item 1, proposed section 76DAB.

30 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, Schedule 1, item 1, proposed section 76DAC.

31 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, section 76DA.

32 The defendant bears an evidential burden in relation to demonstrating that they have a reasonable excuse for failing to comply with the requirement of the monitoring condition. With respect to the offence relating to the requirement to not contact the victim of the offence or a member of the victim's family, a reasonable excuse for failing to comply with the condition is if the victim or a member of the victim's family is at least 16 years of age and voluntarily consents to the contact (and has capacity to give that consent) or the contact or attempted contact is authorised by law: Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, Schedule 1, item 1, proposed subsection 76DAC(3).

33 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, subsection 76B(4).

1.16 Based on the above definition, it appears that the following conditions would be 'monitoring conditions' for the purposes of the offence provision (as they require the person to either notify, report or attend).[34] That is, the visa holder must:

- notify the minister within a specified timeframe of their personal details and circumstances and of any changes in these (including employment details; residential address; the full name and date of birth of each person who ordinarily resides with the visa holder);[35]
- notify Immigration[36] of any travel interstate or overseas within a specified timeframe;[37]
- notify Immigration within a specified timeframe of the details of the visa holder's association with, or membership of, any organisation, and any changes in those details;[38]
- notify Immigration within two working days of any contact with any individual, group or organisation that is alleged, or is known by the visa holder, to be engaging in, or has previously engaged in, or has expressed an intention to engage in, criminal or other illegal activities (excluding contact in the course of attending a therapeutic or rehabilitative service or in connection with legal proceedings or advice);[39]

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34 It is noted that the Migration Amendment (Bridging Visa Conditions) Bill 2023 prescribes four conditions that are not a 'monitoring condition', meaning that the visa holder would not be liable for a criminal penalty for non-compliance with these prescribed conditions. See Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, paragraph 76B(4)(b) and schedule 2, item 3, regulation 2.25AC, which prescribes conditions 8617; 8618; 8619; and 8621. These conditions are set out in schedule 2, item 13 and require the visa holder to notify Immigration within a specified time period of certain financial matters, including changes to banking arrangements; experience of financial hardship; and the receipt or transfer of AUD $10,000. While condition 8621 is prescribed, it is noted that this condition relates to the wearing and maintenance of a monitoring device and that new section 76D (schedule 1, item 4) makes it an offence to not comply with conditions relating to monitoring devices and related monitoring equipment.

35 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 13, condition 8612; Migration Regulations 1994, Schedule 8, conditions 8550, 8552 and 8513. Additionally, condition 8514 requires there to be no material change in the circumstances on the basis of which the visa was granted.

36 Being the department administered by the Minister administering the *Migration Act 1958* (see Migration Regulations 1994, section 1.03), currently the Department of Home Affairs.

37 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 13, condition 8614.

38 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 13, condition 8615.

39 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 13, condition 8616.

- do everything possible to facilitate their removal from Australia and not attempt to obstruct efforts to arrange and effect their removal from Australia;[40]
- attend an interview relating to their visa as directed by the minister, either orally or in writing;[41]
- report to the minister at the time, place and in a manner specified;[42]
- report in person for removal from Australia in accordance with instructions given, orally or in writing, by the minister;[43] and
- attend at a place, date and time specified, orally or in writing, by the minister in order to facilitate efforts to arrange and effect their removal from Australia.[44]

1.17 All of the above conditions must be imposed on all visas granted to this cohort of people.[45]

1.18 The condition that engages the offence under section 76C relating to remaining at a particular address requires the visa holder to remain at a notified address[46] between 10 pm on one day and 6 am the next day, or between such other times as are specified in writing by the minister (the times must not be more than eight hours apart).[47] The minister must impose this condition unless they are satisfied that the visa holder does not pose a risk to the community.[48]

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40 Migration Regulations 1994, Schedule 8, condition 8541.

41 Migration Regulations 1994, Schedule 8, condition 8561.

42 Migration Regulations 1994, Schedule 8, condition 8401.

43 Migration Regulations 1994, Schedule 8, condition 8542; Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 10.

44 Migration Regulations 1994, Schedule 8, condition 8543; Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 11.

45 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 7.

46 A notified address includes the residential address notified by the holder; an address the holder regularly stays because of a close personal relationship and which the holder has notified to Immigration; and another address that the holder has notified to Immigration: Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 13, subcondition 8620(3).

47 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 13, condition 8620.

48 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 8, subclause 070.612A(1).

1.19 The conditions that engage the offences relating to a monitoring device and related monitoring equipment include requiring the visa holder to:[49]

- wear a monitoring device at all times;
- allow an authorised officer to fit, install, repair or remove the monitoring device and any related monitoring equipment;
- take steps specified in writing by the minister and any other reasonable steps to ensure that the monitoring device and related monitoring equipment remains in good working order; and
- notify an authorised officer as soon as practicable that the monitoring device and any related monitoring equipment are not in good working order.[50]

1.20 The minister must impose the above monitoring device conditions unless they are satisfied that the visa holder does not pose a risk to the community.[51]

1.21 The conditions that engage the additional offences sought to be introduced by the second bill would require that the visa holder:

- not perform any work, or participate in any regular organised activity, involving more than incidental contact with a minor or any other vulnerable person;[52]
- not go within 200 metres of a school, childcare centre or day care centre;[53] and
- not contact, or attempt to contact, the victim of the offence or a member of the victim's family.[54]

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49 A monitoring device means any electronic device capable of being used to determine or monitor the location of a person or an object or the status of an object and related monitoring equipment for a monitoring device means any electronic equipment necessary for operating the monitoring device. See Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, subsection 76D(7).

50 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, section76C and Schedule 2, item 13, condition 8621.

51 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, section76D and Schedule 2, item 8, subclause 070.612A(2).

52 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 13, condition 8622.

53 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 13, condition 8623.

54 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 13, condition 8624.

1.22 The above conditions would be imposed on persons who have been convicted of an offence that involves a minor or any other vulnerable person or, with respect to the no contact condition, an offence involving violence or sexual assault.[55]

1.23 Further, the rules of natural justice do not apply to the making of a decision to grant a bridging visa subject to the mandatory conditions relating to remaining at a notified address and monitoring devices and related monitoring equipment.[56] However, as soon as practicable after making the decision, the minister must notify the person of the decision and invite them to make representations within a specified period and in a specified manner as to why the visa should not be subject to those mandatory conditions.[57] If the person makes such representations, the minister must grant a second bridging visa not subject to any one or more of the conditions relating to remaining at a notified address and monitoring devices and related monitoring equipment, if they are satisfied that those conditions are not reasonably necessary for the protection of any part of the Australian community.[58] A decision to not grant a person a second bridging visa is a reviewable decision.[59]

Preliminary international human rights legal advice

Criminal process rights; right to a fair trial; freedom of expression, movement and association; right to liberty; right to privacy; and right to work

1.24 The imposition of mandatory visa conditions, non-compliance with which carries a mandatory minimum sentence of one year imprisonment, engages and limits multiple human rights. In particular, the measure engages and limits the right to privacy, the right to work and the rights to freedom of expression, movement and association by requiring the visa holder to:

- provide certain personal information (including details about who the visa holder ordinarily resides with);
- be electronically monitored at all times;
- remain at a notified address within certain times of a day;

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55 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 13, conditions 8622, 8623 and 8624.

56 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, subsection 76E(2) and Schedule 2, item 3, regulation 2.25AD, which prescribes conditions 8620 and 8621 for the purposes of section 76E.

57 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, subsection 76E(3).

58 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, subsection 76E(4), as amended by Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, item 3.

59 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 5, paragraph 338(4)(c).

- not go within a certain distance of specified places;
- notify Immigration of any travel and contact and association with certain individuals, groups and organisations;
- not perform certain work; and
- not contact certain persons.

1.25 The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[60] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life, as well as the right to control the dissemination of information about one's private life .[61] The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[62] The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country.[63] The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[64] The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds.[65] While restricting contact between a visa holder who has been convicted of an offence involving violence or sexual assault and the victim or a member of the victim's family may be a reasonable, necessary and proportionate limitation on the right to freedom of expression, the statements of compatibility do not acknowledge that this right is engaged and so provides no assessment as to its compatibility. Where legislation limits human rights, the committee expects that the accompanying statement of compatibility provide a detailed, reasoned and evidence-based assessment of each measure that limits rights, even where the conclusion of such an assessment is that the limitation is permissible.

1.26 Additionally, the imposition of a mandatory minimum sentence of imprisonment engages and limits the right to liberty, which protects the right not to be arbitrarily detained.[66] The United Nations (UN) Human Rights Committee has stated that 'arbitrariness' under international human rights law includes elements of

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60 UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]-[4].

61 The UN Human Rights Committee further explains that this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. *General Comment No. 16: Article 17* (1988).

62 International covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

63 International Covenant on Civil and Political Rights, article 12.

64 International Covenant on Civil and Political Rights, article 22.

65 International Covenant on Civil and Political Rights, article 19(2).

66 International Covenant on Civil and Political Rights, article 9.

inappropriateness, injustice and lack of predictability.[67] In order for detention not to be considered arbitrary under international human rights law it must be reasonable, necessary and proportionate in the individual case. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy). As mandatory sentencing removes judicial discretion to take into account all of the relevant circumstances of a particular case, it may lead to the imposition of disproportionate or unduly harsh sentences of imprisonment.

1.27 The mandatory minimum sentencing provisions also engage and limit article 14(5) of the International Covenant on Civil and Political Rights, which protects the right to have a sentence reviewed by a higher tribunal (right to a fair trial). This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence. A previous UN Special Rapporteur on the Independence of Judges and Lawyers has observed in relation to article 14(5) and mandatory minimum sentences:

> This right of appeal, which is again part of the requirement of a fair trial under international standards, is negated when the trial judge imposes the prescribed minimum sentence, since there is nothing in the sentencing process for an appellate court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards.[68]

1.28 Further, questions arise as to whether the cumulative impact of all these conditions, particularly being electronically monitored at all times and subject to eight hour periods of home detention, may be construed as imposition of a criminal penalty for the purposes of international human rights law. In assessing whether a penalty may be considered 'criminal' in nature under international law, it is necessary to consider:

- the domestic classification of the penalty as civil or criminal;
- the nature and purpose of the penalty: a penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- the severity of the penalty.

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67 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of person)* (2014) [12]. It is noted that the UN Human Rights Committee has held that mandatory minimum sentences will not *per se* be incompatible with the right to be free from arbitrary detention, see *Nasir v Australia*, UN Human Rights Committee Communication No 2229/2012 (2016) [7.7].

68 Dato' Param Cumaraswamy 'Mandatory Sentencing: the individual and Social Costs', *Australian Journal of Human Rights*, vol. 7, no. 2, 2001, pp. 7–20.

1.29 While the visa conditions are not classified as a 'criminal' penalty under domestic law, this is not determinative as the term 'criminal' has an autonomous meaning in international human rights law. As to the nature and purpose of the conditions, the conditions attach to the bridging visas granted to the NZYQ cohort rather than the public in general and the stated objectives of the conditions are to support community safety and manage visa holders to ensure eventual removal from Australia once removal becomes reasonably practicable.[69] However, as the conditions significantly interfere with multiple human rights, it is arguable that together they may be so severe as to constitute a 'criminal' penalty for the purposes of international human rights law. If the conditions were to be considered a 'criminal' penalty, this would mean that the relevant provisions must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights. This includes the right not to be punished twice for the same offence (noting that the mandatory visa conditions only apply to the NZYQ cohort, many of whom are within this cohort because they have had their previous visa cancelled due to a criminal conviction);[70] the right to be presumed innocent until proven guilty according to law, which requires that the case against a person be demonstrated on the criminal standard of proof (beyond all reasonable doubt);[71] and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.[72]

1.30 Most of the above rights may be subject to permissible limitations where the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

Prescribed by law

1.31 Interferences with human rights must have a clear basis in law (that is, they must be prescribed by law).[73] This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities

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69 Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, pp. 30, 40–41.

70 International Covenant on Civil and Political Rights, article 14(7).

71 International Covenant on Civil and Political Rights, article 14(2). See UN Human Rights Committee, *General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial* (2007) [30]: 'The presumption of innocence, which is fundamental to the protection of human rights… guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt'.

72 International Covenant on Civil and Political Rights, article 14(1).

73 See, eg, UN Human Rights Committee, *General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17)* (1988) [3]–[4].

may restrict the exercise of their rights.[74] The UN Human Rights Committee has stated that the 'relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted'.[75]

1.32 In this regard, it is relevant to consider whether the conditions are sufficiently precise to enable visa holders to understand what is expected of them and in what circumstances a breach is likely to occur, particularly noting the severity of the punishment for breach of a visa condition. Some of the conditions are drafted using broad and imprecise terms. For example, a visa holder is required to notify Immigration of any contact with any individual, group or organisation that is alleged, or is known by the visa holder, to be engaging in, or has previously engaged in, or has expressed an intention to engage in, criminal or other illegal activities. In practice, it is not clear that the visa holder will necessarily be aware of whether it is 'alleged' that an individual has previously engaged in, or expressed an intention to, engage in criminal or other illegal activities, and thus whether they are required to notify Immigration of the details of any contact with such individuals. Another condition requires visa holders to take 'any other reasonable steps' to ensure that their electronic monitoring device and related monitoring equipment remains in 'good working order'. It is not clear what constitutes 'reasonable steps' or how 'good working order' is to be interpreted, and there is no legislative guidance in this regard. Further, the minister may orally specify matters relating to a number of conditions, such as the place, date and time that a visa holder must attend or report. The ability to provide such directions orally, noting that English is unlikely to be the primary language of many, if not most, of the NZYQ cohort, may increase the risk that the conditions are not sufficiently clear as to enable the visa holders to understand what is expected of them (noting that failure to comply with such an oral request would lead to imprisonment for a minimum of one year). As such, there appears to be a significant risk that the measures may not meet the quality of law test, as it is not clear that all the mandatory conditions satisfy the minimum requirements of legal certainty and foreseeability. Foreseeability is particularly important in this context as the consequence of non-compliance with a condition is a minimum one year (and maximum five years) imprisonment.

Legitimate objective and rational connection

1.33 The stated objective of the measure is to manage members of the NZYQ cohort in the community in a way that supports community safety and ensures their removal

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74 *Pinkney v Canada,* United Nations (UN) Human Rights Communication No.27/1977 (1981) [34]; *Rotaru v Romania*, European Court of Human Rights (Grand Chamber), Application No. 28341/95 (2000) [56]–[63]; *Gorzelik and others v Poland*, European Court of Human Rights (Grand Chamber), Application No. 44158/98 (2004) [64].

75 UN Human Rights Committee, *General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17)* (1988) [8]; *General Comment No. 27, Freedom of Movement (Art. 12)* (1999) [13].

from Australia once removal becomes reasonably practicable.[76] The statement of compatibility explains that members of the NZYQ cohort have no substantive visa to remain in Australia due to their visa applications being refused or their visa cancelled in most cases on character grounds, and they have not previously been granted a bridging visa due to the risks they may pose to the Australian community.[77] The explanatory memorandum states that some members of the NZYQ cohort have committed serious offences in Australia.[78] The statement of compatibility states that because a proportion of the NZYQ cohort present community safety concerns, it is necessary to impose visa conditions that require regular reporting and engagement with the department in order to monitor the visa holder's personal situation and commence compliance action if necessary.[79] The statement of compatibility states that the conditions available prior to the amendments made by this bill were insufficient to mitigate the risk posed to community safety by members of the NZYQ cohort and the additional mandatory conditions introduced by this bill emphasise the Australian government's expectations regarding a person's conduct in the community and consequences for failing to meet those expectations.[80] It notes that because visa cancellation and detention in immigration detention is no longer a possible consequence of non-compliance with a visa condition, it is necessary to make non-compliance with a mandatory condition a criminal offence.[81] In relation to mandatory minimum sentences, while the explanatory materials accompanying the first bill did not explain why this was considered necessary, the statement of compatibility accompanying the second bill states that mandatory minimum sentences appropriately reflect the seriousness of the offences and the need to make clear that non-compliance with visa conditions that are aimed at protecting community safety is viewed seriously.[82]

1.34 While the objectives of protecting public safety and facilitating the removal of non-citizens are generally capable of constituting a legitimate objective, questions arise as to whether the measure addresses a pressing and substantial concern for the purposes of international human rights law. The public safety risk posed by individuals in the NZYQ cohort and the manner in which this risk is assessed are relevant considerations in determining whether the measure addresses a pressing and substantial public concern. However, as the conditions imposed are mandatory, there

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76 Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, p. 30. See also Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, statement of compatibility, p. 18.

77 Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, p. 40.

78 Migration Amendment (Bridging Visa Conditions) Bill 2023, explanatory memorandum, p. 2.

79 Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, p. 41.

80 Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, p. 41.

81 Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, p. 40.

82 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, statement of compatibility, p. 21.

is no individual assessment of the risk profile of each individual within the NZYQ cohort. The explanatory materials note that members of the NZYQ cohort have had their visa applications refused or visa cancelled 'in most cases' on character grounds and thus pose a risk to community safety. While some members of the NZYQ cohort have been convicted of serious offences, it is not clear that all members of the cohort have engaged in criminal conduct. Under the Migration Act, a non-citizen may be of 'character concern' and thus have their visa cancelled on character grounds, on a broad range of bases, including if, having regard to the non-citizen's past and present general conduct, the non-citizen is not of good character or there is a risk that the non-citizen would incite discord in the Australian community or in a segment of that community.[83] There may be circumstances where an individual is of character concern but does not necessarily pose a risk to public safety or national security. It is therefore not clear that all members of the NZYQ cohort would pose the same level of risk to the community. Indeed, the statement of compatibility states that the mandatory conditions will allow the department to monitor a visa holder's personal situation and assess whether certain risk factors, such as significant financial transactions or debts or engagement with criminal groups or organisations, increase the potential likelihood of the visa holder becoming a risk to the community.[84] This information suggests that the risk profile of members of the NZYQ cohort is not necessarily clear and the measure is being used to assess this risk in the first instance (rather than being imposed in response to a pre-assessed risk). Without further information in relation to the risk profile of each individual affected by the measure, it is difficult to assess whether the public safety risk cited in the explanatory materials is a concern that is pressing and substantial enough to warrant the significant limitation on rights imposed by this bill.

1.35 Further, it is not clear whether the measure is strictly necessary. Prior to the amendments passed by this bill, there were a wide range of discretionary visa conditions that could be imposed on visa holders, including various monitoring and reporting conditions as well as requiring the visa holder to do everything possible to facilitate their removal from Australia and not attempt to obstruct efforts to arrange and effect their removal from Australia.[85] While it is acknowledged that imposing criminal penalties for non-compliance with the visa conditions may be necessary for deterrent purposes noting the recent High Court decision, it is not clear why additional more punitive conditions, such as electronic monitoring at all times, are necessary to manage the potential safety risk posed by the NZYQ cohort. This is particularly so noting that Australian citizens who have been convicted of a criminal offence and served their sentence do not have equivalent conditions or restrictions imposed on them indefinitely. The statement of compatibility acknowledges that the mandatory

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83 *Migration Act 1958*, subparagraphs 5C(1)(c)(ii) and 5C(1)(d)(iv).

84 Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, p. 41.

85 Some of these conditions were introduced in Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444]. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2021) pp. 50–74 and *Report 9 of 2021* (4 August 2021) pp. 66–108.

conditions only apply to members of the NZYQ cohort and not to other visa holders, and the requirements imposed on this cohort do not apply to Australian citizens who have previously offended.[86] However, if the risk posed to the Australian community by citizens who have previously offended and served their sentence can be managed without imposing strict conditions subject to criminal penalties (such as electronic monitoring and curfews), it is unclear why similar measures could not adequately address the potential threat posed by members of the NZYQ cohort (noting that the number of prisoners released into the Australian community after they have served their sentence is far greater than the number of people within the NZYQ cohort so far released).[87] The statements of compatibility have not adequately justified why the previous laws were insufficient to achieve the stated objectives and thus why the measure is strictly necessary.

1.36 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to, that is effective to achieve, the objective. Some of the mandatory conditions appear likely to be rationally connected to the stated objectives. For example, for those individuals within the NZYQ cohort who have been assessed to pose a risk to the community, imposing reporting and monitoring conditions may be rationally connected to the objective of protecting community safety. Other conditions, such as reporting at a time and place for removal purposes or doing everything possible to facilitate removal, are theoretically rationally connected to the stated objective of facilitating removal from Australia when removal is practicable. However, noting that the underlying purpose of the measure is to respond to the High Court's decision and that it relates solely to people who have no real prospect of removal becoming practicable in the reasonably foreseeable future, it is not clear that the measure would, in practice, be effective to achieve this objective.

Proportionality

1.37 In assessing whether the measure is proportionate, it is necessary to consider a number of matters, including: whether the measure is sufficiently circumscribed and flexible; whether the measure is accompanied by adequate safeguards and review mechanisms; whether any less rights restrictive alternatives could achieve the same stated objectives; and the extent of any interference with human rights.

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86 Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, p. 40; Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, statement of compatibility, pp. 19–20.

87 16,511 Australian prisoners were released in the most recent three month period (June quarter 2023): Bureau of Statistics, *Corrective Services, Australia* (21 September 2023). As at 27 November 2023, 141 people in the NZYQ cohort are reported to have been released so far from immigration detention Australian. See Paul Karp, 'Another 45 people released due to high court ruling on indefinite detention as Coalition plays hard ball on 'patch-up' bill', *The Guardian*, 27 November 2023 (accessed 28 November 2023).

1.38 As noted above, some of the conditions are drafted in broad and ambiguous terms and it is unclear how these conditions will be interpreted, applied and enforced in practice. This raises concerns that the measure is not sufficiently circumscribed.

1.39 The mandatory nature of the conditions also means there is no flexibility to assess the individual risk profile of each individual and apply conditions on a case by case basis. There are likely to be circumstances in which conditions are imposed on a visa holder that are not proportionate to the level of risk posed by the individual. The supplementary statement of compatibility states that allowing the minister to not impose the conditions relating to curfew and electronic monitoring if they are satisfied that the holder 'does not pose a risk to the community', helps ensure that the imposition of the conditions is reasonably, necessary and proportionate to the individual circumstances.[88] However, this is unlikely to offer any real discretion or safeguard value in practice, noting that any person could pose some level of risk to the community and it will be extremely unlikely, if not impossible, that an individual within the NZYQ cohort will be able to satisfy the minister that they pose *no* risk to the community (given they are part of a cohort of people who have already been assessed to be of character concern). The statements of compatibility do not identify any other safeguards accompanying the measure.

1.40 Additionally, the imposition of mandatory minimum sentences of imprisonment removes the court's discretion to consider the individual circumstances of each case and impose a sentence proportionate to the offending. This increases the risk that sentences of imprisonment will be arbitrary and not proportionate in all the circumstances.[89] The statement of compatibility accompanying the second bill states that any term of imprisonment beyond the mandatory one year would be imposed by the court in consideration of the seriousness of the person's offending and the individual circumstances of the case.[90] It states that the maximum penalty provides flexibility for courts to treat different cases differently.[91] However, retaining the court's discretion to impose a sentence *greater* than the mandatory minimum sentence does not mitigate the risk that imposing a mandatory minimum sentence of one year imprisonment may be disproportionate and arbitrary in light of the particular

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88 Migration Amendment (Bridging Visa Conditions) Bill 2023, supplementary statement of compatibility, p. 7.

89 It is noted that the original statement of compatibility had highlighted the importance of providing the court with discretion to consider the seriousness of the person's offending and the individual circumstances of the case so as to determine an appropriate sentence, noting that the mandatory minimum sentencing provisions were introduced as an amendment to the bill. See Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, p. 42.

90 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, statement of compatibility, p. 22.

91 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, statement of compatibility, p. 21.

circumstances of the case. As such, the inclusion of a maximum penalty does not offer any safeguard value.

1.41 As to the availability of review, a decision to not grant a person a second bridging visa not subject to mandatory conditions relating to curfew and electronic monitoring is a reviewable decision under the Migration Act.[92] However, the decision to grant the bridging visa subject to mandatory conditions is not reviewable. Further, noting the mandatory nature, or virtually mandatory nature, of most of the conditions to be imposed, it would not appear that another decision-maker reviewing the 'decision' would be in a position to make a different decision to that made by the minister. It is noted that the second bill provides that on review the minister must grant a visa that is not subject to conditions relating to curfews and electronic monitoring if the non-citizen makes representations and the conditions are not reasonably necessary for the protection of any part of the Australian community.[93] This differs from the first bill which required that the minister be satisfied that the non-citizen does not pose a risk to the community. Noting that the conditions must originally be imposed unless the minister is satisfied that the visa holder does not pose a risk to the community, it is not clear if on review this new criteria gives the minister greater discretion. In this regard, the explanatory memorandum states that this amended provision will 'ensure that the protection of the Australian community is the paramount consideration'.[94] Further, the imposition of mandatory sentences also prevents judicial review of the severity or correctness of a minimum sentence.

1.42 As to whether less rights restrictive alternatives are available, with respect to the curfew condition, the statement of compatibility notes that while breach of the curfew would constitute a criminal offence subject to a mandatory minimum one year imprisonment, there are no additional physical controls preventing the person from departing the place where they are spending their curfew hours, such as fences, controlled entry/exit, guards or a police presence.[95] The identification of *more* rights restrictive measures does not demonstrate that the measure introduced by the bill is the least rights re strictive. The explanatory materials do not address why alternative approaches, such as only imposing conditions on individuals who have been objectively assessed to pose a real risk to public safety and to apply the minimum necessary and least invasive or coercive conditions to mitigate that risk, would not be effective to achieve the stated objectives. The removal of mandatory minimum sentences would also be a less rights restrictive approach.

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92 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 5, paragraph 338(4)(c).

93 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, item 3, which seeks to amend section 76E(4)(b).

94 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, statement of compatibility, p. 12.

95 Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, p. 44.

1.43 A further consideration in assessing proportionality is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate. The mandatory conditions, as well as the mandatory minimum sentence of imprisonment for non-compliance with the conditions, constitute a significant interference with human rights. The severity of this interference is exacerbated by the fact that the conditions may seemingly be imposed indefinitely, noting that there are no effective avenues to review the conditions imposed and there is no real prospect of the NZYQ cohort being removed from Australia in the foreseeable future.

Committee view

1.44 The committee notes this legislation responds to a High Court decision which requires the release into the community of certain non-citizens, including individuals with serious criminal histories. The committee notes the intention behind the legislation to complement and strengthen existing safeguards to appropriately manage these individuals to meet the objective of community safety. In granting members of the NZYQ cohort bridging visas subject to mandatory conditions, non-compliance with which is a criminal offence carrying a mandatory minimum sentence of one year imprisonment, the committee considers the bill engages and limits multiple human rights, particularly the rights to privacy, work, freedom of movement and association, expression, liberty, fair trial and criminal process rights (if the conditions themselves are considered to be so severe as to amount to a criminal penalty for the purposes of international human rights law).

1.45 The committee notes the Migration Amendment (Bridging Visa Conditions) Bill 2023 passed both Houses of Parliament on the same day it was introduced. While the committee acknowledges that urgent bills are sometimes necessary, this meant the committee was unable to scrutinise this bill for compatibility with human rights prior to its passage. The committee notes that the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 is intended to complement amendments made by the first bill (now Act).

1.46 The committee considers that as the legislation engages multiple and significant human rights and further information is required to assess its compatibility with these rights, and noting also the committee's function of examining Acts for compatibility with human rights, the committee seeks the minister's advice in relation to:

(a) noting the conditions amount to a significant limitation on rights, why it is not appropriate for such conditions to only be imposed by a court following consideration of the individual circumstances of each case;

(b) whether, as a matter of international human rights law, the mandatory conditions are so severe as to be considered to be 'criminal' in nature under international human rights law. If so, how is the measure compatible with the criminal process rights in articles 14 and 15 of the

International Covenant on Civil and Political Rights, including the right not to punished twice for the same offence, the right to be presumed innocent until proven guilty and the right to have a fair and public hearing by a competent, independent and impartial tribunal;

(c) how the conditions satisfy the requirements of legal certainty and foreseeability;

(d) whether visa holders and those enforcing the visa conditions will be provided with guidance as to how the conditions will be interpreted and applied in practice. For example, will guidance be provided as to what constitutes 'reasonable steps' or how 'good working order' is to be interpreted in the context of the electronic monitoring conditions so as to ensure visa holders understand what is expected of them;

(e) why is it appropriate that the minister specify matters relating to certain conditions orally, noting the risk that oral directions may lead to misunderstanding and confusion for visa holders whose primary language is not English;

(f) can visa holders travel overseas (noting the requirement for visa holders to notify of any overseas travel);

(g) how does the measure address a public or social concern that is pressing and substantial enough to warrant limiting rights, in particular:

(i) noting that each individual is likely to pose a different level of risk; and

(ii) noting that Australian citizens who have previously offended and served their sentence are released in the community without strict conditions subject to criminal penalties, why do members of this cohort pose a greater risk to the community than Australian citizens who have committed equivalent offences;

(h) how the measure will be effective to achieve the objective of removal from Australia if those to whom the measure applies are stated to have no real prospect of removal in the reasonably foreseeable future;

(i) why is it necessary and appropriate to impose mandatory minimum sentences of imprisonment, noting that the statement of compatibility accompanying the Migration Amendment (Bridging Visa Conditions) Bill 2023 as first introduced acknowledged the importance of courts retaining discretion to consider the individual circumstances of the case so as to determine an appropriate sentence;

(j) why only imposing conditions on individuals who have been objectively assessed to pose a real risk to public safety and to apply the minimum

necessary and least invasive or coercive conditions to mitigate that risk would not be effective to achieve the stated objectives;

(k) whether there is any limit on the length of time the conditions may be imposed on an individual; and

(l) what, if any, other safeguards (including the availability of review) exist to ensure that any limitation on rights is proportionate to the objectives being sought.

Additional mandatory visa conditions

1.47 In addition to the mandatory conditions set out above (in paragraphs [1.13] to [1.201.21]), the bridging visas granted to the NZYQ cohort are subject to other mandatory visa conditions.[96] While these visa conditions must be imposed, they do not appear to engage the offence provisions in new sections 76B, 76C and 76D, and proposed sections 76DAA, 76DAB and 76DAC of the Act. As outlined above, the conditions that engage these offence provisions include those that require the visa holder to:

- 'notify' the minister or department of specified matters, 'report' at a specified time and place, and 'attend' a specified place on a specified day and time (a 'monitoring condition');
- remain at a notified address;
- wear a monitoring device and keep the device and any related monitoring equipment in good working order;
- not perform certain work;
- not go within a particular distance of a certain place; and
- not contact the victim of the offence.

96 These conditions include those introduced by this bill as well as those conditions specified in clause 070.611 of the Migration Regulations 1994. See Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, paragraph 76A(5)(c) and Schedule 2, item 7, substituted 070.612(1). The specified conditions are conditions 8550, 8551, 8552, 8553, 8554, 8555, 8556, 8560, 8561, 8562, 8563, 8612, 8613, 8614, 8615, 8616, 8617, 8618, 8619, 8622 and 8623 as well as conditions 8303, 8401, 8513, 8514, 8541, 8542 and 8543, which must be imposed on a Subclass 070 Bridging (Removal Pending) visa per clause 070.611 of the Migration Regulations 1994. The conditions are set out in Schedule 8 of the Migration Regulations 1994.

1.48 As a matter of statutory interpretation, the following conditions that require the visa holder to do the following things do not appear to be captured by these offence provisions:[97]

- obtain the minister's approval before taking up specific kinds of employment or activities, undertaking flight training, or obtaining specific chemicals;[98]
- not acquire any weapons or explosives, or take up employment or undertake activities involving weapons or explosives;[99]
- not communicate or associate with a terrorist entity or organisation; and[100]
- not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community.[101]

1.49 Additionally, there are four conditions relating to notifying Immigration about certain financial matters, including when a visa holder is experiencing significant financial hardship, that are prescribed as conditions that are not a 'monitoring condition'.[102] This means that non-compliance with these prescribed conditions does not constitute a criminal offence under new section 76B.

Preliminary international human rights legal advice

Rights to privacy, work, adequate standard of living, health and social security; freedom of assembly, association and expression; and prohibition on inhuman or degrading treatment

1.50 In order to assess whether the above mandatory conditions would in practice limit human rights it is necessary to consider whether the conditions are enforceable and subject to legal consequences for non-compliance. As noted above, as a matter of

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97 This is on the basis that while these conditions require the holder to do something, it does not require the holder to 'notify' anything or 'report' or 'attend' anywhere (or remain at an address, wear an electronic monitoring device or not perform work, go within a particular distance of a place or contact the victim or the victim's family).

98 Schedule 2, item 13, condition 8613; Migration Regulations 1994, Schedule 8, conditions 8551, 8555, 8560 and 8562. It appears possible that condition 8613 could be interpreted to be captured by the new offence in proposed section 76DAA of the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (see item 1). However, the explanatory memorandum states that this new offence is intended to apply to condition 8622 and makes no mention of condition 8613, in which case questions remain as to the legal consequences of condition 8613.

99 Migration Regulations 1994, Schedule 8, conditions 8554, 8562 and 8563.

100 Migration Regulations 1994, Schedule 8, condition 8556.

101 Migration Regulations 1994, Schedule 8, condition 8303.

102 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 13, conditions 8617, 8618 and 8619 and Schedule 2, item 3, regulation 2.25AC.

statutory interpretation, it does not appear that the above conditions are captured by the new offence provisions. It is therefore unclear what the consequences of non-compliance with these conditions would be. The statement of compatibility explains that ordinarily if a bridging visa holder breaches a visa condition, their visa may be subject to cessation or cancellation and if this occurs, they would be liable for immigration detention as an unlawful non-citizen.[103] However, if a member of the NZYQ cohort breaches a visa condition and their bridging visa is cancelled, they are unable to be detained in immigration detention under section 189 of the Migration Act following the High Court decision.[104] The statement of compatibility states that the consequence of a visa cancellation without immigration detention for breach of a visa condition is not an effective deterrent against non-compliance and hence the necessity to establish criminal offences in relation to breaches of visa conditions.[105] However, if the above conditions are not subject to the criminal offence provisions and noting that immigration detention is not a possible consequence for non-compliance, it appears that the only consequence for breaching one or more of the above visa conditions is potential visa cancellation action.[106] The statement of compatibility states that bridging visa holders have work rights, are eligible for Medicare and potentially Special Benefit as well as Status Resolution Support Services, which assist with their transition from immigration detention to independent living in the community.[107]

1.51 If the mandatory conditions are subject to legal consequences for non-compliance, they would engage and may limit a number of human rights. In particular, by requiring the minister's approval to undertake specific kinds of employment; requiring the provision of certain financial information; and restricting the activities the visa holder can engage in (such as activities that are disruptive to the Australian community), and the persons and organisations with whom the visa holder can associate and communicate; the measure limits the rights to privacy, work and freedom of assembly, association and expression. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home, and includes a requirement that the state does not

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103 Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, p. 31. The committee has previously raised human rights concerns with this process. See *Report 7 of 2021* (16 June 2021) pp. 50–74 and *Report 9 of 2021* (4 August 2021) pp. 66–108 with respect to the Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444].

104 Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, p. 31.

105 Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, p. 31.

106 *Migration Act 1958*, subsections 116(1)(b) and 133C(3). Breach of a visa condition may provide a basis for cancellation of the visa under subsection 116(1)(b). This may include visa cancellation by the minister acting personally under subsection 133C(3), if the minister considered it was in the public interest to do so.

107 Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility, p. 30–31.

arbitrarily interfere with a person's private and home life.[108] The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[109] The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds.[110] The right to freedom of assembly protects the right of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.[111] The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[112]

1.52 In addition, if the consequence of non-compliance with a visa condition is cancellation of a visa, resulting in removal of a person's work rights and access to social security and Medicare, the measure would limit other human rights as well, including the rights to an adequate standard of living, social security and health.[113] This is because without any right to work and earn an income or access social security, an individual will likely lack the necessary resources to access housing, food and healthcare. Further, there is a risk that denying an individual of their most basic needs could amount to inhuman or degrading treatment. In a UK case concerning the state's failure to provide food and accommodation to certain asylum seeker applicants who were not permitted to work and therefore had no means of supporting themselves, the court found such treatment to be inhuman or degrading, stating that 'treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being'.[114] While the court observed that the threshold of what amounts to inhuman or degrading treatment is a 'high one' and will depend on the particular circumstances of each case, it stated that 'the threshold may be crossed if an [asylum seeker] applicant with no means and no alternative sources of support,

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108 UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]-[4]. The UN Human Rights Committee further explains that this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. *General Comment No. 16: Article 17* (1988).

109 International Covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

110 International Covenant on Civil and Political Rights, article 19(2).

111 International Covenant on Civil and Political Rights, article 21, UN Human Rights Committee, *General Comment No 25: Article 25 (Participation in public affairs and the right to vote)* [8].

112 International Covenant on Civil and Political Rights, article 22.

113 International Covenant on Economic, Social and Cultural Rights, articles 9, 11 and 12.

114 *Regina v Secretary of State for the Home Department ex parte Adam; Limbuela; Tesema* [2005] UKHL 66 [7].

unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life'.[115]

1.53 Further, even if in practice a person's visa would not be cancelled for breach of these conditions, the limit on human rights may be more indirect. For example, if visa holders are directed to comply with all mandatory conditions but are not informed as to the exact consequences of non-compliance for each specific condition (even where, for instance, some conditions may not be subject to criminal penalties for non-compliance), there may still be a chilling effect on human rights. The explanatory materials do not clarify this issue and it is therefore difficult to properly assess the compatibility with human rights of the above conditions that do not have clear consequences for non-compliance. It is noted that much of the analysis above with respect to the application of the limitation criteria (as to whether the measures are necessary, reasonable and proportionate) would be applicable with respect to this measure. For example, the stated objective of the measure and its likely proportionality would be identical to those identified above. In relation to whether the conditions meet the quality of law test, further concerns arise with respect to the conditions requiring a visa holder to not become involved in activities 'disruptive' to the Australian community and to notify Immigration if they begin to experience 'significant financial hardship' or 'any significant change' in 'financial hardship', namely whether these terms would be sufficiently certain such as to meet this test.

Committee view

1.54 The committee notes that imposing mandatory visa conditions that require visa holders to, among other things, obtain the minister's approval before taking up specific kinds of employment and not communicate or associate with certain organisations, engages and may limit multiple human rights, including the rights to privacy, work and freedom of assembly, association and expression. The committee notes that as a matter of statutory interpretation, it does not appear that breach of these visa conditions would be captured by the offence provisions, such that it is unclear what the legal consequences would be for non-compliance with the conditions. The committee notes that the explanatory materials do not clarify this issue and it is therefore difficult to properly assess whether these conditions are compatible with human rights.

1.55 The committee notes that it has previously considered several of these visa conditions when they were first introduced in 2021, including the conditions requiring visa holders to obtain the minister's approval before taking up specific kinds of employment and not become involved in disruptive activities. The committee previously concluded that there may be a significant risk that the conditions

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115 *Regina v Secretary of State for the Home Department ex parte Adam; Limbuela; Tesema* [2005] UKHL 66 [7], [9], [54].

impermissibly limit multiple human rights.[116] Given the committee's previous human rights concerns with respect to many of the conditions and noting the insufficient information is contained in the explanatory materials, the committee considers further information is required to assess the compatibility of this measure with multiple human rights, and as such seeks the minister's advice in relation to:

(a) what are the legal consequences of not complying with conditions outlined in paragraphs [1.481.481.49];

(b) are the conditions described in paragraph [1.481.48] sufficient to meet the quality of law test, in particular:

  (i) what activities would be considered 'disruptive' and would this condition limit a visa holder's right to freedom of assembly (for instance, by preventing the visa holder from engaging in peaceful protest);

  (ii) what constitutes 'significant financial hardship' and how is this assessed;

  (iii) what constitutes 'any significant change' in relation to a visa holder's 'debts, bankruptcy or financial hardship'; and

  (iv) is the visa holder provided with guidance as to the matters set out above (in subparagraphs (i)–(iii));

(c) whether visa cancellation action remains a possible consequence of non-compliance and if so, whether the measure is compatible with the rights to work, an adequate standard of living, social security and health as well as the prohibition against inhuman or degrading treatment (noting that visa cancellation would result in the removal of work rights and eligibility for social security and Medicare); and

(d) whether visa holders will be clearly notified of the specific consequences of breaching a mandatory visa condition (including specifying which conditions are subject to the offence provisions and which provisions do not carry a criminal penalty).

Powers of authorised officers

1.56 The second bill seeks to introduce two new powers relating to monitoring devices and the collection, use and disclosure of information by 'authorised officers'.[117] An 'authorised officer' is defined to be anyone (or a class of persons)

116 Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444], *Report 9 of 2021* (4 August 2021) pp. 66–108.

117 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, Schedule 1, item 4, proposed section 76F.

authorised in writing by the minister, the Secretary or the Australian Border Force Commissioner to act as such.[118]

1.57 In relation to a person who is subject to monitoring, an authorised officer may do all things necessary or convenient to be done to:

(a) install, fit or remove the person's monitoring device or related equipment;

(b) maintain, repair or otherwise keep the device in good working order;

(c) operate or use the person's monitoring device or related equipment; and

(d) determine or monitor the location of the person or an object relating to them through the operation of the monitoring device.

1.58 An authorised officer may also collect, use or disclose to 'any other person' information, including personal information, for the purpose of:

(a) determining whether a condition of a visa is being complied with;

(b) determining whether a person subject to monitoring has committed an offence against the Migration Act or regulations;

(c) protecting the community in relation to persons subject to monitoring;

(d) facilitating the location of a person subject to monitoring if there is a real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future, or a visa held by them ceases to be in effect; and

(e) facilitating the performance of functions and exercise of powers of authorised officers.

1.59 The second bill provides that an authorised officer may exercise any of the above powers despite any provision of any law of the Commonwealth, a State or a Territory (whether written or unwritten).[119] However, the authorised officer's exercise of power may be subject to any conditions, restrictions or other limitations as prescribed by future regulations.

Preliminary international human rights legal advice

Rights to privacy, life and security of person, and effective remedy

1.60 Enabling an authorised officer to do all things necessary or convenient to be done relating to a person's monitoring device limits the right to privacy, as a person required to wear the device would be required to make the device (which is attached

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118 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, Schedule 1, item 4, proposed subsection 76F(6).

119 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, Schedule 1, item 4, proposed subsection 76F(3).

to them) available to the authorised officer in order for them to maintain the device. Giving the authorised officer the power to determine or monitor the location of the person through the operation of the monitoring device also limits the right to privacy. As does providing an authorised officer with the power to collect, use or disclose personal information to any person for a wide variety of purposes. This would relate to the personal information of the person subject to monitoring and would also include any other person if that information was related to any of the broadly listed purposes. As referenced above, the right to a private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[120]

1.61 Further, proposed subsection 76F(2) provides that personal information may be shared with 'any other person' for the broad purpose of 'protecting the community in relation to persons who are subject to monitoring'. Noting that this is stated to operate despite any other law, this would appear to allow authorised officers to share information about the person with a wide variety of persons (including potentially on social media or to journalists), including their name and address, if they consider it would help protect the community. This raises concerns that the measure may limit the rights to life and security of person. The right to life requires States parties to take positive measures to protect life, including from non-State actors.[121] The right to security of person[122] requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation (including providing protection for people from domestic violence or vigilante 'justice').

1.62 Finally, as the second bill provides that the authorised officer's powers can be exercised despite any other law of the Commonwealth, a State or a Territory (whether written or unwritten), which would remove any ability to take action, for example, for defamation or negligence, this engages the right to an effective remedy. The right to an effective remedy requires the availability of a remedy which is effective with

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120 Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been processed contrary to legal provisions, every person should be able to request rectification or elimination. UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

121 International Covenant on Civil and Political Rights, article 6.

122 International Covenant on Civil and Political Rights, article 9(1).

respect to any violation of rights and freedoms recognised by the covenant.[123] It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state.

1.63 The rights to privacy, life and security of person may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. In relation to the right to an effective remedy, while limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the fundamental obligation to provide a remedy that is effective.[124]

1.64 In relation to whether this measure seeks to achieve a legitimate objective, the statement of compatibility does not directly address how empowering an authorised officer to act in relation to a monitoring device seeks to achieve a legitimate objective. It states, in relation to the powers to collect, use and disclose personal information, that the purpose of this is to protect the Australian community and to make clear that the collection, use and disclosure of personal information is authorised in order to monitor relevant persons 'even where State or Territory laws in respect of use of surveillance devices might otherwise apply'.[125] It also states that it is essential for the protection of the community not to have uncertainties around disclosure, giving the example of the need to disclose information to various police forces to take steps to protect children.[126]

1.65 As set out above (at paragraph [1.34]) while the objectives of protecting public safety is generally capable of constituting a legitimate objective, questions arise as to whether the measure addresses a pressing and substantial concern for the purposes of international human rights law. It remains unclear whether all members of the NZYQ cohort pose a particular risk to community safety, noting it applies to all members of that group without any assessment of their individual risk profile. Further,

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123 International Covenant on Civil and Political Rights, article 2(3). See, *Kazantzis v Cyprus,* UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia,* UN Human Rights Committee Communication No. 1036/01 (2005), States parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia* UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

124 See UN Human Rights Committee, *General Comment 29: States of Emergency (Article 4)* (2001) [14].

125 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, statement of compatibility, p. 24.

126 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, statement of compatibility, p. 24.

the breadth of the powers raises questions regarding their necessity. In particular, proposed subsection 76F(1) would enable an authorised officer to do all things to determine or monitor the location of the person subject to monitoring. This is not linked to determining whether a condition is being complied with, whether the person has committed an offence, to protect the public or to facilitate their location for the purposes of their removal. Instead, it would allow the authorised officer to check on a person's location at all times. It is unclear what purpose such an unfettered power seeks to achieve. As the objective sought to be achieved by this measure is unclear, it is not possible to determine whether the measure is rationally connected to (that is effective to achieve) that objective.

1.66 In relation to proportionality, a number of concerns arise as to the breadth of the proposed powers. In particular, in relation to the power relating to monitoring devices, an authorised officer is empowered to do 'all things necessary or convenient' for a number of listed purposes. It is not clear what is meant by 'convenient' in this context and why such a broad power is provided. If it is more 'convenient' for the authorised officer to require the person subject to the monitoring device to travel 100 kilometres in order for the officer to check the device, this would appear to be authorised by the legislation. It would also allow the authorised officer to require the person to be available 24 hours a day to allow the authorised officer to repair the device. It could also allow the officer to restrain a person in order to check their device (noting that the crime of assault and the tort of false imprisonment would be excluded from applying to the officer's actions).[127] While as a matter of practice authorised officers may act reasonably, there is no requirement that they do so as a matter of law. This is of particular concern as it is a criminal offence (subject to mandatory one year's imprisonment) as noted above, for a person to fail to comply with a condition requiring the authorised officer to fit, install, repair or remove the monitoring device or to take specified steps to keep it in good working order.[128] Enabling the authorised officer to act in any way they consider convenient to them, in circumstances where the affected person will commit a criminal offence if they do not comply, is likely to greatly interfere with the rights of the persons subject to these measures.

1.67 In relation to the ability for authorised officers to collect, use and disclose personal information, proposed subsection 76F(2) does not provide what the information must relate to, only the purposes by which it can be collected etc. This means that the information that may be collected, used and disclosed can relate to any person, and be disclosed to any person, without any limitation other than it be for one of the broadly listed purposes. This would allow personal information about persons who are not subject to visa conditions (such as family members) to be

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127 See Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, Schedule 1, item 4, proposed section 76F(3).

128 See Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 3, section76D.

collected and disclosed by authorised officers to anyone. It would also allow personal information to be potentially disclosed to a wide range of people, particularly noting that information could be disclosed for the purpose of 'protecting the community'. As stated above, this could allow information to be disclosed to a potentially wide range of people (for example, this could allow an authorised officer to disclose the whereabouts of a person subject to a monitoring device to all persons in a particular location if they consider that would assist in protecting the community). The explanatory memorandum states that disclosures using this power 'would generally be for the purposes of, or in connection with, an offence committed by the relevant person or for responding to an incident that poses a threat to safety or national security'.[129] However, the bill is not circumscribed in this way. The explanatory statement also gives examples of to whom the disclosure of such information may be made, referencing law enforcement or corrections authorities. It also states in all instances where information is shared 'between authorised entities in the Commonwealth, the States and the Territories' appropriate protocols and processes will be implemented to ensure the information is protected within the bounds of the purpose for which it is shared.[130] If in practice information was only disclosed to a narrow class of recipients and safeguards were in place to further protect the information, that may operate to safeguard the right to privacy to some extent. However, there is no legislative requirement to only disclose it to relevant Commonwealth, state and territory entities, nor is there a requirement to have such protocols in place. It is not clear why the bill does not circumscribe the type of persons to whom the information may be disclosed, such as to law enforcement and corrections authorities and relevant departmental staff if this is the intention behind this power or require that such protocols be made.

1.68 Of particular concern is that the authorised officer's powers may be exercised despite any law of the Commonwealth, a State or a Territory, whether it be written or unwritten. This would exclude the common law, including laws regarding negligence, defamation or criminal laws and any safeguards that may otherwise be applicable such as legislated privacy protections. The explanatory memorandum states that information collected by an authorised officer would be protected under the *Privacy Act 1998*.[131] However, this does not appear to be consistent with what the legislation itself provides. Under the second bill there appear to be no privacy protections in place – including no requirements as to what to do with the information collected, how to store it, how long to store it etc. Proposed subsection 76F(4) provides that an authorised officer's exercise of power is subject to any conditions, restrictions or other

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129 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, explanatory memorandum p. 14.

130 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, explanatory memorandum p. 14.

131 Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, explanatory memorandum p. 13.

limitation prescribed by the regulations for this purpose. This could operate as a safeguard if appropriate conditions are included in the regulations. However, the explanatory materials do not explain the intention behind this provision and what, if anything, is to be prescribed. The statement of compatibility refers only to the need to allow authorised officers to be able to monitor relevant individuals even where state or territory laws 'in respect of the use of surveillance devices' might otherwise apply. If this is the intention, it is not clear why the provision does not exclude the application of specified types of laws rather than excluding all laws of the Commonwealth, states or territories.

Committee view

1.69 The committee notes that empowering an authorised officer to do all things necessary or convenient to be done relating to a person's monitoring device; to determine or monitor the location of a person wearing a device; and to collect, use or disclose personal information to any person for a wide variety of purposes, would engage and limit the right to privacy. In addition, noting that personal information may be shared with 'any other person', including potentially the media or general public, for the broad purpose of 'protecting the community in relation to persons who are subject to monitoring', the committee notes there are concerns that the measure may limit the rights to life and security of person. Further, as the authorised officer's powers can be exercised despite any other law of the Commonwealth, a State or a Territory, the committee notes that this would remove any ability to take action with respect to a potential violation of rights, which engages the right to an effective remedy.

1.70 The committee notes that the information sought from the minister with respect to the measures set out above will be relevant to the committee's assessment of the human rights compatibility of this measure. In addition to the information sought above, the committee considers further information is required with respect to this specific measure to assess its compatibility with the rights to privacy, life, security of person and effective remedy, and as such seeks the minister's advice in relation to:

(a) why it is necessary to enable an authorised officer to do anything 'convenient' to be done for a number of listed purposes and not just that which is reasonably necessary;

(b) why there is no requirement on an authorised officer to act reasonably when imposing a requirement on a person subject to monitoring to allow the officer to exercise their powers;

(c) why an authorised officer can do all things to determine or monitor the location of the person subject to monitoring rather than specifying that this is limited to determining whether a condition is being complied with,

whether the person has committed an offence, to protect the public or to facilitate their location for the purposes of their removal;

(d) with respect to proposed subsection 76F(2), which would empower an authorised officer to collect, use or disclose to any other person information for certain purposes, why is it not appropriate to:

(i) circumscribe the scope of information that may be collected, used or disclosed and to whom the information must relate (noting that as currently drafted, the measure would allow personal information about persons who are not subject to visa conditions (such as family members) to be collected and disclosed by authorised officers to anyone);

(ii) limit to whom personal information may be disclosed to only those Commonwealth, state and territory entities that require the information, such as law enforcement and corrections authorities and relevant departmental staff; and

(iii) circumscribe the purposes for which information may be collected, used or disclosed, in particular, clarify the scope of 'protecting the community in relation to persons who are subject to monitoring'.

(e) why there is no legislative requirement to only share information between authorised entities in accordance with appropriate protocols and processes;

(f) what safeguards, if any, exist to ensure that any limitation on the right to privacy is proportionate, such as requirements as to what to do with the information collected, how to store it, how long to store it etc;

(g) what safeguards are in place to mitigate the risk of a person's rights to life and security of person being limited as a consequence of the potential sharing of information with the general public and the media;

(h) why it is necessary for the authorised officers' powers to be exercised despite any other law of the Commonwealth, a State or a Territory (whether written or unwritten); and

(i) what remedies are available for any potential violation of rights arising from the exercise of an authorised officers' powers.

National Redress Scheme for Institutional Child Sexual Abuse Amendment Bill 2023[132]

Purpose	The bill seeks to amend the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*. Schedule 1 Part 1 seeks to amend the review of determinations regarding applications for redress. Part 2 would remove the bar on survivors in prison from applying for redress and amend the special assessment process. Part 3 would add new circumstances in which protected information may be lawfully shared. Part 4 would amend provisions relating to the special rules for funder of last resort cases. Part 5 would make application and transitional amendments. Schedule 2 would amend provisions relating to the reassessment of determinations.
Portfolio	Social Services
Introduced	House of Representatives, 15 November 2023
Rights	Effective remedy; equality and non-discrimination

Limiting entitlement to seek redress

1.71 Part 2 of Schedule 1 seeks to amend the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act) to amend who is entitled to apply for redress for child sexual abuse under this scheme. The Act currently provides that a person in gaol (either following a sentence of imprisonment or on remand) cannot apply for redress.[133] Part 2 of the bill seeks to remove this bar, meaning that the fact a person is in gaol is not itself a bar to an application for redress.[134]

1.72 Part 2 of Schedule 1 of the bill also seeks to amend the existing process by which people convicted of serious criminal offences may be eligible to apply for redress. Section 63 of the Act currently provides that a person will not be entitled to redress if they have been sentenced to imprisonment for five years or longer for an offence

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132 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Amendment Bill 2023, *Report 13 of 2023*; [2023] AUPJCHR 33.

133 *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*, subsection 20(1)(d). 'In gaol' is defined by reference to subsection 23(5) of the *Social Security Act 1991* which provides that a person is in gaol if (a) the person is being lawfully detained (in prison or elsewhere) while under sentence for conviction of an offence and not on release on parole or licence; or (b) the person is undergoing a period of custody pending trial or sentencing for an offence.

134 Schedule 1, Part 2, item 6.

against a law of the Commonwealth, a state, a territory or a foreign country, unless the scheme operator (the departmental secretary) determines that they may. In making such a determination, the secretary must be satisfied that providing redress to the person under the scheme would not bring the scheme into disrepute, or adversely affect public confidence in, or support for, the scheme. As soon as practicable, after becoming aware of the person's sentence, the scheme operator is required to consider whether to make a determination and give a written notice to the relevant 'specified advisor' from the Commonwealth or participating state or territory, requesting that the specified advisor provide advice about whether a determination should be made.[135]

1.73 The bill[136] would amend section 63 to provide that a person is not entitled to redress under the scheme, unless the operator makes a determination under subsection 63(5) that the person is not prevented from being entitled to redress, if:

(j) the person is sentenced to imprisonment for five years or longer for unlawful killing, sexual offences, a terrorism offence, or certain related offences;[137] or

(k) the operator has determined that the person should undergo a special assessment process because they consider that there are 'exceptional circumstances' that make it likely that providing redress to the person under the scheme may bring the scheme into disrepute or adversely affect public confidence in, or support for, the scheme.

1.74 The operator can make a determination under subsection 63(5) that the person is not prevented from being entitled to redress if they are satisfied that providing redress to the person under the scheme would not bring the scheme into disrepute, or adversely affect public confidence in, or support for, the scheme.

1.75 This would mean that a narrower class of persons who have been sentenced for a serious criminal offence would be required to undergo a special assessment process to determine whether they are entitled to claim redress, and that persons who have been convicted of specified serious criminal offences will only be entitled to apply for redress if the operator exercises their discretion to determine that they may.

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135 'Specified advisor' is defined in section 64(3)(b) and includes the Attorney-General of a state or territory or the Commonwealth Attorney-General.

136 Schedule 1, item 9.

137 Specifically, unlawful killing, attempting to commit an unlawful killing, or conspiring to commit an unlawful killing; a sexual offence or an offence that includes the intention to commit a sexual offence; a terrorism offence within the meaning of the *Crimes Act 1914* or an offence against a law of a State, a Territory or a foreign country that the operator is satisfied is substantially similar to a terrorism offence within the meaning of the *Crimes Act 1914*. See, schedule 1, Part 2, item 9, subsection 63(2).

International human rights legal advice

Rights to an effective remedy and equality and non-discrimination

1.76 As Part 2 of Schedule 1 would reduce the circumstances in which people who are, or have been, incarcerated may be prevented from applying for redress under this scheme, it may promote the right of affected persons to an effective remedy in respect of institutional child sexual abuse. The redress scheme seeks to provide remedies in response to historical failures of the Commonwealth and other government and non-government organisations to uphold human rights obligations, including the right of every child to protection by society and the state, and the right of every child to protection from all forms of physical and mental violence, injury or abuse (including sexual exploitation and abuse).[138] The United Nations Committee on the Rights of the Child explains that for rights to have meaning, effective remedies must be available to redress violations, noting that children have a special and dependent status.[139] This right to an effective remedy also exists in relation to individuals who are now adults, but regarding conduct which took place when they were children.[140] It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse.

1.77 However, insofar as persons with certain criminal convictions may still be precluded from accessing redress for child sexual abuse, the restrictions on the entitlement of survivors with such criminal convictions engages and may limit the right to an effective remedy. It may also have a disproportionate impact on some people based on a protected characteristic (such as ethnicity, or other status such as criminal record), meaning that it may also engage and limit the right to equality and non-

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138 Article 24 of the International Covenant on Civil and Political Rights, articles 19 and 34 of the Convention on the Rights of the Child. See, statement of compatibility, p. 54.

139 See, United Nations Committee on the Rights of the Child, *General Comment No. 5 (2003): general measures of implementation of the Convention on the Rights of the Child,* [24]. The right to an effective remedy pursuant to article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) also requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the covenant. Relevantly, this includes the right to an effective remedy in relation to degrading treatment under article 7 of the ICCPR.

140 Article 5(1) of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3 CRC) provides that a communication can be submitted by any *individual*. This reflects that the understanding of the temporal nature of childhood has been adopted in OP3 CRC, which facilitates complaints submitted by adults in relation to claims of abuse of their rights as children; see Malcolm Langford and Sevda Clark, 'New Kid on the Block: A Complaints Procedure for the Convention on the Rights of the Child', *Nordic Journal of Human Rights*, vol. 28, no. 3-4, 2010, pp. 376, 393-4.

discrimination.[141] The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law. In this regard, when this scheme was introduced it noted that Aboriginal and Torres Strait Islander persons are sentenced to custody at a higher rate than non-Indigenous defendants, and so this part of the scheme may therefore impact on Aboriginal and Torres Strait Islander peoples disproportionately.[142]

1.78 Differential treatment will not constitute discrimination if it can be shown to be justifiable, that is, if it can be shown to be based on objective and reasonable grounds such that it is rationally connected to, and proportionate in pursuit of, a legitimate objective.

1.79 The statement of compatibility does not identify that the framework for limiting access to redress by persons who have been sentenced for a serious criminal offence itself limits the right to an effective remedy. With respect to the right to equality and non-discrimination, it briefly states that the bill promotes the right by expanding access to the scheme, including to survivors who have been convicted of most offences, while access to the scheme is limited as those who have committed the most serious crimes are still required to undergo a special assessment process. It states that incarceration has been identified as a potential impact associated with child sexual abuse, and that these amendments 'balance this understanding while not compromising the integrity of the scheme'.[143]

1.80 However, the committee has previously concluded that it is not clear that this aspect of the scheme would permissibly limit the right to equality and non-discrimination.[144] In particular, the committee has considered that it is not clear that

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141 The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The United Nations Human Rights Committee has not considered whether having a criminal record is a relevant personal attribute for the purposes of the prohibition on discrimination in Article 26 of the ICCPR. However, relevantly, the European Court of Human Rights has interpreted the prohibition on discrimination on the grounds of 'other status' to include an obligation not to discriminate on the basis of a criminal record. See, *Thlimmenos v Greece*, ECHR Application No. 34369/97 (6 April 2000).

142 National Redress for Institutional Child Sexual Abuse Scheme Bill 2018 and National Redress for Institutional Child Sexual Abuse Scheme (Consequential Amendments) Bill 2018, statement of compatibility, p. 118.

143 Statement of compatibility, p. 55.

144 Parliamentary Joint Committee on Human Rights, *Report 9 of 2018* (11 September 2018), National Redress for Institutional Child Sexual Abuse Scheme Bill 2018 and National Redress for Institutional Child Sexual Abuse Scheme (Consequential Amendments) Bill 2018, pp. 46-80.

the stated objective of limiting entitlements to persons with serious criminal convictions to align this scheme with 'community expectations' would be a legitimate objective for the purposes of international human rights law, or that limiting the entitlement to redress of persons with serious criminal convictions is rationally connected to the objectives of the redress scheme.[145] It has also expressed concerns regarding whether the measure is proportionate, and recommended that the special assessment process for persons with serious criminal convictions be monitored by government to ensure that it operates in a manner compatible with the right to equality and non-discrimination.[146] The committee has also stated that there is a risk that the measure may operate in a manner that may be incompatible with the right to an effective remedy, depending on how the discretion to make a determination otherwise was exercised in practice.[147]

1.81 While this bill seeks to limit the circumstances in which a special assessment would be required where a person has been sentenced to five years or more in prison for a serious criminal offence, the measure itself still fundamentally relies on the same processes as when it was introduced. Namely, that people convicted of serious criminal offences may still be prevented from accessing redress for child sexual abuse because of that conviction. As such, the human rights concerns which the committee raised in 2018, as set out above, remain relevant.

Committee view

1.82 The committee notes that reducing the circumstances in which people who are, or have been, incarcerated may be prevented from applying for redress under this scheme, may promote the right of survivors to an effective remedy in respect of institutional child sexual abuse.

1.83 However, the committee notes that because people with some serious criminal convictions may still be precluded from accessing redress for institutional child sexual abuse, the restrictions on the entitlement of survivors to claim redress itself engages and may impermissibly limit the right to an effective remedy. The committee also notes that this may also engage and limit the right to equality and non-discrimination, as it may have a disproportionate impact on people based on protected characteristics. The committee notes that it has previously raised human rights concerns in relation to this limit on access to redress when this legislation was introduced in 2018, in particular that the measure may impermissibly limit the right to equality and non-discrimination, and may operate in a manner that may be incompatible with the right to an effective remedy.

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145 Parliamentary Joint Committee on Human Rights, *Report 9 of 2018* (11 September 2018), pp. 60-61. See also, the committee's preliminary consideration of this legislation in *Report 5 of 2018* (19 June 2018) pp. 27-28.

146 Parliamentary Joint Committee on Human Rights, *Report 9 of 2018* (11 September 2018) p. 63.

147 Parliamentary Joint Committee on Human Rights, *Report 9 of 2018* (11 September 2018) p. 65.

1.84 The committee draws this human rights advice to the attention of the minister and the Parliament.

Chapter 2
Concluded matters

2.1 The committee considers a response to matters raised previously by the committee.

2.2 Correspondence relating to these matters is available on the committee's website.[1]

Legislative instruments

Migration Amendment (Resolution of Status Visa) Regulations 2023[2]

FRL No.	F2023L01393
Purpose	Schedule 1 amends the *Migration Regulations 1994* to expand the cohort of persons on temporary visas who may apply for a permanent Resolution of Status visa. Schedule 2 requires that a permanent visa must be refused where a person fails to provide identity information
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives on 19 October 2023 and in the Senate on 6 November 2023. Notice of motion to disallow must be given by 5 December 2023 in the Senate and by 14 February 2024 in the House)[3]
Rights	Equality and non-discrimination; protection of the family; liberty

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Resolution of Status Visa) Regulations 2023, *Report 13 of 2023*; [2023] AUPJCHR 125.

3 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

2.3 The committee requested a response from the minister in relation to the instrument in *Report 12 of 2023*.[4]

Refusal of permanent visas on identity grounds

2.4 This legislative instrument amends the circumstances in which people on certain temporary visas may apply for a permanent visa, and the circumstances in which such an application must be refused. Most people to whom this measure relates are people who sought to claim asylum in Australia after travelling by boat without a valid visa ('unauthorised maritime arrivals').[5]

2.5 In February 2023, the *Migration Regulations 1994* were amended to enable persons who arrived in Australia before 14 February 2023 and who applied for, or obtained, temporary protection in Australia through a Subclass 785 (Temporary Protection) visa (TPV) or a Subclass 790 (Safe Haven Enterprise) visa (SHEV) to transition to a permanent visa.[6] The explanatory statement accompanying that measure stated that there is a group of approximately 18,500 people who have been found to engage protection obligations (or to be members of the same family unit as someone who has) and who have been granted temporary protection visas, most of whom have been living in Australia temporarily for almost a decade and have no realistic prospects for permanency.[7]

2.6 The explanatory statement states that it was identified that further amendments were required to address gaps in the legislative scheme, which had inadvertently excluded certain persons from eligibility for a permanent Resolution of

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4 Parliamentary Joint Committee on Human Rights, *Report 12 of 2023* (15 November 2023), pp. 20-30.

5 Statement of compatibility, p. 11. Specifically, this measure would appear to relate to those unauthorised maritime arrivals who arrived in Australia by boat without a visa between 13 August 2012 and the end of December 2013, after which time such persons were subject to mandatory removal for offshore processing. The total number of people in the 'legacy caseload' is about 31,000 as at March 2023. See, Department of Home Affairs, *UMA Legacy Caseload Report on Processing Status and Outcomes March 2023* (released 20 April 2023).

6 Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023 [F2023L00099].

7 Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023 [F2023L00099], explanatory statement, p. 4.

Status (RoS) visa application.[8] Schedule 1 of this measure enables people in these categories to apply for a RoS visa.[9]

2.7 In addition, the measure adds a new ground on which a RoS visa application must be refused. In applying for this visa, an applicant must provide evidence of their identity (by producing documents from their home country or a place they were in before they came to Australia) or otherwise provide a reasonable excuse as to why they cannot.[10] Schedule 2 inserts new criteria for the issue of this visa where an invitation to give identity information has been issued, and the applicant either does not provide the requested information, or provides a bogus document or false or misleading information (and does not have a reasonable explanation for doing so and does not take reasonable steps to provide the information).[11] New section 851.229 provides that where there are 'substantial concerns' with previous identity findings, the applicant will only be eligible for the visa if: they would be eligible for a protection visa; there are compassionate or compelling circumstances for granting the RoS visa; or they are a family member of a person with a RoS visa. The statement of compatibility states that these amendments have the effect that if these criteria are not met, the application must be refused.[12]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to equality and non-discrimination; protection of the family; liberty

2.8 Schedule 2, by requiring that an application must be refused where an applicant does not satisfy an invitation to provide personal identification information, engages and may limit human rights.[13] The refusal of a RoS visa may have significant

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8 Specifically, the measure permits applications by: persons who held a TPV or SHEV on 14 February 2023, but who failed to apply for a RoS visa before their TPV or SHEV ceased, who were previously unable to apply for a RoS visa; initial TPV or SHEV applicants (who do not have their own claims for protection, but are a family member of a person who does) who were previously unable to have their TPV or SHEV application converted to a RoS visa application if the family member is found to engage protection obligations; persons who did not hold a TPV or SHEV on 14 February 2023, but who had held a TPV or SHEV before that day, who were previously unable to have their TPV or SHEV application converted to a RoS visa application; and persons who have previously made a valid application for a TPV or SHEV which was finalised, but who have never held a TPV or SHEV, and who were previously unable to have the current TPV or SHEV application converted to a RoS visa application.

9 Schedule 1, items 1-16.

10 Department of Home Affairs, *Identity requirements for protection visa applicants*.

11 Schedule 2, Section 851.228.

12 Statement of compatibility, p. 11.

13 Schedule 1, by enabling more people who arrived in Australia by boat without a valid visa (and have been in Australia for 10 years) to apply for a permanent visa engages and promotes several human rights, including the right to social security, an adequate standard of living, education, protection of the family, and freedom of movement.

consequences for an individual. As the statement of compatibility notes, persons who are refused the grant of a RoS visa will remain on their bridging visa, TPV or SHEV until it ceases 35 days after the RoS visa application is finally determined (which usually includes the completion of merits review processes).[14] Were this to occur, the person would be liable for removal from Australia as an unlawful non-citizen[15] and would be subject to mandatory immigration detention (with no maximum detention period) while awaiting removal. As such, the measure may engage and limit the right to liberty, which prohibits the arbitrary and unlawful deprivation of liberty, including with respect to immigration detention.[16]

2.9 If a person who is refused a RoS visa does not secure another visa and is required to leave Australia, this may limit the right to protection of the family for those with family members in Australia. This right requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.[17] An important element of protection of the family is to ensure family members are not involuntarily separated from one another. Further, if this measure were to disproportionately impact on people of a particular nationality in practice, it may engage the right to equality and non-discrimination.[18] The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[19] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[20] Indirect discrimination occurs

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14 Statement of compatibility, p. 8.

15 Note that section 197C of the *Migration Act 1958* provides that a non-citizen cannot be removed to the country in relation to which their protection claims have been accepted, unless the non-refoulement obligations no longer apply or the person requests in writing to be removed.

16 International Covenant on Civil and Political Rights, article 9.

17 International Covenant on Civil and Political Rights, articles 17 and 23; and the International Covenant on Economic, Social and Cultural Rights, article 10.

18 In this regard, it is noted that in April 2023, the Department of Home Affairs stated that the majority of the 'unauthorised maritime arrival legacy caseload' with visa processes finalised (that is, either refused or approved) were from Iran and Afghanistan, whereas those where visa applications were on hand were primarily Iranian and stateless. See, *UMA Legacy Caseload Report on Processing Status and Outcomes March 2023* (released 20 April 2023).

19 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

20 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

where 'a rule or measure that is neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.[21]

2.10 The rights to protection of the family and to liberty may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. With respect to the right to equality and non-discrimination, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[22]

2.11 Questions arose as to whether the stated objectives would be sufficient to constitute a legitimate objective for the purposes of international human rights law. A further important consideration is whether the limitation on these rights is proportionate to the objective being sought. In this respect, it is necessary to consider whether the limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and the possibility of oversight and the availability of review.

Committee's initial view

2.12 The committee considered further information was required to assess the compatibility of this measure with these rights, and as such sought the minister's advice in relation to the questions as set out below.

2.13 The full initial analysis is set out in *Report 12 of 2023.*

Minister's response[23]

2.14 The minister advised:

(a) whether requiring a greater degree of satisfaction in relation to identity in order to grant a person permanent residence (as opposed to temporary residence) is a legitimate objective addressing an issue

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21 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

22 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

23 The minister's response to the committee's inquiries was received on 24 November 2023. This is an extract of the response. The response is available in full on the committee's website.

of public or social concern that is pressing and substantial enough to warrant limiting these rights;

A number of visa subclasses make use of Public Interest Criterion (PIC) 4020 to establish a legislative requirement for the Minster (or delegate) to be satisfied as to the visa applicant's identity. However PIC 4020 does not apply to either the RoS visa, nor the TPV or SHEV from which this cohort has transitioned. The Government acknowledges that in some cases, it will not be possible to positively establish the identity of some applicants in the TPV/SHEV cohort due to their complex and vulnerable circumstances.

The amendments made by Schedule 2 to the RoS visa Regulations are instead aimed at facilitating the RoS visa applicant's cooperation in attempting to establish their identity, and not impose an actual requirement that identity be confirmed. In the context of the transition to permanent residence, the intention is to take action prior to the grant of permanent residence to resolve, as far as possible, any doubts that may exist in relation to an applicant's identity.

Under section 65 of the *Migration Act 1958* (the Act), the Minister (or delegate) is to refuse to grant a visa if the Minister (or delegate) is not satisfied that the criteria prescribed by the Act or the regulations have been satisfied. Clause 851.228 of the Regulations prescribes criteria concerning the collection of identity-related information for RoS visa applicants. Refusal is relevantly required where, when considering the RoS visa application, the Minister invites the applicant (under section 56 of the Act) to give information for the purposes of establishing or confirming the applicant's identity and the applicant does not give that information, or cause the information to be given, in accordance with the invitation and the applicant has not provided a reasonable explanation for refusing or failing to provide the information and has not taken reasonable steps to give the information - subclause 851.228(2) and paragraph 851.228(3)(a).

(b) what is the legislative source that establishes that the minister must refuse a visa application where identity requirements have not been met;

Under section 65 of the Act, the Minister (or delegate) is to refuse to grant a visa if the Minister (or delegate) is not satisfied that the criteria prescribed by the Act or the regulations have been satisfied. Clause 851.228 of the Regulations prescribes criteria concerning the collection of identity-related information for RoS visa applicants. Refusal is relevantly required where if, when considering the RoS visa application, the Minister invites the applicant, under section 56 of the Act, to give information for the purposes of establishing or confirming the applicant's identity and the applicant does not give that information, or cause the information to be given, in accordance with the invitation and the applicant has not provided a reasonable explanation for refusing or failing to provide the information and

has not taken reasonable steps to give the information - subclause 851.228(2) and paragraph 851.228(3)(a).

(c) why giving a decision-maker the discretion to refuse a visa on identity-related grounds, as opposed to requiring that they must refuse a visa, would be ineffective to achieve the objective of the measure;

The requirements set out in paragraphs 851.228(1) and (2) set a clear expectation with the applicant that their cooperation in attempting to establish their identity is a requirement. Given the importance of establishing the identity of permanent visa applicants, this is in line with community expectations. However, as noted above, given the complex and vulnerable circumstances of some applicants in the TPV/SHEV cohort, those who cannot provide the required further identity information that has been requested need to have a reasonable explanation for not providing the information and have taken reasonable steps to provide it, which gives discretion for decision-makers to consider the person's reasons for not providing the requested information.

(d) what is meant by 'substantial identity-related concerns';

'Substantial identity-related concerns' is not defined in the Act or the Regulations. Based on the policy guidance prepared by the Department substantial identity-related concerns, in relation to a relevant matter set out in subclause 851.228(2), is a suspicion or a finding that the applicant's identity as claimed and accepted in making the previous protection finding (paragraph 851.229(2)(a)), visa grant (paragraph 851.229(2)(b)) or record (paragraphs 851.229(2)(c) or (d)) was inaccurate and had information about their correct identity been known at that time, it could have affected the outcome of the protection finding, visa grant or record.

For example:

Example 1: A substantial identity-related concern might not exist in respect of Person A if the Minister has information about their identity which reveals that their name has been previously misspelt in Departmental records, including records relevant to any visa application, but there is no evidence that information considered as part of the RoS visa application would lead to doubts about their correct identity.

Example 2: A substantial identity-related concern might not exist in respect of Person B if the Minister has information about their identity which reveals that the applicant presented incorrect information to the Minister/Department in making the previous protection finding, however even if the current information about their identity had of been known it would not have had a material impact on the previous protection finding/grant/record.

Example 3: A substantial identity-related concern might exist in respect of Person C if the Minister has information about their identity that reveals

that their receiving country is Country A, and is not Country B as was claimed and accepted in making the previous protection finding.

Example 4: A substantial identity-related concern might exist in respect of Person D if the Minister has information about their identity that reveals that their identity is Mr X and not Mr Y as was claimed and accepted in making the previous protection finding/grant/record, and that being Mr Y formed a key component of the claims for protection or of an assessment of whether the person was a member of the same family unit (MSFU) of a protection visa applicant.

Example 5: A substantial identity-related concern might exist in respect of Person E if the Minister has information about the composition of the family unit that reveals that Person E may not have been a MSFU of a person granted a protection visa.

(e) what circumstances are likely to constitute 'compelling or compassionate grounds' and whether the fact that a person has resided in Australia continuously for 10 years would itself constitute a compelling reason for granting a permanent visa;

A compelling or compassionate reason is not defined in the Act or the Regulations and for assessing a RoS visa application is given its ordinary meaning. Based on the policy guidance prepared by the Department, it is possible that a person who has resided in Australia continuously for 10 years would have some community connections that could constitute a compelling or compassionate reason to grant the RoS visa.

The policy guidance provides as follows in relation to what can be a compelling or compassionate reason:

<u>Compelling reason</u>

A compelling reason may affect the interests of Australia such as its economy, or an Australian community.

Examples (non-exhaustive):

- The applicant is employed as a highly skilled worker (ANZSCO 1-2) and removal of the applicant from this occupation would adversely affect the operations of the business or its clients;
- The applicant is meaningfully employed (has a paid job) and makes an economic contribution to Australian society (earns a sufficient amount to contribute to Australia's taxation system);
- Essential worker in one of the following vocations:
  - Health, welfare, social and aged care.
  - Emergency services, safety, law enforcement, justice and correctional services.
  - Energy, resources and water, and waste management.

- Education and childcare.

- Ongoing engagement in an activity, paid or unpaid, that makes a significant/valuable contribution to Australia or its communities;

- Requires the support of Australian services due to mental health concerns, or illness/injury of applicant.

Compassionate reason

A compassionate reason may relate to the applicant's personal circumstances or the circumstances of another person.

Examples (non-exhaustive):

- The applicant is a member of the same family unit (MSFU) of an Australian citizen or permanent resident;

- Where an Australian citizen or permanent resident is dependent upon the applicant for financial and/or emotional support;

- Disability or serious illness of family member in Australia where the applicant has carer responsibilities;

- Substantial community ties, which may include school age children, member of community/religious groups, volunteer worker, or extended family reside in Australia.

Not a compelling or compassionate reason

The following circumstances are unlikely to satisfy regulation 851.229(3)(b):

- Past compelling or compassionate reason no longer applicable.

- Compelling or compassionate reason not enduring in nature at time of decision, that is, the reason will cease to exist in the immediate future.

- Compelling or compassionate reason that arose as a result of direct and deliberate action of the applicant (or another person) in order to create a circumstance for the sole purpose of satisfying 851.229(3)(b)

(f) what legal and social supports are available to people in this cohort in applying for these visas and seeking to obtain and translate identity documents from countries outside Australia;

RoS visa applicants receive free access to legal assistance providers and free access to document translations support. They also have access to Medicare, full work rights and asylum seeker-related non-government organisations for social support.

(g) what happens if a person is refused a RoS visa: can they apply for a new RoS visa and in what timeframe would they need to do this. Noting unauthorised maritime arrivals are prevented from making a further visa application unless the minister allows them to do so, is

this ministerial discretion, rather than a legislative requirement, an appropriate safeguard;

If a RoS visa is refused:

- under section 65 of the Act on the grounds of failure to satisfy PIC 4002 or 4003A, or
- under subsection 501(1) of the Act on the grounds of failure to satisfy PIC 4001 or the character test in subsection 501(6) of the Act,

the decision will be merits reviewable by the AAT General Division under Part 9 of the Act. An application for review must be made within the prescribed period, being 28 days after the applicant is taken to have received notification of the decision.

If a RoS visa is refused on non-character or security grounds, including on the basis of the criteria concerning the collection of identity-related information, the decision will be merits reviewable under Part 5 of the Act. An application for review must be made within the prescribed period, being 28 days after the applicant is taken to have received notification of the decision.

If the RoS visa refusal is affirmed at merits review the applicant, can seek judicial review of the merits review decision.

Alternatively, or if the person is unsuccessful at merits and/or judicial review, the person can apply for another RoS visa (unless an application bar applies and Ministerial Intervention is required for the person to apply for another RoS visa.). However, as noted in the Statement of Compatibility, the application bar lift for the RoS visa is currently open ended, and the online application form serves as notification of the bar lift.

(h) if refusal of a RoS visa leads to cancellation of the existing TPV or SHEV, will this be treated as a decision to refuse the RoS or a decision to cancel the TPV/SHEV, and what review rights apply;

As noted in the Statement of Compatibility, persons who are refused the grant of a RoS visa will remain on their bridging visa, TPV or SHEV until it ceases, by operation of law, 35 days after the RoS visa application is finally determined (a term which includes the completion of merits review processes, if merits review is sought). This is treated as a decision to refuse the RoS visa and this decision is merits reviewable (refer to the answer for question (g)).

Refusal of the RoS visa does not in and of itself enliven grounds for cancellation of the TPV or SHEV. In the event that a TPV or SHEV were cancelled for some reason, such as on character or national security grounds, prior to it ceasing as outlined above, both the RoS visa refusal would be merits reviewable (refer to the answer for question (g)) and the decision to cancel the TPV or SHEV would be merits reviewable (under Part 7 or Part 9 of the Act, depending on what cancellation power was used).

(i) noting that a person can still receive a RoS visa if it is demonstrated that they meet the criteria for a protection visa, will this require a reopening of the person's protection visa claims and what process will be followed to assess such claims, and how will this ensure procedural fairness; and

If an officer is assessing paragraph 851.229(3)(a) an assessment of protection obligations, and whether an applicant would satisfy the criteria for a protection visa paragraph under 851.229(3)(a), is not an assessment for an actual protection visa application. Rather, it is an assessment of whether the applicant *would have* satisfied the criteria for the visa had they made a valid application for one when they made the RoS visa application.

The term 'protection visa' covers subclass 785, 790 and 866 visas. Therefore the applicant need only satisfy the criteria for any one of those visas, noting that the criteria are replicated across section 36 of the Act and Schedule 2 to the Regulations. To satisfy paragraph 851.229(3)(a), the applicant must satisfy the criteria at section 36 of the Act and Schedule 2 of the relevant visa (785, 790 or 866) of the Regulations.

The term in paragraph 851.229(3)(a) "if the applicant had made a valid application" assumes the applicant had made a valid application for a protection visa, and therefore there is no requirement for the officer to consider Schedule 1 to the Regulations or give any consideration to whether the applicant could have made a valid application at that time.

The term in paragraph 851.229(3)(a) "at the same time as the applicant made the application for the Subclass 851 (Resolution of Status) visa" assumes the hypothetical protection visa application was made at the same time as the RoS visa application; therefore when considering the criteria in section 36 of the Act and Schedule 2 to the Regulations the officer will have regard to the version of the Act and the Regulations as they applied at that time.

The assessing officer will contact the applicant under section 56 of the Act to obtain further information and protection claims from the applicant and will apply the full procedural fairness requirements set out in the Act, which apply to the consideration of all visa applications.

The aim of these provisions is, for RoS visa applicants who are found to have a substantially different identity to what they previously were found to have, to have an opportunity to have protection obligations assessed in their 'new' identity and allow a RoS visa to be granted if protection obligations are found to be engaged. As noted in the Statement of Compatibility, if the applicant provides information that confirms a different identity, which could include that they are a national of a different country to what had previously been claimed, the effect of these provisions is that the applicant does not have to have their RoS visa application refused and go through a new protection visa process in order to assess the protection claims they may have in their 'new' identity. In some cases the assessment

of protection obligations as part of the RoS visa may involve looking at the person's previous protection claims, however ultimately the assessment is of their current protection claims.

(j) whether the measure will have a disproportionate impact on persons based on protected characteristics (such as nationality), and if so whether this would constitute lawful differential treatment.

The RoS Regulations are not designed to target or have a disproportionate effect on any cohort or any person on the basis of any characteristic about them. They are applied individually on a case by case basis and entirely focus on whether the Department has sufficient information to establish a person's identity or whether an invitation to give further information in relation to their identity will be made.

Concluding comments

International human rights legal advice

Legitimate objective

2.15 Further information was sought as to whether this measure seeks to achieve a legitimate objective and, in particular, whether requiring a greater degree of satisfaction in relation to identity in order to grant a person permanent residence (as opposed to temporary residence) seeks to address an issue of public or social concern that is pressing and substantial enough to warrant limiting these rights. The minister stated that these amendments are 'aimed at facilitating the RoS visa applicant's cooperation in attempting to establish their identity' and does not impose an actual requirement that identity be confirmed. In this regard, the minister stated that several visa subclasses make use of Public Interest Criterion (PIC) 4020 to establish a legislative requirement for the minster to be satisfied as to the visa applicant's identity. However, this information does not address the question of why 'facilitating' the applicant's cooperation in attempting to establish their identity is itself necessary, nor does it identify whether there is an issue of public or social concern that is pressing and substantial enough to warrant limiting human rights. A limit on a human right will not be permissible if it does not seek to achieve an objective which would be considered legitimate under international human rights law. In this regard, as noted in the preliminary legal advice, Australia has obligations under the 1951 Convention Relating to the Status of Refugees (Refugee Convention) to facilitate the provision of identity documents to 'ensure that all refugees, even those not lawfully residing in the territory, [are] spared the hardship of having no identity papers at all'.[24] People in Australia on a SHEV or TPVs who do not have, and cannot obtain, a passport recognised

[24] 1967 Convention on the Status of Refugees, article 27. See further, UN High Commissioner on Refugees, *Identity Documents for Refugees Executive Committee Meeting, EC/SCP/33* (20 July 1984). While this Convention does not fall within this committee's statutory remit, it is nevertheless a relevant consideration and forms part of Australia's international human rights law obligations.

by the Australian Government are provided with photographic identification to provide evidence of their 'commencement of identity' in Australia.[25] It does not appear that imposing a higher threshold for acceptable identification documents with respect to people who sought to claim asylum in Australia by boat ten years prior (and who may therefore be less likely to be in a position to secure identity documents now) in order to be eligible for a permanent visa would be consistent with the Refugee Convention. The statement of compatibility states that the primary objective of the measure is to ensure that any person granted a permanent visa has properly established their identity, in line with the expectations of the Australian community.[26] It also states that 'the Department of Home Affairs has identified instances of suspected identity fraud in this caseload'. However, as noted in the initial analysis it is not clear that establishing identity to standards that meet 'community expectations' meets a pressing and substantial need. The minister's response also did not provide any further detail regarding the prevalence of suspected identity fraud and the only further information provided as to the necessity of the measure is that it is aimed at securing the applicant's cooperation in establishing their identity – not why they need to establish their identity. On the basis of this information, it does not appear that this measure aims to achieve an objective that is pressing and substantial enough to warrant limiting rights, for the purposes of international human rights law.

Proportionality

2.16 Further information was also sought in order to establish whether the measure would constitute a proportionate limit on human rights. The minister advised that it is section 65 of the Migration Act that establishes the legislative requirement for the minister (or delegate) to refuse to grant a visa if they are not satisfied that the criteria prescribed by the Act or the regulations have been satisfied. As to why giving a decision-maker the discretion to refuse a visa on identity-related grounds (rather than requiring that they must) would be ineffective to achieve the objective of the measure, the minister stated that the requirements set a clear expectation that the applicant's cooperation in attempting to establish their identity is a requirement, while given the complex and vulnerable circumstances of some applicants in the TPV/SHEV cohort, those who cannot provide the required further identity information can fail to provide it if they can demonstrate they have a reasonable explanation for not providing it and have taken reasonable steps to provide it. The minister states this gives discretion for decision-makers to consider the person's reasons for not providing the requested information. That is, while a decision-maker must refuse a visa where the criteria has not been satisfied, that criteria itself contains discretion to determine that the criteria has been satisfied.

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25 Department of Home Affairs, Immicard.

2.17 As noted in the initial analysis, the capacity to provide an explanation for not providing documents may have safeguard value, depending on how this is applied in practice. The explanatory statement also noted that a 'reasonable explanation' for failing to provide identity information may include where the person could only obtain a particular document by requesting it directly from the authorities of the country in relation to which they have made protection claims and it would not be reasonable to expect them to contact those authorities.[27] This would appear to provide applicants with a degree of flexibility in seeking to comply. However, in this regard, it is noted that recent case law relating to similar legislative identity requirements would appear to suggest that the threshold for a reasonable excuse may be high in practice.[28]

2.18 Further, a decision-maker's discretion to determine that the criteria has been satisfied is only enlivened where a visa holder *responds* to an invitation to provide identity information and engages with the department in relation to this. If a person does not engage, such as where they have not received correspondence sent by the department inviting them to provide information, or personal circumstances mean they have not responded to the letter, the criteria will not be satisfied and section 65 of the Migration Act would require that the visa application must be refused. In this regard, it is noted that this measure may operate in relation to people who lodged a TPV/SHEV application with the department before 14 February 2023 and whose application is automatically converted to a RoS application, and who may therefore not have engaged with the department in some time.[29] As the minister notes, some of the people in this cohort have complex and vulnerable circumstances. Indeed, numerous studies identify that asylum seekers may have experienced significant trauma before they arrived in Australia and in seeking to claim asylum by boat,[30] which may have been compounded by virtue of the uncertainty of being on temporary visas

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27 Explanatory statement, p. 19.

28 For example, in *DXG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FedCFamC2G 175 (8 March 2023) the Federal Court considered section 91W of the *Migration Act 1958*, which establishes the identity requirements for the issue of a protection visa. The court noted that it allows the minister to request that an applicant provide documents falling into the broad category of documents that show the applicant's identity, nationality or citizenship, and permits them to require certain documents that an applicant claimed to have been in possession of in the past. It found that, by extension, finding that the applicant did not have a reasonable explanation for failing to produce the documents that were once in his possession meant that it could not be satisfied that he had a reasonable explanation for failing to comply with the request, even if he could have provided a reasonable explanation as to why there were some types of identity documents that he never held (at [85]).

29 Department of Home Affairs, *TPV/SHEV transition to permanent visas Factsheet*, p. 1.

30 See, for example, Miriam Posselt, Heather McIntyre, Mtho Ngcanga, Thomas Lines and Nicholas Procter, 'The mental health status of asylum seekers in middle- to high-income countries: a synthesis of current global evidence', *British Medical Bulletin*, vol. 134, no. 1, 2020, pp. 4-20.

for extended periods.[31] There may be a risk that persons affected by this measure do not have a stable mailing address, or regular access to an email or mobile phone, and so may face additional challenges receiving correspondence from the department.[32] It is not clear that it is the least rights restrictive approach to require that their visa be rejected in circumstances where they have not engaged with the department, with the onus being on them to provide a reasonable explanation as to why they are not able to provide the requisite information.

2.19 Further information was also sought in relation to the circumstances where an applicant has responded to an invitation to provide information to establish or confirm their identity, and the minister is satisfied that 'substantial-identity related concerns' exist in relation to a prior protection finding or the grant of a temporary protection visa.[33] As to the meaning of 'substantial identity-related concerns', the minister noted that this term is not defined by law, but that policy guidance has been prepared by the department in relation to it. The minister stated that 'substantial identity-related concerns' is a suspicion or a finding that the applicant's identity as claimed and accepted in making the previous finding was inaccurate and had information about their correct identity been known at that time, it could have affected the outcome. The minister provided five examples as to how this may operate in practice, indicating that such a concern may not exist if the person's name was misspelt in departmental records, but may exist if information indicated that the person is from a different country, they are a different person to whom they claimed to be or are not in fact part of the family unit of a protection visa applicant.

2.20 If substantial identity-related concerns did arise in relation to a person, the instrument provides they may still be granted a RoS visa. One such basis for granting a visa is where there is a 'compelling or compassionate reason' to do so. The minister advised that the term 'compelling or compassionate reason' is not defined and is given its ordinary meaning, and that policy guidance prepared by the department provides information in relation to what can be a compelling or compassionate reason. The minister advised that a compelling reason is one that may affect the interests of Australia and may include the person's employment as an essential worker, ongoing activities that make a significant contribution to Australia, or where a person requires

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31 See, for example, Mary Anne Kenny, Nicholas Procter and Carol Grech, 'Mental deterioration of refugees and asylum seekers with uncertain legal status in Australia: Perceptions and responses of legal representatives', *International Journal of Social Psychiatry*, vol. 69, no. 5, 2023, pp. 1277-1284; and Angela Nickerson et al, 'The association between visa insecurity and mental health, disability and social engagement in refugees living in Australia', *European Journal of Psychotraumatology*, vol. 10, no. 1, 2019.

32 In 2020, the Asylum Seeker Resource Centre submitted to the Victorian Parliament that people seeking asylum have specific risk factors for homelessness and may rely on community supports to buffer their risk of homelessness while experiencing very low or no income. See, Inquiry into Homelessness in Victoria, *Submission 339*.

33 Subsection 851.229(1)(b).

the support of Australian services due to mental health concerns, or illness or injury. The minister stated that a compassionate reason may relate to the applicant's personal circumstances or those of another person and may include membership in the same family unit of an Australian citizen or permanent resident, disability or serious illness of a family member where the applicant has carer responsibilities, or substantial community ties. The minister advised that some circumstances are unlikely to constitute compelling or compassionate reasons, such as where a past compelling or compassion reason is no longer applicable or will cease to exist in the immediate future, or where it arose as a result of a direct and deliberate action in order to create a circumstance for the sole purpose of satisfying this criterion. The minister stated that it is possible that a person who has resided in Australia continuously for 10 years 'would have some community connections that could constitute a compelling or compassionate reason to grant the RoS visa'. However, it does not appear that the fact a person has resided continuously in Australia for 10 years would constitute a compassionate reason for granting a visa in and of itself. As such, while this ground may operate as a safeguard for some of those who have engaged with the department, it has no safeguard value for those who have not so engaged and, depending on how it is applied in practice, may have limited safeguard value for those who have lived in Australia for over a decade but with no family ties or who have not made a 'significant contribution' to Australia.

2.21 Where substantial identity-related concerns arise in relation to a person, they may also be granted a RoS visa if it is demonstrated that they meet the criteria for a protection claim.[34] Clarification was sought as to whether this would require a reopening of the person's protection visa claims. The minister advised that an assessment of this criteria is not an assessment for an actual protection visa application, but rather an assessment of whether the applicant *would have* satisfied the criteria for the visa had they made a valid application for one when they made the RoS visa application. The minister advised that the assessing officer will contact the applicant under section 56 of the Migration Act to obtain further information and protection claims from the applicant and will apply the full procedural fairness requirements set out in the Act. The minister stated that the aim of these provisions is, for RoS visa applicants who are found to have a substantially different identity to that they were previously found to have, to have an opportunity to have protection obligations assessed in their 'new' identity and allow a RoS visa to be granted if protection obligations are found to be engaged. The minister stated that in some cases the assessment of protection obligations as part of the RoS visa may involve looking at the person's previous protection claims, however, ultimately the assessment is of their current protection claims. It is not clear whether the procedures involved in an assessment of a protection claim in this context are as comprehensive as that involved in a protection claim for the purposes of a protection visa, and as such it is not clear

[34] Subsection 851.229(3)(a).

whether this element of the measure may operate to the benefit or detriment of affected persons.

2.22 As to what legal and social supports are available to people in this cohort in seeking support to provide the requisite information, including to obtain and translate identity documents from countries outside Australia, the minister advised that applicants have free access to legal assistance providers and free access to document translations support. In this regard, it is noted that nine community and low-cost legal services have been funded to provide this assistance across Australia.[35] The availability of free legal advice specifically in relation to this measure would likely serve as an important safeguard. However, as noted in the initial analysis, it is likely that applicants may have a high degree of vulnerability, such as having limited ability to read and speak English, limited education and/or a lack of stable housing (and therefore, a stable address).[36] As such, their capacity to engage with these legal processes may depend on access to other social support and advocacy.

2.23 Further information was also sought as to what may occur after a RoS visa application has been refused. The minister advised that where a visa is refused, the applicant may apply for merits review of the decision in the Administrative Appeals Tribunal (AAT) within 28 days from the date on which they are taken to have been notified of the decision. If the refusal is affirmed at merits review the applicant can then seek judicial review of the merits review decision. The minister stated that alternatively, or if the person is unsuccessful at the merits and/or judicial review stage, the person can apply for another RoS visa (unless an application bar applies and ministerial intervention is required for the person to apply for another RoS visa). The minister noted that the application bar lift for the RoS visa is currently open ended, and the online application form serves as notification of the bar lift. However, it is noted that this lifting of the bar is purely a ministerial discretion, which could change at any time, in which case a person refused a RoS visa may have no ability to apply for another RoS visa to put forward their claim for protection. The minister further advised that persons who are refused a RoS visa will remain on their bridging visa, TPV or SHEV until it ceases 35 days after the RoS visa application is finally determined (including the completion of merits review processes). The minister stated that this is treated as a decision to refuse the RoS visa meaning that this decision is merits reviewable. The minister stated that refusal of the RoS visa does not in and of itself enliven grounds for cancellation of the TPV or SHEV. The availability of merits review and judicial review assists with the proportionality of the measure, although noting that strict timeframes do apply to lodge an application for such review and requires the applicant to have the capacity to engage with legal services.

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35 Department of Home Affairs, *TPV/SHEV transition to permanent visas Factsheet*, p. 3.

36 See further, Australian Human Rights Commission, *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'* (2019).

2.24 As to whether the measure will have a disproportionate impact on persons based on protected characteristics (such as nationality), and if so whether this would constitute lawful differential treatment, the minister stated that the RoS regulations 'are not designed to target or have a disproportionate effect on any cohort or any person on the basis of any characteristic about them'. The minister stated that the measures are applied individually on a case by case basis and relate only to whether the department has sufficient information to establish a person's identity or whether an invitation to give further information in relation to their identity will be made. However, as noted in the preliminary legal advice, indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.[37] In this regard, an individual person's lack of documentation confirming their identity may arise by virtue of their nationality, meaning that the measure may indirectly have more of an impact on people of a certain nationality, or who are stateless. It may also be more difficult for persons with disability to meet these requirements. Consequently, it would appear that there may be a risk that this measure may have a disproportionate impact on persons based on protected characteristics (such as nationality or disability). Noting that it is not clear that this measure seeks to achieve a legitimate objective, if this measure did have such a disproportionate impact, this would constitute impermissible differential treatment, and so be incompatible with the right to equality and non-discrimination.

Concluding observations

2.25 Based on the information provided, it does not appear that this measure seeks to achieve a legitimate objective – in particular, that facilitating an applicant's cooperation in attempting to establish their identity seeks to achieve an issue of public or social concern that is pressing and substantial enough to warrant limiting human rights.

2.26 As to how this visa application process may operate in practice, where people were to engage with the department and respond to questions, it would appear that there may be sufficient legal and social supports in place to ensure that their individual circumstances are considered. However, if people do not engage with the department (including where their vulnerabilities make it too difficult to engage or because they are not aware that they have received correspondence from the department) there is

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37 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

no flexibility to support that person to engage or to issue a visa. The person would be subject to mandatory cancellation of their visa, and if they did not receive a further visa they would be liable to mandatory immigration detention. As such, there is a risk that this measure is not compatible with the right to protection of the family (if it resulted in the separation of family members), the right to equality and non-discrimination (if it had a disproportionate impact on people of certain nationalities), and the right to liberty (if the refusal of the visa led to mandatory immigration detention).

Committee view

2.27 The committee thanks the minister for this response. The committee notes that by requiring that an application for a RoS visa must be refused where an applicant does not provide personal identification information, this measure may limit a number of human rights. While the committee acknowledges that the aim of the measure is to facilitate the RoS visa applicant's cooperation in attempting to establish their identity, and not necessarily impose a requirement that identity be confirmed, the committee is concerned that in practice this may operate to the significant detriment of certain applicants. Based on the information provided by the minister, it is not clear that this measure is directed towards an objective that would be regarded as legitimate under international human rights law.

2.28 The committee considers that, in practice, were people to engage with the department, there may be sufficient legal and social supports in place to ensure that their individual circumstances are considered. However, the committee considers that there are no safeguards or flexibility where people do not engage with the department. In this regard, the committee notes that this measure operates in relation to a cohort of persons that the minister has advised are vulnerable. The committee notes that the person would be subject to mandatory cancellation of their visa, and if they did not receive a further visa they would be liable to mandatory immigration detention.

2.29 Noting the vulnerability of this cohort, the committee considers that the extent to which this measure may impermissibly limit human rights in practice will depend largely on the supports, both social and legal, that are provided to persons in this cohort. Noting that the minister has not established that the measure seeks to achieve a legitimate objective for the purposes of international human rights law, the committee considers there is a risk that this measure is not compatible with the rights to protection of the family, equality and non-discrimination and liberty.

Suggested action

2.30 The committee considers the proportionality of this measure may be somewhat assisted were:

(a) the instrument amended to provide that the requirement that the applicant must give information does not apply if the decision maker is

satisfied that the applicant has a reasonable excuse for not providing identification documents, without requiring that the applicant have taken certain steps to establish this;[38]

(b) guidelines provided to decision-makers informing them of the vulnerability of this cohort and the need for them to significantly engage with the applicant to explain what is required of the applicant; and

(c) regular consultation undertaken with legal and community services supporting persons in relation to this measure to consider how it is working in practice, and if necessary, further provision is made to advocacy and support services to assist people affected by this measure.

2.31 The committee recommends that the minister table a report in Parliament at regular intervals during the period in which this measure is operating to advise how many applications are being processed and how many have been refused and on what basis.

2.32 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

2.33 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Mr Josh Burns MP

Chair

[38] See subparagraph 851.228(3)(a)(i) of the instrument which could be amended to remove 'and' and replace with 'or'.

Coalition Members Additional Comments[39]

1.2 Coalition Members of the Committee acknowledge that the Committee was unable to scrutinise the Crimes and Other Legislation Amendment (Omnibus No.2) Bill 2023 and Migration Amendment (Bridging Visa Conditions) Bill 2023 for compatibility with human rights prior to their passage.

1.3 Coalition Members consider this rushed legislative response was necessitated by the Government's failure to prepare for the decision of the High Court in NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs & Anor., despite clear warnings that the matter would be decided adversely to the Government from June 2023.

1.4 Notwithstanding this limitation, Coalition Members believe the safety and security of the Australian community is paramount, and that their human rights need to be protected and prioritised above the rights of the NZYQ cohort.

1.5 Coalition Members do not support the Government's rushed decision to release NZYQ cohort detainees without appropriate safeguards in place.

1.6 Coalition Members support further urgent legislation to provide for preventive detention of those who present an unacceptable risk of re-offending if released from custody. The Government should move to enact such a law as an immediate priority.

Henry Pike MP
Member for Bowman

Senator Matt O'Sullivan
Liberal Senator for Western Australia

Senator Gerard Rennick
Liberal National Senator for Queensland

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39 This section can be cited as Parliamentary Joint Committee on Human Rights, Additional Comment, *Report 13 of 2023;* [2023] AUPJCHR 126.