

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 2023⁷

Purpose	<p>This bill seeks to amend:</p> <ul style="list-style-type: none"> • the <i>Crimes Act 1914</i> 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 <i>Criminal Code Act 1995</i> 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 <i>Australian Crime Commission Act 2002</i> 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. <i>Passed both Houses on 17 November 2023</i>
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,

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.

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

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.

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 2023²⁰

<p>Purpose</p>	<p>The Migration Amendment (Bridging Visa Conditions) Bill 2023 (now Act) amends the <i>Migration Act 1958</i> and the <i>Migration Regulations 1994</i> 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</p> <p>The Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 seeks to amend the <i>Migration Act 1958</i> 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</p>
<p>Portfolio</p>	<p>Home Affairs</p>
<p>Introduced</p>	<p>Migration Amendment (Bridging Visa Conditions) Bill 2023: House of Representatives, 16 November 2023 <i>Finally passed both Houses, 16 November 2023</i></p> <p>Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023: House of Representatives, 28 November 2023</p>
<p>Rights</p>	<p>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</p>

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 Affairs* (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

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

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 Immigration³⁶ 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

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 address⁴⁶ 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

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

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, section 76C and Schedule 2, item 13, condition 8621.

⁵¹ Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, section 76D 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;

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

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.

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 Kumaraswamy '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

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

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

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

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.

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

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 restrictive. 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.

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 be 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; and¹⁰⁰
- 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

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

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,

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

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

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 person¹²² 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

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,

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

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, section 76D.

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

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 2023¹³²

Purpose	<p>The bill seeks to amend the <i>National Redress Scheme for Institutional Child Sexual Abuse Act 2018</i>.</p> <p>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.</p> <p>Schedule 2 would amend provisions relating to the reassessment of determinations.</p>
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

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 bill¹³⁶ 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.

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-

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

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.

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.