# Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 1 of 2024

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# Membership of the committee

**Members**

| | |
|---|---|
| Mr Josh Burns MP, Chair | Macnamara, Victoria, ALP |
| Mr Henry Pike MP, Deputy Chair | Bowman, Queensland, LNP |
| Senator Karen Grogan | South Australia, ALP |
| Senator Matt O'Sullivan | Western Australia, LP |
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# Committee information

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

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

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

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

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

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

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

# Report snapshot[1]

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

## Bills

| **Chapter 1: New and continuing matters** | |
|---|---|
| Bills previously deferred[2] | 2 |
| Bills commented on in report | 2 |
| **Chapter 2: Concluded** | |
| Bills committee has concluded its examination of following receipt of ministerial response | 2 |

### Administrative Review Tribunal Bill 2023

### Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023

| *Advice to Parliament* | **Litigation guardians**<br>*Rights of persons with disability*<br>This measure would empower the new Administrative Review Tribunal (Tribunal) to appoint a litigation guardian for those considered to lack capacity. In doing so, the measure engages the right to equal recognition before the law for people with disability and the right to equality and non-discrimination. The committee notes the clear position under international human rights law that substitute decision-making regimes are contrary to the right to equal recognition before the law and that States parties should move towards the abolition of such regimes and instead develop supported decision-making.<br>The committee considers the measure pursues the legitimate objective of enhancing access to justice for people with disability but notes that while the measure contains features of supported decision-making, it ultimately remains a model of substitute decision-making. As such, the committee considers that the measure |
|---|---|

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 1 of 2024*; [2024] AUPJCHR 2.

2 Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 and Administrative Review Tribunal Bill 2023, which were previously deferred in *Report 14 of 2023* (19 December 2023).

does not appear to be compatible with the right to equal recognition before the law. As this right is considered a 'threshold right' under international human rights law, the committee notes that as the measure appears to violate this right, it is likely that it would also impermissibly limit the associated right to equality and non-discrimination.

The committee considers the compatibility of this measure may be assisted were it amended to set out a model of supported rather than substitute decision-making and that the recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability be fully implemented. The committee recommends the statement of compatibility be updated and otherwise draws these human rights concerns to the attention of the Attorney-General and the Parliament.

**Restricting disclosure of information relevant to proceedings**

*Right to a fair hearing and prohibition against expulsion of aliens without due process*

There are several provisions in the bills that, while different in nature, have the similar effect of seeking to restrict the disclosure of information or evidence from the applicant and their representative. By withholding information that is relevant to the proceeding from the applicant and their representative, the measures engage and limit the right to a fair hearing and, with respect to migration decisions relating to the expulsion or deportation of non-citizens or foreign nationals who are lawfully in Australia, the prohibition against expulsion of aliens without due process.

While the committee considers that the measures pursue the legitimate objectives of seeking to protect national security and the public interest, it is concerned that the proposed limitations may not be proportionate in all circumstances. As such, the committee considers there to be a risk that the measures may impermissibly limit these rights.

The committee has made recommendations to assist with the proportionality of the measures, including conferring greater discretion on the Tribunal and incorporating a special advocate scheme (that complies with human rights), and otherwise draws these human rights concerns to the attention of the Attorney-General and the Parliament.

**Termination of employment of AAT members**

*Right to a fair hearing*

The Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 seeks to abolish the Administrative Appeals Tribunal (AAT) and only transition certain AAT members to the new Tribunal. For those members who are not automatically transitioned to the new Tribunal, their employment would effectively

be terminated before the end of the term for which they were originally appointed.

By terminating the employment of certain AAT members, the measure engages the right to a fair hearing, particularly the requirement for a competent, independent and impartial tribunal. The committee notes that the requirement of judicial independence demands freedom from political interference by the executive or legislature and is an absolute right that is not subject to any exception. The committee notes that all AAT members were provided with an opportunity to apply for appointment to the new Tribunal through a merit-based process and those who are not to be appointed to the new Tribunal will be adequately compensated. However, noting the position under international human rights law that members of the judiciary should only be dismissed on serious grounds of misconduct or incompetence, and in such cases, they should have access to judicial protection to contest their dismissal, the committee considers there to be a risk that the measure may not be compatible with the notion of an independent tribunal. The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

## Migration Amendment (Bridging Visa Conditions) Bill 2023

## Migration Amendment and Other Legislation (Bridging Visas, Serious Offenders and Other Measures) Bill 2023 and related instrument

*Advice to Parliament*

**Criminalisation of breach of mandatory bridging visa conditions**

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

This legislation made amendments to grant non-citizens for whom there is no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future (the NZYQ cohort) a bridging visa subject to specified mandatory visa conditions (such as reporting obligations, curfews and electronic monitoring). Non-compliance with certain conditions is a criminal offence carrying a mandatory minimum sentence of at least one year imprisonment and a maximum sentence of five years imprisonment.

By requiring the visa holder to provide certain personal information, be electronically monitored at all times, remain at a particular address, notify Immigration of personal details, not go within a certain distance of specified places, perform certain work or contact certain persons, the measure engages and limits the right to privacy, the right to work and the rights to freedom of expression, movement and association. By imposing a mandatory minimum sentence of imprisonment for non-compliance with a condition, the measure engages and limits the rights to liberty and a fair trial. Further, questions arise as to whether the cumulative impact of all these

conditions may be construed as an imposition of a criminal penalty for the purposes of international human rights law. The committee 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, and the intention is to complement and strengthen existing safeguards to appropriately manage these individuals to meet the objective of community safety.

The committee considers that as the legislation engages multiple and significant human rights. The committee considers that the measure seeks to achieve the legitimate objective of seeking to protect the Australian community, and considers the protection of the community to be an extremely important objective. The committee notes the minister's response did not provide sufficient information to alleviate all of the committee's human rights concerns. In particular, the committee considers there may be a 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. Further, noting the potential severity of the conditions on individual liberty (particularly curfews and electronic monitoring) and that breach of these conditions is subject to mandatory minimum imprisonment of one year (and up to five years), it has not been established that each of these conditions and offences would constitute a proportionate limit on rights.

**Additional mandatory visa conditions**

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

The bridging visas granted to the NZYQ cohort are subject to additional mandatory conditions that do not engage the offence provisions. The consequence for breaching one or more of the visa conditions is warnings, potential referral for a Community Safety Order and potential visa cancellation action. If the visa is cancelled this would result in the person being denied the right to work and access to social security and Medicare.

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

The committee considers that the imposition of these measures seeks to achieve the legitimate and important objective of protecting public safety. The minister advised that visa cancellation would only occur in 'exceptional circumstances', as to cancel visas of people in this cohort would lead to the denial of the ability of the person to

support themselves while living in the community. The committee considers that as the legislation does not restrict the cancellation of visas only in exceptional circumstances, there is a risk that the imposition of these conditions is not compatible with multiple rights.

**Powers of authorised officers**

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

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

These new powers engage and limit the right to privacy and potentially the rights to life and security of person, noting that personal information may be shared with 'any other person', including possibly the media or general public, for the broad purpose of 'protecting the community'. As the powers may be exercised despite any other law, the measure also engages the right to an effective remedy.

The committee considers that the protection of the Australian community is an important and legitimate objective and understands the need to make clear on the face of the legislation the powers of authorised officers to use electronic monitoring. However, the committee notes the breadth of the powers provided to officers to do all things 'necessary or convenient' and considers there are inadequate safeguards to properly protect the right to privacy. This is particularly so noting that the authorised officers' powers can be exercised despite any other law, written or unwritten. As such, the committee considers the measure is not compatible with the right to privacy and the right to an effective remedy. As the minister did not provide any information as to the engagement of the rights to life and security of the person the committee is unable to conclude that the powers are compatible with these rights. The committee notes the power for regulations to be made to restrict or limit an authorised officer's powers, and has suggested matters that could be included in such regulations to assist with the proportionality of this measure.

# Legislative instruments

## Chapter 1: New and continuing matters

| | |
|---|---|
| Legislative instruments registered on the Federal Register of Legislation between 8 December to 8 January 2024[3] | 158 |
| Legislative instruments commented on in report[4] | 1 |

## Chapter 2: Concluded

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

## Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2023

*Advice to Parliament*

**Freezing of individuals' assets**

*Rights to fair hearing and privacy*

This legislative instrument lists seven individuals for counter-terrorism financing sanctions under Part 4 of the Charter of the United Nations Act 1945 – the effect of which is to freeze existing money and assets of those listed and to make it an offence for a person to use or deal with a freezable asset (unless it is an authorised dealing) and to provide any future assets to listed persons. Of those persons listed, one person is stated to be in Australia, thus enlivening Australia's human rights obligations.

Sanctions regime generally may promote human rights by operating to apply pressure to regimes and individuals with a view to ending the repressing of human rights and countering terrorism. However, for those in Australia who may be subject to sanctions, requiring

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

4 The instrument commented on is the Migration Amendment (Bridging Visa Conditions) Regulations 2023 [F2023L01629] which was deferred in *Report 14 of 2023*. The committee makes no comment on the remaining legislative instruments on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the instrument and relevant information provided in the statement of compatibility (where applicable). The committee may have determined not to comment on an instrument notwithstanding that the statement of compatibility accompanying the instrument may be inadequate.

ministerial permission to access money for basic expenses limits a person's private life as well as the privacy of their family. The sanctions regime also limits the right to a fair hearing.

The committee acknowledges that sanctions regimes generally operate as mechanisms for applying pressure to regimes and individuals with a view to ending the repression of human rights internationally and suppressing terrorism. However, the committee regards it as important to recognise that the sanctions regimes operate independently of the criminal justice system, and can be used regardless of whether a designated or declared person has been charged with or convicted of a criminal offence. The committee notes that the minister, in making a listing, is not required to hear from the affected person at any time; or provide reasons for the listing; and there is no provision for merits review of any of the minister's decision (including any decision to grant, or not grant, a permit allowing access to funds). The committee has previously found that there is a risk that the sanctions regimes may be incompatible with the rights to a fair hearing and privacy (and other rights). As such, this instrument, by applying sanctions to a person within Australia’s jurisdiction, also risks being incompatible with these rights.

The committee considers given the significant human rights engaged by the sanctions regimes, a full review of their compatibility with human rights be undertaken with a view to including legislative safeguards, in line with international best practice. The committee draws these human rights concerns to the attention of the minister and the Parliament.

# Chapter 1
## New and ongoing matters

1.1 The committee comments on the following bills.

## Bills

## Administrative Review Tribunal Bill 2023[7]

## Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023

| | |
|---|---|
| **Purpose** | The Administrative Review Tribunal Bill 2023 seeks to establish the Administrative Review Tribunal, which would replace the Administrative Appeals Tribunal, and re-establish the Administrative Review Council<br>The Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 seeks to abolish the Administrative Appeals Tribunal; make consequential amendments to 138 Commonwealth Acts; and provide for transitional rules to facilitate the transition from the Administrative Appeals Tribunal to the Administrative Review Tribunal |
| **Portfolio** | Attorney-General |
| **Introduced** | House of Representatives, 7 December 2023 |
| **Rights** | Equality and non-discrimination; prohibition against expulsion of aliens without due process; fair hearing; rights of persons with disability |

### Litigation guardians

1.2 Clause 67 of the Administrative Review Tribunal Bill 2023 (the ART bill) provides that the Administrative Review Tribunal (the Tribunal) may appoint a person to be a litigation guardian for a party to a proceeding if:

- the Tribunal considers that the party does not understand the nature and possible consequences of the proceeding, or is not capable of adequately

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7 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Administrative Review Tribunal Bill 2023 and Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, *Report 1 of 2024*; [2024] AUPJCHR 3.

conducting, or giving adequate instruction for the conduct of, the proceeding; and

- the appointment is necessary, taking into account the availability and suitability of other measures that would allow the party to participate in the proceeding.[8]

1.3 In appointing a litigation guardian, the Tribunal must take into account the party's will and preferences, or likely will and preferences, in relation to whether a guardian should be appointed and who should be appointed.[9] If the party's will and preferences cannot be ascertained, the Tribunal must take into account the 'personal and social wellbeing of the party'.[10] If appointed, a litigation guardian would act on behalf of the party, meaning the party may only participate in the proceeding through the litigation guardian.[11] A litigation guardian must be at least 18 years old, have no conflict of interest, consent to the appointment and be able to perform the duty of a litigation guardian.[12] That is, the guardian must give effect to the party's will and preferences, or likely will and preferences, unless doing so would pose a serious risk to the party's personal and social wellbeing, in which case the guardian must act in a manner that promotes the personal and social wellbeing of the party.[13]

## International human rights legal advice

### *Rights of persons with disability*

1.4 By providing for the appointment of a litigation guardian for a party who is considered not to understand the proceeding or not be capable of adequately conducting, or providing instructions for, the proceeding, the measure engages the rights of persons with disabilities, particularly the right to equal recognition before the law, which is protected under article 12 of the Convention on the Rights of Persons with Disabilities. The statement of compatibility does not recognise that this measure engages the right of persons with disability to equal recognition before the law, and so provides no assessment of the compatibility of the ART bill with this right.[14]

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8 Administrative Review Tribunal Bill 2023, subclause 67(1).

9 Administrative Review Tribunal Bill 2023, paragraph 67(2)(a).

10 Administrative Review Tribunal Bill 2023, paragraph 67(2)(b).

11 Administrative Review Tribunal Bill 2023, subclause 67(5).

12 Administrative Review Tribunal Bill 2023, subclause 67(3).

13 Administrative Review Tribunal Bill 2023, subclauses 67(6)–(8).

14 Administrative Review Tribunal Bill 2023, statement of compatibility, pp. 14-15. The statement of compatibility states that the ART bill promotes the right of access to justice for people with disability by enabling review of decisions that particularly impact people with disability, such as NDIS decisions, and by empowering the Tribunal President to make practice directions in relation to accessibility. The statement of compatibility does not, however, acknowledge the engagement of the right to equal recognition before the law under article 12 of the Convention on the Rights of Persons with Disabilities.

1.5 The explanatory memorandum states that a litigation guardian would be appointed where a party lacks the capacity to understand, conduct or provide adequate instruction for, the proceeding, and this may be due to the person's age or disability.[15]

1.6 If a litigation guardian were to be appointed on the basis of a person's age, the rights of the child may also be engaged and limited. Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. In particular, children have a right to be heard, which requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. The views of the child must be given due weight in accordance with the age and maturity of the child, as set out in article 12 of the Convention on the Rights of the Child. The statement of compatibility does not address this issue. It simply states that the right of a child to express their opinion is promoted by providing for review of decisions affecting children.[16] However, as the provision allows the Tribunal to consider whether the child understands the nature and possible consequences of the proceeding, or is capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding, it appears likely that the views of the child will be taken into account and so this right is not considered in detail in this report.

1.7 In practice an adult party who would be considered to lack capacity would invariably be one with cognitive impairment and thus in effect, the measure would exclusively apply to people with disability.[17] The right to equal recognition before the law includes the right to enjoy legal capacity on an equal basis with others in all aspects of life; and in all measures that relate to the exercise of legal capacity, there should be appropriate and effective safeguards to prevent abuse.[18] There can be no derogation from article 12, which describes the content of the general right to equality before the law under the International Covenant on Civil and Political Rights.[19] This means 'there

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15 Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 70.

16 Statement of compatibility, p. 19.

17 The Committee on the Rights of Persons with Disabilities has stated that 'persons with cognitive or psychosocial disabilities have been, and still are, disproportionately affected by substitute decision-making regimes and denial of legal capacity. The Committee reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12. All practices that in purpose or effect violate article 12 must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others': *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [5].

18 Convention on the Rights of Persons with Disabilities, article 12.

19 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [1], [5].

are no permissible circumstances under international human rights law in which this right may be limited'.[20]

1.8 The appointment of a litigation guardian to 'stand in the place' of a party who is considered by the Tribunal to lack capacity and 'make all the decisions about the conduct of the proceedings'[21] would be a form of substitute decision-making and would therefore engage the right to equal recognition before the law.[22] The UN Committee on the Rights of Persons with Disabilities has made clear that practices that deny the right of people with disabilities to legal capacity in a discriminatory manner, such as substitute decision-making regimes, are contrary to article 12 and must be 'abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others'.[23]

1.9 Additionally, States parties are required to take appropriate measures to provide access to support for persons with disabilities in exercising their legal capacity, such as the provision of advocacy or assistance with communication. The UN Committee on the Rights of Persons with Disabilities has stated that substitute decision-making should be replaced by supported decision-making and has noted that '[s]upport in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making'.[24] It noted that 'where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations'.[25]

1.10 The ART bill provides that a litigation guardian would be appointed if the party is considered to lack the capacity to understand, conduct or provide instruction for, the proceeding, and the appointment is necessary taking into account the availability

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[20] Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [5].

[21] Administrative Review Tribunal Bill 2023, statement of compatibility, p. 15.

[22] The key features of substitute decision-making regimes are set out in Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [27].

[23] Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [7]. For a discussion of the academic debate regarding the interpretation and application of article 12, particularly in relation to substitute decision-making, see, eg, Bernadette McSherry and Lisa Waddington, 'Treat with care: the right to informed consent for medical treatment of persons with mental impairments in Australia', *Australian Journal of Human Rights*, vol. 23, issue no. 1, pp. 109–129.

[24] Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15]–[17], [21]. The features of a supported decision-making regime are detailed in paragraph [29].

[25] Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [21].

and suitability of other measures. While neither the legislation nor the explanatory materials provide guidance as to how the Tribunal should, in practice, assess whether a party is capable of understanding and conducting the proceeding, the general approach set out in clause 67 appears to be inconsistent with article 12 insofar as a party's legal capacity would be denied where their decision-making skills are considered to be impaired or deficient. The UN Committee on the Rights of Persons with Disabilities has described this as a 'functional approach' to assessing capacity. It has observed:

> The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.[26]

1.11 As to the availability of supports, the explanatory memorandum states that a litigation guardian should only be appointed where a party does not have any other options available to them for participating in the proceeding, including through the provision of other supports.[27] However, neither the legislation nor the explanatory materials provide any guidance as to what 'other measures' may be available and suitable to allow a party to effectively participate and at what point these measures would be said to be unavailable or unsuitable. It appears the onus would be on the party rather than the Tribunal to secure other support measures to enable their effective participation. It is noted that international human rights law obliges States parties to take appropriate measures to provide access to support for persons with disabilities in exercising their legal capacity. The UN Committee on the Rights of Persons with Disabilities has emphasised that to comply with this requirement:

> States parties must ensure that support is available at nominal or no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity.[28]

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26 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15].

27 Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 70.

28 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [29(e)].

1.12 Under the ART bill as currently drafted, even if the Tribunal provided a party with access to support measures initially, once a litigation guardian is appointed, the party would not be supported to participate in the proceeding as the role of the guardian would be to fully stand in the shoes of the party. The explanatory memorandum states that this ensures the party has 'one voice' in the proceeding.[29]

1.13 Further, as noted above, States parties must ensure measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse; respect the rights, will and preferences of the person; are free of conflict of interest and undue influence; are proportional and tailored to the person's circumstances; apply for the shortest time possible; and are subject to regular review.[30] Under the ART bill, a litigation guardian must not have a conflict of interest (and may be removed if one arises) and must give effect to the party's will and preferences, or likely will and preferences, and where this cannot be ascertained, the guardian must act in a manner that promotes the personal and social wellbeing of the party.[31] However, where giving effect to the party's will and preferences would pose a serious risk to their personal and social wellbeing, the litigation guardian must instead act in a manner that promotes the personal and social wellbeing of the party.[32] The explanatory memorandum states that the measure seeks to preserve the party's autonomy to the greatest extent possible while ensuring the litigation guardian is acting in the party's best interests.[33] While the measure contains some safeguards that would ensure respect for a party's will and preferences in certain circumstances and may mitigate the risk of conflict of interest or undue influence, the strength of these safeguards would be weakened where the party's will and preferences are overridden in order to promote their personal and social wellbeing. The concept of 'personal and social wellbeing' is not defined in the legislation and the explanatory materials provide no guidance as to how the concept should be interpreted. Further, while the party's will and preferences are to be taken into account when the Tribunal appoints a litigation guardian, ultimately a guardian may be appointed irrespective of whether the party consents to the appointment.[34]

1.14 The explanatory memorandum notes that this measure has been drafted with reference to the findings and recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission).[35] Among other things, the Royal Commission recommended that '[s]upported decision-making should be embedded in guardianship and administration

29 Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 71.

30 Convention on the Rights of Persons with Disabilities, article 12(4).

31 Administrative Review Tribunal Bill 2023, subclauses 67(6) and 67(8).

32 Administrative Review Tribunal Bill 2023, subclause 67(7).

33 Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 71.

34 Administrative Review Tribunal Bill 2023, subclause 67(2).

35 Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 72.

law and practice, and other systems over time, to ensure substitute decision-making only happens as a last resort and in the least restrictive manner'.[36] The Royal Commission recommended that a representative may only override a person's will and preferences where it is necessary to prevent serious harm and in these circumstances, 'the representative must act to promote and uphold the person's personal and social wellbeing with the least possible restriction on their dignity and autonomy'.[37] The Royal Commission noted that what is meant by 'personal and social wellbeing' will depend on each individual's circumstances.[38] While there remains some uncertainty as to how this concept would be interpreted in the context of this measure, it is noted that the threshold set out in subclause 67(7) for overriding an individual's will and preferences (applying if giving effect to them would pose a serious risk to the party's 'personal and social wellbeing', rather than where necessary to prevent serious harm) appears to be lower than the threshold recommended by the Royal Commission, although much will depend on how this concept is interpreted in practice.

1.15 While the measure contains some features of supported decision-making, such as requiring a guardian, for the most part, to give effect to the party's will and preferences, these appear to be insufficient to ensure the measure's compatibility with the right to equal recognition before the law. This is because a party would be denied legal capacity on the basis of impaired decision-making ability; they may be appointed a guardian without their consent; they would not be supported to participate in the proceeding once a litigation guardian is appointed; and they may have their will and preferences overridden in certain circumstances. The UN Committee on the Rights of Persons with Disabilities has noted that the 'development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12'.[39] As such, the substitute decision-making model set out in clause 67 does not appear to comply with

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36 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive Summary, Our vision for an inclusive Australia and Recommendations* (September 2023) p. 67 and pp. 216–221 (recommendations 6.4–612).

37 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive Summary, Our vision for an inclusive Australia and Recommendations* (September 2023) p. 221, recommendation 6.10.

38 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Enabling autonomy and access,* Volume 6 (September 2023) p. 190.

39 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [28].

all requirements in article 12 of the Convention on the Rights of Persons with Disabilities as set out above.[40]

### *Right to equality and non-discrimination*

1.16 As a litigation guardian would only be appointed to act on behalf of those who are considered to lack capacity, the measure would have a disproportionate impact on people with certain protected attributes, such as disability or age, and thus engage and limit the right to equality and non-discrimination.[41] The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[42] The Convention on the Rights of Persons with Disabilities further describes the content of these obligations, including the specific elements that States parties are required to take into account to ensure the right to equality before and under the law for people with disabilities, on an equal basis with others.[43] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[44] Indirect discrimination occurs where 'a rule or measure that is

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[40] It is noted that Australia has made an interpretive declaration in relation to article 12, which most relevantly states, 'Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards'. The Australian Government has stated that it does not propose to withdraw this declaration and it does not purport to exclude or modify the legal effects of the Convention, but clarify Australia's understanding: see Committee on the Rights of Persons with Disabilities, *Combined second and third periodic reports submitted by Australia under article 35 of the Convention, due in 2018*, CRPD/C/AUS/2-3 (2019) [15]. The Committee on the Rights of Persons with Disabilities has recommended that Australia urgently withdraw this declaration: see Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3 (2019) [5], [6], [63].

[41] International Covenant on Civil and Political Rights, articles 2 and 26; Convention on the Rights of Persons with Disabilities, article 5. The focus in this entry is discrimination on the basis of disability as the discrimination on the basis of age appears based on reasonable and objective criteria.

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

[43] See also UN Committee on Economic, Social and Cultural Rights, *General Comment No. 5: Persons with disabilities* (1994); Convention on the Rights of Persons with Disabilities, articles 5, 12 and 13.

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

neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.[45]

1.17 While article 12 of the Convention on the Rights of Persons with Disabilities is absolute, the rights to equality and non-discrimination may be subject to permissible limitations. Under international human rights law, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[46] However, as the right to equal recognition before the law is a 'threshold right', were the measure to violate article 12, it is likely that it would impermissibly limit the associated right to equality and non-discrimination. In this regard, the UN Committee on the Rights of Persons with Disabilities has stated:

> The right to legal capacity is a threshold right, that is, it is required for the enjoyment of almost all other rights in the Convention, including the right to equality and non-discrimination. Articles 5 and 12 are fundamentally connected, because equality before the law must include the enjoyment of legal capacity by all persons with disabilities on an equal basis with others. Discrimination through denial of legal capacity may be present in different ways, including status-based, functional and outcome-based systems. Denial of decision-making on the basis of disability through any of these systems is discriminatory.[47]

1.18 The statement of compatibility acknowledges that the right to equality and non-discrimination is engaged, however, it states that the measure promotes this right as it empowers the Tribunal to adapt its procedure and offer a range of supports to

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

46 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2]. It is noted that while the Convention on the Rights of Persons with Disabilities contains no general limitation provision, the general limitation test under international human rights law is applicable, noting that many rights in the Convention on the Rights of Persons with Disabilities are drawn from the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

47 Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination* (2018) [47].

ensure that all persons seeking review can participate in the proceeding.[48] Were the measure to facilitate supported decision-making, it may promote this right. However, as outlined above, while the measure contains some safeguards to ensure respect for the party's will and preferences, it remains at its core a model of substitute decision-making.

1.19 The stated objective of the measure is to enhance access to the Tribunal so that parties can meaningfully participate in Tribunal proceedings.[49] The explanatory memorandum states that the measure rectifies a current gap in the *Administrative Appeals Tribunal Act 1975* (AAT Act), which does not provide for the appointment of a litigation guardian, and has been drafted with reference to the recommendations of the Royal Commission.[50] In general terms, the objective of enhancing access to justice for people with disability would be legitimate for the purposes of international human rights law and, depending on how the measure was implemented in practice, it may be rationally connected to this objective.

1.20 In assessing proportionality, as outlined above (in paragraph [1.13]), the measure contains some safeguards that may ensure respect for the party's will and preferences in certain circumstances and mitigate the risk of undue influence or conflict of interest. Yet while the measure contains elements of supported decision-making, it ultimately remains a model of substitute decision-making as set out above. Further, it is not clear that the measure pursues the least rights restrictive approach. For example, it is unclear why a representative is not only appointed as a measure of last resort and why the role of the representative is not to support and maximise the participation of the party in the proceeding. Such approaches reflect the supported decision-making principles recommended by the Royal Commission.[51] As such, it has not been established that the proposed limitation on the right to equality and non-discrimination would be proportionate such that it would constitute lawful discrimination.

## Committee view

1.21 The committee notes that by providing for the appointment of a litigation guardian for those considered to lack capacity, the measure engages the right to equal recognition before the law for people with disability and the right to equality and non-discrimination. The committee notes the clear position under international human rights law that substitute decision-making regimes are contrary to the right to equal

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48 Administrative Review Tribunal Bill 2023, statement of compatibility, p. 15.

49 Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 72.

50 Administrative Review Tribunal Bill 2023, explanatory memorandum, p. 72.

51 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive Summary, Our vision for an inclusive Australia and Recommendations* (September 2023) pp. 216–221 (recommendations 6.4–612).

recognition before the law and that States parties should move towards the abolition of such regimes and instead develop supported decision-making.

1.22 The committee notes the intended purpose of the measure is to enhance access to justice for people with disability and considers this to be an important objective. While the measure contains features of supported decision-making, such as requiring the litigation guardian to give effect to the party's will and preferences (unless to do so would pose a serious risk to the party's personal and social wellbeing), the committee notes that the measure ultimately remains a model of substitute decision-making as legal capacity would be denied on the basis of impaired decision-making ability; a guardian may be appointed without the party's consent; the party would not be supported to participate in the proceeding once a litigation guardian is appointed; and the party's will and preferences may be overridden in certain circumstances. As such, the committee considers that the measure does not appear to be compatible with the right to equal recognition before the law. As this right is considered a 'threshold right' under international human rights law, the committee notes that as the measure appears to violate this right, it is likely that it would also impermissibly limit the associated right to equality and non-discrimination.

1.23 The committee notes that the measure was drafted with reference to the Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and indeed the measure has incorporated some key concepts canvassed in the report, such as the concept of 'personal and social wellbeing'. However, many of the findings and recommendations of the Royal Commission are not reflected in the measure. The committee considers that were these recommendations to be more fulsomely implemented, the compatibility of the measure may be significantly assisted.

**Suggested action**

1.24 The committee considers the compatibility of this measure may be assisted were clause 67 of the bill amended to set out a model of supported, rather than substitute, decision-making; and the recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, particularly Recommendations 6.4–6.12, implemented.

1.25 The committee recommends that the statement of compatibility be updated to include an assessment of the compatibility of the measure with the right to equal recognition before the law for people with disability.

1.26 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

## Restricting disclosure of information relevant to proceedings

1.27 There are several provisions in both the ART bill and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Consequential bill) that effectively seek to restrict the disclosure of information or evidence from the applicant and their representative.[52] These measures are described below in turn and analysed collectively, as while different in nature, they have a similar effect in withholding information from the applicant and thus raise similar human rights concerns.

1.28 Firstly, clause 70 of the ART bill seeks to empower the Tribunal to prohibit or restrict the publication or other disclosure of information or evidence given to the Tribunal to some or all of the parties.[53] In considering whether to make such an order, the Tribunal must have regard to specified matters, including the principles that it is desirable that hearings be held in public, evidence be made available to the public, and all documents and information be given to all parties; the circumstances of the parties; the harm likely to occur if the order is not made; the confidential nature of the information; and any other matters the Tribunal considers relevant.[54] In addition, clause 157 provides that if an order is being considered in relation to a proceeding in the Intelligence and Security jurisdictional area, the Tribunal must have regard to the necessity of avoiding the disclosure of national security information and, in relation to a review proceeding, give particular weight to any submission made by or on behalf of the agency head.[55]

1.29 Further, the disclosure of information to the applicant and their representative may be restricted where a non-disclosure certificate applies.[56] In relation to general proceedings before the Tribunal, the Attorney-General may issue a public interest certificate in relation to specified information if disclosure of such information:

- would be contrary to the public interest for reasons that it would prejudice security, defence or international relations;
- would involve disclosure of Cabinet decisions or deliberations; or
- could form the basis of a claim in a judicial proceeding.[57]

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[52] See Administrative Review Tribunal Bill 2023, clauses 70, 71, 91, 143, 144, 156–162; Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, items 43, 160 and 161.

[53] Administrative Review Tribunal Bill 2023, subclause 70(2).

[54] Administrative Review Tribunal Bill 2023, subclause 71(2).

[55] Administrative Review Tribunal Bill 2023, clause 157. This provisions applies in addition to clauses 70 and 71.

[56] Administrative Review Tribunal Bill 2023, clauses 91, 158, 159, 161 and 162.

[57] Administrative Review Tribunal Bill 2023, clauses 91 (regarding information in a proceeding) and 272 (regarding information in a statement of reasons for a decision).

1.30 The effect of a public interest certificate is that the information can only be disclosed to the Tribunal (and not the parties, including the applicant). In limited circumstances the Tribunal may decide to make the information available to any or all of the parties. In exercising this discretion, the Tribunal must take into account the desirability of parties being aware of all matters and the reason specified in the certificate for not disclosing the information.[58] Similar certificates may be issued by the responsible minister or Director-General of Security with respect to information relating to proceedings in the Intelligence and Security jurisdictional area, including a security certificate (in relation to evidence adduced in a proceeding for review of an intelligence and security decision), sensitive information certificate (in relation to a security clearance decision or security clearance suitability assessment) or a public interest certificate (in relation to a proceeding for review of an intelligence and security decision).[59]

1.31 Additionally, there are a number of other provisions in the ART bill and the Consequential bill that would prohibit or restrict the disclosure of information to parties in relation to proceedings in the Intelligence and Security jurisdictional area. For example, the Tribunal must do all things necessary to ensure that information given to the Tribunal that was used to make a security clearance decision or a security clearance suitability assessment is not disclosed to the applicant or any other person other than the Director-General of Security or their representative or specified Tribunal staff members.[60] Further, the applicant and their representative must not be present when the Tribunal is hearing submissions made, or evidence adduced, in relation to security clearance standards relating to review of a security clearance decision or a security clearance suitability assessment (unless the applicant already has that information or the Director-General of Security consents to the applicant being present).[61] The Tribunal also has a general duty to ensure, so far as possible, that security and law enforcement information is not communicated or made available to a person if it would prejudice the security, defence or international relations of the Commonwealth or law enforcement interests.[62]

1.32 The Tribunal may also direct that the whole or a particular part of its findings, so far as they relate to a matter that has not been disclosed to the applicant, not be

58 Administrative Review Tribunal Bill 2023, subclauses 91(3)–(7).

59 Administrative Review Tribunal Bill 2023, clauses 158 (security certificates), 159 (sensitive information certificates), and 161 (public interest certificates, noting this clause would apply instead of clause 91). Other non-disclosure certificates issued under other Acts, including the *Australian Crime Commission Act 2002* and the *Australian Security Intelligence Organisation Act 1979*, may also apply. See Administrative Review Tribunal Bill 2023, clause 162.

60 Administrative Review Tribunal Bill 2023, clauses 143 and 144.

61 Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 4, item 43.

62 Administrative Review Tribunal Bill 2023, clause 156.

given to the applicant.[63] If the decision is appealed or referred to the Federal Court, the court must do all things necessary to ensure that any information subject to a non-disclosure certificate or other sensitive information is not disclosed to any person other than a member of the court or the Director-General of Security (with respect to security clearance documents).[64] Limited exceptions would apply.[65]

1.33 Further, the Consequential bill seeks to amend provisions relating to the disclosure of information with respect to decisions made under the *Migration Act 1958* (the Migration Act).[66] Currently under the Migration Act the Tribunal must give the applicant, in a way that is appropriate in the circumstances, clear particulars of any information that the Tribunal will rely on in affirming the decision under review and must invite the applicant to comment on or respond to that information.[67] However, the Tribunal does not have to disclose certain types of information to the applicant, including where the information relates to another person (not the applicant), where the applicant gave the information to the Tribunal or where the information is non-disclosable.[68] The Consequential bill would expand this provision to provide that the Tribunal does not have to disclose information to the applicant that was included in the written statement of the decision that is under review or information that is to be prescribed by regulations.[69] The Consequential bill seeks to also include a new subsection that clarifies that the Tribunal is not required to give particulars in relation to any of the information that is not required to be disclosed to the applicant before making a decision.[70]

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63 Administrative Review Tribunal Bill 2023, subclauses 167(5) and (8).

64 Administrative Review Tribunal Bill 2023, clauses 189 and 190.

65 Administrative Review Tribunal Bill 2023, subclauses 189(3) and 190(3).

66 Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 2, items 160 and 161. See also items 32, 45 and 270 which would disapply certain clauses in the ART bill, having the effect of restricting access to certain information or documents, including a statement of reasons for the decision. Item 32 relates to a decision to cancel a visa and item 45 relates to a decision to not revoke a visa cancellation decision. These items would disapply clauses 267 and 268 of the ART bill, which relate to the rules that must be regarded when giving notice of the decision and would allow a person to request a statement of reasons for the decision. Item 270 relates to review of a decision to not revoke a decision to cancel a visa. It would disapply clause 23 of the ART bill, which would require the decision-maker to give the Tribunal a statement of reasons for the decision and documents relevant to the review.

67 *Migration Act 1958*, subsection 359A(1).

68 *Migration Act 1958*, subsection 359A(4).

69 Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 2, item 160.

70 Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 2, item 161.

## International human rights legal advice

### *Right to fair hearing*

1.34 By restricting the disclosure of information relevant to proceedings to the applicant and their representative, the measures engage and limit the right to a fair hearing. Article 14(1) of the International Covenant on Civil and Political Rights requires that in the determination of a person's rights and obligations in a 'suit at law', everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[71] The concept of 'suit at law' encompasses judicial procedures aimed at determining rights and obligations and equivalent notions in the area of administrative law, and also extends to other procedures assessed on a case-by-case basis in light of the nature of the right in question.[72] Proceedings involving the determination of social security benefits or the pension rights of soldiers, for example, have been recognised as creating a 'suit at law' for the purposes of article 14.

1.35 In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal, and have a reasonable opportunity to present their case.[73] This means the same procedural rights must be guaranteed to all parties and, in the context of civil proceedings, requires that 'each side be given the opportunity to contest all the arguments and evidence adduced by the other party'.[74] The United Kingdom (UK) courts and the European Court of Human Rights have held that the right to a fair hearing is violated where a person is not provided with sufficient information about the allegations against them to enable them to give effective instructions in relation to those allegations, and have an opportunity to challenge the allegations, even in circumstances where full disclosure of information is not possible for reasons of

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[71] International Covenant on Civil and Political Rights, article 14

[72] UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16]. At [17], the UN Human Rights Committee has indicated that the guarantees in article 14 do not generally apply to expulsion or deportation proceedings, although the procedural guarantees of article 13 are applicable to such proceedings.

[73] See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [18].

[74] UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [13].

national security.[75] There can be no fair hearing if a case against a person is based solely or to a decisive degree on closed materials or where open material consists only of general assertions.[76] As regards these bills, a person's right to a fair hearing may be limited by the measures insofar as they would restrict the disclosure of information relevant to the proceeding from the applicant and their representative, including information that formed the basis of the decision subject to review, evidence adduced by the other party as well as all or part of the Tribunal's findings. In doing so, the applicant would be unable to effectively provide instructions in relation to, and challenge, the information before the Tribunal and contest the evidence adduced by the other party.

***Prohibition against expulsion of aliens without due process***

1.36 As regards migration decisions relating to the expulsion or deportation of non-citizens or foreign nationals who are lawfully in Australia, such as visa cancellation decisions, the measures also appear to engage and limit the prohibition against expulsion of aliens without due process.[77] This right is protected by article 13 of the International Covenant on Civil and Political Rights, which provides that:

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75 See, *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28, especially at [59] where the court ruled that 'the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations'. See also, *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009), especially [218] where the Court stated that 'it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5(4) required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him'.

76 *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28 [59]; *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009) [220].

77 To the extent that the effect of these bills would be to limit a person's ability to challenge a migration or citizenship decision, the consequence of that decision being the person's detention and deportation from Australia or prevention of return to Australia for citizens overseas, the measure may also engage and limit a number of other rights. In particular, the right to liberty (as immigration detention may be a consequence of a decision); right to protection of the family (as family members may be separated); right to non-refoulement (if the consequence of a decision is deportation and removal from Australia); freedom of movement (if cancellation of a visa or cessation of citizenship prevents a person from re-entering and remaining in Australia as their own country); and rights of the child (if the decision relates to a child's nationality). The rights implications of citizenship cessation are discussed in Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 2–31; and *Report 6 of 2019* (5 December 2019), pp. 2–19.

> An alien lawfully in the territory of a State Party…may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

1.37 Article 13 incorporates notions of due process also reflected in article 14 of the International Covenant on Civil and Political Rights and should be interpreted in light of that right.[78] In particular, the United Nations (UN) Human Rights Committee has stated that article 13 encompasses ‘the guarantee of equality of all persons before the courts and tribunals as enshrined in [article 14(1)] and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable’.[79] The UN Committee has further stated that article 13 requires that 'an alien…be given full facilities for pursuing [their] remedy against expulsion so that this right will in all circumstances of [their] case be an effective one'.[80]

1.38 The measures limit the due process requirements in article 13 to the extent that they may restrict a person’s access to information that informed the decision leading to their expulsion or deportation, as well as their ability to make submissions on the use of that information or the weight to be attributed to the information by the Tribunal. Such restrictions would appear to prevent the person from effectively contesting or correcting potentially erroneous information, thereby hindering their ability to effectively challenge the decision and pursue a remedy against expulsion.[81]

78 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [17], [63].

79 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [17], [63].

80 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. The Committee has also stated that ‘Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out “in pursuance of a decision reached in accordance with law”, its purpose is clearly to prevent arbitrary expulsions’.

81 See Committee on the Elimination of Racial Discrimination, *General Comment No. 30: discrimination against non-citizens* (2004) at [25], where the Committee on the Elimination of Racial Discrimination stressed the importance of the right to challenge expulsion and access an effective remedy, noting that States should ensure that ‘non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies’.

1.39 The due process guarantees in article 13 may be departed from, but only when 'compelling reasons of national security' so require.[82] It is unclear whether this exception would apply to the measures. The reasons in the Consequential bill for not disclosing the information to the applicant include where the information: relates to a person other than the applicant; was provided to the Tribunal by the applicant; is 'non-disclosable information'; is included in the written statement of the decision under review; or is prescribed by regulations. 'Non-disclosable information' means information that would, if disclosed, be contrary to the national interest because it would prejudice the security, defence or international relations of Australia or involve the disclosure of Cabinet deliberations or decisions; would be contrary to the public interest; or would found an action by a person for breach of confidence.[83] It is not clear what type of information is to be prescribed by regulations or the basis for non-disclosure of that information to an applicant. While national security is one ground for non-disclosure of information, there are other grounds which are broader than national security reasons, such as Australia's relations with other countries or the public interest, which would not appear to fall within the exception in article 13. Furthermore, the UN Human Rights Committee appears to have interpreted the exception of 'compelling reasons of national security' to be a reasonably high threshold which States parties must meet before departing from their due process

82 International Covenant on Civil and Political Rights, article 13; UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. Note that if there are compelling reasons of national security not to allow an alien to submit reasons against their expulsion, the right will not be limited. Where there are no such grounds, the right will be limited, and then it will be necessary to engage in an assessment of the limitation using the usual criteria (of necessity and proportionality).

83 *Migration Act 1958*, section 5.

obligations.[84] As such, it appears that article 13 is engaged and limited by the measures.

### *Assessment of limitations on rights*

1.40 The right to a fair hearing and the prohibition against expulsion of aliens without due process 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.

1.41 The general objectives underpinning the measures are to promote national security and the public interest, which are capable of constituting legitimate objectives for the purposes of international human rights law.[85] Insofar as the measures seek to restrict the disclosure of sensitive information in circumstances where disclosure may damage national security or the public interest, the measures would appear to be rationally connected to the stated objectives.

1.42 In assessing proportionality, it is relevant to consider a number of factors, including whether the measures are accompanied by adequate safeguards, including

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[84] See, for example, *Mansour Leghaei and others v Australia,* United Nations Human Rights Committee Communication No. 1937/2010 (2015): the partially dissenting opinion of Committee members Sarah Cleveland and Víctor Manuel Rodríguez-Rescia (dissenting only because the Committee as a whole did not consider the article 13 arguments) is noteworthy with respect to the national security exception in article 13. The Committee concluded at [10.4] that 'the author was never formally provided with the reasons for the refusal to grant him the requested visa which resulted in his duty to leave the country, except for the general explanation that he was a threat to national security based on security assessment of which he did not even receive a summary'. In light of this finding, Committee members Cleveland and Rodríguez-Rescia concluded at [5] that the 'invocation of "compelling reasons of national security" to justify the expulsion of the author…did not exempt the State from the obligation under article 13 to provide the requisite procedural safeguards. The fact that the State failed to provide the author with these procedural safeguards constitutes a breach of the obligation under article 13 to allow the author to submit the reasons against his expulsion…This means that he should have been given the opportunity to comment on the information submitted to them, at least in summary form'. See also, *Mansour Ahani v Canada,* United Nations Human Rights Committee Communication No. 1051/2002 (2004) [10.8]: 'Given that the domestic procedure allowed the author to provide (limited) reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate for the Committee to accept that, in the proceedings before it, "compelling reasons of national security" existed to exempt the State party from its obligation under that article to provide the procedural protections in question'. Other jurisprudence of the UN Human Rights Committee indicates that States have previously been afforded 'wide discretion' as to whether national security reasons exist but that States should at least demonstrate that there are 'plausible grounds' for exercising the national security exception: See *Alzery v Sweden,* United Nations Human Rights Committee Communication No. 1416/2005 (2006).

[85] Administrative Review Tribunal Bill 2023, statement of compatibility, pp. 10 and 12; Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, statement of compatibility, p. 11.

access to review, and pursue the least rights restrictive means of achieving the stated objectives.

1.43 The statement of compatibility states that the limitation is proportionate as strict criteria apply for the issuing of public interest certificates; the certificate only applies to information in the proceeding that it would be against the public interest to disclose; and the Tribunal can allow disclosure of information subject to a certificate in limited circumstances.[86] Proceedings involving public interest certificates or in the Intelligence and Security jurisdictional area must be considered by a tribunal constituted with a Deputy President or the President, which the statement of compatibility says ensures that the most senior levels within the Tribunal will consider these matters.[87] The statement of compatibility also notes that in relation to the Tribunal's own powers to restrict the publication or disclosure of information, the Tribunal must weigh up the competing interests of open justice and the particular circumstances of the parties and the harm that could occur if the order is not made.[88] The statement of compatibility further states that parties can seek review of decisions on public interest certificates and non-disclosure orders in the Federal Court.[89]

1.44 The statement of compatibility identifies some useful safeguards that would assist with proportionality. In particular, in deciding whether to make an order under clause 70 restricting the publication or disclosure of information to parties, clause 71 would require the Tribunal to have regard to specified matters, including the desirability that evidence and documents given to the Tribunal are made available to all parties.[90] In addition to these matters, if an order is being considered in a proceeding in the Intelligence and Security jurisdictional area, the Tribunal must also have regard to the necessity of avoiding the disclosure of national security information and, in relation to a review proceeding, give particular weight to any submission made by or on behalf of the agency head.[91] Clause 71 appears to confer the Tribunal with flexibility to consider the particular circumstances of each individual case and undertake some form of balancing exercise, whereby it may weigh the risk of damage

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86 Administrative Review Tribunal Bill 2023, statement of compatibility, p. 10.

87 Administrative Review Tribunal Bill 2023, statement of compatibility, p. 10.

88 Administrative Review Tribunal Bill 2023, clauses 70 and 71; statement of compatibility, p. 12.

89 Administrative Review Tribunal Bill 2023, statement of compatibility, pp. 10 and 12.

90 Administrative Review Tribunal Bill 2023, clause 71.

91 Administrative Review Tribunal Bill 2023, clause 157. This provision applies in addition to clauses 70 and 71.

to the public interest against the right to a fair hearing or other matters that it considers appropriate and necessary. This would assist with proportionality.[92]

1.45 However, the Tribunal is conferred with minimal flexibility with respect to disclosing information subject to a non-disclosure certificate. Such certificates are issued by the Commonwealth, state or territory Attorney-General, the responsible minister or the Director-General of Security on the grounds that disclosure of the specified information would be contrary to the public interest for one or more specified reasons, such as the disclosure would prejudice the security, defence or international relations of the Commonwealth.[93] The Tribunal is not involved in the issuing of a certificate and may only disclose information subject to a certificate to parties in very limited circumstances. For example, with respect to a public interest certificate issued under clause 91, the Tribunal may allow disclosure of the restricted information if the certificate was issued on the ground that disclosure would be contrary to the public interest for 'any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the matter contained in the document should not be disclosed'.[94] In deciding whether to make the information available to the parties, the Tribunal must take into account as a primary consideration the principle that it is desirable for the parties to the proceeding to be made aware of all relevant matters; and have regard to any reason specified in the certificate.[95]

1.46 However, in relation to information subject to a public interest certificate on other grounds, such as where disclosure would prejudice Australia's security, defence or international relations or involve Cabinet deliberations or decisions, the Tribunal is not afforded any discretion to disclose this information to parties. Similarly, there is no flexibility to disclose information subject to other certificates, such as a sensitive information certificate or a security certificate, to parties.[96] Given the very limited circumstances in which the Tribunal may disclose information subject to a non-

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[92] See *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009) at [206] where the Court stated that the right to a fair trial may not be violated in circumstances where, having full knowledge of the issues in the trial, the judge is able to carry out a balancing exercise and take steps to ensure that the defence (whose rights are limited) is kept informed and is permitted to make submissions and participate in the decision-making process so far as is possible without disclosing the confidential material.

[93] Administrative Review Tribunal Bill 2023, clauses 91, 158, 159, 161 and 162.

[94] Administrative Review Tribunal Bill 2023, paragraphs 91(1)(c) and 91(2)(b). Subclause 91(6) provides that the Tribunal may decide to make the information or document available to any or all of the parties to the proceeding if the reason for the certificate being given by the Attorney-General is a reason other than the reason set out in paragraphs 91(1)(a) or (b) or 91(2)(a). In effect, this means the information may only be disclosed if the reason for the public interest certificate is that set out in paragraphs 91(1)(c) and 91(2)(b). See also subclause 161(6).

[95] Administrative Review Tribunal Bill 2023, subclause 91(7).

[96] Administrative Review Tribunal Bill 2023, clauses 158 and 159.

disclosure certificate to the applicant in practice, it appears that, with respect to these measures, there is insufficient flexibility for the Tribunal to consider the individual circumstances of each case, including the sensitivity of the information and likely harm if it were to be disclosed and the right of the applicant to a fair hearing. Without this flexibility, it is not clear that the non-disclosure of information to the applicant would necessarily be proportionate in each case.

1.47 While the availability of review in relation to non-disclosure decisions would theoretically serve as an important safeguard, its value in practice is uncertain. This is because the applicant is unable to access critical information on which the decision was based, making it very difficult for the applicant to understand the reasons for the decision and thus effectively challenge the decision. Concerns therefore arise that the right of review is not, in all the circumstances, an effective one.

1.48 As to whether there are less rights restrictive alternatives available, the jurisprudence of the European Court of Human Rights offers some guidance in this regard. In the context of domestic laws that restrict disclosure of information to parties for reasons of national security, the European Court of Human Rights has identified special advocates as an important safeguard to 'counterbalance procedural unfairness' through 'questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure'.[97] The European Court of Human Rights has stated:

> the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.[98]

1.49 It is noted that in other Commonwealth legislation where information is withheld from the affected person on national security grounds, there is a process by which the affected person is provided with a summary of the information and a special advocate is appointed to represent the person's interests in closed hearings.[99] However, neither the ART bill nor the Consequential bill provide for special advocates or even for a process by which the applicant and their representative may be provided

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97 *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009) [209] and [219].

98 *A v United Kingdom*, European Court of Human Rights (Grand Chamber), Application no. 3455/05 (2009) [220].

99 See *National Security Information (Criminal and Civil Proceedings) Act 2004*. Although note the human rights concerns regarding the adequacy of these measures to safeguard the right to a fair hearing, see Parliamentary Joint Committee on Human Rights, *Report 13 of 2020* (13 November 2020) pp. 54–61.

with a summary of the restricted information. Indeed, the amendments to the Migration Act in the Consequential bill clarify that the Tribunal is not required to give particulars in relation to any of the information that is not required to be disclosed to the applicant before making a decision.[100]

1.50 A less rights restrictive way of achieving the stated objectives would appear to be to confer the Tribunal with sufficient discretion so as to allow them to disclose as much information as possible without compromising the public interest or national security, or, following an independent assessment of the information and the risk of disclosure, to provide the applicant and their representative with a summary of the information. This would provide the Tribunal with greater flexibility to treat different cases differently.[101]

### Committee view

1.51 The committee notes that those provisions in the ART bill and the Consequential bill that seek to restrict the disclosure of information or evidence engage and limit the right to a fair hearing and, with respect to migration decisions relating to the expulsion or deportation of non-citizens or foreign nationals who are lawfully in Australia, the prohibition against expulsion of aliens without due process. With respect to the latter right, while the due process guarantees in article 13 may be departed from when compelling reasons of national security so require, the current measures go further and allow restrictions based on Australia's relations with other countries or the public interest. The committee notes that the UN Human Rights Committee appears to have interpreted the exception of 'compelling reasons of national security' to be a reasonably high threshold which States parties must meet before departing from their due process obligations. The committee notes that the right to a fair hearing and the prohibition against expulsion of aliens without due process may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.52 While the committee considers that the measures pursue the legitimate objectives of seeking to protect national security and the public interest, it is concerned that the proposed limitations may not be proportionate in all circumstances. The safeguards identified in the statement of compatibility do not appear to be sufficient, noting the Tribunal has minimal flexibility to disclose information subject to a non-disclosure certificate to the applicant and there appear to be less rights restrictive ways of achieving the stated objectives. Depending on the

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100 Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 2, item 161.

101 The Parliamentary Joint Committee on Human Rights raised similar human rights concerns regarding the restricted disclosure of information to the applicant in the context of migration decisions. See Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, *Report 1 of 2021* (3 February 2021) and *Report 3 of 2021* (17 March 2021).

scope and nature of information withheld from the applicant and the consequent interference with their ability to effectively participate in proceedings, there appears to be a risk that the measures would not be proportionate in all circumstances and thus may impermissibly limit the right to a fair hearing and the prohibition against expulsion of aliens without due process.

**Suggested action**

**1.53 The committee considers the proportionality of these measures may be assisted were the bills amended to provide:**

**(a) the Tribunal with the discretion to disclose the relevant information (or a summary of it) to the extent that is necessary to ensure procedural fairness in circumstances where partial disclosure could be achieved without creating a real risk of damage to the public interest or national security; and**

**(b) a process by which a special advocate scheme (that complies with human rights) or equivalent safeguard be created to allow the Tribunal to appoint someone in a particular case to represent the applicant's interests if it is determined that the relevant information cannot be disclosed to the applicant.**

**1.54 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.**

## Termination of employment of AAT members

1.55 The Consequential bill seeks to abolish the Administrative Appeals Tribunal (the AAT)[102] and transition AAT staff and some AAT members to the new Tribunal.[103] In particular, staff members of the AAT who were engaged immediately before the transition time (that is, the time the ART bill would commence) are to be engaged as staff members of the new Tribunal on the same terms and conditions.[104] Regarding AAT members, the President, Deputy Presidents who are judges, and members who were appointed on or after 1 January 2023 to the AAT (as a result of a selection process conducted in accordance with the Guidelines for appointments to the AAT) are to be transitioned as members to the new Tribunal on the same terms and conditions of employment for the remainder of the term for which they were originally

102 Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 17, item 1 (which repeals the *Administrative Appeals Tribunal Act 1975*).

103 Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 16, item 11.

104 Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 16, items 11, 28–32.

appointed.[105] All other current members of the AAT would need to apply for membership of the Tribunal, to be appointed to the ART through a merit-based process. For those AAT members who are not appointed as members of the new Tribunal, they are to be compensated an amount equivalent to four months remuneration or, for members with less than four months remaining of their term, an amount the person would have received as remuneration for the remainder of that term.[106]

## International human rights legal advice

### *Right to fair hearing*

1.56 By abolishing the AAT, certain AAT members would have their employment terminated insofar as they would not be automatically transitioned to the new Tribunal. Terminating the appointments of some Tribunal members prior to the end of their term by way of government legislation appears to constitute executive interference with the independence of the judiciary, which has implications for the right to a fair hearing. This right requires that in the determination of a person's rights and obligations in a 'suit at law', everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[107] The requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception.[108] The requirement of independence demands:

> …actual independence of the judiciary from political interference by the executive branch and legislature…A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of independent tribunal.[109]

1.57 In order to guarantee judicial independence, States parties must protect members of the judiciary from any form of political interference in their decision-making through the adoption of laws that establish clear procedures and objective

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105 Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 16, items 28–30. Other AAT members who are to be appointed as members of the new Tribunal commencing at, or immediately after, the transition time are to be remunerated at the same rate for the first four months as a member of the new Tribunal (or for less than four months if the remainder of the term for which the person was appointed as a member of the AAT is less than four months), see schedule 16, item 31.

106 Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, schedule 16, item 32.

107 International Covenant on Civil and Political Rights, article 14.

108 UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [19].

109 UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [19].

criteria for the appointment, remuneration, tenure and dismissal of members.[110] Regarding the dismissal of judicial members, the UN Human Rights Committee has stated that:

> Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.[111]

1.58 Terminating AAT members prior to the end of the original term for which they were appointed therefore risks violating the requirement of an independent judiciary with respect to the right to a fair hearing.[112] The statement of compatibility does not address the engagement of the right to a fair hearing and so no assessment is provided as to its compatibility with this right.

1.59 The statement of compatibility generally notes that the Consequential bill forms part of a package of legislation that would abolish the AAT and establish the new Tribunal, which is intended to be a new federal administrative review body that is user-focused, efficient, accessible, independent and fair.[113] While the statement of compatibility acknowledges that abolishing the AAT would cease the employment of existing AAT members, it does not explain why all members cannot transition to the new Tribunal, at least for the duration of their term. The statement of compatibility states that all current members of the AAT have had the opportunity to apply for membership of the Tribunal through a merit-based process consistent with the Guidelines of Appointments to the AAT. It states that members of the AAT who are not appointed to the new Tribunal but whose terms as AAT members would have continued beyond the abolition of the AAT will receive compensation for the termination of their appointment.[114] While providing members with compensation

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110 UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [19].

111 UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [20].

112 The termination of certain AAT members would also engage the right to work. The statement of compatibility has sufficiently justified the potential limitation on the right to work insofar as those AAT members who are to be terminated will receive up to four months compensation. As such, the right to work is not discussed in detail in this report. See Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, statement of compatibility, p. 23.

113 Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, statement of compatibility, p. 4.

114 Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, statement of compatibility, p. 23.

and the option to re-apply for membership of the new Tribunal would appear to safeguard the right to work, it does not satisfy the requirement of independence in the context of the right to a fair hearing, which protects judicial members against dismissal.

1.60 In the absence of any specific reasons set out in the explanatory materials as to why it is necessary to dismiss certain AAT members (such as on the grounds of serious misconduct or incompetence) and without effective judicial protection being available to members to contest their dismissal, there appears to be a risk that the measure is incompatible with the notion of an independent tribunal.[115]

### Committee view

1.61 The committee notes that abolishing the AAT and consequently terminating the appointment of certain AAT members before the end of the term for which they were originally appointed engages the right to a fair hearing, particularly the requirement for a competent, independent and impartial tribunal. The committee notes that the requirement of judicial independence demands freedom from political interference by the executive or legislature and is an absolute right that is not subject to any exception.[116] The statement of compatibility does not address the engagement of this and so provides no assessment as to its compatibility.

1.62 The committee notes that all AAT members were provided with an opportunity to apply for appointment to the new Tribunal through a merit-based process and those who are not to be appointed to the new Tribunal will be adequately compensated. The committee considers a merit-based process for appointment of members to the new

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[115] Jurisprudence of the European Court of Human Rights suggests that the political context in which judicial reforms take place may be relevant in assessing whether dismissal of judicial members is compatible with human rights. See, e.g. *Grzęda v. Poland*, European Court of Human Rights (Grand Chamber), Application no. 43572/18 (2022). In this case, the applicant, a judge at the Polish Supreme Court, was removed from the National Council of the Judiciary before the end of his term and he was unable to get a judicial review of that decision. The Court found a violation of the applicant's right to access a court. At [348], the Court observed that 'the whole sequence of events in Poland…vividly demonstrates that successive judicial reforms were aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, remodelling the [National Council of the Judiciary] and setting up new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline…As a result of the successive reforms, the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislative powers and thus substantially weakened. The applicant's case is one exemplification of this general trend'. The current measures were clearly introduced in a very different context. However, in the absence of reasons justifying why these measures were necessary, questions remain as to whether the measures are compatible with the notion of an independent tribunal.

[116] UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [19].

Tribunal is important for ensuring the new Tribunal is independent and fair. However, noting the position under international human rights law that members of the judiciary should only be dismissed on serious grounds of misconduct or incompetence, and in such cases, they should have access to judicial protection to contest their dismissal, the committee considers there to be a risk that the measure may not be compatible with the notion of an independent tribunal.

1.63 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

# Chapter 2
## Concluded matters

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

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

## Bills

# Migration Amendment (Bridging Visa Conditions) Bill 2023, Migration Amendment and Other Legislation (Bridging Visas, Serious Offenders and Other Measures) Bill 2023 and related instrument[2]

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|---|---|
| **Purpose** | The Migration Amendment (Bridging Visa Conditions) Bill 2023 (now Act) amends the *Migration Act 1958* and the *Migration Regulations 1994* to grant certain non-citizens for whom there is no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future a Subclass 070 (Bridging (Removal Pending)) visa subject to specified mandatory visa conditions, breach of which is a criminal offence carrying a mandatory minimum sentence.<br><br>The Migration Amendment and Other Legislation (Bridging Visas, Serious Offenders and Other Measures) Bill 2023 amended the *Migration Act 1958* to introduce new criminal offences with mandatory minimum sentences for breach of certain visa conditions and to empower authorised officers to do all things necessary or convenient in relation to monitoring devices and related monitoring equipment, and to collect, use or disclose to any other person personal information relating to the visa |

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

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Bill 2023, Migration Amendment and Other Legislation (Bridging Visas, Serious Offenders and Other Measures) Bill 2023 and related instrument, *Report 1 of 2024*; [2023] AUPJCHR 4. Note that when the committee first considered this bill in *Report 13 of 2023* the title of the second bill was ‘Migration Amendment (Bridging Visa Conditions) Bill 2023’ but its title was amended before its passage. The related instrument is the Migration Amendment (Bridging Visa Conditions) Regulations 2023 [F2023L01629].

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| | holder. It also introduced a new Community Safety Order regime. The Migration Amendment (Bridging Visa Conditions) Regulations 2023 [F2023L01629] makes amendments to the Migration Regulations 1994 consequential to the passage of the above bills. |
| **Portfolio** | Home Affairs |
| **Introduced** | Migration Amendment (Bridging Visa Conditions) Bill 2023:<br>House of Representatives, 16 November 2023<br>*Finally passed both Houses, 16 November 2023*<br>Migration Amendment and Other Legislation (Bridging Visas, Serious Offenders and Other Measures) Bill 2023:<br>House of Representatives, 28 November 2023<br>*Finally passed both Houses, 6 December 2023*<br>Migration Amendment (Bridging Visa Conditions) Regulations 2023 [F2023L01629] registered 7 December 2023 |
| **Rights** | Criminal process rights; right to a fair trial; freedom of expression, movement, assembly and association; right to liberty; right to privacy; right to work; rights to life and security of person; effective remedy; adequate standard of living, health and social security; and prohibition on inhuman or degrading treatment |

2.3 The committee requested a response from the minister in relation to the bills in *Report 13 of 2023*.[3]

## Criminalisation of breach of mandatory bridging visa conditions

2.4 The Migration Amendment (Bridging Visa Conditions) Bill 2023 (now Act)[4] ('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 with which is a criminal offence carrying a mandatory minimum sentence of at least one year

3 Parliamentary Joint Committee on Human Rights, *Report 13 of 2023* (29 November 2023), pp. 12–42.

4 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).

imprisonment.[5] The Migration Amendment and Other Legislation (Bridging Visas, Serious Offenders and Other Measures) Bill 2023 (now Act) ('second bill')[6] introduced additional criminal offences with mandatory minimum sentences for non-compliance with visa conditions relating to not performing certain work, not going within a certain distance of a school or childcare or day care centre and not, if convicted of an offence, contacting the victim of that offence.[7] The Migration Amendment (Bridging Visa Conditions) Regulations 2023 (2023 Regulations) (registered on 7 December 2023) made other amendments consequential to these bills and altered some of the applicable conditions. The cohort of people to whom this legislation applies are those non-citizens who were released from immigration detention following the orders of the High Court of Australia of 8 November 2023 in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affair* (the NZYQ cohort).[8]

2.5 The details of how the legislation applied as it stood before the 2023 Regulations amended it is set out in the initial report in *Report 13 of 2023*. Following changes made by the 2023 Regulations, in summary it appears that if a visa is granted to a member of the NZYQ cohort (not subject to a Community Safety Order) the minister must impose 19 to 20 specified conditions.[9] These conditions relate to not being engaged in certain activities; notifying the minister of various changes; and

5 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.

6 It was originally titled the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 and reported on in the committee's initial report using this name. However, the bill as passed was renamed.

7 Migration Amendment and Other Legislation (Bridging Visas, Serious Offenders and Other Measures) Bill 2023, Schedule 1, items 1 and 2.

8 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.

9 See Migration Regulations 1994, section 070.612 and 070.612A, as amended by items 14 and 15 of the Migration Amendment (Bridging Visa Conditions) Regulations 2023.

reporting to the minister.[10] There are also additional conditions, relating to not undertaking certain work, not contacting certain people and not going to schools or childcare centres, which are applicable only to those convicted of certain offences.[11] In addition, the minister must impose the following conditions unless satisfied that it is not reasonably necessary to do so for the protection of any part of the Australian community:

- 8621: electronic monitoring;
- 8617: visa holder must notify Immigration within 5 working days if they receive or transfer amounts totalling $10 000 or more from one or more other persons;
- 8618: the holder must notify Immigration within 5 working days if: the visa holder incurs debts totalling $10 000 or more; is declared bankrupt; or there is any significant change in relation to the holder's debts or bankruptcy; and
- 8620: curfews.[12]

2.6 The minister must decide whether to impose these conditions in the order in which they are listed.[13] If a Community Safety Order is made, 18 of these conditions must be imposed on the visa holder; these relate to reporting requirements and are

[10] See Migration Regulations 1994, clause 070.611(1): conditions 8303 (must not become involved in activities disruptive to the community, or violence threatening harm); 8513 (notify of residential address); 8514 (no material change in the circumstances on the basis of which visa granted); 8541, (must do everything possible to facilitate and not obstruct their removal from Australia); 8542 (report in person for removal); 8543 (attend at a place, date and time specified to facilitate efforts to arrange and effect removal); 8401 (report at times and places specified by minister) if condition 8621 (must wear a monitoring device) is not imposed; clause 070.612A(1): 8551 (occupations which require approval); 8552 (notify change of employment); 8553 (involvement in activities prejudicial to security); 8554 (acquiring weapons or explosives); 8555 (approval required before undertaking flight training or flying aircraft); 8556 (communication with certain listed organisations); 8560 (approval required before obtaining certain chemicals); 8561 (requirement to attend interview as directed); 8562 (employment in occupations that involve weapons or explosives); 8563 (engaging activities involving weapons or explosives); 8614 (notification of travel); 8616 (notification of contact with people involved in illegal activities) and 8625 (notification of personal details) must be imposed.

[11] Migration Regulations 1994, clause 070.612B.

[12] Migration Regulations 1994, subclause 070.612A(1).

[13] Migration Regulations 1994, subclause 070.612A(2), as amended by the Migration Amendment (Bridging Visa Conditions) Regulations 2023, item 17.

said to focus on managing the migration status of the visa holder.[14] Failure to comply with some, but not all, of these conditions would result in a criminal offence for breach. Those conditions that are subject to a criminal penalty for breach are conditions that the visa holder:

- 8401 – must report at a specified time and place;
- 8513 – must notify of residential address within 5 days of grant;
- 8542 – must report in person for removal when instructed;
- 8543 – must attend at a place and time to facilitate efforts to arrange removal;
- 8552 – must notify of change in employment details;
- 8561 – must attend a specified place and time for an interview relating to the visa;
- 8614 – must notify of interstate or overseas travel;
- 8615 – must notify of associations if convicted of offence involving minor or vulnerable person;
- 8620 – must comply with curfew requirements;
- 8621 – must comply with electronic monitoring;
- 8622 - must not work or perform incidental activity with minors or vulnerable people if have a relevant criminal history;
- 8623 – must not go within 200 metres of a school if have a relevant criminal history; and
- 8624 – must not make contact with victim or victim's family if have a relevant criminal history.

[14] See Migration Amendment (Bridging Visa Conditions) Regulations 2023, item 14. The applicable conditions are 8401 (reporting), 8513 (notify of residential address), 8514 (no change in circumstances of visa grant), 8541 (facilitate removal), 8542 (report for removal), 8543 (attend to facilitate removal), 8551 (approval for employment involving chemicals of security concern), 8552 (notify of change in employment details), 8553 (security), 8554 (possession of weapons and explosives), 8555 (piloting aircraft), 8556 (communication with terrorist organisations), 8560 (acquiring chemicals of security concern), 8561 (attending an interview), 8562 (employment involving weapons or explosives), 8563 (activities involving weapons or explosives), 8614 (notification of interstate or overseas travel) and 8625 (notification of change of details) must be imposed. The committee considered the compatibility of the Community Safety Orders scheme in Parliamentary Joint Committee on Human Rights, *Report 14 of 2023* (19 December 2023) pp. 31-59.

## Summary of initial assessment

***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*

2.7 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;
- 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.

2.8 The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[15] 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.[16] 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.[17] The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country.[18] 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.[19] The right to freedom of expression includes the freedom to seek, receive

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

16 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).

17 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].

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

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

and impart information and ideas of all kinds.[20] 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 provide 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.

2.9 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.[21] The United Nations (UN) Human Rights Committee has stated that 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability.[22] 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.

2.10 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

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

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

22 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].

requirements of the fair trial principle and may not be supported under international standards.[23]

2.11 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.

2.12 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. Questions arose, as set out in the initial report, as to whether these measures meet all of these criteria.

### *Committee's initial view*

2.13 The committee noted the Migration Amendment (Bridging Visa Conditions) Bill 2023 passed both Houses of Parliament on the same day it was introduced. While the committee acknowledged 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.

2.14 The committee considered that as the legislation engaged multiple and significant human rights further information was required to assess its compatibility with these rights and as such the committee sought the minister's advice in relation to the questions as set out in the minister's response below.

2.15 The full initial analysis is set out in *Report 13 of 2023*.

## Minister's response[24]

2.16 The minister advised:

> ***(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;***
>
> The conditions allow for those detainees who have been released to be more effectively monitored and regulate certain activities. They will also help the Government ensure BVR holders cooperate in Government efforts to remove them from Australia when this becomes reasonably practicable.
>
> For example, the electronic monitoring (8621) and curfew (8620) conditions must be imposed unless the Minister considers it is not reasonably necessary for the protection of the community. Some of the conditions are

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

24 The minister's response to the committee's inquiries was received on 15 January 2024. This is an extract of the response. The response is available in full on the committee's webpage.

called the Community Safety Test conditions and must be decided by the Minister in a sequential order:

- the Minister must first consider whether to apply the electronic monitoring condition,
- followed by financial reporting conditions 8617 (notify of transactions over $10,000 AUD) and then 8618 (notify of debts in excess of $10,000 AUD and bankruptcy), and
- finally whether the curfew, condition 8620, is reasonably necessary for community protection, having regard to all other conditions applicable to the individual's BVR.

The requirement for the Minister to consider the Community Safety Test conditions in a sequential order is intended to ensure that the conditions imposed are adequate and proportionate. Where a monitoring condition is imposed, consideration is given to additional conditions that may also be applied. This is to ensure that the extent to which each of the visa condition contributes to protection of the Australian community is appropriately considered prior to imposing further conditions.

Additionally, the amendments create a 12 month time limit after which these conditions cease to have effect. At any time before or after the 12 month period, the Minister can re-grant the person a BVR with these conditions imposed (subject to consideration of the Community Safety Test).

This amendment improves proportionality by ensuring regular review that conditions remain appropriate for the particular circumstances of the individual and allows for a BVR to be re-granted without these conditions imposed if the Minister is satisfied that they are no longer reasonably necessary for the protection of the community.

Following the passage of the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* and the supporting amendments in the *Migration Amendment (Bridging Visa Conditions) Regulations 2023* in December 2023*,* the Australian Border Force established a Community Protection Board that considers the individual circumstances of each BVR holder to consider whether the imposition of BVR conditions are reasonably necessary. The Community Protection Board is made up of senior officials from the Department of Home Affairs, the Australian Border Force, the Australian Federal Police and independent experts in corrections, policing and a community representative. The Board then makes individualised recommendations to the Minister or the delegate about appropriate BVR visa conditions.

In addition to the BVR conditions, the Government introduced new measures that were enacted on 8 December 2023 in the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023.* This Act created a framework in the Criminal Code for

courts to impose Community Safety Orders including Community Safety Detention Orders, and Community Safety Supervision Orders. Such an Order may be granted by a Court where the Court is satisfied that the conditions attached to the BVR would not be effective in protecting the community from the serious harm posed by an individual.

***(b) whether, as a matter of international human rights law, the mandatory conditions are so severe as to be considered to be 'criminal' in nature under international human rights law. If so, how is the measure compatible with the criminal process rights in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to punished twice for the same offence, the right to be presumed innocent until proven guilty and the right to have a fair and public hearing by a competent, independent and impartial tribunal;***

It is the Department's view that the mandatory conditions are not so severe as to be considered 'criminal' in nature. They are not imposed as a penalty, rather they are imposed on a member of the NZYQ cohort to ensure the safety of the Australian community and that the BVR holder remains in contact with the Department regarding removal from Australia. It is the expectation of the Australia community that non-citizens abide by all visa conditions, including that they be of good character. Non-citizens who do not (or no longer) have an entitlement to a visa to remain in Australia must depart Australia. These BVR conditions have been put in place to manage this cohort who would otherwise be expected to leave Australia, but who cannot be returned to their country of nationality, due to a range of factors. While they would previously have been held in immigration detention, following the High Court's judgment in NZYQ, this option is no longer available to the Government.

Some of the BVR conditions put in place to manage this cohort, only apply to those with serious criminal backgrounds, such as where the person has been convicted of a violent and/or sexual offence that could involve a minor or other vulnerable person. For example, BVR condition 8622 prohibits the holder from working with minors or other vulnerable people only where the holder has been convicted of an offence involving a minor or vulnerable person.

Some of these BVR conditions do not unreasonably limit the conduct or movement of the BVR holder in the Australian community, and apply only where the person has a history of serious violent and sexual assault offending, supporting the Government to protect the most vulnerable members of society.

Other conditions, such as curfew (8620) and electronic monitoring (8621) must apply unless the Minister is satisfied that it is not reasonably necessary for the protection of the community (i.e. "the Community Safety Test"). As noted above, a Community Protection Board has been established to individually consider the factual circumstances of each BVR holder to

identify the community protection risk posed by that individual and whether conditions are reasonably necessary and make recommendations to the Minister or delegate.

New section 76E of the Migration Act creates a process where, following the grant of a first BVR, individuals will have the opportunity to make representations to the Minister about the imposition of the Community Safety Test conditions. If the Minister is satisfied that one of more of the conditions are not reasonably necessary for the protection of any part of the Australian community, the Minister must grant the individual a second BVR that is not subject to those conditions and provide the individual with a written notice and reasons for the decision.

Where the Minister considers that an individual's circumstances warrant consideration of imposing a Community Safety Order, the Minister will refer those individuals to the Court for assessment.

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

Information as to the BVR conditions imposed and the requirements that a BVR holder must fulfil will be provided to the BVR holder upon grant of the visa. Where applicable, the BVR holder is provided with information on how to maintain the electronic monitoring device, primarily around maintaining charge of the device and an accompanying FAQ. This information is being translated into a number of common languages and interpreters are available for BVR holders during conversations if required. Please see the response to paragraph 1.46(d) for more information on what advice is provided regarding the BVR conditions.

The amendments also create a 12 month time limit after which the BVR conditions 8617, 8618, 8620 (curfew) and 8621 (electronic monitoring) cease to have effect. These are BVR conditions that must be applied unless the Minister is satisfied that they are not reasonably necessary for the protection of the Australian community. A 12 month time limit creates certainty for a BVR holder as to when conditions in relation to the visa granted will cease to have effect.

At any time before or after the 12 month period, the Minister can grant the person a new BVR with these conditions imposed or not imposed (subject to consideration of the Community Safety Test). This ensures regular review that conditions remain appropriate for the particular circumstances of the individual and allows for a BVR to be re-granted without these conditions imposed if the Minister is satisfied that they are no longer reasonably necessary for the protection of the community.

This amendment ensures regular review that BVR conditions remain appropriate for the particular circumstances of the individual.

***(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;***

A BVR holder can be notified of the grant orally or in writing, though in practice the Department provides written notification of all BVR grants. This notification includes information about all conditions that apply to the BVR holder. Where information is provided orally, either of a BVR grant or other related matters, interpreters are available for BVR holders during these conversations if required and a BVR holder may have a lawyer present or on the phone during notification. If the BVR holder has an authorised recipient (for example, a registered migration agent), the notification of the BVR grant and related matters will be sent to the authorised recipient.

The BVR holder is also provided with information on how to maintain the device, primarily around maintaining charge of the device and an accompanying FAQ. This is being translated into a number of common languages for this cohort.

During subsequent interactions with the Department and ABF, BVR holders will be reminded of their obligations to comply with BVR conditions including to report any changes in circumstances, in addition to discussing the person's well-being.

Where there is an electronic monitoring condition, the ABF is alerted to a potential device malfunction. In the first instance this will result a phone call from the ABF to assist the BVR holder to identify any issues with the device. At times, where a device is found to be faulty this will be rectified by providing new equipment to the BVR holder by the ABF.

***(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;***

Allowing the Minister to orally specify matters relating to visa conditions that a BVR holder must comply with helps ensure the affected BVR holders have an opportunity to ask questions to clarify and confirm their understanding of conditions when a BVR is granted or when there is a change in reporting conditions.

Where a BVR holder's primary language is not English, interpreters are available for these conversations for BVR holders if required.

Allowing the Minister to specify certain matters orally or in writing provides the Minister with the flexibility to contact BVR holders in the most appropriate way, to give directions on how to comply with certain visa conditions in the most suitable way. Oral directions may be given in person or by telephone. This enable the Minister to quickly and flexibly specify

matters which may allow the BVR holder to immediately self-regulate their behaviour, and if necessary take remedial actions to comply

With regard to the reporting requirement in condition 8401, in many cases, the best time to notify a visa holder of a variation of the reporting requirements imposed for the purpose of visa conditions is during a reporting instance, when a discussion could take place about the reasons for considering whether or not to vary condition 8401 and taking into account the holder's ability to comply with the proposed variation of the condition (for example, ensuring the reporting condition does not conflict with the visa holder's work obligations).

As a matter of policy, oral notification of a variation to BVR conditions is followed up with written confirmation, and the holder's acknowledgement of their BVR conditions and any change in conditions is sought in writing.

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

BVR holders may depart Australia voluntarily, or travel interstate, at any time.

Condition 8614 requires BVR holders to notify the Department of plans to travel interstate or internationally for a number of reasons including that if the person is subject to an electronic monitoring device, it will allow ABF to remove the device before the person departs Australia.

***(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;***

The conditions 8620 (curfew) and 8621 (electronic monitoring) must be applied unless the Minister thinks it is not reasonably necessary for the protection of the community. This means the risk that each BVR holder poses can be assessed and those conditions are applied in consideration of that risk.

Additionally the amendments create a 12 month time limit after which these BVR conditions cease to have effect. These are conditions that must be applied unless the Minister is satisfied that they are not reasonably necessary for the protection of the community. At any time before or after the 12 month period, the Minister can grant the person a new BVR with these conditions imposed or not imposed (subject to consideration of the Community Safety Test). This amendment ensures regular review that

conditions remain appropriate for the particular circumstances of the individual and allows for a BVR to be granted without these conditions imposed if the Minister is satisfied that they are no longer reasonably necessary for the protection of the community.

These BVR conditions are appropriate because the NZYQ-affected cohort includes individuals with serious criminal histories who are no longer able to be managed in immigration detention where there remains no prospect of removal in the reasonably foreseeable future.

The curfew has the community protection purpose of BVR holders who have, for example, been assessed to fail the character test and to be of particular concern to the Minister in terms of future criminal offending. Therefore any deprivation of liberty that the curfew may constitute, is intended to protect public order and the rights and freedoms of others, and would not be arbitrary and be necessary, reasonable and proportionate to achieving that objective.

One purpose of electronic monitoring is to deter the BVR holders from committing further offences, knowing they are being monitored, and thereby keep the community safe. The electronic monitoring will also assist with prevention of absconding behaviour which is contrary to the obligation of the BVR holder to engage in the Department's efforts to facilitate their removal.

The use of electronic monitoring serves the legitimate obligation where there is a higher likelihood of non-compliance by the BVR holder, and provides an alternative avenue for compliance that will be more suitable to some circumstances such as where additional support alone will not prevent reoffending.

The provisions put beyond doubt the types of behaviours that are unacceptable for NZYQ-affected persons to engage in whilst they resolve their migration status residing in the Australian community, and the sanctions that will apply to any person who breaches the conditions of the BVR they are granted. This is appropriate and reasonable to ensure the Australia community can continue to have confidence that the migration system is being well-managed in respect of this cohort.

***(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;***

At the point in time an individual is identified as being NZYQ-affected, there is no real prospect of removing the person in the reasonably foreseeable future. However, a number of factors can influence whether or not a person is removable over time, including changing country information and new information regarding the individual becoming available. This means that it is possible that removal could become available for an individual in the NZYQ-affected cohort in the future.

For these reasons, it is important that the BVR holder adhere to reporting conditions so that the Department can locate the individual if and when removal becomes available.

***(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;***

The mandatory minimum sentence of 1 year imprisonment was proposed by the Opposition in the Senate. As a result it was not referenced in the statement of compatibility with human rights for the BVC Bill.

The use of a minimum sentence of 1 year imprisonment and maximum penalty of 5 years imprisonment or 300 penalty units reflects the seriousness of the regard that the NZYQ-affected cohort are expected to have towards the conditions imposed on their BVR and reflects the level of protection necessary for community safety and the management of the cohort.

As BVR holders who continue to be NZYQ-affected cannot be detained in immigration detention, the usual potential consequences for breaching visa conditions, cancellation of that visa and immigration detention, is not available. This removes these measures as an effective deterrent against non-compliance with reporting requirements and other key visa conditions.

Breaches of conditions that fall within the new offences will be subject to the usual judicial processes. This includes the assessment by the Commonwealth Director of Public Prosecutions of whether to pursue a prosecution, taking into account whether it is in the public interest to do so. The defence of a reasonable excuse is available.

Members of the NZYQ-affected cohort have no substantive visa to remain in Australia, having had their visa applications refused, or a visa cancelled, in most cases on character grounds under section 501 of the Migration Act. Consequently, the Government considers that mandatory minimum sentencing is proportionate to the particular circumstances of the NZYQ-affected cohort and aimed at the legitimate objective of protecting community safety.

***(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;***

The Migration Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023 created new conditions 8620 (curfew) and 8621 (electronic monitoring) which only apply to individuals where the Minister considers this reasonably necessary for the protection of the Australian

community. As noted above, the Community Protection Board has been established to consider each individual's factual circumstances and make recommendations as to which conditions are reasonably necessary to manage the risk to the community.

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

The Migration Amendment (Bridging Visa Conditions) Regulations 2023 create a 12 month time-limit for certain visa conditions applied to BVRs after which these conditions cease to have effect. The time limit applies to the conditions that must be applied unless the Minister is satisfied that they are not reasonably necessary for the protection of the community.

At any time before or after the 12 month period, the Minister can grant the person a new BVR with these conditions imposed or not imposed (subject to consideration of the Community Safety Test).

This amendment ensures regular review that conditions continue to be reasonably necessary in light of the particular circumstances of the individual and allows for a BVR to be granted without these conditions imposed if the Minister is satisfied that they are no longer reasonably necessary for the protection of the community.

***(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.***

The following safeguards apply to ensure that limitation on rights is proportionate to the objectives being sought:

- The individual circumstances of each BVR holder will be considered to assess whether conditions are necessary for the protection of the Australian community. Conditions such as curfew (8620) and electronic monitoring (8621) must be imposed unless the Minister considers it is not reasonably necessary for the protection of the community. This provides scope for the Minister to consider whether it is not reasonably necessary in an individual's circumstances to impose those conditions.
- Importantly, where these conditions are imposed, they will be subject to a 12 month time limit after which they cease to be in effect on the individual's BVR. This ensures the circumstances of the individual are regularly reviewed and that assessments about whether the condition is reasonably necessary for the protection of the community remains relevant and appropriate.
- To improve proportionality, the BVC Regulations (registered on 7 December 2023) prescribe that condition 8401 (requirement to report) cannot be imposed where electronic monitoring (8621) is imposed. This ensures that a reporting requirement is not

unnecessarily imposed where the holder is already subject to the electronic monitoring condition.

- The BVC Bill also created new conditions that will only apply where a person has a relevant criminal history. For example, conditions 8622 (the visa holder must not work or participate in any regular activity involving more than incidental contact with minors or vulnerable people), 8623 (the visa holder must not go within 200 metres of a school) apply only where the individual has been convicted of an offence involving a minor or vulnerable person. Condition 8624 (must not make contact with victim or victim's family) applies only where a person has been convicted of an offence involving violence or sexual assault. Further, the BVC Regulations prescribe condition 8262, which provides that if a BVR holder has been convicted of an offence involving a minor or a vulnerable person, the holder must notify the Minister of a change in an online profile or user name. The applicability of these conditions only to BVR holders who have previously been convicted of offences involving a minor or a vulnerable person ensures those conditions are appropriately targeted to protecting the Australian community and that the conditions are proportionate and reasonable to the circumstances of the individual.

## Concluding comments

### *International human rights legal advice*

*Fair trial rights if conditions considered a 'criminal' penalty*

2.17 In relation to whether the mandatory conditions are so severe as to be considered 'criminal' in nature under international human rights law, the minister advised that it is the department's view that they are not likely to be considered as a criminal penalty, as they are not imposed as a penalty. Rather the conditions and offence are intended to ensure the safety of the community and require the visa holder to remain in contact with the department regarding removal from Australia. As set out in the initial analysis, 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.

2.18 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 if removal becomes reasonably practicable.[25] The minister also stated that 'some' of the conditions apply only to those with serious criminal backgrounds and 'some' conditions do not unreasonably limit the conduct or movement of the visa holder, and that in relation to certain conditions a process has been established to individually consider the factual circumstances of each visa holder. However, the minister's response did not explain why the conditions, which significantly interfere with multiple human rights, taken together are not so severe as to constitute a 'criminal' penalty for the purposes of international human rights law.

2.19 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);[26] 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);[27] and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.[28]

2.20 As the minister's response did not explain how the conditions taken together would not be so severe so as to not amount to a criminal penalty under international human rights law, there would appear to be some risk that it would be considered as such, and the measure may not be compatible with these fair trial rights.

*Prescribed by law*

2.21 As set out in the initial analysis, interferences with human rights must have a clear basis in law (that is, they must be prescribed by law).[29] This principle includes the

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

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

27 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'.

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

29 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];

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 may restrict the exercise of their rights.[30] 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'.[31]

2.22 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. It is welcome that following the committee's initial report entry raising concerns about the clarity of a condition requiring a visa holder to notify of any contact with someone 'alleged' to be involved in criminal activity, the 2023 Regulations has amended this to only require notification when the visa holder knows the person has been convicted of an offence.[32] The 2023 Regulations also removed this as a condition subject to the criminal offence provisions.[33] Concerns regarding the preciseness of this specific condition have therefore been alleviated.

2.23 However, 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'. The minister advised that where applicable the visa holder will be provided with information on how to maintain the electronic monitoring device and there will be an accompanying FAQ. The minister advised this information is being translated into a number of common languages and interpreters are available if required. The minister advised where there is a potential device malfunction the Australian Border Force (ABF) is alerted to this and in the first instance the ABF will call the visa holder to identify any issues with the device. If the device is found to be faulty, new equipment will be provided. However, it remains unclear, as a matter of law, what constitutes 'reasonable steps' or how 'good working order' is to be interpreted as there is no legislative guidance in this regard. Instead, it appears this is provided as a FAQ to those subject to this condition. Given failure to

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30 *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].

31 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].

32 See Migration Regulations 1994, condition 8616 as amended by item 26 of the Migration Amendment (Bridging Visa Conditions) Regulations 2023.

33 Migration Amendment (Bridging Visa Conditions) Regulations 2023, item 9.

comply results in a mandatory minimum sentence of one year imprisonment it is not apparent that the provision of FAQs would satisfy the quality of law requirements.

2.24 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). The minister advised that allowing matters to be specified orally helps ensure the affected visa holders have an opportunity to ask questions to clarify and confirm their understanding and gives the minister the flexibility to contact visa holders in the most appropriate way. The minister advised that 'as a matter of policy' oral notification is followed up with written confirmation and the visa holder's acknowledgement of the conditions is sought in writing. In practice, this policy of providing the condition in writing may assist in ensuring the visa holder is aware of the applicable conditions. However, as a matter of law, a visa holder would be liable to have breached the condition as soon as it was advised to them orally (even if they didn't fully understand the condition or had not been able to seek advice in relation to it). Further, where a measure limits a human right, discretionary or administrative safeguards (such as departmental policy to provide the conditions in writing) alone may not be sufficient for the purpose of a permissible limitation under international human rights law.[34] This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes as they can be amended or removed at any time.

2.25 The minister also advised that the amendments made by the 2023 Regulations create a 12 month time limit for the imposition of certain conditions, which, while they can be remade again every 12 months, provides for a review of the appropriateness of the conditions. The minister stated that this creates certainty for the visa holder as to when the conditions will cease to have effect. However, certainty as to when conditions expire does not go to the question of whether the conditions themselves are sufficiently precise to enable visa holders to understand what is expected of them and in what circumstances a breach is likely to occur.

*Legitimate objective and rational connection*

2.26 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

[34] See, for example, Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)* (1999).

from Australia once removal becomes reasonably practicable.[35] As noted in the initial analysis, 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 is no individual assessment of the risk profile of each individual within the NZYQ cohort.

2.27 In this regard, changes made by the 2023 Regulations appear to allow for a somewhat more individualised assessment for the imposition of conditions. In particular, it requires that certain conditions are only imposed on individuals with relevant criminal convictions[36] and that the minister must consider whether imposing electronic monitoring is sufficient to protect the community before imposing financial reporting requirements and curfews.[37] The explanatory statement to the 2023 Regulations states that the purpose of this amendment is to 'provide authority to the Minister to exercise a discretion not to impose a mandatory visa condition, if satisfied that it is not reasonably necessary for the protection of the community'.[38] In addition the 2023 Regulations provide that if conditions 8617 (financial transactions), 8618 (bankruptcy), 8620 (curfews) or 8621 (electronic monitoring) are imposed these will be imposed only for 12 months,[39] with the intention of ensuring there is periodic review of whether it is not reasonably necessary to impose the condition for a further 12 months.[40] The minister additionally advised that a Community Protection Board (Board) has been established to consider the individual circumstances of each visa holder and consider whether the conditions are reasonably necessary. The Board is made up of senior officials from the Department of Home Affairs, the Australian Border Force, the Australian Federal Police as well as independent experts in corrections, policing and a community representative. The Board then makes individualised representations to the minister or their delegate.

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35 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.

36 Migration Amendment (Bridging Visa Conditions) Regulations 2023, item 18.

37 Migration Amendment (Bridging Visa Conditions) Regulations 2023, item 17.

38 Migration Amendment (Bridging Visa Conditions) Regulations 2023, item 18, explanatory statement regarding item 17.

39 Migration Amendment (Bridging Visa Conditions) Regulations 2023, item 12, new section 2.25AE.

40 Migration Amendment (Bridging Visa Conditions) Regulations 2023, explanatory memorandum, p. 1.

2.28 This has the potential to allow for a more individualised assessment of the risk each visa-holder poses, such that it may demonstrate that the objective of protecting the Australian community responds to a pressing and substantial need, based on objective criteria. However, it is noted that there are a large number of conditions that remain mandatorily imposed where no individualised assessment can occur. In relation to those where there is some discretion (that of electronic monitoring, curfews and financial reporting) the threshold for imposing the conditions is still very high – namely, that each condition *must* be imposed 'unless the minister is satisfied that it is not reasonably necessary' to protect the community.

2.29 Further, the minister did not address the question as to whether the measures are strictly necessary, 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. 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).[41]

2.30 The initial analysis also queried whether conditions requiring reporting at a time and place for removal purposes, or doing everything possible to facilitate removal, are rationally connected to the stated objective of facilitating removal from Australia, in light of the fact that the NZYQ cohort are those who have no real prospect of removal becoming practicable in the reasonably foreseeable future. The minister advised that it is possible that removal could become available for one of these visa holders in the future, noting changing country information and new information regarding the individual may become available. As such, the minister advised that it is important that the visa holder adhere to reporting conditions to ensure the department can locate them if removal becomes available. On the basis of this information it may be that the reporting requirements are rationally connected, that is effective to achieve, the objective of removal from Australia.

2.31 In relation to mandatory minimum sentences, the minister advised that the use of a mandatory minimum sentence of one year and maximum five years imprisonment reflects the seriousness of the regard the visa holders are expected to have towards

41 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 were 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).

the conditions of their visa. However, the minister does not explain how this objective is not able to be achieved by having maximum five years imprisonment alone, noting that this is a significant penalty. As such, it has not been established that the mandatory minimum sentence seeks to achieve a legitimate objective for the purposes of international human rights law.

*Proportionality*

2.32 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.

2.33 As noted in the initial analysis, the mandatory nature of many of the conditions means there is no flexibility to assess the individual risk profile of each individual and apply conditions on a case by case basis. The minister's response stated that in relation to the four visa conditions regarding electronic monitoring, curfews and reporting financial information, the Community Protection Board has been established to consider each individual's factual circumstances and make recommendations as to which conditions are reasonably necessary to manage the risk to the community. Further, the minister now has to first consider if electronic monitoring alone would be enough to manage the risk before considering imposing financial reporting obligations and then finally curfews. This may offer some safeguard value if it allows for individualised decision-making and for proportionate conditions to be imposed. However, as stated above, the legislative criteria states that the minister *must* impose these four conditions unless they are satisfied that it is not reasonably necessary to protect the community. As such, it is unclear how much discretion is available in practice, noting that any person could pose some level of risk to the community. Further, there remain many more conditions that are mandatorily imposed, in respect of which there can be no consideration of individual circumstances in the imposition of them (although not all carry a criminal penalty for breach).

2.34 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.[42] No information was provided as to how removing the court's discretion and requiring a mandatory one year penalty would be proportionate.

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[42] 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.

2.35 As to the availability of review, the minister advised that the 2023 Regulations introduced a requirement that the four conditions relating to electronic monitoring, financial reporting and curfews last for 12 months and then can be remade. The minister advised that this improves proportionality by ensuring regular review of whether the conditions remain appropriate. This assists with the proportionality of these conditions. However, it is noted that this only applies to four conditions and not the others that are mandatorily imposed, which continue indefinitely. Further, the same limited discretion applies at the end of each 12 month period and the decision is made by the same decision-maker each time. There appears to be no independent review available. Further, the imposition of mandatory sentences also prevents judicial review of the severity or correctness of a minimum sentence.

*Conclusion*

2.36 As set out above, there appears to be a 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 many conditions is a minimum one year (and maximum five years) imprisonment.

2.37 In relation to whether the measure seeks to achieve a legitimate objective, noting the changes made by the 2023 Regulations, it would appear that there is some opportunity for a more individualised assessment of the risk potentially posed by visa holders, such that the measure may be said to meet the legitimate objective of protecting the Australian community. However, questions remain as to the strict necessity of the measures noting that Australian citizens who have completed a sentence of imprisonment are not subject to additional monitoring conditions in order to protect the community. In addition, it has not been established that it is necessary to impose mandatory minimum sentences to achieve the stated objectives of ensuring visa holders know of the seriousness with which breach of the conditions are taken (noting the fact that breach of the conditions makes the visa holder liable to up to five years imprisonment would appear to, itself, reflect this). The monitoring conditions said to be imposed to allow for removal of the non-citizen if it becomes possible in the future appear to be rationally connected (that is, likely to be effective to achieve) that objective.

2.38 In relation to proportionality, the 2023 Regulations introduced a number of safeguards that improve the proportionality of the measure, in that they may allow for more individualised decision-making in relation to four conditions and a requirement to remake these every 12 months. However, the discretion available is limited and there is no independent review available. Further, the imposition of mandatory sentences prevents judicial review of the severity or correctness of a minimum sentence. 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 many of 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. It is also intensified by the fact that these conditions are imposed by a member of the executive and not by a court following consideration of the individual circumstances of each case. As such, there is a significant risk, that this measure is incompatible with criminal process rights, the rights to a fair trial, right to liberty, freedom of expression, movement and association.

***Committee view***

2.39 The committee thanks the minister for this response. As set out in the committee's initial report, 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). The committee acknowledges that these conditions, particularly electronic surveillance, raise some of the same human rights concerns as incarceration.

2.40 The committee considers that the measure seeks to achieve the legitimate objective of seeking to protect the Australian community. The committee acknowledges that the amendments made by the 2023 Regulations allow for a more individualised assessment of the risk posed by each visa holder, however there still remains concerns around the human rights that are engaged. The committee considers the protection of the community to be an extremely important objective.

2.41 The committee notes the minister's response did not provide sufficient information to alleviate all of the committee's human rights concerns. In particular, the committee considers there may be a 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. Further, noting the potential severity of the impact of the conditions on individual liberty (particularly curfews and electronic monitoring) and that breach of these conditions is subject to mandatory minimum imprisonment of one year (and up to five years), it has not been

established that each of these conditions and offences would constitute a proportionate limit on rights.

2.42 The committee therefore considers there is a significant risk that this measure is incompatible with criminal process rights, the rights to a fair trial, freedom of expression, movement and association, right to liberty, right to privacy, and right to work. However, as the bills have now passed, and as the 2023 Regulations appear to in part provide for additional safeguards, the committee makes no further comment on this legislation.

## Additional mandatory visa conditions

2.43 As set out above, the bridging visas granted to the NZYQ cohort are subject to other mandatory visa conditions.[43] While these visa conditions must be imposed, they do not engage the new offence provisions.

2.44 The following conditions that require the visa holder to do the following things do not appear to be captured by the offence provisions:[44]

- obtain the minister's approval before taking up specific kinds of employment or activities, undertaking flight training, or obtaining specific chemicals;[45]
- not acquire any weapons or explosives, or take up employment or undertake activities involving weapons or explosives;[46]

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[43] 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.

[44] 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).

[45] 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.

[46] Migration Regulations 1994, Schedule 8, conditions 8554, 8562 and 8563.

- not communicate or associate with a terrorist entity or organisation; and[47]
- not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community.[48]

2.45 Additionally, the following are prescribed as conditions that are not a 'monitoring condition', and therefore breach of these will not constitute an offence:[49]

- 8612: if convicted of an offence involving a minor or any other vulnerable person, the holder must notify Immigration of the full name, and date of birth, of each person residing with them;
- 8616: must notify Immigration of any contact with anyone known by the holder to have been charged with, or convicted of, a criminal offence;
- 8617: must notify Immigration within 5 working days if they receive or transfer amounts totalling $10 000 or more from one or more other persons;
- 8618: must notify Immigration within 5 working days if: the visa holder incurs debts totalling $10 000 or more; is declared bankrupt; or there is any significant change in relation to the holder's debts or bankruptcy.[50]

## Summary of initial assessment

### *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*

2.46 In order to assess whether the 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. Not all of the mandatory 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

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47 Migration Regulations 1994, Schedule 8, condition 8556.

48 Migration Regulations 1994, Schedule 8, condition 8303.

49 Migration Regulations 1994, section 2.25AC (as amended by items 8 and 9 of the Migration Amendment (Bridging Visa Conditions) Regulations 2023.

50 Condition 8621 (must wear a monitoring device at all times) is also prescribed, although note, section 76D separately makes this an offence for failure to comply.

liable for immigration detention as an unlawful non-citizen.[51] 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.[52] 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.[53] 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.[54] If the visa were cancelled, all such benefits would cease and the member of the NZYQ cohort (who cannot be deported from Australia) would be required to live in the community without any means of supporting themselves.

2.47 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 arbitrarily interfere with a person's private and home life.[55] The right to work provides that everyone must be able to freely accept or choose their work, and includes a right

51 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].

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

53 *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.

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

55 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).

not to be unfairly deprived of work.[56] The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds.[57] 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.[58] 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.[59]

2.48 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.[60] 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.

***Committee's initial view***

2.49 The committee noted 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 impermissibly limit multiple human rights.[61] Given the committee's previous human rights concerns with respect to many of the conditions and noting the insufficient information contained in the explanatory materials, the committee considered further information was required to assess the compatibility of this measure with multiple human rights, and as such sought the minister's advice in relation to questions as set out in the minister's response below.

2.50 The full initial analysis is set out in *Report 13 of 2023*.

[56] 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].

[57] International Covenant on Civil and Political Rights, article 19(2).

[58] 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].

[59] International Covenant on Civil and Political Rights, article 22.

[60] International Covenant on Economic, Social and Cultural Rights, articles 9, 11 and 12.

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

## Minister's response[62]

2.51 The minister advised:

> The conditions imposed on BVRs are not all considered to be monitoring and curfew conditions (the breach of which constitutes a criminal offence).
>
> Broadly, criminal offences apply in relation to breaches of monitoring conditions, curfew and electronic monitoring conditions. This means that those conditions as listed in the Committee's paragraph 1.48 do not attract criminal penalties as they do not fall into one of these categories.
>
> The Committee also correctly notes that subsection 76B(4) of the Migration Act provides that certain prescribed conditions are excluded from criminal penalties. For the purposes of subsection 76B(4), regulation 2.25AC prescribes conditions 8612 (notify of household members), 8616 (notify of criminal contacts), 8617 (notify of transactions over $10,000 AUD), 8618 (notify of debts in excess of $10,000 AUD and bankruptcy) and 8621 (electronic monitoring).
>
> This means that as a result of the BVC and BVSOOM Bills, criminal offences apply for breaches of the following monitoring conditions:
>
> - 8401 – Must report at a specified time and place.
> - 8513 – Must notify of residential address within 5 days of grant
> - 8542 – Must report in person for removal when instructed
> - 8543 – Must attend at a place and time to facilitate efforts to arrange removal
> - 8552 – Must notify of change in employment details
> - 8561 – Must attend a specified place and time for an interview relating to the visa
> - 8614 – Must notify of interstate or overseas travel
> - 8615 – Must notify of associations if convicted of offence involving minor or vulnerable person
>
> Criminal offences also apply to breaches of the curfew condition (8620) and the electronic monitoring condition (8621).
>
> Additionally, new criminal offences introduced in the BVC Bill apply for breaches of conditions 8622 (must not work or perform incidental activity with minors or vulnerable people), 8623 (must not go within 200 metres of a school) and 8624 (must not make contact with victim or victim's family). These conditions only apply where a person has a relevant criminal history.

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62 The minister's response to the committee's inquiries was received on 15 January 2024. This is an extract of the response. The response is available in full on the committee's webpage.

The offences that apply to a breach of these BVR conditions are vital to ensuring that the NZYQ-affected cohort remain appropriately engaged with the Department and the ABF, and cooperate in arrangements to facilitate their removal from Australia. The new offence provisions provide a proportionate response in order to effect engagement of the NZYQ-affected cohort with the Department and ABF. Attempts to deliberately and repeatedly evade contact with, and monitoring by, the Department and the ABF demonstrates a disregard and contempt for Australian laws. This behaviour is contrary to the Australian community's expectations that the NZYQ-affected cohort abides by Australia's laws and will engage with the Department and the ABF to resolve their immigration status.

All visa conditions applicable to BVRs put beyond doubt the types of behaviours that are unacceptable for the NZYQ-affected to engage in whilst they resolve their immigration status residing in the Australian community.

However, only some of these BVR conditions attract criminal penalties when breached. This is appropriate and reasonable to ensure the Australia community can continue to have confidence that the migration system is being well-managed in respect of the NZYQ-affected cohort.

The consequence of breaching a BVR condition that does not attract criminal penalties could include that the individual will be warned and counselled about expected conduct.

Previous compliance with visa conditions is one factor that may be considered when assessing whether a person should be referred to the Court for consideration under the new Community Safety Order provisions.

***(a) what are the legal consequences of not complying with conditions [that are not subject to criminal penalties]***

Some of the BVR conditions that do not attract criminal penalties are imposed so that the Government can be clear about what behaviour is expected of this cohort in the Australian community.

While failure to comply with a visa condition can render a BVR liable for cancellation, the Department and the ABF will consider compliance with the relevant BVR condition and other conditions, employing a flexible response to alleged breaches that will be proportionate to the severity of the breach. The Department and ABF ensure that BVR holders understand the conditions through the provision of information, education and counselling about expected behaviours and consequences of non-compliance.

The BVCOM Bill was amended by the Government in the Senate to introduce a Community Safety Order scheme in the Criminal Code 1995 which includes Community Safety Detention Orders and Community Safety Supervision Orders that can be issued by a court.

Previous compliance with visa conditions is one factor that may be considered when assessing whether a person should be referred to the Court for consideration under these new provisions.

***(b) are the conditions described in paragraph [1.48] 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***

Condition 8303 is an existing condition that has not been amended by either the BVC or BVCOM Bills. What would be considered 'disruptive' would depend on the factual circumstances.

The amendments in the Migration Amendment (Bridging Visa Conditions) Regulations 2023 omit wording referring to significant financial hardship. Instead, condition 8618 has been reworded as follows:

> **8618** (1) If the holder incurs a debt or debts totally AUD10 000 or more, the holder must notify Immigration within 5 working days after the holder incurs the debt or debts.
>
> (2) If the holder is declared bankrupt, the holder must notify Immigration within 5 working days after the holder is so declared.
>
> (3) The holder must notify Immigration of any significant change in relation to the holder's debts or bankruptcy within 5 working days after the change occurs.

New condition 8618 clearly requires the BVR holder to whom the condition applies to notify of debts amounting to a total of AUD10,000 or more or bankruptcy.

The meaning of significant change as defined in policy by the Department is any receipt of AUD10,000 or more, and any increase in the level of debt of AUD10,000 or more.

These amendments strengthen and make clear what behaviour is required by the visa conditions.

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

Non-citizens granted any visa, including a BVR, are notified in writing of the decision to grant the visa. This notification includes information about any conditions that apply to the holder of the visa.

Additionally, the Department provides oral notification of the BVR grant to each individual and explains the conditions that apply. Interpreters are available for BVR holders during these conversations if required.

During reporting conversations, the Department gathers information from the BVR holder about compliance with visa conditions and if breaches are identified, counselling about expected behaviour is provided and the BVR holder's understanding is confirmed.

Failure to continue to comply may lead to formal warning notices, criminal penalties, and/or a referral to the court for consideration of a Community Safety Order.

***(c) whether visa cancellation action remains a possible consequence of noncompliance 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***

The provisions in the Migration Act that allow or require a visa to be cancelled will still apply to BVR holders. However, where that cancellation is discretionary, such as for breaching BVR conditions, it is expected to be used only in exceptional circumstances. This is because the usual consequence of visa cancellation is detention and removal, which are not available to the NZYQ-affected cohort. As the Committee has pointed out, visa cancellation would lead to the denial of the ability to support themselves while living in the community.

The Government has therefore created criminal penalties that apply to this cohort for breaches of certain BVR conditions and a Community Safety Order framework which includes Community Safety Detention orders as well as Community Safety Supervision orders. These provide an effective means of response to potential serious breaches of visa conditions within the NZYQ-affected cohort, because it is clear that the normal consequences of breaching visa conditions will not apply to this cohort.

The Minister will consider a person's compliance with visa conditions as well as other aspects of the individual's circumstances when considering whether to make an application to the court for consideration for a Community Safety Order.

An individual's history of compliance with conditions on their BVR, including any warning notices previously issued, will be taken into account when decided whether to refer the individual to the Australian Federal Police for consideration of prosecution for a breach those visa conditions that are linked to criminal offences at sections 76B, 76C and 76D of the Migration Act.

***(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).***

> Upon grant of a BVR, individuals are given a grant notification letter which contains a list of all conditions imposed on the person's visa.
>
> The grant notification also provides an explanation of which conditions are subject to an offence under the Migration Act, as well as those conditions for which breaches are excluded from the offences.

## Concluding comments

### *International human rights legal advice*

2.52 The minister advised that for those conditions that do not attract a criminal penalty, the consequence of breaching the condition could include that the individual will be warned and counselled about expected conduct, and that compliance with visa conditions is one factor that may be considered when assessing whether a person should be referred to the court to impose a new Community Safety Order. The minister also acknowledged that failure to comply with a condition could render the visa liable to be cancelled, but said that it is 'expected to be used only in exceptional circumstances' given visa cancellation (for those who cannot be removed from Australia) would lead to the denial of the ability of the person to support themselves while living in the community.

2.53 On the basis of this advice, it would appear that there is the possibility that non-compliance with the visa conditions could lead to its cancellation, which, as noted in the initial advice would result in the removal of the person's work rights and access to social security and Medicare. As such, this measure risks limiting a number of human rights, including the rights to an adequate standard of living, social security and health.[63] 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'.[64] 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, unable to support himself, is, by the deliberate action of the state, denied

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

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

shelter, food or the most basic necessities of life'.[65] While the minister advised that visa cancellation would occur only in 'exceptional circumstances', such circumstances are not defined and there is no legislative limit to require that the visas of the NZYQ cohort only be cancelled in exceptional circumstances.

2.54 In addition, as set out in the initial analysis, 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. This is because the conditions appear enforceable noting the risk of visa cancellation. 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, and warned and counselled as to expected conduct, there may still be a chilling effect on human rights. In this respect, it is noted that the minister advised that non-compliance with these conditions may be a factor for referral to the court for a Community Safety Order. It is noted that a Community Safety Order can only be made by a court if, amongst other things, 'the offender poses an unacceptable risk of seriously harming the community by committing a serious violent or sexual offence'.[66] It is unclear that breach of conditions relating to notification of financial matters or taking up certain kinds of employment is relevant to whether such an order can be made against them.[67]

2.55 Most of the rights engaged by this measure may be limited if it is demonstrated that 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. Much of the analysis above with respect to the application of the limitation criteria is applicable with respect to this measure.

2.56 In relation to the quality of law test, the initial analysis raised concerns that some of the conditions may not be sufficiently certain such as to meet this test, particularly 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'. The minister advised that condition 8303, that the visa holder 'must not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community', was an existing condition and what would be considered 'disruptive' would depend on the factual

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

66 Criminal Code Act 1995, sections 395.12 and 395.13.

67 The committee commented on the compatibility of these orders with multiple human rights in its *Report 14 of 2023* (19 December 2023) pp. 31-59.

circumstances. This does not provide any further clarification as to what activities would be likely to lead to visa cancellation. Nor did the minister address the question as to whether this would limit a visa holder's right to freedom of assembly, for instance by preventing them from engaging in peaceful protest. As such, it has not been demonstrated that the imposition of this condition satisfies the 'quality of law' test, which requires 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 may restrict the exercise of their rights.[68] 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'.[69]

2.57 In relation to the financial hardship condition, the minister advised that the 2023 Regulations amended this condition to omit references to significant financial hardship and to reword it to make clearer the responsibility of the visa holder, namely to notify if the holder incurs specific debts, is declared bankrupt or if there is 'any significant change in relation to the holder's debts or bankruptcy'. The minister advised that the meaning of significant change is defined in the policy of the department as any receipt of $10 000 or more or increase in the debt by $10 000 or more. Removal of the requirement to notify Immigration within five days of any significant financial hardship is welcome, noting the lack of clarity as to when suffering such hardship would begin or end. The department's policy makes clear what is meant by a significant change in relation to debts or bankruptcy, but it is not clear why this is not specified within the condition itself. As such, there is some uncertainty regarding its application, such that there may be some concerns whether it meets the quality of law test. This is particularly so noting that the minister's response did not answer the question posed as to whether visa holders are provided with any guidance as to what each condition specifically requires.

2.58 The objective of these measures and its proportionality are identical to those identified at paragraphs [2.26]-[2.30] above. As concluded above, the measures may be said to meet the legitimate objective of protecting the Australian community, but questions remain as to the strict necessity of the measures, and the measures are not likely to be proportionate. In relation to these conditions that are not subject to criminal penalty, if the consequence is warnings and counselling as to expected behaviour, this would likely be a proportionate limit on rights. However, cancellation

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68 *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].

69 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].

of the visa (leading to a loss of work rights or any social security benefits) would not amount to a proportionate limit on rights. As such, there is a risk, depending on how breach of these conditions is treated, that the measures would be incompatible with multiple rights.

***Committee view***

2.59 The committee thanks the minister for this response. 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, engage and may limit multiple human rights, including the rights to privacy, work and freedom of assembly, association and expression.

2.60 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 impermissibly limit multiple human rights.[70]

2.61 The committee considers that the imposition of these measures seeks to achieve the legitimate and important objective of protecting public safety. The committee considers that the compatibility of these measures with multiple human rights depends on the consequences, in practice, for visa holders for breach of these conditions. The minister advised that visa cancellation would only occur in 'exceptional circumstances', as to cancel visas of people in this cohort would deny the ability of the person to support themselves while living in the community (as they would not be eligible to work or to receive any social security benefits). The committee considers that as the legislation does not restrict the cancellation of visas to only in exceptional circumstances, there is a risk that the imposition of these conditions is not compatible with multiple rights. However, as the bills have now passed, and as the 2023 Regulations appear to largely provide for additional safeguards, the committee makes no further comment on this legislation.

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## Powers of authorised officers

2.62 The second bill introduced two new powers relating to monitoring devices and the collection, use and disclosure of information by 'authorised officers'.[71] An 'authorised officer' is defined to be anyone (or a class of persons) authorised in writing

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

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

by the minister, the Secretary or the Australian Border Force Commissioner to act as such.[72]

2.63 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;

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

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

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

2.64 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.

2.65 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).[73] 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*

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

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

73 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.[74]

2.67 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.[75] The right to security of person[76] 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’).

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

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[74] 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].

[75] International Covenant on Civil and Political Rights, article 6.

[76] International Covenant on Civil and Political Rights, article 9(1).

respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.[77] 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.

2.69 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.[78]

#### *Committee's initial view*

2.70 The committee considered further information was required with respect to this measure to assess its compatibility with the rights to privacy, life, security of person and effective remedy, and as such sought the minister's advice in relation to questions as set out in the minister's response below.

2.71 The full initial analysis is set out in *Report 13 of 2023.*

### Minister's response[79]

2.72 The minister advised:

> The safety of the Australian community is an absolute priority for the Government. The measures in the proposed legislation were enacted because of the pressing need to ensure that members of the Australian community are not placed at risk due to the release of the NZYQ-affected cohort from immigration detention.
>
> Many of the people who have been released are individuals who have committed serious criminal offences, including violent and sexual assault offences. The Government is committed to monitoring the behaviour of these individuals and, where necessary, imposing additional measures to protect the Australian community.

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[77] 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.

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

[79] The minister's response to the committee's inquiries was received on 15 January 2024. This is an extract of the response. The response is available in full on the committee's webpage.

Electronic monitoring must be imposed unless the Minister is satisfied that it is not reasonably necessary to impose the condition for the protection of any part of the Australian community. The provisions to support the use of electronic monitoring devices only apply where the electronic monitoring condition is imposed.

The objective of the amendments in the BVCOM Bill is to make clear on the face of the legislation the power to use electronic monitoring. This includes:

- authority for the installation, use and monitoring of the electronic monitoring devices
- authority for the collection, use and disclosure of information gained from electronic monitoring devices, and
- ensuring this authority extends to officers of specified Commonwealth, state and territory agencies.

Visa condition 8621(2) requires a visa holder to allow an authorised officer to fit, install, repair or remove a monitoring device. As such, under the current legislative provisions, it is necessary to obtain a BVR holder's consent to fit, install, repair and remove a monitoring device.

These provisions do not authorise the use of force to install monitoring devices, however a refusal to comply with this requirement constitutes a criminal offence (subsection 76D(2)).

Authorisation provisions in the *Criminal Code Act 1995* in relation to control orders have been adapted for this purpose – see for example subsections 104.5A(2), (4) and (5) of the Code. The provisions represent an appropriate and proportionate method of achieving the non-punitive object of community safety.

One purpose of electronic monitoring is to avoid a requirement for a BVR holder to have to report frequently to the Department and the ABF on their location, if the Department or the ABF already have that information via electronic monitoring. The amendments make the imposition of the conditions as a whole less of an interference in the day to day activities of an individual's life.

The scope of the authorisation to collect, use and disclose information raised a number of policy issues which were carefully worked through by the Department, including:

- who should be authorised to collect, use and disclose information
- the purpose for which the information may be collected, used and disclosed
- the scope of the information covered, for example:
  - the initial disclosure of information by the Commonwealth to State or Territory authorities, contractors and subcontractors for the purpose of configuring a monitoring device

  - information obtained through the use of monitoring devices
  - information obtained through other surveillance and enforcement activities, such as curfew checks
- safeguards or restrictions to prevent the misuse of this information.

Any use of personal information by ABF officers and Departmental officers is consistent with the *Privacy Act 1988*.

***(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;***

The provisions to support the use of electronic monitoring devices only apply where the electronic monitoring condition is imposed. The provisions represent an appropriate and proportionate method of achieving the enabling authorised officers to carry out functions in relation to electronic monitoring, to protect community safety.

Applying these monitoring conditions in practice can be time-critical, and it is a policy decision of the Government to give authorised officers the power to do anything convenient that may help in determining the location of the BVR holder being monitored.

***(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;***

The provisions to support the use of electronic monitoring devices can only be imposed where this is necessary to support community safety and to be able to readily contact BVR holders should their removal from Australia become reasonably practicable. The provisions represent an appropriate and proportionate method of achieving the non-punitive object of community safety.

It is a policy decision of the Government to give authorised officers the power to do all things that may help in determining the location of the person being monitored.

All departmental employees and ABF officers are subject to the Department's Integrity and Professional Standards Framework, which supports officers' obligation to undertake their duties in accordance with the APS code of conduct. This framework ensures all behaviours and actions undertaken by employees is done so with consideration to the preservation of human rights, and respect and reasonableness, wherever possible and appropriate.

***(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;***

The Government considers the imposition of these monitoring requirements to be reasonable and necessary both for the purposes of community safety and to ensure that members of the NZYQ-affected cohort remain engaged in arrangements to manage their temporary stay in, and when practicable removal from, Australia.

The monitoring conditions are targeted and applied where reasonably necessary, allowing the Department and the ABF to respond appropriately if the BVR holder engages in behaviour that may put the Australian community or public order at risk.

The targeted monitoring conditions apply where knowing the physical location of person is important for community protection, for example in ensuring that a convicted child sex offender complies with conditions relating to proximity to child-care centres and schools.

***(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'.***

The Government is committed to ensuring the safety of the Australian community and giving authorised officers the necessary powers to achieve this. This includes the collection, use and disclosure of information that may be necessary to protect the public.

There are a range of persons that may need to collect, use and disclose information obtained through the use of monitoring devices or in the course of other activities associated with monitoring compliance with BVR conditions. These people may be in government agencies at the Commonwealth, State or Territory level, and in some cases could be contractors and sub-contractors to government.

Monitoring and responding to potential BVR condition breaches requires a collaborative approach, which includes the sharing of information with third party agencies and sub-contractors. Prescribing the scope of information,

and who it can be disclosed to, would limit this collaboration, and likely increase community risk as authorised officers may not be able to share information in all situations where it might be necessary.

Any collection, use or disclosure of personal information by authorised officers and must be consistent with the Privacy Act 1988 (Privacy Act). For example, if a visa holder is alleged to have committed an offence, then the disclosure of that visa-holder’s personal information to a law enforcement body, such as the Australian Federal Police, or a State or Territory police as part of the process of mitigating risk to the Australian community would be subject to the protections and regulatory actions afforded by the Privacy Act.

***(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;***

The right to privacy 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.

Personal information collected in the monitoring process would be held in accordance with the collection and security requirements of the Australian Privacy Principles, the policies and procedures of the Department and the Australian Government Protective Security Policy Framework (AGPSPF). The Department holds personal information in a range of audio-visual, paper and electronic based records (including in cloud-based applications and services). The Department complies with the AGPSPF for protecting departmental resources (including information) from harm or unauthorised access. If personal information held by the Department is lost, or subject to unauthorised access or disclosure, the department will respond in accordance with the Office of the Australian Information Commissioner's guidelines.

The Government is committed to ensuring the safety of the Australian community and to give authorised officers the necessary power to achieve this. This includes the collection, use and disclosure of information necessary to protect the public and the provisions represent an objective and proportionate means of achieving that objective. Disclosure of information must be made in accordance with the Privacy Act and Departmental employees are also subject to the Department’s Integrity and Professional Standards Framework, which supports officers’ obligation to

undertake their duties in accordance with the APS code of conduct. This framework ensures all behaviours and actions undertaken by employees is done so with consideration to the preservation of human rights, and respect and reasonableness, wherever possible and appropriate.

Any member of the NZYQ cohort who is in the community and is experiencing an emergency (whether that be to their personal safety or something such as a fire, flood or other natural disaster) has access to, and is entitled to receive, the same level of assistance from emergency services as any other member of the public.

***(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***

The legislation ensures that authorised officers – a class of persons which may include Commonwealth, State and/or Territory employees – can exercise powers as necessary under subsections 76F(1) and (2) of the Migration Act without contravening any Commonwealth, State or Territory legislation relating to the collection, use or disclosure of personal information; other restrictions on the use of information; or the use of surveillance devices. These powers are necessary to facilitate the physical operation of the electronic monitoring scheme as well as the exchanges of information necessary to facilitate that operation. Given the electronic monitoring devices may be applied in one jurisdiction and the individual may travel across state borders, making it clear that electronic monitoring pursuant to the Migration Act can operate without contravening state or territory legislation avoids any doubt about the interaction between laws and across jurisdictions.

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

A BVR holder has the following remedies for the potential violation of any rights arising from the exercise of an authorised officer's powers:

- A right to seek a remedy in tort, for example damages for trespass, or false imprisonment
- A right to make a complaint to the Commonwealth Ombudsman, the Australian Human Rights Commission, or the National Anti-Corruption Commission as relevant.
- A right to make representations under subsection 76E(3) as to why their BVR should not be subject to a condition prescribed under paragraph 76E(1)(a) (which includes the monitoring condition, and so could be indirectly relevant to an authorised officer's exercise of powers under s 76F).
- A right to seek judicial review of a decision of the Minister (or a delegate) to grant a BVR with a monitoring condition imposed.

## Concluding comments

### *International human rights legal advice*

2.73 The minister advised that the main purpose of this measure is to make clear on the face of the legislation the power to use electronic monitoring, by empowering an authorised officer to act in relation to a monitoring device. The analysis above (at paragraphs [2.26]-[2.30])in relation to legitimate objective and rational connection generally apply in relation to this measure. However, questions arise as to the necessity and proportionality of all of the powers available to authorised officers.

2.74 In particular, subsection 76F(1) enables 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. The minister advised that the targeted monitoring conditions apply where knowing the physical location of a person is important for community protection. However, the minister did not explain why it would not be sufficient to limit the monitoring of location to specific instances (including where necessary to protect the public), noting that as drafted it would allow the authorised officer to monitor the person's location via the monitoring device at all times.

2.75 In respect of whether the powers given to authorised officers are a proportionate limit on the right to privacy, 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.

2.76 In response to why an authorised officer is empowered to do anything 'convenient' to be done, and not that which is 'reasonably necessary', the minister advised that it is a policy decision of government to give authorised officers the power 'to do all things that may help in determining the location' of the person being monitored and applying these monitoring conditions in practice can be time-critical. The minister advised that all departmental employees and ABF officers are subject to the APS Code of Conduct, to ensure all behaviours and actions undertaken by employees are done with consideration to human rights and respect and reasonableness 'wherever possible and appropriate'. This may mean that in practice officers act with reasonableness. However, it is noted that anyone, including non-APS officers, may be designated as authorised officers. Further, subsection 76F(3) provides

that authorised officers may exercise their power despite any other law of the Commonwealth, a State or a Territory. This would include the APS Code of Conduct which is found in section 13 of the *Public Service Act 1999*.

2.77 The minister also advised that the provisions do not authorise the use of force to install a monitoring device. However, again, as all other laws, including unwritten laws, are excluded from applying, the crime of assault and the tort of false imprisonment would be excluded from applying to the officer's actions.[80] Conceivably therefore the provision could allow the officer to restrain a person in order to check their device. 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 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.[81] 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.

2.78 In relation to the ability for authorised officers to collect, use and disclose personal information, 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 that 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 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'.[82] However, the bill is not circumscribed in this way. The explanatory statement also

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

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

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

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.[83]

2.79 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. The minister did not specifically address this question. The minister advised that personal information collected in the monitoring process would be held in accordance with the Australian Privacy Principles and the policies and procedures of the department and the Australian Government Protective Security Policy Framework. The minister advised that disclosure 'must' also be made in accordance with the Privacy Act and the APS Code of Conduct. However, as discussed above, subsection 76F(3) provides that an authorised officer's powers, including their power in subsection 76F(2) to 'collect, use, or disclose to any other person, information (including personal information)' for a range of purposes is exercisable despite any other law. This would include the Privacy Act and APS Code of Conduct. Therefore, while in practice such matters may (or may not) be adhered to, there would appear to be no legislative limit on collection, use and disclosure of the personal information if it is for one of the broadly framed purposes.

2.80 Subsection 76F(4) provides that an authorised officer's exercise of power is subject to any conditions, restrictions or other limitation prescribed by the regulations for this purpose. This could operate as a safeguard if appropriate conditions are included in the regulations, however, the minister's response did not address whether there is any intention to make such regulations. The minister advised that this provision allows authorised officers to exercise powers without contravening any law 'relating to the collection, use or disclosure of personal information; other restrictions on the use of information; or the use of surveillance devices'. The minister advised this is necessary given electronic monitoring devices may be applied in one jurisdiction and the individual may travel so it is necessary to operate without contravening state or territory legislation. The minister also advised a person would still have a right to seek a remedy in tort. However, as a matter of statutory interpretation, it would appear

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

that it is not only such laws as listed by the minister that would be disapplied. Subsection 76F(3) provides that in the exercise of any of the authorised officer's powers relating to monitoring devices and related monitoring equipment and the collection, use and disclosure of information, these powers may be exercised despite any other law. Therefore, in exercising these powers, discrimination laws, privacy protections, tort law etc would not apply. If the intention is to avoid doubts about the interaction between laws and across jurisdictions, 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, written or unwritten.

2.81 Noting the breadth of the powers given to authorised officers to do all things necessary or convenient to be done for a range of purposes in relation to a person who is subject to monitoring, and their broad collection, use and disclosure powers, without any statutory safeguards applying, this measure appears incompatible with the right to privacy. As these powers are exercised despite any other law it also is likely to be incompatible with the right to an effective remedy.

2.82 Finally, the minister's response did not address the question of 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 personal information with the general public and media. As stated above, 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, which requires protection against vigilante 'justice'. As the minister provided no information in relation to this, it is not possible to conclude whether the measure is compatible with the rights to life and security of person.

### *Committee view*

2.83 The committee thanks the minister for this response. 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, engages and limits 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.

2.84 As stated above, the committee considers that the protection of the Australian community is an important and legitimate objective and understands the need to make clear on the face of the legislation the powers of authorised officers to use electronic monitoring. However, the committee notes the breadth of the powers provided to officers to do all things ‘necessary or convenient’ and considers there are inadequate safeguards to properly protect the right to privacy. This is particularly so noting that the authorised officers’ powers can be exercised despite any other law, written or unwritten. As such, the committee considers the measure is not compatible with the right to privacy and the right to an effective remedy. As the minister did not provide any information as to the engagement of the rights to life and security of the person, the committee is unable to conclude that the powers are compatible with these rights.

**Suggested action**

2.85 The committee notes the power for regulations to be made to restrict or limit an authorised officer’s powers, and considers the proportionality of this measure may be assisted were regulations made to provide:

(a) that an authorised officer is subject to those laws the minister advised they are subject to, including the common law of tort, the *Privacy Act 1998* and the APS Code of Conduct (found in the *Public Service Act 1999*);

(b) that an authorised officer must only do that which is ‘reasonably necessary’ (rather than anything ‘necessary or convenient’);

(c) that an authorised officer’s powers are subject to the condition that they are bound by the APS Code of Conduct;

(d) that an authorised officer must act reasonably when imposing a requirement on a person subject to monitoring to enable the officer to exercise their powers;

(e) that, consistent with subsection 76F(2), in exercising the power to monitor a person’s location, an authorised officer must only do so in order to determine whether a condition is being complied with; whether the person has committed an offence; to protect the public; or to facilitate the person’s location for the purposes of their removal;

(f) that an authorised officer must not disclose the location and name of a person subject to monitoring to the media (except in life-threatening emergencies);

(g) that an authorised officer is restricted to using, collecting or disclosing the personal information of the person subject to monitoring and not anyone else connected with the person; and

(h) to limit to whom an authorised officer may disclose personal information, namely to those Commonwealth, state and territory entities that require the information.

2.86 As the bills have now passed the committee makes no further comment.

# Legislative instruments

## Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2023[84]

| | |
|---|---|
| **FRL No.** | F2023L01372 |
| **Purpose** | This legislative instrument amends the Charter of the United Nations (Listed Persons and Entities) Instrument 2022 to list seven persons and one entity for counter-terrorism financing sanctions under Part 4 of the *Charter of the United Nations Act 1945* |
| **Portfolio** | Foreign Affairs and Trade |
| **Authorising legislation** | *Charter of the United Nations Act 1945* |
| **Disallowance** | 15 sitting days after tabling (tabled in the House of Representatives and in the Senate on 16 October 2023). Notice of motion to disallow must be given by 28 November 2023 in the Senate and by 8 February 2024 in the House)[85] |
| **Rights** | Fair hearing; privacy |

2.87 The committee requested a response from the minister in relation to the instrument in *Report 12 of 2023*.[86]

### Freezing of individuals' assets

2.88 The *Charter of the United Nations Act 1945* (Charter of the UN Act), in conjunction with various instruments made under that Act,[87] gives the Australian government the power to apply sanctions to give effect to decisions of the United Nations (UN) Security Council. Australia is bound by the *Charter of the United Nations 1945* (UN Charter) to implement UN Security Council decisions.[88] Obligations under the UN Charter may override Australia's obligations under international human rights

84 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2023, *Report 1 of 2024*; [2024] AUPJCHR 5.

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

86 Parliamentary Joint Committee on Human Rights, *Report 12 of 2023* (15 November 2023), pp. 10–19.

87 See, in particular, the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2021C00916].

88 *Charter of the United Nations 1945*, articles 2 and 41.

treaties.[89] However, the European Court of Human Rights has stated there is a presumption that UN Security Council Resolutions are to be interpreted on the basis that they are compatible with human rights, and that domestic courts should have the ability to exercise scrutiny of sanctions so that arbitrariness can be avoided.[90]

2.89 This legislative instrument lists seven individuals for counter-terrorism financing sanctions under Part 4 of the Charter of the UN Act – the effect of which is to freeze existing money and assets of those listed and to make it an offence for a person to use or deal with a freezable asset (unless it is an authorised dealing) and to provide any future assets to listed persons.[91] The instrument is stated as giving effect to UN Security Council resolution 1373, which requires Australia, as a UN Member State, to freeze the funds, assets and economic resources of persons 'who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts'.[92] Of those individuals listed, three persons are stated to hold dual Australian citizenship, one of whom is currently stated to be located in Australia.[93]

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89 *Charter of the United Nations 1945*, section 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. However, there is a body of academic literature arguing that international human rights law does apply to the UN Security Council (UNSC). See, e.g. Nadeshda Jayakody, 'Refining United Nations Security Council Targeted Sanctions: 'Proportionality' as a way forward for human rights protection', *Security and Human Rights*, vol. 29, 2018 pp. 90–119. At p. 99, the author states that the 'most convincing argument in favour of the application of human rights to the UNSC [United Nations Security Council] is the UN Charter itself. The Charter obliges the UNSC to act in accordance with the UN's purposes and principles, one of which is to "promote and encourage respect for human rights and fundamental freedoms." Another is to settle situations which might breach the peace "in conformity with the principles of justice and international law." As a result, there is a strong textual argument to be made that respect for human rights is inherent in the UN Charter. The UNSC must respect human rights by virtue of its own governing document.'

90 *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights (Grand Chamber) Application No.5809/08 (2016) [140] and [145]–[146]. At paragraph [153], the Court outlined various criticisms of the UN sanctions system with respect to human rights, including consistent criticisms from Special Rapporteurs of the UN and other regional and domestic courts.

91 *Charter of the United Nations Act 1945*, sections 20–22. It is noted that the legislative instrument also lists one entity for sanctions, however, noting that human rights apply to persons not entities, this entry is only concerned with the listing of individuals.

92 United Nations Security Council, Resolution 1373(1)(c), S/RES/1373 (2001), made on 28 September 2001.

93 Item 2. All three individuals listed as dual Australian citizens have had their Australian passports either revoked or cancelled.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights to a fair hearing and privacy*

2.90 The committee's examination of Australia's sanctions regimes has been, and is, focused solely on measures that impose restrictions on individuals that are within Australia's jurisdiction. As this instrument lists an individual who is located in Australia and therefore within Australia's jurisdiction, Australia's human rights obligations are enlivened.[94] It is therefore necessary to assess the human rights compatibility of the sanctions regime under Part 4 of the Charter of the UN Act with respect to individuals in Australia.

2.91 The effect of a listing is that it is an offence for a person to use or deal with a freezable asset (unless it is an authorised dealing) and to make an asset directly or indirectly available to, or for the benefit of, a listed person.[95] A person's assets are therefore effectively 'frozen' as a result of being listed. For example, a financial institution is prohibited from allowing a listed person to access their bank account. This can apply to persons living in Australia or could apply to persons outside Australia and would impact both the persons listed as well as any dependent family or relatives. A listing by the minister is not subject to merits review, and there is no requirement that an affected person be given any reasons for why a decision to list them has been made.

2.92 The scheme provides that the minister may grant a permit authorising the making available of certain assets to a listed person (known as 'authorised dealings').[96] An application for a permit can only be made for basic expenses; a legally required dealing; where a payment is contractually required; or an extraordinary expense dealing.[97] A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[98]

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94 Noting that the scope of a State party's obligations under human rights treaties extends to all those within the State's jurisdiction. For instance, article 2(1) of the International Covenant on Civil and Political Rights requires a state 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.

95 *Charter of the United Nations Act 1945*, sections 20 and 21. Section 22 relates to authorised dealings.

96 *Charter of the United Nations Act 1945*, section 22.

97 Charter of the United Nations (Dealing with Assets) Regulations 2008, section 5.

98 Charter of the United Nations (Dealing with Assets) Regulations 2008, subsection 5(3).

2.93 The listing of a person under the sanctions regime may therefore engage a range of human rights. As the committee has previously set out,[99] sanctions may operate variously to both limit and promote human rights. For example, sanctions prohibiting the proliferation of weapons of mass destruction will promote the right to life. Sanctions could also promote human rights globally. With respect to this instrument, the statement of compatibility states that denying an individual access to assets that could be used to carry out or facilitate terrorist acts of violence, which may take lives, promotes the rights to life and freedom from the advocacy of national, racial or religious hatred.[100]

2.94 However, the sanctions regime also limits a number of human rights, in particular the right to a private life and the right to a fair hearing.[101] The statement of compatibility acknowledges the right to privacy is engaged, but does not identify the potential limitation on the right to a fair hearing and so provides no assessment of compatibility with this right.[102]

2.95 The right to privacy prohibits arbitrary or unlawful interference with an individual's privacy, family, correspondence or home.[103] The freezing of a person's assets and the requirement for a listed person to seek the permission of the minister to access their funds for basic expenses imposes a limit on that person's right to a

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99 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 15 of 2021* (8 December 2021), pp. 2–11 (Autonomous Sanctions), and *Report 8 of 2021* (23 June 2021) pp. 27–35 and *Report 10 of 2021* (25 August 2021) pp. 117–128 (Charter of UN Sanctions). See also *Report 2 of 2019* (2 April 2019) pp. 112–122; *Report 6 of 2018* (26 June 2018) pp. 104–131; *Report 4 of 2018* (8 May 2018) pp. 64–83; *Report 3 of 2018* (26 March 2018) pp. 82–96; *Report 9 of 2016* (22 November 2016) pp. 41–55; *Thirty-third Report of the 44th Parliament* (2 February 2016) pp. 17–25; *Twenty-eighth Report of the 44th Parliament* (17 September 2015) pp. 15–38; *Tenth Report of 2013* (26 June 2013) pp. 13–19; Sixth Report of 2013 (15 May 2013) pp. 135–137.

100 Statement of compatibility, p. 4. It is noted that the statement of compatibility incorrectly identified other rights as being promoted, such as the right to self-determination (which is a collective, not individual, human right).

101 The sanctions regime may also engage and limit the right to an adequate standard of living if an individual was unable to meet their basic needs or those of their family as a result of their assets being frozen. However, the statement of compatibility (p. 5) has adequately justified this potential limitation. In particular, the provisions allowing for authorised dealings appear to be sufficient to mitigate the risk of the right to an adequate standard of living being impermissibly limited. Further, it is noted that the individual who is located in Australia is detained in Melbourne Assessment Prison and it is therefore likely that his basic needs are being met (such as access to food, shelter and water). This right is therefore not considered in this entry. For a general discussion on the human rights implications of targeted sanctions see Matthew Happold, 'Targeted Sanctions and Human Rights', in Paul Eden and Matthew Happold (eds), *Economic Sanctions and International Law*, Hart Publishing, Oxford, 2016, pp. 87–112.

102 Statement of compatibility, pp. 5–6.

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

private life, free from interference by the state. The measures may also limit the right to privacy of close family members of a listed person. As noted above, once a person is listed under the sanctions regime, the effect of the listing is that it is an offence for a person to directly or indirectly make any asset available to, or for the benefit of, a listed person (unless authorised under a permit to do so). This could mean that close family members who share funds with a listed person may not be able to access those shared funds without needing to account for all expenditure, on the basis that the expenditure could indirectly benefit a listed person, for example, if the funds were used to purchase goods that were provided to the listed person.

2.96 In relation to a similar sanctions regime in the United Kingdom, the House of Lords held that the regime 'strike[s] at the very heart of the individual's basic right to live his own life as he chooses'.[104] Lord Brown concluded:

> The draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated. Construe and apply them how one will…they are scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing. Undoubtedly, therefore, these Orders provide for a regime which considerably interferes with the [right to privacy].[105]

2.97 The need to get permission from the minister to access money for basic expenses could, in practice, impact greatly on a person's private and family life.

2.98 The right to a fair hearing applies both to criminal and civil proceedings, to cases before both courts and tribunals.[106] The right applies where rights and obligations, such as personal property and other private rights, are to be determined. In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal and have a reasonable opportunity to present their case. Ordinarily, the hearing must be public, but in certain circumstances, a fair hearing may be conducted in private. When a person is listed by the minister, there is no requirement that the minister hear from the affected person before a listing is made or continued; no requirement for reasons to be provided to the affected person; no provision for merits review of the minister's decision; and no review of the minister's decision to grant, or not grant, a permit allowing access to funds, or review of any conditions imposed. The European Court of Human Rights has emphasised the importance of protecting the right to a fair hearing in the context of sanctions regimes.[107] It has stated:

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[104] *HM Treasury v Ahmed* [2010] UKSC2 at [60] (*Ahmed*).

[105] *Ahmed* at [192] per Lord Brown.

[106] International Covenant on Civil and Political Rights, article 14.

[107] *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights (Grand Chamber) Application No.5809/08 (2016) [146]–[147].

> in view of the seriousness of the consequences for the [European] Convention rights of those [listed] persons, where a resolution such as that in the present case, namely [UN Security Council] Resolution 1483 [which required the freezing of the assets and property of senior officials of the former Iraqi regime], does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided. By limiting that scrutiny to arbitrariness, the Court takes account of the nature and purpose of the measures provided for by the Resolution in question, in order to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security.[108]

2.99 The rights to a private life and fair hearing 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 the case of executive powers which could seriously disrupt the lives of individuals subjected to them, the existence of safeguards is important to prevent arbitrariness and error, and ensure that the powers are exercised only in the appropriate circumstances.

***Committee's initial view***

2.100 On the basis of the significant human rights concerns identified by the committee previously in relation to sanctions regimes that apply to individuals, the committee has made a number of recommendations,[109] several of which have been implemented in comparable regimes like in the United Kingdom, to ensure the compatibility of the sanctions regimes with human rights. The committee noted that its recommendations do not appear to have been implemented and as such, sought the minister's advice as to why the sanctions regime does not include each of its previous recommendations. The committee also sought information from the minister regarding the compatibility of this specific instrument with the right to a private life (as set out in the minister’s response below).

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

108 *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights (Grand Chamber) Application No.5809/08 (2016) [146].

109 Parliamentary Joint Committee on Human Rights, *Report 15 of 2021* (8 December 2021), pp. 2–11 (Autonomous Sanctions) and *Report 8 of 2021* (23 June 2021) pp. 27–35 and *Report 10 of 2021* (25 August 2021) pp. 117–128 (Charter of UN Sanctions). See also *Report 9 of 2016* (22 November 2016) p. 53; *Report 6 of 2018* (26 June 2018) pp. 128–129; and *Report 2 of 2019* (2 April 2019) p. 122.

## Minister's response[110]

2.102 The minister advised:

Committee's recommendations

a) the provision of publicly available guidance in legislation setting out in detail the basis on which the minister decides to list a person;

The criteria for sanctions listings under the *Autonomous Sanctions Act 2011* (AS Act) are articulated in regulations 6 and 6A of the Autonomous Sanctions Regulations 2011 (AS Regs). Where these criteria are met, the Minister for Foreign Affairs' (the Minister) decision to list is discretionary. Sanctions decisions are made on a case-by-case basis, and are applied judiciously based on relevant evidence and following careful consideration. As each listing is determined on the facts specific to the individual and entity, which will differ depending on the situation of international concern, further detail on the basis on which the Minister decides a listing beyond that already provided in the AS Regs would not be appropriate.

The listing criteria for counter-terrorism financing sanctions are set out in United Nations Security Council Resolution (UNSCR) 1373 and implemented in Australian law by Regulation 20 of the Charter of the United Nations (Dealing with Assets) Regulations 2008, which provides that

> *the Minister must list a person or entity if the Minister is satisfied that the person or entity is a person or entity mentioned in paragraph 1 (c) of UNSCR 1373;*

That is:

- a person who commits, or attempts to commit, terrorist acts or participates in or facilitates the commission of terrorist acts;
- an entity owned or controlled directly or indirectly by such persons; or
- a person or an entity acting on behalf of, or at the direction of such persons and entities.

If the Minister is satisfied on reasonable grounds of the listing criteria, then the Minister must list them.

As such, the guidance for listing in relation to counter-terrorism financing sanctions is already provided for in publicly available legislation, and any decision by the Minister to list under Part 4 of COTUNA requires the Minister to be satisfied on reasonable grounds.

110 The minister's response to the committee's inquiries was received on 25 January 2024. This is an extract of the response. The response is available in full on the committee's website.

b) <u>regular reports to Parliament in relation to the basis on which persons have been listed and what assets, or the amount of assets, that have been frozen;</u>

The Department must maintain a Consolidated List setting out all persons and entities subject to sanctions under Australian sanctions law, as well as all assets or classes of assets currently listed under section 15 of COTUNA or regulation 7 of the AS Regs. The Consolidated List is available here.

The names of persons, entities, and assets or classes of assets subject to sanctions are also detailed within various legislative instruments made under Part 4 of COTUNA and the AS Regs (for example, the Charter of the United Nations (Listed Persons and Entities) Instrument 2022).

c) <u>provision for merits review before a court or tribunal of the minister's decision to list a person;</u>

It is the Government's position that any limitation on access to merits review for such decisions should be justified in line with the principles developed by the Administrative Review Council (ARC). The ARC'S publication 'What decisions should be subject to Merits review?' provides examples of situations where exclusion of merits review may be justified. Included in this category are policy decisions of a high political content (from 4.22).

The decisions of the Minister in relation to sanctions fall within the scope of this exception. The ARC cites illustrative examples of decisions that may fall within this exception, including decisions:

- affecting the Australian economy;
- affecting Australia's relations with other countries;
- concerning national security; and
- concerning major political controversies.

The Minister's sanctions decisions under Australian sanctions law engage most if not all of these characteristics.

Australian sanctions law has the legitimate objective of giving domestic effect to UNSCRs and providing a foreign policy mechanism for the Australian Government to address situations of international concern. The exclusion of merits review in relation to sanctions- related decisions is warranted by the seriousness of the foreign policy and national security considerations involved, as well as the potentially sensitive nature of the evidence relied on in reaching those decisions.

While merits review is unavailable for a sanctions decision by the Minister, an applicant can still seek judicial review of a decision.

d) <u>regular periodic reviews of listings;</u>

All listings under Part 4 of COTUNA and AS Regs expire three years after they are made, and the Minister must determine whether or not to remake them before that date. The Minister is therefore already required to make a fresh decision for each listing on a periodic basis.

e) automatic reconsideration of a listing if new evidence or information comes to light;

A person may request the revocation of their listing (under both Part 4 of COTUNA and the AS Regs) at any time, including on the basis that there is new information that the Minister should consider. The Minister also maintains the power to revoke a listing on their own initiative if they became aware of new information. A listing must be revoked if the Minister no longer considers that a person meets the relevant listing criteria.

f) limits on the power of the minister to impose conditions on a permit for access to funds to meet basic expenses;

Sanctions permits are requested by a range of individuals and entities in the Australian community, and in a range of circumstances. A fetter on the power to impose conditions may unintentionally limit the Minister's ability to ensure permits comply with our international obligations (for example, under UNSCR 1373) and accord with Australia's foreign policy. Such a permit would be decided on a case-by-case basis and the conditions (if any) placed on it would be fact-dependant.

g) review of individual listings by the Independent National Security Legislation Monitor (INSLM);

Listing decisions undertaken by the Minister already undergo consultation with a range of Government agencies as appropriate, and consultation is undertaken on a case-by-case basis depending on the relevant situation of international concern. The Prime Minister and Attorney-General also retain the power to refer matters related to national security or counter-terrorism to the INSLM for review (s 7 of the *Independent National Security Legislation Monitor Act 2010).*

The ability for any listee to seek to revoke their listing (under both Part 4 of COTUNA and the AS Regs), as well as the ability for the Minister to issue permits tailored to each individual case and specific to each situation of international concern, are appropriate and proportionate.

h) provision that any prohibition on making funds available does not apply to social security payments to family members of a listed person (to protect those family members);

There are very limited situations under which social security payments made to a family member of a listed person, rather than to a listed person themselves, would be a freezable asset, or under which social security payments to someone who is not a listed person would be prohibited. A blanket provision to that effect would, consequently, be unnecessary, and

would not allow the Minister flexibility to apply such a prohibition in the unlikely event that it became necessary to do so.

In any case, the ability for the Minister to use permits is a flexible mechanism permitting Australia to consider its human rights obligations alongside its obligations under UNSCRs, in accordance with Australian foreign policy, and as appropriate on a case by case basis.

i) <u>consultation with operational partners such as the police regarding other alternatives to the imposition of sanctions.</u>

As the Minister has noted publicly, sanctions are not the only tool available in situations of international concern, and they will rarely be the Minister's first choice. Alternatives are explored, and consultation undertaken across Government (including with the Australian Federal Police), as appropriate on a case-by-case basis.

<u>*The Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2023*</u>

The Committee has also sought advice on the below questions:

a) <u>whether consideration is given to the potential impact on family members or other dependents when a decision is made to freeze the assets of a person located in Australia;</u>

As part of each listing, the Department undertakes a search to assess what transactions have been conducted by a potential listee, so that the impact of any asset freeze or targeted financial sanction can be assessed (including impacts on potential family members and dependents), and inform any listing decision.

If there are potential impacts on family members or other dependents, the ability for the Minister to use permits is a flexible mechanism permitting Australia to consider its human rights obligations alongside its obligations under UNSCRs, in accordance with Australian foreign policy, and as appropriate on a case by case basis.

b) <u>if a freezable asset is a joint asset, such as a joint bank account of a listed person and their spouse, what safeguards are in place to ensure that any interference with the privacy of the joint asset owner is proportionate?</u>

UNSCR 1373 requires signatories to, among other things, prevent and suppress the financing of terrorist acts, and freeze the financial assets of terrorists. This is implemented through Part 4 of COTUNA. Freezing joint assets is a necessary step in achieving this outcome, and is a proportionate response in preventing the financing of terrorism. Any joint asset owners may apply for authorisation in dealing with those assets. The ability for the Minister to use permits is a flexible mechanism permitting Australia to consider its human rights obligations alongside its obligations under UNSCRs, in accordance with Australian foreign policy, and as appropriate on a case-by-case basis.

c) what types of conditions would the minister impose on a permit for access to funds to meet basic expenses?

Sanctions permits are requested by a range of individuals and entities in the Australian community. Types of conditions imposed by the Minister will be a matter for the Minister to decide, on a case by case basis, to ensure the specific conditions enable Australia to continue to meet its obligation to prevent and suppress the financing of terrorist acts, and freeze the financial assets of terrorists.

A permit may specify certain people, entities, organisations or institutions which may deal with the assets of, and / or provide assets to a listee, and the conditions may stipulate the circumstances under which such dealings can take place. The ability for the Minister to use permits is a flexible mechanism permitting Australia to consider its human rights obligations alongside its obligations under UNSCRs, in accordance with Australian foreign policy, and as appropriate on a case by case basis.

## Concluding comments

### *International human rights legal advice*

2.103 As set out in the initial analysis, giving effect to Australia's international obligations to prevent and suppress terrorist financing is a legitimate objective for the purposes of international human rights law, and imposing sanctions is rationally connected to this objective by denying persons the financial means to undertake terrorist activities.[111] The key question is whether the measure is proportionate.

2.104 As set out in the initial analysis, the committee has consistently raised concerns that the sanctions regimes, including sanctions to which this instrument relates, may not be regarded as proportionate, in particular because of a lack of effective safeguards to ensure that the regime, given its potential serious effects on those subject to it, is not applied in error or in a manner which is overly broad in the individual circumstances.[112]

2.105 For example, the minister is required to list a person as subject to sanctions on the broad grounds that the minister is 'satisfied' that the person has committed, or attempted to commit, terrorist acts or participated in or facilitated the commission of terrorist acts.[113] The specific criteria as to how the minister determines these matters is not set out in legislation. There is no requirement that there first be a judicial finding that the person has engaged in terrorist acts, and it would appear that the minister could list a person who had been acquitted of engaging in terrorist acts, as long as the

[111] Statement of compatibility, pp. 4 and 6.

[112] See, most recently, Parliamentary Joint Committee on Human Rights, *Report 8 of 2021* (23 June 2021) pp. 27–35 and *Report 10 of 2021* (25 August 2021) pp. 117–128.

[113] Charter of the United Nations (Dealing with Assets) Regulations 2008, section 20.

minister is satisfied that the person had been involved.[114] There is also no requirement that the minister form a reasonable suspicion or even a reasonable belief. The minister advised that the criteria on which a person is listed for sanctions is publicly available, reflecting what is set out in the UN Security Council Resolution. While Resolution 1373 is indeed publicly available, the obligation imposed on states parties is framed in relatively broad terms, requiring states to freeze funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; or anyone who acts on behalf of, or at the direction of, such persons.[115] Resolution 1373 does not provide specific guidance on the threshold at which an individual may be declared by the minister and on what particular basis. This lack of clarity raises concerns that the measure may not be sufficiently circumscribed.

2.106 Of particular concern with respect to proportionality is that there is no provision for merits review before a court or tribunal of the minister's decision to list a person. While the minister's decision is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), the effectiveness of judicial review as a safeguard within the sanctions regime relies, in significant part, on the clarity and specificity with which legislation specifies powers conferred on the executive. The scope of the power to list someone is based on the minister's satisfaction in relation to certain matters which are stated in broad terms. This formulation limits the scope to challenge such a decision on the basis of there being an error of law (as opposed to an error on the merits) under the ADJR Act. The European Court of Human Rights has observed that for judicial review to be sufficient in the context of a dispute over a decision to list a person for sanctions, the court must be able to obtain:

> sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary. Any inability to access such information is therefore capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged, thus continuing to hinder any judicial scrutiny.[116]

2.107 Further, the Court has held that failure to afford a listed person 'at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been

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114 See *Sayadi and Vinck v Belgium*, UN Human Rights Committee (Application No. 1472/2006) (22 October 2008) [10.8 and [10.12]], where the UN Human Rights Committee noted that as a criminal investigation against listed persons was dismissed, restrictions on those persons were not necessary and violated their right to freedom of movement and right to privacy.

115 United Nations Security Council, Resolution 1373(1)(c), S/RES/1373 (2001), made on 28 September 2001.

116 *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights (Grand Chamber) Application No.5809/08 (2016) [147].

arbitrary' impaired 'the very essence of their right of access to a court'.[117] Thus, the availability of judicial review in this context appears insufficient, in and of itself, to operate as an adequate safeguard for human rights purposes.

2.108 The minister advised that it is the government's position that it is guided by the principles developed by the Administrative Review Council (the Council) in 1999 as to which decisions should be subject to merits review.[118] Using this guide the minister states that policy decisions of a high political content are excluded from merits review, and that sanctions decisions affect the Australian economy; relations with other countries; concern national security; and concern major political controversies. The minister also states that the exclusion of merits review in relation to sanctions-related decisions is warranted by the seriousness of the foreign policy and national security considerations and the potentially sensitive nature of the evidence relied on in reaching those decisions. However, it is noted that the 1999 guide also states that 'an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review'[119] and only rarely will decision-making powers fall within the exception of policy decisions of a high political content. The Council also stated that it 'considers it preferable for decisions made under such a power to be made subject to merits review, with a mechanism being established to provide for the exclusion from review of those decisions that fall within the exception', for example that they only be effected by the minister issuing and tabling in the Parliament a certificate, providing for the particular decision to be excluded from review, and indicating the basis of the exclusion.[120] As this does not occur in relation to the imposition of sanctions it is not clear that the exclusion is, as the response suggested, in line with the principles developed by the Council. In any event, as a matter of international human rights law, in cases involving severe interferences with the fundamental rights of individuals, there is a requirement for sufficient rights of review such as to satisfy the requirements of a fair hearing. In relation to the minister's argument that potentially sensitive evidence might be relied on in making the decision, it is noted there are already processes in place for administrative tribunals to restrict the evidence available to the applicant on national security grounds.[121]

2.109 The minister can also make the listing without hearing from the affected person before the decision is made. While the initial listing may be necessary to ensure

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117 *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights (Grand Chamber) Application No.5809/08 (2016) [151].

118 Administrative Review Council, *What decisions should be subject to Merits review?* (1999).

119 Administrative Review Council, *What decisions should be subject to Merits review?* (1999), paragraph 2.1.

120 Administrative Review Council, *What decisions should be subject to Merits review?* (1999), paragraph 4.28.

121 For example, see the entry in this report relating to the Administrative Review Tribunal Bill 2023 and Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023.

the effectiveness of the regime, as prior notice would effectively 'tip off' the person and could lead to assets being moved off-shore, there may be less rights-restrictive measures available, such as freezing assets on an interim basis until complete information is available including from the affected person.

2.110 Additionally, once the decision is made to list a person, the listing remains in force for three years and may be continued after that time.[122] The listing may be continued by the minister declaring in writing that it continues to have effect, but such a declaration is not a legislative instrument.[123] There also does not appear to be any requirement that if circumstances change or new evidence comes to light, the listing will be reviewed before the three-year period ends. The minister advised that a person may request the revocation of their listing at any time, including on the basis that there is new information the minister should consider. However, while a person may apply to have their listing revoked, the minister is not required to consider an application if the listed person has made an application within the year.[124] The minister also advised that the minister has the power to revoke a listing on their own initiative if they become aware of new information, and a listing must be revoked if the minister no longer considers that a person meets the listing criteria. However, without an automatic requirement of reconsideration if circumstances change or new evidence comes to light, a person may remain subject to sanctions notwithstanding that the listing may no longer be required.

2.111 In relation to the committee’s recommendation that the Independent National Security Legislation Monitor (INSLM) review individual listings, the minister advised that other mechanisms are sufficient, namely: internal government consultation; the ability for the government to choose to refer matters to the INSLM; the ability for the listed person to seek to revoke their listing; and the minister’s discretion to issue a permit. However, none of these discretionary mechanisms would appear equivalent to having independent oversight requirements built into the process.

2.112 In relation to the committee’s recommendation that there should be regular reports to Parliament in relation to the basis on which persons have been listed and what assets, or the amount of assets, that have been frozen, the minister advised that the department maintains a publicly available Consolidated List setting out all persons and entities subject to sanctions and they are detailed within various legislative instruments. However, while the names of the individuals are publicly available, this does not detail the reasons for which the minister has listed each individual and what assets have been frozen.

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122 *Charter of the United Nations Act 1945*, section 15A.

123 *Charter of the United Nations Act 1945*, subsections 15A(2) and (5).

124 *Charter of the United Nations Act 1945*, section 17.

2.113 There are also concerns relating to the minister's unrestricted power to impose conditions on a permit to allow access to funds to meet basic expenses. Giving the minister an unfettered power to impose conditions on access to money for basic expenses does not appear to be the least rights restrictive way of achieving the legitimate objective, noting that the type of conditions imposed will impact the potential extent of interference with rights. The minister advised that permits are requested by a range of individuals and entities in a range of circumstances and limiting the minister’s powers to impose conditions may limit the ability of the minister to ensure the permits comply with Australia’s international obligations. Rather, permits should be decided flexibly, on a case-by-case basis and any conditions should be fact-dependent. The minister did not answer the question as to what types of conditions would be imposed on a permit for access to funds to meet basic expenses.

2.114 In relation to the family members of an affected person, the minister advised that there are ‘very limited situations under which social security payments made to a family member of a listed person, rather than to a listed person themselves, would be a freezable asset, or under which social security payments to someone who is not a listed person would be prohibited’. In response to whether consideration should be required to be given to the potential impact on family members or other dependents, therefore, the minister advised that this is unnecessary and would not allow the minister ‘sufficient flexibility’. The minister also advised that if the assets of a person in Australia are frozen, and this would affect family members in Australia, the use of permits is a flexible mechanism permitting Australia to consider its human rights obligations alongside other obligations as appropriate on a case-by-case basis. If a freezable asset is a joint asset, any joint asset owners may apply for a permit to deal with those assets. Therefore, it is clear that persons in Australia who are not listed may be affected by the application of sanctions, including having their assets frozen should they be joint asset holders, or the potential to have any benefits accruing to them (that may assist a listed family member) frozen. The requirement for such non-listed persons to rely on the minister exercising their non-compellable, non-reviewable, broad discretionary power to ensure they have sufficient funds available to live by, raises significant concerns about the limit on their human rights.

2.115 Noting these concerns regarding the breadth of the minister’s discretion, the lack of applicable statutory safeguards and the potential significant impact on human rights, there is a significant risk that the imposition of sanctions by this instrument (applying as it does to a person within Australia) is incompatible with the rights to a fair hearing and privacy.

***Committee view***

2.116 The committee thanks the minister for this response. The committee acknowledges that sanctions regimes generally operate as mechanisms for applying pressure to regimes and individuals with a view to ending the repression of human rights internationally and suppressing terrorism. The committee notes the importance

of Australia acting in concert with the international community to prevent egregious human rights abuses arising from situations of international concern, including the importance of satisfying Australia's obligations under the UN Charter.

2.117 However, the committee regards it as important to recognise that the sanctions regimes operate independently of the criminal justice system, and can be used regardless of whether a designated or declared person has been charged with or convicted of a criminal offence. For those in Australia who may be subject to sanctions, requiring ministerial permission to access money for basic expenses could, in practice, impact greatly on a person's private life as well as the privacy of their family members. As such, the committee considers these listings engage and limit the right to privacy and a fair hearing for those in Australia. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.118 While the committee acknowledges that Australia's obligations under the UN Charter may override Australia's obligations under international human rights treaties, it notes that European Court of Human Rights jurisprudence has held that UN Security Council Resolutions, such as Resolution 1373 to which this instrument relates, are to be interpreted on the basis that they are compatible with human rights.

2.119 The committee notes that the minister, in making a listing, is not required to hear from the affected person at any time; or provide reasons for the listing; and there is no provision for merits review of any of the minister's decisions (including any decision to grant, or not grant, a permit allowing access to funds). The committee has previously found that there is a risk that the sanctions regimes may be incompatible with the rights to a fair hearing and privacy (and other rights). As such, this instrument, by applying sanctions to a person within Australia's jurisdiction, also risks being incompatible with these rights.

2.120 On the basis of the significant human rights concerns identified by the committee in relation to sanctions regimes that apply to individuals, the committee has previously made a number of recommendations,[125] several of which have been implemented in relation to a comparable regime in the United Kingdom, to assist the compatibility of the sanctions regimes with human rights. The committee's previous recommendations have not been implemented and the committee notes the minister has indicated the government 'has no immediate plans to adopt the measures proposed by the Committee'. The committee considers, given the significant human rights engaged by the sanctions regimes, a full review of their compatibility with

[125] Parliamentary Joint Committee on Human Rights, *Report 15 of 2021* (8 December 2021), pp. 2–11 (Autonomous Sanctions) and *Report 8 of 2021* (23 June 2021) pp. 27–35 and *Report 10 of 2021* (25 August 2021) pp. 117–128 (Charter of UN Sanctions). See also *Report 9 of 2016* (22 November 2016) p. 53; *Report 6 of 2018* (26 June 2018) pp. 128–129; and *Report 2 of 2019* (2 April 2019) p. 122.

human rights be undertaken with a view to including legislative safeguards, in line with international best practice.

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

**Mr Josh Burns MP**

**Chair**