

Report snapshot¹

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
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Administrative Review Tribunal Bill 2023

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

Advice to Parliament

Litigation guardians

Rights of persons with disability

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.

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
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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

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.
