Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 10 of 2024

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Contents

Committee information

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

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

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

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

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

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

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

Report snapshot[1]

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

Bills

Chapter 1: New and continuing matters	
Bills introduced 8 October to 11 November 2024	24
Bills commented on in report[2]	1
Private members or senators' bills that may engage and limit human rights	0
Chapter 2: Concluded	
Bills committee has concluded its examination of following receipt of ministerial response	2

Accountability of Grants, Investment Mandates and Use of Public Resources Amendment (End Pork Barrelling) Bill 2024 [No. 2]

No comment

Aged Care Bill 2024

Advice to Parliament

Commonwealth aged care system (including statement of rights, restrictive practices, supporters and guardians, publication of banning orders and information sharing)

Multiple rights

The committee thanks the minister for the provision of a response and reiterates the recommendations it made in *Report 9 of 2024*.

With respect to the proposed statement of rights, the committee reiterates that, in view of the direct connection between several of

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 10 of 2024*; [2024] AUPJCHR 78.

2 The committee makes no comment on the remaining bills on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

the rights contained in the statement of rights, and key human rights contained in the International Covenant on Civil and Political Rights, it would be appropriate for the bill to be amended to identify that the bill gives effect to Australia's obligations under the International Covenant on Civil and Political Rights. The committee recommends that subclause 5(a) of the bill be amended to include reference to Australia's obligations under the International Covenant on Civil and Political Rights.

Aged Care Legislation Amendment Bill 2024

No comment

Better and Fairer Schools (Funding and Reform) Bill 2024

No comment

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024

Advice to Parliament

Regulating digital content

Multiple rights

The committee thanks the minister for the provision of a response and reiterates the recommendations it made in *Report 9 of 2024*.

The committee further considers that, having regard to the additional information provided with respect to the right to an effective remedy, there appear to be insufficient remedies available with respect to breaches of human rights (including the right to freedom of expression and privacy), which raises questions as to whether there is an effective remedy. The committee recommends that consideration be given to amending the bill to require the Australia Communications and Media Authority (ACMA) to establish a complaints mechanism to handle complaints with respect to breaches of human rights arising from the proposed scheme.

Competition and Consumer Amendment (Tougher Penalties for Supermarket and Hardware Businesses) Bill 2024

No comment

Corporations Amendment (Streamlining Advice Process) Bill 2024

No comment

Customs Amendment (ASEAN-Australia-New Zealand Free Trade Area Second Protocol Implementation and Other Measures) Bill 2024

No comment

Customs Tariff Amendment (Incorporation of Proposals and Other Measures) Bill 2024

No comment

Cyber Security Bill 2024

No comment

Environment Protection and Biodiversity Conservation Amendment (Reconsideration of Decisions) Bill 2024

No comment

Food and Grocery (Mandatory) Code of Conduct Bill 2024

No comment

Free TAFE Bill 2024

No comment

Help to Buy (Consequential Provisions) Bill 2023 [No. 2]

No comment

Help to Buy Bill 2023 [No. 2]

No comment

Higher Education Support Amendment (Fair Study and Opportunity) Bill 2024

No comment

Intelligence Services and Other Legislation Amendment (Cyber Security) Bill 2024

No comment

Interactive Gambling Amendment (Ban Gambling Ads) Bill 2024

No comment

Migration Amendment Bill 2024 and related instrument[3]

Seeking Information	**Visa cancellation, bridging visa conditions and associated measures** *Multiple human rights* The bill seeks to amend the *Migration Act 1958* to provide for the cessation of certain bridging visas, enable protection findings to be

[3] Migration Amendment (Bridging Visa Conditions) Regulations 2024

reversed, permit the disclosure of criminal history information (both domestically and to foreign countries), and enable Australia to establish third country reception arrangements, enabling people who have had their visa ceased to be removed to those countries. The bill also seeks to alter the test by which the minister may remove certain bridging visa conditions (relating to electronic monitoring and curfews). The Migration Amendment (Bridging Visa Conditions) Regulations 2024 (which took effect from 10.13am on 7 November 2024) changed the test for where the minister may impose visa conditions, including curfews or electronic monitoring, on a bridging visa.

The measures in this bill and legislative instrument engage and may limit multiple human rights, including: criminal process rights; effective remedy; expulsion of aliens; freedom of movement; health; liberty; non-refoulement; privacy; protection of the family; and the prohibition on torture and cruel, inhuman or degrading punishment. The committee is seeking further information from the minister in order to assess the compatibility of these measures with these human rights.

National Broadband Network Companies Amendment (Commitment to Public Ownership) Bill 2024

No comment

Navigation Amendment Bill 2024

No comment

Oversight Legislation Amendment (Robodebt Royal Commission Response and Other Measures) Bill 2024

No comment

Scams Prevention Framework Bill 2024

This bill seeks to establish a framework for the prevention of scams, the detail of which would be set out in delegated legislation. The scheme would provide for the sharing of personal information 'where appropriate', however the statement of compatibility provides no detail as to: what types of personal information may be shared (to whom or when) and subject to what (if any) privacy safeguards. No information is provided as to whether or how such disclosure would be subject to oversight and review, or whether a person whose privacy was breached as a result would have access to an effective remedy to address the breach (particularly in light of the proposed immunity from liability in the bill). The committee has authorised its secretariat to notify departments where statements of compatibility appear to be inadequate. As such, the committee's secretariat has written to the department in relation to this matter.

Security of Critical Infrastructure and Other Legislation Amendment (Enhanced Response and Prevention) Bill 2024

No comment

Sydney Airport Demand Management Amendment Bill 2024

No comment

Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024

The committee notes that this bill would engage and limit the privilege against self-incrimination and the right to privacy. While the statement of compatibility accompanying this bill identified the engagement of these rights, it did not provide sufficient information to demonstrate that the proposed limitations would likely be permissible under international human rights law. The committee considers that while the proposed limitations on rights would likely be permissible, having regard in particular to the regulatory context of the measures, the statement of compatibility should nevertheless have provide a detailed, reasoned and evidence-based assessment of each of the measures that would limit these rights. The committee has authorised its secretariat to notify departments where statements of compatibility appear to be inadequate. As such, the committee's secretariat has written to the department in relation to this matter.

Legislative instruments

Chapter 1: New and continuing matters

Legislative instruments registered on the Federal Register of Legislation between 7 September to 10 October 2024 and one further legislative instrument[4]	162
Legislative instruments commented on in report[5]	1

Chapter 2: Concluded

Legislative instruments committee has concluded its examination of following receipt of ministerial response	0

Legislation (Deferral of Sunsetting—Aged Care Instruments) Certificate 2024

This instrument defers sunsetting of a number of legislative instruments, including the Quality of Care Principles 2014, which set out the circumstances and requirements for the use of restrictive practices on persons receiving aged care services. The committee has commented on the significant human rights issues relating to the use of restrictive practices on persons in aged care, particularly in the context of legislation that amended the Quality of Care Principles 2014, such as the Quality of Care Amendment (Restrictive Practices) Principles 2022 (*Reports 1* and *3 of 2023*) and the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 (*Inquiry Report 2019*). Most recently, in its consideration of the Aged Care Bill 2024 (in *Report 9 of 2024*), the committee considered that to the extent that requirements relating to the use of restrictive practices would strengthen the responsibilities of providers by enhancing safeguards around the use of restrictive practices, they may assist to ensure that rights are not impermissibly limited. However, allowing for the requirements to not apply in an emergency and authorising substitute decision-makers to consent to the restrictive practice on behalf of an individual who is considered to lack capacity (as is the case currently under the Quality of Care Principles 2014), would likely weaken the safeguard value of the requirements and may in practice increase the risk of human rights violations. The

[4] 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, use the advanced search function on the Federal Register of Legislation, and select 'Collections' to be 'legislative instruments'; 'type' to be 'as made'; and date to be 'registered' and 'between' the date range listed above. This report includes consideration of the Migration Amendment (Bridging Visa Conditions) Regulations 2024 [F2024L01410], registered on 7 November 2024.

[5] Unless otherwise indicated, 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.

committee further considered that allowing substitute decision-makers to consent to the use of restrictive practices and granting complete immunity to persons who use restrictive practices in reliance of the consent of substitute decision-makers risks being incompatible with a range of human rights, particularly the rights of persons with disability.

By deferring the sunsetting of the Quality of Care Principles 2014, this instrument, in effect, remakes the legislation. As such, the committee's previous comments on the specific measures in the Quality of Care Principles 2014 relating to use of restrictive practices as well as the committee's comments on related aged care legislation, remain relevant. The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

Legislation (Deferral of Sunsetting—Airport Instruments) Amendment Certificate 2024

The committee notes that this legislative instrument defers sunsetting of the Airports (Protection of Airspace) Regulations 1996 (regulations), which establish a system for the protection of airspace at, and around, airports. The committee notes that this is the first time a statement of compatibility has been prepared with respect to the regulations as a whole (noting that the regulations were initially made prior to this committee's establishment and the previous sunsetting certificate was exempt from disallowance). In such circumstances, the committee expects the statement of compatibility to provide a detailed, reasoned and evidence-based assessment of each measure that may engage and limit a right. The statement of compatibility accompanying this instrument did not meet the committee's expectations in this regard. The committee has authorised its secretariat to notify departments where statements of compatibility appear to be inadequate. As such, the committee's secretariat has written to the department in relation to this matter.

Legislation (Deferral of Sunsetting—National Security Information (Criminal and Civil Proceedings) Regulation) Certificate 2024

The committee notes that this legislative instrument defers sunsetting for 24 months of the National Security Information (Criminal and Civil Proceedings) Regulation 2015 (the regulation), which establishes obligations for the protection of national security information in federal criminal and civil proceedings to which the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act) applies. The committee has previously commented on the NSI Act in *Report 13 of 2020*, in relation to the right to a fair hearing and the withholding of certain evidence from a defendant in criminal proceedings and access to a special advocate. The committee notes that the Independent National Security Legislation Monitor conducted a review of the NSI Act in 2023 and Recommendation 12 recommends that the regulation expressly provide for the powers and obligations of special advocates in this context. The committee reiterates its concerns regarding the scheme for restricting access to national security information in criminal proceedings and special advocates and draws these human rights concerns to the attention of the Parliament.

Migration Amendment (Bridging Visa Conditions) Regulations 2024

Seeking Information	See summary above regarding the Migration Amendment Bill 2024

National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (NDIS Supports) Transitional Rules 2024

This instrument sets out what supports are NDIS supports and what supports are *not* NDIS supports for the purposes of section 10 of the *National Disability Insurance Scheme Act 2013* (NDIS Act). It also sets out the transitional rule for participants' plans that commenced before schedule 1 of the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Act 2024.* In effect, the transitional rule will ensure that participants who have a support stated in their plan or participants who have received a decision from the Administrative Appeals Tribunal that identifies a particular support as reasonable and necessary, can continue to access that support for the duration of their plan even if it is not declared to be an NDIS support under this instrument. Finally, the instrument prescribes the supports and conditions for the purposes of the CEO of the National Disability Insurance Agency (NDIA) making a replacement support determination under subsection 10(6) of the NDIS Act. Subsection 10(6) of the NDIS Act allows the CEO to declare in relation to a participant that a support is taken to *not* be declared as a support that is not an NDIS support if certain criteria are met, including that the support is prescribed by the NDIS rules and the CEO is satisfied that any other conditions specified in the NDIS rules are met. The effect of a replacement support determination is that a support that has been declared to not be an NDIS support may nonetheless be considered to be an NDIS support for a particular participant and the participant can use their funding to purchase the support without contravening the requirements of their plan.

In *Reports 4* and *5 of 2024*, the committee considered that to the extent that the new definition of an NDIS support would have the effect of reducing the type of supports that will be funded by the NDIS and thus available for participants, it would engage and limit the rights of persons with disability as well as the rights to an adequate standard of living, health and social security. Additionally, to the extent that the measure applied to children, the rights of the child would be engaged and possibly limited. The committee considered that while the measure pursued a legitimate objective, there was a risk that, depending on how the NDIS rules were drafted, the measure may not be sufficiently flexible to ensure that any limitation on rights would be proportionate in each case. It recommended that future NDIS rules made for the purposes of section 10 of the NDIS Act contain sufficient flexibility such that where a support is either not declared to be an NDIS support or is declared to not be an NDIS support, the NDIA may nevertheless exercise discretion to approve the provision of that support through the NDIS if the participant has demonstrated a need for the support as a result of their disability.

Subsequently to the committee's concluding comments in *Report 5 of 2024* (tabled on 26 June 2024), there were numerous amendments to the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, including amendments to the definition of NDIS support. In particular, subsection 10(6) of the NDIS Act was introduced, which as noted above, provides some flexibility to consider the individual needs of participants. In explaining subsection 10(6), the Revised Supplementary Explanatory Memorandum referenced the committee's recommendation that the NDIS rules should allow the NDIA to exercise discretion regarding supports that are declared to not be NDIS supports. The committee welcomes these subsequent amendments that responded to the committee's recommendation.

In relation to this instrument, the committee considers that to the extent that declaring certain supports to not be NDIS supports results in fewer supports being funded by the NDIS and thus available for participants, the committee considers that a number of rights may be limited, including the rights of persons with disability; the rights to an adequate standard of living, health and social

security; and the rights of the child (to the extent that the instrument applies to children). However, consistent with the committee's previous findings in *Report 5 of 2024*, the committee considers that clarifying what supports are and are not to be funded by the NDIS is a legitimate objective. The committee considers that the inclusion of subsection 10(6) of the NDIS Act assists with proportionality insofar as it provides some flexibility for participants to apply to the CEO for a determination that a support is an NDIS support even if it is declared not to be by this instrument. The transitional rule for current participants also assists with proportionality and mitigates the risk that the measure may be retrogressive, as it will ensure that supports that are currently funded under a participants' plan will continue to be funded until the plan expires (with some exceptions in relation to sexual services, alcohol and unlawful drugs). However, the committee considers that whether these safeguards will be sufficient will depend on how this instrument operates in practice (as much will depend on the extent to which it results in fewer supports being funded).

National Disability Insurance Scheme (Old Framework Plans) Determination 2024

This instrument sets out the methodology for funding NDIS participant supports under the 'old' framework plans, by way of categorising reasonable and necessary supports into groups of supports, specifying funding amounts for groups of supports and the total funding amount available, and specifying the periods in which the funding can be used. In *Reports 4* and *5 of 2024*, the committee commented on the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (now Act) as it was originally introduced on 27 March 2024 and as amended on 5 June 2024. The committee commented on sections 32E-32G which provide for the entitlement to flexible funding or stated supports in an NDIS participant's budget under the new framework plans and section 32K which provides for rules to be made to provide a method for how the total funding amount for flexible funding and/or funding for a stated support in a participant's plan must be worked out. The committee considered that, to the extent that the measure may result in fewer supports being approved and funded for participants and has an adverse impact on participants' independence and quality of life, the measures would engage and may limit several human rights. The committee notes that this instrument is concerned with the funding methodology for supports rather than determining which supports are available. As such, the committee considers it likely does not raise the same concerns. However, to the extent that this instrument does result in less funding for some NDIS participants, it may engage and limit similar rights. The committee therefore reiterates its previous comments and draws its broader concerns with the NDIS scheme to the attention of the Parliament.

National Redress Scheme for Institutional Child Sexual Abuse Amendment (2024 Measures No. 1) Rules 2024

Following changes made in the *National Redress Scheme for Institutional Child Sexual Abuse Amendment Act 2024* (amending Act) to remove the prohibition on persons in gaol applying for redress, this instrument amends the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 to give effect to these changes and provide for notice requirements to funders of last resort about the total amount of redress a person is to receive. While the committee notes this instrument gives effect to changes in the amending Act, the committee has previously commented on human rights issues in relation to this scheme on a number of occasions (see *Report 13 of 2017*, *Report 2 of 2018*, *Report 9 of 2018* and *Report 13 of 2023*). Most recently in *Report 13 of 2023*, the committee noted that the amending Act seeks to reduce the circumstances in which people who are, or have been, incarcerated may be prevented from applying for redress for institutional child

sexual abuse. To the extent that the prohibition is removed, this appears to promote the right to an effective remedy. However, the committee noted that some people with serious criminal convictions may still be precluded from accessing redress, and considers that the restrictions on the entitlement of survivors to claim redress itself engages and may impermissibly limit the right to an effective remedy and may also engage and limit the right to equality and non discrimination. As such, the committee reiterates its previous concerns in relation to the legislative framework in which this instrument operates.

Parliamentary Service Determination 2024

This instrument prescribes matters required or permitted by the *Parliamentary Service Act 1999* and repeals the Parliamentary Service Determination 2013. The instrument contains a number of measures relating to employment matters. The committee considers that many of these measures promote human rights, including the right to work and the right to equality and non-discrimination, but other measures may engage and limit human rights.

The instrument requires the Secretary to publish on the Public Service Gazette decisions relating to the termination of the employment of an ongoing Parliamentary Service employee on the ground of breach of the Code of Conduct. The employee's name must be included on the gazette unless the Secretary decides that the name should not be included because of the person's work-related or personal circumstances, or because including the name is not necessary to ensure public confidence in the integrity of the Parliamentary Service. The committee has previously commented on the privacy implications of this measure, including in the context of the Parliamentary Service Determination 2013 and various iterations of the Australian Public Service Commissioner's Directions. In relation to this instrument, the committee considers that the inclusion of the exception so that an employee's name may not be included on the gazette in certain circumstances is a sufficient safeguard to ensure that the limitation on the right to privacy is proportionate. Noting that the previous iteration of this instrument (in 2013) did not include such a safeguard, the committee welcomes the inclusion of this safeguard in this instrument and considers that it largely addresses its previous privacy concerns.

The instrument allows the Secretary to direct an employee to attend a medical examination by a medical practitioner nominated by the Secretary to assess the employee's fitness for duty and direct the employee to give the Secretary the report of that examination. The committee commented on a similar measure contained in the Public Service Regulations 2023 in *Reports 6* and *8 of 2023*. As these two measures are drafted in equivalent terms, the committee's previous comments in *Reports 6* and *8 of 2023* are applicable to this instrument. Directing an employee to undergo a medical examination and provide the results of that examination to their employer engages and limits the right to privacy and, if it were to disproportionately impact people with disability, the right to equality and non-discrimination and the rights of people with disability. The committee considers that the measure pursues the legitimate objective of enabling departments to meet their duty of care to employees and general work, health and safety obligations, and if the Secretary's power to direct an employee to attend a medical examination were exercised in the manner set out in the statement of compatibility, it would likely be reasonable and proportionate. However, the committee is concerned that the measure is drafted in broad terms that could allow the power to be used in circumstances that may be an impermissible limit on the right to privacy and may unlawfully discriminate against persons with disabilities. The committee reiterates its previous recommendation that the circumstances as to when a Secretary may come to believe that the state of health of an employee may be a relevant workplace consideration be more precisely defined.

Instruments imposing sanctions on individuals[6]

A number of legislative instruments impose sanctions on individuals. The committee has considered the human rights compatibility of similar instruments on a number of occasions, and retains scrutiny concerns about the compatibility of the sanctions regime with human rights.[7] However, as these legislative instruments do not appear to designate or declare any individuals who are currently within Australia's jurisdiction, the committee makes no comment in relation to these instruments at this stage.

6 See Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment (No. 2) Instrument 2024 [F2024L01165]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Myanmar) Amendment (No. 2) Instrument 2024 [F2024L01183]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Thematic Sanctions) Amendment (No. 5) Instrument 2024 [F2024L01258].

7 See, most recently, Parliamentary Joint Committee on Human Rights: *Report 2 of 2024* (20 March 2024) pp. 14–20 and *Report 15 of 2021* (8 December 2021).

Chapter 1
New and ongoing matters

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

Bill

Migration Amendment Bill 2024

Migration Amendment (Bridging Visa Conditions) Regulations 2024[10]

Purpose	The Migration Amendment Bill 2024 seeks to amend the *Migration Act 1958* to provide for the cessation of Subclass 070 (Bridging (Removal Pending) visas (BVR), facilitate arrangements for the removal of visa-holders to receiving countries, permit the sharing of criminal history information both domestically and with foreign countries, provide for the reversal of protection findings, and alter the test for where the minister may remove certain BVR visa conditions. The Migration Amendment (Bridging Visa Conditions) Regulations 2024 changes the test for where the minister may impose visa conditions, including curfews or electronic monitoring, on a BVR.
Portfolio	Home Affairs
Introduced	House of Representatives, 7 November 2024 Migration Amendment (Bridging Visa Conditions) Regulations 2024 [F2024L01410] registered 7 November 2024 at 10.13 am 15 sitting days after tabling (tabled in the House of Representatives and the Senate on 18 November 2024). Notice of motion to disallow must be given by 25 March 2025 in the House and by 25 March 2025 in the Senate [11]
Rights	Criminal process rights; effective remedy; expulsion of aliens; freedom of movement; health; liberty; non-refoulement;

[10] This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment Bill 2024 and Migration Amendment (Bridging Visa Conditions) Regulations 2024, *Report 10 of 2024*; [2024] AUPJCHR 79.

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

	privacy; protection of the family; prohibition on torture and cruel, inhuman or degrading punishment

Cessation of bridging visas

1.2 Schedule 1 of the bill seeks to amend the *Migration Act 1958* (the Migration Act) to provide that where a non-citizen holds a Subclass 070 (Bridging (Removal Pending)) visa (BVR), their visa will cease where they have 'permission' to enter and remain in a foreign country that is party to a 'third country reception arrangement', where the minister gives them notice of this.[12]

1.3 The effect of a visa cancellation is that the non-citizen becomes an unlawful non-citizen and is subject to immigration detention prior to their removal to the foreign country.[13] This measure does not apply to a child aged under 18 or a person whose protection claim has yet to be determined, and a person cannot be removed to the country they have had a protection finding from.[14]

1.4 The term 'permission' is not defined in the bill, and the provision refers to permission 'however described'. The explanatory memorandum states that permission may be in the form of a visa granted by, or other authority given by, the foreign country.[15] Permission to enter the foreign country may be unconditional or conditional on the non-citizen doing one or more things required by the foreign country that the non-citizen is capable of doing before entering the country.[16]

1.5 These amendments would apply in relation to BVRs, or permissions of a foreign country, granted before, on or after the commencement of these provisions.[17]

1.6 Schedule 5 of the bill would provide for spending authority for 'third country reception arrangements'. These are arrangements entered into by the Commonwealth with a foreign country in relation to the removal of non-citizens from Australia and their acceptance, receipt or ongoing presence in the foreign country.[18] Where such an arrangement is in place, the Commonwealth may:

- take, or cause to be taken, any action (not including exercising restraint over the liberty of a person) in relation to the third country reception arrangements or 'third country reception functions' of the foreign country. 'Third party reception functions' means the implementation of any law or

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12 Migration Amendment Bill 2024, schedule 1, item 1, proposed subsections 76AAA(1),(2) and (4). The notice must be given as soon as reasonably practicable to the non-citizen and may be given orally or in writing, see subsection 76AAA(3).

13 *Migration Act 1958*, section 189.

14 Migration Amendment Bill 2024, schedule 1, item 1, proposed paragraph 76AAA(1)(d).

15 Migration Amendment Bill 2024, explanatory memorandum, p. 5.

16 Migration Amendment Bill 2024, schedule 1, item 1, proposed subsection 76AAA(6).

17 Migration Amendment Bill 2024, schedule 1, item 3.

18 Migration Amendment Bill 2024, schedule 5, item 1, proposed subsection 198AHB(1).

policy, or the taking of any action, by the foreign country (including, if the foreign country so decides, exercising restraint over the liberty of a person);[19]

- make payments or cause payments to be made, in relation to the third country reception arrangement or third country reception functions of the foreign country, or
- do anything else that is incidental or conducive to the taking of such action or making of such payments.[20]

1.7 Schedule 2 of the bill would provide for various immunities from civil liability with respect to actions taken in good faith, and acts by foreign countries and persons in foreign countries not taken in good faith. It would provide that:

- no civil liability is incurred by an officer of the Commonwealth for any act or thing done, or omitted to be done, *in good faith* in relation to the refusal or cancellation of a visa on character grounds; or for refusing to grant a person a protection visa, or where the person's BVR has ceased to be in effect under the Schedule 1 amendments;
- no civil liability is incurred by an officer, an officer of the Commonwealth (including a minister) or the Commonwealth, in relation to any act or thing done, or omitted to be done by the officer *in good faith* in the exercise of their powers or performance of their functions or duties in relation to the acceptance or receipt by a foreign country, or ongoing presence in a foreign country, of a person removed from Australia under section 198 of the Migration Act, or in relation to third country reception arrangements or third country reception functions of the country;
- no civil liability is incurred by an officer, an officer of the Commonwealth (including a minister) or the Commonwealth, in relation to any act or thing done, or omitted to be done by a foreign country or any person in a foreign country in relation to the acceptance or receipt by a foreign country, or ongoing presence in a foreign country, of a person removed from Australia under section 198 of the Migration Act, or in relation to third country reception arrangements or third country reception functions of the country.[21]

1.8 The bill would also extend these same immunities from civil liability with respect to any act or thing done, or omitted to be done, in relation to the acceptance or receipt by a regional processing country or another foreign country, or ongoing presence in a regional processing country or foreign country, of an unauthorised

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19 Migration Amendment Bill 2024, schedule 5, item 1, proposed subsection 198AHB(5).

20 Migration Amendment Bill 2024, schedule 5, item 1, proposed subsection 198AHB(2).

21 Migration Amendment Bill 2024, schedule 2, item 1, proposed subsections 198(12)-(13).

maritime arrival taken to a regional processing country, including anything done or omitted to be done under or in relation to an arrangement that relates to the regional processing functions of the relevant country, or relating to a third country reception arrangement or functions.[22]

Preliminary international human rights legal advice

1.9 Establishing a mechanism by which a BVR may be ceased, meaning that a person becomes an unlawful non-citizen who is liable to mandatory immigration detention, and providing for their removal from Australia, engages and limits multiple human rights, both while those individuals are in Australia, and in circumstances where they have been removed to a foreign country.

1.10 The statement of compatibility identifies that these measures engage and limit numerous human rights. It states:

> The Bill is compatible in most respects with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011, so long as policies, practices and procedures are in place to ensure that the powers provided in these amendments are exercised consistently with Australia's human rights obligations, including in relation to removal to third countries. To the extent that the measures in this Bill limit human rights, they do so in order to maintain the integrity of the migration system and protect the safety of the Australian community.

Cessation of BVR and subsequent mandatory immigration detention

Right to liberty

1.11 By establishing a mechanism by which certain non-citizens will be subject to mandatory immigration detention in Australia when permission has been granted by a foreign country to accept them, this measure engages and limits the right to liberty. The stated reliance on policies, practices and procedures that are yet to be made (and not subject to parliamentary scrutiny and oversight) raises the question of whether the measures in the bill itself are compatible with human rights.

1.12 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[23] 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.[24] Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the

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22 Migration Amendment Bill 2024, schedule 2, item 2, proposed paragraphs 198AD(11)(11A)-(11B).

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

24 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of person)* (2014) [12].

circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The detention of a non-citizen pending deportation will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable period of time in these circumstances. However, detention may become arbitrary in the context of mandatory detention, where individual circumstances are not taken into account, and a person may be subject to a significant length of detention.[25]

1.13 The right to liberty may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.14 The statement of compatibility briefly identifies that this measure engages and limits the right to liberty.[26] The statement of compatibility broadly states that the legitimate objective of the measure is 'protecting the safety of the Australian community and maintaining the integrity of the migration system'.[27] Protecting the safety of the Australian community and the integrity of the migration system may be capable of being legitimate objectives for the purposes of international human rights law. However, to be a legitimate objective, the objective must be one that is pressing and substantial, and not one that simply seeks an outcome that is desirable or convenient. In this regard, no information is provided as to whether and how rendering a formerly lawful non-citizen an unlawful non-citizen (who is subject to mandatory immigration detention) protects the integrity of Australia's migration system. In relation to whether the measure is rationally connected to the objective of community safety, it is unclear why the cessation of a non-citizen's BVR and their removal from Australia would necessarily achieve that objective. The explanatory materials provide no justification or evidence to identify any specific (or heightened) threat that BVR holders pose to the Australian community.[28]

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25 See *F.K.A.G v Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.5]; *M.M.M et al v Australia*, UN Human Rights Committee Communication No. 2136/2012 (2013) [10.4] ['the authors are kept in detention in circumstances where they are not informed of the specific risk attributed to each of them… They are also deprived of legal safeguards allowing them to challenge their indefinite detention'].

26 Migration Amendment Bill 2024, statement of compatibility, pp. 30-31.

27 Migration Amendment Bill 2024, statement of compatibility, p. 29.

28 In *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, Gageler CJ, Gordon, Gleeson and Jagot JJ noted that while the *NZYQ* cohort may largely consist of persons with criminal records, to be part of the *NZYQ* cohort a person does not need to have committed a crime: at [37] and [74]. The statement of compatibility to this bill states that many non-citizens released from immigration detention following *NZYQ* were granted BVRs, p. 25.

1.15 In assessing the proportionality of any limit on human rights, it is necessary to consider whether the measure is sufficiently circumscribed and accompanied by sufficient safeguards, whether there is the capacity to treat different cases differently, whether any less rights restrictive alternatives could achieve the same stated objective, and whether there is the possibility of oversight and the availability of review.

1.16 The statement of compatibility states that if a foreign country with which Australia has a third country reception arrangement provides the person with permission to enter and remain, this 'may' mean that the person's removal 'will become reasonably practicable'.[29] However, it is unclear whether the permission granted by a foreign country (which is the trigger for the mandatory visa cessation) denotes immediate permission to enter that country. The statement of compatibility does not identify what 'permission (however described)' may mean and how immediate it may be for the non-citizen to be removed from Australia. For example, the Commonwealth could enter into an arrangement with a third country and the third country may grant permission for non-citizens to enter, but there may be a significant intervening period before the third country is in a position to accept non-citizens, for example where 'reception' facilities require construction. It is unclear whether such 'permission' would constitute 'permission' for the purposes of the bill, such that the relevant non-citizens could be in immigration detention for a significant time while the 'reception' facilities are constructed. The explanatory materials draw on the test laid down by the High Court of Australia for when immigration detention will be permissible (that is, where there is a real prospect of the person's removal from Australia becoming practicable in the reasonably foreseeable future).[30] However, that judgment did not identify what constitutes 'the reasonably foreseeable future', 'practicable' or 'real prospect'. It is unclear, therefore, whether a person could be subject to extended immigration detention for years in Australia while awaiting their removal to a foreign country pursuant to this measure, on the basis that because of this measure they may be removed to that country at some undefined point in the future.

1.17 Further, a foreign country may give permission to accept a person upon certain conditions being fulfilled. The explanatory materials state that this could include a requirement to provide evidence of identity but otherwise provides no further detail on what kinds of conditions might be required, whether the individual would have any capacity to challenge them, and what the effects of non-compliance with the conditions would be.[31] If the kinds of conditions set were unattainable or unrealistic this may mean that affected persons are subject to extended immigration detention.

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29 Migration Amendment Bill 2024, statement of compatibility, p. 30.

30 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37.

31 Migration Amendment Bill 2024, explanatory memorandum, p. 6.

1.18 No information is provided as to whether any less rights restrictive alternatives could achieve the same stated objective (for example, allowing the person to remain in the community subject to a BVR unless and until a relevant foreign country is ready to accept them). It is also unclear what (if any) oversight of the measures there would be, and whether any review would be available (noting that the cessation of a BVR would be mandatory, and not a decision in relation to which review could be sought).

Removal under a third country reception arrangement

Multiple rights

1.19 Depending on the circumstances in practice, the removal of a non-citizen to a foreign country under a third country reception arrangement may engage and limit further human rights, including freedom of movement, protection of the family, non-refoulement, prohibition on torture and cruel, inhuman or degrading treatment or punishment and the right to an effective remedy.

Effective control

1.20 The statement of compatibility states that it is not intended that Australia will owe human rights obligations once persons leave Australia:

> With respect to the measure regarding spending authority for third country reception arrangements, the Australian Government's long-standing view is that Australia's human rights obligations are essentially territorial. Persons subject to third country reception arrangements would be outside Australia's territory. Australia will also owe human rights obligations with respect to individuals who are outside Australia's territory but within its 'effective control'.
>
> In countries with which Australia enters into a third country reception arrangement, there is no intention that Australia will exercise effective control. In particular, the amendments specifically provide that the Commonwealth may take actions, that do not include exercising restraint over the liberty of the person, in relation to third country reception arrangements or functions. As such, Australia would not be detaining or otherwise exercising physical control over persons under third country reception arrangements.[32]

1.21 However, the question of how far Australia's human rights obligations extend to individuals outside its territory is complex.[33] It is possible for Australia to have 'effective control' of persons even if formal legal authority over those persons lies with

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32 Migration Amendment Bill 2024, statement of compatibility, pp. 30-31.

33 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 ICCPR requires states parties 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.

another state.[34] The 'effective control' test under international human right law is essentially one of sufficient control and the question as to whether Australia is exercising sufficient control and authority is a question of fact and degree.[35]

1.22 Thus, while the statement of compatibility states that the Commonwealth has no intention to exercise effective control, the test is not one of intention but whether *in fact* Australia is exercising sufficient control. The measure proposes that the Commonwealth cannot take or cause to be taken any action that includes exercising restraint over the liberty of a person, but would provide that it can make payments to a third country to set up detention facilities to detain individuals, and do anything else incidental or conducive to the taking of any action in relation to the third country reception arrangement or their third country reception functions.[36] While this appears to suggest that Australia would not be permitted to cause the detention of a person in the foreign country, it is not clear whether it could include, for example: establishing and funding contracts for the provision of accommodation, food and healthcare services in detention; or funding services which facilitate the monitoring of individuals in the foreign country. Given that the bill would only establish authority to spend money on third country reception arrangements, and provides little detail as to what arrangements may subsequently be authorised, the question of whether Australia exercises 'effective control' over individuals subject to third country reception arrangements would appear likely to depend on how the third country reception arrangements are implemented in practice. Given the powers Australia has to enter into arrangements with third countries and facilitate actions in those countries and provide spending authority for such arrangements, it would appear possible that Australia could be regarded as having effective control over persons removed

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34 In 'effective control' cases, a State can be held accountable for the violation of rights 'of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State': see *Issa and others v Turkey,* European Court of Human Rights, Application No. 31821/96 (2004) [71]; see also *Őcalan v Turkey*, European Court of Human Rights (Grand Chamber), Application No. 46221/99 (2005); and *Ilascu and others v Moldova and Russia,* European Court of Human Rights, Application No. 48787/99 (2004). In Issa, the European Court of Human Rights said '[a]ccountability in such situations', … 'stems from the fact that [the jurisdictional scope of the European Convention on Human Rights (which is analogous to the jurisdictional scope of the international human rights treaties)] cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.

35 See, for example, *Al-Jedda v United Kingdom*, European Court of Human Rights (Grand Chamber), Application No. 27021/08 (2011); and *Al-Skeini v United Kingdom*, European Court of Human Rights, Application No. 55721/07 (2011). In both these cases, the European Court of Human Rights noted that whether the UK was exercising jurisdiction extra-territorially must be determined by reference to the particular facts of the case. In both cases, the Court held that the conduct fell within the jurisdiction of the UK.

36 Migration Amendment Bill 2024, schedule 5, item 1, proposed section 198AHB.

pursuant to this measure (in which case Australia would owe human rights obligations to those persons).

1.23 If Australia did have 'effective control' over individuals under a third country reception arrangement as a matter of international law, their removal from Australia, subsequent treatment in the foreign country, and any risk of return to a country where they had faced persecution, would engage Australia's human rights law obligations.

1.24 Removing a person from Australia may engage and limit the right to freedom of movement, which includes the right to enter one's own country.[37] Where it results in separation of that person from their family in Australia, this may engage the right to protection of the family, which requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.[38] This right may be engaged where a person is expelled from a country without due process and is thereby separated from their family.[39] While there is significant scope for states to enforce their immigration policies and to require departure of unlawfully present persons, where a family has been in the country for a significant duration of time additional factors justifying the separation of families going beyond a simple enforcement of immigration law must be demonstrated in order to avoid a characterisation of arbitrariness or unreasonableness.[40] These rights may be permissibly limited where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. This test is set out below.

1.25 Were a person exposed to a risk of poor treatment in the foreign country, this may engage the absolute prohibition against torture and other cruel, inhuman and degrading treatment or punishment. This right may never be permissibly limited. The statement of compatibility does not identify that this right may be engaged, and so no assessment of its compatibility is provided.

1.26 If there were a risk that the person's removal to the foreign country led to that person being refouled to a country from which they had sought protection from persecution ('chain refoulement'), this may engage the right to non-refoulement. Australia has 'non-refoulement' obligations under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or

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37 International Covenant on Civil and Political Rights, article 12. The reference to a person's 'own country' is not restricted to countries with which the person has the formal status of citizenship. It includes a country to which a person has very strong ties, such as long-standing residence, close personal and family ties and intention to remain, as well as the absence of such ties elsewhere.

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

39 *Leghaei v Australia,* UN Human Rights Committee Communication No.1937/2010 (2015).

40 *Winata v Australia*, UN Human Rights Committee Communication No.9030/2000 (2001) [7.3].

Degrading Treatment or Punishment.[41] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[42] This is an absolute right and may never be permissibly limited.

1.27 To the extent that a person is limited in their ability to effectively challenge a decision which may lead to their removal, possibly to a country where they would face persecution, torture or other serious forms of harm, there is a risk that this measure may not be consistent with Australia's non-refoulement obligations, which include the requirement for independent, effective and impartial review of non-refoulement decisions. The measure may also not be consistent with the right to an effective remedy.[43] Non-refoulement obligations are absolute and may not be subject to any limitations.[44] The obligation of non-refoulement requires an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[45] The statement of compatibility notes that the measure may apply to persons who have a protection finding (meaning they have been found to engage Australia's non-refoulement obligations with respect to certain countries).[46] It states that:

- the Migration Act already prevents the person's forcible removal to a country to which the protection finding relates, and states that these measures would not provide for the person's removal to such a country;
- for a person subject to these measures who then makes protection claim, they would have those claims considered through a protection visa process or through consideration of ministerial intervention pathways;
- where a person makes new protection claims in relation to a country they have previously been assessed with respect to and in relation to which they have had no protection finding made, or in relation to another country to

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41 Australia also has obligations under the 1951 *Convention Relating to the Status of Refugees* and its 1967 *Protocol Relating to the Status of Refugees*, but it is noted that these conventions do not form part of the committee's mandate under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

42 UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 of the Convention in the context of article 22* (2018). See also UN Human Rights Committee, *General Comment No. 20: Article 7 (prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)* (1992) [9].

43 Obligations arise under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See also UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 of the Convention in the context of article 22* (2018).

44 UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 of the Convention in the context of article 22* (2018).

45 International Covenant on Civil and Political Rights, article 2 (the right to an effective remedy).

46 Migration Amendment Bill 2024, statement of compatibility, p. 27.

> which they may be removed, including a country with which Australia has a reception arrangement, or where there may be chain refoulement concerns with respect to the third country, there is scope to identify such cases and refer them for ministerial intervention consideration prior to removal actually taking place.[47]

1.28 The safeguards identified in the statement of compatibility have the capacity to serve as important safeguards to ensure a person is not returned to a country in a way that would breach Australia's obligations of non-refoulement. However, with respect to foreign countries providing reception arrangements, the statement of compatibility states that the government 'would ensure that any such arrangements are consistent with Australia's non-refoulement obligations, including that there are mechanisms to guard against chain refoulement by the third country'. It also states that 'it is intended that other safeguards will be used and/or implemented as a matter of practice, policy and procedure to ensure that Australia is prepared and able to comply with its non-refoulement obligations'. However, no information is provided as to what those safeguards may be, why they do not already exist, why they are not included in the bill itself, and whether and how they will be sufficient to protect against the risk of direct refoulement (to a foreign country providing reception arrangements) or chain refoulement (from the reception country to another country).

1.29 Further, as the bill would establish wide-ranging immunities for the Commonwealth from civil liability (including with respect to actions in foreign countries not done in good faith), this engages and limits the right to an effective remedy. The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.[48] While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states must comply with the fundamental obligation to provide a remedy that is effective.[49] The statement of compatibility states that:

> [T]he amendment does not preclude remedies for actions that were not carried out in good faith or remedies through the criminal justice system, administrative law remedies, Constitutional remedies, remedies for actions that were not carried out in good faith or were beyond the exercise of

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47 Migration Amendment Bill 2024, statement of compatibility, p. 27.

48 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.

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

> powers or the performance of functions or duties, or preclude a person from initiating complaints through bodies such as the Commonwealth Ombudsman or the Australian Human Rights Commission.
>
> To the extent that the amendments limit some remedies for certain persons within Australia's jurisdiction, the Government considers this appropriate to aims such as maintaining the integrity of the migration system.[50]

1.30 The powers the Commonwealth and officers of the Commonwealth have in assisting third country reception arrangements is broad, and the statement of compatibility has not explained why such an immunity is necessary and why it needs to be so broad. While it identifies the potential availability of some remedies for criminal conduct or actions undertaken without lawful authority (while a person is in Australia), it is unclear in practice whether those remedies would be effective with respect to a breach of a person's rights. It is also unclear why, if Australia does not or will not have effective control over persons who are affected by these measures once they are in a foreign country, that aspect of the proposed immunity is necessary.

1.31 With respect to the rights to protection of the family and freedom of movement, the statement of compatibility states that the strength, nature and duration of a person's ties to Australia would have already been considered as part of the decision to cancel the person's substantive visa on character grounds, or to not revoke a mandatory visa cancellation.[51] However, it is not clear whether any contemporaneous assessment of such matters would be permitted, having regard to a person's circumstances at the time their BVR would be ceased under this measure.

1.32 As to whether there are less rights-restrictive ways of achieving the same objective, it is unclear whether other measures have been considered which could allow an individual to stay in Australia, and not be separated from their family (where relevant). In relation to the need to accommodate the risk posed by an individual to the Australian community, the committee has previously commented that, in relation to individuals who have been convicted of a crime, it would appear that this is a risk more appropriately managed by the courts in the sentencing process and then managed in the community, such that they do not require further detention and removal from Australia following the completion of their sentence.[52] Further, where consideration of a person's family circumstances has not taken place, the statement of compatibility states that there may be opportunities for that consideration to take place as part of a ministerial intervention consideration. However, it is unclear to what extent an individual's family circumstances are considered and in what circumstances they may not be, and how readily review is available.

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50 Migration Amendment Bill 2024, statement of compatibility, p. 32.

51 Migration Amendment Bill 2024, statement of compatibility, p. 30.

52 Parliamentary Joint Committee on Human Rights, Migration Amendment (Aggregate Sentences) Bill 2023, *Report 2 of 2023* (8 March 2023) p. 16.

Committee view

1.33 The committee notes that this bill seeks to amend the *Migration Act 1958* to provide for the mandatory cessation of a Subclass 070 (Bridging (Removal Pending)) visa (BVR) where Australia has entered into third country reception arrangements with foreign countries to remove certain non-citizens.

1.34 The committee notes that detaining and removing non-citizens may engage and limit several human rights. The committee considers that further information is required to assess the compatibility of this measure with these rights. As such, the committee seeks the minister's advice in relation to:

(a) whether and how rendering a formerly lawful non-citizen an unlawful non-citizen (who is subject to mandatory immigration detention) protects the integrity of Australia's migration system;

(b) what is the pressing and substantial concern that the measure seeks to address, including the specific risk that exists for holders of a Subclass 070 (Bridging (Removal Pending)) visa to remain in the Australian community;

(c) what evidence demonstrates that the cessation of a person's BVR, and their subsequent removal to a third country, would be rationally connected to (that is, effective to achieve) the objectives sought;

(d) what the term 'permission (however described)' by a foreign country means;

(e) whether the Commonwealth could enter into an arrangement with a third country granting permission for non-citizens to enter subject to a significant intervening period before the third country is in a position to accept non-citizens, for example where 'reception' facilities require construction;

(f) what is the maximum period of time for which a non-citizen may be subject to immigration detention in Australia prior to their removal pursuant to this measure;

(g) what kinds of conditions may a foreign country impose in order to accept a person, and what would be the consequence for non-compliance with such conditions;

(h) why less right-restrictive alternatives (for example, allowing the person to remain in the community subject to a BVR unless and until a relevant foreign country is ready to accept them) would not be effective to achieve the objectives of the measure;

(i) what oversight of the measures there would be;

(j) whether any review would be available (noting that the cessation of a BVR would be mandatory, and not a decision in relation to which review could be sought);

(k) whether and how the measure is compatible with the absolute prohibition against torture and other cruel, inhuman or degrading treatment or punishment;

(l) what practices, policies and procedures will be developed to ensure 'these amendments are exercised consistently with Australia's human rights obligations'; and

(i) whether and how they will be effective to achieve this (in particular, whether and how they will be sufficient to protect against the risk of direct refoulement (to a foreign country providing reception arrangements) or chain refoulement (from the reception country to another country));

(ii) why are they not included in the bill itself;

(m) whether those remedies identified in the bill would be effective with respect to a breach of a person's rights;

(n) why, if Australia does not or will not have effective control over persons who are affected by these measures once they are in a foreign country, the bill seeks to establish a broad immunity from civil liability with respect to acts (done in both good and bad faith) in relevant foreign countries;

(o) would an assessment of matters related to a person's family ties be permitted before the person's BVR would be ceased, before the person would be subject to mandatory immigration detention and removal; and

(p) where a ministerial intervention were to occur, to what extent an individual's family circumstances would be considered, in what circumstances they may not be, and how readily review of such decisions would be available.

Reversing a protection finding

1.35 Schedule 1 Part 2 of the bill seeks to amend the Migration Act to expand the circumstances in which the minister may determine that a protection finding would no longer be made in relation to a person.[53]

[53] These proposed amendments were last introduced in March 2024 in the Migration Amendment (Removal and Other Measures) Bill 2024. The bill did not proceed. The committee commented on this bill in *Report 4 of 2024* (17 April 2024) pp. 16-43.

1.36 Section 197D currently provides that a protection finding may only be reversed in relation to specific *unlawful* non-citizens and for the purposes of subsection 197C(3), namely, where the non-citizen has made a valid application for a protection visa that has been finally determined; and in the course of considering the application, a protection finding was made with respect to the country (whether or not the visa was refused or was granted and has since been cancelled); and none of the following apply: the decision in which the protection finding was made has been quashed or set aside; or a decision made under subsection 197D(2) in relation to the non-citizen is complete within the meaning of subsection 197D(6).[54]

1.37 The bill would allow the minister to revisit a protection finding in relation to a broader range of non-citizens, including *lawful* non-citizens (holders of Subclass 070 (Bridging (Removal Pending)) visas, Subclass 050 (Bridging (General)) visas granted on 'final departure' grounds), and the holder of a type of visa which is prescribed by regulation and subject to a requirement that the person make arrangements to depart Australia.[55] The bill would repeal and replace subsection 197D(1) to provide that the minister may make a decision that a protection finding would no longer be made in relation to a person (that is, to reverse a protection finding) if: the non-citizen is a 'removal pathway non-citizen'; they have made a valid application for a protection visa that has been finally determined; and in the course of considering that application, a protection finding was made with respect to a country (whether or not the protection visa was refused, or granted and subsequently cancelled).[56] It also seeks to amend subsection 197D(2) by omitting reference to 'an *unlawful* non-citizen to whom paragraphs 197C(3)(a) and (b) apply in relation to a valid application for a protection visa' and substituting it with 'the non-citizen'.[57] The bill would also provide that section 197D, as amended, applies in relation to a protection finding, whether the protection finding is made before, on or after the commencement of the item.[58]

Preliminary international human rights legal advice

Rights to protection of the family; health; freedom of movement; expulsion of aliens; and non-refoulement

1.38 Currently, the power to reverse a protection finding can only be exercised in relation to *unlawful* non-citizens (that is, certain non-citizens without a visa). This

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54 The Migration Amendment (Removal and Other Measures) Bill 2024 was introduced in March 2024 seeking to amend section 197D relating to the reversal of protection findings. That bill did not proceed. The committee commented on this bill in *Report 4 of 2024* (17 April 2024) pp. 16-43.

55 Migration Amendment Bill 2024, schedule 1, part 2, item 4, proposed definition of a 'removal pathway non-citizen' in subsection 5(1).

56 Migration Amendment Bill 2024, schedule 1, part 2, item 6, proposed subsection 197D(1).

57 Migration Amendment Bill 2024, schedule 1, part 2, item 5 and 7.

58 Migration Amendment Bill 2024, schedule 1, part 2, item 11.

amendment would enable the exercise of that power in relation to those lawful non-citizens (that is, non-citizens with a visa) who are subject to the removal pathway.[59]

1.39 The statement of compatibility with human rights states that this measure engages the prohibition on the expulsion of aliens without due process, which provides that an alien lawfully in a country may be expelled therefrom only in pursuance of a decision reached in accordance with law and with due process.[60] It states that a decision under section 197D may mean that a person becomes available for removal once their bridging visa ceases, and that the person is able to submit reasons why a protection finding should still be made as part of the section 197D decision-making process and have that decision reviewed by a merits review tribunal pursuant to existing provisions of the Act.[61] It also states that where a decision is made to cease a BVR because the person may be able to be removed following a section 197D decision, that decision is subject to natural justice processes and judicial review. These processes may mean that, in practice, there are sufficient procedures in place such that a reversal of a protection finding may be compatible with the prohibition against the expulsion of aliens without due process. Further, if a reversal of a protection finding (and subsequent removal of the person to the relevant country) did accurately and appropriately determine that the person was no longer at risk of persecution, and so no such risk arose as a matter of fact, it may also be compatible with Australia's obligations in relation to non-refoulement.[62] However, much will depend on the quality of the decision-making as to whether a person is owed protection obligations.

1.40 The expansion of the power to reverse a protection finding to include lawful non-citizens may also engage and limit the right to health, having regard to the potential for a possible reversal of a protection finding, or actual reversal, to have a detrimental impact on an affected person's mental health.[63] The right to health refers

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59 Migration Amendment Bill 2024, schedule 1, part 2, item 4, subsection 5(1) seeks to insert a definition of a 'removal pathway non-citizen', which would include certain lawful non-citizens on a BVR.

60 International Covenant on Civil and Political Rights, article 13. See statement of compatibility, p. 31.

61 Migration Amendment Bill 2024, statement of compatibility, p. 31.

62 See further, Migration Amendment Bill 2024, statement of compatibility, p. 24.

63 Further, as a protection finding had been made in relation to a child who holds a Subclass 050 Bridging (General) visa, or any of the categories of visa which may be prescribed by regulation, the measure may also engage and limit the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities. Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (Rights of the child) (1989) [1]. Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. The statement of compatibility does not identify this.

to the right to enjoy the highest attainable standard of physical and mental health.[64] The negative impacts of insecure visa status for refugees has, in particular, been considered in academic research.[65]

1.41 Further, depending on how the power to reverse a protection finding was used in practice, it may engage and limit other human rights. In this regard, proposed paragraph 199B(1)(d) would empower the minister to prescribe *any* Australian visa as one in relation to which a visa-holder would be a 'removal pathway non-citizen', provided that the visa was subject to a criterion requiring the person to make arrangements to depart Australia. If the minister prescribed a large category of visas to which the removal pathway directions could apply, including visas granted to long-term residents, such as spouse visas or permanent residence visas, the effect on those who have been in Australia for a long period could be significant. If such visas were so prescribed, it would appear that a person who had a protection finding made in relation to them many years ago, and who had since lived for many years in Australia, could therefore be vulnerable to a reversal of that protection finding (regardless, it would appear, of whether that protection finding was relevant to their current visa status). If the power was used in relation to people who had been in Australia for a substantial period of time, including those who had established families and personal lives in Australia, it may engage and limit the rights to protection of the family and to a private life. The right to privacy includes the right to a private life, which is linked to notions of personal autonomy and human dignity.[66] 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. It may also engage and limit the right to freedom of movement, which includes the right to enter, remain, or return to one's 'own country'.[67]

1.42 The statement of compatibility does not identify that this measure engages and may limit the right to health, or whether (and to what extent) it may engage and limit the right to a private life, and so no analysis is provided in relation to these matters. The statement of compatibility states that this measure does not directly engage the right to freedom of movement, but acknowledges that some persons who are removal pathway non-citizens 'may be long-term residents of Australia who had their substantive visa cancelled on character grounds'.[68] It states that the 'strength, nature and duration of the person's ties to Australia would have already been considered as part of the decision to cancel their substantive visa on character grounds', which would

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64 International Covenant on Economic, Social and Cultural Rights, article 12(1).

65 See, for example, Nickerson A, Byrow Y, O'Donnell M, et al, 'The Mental Health Effects of Changing from Insecure to Secure Visas for Refugees', *Australian & New Zealand Journal of Psychiatry,* vol. 57, no. 11, 2023, pp. 1486–1495.

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

67 International Covenant on Civil and Political Rights, article 12(4).

68 Migration Amendment Bill 2024, statement of compatibility, p. 30.

help ensure that Australia was not the person's 'own country'. The statement of compatibility states that this measure may engage rights relating to families and children, as a person holding a bridging visa may be able to be removed, which may separate them from their family members in Australia.[69]

1.43 These rights may be limited where the limitation: seeks to achieve a legitimate objective (one which, in the case of the right to freedom of movement, is necessary to protect national security, public health or morals or the rights and freedoms of others); is rationally connected to (that is, effective to achieve) that objective; and proportionate.

1.44 The explanatory materials state that the purpose of these amendments to section 197D is to facilitate the lawful removal of non-citizens who are on a removal pathway, and that they apply only in circumstances where a protection finding has not been made in relation to the non-citizen, or where the Minister determines that a non-citizen is no longer a person in respect of whom any protection finding would be made.[70] The statement of compatibility further states that the measure:

> would expand the situations in which a decision under section 197D can be made, that a person is no longer a person in respect of whom any protection finding would be made, to encompass persons who hold certain bridging visas as defined in new section 199AB, in addition to persons who are unlawful non-citizens. As such persons are on a removal pathway following the refusal or cancellation of a substantive visa, usually on character or security grounds, and a protection finding may be a key barrier to their removal from Australia, it is appropriate that reconsideration of their circumstances, to see if they continue to engage Australia's non-refoulement obligations, can take place. The Bill does not provide a mechanism to reconsider the protection findings of current protection visa holders, or former protection visa holders who now hold visas such as Resolution of Status Visas or Resident Return Visas.[71]

1.45 As noted above, any limitation on a right must be shown to be aimed at achieving a legitimate objective that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting rights. While regulating Australia's migration system is a legitimate objective, it is not clear that there is a pressing need to extend the power to reverse a protection finding in relation to a potentially significant number of lawful visa holders. The statement of compatibility states:

> [S]ome removal pathway non-citizens have a 'protection finding'. The Bill would expand the situations in which a decision under section 197D can be made, that a person is no longer a person in respect of whom any protection

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69 Migration Amendment Bill 2024, statement of compatibility, p. 29.

70 Migration Amendment Bill 2024, explanatory memorandum, p. 8.

71 Migration Amendment Bill 2024, statement of compatibility, p. 28.

> finding would be made, to encompass persons considered to be 'removal pathway non-citizens' (as defined in new subsection 5(1)), to include persons who are both lawful or unlawful non-citizens. As such persons are on a removal pathway following the refusal or cancellation of a substantive visa, usually on character or security grounds, and a protection finding may be a key barrier to their removal from Australia…[72]

1.46 No information is provided to demonstrate that there is a pressing and substantial need to be able to reverse protection findings with respect to lawful non-citizens noting that a protection finding may be a barrier to removing such persons from Australia.

1.47 In relation to proportionality, the statement of compatibility states that in many cases the impact of the person's removal from Australia on their family members would have already been considered as part of the decision to refuse or cancel their protection visa on character grounds, and 'there may be opportunities for that consideration to take place as part of a ministerial intervention consideration'.[73] However, under the Migration Act there are certain bases on which a decision to cancel a visa on character grounds is not discretionary, but mandatory.[74] This includes when a person has been sentenced to imprisonment for 12 months or more (which incidentally would include imprisonment for failure to comply with a removal pathway decision). In relation to the cancellation of such visas, no consideration would have been given to a person's connection to Australia at the time the visa was cancelled, as there is no discretion to consider any individual circumstances. Further, the statement of compatibility does not identify that, because the 'removal pathway non-citizen' category could (as a matter of law) be expanded to include more Australian visas, the measure could operate in relation to a far more substantial group of non-citizens, including people with extensive social connections, families and private lives in Australia. This raises questions as to whether the measure is sufficiently circumscribed. Further, while the availability of this discretion may have safeguard value, its discretionary nature means there is a risk that it may be inadequate in practice. In this regard, it is not clear what information the minister would use to reverse a protection finding in relation to a person (particularly a protection finding made several years prior), particularly if the process did not permit the affected person to submit information or reasons.

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72 Migration Amendment Bill 2024, statement of compatibility, p. 28.

73 Migration Amendment Bill 2024, statement of compatibility, p. 29.

74 See *Migration Act 1958*, subsection 501(3A) which provides that the minister 'must' cancel a visa if satisfied the person does not pass the character test because they are serving a sentence of imprisonment because of a substantial criminal record (being sentenced to imprisonment of 12 months or more) or sexually based offences involving a child.

Committee view

1.48 The committee notes that providing for the reversal of a previous protection finding relating to a non-citizen engages and limits several human rights.

1.49 The committee considers further information is required to assess the compatibility of this measure with this right, and as such seeks the minister's advice in relation to:

(a) whether and how the measure is compatible with the right to health;

(b) whether and how the measure is compatible with the right to a private life;

(c) whether this measure is directed towards a legitimate objective which seeks to address an issue of public or social concern that is pressing and substantial enough to warrant limiting rights, and

  (i) how many people who would currently meet the proposed definition of a 'removal pathway non-citizen' are subject to a protection finding;

  (ii) of those persons, what year was the oldest relevant protection finding made;

(d) how permitting the reversal of protection findings would be effective to achieve the objective;

(e) what information the minister would use to reverse a protection finding in relation to a person (particularly a protection finding made several years prior);

(f) whether an affected person would be able to make submissions regarding a potential reversal of protection finding (and if so, when); and

(g) whether a decision to reverse a protection finding would be subject to review either internally or externally, and whether this would be administrative review or merits review.

Disclosure of criminal history information, including to foreign countries

1.50 Schedule 3 of the bill seeks to establish broad information sharing powers. It would provide that the minister or an officer of the department may collect, use or disclose to a person or body, 'criminal history information' for the purpose of directly or indirectly informing the performance of a function or the exercise of a power under the Migration Act or the Migration Regulations 1994 (the Regulations).[75]

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[75] Migration Amendment Bill 2024, schedule 3, item 2, proposed subsection 501M(1).

1.51 'Criminal history information' means information about an individual's criminal history, including any charge against the individual, whether or not they have been found to have committed the offence; any finding that the individual committed such an offence, whether or not the individual has been convicted of the offence; any conviction of the individual of such an offence, whether or not the conviction is spent; and any other result of a proceeding for the prosecution of the individual for an offence.[76]

1.52 Any criminal history information disclosed to a person or body may be collected, used or disclosed to other persons or bodies for the purpose of providing advice or recommendations, directly or indirectly, to the minister or an officer in relation to the performance of functions or the exercise of powers under the Migration Act or Regulations.[77] This information may also be collected, used or disclosed under other provisions of the Migration Act, Regulations or any other law of the Commonwealth.[78]

1.53 The bill also seeks to provide that any collection, use or disclosure of criminal history information which occurred *before* the commencement of the bill would be retrospectively validated,[79] despite any effect that may have on the accrued rights of any person. A note to this provision provides that this may include the making of a decision under the Migration Act or the Regulations.[80] Retrospective validation would also apply to civil and criminal proceedings instituted before the commencement of the item, including where those proceedings have concluded before the commencement of the bill.[81]

1.54 In addition, schedule 4 of the bill would provide that the minister or officer of the department may collect, use or disclose information, including personal information (which may include criminal history information), to the government of a foreign country in relation to removal pathway non-citizens[82] and also in relation to

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76 Migration Amendment Bill 2024, schedule 3, item 1, proposed subsection 5(1).

77 Migration Amendment Bill 2024, schedule 3, item 2, proposed subsection 501M(2).

78 Migration Amendment Bill 2024, schedule 3, item 2, proposed subsection 501M(4).

79 Migration Amendment Bill 2024, schedule 3, item 4, subitem 2.

80 Migration Amendment Bill 2024, schedule 3, item 4, subitem 3

81 Migration Amendment Bill 2024, schedule 3, item 4, subitem 4.

82 Migration Amendment Bill 2024, schedule 1, part 2, item 4 defines a 'removal pathway non-citizen' to mean an unlawful non-citizen who is required to be removed as soon as is reasonably practicable; a lawful non-citizen who holds a Subclass 070 (Bridging (Removal Pending)) visa; a lawful non-citizen who holds a Subclass 050 (Bridging (General)) visa and is subject to acceptable arrangements to depart Australia; and a lawful non-citizen who holds a visa prescribed by the regulations and satisfies a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia.

former removal pathway non-citizens who do not hold a substantive visa or a criminal justice visa.[83] The purposes for which these disclosures may be made include:

- determining whether there is a real prospect of the removal of the non-citizen from Australia under section 198 becoming practicable in the reasonably foreseeable future;
- facilitating the removal of the non-citizen from Australia;
- taking action or making payments, or doing a thing that is incidental or conducive to the taking of an action or making of a payment, in relation to a third country reception arrangement or the third country reception functions of a foreign country; and
- purposes directly or indirectly connected with, or incidental to, any of these purposes.[84]

1.55 The disclosure may be made to any level of government of a foreign country, including a local or regional government body or an agency or authority of the government of the foreign country.[85]

Preliminary international human rights legal advice

Right to privacy

1.56 By providing for the collection, use and disclosure of criminal history information to a range of authorities in Australia, and the collection, use and disclosure of personal information (which may include criminal history information) to foreign countries, these measures engage the right to privacy.[86]

1.57 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.[87] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations where the measure pursues a legitimate objective,

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83 Migration Amendment Bill 2024, schedule 4, item 1, proposed subsection 198AAA(1).

84 Migration Amendment Bill 2024, schedule 4, item 1, proposed subsection 198AAA(2).

85 Migration Amendment Bill 2024, schedule 4, item 1, proposed subsection 198AAA(6).

86 Further, the proposed sharing of information within Australia could include sharing and disclosure of a broad range of criminal history information which relates to children who are not citizens (including matters for which the child was never convicted of a criminal offence), for the purpose of informing, directly or indirectly, the performance of a function or the exercise of a power under the Migration Act or the Migration Regulations. These pieces of legislation are complex and collectively exceed 2,800 pages. The explanatory materials do not particularise any of the functions or powers to which this broad information disclosure may relate. There may be a risk that this information sharing may engage and limit the rights of the child, including to privacy. The statement of compatibility does not identify this.

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

is rationally connected to that objective and is a proportionate means of achieving that objective.

1.58 The statement of compatibility identifies that the measure engages the right to privacy.[88] As to legitimate objective, the statement of compatibility states that the objective behind sharing of information within Australia would be to ensure that criminal history information can be used by the Australian Border Force Community Protection Board[89] in making recommendations about visa conditions to be imposed, and to ensure that such criminal history information can be used in character-related decision-making under the Migration Act to broadly protect the community by identifying persons 'of character concern'. [90]

1.59 In relation to the proposed disclosure of information to foreign countries, the statement of compatibility states that this is to establish whether the country will grant that person permission to enter and remain in that country. It further states that:

> The ultimate objective of such disclosures is to be able to effect the removal from Australia of non-citizens who are on a removal pathway because they do not have a substantive visa to remain in Australia – in many cases this is because their substantive visa was refused or cancelled on character grounds – but for whom there have been barriers to effecting their removal, particularly to their country of nationality.[91]

1.60 Protecting the Australian community from risks of harm would generally constitute a legitimate objective. However, a legitimate objective must also be one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. In this regard, no information is provided as to the specific risk that persons in this cohort pose to the Australian community (particularly when compared with persons – including people who have been convicted of serious criminal offences – in the broader community). It is therefore unclear whether and how persons who would be affected by this measure pose some risk which is pressing and substantial enough to warrant limiting their right to privacy in this manner.

1.61 As to rational connection, it is unclear how the sharing of a broad range of criminal history information (including information about convictions which are spent and therefore occurred some time ago, and circumstances in which the person was never convicted of an offence) would be effective to achieve the stated objectives of the measure. The statement of compatibility does not explain how such a broad scope

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88 Migration Amendment Bill 2024, statement of compatibility, pp 33–34.

89 The Community Protection Board was established in December 2023 to provide recommendations relating to visa decision making, see: Australian Border Force, 'Community', <https://www.abf.gov.au/about-us/what-we-do/border-protection/community>.

90 Migration Amendment Bill 2024, statement of compatibility, p. 34.

91 Migration Amendment Bill 2024, statement of compatibility, p. 34.

of information (particularly information about criminal charges where there was no conviction, and information about criminal charges which an Australian citizen would not be required to disclose because it was so old) would be relevant to a contemporaneous assessment of the person's character, or the likelihood of a foreign country agreeing to accept them.

1.62 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

1.63 As to whether the measure is sufficiently circumscribed, the statement of compatibility states that the measure provides 'clarity around information about criminal history information being considered for the purposes of the Migration Act and Regulations', consistent with the government's existing understanding of the use of the information, and 'ensures that criminal history information may also be used by the Community Protection Board, and the experts who advise the Board'.[92] The power to collect, use and disclose information is broad, and can be done for the purpose of informing, directly or indirectly, the performance of a function or the exercise of a power under the Migration Act or Regulations. This would be a very broad range of purposes. Further, the bill would permit secondary use and disclosure of information, and would override other laws of the Commonwealth, states or territories regardless of whether they create offences for the sharing of such information (including spent convictions information). It would include the sharing of information to foreign countries, and for a broad range of purposes which includes anything incidental or conducive to taking actions in relation to third country reception arrangements or functions and making payments towards them.[93] Further, the bill seeks to establish broad ranging immunity from civil liability for activities associated with the broader visa cancellation and foreign country reception scheme this bill seeks to establish, which would mean an individual whose personal information is shared pursuant to these measures would have limited recourse for any breach of their human rights which resulted. In addition, the measure seeks to retrospectively validate the sharing of criminal history information which has already occurred, which suggests that such disclosure has taken place (potentially in breach of secrecy provisions which would otherwise apply to that disclosure). The breadth of this proposed information use and disclosure scheme suggests that the measure may not be sufficiently circumscribed.

1.64 As to safeguards, the statement of compatibility states:

> The power to collect, use and disclose information under this provision is discretionary, and policy guidance will guide officers to exercise this power

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92 Migration Amendment Bill 2024, statement of compatibility, p. 34.

93 Migration Amendment Bill 2024, schedule 4, item 1, proposed subsection 198AAA(2).

> in a way that is necessary, reasonable and proportionate in the individual circumstances, including, for example, that no more information than is necessary to achieve these removal objectives is to be disclosed.[94]

1.65 The bill itself provides for no safeguards on the collection, use and disclosure of information. No information is provided as to why any safeguards which will be set out in policy documents are not contained in the bill itself. As the content of those policy documents are not apparent, the extent to which other individuals, for example members of the Community Protection Board or the experts who advise the board, and members of foreign governments who have received personal information, would be required to consider and manage the privacy of individuals' information (if at all) is not clear. As such, their potential safeguard value (if any) is unclear.

1.66 The statement of compatibility does not address why less rights restrictive means to achieve the same aim are insufficient. It is unclear why there needs to be such a breadth of information sharing powers in order to adequately make a decision under the Migration Act and Regulations or to assist a foreign country in removing a non-citizen from Australia. It is unclear why other less rights restrictive measures (for example, providing a legislative basis to require that adequate privacy protections are in place before information is shared and to protect from unauthorised disclosure to a foreign country) have been considered to be ineffective to achieve these aims.

Right to life, prohibition against torture and non-refoulement

1.67 If the use and disclosure of such information led to a decision to cancel a person's visa and remove them to a foreign country, there could be a risk that the measures may (depending on the circumstances) engage and limit further rights, such as the right to life (if a person were exposed to the risk of the death penalty in a foreign country), the prohibition on torture and cruel, inhuman or degrading treatment or punishment (if they were exposed to such a risk in a foreign country as a result of the disclosure), or non-refoulement (if the disclosure contributed to their return to a country in which they faced persecution).

1.68 The right to life imposes an obligation on Australia to protect people from being killed by others or from identified risks. As Australia has prohibited the death penalty, this prohibits Australia from deporting or extraditing a person to a country where that person may face the death penalty.[95]

1.69 The statement of compatibility does not identify that these rights are engaged. These concerns, and similar concerns with respect to potentially exposing a person to a risk of torture or cruel treatment and potentially to a risk of chain refoulement, arise having regard to the kinds of personal information and criminal history that would be able to be shared pursuant to this measure. Depending on the nature of an individual's

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94 Migration Amendment Bill 2024, statement of compatibility, p. 34.

95 *Judge v Canada*, UN Human Rights Committee Communication No.929/1998 (2003) [10.4]; *Kwok v Australia*, UN Human Rights Committee Communication No.1442/05 (2009) [9.4],[9.7].

criminal history information (which may include charges against the individual that they were found not to have committed), this could include information that may expose an individual to a risk of harm depending on the foreign country, for example information that an individual is LGBTIQA+. The extent of such a risk would depend on the foreign country to which they were being sent (and any relevant domestic laws, practices or policies, for example laws criminalising homosexuality) and the extent of any safeguards Australia would put in place to alleviate such a risk. On the face of the bill, it is unclear what foreign countries may participate in this scheme, and what requirements (if any) those countries would be required to meet in order to protect against such risks of harm. There are no safeguards with respect to these concerns on the face of the bill to ensure that personal information is not shared with a foreign government in circumstances that would or may expose a person to the death penalty or lead to a person being tortured, or subjected to cruel, inhuman or degrading treatment or punishment.

Committee view

1.70 The committee notes that providing for the collection, use and disclosure of criminal history information under the *Migration Act 1958* and Migration Regulations 1994 in Australia, and the sharing of personal information, including criminal history information, to the governments of foreign countries, engages and limits the right to privacy, and may engage and limit further human rights.

1.71 The committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to:

(a) whether the stated objectives of the measure are directed towards an issue of pressing and substantial concern which warrants limiting rights;

(b) how the sharing of a broad range of criminal history information (including information about convictions which are spent and therefore occurred some time ago, and circumstances in which the person was never convicted of an offence) would be effective to achieve the stated objectives of the measure;

(c) how information about criminal charges where there was no conviction, and information about criminal charges which an Australian citizen would not be required to disclose because they were so old would be relevant to a contemporaneous assessment of the person’s character, or the likelihood of a foreign country agreeing to accept them;

(d) why such a broad range of criminal history information is required to be shared in order to adequately make a decision under the Migration Act and Regulations or to assist a foreign country in removing a non-citizen from Australia, and why existing information-sharing powers are inadequate;

(e) why is it considered necessary to retrospectively validate use and disclosure of criminal history information, and whether such information has already been shared without this proposed authorisation;

(f) what will be included in the policy guidance on exercising these powers and why any such privacy safeguards are not contained in the bill itself;

(g) what privacy protections are in place for a departmental officer, member of the Community Protection Board or expert who advises the board, and anyone else who may access information under these provisions, when handling personal information;

(h) why other less rights restrictive measures have been considered to be ineffective to achieve these aims, for example providing a legislative basis to require that adequate privacy protections are in place before information is shared and to protect from unauthorised disclosure to a foreign country;

(i) what protections will prohibit the sharing of personal information with a foreign government where its disclosure may expose the person to a risk of the death penalty, to torture or cruel, inhuman or degrading treatment or punishment, or to a risk of refoulement; and

(j) why are there no safeguards in the bill to ensure that personal information is not shared with a foreign government in circumstances that would or may expose a person to the death penalty or lead to a person being tortured, or subjected to cruel, inhuman or degrading treatment or punishment.

Enforceable bridging visa conditions

1.72 Schedule 6 of the bill seeks to amend the Migration Act with respect to Subclass 070 (Bridging (Removal Pending) visas (BVRs). An associated legislative instrument, the Migration Amendment (Bridging Visa Conditions) Regulations 2024, which was registered on 7 November 2024, amended the requirements relating to the issue of those visas subject to certain conditions.

1.73 Given the complexity of these measures, it is useful to set out the background to this legislative framework.[96]

[96] The committee has commented on the legislation which established this scheme. See, Parliamentary Joint Committee on Human Rights, *Report 13 of 2023* (29 November 2023), pp. 12–42; *Report 1 of 2024* (7 February 2024), pp. 43-94; and *Report 4 of 2024* (15 May 2024) p. 8.

The Regulations

1.74 On 16 November 2023, the *Migration Amendment (Bridging Visa Conditions) Act 2023* amended the *Migration Act 1958* 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 BVR subject to specified mandatory visa conditions – non-compliance with which is a criminal offence carrying a mandatory minimum sentence of at least one year imprisonment.[97] It also amended the Migration Regulations to provide that certain conditions (including imposition of a curfew and electronic monitoring) must be imposed on the visa unless the minister is satisfied that the holder does not pose 'a risk to the community'.[98]

1.75 The Department of Home Affairs advised that, at 1 July 2024, there were 182 NZYQ-affected BVR holders in the community (168 of whom had been released from immigration detention pursuant to the High Court judgment).[99]

1.76 On 6 November 2024, the High Court of Australia determined that the elements of the Migration Regulations relating to electronic monitoring and the imposition of a curfew were constitutionally invalid because they constituted the imposition of punishment, which only the judiciary has the constitutional authority to impose.[100] Two key elements of this conclusion were:

> On its proper construction, cl 070.612A(1) is broad and flexible and authorises uncertain and unpredictable outcomes. It requires the monitoring and curfew conditions to be imposed on the visa of every person within the class unless the Minister can reach the specified state of satisfaction. That specified state of satisfaction involves a wide conception of protection of the Australian community, which extends well beyond

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97 Migration Regulations, clause 070.612A. This bill was largely in response to non-citizens who were released from immigration detention following the orders of the High Court of Australia of 8 November 2023 in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

98 The four conditions are 8621 (electronic monitoring), 8617 (financial reporting), 8618 (debt or bankruptcy reporting), and 8620 (curfew). Clause 070.612A was subsequently amended on 7 December 2023 by the Migration Amendment (Bridging Visa) Regulations 2023 [F2023L01629].

99 Department of Home Affairs, *brief released via freedom of information*, p. 3. The briefing indicates that this number of BVR holders in the community will continue to grow 'as further non-citizens in Australia conduct criminal activity in Australia and fail the character test to hold a visa (or are released from prison/detention).

100 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40. The Court stated (at [83]) "As the power to impose each of the curfew condition and the monitoring condition on a non-citizen by the Executive Government of the Commonwealth is prima facie punitive and there is no legitimate non-punitive purpose justifying the power, the power is to be characterised as punitive and therefore infringes on the exclusively judicial power of the Commonwealth in Ch III of the Constitution".

> protection from the risk of harm arising from persons within the class committing future offences and does not specify the degree or extent of: (a) the protection that is sought to be achieved; (b) the risk to such protection before the Minister may reach the required state of satisfaction; or (c) the required state of satisfaction other than at the level of "reasonable necessity" which, properly construed, means only appropriate or adapted and not essential or indispensable. This is why the plaintiff's description of cl 070.612A(1)(a) and (d) as "free-floating", "elastic", and "abstract and ill-defined", is correct.[101]

and

> The required state of satisfaction in cl 070.612A(1)(a) and (d) involves a positive state of mind about a negative stipulation ("the Minister is satisfied that it is not reasonably necessary to impose that condition") so that if the Minister cannot be so satisfied the conditions must be imposed, meaning that the provision resolves all doubt and uncertainty in favour of the imposition of the conditions. It does so, moreover, in circumstances where the person's right to make representations against the conditions being imposed exists only after the conditions have been imposed. In the case of the power to impose the impugned conditions, therefore, the power can be exercised even where it cannot be and has not been established that the imposition of the condition is reasonably necessary for the achievement of the purported legitimate non-punitive purpose because the default position is that the Minister imposes the condition. Indeed, there may be cases where the Minister never has the information necessary to meaningfully assess whether the imposition of the condition is not reasonably necessary for the protection of the Australian community. In these cases, the condition will generally remain imposed for up to 12 months, notwithstanding that it is not reasonably necessary to impose the condition to protect any part of the Australian community. The law is framed such that, Ch III aside, the consequences set out above may result.[102]

1.77 The effect of this decision is that those two conditions were invalid.

1.78 On 7 November 2024, the Migration Amendment (Bridging Visa Conditions) Regulations 2024 (the amending regulations) were registered on the Federal Register of Legislation, to take effect from 10.13 am that day. The amending regulations provide that for each of the four conditions that may be imposed on a BVR-holder, the minister *must* impose the condition if:

> (a) at the time the visa was granted there was no real prospect of the removal of the holder from Australia becoming practicable in the reasonably foreseeable future; and

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101 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 [79].

102 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 [85].

(b) despite the other conditions imposed on the visa by or under this subclause or another provision of this Division, the minister is satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and

(c) the minister is satisfied on the balance of probabilities that the imposition of the condition (in addition to the other conditions imposed by or under this subclause or another provision of this Division) is:

(i) reasonably necessary; and

(ii) reasonably appropriate and adapted;

for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.[103]

1.79 The amendment to subsection 070.612A thereby reverses the required state of mind required of the minister before they may impose relevant conditions.

1.80 A 'serious offence' would mean a criminal offence against a state or federal law punishable by at least five years imprisonment where the relevant conduct involved (or would involve), specific matters including: loss of life or serious personal injury (or risk thereof); sexual assault; possession of child abuse material; child exploitation; domestic or family violence; threatening or inciting violence towards a person or group of persons on the ground of an attribute; people smuggling or human trafficking.[104]

1.81 The rules of natural justice do not apply to the making of a decision to grant a first BVR.[105] This means the minister is not required to invite the affected person to make representations about proposed conditions. Once applied, these visa conditions remain in place for 12 months (although nothing prevents another BVR being granted to the non-citizen, before or after the 12-month period ends).[106] Where a BVR-holder is subject to a condition requiring them to remain at a particular address between certain times of the day, or requiring them to wear and take other action relating to a monitoring device, they are liable for a range of offences where they fail to comply with the condition. The offences are punishable by 5 years imprisonment, or 300PU (currently $93,900) or both, and subject to a mandatory minimum sentence of at least one year imprisonment.[107]

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103 Migration Amendment (Bridging Visa Conditions) Regulations 2024, item 2.

104 Migration Amendment (Bridging Visa Conditions) Regulations 2024, item 1, clause 070.111.

105 *Migration Act 1958*, subsection 76E(2).

106 Migration Regulations 1994, subregulation 2.25AE.

107 *Migration Act 1958*, ss 76C, 76D and 76DA.

The Migration Act

1.82 In addition, schedule 6 of the bill seeks to amend section 76E of the Migration Act. Section 76E provides a mechanism for a visa holder who has been granted a BVR subject to conditions pursuant to the regulations, to make representations relating to the grant of a second BVR without any one or more of those conditions, and for the minister to decide whether or not to grant the second BVR accordingly. While the rules of natural justice do not apply to decisions to grant a *first* BVR,[108] the minister is required to invite the visa-holder to make representation within a prescribed period as to why that first visa should not be subject to one or more of those conditions. It provides that the minister must grant the visa-holder a second BVR that is *not* subject to any one or more of the conditions relevantly prescribed if: the non-citizen makes representations in accordance with the invitation; and the minister 'is satisfied that those conditions are not reasonably necessary for the protection of any part of the Australian community'.

1.83 The bill would amend section 76E to provide that the minister must grant a non-citizen a second BVR that is not subject to any one or more of the conditions relevantly prescribed if:

(a) the non-citizen makes representations in accordance with the invitation; and, either

(i) the minister is not satisfied, on the balance of probabilities, that the non-citizen poses a substantial risk of seriously harming any part of the Australian community by committing 'a serious offence'; or

(ii) if the minister is satisfied, on the balance of probabilities, that the non-citizen poses the substantial risk mentioned in subparagraph (i)—the Minister is not satisfied, on the balance of probabilities, that the imposition of that condition, or those conditions, is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.[109]

1.84 It would also provide that in determining whether to grant a visa in accordance with subsection (4), the minister must decide whether to impose each condition

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108 'This is intended to make clear on the face of the provision that a decision to grant a BVR without application in these circumstances is not subject to the 'hearing rule', being the administrative law rule that requires a decision-maker to afford a person an opportunity to be heard before making a decision affecting their interests'. See, Migration Amendment (Bridging Visa Conditions) Bill 2023, explanatory memorandum, p. 19.

109 Migration Amendment Bill 2024, schedule 6, item 2, proposed paragraph 76E(4)(b).

prescribed for the purposes of paragraph (1)(a) 'in the same order as required by the regulations'.[110]

1.85 This amendment would apply both prospectively and retrospectively, including in relation to a BVR:

- granted before 10.13am on 7 November 2024, if as at that commencement the visa-holder was still able to make representations regarding their existing BVR, or they had made such representations but the minister has not yet made a decision about it;
- granted from 10.13am on 7 November 2024 and the commencement of this item; or
- granted on or after the commencement of this item (that is, the day after the bill receives Royal Assent).[111]

Preliminary international human rights legal advice

Criminal process rights

1.86 As the committee noted when these conditions were first introduced,[112] being electronically monitored at all times and subject to eight-hour periods of home detention may be regarded as the imposition of a criminal penalty for the purposes of international human rights law. Although the committee raised this issue previously, the statement of compatibility accompanying the amending regulation does not identify whether the imposition of these conditions may, in and of themselves, constitute a criminal penalty under international human rights law.

1.87 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.

1.88 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

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110 Migration Amendment Bill 2024, schedule 6, item 3, proposed subsection 76E(4A). Pursuant to the amendments to the Migration Regulations, that order is: electronic monitoring; financial matters; bankruptcy matters; curfew.

111 Migration Amendment Bill 2024, schedule 6, item 5.

112 Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Bill 2023 and Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, *Report 13 of 2023*, p. 20–21.

meaning in international human rights law. As to the nature and purpose of the conditions, the conditions attach to the bridging visas granted primarily to the NZYQ cohort rather than the public in general. The stated objectives of the conditions include: for the purposes of community safety, to mitigate the risk posed by impacted BVR holders to the Australian community, and to deter the individual from committing 'further offences';[113] and to ensure compliance with visa conditions and to prevent 'absconding behaviour' (contrary to the government's efforts to facilitate the person's removal).[114] However, as the conditions significantly interfere with multiple human rights, it is arguable that together they may be so severe as to constitute a 'criminal' penalty for the purposes of international human rights law.

1.89 The High Court of Australia recently made several pertinent observations in this regard (with respect to the correct classification of these conditions as being *prima facie* punitive under Australian law). With respect to the imposition of a curfew, the Court observed:

> The detention imposed by the curfew condition is neither trivial nor transient in nature. For one-third of every day, the person is confined to a specified place. And they are required to remain at that specified place. The person is confined because if they leave the notified address, they will commit a criminal offence and be subject to a mandatory minimum sentence of one year in prison. Further, because of the requirement they remain at a notified address for one-third of the day, the person's liberty to remain in the community during the other two thirds of the day is also constrained. The person cannot travel any distance that would prevent them from returning in time to a "notified address"…[S]everal considerations dictate the characterisation of [this condition] as prima facie punitive. First, the curfew condition involves a deprivation of liberty. Second, that deprivation of liberty is material and relatively long-term. Third, the deprivation of liberty applies and will apply to all persons within the class unless the Minister reaches the specified state of satisfaction.[115]

1.90 With respect to the electronic monitoring condition, the Court stated:

> [N]o person wearing the monitoring device, while awake, could become unaware of its presence. Its continued presence on the body, whilst not a cause of pain or physical discomfort, cannot be described as only a slight or modest interference with bodily integrity. One reason a person subject to the monitoring condition could not forget or ignore the monitoring device is because they are instructed to charge it twice a day for at least 90 minutes each time (and it vibrates if its charge is low)…The monitoring condition also

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113 Migration Amendment (Bridging Visa Conditions) Regulations 2024, statement of compatibility, pp. 7 and 11.

114 Migration Amendment (Bridging Visa Conditions) Regulations 2024, statement of compatibility, p. 11.

115 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 [51].

> effects an involuntary restraint on the liberty of the person wearing the monitoring device. The practical effect of the charging requirement and the other requirements to keep the device in good working order is to prevent an individual from being separated for an extended period from any place that has access to a mains power supply…Further, as persons unknown to the individual will be continuously tracking the individual's location (which would be likely to divulge to these persons unknown the individual's religious, political, sexual, and other personal affiliations and associations), the individual may be deterred from going to places they may otherwise go because of shame or a fear of adverse consequences from the Commonwealth or other persons with access to the information.[116]

1.91 If the conditions were to be considered a 'criminal' penalty under international human rights law, 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 (a relevant consideration to the extent that assessments of a risk of future offending with respect to any individuals within the affected cohort are based on prior criminal convictions);[117] 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);[118] and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.[119] These requirements would not be met (noting that a decision to impose a condition is not made by a court, and the minister is only required to be satisfied to the civil standard of proof that the visa holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence).

1.92 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.[120] The United Nations (UN) Human Rights Committee has stated that 'arbitrariness' under international human rights law includes elements of

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116 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 [58]–[61].

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

118 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'.

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

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

inappropriateness, injustice and lack of predictability.[121] In order for detention not to be considered arbitrary under international human rights law it must be reasonable, necessary and proportionate in the individual case. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy). As mandatory sentencing removes judicial discretion to take into account all of the relevant circumstances of a particular case, it may lead to the imposition of disproportionate or unduly harsh sentences of imprisonment.

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

> This right of appeal, which is again part of the requirement of a fair trial under international standards, is negated when the trial judge imposes the prescribed minimum sentence, since there is nothing in the sentencing process for an appellate court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards.[122]

1.94 The statement of compatibility states that any term of imprisonment imposed for these offences, beyond the mandatory one year, would follow conviction by a court and would be imposed by the court in consideration of the seriousness of the person's offending and the individual circumstances of their case.[123] It states that mandatory minimum sentences 'appropriately reflect the seriousness of these offences and the need to make clear that non-compliance with visa conditions that are aimed at protecting community safety is viewed seriously', and that '[i]n reaching its decision following a finding of guilt it is open to the court to take into account a wide range of factors, both aggravating and mitigating, to inform its view'.[124] It is unclear how the

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121 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].

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

123 Migration Amendment (Bridging Visa Conditions) Regulations 2024, statement of compatibility, p. 10.

124 Migration Amendment (Bridging Visa Conditions) Regulations 2024, statement of compatibility, pp. 10–11.

objective of protecting community safety is not able to be achieved by having maximum five years imprisonment alone, noting that this is a significant penalty. As such, it is not clear that the mandatory minimum sentence is compatible with the right to a fair trial and criminal process rights.

Rights to liberty; freedom of movement; privacy

1.95 The imposition of visa conditions, particularly those requiring a person to always wear (and maintain) an electronic monitoring bracelet, and/or be subject to a curfew relating to a specific address for up to eight hours per day for up to one year (where non-compliance carries a mandatory minimum sentence of one year imprisonment), also engages and limits a number of other human rights, in particular:

- the right to **liberty**, which prohibits the arbitrary and unlawful deprivation of liberty;[125]
- the right to **privacy**, which 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, as well as the right to control the dissemination of information about one's private life;
- the right to **freedom of movement**, which includes the right to move freely within a country for those who are lawfully within the country.[126]

1.96 These 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.

Legitimate objective and rational connection

1.97 The statement of compatibility identifies that the measure engages and limits these rights.[127] The statement of compatibility accompanying the amending regulation states that the ability to impose visa conditions (including relating to electronic monitoring and curfew) 'on members of the NZYQ-affected cohort' is aimed at the legitimate objective of mitigating risks to the Australian community posed by such non-citizens, especially vulnerable members of the public.[128] It also states that the conditions are intended to deter the individual from committing further offences; and

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

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

127 Migration Amendment (Bridging Visa Conditions) Regulations 2024, statement of compatibility, p. 6. The statement of compatibility also indicates that the measure engages and limits the right to equality and non-discrimination.

128 Migration Amendment (Bridging Visa Conditions) Regulations 2024, statement of compatibility, pp. 8-9.

to ensure compliance with visa conditions and to prevent 'absconding behaviour' (contrary to the government's efforts to facilitate the person's removal).[129]

1.98 While the objectives of protecting public safety and facilitating the removal of non-citizens are generally capable of constituting a legitimate objective (and the imposition of monitoring conditions may be effective to achieve that objective), questions remain as to whether the measure addresses a pressing and substantial concern for the purposes of international human rights law.

1.99 The public safety risk posed by affected individuals and the manner in which this risk is assessed are relevant considerations in determining whether the measure addresses a pressing and substantial public concern. The amended regulations appear to now require that an individual assessment of the risk profile of each person who may be subject to these conditions is undertaken. The statement of compatibility states that the Australian Border Force Community Protection Board provides evidence-based recommendations about matters including visa conditions to the minister.[130] Under the new test, the board would be required to consider whether the person poses a substantial risk (meaning a risk that is not remote, far-fetched or insubstantial) of seriously harming any part of the Australian community by committing one of a specified series of criminal offences. However, it is not clear how, and in accordance with what methodology, the minister would predict each individual's future risk of offending. It is unclear what is meant by 'substantial risk', and why this threshold was considered appropriate noting that the standard of 'unacceptable risk' is utilised in comparable schemes.[131] It is not clear what evidence the minister would be required to have regard to in order to reach this conclusion on the balance of probabilities. For example, it is not clear whether the fact an affected person has previously been convicted of a serious offence (as defined in the amending regulations) many years prior would be regarded as sufficient evidence that the person poses a substantial risk of committing a serious offence in the future. The speed with which these new conditions were introduced after the judgment of the High Court of Australia on 6 November 2024 (the amending regulation was registered the following day with effect from 10.13 am that morning) suggests that new BVRs were determined and issued in haste. While it is not clear precisely how many visa-holders' BVR conditions were invalidated following that decision, questions arise as to the nature of evidence to which regard was had by the minister in determining that an individual

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129 Migration Amendment (Bridging Visa Conditions) Regulations 2024, statement of compatibility, p. 11.

130 Migration Amendment (Bridging Visa Conditions) Regulations 2024, statement of compatibility, pp. 9–10.

131 In particular, the Community Supervision Order Scheme. See, Parliamentary Joint Committee on Human Rights, *Report 14 of 2023* (19 December 2023), pp. 31–59.

poses a substantial risk of seriously harming the community by committing a serious offence, particularly noting the number of people subject to a BVR.[132]

1.100 Further, no information is provided as to whether the measure is strictly necessary. Visa-holders may be subject to a wide range of discretionary visa conditions, including various monitoring and reporting conditions as well as requirements for the visa holder to do everything possible to facilitate their removal from Australia and not attempt to obstruct efforts to arrange and effect their removal from Australia.[133] As with all individuals in Australia, they are subject to the oversight of policing authorities, and liable to investigation for any suspected criminal offences. Further, they may be subject to a Community Supervision Order, by which a court may impose any conditions on a person subject to a supervision order that it is satisfied, and which it is satisfied the combined effect of which, on the balance of probabilities, are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from serious harm by addressing the unacceptable risk of the offender committing a serious violent or sexual offence.[134] While imposing criminal penalties for non-compliance with the visa conditions may be necessary for deterrent purposes, it remains unclear why punitive conditions including electronic monitoring are necessary to manage the potential safety risk posed by the NZYQ cohort. This is particularly so noting that Australian citizens who have been convicted of a criminal offence and served their sentence do not have equivalent conditions or restrictions imposed on them indefinitely. 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 who were released from immigration detention).[135] It is not clear why existing laws are

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132 The Department of Home Affairs indicated that, at 1 July 2024, there were 182 NZYQ-affected BVR holders in the community, and that this number would continue to increase. See, *brief released under freedom of information*, p. 2.

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

134 Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023. See Parliamentary Joint Committee on Human Rights, *Report 14 of 2023* (19 December 2023), pp. 31–59.

135 16,511 Australian prisoners were released in the June quarter in 2023: Bureau of Statistics, *Corrective Services, Australia* (21 September 2023). As at 27 November 2023, 141 people in the NZYQ cohort are reported to have been released so far from immigration detention Australian. See Paul Karp, 'Another 45 people released due to high court ruling on indefinite detention as Coalition plays hard ball on 'patch-up' bill', *The Guardian*, 27 November 2023 (accessed 28 November 2023).

insufficient to achieve the stated objectives and thus why the measure is strictly necessary.

Proportionality

1.101 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.

1.102 A consideration in assessing proportionality is also the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate. As the High Court of Australia considered, the imposition of constant electronic monitoring and/or curfews, as well as the mandatory minimum sentence of imprisonment for non-compliance with the conditions, constitute a significant interference with human rights.

1.103 The revised test which the minister must apply in order to impose electronic monitoring and/or curfew conditions on a visa-holder indicates that the minister is required to assess the individual risk profile of each individual with respect to specific serious criminal offences, and apply conditions on a case by case basis. This may assist with the proportionality of the measure, albeit noting that the minister is only required to be satisfied to the civil standard (on the balance of probabilities) that the visa-holder poses a substantial risk of committing a serious offence, and that the associated conditions are reasonably necessary, appropriate and adapted to address that risk. The application of this standard requires only a determination that the visa-holder is more likely than not to pose that level of risk, and that the application of the relevant visa condition is more likely than not to address that risk. Further, as noted above, it appears that this test may be applied in haste in practice, which may raise questions as to the depth of these assessments.

1.104 While a BVR holder must be invited to make representations as to why one or more conditions should not be applied to them, this is only after those conditions have already been applied, and places the onus on the individual to justify why they should not be required. In order for the minister to remove one or all of the conditions, they would be required to *not be* satisfied that the person poses a relevant substantial risk, or if they are satisfied of such a risk, they are *not satisfied* that the imposition of the relevant conditions are necessary to address that risk.[136] This therefore has no safeguard value in relation to the issue of a first BVR, and offers limited safeguard value with respect to the issue of any further BVRs. English is unlikely to be the primary language of many, if not most, of the NZYQ cohort, which may hinder their ability to make persuasive representations or to understand their ability to make them.

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136 Migration Amendment Bill 2024, schedule 6, item 2, paragraph 76E(4)(b).

1.105 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. The statement of compatibility states that any term of imprisonment beyond the mandatory one year would be imposed by the court in consideration of the seriousness of the person's offending and the individual circumstances of the case.[137] It states that the maximum penalty provides flexibility for courts to treat different cases differently.[138] However, retaining the court's discretion to impose a sentence *greater* than the mandatory minimum sentence does not mitigate the risk that imposing a mandatory minimum sentence of one year imprisonment may be disproportionate and arbitrary in light of the particular circumstances of the case. As such, the inclusion of a maximum penalty does not offer any safeguard value.

1.106 The statement of compatibility notes that the 12-month time limit on these visa conditions provides for 'regular review' of whether the conditions continue to remain reasonably necessary, appropriate and adapted.[139] However, given the extent of the interference with the human rights of affected persons, it is not clear that review on an annual basis would constitute 'regular' review. No information is provided as to why the measure should not require review of the continued necessity of conditions more frequently (such as, every two months), or whether an affected person can make representations to the minister regarding those conditions at any time (not merely where invited on the issue of the first BVR). As to the availability of other review, no information is provided in the explanatory materials as to whether decisions related to the imposition of these visa conditions are subject to internal or external review, and if so whether such review is administrative or a review of the merits of the decision.

Committee view

1.107 The committee notes the imposition of visa conditions, particularly those requiring a person to always wear (and maintain) an electronic monitoring bracelet, and/or be subject to a curfew relating to a specific address for up to eight hour per days for up to one year (where non-compliance carries a mandatory minimum sentence of one year imprisonment) engages and limits multiple human rights.

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137 Migration Amendment (Bridging Visa Conditions) Regulations 2024, statement of compatibility, p. 15.

138 Migration Amendment (Bridging Visa Conditions) Regulations 2024, statement of compatibility, p. 15.

139 Migration Amendment (Bridging Visa Conditions) Regulations 2024, statement of compatibility, p. 10.

1.108 The committee considers further information is required to assess the compatibility of this measure with this right, and as such seeks the minister's advice in relation to:

(a) whether the imposition of electronic monitoring and/or curfew conditions may constitute a criminal penalty under international human rights law;

(b) whether the amending regulations address a pressing and substantial concern for the purposes of international human rights law, and

  (i) how many BVRs were affected by the YBFZ decision on 6 November 2024;

  (ii) how many BVRs have been issued since the YBFZ decision (and how many had electronic monitoring and/or curfew conditions), and what was the timeframe in which these visas were granted;

  (iii) what evidence the minister would be required to have regard to in order to be satisfied on the balance of probabilities as to a level of risk;

  (iv) whether the fact an affected person has previously been convicted of a serious offence (a defined in the amending regulations) many years prior may be regarded as sufficient evidence that the person poses a substantial risk of committing a serious offence in the future;

  (v) why the measure is necessary despite existing discretionary visa conditions, general policing oversight and investigation facilities in the community, and the Community Supervision Order scheme;

(c) why the test requires satisfaction as to a ‘substantial risk’ rather than an ‘unacceptable risk’;

(d) how, and in accordance with what methodology, is a risk of future offending predicted (and whether, if it is assessed according to prior convictions, this constitutes double punishment for the original offending);

(e) why the measure does not require review of the continued necessity of visa conditions more frequently than annually (such as, every two months);

(f) whether an affected person can make representations to the minister regarding those conditions at any time (not merely where invited on the issue of the first BVR); and

(g) whether decisions related to the imposition of these visa conditions are subject to internal or external review, and if so whether such review is administrative or a review of the merits of the decision.

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

Aged Care Bill 2024[2]

Purpose	This bill would establish a legislative framework for the Commonwealth aged care system, including by: • providing legislative authority for the delivery of funded aged care services to individuals; • setting out the eligibility requirements for individuals seeking to access funded aged care services; • setting out conditions of registration for providers and key obligations of registered providers and aged care workers; • providing for funding arrangements for funded aged care services; • establishing the governance and regulatory framework for the Commonwealth aged care system; • authorising the use and disclosure of protected information in certain circumstances and providing for whistleblower protections; and providing pathways for review of decisions made under the bill.
Portfolio	Health and Aged Care
Introduced	House of Representatives, 12 September 2024
Rights	Effective remedy; equality and non-discrimination; freedom of movement; health; liberty; privacy; rights of persons with disability; torture or cruel, inhuman or degrading treatment or punishment

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, Aged Care Bill 2024, *Report 10 of 2024*; [2024] AUPJCHR 80.

2.3 The committee published its advice to Parliament in relation to this bill in *Report 9 of 2024*.[3] The committee did not request the provision of a response from the minister but did make a series of recommendations.

Statement of rights

2.4 In *Report 9 of 2024*, the committee noted that the bill proposed to include a Statement of Rights, which would set out a number of rights to which individuals accessing, or seeking to access, funded aged care services would be entitled, including the rights to have personal privacy respected and personal information protected, and be free from all forms of violence, degrading or inhumane treatment, exploitation, neglect, coercion, abuse or sexual misconduct. Registered providers would be required to take all reasonable and proportionate steps to act compatibly with the rights specified in the Statement of Rights in delivering funded aged care services, taking into account that limits on rights may be necessary to balance competing or conflicting rights; the rights and freedoms of others; and compliance with other laws.

2.5 The committee considered that to the extent that registered providers deliver aged care services to individuals compatibly with the Statement of Rights, a number of human rights would be promoted. The committee noted that while a number of rights specified in the Statement of Rights are derived from international human rights law, there are number of key rights missing including the rights to life, liberty and security of person, freedom of movement, freedom of religion, freedom from restraint, the presumption of legal capacity and the prohibition against torture. It was not clear to the committee why these important human rights are not reflected in the Statement of Rights. The committee further noted that the limitation clause that would apply to the Statement of Rights does not distinguish between rights that may be subject to permissible limitations and rights that may not (namely, absolute rights). The committee considered that without this distinction there may be a risk that registered providers may apply the limitation criteria to absolute rights and thus not act compatibly with international human rights law. The committee also noted that it is not clear whether there would be an effective remedy for any violation of the rights specified in the Statement of Rights.

2.6 The committee made recommendations to strengthen the human rights compatibility of this measure, including that all key human rights be protected, that the limitation clause be amended to reflect international human rights law, and that there be an effective remedy for any violation of a right specified in the Statement of Rights.

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[3] Parliamentary Joint Committee on Human Rights, *Report 9 of 2024* (9 October 2024), pp. 19–65.

Minister's response[4]

2.7 The minister advised:

Suggested action

1.28 The committee considers the human rights compatibility of this measure may be strengthened if:

a) all key human rights treaties were included in the objects clause (paragraph 5(a)), including, at a minimum, the International Covenant on Civil and Political Rights; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Elimination of All Forms of Racial Discrimination; and United Nations Declaration on the Rights of Indigenous Peoples;

b) all human rights protected in the international human rights law treaties to which Australia is party be specified in the Statement of Rights, including the addition of, at a minimum, the rights to life, liberty and security of person, freedom of movement, freedom of religion and freedom from restraint, and the prohibition against torture;

c) the Statement of Rights included the right to an effective remedy for any violation of a right specified in the statement;

d) consideration were given to removing subclause 24(3) so that on compliance with the Statement of Rights by registered providers may be enforceable by proceedings in a court or tribunal; and

(e) the limitation clause in subclause 24(2) were amended to not apply to absolute rights.

Some feedback during consultation suggested that the Objects should reference all relevant international conventions, such as:

• International Covenant on Civil and Political Rights,

• The Convention against Torture and Other Forms of Cruel Inhuman or Degrading Treatment or Punishment,

• United Nations Declaration on the Rights of Indigenous Peoples.

One of the objects of the Aged Care Bill 2024 (Bill) is to ensure that, in conjunction with other legislation, the Bill gives effect to Australia's

[4] The minister's response to the committee's entry was received on 30 October 2024. This is an extract of the response. The response is available in full on the committee's webpage.

> obligations under the International Covenant on Economic Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities.
>
> To make the constitutional basis for the legislation clear, the Objects only specify the international conventions relevant to the external affairs power.
>
> This does not mean that aged care does not endeavour to uphold other international conventions.
>
> Aged care services for Aboriginal and Torres Strait Islander people rely on the races power. As a result the United Nations Declaration on the Rights of Indigenous Peoples has not been referenced in the Bill.
>
> This Declaration does not need to be named in the Bill for it to continue to influence the way the Government approaches and delivers services to and with Aboriginal and Torres Strait Islander people and communities.
>
> The Declaration's relationship to the National Agreement on Closing the Gap and meaningful outcomes was discussed in the Productivity Commission's recent report on Closing the Gap.

Concluding international human rights legal advice

2.8 The minister stated that clause 5 of the bill only specifies the international conventions 'relevant to the external affairs power'. However, the Statement of Rights includes references to several rights which are derived from, or directly related to, human rights set out in the International Covenant on Civil and Political Rights (ICCPR), a key covenant which has direct relevance to the external affairs power. Professor Andrew Byrnes (Emeritus Professor of Law at the University of New South Wales and Chair of the Older Persons Advocacy Network Human Rights Advisory Group) notes that the external affairs power requires that a legislative provision give effect to an obligation under a treaty and the legislative provisions must be capable of being considered appropriate and adapted to the implementation of that treaty.[5] In this regard, the Statement of Rights provides that an individual: has the right to exercise choice and make decisions; has a right to have their personal privacy respected and personal information protected; and a right to be informed and express opinions.[6] These would appear to give effect to rights contained in the ICCPR, in particular the rights to equal recognition before the law,[7] privacy,[8] and freedom of expression.[9] Professor Byrnes notes that these rights are exclusively or primarily referable to the ICCPR.[10] As such, the stated reliance on the external affairs power in respect of subclause 5(a) does not appear to present a barrier to the inclusion of the ICCPR.

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5 Professor Andrew Byrnes, *correspondence to the committee*, received 12 August 2024.

6 Chapter 1, Part 3, clause 23.

7 See, ICCPR, articles 16, 17, 25, and 26.

8 ICCPR, article 17.

9 ICCPR, article 19.

10 Professor Andrew Byrnes, *correspondence to the committee*, received 12 August 2024.

Committee view

2.9 The committee thanks the minister for the provision of this additional information.

2.10 The committee notes the minister's advice that the limited reference to international agreements in clause 5 of the bill does not mean that aged care does not endeavour to uphold other international conventions. However, as the committee noted previously, the committee considers that, in view of the direct connection between several of the rights contained in the Statement of Rights, and key human rights contained in the International Covenant on Civil and Political Rights, it would be appropriate for the bill to be amended to identify that the bill gives effect to Australia's obligations under the International Covenant on Civil and Political Rights.

Suggested action

2.11 The committee recommends that subclause 5(a) of the bill be amended to include reference to Australia's obligations under the International Covenant on Civil and Political Rights.

2.12 The committee reiterates its recommendations from *Report 9 of 2024* relating to the proposed Statement of Rights.

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

Restrictive practices

2.14 The bill would allow rules to be made regarding the use of restrictive practices. These rules must include certain requirements, such as that a restrictive practice only be used as a last resort to prevent harm; to the extent necessary and in proportion to the risk of harm; and with the informed consent of the individual or another person or body (a substitute decision-maker) if the individual lacks capacity to give that consent. If consent is given by a substitute decision-maker, the bill would grant the aged care provider and staff member who used the restrictive practice immunity from any civil or criminal liability in relation to the use of the restrictive practice.

2.15 The committee noted that the use of restrictive practices on persons in aged care raises significant human rights issues, as previously considered by the committee on numerous occasions. In particular, setting out requirements relating to when restrictive practices can be used by aged care providers engages multiple human rights. To the extent that the requirements would strengthen the responsibilities of providers by enhancing safeguards around the use of restrictive practices, the measure may assist to ensure that rights are not limited. However, the committee noted that as the restrictive practice requirements are to be set out in future rules, it is difficult to properly assess their safeguard value. The committee noted that allowing

for the requirements to not apply in an emergency and authorising substitute decision-makers to consent to the restrictive practice on behalf of an individual who is considered to lack capacity would likely weaken the safeguard value of the requirements and may in practice increase the risk of human rights violations.

2.16 The committee considered that allowing substitute decision-makers to consent to the use of restrictive practices, and granting complete immunity to persons who use restrictive practices in reliance on the consent of substitute decision-makers, risks being incompatible with a range of human rights, particularly the rights of persons with disability. The extent of the risk will depend on which persons or bodies are prescribed in the rules to give consent. The committee considered that allowing a broad range of people, who may not have the necessary expertise or qualifications with respect to restrictive practices, to give consent could have the effect of facilitating the use of restrictive practices, which is inconsistent with Australia's obligation to minimise, and ultimately eliminate, the use of restrictive practices.

2.17 The committee suggested some actions to assist with the human rights compatibility of the measure, including that the bill be amended to incorporate the additional safeguards with respect to restrictive practices recommended by the Royal Commission into Aged Care Quality and Safety.

Minister's response[11]

2.18 The minister advised:

> **Suggested action**
>
> **1.54. The committee considers that in drafting the rules relating to restrictive practices, regard should be had to the committee's previous comments and recommendations on equivalent legislation.[12]**
>
> I note the Committee's recommendation.
>
> **1.55 The committee considers the proportionality of this measure may be assisted were the bill amended to incorporate the additional safeguards recommended by the Royal Commission into Aged Care Quality and Safety, including that restrictive practices be prohibited unless recommended by an accredited independent expert or when necessary in an emergency to avert the risk of immediate physical**

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11 The minister's response to the committee's entry was received on 30 October 2024. This is an extract of the response. The response is available in full on the committee's webpage.

12 See most recently Parliamentary Joint Committee on Human Rights, *Report 3 of 2023 – Quality of Care Amendment (Restrictive Practices) Principles 2022* (15 March 2023). See also Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 and Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021, *Report 10 of 2021* (25 August 2021) pp. 63–90.

harm, with any further use subject to recommendation by an independent expert.

As drafted, clause 18 provides that the rules made regarding restrictive practices are to ensure that restrictive practices are only ever to be used as a last resort, only to the extent that is necessary, for the shortest time and in the least restrictive form, to prevent harm to the individual and others.

Assessment by an approved health practitioner, and similar requirements (including additional requirements for chemical restraints) will be set out under the rules, which must be documented, consistent with the *Quality of Care Principles 2014*. The arrangements provide a quick and responsive assessment by medical practitioners, nurse practitioners and registered nurses with day-to-day knowledge of the older person.

This is important as the care needs of older people in residential care are likely to change and/or deteriorate rapidly.

1.56 The committee recommends that the statement of compatibility be updated to provide a more fulsome assessment of the rights identified above, having regard to the committee's previous comments.

I note the Committee's recommendation. I will consider the comments of the Joint Committee of Human Rights in relation to making updates to the Statement of Compatibility with Human Rights, particularly in relation to the concerns raised around restrictive practices.

Supporters and guardians

2.19 The bill establishes a supporter framework by which a person may be registered as a supporter of an individual and that supporter may be given decision-making authority to act and make decisions on behalf of the individual in exceptional circumstances.

2.20 The committee noted that while it is not clear on the face of the legislation the grounds on which a person's capacity would be denied and a supporter would consequently be granted decision-making authority, there appears to be a risk that the measure would invariably apply to people with disability. Having regard to the clear position under international human rights law that a person's disability must never be grounds for denying legal capacity, the committee considers there to be a risk that this aspect of the measure may be incompatible with the right to equal recognition before the law.

2.21 The committee further noted that Australia has an obligation to replace substitute decision-making with supported decision-making.

2.22 The committee considered that the measure contains several key elements of supported decision-making and important safeguards to protect individuals against

abuse. However, the committee considered that the effectiveness of the duties imposed on supporters and the other safeguards accompanying the measure will depend on how the measure operates in practice. The committee made some recommendations to assist with the human rights compatibility of the measure.

Minister's response[13]

2.23 The minister advised:

> **Suggested action**
>
> **1.74 The committee considers the human rights compatibility of this measure may be assisted were the bill to be amended to clarify:**
>
> **(a) what constitutes exceptional circumstances for the purposes of making a determination that a supporter has decision-making authority; and**
>
> **(b) what is meant by an 'individual's personal, cultural or social wellbeing' in the context of a decision-making supporter acting in a way that is not in accordance with the individual's will and preferences if necessary to prevent serious risk to one of those things.**
>
> Determinations that provide a supporter with decision-making authority are not intended to be common and are only intended to be made due to circumstances that are unexpected, unavoidable and outside the control of the older person or their supporter(s).
>
> In considering make such determinations, the factors that the System Governor will consider in this regard include:
>
> • Whether the older person experienced unexpected and unavoidable circumstances, outside of their control, that have significantly impacted their ability to access and interpret information, make decisions and communicate with relevant stakeholders
>
> • whether the older person, in such circumstances, is required to make decisions under aged care legislation (e.g. do they require a new needs assessment, agreement and execution of a service agreement) and would delays in making those decisions likely have negative or harmful consequences for them
>
> • whether a substitute decision-maker is already authorised to make decisions for the older people through a state or territory legal instrument.
>
> Determinations will only be in effect for the time specified by the System Governor (initial period of registration is up to six months, with one possible

[13] The minister's response to the committee's entry was received on 30 October 2024. This is an extract of the response. The response is available in full on the committee's webpage.

extension of up to an additional 6 months), however those arrangements can be suspended or cancelled if the:

• older person has recovered from the sudden or unforeseen circumstance that significantly impacted their ability to and interpret information, make decisions and communicate with relevant stakeholders.

• System Governor is made aware of a substitute decision-maker being granted decision-making authority under a state or territory legal instrument (e.g. guardianship order).

Such determinations are not enduring and do not negate the need for individuals to seek the establishment of arrangements under state and territory legislation, such as guardianship orders, where the older person requires more intensive decision-making support in other aspects of their life.

The explanatory memorandum to the Bill provides examples of what constitutes exceptional circumstances, and these details will also be set out in departmental policy materials.

Decision-making supporters are required to make reasonable efforts to ascertain the older person's wills and preferences. How this works for individuals will be determined by the older person's individual circumstances.

A decision-making supporter is required to take reasonable steps to consult any other supporter of the individual (including non-decision-making supporters), and, where appropriate, any other person who assists the individual in their day-to-day life. Where there is no such person, the decision-making supporter is required to take reasonable steps to consult with any family members or other persons who have a close continuing relationship with the individual.

Subclause 30(5) provides that the individual's will and preferences may only be overridden by a decision-making supporter where it is necessary to prevent serious risk to the individual's personal, cultural and social wellbeing.

When this is necessary will need to be determined based on an individual's unique circumstances.

For example, where the individual's cultural beliefs mean that their wish is to be in a specific location or on specific country at the end of their life, and this means withdrawing from comprehensive aged care services, the individual has a right to the dignity of risk and exercise that will. It would not be appropriate for a decision-making supporter to override that preference because they themselves do not have that cultural background.

1 .75 The committee recommends that consideration be given to ensuring the provision of training and guidance to supporters in order that they can support the individual to exercise legal capacity in a way

that respects their rights, will and preferences and does not amount to substitute decision-making.

I accept the Committee's recommendation.

Implementing supported decision-making in aged care requires a program of educational and awareness uplift across all aged care stakeholders, including older people, their supporters and the whole aged care workforce. Supported decision-making places the older person at the centre of their decision-making and seeks to address processes and systemic factors rather than reinforce binary interpretations of an older person's legal capacity to make decisions.

Initially the focus will be on supporting the transition and implementation of the new arrangements. This will include education and awareness of the older person themselves, their supporters and aged care service providers in preparation for the commencement of the new arrangements. Ongoing activities will be required to support efforts to embed the necessary behavioural change to achieve supported decision-making in aged care post implementation.

The legislation contains safeguards to ensure the older person is always involved in their decision-making, and where they cannot for whatever reason, their will and preferences are central to making decisions. The registration process for supporters will require supporters to consent to and agree the obligations and duties set out in the legislation. This information will be available publicly and reinforced through the registration processes (both in writing on a registration form and through scripting via My Aged Care). A range of resources will also be published to support all parties understanding of the operational policy relating to supported decision-making.

The Bill sets out review requirements (including timing) for a range of provisions including those relating to supporters. The review of the operation of the new Aged Care Act (clause 601) will provide valuable insights into the operation of the provisions, which may result in legislated changes and/or targeted education and awareness activities across the sector.

Publication of banning order

2.24 The bill would empower the Commissioner to make banning orders prohibiting or restricting an entity (which includes an individual), or an individual worker, from engaging in the delivery of funded aged care services generally or in relation to a specified type of service. The Commissioner would be required to establish and maintain both a register of banning orders, and a provider register (which must include details about any associated banning orders).

2.25 The committee noted that insofar as publishing information about banning orders on a register may help to ensure that unsuitable people who may present a risk to aged care recipients are not engaged in the provision of their care, this measure appears to promote the right to health and the rights of people with disability. However, by providing that the register may be made public, the measure would limit the right to privacy. While the committee considered that protecting the safety of vulnerable aged care recipients is a legitimate objective, it is not clear that the measure would be proportionate. The committee made recommendations to assist with the proportionality of the measure, including amending the bill to require the Commissioner to ensure that the register contains correct and complete information, and does not include misleading information; and to empower the Commissioner to not include information on a register in certain circumstances; and to identify whether a decision to include information on the register, or to not amend the register, would be reviewable.

Minister's response[14]

2.26 The minister advised:

> **Suggested action**
>
> **1.93 The committee considers that the proportionality of the measure may be assisted were the bill amended to:**
>
> **(a) amend section 141 and 507 to require the Commissioner to ensure that the register contains correct and complete information, and does not include misleading information; and to empower the Commissioner to not include information on a register in certain circumstances; and**
>
> **(b) identify whether a decision to include information on a register, or to not amend the register, would be reviewable.**
>
> The Bill, through clauses 507 and 141, establishes both the Provider Register and the Banning Order Register and requires the Commissioner to administer each of these. While it is explicitly stated in subclause 507(3) of the Bill that the Commissioner must ensure that the register of banning orders is kept up to date, it is expected that the Commissioner's full and proper exercise of their functions would see this requirement apply equally to the administration of each Register.
>
> To the extent that the information in these registers will be personal information, APP 13 in Schedule 1 of the Privacy Act also applies to the Commissioner (as an APP entity), and requires the Commissioner to ensure that any personal information they hold is accurate, up to date, complete, relevant and not misleading.

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[14] The minister's response to the committee's entry was received on 30 October 2024. This is an extract of the response. The response is available in full on the committee's webpage.

It is inherent in the Commissioner keeping the registers up to date that this requires the Commissioner to ensure the information within each register is both correct and complete. However, should this obligation need to be legislatively imposed upon the Commissioner to ensure the fit and proper exercise of their functions, the Bill provides that the rules may prescribe matters in relation to the administration of these Registers, in paragraphs 141(8)(d) and 507(6)(b) respectively, which could prescribe the necessary requirements to be imposed on the Commissioner's administration of the Registers for this purpose.

The Bill requires the Commissioner to include specified information within each register to provide a correct and complete record of registered providers and banning orders. The establishment and administration of these registers is necessary for the effective performance of the Commissioner's functions and the Bill prescribes the minimum information which the Commissioner would be required to hold for that purpose.

Paragraph (i) of subclause 507(1) enables rules to be made concerning the inclusion of further information in the Banning Order register.

It is intended to make rules to enable additional information to be included to address circumstances where information on the register may be accurate, but misleading, e.g. where an individual has a common name and further information, such as a date of birth, may be necessary to identify them.

As the establishment and administration of the register, and the associated collection and use of personal information, are necessary to the performance of Commissioner's functions, the Bill's authorisation to collect and use that information constitutes a necessary and proportionate limitation on the right to privacy of affected individuals.

It is the disclosure of personal information through publication that would most directly limit the right to privacy for affected individuals. It is intended that any privacy concerns will be addressed through rules being made concerning publication of the register (subclause 507(6)). Those rules will require or empower the Commissioner not to publish information on the register in certain circumstances with due regard to an affected person's right to privacy.

As noted, the Bill requires the Commissioner to include specified information within each register to provide a correct and complete record of registered providers and banning orders. As such, it is not intended that the inclusion of information within the register would be a reviewable decision as the Commissioner is not afforded discretion as to its inclusion other than where additional information may be required to specifically identify an individual where the general information collected is not sufficient for this purpose.

Matters relating to the inclusion of additional identifying information at the Commissioner's discretion, correction of information on the register, and its publication are matters dealt with in the rules (clauses 507(1)(i), 507(5) and 507(6)). The rules will also address procedural fairness matters in this regard, including whether these decisions are reviewable.

1.94 The committee recommends that the statement of compatibility be updated to provide a more fulsome assessment of the compatibility of these measures with the right to privacy, and in particular to set out: what safeguards would apply to these measures; whether a decision to include information on a register, or to not amend the register, would be reviewable; whether the exercise of powers related to the registers would be subject to independent oversight and review (and if so, how).

As noted, the Committee's concerns are to be addressed primarily through rules to be made relating to management, administration and publication of the registers. The Committee's concerns will inform the consideration and explanation of the interaction of those rules with the right to privacy to be provided in the statement of compatibility associated with the legislative instrument.

Information-sharing

2.27 The bill would provide for the use and disclosure of information including personal information, subject to an overarching prohibition against unauthorised disclosure. These provisions would engage and limit the right to privacy.

2.28 The committee considered that while the measures would pursue legitimate objectives, it is not clear that they would be sufficiently circumscribed, accompanied by sufficient safeguards, and subject to independent oversight and review. The committee considered that some of the safeguards in the bill could be strengthened in a manner that would assist their proportionality, and would not appear to frustrate their overall policy intention, and has made recommendations to that effect.

Minister's response[15]

2.29 The minister advised:

Suggested action

1.114 The committee considers that the proportionality of the measure may be assisted were the bill amended as follows:

a) amend subclause 539(7) to provide that personal information may only be disclosed for research purposes

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15 The minister's response to the committee's entry was received on 30 October 2024. This is an extract of the response. The response is available in full on the committee's webpage.

where it has been deidentified, or otherwise where individuals have consented to the disclosure of their identifiable personal information for the specific research purpose;

b) require an independent review of the privacy implications of the information-sharing scheme after a specified period of operation;

Subclause 539(7) provides that relevant information may be disclosed for the purposes of research into funded aged care services if conducted on behalf of the Commonwealth. The disclosure of personal information for this purpose is only considered necessary if the research cannot be conducted if the information were to be de-identified.

To amend the provision as proposed would significantly alter the intended operation of this provision and result in no authorisation being available to allow relevant research that requires information about identified or reasonably identifiable individuals. We note some important research projects may involve linkage with other data sets where it is not possible to remove all risk of re-identification. Research may also extend to a large number of individuals, and it would be impractical and untimely to obtain require the consent of all individuals.

Further, obtaining informed consent at the time of collecting the information is not practicable, as it would not be known at that time what future research may be proposed. To obtain consent at the time of each new research proposal would also not be practicable as it could limit the value of the research where consent was not obtained, or responses not provided.

Research into funded aged care services is of significant import to enable a sustainable aged care system.

Clause 601 provides for the independent review of the operation of the Bill, with a written report to be provided to the Minister and tabled in Parliament. This review covers the operation of the Bill as a whole, which would include Chapter 7 and the information management clauses therein. In addition, the department has engaged an external legal provider to undertake a privacy impact assessment (PIA) of the Bill, with a particular focus on provisions in Chapter 7. The PIA involves a systematic assessment of a project and identifies potential privacy risks. It also includes recommendations on how to manage, minimise or eliminate these privacy risks. These recommendations were finalised prior to the introduction of the Bill, and fed into the drafting of the Bill. I do not consider that a further independent review of the privacy implications is necessary.

1.115 The committee recommends that the statement of compatibility be updated to provide a more fulsome assessment of the compatibility of these measures with the right to privacy, and in particular:

(c) what review mechanisms in the bill may have safeguard value with respect to the right to privacy, and how;

(d) whether and how the information-sharing scheme would be subject to independent oversight, and whether such oversight would offer safeguard value in respect of the right to privacy;

(e) to whom a person affected by the disclosure of their personal information could complain, and what remedies such entities may offer;

(f) why the bill would not require the consent of an affected individual to the disclosure of their personal information under any of the proposed measures, and whether requiring the consent of individuals would be ineffective to achieve the stated objectives of the measures; and

(g) whether subclause 539(7) would permit the disclosure of identifiable personal information for research purposes as a matter of law, and why the bill does not require that individuals must consent to such disclosure.

Entrusted persons as defined in the Bill will, in most cases, be APP entities themselves, or (for example, in the case of contracted service providers) will be required under contractual arrangements to comply with the *Privacy Act 1988* in relation to the handling of personal information as well as being subject to the secrecy provisions of the Bill. Complaints regarding handling of personal information and any potential interference with privacy will therefore be able to be made directly to the relevant APP entities or to Office of the Australian Information Commissioner. The remedies available under the *Privacy Act 1988* will continue to apply in relation to the handling of personal information by entrusted persons who are subject to that Act.

The Australian Information Commissioner's powers under the *Privacy Act 1988* to investigate complaints and make determinations in relation to interferences with privacy will continue to apply to the handling of personal information by APP entities as part of the information sharing scheme in the Bill.

The purpose of the authorisations under the Bill is to provide timely services to aged care recipients, prevent or lessen threats to health and safety, and to fulfil public interest purposes.

Requiring the consent of individuals prior to the use and/or disclosure of their personal information (either in the course of the performance of powers, functions and duties under the Act, or in order to lessen/prevent a threat to safety, health or wellbeing of an individual) would present an issue of practicality which would frustrate the purpose of the authorisations where that consent cannot be obtained. Furthermore, consent will continue to be obtained from older people at various points throughout their aged

care journey, and this consent may extend to some of the authorisations set out in Chapter 7.

In relation to subclause 539(7), this issue has been addressed above, however, I would reiterate that obtaining informed consent at the time of collecting the information is not practicable, as it would not be known at that time what future research may be proposed. To obtain consent at the time of each new research proposal would also not be practicable for a number of other reasons, including that it could limit the value of the research where consent was not obtained, or responses not provided, and may involve a very large number of participants. Research into funded aged care services is of significant import to enable a sustainable aged care system.

Committee view

2.30 The committee thanks the minister for the provision of this information. The committee welcomes the minister's acceptance of some of the committee's suggested actions, including with respect to aspects of measures related to restrictive practices and to supporters and guardians.

2.31 However, the committee otherwise reiterates its recommendations from *Report 9 of 2024* and notes that it will carefully consider future instruments related to the Aged Care Bill 2024 as and when they are made.

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

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024[16]

Purpose	The bill seeks to amend the *Broadcasting Services Act 1992* and related legislation to establish a scheme by which the Australian Communications and Media Authority may require digital communications platform providers to regulate misinformation and disinformation on their platforms.
Portfolio	Communications
Introduced	House of Representatives, 12 September 2024
Rights	Freedom of expression; privacy

2.33 The committee published its advice to Parliament in relation to this bill in *Report 9 of 2024*.[17] The committee did not request the provision of a response from the minister but did make a series of recommendations.

2.34 23 amendments to the bill were agreed to on 7 November 2024 in the House of Representatives.[18]

Regulating digital content

2.35 The committee considered that seeking to regulate the dissemination of content on digital communications platforms, where that dissemination may cause or contribute to serious harm, may engage and promote numerous human rights including: the right to health (in relation to the dissemination of inaccurate or baseless healthcare and medical content); equality and non-discrimination (in relation to the dissemination of information that vilifies people of a particular race or gender identity); the right to participate in public affairs (in relation to the dissemination of inaccurate or misleading information about elections or referendums); and the right to security of the person (in relation to information which may cause a person or persons to be at risk of physical harm). In this respect, the committee considered that

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16 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024, *Report 10 of 2024*; [2024] AUPJCHR 81.

17 Parliamentary Joint Committee on Human Rights, *Report 9 of 2024* (10 October 2024) pp. 76-92.

18 Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024, Government amendments (sheet ZC302). Relevantly, item 5 would expand the definition of 'professional news content' to specify a further three broadcasting codes of practice. Item 13 would amend clause 70 (which requires a review after 3 years of operation, including with respect to the impact of the scheme on freedom of expression) to require that this is an independent review.

the statement of compatibility is extensive and comprehensively outlines the expectations of United Nations bodies as to how states parties are to address the dissemination of certain types of misinformation and disinformation. The committee noted that the provision of a detailed statement of compatibility has, in relation to this bill, considerably assisted in the committee's consideration of the compatibility of the bill.

2.36 The committee noted that, in seeking to regulate the dissemination of certain content, the bill also engages and limits the right to freedom of expression and the right to privacy. The committee considered that the bill is directed towards a legitimate objective which is broadly of pressing and substantial concern, and would likely be rationally connected to (that is, capable of achieving) that objective. However, the committee considered that some questions remain as to whether the scheme would constitute a proportionate limit on the right to freedom of expression and the right to privacy in practice. The committee noted that the bill establishes several broad high-level safeguards which would assist with its proportionality, and provides for regular review of the operation of the scheme by the Australian Communications and Media Authority (ACMA). However, the committee noted that much of the detail of what the scheme would require providers to do in practice would be set out in delegated legislation. Further, the committee considered that there may be a risk that, in practice, providers may regulate content on their platforms in a manner which is beyond the scope of what would be required by this scheme in order to avoid the risk of a civil penalty for non-compliance. The committee considered that this may mean that the extent of the limitation on the right to freedom of expression (and to privacy) may only be apparent as a matter of practice.

2.37 The committee made recommendations to strengthen the human rights compatibility of the bill, including that:

- the proportionality of this measure may be assisted were sections 47 and 54 of the bill amended to require ACMA to have regard to the right to freedom of expression (as recognised under international human rights law) in approving a code or determining a standard;
- consideration be given to whether the proposed scheme would appropriately protect content produced by 'citizen journalists' who are not subject to formalised editorial standards; and
- the statement of compatibility be updated to identify what (if any) remedy an individual may access if compliance (or purported compliance) with the proposed scheme resulted in a breach of their right to freedom of expression or privacy.

2.38 The full initial analysis is set out in *Report 9 of 2024*.

Minister's response[19]

2.39 The minister advised:

> **Suggested action: The committee considers that the proportionality of this measure may be assisted were: sections 47 and 54 of the bill *amended to require* ACMA to have regard to the right to freedom of expression (as recognised under international human rights law) in approving a code or determining a standard.**
>
> **Response: <u>Amendment not supported</u>**
>
> The Bill provides that approved codes and standards are legislative instruments subject to parliamentary scrutiny and disallowance.
>
> As a result, the Australian Communications and Media Authority (ACMA), as the rule maker, would already be required to consider the right to freedom of expression (along with other relevant human rights) in order to comply with its consequent obligation to prepare a statement of compatibility for the instrument. See Bill cls 47(6), 47(7); and 55(2); *Human Rights (Parliamentary Scrutiny) Act 2011* s9; *Legislation Act 2003* s15J(2)(f).
>
> Further, before a code can be approved under cl.47 or a standard determined under cl.54 of the Bill, the ACMA must be satisfied that it:
>
> - is reasonably appropriate and adapted to achieving the purpose of providing adequate protection for the Australian community from serious harm caused or contributed to by misinformation or disinformation on the platforms; and
> - goes no further than reasonably necessary to provide that protection.
>
> These requirements are very similar to those set out under Article 19(3) International Covenant on Civil and Political Rights (ICCPR), which sets out the test for permitted limitations on the right to freedom of expression (amongst other human rights).
>
> **Suggested action: Consideration be given to whether the proposed scheme would appropriately protect content produced by 'citizen journalists' who are not subject to formalised editorial standards.**
>
> **Response: <u>Not supported</u>**
>
> The Bill has aligned its definitions of journalism to be consistent with the professional standards test set out in section 52P of the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021*. This contemplates journalism as a line of work subject to codes of practice or professional standards that relate to the provision of journalism.

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19 The minister's response to the committee's inquiries was received on 6 November 2024. This is an extract of the response. The response is available in full on the committee's webpage.

- The policy intent behind the exclusion is to avoid duplicating oversight for a sector that already operates under a framework of professional impartiality, accuracy and accountability requirements.
- Excluding *professional news content* reflects considered policy judgements about the objective misinformation and disinformation risks posed by content originating from recognised media formats where generally material is produced:
    - to prioritise journalistic practice ensuring accuracy and fact-checking;
    - in circumstances which help ensure independent, arm's-length journalism; and
    - where there are established complaint resolution processes - e.g. correction notices.
- The definition of *professional news content* is designed to be flexible and would extend to journalism produced locally or overseas where such activities are subject to professional standards of conduct, oversight or accountability mechanisms similar to those named on the face of the Bill (cl.16(2)(b)(i), (ii) or (iii) refer).
- The right to freedom of expression of 'citizen journalists' will still be protected via broader safeguards across the Bill protecting that right.

Relevant provisions

The operative provisions of the Bill apply in relation to *misinformation* or *disinformation*. This is relevantly defined (cl.13) as the dissemination of content using a digital service if:

- the content contains information that is reasonably verifiable as false, misleading or deceptive; and
- the content is provided on the digital service to one or more end-users in Australia; and
- the provision of the content on the digital service is reasonably likely to cause or contribute to serious harm; and
- the dissemination is not *excluded dissemination*.

Where dissemination of content is *excluded dissemination*, it is effectively entirely outside the scope of the measures contained in the Bill intended to address concerns regarding the dissemination of false, misleading or deceptive information reasonably likely to cause or contribute to *serious harm* as defined in cl.14.

The dissemination of *professional news content* is one of the categories of *excluded dissemination* (cl.16(1)(b)).

The *professional news content* exclusion will apply to the dissemination of content by a person:

- who produces, and publishes online
- *news content* (cl.16(3)) in one of the formats specified in cl.16(2)(a)
- where that person is subject to the rules of an Australian standard or code of practice analogous to those specified in subparagraphs (i), (ii) or (iii) of cl.16(2)(b).

The *professional news content* exclusion can also apply to a person who produces, and publishes online, *news content* in like circumstances provided that person is subject to either:

- *rules or internal editorial standards* that are *analogous* to the Australian rules specified 'to the extent that they relate to the provision of quality journalism' (cl.16(2)(b)(iv)); or
- rules specified for these purposes in digital platform rules (cl.16(2)(b)(v)).

The EM (pp 62-63) explains the rationale for the professional news content exclusion:

> *The purpose of including the professional news content exception is to not infringe on the independence of the media. The exclusion of professional news content also acknowledges that this type of content is subject to the industry's own separate and recognised editorial standards. Further, digital platform services should not be in the position of determining if professional news content is misinformation or disinformation.*

The effect of extending the content exclusion to 'citizen journalists' takes such disseminations of information outside the scope of the Bill for all purposes. This would put it beyond the scope of information and reporting on instances of misinformation or disinformation, for example, not simply measures aimed at preventing dissemination of misinformation or disinformation.

In such circumstances, where anyone who chooses to call themselves a 'citizen journalist'-e.g. a blogger with a smart phone-could be permitted to rely on the exclusion contemplated under cl.16, that provision would be unfeasibly broad and indeterminate, greatly reducing the efficacy of the Bill. In particular, there is greater potential for harm from the spread of content from self-described 'journalists' whose activities are not subject to any professional standards of conduct or for that matter mechanisms to ensure accountability. However, it should be kept in mind that dissemination from such persons on a digital service will not come within the scope of the Bill unless it also meets the *false, misleading or deceptive* and *serious harm* requirements of the Bill. It should also be noted that permitting self-described 'citizen journalists' to be exempted from the Bill risks inadvertently excluding the activities of foreign influence operations by state-based actors that masquerade as producers of legitimate journalism and greatly reducing the efficacy of the Bill.

Instead, where content originates from a person covered by the criteria set out in cls 16(2)(b) and (c), that material is produced in circumstances which help ensure independent, arm's-length journalism where the potential for intentionally false or misleading material is low or negligible. In addition, where content originates under such circumstance, there are generally established complaint resolution processes that may address harms arising from the circulation of that material-for example, the issue of correction notices in relation to material found to be factually inaccurate or not prepared in accordance with fair and accepted standards of investigation or reporting. There also may be additional commercial or regulatory levers that ensure high quality journalism for bodies captured by this exemption class.

Suggested action: The statement of compatibility be updated to identify what (if any) remedy an individual may access if compliance (or purported compliance) with the proposed scheme resulted in a breach of their right to freedom of expression or privacy.

Response: Supported

The Statement of Compatibility will be updated to explain the remedies available, if the actions of a platform constitute a breach of either an individual's right to freedom of expression or right to privacy (as recognised under international law).

When approving a code, determining a standard, or varying an approved code or a standard, the ACMA must be satisfied that the code or standard is reasonably appropriate and adapted to the purpose of providing adequate protection from serious harm caused or contributed to by misinformation or disinformation on relevant platforms, and goes no further than reasonably necessary to provide that protection (see cls 47(1)(d)(iii) and (iv), 50(1)(d)(iii) and (iv), 54 and 60(2)).

This proportionality analysis involves the ACMA making an evaluative judgement about a broad range of factors, including, potentially, considerations related to the freedom of expression and the protection of individual privacy.

That exercise by the ACMA will be informed by the exercise, carried out in parallel, of the ACMA preparing a statement of compatibility for each approved code, standard or variation instrument (see cls 47(6) and (7), 50(5), 55(2), 56(2), 57(3), 58(3), 59(2) and 60(1) *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 9, and *Legislation Act 2003* s15J(2)(f). Any statement of compatibility must necessarily address the instrument's impact on freedom of expression and rights to privacy amongst any other human right that is engaged.

There are further limits on the power to approve codes or determine standards aimed specifically at safeguarding core aspects of an individual's right to privacy.

Relevantly, cls 45 and 46 provide that ACMA must not approve a code (or part of a code) or determine a standard where that code or standard contains requirements related to the content of private messages, the encryption of private messages, or to real-time voice communication using the internet that is not recorded.

If either:

- the ACMA's consideration of the relevant statutory questions (including considerations of human rights related issues) miscarries to a degree or extent involving a jurisdictional error of law; or
- the ACMA approves a code or determines a standard that deals with a matter that may not be dealt with in a code or standard because of cls 45 and 46;

then any person aggrieved - including an individual whose freedom of expression or right to privacy may have been infringed - may apply to a court of competent jurisdiction seeking appropriate orders, including declarations that the relevant instrument is invalid.

Alternatively, a person aggrieved by an act or practice that is inconsistent with or contrary to any human right may make a complaint to the Australian Human Rights Commission ('the Commission') under s20(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth) (**Human Rights Commission Act**).

- The Commission has the function under s 11(1)(f) of the Human Rights Commission Act to inquire into any practice that may be inconsistent with or contrary to any human right and, if the Commission considers it appropriate to do so, the Commission may endeavour by conciliation to effect settlement of the matters that give rise to the inquiry. The Commission may draw on a range of supporting powers under ss 19A - 29 of the *Human Rights Commission Act* in any such inquiry.

If a platform erroneously removes or otherwise deals with material in the mistaken belief that such action is required by a code or standard, a person aggrieved may make a complaint to the Australian Human Rights Commission.

This provides a targeted and effective means for addressing human rights concerns if the ACMA has approved a code or determined a standard which the Commission finds to result in a breach of human rights. In such an instance, the most appropriate course is for that issue to be resolved through its established processes, and for any changes to a code or standard to then be made accordingly.

There is also the option for complaints to the Human Rights Committee of the United Nations once all domestic remedies have been exhausted.

Concluding comments

International human rights legal advice

2.40 In relation to amending the bill to require ACMA to have regard to the right to freedom of expression in approving a code or determining a standard, the minister advised that ACMA would already be required to consider the right to freedom of expression (and other human rights) in order to comply with its obligation to prepare a statement of compatibility. The minister further advised that, before a code can be approved or a standard determined, ACMA must be satisfied that it is reasonably appropriate and adapted to achieving the purpose of providing adequate protection for the Australian community from serious harm and goes no further than reasonably necessary to provide that protection.

2.41 As noted in the previous analysis, the matters ACMA must be satisfied of before a code can be approved or standard determined may assist in ensuring proportionality, however nothing would prevent a provider from regulating more content than is specified in a code or standard so as to avoid the risk of a substantial civil penalty for non-compliance. This may risk providers taking an overly cautious approach to the regulation of content and have a 'chilling effect' on the right to freedom of expression. If ACMA were required to have specific regard to the right to freedom of expression in approving a code or determining a standard (rather than simply whether the standard is reasonably appropriate and adapted to achieving the purpose of providing adequate protection for the Australian community from serious harm and goes no further than reasonably necessary to provide that protection), this could assist in strengthening this safeguard by helping providers strike a more appropriate balance in the content they choose to remove.

2.42 Further, the preparation of a statement of compatibility does not, in and of itself, constitute a sufficient safeguard with respect to the substantive effect of codes or standards on human rights in practice. The requirement to prepare a statement of compatibility pursuant to section 8 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is engaged when a bill is introduced into the Parliament, or disallowable delegated legislation is registered on the Federal Register of Legislation. Compliance with this requirement does not itself require legislation to be compatible with human rights. In its recent inquiry into Australia's human rights framework, the committee also noted that:

> A persistent concern is that statements of compatibility with human rights will always state that a proposed law is consistent with human rights, regardless of the international law position. This is most apparent in relation to statements of compatibility accompanying legislation dealing with policies and legislative frameworks which clearly breach human rights, where such breaches are not minor or otherwise inadvertent matters that may be rectified without altering the intended effect of the legislation. In such instances, the statement of compatibility will almost invariably

> conclude that the legislation is compatible with human rights, largely because any limitation on rights is 'reasonable, necessary and proportionate' having regard to the objective of the law. This approach is taken even where the committee has previously concluded that such a policy or law is incompatible with human rights, and, more concerningly, where UN bodies have concluded that that specific law or policy breaches human rights. In such cases, the opinion in the statement of compatibility that the measure is compatible is not supported by any compelling evidence to justify the conclusion.[20]

2.43 Further, there is nothing procedurally to prevent a statement of compatibility being prepared only once a bill or legislative instrument has been finally drafted, meaning its preparation does not necessarily inform the development of the measure.[21]

2.44 As to whether the proposed scheme would appropriately protect 'citizen journalists', the minister advised that the scheme is designed to exclude the dissemination of certain material which includes professional news content, a sector that already operates under a framework of professional impartiality, accuracy and accountability standards, and as such there are reduced misinformation and disinformation risks. The minister advised that if excluded dissemination covered 'citizen journalists', this could include anyone, for example 'a blogger with a smart phone'. The minister advised this would make the exclusion unfeasibly broad and greatly reduce the efficacy of the bill, and could risk inadvertently excluding the activities of foreign influence operations by state-based actors that masquerade as producers of legitimate journalism. The minister further advised that the right to freedom of expression of 'citizen journalists' will still be protected via broader safeguards across the bill protecting that right.

2.45 However, as noted in the initial analysis, the scheme seeks to regulate content including that posted or produced from overseas (to one or more end-users in Australia). It remains unclear how providers would ascertain whether a person in a foreign country who has produced content is subject to appropriate editorial standards and has editorial independence from the subjects of the person's news coverage,[22] and therefore whether the dissemination is excluded from the scheme.

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20 Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (30 May 2024) p. 241. See also, pp. 239–242 and 324–326. The committee noted that, with respect to the development of bills, the Human Rights Unit of the Attorney-General's Department is consulted on the human rights effects of a proposed law once the bill has been drafted, suggesting that it may provide assistance as to what should be included in the statement of compatibility, rather than necessarily suggesting amendments to the draft legislation to make it less likely to infringe on human rights. See, p. 241.

21 See further, Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (30 May 2024) pp. 239–242.

22 Schedule 1, proposed subparagraph 16(2)(b)(iv) and paragraph 16(2)(c).

There may be a risk that providers take an overly cautious approach to the regulation of content. Further, as noted in the committee's initial analysis, the bill does not appear to contemplate that foreign jurisdictions may establish legal and regulatory frameworks that effectively prevent journalists from reporting freely via state-sanctioned publications or outlets.[23] There is, therefore, a risk that such journalists may be unable to benefit from this exclusion, and that news content produced by journalists from countries without established journalistic rules or standards may be blocked, despite the content potentially reporting news and current affairs. Given the breadth of disseminated content likely to be regulated under the scheme, including from 'citizen journalists' who are independently reporting public events, there remains a risk of content being regulated in a manner which is not a proportionate limit on the right to freedom of expression.

2.46 As to the right to an effective remedy, the minister agreed to update the statement of compatibility to identify what (if any) remedy an individual may access if compliance, or purported compliance, with the scheme resulted in a breach of their right to freedom of expression or privacy. The minister stated that when undertaking its proportionality analysis in approving a code or determining a standard, ACMA must be satisfied that the measure is reasonably appropriate and adapted to the purpose of providing adequate protection from serious harm, and goes no further than reasonably necessary to provide that protection. The minister stated that this requires ACMA to consider several factors, including freedom of expression and the protection of privacy. The minister also noted that clauses 45 and 46 require that ACMA must not approve a code or determine a standard where they contain requirements related to the content of private messages, the encryption of private messages or to real-time voice communication using the internet that is not recorded.

2.47 The minister advised that if there was a jurisdictional error in ACMA's consideration of relevant statutory questions, or ACMA approved a code contrary to clauses 45 and 46, then any person 'aggrieved' may apply to a court seeking appropriate orders, including declarations that the relevant instrument is invalid. Access to this remedy relies on an error made in the application of the legislation (jurisdictional error). This means a circumstance in which a decision-maker has exceeded the power conferred on them by law. It would provide no remedy in circumstances where ACMA has complied with the scheme in a manner which nevertheless resulted in a breach of an individual's human rights.

2.48 The minister stated that if a platform erroneously removed material in the mistaken belief that such an action is required by a code or standard, a person aggrieved may make a complaint to the Australian Human Rights Commission (the AHRC). The AHRC's statutory functions include to: deal with complaints made to the Commission under the *Australian Human Rights Commission Act 1986* (relating to

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23 See, for example, Amnesty International '*Russia: Kremlin's ruthless crackdown stifles independent journalism and anti-war movement'* (March 2022).

unlawful discrimination or other grounds of discrimination in employment); and to investigate and resolve complaints about alleged breaches of human rights against the Commonwealth and its agencies.[24] The AHRC does not have the statutory authority to investigate complaints about alleged breaches of human rights (such as the right to freedom of expression or the right to privacy) against private businesses. It would appear, therefore, that the AHRC may not have the authority to investigate a complaint in relation to a provider removing content on the basis that this breaches an individual's right to freedom of expression.

2.49 The minister further advised that an individual can complain to the United Nations Human Rights Committee once all domestic remedies have been exhausted. Australia has accepted the complaint jurisdiction of the UN with respect to the International Covenant on Civil and Political Rights (ICCPR). However, as noted by the Attorney-General's Department, its decisions are not legally binding:

> Any individual can make a complaint against Australia if they are concerned that their human rights under these treaties have been violated…The views of the committees are not binding under international law. However, Australia gives careful consideration, in good faith, to any adverse views when received.[25]

2.50 As such, it remains unclear what (if any) remedy a person in Australia would have for a breach of their human rights (particularly the right to freedom of expression and the right to privacy) pursuant to this proposed scheme. As the right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights,[26] it is not clear that Australia would meet its fundamental obligation to itself provide a remedy that is effective.[27]

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24 Unless the complaint relates to unlawful discrimination or other grounds of discrimination in employment, see *Australian Human Rights Commission Act 1986*, paragraphs 11(1)(aa) and (ab).

25 Attorney-General's Department, *Human Rights Communications*. Further, it is noted that the UN Human Rights Committee has a significant complaints backlog, which may limit access to this mechanism in practice. At December 2023, the committee had received 231 new cases, concluded 164 cases, and had 1,267 cases pending. See, UN Human Rights Committee, Report of the Human Rights Committee (2023-2024) A/79/40*, p. 4.

26 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.

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

Committee view

2.51 The committee thanks the minister for this response.

2.52 The committee reiterates its recommendations from *Report 9 of 2024* and notes that it will assess the compatibility of any future legislative instruments made pursuant to this scheme.

2.53 The committee considers that the preparation of a statement of compatibility is an important element of legislative explanatory materials supporting the legislative scrutiny process. However, the committee considers that the requirement to prepare a statement of compatibility does not, in and of itself, constitute a sufficient safeguard to protect human rights, particularly as it does not require the legislation be compatible with human rights.

2.54 The committee thanks the minister for the provision of this additional information with respect to the right to an effective remedy. The committee considers that there appear to be insufficient remedies available with respect to breaches of human rights (including the right to freedom of expression and privacy), which raises questions as to whether there is an effective remedy.

Suggested action

2.55 The committee recommends that consideration be given to amending the bill to require the Australian Communications and Media Authority (ACMA) to establish a complaints mechanism to handle complaints with respect to breaches of human rights arising from the proposed scheme.

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

Mr Josh Burns MP

Chair