Chapter 2

Concluded matters

2.1 This chapter considers responses to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

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

Bills

National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021[2]

Purpose	This bill seeks to amend the *National Disability Insurance Scheme Act 2013* to: • prescribe additional circumstances in which reportable incidents must be notified to the NDIS commission; • amend disclosure of information provisions, including broadening the circumstances under which information can be shared; • allow the commissioner to place conditions on, or vary or revoke the approval of quality auditors; • allow conditions to be imposed on banning orders; and • make a number of technical amendments
Portfolio	National Disability Insurance Scheme
Introduced	House of Representatives, 3 June 2021
Rights	Privacy; work; people with disability

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, National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021, *Report 9 of 2021*; [2021] AUPJCHR 84.

2.3 The committee requested a response from the minister in relation to the bill in *Report 7 of 2021*. [3]

NDIS Provider Register

2.4 The *National Disability Insurance Scheme Act 2013* (NDIS Act) currently provides that the NDIS Provider Register must include certain information, including personal information, in relation to persons who are current or former NDIS providers or persons against whom a banning order is, or was, in force.[4] This bill proposes to expand the information that must be included on the NDIS Provider Register in relation to each person who is a registered NDIS provider.[5] Specifically, the NDIS Provider Register would be required to include information about a compliance notice if the person is, or was, subject to a compliance notice.[6] A compliance notice may be given to an NDIS provider by the NDIS Quality and Safeguards Commissioner (Commissioner) if the Commissioner is satisfied than an NDIS provider is not complying with the NDIS Act or is aware of information that suggests that an NDIS provider may not be complying with the Act.[7] The compliance notice must include the information specified in subsection 73ZM(2) of the NDIS Act, including the name of the provider and the details of (possible) non-compliance.[8] This bill also proposes to amend the definition of 'protected Commission information' to exclude any information covered in whole or part by a publication on the NDIS Provider Register.[9]

Summary of initial assessment

Preliminary international human rights legal advice

Rights of people with disability

2.5 Insofar as this bill facilitates greater information sharing and authorises the publication of compliance information about NDIS providers on a public website, thereby supporting NDIS participants to make informed decisions about their providers and supports, it appears to promote the rights of people with disability. The right to be free from all forms of violence, abuse and exploitation is enshrined in article 16 of the Convention on the Rights of Persons with Disabilities, which requires that States Parties shall take all appropriate legislative, administrative, social,

3 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (16 June 2021), pp. 16-26.

4 *National Disability Insurance Scheme Act 2013*, section 73ZS.

5 *National Disability Insurance Scheme Act 2013*, subsection 73ZS sets out the information that must be included on the NDIS Provider Register.

6 Schedule 1, item 38, amended subsection 73ZS(3)(j).

7 *National Disability Insurance Scheme Act 2013*, subsection 73ZM(1).

8 *National Disability Insurance Scheme Act 2013*, subsection 73ZS(2).

9 Schedule 1, item 1, proposed section 9.

educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse.[10] Further, '[i]n order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities'.[11]

Right to privacy

2.6 However, by broadening the circumstances in which information can be published on the NDIS Provider Register and excluding any information published on the Register from being classified as 'protected Commission information', the measure also engages and limits the right to privacy. This is because the measure would authorise publishing on a public website the personal details (including personal reputational information) of persons who are, or have been, subject to a compliance notice. By amending the definition of 'protected Commission information' to exclude any information published on the NDIS Provider Register, such information would no longer be protected by the relevant privacy safeguards, including the use and disclosure provisions in the NDIS Act and the *Privacy Act 1998* (Privacy Act).[12] Any information published on the NDIS Provider Register is accessible to the public, noting that an internet search of the person's name would bring up search results in relation to information contained on the Register. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation. It includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life.[13]

2.7 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective, be rationally connected to that objective and proportionate to achieving that objective.

2.8 In order to assess the compatibility of this measure with the right to privacy, further information is required as to:

(a) the scope of information about a compliance notice that would be published on the NDIS Provider Register, including whether the information would include the grounds on which a compliance notice was issued and whether that notice is subject to review;

10 Convention on the Rights of Persons with Disabilities, article 16(1).

11 Convention on the Rights of Persons with Disabilities, article 16(3).

12 See *National Disability Insurance Scheme Act 2013*, Chapter 4, Part 2, sections 60–67H.

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

(b) whether there are other less rights restrictive means to achieve the stated objective (for example, allowing the NDIS Provider Register to be accessed on request); and

(c) what safeguards, if any, are in place to ensure that an individual's right to privacy is adequately protected, particularly where a compliance notice is issued on a lower evidentiary threshold and/or subject to review.

Committee's initial view

2.9 The committee considered that the bill generally, which is designed to help prevent the violence, abuse, neglect and exploitation of persons with disabilities, promotes and protects the rights of persons with disabilities. The committee considered that this measure specifically promotes the rights of persons with disabilities by facilitating greater information sharing and authorising the publication of compliance information about NDIS providers on a public website, thereby supporting NDIS participants to make informed decisions about their providers and supports. However, the committee noted that in order to achieve these important objectives, the measure also necessarily limits the right to privacy by publishing on a public website the details of persons who are, or have been, subject to a compliance notice, and sought the minister's advice as to the matters set out at paragraph [2.8].

2.10 The full initial analysis is set out in *Report 7 of 2021*.

Minister's response[14]

2.11 The minister advised:

(a) The scope of the information about a compliance notice that would be published on the NDIS Provider Register, including whether the information would include the grounds on which a compliance notice was issued and whether that notice was subject to review.

The amendment in item 38 of the Bill will address an inconsistency in the *National Disability Insurance Scheme Act 2013* (NDIS Act) between registered and unregistered providers in relation to the scope of information required to be published on the NDIS Provider Register (the Register).

In relation to NDIS providers who are ***not*** a registered NDIS provider, the NDIS Act currently enables the Register to include information about ***any*** compliance notice to which the unregistered NDIS provider is, or was, subject. Please refer to subsection 73ZS(4)(f).

14 The minister's response to the committee's inquiries was received on 1 July 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

In contrast, for ***registered*** NDIS providers, the NDIS Act currently requires the Register to include information about any compliance notice that is ***in force***. Please refer to paragraph 73ZS(3)G).

This inconsistency is currently addressed by the NDIS Quality and Safety Commissioner (the Commissioner) exercising a discretion under subsection 73ZS(6), which allows additional information (i.e. additional to that specified at subsection 73ZS(6)) to be included on the Register if the Commissioner is satisfied that the information is relevant to the provision of supports or services to people with disability. The Commissioner currently relies on this discretion to include information pertaining to registered NDIS providers with compliance notices that are no longer in force. The amendment in item 38 of the Bill will address the inconsistency and eliminate the need to use discretion for this purpose.

Under the amended provisions the scope of information that would be published on the Register about compliance notices that were issued to registered NDIS providers but are no longer in force would be consistent with the information that is currently being published on the Register about such compliance notices in relation to NDIS providers who are not registered NDIS providers. The information comprises:

- the date on which the notice was issued;
- the fact that it required the provider to take certain action in order to address non-compliances with specified provisions of the NDIS Act or rules; and
- the fact that notice is no longer in force.

The information does not include personal identifiers or enable identification of any individual. The exception is where the notice was issued to an NDIS provider who is an individual, in which case the person would be identified.

To date, the information on the Register does not identify that decisions made to issue a notice are reviewable decisions (noting that a request for a review of a reviewable decision does not affect the operation of the decision or prevent the taking of action to implement the decision: subsection 100(7) of the NDIS Act). But if the notice had been varied, whether as a result of a review or otherwise, the variation of fact is information included on the Register.

The law allows all information on the Register to be published except for any part that the Commissioner considers would be contrary to the public interest, or to the interests of one or more persons with disability receiving supports or services, to publish. The Commissioner is precluded from publishing any part in those circumstances. Please refer to sections 17 and 18 of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*. Under the amendments proposed by the Bill, these rules would continue to apply to the publication of information about compliance notices that are no longer in force.

(b) Whether there are other less rights restrictive means to achieve the stated objective (for example allowing the NDIS Provider Register to be accessed on request).

Information that is readily available and easily accessible is a crucial component of supporting NDIS participants to exercise their right to choice and control, allowing them to make informed decisions in respect of the providers from whom they receive supports and services. Transparency and driving better performance is consistent with the expectation of good regulatory practice.

Having the Register available only on request would have a significant and detrimental impact on timely and easy access to information that is directly relevant to choosing providers with full awareness of any past behaviour that may pose a risk to their safety.

Sections 17 and 18 of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* constitute a strong safeguard against inappropriate publication of information on the Register (see (a) above). Importantly, as Category D Rules, these cannot be amended without consultation with States and Territories, with any amendment subject to a disallowance period before Parliament.

(c) What safeguards, if any, are in place to ensure that an individual's right to privacy are adequately protected, particularly where a compliance notice is issued on a lower evidentiary threshold and/or subject to review?

For compliance action taken against a provider or worker to be listed on the Register the provider will have had to meet the evidentiary threshold necessary for the Commissioner to take regulatory action. All regulatory action taken by the Commissioner is a reviewable decision providing natural justice to providers and workers. The Register is adjusted to reflect any outcomes of a review. These processes take into consideration the privacy of a provider or worker which is balanced against the right of people with disability to be protected from the risk of harm.

Protecting people with disability is paramount and providing transparency around compliance action taken to inform choice and control is critical for a safe NDIS market.

Concluding comments

International human rights legal advice

Right to privacy

2.12 As noted in the preliminary analysis, ensuring that NDIS participants are able to make informed decisions about their providers and supports, thereby promoting the rights of people with disability, is a legitimate objective, and making information about NDIS providers publicly accessible, is likely to be effective to achieve that objective. The key question is whether the measure is proportionate. In assessing the

proportionality of the measure, relevant considerations include whether the limitation is only as extensive as is strictly necessary; whether there are other less rights restrictive means to achieve the objective; and whether there are appropriate safeguards accompanying the measure.

2.13 The scope of personal information published on the NDIS Provider Register (the Register) is relevant in considering whether the limitation on the right to privacy is only as extensive as is strictly necessary. The minister advised that the information published on the Register in relation to compliance notices that are no longer in force includes the date on which the notice was issued; the fact that it required the provider to take certain action to address the non-compliance; and the fact that the notice is no longer in force. The minister stated that the information does not include personal identifiers unless the NDIS provider is an individual, in which case the person would be identified. The minister noted that the information on the Register does not specify that the decision to issue a notice is reviewable (noting that a request for review does not affect the operation of the decision), but where a notice is varied as a result of a review, the variation of fact is recorded on the Register. The minister stated that all information on the Register can be published except for any part that the Commissioner considers would be contrary to the public interest or the interests of one or more persons with disability receiving supports or services.

2.14 The scope of information to be included on the Register appears to be quite broad, raising concerns that the potential interference with the right to privacy may be extensive. Of particular concern is the fact that the Register does not include information in relation to the grounds on which the notice was issued (particularly where the notice was issued on the basis of information that *suggested* the person may not be complying with the NDIS Act as opposed to the Commissioner being *satisfied* that the person is not complying with the NDIS Act); the fact that the decision to issue the notice is reviewable; and if applicable, the fact that the provider had sought review of the decision, or in the case of a compliance notice that is in force, the fact that the decision is under review. The exclusion of this information may mean the potential interference with an individual provider's right to privacy, which includes the right to reputation, is more extensive than is strictly necessary. Generally, the greater the interference with human rights, the less likely the measure is to be considered proportionate.

2.15 Noting the likely breadth of information published on the Register and the fact that the information would not be subject to existing privacy safeguards (as it would no longer be classified as protected information), it is not clear that the measure pursues the least rights restrictive means of achieving the stated objective. In considering other less rights restrictive options, the minister stated that having the Register available on request (rather than generally available via an internet search engine facility, e.g. via a Google search) would have a significant and detrimental impact on timely and easy access to information that is directly relevant to NDIS participants choosing their providers with full awareness of any past behaviour that

may pose a risk to their safety. While perhaps more administratively burdensome (although the extent to which is not clear), making the information on the Register available on request or perhaps available via a secure online platform as opposed to being publicly accessible by default (noting that a search of an individual provider's name, for unrelated purposes, would bring up the information on the NDIS Register), would still appear to be a less rights restrictive way of achieving the stated objective. Questions therefore remain as to whether there are other less rights restrictive methods by which an NDIS participant could determine whether a provider is or was subject to a compliance notice, rather than publishing those details on a public website.[15] As noted in the preliminary analysis, in relation to equivalent sectors such as the aged care or child care sectors, it does not appear that there is an equivalent process to search for the names of employees who have been subject to sanctions in those industries.[16]

2.16 Finally, as to the safeguards accompanying the measure, the minister advised that sections 17 and 18 of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* constitute a strong safeguard against inappropriate publication of information on the Register. These sections allow the Commissioner to publish the whole of the Register on the Commissioner's website except if the information would be contrary to the public interest, or to the interests of one or more persons with disability receiving supports or services.[17] While this discretion may protect the rights of people with disability by preventing sensitive information from being published, it does not appear to be an effective safeguard for protecting the right to privacy of individual providers. This is because it seems unlikely that interference with an individual NDIS provider's right to privacy, including reputation, would meet the threshold for non-publication (namely, the public interest or the interests of NDIS participants).

2.17 The other safeguard identified by the minister is the fact that regulatory decisions by the Commissioner are reviewable and the Register is adjusted to reflect any outcomes of a review. The minister states that these processes take into consideration the privacy of a provider or worker – although it is not clear how or to

15 The committee considered similar issues in relation to the publication of information about banning orders on the NDIS Provider Register. See Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme Amendment (Strengthening Banning Orders) Bill 2020, *Report 8 of 2020* (1 July 2020) pp. 32–36; *Report 10 of 2020* (26 August 2020) pp. 20–27.

16 For example, sections 59 and 59A of the *Aged Care Quality and Safety Commission Act 2018* provide that information about an aged care service or a Commonwealth-funded aged care service may be made publicly available (including any action taken to protect the welfare of care recipients), but this does not apply to information relating to action taken against employees of those service providers.

17 *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* [F2020C01088] sections 17 and 18.

what extent – which is balanced against the right of people with disability to be protected from the risk of harm. While access to review is an important safeguard generally, it is unlikely to assist with the proportionality of this specific measure, as it does not appear that the Commissioner's decision to publish information on the Register is a reviewable decision. Thus, the availability of review for a decision to issue a compliance notice does not seem to be an effective safeguard to ensure that an individual provider's right to privacy is adequately protected in relation to information published on the Register. Noting that the existing privacy safeguards in the NDIS Act and the Privacy Act would no longer apply to information contained on the Register (as a result of the amended definition of 'protected Commission information') and in the absence of any other safeguards, concerns remain that the measure may not be accompanied by effective safeguards so as to ensure that any limitation on the right to privacy is proportionate.

Concluding remarks

2.18 In conclusion, as stated in the preliminary analysis, this measure appears to promote the rights of people with disability by facilitating greater information sharing and authorising the publication of compliance information about NDIS providers on a public website, thereby supporting NDIS participants to make informed decisions about their providers and supports. However, by broadening the circumstances in which information can be published on the Register and excluding any information published on the Register from being classified as 'protected Commission information', the measure also engages and limits the right to privacy. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.19 While the measure pursues a legitimate objective and appears to be rationally connected to that objective, questions remain as to whether the measure is proportionate. Having regard to the scope of information published on the Register, it is not clear that the proposed limitation is only as extensive as is strictly necessary and is the least rights restrictive way of achieving the objective. It appears that there may be other, less rights restrictive ways, for an NDIS participant to determine whether an NDIS provider is, or was, subject to a compliance notice, such as making the information available via a secure online platform or at least not available via an internet search engine. Noting that the existing privacy safeguards in the NDIS Act and the Privacy Act would no longer apply to information contained on the Register, there are also concerns that the measure is not accompanied by sufficient safeguards. In the absence of other safeguards, the proposed measure does not appear to constitute a permissible limitation on the right to privacy.

Committee view

2.20 The committee thanks the minister for this response. The committee notes the bill seeks to expand the information that must be published on the NDIS Provider

Register and amend the definition of 'protected Commission information' to exclude any information published on the Register from being considered protected information. The effect of this measure would mean any person who is, or was, subject to a compliance notice would have their name and information about the compliance notice published on a public website, and that information would not be classified as protected information, meaning it would not be subject to existing privacy safeguards.

2.21 The committee considers that the bill generally, which is designed to help prevent the violence, abuse, neglect and exploitation of persons with disabilities, promotes and protects the rights of persons with disabilities. The committee considers that this measure specifically promotes the rights of persons with disabilities by facilitating greater information sharing and authorising the publication of compliance information about NDIS providers on a public website, thereby supporting NDIS participants to make informed decisions about their providers and supports. However, the committee notes that in order to achieve these important objectives, the measure also necessarily limits the right to privacy by publishing on a public website the details of persons who are, or have been, subject to a compliance notice. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.22 The committee considers that while the measure pursues a legitimate objective and appears to be rationally connected to that objective, questions remain as to whether the measure is proportionate. Having regard to the scope of information published on the Register, and noting that information about individual providers would appear to be available via a general internet search engine, it is not clear to the committee that the proposed limitation on the right to privacy would be only as extensive as is strictly necessary and would necessarily be the least rights restrictive way of achieving the objective. While the committee acknowledges that making the relevant information available on request (as opposed to publicly available by default) may be more administratively burdensome, it notes that there may still be other less rights restrictive ways of achieving the objective, such as making the information available via a secure online platform, or at least not accessible via an general internet search. The committee notes that because the existing privacy safeguards in the NDIS Act and the Privacy Act would no longer apply to information contained on the Register, there are concerns that the measure may not be accompanied by sufficient safeguards. In the absence of other safeguards, the committee notes that the proposed measure may not constitute a permissible limitation on the right to privacy.

Suggested Action

2.23 The committee recommends the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

Banning orders

2.25 The NDIS Act currently provides that the Commissioner may make a banning order prohibiting or restricting specified activities by current or former NDIS providers and persons currently or formerly employed or engaged by an NDIS provider.[18] A banning order may also be made to prohibit or restrict a person from being involved in the provision of specified supports or services to people with disability.[19] The grounds on which a banning order may be made are set out in section 73ZN of the NDIS Act, including where the Commissioner reasonably believes that the person is not suitable to be involved in the provision of supports or services to people with disability.

2.26 The bill seeks to broaden the circumstances in which the Commissioner may make a banning order, so as to allow an order to be made against a person who is or was a member of the key personnel of an NDIS provider, such as current or former board members and chief executive officers of NDIS providers.[20] Where a banning order is made against a person who is a member of the key personnel of an NDIS provider, the bill proposes that the continuity of the order is not affected by the person ceasing to be such a member.[21] For instance, if a banning order is made against a board member of an NDIS provider, that banning order remains in force even when the person ceases to be a board member.

2.27 In addition, the bill seeks to amend the NDIS Act to enable banning orders to be made subject to specified conditions.[22] The NDIS Act currently provides that a banning order may apply generally or be of limited application and be permanent or

18 *National Disability Insurance Scheme Act 2013*, section 73ZN.

19 *National Disability Insurance Scheme Act 2013*, subsection 73ZN(2A).

20 Schedule 1, item 28, amended subsection 73ZN(2); explanatory memorandum, pp. 9–10.

21 Schedule 1, item 33, proposed subsection 73ZN(5B).

22 Schedule 1, item 32, proposed subsection 73ZN(3)(c).

for a specified period.[23] The bill proposes to allow the variation of a banning order by imposing new conditions on the order or varying or removing existing conditions.[24] The bill also proposes to make it a civil penalty offence to contravene a condition of a banning order, with a penalty of up to 1,000 penalty units ($222,000).[25]

Summary of initial assessment

Preliminary international human rights legal advice

Rights of people with disability

2.28 As these amendments seek to expand the Commissioner's powers to make a banning order, including subject to specified conditions where appropriate, against a broader range of people who may pose a risk of harm to people with disability, it appears to promote the rights of persons with disabilities. In particular, the measure may promote the right to be free from all forms of violence, abuse and exploitation as enshrined in article 16 of the Convention on the Rights of Persons with Disabilities (as outlined above at paragraph [2.5]).

Rights to privacy and work

2.29 However, by allowing the Commissioner to make a banning order subject to potentially broad conditions against a wide range of people, including those who have ceased to be key personnel of an NDIS provider, the measure also engages and limits the rights to privacy and work. The content of the right to privacy is set out above at paragraph [2.6]. Banning orders limit the right to privacy by authorising interference with a person's private and work life, noting that the extent of the interference will depend on the scope of the banning order and the conditions imposed. The publication of banning orders on the NDIS Provider Register also limits the right to privacy, particularly the right to control the dissemination of information about one's private life, as such data contains personal reputational information that may affect an individual's ability to get employment in other, unrelated sectors.[26] The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[27] This right is limited to the extent that the measure adversely interferes with a person's work and results in the unfair deprivation of work. The statement of compatibility does not address these potential

23 *National Disability Insurance Scheme Act 2013*, subsection 73ZN(3).

24 Schedule 1, item 36, proposed subsection 73ZO(2A).

25 Schedule 1, item 35, amended subsection 73ZN(10)(b).

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

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

rights limitations in relation to this specific measure, and as such, there is no compatibility assessment provided.

2.30 These rights 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.

2.31 In order to assess the compatibility of this measure with the rights to privacy and work, further information is required as to:

(a) the breadth of conditions that may be imposed on a banning order, and why it is not considered necessary to include legislative guidance as to the kinds of conditions that may be imposed on a banning order;

(b) how the conditions would likely operate in practice in relation to a banning order against a person who has ceased to be a member of the key personnel of an NDIS provider. For example, would a former member be required to comply with banning order conditions, such as a requirement to undertake training or provide a copy of the banning order to prospective employers, if they are no longer engaged or involved in the disability service sector;

(c) whether there are other less rights restrictive means to achieve the stated objective; and

(d) what safeguards, if any, are in place to ensure that an individual's rights to privacy and work are adequately protected.

Committee's initial view

2.32 The committee considered that the bill generally, which is designed to help prevent the violence, abuse, neglect and exploitation of persons with disabilities, promotes and protects the rights of persons with disabilities. The committee considered that this measure specifically promotes the rights of persons with disabilities by expanding the Commissioner's powers to make banning orders, thereby strengthening protections for NDIS participants and ensuring that responsible personnel are held accountable in circumstances where a participant may be at risk of harm. However, the committee noted that in order to achieve these important objectives, the measure also necessarily limits the rights to privacy and work for persons against whom a banning order is made, and sought the minister's advice as to the matters set out at paragraph [2.31].

2.33 The full initial analysis is set out in *Report 7 of 2021*.

Minister's response

2.34 The minister advised:

(a) The breadth of conditions that may be imposed on a banning order, and why it is not considered necessary to include legislative guidance

as to the kinds of conditions that may be imposed on a banning order.

The purpose of making a banning order is to remove a provider or worker entirely from the NDIS market or to restrict their involvement in that market. The order is made because the continued involvement of that provider or person would pose a risk to NDIS participants which cannot be averted in any other way. Making a banning order is one of the most serious compliance actions the Commission can take in response to conduct by a provider or worker. Banning orders are only contemplated after other possible compliance responses such as education, warning letters or infringement notices are considered but found to be inappropriate in the circumstances.

The current banning order provisions empower the Commissioner to prevent or restrict a provider or person who is or was employed or engaged by a provider (worker) from engaging in specified activities either permanently or for a specified period.

Most banning orders are made for specified periods. They mostly state that a provider or worker is banned from providing or being involved in the provision of disability support services, both directly and indirectly. This is to ensure that banned persons also do not work in a clerical or administrative role with a provider, which does not involve direct support work and contact with participants.

The current provisions are a 'blunt instrument' and do not allow the Commissioner to refine the banning order to address specific concerns in particular cases. The ability to impose conditions allows a more fine-tuned regulatory response to enhance participant safeguarding.

A broad discretion to impose conditions on a banning order enables the Commissioner to be flexible and tailor banning orders to the specific circumstances of each case. The Commissioner would be guided by paragraph 181D(4)(b) of the NDIS Act in deciding what conditions should be imposed. Paragraph 181D(4)(b) provides that the Commissioner must use best endeavours to conduct compliance and enforcement activities in a risk responsive and proportionate manner. In practice this would mean that when determining conditions on a banning order, the Commissioner would consider matters such as the risk to participants, the nature of the conduct which led to banning order being made, previous work, conduct history of the banned person, expressions or actions of remorse/commitment to rehabilitation/co-operation of the banned person, support for the banned person from NDIS participants or their families based on past experience of service provision by that person.

In some cases, it would be beneficial if the Commissioner could require the subject of the banning order to undertake action to remedy identified deficits in the way they have provided supports or services to people with a disability. This could be skill development or training in a particular area, such as medication management.

The Commissioner routinely reviews banning orders which are near the end of their term and can decide to extend them for a further period. Where a banning order is for a specified time, the Commissioner can consider the person's compliance with a condition (e.g. if a person was banned until such time that they had successfully completed particular training) in deciding whether to vary the banning order to extend it. Compliance with the condition could demonstrate to the Commissioner that the banning order subject has addressed the concerns which led to the order being made.

The imposition of conditions can also provide greater safeguards where a banning order restricts a person from providing direct disability support services but not from providing indirect disability support services, such as working in an administrative or clerical role which involves no direct contact with people with disability. The condition might be that the worker provides a copy of the banning order with this restriction to each prospective employer. This ensures the employer knows not to employ the person in a direct service role. Without the power to impose this condition on the banned worker, the Commission relies on the honesty of the worker to inform the new employer of the restrictions in the banning order and to comply with it themselves, although the worker screening system provides some protections in this regard.

In this context, it is important to note that the Commissioner's practice is to notify worker screening units of banning orders which may then affect the worker's NDIS worker screening check. Registered providers must only engage or employ workers who have an NDIS clearance in a risk assessed role. However, an unregistered provider is not subject to this requirement and may choose to employ workers without an NDIS worker screening check. It may therefore be appropriate in some cases to impose a condition that the banned worker gives a copy of the banning order to any employer who is an NDIS provider to ensure the employer has knowledge of any restriction on their work duties.

Due to the nature of NDIS services there is no finite list of the types of conditions that can be imposed on providers or workers. Any attempt to include legislative guidance around conditions that can be imposed, such as including examples or types of conditions, introduces the risk of limiting the conditions the NDIS Commission can apply to those examples or types listed. This may inadvertently reduce protections to NDIS participants.

In addition, it is also envisaged that the inclusion of conditions like requiring workers to make any new NDIS employer aware of the banning order will promote awareness of the existence of such orders. At present, subsection 73ZN(9) of the NDIS Act makes it a requirement that the Commissioner notify an NDIS provider of a banning order where one is made against one of the provider's workers. If that worker changes employment there is currently no guarantee that the new employer will be made aware of the banning order.

(b) How the conditions would likely operate in practice in relation to a banning order against a person who has ceased to be a member of the key personnel of an NDIS provider. For example, would a former member be required to comply with banning order conditions, such as a requirement to undertake training or provide a copy of the banning order to prospective employers, if they are no longer engaged or involved in the disability service sector?

At present, a banning order can only prohibit or restrict a provider or worker from engaging in specified activities, without providing a clear avenue by which the provider or worker could seek to address the matters of concern that led to the ban. The capacity to make a banning order subject to specified conditions will allow the Commissioner greater flexibility to tailor banning orders to the specific circumstances of each case, increasing protections to NDIS participants.

In practice, where a person is subject to a banning order and is no longer involved in providing services under the NDIS, the banning order will remain in force. If a person wishes to return to the disability sector, they will need to have complied with the conditions in the banning order, such as completed training. Where a person is no longer involved in providing services and is not wishing to return to the disability sector, the Commissioner's remit does not allow further compliance and enforcement action to be taken.

A banning order is the most serious regulatory action that the Commission can apply to a person involved in the delivery of NDIS services. Any condition to notify prospective employers of the existence of the banning order would be limited to employers in the disability services sector, generally NDIS providers.

(c) Whether there are other less rights restrictive means to achieve the stated objective.

The Commissioner considers that the NDIS Act does not currently provide another means to achieve the stated objective. The NDIS Act allows the Commissioner to apply a banning order against a provider or worker to restrict or prohibit them from operating under the NDIS. A banning order is proportionate to the severity of the offence. The imposition of conditions provides a clearer way forward for banning order recipients to address the safeguarding issues that underpinned the making of the order and for prospective employers to manage risk.

This amendment provides the necessary means to improve protections for NDIS participants and promotes the rights of persons with disability to be free from exploitation, violence and abuse.

(d) What safeguards, if any, are in place to ensure that an individual's rights to privacy and work are adequately protected?

The imposition of conditions on banning orders would not affect or impact an individual's right to privacy and work, any more than section 73ZN as

currently in force might affect those same rights. Specifically, in relation to privacy, the imposition of conditions would not materially change what is currently published on the NDIS Provider Register.

Protecting people with disability is paramount and providing transparency around compliance action taken to inform participant choice and provide assurance and control is critical for a safe NDIS market.

Concluding comments

International human rights legal advice

Rights to privacy and work

2.35 As noted in the preliminary analysis, the objectives of protecting people with disability from harm, holding responsible persons accountable in circumstances where an NDIS participant is at risk of harm, and minimising the risk of banned individuals from working with people with disability, are capable of constituting legitimate objectives for the purposes of international human rights law. Expanding the Commissioner's powers in relation to banning orders would likely be effective to achieve these objectives. The key question is whether the measure is proportionate. In this regard, further information was sought from the minister as to whether the proposed limitation is sufficiently circumscribed; how the banning order conditions would likely operate in practice so as to determine the extent to which the measure interferes with rights; whether there are less rights restrictive means to achieve the objectives; and whether the measure is accompanying by adequate safeguards.

2.36 Regarding the breadth of conditions that may be imposed on a banning order, the minister stated that the broad discretion to impose conditions enables the Commissioner to be flexible and tailor banning orders to the specific circumstances of each case. The minister stated that in imposing conditions, the Commissioner would be guided by paragraph 181D(4)(b) of the NDIS Act. This provision requires the Commissioner to use his or her best endeavours to conduct compliance and enforcement activities in a risk responsive and proportionate manner.[28] The minister stated that in practice this would mean that when determining conditions, the Commissioner would consider matters such as:

- the risk to participants;
- the nature of the conduct which led to the banning order being made;
- previous work and conduct history of the banned person;
- expressions or actions of remorse or commitment to rehabilitation or cooperation of the banned person; and

28 *National Disability Insurance Scheme Act 2013*, paragraph 181D(4)(b).

- support for the banned person from NDIS participants or their families based on past experience of service provision by that person.

2.37 In relation to the types of conditions that may be imposed, the minister noted that the Commissioner may impose conditions relating to skill development or training if they considered that it would be beneficial to remedying the identified deficit in the way the person had provided supports or services. Another condition that may be imposed would require the individual worker to provide a copy of the banning order – which may restrict the person from providing direct disability support services, but not indirect disability support services (such as administrative or clerical work) – to any prospective employers. The minister stated that such a condition would ensure the prospective employer knows not to employ the person in a direct service role and knows of any other restrictions on the person's work duties. The minister explained that this may be appropriate in the case of unregistered NDIS providers because they can employ workers without an NDIS worker screening check and may be unaware of a banning order imposed on a prospective worker.

2.38 While the minister provided some examples of the types of conditions that may be imposed, she stated that there is no finite list and any attempt to include legislative guidance around conditions, such as including examples or types of conditions, introduces the risk of limiting the conditions the NDIS Commissioner can apply. The minister stated that this may inadvertently reduce protections for NDIS participants. The minister further noted that the Commissioner routinely reviews banning orders and would consider a person's compliance with the order and any conditions in deciding whether to extend the order and the associated conditions for a further period.

2.39 By conferring a broad discretion on the Commissioner to impose any conditions on a banning order, the measure provides flexibility to treat different cases differently, having regard to the individual circumstances of each case. This flexibility may assist with the proportionality of the measure. However, the breadth of the discretion also gives rise to concerns that the measure may not be sufficiently circumscribed. International human rights law jurisprudence states that laws conferring broad discretion or rule-making powers must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[29] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. As noted in the preliminary analysis, the explanatory materials provide some guidance as to how the Commissioner's discretion may be exercised. The minister's response provides

29 UN Human Rights Committee, *General Comment No. 27, Freedom of Movement (Art. 12)* (1999) [13]; *Hasan and Chaush v Bulgaria,* European Court of Human Rights App No.30985/96 (2000) [84]; *Rotaru v Romania*, European Court of Human Rights (Grand Chamber), Application No. 28341/95 (2000) [61]; *Gillan and Quinton v UK*, European Court of Human Rights, Application No. 415/05 (2010) [77].

further guidance as to the types of conditions that may be imposed and considerations that the Commissioner may have regard to in exercising their discretion (as outlined in paragraphs [2.36]–[2.38]). For example, the Commissioner may be guided by paragraph 181D(4)(b), which requires compliance and enforcement activities to be proportionate. This provision as well as the other matters that may be considered by the Commissioner, such as the risk to participants, the nature of the conduct and the individual's work history, would likely provide useful guidance as to the scope of the discretion and the types of conditions that may be imposed. However, it remains unclear why all such matters cannot be included in the legislation itself. The minister states that the inclusion of legislative guidance around conditions would risk limiting the Commissioner's powers to impose conditions. However, some form of legislative guidance, such as the inclusion of a non-exhaustive list of the types of conditions that may be imposed and the matters that should be considered in exercising the discretion – for example, whether the conditions are the least rights restrictive and the consequent interference with rights is proportionate and only to the extent necessary – would likely assist with the proportionality of this measure. In the absence of clear legislative guidance, concerns remain that the measure may not be sufficiently circumscribed.

2.40 Another relevant factor in assessing proportionality is the extent to which the measure may interfere with rights, noting that the greater the interference with rights, the less likely the measure is to be considered proportionate. Depending on the breadth of conditions imposed, there may be a significant interference with the rights of the person who is the subject of the banning order. How the conditions are likely to operate in practice is therefore relevant in considering the potential interference with rights. The minister advised that where a person is subject to a banning order but is no longer involved in providing NDIS services, the banning order will reman in force. If that person sought to return to the disability sector they would need to comply with the conditions of the banning order, such as completing training. If the person is no longer providing disability services and does not want to return to the disability sector, the minister stated that the Commissioner's remit does not allow further compliance and enforcement action to be taken against that person. This clarification regarding the scope of the Commissioner's enforcement powers alleviates the concern raised in the preliminary analysis that if a person was required to comply with conditions of a banning order in circumstances where they had left the disability sector (noting that failure to comply could result in a civil penalty of up to $222,000), this may constitute a significant interference with their rights to work and privacy. The fact that the Commissioner's powers to enforce compliance with banning order conditions appears to extend only to persons working in the disability sector or persons seeking to return to the disability sector, assists with the proportionality of this measure.

2.41 Regarding the existence of safeguards, as noted in the preliminary analysis, access to internal and external merits review and judicial review in relation to banning order decisions would serve as an important safeguard and assist with the proportionality of this measure. However, it is unclear whether access to review alone

is sufficient, noting that the minister's response did not identify any other safeguards accompanying the measure.

Concluding remarks

2.42 In conclusion, as noted in the preliminary analysis, by expanding the Commissioner's powers to make a banning order, including subject to specified conditions, against a broader range of people who may pose a risk of harm to people with disability, the measure appears to promote the rights of persons with disabilities. However, by conferring a broad discretion on the Commissioner to make a banning order subject to potentially broad conditions against a wide range of people, including those who have ceased to be key personnel of an NDIS provider, the measure also engages and limits the rights to privacy and work. These rights 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.

2.43 The measure appears to pursue a legitimate objective and is rationally connected to that objective, and may be proportionate, though some questions remain in relation to this. In particular, the wide range of conditions that may be imposed on a banning order provides flexibility to treat different cases differently. Depending on how the conditions are applied and enforced in practice, this flexibility may assist with the proportionality of the measure as it would allow the Commissioner to tailor the banning order to each individual case. However, the breadth of the discretion also raises concerns as to whether the measure is sufficiently circumscribed, noting that there is no legislative guidance as to the types of condition that may be imposed and the matters that the Commissioner should consider when exercising their discretion. As such, some questions remain as to whether the measure will be exercised in a manner that is proportionate, noting that much will depend on the type of conditions imposed in practice.

Committee view

2.44 The committee thanks the minister for this response. The committee notes the bill proposes to allow the Commissioner to impose a banning order on key personnel of NDIS providers and make banning orders subject to specified conditions, with contravention of a condition attracting a civil penalty of up to $222,000.

2.45 The committee considers that the bill generally, which is designed to help prevent the violence, abuse, neglect and exploitation of persons with disabilities, promotes and protects the rights of persons with disabilities. The committee considers that this measure specifically promotes the rights of persons with disabilities by expanding the Commissioner's powers to make banning orders, thereby strengthening protections for NDIS participants and ensuring that responsible personnel are held accountable in circumstances where a participant may be at risk of harm. However, the committee notes that in order to achieve these

important objectives, the measure also necessarily limits the rights to privacy and work for persons against whom a banning order is made. These rights may be permissibly limited if it is shown to be reasonable, necessary and proportionate.

2.46 The committee considers that the measure pursues a legitimate objective and appears to be rationally connected to that objective, and may be proportionate, although some questions remain in relation to this. The committee notes that the wide range of conditions that may be imposed on a banning order provides flexibility to treat different cases differently. However, the breadth of the discretion also raises concerns as to whether the measure is sufficiently circumscribed, noting that there is no legislative guidance as to the types of condition that may be imposed and the matters that the Commissioner should consider when exercising their discretion.

Suggested action

2.47 The committee considers that the proportionality of the measure may be assisted were the bill amended to include legislative guidance as to the conditions that may be imposed on a banning order, for example, the inclusion of a non-exhaustive list of the types of conditions that may be imposed and the matters that should be considered by the Commissioner in exercising their discretion, such as, whether the conditions are the least rights restrictive and the consequent interference with rights is proportionate and only to the extent necessary.

2.48 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021[1]

Purpose	This bill seeks to amend a number of Acts in relation to social security to: • allow jobseekers to manage their job plans online within departmental guidelines; • amend the social security law to provide legislative authority for spending for employment programs; • amend the targeted compliance framework to ensure that sanctions need not be imposed when recipients of participation payments have a valid reason for failing to meet their requirements; • ensure that payments from government employment programs to assist jobseekers with finding work do not need to be declared as income to Centrelink and do not reduce a jobseeker's payment; • clarify the administrative process for declarations of approved programs of work; • clarify that certain Commonwealth workplace laws do not apply in relation to a person's participation in Commonwealth employment programs; • clarify that young people who are participating in full-time study as part of a job plan are considered jobseekers and not students for the purposes of the Youth Allowance income-free area; • align payment commencement for jobseekers referred to online employment services with those who are referred to a provider; and • repeal spent provisions relating to ceased programs
Portfolio	Education, Skills and Employment
Introduced	House of Representatives, 27 May 2021
Rights	Work; education; social security; adequate standard of living; equality and non-discrimination; privacy

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021, *Report 9 of 2021*; [2021] AUPJCHR 85.

2.50 The committee requested a response from the minister in relation to the bill in *Report 7 of 2021*.[2]

Participation requirements

2.51 Schedule 1 of the bill seeks to set out the requirements for 'employment pathway plans' in the *Social Security Act 1991* (Social Security Act) and *Social Security (Administration) Act 1999* (Social Security Administration Act), which some social welfare recipients must comply with to qualify for a social welfare payment. While the requirement to enter into an employment pathway plan already exists,[3] Schedule 1 would re-make this requirement by establishing a single set of 'employment pathway plan requirements' relating to Job Seeker, Parenting Payment, Youth Allowance and Special Benefit.[4] These would require that a person must:

(a) satisfy the employment pathway plan requirements (by entering into a plan and complying with it),[5] and satisfy the Employment Secretary that they are willing to actively seek and to accept and undertake suitable paid work in Australia; or

(b) have an exemption from their requirements,[6] and satisfy the Employment Secretary that were it not for the circumstances giving rise to the exemption, they would be willing to actively seek and to accept and undertake suitable paid work in Australia.[7]

2.52 In addition, the bill would make several other amendments. It would permit a person to use 'technological processes' where entering into or varying an employment pathway plan,[8] and so self-manage their employment plan (as opposed to the current

2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (16 June 2021), pp. 27-49.

3 The explanatory memorandum notes that there are currently four sets of employment pathway plan provisions separately dealing with Youth Allowance, Job Seeker, Parenting Payment and Special Benefit. See, p. 7.

4 The explanatory memorandum states that this is intended to shorten and simplify the Social Security Act which currently provides for employment pathway plan requirements in separate parts of the legislation, explanatory memorandum, p. 41.

5 The phrase 'satisfies the employment pathway plan requirements' would be defined per Schedule 1, item 12, subsection 23(1).

6 Pursuant to Schedule 1, item 123, Division 2A, Subdivision C, proposed sections 40L – 40U.

7 Schedule 1, item 123, proposed Division 2A. These general requirements would be applied specifically to each of the relevant payment: Schedule 1, item 19, proposed subsection 500(2A) (relating to qualification for Parenting Payment); item 28, proposed subsection 540(2) (relating to qualification for Youth Allowance); item 70, proposed subsection 593(1AC) (relating to qualification for Job Seeker); item 85, proposed subsection 729(2B) (relating to qualification for Special Benefit).

8 Schedule 1, item 123, proposed section 40B.

requirement that they engage with a job services provider).[9] Schedule 8 would insert additional provisions establishing the start date from which a person who has used technological processes will be taken to have entered into an employment pathway plan relating to Job Seeker or Youth Allowance.[10]

2.53 In addition, the bill would insert a new provision to provide that 'paid work' will not be considered 'unsuitable' for a person merely because the work is not the person's preferred type of work; the work is not commensurate with the person's highest level of educational attainment or qualification; or the level of remuneration for the work is not the person's preferred level of remuneration.[11] In addition, the bill would amend the existing exemptions from the employment pathway plan requirements, including by establishing a new general exemption provision whereby the Employment Secretary may make a determination that a person is not required to satisfy the employment pathway plan requirements if they are satisfied in all the circumstances that the person should not be required to satisfy these requirements, whether or not the circumstances were in the person's control (although not circumstances attributable to the person's misuse of alcohol or drugs).[12]

2.54 Compliance with an employment pathway plan is compulsory, and subject to the application of the Targeted Compliance Framework.[13] Currently, where a person fails to comply with their employment pathway plan (that is, commits a 'mutual obligation failure'),[14] the Secretary must suspend (or, where applicable, cancel) their welfare payment.[15] Schedule 3 of the bill seeks to amend the Targeted Compliance Framework by providing that the Secretary 'may' (as opposed to must) suspend or cancel their payments.

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9 The general requirements relating to employment pathway plans include the requirement to attend provider appointments. See, Social Security Guide, *3.11.2 Job Plans* (Version 1.282, 10 May 2021) https://guides.dss.gov.au/guide-social-security-law/3/11/2#:~:text=2%20Job%20Plans,Overview,requirements%20under%20social%20security%20law (accessed 2 June 2021).

10 See, in particular, Schedule 8, item 14, proposed clause 4B.

11 Schedule 1, item 123, proposed subsection 40X(6).

12 Schedule 1, item 123, proposed section 40L.

13 Pursuant to Division 3AA of the *Social Security (Administration) Act 1999.*

14 A 'mutual obligation failure' is defined in section 42AC of the *Social Security (Administration) Act 1999* to include a failure to comply with a requirement to enter into an employment pathway plan; a failure to attend (or be punctual for) an appointment or activity they are required to attend as part of their plan; and other matters.

15 Section 42AF, *Social Security (Administration) Act 1999*.

Summary of initial assessment

Preliminary international human rights legal advice

2.55 Provisions establishing a requirement to enter into an employment pathway plan as a condition of receiving social welfare payments already exist in the Social Security Act and Social Security Administration Act. This bill would repeal those provisions and separately re-establish the requirement to enter into an employment pathway plan (with some amendments). As this bill inserts a new Division it is therefore necessary to examine in full the provisions sought to be introduced by this bill itself, and not merely those provisions which would alter the existing legislative provisions.

Rights to work and education

2.56 Entering into an employment pathway plan may, in and of itself, promote the right to work by helping individuals gain employment. The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[16] It requires that states provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory way.[17] The right to work also requires that, for full realisation of that right, steps should be taken by a State, including 'technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and productive employment'.[18] This is recognised in the statement of compatibility.[19] In addition, entering into an employment pathway plan may also promote the right to education where a person completes further study as part of their plan.[20] The right to education provides that education should be accessible to all.[21]

Rights to social security, adequate standard of living, equality and non-discrimination and privacy

2.57 However, by establishing that particular recipients of Job Seeker, Parenting Payment, Special Benefit and Youth Allowance *must* enter into and undertake an employment pathway plan in order to qualify for their respective social welfare payment (meaning that their payments may be suspended or cancelled for a failure to

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

17 International Covenant on Economic, Social and Cultural Rights, articles 6 and 2(1).

18 International Covenant on Economic, Social and Cultural Rights, article 6(2).

19 Statement of compatibility, p. 16.

20 See, Schedule 1, item 123, proposed subsection 40G(2).

21 International Covenant on Economic, Social and Cultural Rights, article 13.

comply), this measure engages and appears to limit a number of rights, including the rights to social security and an adequate standard of living. There may also be a risk that aspects of the measure have a disproportionate impact on certain persons, and so engage and limit the right to equality and non-discrimination. This is because Youth Allowance operates with respect to young people; Parenting Payment is a payment specifically for parents (and so may disproportionately impact on women); and Special Benefit is a payment which may be made to non-Australians (and so may disproportionately impact people based on their race). Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute (including race, gender and age).[22] In addition, by requiring that persons engage in an employment pathway plan—which may require the ongoing monitoring of the person's educational and job search activities, and permit the Employment Secretary to have regard to their other personal activities—the measure may also engage and limit the right to privacy. The right to privacy includes a requirement that the state does not arbitrarily interfere with a person's private and home life.[23] A private life is linked to notions of personal autonomy and human dignity.

2.58 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.[24] Social security benefits must be adequate in amount and duration.[25] States must also have regard to the principles of human dignity and non-discrimination so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.[26] They must guarantee the equal enjoyment by all of minimum and adequate protection, and the right includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security

22 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

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

24 International Covenant on Economic, Social and Cultural Rights, article 9. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008).

25 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [22].

26 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [22].

coverage.[27] In addition, public authorities are responsible for ensuring the effective administration or supervision of a social security system.[28] The right to an adequate standard of living requires States Parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.[29]

2.59 The rights to social security, adequate standard of living, equality and non-discrimination and privacy can generally be limited so long as the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and constitutes a proportionate means of achieving that objective.

2.60 In order to assess the compatibility of this measure with the rights to social security, an adequate standard of living, equality and non-discrimination and privacy, further information is required, in particular:

(a) how, and based on what criteria, the Employment Secretary would determine that although a person was meeting their employment pathway plan requirements pursuant to proposed section 40G, they had not satisfied the Secretary as to their genuine willingness to actively seek, accept and undertake paid work in Australia;

(b) how, and based on what criteria, a person subject to an exemption could satisfy the Employment Secretary that (but for the exemption) they would otherwise be willing to actively seek and to accept and undertake paid work in Australia;

(c) what is the objective behind making engagement in an employment pathway plan a compulsory condition on a person's qualification for a social welfare payment, and whether and how that objective constitutes a legitimate objective for the purposes of international human rights law;

(d) whether, how, and based on what evidence is making the requirement that a person engage in an employment pathway plan in order to continue to qualify for a social welfare payment rationally connected (that is, effective to achieve) a legitimate objective;

27 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [4] and [9].

28 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [11].

29 International Covenant on Economic, Social and Cultural Rights, article 11.

(e) in relation to the Employment Secretary's discretion to suspend, reduce or cancel a person's welfare payments because of a mutual obligation failure:

(i) on what basis, and in accordance with what guidelines and criteria, is it likely that the Employment Secretary would determine that a person's welfare payments should be suspended, reduced or cancelled;

(ii) who will make this decision (noting the Employment Secretary may delegate their powers and functions);

(iii) whether, in exercising their discretion to suspend or not suspend a person's social welfare payments, the Employment Secretary would make enquiries as to how the individual would meet their basic needs if their payment were to be suspended, and whether a person's disclosing their inability to meet their basic needs if their payment were suspended would be a factor influencing the Secretary's decision about whether or not to suspend the payment;

(f) if a person failed to meet a series of their employment plan requirements, would this trigger an inquiry into that person's welfare, and consideration as to whether their circumstances warrant an exemption from the requirements, and if so how such inquiries would occur;

(g) how the demerit aspect of the Targeted Compliance Framework would operate pursuant to these amendments, and whether a person who had accrued demerits in accordance with the current framework would still be liable to having their payments suspended, reduced or cancelled in the existing manner;

(h) in relation to the use of 'technological processes':

(i) what does arranging for the use of 'technological processes' in relation to persons entering or varying employment pathway plans mean in practice (for example, will this require a person to engage with an app, a website, a phoneline, or a combination of these or other processes);

(ii) to what extent would the use of a technological process require regular access to a computer or smart phone, and a viable internet and/or mobile telephone signal;

(iii) whether a person's practical capacity to access the devices necessary to use a digital platform regularly is part of the assessment of a person's suitability for the use of technological processes;

(iv) what information would be given to individuals to ensure they are aware of their ability to select either online servicing or a job services provider in entering into and administering an employment pathway plan, and what safeguards would ensure persons are not disadvantaged by being inappropriately directed to an online servicing mechanism;

(v) how the proposed amendments in Schedule 8 relating to the start date of a person's social welfare payment would be exercised in practice, and whether a person who intended to accept their job plan online, but had technical difficulties, and who could have telephoned a support line for assistance but failed to, would be found to have not made efforts to address their technical difficulties;

(i) what safeguards are in place to ensure that people are not required to agree to an employment pathway plan that effectively requires them to apply for work that may be unsuitable (noting, for example that some plans may require a certain number of job applications per month and noting also that job opportunities may be more limited in regional and remote areas of Australia);

(j) why other less rights restrictive alternatives to requiring immediate entry into an employment pathway plan would not be as effective to achieve the same objective;

(k) in determining the circumstances in which work may be deemed 'unsuitable', what evidence would a potential employee need to adduce if they believed the workplace may be unsafe because of conduct relating to sexism, racism, homophobia or other bullying or harassment;

(l) whether an individual could seek an exemption from their employment pathway plan requirements on the basis that they are residing in a rural area and are unable to secure employment because of a depressed local labour market, or whether such a person would be required to apply for jobs further from their home;

(m) whether and how the differential treatment in proposed subsection 40L(4) (relating to misuse of drugs and alcohol) is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that objective and is a proportionate means of achieving it; and

(n) whether 'circumstances wholly or predominantly attributable to' misuse of drugs and alcohol in proposed subsection 40L(4) would encompass ongoing drug and alcohol misuse and diseases that may result from past misuse such as Alcoholic Liver Disease or brain damage, or injuries

resulting from accidents when intoxicated where the relevant misuse occurred in the past.

Committee's initial view

2.61 The committee noted that engagement in an employment pathway plan may, in and of itself, promote the rights to work and education, as it may assist individuals to gain employment or undertake study. However, because the bill links engagement in such a plan with eligibility for social welfare payments, the committee noted that it may also engage and limit a number of human rights including the rights to social security, an adequate standard of living, equality and non-discrimination and privacy. The committee considered further information was required to assess the human rights implications of this bill, and as such sought the minister's advice as to the matters set out at paragraph [2.60].

2.62 The full initial analysis is set out in *Report 7 of 2021*.

Minister's response[30]

2.63 The minister advised:

> **(a) how, and based on what criteria, the Employment Secretary would determine that although a person was meeting their employment pathway plan requirements pursuant to proposed section 40G, they had not satisfied the Secretary as to their genuine willingness to actively seek, accept and undertake paid work in Australia;**
>
> The requirement for a person to satisfy the Employment Secretary they are willing to actively seek and to accept and undertake paid work in Australia, except unsuitable paid work, is equivalent to the current and longstanding "activity test" requirement that a person must satisfy the Secretary that they are actively seeking and willing to undertake paid work in Australia except unsuitable work. Usually a person could satisfy the Employment Secretary of this by entering an employment pathway plan and meeting their employment pathway plan requirements or only failing to do so for good reason, or simply making a statement as to their willingness if a delegate asked them, in the absence of any contrary evidence.
>
> In practice, a person would only fail to comply with the requirement in egregious cases where the person actively states that they would be unwilling to accept suitable work if it were offered, or in other rare cases where the person has such a major focus on volunteer work, unprofitable self-employment or some other project that it is incompatible with being willing to actively seek or to accept or undertake paid work.

30 The minister's response to the committee's inquiries was received on 24 June 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

(b) how, and based on what criteria, a person subject to an exemption could satisfy the Employment Secretary that (but for the exemption) they would otherwise be willing to actively seek and to accept and undertake paid work in Australia;

As with the answer to part (a), provisions ensuring that a person must be willing to look for and accept work replicate elements of the activity test that are still needed, reflecting that a person must be unemployed to qualify for unemployment payments. An exemption does not remove this requirement, although the provisions in Schedule 1 are clear that a person would only be required to be willing to look for and accept work if it were not for the exemption from requirements.

In practice, these provisions would only apply in very egregious cases where a person actively states that they would be unwilling to accept suitable work if it were offered.

(c) what is the objective behind making engagement in an employment pathway plan a compulsory condition on a person's qualification for a social welfare payment, and whether and how that objective constitutes a legitimate objective for the purposes of international human rights law;

Currently under social security law, entry into employment pathway plans is compulsory where a person is required by the Secretary or delegate to enter a plan and this would not change following passage of the Bill.

The legitimate objective behind compulsory employment pathway plans is to ensure that those receiving unemployment payments do all that they are able to support themselves through paid work. The employment pathway plan sets out job seekers' mutual obligation requirements. There is strong evidence that these requirements increase the chances of and speed the rate at which job seekers find work (see answer to part (d) for a summary of this evidence).

Protections within the current employment pathway plan provisions, and those proposed in the Bill, ensure that job seekers' circumstances and capacity to comply with their requirements need to be taken into consideration when a person enters into an employment pathway plan with the Secretary, or if a person seeks review of a plan that they have chosen to enter into.

The Bill makes it very clear that a delegate cannot require a person to comply with an employment pathway plan requirement which is not suitable for them – see proposed subsection 40D(5): "The Employment Secretary must not approve requirements which are not suitable for a person" and that in determining what is suitable the person's circumstances must be considered by the delegate – see proposed subsection 40D(5) and 40F. The Bill also makes clear that plans cannot contain a requirement to seek, accept or undertake unsuitable paid work – see proposed section 40H.

In addition, administrative arrangements under the targeted compliance framework ensure that job seekers will not face a financial penalty for not complying with a term of their employment pathway plan until the appropriateness of their employment pathway plans has been assessed twice – once by their provider (or the Digital Services Contact Centre) and once by Services Australia. In addition, job seekers also will not face financial penalties if they have a reasonable excuse for not meeting a requirement.

The compulsory nature of employment pathway plans therefore promote the right to work, and to the extent that there is any restriction on the right to social security and adequate standard of living, this is minimised, reasonable and proportionate to achieve a legitimate objective.

(d) whether, how, and based on what evidence is making the requirement that a person engage in an employment pathway plan in order to continue to qualify for a social welfare payment rationally connected (that is, effective to achieve) a legitimate objective;

Requiring a person to engage in an employment pathway plan is rationally connected to the legitimate objective of job seekers finding employment and reducing their reliance on income support.

There is a strong evidence base that mutual obligation requirements increase the speed and likelihood of job seekers finding work. For example, the OECD has highlighted the effectiveness of job seeker participation in targeted programs that include job search monitoring and participation in activities that promote motivation and employability[31] (referred to internationally as active labour market programs). One meta-analysis of 207 studies looking at 857 active labour market programs found participation in these programs effective in the short and long term.[32]

31 OECD (2015). *Employment Outlook 2015 – Activation policies for more inclusive labour markets,* OECD Publishing.

32 Car, D., Kluve, J., Weber, A., (2018). What Works? A Meta Analysis of Recent Active Labour Market Program Evaluations. Journal of the European Economic Association, 16(3).

There is also strong evidence that making these requirements compulsory, with consequences applying for not complying with requirements, increases employment[33] and engagement with requirements.[34]

In addition, while mutual obligation requirements have existed for many years, requirements have more recently been introduced for some groups of parents. In 2006 and 2007, activity requirements for parents receiving payment were introduced for those with a youngest child aged 6 or over. Administrative data was analysed for the sub-group of parents with a youngest child aged 6 and 7, as this group was given activity requirements but experienced no change in payment rates or other settings. The analysis shows this led to an increase in the average proportion of parents reporting earnings in the years following the changes compared to previously:

- from 30 per cent to 37 per cent for parents of youngest children aged 6; and
- from 32 per cent to 45 per cent for parents of youngest children aged 7.

A 2013 study also found that parent job seekers were more likely to exit income support after the introduction of mutual obligation requirements. Parents of youngest children aged seven were 48 per cent more likely to exit payment in the year after introduction.[35]

As mentioned in the answer to part (c), the employment pathway plan is the method of setting out job seekers' mutual obligation requirements.

(e) in relation to the Employment Secretary's discretion to suspend, reduce or cancel a person's welfare payments because of a mutual obligation failure:

33 See for example: Arni, P., Lalive, R. and Van Ours, J. (2013) 'How Effective Are Unemployment Benefit Sanctions? Looking Beyond Unemployment Exit', Journal of Applied Econometrics, 28, 1153–1178; Abbring, J., Van den Berg, G. and Van Ours, J. (2005) 'The Effect of Unemployment Insurance Sanctions on the Transition Rate from Unemployment to Employment', The Economic Journal, 115, 505, 602–630; Van den Berg, G., Van der Klaauw, B. and Van Ours, J. (2004) 'Punitive Sanctions and the Transition Rate from Welfare to Work' Journal of Labor Economics, 22, 1, 211–241 and Van der Klaauw, B. and Van Ours, J. (2013) 'Carrot and stick: How re-employment bonuses and benefit sanctions affect exit rates from welfare' Journal of Applied Econometrics, 28, 2, 275–296.

34 See for example: Wright, A., Dollery, B, Kortt, M., Leu, S., (forthcoming) "The Effect of Varying Sanction Values on Future Compliance with Unemployment Benefit Requirements: An Empirical Analysis Using Australian Administrative Data". Public Administration Quarterly and Wright, A. and Dollery, B. (2020) 'The impact of sanctions on compliance with unemployment payment requirements: An analysis using 2015/16 Australian national data'. Australian Journal of Labour Economics, 23, 1-20.

35 Fok and McVicar (2013). Did the 2007 welfare reforms for low income parents in Australia increase welfare exits?, IZA Journal of Labor Policy.

(i) on what basis, and in accordance with what guidelines and criteria, is it likely that the Employment Secretary would determine that a person's welfare payments should be suspended, reduced or cancelled;

Current provisions in the *Social Security (Administration) Act 1999* specify that failures to comply with mutual obligation requirements 'must' result in a payment suspension, regardless of whether the person has a good reason for missing their requirement. In practice, this means that in cases where a person has a valid reason for missing a requirement, their payment suspension is ended at the same time it begins – with no practical effect on the payment.

The amendments proposed by the Bill would mean the requirement for this suspension would cease, and instead provide flexibility on whether or not a payment suspension should apply. For example, the amendments more clearly support the current practice of appropriate compliance response to failures by recipients of participation payments to meet requirements, by making clear that sanctions need not be imposed where doing so would not further the objectives of the Targeted Compliance Framework.

The purpose of payment suspension is to motivate a person to reconnect with their employment services provider after a mutual obligation failure. However, the Secretary is currently obliged to suspend a person's participation payment even if the person has a reasonable excuse for the mutual obligation failure, and even if the person has already reconnected with their provider by the time the mutual obligation failure comes to the Secretary's attention or before the Secretary has had time to issue a reconnection requirement.

For example, a job seeker might miss an appointment with their provider scheduled for 10am on a day, with or without a reasonable excuse, but of their own volition attend their provider soon after on the same day, before being issued with a reconnection requirement.

In these cases, currently the Secretary suspends the person's participation payment, but the period of suspension immediately ends, with no practical consequence. Suspension therefore serves no material purpose, so it is appropriate to amend the law as is being done by this Schedule.

As explained in the Explanatory Memorandum, the proposed amendments would more clearly support, not alter, existing practice by not requiring a participant's payment to be suspended if the participant has a good reason for missing a requirement or if they have already re-engaged with their provider.

Further detail on the operation of the targeted compliance framework is available at:

- https://guides.dss.gov.au/guide-social-security-law/3/11/13 ; and

- https://docs.employment.gov.au/system/files/doc/other/targeted_compliance_framework_1.pdf

The provisions in the Bill will not result in any changes to the processes contained in these documents.

(ii) who will make this decision (noting the Employment Secretary may delegate their powers and functions);

As is currently the case, delegations regarding suspensions will be made to employment services providers and delegations regarding application of penalties will be made to Services Australia. The only changes in delegations will be updated references to powers in social security law as a result of changes in the Bill. No change will be made to the current processes that these delegates are required to follow.

(iii) whether, in exercising their discretion to suspend or not suspend a person's social welfare payments, the Employment Secretary would make enquiries as to how the individual would meet their basic needs if their payment were to be suspended, and whether a person's disclosing their inability to meet their basic needs if their payment were suspended would be a factor influencing the Secretary's decision about whether or not to suspend the payment;

When a person's payment is suspended they must be notified of how to re-engage with their requirements and end their payment suspension (a reconnection requirement). In practice, reconnection requirements are to meet the requirement that was missed, or supply a valid reason for not being able to. As outlined in the answer to part (c), requirements need to be achievable and take into account job seekers' circumstances and capacity to comply.

In December 2020, the Government introduced "resolution time" which allows job seekers two business days to re-engage with their requirements before their payments are suspended. If job seekers are unable to re-engage with their requirements within two business days, their payment suspension is ended.

These arrangements mean that job seekers' suspensions are within their control and can be ended either through re-engaging with requirements, providing a valid reason for their initial failure to meet their requirement or explaining why they cannot re-engage within two business days.

(f) if a person failed to meet a series of their employment plan requirements, would this trigger an inquiry into that person's welfare, and consideration as to whether their circumstances warrant an exemption from the requirements, and if so how such inquiries would occur;

Current processes and safeguards will remain in place, including two separate and rigorous job seeker capability assessments before a person faces financial penalties for not meeting their requirements.

The first assessment, a Capability Interview, is undertaken by the job seeker's employment services provider (or the Digital Services Contact Centre for those in online employment services) generally following a third failure without a valid reason. At this assessment, the appropriateness of job seekers' requirements is examined, and the assessment is designed to prompt job seekers to disclose any circumstances that may affecting their ability to meet their requirements. This may result in job seekers being referred to further assessment or referred to Services Australia for consideration of whether an exemption from requirements is appropriate.

A second similar assessment is undertaken by Services Australia (generally following a fifth failure without a valid reason). In addition, following a missed requirement, employment services providers are generally required to try to contact the job seeker.

(g) how the demerit aspect of the Targeted Compliance Framework would operate pursuant to these amendments, and whether a person who had accrued demerits in accordance with the current framework would still be liable to having their payments suspended, reduced or cancelled in the existing manner;

This Bill makes no changes to processes regarding demerits or to the operation of the Targeted Compliance Framework more generally. As explained in the Explanatory Memorandum, the Bill would better support, not alter, existing practice.

(h) In relation to the use of 'technological processes':

(i) what does arranging for the use of 'technological processes' in relation to persons entering or varying employment pathway plans mean in practice (for example, will this require a person to engage with an app, a website, a phoneline, or a combination of these or other processes);

The provisions in the Bill deliberately do not specify the types of technological processes that may be used so as to allow flexibility to develop the best service for job seekers as technology and service offerings develop. Currently, it is envisaged that job seekers will use online processes to enter or vary their employment pathway plans.

(ii) to what extent would the use of a technological process require regular access to a computer or smart phone, and a viable internet and/or mobile telephone signal;

No job seeker will be required to enter an employment pathway plan through technological processes if they do not have access to, or cannot use, or do not wish to use, relevant technology.

Some technological processes would require access to one or more of the above services or devices. For this reason, before a job seeker is offered the opportunity of entering a plan via the new technological processes, they will have their circumstances assessed. Job seekers who are assessed as job-ready and able to use and access digital services will be able to choose to manage their requirements online.

However, human oversight and assistance also remain an integral part of all employment services and will continue to do so. At any time, job seekers will be able to contact a person in the Digital Services Contact Centre who is trained to answer their questions and assist them with any difficulties.

The amendments also require that all job seekers will have the option of entering an employment pathway plan with a human delegate – see proposed subsection 40A(3).

(iii) whether a person's practical capacity to access the devices necessary to use a digital platform regularly is part of the assessment of a person's suitability for the use of technological processes;

Yes, assessment of digital literacy and access is part of the process of determining whether somebody is able to enter into an employment pathway plan through technological processes. Proposed paragraph 40A(3)(b) says that a person may be given the option to enter a plan through technological processes, taking account of their circumstances. Whether or not a person has digital literacy and access is part of their circumstances.

(iv) what information would be given to individuals to ensure they are aware of their ability to select either online servicing or a job services provider in entering into and administering an employment pathway plan, and what safeguards would ensure persons are not disadvantaged by being inappropriately directed to an online servicing mechanism;

Before a job seeker is offered the opportunity to enter into an employment pathway plan using technological processes, they will have their circumstances assessed. Job seekers who are assessed as job-ready and able to use and access Digital Services will be able to choose to manage their requirements online. These job-ready job seekers can also choose to be referred to a provider. Job seekers who are not assessed as job-ready will be referred to a provider to manage their requirements.

Again, the Bill also ensures that a person must be given the option of entering into an employment pathway plan with a human delegate when being given the requirement to enter into an employment pathway plan – see proposed subsection 40A(3).

Safeguards built into the Digital Employment Services Platform will ensure people do not get left behind, including a Digital Services Contact Centre to provide advice and extra support via phone or email. In addition, existing safeguards built into compliance arrangements will ensure that before

anybody faces any financial penalty for not meeting their requirements they will have the appropriateness of their requirements for their individual circumstances assessed twice, at a Capability Interview and a Capability Assessment with human delegates. Further, job seekers are able to move to a provider of their choice at any time if they feel the online service is not meeting their needs.

(**v) how the proposed amendments in Schedule 8 relating to the start date of a person's social welfare payment would be exercised in practice, and whether a person who intended to accept their job plan online, but had technical difficulties, and who could have telephoned a support line for assistance but failed to, would be found to have not made efforts to address their technical difficulties;**

Schedule 8 sets out that a job seeker's payment start date will not be delayed when the delay in completing their job plan is for a reason beyond their control. The specific notification processes for the measure are yet to be developed and will be finalised ahead of the 1 July 2022 implementation date.

(i) what safeguards are in place to ensure that people are not required to agree to an employment pathway plan that effectively requires them to apply for work that may be unsuitable (noting, for example that some plans may require a certain number of job applications per month and noting also that job opportunities may be more limited in regional and remote areas of Australia);

There are a range of legislative criteria in the Bill that prevent job seekers being compelled to apply for unsuitable work. An employment pathway cannot contain a requirement to look for, accept, or undertake unsuitable paid work – see proposed section 40H which applies in relation to both traditional plans and plans entered through technological processes. Further, due to proposed subsection 40D(5) and 40F, when a job seeker enters an employment pathway plan with the Employment Secretary (in practice a delegate), the delegate must consider a range of matters in determining requirements, including requirements about the number of job searches. The matters which must be considered include the person's capacity to comply;

- the state of the local labour market;
- the participation and transport options available to the person;
- the length of travel time to comply with those requirements.

These legal protections are supplemented by administrative protections. For example, if a person considers that their requirements are unsuitable, they may contact their provider or the Digital Services Contact Centre in order to reduce their requirements. Further, if for some reason, a person's employment pathway plan does contain requirements above their capacity, two assessments of the appropriateness of their employment pathway plan

will be undertaken before they face financial penalties for not meeting those requirements (see answer to part (f)).

(j) why other less rights restrictive alternatives to requiring immediate entry into an employment pathway plan would not be as effective to achieve the same objective;

The measure implemented by schedule 8 of the Bill builds on alternative approaches. For example, currently job seekers in online employment services may not receive their payment until they sign an employment pathway plan. However, job seekers' payment is back-dated to claim once they sign their employment pathway plan. These arrangements are referred to as 'RapidConnect' and evidence in the Evaluation of jobactive Interim Report shows that these processes speed the time to engagement with employment services.

However, in July 2018 provisions equivalent in effect to those contained in Schedule 8 were introduced for provider-managed job seekers. Introduction of these measures further reduced the time to commencement in employment services by two days on average.

The measure at schedule 8 would address the current inequity whereby the start date for job seekers' income support payments depends on whether they are referred to online employment services or referred to an employment services provider.

Protections will also remain for job seekers who are unable to connect for a reason outside of their control – and the provisions in the Bill explicitly provide that payment will not be delayed in these circumstances. This could occur, for example, when a job seeker experiences illness, an accident, or inability to access IT services.

Some job seekers may also be exempt from the measure, consistent with existing arrangements that apply to provider-managed job seekers. This means they will receive their payment immediately after their claim has been processed. These exemptions cover, for example:

- Job seekers who are transferring from another payment.
- Job seekers who have an exemption from mutual obligations.
- Job seekers who are referred for further assessment at the time they lodge their claim.

Job seekers self-managing using online employment services can also contact the Digital Services Contact Centre if they need assistance or have any questions, for example in relation to agreeing to their Job Plan or meeting their requirements.

(k) in determining the circumstances in which work may be deemed 'unsuitable', what evidence would a potential employee need to adduce if they believed the workplace may be unsafe because of conduct relating to sexism, racism, homophobia or other bullying or harassment;

There are no specified evidence requirements needed to satisfy providers or delegates in Services Australia that work was unsuitable. However, it would also be open to a delegate to accept evidence from a jobseeker, if it were available, and to conclude on that basis that particular work is unsuitable for the jobseeker.

(l) whether an individual could seek an exemption from their employment pathway plan requirements on the basis that they are residing in a rural area and are unable to secure employment because of a depressed local labour market, or whether such a person would be required to apply for jobs further from their home;

Job seekers requirements are adjusted to ensure their requirements are appropriate and achievable – including if they live in a rural area or live in a depressed labour market. However, job seekers are not usually completely exempted from requirements merely due to living in a rural area. The Bill will not change this situation.

There are existing safeguards relating to the extent to which a person can be expected to seek, accept or undertake jobs some distance from their home. The Bill will not change this – see for example proposed paragraphs 40X(1)(f) and (h) regarding unreasonably difficult commutes and work which requires a person to move from home.

Recognising the unique social and labour market conditions in remote Australia, a different employment service exists in remote Australia. The Community Development Program (CDP) is the Government's remote employment and community development service. CDP supports job seekers in remote Australia to build skills, address barriers to employment and contribute to their communities through a range of flexible activities.

(m) whether and how the differential treatment in proposed subsection 40L(4) (relating to misuse of drugs and alcohol) is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that objective and is a proportionate means of achieving it; and

The provisions in subsection 40L(4) replicate existing provisions in social security law, and arrangements would not alter following passage of the Bill.

A fundamental principle of mutual obligation requirements is that job seekers must do all that they are able to in order to support themselves through paid work – including addressing drug or alcohol misuse. Participation in drug and alcohol treatment may count towards other mutual obligation requirements, and if job seekers cannot meet a requirement due to a circumstance wholly or predominantly due to drug or alcohol misuse, this may be a reasonable excuse (however, there are restrictions on repeatedly using drug and alcohol as a reasonable excuse if a person has refused appropriate and available treatment).

Further explanation of the objective, legitimate and proportionate nature of subsection 40L(4) is contained in the Statement of Compatibility with

Human Rights for Schedule 13 of the *Social Services Legislation Amendment (Welfare Reform) Act 2018* at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5927

(n) whether 'circumstances wholly or predominantly attributable to' misuse of drugs and alcohol in proposed subsection 40L(4) would encompass ongoing drug and alcohol misuse and diseases that may result from past misuse such as Alcoholic Liver Disease or brain damage, or injuries resulting from accidents when intoxicated where the relevant misuse occurred in the past.

The provisions in subsection 40L(4) replicate existing provisions in social security law, and arrangements would not alter following passage of the Bill.

Exemptions are intended for circumstances where a person is temporarily unable to meet their requirements. For this reason, a person would generally not be eligible for an exemption solely due to the impact of a permanent condition. In these cases, a person would be assessed for a partial capacity to work, or potentially have their eligibility assessed for other payments such as Disability Support Pension.

Where a person has a disability or illness, regardless of the cause, this must be considered in setting the person's mutual obligation requirements.

A job seeker may also be eligible for a temporary medical incapacity exemption if they experience a temporary exacerbation of a permanent condition, which would be considered a result of the medical condition – not the circumstances which caused the medical condition.

Concluding comments

International human rights legal advice

Rights to social security, adequate standard of living, equality and non-discrimination and privacy

2.64 As noted at paragraph [2.59], the rights to social security, adequate standard of living, equality and non-discrimination and privacy can generally be limited so long as the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and constitutes a proportionate means of achieving that objective.

Prescribed by law

2.65 Further information was sought as to the meaning of proposed section 40G (which provides that the Employment Secretary may determine that although a person is meeting their employment pathway plan requirements, they have not satisfied the Secretary as to their genuine willingness to actively seek, accept and undertake paid work). The minister stated that a person would only fail to comply with this requirement where they actively stated that they would be unwilling to accept suitable work if it were offered, or in other rare cases where the person had 'such a major focus

on volunteer work, unprofitable self-employment or some other project that it is incompatible with being willing to actively seek or to accept and undertake paid work'. As to where an individual is subject to an exemption, and would still be required to satisfy the Secretary that but for that exemption, they would be willing to actively seek and accept and undertake paid work, the minister stated that these provisions would only apply in 'very egregious cases where a person actively states that they would be unwilling to accept suitable work if it were offered'. This information would appear to indicate that the requirement of being 'willing to undertake' paid work will be met in most cases. However, there may be a risk that there are cases where a person is undertaking volunteer work or another project but is unsure when those activities may be considered to reach the threshold of being incompatible with being willing to actively seek or to accept and undertake paid work. The development of guidelines would have the capacity to assist in providing clarity.

Legitimate objective

2.66 Further information was sought as to the objective behind making engagement in an employment pathway plan a compulsory condition on a person's qualification for a social welfare payment. The minister stated that the objective behind compulsory employment pathway plans is to ensure that those people who receive unemployment payment do all that they can to support themselves through paid work, which thereby promotes the right to work. Measures which are intended to promote the right to work would generally be considered to have a legitimate objective for the purposes of international human rights law.

Rational connection

2.67 Further information was also sought as to whether, how and based on what criteria making the requirement that a person engage in an employment pathway plan in order to qualify for a social welfare payment is rationally connected to achieving a legitimate objective. The minister stated that there is strong evidence that mutual obligation requirements increase the speed and likelihood of job seekers finding work.[36] The minister further stated that there is strong evidence that making these requirements compulsory, with consequences applying for not complying with requirements, increases employment and engagement with requirements. If the evidence demonstrates that mutual obligation requirements do lead more people to finding paid work, the measure would be rationally connected to the stated objective.

2.68 However, it is noted that the evidence which the minister has cited as to the effectiveness of mutual obligation requirements contains some nuanced findings. For example, the articles cited also note that: where job seekers are already relatively well-

36 Including by participating in targeted programs that include job search monitoring and participation in activities that promote motivation and employability. See, OECD (2015). *Employment Outlook 2015 – Activation policies for more inclusive labour markets,* OECD Publishing.

qualified, the monitoring of their job seeking may merely cause an inefficient shift from informal to formal job-search methods;[37] that some studies call into question the effectiveness of mutual obligations in securing long-term stable employment, and suggest mutual obligations lead to higher incidences of part-time employment;[38] and that programs with numerical job application requirements per month risk generating employer complaints about too many solicitations.[39] In addition, one article argues that job search assistance programs and other programs that include monitoring of search are designed to push participants into the labour market quickly and are unlikely to have large long term effects.[40]

2.69 The minister also cited evidence that making job search requirements compulsory (subject to consequences) increases employment and engagement with requirements themselves. However, it is noted that this evidence likewise contains nuanced findings.[41] For example, a 2013 study found that the imposition of sanctions

37 Gerard Van Den Berg and Bas Van der Klaauw 'Counseling and Monitoring of Unemployed Workers: Theory and Evidence from a controlled Social Experiment', *International Economic Review*, vol. 47, no. 3, 2006, pp. 895–936. See, Organisation for Economic Co-operation and Development (OECD), *Employment Outlook 2015 – Activation policies for more inclusive labour markets*, 2015, p. 121.

38 See, Patrick Arni, Rafael Lalive and Jan van Ours, 'How Effective Are Unemployment Benefit Sanctions? Looking Beyond Unemployment Exit', *Journal of Applied Econometrics*, vol. 28, 2013, pp. 1153–1178; and Gerard Van den Berg and Johan Vikström, 'Monitoring Job Offer Decisions, Punishments, Exit to Work, and Job Quality', *Scandinavian Journal of Economics*, vol. 116, no. 2, 2014, pp. 284–334. See, OECD, *Employment Outlook 2015 – Activation policies for more inclusive labour markets*, 2015, p. 122. This section of the report also notes further studies which examine the wider consequences of sanctions and provide evidence that there may be adverse consequences for child welfare, family welfare, and health outcomes. For example, Joshua Rowntree Foundation, *Sanctions within conditional benefits systems: a review of evidence* (by J Griggs and M Evans), 2010. Other studies have examined the harms caused by behavioural conditionalities, such as attending mandatory sessions with job service providers. See, John David Jordan, 'Welfare grunters or workfare monsters? An empirical review of the operation of two UK 'work programme' centres', *Journal of Social Policy*, vol. 47, no. 3, 2017, pp. 583–601.

39 OECD, *Employment Outlook 2015 – Activation policies for more inclusive labour markets*, 2015, p. 121. In this regard it is noted that Australia has a dedicated phone line for employers to report disingenuous job applications from jobseekers who are in receipt of social welfare payments. See, https://jobsearch.gov.au/employer-reporting-line [Accessed 1 July 2021].

40 David Card, Jochen Kluve and Andrea Weber, 'What works? A meta analysis of recent active labor market program evaluations', *Journal of European Economic Association,* vol. 16, no. 3, 2018, p. 906.

41 See Patrick Arni, Rafael Lalive and Jan van Ours, 'How Effective Are Unemployment Benefit Sanctions? Looking Beyond Unemployment Exit', *Journal of Applied Econometrics*, vol. 28, 2013, p. 1166. See further, Ruud Gerards and Riccardo Welters, 'Liquidity Constraints, Unemployed Job Search and Labour Market Outcomes' *Oxford bulletin of economics and statistics*, vol. 82, 2020, p. 625.

while a person is unemployed reduces their subsequent employment stability, and that affected persons have a tendency to exit the social welfare scheme (that is, paid employment) for unregistered unemployment in order to avoid pressures exerted by the sanction system and to 'gain' more (unpaid) job search time. The study found that sanctions on job seekers had a persistent negative effect on their post-unemployment earnings, and that the imposition of sanctions (that is, the actual reduction in social welfare payments) further exacerbates this negative effect. It concluded that the positive effects of leaving unemployment more quickly do not outweigh these effects of benefit sanctions, and that job seekers who are confronted with or a benefit sanction tend to reduce their demands concerning the quality of the post-unemployment job, being more likely to accept a job offer more quickly at the cost of a reduced employment and/or lower earnings.[42]

2.70 Based on the minister's advice, there would appear to be evidence indicating that instituting a mutual obligation to apply for, accept and undertake paid work in order to qualify for a social welfare payment may be effective to cause a person to gain paid work. As such the measure may be rationally connected to (that is, effective to achieve) its stated objective. However, it is noted there is also evidence which raises questions as to the effectiveness of this process in securing sustainable and ongoing employment, and the nexus between mutual obligations and a negative ongoing impact on the person's post-unemployment earnings. This raises some questions as to the effectiveness of mutual obligations in achieving the stated goal of ensuring that people do all they can to support themselves with their own earnings, and thereby promoting the right to work.

Proportionality

2.71 Further information was sought as to the proportionality of different aspects of the proposed measure.

Proposed amendments to the mutual obligation scheme

2.72 Further information was sought in relation to the proposed discretion for the Employment Secretary to suspend, reduce or cancel a person's welfare payments because of a mutual obligation failure (as opposed to the current mandatory requirement). The minister stated that these amendments would more clearly support the current practice of 'appropriate compliance responses' where a person has failed to meet a mutual obligation. The minister stated that this makes clear that sanctions need not be imposed where doing so would not further the objectives of the Targeted Compliance Framework—that is, to motivate a person to reconnect with their employment services provider after a mutual obligation failure. The minister indicated that this amendment is intended to capture circumstances where a person misses a

42 Patrick Arni, Rafael Lalive and Jan van Ours, 'How Effective Are Unemployment Benefit Sanctions? Looking Beyond Unemployment Exit', *Journal of Applied Econometrics*, vol. 28, 2013, p. 1174.

relevant appointment and then re-connects with their employment services provider within the same day, meaning that while their payment currently must be suspended that suspension served no practical purpose. As such, it would appear that this introduction of a discretion to suspend, or not to suspend, a person's social welfare payment for non-compliance will be exercised in the same manner as the current suspension and Targeted Compliance Framework is operating. In this regard, the minister advised that the bill would not alter the processes regarding demerits under the Targeted Compliance Framework. That is, a person who had accrued demerits in accordance with the current framework would still be liable to having their payments suspended, reduced or cancelled in the existing manner. Consequently, it would appear that amending the Secretary's existing power to suspend a social welfare payment in this manner would be, in practice, neither rights promoting nor rights limiting, because it will not alter the existing manner in which the Target Compliance Framework is applied.

Use of technological processes

2.73 Further information was also sought in relation to the use of technological processes in relation to those entering into, or varying, employment pathway plans, and what these may entail. The minister advised that the bill deliberately provides for future flexibility as technology and service offerings develop. He stated that it is envisaged that job seekers will use online processes to enter into or vary their employment pathway plans, and accessing such processing would require the use of a computer or smart phone. However, the minister noted that job seekers will not be required to enter into an employment pathway plan in this manner, but will only be able to do so where they have been assessed as job-ready and able to use and access digital services. The minister stated that this would include an assessment of the person's digital literacy, as well as their access.

2.74 As to how individuals would be made aware of their choice to use either digital processes or a human delegate to enter and manage their employment pathway plan, the minister stated that the bill ensures that people must be given the option when they are required to enter into such a plan. The minister further stated that where a person has entered such a plan using digital services, they will be able to access the Digital Services Contact Centre for support, and there is the existing safeguard of two capability assessments before any financial penalties are imposed, to ensure job requirements in a plan are appropriate for the individual. The minister further noted that job seekers can move to a provider of their choice at any time. These may all serve as useful safeguards to ensure that people who may not have regular access to a phone, tablet or computer with regular internet access are not inappropriately signed up to manage their employment pathway plan online. However, it is noted that the extent to which these operate as effective safeguards may only become apparent as a matter of practice. That is, while individuals may have the choice to use either online services or a job services provider, their understanding of making that choice (and the implications in either case) from the outset would be important factors in assessing

whether individuals will not be inappropriately directed to online servicing.[43] As such, it would appear that for some people, the introduction of digital processes will have no impact on their capacity to enter into and undertake an employment pathway plan. However, some questions remain as to whether disadvantaged and otherwise vulnerable welfare recipients will have sufficient information in order to inform their decision of whether to agree to managing their employment pathway plan online or not.[44] If they are not provided with sufficient information to exercise their choice, there may be a risk that some vulnerable individuals who elect to use technological processes may be disadvantaged in practice. It appears much will depend on the effectiveness of processes in place to ensure applicants are aware of the phone, computer and internet requirements for managing a plan using technological processes.

2.75 In relation to the proposed amendments in Schedule 8 (relating to the start date of a person's social welfare payments when they applied online), the minister stated that a person's start date for social welfare would not be delayed if the cause of the delay in completing a job plan was beyond their control. However, the minister also stated that the specific notification processes are not yet developed. As such, some questions remain as to how circumstances will be assessed as being outside a person's control, and whether and how a person's ability to have sought assistance

43 In this regard it is noted that the Services Australia Jobseeker payment page appears to primarily direct applicants to apply for the payment online (describing this as the easiest way to claim), or alternatively over the phone. See, https://www.servicesaustralia.gov.au/individuals/services/centrelink/jobseeker-payment/how-claim#dc-52713-s-208060-208061-208062-208065-208064-208068-208071 [Accessed 2 July 2021]. These concerns were recently noted by community groups in an inquiry into this bill. See, Senate Standing Committee on Education and Employment Legislation Committee, *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021 [Provisions]* (June 2021).

44 While the use of online services has expanded significantly during the COVID-19 pandemic, it is relevant that some community groups have cautioned against relying on the success of that rollout, given the atypical profile of many job seekers who lost their job during the pandemic but were capable of being quickly reabsorbed into the workforce. See, Senate Standing Committee on Education and Employment Legislation Committee, *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021 [Provisions]* (June 2021), p. 23.

over the phone with technical problems may delay the start date of their social welfare payment.[45]

Unsuitable work

2.76 Further information was sought as to whether safeguards are in place to ensure that people are not required to agree to an employment pathway plan that effectively requires them to apply for work that may be unsuitable (noting, for example that some plans may require a certain number of job applications per month and noting also that job opportunities may be more limited in regional and remote areas of Australia). The minister stated that the relevant delegate must consider a range of matters when a person enters an employment pathway plan, including requirements about the number of job searches, having regard to the person's capacity to comply. The minister state that this would include consideration of the local labour market, participation and transport options available and the length of travel time to comply with those requirements. In addition, the minister noted that a person may contact their provider (or the Digital Services Contact Centre) to reduce their requirements, and that these matters would be considered at a capability assessment if this were to take place. These have the capacity to serve as important safeguards to ensure that people are not effectively required to apply for jobs that may be unsuitable for them. However, it is relevant that the Social Security Guide states that job seekers living in a metropolitan area or within 90 minutes travel time to a metropolitan area would typically be expected to have 20 job searches per month, and in regional areas with limited vacancies and where the travel time to a stronger labour market is more than 90 minutes, it might be appropriate that only 15 job searches per month be required.[46] Considering that this is the general guidance provided to delegates, there would appear to be a risk that job seekers will apply for positions for which they are unqualified or otherwise unsuited in order to meet their minimum number of applications per month. Consequently, the safeguards which provide that certain offers of employment are unsuitable for an individual are of considerable significance.

45 It is also noted that broader concerns have been raised by community groups about: the risk that job seekers may feel pressured to agree to an online job plans that is not appropriate in order to commence their social welfare payments; and the risk that aligning the payment commencement day for online and offline applicants may have a negative impact on online applicants if their acceptance of their job plan is delayed, see Senate Standing Committee on Education and Employment Legislation Committee, *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021 [Provisions]* (June 2021), p. 27–28.

46 Department of Social Services, *Social Security Guide (Version 1.283 – Released 1 July 2021), section 3.11.1.10 setting job search requirements*, https://guides.dss.gov.au/guide-social-security-law/3/11/1/10 [Accessed 2 July 2021].

2.77 In relation to the circumstances in which work may be deemed 'unsuitable', information was sought as to the evidence a potential employee would need to adduce if they believed the potential workplace may be unsafe because of conduct relating to sexism, racism, homophobia or other bullying or harassment. The minister stated that there are no specified evidence requirements needed to satisfy providers or delegates in Services Australia that work is unsuitable for a potential employee. The minister stated that it would be open to a delegate (that is, a job services provider employee) to accept evidence from a person and conclude on that basis that the particular work would be unsuitable for them. The proposed legislative basis for this would appear to be the residual catch-all category in proposed subsection 40X(1)(i): 'for any other reason, the work is unsuitable to be done by the person'. However, it would appear that there may, therefore, be instances in which a provider or delegate may not accept evidence and conclude on that basis that particular work is unsuitable. Further, it remains unclear how job seekers would know that they can refuse a job offer where they believe the workplace may be unsafe because of conduct relating to sexism, racism, homophobia or other bullying or harassment, and whether job services providers would themselves be aware that this may be a legitimate basis on which to find that an offer of employment was not suitable. In addition, it is not clear what a person would need to demonstrate to make out their case that work was unsuitable. For example, if a person had merely considered the behaviour of another employee raised concerns that this would risk being an unsafe workplace, it would appear that a job services provider would have a wide degree of discretion in terms of whether to accept this as a basis for refusing a job offer. Under international human rights law, the State remains responsible for a private contractor, and must ensure that a private actor does not compromise equal, adequate, affordable and accessible social security.[47] As the minister has not provided information as to how the Employment Secretary would guide the making of such decisions or assess the sufficiency of any such decision by a provider, this raises concerns as to the State's oversight of these decisions in practice. This, in turn, raises concerns with respect to the proportionality of the proposed measure, noting that if paid work was found to be suitable, a failure to accept an offer of employment could constitute a mutual obligation failure and cause a person's social welfare payment to be suspended, reduced or cancelled.

Less rights restrictive alternative

2.78 Further information was sought as to why other less rights restrictive alternatives to requiring immediate entry into an employment pathway plan would not be as effective to achieve the same objective. That is, why would it be less effective to provide job seekers with social welfare payments with no conditions for an initial set period of time, only after which they would be required to enter into an employment pathway plan (if they were still unemployed). The minister provided

47 UN Committee on Economic, Social and Cultural Rights, *General Comment No.19 on the right to social security (Art. 9)*, (4 February 2008) [46].

information related to the proposed amendments in Schedule 8 regarding the start date for social welfare payments where a person has applied online, but not in relation to why other less rights restrictive alternative would not be as effective. As such, it remains unclear that a less rights restrictive alternative would not be as effective to achieve the stated objective of this measure.

Exemptions from employment pathway plan requirements

2.79 Further information was also sought as to the operation of exemptions from employment pathway plan requirements, for example on the basis that a person is residing in a rural area and unable to secure employment because of a depressed local labour market, or whether such a person would be required to apply for jobs further from their home. The minister stated that job seekers are not usually completely exempted from requirements merely due to living in a rural area, but that job seeker requirements are adjusted to ensure they are appropriate and achievable. The minister noted that existing safeguards relating to the extent to which a person may be expected to seek jobs some distance from their home will remain in place, including where a commute to work would be unreasonably difficult. The minister further noted that job seekers in remote areas of Australia are supported by the Community Development Program. These existing safeguards would appear to have the capacity to regulate the number of activities which a person in a rural area, or in a depressed labour market more generally, would be required to undertake per month (that is, factors beyond that person's control which impact on their ability to gain employment would be taken into account). However, it would appear that such factors would not be anticipated to form the basis for an exemption from employment pathway plan requirements under proposed subsections 40L(2) and (3). It would appear that there may, therefore, be a risk that a cohort of social welfare recipients who live in rural areas with a depressed job market are required to agree to and undertake an employment pathway plan and face considerable challenges in designing such a plan with 'appropriate and achievable' outcomes, and complying with any such plan.

2.80 Proposed subsection 40L(4) states that a person cannot be exempted from their employment pathway plan requirements due to circumstances which are wholly or predominantly attributable to the person's misuse of alcohol or other drugs (unless they are a declared program participant). Further information was also sought as to whether and how this differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that objective and is a proportionate means of achieving it. The minister stated that a fundamental principle of mutual obligation requirements is that job seekers must do all that they are able to in order to support themselves through paid work – including addressing drug or alcohol misuse. In this respect, he advised that participation in drug and alcohol treatment may count towards other mutual obligation requirements, and if a person cannot meet a requirement due to a circumstance wholly or predominantly due to drug or alcohol misuse, this may be a reasonable excuse (however, there are restrictions on repeatedly using drug and alcohol as a reasonable excuse if a person

has refused appropriate and available treatment). The minister further stated that 'circumstances wholly or predominantly attributable to' misuse of drugs and alcohol in proposed subsection 40L(4) is intended for circumstances where a person is *temporarily* unable to meet their requirements. He stated that a person would generally not be eligible for an exemption solely due to the impact of a permanent condition. In these cases, a person would be assessed for a partial capacity to work, or potentially have their eligibility assessed for other payments such as Disability Support Pension. Further, where a person has a disability or illness, regardless of the cause, the minister stated that this must be considered in setting the person's mutual obligation requirements. The minster further noted that a person may also be eligible for a temporary medical incapacity exemption if they experience a temporary exacerbation of a permanent condition, which would be considered as a result of the medical condition – not the circumstances which caused the medical condition.

2.81 Based on this information, the proposed measure would appear to be accompanied by a number of measures such that a person who experiences alcohol and other drug abuse health issues on a temporary basis may be eligible for a temporary exemption, and that where this rose to the level of a disability they may be assessed for an alternative social welfare payment. There would, however, appear to remain a risk that a cohort of persons would fall in the middle of these two categories – not meeting the requirements for a temporary exemption, but not with a condition found to rise to the level of a disability for the purposes of the disability support pension. Further, the minister stated that the fundamental principle of mutual obligation requirements is that job seekers must do all that they are able to in order to support themselves through paid work – including addressing drug or alcohol misuse. However, it is not clear how limiting the extent to which a person's drug or alcohol misuse (and any health conditions flowing therefrom) may be taken into consideration in establishing exemptions from job search activities, and therefore exposing the person to the risk of payment suspension, reduction or cancellation, would be effective to help that person to address the drug or alcohol misuse itself. Indeed, the withdrawal of income support payments may appear to risk exacerbating substance abuse problems rather than encouraging their treatment, and may risk exposing the individual to other harms (if they were unable to meet their basic needs such as food and rent expenses). As previously stated by the committee when this power was introduced,[48] it appears unlikely that suspending, reducing or cancelling a person's welfare payment for non-compliance with an employment pathway plan requirement because of circumstances attributable to the person's misuse of alcohol or other drugs, which may impair their ability to afford basic necessities, will be considered proportionate to the legitimate objectives of the measure as a matter of international human rights law.

48 Parliamentary Joint Committee on Human Rights, Report 11 of 2017 (17 October 2017) at p. 179-180.

Concluding comments

2.82 As noted, a number of measures in the bill engage and limit the rights to social security, adequate standard of living, equality and non-discrimination and privacy. These rights can generally be limited provided the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and constitutes a proportionate means of achieving that objective.

2.83 The objective behind compulsory employment pathway plans, being to ensure that people who receive unemployment payment do all that they can to support themselves through paid work, would appear to generally be capable of constituting a legitimate objective for the purposes of international human rights law.

2.84 With respect to rational connection, there would appear to be evidence indicating that instituting a mutual obligation to apply for, accept and undertake paid work in order to qualify for a social welfare payment may be effective to cause a person to gain paid work. However, there are some questions as to the effectiveness of this process in securing sustainable and ongoing employment, and as to the nexus between mutual obligations and a potential negative ongoing impact on the person's post-unemployment earnings. This raises some questions as to the effectiveness of mutual obligations in achieving the stated goal of ensuring that people do all they can to support themselves with their own earnings, and thereby promoting the right to work

2.85 Finally, several questions remain as to whether specific proposed measures are sufficiently circumscribed and accompanied by sufficient safeguards such that they would constitute a proportionate means by which to achieve the stated objective. In this regard, some questions remain as to whether sufficient safeguards will operate to ensure that individuals without regular access to mobile phones or computers with internet will not inappropriately elect to enter into and manage their employment pathway plans online. In addition, it is not clear that the proposed requirement to seek, accept and undertake only work which is not 'unsuitable' would effectively protect individuals from workplaces which may be unsafe for them without exposing them to the risk of a mutual obligation failure. Further, some questions remain as to whether other, less rights restrictive alternatives would be ineffective to achieve the stated objective of the measure. Finally, some questions also remain as to whether the proposed exemptions from the employment pathway plan requirements would ensure that job seekers who struggle to meet their obligations because of their rural location, a lack of jobs, or because of health problems associated with alcohol or drug misuse, would not be unfairly disadvantaged due to these factors. As such, it would appear there is some risk that in some circumstances requirements for welfare recipients to enter into and comply with employment pathway plans in order to receive social security may not adequately protect the rights to social security, an adequate standard of living, equality and non-discrimination and a private life.

Committee view

2.86 The committee thanks the minister for this response. The committee notes that this bill would re-make the requirements for 'employment pathway plans', which some social welfare recipients must comply with in order to qualify for a social welfare payment. It would also introduce the ability to use technological processes to enter into employment pathway plans and make amendments as to what will constitute a suitable offer of employment, and the circumstances in which a person may be exempted from their employment pathway plan requirements. In addition, the bill would amend the Targeted Compliance Framework by introducing a discretion for the Employment Secretary to suspend a person's social welfare payments for a mutual obligation failure (noting that they are currently required to suspend payments in these circumstances).

2.87 The committee notes that this bill is intended to shorten and simplify social security law, making it clearer and more accessible. The committee considers that, having regard to the existing complexity of this law, this is an important aim.

2.88 The committee notes that engagement in an employment pathway plan may, in and of itself, promote the rights to work and education, as it may assist individuals to gain employment or undertake study. However, because the bill links engagement in such a plan with eligibility for social welfare payments, the committee notes that it may also engage and limit a number of human rights including the rights to social security, an adequate standard of living, equality and non-discrimination and privacy. The committee notes that these rights can generally be limited provided the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and constitutes a proportionate means of achieving that objective.

2.89 The committee considers that the measure is directed towards a legitimate objective (that is, ensuring that people who receive unemployment payment do all that they can to support themselves through paid work). The committee also considers that the proposed measure may be effective to achieve its objective, however it notes that there are some questions about the effectiveness of mutual obligations in causing a person to secure sustainable and ongoing employment.

2.90 The committee also considers that some questions remain as to whether specific proposed measures are sufficiently circumscribed and accompanied by sufficient safeguards such that they constitute a proportionate means by which to achieve the stated objective. In particular, the committee considers that it is unclear whether the proposed expanded use of technological processes to manage employment pathway plans will ensure that individuals without regular access to mobile phones or computers with internet do not inappropriately elect to enter into and manage their employment pathway plans online. In addition, the committee considers that it is not clear that the proposed requirement to seek accept and undertake only work which is not 'unsuitable' may effectively protect individuals

from workplaces which may be unsafe for them without exposing them to the risk of a mutual obligation failure. Further, the committee notes that some questions remain as to whether a less rights restrictive alternative may be effective to achieve the stated objective of the measure.

2.91 Finally, the committee notes that some questions remain as to whether the proposed exemptions from the employment pathway plan requirements may ensure that job seekers who struggle to meet their obligations because of circumstances beyond their control (for example, because of their rural location, a lack of jobs, or because of health problems associated with alcohol or drug misuse) would not be disadvantaged due to these factors. As such, the committee considers there is some risk that in some circumstances requirements for welfare recipients to enter into and comply with employment pathway plans in order to receive social security may not adequately protect the rights to social security, an adequate standard of living, equality and non-discrimination and a private life.

Suggested action

2.92 The committee further considers that the proportionality of the proposed measure may be assisted were the bill amended to require that guidelines must be established to:

- **(a) outline the circumstances in which a person may satisfy their employment pathway plan requirements, including as to how a person must demonstrate that they are willing to actively seek and to accept and undertake paid work in Australia (including where they are subject to an exemption);**
- **(b) set out the kind of information which must be provided to a person applying for a social welfare payment regarding their ability to enter into an employment pathway plan either through a job services provider or via technological processes, and what using technological requirements will necessitate (e.g. regular access to a phone with credit, regular access to a computer with internet, self-reporting each week); and**
- **(c) set out the types of circumstances in which a workplace may be unsafe for a person, and what a person would need to demonstrate that they consider a workplace may be unsafe.**

2.93 The committee recommends that both the explanatory memorandum and the statement of compatibility be updated to include the extensive information provided in the minister's response.

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

Legislative instruments

Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444][1]

Purpose	This instrument allows the minister to specify that certain bridging visas are subject to specified visa conditions
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 11 May 2021). Notice of motion to disallow must be given by 11 August 2021 in the Senate[2]
Rights	Liberty; privacy; freedom of movement; freedom of association; freedom of assembly; freedom of expression; work; rights of people with disability; social security; rights of the child; criminal process rights

2.95 The committee requested a response from the minister in relation to the legislative instrument in *Report 7 of 2021*.[3]

Additional discretionary bridging visa conditions

2.96 This instrument permits the minister to impose a range of additional discretionary conditions on Subclass 050 (Bridging (General)) visas,[4] and Subclass 070 (Bridging (Removal Pending)) visas, where the visa is being granted to a person in immigration detention by the minister exercising their personal power under section 195A of the *Migration Act 1958* (Migration Act) (for example, to allow for the release of a person in immigration detention).

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444], *Report 6 of 2021*; [2021] AUPJCHR 86.

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

3 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (16 June 2021), pp. 50-74.

4 A Subclass 050 visa allows a person to remain lawfully in Australia while they make arrangements to leave, finalise their immigration matter, or wait for an immigration decision. See, https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/bridging-visa-e-050-051 (accessed 4 May 2021).

2.97 This instrument provides for 13 additional conditions which the minister may impose on a Subclass 050 visa, including requiring that the holder must:

- not become involved in activities disruptive to the Australian community or a group within the Australian community, or engage in violence that threatens to harm the Australian community;
- not become involved in activities that are prejudicial to security;
- obtain the minister's approval before taking up specific kinds of employment (including in aviation), undertaking flight training, or obtaining specific chemicals;
- not acquire any weapons or explosives, or associate with terrorist organisations; and
- notify the minister of any changes in their personal circumstances or contact details.[5]

2.98 Further, during the period of the visa, there must be no material change in the circumstances on the basis of which it was granted.[6]

2.99 In the case of a Subclass 070 visa, the instrument provides that the minister may impose four additional discretionary visa conditions, requiring that the holder must: remain at the same address; notify the department at least two days in advance of any change in address; not engage in criminal conduct; and/or notify the department within 14 days of any changes in personal contact information.[7]

Summary of initial assessment

Preliminary international human rights legal advice

Rights engaged by imposing visa conditions

Right to liberty

2.100 The explanatory materials state that this measure strengthens the community placement options available to the minister when considering whether to release an individual from immigration detention in cases where the individual poses a risk to public safety.[8] The statement of compatibility notes that the measure supports the management of non-citizens in the community wherever possible and helps to ensure immigration detention is used as a last resort.[9] If this measure has the effect of facilitating the release of individuals from immigration detention, it would appear to

5 Schedule 1, item 2, subclause 050.616A(1).

6 Schedule 1, item 2, subclause 050.616A(1).

7 Schedule 1, item 5, subclause 070.612.

8 Explanatory statement, p. 1; statement of compatibility, p. 4.

9 Statement of compatibility, p. 12.

promote the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[10] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the 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 right to liberty applies to all forms of deprivations of liberty, including immigration detention.

Rights to privacy, work, freedom of movement, freedom of assembly, freedom of association and freedom of expression

2.101 However, this measure may also engage and limit a number of other human rights. The discretionary conditions which may be imposed by the minister may include:

- requiring the provision of personal information (including the visa holder's name, address, phone number, email address, employment and online profile and user name);
- restricting the activities which the person can do (such as activities that are disruptive to the Australian community);
- restricting the employment which the person may undertake; and
- requiring that the person conduct themselves in a particular manner or not communicate or associate with particular people.[11]

2.102 Consequently, this instrument may engage and limit: the right to privacy; right to work; freedom of movement; freedom of assembly; freedom of association; and freedom of expression. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[12] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life, as well as the right to control the dissemination of information about one's private life .[13] The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of

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

11 Statement of compatibility, pp. 4–9.

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

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

work.[14] The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country.[15] The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds.[16] The right to freedom of assembly protects the right of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.[17] The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[18] These rights 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.

Rights engaged by consequences for breach of a visa condition

Rights to liberty, rights of the child and criminal process rights

2.103 In addition, if a visa holder breaches a condition, their visa may be subject to cancellation action and they may be detained in immigration detention.[19] While acknowledging the intent of the measure is to facilitate release from detention (noting that the additional conditions may increase the likelihood that the minister will exercise their existing discretionary powers under section 195A), as a matter of law, insofar as the consequence of a breach of a visa condition is detention in immigration detention, the instrument may also engage and limit the right to liberty. The consequence of detention following visa cancellation is of particular concern in relation to individuals who may have been rendered stateless, may not be accepted

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

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

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

17 International Covenant on Civil and Political Rights, article 21, UN Human Rights Committee, *General Comment No 25: Article 25 (Participation in public affairs and the right to vote)* [8]. The Committee notes that citizens take part in the conduct of public affairs, including through the capacity to organise themselves.

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

19 *Migration Act 1958*, subsections 116(1)(b) and 133C(3). The explanatory statement at p. 14 notes that breach of a visa condition may provide a basis for cancellation of the visa under subsection 116(1)(b). This may include visa cancellation by the Minister acting personally under subsection 133C(3), if the minister considered it was in the public interest to do so. Visa cancellation results in a person being classified as an unlawful non-citizen, and subject to mandatory immigration detention under section 189. See also statement of compatibility, p. 4. The human rights implications of visa cancellation, including on character grounds, has been considered by the committee previously, see, Parliamentary Joint Committee on Human Rights, *Nineteenth report of the 44th Parliament* (3 March 2015) pp. 13–28; *Thirty-fourth report of the 44th Parliament* (23 February 2016) pp. 29–65; *Report 7 of 2016* (11 October 2016) pp. 89–92.

by another country, or have been found to engage Australia's protection obligations. This is because it gives rise to the prospect of prolonged or indefinite detention, noting that a person will be subject to mandatory immigration detention following visa cancellation.[20] The UN Human Rights Committee has made clear that '[t]he inability of a state to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention'.[21] 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.[22] In addition, where the measure applies to children, it may also engage and limit the rights of the child.[23] Children have special rights under international human rights law taking into account their particular vulnerabilities.[24] In the context of immigration detention, the UN Human Rights Committee has stated that:

> children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.[25]

2.104 Furthermore, return to detention as a consequence of breaching a visa condition may be construed as imposition of a criminal penalty for the breach, given

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20 *Migration Act 1958*, section 189, 198.

21 UN Human Rights Committee, *General Comment 35: Liberty and security of person* (2014) [18]. See, also*, C v Australia,* UN Human Rights Committee Communication No.900/1999 (2002) [8.2]; *Bakhtiyari et al. v. Australia,* UN Human Rights Committee Communication No.1069/2002 (2003) [9.3]; *D and E v. Australia,* UN Human Rights Committee Communication No. 1050/2002 (2006) [7.2]; *Shafiq v. Australia*, UN Human Rights Committee Communication No. 1324/2004 (2006) [7.3]; *Shams et al. v. Australia,* UN Human Rights Committee Communication No. 1255/2004 (2007) [7.2]; *F.J. et al. v. Australia,* UN Human Rights Committee Communication No. 2233/2013 (2016) [10.4].

22 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'].

23 Including the requirement that the best interests of the child be the primary consideration in all actions concerning children; the obligation to provide protection and humanitarian assistance to child refugees and asylum seekers; the requirement that detention is used only as a measure of last resort and for the shortest appropriate period of time; and the obligation to take measures to promote the health, self-respect and dignity of children recovering from torture and trauma: Convention on the Rights of the Child, articles 3(1), 22, 37(b) and 39.

24 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

25 UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [18].

the seriousness of that consequence. If this were the case, then this would engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights. In assessing whether a penalty may be considered criminal, it is necessary to consider:

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

2.105 While the penalty is not classified as criminal under domestic law, this is not determinative as the term 'criminal' has an autonomous meaning in international human rights law. As to the nature and purpose of the penalty, it would apply to Subclass 050 and 070 visa holders rather than the public in general and appears likely to be intended to deter visa holders from engaging in specified conduct. Given that visa cancellation and detention in immigration detention, potentially for a protracted or even indefinite period, would result in a deprivation of liberty, there appears to be a risk that the consequences of breaching a visa condition may be so severe as to constitute a 'criminal' penalty for the purposes of international human rights law. If it were to be considered a 'criminal' penalty, this would mean that the relevant provisions,[26] which empower the minister to cancel a visa and re-detain a person who has not complied with a visa condition, 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, including the right not to be tried twice for the same offence,[27] and the right to be presumed innocent until proven guilty according to law.[28]

2.106 As to the right to be presumed innocent until proven guilty according to law, this requires that the case against a person be demonstrated on the criminal standard of proof (beyond all reasonable doubt).[29] However, the criminal standard of proof

26 *Migration Act 1958*, subsections 116(1)(b) and 133C(3). Note that section 118 provides that the powers to cancel a visa under sections 116 (general power to cancel) and 133C (Minister's personal powers to cancel visas on section 116 grounds) are not limited, or otherwise affected, by each other.

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

28 International Covenant on Civil and Political Rights, article 14(2).

29 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'.

does not apply to visa cancellation powers under the Migration Act. If the minister is considering cancelling a visa under section 116 because a visa holder has not complied with their visa conditions, they must notify the holder that there appear to be cancellation grounds; give the holder particulars of those grounds; and invite the holder to show that the grounds do not exist or that there are reasons why the visa should not be cancelled.[30] Even where such notification is provided to the visa holder and a tribunal decides that the cancellation ground does not exist or decides not to cancel the visa despite the existence of the ground, the minister may still set aside that tribunal decision and cancel the visa if they consider the ground exists, the visa holder has not satisfied the minister that the ground does not exist, and the minister considers it to be in the public interest to cancel the visa.[31] As regards the minister's personal power to cancel a visa under section 133C(3), the minister may do so whether or not: the holder was notified of the cancellation grounds; the holder responded to any such notification; the tribunal decided that the ground did not exist or decided not to cancel the visa; or a delegate of the minister decided to revoke the visa cancellation.[32] Having regard to these provisions, the standard of proof that applies to visa cancellation decisions does not appear to comply with the right to be presumed innocent or to the minimum guarantees in criminal proceedings (such as time to prepare a defence, right to be tried in person, present relevant witnesses and examine witnesses against them).

2.107 In order to fully assess the compatibility of this measure with human rights, further information is required, in particular:

(a) what standard of proof must be met in order for the minister to be satisfied that a visa condition has been breached;

(b) noting that breaching a visa condition does not result in automatic visa cancellation, in what circumstances would the minister elect to exercise their discretion to cancel a visa under sections 116(1)(b) or 133C(3);

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

(d) would condition 8564 (which states that the holder must not engage in criminal conduct) be breached if the holder was arrested or charged, but not yet convicted, of a criminal offence;

(e) regarding condition 8303 (which states that the holder must not become involved in activities disruptive to the Australian community), what

30 *Migration Act 1958*, section 119.

31 *Migration Act 1958*, subsection 133C(1). Subsection 133C(2) provides that if subsection 133C(1) applies, subdivisions E and F of the *Migration Act 1958*, which deal with the procedures for cancelling visas, do not apply.

32 *Migration Act 1958*, subsection 133C(5).

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

(f) what is the basis on which the minister has concluded that Subclass 050 and 070 visa holders pose a particular risk to public safety and how is this risk assessed in each instance;

(g) what factors does the minister consider in determining which conditions to impose on an individual;

(h) noting the stated intention to impose conditions only on visa holders who pose a real risk to public safety and to apply only the minimum conditions necessary to mitigate that risk, why is this not contained in the legislation;

(i) how does the measure address a public or social concern that is pressing and substantial enough to warrant limiting rights;

(j) what review options are available (including merits and judicial review) to Subclass 050 and 070 visa holders in relation to decisions concerning the imposition of visa conditions and the cancellation of visas; and

(k) what, if any, other safeguards exist to ensure that any limitation on rights is proportionate to the objectives being sought.

Committee's initial view

2.108 The committee noted that the measure may promote the right to liberty to the extent that it may facilitate the release of individuals in immigration detention. However, the committee also noted that insofar as the additional conditions may require the provision of personal information, restrict engagement in certain activities or employment, or require a person not to communicate or associate with certain peoples or groups, the measure also engages and limits a number of other rights. The consequence of a visa holder breaching a condition, including visa cancellation and detention, may also engage and limit rights.

2.109 The committee considers there were questions as to whether some of the conditions meet the minimum requirements of legal certainty and foreseeability, whether the measure addresses a pressing and substantial concern for the purposes of international human rights law, and whether it is proportionate and so sought the minister's advice as to the matters set out at paragraph [2.107].

2.110 The full initial analysis is set out in *Report 7 of 2021*.

Minister's response[33]

2.111 The minister advised:

> **(a) what standard of proof must be met in order for the minister to be satisfied that a visa condition has been breached;**
>
> Section 116 of the *Migration Act 1958* (the Act) requires the Minister to be "satisfied" that the relevant ground for cancellation is established. Accordingly, the Minister has a discretion to cancel a visa pursuant to s 116(1)(b) if the Minister is satisfied that the visa holder has not complied with a condition of the visa. It has been said in the High Court that '(t)he "satisfaction" required to found a valid exercise of the power to cancel a visa conferred by s 116(1)(b) of the Migration Act is a state of mind. It is a state of mind which must be formed reasonably and on a correct understanding of the law': *Wei v Minister for Immigration and Border Protection* [2015] HCA 51 at [33] per Gageler and Keane JJ. It is not appropriate to refer to the 'standard of proof' in this context (see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 136 ALR 481 at 498 – 499). It is accepted, however, that an administrative decision-maker is obliged to make decisions that are based on logically probative material and arrived at in a logical or rational way.
>
> **(b) noting that breaching a visa condition does not result in automatic visa cancellation, in what circumstances would the minister elect to exercise their discretion to cancel a visa under sections 116(1)(b) or 133C(3);**
>
> A primary consideration is public safety. The exercise of the discretion to cancel would be considered in circumstances where the Minister (or delegate) formed the view that allowing the non-citizen to remain in the community may present an unacceptable risk to public safety. Another primary consideration would be the best interests of any child who would be affected by a decision to cancel the visa.
>
> Under s 116 of the Migration Act, the Minister, or their delegate, would carefully weigh up the available evidence, including any matters that weigh against the cancellation of the visa, including but not limited to the purpose of the Bridging visa, past compliance with visa conditions, degree of hardship to the non-citizen, family members and international obligations.
>
> The Minister may exercise his or her personal power to cancel a visa under s 133C(3) of the Migration Act if they are satisfied that a ground for cancelling the visa under section 116 exists, and it would be in the public interest to cancel the visa.

33 The minister's response to the committee's inquiries was received on 8 July 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Section 133C was introduced in 2014 because from time to time there may be a situation that requires visa cancellation action to be taken quickly and decisively, and without notice. It is appropriate that the Minister is able to cancel the visas of high risk individuals, where it is in the public interest to do so, the cancellation decision is time critical, and it is appropriate for the individual to be invited to comment on the decision only after (but not before) the decision. The public interest test is reflective of the threshold at which it is appropriate that a visa cancellation decision may be made without notice. Rare circumstances can and do arise where a non-citizen is of sufficient concern to the Minister that he or she considers the case personally.

Where the Minister is considering exercising his or her power to cancel a visa under s 133C(3), the Department provides the Minister with all relevant details and evidence available to inform his or her consideration.

As soon as practicable after making a decision to cancel a visa under s 133C(3), the Minister must give the person a written notice setting out the original decision and particulars of the relevant information. Relevant information is information (other than non-disclosable information) that the Minister considers:

- would be the reason, or part of the reason, for making the original decision; and
- is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.

The Minister must also invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision. This provides an opportunity for a person whose visa has been cancelled without prior notice to make representations to the Minister about revocation of the original decision. As part of this process, the Minister can only revoke the cancellation if the person satisfies the Minister that the ground for cancelling the visa referred to in s 133C(3) does not exist.

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

It is important to note that the amending regulations do not create any new visa conditions. The amending regulations make a range of existing conditions available to the Minister, on a discretionary basis, to impose on the Subclass 050 and Subclass 070 visas using the Minister's personal intervention powers under s195A of the Migration Act.

The conditions are sufficiently certain and reasonably foreseeable. For example, in relation to the Committee's example at clause 1.116 of the Committee's report, it is sufficiently clear that condition 8303 would not be breached by undertaking peaceful protest activity in Australia. It would be unsustainable to interpret peaceful and lawful protest as an activity that was disruptive to the Australian community or a group within the Australian

community. In assessing the acceptability of broadly worded visa conditions, it is also important to bear in mind any available independent merits review by the Administrative Appeals Tribunal for cancellations and judicial review by the courts.

When an individual is granted a Subclass 050 or Subclass 070 visa, it is standard practice for the Department to organise a meeting to provide them with the visa grant notification. The visa grant notification contains the list of visa conditions that have been imposed by the Minister on that particular visa. During this meeting, the Department will advise the individual of which conditions are imposed on their Bridging visa and an interpreter will be provided, as required. The Department will also provide the individual with some common examples of breaches of the visa conditions. This provides the individual with the opportunity to ask questions and seek clarification about the conditions imposed. As all possible breaches cannot be discussed practically, the individual is given the means and knowledge to, at any time, seek more information on the visa conditions.

Visa holders can also access the Department's Visa Entitlement Verification Online system at any time to check which conditions are attached to their current visa and the Department's website also contains information about visa conditions. It is also possible for visa holders or their representatives, such as migration agents, to request further guidance from the Department if necessary. It is not possible for the Department to anticipate, and address in advance, every factual circumstance that may arise.

(d) would condition 8564 (which states that the holder must not engage in criminal conduct) be breached if the holder was arrested or charged, but not yet convicted, of a criminal offence;

The existence of an arrest warrant or charge may be evidence that the non-citizen has engaged in criminal activity while holding a visa and they may possibly pose a risk to the Australian community. Condition 8564 could be breached if the holder was arrested or charged with a criminal offence, as this may indicate non-compliance and that consideration of visa cancellation may be warranted. Imposition of condition 8564 is intended to encourage compliance with reasonable standards of behaviour.

The Government is committed to ensuring that non-citizens given the privilege of living in the Australian community on a Subclass 050 or Subclass 070 visa behave in a manner that is in accordance with Australian laws and which respects Australia's community values and standards of democracy, multiculturalism, respect, inclusion, cohesion, tolerance, and cooperation. All non-citizens in Australia are expected to abide by the law. This is particularly relevant where the Minister has used their personal non-delegable power to grant a non-citizen in immigration detention a visa in the public interest.

The Australian Government has a low tolerance for criminal behaviour by non-citizens who are in the Australian community on a temporary basis, and

do not hold a substantive visa. In the case of a non-citizen who, but for the Minister granting them a visa in the public interest, would be subject to mandatory detention, it is a privilege and not a right to be allowed to live in the community while their immigration status is being resolved.

(e) regarding condition 8303 (which states that the holder must not become involved in activities disruptive to the Australian community), what activities would be considered 'disruptive' and would this condition limit a visa holder's right to freedom of assembly (for instance, by preventing the visa holder from engaging in peaceful protest);

As noted in an answer above, the right to peaceful and lawful protest would not be affected by condition 8303. The intention of condition 8303 is twofold. Firstly, it is a messaging tool, explicitly requiring that temporary visa holders' behaviours are consistent with Government and community expectations. Secondly, it empowers the Department to capture adverse behaviour within the community, such as objective evidence of activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community, but which is not necessarily subject to criminal sanctions.

These activities may include public 'hate speech', and online vilification of groups based on gender, sexuality, religion and race. These activities should be considered against the well-established tradition of free expression in Australia. Condition 8303 does not provide a charter for continued stay to persons merely because they hold or express unpopular or offensive opinions. However, where these opinions attract strong expressions of disagreement and condemnation from the Australian community, the current views of the community should be a consideration in terms of assessing the extent to which particular activities or opinions vilify a part of the community. Examples of online 'hate speech' includes the advocacy of extremist views and violence as a legitimate means of political expression, the vilification of a part of the community, encouragement to disregard law and order, or an incitement to violence or to cause harm.

Non-compliance with visa condition 8303 does not require a visa holder to be convicted of a criminal offence. However, a relevant conviction would be strong evidence that a visa holder has not complied with condition 8303. In the absence of a conviction, demonstrating that the visa holder has not complied with condition 8303 would require reliance on reasonable evidence.

Whether or not a conviction recorded against a visa holder would trigger the application of condition 8303 would depend on the nature of the offence or offences involved. Non-compliance with condition 8303 only occurs if the visa holder actually becomes involved in such activities. In order for a conclusion to be drawn that the visa holder has not complied with condition 8303, any offence of which the holder has been convicted would need to be of such a kind as to demonstrate the holder's involvement in such activities or violence.

For example, a breach of parole reporting conditions of itself would not amount to a visa holder becoming involved in activities (or violence) of the kind described in condition 8303.

(f) what is the basis on which the minister has concluded that Subclass 050 and 070 visa holders pose a particular risk to public safety and how is this risk assessed in each instance;

The assessment would be done on a case by case basis. The issue that arises is that some unlawful non-citizens in immigration detention may present a risk to the community because of their background. However, removal of those detainees from Australia may not be feasible for lengthy periods. The availability of the additional bridging visa conditions is intended to provide a basis on which it may be acceptable to release certain detainees who would otherwise be subject to continued detention. The capacity to cancel those bridging visas, if necessary, is an important part of the overall scheme, which is intended to limit the need for immigration detention as far as possible.

Section 195A of the Migration Act provides Portfolio Ministers with the power to grant any subclass of visa to a non-citizen in immigration detention if they consider that it is in the public interest to do so. This power is non-delegable and non-compellable and the grant of a visa by the Minister using these powers is not an entitlement, as the holder has not met the eligibility criteria for a visa that would otherwise be required by the migration legislation.

There is no suggestion that Subclass 050 and Subclass 070 visa holders as a cohort pose a risk to public safety and it is important to re-iterate to the Committee that it is Government policy that the additional visa conditions will only be imposed on Subclass 050 and Subclass 070 visas granted under s 195A of the Migration Act to unlawful non-citizens in immigration detention who pose a risk to public safety. A high risk individual may be a non-citizen who, due to reasons such as criminal history, behavioural concerns or previous non-compliance, presents a significant risk to themselves, the community or the migration program. This amendment improves options for managing these unlawful non-citizens in the community in a manner that would seek to protect the Australian community while addressing the risks associated with long-term detention. Previously, the release of these non-citizens may not have been considered to be in the public interest due to community protection risks.

Bridging visas are often used to manage non-citizens in the community while they resolve their immigration status. The amending regulations provide additional discretionary conditions for Portfolio Ministers to impose on Subclass 050 and Subclass 070 visas only. The grant of a Subclass 050 visa means the holder is a lawful non-citizen pending their departure from Australia or while they are awaiting the outcome of a visa application or review process. The grant of a Subclass 070 visa means the holder is a lawful non-citizen pending their departure from Australia.

The additional conditions cannot be imposed on Subclass 050 and 070 visa holders in circumstances where the visa was not granted by the Minister under s 195A of the Migration Act. The vast majority of Subclass 050 visas are granted by departmental delegates and these additional conditions are not available in those circumstances.

(g) what factors does the minister consider in determining which conditions to impose on an individual;

It will depend on the circumstances of the case and the criminal or security history and profile of the particular individual.

The visa conditions made available by the amending regulations can only be imposed in limited circumstances. That is, by Ministers, and only if they decide to grant a Subclass 050 or Subclass 070 visa using their Ministerial Intervention powers under s 195A of the Migration Act.

The visa conditions made available by the amending regulations are not mandatory. The discretionary nature of these conditions was intentional and allows the Minister to consider the individual's circumstances when deciding whether to impose one or more of these conditions on a Subclass 050 or Subclass 070 visa. Ultimately, it is the Minister's personal decision and it is open to the Minister to impose any condition available for that subclass of visa. However, it is not envisaged that these additional, discretionary conditions will be imposed on visas where the individual has a history of compliance with Australian laws and where no character concerns have been raised previously.

To support the Ministers' consideration of cases under s 195A of the Migration Act, including which conditions to impose, the Department provides a comprehensive submission to the Minister that includes the detainee's biodata, immigration history, health, identity, character and removal issues. These submissions also set out risks and intervention options. Ministers can request additional information as required in order to make an informed decision about whether to exercise their personal powers. Ministers outline the types of information they require in the *Guidelines on Minister's detention intervention power - section 195A of the Migration Act 1958.*

The Minister's intervention powers are only used to intervene in a relatively small number of cases which present unique and exceptional circumstances, or compelling and compassionate circumstances.

(h) noting the stated intention to impose conditions only on visa holders who pose a real risk to public safety and to apply only the minimum conditions necessary to mitigate that risk, why is this not contained in the legislation;

The framework provided by the Migration Act and Migration Regulations distinguishes between mandatory conditions, which must be imposed on a visa, and discretionary conditions, which the Minister or delegate can choose to impose on a visa. Different discretionary conditions are made

available by the Migration Regulations for different cohorts of applicants as defined in the Migration Regulations (i.e. applicants who satisfy particular visa criteria). Apart from that limitation, the discretionary conditions are not subject to any further level of legislative control in relation to when they can be imposed. The Migration Regulations, in their current form, have been in place since 1994 and the policy based approach to the imposition of discretionary visa conditions has been in place for all of that period.

The intention of these amending regulations is to provide Ministers with sufficient flexibility when considering using their personal intervention powers under s 195A of the Migration Act to release non-citizens from immigration detention, specifically non-citizens whose past behaviour indicates they may pose a public safety risk. It is the Minister's personal decision as to whether intervention is in the public interest and whether it is appropriate for these additional conditions to be imposed. The Minister's decision will be based on the individual's circumstances. As previously noted in this response, it is Government policy that these additional discretionary conditions will not be imposed on visas where the individual has a history of compliance with Australian laws and where no character concerns have been raised previously.

(i) how does the measure address a public or social concern that is pressing and substantial enough to warrant limiting rights;

It is relevant to re-iterate the Government's long-standing policy that detention in an immigration detention centre continues to be an option of last resort for managing unlawful non-citizens who cannot be removed and present a risk to the community. Whether the person is placed in an immigration detention facility, or other arrangements are made, including consideration of the grant of a visa (including a Bridging visa), is determined using a risk-based approach. Where appropriate, it is the Government's preference to manage individuals in the community. Having access to these additional discretionary conditions on the Subclass 050 and Subclass 070 visas provides Ministers with greater confidence that there are appropriate community protection safeguards in place for individuals that would normally not be released from immigration detention due to the risk they pose to public order and national security. The availability of these discretionary conditions provides a more robust community based alternative.

The Government is committed to ensuring that non-citizens given the privilege of living in the Australian community on a Subclass 050 or Subclass 070 visa behave in a manner that is in accordance with Australian laws and which respects Australia's community values and standards of democracy, multiculturalism, respect, inclusion, cohesion, tolerance, and cooperation. This expectation is especially heightened when the person has been granted a Subclass 050 or Subclass 070 visa by Ministers using their personal powers, and in such cases, the grant of a Subclass 050 or Subclass 070 visa is a privilege and not an entitlement, as the holder has not met the eligibility

criteria for a visa that would otherwise be required by the migration legislation.

As previously noted to this Committee, the amending regulations themselves are designed to be an additional safeguard to complement the recently passed *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* by improving the viability of Bridging visas granted using the Minister's personal intervention powers under s 195A of the Migration Act as an alternative to detention.

It is important for the Committee to note that contrary to observations made at para 1.129 of the Committee's report, a Subclass 070 visa is not only granted to a non-citizen who has been found to engage Australia's international obligations.

(j) what review options are available (including merits and judicial review) to Subclass 050 and 070 visa holders in relation to decisions concerning the imposition of visa conditions and the cancellation of visas; and

The Migration Act provides circumstances in which a migration decision is merits reviewable by the Administrative Appeals Tribunal (AAT). Depending upon the circumstances of a visa cancellation, such as the location of the person cancelled and the cancellation ground used, the decision may give rise to a right to merits review in the Migration and Refugee Division of the AAT, with some other decisions reviewable in the General Division of the AAT.

Generally speaking, persons who have had a visa cancelled due to non-compliance with a visa condition would be able to seek merits review of the cancellation of their visa.

In terms of judicial review, 'migration decisions' are generally reviewable by the Courts under Part 8 of the Migration Act.

Concerning the imposition of visa conditions on any visa, s 41 of the Migration Act enables the Regulations to provide for visas to be subject to specified conditions. Regulation 2.05 of the *Migration Regulations 1994* (the Regulations) provides that Schedule 2 to the Regulations specifies the visa conditions for a subclass of visa including, for s 41(1) of the Migration Act, mandatory visa conditions that must be imposed and, for s 41(3) of the Migration Act, discretionary conditions that may be imposed. In relation to the discretionary imposition of visa conditions for grants under s 195A, there will still be a judicial pathway through the constitutional writs.

(k) what, if any, other safeguards exist to ensure that any limitation on rights is proportionate to the objectives being sought.

As previously noted, it is the Government's preference to manage individuals in the community where appropriate and that detention in an immigration detention centre continues to be an option of last resort for managing unlawful non-citizens who cannot be removed and present a risk to the community. These amending regulations align with this objective by

providing the Minister with a community alternative for those individuals that may pose a heightened risk to the Australian community, with greater safeguards than currently available, and who would otherwise remain in immigration detention until the legitimate purpose of their detention no longer exists.

In addition to the review rights set out in the answer to paragraph 1.131(j) and the ability for individuals to seek revocation of decisions under s 133C(3) as set out in the answer to paragraph 1.131(b) above, in the rare circumstance that non-compliance with a visa condition does result in visa cancellation and the individual is returned to immigration detention, the Department has an internal assurance framework in place, and external oversight is required under the Migration Act to help care for and protect people in immigration detention, and maintain the health, safety and wellbeing of all detainees. This includes regular oversight by the Commonwealth Ombudsman and the Australian Human Rights Commission.

Concluding comments

International human rights legal advice

Multiple rights

2.112 As noted in the preliminary analysis, while the ability to impose additional visa conditions on those granted bridging visas may promote the right to liberty to the extent that it provides an alternative to detention, it also engages and limits multiple other human rights.[34] 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.

Prescribed by law

2.113 To meet the quality of law test, the measure must be sufficiently certain and accessible, such that visa holders understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.[35] In other words, the regulations should satisfy the minimum requirements of legal certainty and foreseeability, whereby the precise circumstances in which interferences

34 These rights include the rights to liberty, privacy, and work; freedom of assembly, movement, association, and expression; rights of the child; and criminal process rights.

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

with rights may be permitted are clearly specified.[36] In this regard, it is relevant to consider how the additional conditions, many of which are drafted in broad and ambiguous terms, are likely to be interpreted, applied and enforced in practice.

2.114 The minister stated that the conditions are sufficiently certain and reasonably foreseeable, advising that the visa holder is provided with a visa grant notification that includes the list of visa conditions that have been imposed and the Department provides the individual with an explanation of the conditions and common examples of breaches of those conditions. The minister stated that an interpreter can be provided as required and the individual may seek further clarification and information from the Department where necessary. The individual can also access the Department's Visa Entitlement Verification Online system to check which conditions are attached to their visa. As regards when and on what basis the minister would be satisfied that a visa condition has been breached, the minister referred to a High Court case that the requisite 'satisfaction' to cancel a visa is a state of mind formed reasonably and on a correct understanding of the law.[37] The minister stated that an administrative decision-maker is obliged to make decisions that are based on logically probative material and arrived at in a logical or rational way.

2.115 Where the minister is satisfied that a visa condition has been breached, the minister advised that public safety is a primary consideration in deciding when to exercise the discretion to cancel the visa. Visa cancellation would be considered, for example, where the minister formed the view that allowing the non-citizen to remain in the community may present an unacceptable risk to public safety. The minister advised that the best interests of the child would also be a primary consideration if a child was to be affected by the decision. More specifically, the minister stated that in deciding to cancel a visa under paragraph 116(1)(b) of the Migration Act, the minister or their delegate would weigh up the available evidence, including matters that weighed against visa cancellation, such as, the purpose of the Bridging visa, past compliance with visa conditions, degree of hardship to the visa holder and their family members and Australia's international obligations. In relation to the minister's personal power to cancel a visa under subsection 133C(3), the minister stated that

36 UN Human Rights Committee, *General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17)* (1988) [8]; *General Comment No. 27, Freedom of Movement (Art. 12)* (1999) [13]. See also UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [36], where the UN High Commissioner for Refugees has observed in the context of alternatives to detention: 'Like detention, alternatives to detention equally need to be governed by laws and regulations in order to avoid the arbitrary imposition of restrictions on liberty or freedom of movement. The principle of legal certainty calls for proper regulation of these alternatives…Legal regulations ought to specify and explain the various alternatives available, the criteria governing their use, as well as the authority(ies) responsible for their implementation and enforcement'.

37 *Wei v Minister for Immigration and Border Protection* [2015] HCA 51

they must be satisfied a ground for visa cancellation under section 116 exists and it would be in the public interest to cancel the visa. The minister noted that the public interest test reflects the threshold at which it is appropriate that a visa cancellation decision may be made without notice to the individual. In deciding whether to cancel a visa under subsection 133C(3), the minister stated that they are informed by evidence and information provided by the Department.

2.116 Given that some additional conditions are drafted in particularly broad and imprecise terms, further information was also sought from the minister as to how these conditions would likely be interpreted and applied in practice. In particular, the minister advised that condition 8564, which states that the visa holder must not engage in criminal conduct, could be breached if the individual was arrested or charged with, but not yet convicted of, a criminal offence, as this may indicate non-compliance, and that consideration of visa cancellation may be warranted. The minister stated that this condition is intended to encourage compliance with reasonable standards of behaviour. The minister reiterated that it is a privilege and not a right for a non-citizen who is granted a visa by the minister in the public interest to be allowed to live in the community while their immigration status is being resolved. Regarding condition 8303, which states that the visa holder must not become involved in activities disruptive to the Australian community, the minister advised that the right to peaceful and lawful protest would not be affected by this condition. Rather, the condition is intended to capture activities which constitute adverse behaviours within the community but which are not necessarily subject to criminal sanctions, such as public 'hate speech' and online vilification of groups with protected attributes. In practice, the minister noted that where a visa holder expresses an opinion or engages in an activity that attracts strong disagreement and condemnation from the Australian community, the community's views would be considered in assessing the extent to which those particular activities or opinions vilify a part of the community. Further, the minister noted that conviction of a criminal offence is not required for non-compliance with condition 8303, although in the absence of a conviction, the minister would require reasonable evidence indicating non-compliance.

2.117 The visa grant notification and information provided by the Department to the visa holder regarding the conditions attached to their visa may assist the individual to understand what is expected of them and in what circumstances a breach is likely to occur in relation to certain conditions. However, noting that much will depend on how this process operates in practice, it remains unclear whether this process would be sufficient to provide visa holders with legal certainty and foreseeability in relation to all conditions such that they will understand the legal consequences of their actions, including when a breach is likely to occur and in what circumstances the minister would elect to exercise their discretion to cancel a visa. For example, in relation to condition 8303, while the minister clarified that peaceful and lawful protest would not constitute a 'disruptive' activity, it remains ambiguous as to what activities would be considered 'disruptive'. The minister's response suggests that behaviours that are inconsistent with government and community expectations may be considered

disruptive. The minister noted that community views would be relevant in assessing whether certain activities, behaviours or opinions expressed were inconsistent with community expectations.

2.118 The concept of community expectations is vague and open-ended and could therefore encompass a broad range of behaviours and activities. Community expectations are also generally diverse and dynamic, which may make it difficult for visa holders to foresee the consequences of a given action and regulate their conduct accordingly. Foreseeability is particularly important in this context as the consequences of breaching a condition may be severe (involving the loss of liberty). The circumstances in which the minister may elect to exercise their discretion to cancel a visa is therefore relevant in this regard. The minister's response provides some guidance as to the matters that may be considered in exercising the discretion, including public safety, the best interests of the child, the degree of hardship to the visa holder and international obligations. However, these matters are not provided for in the legislation and in the absence of any legislative guidance, there remain concerns that the scope of the minister's discretion and the manner of its exercise are not reasonably clear. For these reasons, concerns remain that as currently drafted, the regulations may not meet the quality of law test as it is not clear that all the additional conditions satisfy the minimum requirements of legal certainty and foreseeability.

Legitimate objective and rational connection

2.119 The preliminary analysis noted that while the objectives of protecting public safety and strengthening community placement options are generally capable of constituting a legitimate objective, questions remain as to whether the measure addresses a pressing and substantial concern for the purposes of international human rights law. The public safety risk posed by individuals in immigration detention 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 minister advised that the risk assessment would be done on a case by case basis, noting that some individuals may present a risk to the community because of their background. The minister states that it is not suggested that Subclass 050 and Subclass 070 visa holders as a cohort pose a risk to public safety and notes that it is government policy that additional visa conditions will only be imposed on those individuals who pose a risk to public safety. Factors that may indicate that an individual is of high risk include criminal history, behavioural concerns or previous non-compliance. The minister states that without the additional conditions, high risk individuals may not have been granted a visa due to community protection risks. The minister explains that having access to additional discretionary conditions provides a more robust community-based alternative to immigration detention and provides the minister with greater confidence to release individuals who pose a risk to public safety from immigration detention.

2.120 Based on the minister's advice that the additional visa conditions will only be imposed on those who may pose a risk to public safety, and noting that in the absence

of additional conditions such persons would remain in detention, it would appear that this measure seeks to address a substantial and pressing concern.

2.121 As regards whether the measure is rationally connected to the stated objectives, as noted in the preliminary analysis, insofar as the measure provides the minister with the discretion to impose additional, stricter conditions on individuals who pose a risk to public safety, thereby assisting the department to monitor such individuals and mitigate any public safety risk, the measure would appear to be rationally connected to the stated objectives.

Proportionality

2.122 In assessing whether the measure is proportionate, it is necessary to consider a number of matters, including: whether the proposed limitation is sufficiently circumscribed; whether any less rights restrictive alternatives could achieve the same stated objective; whether the measure is accompanied by adequate safeguards and oversight and review mechanisms; whether the measure provides sufficient flexibility; and the extent of any interference with human rights.

2.123 Noting the breadth of the measure, including the lack of precise criteria as to how public safety risk is assessed and the failure to articulate circumstances in which conditions will be imposed, the preliminary analysis raised concerns that the measure may not be sufficiently circumscribed. In this regard, it is relevant to consider how a risk to public safety is assessed and the factors considered by the minister in determining which conditions to impose. The minister advised that the public safety risk is assessed on a case by case basis (as discussed in paragraph [2.119]) and the factors considered in determining which conditions to impose will depend on the circumstances of the case as well as the criminal or security history and profile of the particular individual. The minister stated that they are supported by a comprehensive submission from the Department, which includes the individual's biodata, immigration history, health, identity, character and removal issues. The minister stated that these submissions set out the risks and intervention options available to the minister under section 195A. The minister noted that the intervention powers under section 195A are used in a relatively small number of cases that present unique and exceptional or compelling and compassionate circumstances.[38] The minister further stated that the discretionary nature of the additional conditions allows the minister to consider the individual's circumstances and impose any condition available for that subclass of visa that the minister considers appropriate.

38 The Parliamentary Joint Committee on Human Rights has recently commented on the infrequent use of the minister's discretionary intervention powers under section 195A in the context of the *Migration Amendment (Clarifying International Obligations for Removal) Bill 2021.* See Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2020) pp. 100–124.

2.124 The minister's response provides some guidance as to how public safety risk is assessed and what factors may be considered in deciding which conditions to attach to a visa. As the imposition of conditions is discretionary, there is flexibility to treat different cases differently, having regard to the individual circumstances of each case.[39] The UN High Commissioner for Refugees has urged States to closely consider the circumstances of particular vulnerable groups, such as children or people with disability, in designing alternatives to detention.[40] To the extent that the measure allows the minister to consider the individual circumstances of detainees in deciding whether to grant a visa and attach conditions to that visa, the measure appears to provide flexibility to treat different cases differently. Depending on how it is exercised in practice, this flexibility may assist with proportionality. However, where a measure confers broad discretion on the executive, the scope of discretion and manner of its exercise should be sufficiently precise.[41] While the minister's response and explanatory materials provide some guidance as to how the minister's discretion may be exercised, these matters are not set out in the legislation itself. Given the breadth of the measure and lack of legislative guidance, there remain concerns that the measure may not be sufficiently circumscribed.

2.125 As regards when additional conditions are likely to be imposed, the minister advised that it is government policy that the additional conditions will not be imposed on visas where the individual has a history of compliance with Australian laws and where no character concerns have previously been raised. The minister noted that there is no level of legislative control in relation to when conditions may be imposed, although there is some legislative control as to which conditions may be imposed on different applicants. Noting the stated intention to impose conditions only in high risk cases and, in relation to conditions that limit privacy, only where it is considered that

39 With respect to the right to liberty, the UN Human Rights Committee has observed: 'The decision [to detain a person in immigration detention] must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health': UN Human Rights Committee, *General Comment 35: Liberty and security of person* (2014) [18].

40 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [39]: 'It must be shown that in light of the asylum-seeker's particular circumstances, there were not less invasive or coercive means of achieving the same ends. Thus, consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken…In designing alternatives to detention, it is important that States observe the principle of minimum intervention and pay close attention to the specific situation of particular vulnerable groups such as children, pregnant women, the elderly, or persons with disabilities or experiencing trauma'.

41 *Gillan and Quinton v UK*, European Court of Human Rights, Application No. 415/05 (2010) [77].

there is no less rights restrictive way of achieving the objective, it remains unclear why this intention is not reflected in the legislation. The minister's response did not address this issue clearly, stating that the policy-based approach to the imposition of discretionary visa conditions has been in place since 1994. Where a measure limits a human right, discretionary safeguards alone may not be sufficient for the purposes of international human rights law.[42] This is because discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time. Without a legislative requirement to apply conditions only to individuals who pose a real risk to public safety and to apply the minimum conditions necessary to mitigate that risk, such assurances in the statement of compatibility and the minister's response would appear to be insufficient to guarantee that the discretionary powers will be exercised in the least rights restrictive manner.

2.126 In addition, the minister states that the availability of discretionary conditions facilitates the release of individuals from detention as without this more robust community-based alternative, those individuals would remain in detention due to the risk they pose to the public order and national security. However, as noted in the preliminary analysis, the fact that the granting of Subclass 050 or 070 visas subject to conditions is a less rights restrictive alternative to mandatory detention is not a sufficient safeguard to ensure that the conditions imposed on such visas are the minimum necessary and least invasive or coercive means of mitigating the public safety risk.

2.127 As regards the possibility of oversight and the availability of review, the minister advised that depending on the circumstances of the visa cancellation, such as the location of the visa holder and the cancellation ground used, the decision may be subject to merits review in the Administrative Appeals Tribunal (AAT). The minister advised that in general, individuals who have had their visa cancelled due to non-compliance with a visa condition would be able to seek merits review of that cancellation decision. The minister stated that migration decisions are also generally subject to judicial review. Regarding the decision to impose discretionary conditions on a visa under section 195A, the minister stated that there is a judicial pathway through the constitutional writs.

2.128 As stated in the preliminary analysis, the minister's powers to grant a visa under section 195A of the Migration Act and impose the additional conditions set out in this instrument are discretionary, non-compellable and non-reviewable powers, and

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

they do not attract the requirement of procedural fairness.[43] There is therefore no independent oversight of the exercise of the minister's discretionary powers to impose conditions on discretionary visas. While the minister advised that the judicial pathway of constitutional writs is available in relation to the minister's decision to impose conditions, it is unclear how accessible and effective this review mechanism would be in practice. While the minister states that generally visa cancellation decisions made on the basis of non-compliance with a visa condition are subject to merits review, it would appear that this may not be the case for many individuals to whom this measure applies. This is because section 388 of the Migration Act provides that a decision to cancel a visa held by a non-citizen who is in the migration zone at the time of the cancellation is a reviewable decision unless the decision was made under section 133C or made personally by the minister under section 116.[44] Under sections 116 and 133C, the minister has a general and personal power to cancel a visa held by a person if they are satisfied that the person has not complied with a visa condition and, under subsection 133C(3), if they are satisfied it would be in the public interest.[45] As such, where a visa holder breaches a discretionary condition and consequently a decision is made personally by the minister to cancel their visa under sections 116 or 133C, that decision is not subject to merits review.[46] The minister's response did not clarify whether a decision made by a delegate of the minister to cancel a visa under section 116 would be reviewable.[47] It is also noted that a decision will not be subject to merits review if the minister issues a conclusive certificate on the basis that it would be contrary to the national interest to change the decision or for the decision to be reviewed.[48]

2.129 The committee has previously concluded that judicial review without merits review is unlikely to be sufficient to fulfil the international standard required of

43 *Migration Act 1958*, subsections 195A(4) and 197AE. See *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31. For discussion of review in the context of the minister's discretionary powers under section 195A of the Migration Act see Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal), *Report 5 of 2021* (29 April 2021) pp. 21–25; *Report 7 of 2021* (16 June 2020) pp. 100–124.

44 *Migration Act 1958*, subsections 338(3)(c)–(d).

45 *Migration Act 1958*, sections 116 and 133C.

46 *Migration Act 1958*, subsections 338(3)(c)–(d).

47 Section 496 of the *Migration Act 1958* authorises the minister to delegate their powers under the Act, including delegating the minister's powers under section 116 to persons holding the position of executive levels 1 and 2.

48 *Migration Act 1958*, section 339.

effective review.[49] This is because judicial review is only available on a number of restricted grounds and does not allow the court to conduct a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision.[50] While judicial review is available with respect to the lawfulness of administrative decisions made under the Migration Act, there are serious concerns that, in the absence of merits review, this is not effective in practice to allow the individual to challenge the decision in substantive terms and so does not appear to assist with the proportionality of this measure.

2.130 As to the possibility of oversight, the minister stated that where an individual has their visa cancelled due to non-compliance with a visa condition and they are detained in immigration detention, the Department has an internal assurance framework in place and external oversight is required under the Migration Act, including by the Commonwealth Ombudsman and the Australian Human Rights Commission. While the possibility of oversight by these bodies may, more generally, serve as a safeguard against arbitrary and unlawful detention, it does not appear to operate as an oversight mechanism in relation to the imposition of discretionary conditions on a visa, and so does not appear to assist with the proportionality of this specific measure.[51]

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49 The committee has previously raised concerns about the lack of merits review of visa cancellation decisions and the compatibility of such measures with the rights to a fair hearing and liberty. See Parliamentary Joint Committee on Human Rights*, First Report of the 44th Parliament* (10 December 2013), pp. 103–108; *Second Report of the 44th Parliament* (February 2014), pp. 107–120; *Fourth Report of the 44th Parliament* (March 2014), pp. 75–112; *Seventh Report of the 44th Parliament* (June 2014), pp. 90–96.

50 See Parliamentary Joint Committee on Human Rights*, Report 1 of 2019* (12 February 2019) pp.14-17; *Report 12 of 2018* (27 November 2018) pp. 2-22; *Report 11 of 2018* (16 October 2018) pp. 84-90; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28; *Report 3 of 2021* (17 March 2021) pp. 58–59 and 91–97. See also *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]-[8.9].

51 In its comments on the *Migration Amendment (Clarifying International Obligations for Removal) Bill 2021*, the Parliamentary Joint Committee on Human Rights raised questions as to whether external oversight by the Commonwealth Ombudsman and the Australian Human Rights Commission would, in practice, be an effective safeguard against arbitrary detention. This is because these external oversight frameworks may not necessarily result in the release of an individual from detention, as release is only possible where the minister exercises their discretionary powers to grant a visa under sections 195A or 197AB—which seems to occur infrequently, noting in particular that of those detained under these powers in the last five years, three-quarters were detained for over two years, and almost half were detained for over five years. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2020) pp. 100–124.

2.131 Finally, as discussed in the preliminary analysis, the extent of any interference with human rights is a relevant consideration in assessing proportionality, noting that the greater the interference, the less likely the measure is to be considered proportionate. Depending on the nature of the visa conditions imposed and the length and conditions of detention (since breaching a visa condition may lead to visa cancellation and immigration detention), this measure may result in a significant interference with human rights. This is especially so where the consequence of breaching a condition is visa cancellation and detention. For Subclass 070 visa holders, there is a particular risk of indefinite detention if their visa is cancelled because removal of such persons from Australia may not be not reasonably practicable.[52] The preliminary analysis particularly raised concerns about the risk of indefinite detention for Subclass 070 visa holders who are owed protection obligations and therefore cannot be removed from Australia but are ineligible for a grant of a visa and are therefore subject to ongoing immigration detention while they await removal. The minister noted that Subclass 070 visas are not only granted to non-citizens who have been found to engage Australia's international obligations. However, concerns remain that without any legislative maximum period of detention under the Migration Act and an absence of effective safeguards to protect against arbitrary detention, there is a real risk that detention may become indefinite, particularly where removal of the person from Australia is unlikely to occur in the reasonably foreseeable future. Where a measure results in the indefinite detention of certain persons, it would not appear to be proportionate.[53]

Concluding remarks

2.132 While the ability to impose additional visa conditions on those granted bridging visas may promote the right to liberty to the extent that it provides an alternative to detention, it also engages and limits multiple other rights. There appears to be a risk that as currently drafted, the regulations may not meet the quality of law test. While the visa grant notification and information provided by the Department to the visa holder regarding their visa conditions may assist them to understand what is expected of them and in what circumstances a breach is likely to occur, noting that much will depend on how this process operates in practice, it remains unclear whether

52 A Subclass 070 visa enables the visa holder to be released from immigration detention pending removal from Australia, as removal of the person is not reasonably practicable at that time.

53 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5. Note that, to the extent that the measure could result in indefinite detention, it may also have implications for Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment. For a discussion on these implications see Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal), *Report 5 of 2021* (29 April 2021) pp. 25–26; *Report 7 of 2021* (16 June 2020) pp. 120–121.

this process would be sufficient to provide visa holders with legal certainty and foreseeability in relation to all conditions. As regards the objective pursued, the objectives of protecting public safety and strengthening community placement options may be capable of constituting a legitimate objective. In particular, for the cohort of individuals who are assessed as posing a high risk to public safety, the provision of alternative detention options to facilitate their release would appear to address a substantial and pressing concern. The measure would also appear to be rationally connected to these objectives.

2.133 As regards proportionality, while there is flexibility to treat different cases differently, the breadth of the minister's discretion and the lack of legislative guidance as to the scope of the discretion and manner of its exercise raise concerns that the measure may not be sufficiently circumscribed. The measure does not appear to be accompanied by sufficient safeguards, noting that discretionary safeguards and assurances alone are unlikely to be sufficient. While judicial review is available, in the absence of merits review, this does not appear to assist with the proportionality of this measure. Finally, the measure has the potential to significantly interfere with rights and, in the absence of sufficient safeguards and access to review, such interferences are less likely to be considered proportionate. For these reasons, there may be a significant risk that the measure impermissibly limits multiple human rights.

Committee view

2.134 The committee thanks the minister for this response. The committee notes that the instrument permits the minister to impose a range of additional discretionary conditions on Subclass 050 (Bridging (General)) and Subclass 070 (Bridging (Removal Pending)) visas, where the visa is granted to a detainee by the minister exercising their personal power.

2.135 The committee notes that the measure may promote the right to liberty to the extent that it may facilitate the release of individuals in immigration detention. However, the committee also notes that insofar as the additional conditions may require the provision of personal information, restrict engagement in certain activities or employment, or require a person not to communicate or associate with certain peoples or groups, the measure also engages and limits a number of other rights. The consequence of a visa holder breaching a condition, including visa cancellation and detention, may also engage and limit rights. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.136 The committee notes that while the measure is prescribed by law, there are concerns that it may not meet the quality of law test. The committee notes the minister's advice that visa holders are notified of their visa conditions and so visa holders are assisted to understand what is expected of them and in what circumstances a breach is likely to occur. While this may assist somewhat with legal certainty and foreseeability, the committee notes that as much will depend on how

this process operates in practice, it remains unclear whether this is sufficient to provide visa holders with legal certainty and foreseeability in relation to all conditions such that they will understand the legal consequences of their actions.

2.137 Regarding the objective pursued by the measure, the committee considers that protecting public safety and strengthening community placement options for high risk detainees is a legitimate objective, and the measure is rationally connected to this objective.

2.138 However, the committee remains concerned that the measure may not be proportionate to the objectives sought to be achieved. The committee notes that while there is flexibility to treat different cases differently, the breadth of the minister's discretion raises concerns that the measure may not be sufficiently circumscribed. Regarding the existence of safeguards, the committee notes that discretionary safeguards and assurances alone are unlikely to be sufficient to guarantee that discretionary powers will always be exercised consistently with human rights. While judicial review is available, in the absence of merits review, the committee considers that these review mechanisms may not assist with the proportionality of this measure. Finally, the committee notes that the measure has the potential to significantly interfere with rights (noting that breach of a visa condition could lead to a person being removed to potentially lengthy immigration detention) and, in the absence of sufficient safeguards and access to review, such interreferences are less likely to be considered proportionate. For these reasons, the committee considers that there may be a significant risk that the measure impermissibly limits multiple human rights.

Suggested action

2.139 The committee considers that the proportionality of the measure may be assisted were the instrument amended:

- **(a) include guidance as to the matters the minister may consider in electing to exercise their discretion to cancel a visa on the basis of non-compliance with a visa condition;**
- **(b) include guidance as to the factors the minister may consider in assessing the public safety risk posed by an individual to whom this measure applies; and**
- **(c) provide that discretionary conditions must only be attached to visas in relation to individuals who have been assessed as posing a real risk to public safety, and the conditions imposed must be the minimum necessary and least invasive or coercive means of mitigating that risk.**

2.140 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

Code of behaviour

2.142 Before exercising the power under section 195A of the Migration Act to grant a Subclass 070 visa (that is, a bridging visa pending the person's removal from Australia), the minister will decide whether a code of behaviour must be signed by the non-citizen (unless they have already signed the code of behaviour in relation to a previous visa grant).[54] If the code of behaviour is signed, then the regulations confer discretion on the minister to attach condition 8566 to Subclass 070 visa, which requires the visa holder to not breach the code.[55] The code of behaviour requires that a person comply with certain expectations, including:

- not disobeying any laws (including road laws) or becoming involved in any criminal behaviour;
- not harassing, intimidating or bullying any other person or group of people or engaging in any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community;
- not refusing to comply with any health undertaking provided by the Department of Immigration and Border Protection or direction issued by the Chief Medical Officer to undertake treatment for a health condition for public health purposes; and
- co-operating with all reasonable requests from the department or its agents in regard to the resolution of the person's status, including requests to attend interviews or to provide or obtain identity and/or travel documents.[56]

2.143 The consequences of breaching the code may include reduction of income support or visa cancellation and subsequent return to immigration detention, including potential transferral to an offshore processing centre.[57]

54 Statement of compatibility, p. 6.

55 Schedule 1, item 6, subclause 070.613.

56 Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 [F2013L02105].

57 Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 [F2013L02105].

Summary of initial assessment

Preliminary international human rights legal advice

Multiple rights

2.144 The requirements in the code of behaviour may engage and limit the rights to freedom of expression and assembly (as outlined above at paragraph [2.101]).[58] They may also engage and limit the right to a private life, which requires the state to not arbitrarily interfere with a person's private and home life.[59] Requiring that a person must undergo medical treatment engages and may limit the right to privacy, which includes the right to personal autonomy and physical and psychological integrity, and protects against compulsory procedures.[60] To the extent that this requirement has a disproportionate impact on people with disability, it may also engage and limit the rights of persons with disability, particularly the rights to equality and non-discrimination and equal recognition before the law; the right to respect for a person's physical and mental integrity; the right to consent to medical treatment; and the right to be free from involuntary detention in a mental health facility and not to

58 The Parliamentary Joint Committee on Human Rights has previously considered the human rights implications of the Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 in the *Second Report of the 44th Parliament* (February 2014) pp. 107–120; *Fourth Report of the 44th Parliament* (March 2014) pp.75–112; and *Seventh Report of the 44th Parliament* (June 2014) pp. 90–96.

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

60 See, *MG v Germany*, UN Human Rights Committee Communication No. 1428/06 (2008) [10.1]. Note also that article 7 of the International Covenant on Civil and Political Rights expressly prohibits medical or scientific experimentation without the free consent of the person concerned. Article 7 may not be engaged in relation to non-experimental medical treatment, even when given without consent, unless it reaches a certain level of severity. See *Brough V Australia*, UN Human Rights Committee Communication No. 1184/03 (2006) [9.5], where the Committee concluded that the prescription of anti-psychotic medication to the author without his consent did not violate article 7, noting that the medication was intended to control the author's self-destructive behaviour and treatment was prescribed by a General Practitioner and continued after examination by a psychiatrist. However, with respect to persons with disability, the UN Committee on the Rights of Persons with Disabilities has held that 'forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law an infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16). This practice denies the legal capacity of a person to choose medical treatment and is therefore a violation of article 12 of the Convention': *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [42].

be forced to undergo mental health treatment.[61] The Committee on the Rights of Persons with Disabilities has emphasised that prior to the provision of medical treatment or health care, health and medical professionals must obtain the free and informed consent of persons with disabilities.[62] Consent should be obtained through appropriate consultation and not as a result of undue influence.[63] As drafted, the code of behaviour requires a person not to refuse to comply with any health treatment for a health condition for public health purposes. Refusal to comply with this requirement will constitute a breach of the code, which may result in a reduction of social security payments or visa cancellation and detention.[64] While the requirement to comply with health treatment may not necessarily result in forced medical treatment without consent, the severe consequences of refusing to comply (such as deprivation of liberty) raises questions as to whether consent to health treatment in this context is genuinely free and not the result of undue influence.[65]

2.145 In addition, to the extent that breach of the code results in the reduction of social security payments or the cancellation of an individual's visa and their return to immigration detention, the measure also engages and limits the right to liberty and the rights of the child (as outlined above at paragraph [2.103]), criminal process rights (as outlined above at paragraphs [2.104] to [2.106]) and the right to social security. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.[66] The UN Committee on Economic, Social and Cultural Rights has noted that social security benefits must be adequate in amount and duration having regard to the principles of human dignity and non-discrimination.[67] It

61 Convention on the Rights of Persons with Disabilities, articles 5, 12, 14, 17 and 25(d). See also Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [31].

62 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [41].

63 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [41].

64 Statement of compatibility, p. 4.

65 In another context, the Committee on the Rights of Persons with Disabilities has characterised undue influence as occurring 'where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation': *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [22].

66 International Covenant on Economic, Social and Cultural Rights, article 9. See also, UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008).

67 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [22].

has stated that the adequacy of social security 'should be monitored regularly to ensure that beneficiaries are able to afford the goods and services they require' to realise other human rights.[68]

2.146 In order to fully assess the compatibility of this measure with human rights, further information is required, in particular:

(a) what is the pressing or substantial concern that the measure seeks to address;

(b) what particular public safety risk do Subclass 070 visa holders pose and what level of public safety risk must exist to justify imposing the code of behaviour on visa holders;

(c) why are the additional discretionary conditions that can attach to Subclass 070 visas and the expansive cancellation powers under the Migration Act insufficient to manage any public safety risk posed by visa holders;

(d) how is the measure, including each expectation contained in the code, rationally connected to the stated objective;

(e) what type of breach must occur for the minister to exercise their discretion to: reduce an individual's social security or cancel an individual's visa and re-detain them;

(f) if the minister decides to reduce a visa holder's social security income as a result of breaching the code, is this decision subject to independent review;

(g) is the right to social security and associated rights, including the right to an adequate standard of living, considered prior to the minister exercising their discretion to reduce a visa holder's social security income; and

(h) what, if any, other safeguards exist to ensure that any limitation on rights is proportionate to the objectives being sought.

Committee's initial view

2.147 The committee noted that the requirements in the code of behaviour and the consequences of breaching the code may engage and limit a number of rights, including the rights to privacy, liberty, social security and adequate standard of living, freedom of expression and assembly, rights of people with disability and criminal process rights.

68 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [22].

2.148 The committee noted that while the measure is prescribed by law, it is unclear whether it meets the quality of law test because the expectations set out in the code are drafted in broad and imprecise terms and the consequences of breaching the code are not clear. While the general objectives of protecting public safety and strengthening community placement options may be capable of constituting a legitimate objective, the committee had questions as to whether the measure addressed a pressing and substantial concern for the purposes of international human rights law. The committee also raised concerns that the measure may not be proportionate and therefore compatible with multiple rights. As such, the committee sought the minister's advice as to the matters set out at paragraph [2.146].

2.149 The full initial analysis is set out in *Report 7 of 2021*.

Minister's response

2.150 The minister advised:

> **(a) what is the pressing or substantial concern that the measure seeks to address;**
>
> The availability of condition 8566, like the other conditions associated with this amendment, improves Ministerial Intervention options for managing unlawful non-citizens in the community in a manner that would seek to protect the Australian community while addressing the risks associated with long-term detention. Previously, the release of these non-citizens may not have been considered to be in the public interest due to community protection risks.
>
> The Committee may wish to note that the Code of Behaviour has not been altered by these amending regulations and remains unchanged.
>
> **(b) what particular public safety risk do Subclass 070 visa holders pose and what level of public safety risk must exist to justify imposing the code of behaviour on visa holders;**
>
> The amending regulations allow the Minister to grant a Subclass 070 visa and impose condition 8566 if the Minister thinks it is in the public interest to do so. Condition 8566 complements the other conditions made available to the Minister by this amendment. This amendment also brings the Subclass 070 visa into closer alignment with the Subclass 050 visa, which already has condition 8566 as a mandatory condition for individuals who have signed a Code of Behaviour.
>
> It is Government policy that the additional visa conditions, including condition 8566, will only be imposed on Subclass 070 visas granted under s 195A to unlawful non-citizens in immigration detention who pose a risk to public safety. A high risk individual may be a non-citizen who, due to reasons such as criminal history, behavioural concerns or previous non-compliance, presents a significant risk to themselves, the community or the migration program. This amendment improves options for managing unlawful non-citizens in the community in a manner that would seek to protect the

Australian community while addressing the risks associated with long-term detention. Previously, the release of these non-citizens may not have been considered to be in the public interest due to community protection risks. It is not Government policy to impose condition 8566 on a Subclass 070 visa where the individual has a history of compliance with Australian laws and where no character concerns have been raised previously.

(c) why are the additional discretionary conditions that can attach to Subclass 070 visas and the expansive cancellation powers under the Migration Act insufficient to manage any public safety risk posed by visa holders;

The existing discretionary conditions and cancellation powers are ordinarily sufficient to manage public safety risks of most visa holders. However, the result of the exercise of those powers is that non-citizens may then be placed in immigration detention for a breach of the conditions or a visa cancellation.

The purpose of the additional conditions is to enable the Minister to consider community alternatives to immigration detention for those individuals that may pose a heightened risk to the Australian community, with greater safeguards than currently available, and who would otherwise remain in immigration detention until the legitimate purpose of their detention no longer exists.

Visa conditions, including condition 8566, provide a strong and clear message to visa holders from the very outset about the behaviours that are expected while they live in the Australian community on a particular visa. They are intended to promote understanding and compliance with these expectations and provide a level of assurance to the Minister, the Government and the broader community that individuals are aware of these expectations, including abiding by Australian laws and assisting the Department resolve their immigration status.

The benefit of condition 8566 is that it requires the Subclass 070 visa holder to acknowledge and agree to a list of expectations relating to the visa holder's behaviour while living in the Australian community. By signing and agreeing to abide by the Code of Behaviour the Subclass 070 visa holder is actively acknowledging from the outset their agreement to abide by this list of community expectations. This condition complements the other additional discretionary visa conditions made available to the Minister by these amending regulations and may help increase a Minister's comfort level when considering whether to grant a Subclass 070 visa and release an individual from immigration detention.

(d) how is the measure, including each expectation contained in the code, rationally connected to the stated objective;

As previously noted, it is the Government's preference to manage individuals in the community where appropriate and that detention in an immigration detention centre continues to be an option of last resort for

managing unlawful non-citizens who cannot be removed and present a risk to the community. These amending regulations, including the availability for condition 8566 to be imposed on a Subclass 070 visa, aligns with this objective by providing the Minister with a community alternative for those individuals that may pose a heightened risk to the Australian community, with greater safeguards than currently available, and who would otherwise remain in immigration detention until the legitimate purpose of their detention no longer exists.

The introduction of the Code of Behaviour in 2013 was intended to ensure individuals whose Subclass 050 visas were granted through the personal intervention of the Minister under s 195A of the Migration Act be held to a suitable standard of behaviour. Each expectation listed in the Code reflects the Australian Government's commitment to protecting the community from non-citizens who pose a risk to our safety. It supports the objective of these changes by providing Portfolio Ministers, the Government and the wider community with confidence that there are appropriate community protection safeguards in place for individuals that have been released from immigration detention through the Minister's personal intervention power.

Adding condition 8566 to the list of conditions available for the Minister to impose on a Subclass 070 visa provides the Minister with confidence that the Subclass 070 visa holder is fully aware of and agrees to adhere to the standards of behaviour expected by the Australian community. It sends a strong message to the Subclass 070 visa holder, just as it does for Subclass 050 visa holders already subject to this condition, about these expectations and improves options for managing unlawful non-citizens in the community in a manner that would seek to protect the Australian community while addressing the risks associated with long-term detention. Requiring visa holders to sign the Code of Behaviour and acknowledge the conditions that are being imposed, means visa holders are agreeing to abide by the terms of their visa, with the understanding that non-compliance may result in the visa being cancelled. This improves the level satisfaction that the Minister has that the visa holder can be safely managed in the community, as an alternative to immigration detention.

The Committee may wish to note that the content of the Code of Behaviour is not altered by these amending regulations.

(e) what type of breach must occur for the minister to exercise their discretion to: reduce an individual's social security or cancel an individual's visa and re-detain them;

A reduction of income support by a Portfolio Minister would not be a potential consequence if a Subclass 070 visa holder breached the Code of Behaviour. This is because Subclass 070 visa holders, unlike some Subclass 050 visa holders, are not eligible to receive financial assistance under the Status Resolution Support Services (SRSS) Program administered by the Department. Subclass 070 visa holders may instead be eligible for Special Benefit payments administered by Services Australia. However, social

security or income support payments administered by other Federal Government Agencies or Departments are not within the scope of the sanctions provided for by the Code of Behaviour for Subclass 070 visa holders subject to condition 8566.

Where an individual engages in behaviour contrary to the expectations articulated in the Code of Behaviour, the Minister, or their delegate, may elect to exercise discretion to cancel the Subclass 070 visa for non-compliance with condition 8566 after weighing up the available evidence, including any matters that weigh against the cancellation of the visa, including but not limited to the purpose of the visa held, past compliance with visa conditions, degree of hardship to the non-citizen and family members – such as best interests of the child and international *non-refoulement* considerations. The legitimate aim for these amendments is to maintain community safety while non-citizens remain on Subclass 070 visas in the community and the Code is tailored to this objective.

(f) if the minister decides to reduce a visa holder's social security income as a result of breaching the code, is this decision subject to independent review;

As noted at the answer to paragraph 1.147(e), a reduction of income support by a Portfolio Minister would not be a potential consequence if a Subclass 070 visa holder breached the Code of Behaviour.

(g) is the right to social security and associated rights, including the right to an adequate standard of living, considered prior to the minister exercising their discretion to reduce a visa holder's social security income; and

As noted at the answer to paragraph 1.147(e), a reduction of income support by a Portfolio Minister would not be a potential consequence if a Subclass 070 visa holder breached the Code of Behaviour.

(h) what, if any, other safeguards exist to ensure that any limitation on rights is proportionate to the objectives being sought.

Before granting a visa using their personal powers under s 195A of the Migration Act, Ministers must be satisfied that the grant of the visa is in the public interest. For individuals in immigration detention considered high risk, the Minister needs to be satisfied that adequate measures are in place to ensure the safety of the Australian community. A high risk individual may be an unlawful non-citizen who, due to reasons such as criminal history, behavioural concerns or previous non-compliance (amongst other factors) presents a significant risk to themselves, the community or the migration program. It is not intended that these additional, discretionary conditions will be imposed on visas where the individual has a history of compliance with Australian laws and where no character concerns have been raised previously.

As previously noted in this response, the decision to cancel a visa for non-compliance with a visa condition, including for a breach of the Code of

Behaviour, is discretionary. The decision to cancel will be based on the individual merits of a client's case, including the severity of the offence or conduct. There may be compelling grounds to not cancel a Subclass 050 or Subclass 070 visa.

Should a Subclass 070 visa holder have their visa cancelled and be re-detained, their detention would be subject to a range of existing internal assurance processes and external oversight by scrutiny bodies. In addition, the Minister has the ability at any time to consider granting the person a visa under their personal powers in s 195A of the Migration Act if they consider it is in the public interest to do so.

Concluding comments

International human rights legal advice

Multiple rights

2.151 The preliminary analysis noted that in requiring a person to comply with certain expectations set out in the code of behaviour, the measure engages and limits the rights to freedom of expression and assembly, the right to privacy and a private life, and to the extent that it has a disproportionate impact on people with disability, the rights of persons with disability. To the extent that breach of the code results in the reduction of social security payments or the cancellation of an individual's visa and their return to immigration detention, the preliminary analysis noted that the measure also engages and limits the right to liberty, the rights of the child, criminal process rights and the right to social security. Regarding the latter, the minister advised that a reduction of income support would not be a potential consequence for breaching the code of behaviour for Subclass 070 visa holders. This is because this class of visa holders is not eligible for financial assistance under the Status Resolution Support Services Program, which is administered by the Department. The minister stated that instead, Subclass 070 visa holders may be eligible for Special Benefit payments, which is administered by Services Australia as opposed to the Department, and therefore not within the scope of the sanctions provided for by the code of behaviour for Subclass 070 visa holders subject to condition 8566. On the basis that a reduction of income support is not a consequence of breaching the code of behaviour, it appears that the right to social security is not limited by this measure.

2.152 The other rights engaged and limited by this measure may be subject to permissible limitations where the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

Prescribed by law

2.153 Interferences with human rights must have a clear basis in law and satisfy the 'quality of law' test,[69] such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.[70] The preliminary analysis noted that the expectations in the code of behaviour are drafted in broad and ambiguous terms, which raises concerns that the measure may not be sufficiently precise to enable visa holders to understand what is expected of them and to foresee the consequences of their actions. A relevant consideration in this regard is the standard of proof that must be met in order for the minister to be satisfied that the code of behaviour has been breached, and the circumstances in which the minister will elect to exercise their discretion to take visa cancellation action.

2.154 The minister advised that by signing and agreeing to abide by the code of behaviour, visa holders are actively acknowledging their agreement to abide by this list of community expectations, with the understanding that non-compliance may result in the visa being cancelled. The minister stated that the minister or their delegate may exercise their discretion to cancel a visa for non-compliance with the code of behaviour after weighing up the available evidence, including matters that may weigh against the cancellation of the visa, such as past compliance with visa conditions, degree of hardship to the non-citizen and their family, the best interests of the child and international protection obligations. The minister stated that the decision to cancel a visa will be based on the individual merits of each case, including the severity of the offence or conduct.

2.155 It is acknowledged that by signing the code of behaviour, visa holders may understand, at a broad level, the expectations set out in the code of behaviour and that a breach of these expectations could result in visa cancellation. However, noting the vague and open-ended nature of these expectations, which potentially encompass a broad range of behaviours and activities, there may still be uncertainty as to what activities or behaviour could result in a breach of the code of behaviour. In order to satisfy the requirements of legal certainty and foreseeability, the measure must enable visa holders 'to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct'.[71] An

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

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

71 *Gorzelik and others v Poland*, European Court of Human Rights (Grand Chamber), Application No. 44158/98 (2004) [64].

understanding of the circumstances in which the minister may elect to exercise their discretion to cancel a visa is therefore relevant in this regard. The minister's response provides some guidance as to the matters that may be considered in exercising this discretion. However, these matters are not provided for in the legislation and in the absence of any legislative guidance, there remain concerns that the scope of the minister's discretion and the manner of its exercise are not reasonably clear. As noted by the UN Human Rights Committee, laws should not confer 'unfettered discretion on those charged with their execution' and should indicate 'with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities'.[72] Noting the breadth of the minister's discretion and the vague and open-ended nature of the expectations set out in the code of behaviour, there appears to be a risk that the code of behaviour may not satisfy the minimum requirements of legal certainty and foreseeability.

Legitimate objective and rational connection

2.156 As to the objective being pursued, the minister states that the availability of condition 8566 will improve the minister's intervention options for managing unlawful non-citizens in the community, noting that without this condition, these persons may not have been released from immigration detention due to community protection risks. The minister states that discretionary conditions, including condition 8566, are intended to promote understanding and compliance with community expectations and provide a level of assurance to the minister, the government and the broader community that these visa holders are aware of these expectations. The objective being pursued by this measure appears to be broadly similar to the objectives sought to be achieved by the imposition of additional, discretionary conditions (as outlined above at paragraph [2.119]–[2.120]). Noting the additional conditions set out above, as well as the already expansive powers under the Migration Act to respond to public safety risks, the preliminary analysis raised questions as to why these existing provisions are insufficient to manage any public safety risk posed by Subclass 070 visa holders.[73] The minister advised that these existing provisions are ordinarily sufficient to manage public safety risks but they may result in visa cancellation and detention in immigration detention. The minister explained that the purpose of the measure is therefore to strengthen community placement options for high risk individuals, which protects the community as well as addresses the risks associated with long-term detention.

2.157 In general terms, as discussed at paragraph [2.119], the objectives of protecting public safety and strengthening community placement options may be

72 *General Comment No. 27, Freedom of Movement (Art. 12)* (1999) [13]; *Rotaru v Romania*, European Court of Human Rights (Grand Chamber), Application No. 28341/95 (2000) [61].

73 There are expansive cancellation powers under the *Migration Act 1958* allowing a person's visa to be cancelled on public health, safety and security grounds: sections 116 and 133C.

capable of constituting legitimate objectives for the purposes of international human rights law. For the cohort of individuals who are assessed as high risk, the provision of alternative detention options to facilitate their release would appear to address a substantial and pressing concern. On the basis that the existing cancellation powers under the Migration Act result in long-term detention of individuals as a result of visa cancellation, to the extent that this measure strengthens community placement options and increases the likelihood of high risk individuals being managed in the community instead of in immigration detention, this measure appears to address a necessary social concern. To the extent that the requirement to comply with the code of behaviour mitigates any public safety risk and facilitates the release of individuals from immigration detention, the measure appears to be rationally connected to the objectives of strengthening community placement options and protecting the community.

Proportionality

2.158 In considering the proportionality of the code of behaviour, the proportionality analysis above in relation to the additional conditions (at paragraphs [2.122] to [2.131]) is highly relevant. There remain similar concerns that the measure may not be sufficiently circumscribed. As discussed above (at paragraphs [2.153] to [2.155]), the expectations are drafted in broad and ambiguous terms, which may make it difficult for visa holders to reasonably foresee the consequences of a given action, and the minister has a broad discretion to cancel a visa based on the individual merits of each case. While the breadth of the minister's discretion provides flexibility to treat different cases differently, in the absence of the scope of the discretion and the manner of its exercise being sufficiently precise, there remain concerns that the measure may not be sufficiently circumscribed.

2.159 As to the existence of safeguards, the minister advised that the additional discretionary conditions, including the code of behaviour, are not intended to be imposed on visas where the individual has a history of compliance with Australian laws and where there are no character concerns. The minister stated that it is government policy that condition 8566 (to not breach the code of conduct) will only be imposed on Subclass 070 visa holders who pose a risk to public safety. In this way, the minister explains that the measure improves options for managing these individuals in the community, thereby protecting the Australian community while addressing the risks associated with long-term detention. However, as noted in the preliminary analysis, the fact that the granting of a Subclass 070 visa with the code of behaviour and related conditions attached is a less rights restrictive alternative to ongoing detention does not assist with the proportionality of this specific measure, noting the UN High Commissioner for Refugees' recommendation that alternatives to detention must observe the principle of minimum intervention and be the least invasive or coercive

means of achieving the objective.[74] This principle should also be observed in relation to the consequences of breaching the code. Further, as discussed at paragraph [2.125], while the policy intention is to only impose the code of behaviour on high risk individuals, this is not a legislative requirement and in the absence of this, discretionary safeguards alone are unlikely to be sufficient to ensure that the minister's discretionary powers are exercised consistently with human rights.

2.160 Further, as noted in the preliminary analysis, there is limited access to review. While judicial review is available for decisions relating to visa cancellation, as discussed at paragraph [2.129], merits review does not seem to be available. As regards the possibility of oversight, the minister advised that for individuals who have had their visa cancelled and are detained in immigration detention, their detention would be subject to a range of existing internal assurance processes and external oversight by scrutiny bodies. The minister further stated that the minister has the ability to grant the individual a visa under section 195A if it is considered in the public interest to do so. As discussed at paragraph [2.130], the possibility of external oversight could, more generally, serve as a safeguard against arbitrary and unlawful detention. However, it does not appear to operate as an oversight mechanism in relation to the code of behaviour specifically, and so does not appear to assist with the proportionality of this measure. Further, noting the infrequent use of the minister's discretionary powers to grant a visa under section 195A in practice and the consequent protracted length of time non-citizens spend in immigration detention (with the majority of non-citizens currently in immigration detention having spent over five years in detention), the minister's discretionary powers under section 195A have not, to date, appeared to operate as a safeguard in relation to this measure.[75]

Concluding remarks

2.1 Insofar as the measure requires a person to comply with certain expectations as set out in the code of behaviour, and failure to do so may result in the cancellation of an individual's visa and their detention in immigration detention, the measure engages and limits multiple rights. Noting the breadth of the minister's discretion to cancel a visa and the vague and open-ended nature of the expectations set out in the code of behaviour, there appears to be a risk that the code of behaviour may not meet the quality of law test. The general objectives of protecting public safety and strengthening community placement options may be capable of constituting legitimate objectives for the purposes of international human rights law. To the extent

74 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [35], [39].

75 The committee has previously commented on the minister's discretionary powers under section 195A and the safeguard value of these powers in the context of the Migration Amendment (Clarifying International Obligations for Removal) Bill (now Act). See Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2020) pp. 100–124.

that the requirement to comply with the code of behaviour mitigates any public safety risk and facilitates the release of individuals from immigration detention, the measure appears to be rationally connected to these objectives. However, there remain concerns that the measure may not be proportionate, noting that it may not be sufficiently circumscribed; it appears to be only accompanied by discretionary safeguards, which alone may not be sufficient; and there is limited access to review and oversight. The concerns raised in relation to the proportionality of the additional discretionary conditions (at paragraphs [2.132] to [2.133]) are relevant to this measure. For these reasons, there may be a significant risk that this measure impermissibly limits multiple rights.

Committee view

2.161 The committee thanks the minister for this response. The committee notes that the measure would allow the minister to require a Subclass 070 visa holder to sign a code of behaviour and attach condition 8566 to that visa, which requires the visa holder to not breach the code. The code may require the visa holder to comply with certain expectations, including not engaging in any anti-social or disruptive activities that are inconsiderate or disrespectful. The consequences of breaching the code may be visa cancellation and detention in immigration detention.

2.162 The committee notes that the requirements in the code of behaviour and the consequences of breaching the code may engage and limit a number of rights, including the rights to privacy and liberty, freedom of expression and assembly, rights of people with disability and criminal process rights. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.163 The committee notes that while the measure is prescribed by law, there appears to be a risk that the code of behaviour may not meet the quality of law test because of the breadth of the minister's discretion to cancel a visa and the vague and open-ended nature of the expectations set out in the code of behaviour. The committee considers that the general objectives of protecting public safety and strengthening community placement options may be capable of constituting legitimate objectives for the purposes of international human rights law. The committee considers that, to the extent that the requirement to comply with the code of behaviour mitigates any public safety risk and facilitates the release of individuals from immigration detention, the measure appears to be rationally connected to these objectives. However, the committee remains concerned that the measure may not be proportionate, noting that it may not be sufficiently circumscribed; appears to be only accompanied by discretionary safeguards, which alone may not be sufficient; and there is limited access to review and oversight. The concerns raised by the committee in paragraph [2.138] in relation to the proportionality of the additional discretionary conditions are relevant in the context of this measure. For these reasons, the committee considers that there may be a significant risk that this measure impermissibly limits multiple rights.

Suggested action

2.164 The committee considers that the proportionality of the measure may be assisted were the instrument amended to:

(a) include guidance as to the matters the minister may consider in electing to exercise their discretion to cancel a visa on the basis of non-compliance with the code of behaviour; and

(b) provide that discretionary condition 8566 (compliance with the code of conduct) must only be attached to visas in relation to individuals who have been assessed as posing a real risk to public safety.

2.165 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

Dr Anne Webster MP

Chair