

Chapter 1

New and ongoing matters

1.1 The committee comments on the following bills and legislative instrument.

Bills

Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023¹

Purpose	This bill seeks to amend the <i>Australian Citizenship Act 2007</i> to repeal and replace provisions providing for the cessation of Australian citizenship in certain circumstances, and make related amendments
Portfolio	Home Affairs
Introduced	House of Representatives, 29 November 2023 <i>Finally passed both Houses 6 December 2023</i>
Rights	Criminal process rights; equality and non-discrimination; rights of the child; liberty; protection of the family; freedom of movement; privacy

Cessation of Australian citizenship

1.2 This bill (now Act) amended the *Australian Citizenship Act 2007* (Citizenship Act) to repeal and replace provisions providing for the cessation of Australian citizenship in certain circumstances.

1.3 The High Court of Australia recently held that the mechanisms in the Citizenship Act by which the minister may cease a person's Australian citizenship were unconstitutional and therefore unlawful.² The court made this ruling on the basis that the provisions vested the executive with the exclusively judicial function of punishing criminal guilt.

1.4 This bill repeals sections 36B to 36K of the Citizenship Act, and inserts provisions providing that if a person has been convicted of one or more 'serious offences', and the court has decided to impose a period of imprisonment of (or periods which considered together total) at least three years, before the court imposes the

¹ This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023, *Report 14 of 2023*; [2023] AUPJCHR 130.

² *Alexander v Minister for Home Affairs* [2022] HCA 19 (8 June 2022) and *Benbrika v Minister for Home Affairs* [2023] HCA 33 (1 November 2023).

sentence(s), the minister may apply to the court for an order that the person also ceases to be an Australian citizen.³ An application would be required to be made before or after the person is convicted of one or more serious offences, provided the application was made before the person is sentenced.⁴ The minister would be required to provide the person with written notice of the application as soon as practicable after the application is made, and written notice may be given to 'such other persons as the minister considers appropriate'.⁵

1.5 Subsection 36C(2) provides that the court must not make such an order if the court is satisfied that the person would, if an order was made, become a person 'who is not a national or citizen of any country'.⁶

1.6 A 'serious offence' means:

- (a) international terrorist activities using explosive or lethal devices;⁷
- (b) treason;⁸
- (c) advocating mutiny;⁹
- (d) espionage;¹⁰
- (e) foreign interference;¹¹
- (f) certain terrorism offences;¹² or

³ Schedule 1, Part 1, item 4, proposed section 36C. Proposed subsection 36C(8) provides that if a person has been convicted of two or more serious offences and a court has decided to impose on the person, in respect of the conviction or convictions, two or more periods of imprisonment to be served *concurrently* (whether in whole or in part), then the whole of each period is to be counted in working out the total of those periods.

⁴ Schedule 1, Part 1, item 4, proposed subsection 36D(2). Proposed subsection (5) provides that the application must not be made in the presence of the jury, and must only be heard after the person is convicted of one or more serious offences.

⁵ Schedule 1, Part 1, item 4, proposed subsection 36D(6).

⁶ Schedule 1, Part 1, item 4. Proposed subsection 36C(10) provides that the section applies in relation to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon their birth).

⁷ That is, an offence against a provision of Subdivision A of Division 72 of the *Criminal Code Act 1995* (Criminal Code).

⁸ That is, an offence against a provision of Subdivision B of Division 80 of the Criminal Code.

⁹ Section 83.1 of the Criminal Code.

¹⁰ That is, an offence against a provision of Division 91 of the Criminal Code.

¹¹ That is, an offence against a provision of Division 92 of the Criminal Code.

¹² That is, a provision of Part 5.3 of the Criminal Code, excluding: section 102.8 (associating with terrorist organisations); Division 104 (control orders), Division 105 (preventative detention orders), section 105A.7D (treatment of photographs or impressions of fingerprints), section 105A.18B (offences relating to monitoring devices).

(g) foreign incursions or recruitment.¹³

1.7 In determining whether to make such an order, the court would be required to be satisfied that the person is an Australian citizen aged 14 years or over, and that the conduct to which the conviction or convictions relate is 'so serious and significant that it demonstrates that the person has repudiated their allegiance to Australia'.¹⁴ In deciding whether the court is satisfied as to this third matter (relating to repudiation of allegiance), the court may have regard to any matter, and must have regard to:

- (a) whether the conduct to which the conviction or convictions relate demonstrates a repudiation of the values, democratic beliefs, rights and liberties that underpin Australian society;
- (b) the degree, duration or scale of the person's commitment to, or involvement in, the conduct to which the conviction or convictions relate;
- (c) the intended scale of the conduct to which the conviction or convictions relate;
- (d) the actual impact of the conduct to which the conviction or convictions relate;
- (e) whether the conduct to which the conviction or convictions relate caused, or was intended to cause, harm to human life or a loss of human life.¹⁵

1.8 In deciding whether to make an order, the court would be required to have regard to the best interests of the child (including whether the person in question is a child themselves, or if the person has dependent children in Australia), and the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person.¹⁶

1.9 Subsection 36C(11) provides that Part IB of the *Crimes Act 1914* (Crimes Act) does not apply in relation to an order under this section. Part IB sets out the sentencing factors, procedural requirements and penalty options when sentencing a person for an offence against the law of the Commonwealth.

1.10 The bill provides that section 36C applies in relation to a conviction of a person if the conviction occurs after the commencement of the provision, and the person engaged in the conduct to which the conviction relates on or after 12 December 2015 (being the date on which previous citizenship cessation laws came into effect).¹⁷

¹³ That is, a provision of Part 5.5 of the Criminal Code.

¹⁴ Schedule 1, Part 1, item 4, proposed subsection 36C(4).

¹⁵ Schedule 1, Part 1, item 4, proposed subsections 36C(5) and (7).

¹⁶ Schedule 1, Part 1, item 4, proposed subsection 36C(6).

¹⁷ Schedule 1, Part 2, item 18.

1.11 The bill also amends the *Surveillance Devices Act 2004* to provide that protected information may be used, recorded, communicated or published, or may be admitted in evidence, with respect to section 36C of the Citizenship Act if it is necessary to do so for the purposes of the performance of a function or duty, or the exercise of a power, by a person, court or other body under, or in relation to a matter under specified circumstances.¹⁸

1.12 The bill also amends the *Independent National Security Legislation Monitor Act 2010* and *Intelligence Services Act 2001* to provide that the Independent Security Legislation Monitor (INSLM) must review these provisions after the end of three years from the day the provisions commence, and that the Parliamentary Joint Committee on Intelligence and Security (PJCIS) may commence a review of the provisions after a review by the INSLM has been completed.¹⁹

International human rights legal advice

1.13 By permitting the cessation of Australian citizenship as part of the sentencing process in relation to certain criminal convictions, this measure engages and may limit a number of human rights, including: criminal process rights, the right to equality and non-discrimination, the rights of the child, and the rights to freedom of movement, protection of the family, and liberty.

1.14 International human rights law recognises the significance of citizenship and nationality, and protects against the arbitrary deprivation of nationality.²⁰ Citizenship stripping (or deprivation of nationality) has been recognised as an extreme measure having regard to the significance of citizenship in being able to access a range of human rights. The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has described citizenship as ‘a gateway right enabling the “right to claim rights”, to claim and secure a collection of other basic human rights’.²¹ They have also observed that ‘the widespread use of citizenship stripping in the name of countering terrorism works

¹⁸ Schedule 1, Part 1, item 17, proposed paragraph 45(5)(iii).

¹⁹ Schedule 1, Part 1, items 11–16.

²⁰ International Covenant on the Elimination of All Forms of Racial Discrimination, article 5; International Covenant on Civil and Political Right, article 24(3); and International Convention on the Rights of the Child, articles 7 and 8. See also, article 15(2) of the Universal Declaration of Human Rights.

²¹ Ms. Fionnuala Ní Aoláin, [Position of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights consequences of citizenship stripping in the context of counter-terrorism with a particular application to North-East Syria](#) (February 2022), pp. 2-3.

against the spirit and intention of the International Covenant on Civil and Political Rights'.²²

Criminal process rights

1.15 Under international human rights law, criminal process rights apply whenever a 'criminal penalty' is imposed on a person. The term 'criminal' has an autonomous meaning in human rights law, and as such, the fact that cessation of citizenship is not classified as a criminal penalty under Australian law is not determinative. In this regard, it is noted that the High Court of Australia has found that the decision to cease a person's citizenship on the basis of their conduct is punitive in nature (and should only be exercised by a court).²³ If cessation of Australian citizenship was regarded as being so severe as to amount to a criminal penalty under international human rights law, the retrospective application of a greater penalty to prior criminal conduct would breach the absolute prohibition against retrospective criminal laws.

1.16 In assessing whether a penalty may be regarded as criminal under international human rights law, it is necessary to consider the nature and purpose of the penalty (including whether it applies to the public in general rather than a specific regulatory or disciplinary context); whether there is an intention to punish or deter; and the severity of the penalty. In this regard, the measure provides that a person may be subject to citizenship cessation where they have been convicted of an offence for which a lower sentence of imprisonment has been imposed than was previously required (this is discussed in more detail at paragraph [1.19]). The statement of compatibility states that it is necessary to extend the ability to cease the citizenship of persons who have engaged in conduct attracting a lower prison sentence to ensure the safety of the Australian community, and to ensure people who have repudiated their allegiance to Australia through their actions no longer remain part of the Australian community.²⁴ It further states that by applying to past conduct, the bill 'recognises that past terrorist conduct is conduct that all Australians view as repugnant and in contradiction with the values that define our society'.²⁵

1.17 Noting that the cessation of Australian citizenship would apply to the public at large (and not merely in some regulatory context), is intended to punish persons who

²² Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children; and the Working Group on discrimination against women and girls, [correspondence regarding Ms Fatima Habbat](#) (8 December 2021), p. 3.

²³ *Alexander v Minister for Home Affairs* [2022] HCA 19 (8 June 2022) and *Benbrika v Minister for Home Affairs* [2023] HCA 33 (1 November 2023).

²⁴ Statement of compatibility, p. 34.

²⁵ Statement of compatibility, p. 35.

have engaged in relevant criminal conduct, and has extremely severe consequences for a person's life, there appears to be a risk that the cessation of citizenship could be regarded as a penalty under international human rights law – and so would engage criminal process rights.

1.18 Article 15 of the International Covenant on Civil and Political Rights prohibits retrospective criminal laws; it requires that laws not impose criminal liability for acts that were not criminal offences at the time they were committed and that the law not impose greater penalties than those which would have been available at the time the acts were done. This prohibition supports long-recognised criminal law principles that there can be no crime or punishment without law. The prohibition against retrospective criminal law is absolute and may never be subject to permissible limitations.

1.19 The statement of compatibility states that the prohibition against retrospective criminal law may be engaged by these measures. It states that before the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (2020 Act) was enacted, the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (2015 Act) provided that certain convictions could be considered for citizenship cessation by the minister. When the 2020 Act was found to be unconstitutional, it was rendered void *ab initio*, meaning that the provisions of the 2015 Act (which the 2020 Act had repealed) are no longer repealed, and remained current law (until this bill was enacted).²⁶ The 2015 Act provided that, from 12 December 2015, convictions which resulted in a sentence of six years or more, or convictions in the ten years prior that resulted in a sentence of at least ten years imprisonment, could be considered for citizenship cessation by the minister. This bill applies a lower threshold at which a person's Australian citizenship may be ceased (namely, convictions resulting in three years imprisonment) than that which otherwise applied from 12 December 2015. This lower threshold applies in circumstances where a person was alleged to have engaged in relevant criminal conduct on or after 12 December 2015, but had not yet been convicted. As such, citizenship cessation would potentially be applicable to a broader class of persons than would otherwise have been exposed but for this measure. Further, the bill proposes that if a person were convicted of two relevant offences and the court imposed two sentences of imprisonment to be served concurrently, the whole of each period would be counted in working out the total for the purposes of a citizenship cessation application. (For example, if a person received two sentences of 18 months to be served concurrently, they would nevertheless meet the legislative threshold for an application for citizenship cessation to be made). As such, citizenship cessation may, as a matter of law, be applicable even in circumstances where the court

²⁶ When a law is held to be unconstitutional it 'is not and never has been a law at all ... If it is beyond power it is invalid *ab initio*': *South Australia v Commonwealth* (1942) 65 CLR 373, 408 (Latham CJ). See also, *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327, 342 (Latham CJ).

has determined (by virtue of the sentence imposed) that the conduct was a lower level of seriousness.

1.20 The statement of compatibility says the prohibition against retrospective criminal punishment is engaged, noting:

Any term of imprisonment is considered serious, and courts often only impose imprisonment for the most serious of offences. Given the range of factors a court may take into account when sentencing an offender, some of those factors may reduce a defendant's sentence but this may not impact the serious risk posed by the nature of the offence. It is reasonable, necessary and proportionate to reduce the sentencing threshold at which cessation of citizenship may be considered to a term of imprisonment of at least three years, as this duration adequately balances the risk presented to the community by the commission of the offence with the possible cessation of the offender's citizenship.²⁷

1.21 However, the prohibition against retrospective criminal laws is an absolute right, meaning that there is no basis on which limitations can ever be permissible under international law. As such, questions of reasonableness, necessity and proportionality do not arise. Given the retrospective application of the citizenship cessation powers, if the power to cease citizenship were to be taken to be the imposition of a criminal penalty under international law, this measure would breach the absolute prohibition against retrospective criminal law.

Equality and non-discrimination

1.22 Permitting the cessation of Australian citizenship where a person has, or may be entitled to, a second citizenship or nationality, engages and limits the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.²⁸ It protects against discrimination based on protected attributes (including national or social origin and race).²⁹ The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of

²⁷ Statement of compatibility, p. 34.

²⁸ International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

²⁹ The prohibited grounds 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.

rights).³⁰ As this measure would operate only in relation to persons who have, or may be eligible for, a second citizenship or nationality, and would therefore be more likely to impact persons whose families have been settled in Australia for a shorter period of time, this measure would discriminate against persons based on their nationality.

Rights of the child

1.23 The power to make an order ceasing citizenship applies to children aged 14 or over. In addition, an order may be made in relation to a person who has dependent children who would be impacted by the cessation of the person's citizenship (in that they may be separated from their parent). Consequently, the measures also engage and limit the rights of the child.³¹

1.24 Children have special rights under human rights law taking into account their particular vulnerabilities.³² Children's rights are protected under a number of treaties, particularly the UN Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.³³ Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.³⁴ This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.³⁵ The UN Committee on the Rights of the Child has explained that:

the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child...³⁶

1.25 The child's best interests includes the enjoyment of the rights set out in the Convention on the Rights of the Child, and, in the case of individual decisions, 'must be assessed and determined in light of the specific circumstances of the particular

³⁰ UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

³¹ See, Convention on the Rights of the Child.

³² Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

³³ UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26.

³⁴ Convention on the Rights of the Child, article 3(1).

³⁵ UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

³⁶ UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

child'.³⁷ In addition, every child has the right to acquire a nationality,³⁸ and the right to preserve their identity, including their nationality, without unlawful interference.³⁹

Rights to liberty, protection of the family, freedom of movement and privacy

1.26 The effect of a citizenship cessation order is that the affected person will no longer have a permanent right to reside in Australia. Such persons would acquire an ex-citizen visa as a matter of law.⁴⁰ However, an ex-citizen visa may be subject to cancellation on character grounds,⁴¹ including mandatory cancellation in the case of a person with a 'substantial criminal record' (which includes a sentence of imprisonment of 12 months or more).⁴² Such persons are also prohibited from applying for most other visas.⁴³ As all affected persons will have had to have received sentences of three years or more (or sentences totalling three years if served concurrently) it would appear all ex-citizen visas would subsequently be cancelled, making the person an unlawful non-citizen, subject to mandatory immigration detention and removal (if possible) from Australia.

1.27 As such, this measure engages and limits the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.⁴⁴ 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. The right to liberty applies to all forms of deprivation of liberty, including immigration detention.

³⁷ UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) p. 3.

³⁸ Convention on the Rights of the Child, article 7; and International Covenant on Civil and Political Rights, article 24(3).

³⁹ Convention on the Rights of the Child, article 8. This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

⁴⁰ Statement of compatibility, p. 28 in reference to section 35 of the *Migration Act 1958*.

⁴¹ Migration Act, section 501.

⁴² Migration Act, subsection 501(7).

⁴³ Migration Act, section 501E. While subsection 501E(2) provides that a person is not prevented from making an application for a protection visa, that section also notes that the person may be prevented from applying for a protection visa because of section 48A of the Migration Act. Section 48A provides that a non-citizen who, while in the migration zone, has made an application for a protection visa and that visa has been refused or cancelled, may not make a further application for a protection visa while the person is in the migration zone.

⁴⁴ International Covenant on Civil and Political Rights, article 9.

1.28 As an order may result in the separation of a person from their family it may also engage and limit the right to protection of the family.⁴⁵ The family is recognised as the natural and fundamental group unit of society and, as such, is entitled to protection. This right protects family members from being involuntarily and unreasonably separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation, or forcibly remove children from their parents, will therefore engage this right.⁴⁶

1.29 Ex-citizen visas are a class of permanent visas that permit a person to remain in, but not re-enter, Australia. As such, if a person remained on such a visa, they could not leave Australia with a view to re-entering the country. Further, once such a visa is cancelled, the person would be an unlawful non-citizen and would be subject to mandatory detention and, if possible, removal from Australia. As such, this measure engages and limits the right to freedom of movement. The right to freedom of movement includes a right to leave a country, and to enter, remain in, or return to one's 'own country'.⁴⁷ 'Own country' is a concept which encompasses not only a country where a person has citizenship but also one where a person has strong ties, such as long standing residence, close personal and family ties and intention to remain, as well as the absence of such ties elsewhere.⁴⁸

1.30 Further, the right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.⁴⁹ A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. Cessation of citizenship (and subsequent detention and removal, if possible, from Australia) would limit this right.

Permissible limitations

1.31 Most human rights may be subject to permissible limitations. In order for a limitation to be permissible under international human rights law it must be prescribed by law, pursue a legitimate objective, be rationally connected to (that is,

⁴⁵ Convention on the Rights of the Child; International Covenant on Civil and Political Rights, articles 17 and 23; International Covenant on Economic, Social and Cultural Rights, article 10.

⁴⁶ *Winata v Australia*, UN Human Rights Committee Communication No.930/2000 (26 July 2001) [7.3].

⁴⁷ International Covenant on Civil and Political Rights, article 12.

⁴⁸ UN Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)* (1999). See also *Nystrom v Australia* (1557/2007), UN Human Rights Committee, 1 September 2011.

⁴⁹ UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]-[4].

effective to achieve) that objective and be a proportionate means of achieving that objective.⁵⁰

Prescribed by law

1.32 Human rights standards require that interferences with rights must have a clear basis in law (that is, they must be prescribed by law). This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights. To meet the quality of law test, the law must be 'accessible to the persons concerned and formulated with sufficient precision to enable them...to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct'.

1.33 Proposed section 36C would require that, in considering an application for a cessation of citizenship order, a court must be satisfied that the relevant conduct 'is so serious and significant that it demonstrates that the person has repudiated their allegiance to Australia', having regard to whether the conduct 'demonstrates a repudiation of the values, democratic beliefs, rights and liberties that underpin Australian society'.⁵¹

1.34 As to what these terms mean, the explanatory memorandum states that in exercising this discretion, the court would need to consider whether the relevant conduct 'has the effect of repudiating a person's allegiance to Australia', meaning that the conduct 'must be significant and serious to a degree high enough that it warrants the strongest possible response in the form of citizenship cessation'.⁵² It further states that repudiation is 'characterised by conduct, voluntarily undertaken, that is serious and significant, such as fighting for, or being in the service of, a declared terrorist organisation, or serving in the armed forces of a country at war with Australia'.⁵³ However, this would appear to refer directly to the conduct constituting a relevant criminal offence, not to some additional circumstance that would be so serious as to rise to the level of 'repudiation of allegiance'. As such, this explanation does not identify when the circumstances relating to a specific offence may be so significant as to rise to the level that a court may be satisfied that a person has repudiated their

⁵⁰ See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

⁵¹ Schedule 1, Part 1, item 4, proposed subsections 36C(4)-(5).

⁵² Explanatory memorandum, p. 4.

⁵³ Explanatory memorandum, p. 6.

allegiance to Australia. The statement of compatibility states that the specified offences have ‘a clear nexus to the repudiation of a citizen’s responsibilities to the State’, that commission of these offences places Australian interests at risk and, ‘where the actions of the person are serious and significant, they are incompatible with the values of Australian citizenship’.⁵⁴

1.35 The explanatory memorandum also states that in considering whether a person has demonstrated a repudiation of the values, democratic beliefs, rights and liberties that underpin Australian society the court may consider the responsibilities of an Australian citizen which are ‘broadly but succinctly’ set out in the Australian Citizenship Pledge.⁵⁵ However this pledge states only ‘I pledge my loyalty to Australia and its people; whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey’. It does not define or otherwise elucidate the meaning of any of these terms. Further, it does not appear to point to a source of Australian values or beliefs.⁵⁶

1.36 As such, it is unclear whether the criteria that a person has ‘repudiated their allegiance to Australia’ is sufficiently certain such that people would understand the circumstances under which they may be liable to an order for cessation of their Australian citizenship. This term would appear to be based on broad, uncertain and essentially subjective terms.⁵⁷

Legitimate objective and rational connection

1.37 Any limitation on a right must be shown to be aimed at achieving a legitimate objective. A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. It is not sufficient, therefore, that a measure simply seeks an outcome regarded as desirable or convenient. The statement of compatibility states that the objective of this measure is to protect the Australian community from the risk posed by a person who has committed a serious offence, and whose conduct demonstrates the

⁵⁴ Statement of compatibility, p. 27.

⁵⁵ Explanatory statement, p. 15. The pledges are set out at Schedule 1 of the *Australian Citizenship Act 2007*.

⁵⁶ In this regard, it is noted that temporary and provisional visa applicants are required to agree to a written ‘[Australian Values Statement](#)’ as part of their application. This statement particularises a series of ‘Australian society values’ including equality of opportunity, freedom of religion, and ‘a “fair go” for all’ embracing mutual respect and compassion for those in need. A similar set of values are contained in the ‘[Australian Citizenship: Our Common Bond](#)’ booklet on which some applicants for Australian citizenship may be tested.

⁵⁷ The committee raised this concern in relation to the both the 2015 and 2020 iteration of these measures. See, Parliamentary Joint Committee on Human Rights, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, [25th Report of the 44th Parliament](#) (11 August 2015) pp. 4–46, and [36th Report of the 44th Parliament](#) (16 May 2016) pp. 27–84; and Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, [Report 6 of 2019](#) (5 December 2019), pp. 2–19, and [Report 1 of 2020](#) (5 February 2020) pp. 99–126.

repudiation of their allegiance to Australia.⁵⁸ It states that it is intended that the minister will only make such an application ‘in particular cases involving conduct in the commission of serious offences that is so repugnant to Australia’s interests and values that it elicits the strongest possible response. That is, removing the person’s access to the benefits of Australian citizenship’.⁵⁹

1.38 Australian citizens with no entitlement to a second citizenship would not be affected by these measures. Further, cessation of citizenship would only be permitted to occur if the court were satisfied that the person is entitled to nationality of another country. While it is welcome that it is intended this would not apply to those not eligible for citizenship of another country (as to do otherwise would render the person stateless), this raises questions as to whether these measures are strictly necessary. If the threat posed to the Australian community by citizens who do not possess dual nationality can be managed *without* depriving them of citizenship, it is unclear why similar measures could not adequately address the threat posed by dual citizens.⁶⁰ Further, the statement of compatibility would appear to rely on the desire to limit citizenship to those ‘who embrace and uphold Australian values’, and it is not clear that this seeks to address a pressing and substantial concern such that it is a legitimate objective when considering the significant limitations on rights posed by these measures.

1.39 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. Despite similar powers having been in existence in various forms since 2015, the statement of compatibility does not identify whether, and to what extent, these proposed cessation of citizenship measures would be effective to achieve the stated objectives of protecting the Australian community from the risk posed by a person who has committed a serious offence, and whose conduct demonstrates the repudiation of their allegiance to Australia. In this regard, it is noted that the effectiveness of citizenship cessation in the context of national security/public safety has been called into question. For example, in 2019 the Peter McMullin Centre

⁵⁸ Statement of compatibility, p. 32.

⁵⁹ Statement of compatibility, p. 26.

⁶⁰ See, for example, *A (FC) and others (FC) v Secretary of State for the Home Department* [2004] UKHL 56 where the House of Lords held that detaining non-nationals suspected of terrorism (but not nationals suspected of terrorism) for the purposes of protecting the community was discriminatory. See Lord Bingham at [54]: ‘The appellants were treated differently because of their nationality or immigration status. The comparison contended for by the Attorney General might be reasonable and justified in an immigration context, but cannot in my opinion be so in a security context, *since the threat presented by suspected international terrorists did not depend on their nationality or immigration status.*’ [emphasis added].

of Statelessness stated that research suggests that citizenship cessation measures may have the effect of fostering radicalisation and so increase the risk of terrorism acts.⁶¹

Proportionality

1.40 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. Another relevant factor in assessing whether a measure is proportionate is whether there is the possibility of oversight and the availability of review.

1.41 As to the safeguards in relation to ensuring a person does not become stateless, a court must not make a citizenship cessation order if the court is satisfied that if the order were made the person would become stateless, that is, become a person who is not a national or citizen of any country. The court must therefore be satisfied that the person *is* a national or citizen of at least one other country. This would likely serve as an important safeguard to ensure people are not left stateless by this measure, although it offers no safeguard value for those who are dual nationals. Further, it is noted that establishing whether a person is a ‘national’ of another country is a complex question in practice.⁶² Under international law the government bears the onus of ensuring that a person is indeed a dual national prior to any revocation of citizenship, requiring the government to investigate with the ‘competent authority’ of the person’s presumed other state of nationality as to whether the person is, in fact, a citizen.⁶³ The UN High Commissioner for Refugees (UNHCR) has advised that establishing whether an individual is a national under the operation of a foreign law requires careful analysis of how a state applies its laws in practice, noting any review

⁶¹ Peter McMullin Centre of Statelessness at Melbourne University Law School, [Submission to the Parliamentary Joint Committee on Intelligence and Security, inquiry into Review of the Australian Citizenship Renunciation by Conduct and Cessation Provisions](#) (13 August 2019). See further, Christophe Paulussen, ‘Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive’ (2018), and Sangeetha Pillai and George Williams, ‘The Utility of Citizenship Stripping Laws in the UK, Canada and Australia’, *Melbourne University Law Review* (2017) vol. 41, no. 2.

⁶² See, Peter McMullin Centre of Statelessness at Melbourne University Law School, [Submission to the Parliamentary Joint Committee on Intelligence and Security, inquiry into Review of the Australian Citizenship Renunciation by Conduct and Cessation Provisions](#) (13 August 2019), p. 6.

⁶³ Michelle Foster, Jane McAdam and Davina Wadley, ‘Part Two: The Prevention and Reduction of Statelessness in Australia – An Ongoing Challenge’, *Melbourne University Law Review* (2016) VOL. 40, pp. 456-505, citing UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (2014), p. 13.

or appeal decisions that may impact an individual's status.⁶⁴ While proposed subsection 36D(4) would require the minister to include in an application for an order 'information about the person's nationality or citizenship of other countries', it is not clear what information this would require, and whether the gathering of such information would require confirmation from a foreign government that the individual in question *will* retain nationality or citizenship of the relevant foreign country (and that it will not also be revoked based on the individual's criminal conduct or other grounds).⁶⁵ The explanatory materials do not explain how this information would be gathered, and what would be required to be provided to the court in order for it to be satisfied that a person would not be rendered stateless.⁶⁶

1.42 In relation to equality and non-discrimination, the statement of compatibility states that the bill would operate on the basis of a conviction or convictions for serious criminal offences and apply only to dual nationals, and that this may amount to a differentiation on the basis of 'national origin' and 'other status'.⁶⁷ It states that these measures are necessary to address the risks posed by individuals convicted of serious offences that demonstrate that a person has repudiated their allegiance to Australia, and that the measures only discriminate against dual citizens to the extent that the government is prevented from seeking the cessation of citizenship in circumstances that would leave a person without a nationality.⁶⁸ Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.⁶⁹ In this respect, the statement of compatibility states that the objective behind only applying the

⁶⁴ UNHCR, Handbook on Protection of Stateless Persons, above n 10, 13 [24]. The Handbook goes on to note that 'Applying this approach of examining an individual's position in practice may lead to a different conclusion than one derived from a purely formalistic analysis of the application of nationality laws of a country to an individual's case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance.'

⁶⁵ This may be a relevant consideration in practice, as Foster and McAdam highlight by reference to a case in the United Kingdom in 2015 where two states both sought to first denationalize an individual alleged to have engaged in terrorist training in a third country. See, Michelle Foster, Jane McAdam and Davina Wadley, 'Part Two: The Prevention and Reduction of Statelessness in Australia – An Ongoing Challenge', *Melbourne University Law Review* (2016) vol. 40, p. 495 in reference to *Pham v Secretary of State for the Home Department* [2015] 1 WLF 1591.

⁶⁶ In this regard it is noted that concerns have been raised in relation to a lack of consistency and clarity concerning the official methods for determining whether a person is indeed a citizen of another state. P. 498.

⁶⁷ Statement of compatibility, p. 29.

⁶⁸ Statement of compatibility, p. 30.

⁶⁹ UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

measure to dual nationals is to ensure that a person is not rendered stateless in order to comply with Australia's obligations under the 1961 Convention on the Reduction of Statelessness.⁷⁰ Seeking to ensure persons are not rendered stateless may appear, in and of itself, to be based on reasonable and objective criteria. However, the United Nations Special Rapporteur on the promotion and protection of human rights has noted, in relation to citizenship stripping and the principles of equality and non-discrimination:

The Special Rapporteur is aware that many domestic citizenship stripping laws apply only to citizens with dual nationality in an attempt to evade violation of the prohibition against statelessness. However, the ostensibly neutral differentiation between mono and dual nationals belies the de facto application of deprivation of nationality on the racialized bases of national origin and descent. The Committee on the Elimination of Racial Discrimination has emphasized that the deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin violates States' Parties obligation to ensure the non-discriminatory enjoyment of the right to nationality. There is no exception to this obligation in the context of measures taken to counter terrorism. The Committee has expressed concerns specifically about distinctions on the basis of dual nationality or citizenship status because of their tendency to result in impermissible discriminatory practices. The Special Rapporteur decries State laws which create multiple tiers of citizenship, with the right to nationality less secure for some than for others. She recognises that the 1961 Convention on the Reduction of Statelessness distinguishes between mono-and dual nationals, but stresses that because mono-nationals can be treated with less rights limiting measures than dual-nationals, citizenship deprivation for dual nationals is difficult to reconcile with the principles of necessity and proportionality.⁷¹

1.43 Noting this, and given the conclusion above that it is not clear that this measure satisfies the quality of law test or is directed towards an objective that would be regarded as legitimate under international human rights law, it would appear that the discriminatory application of citizenship cessation would, therefore, be impermissible.

1.44 In relation to children, cessation of a child's citizenship because of criminal conduct raises questions as to whether this measure accords with accepted understandings of the capacity and culpability of children under international human rights law and adequately recognises the vulnerabilities of children. International human rights law recognises that a child accused or convicted of a crime should be

⁷⁰ Statement of compatibility, p. 29.

⁷¹ Ms. Fionnuala Ní Aoláin, [*Position of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights consequences of citizenship stripping in the context of counter-terrorism with a particular application to North-East Syria*](#) (February 2022), pp. 10-11 (footnote references removed).

treated in a manner which takes into account the desirability of promoting his or her reintegration into society.⁷² A person whose Australian citizenship ceases may be prevented from returning to, or residing in, Australia, or travelling to another country, and thereby be prevented from reuniting with close family members. Children have a right to not be separated from their parents against their will, except where competent authorities determine that such separation is necessary for the best interests of the child,⁷³ and they are to be protected from arbitrary interference with their family.⁷⁴ In addition, the enjoyment of a range of rights is tied to citizenship under Australian law, such that the removal of citizenship may have a negative effect on the best interests of any affected children. In addition, it is unclear that the requirement that the court must have regard to the best interests of a child impacted by a citizenship cessation order would satisfy the requirement that the best interests of the child must be a primary consideration and not one considered on the same level as all other considerations.

1.45 In relation to the right to liberty, the statement of compatibility is brief. It states that ‘the Government’s position is that people who have no legal authority to remain in Australia, including if a person’s ex-citizen visa is cancelled following the cessation of Australian citizenship, are expected to depart’.⁷⁵ However, that has no relevance in relation to an assessment of the proportionality of a limitation on the right to liberty. The statement of compatibility states that any immigration detention pending removal involves a risk-based approach to the consideration of the appropriate placement and management of an individual while their status is being resolved. It states that placement in an immigration detention facility is based on the assessment of a person’s risk to the community and level of engagement in the status resolution process. However, section 189 of the Migration Act requires that an unlawful non-citizen in Australia *must* be detained. As such, if the minister did not grant the individual a visa authorising their presence in Australia (which seems likely given the minister would have applied for cessation of their citizenship), they would be subject to mandatory immigration detention. The UN Human Rights Committee has previously held that Australia’s system of mandatory immigration detention, which at the time of the decision was potentially indefinite, was incompatible with the right to liberty.⁷⁶ While the High Court of Australia has recently ruled that *indefinite* immigration

⁷² Convention on the Rights of the Child, article 40. See, also, UN Committee on the Rights of the Child, *General Comment 10: children’s rights in juvenile justice* (2007) [10].

⁷³ Convention on the Rights of the Child, article 9.

⁷⁴ Convention on the Rights of the Child, article 16.

⁷⁵ Statement of compatibility, p. 32. The statement of compatibility states that this measure would not risk breaching the absolute.

⁷⁶ See, *MGC v. Australia*, UN Human Rights Committee Communication No.1875/2009 (2015) [11.6]. See, also UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6 (2017) [37].

detention is unlawful,⁷⁷ the *mandatory* nature of immigration detention pursuant to the Migration Act may nevertheless risk being incompatible with the right to liberty, noting that such detention is not subject to an individualised assessment of the appropriateness and necessity of detention. In this regard, the UN Human Rights Committee has stated that detention must be justified as being reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.⁷⁸

1.46 In relation to freedom of movement, the statement of compatibility states the power to make a citizenship cessation order is circumscribed in that the provisions only operate in circumstances where the person has been convicted of a specified offence, where the court is considering sentencing the person to a term of imprisonment of at least three years, and the court is satisfied of the matters in subsection 36C(6).⁷⁹ However, it is noted that an application for a citizenship cessation order may be made where a court is considering sentencing a person to two or more terms of imprisonment which total three years, but where the court orders that these sentences be served concurrently (so, for example, the person may only serve 1.5 years in prison, but still be liable to citizenship cessation). As such, the extent to which the minimum prison sentence threshold circumscribes the power to seek an order as a matter of law is lesser than asserted in the statement of compatibility. The statement of compatibility further notes that the court may take into account any matters in determining whether to make a cessation order, and that this may include submissions raised by the individual in relation to why they should be able to leave, re-enter and remain in Australia. However, there would be no express requirement for the court to do so. Once a citizenship cessation order is made the person would no longer have a right to re-enter their 'own country' (which as stated above at paragraph [1.29] is a concept which encompasses not only a country where a person has citizenship but also one where a person has strong ties), and so no flexibility would apply to help protect their freedom of movement.

1.47 In relation to the right to protection of the family, the statement of compatibility notes that the cessation of citizenship may interfere with the right to protection of the family in some cases. It states that the cessation of citizenship and any subsequent visa cancellation and removal would be the consequence of the behaviour of a person who has engaged in certain criminal activity, and 'objectively demonstrated a repudiation of their allegiance to Australia through their conduct'. It states that as citizenship cessation and visa cancellation (or non-revocation) decisions are discretionary, the impact on family members may be considered as part of those decisions and any limitation of these rights in an individual case would be

⁷⁷ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

⁷⁸ See, *MGC v Australia*, UN Human Rights Committee Communication No.1875/2009 (2015) [11.5].

⁷⁹ Statement of compatibility, p. 32.

proportionate to the legitimate goal of ensuring the security of the Australian community.⁸⁰ The fact that it would be the court making a citizenship cessation determination is an important safeguard. Further, it is noted that proposed subsection 36C(7) would permit the court to have regard to any matter in deciding whether to make an order, which could operate to safeguard this right. However, this is not a mandatory consideration so it is not clear what weight would be given to this matter in practice.⁸¹

1.48 The availability of review rights is also relevant to assessing the proportionality of these measures. In this regard, the statement of compatibility briefly states that any citizenship cessation order imposed by the court as part of sentencing would be subject to review or appeal by a higher court in the ordinary course.⁸² It notes that proposed subsection 36B(2) would provide that if an order made under subsection 36C(1) were overturned or quashed, and the time for appealing or applying for leave to appeal had expired without an appeal or application being lodged, or the decision was not appealable, then the person's citizenship is taken never to have ceased.⁸³ The availability of review is an important mechanism which would assist with the proportionality of the measure. However, it is noted that once a person's citizenship has ceased in the first instance, if their ex-citizen visa were cancelled on character grounds (as the statement of compatibility notes would be likely),⁸⁴ the person would be subject to mandatory immigration detention in the interim. Further, while the bill would also require the INSLM to review these provisions after the end of three years after they have commenced, and would permit the PJCIS to conduct a review only after an INSLM review had been completed, these reviews would appear to have no oversight value in respect of any orders made during the first three years of the operation of these measures. Further, the value of such reviews in relation to the human rights implications of these measures may be limited, depending on whether human rights considerations are raised when conducting them.

Concluding remarks

1.49 Citizenship cessation engages and limits a number of human rights. As the measure applies retrospectively and as citizenship cessation may amount to a punishment, there is a significant risk that the measure would not be compatible with the absolute prohibition on retrospective criminal punishment. In relation to the rights to equality and non-discrimination, rights of the child, liberty, protection of the family,

⁸⁰ Statement of compatibility, p. 36.

⁸¹ It is noted subsection 36C(6) would obligate the court to have regard to the best interests of the child, which could include consideration of the interests of a child whose parent is the subject of the application. However, this does not require the court to consider the adult's right to protection of the family.

⁸² Statement of compatibility, p. 28.

⁸³ Statement of compatibility, p. 28.

⁸⁴ Statement of compatibility, p. 33.

freedom of movement and privacy, while these rights may be subject to permissible limitations under international human rights law, it does not appear that all aspects of these measures are sufficiently certain such that people would understand the circumstances under which they may be subject to citizenship cessation, and the consequent restriction on the exercise of their rights. In addition, it has not been established that the measure is strictly necessary in order to protect the Australian community, noting that as it only applies to dual nationals it appears the threat presented by nationals without dual citizenship can be managed without ceasing their citizenship. As such, it is not possible to conclude that the measures pursue a legitimate objective for the purposes of international human rights law. In addition, no information has been provided to demonstrate that the measures are rationally connected to (that is, effective to achieve) the stated objectives, there being no reference to the operation of these measures in their various forms.

1.50 The fact that it would be the court determining whether to make a citizenship cessation order would serve as an important safeguard. However, it is not clear that ceasing a person's citizenship, with all the serious consequences for human rights that flow from such a decision, would be the least rights restrictive way to achieve the stated objectives, noting that there already exist a range of other methods to prosecute criminal conduct. It is also not clear that the measure contains sufficient safeguards, particularly to ensure adequate consideration is given to the best interests of the child and protection of the family. As such, it has not been established that providing for the cessation of citizenship is compatible with the prohibition against retrospective criminal punishment, the rights to equality and non-discrimination, rights of the child, liberty, protection of the family, freedom of movement or privacy.

1.51 In addition, this measure provides that protected information pursuant to the *Surveillance Devices Act 2004* may be used, recorded, communicated or published, or may be admitted in evidence, with respect to section 36C if it is necessary to do so for the purposes of the performance of a function or duty, or the exercise of a power, by a person, court or other body under, or in relation to a matter under specified circumstances.⁸⁵ This committee has considered that without a foundational assessment of the *Surveillance Devices Act 2004*, and the sufficiency of the safeguards provided therein, it is difficult to assess the full human rights implications of the conferral of powers under this Act (including in relation to the right to privacy).⁸⁶ In this regard, the statement of compatibility identifies that enabling the use of protected information under this Act engages the right to privacy but states only that 'these limitations on the right to privacy, are reasonable, necessary and proportionate to

⁸⁵ Schedule 1, Part 1, item 17, proposed paragraph 45(5)(iii).

⁸⁶ See, for example, Parliamentary Joint Committee on Human Rights, National Anti-Corruption Commission Bill 2022 National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022, [Report 6 of 2022](#) (24 November 2022) p. 83.

protect national security, public safety, address crime and terrorism'.⁸⁷ This is an insufficient statement, and provides no information to support it.

Committee view

1.52 The committee notes the stated objective of the legislation is to uphold the integrity of Australian citizenship and that since 2007, the Citizenship Act has provided that citizens may demonstrate that they have severed their bond of citizenship and repudiated their allegiance to Australia. The committee notes that this legislation responds to two High Court decisions that invalidated these existing citizenship cessation laws and ensures that the power to make a citizenship cessation order vests in the courts and is an exercise of judicial, rather than executive power. However, by permitting the cessation of Australian citizenship this bill engages and limits a number of human rights. The committee notes that this bill has now passed both Houses of Parliament, and that the speed of its passage meant that the committee was unable to provide its human rights scrutiny considerations while the bill was before the Parliament.

1.53 The committee notes that if the cessation of citizenship could be regarded as the imposition of a penalty under international human rights law, the absolute prohibition against retrospective criminal law would be engaged by this bill. On the basis of the above advice, as the bill permits the cessation of a person's citizenship for conduct prior to the commencement of this measure (which may, therefore impose an additional punishment to that originally applicable), the committee considers there is a risk this measure is not compatible with the absolute prohibition against retrospective criminal law.

1.54 The committee also notes that the measure engages and limits a number of other rights, including the right to equality and non-discrimination (as this measure would operate only in relation to persons who have, or may be eligible for, a second citizenship or nationality), the rights of children (as children aged 14 years and above may be subject to citizenship cessation or be dependent on someone subject to such an order), and the rights to liberty, protection of the family, freedom of movement and privacy (as a person who has their citizenship ceased would likely become an unlawful non-citizen and be subject to mandatory immigration detention and removal from Australia).

1.55 The committee notes that these human rights may be subject to permissible limitations, provided it is demonstrated that those limitations are prescribed by law, pursue a legitimate objective, are rationally connected to (that is, effective to achieve) that objective and are a proportionate means of achieving that objective.

1.56 The committee considers it has not been established that all aspects of this bill (notably when a person has 'repudiated their allegiance') would satisfy the 'prescribed

⁸⁷ Statement of compatibility, p. 36.

by law' criteria under international law (which requires laws to be sufficiently certain and accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights).

1.57 The committee further considers that questions remain as to whether the bill sought to achieve a legitimate objective as defined under international human rights law or if it was rationally connected to the stated objective. As to proportionality, the committee considers that the fact it is now a court determining whether a person's citizenship should be ceased may be a very important safeguard. In this regard, the committee notes that a decision to cease a person's citizenship would, in the context of sentencing procedures, be subject to appeal in the normal course. However, questions remain as to whether there are sufficient safeguards to ensure adequate protection of rights, in circumstances where the limitation on rights is likely to be significant. As such, the committee considers it has not been established that this bill is compatible with multiple human rights.

1.58 The committee draws its human rights concerns to the attention of the Attorney-General and the Parliament, but as the bill has now passed, makes no further comment.

1.59 The committee makes itself available to assist with the review of Independent National Security Legislation Monitor in three years' time and stands ready to assist to provide suggestions regarding proportionality, and notes had the committee had the opportunity to scrutinise this legislation before passing, it would have made suggestions regarding proportionality.

Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023 and related instrument⁸⁸

Purpose	<p>Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023: introduces new criminal offences for breach of certain visa conditions; introduces new powers for authorised officers; and introduces a new Community Safety Order scheme</p> <p>Crimes Legislation Amendment (Community Safety Orders and Other Measures) Regulations 2023 [F2023L01628]: prescribes certain matters relating to the Community Safety Order scheme</p>
Portfolio	Home Affairs
Bill introduced	<p>House of Representatives, introduced and passed on 27 November 2023. Introduced, amendments proposed and passed the Senate, 5 December 2023.</p> <p><i>Finally passed both Houses 6 December 2023</i></p>
Instrument registration	Registered 7 December 2023
Rights	Equality and non-discrimination; retrospective criminal laws; criminal process rights; liberty; work; education; freedom of association; freedom of movement; freedom of expression; freedom of assembly; protection of the family; freedom of religion; privacy

Background

1.60 On 16 November 2023, the Migration Amendment (Bridging Visa Conditions) Bill 2023 (the first bill) was introduced and passed both Houses of Parliament on the same day. It amended the *Migration Act 1958* (Migration Act) and the Migration Regulations 1994 to grant certain non-citizens for whom there is no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future a Subclass 070 (Bridging (Removal Pending)) visa subject to specified mandatory visa conditions, breach of which is a criminal offence carrying a mandatory minimum sentence.

⁸⁸ This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023 and related instrument, *Report 14 of 2023*; [2023] AUPJCHR 131. The related instrument refers to the Crimes Legislation Amendment (Community Safety Orders and Other Measures) Regulations 2023 [[F2023L01628](#)].

1.61 On 27 November 2023, the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 was introduced into the House of Representatives and passed that chamber the same day. At its introduction, it sought to ‘complement and reinforce’ the amendments introduced by the first bill.⁸⁹ In particular, it sought to amend the Migration Act to introduce new criminal offences with mandatory minimum sentences for breach of certain visa conditions and to empower authorised officers to do all things necessary or convenient in relation to monitoring devices and related monitoring equipment, and to collect, use or disclose to any other person personal information relating to the visa holder.

1.62 On 29 November, this committee sought a response from the Minister for Home Affairs in relation to both of those bills with respect to a range of human rights matters in *Report 13 of 2023*.⁹⁰

1.63 On 5 December, the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 was introduced into the Senate and passed the same day, subject to significant government amendments.⁹¹ This entry considers those amendments which were passed by the Senate.

1.64 On 7 December 2023, the Crimes Legislation Amendment (Community Safety Orders and Other Measures) Regulations 2023 was registered.⁹² This legislative instrument amends the Criminal Code Regulations 2019 to prescribe, for the purposes of section 394.44 of this measure, a number of persons and entities from whom the minister may request information, and to whom the minister may disclose information.

Preventative detention and supervision of serious non-citizen criminals

1.65 The Senate amendments to the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (as it then was called) (the measures) amended the *Criminal Code Act 1995* (Criminal Code) and other legislation, to introduce a scheme for the making of Community Safety Orders. The minister may apply to a Supreme Court for a community safety detention order (detention order),

⁸⁹ Explanatory memorandum (as first introduced), p. 1.

⁹⁰ Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Bill 2023, Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023, *Report 13 of 2023* (29 November 2023). Note that the Migration Amendment (Bridging Visa Conditions) Regulations 2023 [F2023L01629], registered 7 December 2023, made amendments regarding these conditions. The committee will consider these regulations when it receives a response to the questions raised in *Report 13 of 2023* in relation to these bills.

⁹¹ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, government amendments, [Sheet SY101]. See also [supplementary explanatory memorandum](#). This also included a change of name to the bill, to the Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023.

⁹² [F2023L01628]

which would cause a person to be detained in prison, or a community safety supervision order (supervision order), which would cause a person to be subject to a number of conditions, breach of which would be a criminal offence.⁹³

1.66 These measures operate in relation to adult non-citizens, who have been convicted of a serious violent or sexual offence (including a foreign offence), and only where there is 'no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future'.⁹⁴ An order may be made where a person is already in prison, or where they are in the community.⁹⁵

1.67 A serious violent or sexual offence means an offence against a law of the Commonwealth or a state or a territory that is punishable by imprisonment for life or for a period, or maximum period, of at least seven years.⁹⁶ A serious foreign violent or sexual offence means an offence against a law of a foreign country, or of part of a foreign country, that is punishable by imprisonment for life or for a period, or maximum period, of at least 7 years, and which would have constituted a serious violent or sexual offence had it occurred in Australia.⁹⁷

1.68 For a court to make a detention order, it must be satisfied 'to a high degree of probability' that the offender 'poses an unacceptable risk of committing a serious violent or sexual offence'. The court must also be satisfied that there is no less restrictive measure, such as a supervision order or visa conditions, available that would be effective in preventing the unacceptable risk. The effect of a detention order is that the person is committed to detention in prison while the order is in force.⁹⁸ The period can be up to three years and can be extended.⁹⁹

1.69 For a court to make a supervision order, it must be satisfied, on the balance of probabilities, that the offender poses an unacceptable risk of committing a serious

⁹³ Where the minister has applied for a community safety supervision order, the court may only determine the application by either making a supervision order or dismissing the application. By contrast, where an application is for a community safety detention order, the court may alternatively make a supervision order. See, Schedule 2, item 5, *Criminal Code Act 1995* (Criminal Code), section 395.10.

⁹⁴ Schedule 2, item 5, Criminal Code, subsection 395.5(1).

⁹⁵ Schedule 2, item 5, Criminal Code, section 395.6.

⁹⁶ Schedule 2, item 5, Criminal Code, section 395.2, definitions. The particular conduct constituting the offence must involve (or would involve), as the case requires: loss of a person's life or serious risk of loss of a person's life; serious personal injury or serious risk of serious personal injury; sexual assault; sexual assault involving a person under 16; the production, publication, possession, supply or sale of, or other dealing in, child abuse material; consenting to or procuring the employment of a child, or employing a child, in connection with child abuse material; or acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16.

⁹⁷ Schedule 2, item 5, Criminal Code, section 395.2, definitions.

⁹⁸ Schedule 2, item 5, Criminal Code, subsection 395.5(3).

⁹⁹ Schedule 2, item 5, Criminal code, subsections 395.12(5) and (6).

violent or sexual offence. The court may consider imposing a broad range of conditions on the person, including restrictions on the person's movement, residence, communication and use of technology, employment, and education. An order may be made if a person is already subject to a detention order.¹⁰⁰

1.70 Section 395.14 (as amended) provides that a court may impose *any* conditions under a supervision order that it is satisfied, and which it is satisfied the combined effect of which are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from serious harm by addressing the unacceptable risk of the offender committing a serious violent or sexual offence. This satisfaction is on the balance of probabilities. The conditions that the court may impose are not limited in any further way. Rather, the measure sets out that such conditions may prohibit or restrict specified conduct, or impose obligations on the individual; or impose restrictions, obligations or prohibitions in relation to classes of conduct. The measure also sets out an extensive and non-exhaustive list of the conditions which a court may impose, including conditions that the offender:

- not be present at specified areas or places or classes of areas or places;
- reside at specified premises, and remain there between specified times each day, for up to 12 hours per day;¹⁰¹
- not leave Australia or the state or territory in which they reside;
- not communicate or associate with specified individuals or classes of individuals;
- not access or use specified forms of telecommunications or other technology (including the internet);
- not engage in specified activities or specified work;
- not engage in specified education or training without permission;
- must undertake anything specified in the order or as directed by a specified authority relating to treatment, rehabilitation, intervention programs or activities, or psychological or psychiatric assessment or counselling.¹⁰²

1.71 In addition, it provides that the court may impose conditions under a supervision order relating to monitoring and enforcement, including requirements that the person: submit to testing regarding specified articles or substances; be subject to electronic monitoring (a condition that would enliven further requirements);¹⁰³ carry a specified mobile phone at all times and be available to answer it; attend places

¹⁰⁰ Schedule 2, item 5, Criminal Code, subsection 395.6(3).

¹⁰¹ Schedule 2, item 5, Criminal Code, section 395.14(4) specifies a condition must not require the offender to remain at specified premises for more than 12 hours within any 24 hours.

¹⁰² Schedule 2, item 5, Criminal Code, section 395.14.

¹⁰³ Schedule 2, item 5, Criminal Code, section 395.17.

and report at specified times; provide a schedule setting out proposed movements and comply with the schedule; allow police to enter premises and search them; and facilitate access to electronic equipment including by providing passwords.¹⁰⁴

1.72 The court must be satisfied that each of the conditions and the combined effect of the conditions is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk. The court may specify that certain conditions of a supervision order are exemption conditions, from which the person may apply to a specified authority for an exemption.¹⁰⁵ If the minister is satisfied that a condition of a supervision order is no longer reasonably necessary, or reasonably appropriate or adapted to protect the community from the relevant harm, the minister must apply to the court to vary the order by removing or varying the condition.¹⁰⁶ A supervision order may be varied by application or consent.¹⁰⁷

1.73 Breach of a condition of a supervision order is a criminal offence.¹⁰⁸ Further, where a supervision order includes a condition that requires monitoring of the person, and the person engages in conduct that ‘results in interference with, or disruption or loss of, a function of the monitoring device or any related monitoring equipment’ without a reasonable excuse, this would also be a criminal offence.¹⁰⁹ These offences are punishable by a mandatory minimum penalty of one year imprisonment, and imprisonment for up to five years, or 300 penalty units (currently \$156,500), or both.¹¹⁰

1.74 A detention order or supervision order may be made for a period of up to three years,¹¹¹ and must be subject to review within each 12 month period while it is in force.¹¹² The affected person may also apply to a court for review of the order.¹¹³ A

¹⁰⁴ Schedule 2, item 5, Criminal Code, subsection 395.14 (7)

¹⁰⁵ Schedule 2, item 5, Criminal Code, section 395.15.

¹⁰⁶ Schedule 2, item 5, Criminal Code, section 395.19.

¹⁰⁷ Schedule 2, item 5, Criminal Code, sections 395.20 and 395.21.

¹⁰⁸ Schedule 2, item 5, Criminal Code, section 395.38.

¹⁰⁹ Schedule 2, item 5, Criminal Code, section 395.39. Subsection 395.39(2) also creates an offence applying to a person who knows, or is reckless as to whether, a person is subject to a CSSO, and does something that results in interference with, or disruption or loss of, a function of the monitoring device or any related monitoring equipment. This offence is also punishable by a mandatory minimum penalty of one year imprisonment, and imprisonment for up to five years, or 300 penalty units (currently \$156,500), or both.

¹¹⁰ Schedule 2, item 5, Criminal Code, sections 395.38 and 395.40.

¹¹¹ Schedule 2, item 5, Criminal Code, subsections 395.12(5 and 395.13(5)).

¹¹² Schedule 2, item 5, Criminal Code, section 395.23.

¹¹³ Schedule 2, item 5, Criminal Code, section 395.24.

person may be subject to multiple successive orders,¹¹⁴ and the decision to make an order is appealable to a higher court.¹¹⁵

1.75 The measure also amends other legislation to provide for the monitoring of supervision order conditions. It amends the *Surveillance Devices Act 2004* (Surveillance Devices Act) to enable law enforcement agencies to obtain surveillance device or computer access warrants, or use less intrusive surveillance devices with no warrant, to monitor people subject to a supervision order. It also allows law enforcement agencies to obtain these warrants to determine whether to make an application for either a detention order or supervision order.¹¹⁶ The measure also amends the *Crimes Act 1914* (Crimes Act) to extend the operation of the monitoring warrant regime in Part IAAB to the monitoring of compliance with a supervision order.¹¹⁷ This regime specifies a range of search, monitoring and seizure powers available to police. It authorises police to search a person and their possessions, record fingerprints and take samples and seize items. It also permits police in searching premises to bring equipment and materials on to the premises, measure or test any ‘thing’ there, take photographs and make copies of documents, and operate electronic equipment.¹¹⁸ It amends the *Telecommunications (Interception and Access) Act 1979* (Telecommunications (Interception and Access) Act) to extend the application of the Act to permit monitoring of conditions of detention and supervision orders, including by allowing agencies to apply for telecommunications services warrants, named person warrants, and warrants for entry to premises.¹¹⁹ The measure also amends the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to provide that a condition imposed on a person by a supervision order, or an action relating to electronic monitoring, are not prescribed administrative actions for the purpose of the ASIO Act.¹²⁰

1.76 As this measure applies only to non-citizens, the measure also amends the *Migration Act 1958* (Migration Act) in relation to the interaction between Community

¹¹⁴ Schedule 2, item 5, Criminal Code, subsections 395.12(6) and 395.13(6).

¹¹⁵ Schedule 2, item 5, Criminal Code, section 395.36.

¹¹⁶ Schedule 2, items 6-82, amendments to the *Surveillance Devices Act 2004*.

¹¹⁷ Schedule 2, item 3, amendments to the *Crimes Act 1914*.

¹¹⁸ See, supplementary explanatory memorandum, pp. 12-18.

¹¹⁹ Schedule 2, items 83-133, amendments to the *Telecommunications (Interception and Access) Act 1979*.

¹²⁰ Schedule 2, item 2, amendments to the *Australian Security Intelligence Organisation Act 1979*. The supplementary explanatory memorandum states that this means that ASIO would not be permitted to pass relevant information to the Australian Federal Police for the purpose of the CSO scheme in the form of security assessments, but the information may be communicated under other provisions of the Act, including for example under subsection 18(3) of the ASIO Act if the Director-General is satisfied that such communication is required, see, pp. 11–12. If it is communicated using these other methods there would be no requirement to notify the affected person and provide them with review rights.

Safety Orders and conditions of Bridging (Pending Removal) Visas (BVRs), breach of which are also subject to serious criminal penalties, including mandatory minimum sentences of imprisonment.¹²¹ This gives effect to the Community Safety Orders scheme in relation to persons who were released from immigration detention as a result of the High Court of Australia decisions in *NZYQ*¹²² and who hold a BVR (*NZYQ* cohort). It provides that if a person is subject to a Community Safety Order, their visa ceases to be in effect while the order is in effect, but they are taken to have been granted a BVR immediately after the Community Safety Order ceases (unless they hold a criminal justice visa). A BVR that is taken to be granted to a non-citizen under these new measures must not be subject to a condition requiring the non-citizen to remain, between certain times of a day, at a particular address for the non-citizen for the day, or a condition requiring the non-citizen to wear a monitoring device. If a condition of a BVR taken to be granted is inconsistent, in whole or in part, with any of the conditions on an active supervision order, then the BVR is taken not to be subject to that condition to the extent of any inconsistency. Similarly, if a non-citizen is unable to comply with a condition of the BVR only because a detention order (other than one that is suspended) is in force in relation to the non-citizen at that time, the BVR is taken not to be subject to that condition.¹²³

1.77 The measure also amends the *Administrative Decisions (Judicial Review) Act 1977* to exclude decisions of the minister relating to these orders from judicial review under the Act.¹²⁴

International human rights legal advice

General comment

1.78 As this committee has previously noted in relation to similar orders,¹²⁵ the introduction of Community Safety Orders providing for either detention in prison or supervision in the community, which would be based on an assessment of a non-citizen's future risk of engaging in criminal conduct, is inherently problematic having regard to both international human rights law and Australia's domestic criminal law system. The imposition of an order, that will significantly curtail individual rights and freedoms, which is said to be made not on the basis of criminal conviction but on the basis of future risk of offending, is a serious measure for the state to take. While the proceedings for an order would appear to be characterised by the usual procedures and

¹²¹ See Schedule 1.

¹²² *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

¹²³ Schedule 1, item 1A, *Migration Act 1958*, section 76AA.

¹²⁴ Schedule 2, item 5, amendments relating to the *Administrative Decisions (Judicial Review) Act 1977*.

¹²⁵ Parliamentary Joint Committee on Human Rights, [Report 11 of 2020](#) (24 September 2020) p. 5-6 regarding the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020.

rules for civil proceedings,¹²⁶ the application of these indicia of judicial processes does not alter the fact that this scheme, like other comparable schemes relating to terrorism offences, fundamentally inverts basic assumptions of the criminal justice system: that persons may only be punished on the basis of offences, the existence of which has been proven beyond reasonable doubt. This measure provides that persons who have committed offences and have completed their sentences for those offences may continue to be subject to coercive and invasive supervisory measures, because they pose an 'unacceptable risk' of engaging in future specified criminal conduct. This inverts a fundamental assumption of democratic systems of criminal law: that a person should not be punished for a crime which they *may* commit in the future. The United Nations (UN) Human Rights Committee has strongly cautioned against punishing a person again after their initial punishment has concluded, based on an assessment of possible future risk:

The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts... While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.¹²⁷

Right to equality and non-discrimination

1.79 Providing for orders which can only be made in relation to non-citizens (who have no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future) engages and limits the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.¹²⁸ It protects against discrimination based on protected attributes (including

¹²⁶ That is, an application for such an order would need to be made to a court, evidence adduced, and a member of the judiciary satisfied as to the level of potential risk posed by the individual.

¹²⁷ *Fardon v Australia*, UN Human Rights Committee Communication No. 1629/2007 (2010), CCPR/C/98/D/1629/2007 [7.4(4)]. See also *Tillman v Australia*, UN Human Rights Committee Communication No. 1635/2007 (2010), CCPR/C/98/D/1635/2007.

¹²⁸ International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

national or social origin and race).¹²⁹ The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).¹³⁰ As this measure would only apply to non-citizens it would directly discriminate on the basis of nationality.¹³¹

1.80 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.¹³²

1.81 The statement of compatibility states that there is a risk that these measures are incompatible with the right to equality and non-discrimination in circumstances where an Australian citizen or unaffected non-citizen who has been convicted of a relevant offence would not be subjected to these orders.¹³³ It notes that comparable state and territory schemes exist which do apply to Australian citizens, and states that the existence of these comparable schemes demonstrates that such measures are necessary, reasonable and proportionate given the risks posed to community safety by sexual and/or violent non-citizen offenders within the NZYQ-affected cohort.¹³⁴ However, it also states that in circumstances where an application for a Community Safety Order was unsuccessful, the bridging visa (BVR) conditions applicable to the person (including mandatory conditions such as electronic monitoring and the imposition of a curfew) would remain in force unless and until the minister decides to remove them. It notes that similar conditions would not apply to a citizen offender the subject of a failed application for a supervision order under a state or territory scheme.

1.82 International case law indicates that treating non-nationals differently from nationals suspected of the same crimes, even for the purpose of protecting the community, is discriminatory where a person's status as a non-national has no

¹²⁹ The prohibited grounds 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.

¹³⁰ UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

¹³¹ It may also indirectly discriminate against persons on the basis of refugee status or lack of a nationality as it would apply only to those non-citizens who cannot be removed from Australia because they are owed protection obligations or are stateless. 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.

¹³² UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

¹³³ Supplementary statement of compatibility, p. 133.

¹³⁴ Supplementary statement of compatibility, p. 134.

connection to a threat posed.¹³⁵ In light of this, and as the statement of compatibility appears to concede that there is a risk that this measure is incompatible with the right to equality and non-discrimination, it has not been demonstrated that this measure is compatible with this right.

Criminal process rights and prohibition against retrospective criminal laws

1.83 The imposition of a Community Safety Order may engage the absolute prohibition against retrospective criminal laws and other criminal process rights. Under international human rights law, criminal process rights apply whenever a 'criminal penalty' is imposed on a person. The term 'criminal' has an autonomous meaning in human rights law, and as such, the fact that a detention or supervision order is not classified as a criminal penalty under Australian law is not determinative. In assessing whether a penalty may be considered 'criminal' in nature under international law, it is necessary to consider:

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

1.84 If the conditions were to be considered a 'criminal' penalty, this would mean that the relevant provisions must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights. This includes the right not to be punished twice for the same offence (noting that the Community Safety Orders can only apply to those previously convicted of serious crimes);¹³⁶ the right to be presumed innocent until proven guilty according to law, which requires that the case against a person be demonstrated on the criminal

¹³⁵ See, for example, *A (FC) and others (FC) v Secretary of State for the Home Department* [2004] UKHL 56 where the House of Lords held that detaining non-nationals suspected of terrorism (but not nationals suspected of terrorism) for the purposes of protecting the community was discriminatory. See Lord Bingham at [54]: 'The appellants were treated differently because of their nationality or immigration status. The comparison contended for by the Attorney General might be reasonable and justified in an immigration context, but cannot in my opinion be so in a security context, *since the threat presented by suspected international terrorists did not depend on their nationality or immigration status.*' [emphasis added].

¹³⁶ International Covenant on Civil and Political Rights, article 14(7).

standard of proof (beyond all reasonable doubt);¹³⁷ and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.¹³⁸ Further, article 15 of the International Covenant on Civil and Political Rights prohibits retrospective criminal laws. This requires that laws not impose criminal liability for acts that were not criminal offences at the time they were committed and that the law not impose greater penalties than those which would have been available at the time the acts were done. The prohibition against retrospective criminal laws is absolute and may never be subject to permissible limitations.

1.85 An individual may only be subject to a Community Safety Order where they have been convicted of a serious violent or sexual criminal offence. This would apply to persons who are currently incarcerated for such offences, although the proposed scheme was not in existence at the point at which they were convicted. Consequently, to the extent that this proposed scheme would apply to persons who have already been convicted and sentenced for relevant offences, imposing what could be considered an additional penalty, over and above the original sentence, this scheme could engage the absolute prohibition against retrospective criminal laws.

1.86 The statement of compatibility states that the imposition of a Community Safety Order is not a penalty for criminal offending, and that it has a protective rather than a punitive or retributive purpose.¹³⁹ It states that the decision of a court to impose such an order is based on an assessment of future risk, not punishment for past conduct, and that this proposed scheme consequently does not breach the prohibition against retrospective criminal laws.¹⁴⁰ However, the characterisation of a Community Safety Order as being non-punitive does not mean that such an order would not have a punitive effect, nor that it would not constitute a heavier penalty than the one that was applicable at the time the offence was committed.

1.87 Relevantly to an assessment of a detention order, the UN Human Rights Committee has advised that imprisonment is penal in character and can only be imposed on conviction for an offence in the same proceedings in which the offence is tried. It has stated clearly that re-detaining a person for the same conduct for which they were previously tried and punished falls within the prohibition of retrospective criminal punishment because the person has been subjected to a heavier penalty than

¹³⁷ 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'.

¹³⁸ International Covenant on Civil and Political Rights, article 14(1).

¹³⁹ Supplementary statement of compatibility, p. 141.

¹⁴⁰ Supplementary statement of compatibility pp. 141–142.

was applicable at the time when the criminal offence was committed.¹⁴¹ As such, a detention order would appear to breach the absolute prohibition against retrospective criminal punishment.

1.88 With respect to a supervision order, depending on the nature and extent of monitoring and supervisory conditions that were imposed on a person (for example, home detention for up to 12 hours), such an order may also risk breaching this right, if the conditions amounted to a penalty under international human rights law.

1.89 In relation to criminal process rights, while a court imposes the order (which ensures some criminal process rights are applied), noting that the standard of proof is not the criminal standard of 'beyond reasonable doubt' and that the penalty is imposed in addition to that imposed for the original conviction, it has not been demonstrated that the Community Safety Orders are compatible with the right to be presumed innocent until proven guilty (on the criminal standard of proof) or the right not to be punished twice for the same offence.

Community Safety Detention Orders

Right to liberty

1.90 A detention order would permit the re-detention in a prison of individuals who have already been convicted and sentenced for relevant criminal conduct. As such, this aspect of the measure engages and limits the right to liberty.

1.91 The right to liberty includes the right to be free from arbitrary detention.¹⁴² Forms of detention that do not arise from a criminal conviction may be permissible under international law, however the use of such detention must be carefully controlled. It must be reasonable, necessary and proportionate in all the circumstances to avoid being arbitrary, and thereby unlawful. Specifically, post-sentence preventative detention of persons who have been convicted of a criminal offence may be permissible under international human rights law in carefully circumscribed circumstances.¹⁴³ The UN Human Rights Committee has stated that:

to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The

¹⁴¹ *Fardon v Australia*, UN Human Rights Committee Communication No. 1629/2007 (2010), CCPR/C/98/D/1629/2007 [7.4 (2)].

¹⁴² International Covenant on Civil and Political Rights, article 9.

¹⁴³ See, UN Human Rights Committee, *General Comment 35: Article 9, Right to Liberty and Security of Person* (16 December 2014) [15], [21]. See, also UN Human Rights Committee, *General Comment 8: Article 9, Right to Liberty and Security of Persons* (30 June 1982).

conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society.¹⁴⁴

1.92 The statement of compatibility notes that the detention order scheme shares significant features with existing state-based continuing detention regimes.¹⁴⁵ Two of those schemes were the subject of individual complaints to the UN Human Rights Committee in 2010 in *Fardon v Australia*,¹⁴⁶ and *Tillman v Australia*.¹⁴⁷ In *Fardon v Australia*, the author of the complaint had been convicted of sex offences in 1989 and sentenced to 14 years imprisonment in Queensland. At the end of his sentence, the complainant was the subject of continuing detention from June 2003 to December 2006. In *Tillman v Australia* the complainant was convicted of sex offences in 1998 and sentenced to 10 years imprisonment in NSW. At the end of his sentence, the complainant was the subject of a series of interim detention orders, and finally a continuing detention order of one year (effectively for a period from May 2007 until July 2008).

1.93 In those two cases, the UN Human Rights Committee found that the continued detention was arbitrary, and in violation of the right to liberty. It identified several considerations relevant to this finding:

- as the complainants remained incarcerated under the same prison regime, the continued detention effectively amounted to a fresh term of imprisonment or new sentence. This was not permissible if a person has not been convicted of a new offence;
- the procedures for subjecting the complainants to continuing detention were civil in character, despite an effective penal sentence being imposed. The procedures therefore fell short of the minimum guarantees in criminal proceedings prescribed in article 14 of the International Covenant on Civil and Political Rights;
- the continued detention of offenders on the basis of future feared or predicted dangerousness was 'inherently problematic'. The application process for orders required the court to 'make a finding of fact on the suspected future behaviour of a past offender which may or may not

¹⁴⁴ See, for example, UN Human Rights Committee, *General Comment 35: Article 9, Right to Liberty and Security of Person* (16 December 2014) [21].

¹⁴⁵ The supplementary statement of compatibility notes that these schemes include the *Dangerous Prisoners (Sexual Offenders Act 2003 (QLD)* and *Crimes (High Risk Offenders) Act 2006 (NSW)*. See, p. 134.

¹⁴⁶ UN Human Rights Committee, (1629/2007) (18 March 2010).

¹⁴⁷ UN Human Rights Committee (1635/2007) (18 March 2010).

materialise.' The complainants' predicted future offending was based on past conduct, for which they had already served their sentences; and

- the state should have demonstrated that the complainant could not have been rehabilitated by means other than detention which were less rights restrictive.

1.94 These findings and the Australian government's formal response in relation to the similar schemes are not referred to in the statement of compatibility. However, the statement of compatibility sets out features in this measure which it says are designed to ensure that detention is not arbitrary.¹⁴⁸ It states that a person detained under a detention order must not be held in the same area or unit of the prison as those prisoners who are serving criminal sentences.¹⁴⁹ It states that the person must be 'treated in a way that is appropriate to the offender's status as a person who is not serving a sentence of imprisonment' subject to reasonable requirements necessary to maintain security or good order, safe custody, and the safety and protection of the community. The requirement that the person must not be held in the same area of the prison as other prisoners serving custodial sentences appears to respond to one of the bases on which Australia's state-level regimes were found to be incompatible with the right to liberty. However, persons subject to a detention order are nevertheless detained in prison. In addition, the measure does permit the detention of the person in the same area or unit of a prison as people serving a custodial sentence in a range of circumstances, including where it necessary for the security or good order of the prison or necessary for the safety and protection of the community.¹⁵⁰ It is not clear whether this requirement could encapsulate, for example, circumstances in which a particular prison does not have the physical facilities or staffing resources to permit the detention of a person under a detention order in a different unit or area.

1.95 The statement of compatibility further notes that to make a detention order, a court must be satisfied 'to a high degree of probability' that the person poses an unacceptable risk and must have regard to evidence provided by an independent expert in making this assessment. However, the UN Human Rights Committee found that because the procedures for subjecting the complainants in *Fardon v Australia*,¹⁵¹ and *Tillman v Australia*¹⁵² to continuing detention were civil in character, despite an effective penal sentence being imposed, they therefore fell short of the minimum guarantees in criminal proceedings. While the standard here is higher than 'on the balance of probabilities' (being satisfaction 'to a high degree of probability') it still falls below the criminal standard of satisfaction 'beyond all reasonable doubt'.

¹⁴⁸ Supplementary statement of compatibility pp. 130–131.

¹⁴⁹ Schedule 2, item 5, Criminal Code, section 395.7.

¹⁵⁰ Schedule 2, item 5, Criminal Code, section 395.7.

¹⁵¹ UN Human Rights Committee, (1629/2007) (18 March 2010).

¹⁵² UN Human Rights Committee (1635/2007) (18 March 2010).

1.96 Further, a court may only make a detention order where satisfied that there is no less rights restrictive measure that would be effective to prevent the unacceptable risk. In this regard, the statement of compatibility notes that a court may impose a supervision order rather than a detention order. The capacity for the court to make a supervision order as opposed to a detention order may assist with the proportionality of the detention order measure (although noting below the numerous human rights engaged by the supervision order scheme).

1.97 Further, the assessment of 'unacceptable risk' is crucial in determining whether the court is empowered to make a detention order. As the risk being assessed relates to future conduct there are inherent uncertainties in what the court is being asked to determine, akin to the concerns in *Fardon v Australia* and *Tillman v Australia*. The measure provides for the court to obtain expert evidence in reaching a determination in relation to risk, though given the nature of the task, inherent uncertainties with risk assessments remain. A significant factor on which the UN Human Rights Committee considered that the state-based regimes were incompatible with the right to be free from arbitrary detention was that the continued detention of offenders on the basis of future feared or predicted dangerousness was 'inherently problematic' and required the court to 'make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise'.¹⁵³ This was notwithstanding that courts under these regimes have access to expert evidence as will be the case under this scheme.

1.98 Finally, the UN Human Rights Committee has stated that, to avoid arbitrariness, additional detention must be aimed at the detainee's rehabilitation and reintegration into society. However, the broader legislative changes applicable to this cohort of persons, creating strict visa conditions, was said to be for the dual purpose of supporting community safety and ensuring the removal of these people from Australia once removal becomes reasonably practicable.¹⁵⁴ It therefore does not appear that the detention is aimed at the detainee's rehabilitation and reintegration into Australian society.

1.99 Having regard to the relevant international human rights law jurisprudence, the detention order powers appear incompatible with the right not to be arbitrarily detained.

Community Safety Supervision Orders

Multiple rights

¹⁵³ *Fardon v Australia*, UN Human Rights Committee Communication No. 1629/2007 (2010), CCPR/C/98/D/1629/2007 [7.4 (4)].

¹⁵⁴ Migration Amendment (Bridging Visa Conditions) Bill 2023, statement of compatibility p. 30 and Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, original statement of compatibility p. 18.

1.100 A court may impose any conditions on a person subject to a supervision order that it is satisfied, and which it is satisfied the combined effect of which, on the balance of probabilities, are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from serious harm by addressing the unacceptable risk of the offender committing a serious violent or sexual offence. Consequently, a supervision order may engage and limit a wide range of human rights, including the:

- **right to privacy**, which prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home; and protects the right to personal autonomy and physical and psychological integrity.¹⁵⁵ A supervision order would involve an individual being subject to monitoring, and being restricted in the activities which they may undertake and the places which they may go. A court may order that a person must participate in treatment or rehabilitation undertake psychological or psychiatric assessment or counselling. In addition, the imposition of a supervision order may trigger a range of other monitoring powers, which are outlined above.
- **right to freedom of movement**, which includes the right to move freely both within one's country, and to travel to other countries.¹⁵⁶ A supervision order could require that a person not be present at specified places or classes of place; that they reside at specified premises; that they remain at a specified premises for up to 12 hours per day; that they not leave Australia or their home state or territory; and that they surrender Australian or foreign travel documents.
- **rights to freedom of expression, assembly and association**, which protect the right to all forms of expression and the means of their dissemination (including spoken, written and sign language and non-verbal expression), the right of all persons to group together voluntarily for a common goal and to form and join an association, including by gathering as a group.¹⁵⁷ A supervision order may limit the persons or classes of person with whom a person can communicate or associate (including by limiting or prohibiting the use of social media or certain forms of communication).
- **right to work**, which provides that everyone must be able to freely accept or choose their work and includes a right not to be unfairly deprived of work.¹⁵⁸ A supervision order may limit the type of work (including voluntary work) which a person is permitted to undertake.

¹⁵⁵ International Covenant on Civil and Political Rights, article 17.

¹⁵⁶ International Covenant on Civil and Political Rights, article 12.

¹⁵⁷ International Covenant on Civil and Political Rights, articles 19–22.

¹⁵⁸ International Covenant on Economic, Social and Cultural Rights, articles 6–7.

- **right to education**, which provides that education should be accessible to all.¹⁵⁹ A supervision order may prohibit a person from engaging in any training or education without the prior permission of a specified authority.
- **right to protection of the family**, which requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.¹⁶⁰ As a supervision order may prohibit a person from associating with certain persons, and prohibit them from travelling, such conditions could have the effect of interfering with that person's family life, and their ability to associate with their family members.
- **right to freedom of religion**,¹⁶¹ which includes the right to demonstrate or manifest religious or other beliefs, by way of worship, observance, practice and teaching.¹⁶² As a supervision order may prohibit a person from being present at specified areas or places (or classes of area or place), or from associating with specified individuals (or classes of persons), such conditions may have the effect of restricting a person's capacity to manifest their religious beliefs (for example, by attending religious worship).

1.101 Most of these rights may be subject to permissible limitations. However, in order for a limitation to be permissible under international human rights law, it must be prescribed by law, pursue a legitimate objective, be rationally connected to (that is, effective to achieve) that objective and be a proportionate means of achieving that objective.

Prescribed by law

1.102 The requirement that interferences with rights must be prescribed by law includes the condition that laws must satisfy the 'quality of law' test. This means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.¹⁶³

1.103 In this respect, a court's assessment of whether there is an 'unacceptable risk' of a person committing a future serious violent or sexual offence in the future raises some questions as to whether this would satisfy the quality of law test. It is not clear what would constitute the difference between an acceptable risk that a person may

¹⁵⁹ International Covenant on Economic, Social and Cultural Rights, article 13.

¹⁶⁰ International Covenant on Economic, Social and Cultural Rights, article 10(1).

¹⁶¹ International Covenant on Civil and Political Rights, article 18.

¹⁶² UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [4].

¹⁶³ *Pinkney v Canada*, UN Human Rights Communication No.27/1977 (1981) [34].

commit a serious terrorism offence in the future, and an unacceptable risk. The explanatory materials do not address the intended meaning of this term.

1.104 The 'unacceptable risk' test currently operates in other areas of law. For example, the *Bail Act 2013* (NSW) provides that a bail authority may refuse to grant bail if satisfied that there is an unacceptable risk that the person will engage in specified conduct if released, including committing a serious offence.¹⁶⁴ In this context, courts appear to have interpreted the unacceptable risk test to require an assessment of whether the risks associated with the release of a person can be mitigated by the imposition of strict conditions.¹⁶⁵ The term has also been used by courts in assessing a risk of child abuse by parents, and corresponding decisions around parental access to children, although the High Court in particular has not offered a precise definition of the term, instead cautioning against 'striving for a greater degree of definition than the subject is capable of yielding'.¹⁶⁶ These have some use in terms of understanding how a court may interpret the phrase in this context, as do the matters the court must have regard to when determining whether to make such an order. However, for the purposes of international human rights law, the quality of law test requires that any measures which interfere with human rights must be sufficiently certain and accessible, such that people can understand the circumstances under which authorities may restrict the exercise of their rights. In this regard, some questions remain as to whether the distinction between an 'acceptable' risk, as opposed to an 'unacceptable risk' of engaging in future conduct, is sufficiently clear such that an individual could adduce evidence to a court demonstrating that they do not pose an unacceptable risk and understand where that threshold lies.

Legitimate objective

1.105 In addition, any limitation on a right must be shown to be aimed at achieving a legitimate objective. A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right.

1.106 The statement of compatibility states that these measures are aimed at protecting community safety.¹⁶⁷ Protecting community safety generally would constitute a legitimate objective under international human rights law. However, this measure operates only in relation to select non-citizens who have committed certain serious offences – it does not apply to citizens who have committed the same type of offences. In this regard, the statement of compatibility does not explain why non-citizens pose more of a risk than citizens who have committed the same offences. If the threat posed to the Australian community by citizens can be managed *without*

¹⁶⁴ *Bail Act 2013* (NSW), section 19.

¹⁶⁵ See, *Rakielbakhour v DPP* [2020] NSWSC 323 (31 March 2020) [21] per Hamill J.

¹⁶⁶ See, *M v M* [1988] HCA 68 [25].

¹⁶⁷ Supplementary statement of compatibility, p. 133.

subjecting them to these supervision orders, it is unclear why similar measures could not adequately address the threat posed by non-citizens.¹⁶⁸ As such, it has not been established that this measure seeks to achieve an issue of public or social concern that is pressing and substantial enough to warrant limiting these rights.

Rational connection

1.107 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought.

1.108 A relevant consideration in this regard is whether, and to what extent, the imposition of a supervision order would be effective to protect the community from a risk of harm. While detaining a person in prison or subjecting them to extensive supervisory conditions would appear likely to be effective to control a person's conduct (including by isolating them from the community in the case of detention), an order could arguably only be effective if a court was able to accurately determine whether an individual in question did, in fact, pose a risk of engaging in relevant conduct in the future. In this regard, if an application for a supervision is made, the court may appoint an expert (meaning a medical practitioner, psychiatrist, psychologist or other expert 'who is competent to assess the risk of a serious offender committing a serious violent or sexual offence')¹⁶⁹ to conduct an assessment of this risk, and provide a report to this effect.¹⁷⁰ Such a report may include information about a person's prior patterns of behaviour, efforts the person has made to participate in rehabilitative programs, and any other relevant background about the person, all of which may be relevant to a prediction of future behaviour. However, the explanatory materials do not provide evidence of the accuracy of such expert assessments in predicting a person's potential future risk of engaging in future serious violent or sexual conduct; nor do they identify how such competence is established, and what methodologies an expert could use in making an assessment. In this regard it is noteworthy that the accuracy of existing tools for predicting a person's likelihood for

¹⁶⁸ See, for example, *A (FC) and others (FC) v Secretary of State for the Home Department* [2004] UKHL 56 where the House of Lords held that detaining non-nationals suspected of terrorism (but not nationals suspected of terrorism) for the purposes of protecting the community was discriminatory. See Lord Bingham at [54]: 'The appellants were treated differently because of their nationality or immigration status. The comparison contended for by the Attorney General might be reasonable and justified in an immigration context, but cannot in my opinion be so in a security context, *since the threat presented by suspected international terrorists did not depend on their nationality or immigration status.*' [emphasis added].

¹⁶⁹ Schedule 2, item 5, Criminal Code, section 395.2 (definitions).

¹⁷⁰ Schedule 2, item 5, Criminal Code, section 395.9.

engaging in future violence have been heavily criticised.¹⁷¹ As outlined above at paragraph [1.97], the UN Human Rights Committee has described the capacity to predict future criminal conduct, even by reference to expert advice or opinion, as being inherently problematic.

1.109 Further, there may be significant challenges in retrospectively assessing the accuracy of expert assessments, noting that it may not be possible to distinguish between persons who were subject to a supervision order and who would never have engaged in the relevant criminal conduct, and those persons who would have engaged in such conduct *but for* the imposition of a supervision order.

Proportionality

1.110 In assessing the proportionality of a proposed limit on a human right, it is necessary to consider whether the proposed limitation is sufficiently curtailed. This requires consideration of any safeguards, the availability of independent oversight and external review, and the capacity for a proposed scheme to operate flexibly and treat different cases differently. In this regard, there are questions as to whether the proposed supervision order scheme would be proportionate to the objectives sought to be achieved.

1.111 The bill proposes that, in applying for a supervision order, the minister would be required to satisfy only the lower 'balance of probabilities' standard of proof, in contrast to the 'high degree of probability' standard required in the case of a detention order. The explanatory memorandum states that this reflects the less restrictive nature of a supervision order (as compared with a detention order).¹⁷² However, while a supervision order does not provide for detention in a prison, the impact on human rights could be quite considerable, depending on the conditions imposed. The fact that the conditions which the court can impose must be those that the court is satisfied are appropriate and adapted for the purpose of protecting the community from the unacceptable risk of a serious violent or sexual offence, suggests that the conditions may be stringent, in order for them to fulfil the stated purpose. In addition, there is no apparent limit on the number of conditions which could be imposed under a single order (noting, however, that the court can only impose conditions which it is satisfied are appropriate and adapted for the purpose of protecting the community). It is not clear why it is appropriate that potentially extensive and stringent conditions should be able to be imposed only on the basis that it is more likely than not that an offender would pose an unacceptable risk, rather than that there is a high degree of probability that they would.

1.112 In addition to the potentially significant number and types of conditions which could be imposed under an extended supervision order, it appears there is no limit to

¹⁷¹ See Dr Emily Corner and Dr Helen Taylor, *Testing the Reliability, Validity, and Equity of Terrorism Risk Assessment Instruments*, Australian National University (2020).

¹⁷² Supplementary explanatory memorandum, p. 38.

the number of successive supervision orders which may be made. Rather, subsection 395.13(6) confirms that a court may make a supervision order (or detention order) in relation to a person which begins to be in force immediately after a previous order ceases to be in force. Consequently, it would appear that a person could feasibly be subject to successive supervision orders indefinitely, and the amount of time a person may be subject to a supervision order could exceed the time spent incarcerated pursuant to the original sentence for the relevant offence.

1.113 In relation to safeguards, a court could specify that some conditions included in a supervision order are ones from which the individual could apply for an exemption from a specified authority. This would enable the individual to then apply in writing to a specified authority for an exemption,¹⁷³ providing a reason for the request. The specified authority may grant or refuse the exemption, including granting the exemption subject to reasonable directions. The explanatory memorandum explains that this is intended to ensure that supervision orders are sufficiently flexible to manage a person in the community.¹⁷⁴ It provides the following example of where such an exemption may be made:

[A supervision order] may prohibit an offender from going to a particular location, such as the area around an airport. If the Court had made that an exemption condition, then the offender could apply to the person or persons specified in the order for an exemption to attend that location at a particular time for a particular reason, such as a medical appointment. The specified authority could approve the exemption subject to certain conditions, such as identifying a specific period of time in which the offender may be present in that location, or requiring the offender to make themselves known to a particular person at the relevant building before attending the appointment.¹⁷⁵

1.114 This may provide the capacity to treat different cases differently and assists with the proportionality of the measure. However, it is noted that having to apply to a specified authority (such as a police officer) to do specified things (such as attend medical appointments) itself limits a person's right to privacy, with the possibility of many day-to-day, and highly personal, decisions needing to be approved by another authority. The measure provides no guidance on when, and on what criteria, a specified authority may grant or refuse the exemption. As such, the specified authority is given an absolute discretion to refuse the exemption. There is also no timeframe by which a decision must be made, and the measure does not require the specified

¹⁷³ A 'specified authority' means a person or class of persons specified in an order, a police officer or class of police officers, a person or class of persons involved in electronically monitoring the person, or any other person or class of persons. See, Schedule 2, item 5, section 395.2 (definitions).

¹⁷⁴ Supplementary explanatory memorandum, p. 44.

¹⁷⁵ Supplementary explanatory memorandum, p. 44.

authority to provide reasons for a decision. Rather, as the explanatory memorandum notes, the only remedy which a person could seek would be seeking a variation of the condition through the courts where an exemption is refused.¹⁷⁶ Consequently, questions remain as to whether this would operate effectively as a safeguard in practice.

1.115 As to the presence of other safeguards, a person would be entitled to reasons for a decision made with respect to a supervision order,¹⁷⁷ and such a decision would be appealable.¹⁷⁸ In addition, the subject of a supervision order, or their legal representative, or the minister (or their legal representative) could apply to the court for variation of an order.¹⁷⁹ The capacity to appeal a supervision order, or seek to vary a condition, may have the capacity to serve as a safeguard. However, the measure specifies that the minister is not required to provide information to the person if it relates to national security, or because of a public interest immunity. Restricting access to this information may, depending on the individual case, limit the person's capacity to seek an appeal or variation of a supervision order.

1.116 Lastly, some questions do remain as to how this scheme will interact with parole provisions. The explanatory materials state that this measure applies to the cohort of persons affected by the NZYQ decision (namely, persons who were held in immigration detention and have subsequently been released). However, it would also apply to non-citizens who are currently in prison and who may then be subject to an assessment of whether they may be removed from Australia for immigration reasons. If a person currently in prison serving a sentence for a serious violent or sexual assault was subject to these provisions, it is relevant that in many ways the type of conditions that could be imposed on a person subject to a supervision order may be similar to those imposed on a person subject to parole. Parole allows an offender to serve part of their already ordered sentence of imprisonment in the community, and its time span is fixed to that sentence, rather than being in addition to the sentence imposed and of potentially unlimited time duration. This raises the question of why and how the power to release an offender on parole during the final quarter of their sentence subject to strict conditions (a less rights restrictive alternative to imposing a post-sentence supervision order) would not be effective to achieve the objective of protecting the public from an unacceptable risk to the community. Indeed, the Crimes Act states that the purposes of parole are to rehabilitate and reintegrate the offender, and to protect the community.¹⁸⁰

¹⁷⁶ Supplementary explanatory memorandum, p. 44.

¹⁷⁷ Schedule 2, item 5, Criminal Code, section 395.35.

¹⁷⁸ Schedule 2, item 5, Criminal Code, section 395.36.

¹⁷⁹ Schedule 2, item 5, Criminal Code, section 395.25.

¹⁸⁰ *Crimes Act 1914*, section 194KA.

Surveillance powers

Multiple rights

1.117 These measures enable law enforcement agencies to obtain surveillance device or computer access warrants, or use less intrusive surveillance devices with no warrant, to monitor people subject to orders, and to permit monitoring of conditions, including by allowing agencies to apply for telecommunications services warrants, named person warrants, and warrants for entry to premises. As the legislation establishing these powers was enacted prior the commencement of the *Human Rights (Parliamentary Scrutiny) Act 2011*, it has not been subject to a foundational human rights assessment. As such, it is not possible to determine whether any limitation of human rights stemming from the application of these laws would be permissible.

Information sharing

Right to privacy

1.118 Section 395.44 of the measure provides that the minister may, by legislative instrument, prescribe persons from whom the minister may request information that they reasonably believe to be relevant to the administration or execution of the Community Safety Order scheme, and to whom the minister may disclose information.¹⁸¹ This would apply despite any other law of the Commonwealth, a state or territory (whether written or unwritten), so overrides any existing privacy legislation.¹⁸² On 7 December 2023 an instrument was registered to this effect.¹⁸³ It prescribes a very broad range of persons with whom information may be shared, including: police; corrections (including prison medical, psychological and psychiatric services), justice or parole employees or service providers; the Director-General and Deputy Director-General of the Australian Security Intelligence Organisation; and certain Australian Public Service employees.¹⁸⁴ In addition, the minister would be permitted to share information with, and obtain information from, a person who provides services for, or on behalf of, the Commonwealth in relation to a person who

¹⁸¹ Schedule 2, item 5, Criminal Code, section 395.44.

¹⁸² Schedule 2, item 5, Criminal Code, subsections 395.44(3) and (5).

¹⁸³ Crimes Legislation Amendment (Community Safety Orders and Other Measures) Regulations 2023 [[F2023L01628](#)].

¹⁸⁴ Crimes Legislation Amendment (Community Safety Orders and Other Measures) Regulations 2023, item 5, section 20B also provides that information may be shared with: the Director of Public Prosecutions or their staff; an authorised officer or delegate under Division 9A of Part IB of the *Crimes Act 1914*; a person appointed as a relevant expert for the purposes of a community safety order application; and a person who is engaged as a consultant or contractor to perform services for the department (or a person who is engaged or employed by such a contractor or consultant).

is subject to a Community Safety Order, or where the minister has made, or is considering making, an application for such an order in relation to the person.¹⁸⁵

1.119 The statement of compatibility accompanying this legislative instrument identifies that this engages and limits the right to privacy.¹⁸⁶ It states that the information subject to this measure would be limited to disclosures that are necessary to achieve the purpose of ensuring the protection of the community and eligible offenders, through efficient information sharing and early risk identification. It states that disclosures may occur where a person has attended psychology sessions, and the psychologist (a prescribed person) responds to a request for information from the relevant minister, to assist in the consideration of a community safety order review.

1.120 Permitting the sharing of information with this broad range of persons may have a significant limit on the right to privacy, noting in particular that information being shared may be highly personal (as in the example set out in the statement of compatibility regarding attendances with a psychologist). As set out above, it is not clear that this measure generally is directed towards a legitimate objective for the purposes of international human rights law as it is not clear that there is a relevant pressing and substantial concern. With respect to this legislative instrument, the statement of compatibility does not identify why each prescribed person is required to be prescribed, nor does it outline the particular kinds of information that may be shared. While it does assist the proportionality of the measure that the minister may only request, not require, that information be disclosed from a prescribed person, there may nevertheless be a risk that a significant amount of personal information is shared. This is particularly concerning noting that these information sharing powers apply despite any other law, so normal privacy protections do not apply. As such this information sharing power in the bill, and the range of persons set out in the legislative instrument, risks impermissibly limiting the right to privacy.

Concluding remarks

1.121 Given the breadth of potential conditions which could be imposed under a Community Safety Order, and the absence of any limits on the number of successive orders which could be made, these orders raise a number of human rights concerns.

1.122 As the measure applies only to non-citizens (and only to those who cannot be removed from Australia) it limits the right to equality and non-discrimination and it has not been established that the differential treatment is based on reasonable and objective criteria such that it is compatible with this right.

1.123 The detention orders, and potentially the supervision orders (if the cumulative effect of the conditions was particularly severe), would appear to amount to a 'penalty' under international human rights law. As this applies to people who have

¹⁸⁵ Crimes Legislation Amendment (Community Safety Orders and Other Measures) Regulations 2023, item 5, paragraph 20B(e).

¹⁸⁶ Statement of compatibility, p. 25.

already been convicted and punished for past criminal conduct, this would appear to breach the absolute prohibition on retrospective criminal penalties and impermissibly limit a number of criminal process rights.

1.124 The detention orders also limit the right not to be arbitrarily detained, and noting relevant international law jurisprudence, this measure is likely to be incompatible with the right to liberty. The supervision orders also engage and limit numerous other human rights, including the rights to privacy, work, freedom of movement and association, assembly, expression, education, religion, and protection of the family. As to whether these limits may be permissible under international human rights law, it is not clear that the distinction between an 'acceptable' risk and an 'unacceptable risk' of engaging in conduct is sufficiently clear that an individual could adduce evidence demonstrating that they do not pose an unacceptable risk, and understand where that threshold lies. As such, it is not clear that these provisions satisfy the 'quality of law' test.

1.125 As to the objective of the measure, seeking to address any risk of future harm to the community would likely constitute a legitimate objective, but it has not been established that there is a pressing or substantial concern relating to a risk of harm to the community posed by persons affected by this measure, noting that any risk posed by citizens appears to be managed without the imposition of such orders. It also remains unclear whether this measure would be rationally connected to (that is, effective to achieve) its stated objective of protecting community safety, noting that the capacity to predict future criminal conduct, even by reference to expert advice or opinion, is inherently problematic.

1.126 Finally, it is not clear that these measures are accompanied by sufficient safeguards such that this would constitute a proportionate limit on these human rights, noting that a court would be empowered to impose any conditions on a person where it considers they have satisfied the statutory threshold necessary. As such, it has not been established that community safety orders are compatible with multiple human rights.

1.127 The amendments relating to surveillance powers limit multiple human rights, and without a foundational human rights assessment of the enabling legislation it is not possible to conclude as to whether any limitation of human rights stemming from the application of these laws would be a permissible limitation on rights (particularly the right to privacy). Finally, the information sharing powers in the bill and related legislative instrument allow the sharing of a wide range of personal information without justifying the necessity of sharing information with each person authorised by the legislation and apply despite any other law, meaning no existing privacy protections apply. As such, there is a risk that these powers impermissibly limit the right to privacy.

Committee view

1.128 The committee notes this legislation is one of several measures that respond to a High Court decision which requires the release into the community of certain non-citizens, including individuals with serious criminal histories. The committee notes the intention behind the legislation to complement and strengthen existing safeguards to appropriately manage these individuals to meet the objective of community safety. The committee notes that members of this cohort have been granted bridging visas subject to mandatory conditions, non-compliance with which is a criminal offence carrying a mandatory minimum sentence of one year imprisonment.¹⁸⁷ The committee notes that the majority of non-citizens whose visas are revoked on character grounds are ultimately deported or removed from Australia and return to their place of citizenship, and that this measure applies to a small cohort of people who are unable to be detained as there is no reasonable prospect of their return.

1.129 The committee notes that these measures permit the minister to apply to a court for a community safety detention order, which would cause a person to be detained in prison, or community safety supervision order, which would cause a person to be subject to a number of conditions, breach of which would be a criminal offence. The committee notes that these two orders effectively replicate existing counter-terrorism orders (extended supervision orders, control orders and continuing detention orders) about which the committee has made numerous comments in previous years.¹⁸⁸

1.130 The committee notes that these measures were introduced as a government amendment to the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (now Act) in the Senate on 5 December 2023. While the committee acknowledges that urgent bills and wholesale amendments to them are sometimes necessary, this meant the committee was unable to scrutinise these amendments for compatibility with human rights prior to the bill's passage.

1.131 The committee considers these measures engage and limit multiple human rights. The committee considers that the scheme generally limits the right to equality and non-discrimination, as it applies only to non-citizens and only to those who cannot be removed from Australia. While discrimination may be permissible in certain

¹⁸⁷ The committee is awaiting further information in relation to these provisions, see Parliamentary Joint Committee on Human Rights, [Report 13 of 2023](#) (29 November 2023) pp. 12–42.

¹⁸⁸ See, Parliamentary Joint Committee on Human Rights, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, [Report 7 of 2016](#) (11 October 2016), pp. 12–20, [Report 8 of 2016](#) (9 November 2016) pp. 16–26, and [Report 2 of 2017](#) (21 March 2017), pp. 59–75; Counter-Terrorism Legislation Amendment Bill (No. 1) 2018, [Report 6 of 2018](#) (19 June 2018) pp. 2–29 and [Report 10 of 2018](#) (18 September 2018) pp. 21–53; Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, [Report 11 of 2020](#) (24 September 2020), pp. 2–29 and [Report 13 of 2020](#) (13 November 2020), pp. 19–62.

circumstances, the committee notes that the statement of compatibility acknowledges that there is a risk that these measures are incompatible with the right to equality and non-discrimination, and considers it has not been established that these measures are compatible with this right.

1.132 The committee also considers that, in relation to those measures which may be regarded as applying an additional penalty under international human rights law (in particular, detention but potentially also some conditions under a supervision order) to people who have already been convicted and sentenced for past criminal conduct, this risks breaching the absolute prohibition on retrospective criminal penalties and limits criminal process rights. The committee notes that the United Nations Human Rights Committee has, in cases involving Australia, held that continued detention on the basis of predicted future criminal conduct is incompatible with the prohibition against retrospective criminal law, describing the concept of feared or predicted dangerousness as inherently problematic.¹⁸⁹

1.133 The committee notes that detention orders limit the right not to be arbitrarily detained. The committee notes that the United Nations Human Rights Committee has previously found that substantially similar existing preventative detention schemes in Queensland and New South Wales were incompatible with the right to be free from arbitrary detention and lacked sufficient safeguards. The committee notes that the court would need to be satisfied to a high degree of probability that an order was necessary, and that these orders would be appealable and subject to review, which may address some aspects of whether a continuing detention order is necessary, reasonable and proportionate in an individual case. However, the committee considers that, as it has previously concluded in relation to the existing continuing detention orders scheme, this measure is likely to be incompatible with the right to liberty under international human rights law, noting the international law jurisprudence to this effect.

1.134 The committee considers that supervision orders also engage and limit numerous other human rights, including the rights to privacy, work, freedom of movement and association, assembly, expression, education, religion, and protection of the family. The committee notes that a court could impose any conditions on a person that it is satisfied on the balance of probabilities (that is, more likely than not) are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of the offender committing a serious violent or sexual offence.

1.135 As to whether these limits may be permissible under international human rights law, the committee considers that questions remain as to whether the distinction between an 'acceptable' risk and an 'unacceptable risk' of engaging in conduct is

¹⁸⁹ *Fardon v Australia*, UN Human Rights Committee Communication No. 1629/2007 (2010), CCPR/C/98/D/1629/2007 [7.4 (2) and (4)]. See also *Tillman v Australia*, UN Human Rights Committee Communication No. 1635/2007 (2010), CCPR/C/98/D/1635/2007.

sufficiently clear that an individual could adduce evidence to a court demonstrating that they do not pose an unacceptable risk, and understand where that threshold lies.

1.136 The committee considers that the measures seek to achieve the legitimate objective of seeking to address any risk of future harm to the community posed by persons convicted of serious violent or sexual offences. The committee considers protection of community safety to be an extremely important objective. The committee notes the public reporting of alleged serious matters relating to some members of this cohort of people, and understands the objective of wanting to keep the community safe, however the committee understands the inherent difficulty in predicting future criminal conduct, including by reference to expert opinion. The committee also considers that some questions remain as to whether these measures are accompanied by sufficient safeguards such that this would constitute a proportionate limit on these human rights, noting that a court would be empowered to impose any conditions on a person where it considers they have satisfied the statutory threshold necessary. As such, the committee considers it has not been established that these amendments are compatible with multiple human rights.

1.137 Finally, the committee notes that these measures made amendments enabling law enforcement agencies to obtain surveillance device or computer access warrants, or use less intrusive surveillance devices with no warrant, to monitor people subject to orders, and to permit monitoring of conditions, including by allowing agencies to apply for telecommunications services warrants, named person warrants, and warrants for entry to premises. As the committee has previously noted, the surveillance legislation this amended was enacted prior the commencement of the *Human Rights (Parliamentary Scrutiny) Act 2011*, and so has not been subject to a foundational human rights assessment. The committee reiterates that a foundational human rights assessment of this legislation is necessary in order to establish whether any limitation of human rights stemming from the application of these laws would be permissible.

1.138 In relation to the information sharing powers in the bill and the Crimes Legislation Amendment (Community Safety Orders and Other Measures) Regulations 2023, the committee notes that the explanatory materials do not justify why each prescribed person is required to be prescribed and why these powers apply despite any other law, meaning no existing privacy protections apply. As such, the committee considers that there may be a risk that these powers impermissibly limit the right to privacy.

1.139 The committee draws these human rights concerns to the attention of the minister and the Parliament, but as these measures have already passed both Houses of Parliament makes no further comment.

Mr Josh Burns MP

Chair