Chapter 1[1]

New and continuing matters

1.1 In this chapter the committee has examined the bills introduced into the Parliament between 22 November and 2 December 2021 for compatibility with human rights.

1.2 The committee has determined that three bills[2] from this period will be considered as part of its inquiry into the Religious Discrimination Bill 2021 and related bills.

1.3 The committee has deferred its consideration of the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021.

1.4 Bills and legislative instruments from this period that the committee has determined not to comment on are set out at the end of the chapter.

1.5 The committee comments on the following bills, and in some instances, seeks a response or further information from the relevant minister.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 15 of 2021*; [2021] AUPJCHR 147.

2 Religious Discrimination Bill 2021; Religious Discrimination (Consequential Amendments) Bill 2021; and Human Rights Legislation Amendment Bill 2021.

Bills

Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021[1]

Purpose	This bill seeks to amend the *Autonomous Sanctions Act 2011* to: • specify thematic categories of conduct to which autonomous sanctions can be applied; • clarify that autonomous sanctions regimes established under the regulations can be either country-specific or thematic; and • specify decision-making processes for imposing targeted financial sanctions and travel bans on person and entities under thematic sanctions regimes
Portfolio	Foreign Affairs
Introduced	Senate, 24 November 2021 *Passed both Houses 2 December 2021*
Rights	Rights to privacy; fair hearing; protection of the family; freedom of movement

Expansion of the autonomous sanctions regime

1.6 This bill seeks to expand the objects of the *Autonomous Sanctions Act 2011* (the Act), thereby expanding the bases on which sanctions can be made under that Act. Sanctions can be imposed under the autonomous sanctions regime if the Minister for Foreign Affairs is satisfied that doing so will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia, or will otherwise deal with matters, things or relationships outside Australia.[2]

1.7 This bill seeks to expand the objects to make it clear that sanctions could be country-specific (which has been the current focus), and also thematic. Thematic sanctions could address such matters as: the proliferation of weapons of mass destruction; threats to international peace and security; malicious cyber activity; serious violations or serious abuses of human rights; or activities undermining good

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Autonomous Sanctions Amendment (Thematic Sanctions) Bill 2021, *Report 15 of 2021*; [2021] AUPJCHR 148.

2 *Autonomous Sanctions Act 2011*, subsection 10.

governance or the rule of law, including serious corruption.[3] The bill would also require that if the Minister for Foreign Affairs seeks to designate or declare a person or entity 'other than by reference to a particular country', the minister must obtain the Attorney-General's agreement, and consult with other ministers as the Minister for Foreign Affairs considers appropriate.[4]

International human rights legal advice

Rights to privacy, fair hearing, protection of the family, freedom of movement

1.8 As the committee has previously set out,[5] sanctions may operate variously to both limit and promote human rights. For example, sanctions targeting the proliferation of weapons of mass destruction will promote, in general terms, the right to life. Sanctions imposed to address serious violations or serious abuses of human rights could help to promote human rights globally. The mandate of this committee is to consider whether legislation is compatible with Australia's international human rights obligations under seven core international human rights law treaties.[6] Under those treaties, Australia has an obligation to uphold human rights to all those within its jurisdiction.[7] As such, for persons designated or declared under the sanctions regime who are not in Australian territory, or otherwise under Australia's effective control, limited human rights obligations apply. On this basis, the committee's examination of Australia's sanctions regimes has been, and is, focused on measures that impose restrictions on individuals that may be located in Australia. As the sanctions legislation empowers the minister to designate or declare a person within Australia as subject to the regime, it is necessary for the committee to consider the

3 Item 4, proposed subsection 3(3).

4 Item 6, proposed subsections 10(4) and (5).

5 This includes consideration of sanctions imposed under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945.* See, most recently, Parliamentary Joint Committee on Human Rights, *Report 10 of 2021* (25 August 2021), pp. 117-128; See also *Report 2 of 2019* (2 April 2019) pp. 112–122; *Report 6 of 2018* (26 June 2018) pp. 104-131; *Report 4 of 2018* (8 May 2018) pp. 64-83; *Report 3 of 2018* (26 March 2018) pp. 82-96; *Report 9 of 2016* (22 November 2016) pp. 41-55; *Thirty-third Report of the 44th Parliament* (2 February 2016) pp. 17-25; *Twenty-eighth Report of the 44th Parliament* (17 September 2015) pp. 15-38; *Tenth Report of 2013* (26 June 2013) pp. 13-19; and *Sixth Report of 2013* (15 May 2013) pp. 135-137.

6 *Human Rights (Parliamentary Scrutiny) Act 2011*.

7 For instance, article 2(1) of the International Covenant on Civil and Political Rights requires states parties 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.

compatibility of the sanctions regime with human rights, even if it appears that, to date, those within Australia have not been subject to it.[8]

1.9 The statement of compatibility states that the bill does not engage any applicable human rights, as these reforms do not change the overarching operation of the Act, and any specific change to the sanctions regime will only occur if these reforms become law and changes are made to the regulations to allow for the imposition of sanctions on these expanded bases.[9] However, the amendments proposed by this bill would extend the scope of when sanctions may be imposed. In doing so, they expand the operation of the sanctions regime. As such, it is necessary to examine the sanctions regime as a whole when determining the compatibility of expanding the application of such a regime.

1.10 Under the autonomous sanctions regime, the effect of a designation is that it is an offence for a person to make an asset directly or indirectly available to, or for the benefit of, a designated person.[10] A person's assets are therefore effectively 'frozen' as a result of being designated. For example, a financial institution is prohibited from allowing a designated person to access their bank account. This can apply to persons living in Australia or could apply to persons outside Australia. A designation by the minister is not subject to merits review, and there is no requirement that an affected person be given any reasons for why a decision to designate them has been made.

1.11 The scheme provides that the minister may grant a permit authorising the making available of certain assets to a designated person.[11] An application for a permit can only be made for basic expenses, to satisfy a legal judgment or where a payment is contractually required.[12] A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[13]

1.12 The scheme also enables the minister to declare that persons are subject to a travel ban, which would prevent the person from travelling to, entering or remaining in Australia.[14]

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8 Department of Foreign Affairs and Trade, *Supplementary Submission 63.3 Answers to QoN*, p. 3: 'Australia has not, to date, sanctioned an individual within its territorial jurisdiction', as quoted in the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Criminality, corruption and impunity: Should Australia join the Global Magnitsky movement? An inquiry into targeted sanctions to address human rights abuses*, December 2020, p. 74.

9 Statement of compatibility, pp. 2-3.

10 Autonomous Sanctions Regulations 2011, section 14.

11 Autonomous Sanctions Regulations 2011, section 18.

12 Autonomous Sanctions Regulations 2011, section 20.

13 Autonomous Sanctions Regulations 2011, paragraph 20(3)(b).

14 Autonomous Sanctions Regulations 2011, paragraphs 6(1)(b) and (2)(b).

1.13 The designation or declaration of a person in Australia under the sanctions regime may therefore limit a range of human rights,[15] in particular the right to a private life; right to an adequate standard of living; right to a fair hearing; protection of the family; and freedom of movement.

Right to privacy

1.14 The right to privacy prohibits arbitrary or unlawful interference with an individual's privacy, family, correspondence or home.[16] The freezing of a person's assets and the requirement for a listed person to seek the permission of the minister to access their funds for basic expenses imposes a limit on that person's right to a private life, free from interference by the State. The measures may also limit the right to privacy of close family members of a listed person. This is because once a person is listed under the sanctions regime, the effect of the listing is that it is an offence for a person to directly or indirectly make any asset available to, or for the benefit of, a listed person (unless authorised under a permit to do so). This could mean that close family members who live with a listed person will not be able to access their own funds without needing to account for all expenditure, on the basis that any of their funds may indirectly benefit a listed person (for example, if a spouse's funds are used to buy food or public utilities for the household that the listed person lives in).

1.15 In relation to a similar sanctions regime in the United Kingdom, the House of Lords held that the regime 'strike[s] at the very heart of the individual's basic right to live his own life as he chooses'.[17] Lord Brown concluded:

> The draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated. Construe and apply them how one will…they are scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing. Undoubtedly, therefore, these Orders provide for a regime which considerably interferes with the [right to privacy].[18]

1.16 The need to get permission from the minister to access money for basic expenses could, in practice, impact greatly on a person's private and family life. For example, it could mean that a person whose assets are frozen would need to apply to the minister whenever they require funds to purchase medicines, travel or meet other basic expenses. The permit may also include a number of conditions. These conditions

15 If a declared person living in Australia had their visa cancelled, this may also engage Australia's non-refoulement obligations. Further, country-specific designations or declarations may engage and limit the right to non-discrimination. For further discussion, see Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp. 104-131.

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

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

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

are not specified in the legislation and accordingly, there is wide discretion available to the minister when imposing conditions on the granting of a permit.

Right to a fair hearing

1.17 The right to a fair hearing applies both to criminal and civil proceedings, to cases before both courts and tribunals.[19] The right applies where rights and obligations, such as personal property and other private rights, are to be determined. In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal and have a reasonable opportunity to present their case. Ordinarily, the hearing must be public, but in certain circumstances, a fair hearing may be conducted in private. When a person is designated or declared by the minister there is no requirement that the minister hear from the affected person before a listing is made or continued; no requirement for reasons to be provided to the affected person; no provision for merits review of the minister's decision; and no review of the minister's decision to grant, or not grant, a permit allowing access to funds, or review of any conditions imposed.

Right to protection of the family

1.18 The right to respect for the family includes ensuring family members are not involuntarily separated from one another.[20] 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. A person who is declared under the autonomous sanctions regime for the purpose of preventing the person from remaining in Australia will have their visa cancelled pursuant to the Migration Regulations 1994.[21] This makes the person liable to deportation which may result in that person being separated from their family, which therefore engages and limits the right to protection of the family.

Right to freedom of movement

1.19 The right to freedom of movement includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'.[22] '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

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

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

21 See Migration Regulations 1994, section 2.43(1)(aa) and section 116(1)(g) of the Migration Act 1958.

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

elsewhere.[23] The power to cancel a person's visa that is enlivened by declaring a person under the autonomous sanctions regime may engage and limit the freedom of movement. This is because a person's visa may be cancelled (with the result that the person may be deported) in circumstances where that person has strong ties to Australia such that Australia may be considered their 'own country' for the purposes of international human rights law, despite that person not holding formal citizenship.

Limitations on human rights

1.20 The above rights may be subject to permissible limitations under international human rights law. In order to be permissible, the measure must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective. In the case of executive powers which seriously disrupt the lives of individuals subjected to them, the existence of safeguards is important to prevent arbitrariness and error, and ensure that the powers are exercised only in the appropriate circumstances.

1.21 The use of international sanctions regimes to apply pressure to governments and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law. However, there are concerns that the sanctions regime itself (including as proposed to be expanded by this bill) may not be regarded as proportionate, in particular because of a lack of effective safeguards to ensure that the regime, given its potential serious effects on those subject to it, is not applied in error or in a manner which is overly broad in the individual circumstances.

1.22 For example, the minister may designate or declare a person as subject to sanctions on the basis that the minister is 'satisfied' of a number of broadly defined matters, with no legislative criteria as to how the minister determines these matters.[24] There is also no provision for merits review before a court or tribunal of the minister's decision. While the minister's decision is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), the effectiveness of judicial review as a safeguard within the sanctions regime relies, in significant part, on the clarity and specificity with which legislation specifies powers conferred on the executive. The scope of the power to designate or declare someone is based on the minister's satisfaction in relation to certain matters which are stated in broad terms. This formulation limits the scope to challenge such a decision on the basis of there being an error of law (as opposed to an error on the merits) under the ADJR Act. Judicial review will generally be insufficient, in and of itself, to operate as an adequate safeguard for human rights purposes in this context.

23 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.

24 Autonomous Sanctions Regulations 2011, section 6.

1.23 Further, the minister can make a designation or declaration without hearing from the affected person before the decision is made. While the initial listing may be necessary to ensure the effectiveness of the regime, as prior notice would effectively 'tip off' the person and could lead to assets being moved off-shore, there may be less rights-restrictive measures available, such as freezing assets on an interim basis until complete information is available including from the affected person.

1.24 Further, once the decision is made to designate or declare a person, this remains in force for three years and may be continued after that time.[25] The designation may be continued by the minister declaring in writing that it continues to have effect, but such a declaration is not a legislative instrument. It is not clear if designations are regularly reviewed and updated. There also does not appear to be any requirement that if circumstances change or new evidence comes to light the designation or declaration will be reviewed before the three-year period ends. Without an automatic requirement of reconsideration if circumstances change or new evidence comes to light, a person may remain subject to sanctions notwithstanding that the designation or declaration may no longer be required.

1.25 There is also no requirement to consider whether applying the ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the minister. While the imposition of targeted financial sanctions may be considered, internationally, to be a preventive measure that operates in parallel to complement the criminal law, without further guidance (such as when and in what circumstances complementary targeted action would be needed) there appears to be a risk that such action may not be the least restrictive of human rights in every case.

1.26 There are also concerns relating to the minister's unrestricted power to impose conditions on a permit to allow access to funds to meet basic expenses. Giving the minister an unfettered power to impose conditions on access to money for basic expenses does not appear to be the least rights restrictive way of achieving the legitimate objective.

1.27 On the basis of the significant human rights concerns identified by the committee in relation to sanctions regimes, the committee has previously recommended[26] that consideration be given to the following measures, several of which have been implemented in relation to a comparable regime in the United Kingdom, to improve the compatibility of the sanctions regimes with human rights:

25 Autonomous Sanctions Regulations 2011, section 9.

26 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 53; *Report 6 of 2018* (26 June 2018) pp. 128–129; and *Report 2 of 2019* (2 April 2019) p. 122.

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

(b) regular reports to Parliament in relation to the sanctions regime including the basis on which persons have been designated or declared and what assets have been frozen, or the amount of assets;

(c) provision for merits review before a court or tribunal of the minister's decision to designate or declare a person is subject to sanctions;

(d) regular periodic reviews of designations and declarations;

(e) automatic reconsideration of designations and declarations if new evidence or information comes to light;

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

(g) review of individual designations and declarations by the Independent National Security Legislation Monitor;

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

(i) consultation with operational partners such as the police regarding other alternatives to the imposition of sanctions.

1.28 The explanatory memorandum states that this bill implements key aspects of the government's response to the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT), in its inquiry into the use of sanctions to target human rights abuses.[27] However, it is noted that the JSCFADT recommended that any new targeted sanctions legislation should not apply to Australian citizens, stating:

> The Sub-committee considers that action against Australian citizens may be best achieved through existing (or updated) domestic legislation such as those covering proceeds of crime and modern slavery. If the system to identify sanctions targets identifies Australian citizens, they should be referred to Australian authorities for application of relevant domestic laws.[28]

1.29 The committee has previously found that there is a risk that the autonomous sanctions regime may be incompatible with the right to a fair hearing, right to privacy, right to protection of the family, right to an adequate standard of living and the right

27 Explanatory memorandum, p. 1.

28 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Criminality, corruption and impunity: Should Australia join the Global Magnitsky movement? An inquiry into targeted sanctions to address human rights abuses*, December 2020, recommendation 10 and p.75.

to freedom of movement. In the absence of legislative amendments to restrict the application of the autonomous sanctions regime to those not located in Australia, or to implement safeguards such as those set out in paragraph [1.27] above, expanding the application of the autonomous sanctions regime as proposed by this bill also risks being incompatible with those rights.

Committee view

1.30 The committee notes that this bill (which has now passed) expands the objects of the existing autonomous sanctions regime to include thematic sanctions (not just country specific sanctions). Thematic sanctions could address such matters as: the proliferation of weapons of mass destruction; threats to international peace and security; malicious cyber activity; serious violations or serious abuses of human rights; or activities undermining good governance or the rule of law, including serious corruption.

1.31 The committee considers that sanctions regimes operate as important mechanisms for applying pressure to regimes and individuals with a view to ending the repression of human rights internationally. The committee notes the importance of Australia acting in concert with the international community to prevent egregious human rights abuses arising from situations of international concern. The committee agrees with the Joint Standing Committee on Foreign Affairs, Defence and Trade in its Magnitsky inquiry that '[r]espect for human rights and fundamental freedoms has long been recognised as essential to efforts to build a more peaceful, harmonious and prosperous world'.[29]

1.32 However, the committee regards it as important to recognise that the sanctions regime operates independently of the criminal justice system, and can be used regardless of whether a designated or declared person has been charged with or convicted of a criminal offence. For those in Australia who may be subject to sanctions, requiring ministerial permission to access money for basic expenses could, in practice, impact greatly on a person's private and family life. The committee also notes that the minister, in making a designation or declaration, is not required to hear from the affected person at any time; or provide reasons; and there is no provision for merits review of any of the minister's decisions (including any decision to grant, or not grant, a permit allowing access to funds). As the sanctions regime could be applied to persons ordinarily resident in Australia, the committee considers expanding the basis on which sanctions can be imposed engages and limits a number of human rights. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

29 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Criminality, corruption and impunity: Should Australia join the Global Magnitsky movement? An inquiry into targeted sanctions to address human rights abuses*, December 2020, p. 1.

1.33 The committee has previously found that there is a risk that the autonomous sanctions regime may be incompatible with the right to a fair hearing, right to privacy, right to protection of the family, right to an adequate standard of living and the right to freedom of movement. As such, by expanding the application of the autonomous sanctions regime, this bill also risks being incompatible with those rights.

1.34 The committee considers that the compatibility of the sanctions regime may be assisted were the autonomous sanctions legislation amended to provide that the minister may only designate or declare a person as subject to sanctions if they are not ordinarily resident in Australia, or at a minimum, that it included the matters set out at paragraph [1.27].

1.35 However, as this bill has now passed both Houses of Parliament the committee makes no further comment. The committee notes that amendments were made to the bill requiring a review by the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) three years after commencement of these amendments.[30] The committee considers its comments in this report should be considered by the JSCFADT as part of its review.

30 See clause 4 of the bill.

Electoral Legislation Amendment (Candidate Eligibility) Bill 2021[1]

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* to streamline the candidate qualification checklist relating to eligibility under section 44 of the Constitution and clarify when a response to a question is mandatory
Portfolio	Finance
Introduced	House of Representatives, 25 November 2021
Rights	Privacy; right to take part in public affairs

Collection and publication of information relating to a person's eligibility for election

1.36 The bill seeks to amend the *Commonwealth Electoral Act 1918* to streamline the questions on the candidate qualification checklist and clarify which questions are mandatory. The qualification checklist relates to a candidate's eligibility to be elected under section 44 of the Constitution.[2] Not completing the mandatory questions will result in the nomination being rejected by the Australian Electoral Commission, however, a question will be considered to have been responded to as long as it is not left blank.[3] The completed qualification checklist is published, along with any supporting documents provided by the candidate, on the website of the Australian Electoral Commission (AEC).[4]

1.37 The new qualification checklist requests largely the same information as the current checklist, but includes some new mandatory questions regarding the candidate's date of birth, place of birth, citizenship at time of birth, and date of naturalisation if they are not an Australian citizen by birth. Like the current qualification checklist, it also includes other matters relevant to the candidate's eligibility for election (for example, their criminal history). The qualification checklist

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Electoral Legislation Amendment (Candidate Eligibility) Bill 2021, *Report 15 of 2021*; [2021] AUPJCHR 149.

2 Completing the qualification checklist does not guarantee eligibility under section 44 as this is a matter for the High Court sitting as the Court of Disputed Returns.

3 Proposed subsection 170(1AA).

4 Proposed Schedule 1 (Form DB).

also includes questions concerning the birthplace and citizenship of the candidate's biological and adoptive parents and grandparents, and current and former spouses.[5]

1.38 The committee previously considered the Electoral Legislation Amendment (Modernisation and Other Measures) Bill 2018, which introduced the candidate qualification checklist, in *Report 1 of 2019* and *Report 2 of 2019*.[6]

Preliminary international human rights legal advice

Right to privacy and right to take part in public affairs

1.39 Requiring candidates seeking nomination for election to complete the qualification checklist, which requires personal information about the individual and their family members and supporting documents, to be publicly disclosed, engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[7] It also includes the right to control the dissemination of information about one's private life.

1.40 The requirements relating to the qualification checklist and supporting documents also engage and may limit the right to take part in public affairs by imposing additional eligibility requirements on persons nominating for election for public office. The right to take part in public affairs guarantees the right of citizens to stand for public office, and requires that any administrative and legal requirements imposed on persons standing for office be reasonable and non-discriminatory.[8] Requiring personal information about candidates, family members and current and former spouses to be publicly disclosed may deter potential candidates from applying to stand for public office.

1.41 The rights to privacy and to take part in public affairs may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective. In order to be proportionate, a limitation should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards.

1.42 In relation to whether the measure pursues a legitimate objective, the statement of compatibility states that the qualification checklist is designed 'to put the

5 See proposed Schedule 1 (Form DB), in particular questions 2 to 4.

6 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 24-28 and *Report 2 of 2019* (2 April 2019) pp. 97-100.

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

8 UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [15].

onus on those seeking nomination for election to demonstrate to the electorate that they are not disqualified under section 44 of the Constitution to sit or be chosen for Parliament.'[9] The explanatory memorandum further explains that the 'requirements aim to maintain public confidence in the electoral process by ensuring transparency and accountability with respect to candidates' eligibility for election to Parliament.'[10] Transparency and confidence in the eligibility of political candidates is likely to be a legitimate objective for the purposes of international human rights law. Requiring candidates to disclose personal information relevant to their eligibility may be rationally connected to (that is, effective to achieve) this objective. However, it is not clear how requiring the publication of the qualification checklist and supporting documentation would be effective to achieve the objective.

1.43 Further, in determining whether the measure is proportionate to the objective sought to be achieved, it is necessary to consider whether the measure is accompanied by sufficient safeguards and whether any less rights restrictive alternatives could achieve the same stated objective. The statement of compatibility states that candidates 'have the option to redact, omit or delete any information from an additional document they do not wish published, for instance if that information has not been sought on the form and does not relate to the eligibility of the candidate', and the 'Electoral Commissioner also has a discretion to omit, redact or delete any information from the Qualification Checklist or additional documents in certain circumstances.'[11] While these are important safeguards, particularly in the protection of information not directly sought by the qualification checklist, the ability of candidates to redact, omit or delete any information only pertains to additional documents supplied and only to information not required by the qualification checklist. The option to omit, redact or delete information is also not available to other individuals even where the information or additional documentation relates to their personal details. For instance, a candidate's parents or grandparents, or current or former spouses have no choice in whether their personal information is made publicly available under the qualification checklist scheme. The statement of compatibility also does not explain in what 'certain circumstances' the Electoral Commissioner may omit, redact or delete information. This safeguard therefore appears to rely on the discretion of the candidate and the Electoral Commissioner. Discretionary safeguards alone are unlikely to be sufficient for the purposes of international human rights law. It is also not clear whether there is any requirement for a candidate or the Electoral Commissioner to consider the privacy, or obtain the consent of, third parties, who may not be aware that their personal information is being published.

9 Statement of compatibility, p. 3.

10 Explanatory memorandum, p. 2.

11 Statement of compatibility, pp. 3-4.

1.44 The statement of compatibility further states that the 'Electoral Act contains existing safeguards to mitigate the risk of publishing personal information without consent.'[12] However, it also explains that a number of Australian Privacy Principles do not apply in relation to personal information in the qualification checklist or within an additional published document.[13] It therefore appears that the consent and knowledge of third parties is not required, and nor is there any ability for third parties to correct or remove published information. It is unclear whether parents, grandparents and current and former spouses of candidates have any avenue to prevent information being published about them or to correct or remove information once published.

1.45 Further, publishing the candidate checklist and supporting documentation on the AEC website appears to go beyond what is strictly necessary to achieve the stated objectives. It is not clear why the same objective could not be achieved by less rights-restrictive measures, such as requiring candidates to provide the checklist and supporting documents to the Electoral Commissioner and requiring confirmation, on the basis of the information provided, that the candidate has complied with the requirement to complete the qualification checklist.

1.46 Further information is required in order to assess the compatibility of this measure with the right to privacy and the right to take part in public affairs, and in particular:

(a) how requiring the publishing of the qualification checklist and supporting documentation would be effective to achieve (that is, rationally connected to) the stated objectives;

(b) how the Electoral Commissioner would determine in which circumstances they would omit, redact or delete information;

(c) how the privacy of third parties whose personal information may be publicly disclosed is to be considered in determining what to publish;

(d) whether third parties have any avenue, whether it is contained in law or policy, to prevent, correct or remove information being published about them; and

(e) whether the measure is the least rights-restrictive means of achieving the stated objectives, including whether publishing the qualifications checklist and supporting documentation is strictly necessary.

Committee view

1.47 The committee notes the bill seeks to amend the *Commonwealth Electoral Act 1918* to streamline the candidate qualification checklist relating to eligibility

12 Statement of compatibility, p. 3.

13 Statement of compatibility, p. 4.

under section 44 of the Constitution and to clarify when a response to a question is mandatory.

1.48 The committee notes that by requiring candidates seeking nomination for election to complete the qualification checklist, which requires personal information about the individual, their family members and supporting documents to be publicly disclosed, this engages and limits the right to privacy and the right to take part in public affairs. The committee notes that these rights may be permissibly limited where a limitation is reasonable, necessary and proportionate.

1.49 The committee considers that the measure seeks to achieve the legitimate objective of improving transparency and confidence in the eligibility of political candidates. However, the committee notes that questions remain as to whether the publishing of the qualification checklist and supporting documentation is rationally connected to (that is, effective to achieve) this objective, and whether the measure is proportionate.

1.50 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and as such seeks the minister's advice as to the matters set out at paragraph [1.46].

Migration Amendment (Strengthening the Character Test) Bill 2021[1]

Purpose	This bill seeks to amend the *Migration Act 1958* to: • introduce a designated offence ground to the character test, such that a person will not pass the character test if they commit an offence punishable by a maximum sentence of two years' or more imprisonment, involving: - violence, or a threat of violence, against a person; or - non-consensual conduct of a sexual nature; or - breaching an order made by a court or tribunal for the personal protection of another person; or - using or possessing a weapon; or - procuring, or assisting in any way with the commission of one of these designated offences. • provide that, for an offence involving violence against a person, a person's conviction for an offence of common assault, or equivalent, will not be taken to be a conviction for a designated offence unless the act constituting the offence: - causes or substantially contributes to bodily harm to another person, or harm to another person's mental health (within the meaning of the *Criminal Code Act 1995*), in both cases either temporarily or permanently; or - involves family violence (as defined by subsection 4AB(1) of the *Family Law Act 1975*) by the person in relation to another person; and • make consequential amendments to the definition of character concern in section 5C of the *Migration Act 1958*
Portfolio	Home Affairs
Introduced	House of Representatives, 24 November 2021

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2021, *Report 15 of 2021*; [2021] AUPJCHR 150.

Rights	Liberty; rights of the child; prohibition on the expulsion of aliens without due process; freedom of movement; protection of the family; prohibition on non-refoulement; and effective remedy

Background

1.51 The committee previously commented on the Migration Amendment (Strengthening the Character Test) Bill 2018, which was substantially the same as this bill.[2] It has also previously considered the power of the minister to cancel or refuse a visa on character grounds.[3]

Power to cancel or refuse a visa when a non-citizen commits a 'designated offence'

1.52 Currently, the character test in section 501 of the *Migration Act 1958* (Migration Act) provides that the minister can cancel or refuse a non-citizen's visa on a number of grounds. In particular, it provides that the minister must cancel or refuse a visa if the non-citizen has a substantial criminal record, having been *sentenced* to imprisonment for 12 months.[4] It also provides that the minister may cancel or refuse a visa 'having regard to' the person's 'past and present criminal conduct'.[5] The bill seeks to introduce amendments to the character test to also give the minister a discretionary power to cancel or refuse a visa where the non-citizen has been convicted of a 'designated offence' (regardless of the sentence imposed).[6] To be a 'designated offence', the offence must be punishable by imprisonment for life, for a fixed term of not less than two years, or for a maximum term of not less than two years.[7] A 'designated offence' is defined as an offence against a law in force in Australia

2 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp. 2–22; *Report 1 of 2019* (12 February 2019) pp. 69–97.

3 Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 195–217. See also *Nineteenth Report of the 44th Parliament* (3 March 2015) pp. 13-28.

4 *Migration Act 1958*, subsection 501(7).

5 *Migration Act 1958*, paragraph 501(6)(c).

6 Item 5, proposed paragraph 501(6)(aaa). Some of these powers to cancel a person's visa may be exercised by a delegate of the minister: see subsections 501(1) and 501(2).

7 Item 6, proposed subparagraphs 501(7AA)(b)(i)-(iii), in relation to offences against a law in force in Australia. For offences against the law in force in a foreign country, an offence will be considered a designated offence if it were assumed that the act or omission that formed the basis of the offence occurred in the Australian Capital Territory (ACT) and the act or omission would also have been an offence against a law in force in the ACT and the offence, if committed in the ACT, would have been punishable by life imprisonment, imprisonment for a fixed term of not less than two years or a maximum term of not less than two years: proposed paragraph 501(7AA)(c).

or a foreign country where one or more of the physical elements of the offence involves:

- violence, or a threat of violence, against a person, including (without limitation) murder, manslaughter, kidnapping, aggravated burglary, robbery or assault (although a conviction for a common assault must have caused or substantially contributed to bodily or mental harm to another person or involve family violence);[8]
- non-consensual conduct of a sexual nature, including (without limitation) sexual assault and the non-consensual commission of an act of indecency or sharing of an intimate image;
- breaching an order made by a court or tribunal for the personal protection of another person; or
- using or possessing a weapon.[9]

1.53 The definition of 'designated offence' also includes ancillary offences in relation to the commission of a designated offence, such that a person may fail the character test and be liable for visa refusal or cancellation where a person is convicted of an offence where one or more of the physical elements of the offence involves:

- aiding, abetting, counselling or procuring the commission of an offence that is a designated offence;
- inducing the commission of an offence that is a designated offence, whether through threats or promises or otherwise;
- being in any way (directly or indirectly) knowingly concerned in, or a party to, the commission of an offence that is a designated offence; or
- conspiring with others to commit an offence that is a designated offence.[10]

8 Note that the requirement that a conviction for a common assault must have caused or substantially contributed to bodily or mental harm to another person or involve family violence, is the main change between this bill and the Migration Amendment (Strengthening the Character Test) Bill 2018.

9 Item 6, proposed subparagraphs 501(7AA)(a)(i)-(iv) 'Weapon' is defined to include a thing made or adapted for use for inflicting bodily injury, and a thing where the person who has the thing intends or threatens to use the thing, or intends that the thing be used, to inflict bodily injury: proposed subsection 501(7AB).

10 Item 6, proposed subparagraphs 501(7AA)(a)(v)-(viii).

International human rights legal advice

Right to liberty and rights of the child

1.54 Under the Migration Act, the cancellation of a person's visa on character grounds results in that person being classified as an unlawful non-citizen and subject to mandatory immigration detention prior to removal from Australia.[11] As such, by expanding the bases on which a visa can be cancelled or refused, this measure engages and limits the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[12] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to liberty applies to all forms of deprivations of liberty, including immigration detention.

1.55 In addition, as noted in the statement of compatibility, as the measures in the bill do not differentiate between adults and children, and the provisions of section 501 can operate to cancel or refuse a child's visa, which could also lead to their detention,[13] the bill, in this respect, also engages and may limit the rights of the child, including the obligation to consider the best interests of the child.

1.56 The detention of a non-citizen on cancellation of their visa pending deportation will not necessarily constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation. However, in the context of mandatory immigration detention, in which individual circumstances are not taken into account, and where there is no right to periodic judicial review of the detention, there may be circumstances where the detention could become arbitrary under international human rights law.[14] This is most likely to apply in cases where the person may be subject to indefinite or prolonged detention as the person cannot be returned to their home country because they may be subject to persecution there.[15]

1.57 The statement of compatibility states that the amendments do not change the framework within which the character cancellation powers function.[16] While the

11 *Migration Act 1958*, section 189.

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

13 Statement of compatibility, p. 18.

14 See, for example, *MGC v Australia,* UN Human Rights Committee Communication No. 1875/2009 (7 May 2015).

15 See an analysis of this in Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2021), pp. 100–124.

16 Statement of compatibility, p. 14.

existing provisions relating to the detention and expulsion of persons following cancellation of a visa are not amended by the bill, in order to consider the human rights compatibility of the expanded visa cancellation powers it is necessary to consider the proposed amendments in the context within which they will operate. Further, while the amendments in the bill would apply only to the minister's discretionary cancellation power and not the mandatory cancellation power,[17] a consequence of the exercise of the discretionary cancellation power would be mandatory immigration detention prior to expulsion. Therefore, to the extent that the additional grounds to refuse or cancel a visa may provide additional circumstances in which a person may be detained, the existing provisions of the Migration Act are relevant.

1.58 Limitations on the right to liberty and the rights of the child are permissible provided the limitation supports a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

1.59 With regard to the objective of the measure, the statement of compatibility states that the proposals in the bill are a reasonable response to achieving 'the safety of the Australian community and the integrity of the migration programme'.[18] The statement of compatibility also notes that the 'new powers will enable the Department to better target individuals with serious criminality or unacceptable behaviour and, in line with community expectations, it is appropriate that a person who engages in these activities should not be entitled to hold a visa'.[19] Protecting the safety of the Australian community and the integrity of the migration programme may be capable of being legitimate objectives for the purposes of international human rights law. However, to be a legitimate objective, the objective must be one that is pressing and substantial and not one that simply seeks an outcome that is desirable or convenient. It is noted that the current provisions of the Migration Act provide for a visa to be refused or cancelled on a broad range of character grounds. The Migration Act allows for cancellation or refusal of a visa, including when a person is sentenced to a period of imprisonment of 12 months or more,[20] and also includes a power for cancellation or refusal 'having regard to' the person's 'past and present criminal conduct' or 'past and present general conduct'.[21] Against this background, it is not clear that there is a 'pressing and substantial need' for the measures in this bill, which would allow for a visa to be refused or cancelled following conviction of an offence punishable by two years or more, regardless of actual sentencing length. The statement of compatibility states that these amendments 'provide a clearer and more

17 The mandatory cancellation power is contained under subsection 501(3A) of the *Migration Act 1958*.

18 Statement of compatibility, p. 15.

19 Statement of compatibility, p. 15.

20 *Migration Act 1958*, subsection 501(7).

21 *Migration Act 1958*, paragraph 501(6)(c).

objective basis for refusing or cancelling the visa of a non-citizen whose offending has not attracted a sentence of 12 months or more, but who nonetheless poses an unacceptable risk.[22] However, the statement of compatibility indicates that the current character test provisions enable a visa to be refused or cancelled in the same circumstances that fall within the bill's definition of 'designated offence'. As such, it is not clear that the measures in the bill are necessary. Further, in relation to the need to accommodate the risk posed by an individual to the Australian community, this should be managed by the court sentencing the individual for the offence.[23] It is not clear why a court's assessment of an appropriate sentence for having a committed a designated offence would not be sufficient to manage such risk, such that visa cancellation or refusal is also required.

1.60 As such, in circumstances where the minister may already cancel or refuse a person's visa where a person has committed an offence that would fall within the definition of 'designated offence', it is not clear that the measures are necessary, and address a pressing and substantial concern for the purposes of international human rights law.

1.61 In relation to proportionality, the statement of compatibility sets out a number of administrative processes that it says take into account an individual's circumstances in determining whether detention remains lawful and reasonable.[24] However, the committee has previously considered that administrative and discretionary processes alone may not meet the requirement for periodic and substantive judicial review of detention so as to be compatible with the right to liberty.[25] Further, in *MGC v Australia,* the UN Human Rights Committee considered a case in which visa cancellation under section 501 of the Migration Act was found to be incompatible with the right to liberty. The UN Human Rights Committee noted that the detainee 'was deprived of the opportunity to challenge his indefinite detention in substantive terms [noting that] judicial review of the lawfulness of detention is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of

22 Statement of compatibility, p. 14.

23 For example, the *Penalties and Sentences Act 1992* (Qld) provides that one of the purposes for sentencing an offender include protecting the community from the offender (section 9(1)), and that for violent offences or offences that resulted in physical harm, a court must have regard to the risk of physical harm to any members of the community if a custodial sentence were not imposed and the need to protect any members of the community from that risk (paragraphs 9(3)(a)-(b)).

24 Statement of compatibility, p. 15.

25 Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 202–205. See also *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 19.

the Covenant'.[26] It further stated that detaining persons while their claims were being resolved would be arbitrary 'in the absence of particular reasons specific to the individual, such as individualised likelihood of absconding, a danger of crimes against others, or a risk of acts against national security'.[27]

1.62 The statement of compatibility refers to other arrangements that can be made for persons other than detention. However, such arrangements are limited and remain at the discretion of the minister. For example, while section 195A of the Migration Act gives the minister the power to grant a visa to a person who is in detention, this is subject to the requirement that the minister must think it is 'in the public interest to do so', and the power is personal and non-compellable.[28] Similarly, section 197AB also gives the minister a personal and non-compellable power to make a 'residence determination' to the effect that a person in detention may instead reside at a specified place, however, the Migration Act and regulations continue to apply to such a person as if they were being kept in immigration detention.[29] Further, while the statement of compatibility states that recent amendments enhance the options available to the minister in considering whether to grant a bridging visa,[30] this remains a personal discretionary power (with the conditions themselves raising human rights concerns).[31] Therefore, notwithstanding the administrative processes to review detention, the minister is not obliged to release a person even if a person's individual circumstances do not justify continued or protracted detention.

1.63 As such, the mandatory nature of detention of persons who have had their visa cancelled, in the absence of any opportunity to challenge detention in substantive terms, means that expanding the bases on which visas may be cancelled increases the risk of a person being arbitrarily deprived of liberty. If this were to apply to children, this would also risk being incompatible with the rights of the child.

Prohibition on expulsion of aliens without due process; freedom of movement; protection of the family; and rights of the child

1.64 The refusal or cancellation of a visa for those in Australia would generally result in the expulsion of those persons from Australia. Therefore, by expanding the

26 *MGC v Australia,* UN Human Rights Committee Communication No.1875/2009 (7 May 2015) [11.6].

27 *MGC v Australia,* UN Human Rights Committee Communication No.1875/2009 (7 May 2015) [11.5]. See also *FKAG et al v Australia,* UN Human Rights Committee Communication No.2094/2011 (28 October 2013).

28 *Migration Act 1958*, subsections 195A(2), (4), (5).

29 *Migration Act 1958*, section 197AB and subsection 197AC(1).

30 Statement of compatibility, p. 15.

31 See Parliamentary Joint Committee on Human Rights, *Report 9 of 2021* (4 August 2021), pp. 66-108.

bases on which visas can be cancelled or refused on character grounds, this measure engages and may limit a number of rights, including the prohibition on the expulsion of aliens without due process; the right to freedom of movement; the right to protection of the family; and the rights of the child. If the visa refusal or cancellation relates to those to whom Australia owes protection obligations, the measure also engages the prohibition on non-refoulement and the right to an effective remedy (as dealt with below).

1.65 Where discretionary decisions to cancel or refuse a visa on character grounds are made by the minister personally under subsection 501(3) of the Migration Act (which would include decisions relating to these expanded grounds of designated offences), the rules of natural justice are stated not to apply.[32] This therefore engages and limits the prohibition against expulsion of aliens without due process, which provides that non-citizens lawfully in a territory may be expelled, but unless compelling reasons of national security otherwise require, they should be allowed to submit reasons against expulsion and to have their case reviewed by a competent authority.[33]

1.66 The right to freedom of movement includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'.[34] The reference to a person's 'own country' is not restricted to countries with which the person has the formal status of citizenship. It includes a country to which a person has very strong ties, such as the country in which they have resided for a substantial period of time and established their home.[35] As such, for those with very strong ties to Australia, the cancelation of their visa on character grounds, leading to their expulsion, and any subsequent refusal to grant them a visa to return to Australia would limit their right to return to their 'own country'.

1.67 The measure also engages and limits the right to protection of the family as visa refusal or cancellation for committing a 'designated offence' could operate to separate family members. The right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another.[36]

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32 *Migration Act 1958*, subsection 501(5).

33 International Covenant on Civil and Political Rights, article 13. This incorporates notions of due process also reflected in article 14 of the International Covenant on Civil and Political Rights and should be interpreted in light of that right, see UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [17], [63].

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

35 *Nystrom v Australia,* UN Human Rights Committee Communication No.1557/2007 (1 September 2011).

36 See International Covenant on Civil and Political Rights, articles 17 and 23; International Covenant on Economic, Social and Cultural Rights, article 10(1); and the Convention on the Rights of the Child, article 16(1).

There is significant scope for states to enforce their immigration policies and to require the departure of unlawfully present persons. However, where a family has been in the country for a significant duration of time, additional factors justifying the separation of families, going beyond a simple enforcement of immigration law, must be demonstrated, in order to avoid a characterisation of arbitrariness or unreasonableness.[37]

1.68 As noted in the statement of compatibility, the measures in the bill do not differentiate between adults and children, and the provisions of section 501 can operate to cancel a child's visa.[38] The obligation to consider the best interests of the child is therefore engaged when determining whether to cancel or refuse a child's visa. It is also engaged when considering the cancellation or refusal of a parent's or close family member's visa, insofar as that cancellation or refusal of the family member's visa may not be in the best interests of their children. Further, under the Convention on the Rights of the Child, Australia has an obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. 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.

1.69 Limitations on the above rights are permissible provided the limitation supports a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

1.70 As set out above at paragraphs [1.59]-[1.60] in relation to the right to liberty, noting the existing powers to cancel or refuse visas on character grounds, it is not clear that the measure addresses an objective that is pressing and substantial enough to warrant limiting these rights.

1.71 In relation to the proportionality of the measure with the prohibition on the expulsion of aliens without due process, the statement of compatibility states that it is rare for decisions to be made personally by the minister (a process which excludes natural justice). It states that the majority of discretionary decisions are made under subsections 501(2) and (3) of the Migration Act which afford a person natural justice.[39] For decisions that are made personally by the minister under subsection 501(3), the statement of compatibility states that it is open to the minister to revoke the cancellation or refusal if the non-citizen satisfies the minister that they pass the character test, and judicial review is available.[40] However, as the proposed

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

38 Statement of compatibility, p. 17.

39 Statement of compatibility, p. 17.

40 Statement of compatibility, p. 17.

amendments in the bill provide that a person will fail the character test if the person has been convicted of a 'designated offence', it is not clear on what basis a person could satisfy the minister that they pass the character test, except in the narrow circumstance where the minister made an error in relation to the person's conviction. That is, in contrast to other discretionary visa cancellation powers, there appears to be no opportunity for the person to be heard as to the minister's broader exercise of discretion to cancel their visa (to make, for example, representations that the exercise of the discretion would be unfair because of the person's long-term residence in Australia, or the impact of visa cancellation on the person's children).[41] Nor is there an opportunity for the person to contest the minister's decision as to whether visa cancellation or refusal is in the national interest, which is a matter determined by the minister personally. The right of aliens not to be expelled without due process requires a person to be allowed to submit reasons against their expulsion, except where 'compelling reasons of national security otherwise require'. Subsection 501(3) does not require the minister to be satisfied that 'compelling reasons of national security' exist. Instead, the minister may exercise their discretion to cancel or refuse a person's visa without natural justice on the broader basis that this is in the 'national interest'.[42] While 'national interest' may include reasons of national security, the concept is not defined in the Migration Act and it is unclear whether the inability of a person to challenge the minister's exercise of discretion or the minister's finding that visa cancellation for having committed a designated offence is in the 'national interest' would comply with Australia's human rights obligations. As such, there appears to be a risk that a person may not have sufficient opportunity to present reasons against their expulsion in cases where the minister exercises their personal discretionary power to cancel a visa

1.72 In relation to the right of persons to return to their 'own country' (as part of the right to freedom of movement), the statement of compatibility does not acknowledge that these measures limit this right and so provides no assessment of this. It is noted that delegates of decision-makers are bound to follow ministerial directions, and that these require the strength of a non-citizen's ties to the Australian community to be taken into account. However, this consideration is a subsidiary consideration. The primary considerations in the latest direction (which are generally

41 *Roach v Minister for Immigration and Border Protection* [2016] FCA 750 at [11], [91]-[93] ('The right to make representations in support of revocation pursuant to an invitation under s 501C(3) therefore ameliorates only in part the lack of procedural fairness afforded at the initial stage of the decision-making process set out in s 501(3). Representations made by the non-citizen at the revocation stage can bear only on the question of whether or not she or he passes the character test'). See also *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177 [50]-[51]; *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 [59].

42 Migration Act, paragraph 501(3)(d).

given greater weight than other considerations)[43] are restricted to: protection of the Australian community; consideration of whether the conduct constituted family violence; the best interests of minor children in Australia; and expectations of the Australian community.[44] As such, a person's ties to Australia are generally given lesser consideration than issues such as community expectations and the protection of the community. The ministerial direction also states that in some circumstances the nature of the non-citizen's conduct, or the harm caused were it to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.[45] Further, the direction is not binding on the minister when making his or her decision personally.[46] As such, it is not clear whether a person's right to remain in one's 'own country' would be taken into account when the minister exercises their discretion to refuse or cancel a visa personally and, if so, what weight that consideration would be given. Given that decision-makers are directed to give greater consideration to the protection, and expectations, of the Australian community than to a person's ties to Australia, there is a significant risk that a person's right to return to their 'own country' (as part of the right to freedom of movement) would be impermissibly limited by expanding the grounds on which visas may be refused or cancelled.

1.73 In relation to the rights to protection of the family and the rights of the child, the statement of compatibility says that the best interests of the child and the impact of separation from family members will be taken into account as part of the decision whether to refuse or cancel a visa.[47] But the statement of compatibility acknowledges that there will be circumstances where these rights may be outweighed by the risk to the Australian community, and states that the amendments in the bill allow 'for a more considered deliberation of community expectations and threats posed by individuals'.[48] However, it is not clear how providing that conviction for an offence subject to a specified period of imprisonment, as opposed to what an offender was actually sentenced to (which takes into account individual circumstances) would allow for a more considered deliberation of the threats posed by individuals. As with the

43 Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Direction No. 90 – Visa refusal and cancellation under section 501 and renovation of a mandatory cancellation of a visa under section 501CA* (15 April 2021) [7].

44 Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Direction No. 90 – Visa refusal and cancellation under section 501 and renovation of a mandatory cancellation of a visa under section 501CA* (15 April 2021) [8].

45 Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Direction No. 90 – Visa refusal and cancellation under section 501 and renovation of a mandatory cancellation of a visa under section 501CA* (15 April 2021) [5.2(5)].

46 *Migration Act 1958*, section 499.

47 Statement of compatibility, p. 17.

48 Statement of compatibility, p. 18.

right to return to one's 'own country', the ministerial direction specifying when a visa should be refused or cancelled on character grounds gives primary consideration to a number of factors other than a person's family ties (see paragraph [1.72]). The potential separation of family members, including of parents from their children, where those persons may have resided in Australia for a very long time, indicates that the impact of these measures may be significant.

1.74 Under the ministerial direction, the best interests of the child would be required to be taken into account as a primary consideration when deciding whether to exercise the discretion to cancel or refuse a visa where a non-citizen commits a designated offence.[49] However, while it is a primary consideration, there would appear to be other 'primary considerations' that must be taken into account as well, including the protection of the Australian community and the expectations of the Australian community.[50] There is a risk that giving the best interests of the child equal weight to these other factors may not be consistent with Australia's obligations under the Convention on the Rights of the Child. 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…[51]

1.75 In light of this interpretation of the Convention on the Rights of the Child, the committee has previously considered that placing the best interests of the child on the same level as other considerations may not be compatible with Australia's obligations to consider the best interests of the child.[52]

1.76 There are also particular questions as to whether allowing the cancellation or refusal of a person's visa for having committed an ancillary offence that falls within the definition of 'designated offence' would be a proportionate limitation on the right to protection of the family and the obligation to consider the best interests of the child, particularly in circumstances where the decision is not based on the sentence or punishment the person may have received for committing that offence. For example,

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49 Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Direction No. 90 – Visa refusal and cancellation under section 501 and renovation of a mandatory cancellation of a visa under section 501CA* (15 April 2021) [8.3].

50 Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Direction No. 90 – Visa refusal and cancellation under section 501 and renovation of a mandatory cancellation of a visa under section 501CA* (15 April 2021) [8].

51 UN Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14 (29 May 2013); see also *IAM v Denmark,* Committee on the Rights of the Child Communication No.3/2016 (8 March 2018) [11.8].

52 See most recently Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (12 June 2021) pp. 89-99.

if a child is convicted of 'being in any way (directly or indirectly) knowingly concerned in, or a party to, the commission of an offence that is a designated offence', an offence which may be punishable by imprisonment of more than two years but for which the child is only sentenced (for example) to a non-custodial sentence, they would be liable to have their visa cancelled or refused. While the statement of compatibility states that a child's visa would only be cancelled in 'exceptional circumstances',[53] it is possible based on the language of the bill for a child's visa to be cancelled or refused in that circumstance. It is unclear how it would be proportionate to separate a child from their parents, for example, through cancelling a child's visa and deporting them.

Prohibition against non-refoulement and the right to an effective remedy

1.77 As noted above, a consequence of a person's visa being cancelled or refused is that the person would become an unlawful non-citizen and would be liable to removal from Australia as soon as reasonably practicable,[54] (and generally prohibited from applying for most other visas).[55] This includes a person found to be a refugee, or otherwise owed protection obligations.

1.78 Australia has 'non-refoulement' obligations, which means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[56] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.79 The statement of compatibility acknowledges that the removal of a person from Australia following visa refusal or cancellation on character grounds engages Australia's non-refoulement obligations. However, it states that Australia remains committed to its international obligations concerning non-refoulement. It also states that subsection 197C(3) of the Migration Act provides that where a protection finding has been made in the course of considering a protection visa application, such a person cannot be removed to the relevant country unless they request this or the minister

53 Statement of compatibility, p. 18.

54 *Migration Act 1958*, section 198.

55 *Migration Act 1958*, 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 1958*. 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.

56 Obligations arise under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See also United Nations Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (9 February 2018).

makes a decision that a protection finding would no longer be made in the person's case.[57] As was stated in the committee's report when subsection 197C(3) was introduced, this measure appears to support Australia's ability to adhere to its non-refoulement obligations, to the extent that it would provide a statutory protection to ensure that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, even where they are ineligible for the grant of a protection visa. However, it also noted that the inclusion of the power in section 197D, which allows the minister to make a decision that an unlawful non-citizen to whom a protection finding is made is no longer a person in respect of whom any protection finding would be made,[58] may have significant human rights implications insofar as it has the effect of allowing the minister to overturn a protection finding, thereby exposing the person to the risk of being returned to the country in relation to which a protecting finding was previously made. It is not clear on what basis the minister would make this decision, noting that section 197D provides limited guidance as to the circumstances in which the minister would be 'satisfied' that a person is no longer owed protection obligations.

1.80 Further, the obligation of non-refoulement and the right to an effective remedy requires an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[59] Such review mechanisms are important in guarding against the potentially irreparable harm which may be caused by breaches of Australia's non-refoulement obligations.[60] There is no right to merits review of a decision that is made personally by the minister to refuse or cancel a person's visa on

57 Statement of compatibility, p. 16.

58 *Migration Act 1958*, subsection 197D(2).

59 International Covenant on Civil And Political Rights, article 2 (the right to an effective remedy). See, for example, *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9]; *Alzery v Sweden*, UN Human Rights Committee Communication No. 1416/2005 (20 November 2006) [11.8]. See, also, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 82-98; *Report 2 of 2017* (21 March 2017) pp. 10-17; *Report 4 of 2017* (9 May 2017) pp. 99-111.

60 *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005(20 November 2006) [11.8].

character grounds.[61] The committee has considered on a number of previous occasions that in the Australian domestic legal context the availability of merits review would likely be required to comply with Australia's obligations under international law.[62] While judicial review of the minister's decision to cancel a person's visa on character grounds remains available, the committee has previously concluded that judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review' of non-refoulement decisions.[63] This is because judicial review is only available on a number of restricted grounds and represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision-maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision.[64] Limiting the form of review to the narrow grounds of judicial review without being able to undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision, to determine whether the decision is the correct or preferable decision, raises serious concerns as

61 Only decisions of a delegate of the minister to cancel a person's visa under section 501 may be subject to merits review by the administrative appeals tribunal: see paragraph 500(1)(b) of the *Migration Act 1958*. Decisions for which merits review is not available include decisions of the minister personally exercising the visa refusal or cancellation power under section 501, and also decisions of the minister personally to set aside a decision by a delegate or the Administrative Appeals Tribunal not to exercise the power to refuse or cancel a person's visa and to substitute it with their own decision to refuse or to cancel the visa: section 501A of the *Migration Act 1958*. Merits review is also unavailable where the minister exercises the power to set aside a decision of a delegate to refuse to cancel a person's visa and substitute it with their own refusal or cancellation under section 501B.

62 See, most recently, in relation to the Migration (Validation of Port Appointment) Bill 2018 in Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 84-90. See also Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

63 See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 84-90. See also *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9].

64 The jurisprudence of the UN Human Rights Committee and the UN Committee against Torture establish the proposition that there is a strict requirement for 'effective review' of non-refoulement decisions, with the purpose of an 'effective' review to 'avoid irreparable harm to the individual', see *Agiza v Sweden,* Committee against Torture Communication No.233/2003 (24 May 2005) [11.8] and[13.7]; *Josu Arkauz Arana v France,* Committee against Torture Communication No.63/1997 (5 June 2000); *Alzery v Sweden*, Human Rights Committee Communication No.1416/2005 (20 November 2006) [11.8]. For an analysis of this jurisprudence, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183. See also *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]–[8.9].

to whether judicial review in the Australian context would be sufficient to be 'effective review'. As such, there is some risk that expanding the bases on which a visa can be cancelled or refused, including a protection visa, could expand the risk of Australia not meeting its non-refoulement obligations.

Conclusion

1.81 This bill, in expanding the bases on which a visa can be cancelled or refused on character grounds, engages and may limit multiple rights. Most of these rights may be limited provided the limitation supports a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

1.82 In relation to the objective of the measure, in general terms, protecting the safety of the Australian community and the integrity of the migration programme may be capable of being legitimate objectives for the purposes of international human rights law. However, to be a legitimate objective, the objective must be one that is pressing and substantial and not one that simply seeks an outcome that is desirable or convenient. In circumstances where the minister may already cancel or refuse a person's visa where a person has committed an offence that would fall within the new definition of 'designated offence', it is not clear that the measures are necessary, and address a pressing and substantial concern for the purposes of international human rights law. It is also not clear that the measures would in all instances be proportionate to the objective sought to be achieved.

1.83 For those in Australia, when a visa is cancelled on character grounds, the person is subject to mandatory immigration detention pending removal from Australia. The mandatory nature of detention of persons who have had their visa cancelled, in the absence of any opportunity to challenge detention in substantive terms, means that expanding the basis on which visas may be cancelled increases the risk of a person being arbitrarily deprived of liberty. If this were to apply to children, this would also risk being incompatible with the rights of the child.

1.84 Further, there appears to be a risk that a person may not have sufficient opportunity to present reasons against their expulsion when the minister cancels a visa personally on the basis of these expanded bases for expulsion. In relation to the right to return to their 'own country' (as part of the right to freedom of movement) and the right to protection of the family, given that decision-makers are directed to give greater consideration to the protection, and expectations, of the Australian community than to a person's ties to Australia, there is a significant risk that these rights would be impermissibly limited by expanding the grounds on which visas may be refused or cancelled. Further, as the best interests of the child is considered on the same level as other considerations (such as protecting the Australian community and community expectations), these measures may not be compatible with Australia's obligations to consider the best interests of the child.

1.85 Finally, noting the lack of merits review of a decision to deport a person following cancellation of their visa, there is some risk that expanding the bases on

which a visa can be cancelled or refused, including a protection visa, could expand the risk of Australia not meeting its non-refoulement obligations.

Committee view

1.86 The committee notes that this bill seeks to allow the minister to cancel or refuse a non-citizen's visa where the non-citizen has been convicted of a 'designated offence', being specified violent offences, or ancillary offences, which are *punishable* by up to at least two years imprisonment. The committee notes this differs from current provisions which require that the person has been *sentenced* to two or more years imprisonment.

1.87 The committee considers that amending the bases on which visas may be cancelled or refused on character grounds engages and may limit a number of human rights. As the cancellation of a person's visa subjects a person to mandatory immigration detention prior to removal, this measure limits the right to liberty (and the rights of the child if a child's visa is cancelled). Further, as the cancellation or refusal of a visa will result in a person's expulsion from Australia (including potentially those with strong ties with Australia, including family ties), the committee considers the measure also may limit the prohibition on expulsion of aliens without due process; the right to freedom of movement (which includes the right to return to one's 'own country'); the right to protection of the family; and the rights of the child. Finally, as protection visas could also be cancelled or refused, the measure engages the obligation of non-refoulement (namely, the prohibition on sending a person to a country where they are at risk of persecution). Most of these rights can be permissibly limited if the measure limiting rights is shown to be reasonable, necessary and proportionate.

1.88 The committee considers protecting the safety of the Australian community and the integrity of the migration programme are important objectives. However, to be a legitimate objective for the purposes of international human rights law, the objective must be one that is pressing and substantial and not one that simply seeks an outcome that is desirable or convenient. In this regard, the committee notes that the minister may already cancel or refuse a person's visa where a person has committed an offence that would fall within the new definition of 'designated offence', including having regard to the broad notion of the person's past or present criminal or general conduct. As such, the committee considers it has not been established that the measure is necessary, and addresses a pressing and substantial concern for the purposes of international human rights law. The committee considers it has also not been established that the measure would, in all instances, be proportionate to the objectives sought to be achieved.

1.89 The committee therefore considers, consistent with its previous findings in relation to substantially similar measures, there is a risk that this measure would be incompatible with a number of human rights. In particular, in the absence of any opportunity to challenge mandatory detention in substantive terms, the committee

considers expanding the bases on which visas may be cancelled increases the risk of a person being arbitrarily deprived of liberty. In expanding the bases on which the minister may cancel or refuse a visa personally (to which the rules of natural justice do not apply), the committee considers this risks breaching the prohibition of expulsion of aliens without due process. Further, in relation to non-citizens who have strong ties to Australia, including close family members in Australia, the committee considers that the measure significantly risks impermissibly limiting the right to return to one's 'own country' (as part of the right to freedom of movement), the right to protection of the family, and the rights of the child. Finally, noting the lack of merits review of a decision to deport a person following cancellation of their visa, the committee considers there is some risk that the measure, in applying to a protection visa, could expand the risk of Australia not meeting its non-refoulement obligations.

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

Bills and instruments with no committee comment[1]

1.91 The committee has no comment in relation to the following bills which were introduced into the Parliament between 22 November and 2 December 2021. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:[2]

- Animal Health Australia and Plant Health Australia Funding Legislation Amendment Bill 2021;
- Australian Research Council Amendment Bill 2021;
- Commonwealth Electoral Amendment (Ensuring Voter Choice Through Optional Preferential Voting and the Robson Rotation) Bill 2021;
- Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021;
- Customs Amendment (Banning Goods Produced By Forced Labour) Bill 2021 [No. 2];
- Customs Amendment (Controlled Trials) Bill 2021;
- Electoral Legislation Amendment (Annual Disclosure Equality) Bill 2021;
- Fair Work Amendment (Same Job, Same Pay) Bill 2021;
- Higher Education Support Amendment (2021 Measures No. 1) Bill 2021;
- Illegal Detention of Australian Journalists (Free Julian Assange) Bill 2021;
- Migration Amendment (Protecting Migrant Workers) Bill 2021;
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Fight for Australia's Coastline) Bill 2021;
- Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Bill 2021;
- Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Miscellaneous Measures) Bill 2021;
- Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Bill 2021; and

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 15 of 2021*; [2021] AUPJCHR 151.

2 Inclusion in the list is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

- Social Services and Other Legislation Amendment (Pension Loans Scheme Enhancements) Bill 2021.

1.92 The committee has determined not to comment on six legislative instruments previously deferred in *Report 14 of 2021*.[3]

Private Senator's bill that may limit human rights

1.93 The committee notes that the following private senator's bill appears to engage and may limit human rights. Should this bill proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill:

- Health Insurance Legislation Amendment (Transparent Patient Outcomes) Bill 2021.

3 National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2021 (No. 10) [F2021L01485]; National Health (Pharmaceutical benefits – early supply) Amendment Instrument 2021 (No. 10) [F2021L01487]; National Health (Highly Specialised Drugs Program) Special Arrangement Amendment (November Update) Instrument 2021 [F2021L01488]; National Health (Continued Dispensing – Emergency Measures) Amendment Determination 2021 (No. 10) [F2021L01489]; National Health (Listed Drugs on F1 or F2) Amendment Determination 2021 (No. 8) [F2021L01491]; and National Health (Commonwealth Price and Conditions for Commonwealth Payments for Supply of Pharmaceutical Benefits) Amendment Determination 2021 (No. 9) [F2021L01493] deferred in *Report 14 of 2021*.